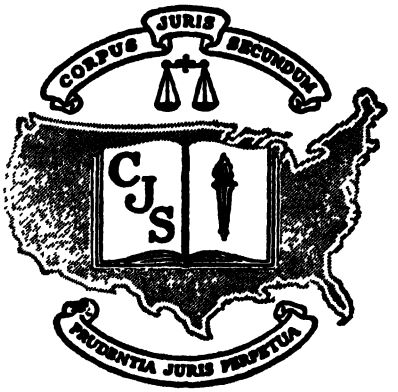


"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

CITE BY TITLE AND SECTION

Thus

33 C.J.S. Exchange of Property § 8

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

DONALD J. KISER, LL. D.

Editor in Chief

Assisted by
The Combined Editorial Staffs
of
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefor a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier.	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.(2d)	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.).	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891]Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes.	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Moutr.Cond.Rep.	Montreal Condensed Reports
Moutr.Leg.N.	Montreal Legal News
Moutr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
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Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

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P.	Pacific Reporter
P.(2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
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Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
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Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
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Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
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Puerto Rico Fed.	Puerto Rico Federal
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P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
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Prid.&C.	Prideaux & Cole (Eng.)
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Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

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[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
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Queensl.L.	Queensland Law
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Que.L.	Quebec Law
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Que.Q.B.	Quebec Official Reports Queen's Bench
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Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
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Brooklyn L.Rev.	Brooklyn Law Review
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Chi-Kent Rev.	Chicago-Kent Review
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Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
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Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
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CORPUS JURIS SECUNDUM

VOLUME THIRTY-THREE

EXCHANGE.

As a Noun

A word of precise import, meaning the giving of one thing for another, requiring the transfers to be in kind, and excluding transactions into which money enters, either as the consideration or as a basis of measure;[1] also the act of giving or taking one thing for another which is regarded as an equivalent.[2] It has several dictionary definitions, depending on the character of the transaction to which it is applied.[3] While the word ordinarily implies the giving of one thing for another, which ordinarily is regarded as an equivalent, it may include, under particular circumstances, a number of transactions in which money is used as the medium of exchange,[4] and it has been said that, in law, an exchange is two sales.[5]

The term is almost synonymous with "barter" see 9 C.J.S. p 1551 note 65, also Exchange of Property § 1, "excambion" and "excambium," see 32 C.J.S. p 1148 notes 30–32, "redemption," "swap" and "trade;" and has been distinguished from "compromise," "lease," "loan," and "sale" see Exchange of Property § 1.

As an association for, or the place of, transacting business especially by brokers see the C.J.S. title Exchanges § 1, also 23 C.J. p 243 note 1–p 245 note 24; and as the contract of commutation or mutual transfer of property real or personal see Exchange of Property § 1. In commercial law, as the amount paid for the collection of commercial paper coming from a distant point, or the negotiation for the transmission of money from place to place see Bills and Notes § 8 text and notes 52–56.

Phrases employing the word are listed in the note.[6]

1. U.S.—U. S. v. Rodenbough, D. C.Pa., 21 F.2d 781, 782, 783.
Tex.—Hoovel v. State, 69 S.W.2d 104, 108, 125 Tex.Cr. 545.

2. U.S.—Baltimore & O. R. Co. v. Western Union Tel. Co., D.C.N.Y., 241 F. 162, 170.

3. Minn.—Mertz v. H. D. Hudson Mfg. Co., 261 N.W. 472, 474, 194 Minn. 636.

4. U.S.—Cary v. U. S., D.C.N.Y., 22 F.2d 298, 299.

5. Cal.—Robbins v. Pacific Eastern Corporation, 65 P.2d 42, 56, 8 Cal. 2d 241.

6. **Phrases construed**

(1) "Acquired in exchange for property so received."—Cary v. U. S., D.C.N.Y., 22 F.2d 298, 299.

(2) "Arbitration of exchange," defined as the business of buying and selling exchange (bills of exchange) between two or more countries or markets, and particularly where the profits of such business are to be derived from a calculation of the relative value of exchange in the two countries or markets, and by taking advantage of the fact that the rate of exchange may be higher in the one place than in the other at the same time.—Black L.D.

(3) "Dry exchange," see 28 C.J. p 570 note 17.

(4) "Exchange of lands" see Exchange of Property § 1.

(5) "Exchange of living," in ecclesiastical law, the practice of resigning livings into the bishop's hands, each party being inducted into the other's benefice.—Black L.D.

(6) "Exchange of property [or properties]" see Exchange of Property § 1.

(7) "Exchange of securities."—Kulddell v. Commissioner of Internal Revenue, C.C.A.Tex., 97 F.2d 725, 726—Atkins v. Bender, D.C.La., 26 F.2d 690, 695.

(8) "Exchange of services."—Baltimore & O. R. Co. v. Western Union Tel. Co., D.C.N.Y., 241 F. 162, 171.

(9) "Exchange of stock."—American Security & Trust Co. v. Tait, D. C.Md., 5 F.Supp. 337, 341.

(10) "Exchange of such indemnity contracts."—Standard Auto Ins. Ass'n v. Henson, 256 S.W. 414, 417, 201 Ky. 230.

(11) "First of exchange," as the first unit in a set of bills of exchange drawn in duplicate or triplicate, for greater safety in transmission; all the units are of the same tenor, the intention being that

As a Verb

To part with, give or transfer to another for an equivalent; to barter; to swap;[7] as to exchange one security for a different security of some kind, or for other property or rights.[8]

Phrases employing the word are set out in the note.[9]

As an Adjective

Exchange value. The general power of purchase of any thing,[10] the command which its possession gives over purchasable commodities in general.[11]

The term is equivalent to "market value," and has been distinguished from "true value."[12]

Other phrases are listed in the note.[13]

the acceptance and payment of any one of them (the first to arrive safely) shall cancel the others of the set; they are called individually the "first of exchange," "second of exchange," etc.—Black L.D.

(12) "Flour exchange."—Boonville Milling Co. v. Roth, 127 N.E. 823, 825, 73 Ind.App. 427.

(13) "In exchange for."—Henderson v. U. S., D.C.Pa., 22 F.Supp. 206, 208.

(14) "In exchange for property sold and delivered."—Jacoby v. Ætna Casualty & Surety Co. of Hartford, Conn., 297 N.Y.S. 105, 110, 163 Misc. 862.

(15) "Owelty of exchange," defined as a sum of money given, when two persons have exchanged lands, by the owner of the less valuable estate to the owner of the more valuable, to equalize the exchange. —Black L.D.

(16) "Post exchanges" see Army and Navy § 104 b.

(17) "Sale, barter, and exchange." —Young v. State, 243 S.W. 472, 473, 92 Tex.Cr. 277.

(18) "Sale, lease, exchange or other disposition of property."—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649, 657—In re Norcor Mfg. Co., C.C.A.Wis., 97 F.2d 208, 212.

(19) "Sale or exchange."—Helvering v. Nebraska Bridge Supply & Lumber Co., C.C.A., 115 F.2d 288, 290—Kenan v. Commissioner of Internal Revenue, C.C.A., 114 F.2d 217, 219—Polin v. Commissioner of Internal Revenue, C.C.A., 114 F.2d 174, 176.

(20) "Second of exchange" see supra (11) this note.

7. N.Y.—Dairymen's League Co-op. Ass'n v. Metropolitan Casualty Ins. Co. of New York, 8 N.Y.S.2d 403, 404.

8. Minn.—Mertz v. H. D. Hudson Mfg. Co., 261 N.W. 472, 474, 194 Minn. 636.

9. **Phrases containing "exchange" or "exchanging"**

(1) "Appraising, buying, selling, exchanging, leasing . . . or negotiating of a loan upon any real estate."—Seitz v. Troidl, 13 N.Y.S. 2d 465, 467, 171 Misc. 632.

(2) "Exchange and convey."—Long v. Fuller, 21 Wis. 121, 123.

(3) "Exchange districts," by a judge as involving more than authority to hold court for any other district judge.—Wallace v. Helena Electric R. Co., 24 P. 626, 25 P. 278, 282, 10 Mont. 24.

(4) "Exchange old issues . . . and receive new issues in lieu thereof."—Quay v. Presidio & F. R. Co., 22 P. 925, 926, 82 Cal. 1, 6.

(5) "Sell, barter, exchange, or give away."—U. S. v. Jin Fuey Moy, D.C.Pa., 253 F. 213, 216.

(6) "Use, store, exchange, or sell." —U. S. v. Pan-American Petroleum Co., D.C.Cal., 6 F.2d 43, 83.

Phrases containing "exchanged"

(1) "Exchanged solely for stock." —Beals' Estate v. Commissioner of Internal Revenue, C.C.A., 82 F.2d 268, 270.

(2) "Sold, mortgaged, exchanged, or otherwise disposed of."—Lord v. Smith, 200 N.E. 547, 550, 293 Mass. 555.

10. N.C.—Marriner v. John L. Roper Co., 16 S.E. 906, 907, 112 N.C. 164.

As measure of its utility to the purchaser

"The utility of a thing in the estimation of the purchaser is the extreme limit of its exchange value." —State v. Carson City Savings Bank, 30 P. 703, 707, 17 Nev. 146.

11. N.J.—Universal Ins. Co. v. State Board of Tax Appeals, 193 A. 915, 916, 118 N.J.Law 538.

12. N.J.—Universal Ins. Co. v. State Board of Tax Appeals, supra.

13. **Phrases construed**

(1) "Exchange agreement," as referring to shipments, control of which has been limited thereby.— Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S.E. 471, 473, 148 Va. 140.

(2) "Exchange broker" see Brokers § 21.

EXCHANGE OF PROPERTY

This Title includes mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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I. IN GENERAL

§ 1. Definitions, Nature, and Distinctions

a. Definitions and nature generally
b. Other terms compared and distinguished

a. Definitions and Nature Generally

An exchange of property is a mutual transfer of property for property other than money. At common law a technical exchange of land is a mutual grant of equal interests, not necessarily in value but in dignity, as a fee for a fee, or a lease for a certain term for a lease for the same term, the one in consideration for the other.

An exchange of property is a mutual transfer of one or more pieces of property for property other than money.[1] Where a transfer of property takes place without the transferor's receiving anything in return the transaction is not an exchange.[2] An exchange of goods is a commutation or transfer of goods for goods.[3]

An exchange of land at common law is a mutual grant of equal interests, not necessarily in value but in dignity, as a fee for a fee, or a lease for a certain term for a lease for the same term, the one in consideration for the other,[4] but the technical exchanges of land, as known to the common law, are now of rare occurrence, and the term is generally used in a broader sense.[5]

b. Other Terms Compared and Distinguished

The word exchange is generally regarded as synonymous with barter, swap, or trade and it is distinguishable from compromise, lease, or loan. It has frequently been stated that there is no substantial difference between a sale and an exchange. Technically speaking, the words exchange or barter and sale express logically different transactions. As a general but not absolute rule, where the consideration for a transfer of property is expressed or valued in money terms and treated as a specified amount of money the transaction is a sale, but where the consideration is other property not measured in money terms the transaction is an exchange.

The word "exchange" is generally regarded as synonymous with "barter,"[6] "swap"[7] or "trade,"[8] in the sense that each is a reciprocal transfer of property for property. A compromise,[9] a lease,[10] or a

1. U.S.—Law v. McLaughlin, D.C. Cal., 2 F.Supp. 601.
Ind.—Boonville Milling Co. v. Roth, 127 N.E. 823, 73 Ind.App. 427.
23 C.J. p 184 note 1.

Other definitions

(1) A covenant by which contractors give to one another one thing for another whatever it may be, except money.—Dairymen's League Co-op. Ass'n. v. Metropolitan Casualty Ins. Co. of New York, 8 N.Y.S.2d 403, 411, affirmed 15 N.Y.S.2d 664, 258 App.Div. 847, motions denied 17 N.Y.S.2d 1002, 258 App.Div. 1030—23 C.J. p 184 note 1 [a] (2).

(2) A contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.
U.S.—U. S. v. Pan-American Petroleum Co., D.C.Cal., 6 F.2d 43, affirmed in part and reversed in part on other grounds, C.C.A., Pan-American Petroleum Co. v. U. S., 9 F.2d 761, certiorari granted Pan American Petroleum & Transport Co., 46 S.Ct. 356, 270 U.S. 640, 70 L.Ed. 775, affirmed 47 S.Ct. 416, 273 U.S. 456, 71 L.Ed. 734.
Cal.—Robbins v. Pacific Eastern Corporation, 65 P.2d 42, 56, 8 Cal. 2d 241.
Mont.—Apple v. Henry, 213 P. 444, 66 Mont. 244.
Ohio.—Davis v. Snow, 25 Ohio N.P., N.S., 178, 181.
23 C.J. p 184 note 1 [a] (3).

(3) A reciprocal transfer of property for property, as distinguished from a transfer of property for a money consideration.—Herring Motor Co. v. Ætna Trust & Savings Co., 154 N.E. 29, 31, 87 Ind.App. 83—Boonville Milling Co. v. Roth, 127 N.E. 823, 825, 73 Ind.App. 427.

(4) A transfer of property for other property of value.—Helvering v. Nebraska Bridge Supply & Lumber Co., C.C.A., 115 F.2d 288.

(5) A mutual grant of equal interests, the one in consideration of the other.—Hale v. Helvering, 85 F. 2d 819, 821, 66 App.D.C. 242.

2. U.S.—Helvering v. Nebraska Bridge Supply & Lumber Co., C. C.A., 115 F.2d 288.

3. Ind.—Jewett & Sherman Co. v. Tindall, 134 N.E. 501, 77 Ind.App. 681.
23 C.J. p 184 note 2.

4. Mo.—Finke v. Boyer, 56 S.W.2d 372, 377, 331 Mo. 1242.
Neb.—Gill v. Eagleton, 187 N.W. 871, 108 Neb. 179.
N.J.—Fidelity Union Trust Co. v. Prudent Inv. Corporation, 19 A.2d 224, 129 N.J.Eq. 255.
Ohio.—Davis v. Snow, 25 Ohio N.P., N.S., 178.
Tex.—Liberto v. Sanders, Civ.App., 248 S.W. 120, 121, reversed on other grounds, Com.App., 259 S.W. 1030.
23 C.J. p 184 note 3, p 188 note 64.

5. Neb.—Gill v. Eagleton, 187 N.W. 871, 108 Neb. 179.
Pa.—Gamble v. McClure, 69 Pa. 282.

6. U.S.—Postal Telegraph-Cable Co. v. Tonopah & T. R. Co., N.Y., 39 S.Ct. 162, 248 U.S. 471, 63 L.Ed. 365.
Ark.—State v. Brown, 102 S.W. 394, 83 Ark. 44, 119 Am.S.R. 109.
Ind.—Boonville Milling Co. v. Roth, 127 N.E. 823, 73 Ind.App. 427.
Okl.—State v. Underwood, 190 P. 281, 17 Okl.Cr. 443.
23 C.J. p 184 note 5—7 C.J. p 931 note 34.

7. Ga.—Mosely v. Gordon, 16 Ga. 384.

8. U.S.—Ewers v. Weaver, C.C. Iowa, 182 F. 713, affirmed 195 F. 247, 115 C.C.A. 219.
Ohio.—Davis v. Snow, 25 Ohio N.P., N.S., 178.
23 C.J. p 184 note 7.

9. D.C.—Hale v. Helvering, 85 F. 2d 819, 66 App.D.C. 242.

Agreement establishing boundary line

Where the true dividing line between two tracts of land is in doubt and there is dispute between the adjoining owners as to the exact location of the line, which depends on variable circumstances not susceptible of certain determination, a parol agreement between adjoining owners establishing a line as the true dividing line is not an "exchange of lands."—Howard v. Howard, 113 S.W.2d 434, 435, 271 Ky. 773.

10. Tex.—Singleton v. Houston, 79 S.W. 98, 35 Tex.Civ.App. 10.

Exchange of lands for term of years

A contract provided first for the use and possession by each party of lands of the other for a term of years from the date thereof, and it was held that a subsequent provi-

loan,[11] is distinguishable from an exchange. The most natural signification of the word "redemption" does not imply exchange, although it may include that meaning.[12] Bailment as distinguished from exchange is considered in the title Bailments § 2.

Sale compared and distinguished. It has frequently been held or stated that there is no substantial difference between a sale and an exchange;[13] and the legal effect of a contract of exchange is generally the same as that of a contract of sale.[14] In both cases the title is absolutely transferred[15] and both transactions are governed by the same rules of law practically.[16] In law an exchange is recognized as two sales[17] or a double sale,[18] and an exchange of real estate is as to each one of the parties a sale and purchase of property.[19] The term "sale" may be construed as including an exchange,[20] particularly under statutes so providing,[21] and indeed exchanges are frequently denominated "sales."[22] When used together the words "sale or exchange" comprehend a transmutation of property from one person to another in consideration of some price or recompense in value.[23]

However, technically speaking the words "exchange" and "sale" express logically different transactions.[24] It has been stated broadly either specifically or substantially, that where there is a transfer of property for property other than money the transaction is an exchange, and that where the transfer is for money the transaction is a sale,[25] and this is the meaning usually ascribed when a question of power or authority to sell is involved.[26] The term sale is not synonymous with barter but on the contrary has a materially different meaning,[27] and if the consideration for the transfer of the property is other goods, no price being fixed in money, the transaction is an exchange or barter rather than a sale.[28] The fact that payment may

sion, requiring the payment of lease money at the end of each year by one or the other, according as there was an excess of land in his favor, must be held to have grown out of the fact that the exact number of acres each was supplying was uncertain when the contract was executed, and did not refer, as was contended, to a probable loss of control of the lands conveyed, and hence the contract must be regarded as an agreement for an exchange of lands for a term of years, and not a lease by the one to the other. —Singleton v. Houston, supra.

11. Ala.—Clark v. State, 52 So. 893, 167 Ala. 101, 31 L.R.A.,N.S., 517.

12. S.C.—Robertson v. Tillman, 17 S.E. 678, 39 S.C. 298.

13. Ky.—Barton v. Jones, 267 S.W. 214, 206 Ky. 238.
23 C.J. p 186 note 29.

14. N.J.—Berger v. U. S. Steel Corp., 53 A. 68, 63 N.J.Eq. 809.
23 C.J. p 186 note 30.

Pleading

In case of an exchange the declaration must be for damages for breach of a special agreement; but if the contract is for exchange of goods at a stipulated price, the declaration may be in assumpsit for goods sold.

Mich.—Picard v. McCormick, 11 Mich. 68.
N.Y.—Herrick v. Carter, 56 Barb. 41.
Vt.—Way v. Wakefield, 7 Vt. 223.

15. Mo.—Kennerly v. Somerville, 68 Mo.App. 222.
23 C.J. p 186 note 31.

16. Tenn.—Arledge v. Ridge, 12 Tenn.App. 415.
Vt.—Turner v. Howard, 99 A. 236, 91 Vt. 40.
23 C.J. p 186 note 32.

17. Cal.—Robbins v. Pacific Eastern Corporation, 65 P.2d 42, 8 Cal.2d 241.

18. S.C.—Mauldin v. Milford, 121 S.E. 547, 127 S.C. 508.

19. Va.—Swain v. Virginia Bank & Trust Co., 144 S.E. 645, 151 Va. 655.

20. Ga.—McDuffie v. State, 90 S.E. 740, 19 Ga.App. 39.
23 C.J. p 185 note 14.

21. Miss.—Stone v. Rogers, 189 So. 810, 186 Miss. 53.

22. U.S.—Sturm v. Boker, Ind., 14 S.Ct. 99, 150 U.S. 312, 37 L.Ed. 1093.

23. U.S.—Helvering v. Nebraska Bridge Supply & Lumber Co., C.C.A., 115 F.2d 288.
23 C.J. p 186 note 29 [c].

24. Vt.—Vail v. Strong, 10 Vt. 457.

Proof of exchange as supporting averment of sale

An averment of a contract of sale is not supported by proof of an exchange, since the words "sale" and "exchange" express legally different transactions.—Vail v. Strong, supra.

25. Ind.—Jewett & Sherman Co. v. Tindall, 134 N.E. 501, 77 Ind.App. 681.
Ohio.—Davis v. Snow, 25 Ohio N.P., N.S., 178.
23 C.J. p 185 note 16.

Valuation of thing exchanged

It cannot be truthfully said that an exchange becomes a sale whenever one of the things exchanged is valued. An "exchange" is always an "exchange," when things other than money are transferred in consideration of other such things, although either or both be given a money value by the parties.—U. S. v. Pan-American Petroleum Co., D.C.Cal., 6 F.2d 43, affirmed in part and reversed in part on other grounds, C.C.A., Pan-American Petroleum Co. v. U. S., 9 F.2d 761, certiorari granted Pan American Petroluem & Transport Co., 46 S.Ct. 356, 270 U.S. 640, 70 L.Ed. 775, affirmed 47 S.Ct. 416, 273 U.S. 456, 71 L.Ed. 734.

26. Iowa.—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.
Authority to exchange under power of sale and to sell under power of exchanging is considered in the C.J.S. title Powers § 25, also 49 C.J. p 1271 notes 25–28.

27. Minn.—Westfall v. Ellis, 170 N.W. 339, 141 Minn. 377.
7 C.J. p 931 note 38.

28. U.S.—Speigle v. Meredith, C.C. Ind., 22 F.Cas.No.13,227, 4 Biss. 120.
Ala.—Duke v. State, 41 So. 170, 146 Ala. 138—Coker v. State, 8 So. 874, 91 Ala. 92—Fuller v. Duren, 36 Ala. 73, 76 Am.D. 318.
Mo.—Martin v. Ashland Mill Co., 49 Mo.App. 23.
Neb.—Laboree v. Klosterman, 49 N.W. 1102, 33 Neb. 150.
N.H.—Mitchell v. Gile, 12 N.H. 390.
Ohio.—Jenkins v. Mapes, 41 N.E. 137, 53 Ohio St. 110.
Vt.—Loomis v. Wainwright, 21 Vt. 520.
7 C.J. p 931 note 38 [a].

Distinction similarly stated

The word "barter" means to traffic or trade by exchanging one commodity for another, as distinguished from selling one commodity and purchasing another through the use of money or some other medium of exchange.—Stone v. Rogers, 189 So. 810, 186 Miss. 53.

be made in something other than money is not a controlling factor in determining whether a contract is one of sale or of barter or exchange,[29] and it has been generally held, where the question has arisen, that any transaction whereby property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain is made and the value measured in money terms, and paid or agreed to be paid in something which the parties agree to treat as a specified amount of money, is a sale, but that where property is transferred for property, no price being set on either piece, the transaction is an exchange;[30] and this distinction has been recognized in the case of a transfer of personal property for other personal property,[31] of real property for other real property,[32] or of real property for personal property.[33]

Whether there has been a sale or an exchange of property cannot be conclusively determined by the fact that there was a fixed price at which the exchange was to be made, although it is a fairly safe criterion, but it depends on the intent at the time and must be determined from the peculiar circumstances of the particular transaction,[34] and so it has been held that the mere fact that a price is placed on the properties involved in an exchange of lands does not render the transaction a sale where the price fixed is evidently for the purpose of constituting a basis on which the exchange may be made, and not for the purpose of fixing definitely the value of the respective properties;[35] and a like rule may be applied in the case of an exchange of personal property for other personal property[36] and, it seems, in the case of an exchange of real property for personal property.[37]

The idea of a consideration of money or its equivalent,[38] or an agreed price,[39] is a necessary element of a sale as opposed to barter or exchange. It has

29. Minn.—Westfall v. Ellis, 170 N. W. 339, 141 Minn. 377.

Uniform Sales Act

(1) This is recognized in the Uniform Sales Act by the provision that the price in a sales contract may be made payable in any personal property.

Minn.—Westfall v. Ellis, supra.

Neb.—Dickinson v. Lawson, 251 N. W. 656, 125 Neb. 646.

(2) The Uniform Sales Act abolished the distinction between sales and barter or exchange, by providing that the price may be payable in any personal property.—Arledge v. Ridge, 12 Tenn.App. 415.

Reservation of right to pay in property

A contract whereby plaintiff agreed to sell and convey certain property, and defendant, without obligating himself to pay money reserved right to turn over in payment certain merchandise and fixtures at their inventoried value, to an amount equal to price set on plaintiff's property, was a contract of sale, and not one for an exchange of properties.—Westfall v. Ellis, 170 N.W. 339, 141 Minn. 377.

30. U.S.—Helvering v. Nebraska Bridge Supply & Lumber Co., C.C. A., 115 F.2d 288, 290, citing **Corpus Juris.**

Ala.—Forsyth v. Alabama City, G. & A. Ry. Co., 93 So. 401, 207 Ala. 488.

Alaska.—Territory v. Tuppela, 6 Alaska 573.

Fla.—Edwards v. Baldwin Piano Co., 83 So. 915, 79 Fla. 143.

Ind.—Herring Motor Co. v. Ætna Trust & Savings Co., 154 N.E. 29, 31, 87 Ind.App. 83, quoting **Corpus Juris.**

Neb.—Dickinson v. Lawson, 251 N. W. 656, 659, 125 Neb. 646, citing **Corpus Juris**—Gill v. Eagleton, 187 N.W. 871, 873, 108 Neb. 179, quoting **Corpus Juris.**

Ohio.—Davis v. Snow, 25 Ohio N.P., N.S., 178.

Or.—Hartwig v. Rushing, 182 P. 177, 93 Or. 6.

Tex.—Morriss-Buick Co. v. Huss, Civ.App., 84 S.W.2d 264, 267, citing **Corpus Juris**—Curton v. Craddock, Civ.App., 252 S.W. 1075—Liberto v. Sanders, Civ.App., 248 S.W. 120, reversed on other grounds, Com.App., 259 S.W. 1080—McDonald v. Whaley, Civ.App., 207 S.W. 609—Goodwin v. Mortsen, 128 S.W. 1182, 60 Tex.Civ. App. 287, error refused—Ullmann v. Land, 84 S.W. 294, 37 Tex.Civ. App. 422, error dismissed.

23 C.J. p 185 note 17.

Test

The test for determining whether there has been a sale or an exchange of real property is whether there was a fixed price at which the exchange was to be made, it being a sale if there was a fixed price and an exchange if there was not.—Hawn v. Malone, 176 N.W. 393, 188 Iowa 439.

Note given in conditional payment

Where a note is given in conditional payment, the transaction is a sale.—Sebastian May Co. v. Codd, 26 A. 316, 77 Md. 293.

31. Ala.—Duke v. State, 41 So. 170, 146 Ala. 138.

Ind.—Herring Motor Co. v. Ætna Trust & Savings Co., 154 N.E. 29, 87 Ind.App. 83.

23 C.J. p 185 note 18.

Credit in merchandise on return of goods

Buyer's return of merchandise of agreed value with understanding that he was to receive other undetermined merchandise of equal value was held a "sale" of property returned, and not exchange.—Herring Motor Co. v. Ætna Trust & Savings Co., supra.

32. Tex.—Liberto v. Sanders, Civ. App., 248 S.W. 120, reversed on other grounds, Com.App., 259 S.W. 1080, rehearing denied 260 S.W. xiv.

23 C.J. p 185 note 19.

33. Neb.—Gill v. Eagleton, 187 N. W. 871, 108 Neb. 179.

Tex.—McDonald v. Whaley, Civ.App., 207 S.W. 609.

23 C.J. p 186 note 20.

34. Iowa.—Lockin v. Welty, 222 N. W. 354, 207 Iowa 142—Dimmitt v. Johnson, 203 N.W. 261, 199 Iowa 966.

Question for jury

Whether a contract by which one party agreed to deliver to the other a definite number of hides, and to accept therefor the paper of a third party, constituted a sale of the hides or an exchange thereof for the paper, was a question for the jury.—Deford v. Dryden, 46 Md. 248.

35. Mich.—Hamburger v. Berman, 168 N.W. 925, 203 Mich. 78.

23 C.J. p 186 note 22.

36. U.S.—Rockefeller v. Merritt, Minn., 76 F. 909, 22 C.C.A. 608, 35 L.R.A. 633.

37. Iowa.—Fagan v. Hook, 105 N. W. 155, 111 N.W. 981, 134 Iowa 381.

38. N.Y.—In re Franks' Estate, 277 N.Y.S. 573, 154 Misc. 472—Richter v. Sea Gate Ass'n, 199 N.Y.S. 303, 120 Misc. 307, affirmed 202 N. Y.S. 68, 207 App.Div. 573.

39. Fla.—Edwards v. Baldwin Piano Co., 83 So. 915, 79 Fla. 143.

also been held that the mere fact that one of the parties is to pay a sum of money in addition to the property to be transferred by him, or that provision is made for an adjustment of the difference in the values of the respective properties, does not necessarily prevent the transaction from being a contract for the exchange of lands;[40] and a like rule has been applied in the case of an exchange of personal property;[41] conversely, the fact that property in addition to a sum of money is paid for a piece of property does not prevent the transaction from being a sale rather than an exchange.[42]

The use of the words "sold" and "payment" does not necessarily prevent the transaction from being an exchange,[43] but the use of the word "sold" has been regarded as an indication of the fact that the parties intended a sale and not an exchange,[44] and where an agreement expressly designates a transaction as a sale of property with the acceptance of a transfer of other lands in part payment, it has been held that it cannot be considered on the basis of an exchange of properties.[45]

If the requisites of a technical common-law exchange are not present the fact that part or all of the consideration for a transfer of land is a conveyance of other land does not in and of itself amount to a technical exchange rather than a sale,[46] and a transaction is a sale rather than a technical or common-law exchange where land is conveyed in consideration of personal property or a chose in action,[47] or where there is a payment of money in addition to the property exchanged.[48]

§ 2. What Law Governs

Questions in regard to the title or transfer of land involved in an exchange are controlled by the laws of the state in which the land is situated, but the right of a party in possession of land under a contract for its conveyance to avoid in equity such contract on the ground that the other party did not have title is governed by the law of the forum.

Questions in regard to the title[49] or transfer[50] of land involved in an exchange and all similar questions are controlled by the laws of the state in which the land is situated; but the right of a party in possession of land under a contract for its conveyance to avoid in equity such contract on the ground that the other party did not have title is governed by the law of the forum.[51] An unevicted party to an exchange of lands may maintain an action to recover damages for fraudulent representations as to title, based on a failure of title to part of the land included in the conveyance to him, notwithstanding the rule of the state where the land lies that there can be no action on a covenant of warranty until after eviction.[52]

§ 3. Requisites and Validity

a. Parties
b. Agreement or mutual assent
c. Consideration
d. Subject matter
e. Legality
f. Formal requisites of contract or conveyance

a. Parties

The intention of a person may be considered in determining whether he has become a party to a contract for the exchange of property. A contract will not be invalidated for lack of mental capacity of one of the parties if he fully comprehends the matters involved and the nature and consequences of his act.

The intention of a person may be considered in determining whether such person has become a party to a contract for the exchange of property.[53] A person who was not originally a party to a conditional agreement for the exchange of real property not under seal, which is subject to ascertainment of future contingent facts dependent on future negotiations before it becomes binding on either party, may subsequently become a party to such agreement.[54] A party may contract for the exchange of real property in the name of another.[55]

The mortgagee of personal property involved in a contract for the exchange of such property for

40. U.S.—Law v. McLaughlin, D.C. Cal., 2 F.Supp. 601, 603, citing **Corpus Juris.**
23 C.J. p 186 note 25.

41. La.—Ails v. Bowman, 2 La. 251.
23 C.J. p 186 note 26.

42. R.I.—Lilley v. Providence Journal Co., 14 A. 915, 16 R.I. 245.

43. Ky.—Ross v. Barr, 53 S.W. 658, 21 Ky.L. 974.
S.D.—Steere v. Gingery, 110 N.W. 774, 21 S.D. 183.

44. N.J.—Haber v. Goldberg, 105 A. 874, 92 N.J.Law 367.

45. Pa.—Wasserman v. Steinman, 155 A. 302, 304 Pa. 150.

46. N.J.—Haber v. Goldberg, 105 A. 874, 875, 92 N.J.Law 367—Fidelity Union Trust Co. v. Prudent Inv. Corporation, 19 A.2d 224, 129 N. J.Eq. 255—Smith v. Colonial Woodworking Co., 160 A. 351, 110 N.J. Eq. 418, affirming 154 A. 744, 108 N.J.Eq. 303, and motion denied 162 A. 255, 111 N.J.Eq. 313.

47. U.S.—Speigle v. Meredith, C.C. Ind., 22 F.Cas No.13,227, 4 Biss. 120.

48. Or.—Windsor v. Collinson, 52 P. 26, 32 Or. 297.
23 C.J. p 186 note 27.

49. Tenn.—Topp v. White, 12 Heisk. 165.

50. S.D.—Bowdle v. Jencks, 99 N. W. 98, 18 S.D. 80.
Tenn.—Topp v. White, 12 Heisk. 165.

51. Tenn.—Topp v. White, supra.

52. Tex.—Foster v. Atlir, Civ.App., 181 S.W. 520.

53. Mich.—Zeigen v. Roiser, 166 N. W. 886, 200 Mich. 328.

54. D.C.—Main v. Aukam, 12 App. D.C. 375.

55. Mo.—Fuchs v. Leahy, 9 S.W.2d 897, 321 Mo. 47.

other personalty cannot be held liable on the contract where he is not a party to it.[56] A broker is not a party to a contract for the exchange of property by which one of the parties agrees to pay him a commission, where he is not named as a party therein, and it is not executed by or delivered to him, and his name appears thereon only as a witness to its execution.[57] The wife of one of the parties who signs a contract in which she is not named as a party merely to release her distributive share is not personally liable on the contract.[58] That a contract was not signed by the wife of one of the parties is immaterial where she signs the deed called for by the contract.[59]

A contract for the exchange of personalty executed by two parties may be binding on them notwithstanding a third person is named in the body of the contract, as a party thereto, where there is nothing to show that the contract was not to become binding until signed by such third person.[60] An exchange contract which requires the signature of joint owners to be effective is not binding on one of the joint owners if the other refuses to sign,[61] but the mere fact that a person is not the sole owner of the property he proposes to exchange does not relieve him from liability for failing to perform,[62] unless he conditions his offer to that effect.[63] So, the mere fact that a party cannot perform it without the signature of his wife to the deed does not render the contract void as between the parties to it.[64]

Capacity to contract. An exchange contract will not be invalidated for lack of mental capacity of one of the parties where the party fully comprehends the matters involved and the nature and consequences of his act.[65] The mere fact that a grantor knows that he is making a deed does not show sufficient mental capacity to sustain an exchange of properties, but he must have sufficient mental strength to protect his interests and fully comprehend the transaction.[66] A contract for an exchange which is entered into while one party knows that the other is intoxicated is voidable at the latter's election.[67]

b. Agreement or Mutual Assent

Agreement or mutual assent is essential in a contract for the exchange of property. A mere offer to exchange can be revoked at any time before acceptance. A conditional acceptance operates as a rejection of the offer, but it may be accepted by the original offerer as a counter offer.

A contract for the exchange of property does not arise where there is no agreement or assent of the parties.[68] In accordance with the general rules pertaining to contracts, an offer for the exchange of property which is accepted before revocation results in a binding contract,[69] and after acceptance the offer cannot be withdrawn,[70] nor can one of the parties change the terms of the contract.[71] The offer must be accepted by the person to whom it is made,[72] or by his authorized agent,[73] and the mere execution of identical offers by each party does not constitute a contract.[74] One offering or proposing exchange of properties need not have actual personal notice of acceptance to bind him,[75]

56. Ala.—Thomas v. Shows, 73 So. 994, 15 Ala.App. 493.

57. Cal.—Brion v. Cahill, 165 P. 704, 34 Cal.App. 258.

58. Iowa.—Durband v. Ney, 191 N. W. 385, 196 Iowa 574.

59. Va.—White v. Bott, 163 S.E. 397, 158 Va. 442, modifying 158 S. E. 880, 158 Va. 442.

60. Minn.—Wilkes v. Holmes, 150 N.W. 1098, 128 Minn. 349.

61. Kan.—Allen v. Elwell, 282 P. 706, 129 Kan. 296.

Refusal of wife to sign

Where husband signed contract for purchase of real estate by husband and wife providing for the conveyance by the husband and wife of land, held by them as tenants by entirety, as part of purchase price, with the intention that the wife should subsequently sign the contract, and the wife thereafter refused to sign, and vendors knew that the land to be conveyed to them was owned by them as tenants by entirety, the husband could recover from the vendors a portion of the purchase price paid by him at the time when he signed the contract, since it was not intended by the parties that the contract should become a valid contract until signed by the wife.—Rothstein v. Weeks, 195 N.W. 49, 224 Mich. 548.

62. Ky.—Struck v. Dralle, 20 S.W. 2d 88, 230 Ky. 393.

63. Ky.—Struck v. Dralle, supra.

Absence of knowledge of condition

Defendant was held bound on plaintiff's acceptance of his written proposition, in absence of proof of plaintiff's knowledge of oral condition.—Struck v. Dralle, supra.

64. Mich.—Dikeman v. Arnold, 44 N.W. 407, 78 Mich. 455.

65. Iowa.—Dunlop v. Wever, 228 N. W. 562, 209 Iowa 590.
Mich.—Devereaux v. Hubbard, 75 N. W. 450, 117 Mich. 119.

66. Ill.—Thatcher v. Kramer, 180 N.E. 434, 347 Ill. 601.

67. Ark.—Katter v. Hardin, 288 S. W. 881, 172 Ark. 268.

68. Cal.—Bandy v. Westover, 252 P. 593, 200 Cal. 222.
23 C.J. p 187 note 47.
Effect of mistake is considered infra § 4 a.

69. Kan.—Ramey v. Thorson, 146 P. 315, 94 Kan. 150.
Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

70. Wash.—Chapman v. Milliken, supra.

71. Ky.—Dupre v. Hortsman, 38 S. W.2d 236, 238 Ky. 382.

72. Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707, superseding, App., 74 P.2d 317.
Ga.—Moore v. Collier, 66 S.E. 1080, 133 Ga. 762.
23 C.J. p 187 note 49.

73. Iowa.—Peterson v. Higgins, 190 N.W. 407, 194 Iowa 759.

74. Cal.—Pratt v. Beretta, 271 P. 546, 94 Cal.App. 527.

75. Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

and notice of acceptance to the offerer's authorized agent,[76] or the transmission of the message of acceptance in the manner specified[77] is sufficient. An offer sent by mail may be accepted by telegram where the offerer does not specify the means of communication.[78] A mere offer to exchange property, in the absence of consideration not to revoke, can be revoked at any time before it is accepted,[79] and an acceptance after revocation is ineffective.[80] It is sufficient if the notice of the revocation is communicated to the agent of the other party who has authority to receive such notice,[81] but a notice of revocation to the offerer's agent does not effect a revocation.[82] Where no time is stated an offer may be accepted within a reasonable time.[83]

An offer to exchange property is not completed on mailing but only on receipt by the offeree, so that the time for acceptance runs from the time of receipt.[84] An offer will lapse as the result of the death of the offerer.[85]

Conditional acceptance or counter offer. A conditional acceptance operates as a rejection of the offer,[86] and an attempted acceptance of the original offer after a counter offer has been made and rejected does not result in a contract and has no legal effect,[87] although within the time originally limited for acceptance.[88] A purported acceptance subject to ability to deliver clear title has been held to create a condition not contemplated in the offer, and not to constitute an acceptance,[89] but it has also been held that an addition of the words "free from incumbrance" does not create a counter offer and render the communication ineffective as an acceptance.[90] After acceptance by the offeree, other propositions by him cannot be considered as counter offers in the original transaction.[91] The original offerer's acceptance of a counter offer results in a binding contract.[92]

c. Consideration

(1) In general
(2) Failure of consideration

(1) In General

A promise to exchange by one party is the consideration for a similar promise by the other and the contract needs no independent or separate consideration. Mutuality is an essential element of the contract but the value of the respective properties need not be equal.

The exchange of one article for another imports a consideration.[93] In the case of an executory contract, the agreement of one party to exchange property is the consideration for the similar agreement of the other party,[94] and the contract needs no independent or separate consideration.[95] The transfer by one party of his property constitutes a consideration for the transfer by the transferee of his property to the other party.[96] Covenants and promises accompanying an exchange form a part of the consideration,[97] such as an agreement to assume a mortgage.[98] A conveyance of land may constitute the consideration for the conveyance of other land by the grantee named in the first mentioned conveyance, notwithstanding the grantor in such conveyance prior to the agreement for exchange ac-

76. Wash.—Chapman v. Milliken, supra.

77. Tex.—Bell v. Western Union Telegraph Co., Civ.App., 21 S.W.2d 39, reversed on other grounds, Com.App., 36 S.W.2d 185.

78. W.Va.—Caldwell v. Cline, 156 S. E. 55, 109 W.Va. 553, 72 A.L.R. 1211.

79. Cal.—Roth v. Moeller, 197 P. 62, 185 Cal. 415—M. V. B. MacAdam Co. v. Bryant, 260 P. 298, 86 Cal. App. 74.
23 C.J. p 187 note 51.

80. Ill.—Dick v. Halun, 176 N.E. 440, 344 Ill. 163.

81. Cal.—Hamlin v. Barnhart, 147 P. 1188, 26 Cal.App. 632.

82. Cal.—Bandy v. Westover, 252 P. 593, 200 Cal. 222.

83. Cal.—Bandy v. Westover, supra.

Four months

Acceptance of offer to exchange land within four months was held within "reasonable time," where offer recognised that the other party was abroad.—Bandy v. Westover, supra.

84. W.Va.—Caldwell v. Cline, 156 S. E. 55, 109 W.Va. 553, 72 A.L.R. 1211.

85. Tex.—Taylor v. Sanford, Civ. App., 150 S.W. 262.

86. Cal.—Howard v. Chow, 81 P.2d 994, 27 Cal.App.2d 755—M. V. B. MacAdam Co. v. Bryant, 260 P. 298, 86 Cal.App. 74.
Ky.—Henry v. Reeser, 154 S.W. 371, 153 Ky. 8.

Provision subjecting property to trust deed

A written acceptance of an offer to exchange lot for apartment in a community apartment house, which varied terms of original offer by providing that apartment should be subject to trust deed on the apartment house, was at most a qualified acceptance and in effect a counter offer.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707, superseding, App., 74 P. 2d 317.

87. N.Y.—Vogt v. Longfellow, 205 N.Y.S. 719, 123 Misc. 498.

88. N.Y.—Vogt v. Longfellow, supra.

89. Cal.—Howard v. Chow, 81 P.2d 994, 27 Cal.App.2d 755.

90. Iowa.—Harris v. Bills, 213 N. W. 929, 203 Iowa 1034.

91. Iowa.—Harris v. Bills, supra.

92. Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707, superseding, App., 74 P.2d 317.

93. Ind.—Forkner v. State, 95 Ind. 406.

94. Ala.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.
23 C.J. p 188 note 56.

95. Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

96. Tenn.—Harvey v. Gallaher, Ch. A., 48 S.W. 298.
23 C.J. p 188 note 57.

97. Ind.—Headrick v. Wisehart, 57 Ind. 129.

98. Mass.—Furnas v. Durgin, 119 Mass. 500, 20 Am.R. 341.

cepted a lease of the land conveyed by him from the other party to the exchange where there was a dispute in good faith as to the ownership of such land.[99]

Mutuality is an essential element of an executory contract for the exchange of property.[1] The mere fact that an agreement involving an exchange does not contain an express provision to buy does not necessarily affect the binding force of the agreement.[2] An alleged lack of mutuality may be waived.[3]

Adequacy. The values of the respective properties need not be equal and mere inequality or inadequacy of consideration where no fraud or misrepresentation is shown is not ground for invalidation of the contract.[4] In determining adequacy of consideration the values placed on the properties to be exchanged are regarded with some degree of liberality.[5] The mere fact that there is a difference in the number of acres in the parcels of land involved in an exchange does not invalidate the transaction.[6] A promise by one party to convey property held by him under an oral contract of purchase under which he has partially performed has been held sufficient to support an executory agreement for the exchange of real property.[7] Although one or more of several considerations which are recited are insufficient, if others are good and sufficient, the validity of the exchange will be upheld.[8]

(2) Failure of Consideration

Where title to either property fails or no title or dominion passes, there is a failure of consideration. On the mere failure of consideration, a conveyance does not ipso facto become void and the transferor does not thereby become reinvested with his original title.

Where the title to either property fails, there is a failure of consideration.[9] There also is a failure of consideration where a deed is delivered but no title passes notwithstanding the covenants in the deed;[10] where a party fails to discharge a mortgage on the property to be conveyed by him pursuant to his agreement;[11] and where one party appropriates for his own use the property which the other party is to receive.[12] The fact that there are encumbrances on land received in exchange, of which the person receiving the land has no knowledge, does not invalidate the contract where such person is not affected in any manner and the defects in title are remedied as soon as the other party learns of them.[13] There is total want of consideration where personal property for which real property and other personalty is to be exchanged is not in existence.[14] On the mere failure of consideration a conveyance does not ipso facto become void and the transferor does not thereby become reinvested with his original title;[15] but the failure of consideration gives the right to a rescission and recovery of the property conveyed, as stated infra § 10. The burden of establishing that there was no consideration is on the person who asserts a lack of consideration.[16] In determining whether there was a failure of consideration, the court must ignore the trade or inflated value and determine the matters at issue on the basis of the real value.[17]

Nonpayment of note given in exchange. It has been held that a note of a third person, given in exchange for other property, is itself the consideration moving from the party giving it in exchange, and if it is not paid such party will not be

99. Tex.—Missouri, K. & T. R. Co. v. Edwards, Civ.App., 176 S.W. 60.

1. Cal.—Hamlin v. Barnhart, 147 P. 1188, 26 Cal.App. 632.
N.C.—Raleigh Real Estate Co. v. Moser, 95 S.E. 498, 175 N.C. 255.
23 C.J. p 188 note 61.

Contract not lacking mutuality
Ind.—Fast v. Baker, 131 N.E. 57, 76 Ind.App. 677.
23 C.J. p 188 note 61 [b].

2. U.S.—Dixon v. Anderson, Va., 252 F. 694, 164 C.C.A. 534.
23 C.J. p 188 note 62.

3. Ill.—Marshall v. Keach, 81 N.E. 29, 227 Ill. 35, 118 Am.S.R. 247, 10 Ann.Cas. 164—Gibson v. Brown, 73 N.E. 578, 214 Ill. 330.

4. Mich.—Vernon v. Antona, 192 N. W. 681, 222 Mich. 83.
N.J.—Garden Realty Corporation v. Hadley, 160 A. 385, 110 N.J.Eq. 474.
Pa.—Rupniewski v. Miasga, 149 A. 193, 299 Pa. 190—Walter's Ex'r v. Martin, 118 A. 434, 274 Pa. 529.
Wis.—Przybylski v. Von Berg, 248 N.W. 101, 211 Wis. 178.
23 C.J. p 188 note 67.
Gross inadequacy as proof of fraud is considered infra § 4 a (9) (d).

5. Iowa.—Ragan v. Lehman, 216 N. W. 717.

6. Pa.—Jermyn v. McClure, 45 A. 938, 195 Pa. 245.

7. Ala.—Goodlett v. Hansell, 66 Ala. 151.

8. Mo.—Bay v. Bedwell, App., 21 S. W.2d 203.

9. N.C.—Harrington v. Furr, 90 S.E. 775, 172 N.C. 610.
23 C.J. p 188 note 70.

10. Mass.—Basford v. Pearson, 9 Allen 387, 85 Am.D. 764.

11. S.D.—Fletcher v. Arnett, 4 S.D. 615, 57 N.W. 915.

12. Pa.—Piper v. Queeney, 127 A. 474, 282 Pa. 135.

13. N.D.—O'Hair v. Sutherland, 152 N.W. 123, 30 N.D. 103.

14. Ark.—Lindsey v. Ritchey, 182 S. W. 901, 122 Ark. 611.

Void stock
Where stock exchanged for property is void, consideration for property exchanged fails and the owner is ordinarily entitled to recover the property or its value.—Becker v. Stineman, 2 P.2d 444, 115 Cal.App. 740.

15. Tex.—Hatton v. Bodan Lumber Co., 123 S.W. 163, 57 Tex.Civ.App. 478.

16. Ind.—Forkner v. State, 95 Ind. 406.

17. Tex.—Stringer v. Urquhart, Civ. App., 288 S.W. 489.

liable to the other party on account of the nonpayment in the absence of fraud or warranty.[18]

d. Subject Matter

The mere fact that at the time of an executory contract a party thereto does not have legal title does not invalidate the contract, but it has been held that a party is not required to accept title if the other party at the time of the contract concealed the fact that he had no title or bona fide claim of ownership.

It has been held that, where neither party to an attempted exchange of realty has a transferable title, the exchange is void;[19] but the mere fact that at the time an executory contract for the exchange is made a party thereto does not have legal title does not invalidate the contract,[20] especially where such party has equitable title to the real property in question.[21] Where the contract contemplates that one party shall secure title from a third person, and such title is secured within the time limited in the contract, he cannot refuse to perform if the other party is willing to accept a conveyance,[22] but it has been held that a party is not required to accept a title to land to which at the time of the contract the other party had no title,[23] nor bona fide claim of ownership,[24] where such party has concealed the facts. The mere fact that title to personal property involved in a contract for the exchange of property is in a third person does not invalidate the contract.[25] A person who holds under a contract of conditional sale has such an interest as will permit him to exchange the property for other personal property.[26]

e. Legality

The legality of a contract of exchange is controlled by rules governing the legality of contracts generally.

General rules apply in determining the legality of contracts of exchange. The mere fact that certain personal property of a third person is in the hands of public authorities after a seizure does not render a contract involving the exchange of such property illegal where there is no attempt to evade the statute under which the seizure is made, and no attempt to interfere with the enforcement of such statute.[27] An agreement by a party to a contract who has given certain corporate stock as part of the consideration for certain property received by him to repurchase the stock on or before a certain day is not void as a gambling contract.[28] The burden of establishing that a contract for the exchange of lands is against public policy is on the person making such claim.[29]

f. Formal Requisites of Contract or Conveyance

(1) Contract
(2) Exchange conveyance

(1) Contract

The contract should be reasonably definite and certain. It should contain the time for passing title and making payment and a description of the land sufficient to identify it. The general rules governing execution and delivery apply.

The terms of the contract should be reasonably definite and certain.[30] The times for passing title and making payment are essential terms of an exchange contract,[31] and where no time is fixed for payment of the balance of the amount due the contract is void for indefiniteness.[32] The terms of a written contract for the exchange of real property should impose on each party the obligation of conveying the land owned by him.[33] A contract for an exchange of lands as within the statute of frauds is considered in the C.J.S. title Frauds, Statute of § 92, also 27 C.J. p 205 note 16–p 206 note 29.

Description of property. The contract must so describe the property involved that it can be identified with reasonable certainty;[34] but no fixed set

18. La.—Shuff v. Cross, 12 Mart. 89. R.I.—Bicknall v. Waterman, 5 R.I. 43.
19. Cal.—Bixby v. Bent, 59 Cal. 522.
20. Ala.—Moore v. Whitmire, 66 So. 601, 189 Ala. 615. Mass.—Couch v. Ingersoll, 19 Mass. 292.
21. Mo.—McGinness v. Brodrick, 192 S.W. 420. 23 C.J. p 189 note 82.
22. Tex.—Hull v. Eidt-Summerfield Co., Civ.App., 204 S.W. 480.
23. Iowa.—Murray Bros. & Ward Land Co. v. Kessey, 166 N.W. 460, 183 Iowa 739. 23 C.J. p 189 note 84.
24. Mo.—Nance v. Sexton, 199 Mo. App. 461, 203 S.W. 649.
25. Minn.—Abernethy v. Halk, 166 N.W. 218, 139 Minn. 252.
26. Ark.—Snyder v. Slatton, 123 S. W. 649, 92 Ark. 530—Dedman v. Earle, 12 S.W. 330, 52 Ark. 164.
27. Minn.—Abernethy v. Halk, 166 N.W. 218, 139 Minn. 252.
28. Ill.—Osgood v. Skinner, 71 N.E. 869, 211 Ill. 229.
29. Wyo.—Stickney v. Hughes, 75 P. 945, 12 Wyo. 397.
30. Tex.—Carlisle v. Green, Civ. App., 131 S.W. 1140. 23 C.J. p 189 note 93.
31. Mass.—Herbert v. Jaffe, 183 N. E. 259, 281 Mass. 202.

Provision for time to cure defects

Contract of exchange to be closed within definite period, provided longer time was not required to cure title defects, was held sufficiently definite as to time.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.

32. La.—Dunn v. Spiro, App., 153 So. 316.
33. Tex.—Carlisle v. Green, Civ. App., 131 S.W. 1140.
34. Tex.—Tian v. Tacquard, Civ. App., 147 S.W.2d 1114, error refused. 23 C.J. p 189 note 95.

Failure to state city, county, or state

A contract which describes the land merely by lot number and does not show in what city, county, or state the lots are situated, or which otherwise does not furnish the means by which the description can

of terms and no particular form of words are necessary to describe the real estate involved.[35] The description is sufficient where from the words used the description can be made certain,[36] as where a surveyor with or without the aid of extrinsic evidence can locate the land and establish the boundaries.[37] A writing is sufficient which affords the means by which the identification of the land involved may be made perfect and certain by extrinsic or parol evidence,[38] showing the application of the description to particular property to the exclusion of all other property.[39] It is sufficient to describe the land involved by reference to ownership,[40] or to location at a specified street number in a certain city,[41] in a specified town, county, and state,[42] or in a certain street between certain avenues,[43] where such description is sufficient to identify the land; but the only purpose for which parol evidence can be heard is to apply the description of the land given in the contract to the subject matter.[44] The mere fact that a part of a contract is indefinite and uncertain does not prevent the contract from being held valid as to part of the land which is properly and sufficiently described.[45] An agreement providing that all the personal property on certain premises shall pass except certain pieces to be agreed on is sufficient.[46] Where an agreement does not sufficiently describe the property, the defect is not cured or the agreement ratified by deeds executed by both parties accurately describing certain lands and left by them with their respective attorneys.[47] A statute prohibiting a sale of realty by reference to a map unless the map has been recorded has been held to apply to a contract of exchange.[48]

Execution, delivery, and acknowledgment. The general rules governing execution and delivery apply to contracts for exchange of property. Thus, a writing signed by an agent in the course of negotiations for the exchange of his principal's real property for real property of another is not binding on the principal where it appears that such writing was merely a memorandum made by the agent for his own convenience and to show what had occurred at a meeting between his principal and such other.[49] A contract, which although executed by one of the parties is never delivered to the other, is not enforceable.[50] A contract for the exchange of lands which is signed by both parties may become operative and be binding on them as a contract, although it is retained by only one of them or is delivered to a third person.[51] A contract for the exchange of real property, which is delivered to a third person with the understanding that it is not to be delivered to the other party, and is not to become binding under certain conditions, does not become binding where such conditions are shown to exist.[52] Where a contract is placed in the hands of a third person for delivery on the happening of a certain contingency with the understanding that it is not to be binding until delivery, delivery contrary to such arrangement is not binding on the parties.[53] There is a sufficient delivery of a contract for the exchange of real property for personal property where the adverse party refuses to receive it merely because it is not acknowledged.[54] A party to a contract of exchange may waive the delivery prior to a certain date of the contract signed by the other party.[55] It has been held that acknowledgment is not essential to the validity of a contract for the ex-

be made definite or certain is void. —Whitehead v. Reiger, Tex.Com. App., 6 S.W.2d 745, affirming, Civ. App., 282 S.W. 651.

Land "as agreed between ourselves"

A contract for the exchange of property describing one of the tracts as "35 acres of land in Alta Loma as agreed between ourselves in Galveston County, Texas", was void on ground of inadequacy of description. —Tian v. Tacquard, Tex.Civ.App., 147 S.W.2d 1114, error refused.

35. N.Y.—Waring v. Ayres, 40 N.Y. 357.

36. Ala.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.
Ill.—Koch v. Streuter, 75 N.E. 1049, 218 Ill. 546, 2 L.R.A.,N.S., 210.
Tex.—Branom v. Scott, Civ.App., 24 S.W.2d 499.

37. Or.—Bogard v. Barhan, 96 P. 873, 52 Or. 121, 132 Am.S.R. 676.

38. Colo.—Drennen v. Williams, 148 P. 265, 59 Colo. 301, Ann.Cas.1917A 664.
Ga.—Lewis v. Trimble, 106 S.E. 101, 151 Ga. 97.
23 C.J. p 189 note 99.

39. Cal.—Wright v. L. W. Wilson Co., 299 P. 521, 212 Cal. 569.
23 C.J. p 190 note 1.

40. Kan.—Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann.Cas.1912A 748.

41. Ala.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.
Ga.—Boney v. Cheshire, 92 S.E. 636, 147 Ga. 30.

42. N.Y.—Richards v. Edick, 17 Barb. 260.

43. N.Y.—Waring v. Ayres, 40 N.Y. 357.

44. Cal.—Marriner v. Dennison, 20 P. 386, 78 Cal. 202.
Tex.—Whitehead v. Reiger, Com. App., 6 S.W.2d 745, affirming, Civ. App., 282 S.W. 651, and rehearing denied, Com.App., 9 S.W.2d xxiii.

45. Kan.—Bacon v. Leslie, 31 P. 1066, 50 Kan. 494, 34 Am.S.R. 134.

46. Mass.—Sleeper v. Nicholson, 87 N.E. 473, 201 Mass. 110.

47. Ga.—Lancaster v. Wilson, 106 S.E. 103, 151 Ga. 154.

48. Cal.—Silverthorne v. Percey, 7 P.2d 746, 120 Cal.App. 83.

49. Ky.—Henry v. Reeser, 154 S.W. 371, 153 Ky. 8.

50. Ky.—Henry v. Reeser, supra.

51. Kan.—Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

52. Iowa.—Weseman v. Graham, 138 N.W. 478, 157 Iowa 430.

53. Mich.—Dikeman v. Arnold, 40 N.W. 42, 71 Mich. 656.

54. N.Y.—Morton v. Witte, 131 N.Y. S. 777, 147 App.Div. 94.

55. N.Y.—Morton v. Witte, supra.

change of personal property for real property.[56]

(2) Exchange Conveyance

For a technical exchange of lands the word exchange must be used, and there must be a provision for reëntry on ouster or eviction. Conveyance may be by deeds exchanged between the parties or by one deed.

Exchange of lands is a technical form of conveyance in which the word "exchange" must be used, and no circumlocution can operate to supply this word if it is omitted.[57] To constitute a technical common-law exchange, there must be a provision for reëntry on ouster or eviction.[58] It seems that the conveyance may be by deeds exchanged between the parties, although only one deed is required.[59] Technical exchanges of land have been almost entirely abandoned in modern conveyancing, the substitute being mutual deeds of bargain and sale.[60]

§ 4. —— Fraud, Mistake, and Undue Influence

a. What constitutes fraud
b. Effect of fraud
c. Mistake
d. Undue influence and confidential relations

a. What Constitutes Fraud

(1) In general
(2) Concealment or suppression of facts
(3) Statement of fact, opinion, or intention
(4) Knowledge and intention
(5) Materiality
(6) Reliance on representations
(7) Fraud of third persons
(8) Resulting damage or injury
(9) Fraud as to particular matters

(1) In General

A false representation as to a material fact which is made with knowledge of its falsity or without knowing whether it is true or false, which may properly be relied on by the party to whom it is made, which is made with the intention that it shall be relied on, and which is acted on by such other to his injury, constitutes fraud which will entitle the party deceived to relief. The mere fact that one party drives an unconscionable bargain does not constitute actionable fraud.

A false representation as to a material fact which is made with knowledge of its falsity or without knowing whether it is true or false, which may properly be relied on by the party to whom it is made, which is made with the intention that it shall be relied on, and which is acted on by such other to his injury, constitutes fraud which will entitle the party deceived to relief.[61] The misrepresentation may be either by words, acts, or the suppression of material facts.[62] The mere fact that one party takes advantage of the ignorance of the other party to drive an unconscionable bargain does not, in the absence of misrepresentations, constitute actionable fraud.[63] Misconduct or a misrepresentation must have actually occurred to entitle a party to relief for fraud,[64] and the representations made must be shown to have been false.[65] The party to whom the representations are made must be actually de-

56. N.Y.—Morton v. Witte, supra.

57. Ill.—Hartwell v. De Vault, 42 N.E. 789, 159 Ill. 325.
Pa.—Rowe v. Thompson, 6 Pa.Dist. & Co. 133.
23 C.J. p 190 note 18.

58. N.J.—Fidelity Union Trust Co. v. Prudent Inv. Corporation, 19 A. 2d 224, 129 N.J.Eq. 255.

59. N.J.—Haber v. Goldberg, 105 A. 874, 92 N.J.Law 367.

60. N.J.—Haber v. Goldberg, supra.
Pa.—Gamble v. McClure, 69 Pa. 282.
23 C.J. p 190 note 24.

61. Ill.—Pusteiniak v. Vilimas, 185 N.E. 611, 352 Ill. 270.
Iowa.—In re Parker's Estate, 179 N. W. 525, 189 Iowa 1131—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
Neb.—Hamaker v. Middaugh, 278 N. W. 849, 134 Neb. 440.
Or.—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.
23 C.J. p 191 note 37.

62. Iowa.—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
Neb.—Faulkner v. Klamp, 20 N.W. 220, 16 Neb. 174.

False representations after inducing intoxication
Where defendants induced plaintiffs to drink to excess and then by means of false representations to consent to an exchange of lands whereby plaintiff was defrauded, defendants were guilty of actionable fraud. —Godwin v. De Motte, 116 N.E. 17, 64 Ind.App. 394.

63. Mont.—Larose v. O'Connell, 216 P. 796, 68 Mont. 160.

64. Tex.—Powell v. Pioneer Building & Loan Ass'n, Civ.App., 111 S. W.2d 764, error dismissed.
Vt.—Luce v. Brown, 118 A. 530, 96 Vt. 140.

Statement to agent concerning route
No representation by one party to an exchange of land that a pike road extended by the farm to be exchanged by him was made by his statement to the agent, with whom both parties were going along a pike road by automobile to see the farm, when several miles from the farm, that "We will turn off here; we could go to the place on this road, but there are some bridges out."—Williams v. Craig, Tex.Civ.App., 252 S.W. 876.

Exchange of property for school lot
(1) Where defendants desired a lot on which there was a school, and they knew that the school board was contemplating moving the school to another locality, it was not a badge of fraud to buy a larger lot in that locality, and offer to exchange it for the schoolhouse lot.—School Board of Sand Lick Dist. v. Smith, 113 S.E. 868, 134 Va. 98.

(2) Where school trustees were fairly well informed on the subject, their failure to investigate the value of a school lot, exchanged for other property, was not a badge of fraud. —School Board of Sand Lick Dist. v. Smith, supra.

65. Iowa.—Lundy v. Surls, 123 N. W. 337, 144 Iowa 670.
Or.—Blakney v. Rowell, 164 P. 709, 84 Or. 363.
Tex.—Kirkland v. Rutherford, Civ. App., 171 S.W. 1031.

ceived by them;[66] but the mere fact that a party is deceived is not a basis for a charge of fraud where the other party is in no way responsible for the deception.[67]

(2) Concealment or Suppression of Facts

Concealment of material facts by a party is fraudulent where the concealment is active or where there is a duty to disclose the facts.

As a general rule where persons are dealing with each other on equal terms, and no confidential relation exists between them, neither is bound to disclose superior information, which he may have, affecting the exchange,[68] particularly where the means of knowledge are at the other party's disposal;[69] but concealment of material facts by a party is fraudulent where the concealment is active,[70] or where there is a duty to disclose the facts.[71] If a defect is not patently observable to the adversary party in the exercise of ordinary care, a positive duty to disclose such fact arises and failure to do so is actionable.[72]

(3) Statement of Fact, Opinion, or Intention

Fraud consists of false representations of existing facts as distinguished from opinions, promises, or assumed future facts.

Material false representations as to existing conditions made with intent to deceive are fraudulent.[73] In order to constitute fraud, false representations must, as a rule, be of facts which exist at the time the representations are made or have existed, in distinction from an opinion, a promise, or an assumed future fact.[74] The facts must be of a concrete character as distinguished from a truth or principle.[75]

A mere expression of opinion does not constitute a fraudulent misrepresentation,[76] but even an opinion may be a misrepresentation, and if a party gives it as an existing fact on a matter material to the transaction it then becomes a statement of fact, which if relied and acted on as a fact may constitute a fraudulent representation.[77] The rules with regard to "dealer's talk," "puffing," or "trade talk" apply in exchanges of property;[78] but the doctrine that proof of mere "trade talk" or "puffing," such as is common to the trader of property, is not sufficient to sustain a charge of fraud, has no application to false representations of material facts which are in their nature calculated to deceive and are made with intent to deceive.[79] A mere promise or representation by a party as to what may happen in the future will not constitute a fraudulent misrepresentation,[80] but it has been held that a party who induces an exchange by false representations, although promissory in nature, at the time not intending to perform them, and not intending that the representation shall be made good, is chargeable with fraud,[81] although there is some authority to the contrary.[82]

(4) Knowledge and Intention

As a general rule, a party must have knowledge that his representations are false to constitute fraud, but fraud may also be predicated on representations which a party makes as true of his own knowledge, although he has no knowledge of their truth or falsity.

As a general rule, to constitute actual fraud in making misrepresentations, the party making them

66. Cal.—Maxon-Nowlin Co. v. Norswing, 137 P. 240, 166 Cal. 509.
Wis.—Fowler v. McCann, 56 N.W. 1085, 86 Wis. 427.

67. Tex.—Summit Place Co. v. Terrell, Civ.App., 207 S.W. 145—Kirkland v. Rutherford, Civ.App., 171 S.W. 1031.

68. Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.
Mont.—Larose v. O'Connell, 216 P. 796, 68 Mont. 160.
23 C.J. p 191 note 42.

Value of other party's property
A party, negotiating for an exchange of realty and occupying no confidential relationship with the other party, was under no obligation to disclose information which he had learned concerning the value of the other party's property.—School Board of Sand Lick Dist. v. Smith, 113 S.E. 868, 134 Va. 98.

69. Tex.—Jones v. Herring, Civ. App., 16 S.W.2d 325, error dismissed.

70. Iowa.—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
23 C.J. p 191 note 43.

71. Wis.—Olson v. Skroch, 196 N.W. 767, 182 Wis. 448.
23 C.J. p 191 note 44.

72. Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.

Condemnation of property for hidden defects
Defendant's concealment of condemnation order as to building on property for defects not patent on inspection was held actionable.—Chapman v. Kraehe, supra.

73. Wash.—Mumford v. Smith, 154 P. 153, 89 Wash. 98.
23 C.J. p 191 note 49.

74. Ala.—Lockwood v. Fitts, 70 So. 467, 90 Ala. 150.
Idaho.—Dellwo v. Petersen, 180 P. 167, 32 Idaho 172.
23 C.J. p 191 note 47.

75. Mo.—Wade v. Ringo, 25 S.W. 901, 122 Mo. 322.

76. Iowa.—Durband v. Ney, 191 N. W. 385, 196 Iowa 574.
Tex.—Campbell v. Jones, Civ.App., 230 S.W. 710.
23 C.J. p 192 note 50.

77. Iowa.—Sutton v. Greiner, 159 N. W. 268, 177 Iowa 532.
23 C.J. p 192 notes 51, 52.

78. Or.—Black v. Irvin, 149 P. 540, 76 Or. 561.

79. Iowa.—Sutton v. Greiner, 159 N. W. 268, 177 Iowa 532.

80. Cal.—Neff v. Mattern, 151 P. 382, 28 Cal.App. 99.
Mich.—Feldpausch v. Hendershot, 224 N.W. 407, 245 Mich. 694—Dennis v. Slyman, 184 N.W. 584, 216 Mich. 202.
23 C.J. p 192 note 55.

81. Minn.—Holmes v. Wilkes, 153 N.W. 308, 130 Minn. 170.
23 C.J. p 192 note 56.

82. Ind.—Burt v. Bowles, 69 Ind. 1.

must have knowledge of their falsity.[83] However, fraud may be predicated on representations which a party makes without knowledge of their falsity where he at least impliedly represents that they are true of his own knowledge, and he knows or has reason to believe that the other party relies on them.[84] So, a positive statement as to a material fact made without knowledge of the true facts,[85] or a statement recklessly made without such knowledge,[86] or a false representation to the effect that the person making it has information on which he bases his representation[87] may constitute fraud. A false representation founded on a mistake resulting from gross negligence will be considered fraudulent in equity.[88]

Statements on information. A person who makes no positive statement, represents that he has no personal knowledge of certain facts bearing on an exchange, and asserts them on information received from third persons, is not chargeable with fraud,[89] but an untrue material representation stated on information warrants rescission in equity where the party making it affirms the truthfulness of the information.[90]

(5) Materiality

In order that a false representation may be fraudulent it must relate to a material matter.

In order that a false representation may be fraudulent it must relate to a material matter which induces the party deceived to enter into the contract of exchange,[91] but where such a representation is made, it is ground for relief where the other elements of fraud are present.[92]

(6) Reliance on Representations

(a) In general

(b) Examination or investigation by injured party

(c) Means of knowledge

(d) Representations as to matters of record

(a) In General

In order that a false representation may constitute actionable fraud, it is necessary that the complaining party should have relied on it and that he had a right to do so.

In order that a false representation may constitute a fraud which will entitle the complaining party to relief, it is necessary that he should have relied on it,[93] and also that he had a right to rely on it.[94]

83. Mo.—Adams v. Barber, 139 S. W. 489, 157 Mo.App. 370.
23 C.J. p 192 note 58.

84. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S. Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
Iowa.—Leaman v. Wise, 200 N.W. 691, 198 Iowa 1035—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
Mass.—Rudnick v. Rudnick, 183 N.E. 348, 281 Mass. 205.
23 C.J. p 202 notes 9-11.

85. Tex.—Sherman v. Sipper, Civ. App., 129 S.W.2d 458, reversed on other grounds, Sup., 152 S.W.2d 319.
23 C.J. p 192 note 59.

Express statutory provisions
When so provided by statute, the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, although he believes it to be true, constitutes actual fraud.—Hewitt v. Klages, 268 P. 694, 92 Cal. App. 596.

86. Tex.—Benham v. Tipton, Civ. App., 181 S.W. 510.
23 C.J. p 192 note 60.

87. Iowa.—Hanson v. Kline, 113 N. W. 504, 136 Iowa 101.

88. Iowa.—Gray v. Bricker, 166 N. W. 284, 182 Iowa 816.
Minn.—Kiefer v. Rogers, 19 Minn. 32.

89. Neb.—Moore v. Scott, 66 N.W. 441, 47 Neb. 346.
Wash.—Jarvis v. Ireland, 154 P. 455, 89 Wash. 286.

90. Tex.—Maddox v. Clark, 175 S. W. 1053, 107 Tex. 212—Boles v. Aldridge, 175 S.W. 1052, 107 Tex. 209—Kincaid v. Tant, Civ.App., 180 S.W. 1103.

Repeating misrepresentations
The fact that defendant, in an exchange of land, merely repeated misrepresentations which others had made to him did not relieve him from liability, if the statements so repeated amounted to such a representation of the character of the land that plaintiff was induced to make the exchange.—Barbian v. Grant, Tex.Civ.App., 190 S.W. 789.

91. Pa.—Walter's Ex'r v. Martin, 118 A. 434, 274 Pa. 529.
Wis.—Walloch v. Washkowiak, 207 N.W. 286, 189 Wis. 491.
23 C.J. p 193 note 65.

Padlock notice on premises
Concealment of fact that, before exchange contract, government placed padlock notice on defendants' property, was held not ground for contract's rescission for fraud, where a bond was given and the premises were not padlocked.—Mielke v. Tucker, 216 N.W. 919, 241 Mich. 449.

92. Cal.—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.
23 C.J. p 193 note 66.

Misrepresentation of one fact
Misrepresentation of single material fact in exchange of properties may be sufficient to entitle a party to relief.—Faull v. Johnson, supra.

93. U.S.—Horton v. Reynolds, C.C. A.Iowa, 65 F.2d 430.
Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Cal.—Spinks v. Clark, 82 P. 45, 147 Cal. 439.
Ill.—Johnson v. Miller, 132 N.E. 490, 299 Ill. 271.
Iowa.—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
Mich.—Barkovits v. Veres, 236 N.W. 857, 254 Mich. 543.
Tex.—Campbell v. Jones, Civ.App., 230 S.W. 710.
Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333—Hudson v. Beers, 188 P. 454, 110 Wash. 225.
23 C.J. p 193 note 67.

94. U.S.—Horton v. Reynolds, C.C. A.Iowa, 65 F.2d 430.
Ark.—Loveless v. Davis, 173 S.W. 196, 116 Ark. 443.
23 C.J. p 194 note 79.

Suspicion as affecting right to rely
That a party to an exchange of land was suspicious, that something was wrong did not deprive her of the right to rely on the misrepresentations of the other party concerning his land made to induce her to enter into the trade.—Perkins v. Orfield, 176 N.W. 157, 145 Minn. 68.

The mere existence of other causes which might have induced a party to enter into a contract will not relieve a party making false representations from his fraud, provided such representations form some of the inducements without which the transaction would not have been consummated.[95] A representation connected with a proposition for the exchange of land may be fraudulent, notwithstanding the fact that subsequently a second proposition is made from which a contract ultimately arises.[96] False representations, knowingly made by a party previous to the exchange as to the character, condition, and value of property involved are presumed to have influenced the mind of the other party, even though he had full opportunity to observe and know the actual truth,[97] and the burden is on the former to prove clearly that such false representations did not influence the opposite party in making the exchange.[98]

(b) Examination or Investigation by Injured Party

As a general rule, a party who makes an independent investigation as to, or an inspection of, the property and relies on his own judgment cannot avoid the contract on the grounds of false representations, but the mere fact that a person inquires about or examines the property does not conclusively show that he did not rely on the misrepresentations.

A party who relies on his own judgment cannot claim that a fraud was practiced on him.[99] As a general rule, a party who makes an independent investigation as to, or an inspection of, the real[1] or personal[2] property to be received by him, and does not rely on the representations of the other party, cannot avoid the contract on the ground that such representations were false and fraudulent; but it has been held that the mere fact that a person to whom false representations have been made makes inquiry as to,[3] or an examination of,[4] the property to be received by him does not conclusively show that he did not rely on such representations, particularly where he is not familiar with the nature of the property.[5] A party to the contract cannot escape responsibility for his false statements where the conditions and circumstances are such as to render it practically impossible for the other party to obtain the necessary information by his examination,[6] or where the guilty party prevents or

95. Cal.—Hewitt v. Klages, 268 P. 694, 92 Cal.App. 596.
23 C.J. p 193 note 70.

96. Colo.—Brown v. Linn, 115 P. 906, 50 Colo. 443.

97. N.J.—Turner v. Houpt, 33 A. 28, 53 N.J.Eq. 526, reversed on other grounds 39 A. 1114, 55 N.J. Eq. 593.

98. N.J.—Turner v. Houpt, 33 A. 28, 53 N.J.Eq. 526, reversed on other grounds 33 A. 1114, 55 N.J.Eq. 593.

99. Mo.—Wade v. Ringo, 25 S.W. 901, 122 Mo. 322.
Wash.—Richardson v. Hutchinson, 169 P. 987, 99 Wash. 471.

1. Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Cal.—Standard Bond & Mortgage Co. v. Boyd, 261 P. 744, 86 Cal.App. 535.
Iowa.—Dunlop v. Wever, 228 N.W. 562, 209 Iowa 590.
Ky.—Jobe v. Brown, 53 S.W.2d 532, 245 Ky. 260.
Mich.—Kowalski v. Rusin, 217 N.W. 768, 242 Mich. 1.
Mo.—Kirby v. Balke, 266 S.W. 704, 306 Mo. 109.
Tex.—Williams v. Craig, Civ.App., 252 S.W. 876—Campbell v. Jones, Civ.App., 230 S.W. 710.
Vt.—Flint v. Davis, 8 A.2d 671, 110 Vt. 401.
23 C.J. p 193 note 73.

2. Wash.—Hudson v. Beers, 188 P. 454, 110 Wash. 225.
23 C.J. p 193 note 74.

3. Ark.—English v. North, 166 S.W. 577, 112 Ark. 489.
Cal.—Dow v. Swain, 58 P. 271, 125 Cal. 674.
N.D.—Liland v. Tweto, 125 N.W. 1032, 19 N.D. 551.

4. Ky.—Addison v. Wilson, 37 S.W. 2d 7, 12, 238 Ky. 143, quoting **Corpus Juris**—Alder v. Yager, 286 S. W. 983, 215 Ky. 678.
Mo.—Vodicka v. Sette, 223 S.W. 578.
23 C.J. p 194 note 76.

Inspection by agent

Defendant widow, contracting to exchange garage for farm, was held not bound by inspection of her agent who was either incompetent, misled, or untrue to his trust.—Yarcho v. Dawson, 233 N.W. 21, 211 Iowa 248.

Intention to examine property

Where one party in a land exchange deal intended to examine the property before closing but, acting in ignorance of its legal effect, sent a wire accepting the offer and making the contract before he had examined the property, the fact that he had intended to make said examination did not negative the fact that he relied on the other party's misrepresentations.—Fisher v. Dippel, 102 S.W. 448, 46 Tex.Civ.App. 266, error refused.

5. Ky.—Alder v. Yager, 286 S.W. 983, 215 Ky. 678.
Mo.—Vodicka v. Sette, 223 S.W. 578.

6. Ky.—Addison v. Wilson, 37 S.W. 2d 7, 12, 238 Ky. 143, quoting **Corpus Juris.**
Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.
23 C.J. p 194 note 77.

Examination of land during winter

Plaintiff is not precluded from maintaining suit to rescind an exchange for a ranch on account of defendant's misrepresentations as to its soil, the amount under cultivation, and what was raised on it, because of having visited the place with defendant, when winter conditions prevailed, preventing a thorough examination, and defendant falsely pointing out cultivated land as part of the ranch, and falsely assuring plaintiff of hay and potatoes in the buildings having been raised on the premises.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.

Illness during inspection

In an action to rescind a contract for the exchange of property on the ground of fraud, a complaint alleging that the plaintiffs investigated the property they were to receive before they signed the contract, but that the husband was too ill at the time to make a careful inspection, and that the wife was unfamiliar with business matters, sufficiently excuses the failure of the plaintiffs to detect the falsity of the misrepresentations as to the value of the property and the timber thereon so as to be good against demurrer.—Stockton v. Hind, 196 P. 122, 51 Cal. App. 131.

Hidden defect in horse

Where plaintiff sold defendant an automobile, and defendant agreed to pay part of the price by delivery of sound horse, even though plaintiff looked at the horse tendered by de-

induces the other party to refrain from a full and complete examination.[7]

(c) Means of Knowledge

As a general rule, where the means of information are as accessible to one party as to the other in the exercise of reasonable diligence, and the injured party is not prevented from making a proper inquiry by any artifice or fraud of the other party, the former cannot avoid the contract on the ground of fraud, but positive representations of fact the truth or falsity of which is known by the party making the representations, may be relied on without an independent investigation.

The rule of caveat emptor applies in the case of an exchange of property;[8] and as a general rule where the means of information are as accessible to one party as to the other in the exercise of reasonable diligence, and the injured party is not prevented from making a proper inquiry by any artifice or fraud of the other party, the former cannot avoid the contract on the ground of fraud.[9] However, notwithstanding the above rule it has been held that a contracting party is entitled to rely on the express statement as to an existing fact, the truth or falsity of which is known to the party making the statement and unknown to the other party, made for the purpose of inducing the making of the contract, and that he is under no obligation to make further investigation;[10] and that the party making the fraudulent representations for the purpose of inducing the other party to act will not be heard to say that his false statement should not have been believed.[11] The guilty party will not be permitted to avoid liability for his false statements on the ground that the defrauded party has acted carelessly or with apparent lack of intelligence,[12] especially where the guilty party in making the representations resorts to conduct which is reasonably calculated to induce the other party to forego investigating or making inquiries.[13] Where the party to whom

fendant in a prior transaction, or even examined him, there was no examination of the horse by plaintiff to make out reliance by him on his own judgment in making the trade, and not on defendant's warranty of soundness of the horse, the fact being that the horse was afflicted with opthalmia or moon blindness, a condition in which the eyes may appear to be all right and later defective, although defective all the time.—McNabb v. Juergens, Iowa, 180 N.W. 758, modified on other grounds 185 N.W. 581.

7. Iowa.—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.
Or.—Criger v. Roche, 264 P. 361, 125 Or. 275.
23 C.J. p 194 note 78.

8. Mich.—Kowalski v. Rusin, 217 N. W. 768, 242 Mich. 1.
Mo.—Chapman v. Kraehe, App., 22 S. W.2d 845.
Vt.—Luce v. Brown, 118 A. 530, 96 Vt. 140.
23 C.J. p 194 note 80.

9. Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Cal.—Standard Bond & Mortgage Co. v. Boyd, 261 P. 744, 86 Cal.App. 535.
Ill.—Johnson v. Miller, 132 N.E. 490, 299 Ill. 271.
Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74.
Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.
Or.—Elliott v. Mork, 24 P.2d 1036, 144 Or. 246—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.
Wash.—Hudson v. Beers, 188 P. 454, 110 Wash. 225—Black v. Thompson, 188 P. 393, 110 Wash. 379.
23 C.J. p 194 note 81.

Duty to inspect

One has duty to inspect property received in exchange when it is at hand.—Hurd v. Bugnon, 260 P. 250, 145 Wash. 338.

Knowledge and opportunity of attorney

Where, in a transaction involving an exchange of real estate between plaintiff and defendant, plaintiff was represented by an attorney, who personally conducted all the negotiations in her behalf, his knowledge and opportunity to investigate matters of title and statements made by defendant were in law those of plaintiff, and defendant is not liable for fraud and deceit, in the absence of conspiracy between him and the attorney, unless the latter could have recovered on the same ground if he had been the principal.—Freeman v. Evans, Pa., 159 F. 26, 86 C. C.A. 216.

10. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S.Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
Cal.—Proctor v. Arakelian, 280 P. 368, 208 Cal. 82—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal. App. 678—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.
Colo.—Masser v. Foxworthy, 281 P. 360, 86 Colo. 313—Cahill v. Readon, 273 P. 653, 85 Colo. 9.
Iowa.—Frost v. Rich, 200 N.W. 561, 199 Iowa 421.
Mass.—Rudnick v. Rudnick, 183 N.E. 348, 281 Mass. 205.
Mo.—Parish v. Casner, 282 S.W. 392.
Neb.—Hamaker v. Middaugh, 278 N. W. 849, 134 Neb. 440.
Vt.—Fenwick v. Sullivan, 145 A. 258, 102 Vt. 28.
Wash.—Hudlow v. Hodgson, 281 P. 331, 154 Wash. 198.
23 C.J. p 194 note 82.

Necessity to hire experts to examine property

A party taking a building in exchange for other property was not bound to have it examined by experts to ascertain the cause of its peculiar shape, but might rely on the statements of the other party's agent who knew the building and that the cause of its shape was an unsafe condition.—Chase v. Wolgamot, 114 N.W. 614, 137 Iowa 128.

11. Cal.—Proctor v. Arakelian, 280 P. 368, 208 Cal. 82.
Colo.—Cahill v. Readon, 273 P. 653, 85 Colo. 9.
Ill.—Herpich v. Williams, 133 N.E. 220, 300 Ill. 540.
23 C.J. p 195 note 83.

12. Ill.—Herpich v. Williams, supra.
Okl.—Kelly v. Robertson, 160 P. 46, 61 Okl. 85.
Or.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.
23 C.J. p 195 note 84.

Failure of broker to examine stock certificate

Where an exchange of realty for stock in a defunct corporation is induced by representing it as in another company of a similar name, negligence preventing recovery is not established by proof that plaintiff's broker conducting the exchange, had the certificate in his possession a few hours and failed to examine it and discover the misrepresentation.—Arnold v. Teel, 64 N.E. 413, 182 Mass. 1.

13. Ind.—Valdenaire v. Henry, 121 N.E. 550, 70 Ind.App. 68.
Neb.—Hamaker v. Middaugh, 278 N. W. 849, 134 Neb. 440.
Wash.—Hurd v. Bugnon, 260 P. 250, 145 Wash. 338.
23 C.J. p 195 note 85.

the representation is made has not equal facilities for ascertaining the truth, he is entitled to rely on the representation.[14] The right of a party to rely on a representation of the opposite party has been upheld where the property as to which the representation was made was real estate in a distant place.[15] A party to a contract is entitled to rely on the other party's representation that he is the owner of certain personalty which the latter is to give in exchange.[16] The question whether the injured party has exercised due diligence may depend on his understanding of the language and the fact that he was not accustomed to transacting business.[17]

(d) Representations as to Matters of Record

That the truth or falsity of a certain statement may be determined by an examination of a public record does not prevent such statement from being fraudulent.

The mere fact that the truth or falsity of a certain statement may be determined by an examination of a public record does not prevent such statement from being fraudulent where made as to real[18] or personal property,[19] particularly where the injured party has been induced by the other not to make an examination.[20] Of course where an examination of the records does not disclose the facts, the fraudulent character of a representation is not affected.[21] It seems, however, that, where there is no actual concealment or attempt to conceal the existence of a matter of record, mere failure to mention the fact will not be considered fraud.[22]

(7) Fraud of Third Persons

A party is chargeable with false representations of his agent or of third persons for whose reliability he vouches or whose statements he ratifies. An injured party cannot obtain relief for the fraud of his own agent unless the other party participates in or has knowledge of the fraud.

A party is chargeable with false and fraudulent representations of his agent made to induce the exchange.[23] A party may ratify fraudulent representations made by a third person to induce an exchange, although at the time the representations were made such third person had no authority to make the representations in question,[24] but no ratification can be implied where the party has no knowledge of the fraud.[25] Where the guilty party has referred the other party to a third person for the purpose of obtaining correct information on which he may rely regarding personal[26] or real[27] property involved in the transaction, he is chargeable with false and fraudulent statements made by such third person. This rule has been applied even where the party chargeable with the fraud has acted in good faith,[28] but his mere reference to a third person as one acquainted with the property is not alone sufficient to bind him to the third person's misrepresentations.[29] The owner of an interest in land involved in an exchange cannot avoid responsibility for misrepresentations of his coöwner where the former has knowledge, or is chargeable with knowledge, of such misrepresentations.[30] A party may obtain relief because of the fraud of his own

14. Wash.—Black v. Thompson, 188 P. 393, 110 Wash. 379.
23 C.J. p 195 note 86.

15. Iowa.—Peterson v. Higgins, 190 N.W. 407, 194 Iowa 759.
Ky.—Addison v. Wilson, 37 S.W.2d 7, 238 Ky. 143.
Okl.—Clark v. O'Toole, 94 P. 547, 20 Okl. 319.
Wash.—Black v. Thompson, 188 P. 393, 110 Wash. 379.
23 C.J. p 195 note 87.

16. Cal.—Crandall v. Parks, 93 P. 1018, 152 Cal. 772.

17. Mo.—Neuman v. Friedman, 136 S.W. 251, 156 Mo.App. 142.

18. Mass.—Rollins v. Quimby, 86 N. E. 350, 200 Mass. 162.
Tex.—Moore v. Beakley, Com.App., 215 S.W. 257, reversed, Civ.App., 183 S.W. 380.
23 C.J. p 195 note 92.

19. Cal.—Hewitt v. Klages, 268 P. 694, 92 Cal.App. 596.
Wis.—Miller v. Hackbarth, 105 N.W. 311, 126 Wis. 50.

20. Illustration
Mass.—Rollins v. Quimby, 86 N.E. 350, 200 Mass. 162.

21. Mont.—Petit v. Sinclier, 163 P. 467, 53 Mont. 317.

22. Wis.—Pfeiffer v. Layton Park Oil & Soap Co., 149 N.W. 395, 159 Wis. 1.
23 C.J. p 196 note 95.

23. Cal.—Hartman v. City Nat. Bank of San Francisco, 27 P.2d 764, 219 Cal. 510.
Mich.—Upell v. Bergman, 224 N.W. 404, 246 Mich. 82—Reich v. Schmidt, 218 N.W. 671, 242 Mich. 130—Chaffee v. Raymond, 217 N. W. 22, 241 Mich. 392.
Minn.—Erickson v. Frazier, 210 N. W. 868, 169 Minn. 118.
Tex.—Richardson v. Wesley, Civ. App., 1 S.W.2d 1098.

Misrepresentations in presence of principal
An owner, who permitted his agent in his presence to misrepresent the land, is guilty of fraud.—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.

24. Ga.—Davis v. Preston, 76 S.E. 766, 12 Ga.App. 65.

25. Wis.—Przybylski v. Von Berg, 248 N.W. 101, 211 Wis. 178.

26. Ark.—Evatt v. Hudson, 133 S. W. 1023, 97 Ark. 265.
Mich.—Barron v. Myers, 109 N.W. 862, 146 Mich. 510.
Tex.—Cabaness v. Holland, Civ.App., 47 S.W. 379.

27. Mo.—Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.
Tex.—Benham v. Tipton, Civ.App., 181 S.W. 510.
23 C.J. p 196 note 99.

Misrepresentations in presence of party
Where parties to proposed exchange of property went to office of agent of mortgagee of defendants' property to ascertain the amount of delinquency on the mortgage, defendants who were present and whose agent also present knew or should have known the extent of the delinquency were responsible for the representations made by the mortgagee's agent in their presence.—Patricio v. Scott, 65 P.2d 215, 189 Wash. 302.

28. Tex.—Cabaness v. Holland, Civ. App., 47 S.W. 379.

29. Tex.—Beazley v. McEver, Civ. App., 238 S.W. 949.

30. Mo.—Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.
Pa.—Sell v. Gup, 32 Berks Co.L.J. 32, exceptions dismissed 32 Berks Co. L.J. 73, affirmed 12 A.2d 1, 338 Pa. 134.

agent where such agent and the other party to the contract were in collusion to defraud the principal,[31] or where the opposite party, although he has no actual knowledge of the misrepresentations made by the agent of the defrauded party, is chargeable with notice that such agent is using improper methods to bring about the exchange,[32] but the injured party cannot obtain relief in the absence of participation or notice,[33] even though the other party retains the benefits of the transaction after knowledge of the fraud.[34] Where a contract is entered into through inducements by an agent who secretly acted for both parties contrary to statute, the contract may be rescinded on the grounds of public policy even though there was no intention to defraud.[35] Statements of a third person are not chargeable to a party to a contract where such party is not represented by, and has not vouched for, the reliability of such third person.[36] A party is not chargeable with the representations of a third person where such representations are not authorized and the exchange results from negotiations between the parties to the contract.[37]

(8) Resulting Damage or Injury

Injury of some description must result in order that there may be fraud justifying relief but a pecuniary loss is not necessary.

Injury of some description must result in order that there may be fraud justifying relief,[38] and where a party receives property of equal value he is not entitled to have the transfer set aside,[39] or to recover damages for the misrepresentation;[40] but it has been held that there may be a rescission in equity without showing a pecuniary loss.[41] In determining whether any loss was suffered through the fraud, the court must ignore the trade or inflated value and determine the matters at issue on the basis of the real value.[42] Where a contract is entered into through inducements by an agent who secretly acted for both parties contrary to statute, the contract may be rescinded on the grounds of public policy even though no actual damages were suffered.[43]

(9) Fraud as to Particular Matters

(a) Title and encumbrances
(b) Identity, location, boundaries, and quantity
(c) Character, nature, quality, and condition
(d) Value
(e) Cost, selling price, and profits or income
(f) Prospective purchaser and matters concerning third persons

31. Iowa.—Lister v. La Plant, 168 N.W. 138, 183 Iowa 1363.
23 C.J. p 196 note 3.

Agent who listed lands of both parties

Party to exchange of lands may rescind for fraud of agents with whom each party listed lands.—Richardson v. Wesley, Tex.Civ.App., 1 S.W.2d 1098.

32. Neb.—Adams v. McGrew, 161 N. W. 425, 100 Neb. 817.

33. Mich.—Roe v. Albain, 238 N.W. 205, 255 Mich. 491.
Mo.—Camren v. Squires, 156 S.W. 773, 174 Mo.App. 272.
Wis.—Przybylski v. Von Berg, 248 N.W. 101, 211 Wis. 178.

34. Wis.—Przybylski v. Von Berg, supra.

35. Wis.—Mueller v. Michels, 197 N. W. 201, 184 Wis. 324, modified on other grounds 199 N.W. 380, 184 Wis. 324.

36. Cal.—Gleason v. Proud, 150 P. 885, 31 Cal.App. 123.

Representations of lessee

Alleged representations of lessee of property involved in exchange do not bind lessor so as to entitle other parties to exchange to rescind for fraud, where the lessee is not the agent of the lessor.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178.

37. Tex.—Kirkland v. Rutherford, Civ.App., 171 S.W. 1031.

38. Tex.—Bryant v. Vaughn, 33 S. W.2d 729, reversing Vaughn v. Bryant, Civ.App., 1 S.W.2d 667—Texas Osage Co-op. Royalty Pool v. Guzman, Civ.App., 153 S.W.2d 239—Texas Osage Co-op. Royalty Pool v. Brown, Civ.App., 118 S.W. 2d 944, error refused—Blankenship v. Stricklin, Civ.App., 77 S.W.2d 339—Blankenship v. Lusk, Civ. App., 77 S.W.2d 341—Federal Mortg. Co. v. Henslee, Civ.App., 43 S.W.2d 609.
Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333.
23 C.J. p 196 note 7.

Failure to allege and prove injury

Party to exchange of property, failing to allege and prove injuries resulting from perpetration of alleged fraud in inducing exchange, is not entitled to rescission.—Federal Mortg. Co. v. Henslee, Tex.Civ.App., 43 S.W.2d 609.

Accomplishment of purpose in exchange

Misrepresentations inducing plaintiff to exchange her property for other property worth five thousand dollars less than represented caused injury sufficient to sustain an action for deceit, even though plaintiff's purpose in making the exchange had been to secure cash to meet indebtedness and such purpose had not been defeated by the misrepresentations.—Bitondi v. Sheketoff, 99 A. 505, 91 Conn. 505.

39. Tenn.—Koehler v. Hughes, 15 Tenn.App. 12.
Tex.—Bryant v. Vaughn, 33 S.W.2d 729, reversing Vaughn v. Bryant, Civ.App., 1 S.W.2d 667.

40. Or.—Parks v. Smith, 186 P. 552, 95 Or. 300—Salisbury v. Goddard, 156 P. 261, 79 Or. 593.

41. Tex.—Barton v. Warner, Civ. App., 142 S.W.2d 303.
23 C.J. p 196 note 8.

Assessment enhancing property

A false representation, inducing exchange of lands, that an assessment will be less than has been decided on is injurious, despite the fact that property is enhanced in value to the extent of assessments levied.—Crawford v. Armacost, 149 P. 31, 85 Wash. 622.

42. Tex.—Stringer v. Urquhart, Civ. App., 288 S.W. 489.

43. Wis.—Mueller v. Michels, 197 N.W. 201, 184 Wis. 324, modified on other grounds 199 N.W. 380, 184 Wis. 324.

(a) Title and Encumbrances

A concealment or false representation with respect to title or encumbrances may constitute fraud.

A concealment or false representation with respect to the title to personal property[44] or to real estate[45] may constitute fraud, although the guilty party has given merely a quitclaim deed,[46] and although complainant has accepted a deed without having a survey made.[47] A false statement as to, or the concealment of, an encumbrance on real[48] or personal[49] property exchanged for other property may constitute fraud, as may statements as to title and encumbrances affecting the value of lien notes or mortgages offered in exchange for other property.[50] A representation that a mortgage on the property will be extended is material and if false may justify rescission.[51]

These rules are subject to the exceptions and qualifications already stated supra in subdivisions a (1)-(8) of this section and a rescission cannot be had for mere expressions of opinion,[52] or for misrepresentations which are not material[53] or which were not relied on.[54] A misrepresentation as to title may subject the contract to rescission although it is not known to be false by the party making the statement.[55]

(b) Identity, Location, Boundaries, and Quantity

Fraud may consist of misrepresentations as to the identity, location, boundaries, or quantity of the property offered in exchange.

Fraud may consist of pointing out or describing land different from that contracted for.[56] The right of the defrauded party to avoid the contract does not depend on the fact that the property pointed out was worth more than the property which was conveyed to him.[57] The failure to inform a party to the contract, who is inspecting land other than that which it is proposed to give in exchange, of his mistake may constitute fraud.[58] The conveyance of property different from that specified in the contract, with fraudulent intent, is ground for relief.[59] Fraud may also consist of misrepresentation as to the location,[60] boundaries,[61] or area[62] of land involved in an exchange. A statement as to the

44. Pa.—Bixler v. Saylor, 68 Pa. 146.

45. Tex.—Sherman v. Sipper, Civ. App., 129 S.W.2d 458, reversed on other grounds, Sup., 152 S.W.2d 319.
23 C.J. p 196 note 10.

46. Iowa.—Ballou v. Lucas, 12 N.W. 745, 59 Iowa 22.

47. N.C.—Walsh v. Hall, 66 N.C. 233.

48. Ga.—Cooper v. Whitehead, 136 S.E. 911, 163 Ga. 662.
Or.—Billups v. Colmer, 244 P. 1093, 118 Or. 192.
23 C.J. p 196 note 13.

Occupancy by another under agreement

Where defendant represented that she had a good title to property, and made an exchange with plaintiffs, and, on attempting to take possession, plaintiffs found another party occupying premises with consent of defendant, under agreement to do work around premises, which had been done, who declined to vacate, it was held that a legal fraud had been perpetrated on plaintiffs, justifying them in rescinding the deal.—Austin v. Ash, 205 N.W. 155, 232 Mich. 251.

Width of right of way

False statement as to width of railroad right of way as stated in lease was held a basis for charge of fraud in change of land.—Billups v. Colmer, 244 P. 1093, 118 Or. 192.

49. Cal.—Hewitt v. Klages, 288 P. 694, 92 Cal.App. 596.
23 C.J. p 197 note 14.

50. Mo.—Parish v. Casner, 282 S.W. 392.
23 C.J. p 197 note 15.

51. Mich.—Kanar v. Schuster, 192 N.W. 562, 222 Mich. 282.

52. Cal.—Strait v. Wilkins, 116 P. 685, 16 Cal.App. 188.

Suits affecting title

The mere expression by defendant that suits concerning land to be exchanged amounted to nothing as affecting the title was but the expression of an opinion on which plaintiff will be presumed equally able to form an opinion and to come to as correct judgment with respect to the matter as were the defendants, who were not lawyers, and plaintiff cannot justly claim to have been misled by such opinion, especially where he visited lawyers for the purpose of obtaining their opinion on the question.—Campbell v. Jones, Tex.Civ.App., 230 S.W. 710.

53. Pa.—Walter's Ex'r v. Martin, 118 A. 434, 274 Pa. 529.

Concealment of abandoned and unsubstantial lien was held not material as affecting rescission of contract for exchange of properties.—Walloch v. Washkowiak, 207 N.W. 286, 189 Wis. 431.

54. Tex.—Campbell v. Jones, Civ. App., 230 S.W. 710.

55. Tex.—Sherman v. Sipper, Civ. App., 129 S.W.2d 458, reversed on other grounds, Sup., 152 S.W.2d 319.
23 C.J. p 202 note 16.

56. Iowa.—Garner v. Johns, 166 N. W. 111, 182 Iowa 684.
23 C.J. p 197 note 17.

57. Minn.—Nelson v. Carlson, 55 N. W. 821, 54 Minn. 90.

58. N.D.—Windedahl v. Harris, 156 N.W. 489, 37 S.D. 7.

59. Mo.—Tucker v. Lindley, 140 S. W. 637, 159 Mo.App. 156.

60. Mich.—Salata v. Dylewski, 207 N.W. 895, 234 Mich. 331.
23 C.J. p 197 note 21.

Unfamiliarity with locality as defense

That plaintiffs were so ignorant of streets and locations that misrepresentations to them as to location had no significance was held no defense in suit to rescind exchange of property.—Salata v. Dylewski, 207 N.W. 895, 234 Mich. 331.

Lake frontage of property

Builder taking for subdivision property erroneously believed to have considerable lake frontage, and so represented, was properly allowed to rescind.—Mann v. Pearson, 228 N.W. 678, 249 Mich. 211.

61. Mo.—Wilson v. Henderson, 191 S.W. 72.
23 C.J. p 197 note 22.

62. Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Cal.—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664.
23 C.J. p 197 note 23.

Effect of phrase "more or less"

As respects rescinding exchange, where property was described by metes and bounds, disparity was held not excused by use of phrase

healthful condition of a locality may be stated as a fact, and not as a matter of opinion, and a misrepresentation when made to induce an exchange of lands may be fraudulent;[63] but a charge of fraud cannot be based on an alleged misrepresentation as to the boundary of real estate where it appears that the party alleged to have made the representation did not attempt to point out the exact lines and in fact did not know them, and that the other party did not at that time consider the exact location of the boundary in question of controlling importance, and asked for no more definite statement as to the boundary than was given to him.[64] Misrepresentations as to the quantity of personal property offered in exchange for other property may be fraudulent.[65]

These rules are subject to the exceptions and qualifications already stated supra in subdivisions a (1)-(8), of this section. A misrepresentation as to quantity to constitute a basis for relief must be relied on,[66] and it has been held that a charge of fraud cannot be based on a misrepresentation as to the number of acres in a tract where the correct boundaries have been pointed out and the party to whom the representation is made has notice before deeds are exchanged that there is actually a smaller number of acres in the tract.[67] Although made in good faith, material misrepresentations as to location[68] or identity[69] of land involved in the exchange, or as to the quantity of personal property,[70] may constitute fraud. A slight variance in the dimensions of property involved not affecting substantially the value of the property is immaterial.[71]

(c) Character, Nature, Quality, and Condition

Misrepresentations as to the character, nature, quality, and condition of property may constitute fraud.

Misrepresentations as to the character,[72] quality,[73] or condition[74] of real estate may be fraudulent. Thus false statements as to the amount of timber on the land involved,[75] or of tillable land,[76] as to water supply,[77] drainage,[78] kind of soil,[79] fertility,[80] crops,[81] yield,[82] quality or the kinds of trees,[83] or to the presence of game[84] or minerals,[85] have been held fraudulent. Misrepresentations as to the quality, condition, or nature of personal property may constitute fraud,[86] and the intentional con-

"more or less."—Dvorak v. Latimer, supra.

63. Tex.—Jones v. Edwards, Civ. App., 152 S.W. 727.

Illness in particular family as bearing on healthful condition

A statement of the healthful condition of a locality is not shown to be false by evidence that there had been much illness in a particular family while living in that locality. —Jones v. Edwards, supra.

64. Wash.—Wilson v. Mills, 157 P. 467, 91 Wash. 71.

65. Kan.—McKenna v. Morgan, 170 P. 998, 102 Kan. 478.
23 C.J. p 197 note 27.

66. Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Vt.—Flint v. Davis, 8 A.2d 671, 110 Vt. 401.

67. Mass.—Mooney v. Miller, 102 Mass. 217.

68. Ind.—Gardner v. Mann, 76 N.E. 417, 36 Ind.App. 694.
Tex.—Peters v. Strauss, 132 S.W. 956, 63 Tex.Civ.App. 118.

69. Mass.—Dzuris v. Pierce, 103 N. E. 296, 216 Mass. 132.

Pointing out wrong land

The party pointing out the wrong parcel is chargeable with constructive fraud, although there is no fraudulent intent.—Murray v. Speed, 153 P. 131, 54 Okl. 31.

70. Tex.—Cabaness v. Holland, Civ. App., 47 S.W. 379.

71. Ill.—Binder v. Hejhal, 178 N.E. 901, 347 Ill. 11.

72. Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736.
Mo.—Pope v. Florea, 152 S.W. 96, 167 Mo.App. 595.
23 C.J. p 198 note 29.

73. Ill.—Herpich v. Williams, 133 N.E. 220, 300 Ill. 540.
Kan.—Stevens v. Allen, 32 P. 922, 51 Kan. 144.
23 C.J. p 198 note 30.

74. Colo.—Masser v. Foxworthy, 281 P. 360, 86 Colo. 313.
Kan.—Stevens v. Allen, 32 P. 922, 51 Kan. 144.
Mich.—Bacon v. Fox, 255 N.W. 340, 267 Mich. 589.
23 C.J. p 198 note 31.

75. Ark.—Paynter v. Littlefield, 200 S.W. 995, 132 Ark. 300.
23 C.J. p 198 note 32.

76. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S. Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
23 C.J. p 198 note 33.

77. Cal.—Adkins v. Potter, 296 P 285, 211 Cal. 512—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532.
Wash.—Hudlow v. Hodgson, 281 P. 331, 154 Wash. 198.
23 C.J. p 198 note 34.

78. Or.—Held v. Kennedy, 151 P. 968, 77 Or. 526.

79. Ill.—Herpich v. Williams, 133 N.E. 220, 300 Ill. 540.
23 C.J. p 198 note 36.

80. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S. Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
Cal.—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532.
23 C.J. p 198 note 37.

81. Colo.—Groves v. Chase, 151 P. 913, 60 Colo. 155.
Ill.—Roche v. Norfleet, 63 Ill.App. 612.

82. Mo.—Wissman v. Cornbelt Inv. Co., 209 S.W. 865.
23 C.J. p 198 note 39.

83. Cal.—Bickel v. Munger, 129 P. 958, 20 Cal.App. 633.
23 C.J. p 198 note 40.

84. Conn.—Robert v. Finberg, 84 A. 366, 85 Conn. 557.

85. Conn.—Robert v. Finberg, supra.

86. Miss.—Evans v. Wenger, 103 So. 481, 139 Miss. 53.
Or.—Criger v. Roche, 264 P. 361, 125 Or. 275.
Tex.—Evans v. Hartman, Civ.App., 286 S.W. 326, 328, citing Corpus Juris.
23 C.J. p 198 note 43.

Kind of cattle

Misrepresentations as to the kind of cattle offered in exchange for other property may be fraudulent.—Cabaness v. Holland, Tex.Civ.App., 47 S.W. 379—Cabiness v. Holland, Tex.Civ.App., 30 S.W. 63.

Nature of mortgage

Misrepresentations that mortgages given in exchange for land were purchase-money mortgages, rather

cealment of a defect in quality of personal property may be fraudulent.[87]

These rules are subject to the exceptions and qualifications already stated supra subdivisions a (1)–(8) of this section; hence relief cannot be afforded for false representations as to the nature,[88] condition,[89] adaptation to particular uses,[90] quality,[91] or productiveness[92] of the property involved where it appears that such representations were mere expressions of opinion, or where such representations were not relied on.[93] Although made in good faith, material representations as to quality[94] or condition[95] of land involved in an exchange, and as to timber on such land,[96] and as to the quality of personal property,[97] may constitute fraud.

(d) Value

A mere statement as to the value of property involved is generally a matter of opinion and not ground for relief where the parties deal at arm's length and stand on an equal footing, but misrepresentations as to value made as a matter of fact when to the knowledge of the party making the statements the other party is ignorant of the value and will rely on the statements will justify rescission. The mere fact that one party does not obtain property equal in value to his own does not show fraud, but gross inadequacy of consideration is always a badge of fraud.

A mere statement as to the value of real or personal property involved in an exchange is generally a matter of opinion and not ground for relief where the parties deal at arm's length and stand on an equal footing.[98] The mere fact that an increased value is placed on property involved, for the purpose of the exchange, does not render the transaction fraudulent.[99] Misrepresentations as to the value of property made as a matter of fact when to the knowledge of the party making the statements the other party is ignorant of the value and will rely on the statements will justify rescission,[1] and this rule has been held to apply where the party to whom the representation is made has not seen the property,[2] where the land to be exchanged is at a distance,[3] where a party is by artifice or fraud in-

than accommodation transactions, are material.—Parish v. Casner, Mo., 282 S.W. 392.

87. Ala.—Whitworth v. Thomas, 3 So. 781, 83 Ala. 308, 3 Am.S.R. 695.
Fla.—Kitchen v. Long, 64 So. 429, 67 Fla. 72, L.R.A.1917C 617.
23 C.J. p 191 note 45.

Failure to correct erroneous impression

Where, in effecting the sale of a tractor, seller was under the impression that he was receiving Liberty bonds in payment, and purchaser was aware of his state of mind on the subject, the failure of purchaser to inform seller that the bonds were not Liberty bonds, but were worthless, operated as a representation that the bonds were Liberty bonds, and was therefore fraudulent.—Olson v. Skroch, 196 N. W. 767, 182 Wis. 448.

88. Mich.—Buxton v. Jones, 79 N. W. 980, 120 Mich. 522.

89. Kan.—Else v. Freeman, 83 P. 409, 72 Kan. 666.
Mass.—Parker v. M[illegible], 114 Mass. 99, 19 Am.R. 315.

90. Mass.—Parker v. Moulton, supra.

91. Ill.—Tryce v. Dittus, 65 N.E. 220, 199 Ill. 189.

Mortgage

A mere statement that a mortgage is as "good as gold" is not fraudulent where the other parties are business men of experience.—Feldpausch v. Hendershot, 224 N.W. 407, 245 Mich. 694.

92. Wash.—Wilson v. Mills, 157 P. 467, 91 Wash. 71.
23 C.J. p 198 note 50.

93. Iowa.—Dunlop v. Wever, 228 N. W. 562, 209 Iowa 590.
Ky.—Jobe v. Brown, 53 S.W.2d 532, 245 Ky. 260.
Mich.—Kowalski v. Rusin, 217 N.W. 768, 242 Mich. 1.
Mo.—Kirby v. Balke, 266 S.W. 704, 306 Mo. 109.
Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333.
23 C.J. p 198 note 52.

94. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S. Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
23 C.J. p 202 note 12.

95. Iowa.—Mohler v. Carder, 35 N. W. 647, 73 Iowa 582.
Tex.—Peters v. Strauss, 132 S.W. 956, 63 Tex.Civ.App. 118.

96. Wis.—Miner v. Medbury, 6 Wis. 295.

97. Tex.—Cabaness v. Holland, Civ. App., 47 S.W. 379.

98. Cal.—Coleman v. Dawson, 294 P. 13, 110 Cal.App. 201.
Kan.—Harvey v. Tucker, 12 P.2d 847, 848, 136 Kan. 61, citing **Corpus Juris**—Berridge v. O'Flanagan, 251 P. 175, 176, 122 Kan. 74, citing **Corpus Juris.**
Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74—Kowalski v. Rusin, 217 N.W. 768, 242 Mich. 1—Bowen v. Stocklin, 183 N.W. 946, 215 Mich. 341.
Or.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178—Malcolm v. Tate, 267 P. 527, 125 Or. 419—White v. Oregon Realty Exch. Inv. Co., 236 P. 269, 114 Or. 636.
23 C.J. p 199 notes 60–62.

99. Iowa.—Thuesen v. Johnson, 166 N.W. 747, 183 Iowa 206.
23 C.J. p 199 note 63.

Right to claim value desired

Usually a person who has a store or other business to sell has right to claim whatever value he desires for it, particularly where he is trading it for something else.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74.

1. Ala.—Pool v. Menefee, 88 So. 654, 205 Ala. 531.
Cal.—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.
D.C.—Slater v. Ruggles, 263 F. 1021, 49 App.D.C. 277.
Ga.—Cooper v. Whitehead, 136 S.E. 911, 163 Ga. 662.
Iowa.—Peterson v. Higgins, 190 N. W. 407, 194 Iowa 759.
Mich.—O'Neill v. Kunkle, 222 N.W. 110, 244 Mich. 653.
Mo.—Parish v. Casner, 282 S.W. 392.
Or.—Burgdorfer v. Thielemann, 55 P.2d 1122, 1129, 153 Or. 354, quoting **Corpus Juris.**
Vt.—Fenwick v. Sullivan, 145 A. 258, 102 Vt. 28.
23 C.J. p 199 note 64, p 200 note 69.

2. Iowa.—Sutton v. Greiner, 159 N. W. 268, 177 Iowa 532—Weeseman v. Graham, 138 N.W. 478, 157 Iowa 430.

3. Mich.—Hillier v. Carpenter, 173 N.W. 386, 206 Mich. 594.
23 C.J. p 200 note 66.

Asking price as indicating value

Where plaintiff proposed exchanging her realty for land of defendant's in another county and which she had never seen and, in reply to

duced to refrain from an examination of the land involved,[4] or where for some other reason the parties have not equal means of knowledge.[5] The rule has also been applied to representations as to corporate stock[6] or other securities[7] exchanged for other property, but an exchange is not invalidated on the ground of fraud where there was no express statement or positive assertion as to the value of the personal property involved.[8] Statements in accordance with highly inflated values which generally prevailed at the time of the exchange are not fraudulent.[9]

These rules are subject to the exceptions and qualifications already stated, supra subdivisions a (1)-(8) of this section, and reliance on the misrepresentations is necessary to justify rescission.[10] Fraud cannot be predicated on false statements as to value where the party claiming fraud is at no disadvantage and has had ample opportunity to examine the property,[11] but an inspection by one who has no knowledge of market value does not prevent cancellation for false statements of fact as to value.[12] False representations as to value may be ground for rescission although not known to be false by the party making the representations.[13]

Inadequacy of consideration as showing fraud. The mere fact that a party to a contract does not obtain property equal in value to his own does not show fraud;[14] there must not be such a disparity as will shock the conscience.[15] Gross inadequacy of consideration is always a badge of fraud,[16] and in connection with proof of imposition and misrepresentation on the part of the other party will be sufficient to characterize the transaction as fraudulent in a court of equity.[17] Moreover, inadequacy of consideration may be so gross and palpable as to amount in itself to proof of fraud.[18] The question as to inequality in value is to be determined by reference to the value of the properties involved, at the time of the transaction.[19]

(e) Cost, Selling Price, and Profits or Income

Under certain circumstances false representations as to the cost or selling price of property may constitute fraud. Rescission cannot be had for mere expressions of opinion as to future profits or rentals, but false representations as to present profits, income, or rentals when made as statements of fact may be fraudulent.

It has been held that a charge of fraud cannot be based on a mere misstatement as to the cost of the property,[20] on a mere statement of the asking price for real property, if the real value is less,[21] or on an alleged misrepresentation as to the amount of an offer for certain personal property made to the owner who offered such stock in exchange for other property, where it appears that such owner could in good faith have sold it for the sum specified in such alleged misrepresentation;[22] but under certain circumstances false representations as to the cost[23] or selling price[24] of property offered in exchange falsely made to induce the exchange and

her question as to its value, defendant said that he asked one thousand dollars for it, inducing the belief that it was of such value, when in fact it was of much less value, such adroit reply amounted to a "fraudulent misrepresentation" justifying rescission.—Henry v. Collier, 169 P. 636, 69 Okl. 24.

4. N.Y.—Chrysler v. Canaday, 90 N. Y. 272, 43 Am.R. 166.

5. Cal.—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.
Mich.—Szarkowski v. Pfister, 247 N. W. 163, 262 Mich. 226.
Mo.—Parish v. Casner, 282 S.W. 392.
23 C.J. p 200 note 67.

6. Tex.—McDonald v. Lastinger, Civ.App., 214 S.W. 829.
W.Va.—Kimmell v. Twigg, 107 S.E. 206, 88 W.Va. 531.
23 C.J. p 200 note 70.

7. Wash.—Siegel v. Schisler, 211 P. 273, 122 Wash. 570.
23 C.J. p 200 note 71.

8. Cal.—Gleason v. Proud, 159 P. 885, 31 Cal.App. 123.

9. Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519.

10. Mo.—Kirby v. Balke, 266 S.W. 704, 306 Mo. 109.

11. Mich.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74.

12. Mo.—Vodicka v. Sette, 223 S. W. 578.

13. Iowa.—Leaman v. Wise, 200 N. W. 691, 198 Iowa 1035.
23 C.J. p 202 notes 14, 21.

14. Or.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178.
23 C.J. p 199 note 54.

15. Mo.—Schroeder v. Turpin, 161 S.W. 716, 253 Mo. 258.
N.Y.—Turner v. Pabst Brewing Co., 77 N.Y.S. 360, 74 App.Div. 106.

16. Iowa.—Rhodes v. Uhl, 178 N. W. 394, 189 Iowa 408.
Wash.—Mumford v. Smith, 154 P. 153, 89 Wash. 98.

17. Iowa.—Lister v. La Plant, 168 N.W. 138, 183 Iowa 1363.
23 C.J. p 199 note 57.

18. Ill.—Page v. Keeves, 199 N.E. 131, 362 Ill. 64.
23 C.J. p 199 note 58.

19. Iowa.—Hogan v. Ross, 205 N. W. 208, 200 Iowa 519.
23 C.J. p 199 note 59.

20. Ill.—Plummer v. Rigdon, 78 Ill. 222, 20 Am.R. 261.
23 C.J. p 200 note 74.

21. N.Y.—MacKellar v. Thompson, 103 N.Y.S. 853, 119 App.Div. 36.

22. Wash.—Jarvis v. Ireland, 154 P. 455, 89 Wash. 286.

23. Vt.—Fenwick v. Sullivan, 145 A. 258, 102 Vt. 28.
23 C.J. p 200 note 77.

Recital of consideration in former contract

Where defendants procured owner of farm to give her son land contract reciting consideration of seven thousand dollars and other consideration, and had contract assigned to themselves without consideration, it was held that plaintiffs in exchanging lands with defendants, were entitled to believe, and act on belief, that value of farm was in excess of contract price.—Schliska v. Ross, 203 N.W. 81, 230 Mich. 225.

24. Wash.—Mumford v. Smith, 154 P. 153, 89 Wash. 98.
23 C.J. p 201 note 78.

relied on by the other party may constitute fraud. It has been held that false representations as to the cost of machinery necessary to manufacture an article, the exclusive privilege to sell which is exchanged for certain property, were fraudulent.[25] Rescission cannot be had for mere expressions of opinion as to the future profits which may be earned,[26] as to future rentals which may be received,[27] or as to future volume of business,[28] but false representations as to the present profits of, or income from, a business[29] or as to the present rental value of, or rentals received from, real property[30] may be fraudulent where made as a statement of fact for the purpose of inducing an exchange, even though the party does not know that his representations are false where he makes the statements as based on his own knowledge.[31] A statement that a party values his equity in certain property at a certain amount is not actionable fraud as a representation that he paid that amount.[32]

(f) Prospective Purchaser and Matters Concerning Third Persons

False representations to the effect that there is a prospective purchaser for the property may be fraudulent but not if the other party has ample opportunity to ask the prospective purchaser concerning the truth of the statements. Where the value of the property is dependent on the financial responsibility of another a misrepresentation of his financial status may constitute fraud.

False representations by a party or his agent to the effect that there is a prospective purchaser for the property offered by such party may be fraudulent,[33] but such representations cannot render the contract unenforceable where the party seeking to rescind has had ample opportunity to ask the prospective purchaser concerning the truth of the statements before the contract was entered into.[34] Where the value of property is dependent on the financial responsibility of another, a misrepresentation of his financial status may constitute fraud sufficient to vitiate the contract.[35]

25. Va.—Hull v. Fields, 76 Va. 594.

26. Cal.—Coleman v. Dawson, 294 P. 13, 110 Cal.App. 201.
23 C.J. p 201 note 80.

27. Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333.

28. Mich.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74.

Falling off of business

Parties who had exchanged farm for store in small town were held not entitled to rescind exchange on ground of fraud because of falling off of sales after change in ownership and sales force.—Achenbach v. Mears, supra.

29. Cal.—Royal Realty Co. v. Harvey Inv. Co., 272 P. 805, 95 Cal. App. 352.
Ga.—Cooper v. Whitehead, 136 S.E. 911, 163 Ga. 662.
Ill.—Pustelniak v. Vilimas, 185 N.E. 611, 352 Ill. 270.
Mich.—Bacon v. Fox, 255 N.W. 340, 267 Mich. 589—Kanar v. Schuster, 192 N.W. 562, 222 Mich. 282.
23 C.J. p 201 note 81.

Not expression of opinion

A statement that the net earnings of a certain business amount to a specified sum is a statement of fact and not a mere expression of opinion.—Morrison v. Cotton, Tex.Civ. App., 152 S.W. 866.

Stock dividends paid from capital

(1) Where dividends paid by a bank were not paid out of the net profits of the bank, but were in fact a distribution of the bank's capital, a representation made as an inducement to the exchange of real estate for bank stock that dividends had been paid was false and material.—J. C. Miller Estate, Inc., v. Drury, 208 P. 77, 120 Wash. 628.

(2) As respects validity of exchange of real estate for bank stock owned by the chairman of the board of directors of a bank, he was charged with knowledge that dividends which had been paid had not been paid out of the net profits of the bank, but were in fact a distribution of the bank's capital.—J. C. Miller Estate, Inc., v. Drury, supra.

30. Colo.—Cahill v. Readon, 273 P. 653, 85 Colo. 9.
Ga.—Turner v. Ware, 58 S.E. 310, 2 Ga.App. 57.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Mass.—Rudnick v. Rudnick, 183 N. E. 348, 281 Mass. 205—Baskes v. Cushing, 170 N.E. 42, 270 Mass. 230—Jasper v. Price, 158 N.E. 504, 261 Mass. 103—McCarthy v. Reid, 129 N.E. 675, 237 Mass. 371, 12 A.L.R. 1000.
23 C.J. p 201 note 82.

Claim that statement was not understandable

Parties to exchange contract cannot escape consequences of their fraudulent statement of rentals in attached rider, by claiming that none of parties could understand it.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.

Concealment of knowledge of ordinance affecting rentability

Where one exchanging a building for other real property has actual knowledge of a city ordinance prohibiting the use of a building simultaneously as a garage and as a residence, he is guilty of fraud where he states that the first floor was rented as a garage for twenty-five dollars a month, and the second floor for twenty-five dollars as living or housekeeping rooms, and that the property could be continued for the uses named, the other person not knowing of the ordinance.—Palmiter v. Hackett, 185 P. 1105, 95 Or. 12, modified on other grounds 186 P. 581, 95 Or. 12.

31. Mass.—Rudnick v. Rudnick, 183 N.E. 348, 281 Mass. 205.

32. Mich.—Mielke v. Tucker, 216 N. W. 919, 241 Mich. 449.

33. Kan.—Hinchey v. Starrett, 137 P. 81, 91 Kan. 181, modified on other grounds 141 P. 173, 92 Kan. 661.
23 C.J. p 201 note 85.

34. Mich.—Feldpausch v. Hendershot, 224 N.W. 407, 245 Mich. 694.

35. Cal.—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.
N.J.—Davis v. Koch, 145 A. 473, 7 N.J.Misc. 279.

Financial status of mortgagor

False statements respecting the financial status of a mortgagor for the purpose of giving value to a mortgage traded to the other party are material statements of fact justifying rescission.—Frost v. Rich, 200 N.W. 561, 199 Iowa 421.

Willingness of maker of note to pay

A statement by plaintiff, party to an exchange of lands, that he had received a request from the makers of notes which he proposed to turn over as part consideration, asking him to let them know the balance due, and where to send the money, and that he expected a remittance within the next day or two was a statement of fact and fraudulent if false.—Ozias v. Paustian, Mo.App., 209 S.W. 587.

b. Effect of Fraud

Fraud vitiates the transaction and renders it voidable at the election of the defrauded party. The guilty party cannot take advantage of the fraud and can acquire no right or interest by virtue of it.

Fraud in the exchange of property vitiates the entire transaction between the parties thereto.[36] An exchange procured by fraud involving real[37] or personal[38] property is not void but is voidable at the election of the defrauded party. The guilty party is not entitled to take advantage of the fraud and can acquire no right or interest by virtue of it.[39]

c. Mistake

A mutual mistake as to a material fact affects the binding force of the contract, but the contract is not unenforceable because of a unilateral mistake as to a fact which could have been ascertained by proper diligence. A mere mistake of law does not render the contract unenforceable.

A mutual mistake as to a material fact affects the binding force of the agreement,[40] and where there is no agreement as to the identity of the subject matter there can be no contract of exchange, there being no meeting of the minds.[41] A mistake as to subject matter,[42] title,[43] quality,[44] character,[45] value,[46] boundaries,[47] or condition[48] of land involved in an exchange may affect the binding force of the agreement in a proper case. An exchange contract is not unenforceable because of a unilateral mistake as to a fact which could have been ascertained by proper diligence before signing,[49] even though no intervening equities have arisen or the other party has suffered no intervening injury,[50] and the contract will not be set aside on the ground that one of the parties was misled as to its contents where the contents have been read to him unless some very good reason for so doing exists.[51] A mere mistake of law not accompanied by other circumstances demanding equitable relief does not render a contract unenforceable.[52] A misapprehension of the amount of encumbrance does not become the basis of a claim that the parties did not agree on the terms of the contract where the conveyance is to be made free of encumbrances by the other party.[53]

d. Undue Influence and Confidential Relations

Undue influence or a violation of a confidential relationship is a ground for avoiding a contract for the exchange of property.

An exchange of property may be avoided on the ground of undue influence.[54] Where the parties stand in a confidential relation there is a duty to disclose all material facts affecting the property to be transferred,[55] and a party may avoid the exchange on the ground that he was overreached by the other party, who occupied a position of advantage because of the former's trust and confidence in such other notwithstanding the former consulted others as to the transaction and was to some extent influenced by them.[56] False statements as to value when made by a party occupying a confidential position toward the other party may be ground for

36. S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
Tex.—McDonald v. Simons, Com. App., 280 S.W. 571, reversing, Civ. App., 271 S.W. 119.

Same right as buyer
A defrauded party to an exchange of personal property has the same right to rescission as would a defrauded buyer or seller at common law.—Arledge v. Ridge, 12 Tenn. App. 415.

37. Wash.—Sherbloom v. Faussett, 170 P. 337, 99 Wash. 680.
23 C.J. p 201 note 87.

38. Iowa.—Rose v. Eggers, 127 N. W. 196, 148 Iowa 306.
S.C.—Manship v. Newsome, 198 S.E. 428, 430, 188 S.C. 6, quoting **Corpus Juris.**
23 C.J. p 201 note 88.

39. Ark.—Merritt v. Robinson, 35 Ark. 483.
S.C.—Manship v. Newsome, 198 S.E. 428, 430, 188 S.C. 6, quoting **Corpus Juris.**

40. Mass.—Greene v. Adomaitis, 156 N.E. 695, 259 Mass. 605.

41. Mass.—Dzuris v. Pierce, 103 N. E. 296, 216 Mass. 132.
23 C.J. p 191 note 26.

42. Iowa.—Waite v. Consigny, 167 N.W. 200, 183 Iowa 259.
23 C.J. p 191 note 28.

43. N.C.—Mason v. Pelletier, 82 N. C. 40.
23 C.J. p 191 note 29.

44. Iowa.—McDonald v. Benge, 116 N.W. 602, 138 Iowa 591—Smith v. Bricker, 53 N.W. 250, 86 Iowa 285.
Tex.—Kincaid v. Tant, Civ.App., 180 S.W. 1103.

45. Iowa.—Hood v. Smith, 44 N.W. 903, 79 Iowa 621.
Tex.—Kincaid v. Tant, Civ.App., 180 S.W. 1103.

46. Iowa.—McDonald v. Benge, 116 N.W. 602, 138 Iowa 591—Smith v. Bricker, 53 N.W. 250, 86 Iowa 285.

47. Iowa.—Gilroy v. Alls, 22 Iowa 174.
Or.—Garland v. Shrier, 64 P.2d 530, 155 Or. 387.

48. Iowa.—Montgomery v. Shockey, 37 Iowa 107.

49. S.C.—New v. Collins, 119 S.E. 835, 126 S.C. 294.
Tex.—Wheeler v. Holloway, Com. App., 276 S.W. 653, reversing Holloway v. Wheeler, Civ.App., 261 S.W. 467.

50. Tex.—Wheeler v. Holloway, supra.

51. Mich.—Dennis v. Slyman, 184 N.W. 581, 216 Mich. 202.

Misunderstanding of terms
Intelligent plaintiff exchanging property "subject to debt" for property on which he "assumed debt," after full study of contract, was held entitled to no relief, notwithstanding his misunderstanding of terms.—Pierce v. Bierman, 162 S.E. 566, 202 N.C. 275.

52. Okl.—Brown v. Privette, 234 P. 577, 109 Okl. 1.

53. Ill.—Kuehnle v. Augustin, 164 N.E. 194, 333 Ill. 31.

54. Iowa.—*In re* Parker's Estate, 179 N.W. 525, 189 Iowa 1131.
Wis.—Watkins v. Brant, 1 N.W. 82, 46 Wis. 419.

55. Ind.—Firebaugh v. Trough, 107 N.E. 301, 57 Ind.App. 421.
23 C.J. p 202 note 24.

56. Tex.—Koppe v. Koppe, 122 S. W. 68, 57 Tex.Civ.App. 204.

avoiding the exchange.[57] Where a person who enjoys the trust and confidence of one party is hired by the other to bring about an exchange, the first party has a right to know the nature and extent of the employment of that person.[58] An exchange may be avoided on the ground that a party taking advantage of the weak mental condition of the other party has fraudulently acquired from the latter property for much less than its value.[59]

§ 5. —— Estoppel, Waiver, and Ratification

A party as to whom a contract of exchange is vitiated by fraud or mistake may ratify it after acquiring knowledge of the material facts. A ratification of the contract after a breach of condition obviates the effect of such a breach.

A contract obtained by fraud[60] or entered into by mistake[61] may be ratified, or a right to rescission may be waived, by the conduct of a party after full knowledge of the facts. The question as to whether there has been a ratification by delivery of a deed after the discovery of fraud depends to a large extent on the intention of the defrauded party, such delivery not being a ratification as a matter of law.[62] Where after the discovery of a fraud which entitles a party to a contract involving the exchange of personal[63] or real[64] property to rescind, such party accepts the benefits of the transaction, uses and deals with the property received by him as his own or does any other act inconsistent with his right to rescind, he thereby ratifies the contract. Thus a sale of the property received,[65] the execution of a mortgage on such property,[66] the purchase of an outstanding title to such property,[67] a suit to compel performance of the contract,[68] payments on the contract,[69] the acceptance of payments from the other party in accordance with the contract,[70] assisting the other party to find a purchaser for the land exchanged,[71] the execution of a receipt in full,[72] or a long delay in asserting the claim of fraud[73] may constitute a ratification of the contract. The consummation of the transaction by a party after he has knowledge or has been put on notice as to the misrepresentations operates as a waiver of the fraud,[74] but consummation of the contract after discovery of certain misrepresentations is not a waiver of the right to rescind for other misrepresentations not discovered at the time.[75]

57. Iowa.—Sutton v. Greiner, 159 N. W. 268, 177 Iowa 532.
23 C.J. p 203 note 26.

58. U.S.—Herschberger v. Woodrow-Parker Co., C.C.A Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S. Ct. 270, 257 U.S. 661, 66 L.Ed. 422.

59. Mo.—Wissman v. Cornbelt Inv. Co., 209 S.W. 865.
23 C.J. p 203 note 27.

60. Or.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178.
Wash.—Sims v. Robison, 253 P. 788, 142 Wash. 555—Hudson v. Beers, 188 P. 454, 110 Wash. 225.
23 C.J. p 201 note 90.

61. Mich.—Harlow v. Jaseph, 149 N. W. 1047, 183 Mich. 500.
Wis.—Karlen v. Trickel, 207 N.W. 273, 189 Wis. 148.

62. Tex.—Cotton v. Morrison, Civ. App., 140 S.W. 114.

63. Wash.—Hudson v. Beers, 188 P. 454, 110 Wash. 225.
23 C.J. p 201 note 93.

64. Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.
Wash.—Sims v. Robison, 253 P. 788, 142 Wash. 555.
23 C.J. p 201 note 94.

65. Or.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178.
Tex.—El Campo Ice, etc., Co. v. Texas Mach., etc., Co., Civ.App., 147 S.W. 338.

Sale of territorial rights to patented article
Where plaintiff conveyed property in exchange for the territorial rights in a patented article, and thereafter demonstrated the article for nearly a year and sold territorial rights thereto after discovering defects in the article, he waived his right to rescind for misrepresentations as to the quality of the article.—Hudson v. Beers, 188 P. 454, 110 Wash. 225.

66. Or.—Stiger v. Persyn, 4 P.2d 629, 138 Or. 178.
Tex.—Koppe v. Koppe, 122 S.W. 68, 57 Tex.Civ.App. 204.

67. N.C.—Van Gilder v. Bullen, 74 S.E. 1059, 159 N.C. 291.

68. Tex.—Newman v. National Loan & Investment Co., Civ.App., 44 S.W.2d 1006.

69. N.J.—Garden Realty Corporation v. Hadley, 160 A. 385, 110 N. J.Eq. 474.

70. Wash.—Sims v. Robison, 253 P. 788, 142 Wash. 555.

Acceptance of money for other purposes
Acceptance of money for other purposes is not a waiver or compromise of a claim.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.

71. Mo.—Stover v. Snow, 287 S.W. 1042, 315 Mo. 1046.

72. Mich.—Parkyn v. Ford, 160 N. W. 531, 162 N.W. 948, 194 Mich. 184.

73. N.J.—Garden Realty Corporation v. Hadley, 160 A. 385, 110 N. J.Eq. 474.
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.

Claim of inability to read contract
Parties to exchange of real properties could not complain, after nearly five years, that they were overreached by reason of their inability to read English, where they did not fulfill their duty to inform themselves as to purport of exchange contract by available means.—Velcich v. Malesh, 1 N.E.2d 278, 284 Ill.App. 63.

Delay in surrendering possession after notice of rescission
A party by remaining in possession of land for nearly fourteen months after giving alleged notice of rescission and for about six months after beginning action to rescind waived alleged fraud.—Beebe v. James, 8 P.2d 803, 91 Mont. 403.

74. Cal.—Wolleson v. Coburn, 218 P. 479, 63 Cal.App. 315.
Mo.—Stockton v. Minkin, 276 S.W. 374.
Tex.—United Land & Irrigation Co. v. Fleming, Com.App., 239 S.W. 610—Powell v. Pioneer Building & Loan Ass'n, Civ.App., 111 S.W.2d 764, error dismissed.
Utah.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.
Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333.

75. Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Ky.—Southeastern Land Co. v. Jonnard, 249 S.W. 789, 198 Ky. 504.

The act constituting ratification must be unequivocal and must show an election to retain the property received,[76] and it has been held that, where the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition that the courts watch it with the utmost strictness and do not allow it to stand except on the clearest evidence.[77]

The ratification must be with a knowledge of the material facts,[78] and usually with knowledge of the legal rights in the premises;[79] but it has been held that there may be a ratification regardless of whether the defrauded party knows specifically what his legal remedies are and of whether he knows that his act constitutes a ratification.[80]

Ratification of the contract or waiver of the fraud is not established by a delay at the request of the other party to give him opportunity to cure defects in the title,[81] by the exercise of dominion and ownership over the property received in order to preserve or operate it,[82] by an unaccepted offer to buy back the traded property where the offer in effect is merely to let the trade stand on certain terms,[83] by the party seeking an adjustment to remedy the situation and meanwhile paying interest on a note,[84] or by acts under moral duress.[85] The mere fact that subsequent to the discovery of the fraud there are negotiations or other transactions looking toward the sale of the property received by the defrauded party does not conclusively establish a ratification where no sale is actually made.[86]

A party is not necessarily precluded from asserting fraud by a "self-reliance clause" in the contract,[87] or by a provision in the original contract waiving all claims for misrepresentation.[88]

The affirmance of a contract induced by fraudulent representations may be rendered inoperative by subsequent events.[89] As a general rule there cannot be a ratification of a part of a contract.[90]

A party does not preclude himself from asserting the defense of fraud or seeking to recover damages by accepting the benefits of the transaction and failing to rescind,[91] and use, occupation, and enjoyment of the land received in exchange do not preclude a defense of fraud to a suit on vendor's lien notes which were given in addition to the other property.[92] A refusal to perform based on one ground waives the right to assert other grounds.[93]

Breach of condition. Ratification of an exchange after a condition thereof had been breached by the other party has the same effect as though the condition had not been breached.[94]

§ 6. Construction, and Rights and Liabilities of Parties

a. General rules of construction
b. Rights and liabilities of parties generally
c. Covenants, conditions, provisos, and alternative promises
d. Encumbrances
e. Subject matter and valuation
f. Time

76. Ind.—Tarkington v. Purvis, 25 N.E. 879, 128 Ind. 182, 9 L.R.A. 607.
Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.

77. Va.—Fitzgerald v. Frankel, 64 S.E. 941, 109 Va. 603.
23 C.J. p 202 note 99.

78. Ill.—Evans v. McKinney, 139 N. E. 99, 308 Ill. 100.
23 C.J. p 202 notes 2, 22.

79. N.J.—Turner v. Houpt, 33 A. 28, 53 N.J.Eq. 526, reversed on other grounds 39 A. 1114, 55 N.J. Eq. 593.

80. Tex.—Koppe v. Koppe, 122 S. W. 68, 57 Tex.Civ.App. 204.
23 C.J. p 202 note 4.

81. Tex.—Mead v. King, Civ.App., 285 S.W. 832.

82. Ky.—Southeastern Land Co. v. Jonnard, 249 S.W. 789, 198 Ky. 504.
Wash.—Stelter v. Fowler, 113 P. 1096, 114 P. 879, 62 Wash. 345.

Payment of taxes, collection of rents, etc.
Plaintiff's collection of rent, payment of taxes, keeping property insured, and meeting obligations on notes did not preclude relief for fraud inducing exchange.—Chapman v. Kraehe, Mo.App., 22 S.W.2d 845.

83. Ky.—Southeastern Land Co. v. Jonnard, 249 S.W. 789, 198 Ky. 504.

84. Cal.—Davison v. Finneran, 47 P.2d 271, 4 Cal.2d 51.

85. Mo.—Parish v. Casner, 282 S.W. 392.

86. Mo.—Cottrill v. Crum, 13 S.W. 753, 100 Mo. 397, 18 Am.S.R. 549.
N.D.—Liland v. Tweto, 125 N.W. 1032, 19 N.D. 551.
Tex.—Cabaness v. Holland, 47 S. W. 379, 19 Tex.Civ.App. 383.

Offer to sell pending suit
Mo.—Chapman v. Kraehe, App., 22 S.W.2d 845.

87. Mich.—Hubert v. Joslin, 280 N. W. 780, 285 Mich. 337.

88. Wash.—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.

89. Mass.—Whiteside v. Brawley, 24 N.E. 1088, 152 Mass. 133.
23 C.J. p 202 note 7.

90. Colo.—Cole v. Smith, 58 P. 1086, 26 Colo. 506.
Conn.—Bitondi v. Sheketoff, 99 A. 505, 91 Conn. 123.
Tex.—Morrison v. Cotton, Civ.App., 152 S.W. 866.

91. Minn.—Johnson v. Freberg, 228 N.W. 159, 178 Minn. 594.

92. Tex.—Crossland v. Evans, Civ. App., 102 S.W.2d 498.

93. D.C.—Robb v. Crawford, 16 F. 2d 339, 56 App.D.C. 394.
Ill.—Selman v. Geary, 166 N.E. 455, 334 Ill. 642.

94. U.S.—Lyden v. Atlanta Trust Co., C.C.A.Ga., 53 F.2d 749.

Retention of property received
Any breach of condition in exchanging bonds was held ratified by retaining bonds received in exchange and by subsequently sending other bonds to be exchanged.—Lyden v. Atlanta Trust Co., supra.

g. Return of property and reëxchange
h. Title, possession, use, and loss of property
i. Rights and liabilities of third persons
j. Party to exchange as bona fide purchaser

a. General Rules of Construction

The court must construe the contract and give effect to the intention of the parties, which is to be determined from a consideration of the entire contract and, in case the language is uncertain, of the surrounding circumstances and the construction of it by the parties. Where several writings constitute the agreement, they must be considered together. Where a contract is complete and unambiguous on its face, it will be held to contain the entire agreement of the parties.

The court cannot make a new contract, but its province is to construe and enforce the agreement made by the parties themselves,[95] and the court must give effect to the intention of the parties.[96] The intention may be determined from a consideration of the entire contract,[97] and, when the language is doubtful and uncertain, the circumstances surrounding the parties may be considered.[98] Where the agreement is embodied in several writings, no one of which shows the whole agreement, they must be construed together for the purpose of determining the whole transaction,[99] particularly when substantially so provided by statute,[1] but a writing antagonistic to the contract is not to be construed with it where the contract is unambiguous on its face.[2]

A contract will be construed so as to render it lawful, operative, and reasonable, where it can be done without violating the intention of the parties.[3] A construction which will lead to an absurdity will be avoided if possible.[4]

Notwithstanding clerical errors in inserting[5] or omitting[6] provisions which would change the intention of the parties, their real intention must be given effect. Conversations and agreements between the contracting parties prior to, or contemporaneous with, the signing of a written contract, and relating to the same subject matter contained in the contract, are presumed to be merged in the final written contract,[7] and where a contract is complete and unambiguous on its face it will be held to contain the entire agreement of the parties.[8]

The construction placed on the contract by the parties may be considered where such contract is ambiguous, uncertain, or doubtful.[9] The fact that a contract is for an exchange of realty ordinarily indicates of itself that an exchange of title is contemplated unless it clearly states otherwise.[10]

Generally speaking, the construction of a written contract is for the court,[11] and where evidence as to the terms of a contract is conflicting, the question is for the jury.[12]

b. Rights and Liabilities of Parties Generally

The rights and liabilities of the parties are to be determined from the contract, and no rights or liabilities based on the breach of an invalid contract may arise.

The rights and liabilities of the parties are to be determined from the contract,[13] by a fair and reasonable interpretation thereof,[14] and no rights or liabilities based on the breach of an invalid con-

95. Neb.—Te Poel v. Shutt, 78 N.W. 288, 57 Neb. 592.
Nev.—Thomas v. Palmer, 248 P. 887, 49 Nev. 438.

96. Mo.—McCanles Bldg. Co. v. Missouri State Life Ins. Co., 93 S.W.2d 917, 338 Mo. 1071.
Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.
23 C.J. p 203 note 30.

97. Ky.—Dupre v. Hortsman, 38 S.W.2d 236, 238 Ky. 382.
23 C.J. p 203 note 31.

98. Iowa.—Merriam v. Leeper, 185 N.W. 134, 192 Iowa 587.
Tex.—Osburn v. Smart, Civ.App., 58 S.W.2d 1073, error dismissed.
23 C.J. p 203 note 34.

99. Ill.—Pinta v. Kral, 1 N.E.2d 876, 285 Ill.App. 232.
Ky.—Taylor v. Helton, 81 S.W.2d 890, 258 Ky. 835.
Neb.—McCaw v. Swallow, 199 N.W. 726, 112 Neb. 458.
23 C.J. p 203 note 32.

1. Cal.—Tetenman v. Melekov, 266 P. 367, 90 Cal.App. 625.

2. Cal.—Ucovich v. Basile, 79 P.2d 188, 26 Cal.App.2d 272.

3. Cal.—Messer v. Hibernia Sav. & Loan Soc., 84 P. 835, 149 Cal. 122.
23 C.J. p 203 note 37.

4. N.Y.—Rosenzweig v. Kitt, 108 N.Y.S. 1010, 58 Misc. 234.

5. Tex.—Osburn v. Smart, Civ.App., 58 S.W.2d 1073, error dismissed.
23 C.J. p 203 note 39.

6. Wash.—Calhoun v. Pederson, 149 P. 25, 85 Wash. 630.

7. Va.—Huffman v. Landes, 177 S.E. 200, 203, 163 Va. 652, citing **Corpus Juris.**
23 C.J. p 203 note 41.

8. Cal.—Ucovich v. Basile, 79 P.2d 188, 26 Cal.App.2d 272.
Conn.—Hosmer v. Butler, 143 A. 526, 108 Conn. 465.

9. Ill.—Gillett v. Teel, 111 N.E. 722, 272 Ill. 106.
Ky.—Asher v. Simpson, 156 S.W. 1067, 154 Ky. 183.
23 C.J. p 203 note 42.

Intendment and actual operation
In action at law to recover for breach of contract to exchange land, court may look to intendment of contract and actual operation to ascertain whether parties intended a particular construction.—Dupre v. Hortsman, 38 S.W.2d 236, 238 Ky. 382.

10. Pa.—Vittor v. Szymanski, 184 A. 27, 321 Pa. 345.

11. Ala.—Martin v. Brown, 74 So. 241, 199 Ala. 134.
Ariz.—Weatherford v. Hanger, 146 P. 759, 16 Ariz. 427.
Ill.—Robinson v. Yetter, 87 N.E. 363, 238 Ill. 320.

12. Iowa.—Fulliam v. Hagens, 50 N.W. 215, 83 Iowa 763.

13. Ark.—Wildrick v. Raney, 282 S.W. 17, 170 Ark. 1194.
Cal.—Ten Winkel v. Anglo California Securities Co., 81 P.2d 958, 11 Cal.2d 707, superseding, App., 74 P.2d 317.

14. Ky.—Dupre v. Hortsman, 38 S.W.2d 236, 238 Ky. 382.

tract may arise.[15] The right to recover for failure to perform is governed by the facts existing on the day performance was due.[16]

c. Covenants, Conditions, Provisos, and Alternative Promises

In the absence of evidence showing a contrary intention the presumption is that the covenants are mutual and dependent but they may be independent in accordance with the intention of the parties. Performance or discharge of the contract may be made subject to a condition or proviso.

In the absence of evidence showing a contrary intention, the presumption is that covenants in a contract for the exchange of property are mutual and dependent,[17] and performance by one party must be given or tendered before performance by the other can be enforced.[18] Any material failure of performance by one party which is not justified by the conduct of the other discharges the latter's duty to give the agreed exchange, even though his promise is not in terms conditional,[19] but an immaterial failure does not operate as such discharge.[20]

The covenants in an exchange contract are not necessarily dependent, however,[21] and the parties may provide for the performance by one party before performance by the other party.[22] The contract may contain both dependent and independent covenants,[23] and an unconditional promise to convey certain property in exchange for other property will not be construed to be dependent on the happening of an event on which another agreement is founded.[24]

A contract of exchange may be made subject to a condition precedent,[25] or it may provide that the exchange shall be deemed closed and binding on the happening or nonhappening of some particular event.[26] The parties may provide for the discharge of the contract, if one of the parties is unable to procure the consent of a third person to the performance of one of the conditions,[27] or if no satisfactory adjustment of the broker's commission can be effected.[28] That a bill of sale to personal property does not mention a prior condition agreed to orally does not destroy the oral agreement.[29]

Under a contract by which one of the parties agrees to deliver to the other party specified personal property other than money or a stated amount in cash, the former is entitled to determine whether he shall deliver the property or pay the money.[30]

A party to a contract cannot avoid performance by having the contract recorded notwithstanding a provision therein that the contract should be void if recorded.[31]

Where one of the parties to an exchange of personal property alleges that, under the agreement, in the event that the property to be transferred to him is not as described, he would be entitled to take other property, evidence to show that there has been no rescission of the contract is admissible in an action by the other party to recover property taken pursuant to such alleged agreement; and in such case evidence that the property which was in the first place to have been transferred to the

15. Ohio.—Brudno v. Kohn, 170 N. E. 581, 34 Ohio App. 133.

16. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.

17. Ill.—Crabtree v. Levings, 53 Ill. 526.
Mass.—Pead v. Trull, 53 N.E. 901, 173 Mass. 450—Couch v. Ingersoll, 2 Pick. 292.

Failure of principal to ratify contract
Where a principal fails to comply with the terms of a land exchange contract made by his agent subject to his ratification, he is not entitled to a conveyance of the land.—Parris v. Messer, 250 S.W. 20, 158 Ark. 643.

Contract held entire and not severable
Cal.—Lasher v. Faw, 289 P. 821, 209 Cal. 726.

18. Ind.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

19. Pa.—Hetkowski v. School District of Borough of Dickson City, 15 A.2d 470, 141 Pa.Super. 526.

Right to withhold remainder of goods
One party who has delivered part of the goods may withhold the remainder until the other party has delivered the property he had agreed to exchange.—State ex rel. Major v Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386, quashing certiorari Major v. Hast, App., 263 S.W. 466.

20. Pa.—Hetkowski v. School District of Borough of Dickson City, 15 A.2d 470, 141 Pa.Super. 526.

21. D.C.—Hartman v. Ruby, 16 App. D.C. 45.
23 C.J. p 203 note 47.

22. N.H.—Putnam v. Mellen, 34 N. H. 71.
23 C.J. p 204 note 48.

23. Mass.—Couch v. Ingersoll, 2 Pick. 292.
N.H.—Putnam v. Mellen, 34 N.H. 71.

24. Cal.—Coleman v. Dawson, 294 P. 13, 110 Cal.App. 201.

25. Cal.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.

Obligation dependent on approval of lease
It was competent for parties to exchange agreement to agree that no obligation to proceed should accrue if lease secured by mortgage constituting a material part thereof should be found reasonably subject to objections.—Williams v. Belling, supra.

26. Iowa.—Wheeler v. McStay, 141 N.W. 404, 160 Iowa 745, L.R.A. 1915B 181—Stotts v. Miller, 105 N.W. 127, 128 Iowa 633.
23 C.J. p 204 note 52.

27. N.Y.—Avon Realty & Amusement Corp. v. Amend, 157 N.Y.S. 719, 172 App.Div. 1.

28. Or.—Kaufman v. Hastings, 184 P. 265, 93 Or. 623.

29. Kan.—Wheeler v. Barr, 4 P.2d 441, 134 Kan. 33.

30. Cal.—Dozier v. National Borax Co., 170 P. 638, 35 Cal.App. 612.

31. Mich.—Cohen v. Bredfeld, 216 N.W. 376, 241 Mich. 173.

party claiming such alleged agreement was never received by him is admissible.[32]

d. Encumbrances

Rights and liabilities concerning encumbrances are governed by the construction of each particular contract.

Rights and liabilities concerning encumbrances,[33] including mortgages,[34] taxes,[35] or assessments[36] depend on the construction of each particular contract. As a general rule, there must be a provision in the contract for the assumption of an encumbrance on land to be conveyed in order that the party to whom the conveyance is to be made may be held to have assumed the payment of such encumbrance.[37] It has been held that the mere fact that a deed provides that certain mortgages "are a part consideration of this deed" does not render the grantee liable for the amount of a mortgage on the property, paid by the grantor, where it appears that the consideration for the conveyance was merely an equity of redemption in other property.[38] A provision by which one party is to procure a loan on his farm for a specified amount at a specified rate to run for a time stated and to convey the property subject to the mortgage which is to be assumed by the grantee authorizes the owner of the farm to place on the farm a mortgage in the usual form and containing the conditions usually found in farm mortgages.[39] In the absence of any reference to the matter in the contract or deed, a special assessment levied on one party's land after the contract and deed are executed does not constitute an encumbrance on the property conveyed; and in such case the grantee must pay the amount of the special assessment.[40] Where the contract is silent as to the payment of taxes, the owner, if he is in possession, is bound to pay the taxes which become payable during the period between the making of the contract and the execution of the deed.[41] Under a provision that all obligations of certain leased property shall be adjusted as of a certain date, taxes which were not delinquent although a lien on the property on that date are to be paid by the party receiving the leased property.[42] A party to the contract is not entitled to recover the amount of a tax on the property received by him where it does not appear that such tax is a valid lien on the property or that he has ever been required to pay it.[43] A party to a contract of exchange who has consented to accept the deed of a third person for the land which he was to receive cannot recover from the other party to the exchange an amount which he has been compelled to pay for taxes on the property received where there is no provision in the contract for payment of such taxes by such other party.[44] A provision that the contract should be of no force if defects should be discovered which could not be removed except by court proceedings does not include liens which may be paid off.[45] Plaintiff is not entitled to a rescission of an exchange of property on the ground of encumbrance on the title of the property received, where defendant's grantor had obtained a quitclaim deed from the holder of the encumbering tax title, and had conveyed to defendant by warranty deed.[46]

e. Subject Matter and Valuation

The court may consider the circumstances surrounding the transaction where the description of the property is doubtful or uncertain, and except where value or quantity is of the essence a deficiency may be considered immaterial, although it has been held that a party is not required to accept a large deficiency in quantity.

A contract for the exchange of land is not ordinarily to be construed by that strict rule in regard to the quantity of land to be transferred that

32. Iowa.—Fulliam v. Hagens, 50 N.W. 215, 83 Iowa 763.

Burden of proof

The burden of proof of the existence of such alleged agreement is on the party asserting such agreement. Fulliam v. Hagens, supra.

33. Iowa.—Olsen v. Sortedahl, 121 N.W. 559, 143 Iowa 166.
23 C.J. p 204 note 57.

34. U.S.—Episcopal City Mission v. Brown, Ill., 15 S.Ct. 833, 158 U.S. 222, 39 L.Ed. 960.
23 C.J. p 204 note 58.

35. Ark.—Hockaday v. Warmack, 182 S.W. 263, 121 Ark. 518.
23 C.J. p 204 note 59.

36. Ill.—Thornton v. Helmick, 201 Ill.App. 592.

37. Tex.—Neeley v. Lane, Civ.App., 193 S.W. 390.

38. Conn.—Hubbard v. Ensign, 46 Conn. 576.

39. Ill.—Gibson v. Brown, 73 N.E. 578, 214 Ill. 330.

Clauses accelerating maturity

Where contract for exchange of farms provided for the execution by one party thereto of separate mortgages on separate tracts of the land received by him on the exchange, this being for his convenience in reselling parts of the tract, and he then lived and expected to continue to live in another county than that in which the land was situated, clauses in the several notes and mortgages, accelerating maturity of the whole debt if the property was sold or the mortgagor removed from the county where the land was situated, were not impliedly called for by the contract of exchange, but were inconsistent with mortgagor's manifest rights.—Merriam v. Leeper, 185 N.W. 134, 192 Iowa 587.

40. Iowa.—Johnston v. Robertson, 162 N.W. 66, 179 Iowa 838.
23 C.J. p 205 note 66.

41. Iowa.—Johnston v. Robertson, 162 N.W. 66, 179 Iowa 838.

42. Wash.—Haynes v. Wisner, 224 P. 592, 129 Wash. 92.

43. Tex.—McGregor v. Johnston, Civ.App., 34 S.W. 407.

44. Mo.—Herryford v. Turner, 67 Mo. 296.

45. Tenn.—Burnett v. Kendrick, 2 Tenn.App. 303.

46. Mich.—Pirgandi v. Fay, 87 N.W. 888, 128 Mich. 630.

might govern if it were a sale for money,[47] although it has also been held that the rights of a party are the same as if he had paid the purchase price in cash.[48] In determining the identity[49] or quantity[50] of the property included in a contract, the court may consider the circumstances surrounding the transaction where the description is doubtful or uncertain. Except where value or quantity is of the essence of the exchange,[51] the transaction may be deemed an exchange in gross[52] and, in the absence of misrepresentations, a deficiency in the estimated amount considered immaterial,[53] at least where the deficiency is slight;[54] but it has also been held that the mere fact that an exchange is in gross does not require a party to accept a large deficiency in the quantity as represented.[55]

The phrase "more or less" in designating quantity ordinarily covers unsubstantial differences as compared to the whole quantity transferred,[56] but it does not relieve from liability for a gross deficiency in quantity.[57]

The value which is stated as a trading basis is not decisive of the true worth of the property,[58] and it is not to be construed as fixing the amount a party must pay if he refuses or fails to transfer the property.[59] Where property is not traded on any basis of represented values, the fact that some of the property transferred by one party is found to be of little or no value does not entitle the other party to damages if he receives exactly what he contracted for.[60]

A party is required to transfer the amount of property stated in the bill of sale, notwithstanding the amount is not stated in the exchange agreement.[61] The amount of boot money fixed definitely and clearly in the contract controls, and it is presumed to include all items.[62] A contract which provides that a certain building is to be conveyed may be construed as including by implication the land on which such building stands.[63] One who is to receive logs to be manufactured into lumber is entitled to logs in good condition.[64]

Corporate stock. It has been held that a contract to exchange goods for corporate stock, without naming its value, calls for the stock at its par value.[65] A contract providing for the exchange of corporate stock for stock of a new corporation made in the course of the organization of such corporation should not be construed as fixing the absolute value of the securities at the estimated value recited in the contract in the absence of a plain stipulation to that effect.[66]

Provisions for appraisal. Where one of the parties to a contract for the exchange of real property prevents an appraisal, by a specified person, of the properties involved as provided for by the contract, he cannot avail himself of the failure to have the value determined in the mode agreed on.[67] The right to maintain an action in equity to rescind a contract on the ground that there has been no appraisal in accordance with the provisions of the contract has been denied where each party has entered on the land of the other.[68] In such case a court of equity may fix the value of the properties involved.[69] The courts have no

47. U.S.—Lawson v. Floyd, W.Va., 8 S.Ct. 409, 124 U.S. 108, 31 L.Ed. 347.

48. Ky.—Barton v. Jones, 267 S.W. 214, 206 Ky. 238.

49. Iowa.—Pickett v. Comstock, 229 N.W. 249, 209 Iowa 968.
Or.—Bogard v. Barhan, 96 P. 673, 52 Or. 121, 132 Am.S.R. 676.

50. U.S.—Lawson v. Floyd, W.Va., 8 S.Ct. 409, 124 U.S. 108, 31 L.Ed. 347.

51. Iowa.—Fisher v. Trumbauer, 138 N.W. 528, 141 N.W. 419, 160 Iowa 255.
23 C.J. p 206 note 99.

52. Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.
W.Va.—Atkinson v. Becket, 12 S.E. 717, 34 W.Va. 584.

53. U.S.—Lawson v. Floyd, W.Va., 8 S.Ct. 409, 124 U.S. 108, 31 L.Ed. 347.
Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.

54. Iowa.—Webber v. Harter, 134 N.W. 947, 154 Iowa 317.
N.M.—Mundy v. Irwin, 145 P. 1080, 20 N.M. 43.
W.Va.—Atkinson v. Becket, 12 S.E. 717, 34 W.Va. 584.

55. Ky.—Barton v. Jones, 267 S.W. 214, 206 Ky. 238.
Tex.—Barton v. Cox, Civ.App., 176 S.W. 793.

56. Iowa.—Webber v. Harter, 134 N.W. 947, 154 Iowa 317.
Okl.—Crowl v. Box, 288 P. 942, 144 Okl. 25.

57. Ky.—Barton v. Jones, 267 S.W. 214, 206 Ky. 238.
Okl.—Crowl v. Box, 288 P. 942, 144 Okl. 25.

58. Wis.—Lommen v. Danaher, 161 N.W. 14, 165 Wis. 15.

Intention of parties

Where an executory contract does not clearly indicate whether the valuation of the property was intended as an actual valuation or as a trading basis, the court may consider the characterizing circumstances in determining the intention of the parties.—Lommen v. Danaher, 161 N.W. 14, 165 Wis. 15.

59. Neb.—Rea v. Pierson, 206 N.W. 760, 114 Neb. 173—Miller v. Ruzicka, 190 N.W. 216, 109 Neb. 152.

60. Ky.—Denton v. White, 4 S.W.2d 412, 223 Ky. 640.

61. R.I.—Lavallee v. Carle, 148 A. 808.

62. Iowa.—Cruzen v. Dunwoody, 185 N.W. 120, 192 Iowa 422.

63. Or.—Bogard v. Barhan, 108 P. 214, 56 Or. 269.

64. La.—George E. Breece Lumber Co. v. Edwards, 8 La.App. 543.

65. Ga.—Tilkey v. Augusta, G. & S. R. Co., 10 S.E. 448, 83 Ga. 757.

66. U.S.—Rockefeller v. Merritt, Minn., 76 F. 909, 22 C.C.A. 608, 35 L.R.A. 633.

67. Ind.—Lingeman v. Shirk, 43 N.E. 33, 15 Ind.App. 432.

68. Ga.—Parsons v. Ambos, 48 S.E. 696, 121 Ga. 98.

69. Ga.—Parsons v. Ambos, supra.

power to order a resubmission to appraisers for the purpose of ascertaining the value of the properties involved in an exchange where the contract itself makes no provision therefor.[70] A provision requiring an appraisement of the property to be taken in exchange if the parties cannot agree as to its value is not for an arbitration in the strict sense, and the award of the appraisers does not have the effect of extinguishing the cause of action on the contract and leaving the parties to their remedies based on the finding of the appraisers, and it has been held that there is no difference in this respect whether the agreement is for appraisers in the first instance or for appraisers only in case the parties fail to agree.[71]

f. Time

The entire contract and the duties imposed on each party may be considered in connection with the language employed in determining the time for the performance of the contract. As a general rule time is not considered as of the essence in the absence of an express provision or circumstances which show that the parties so intended.

The entire contract and the duties imposed on each party may be considered in connection with the language employed in determining the date from which a time limit for the performance of a contract begins to run.[72] A provision that each party shall have a specified time for search of title does not fix the time for closing the transaction.[73] A contract providing that one of the parties is to surrender the possession of his property on a specified day and month, the year being omitted, refers to the designated month then next ensuing, in the absence of any implication to the contrary.[74] A provision that in event of errors appearing in the title the agreement should be extended for a reasonable time for their correction does not apply where there is an absence of title.[75] It has been held that a note to be given as a part of a consideration on an exchange of real property should bear the same date as the written contract in the absence of any evidence of a contrary intention of the parties.[76]

Sufficiency of performance as to time is considered infra § 12.

Time as essence of contract. Time may be made the essence of a contract for the exchange of realty by express provision to that effect,[77] or by necessary implication,[78] and it has been held that at law time is of the essence of a contract to exchange real estate,[79] but in the absence of an express provision or circumstances which show that the parties intended performance within the time fixed in the contract to be a condition precedent to its performance, as a general rule, time is not considered as of the essence of the contract.[80] Time is usually of the essence of a contract for the exchange of goods or other personal property which fluctuates in price or is subject to deterioration.[81]

g. Return of Property and Reëxchange

Provisions for the return or restoration of the property in a certain contingency may be enforced but the party seeking enforcement must tender back the prop-

70. Ga.—Parsons v. Ambos, supra.

71. Mo.—Holt v. Williams, 240 S.W. 864, 210 Mo.App. 470.

72. Neb.—Te Poel v. Shutt, 78 N. W. 288, 57 Neb. 592.
Or.—Kaufman v. Hastings, 184 P. 265, 93 Or. 623.
23 C.J. p 207 note 12.

Exchange after perfecting papers
An agreement to exchange title as soon as the papers can be signed and perfected refers to the time the papers, and not the title, are perfected. —Thomas v. Palmer, 248 P. 887, 49 Nev. 438.

Time to remedy defect after examination of abstract
A provision that if any defect shall appear after examination of the abstracts the party shall be allowed a certain period of time to remedy the defect bestows that period of time to remedy the defect after the examination of the abstract.—Burks v. Neutzler, Tex.Com.App., 2 S.W.2d 416, reversing, Civ.App., 289 S.W. 436, and motion denied, Com. App., 7 S.W.2d 65.

Time for adjustment of agent's commission
Contract for exchange of properties, although providing that it may be declared canceled if a satisfactory adjustment of the real estate agent's commission cannot be effected, not providing any time therefor, time for adjustment is identical with the period named for making the exchange.—Kaufman v. Hastings, 184 P. 265, 93 Or. 623.

73. Cal.—Levy v. Dusenbery, 163 P. 231, 32 Cal.App. 411.

74. Or.—Bogard v. Barhan, 108 P. 214, 56 Or. 269.

75. Cal.—Ellwood v. Niedermeyer, 56 P.2d 279, 12 Cal.App.2d 699.

76. Or.—Bogard v. Barhan, 108 P. 214, 56 Or. 269.

77. Tex.—Burks v. Neutzler, Com. App., 2 S.W.2d 416, reversing, Civ. App., 289 S.W. 436, and motion denied, Com.App., 7 S.W.2d 65.
23 C.J. p 225 note 61.

78. Minn.—Blied v. Barnard, 147 N. W. 1095, 126 Minn. 159.
23 C.J. p 225 note 62.

79. N.Y.—Wilson v. Brauer, 202 N. Y.S. 771.

80. Mo.—Richards v. Johnson, 261 S.W. 53.
Or.—Kaufman v. Hastings, 184 P. 265, 93 Or. 623.
Pa.—Vittor v. Szymanski, 184 A. 27, 321 Pa. 345.
Tex.—Branom v. Scott, Civ.App., 24 S.W.2d 499.
23 C.J. p 225 note 60.

Time for securing loan
Where defendant and plaintiff contracted to exchange realty, plaintiff agreeing to procure a permanent loan of a certain amount on his property, time did not become of the essence of the contract with relation to securing the loan by a letter which contained defendant's construction of the contract as to time of performance.—Keilbert Constr. Co. v. Frey, 161 N.Y.S. 156, 174 App. Div. 513.

81. Tex.—Gaut v. Dunlap, Civ.App., 188 S.W. 1020.
23 C.J. p 225 note 63.

erty received by him or show a good excuse for not so doing.

The parties may provide for the return or restoration of the property in a certain contingency and such provision may be enforced in the case of either real[82] or personal[83] property, but the privilege of rejecting or returning the property may be waived by a failure promptly to do so,[84] or by continuing to enjoy or use it.[85] The party seeking to enforce the agreement must restore or offer to restore all that he has received on the exchange,[86] or show a good excuse for not doing so.[87] The parties to a contract for the exchange of personal property for real property may after the exchange enter into a binding contract for the reëxchange of the property;[88] and a like rule applies in the case of an exchange of personal property for other personal property notwithstanding one of the parties has retained the title to the property originally owned by him as security for an amount due under the original contract; and no demand is necessary to entitle the other party to recover the property originally owned by him where he has returned the property which he received; and in such case the question as to whether the redelivery of the property was absolute is for the jury.[89]

Remedies. Where an exchange is made on the condition that one of the parties may return the personal property received by him on the happening of a certain contingency, relating to the kind, condition, or quality of the property he is receiving, on the breach of such condition, that is, on the happening of the specified contingencies, the party may rescind the exchange, and bring an action at law for the recovery of the property which he gave in exchange.[90] Where defendant fails to perform a contract for the reëxchange of certain property, a suit by plaintiff to cancel a deed executed by him to defendant as a part of the original exchange is a proper remedy.[91] The party who has the right to return the property received may maintain an action for a breach of the contract to return the property transferred by him.[92] An action based on the breach of an agreement under seal to repurchase certain corporate stock given as part consideration for other property is properly brought in the name of both parties to whom the shares were originally transferred, although recovery is sought only for refusal to receive the shares transferred to one of such parties and for his benefit.[93] A tender back of boot money received on the exchange is not required as a condition precedent to the maintenance of an action on the contract to return personal property where a tender would be useless.[94] In an action based on the refusal to perform an agreement to repurchase at a certain price corporate stock transferred as part consideration for other property plaintiff is entitled to recover the contract price.[95] Ordinarily the question as to whether the contingency on the happening of which personal property involved in an agreement for an exchange may be returned has occurred is for the jury.[96] In accordance with the general rules of evidence which apply in actions in which questions as to agreements for return under certain circumstances are involved, evidence has been held admissible,[97] inadmissible,[98] or insufficient.[99]

h. Title, Possession, Use, and Loss of Property

(1) Personal property
(2) Real property

(1) Personal Property

The time at which the title to personal property passes depends largely on the intention of the parties. Title may pass at the time of delivery but delivery of possession is not necessarily a condition precedent nor does it necessarily pass title.

The contract may be executory on one side and

82. Iowa.—Stroff v. Swafford, 44 N. W. 293, 79 Iowa 135.

83. Mo.—Irby v. Stubblefield, 162 S.W. 660, 177 Mo.App. 256.
23 C.J. p 207 note 18.

84. Ind.—Johnson v. McLane, 7 Blackf. 501, 43 Am.D. 102.
N.J.—Cheeseman v. Cade, 24 N.J. Law 632.

85. Wis.—Fox v. Wilkinson, 113 N. W. 669, 133 Wis. 337, 14 L.R.A., N.S., 1107.
23 C.J. p 207 note 20.

86. N.Y.—Stoddard v. Graham, 23 How.Pr. 518.

87. Ill.—Osgood v. Skinner, 71 N.E. 869, 211 Ill. 229.
23 C.J. p 207 note 22.

88. Minn.—Green v. Hayes, 139 N. W. 139, 120 Minn. 201.

89. N.Y.—Dougherty v. Neville, 95 N.Y.S. 806, 108 App.Div. 89, affirmed 79 N.E. 1103, 186 N.Y. 578.
23 C.J. p 207 note 24.

90. Mo.—Irby v. Stubblefield, 162 S. W. 660, 177 Mo.App. 256.

91. Minn.—Green v. Hayes, 139 N. W. 139, 120 Minn. 201.
Question of fact
Whether the contract contemplated a reconveyance of the real estate received by defendant in the exchange was held to be a question of fact.—Green v. Hayes, 139 N.W. 139, 120 Minn. 201.

92. Ga.—Robinson v. Pearce, 89 S.E. 364, 145 Ga. 403.
Mo.—Mekos v. Fricke, 139 S.W. 1181, 159 Mo.App. 631.

93. Ill.—Osgood v. Skinner, 71 N.E. 869, 211 Ill. 229.

94. Mo.—Mekos v. Fricke, 139 S.W. 1181, 159 Mo.App. 631.
23 C.J. p 208 note 33.

95. Ill.—Osgood v. Skinner, 71 N.E. 869, 211 Ill. 229.

96. Ill.—Rhea v. Riner, 21 Ill. 526.

97. Vt.—Davis v. Randall, 81 A. 250, 85 Vt. 70.
23 C.J. p 208 note 34 [a].

98. Vt.—Kelley v. Downing, 87 A. 968, 69 Vt. 266.
23 C.J. p 208 note 34 [b].

99. N.Y.—Boire v. McDowell, 93 N. Y.S. 1091, 105 App.Div. 635.

executed on the other, and the mere fact that one of the parties is not to receive his consideration until a future date will not prevent the transaction from being an exchange.[1] It may be executory on both sides.[2] When the parties agree on a present transfer, the contract is executed rather than executory, and title passes at the time of the execution of the contract,[3] but where the contract contemplates a future transfer, title does not pass until the transaction is consummated.[4] The time at which the title passes under the terms of the contract depends largely on the intention of the parties, and in the absence of a clear expression of such intention a question of fact rather than one of law is presented.[5] The title to property transferred under a contract which provides for the return of the property on a happening of a certain contingency passes subject to the right of return,[6] but where a transaction does not amount to a completed exchange and either party is at liberty further to examine the property and return it if not satisfied and retake his own property, the title of the property does not pass until the parties have a reasonable time in which to make the examination and to satisfy themselves as to the representations made in regard to the property.[7] It is generally held that a person who by fraud induces an exchange acquires title to the property received by him subject to be divested by a rescission of the contract by the defrauded party;[8] but it has been held that in such case title does not pass,[9] unless the fraud is merely constructive.[10] The fact that there is a breach of warranty with respect to the property does not prevent the passing of title.[11] Where defective goods for which payment has been made are returned in exchange for a new shipment, the title remains in the buyer if the seller refuses to exchange them.[12] The party to whom property has been transferred takes the interest,[13] and only such interest,[14] as his transferor had. A consignee receiving goods in exchange cannot dispute the title of the consignor without restoring the status.[15]

Delivery. Where there is a delivery with intent to pass title, the party to whom delivery is made acquires title,[16] even though he has not fully performed his part of the transaction,[17] but title does not pass until full performance by the party receiving the property if such is the intention of the parties.[18] It has been held that a delivery of possession is not necessarily a condition precedent to the passing of title,[19] although it may be a condition

1. Mich.—Pratt v. Wickham, 94 N. W. 1059, 133 Mich. 356.
23 C.J. p 208 note 38.

2. Mich.—Crapo v. Seybold, 35 Mich. 169.
23 C.J. p 208 note 39.

3. Cal.—Young v. New Pedrara Onyx Co., 192 P. 55, 48 Cal.App. 1.

4. Ohio.—National Guarantee & Finance Co. v. Russell, App., 36 N. E.2d 1015.

5. N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.
Vt.—Luce v. Brown, 118 A. 530, 96 Vt. 140.

6. N.Y.—Stoddard v. Graham, 23 How.Pr. 518.
N.C.—Walker v. Reed, 26 N.C. 152.

7. S.D.—Stine v. Foster, 122 N.W. 598, 23 S.D. 558.

8. Ind.—Jarrett v. Cauldwell, 94 N. E. 790, 47 Ind.App. 478.
23 C.J. p 209 note 43.

9. Ga.—Johnson v. Harley, 48 S.E. 685, 121 Ga. 83.
S.C.—Manship v. Newsome, 108 S.E. 428, 430, 188 S.C. 6, quoting Corpus Juris.

10. Ga.—Barnett v. Speir, 21 S.E. 168, 93 Ga. 762.

11. Ga.—Johnson v. Harley, 48 S.E. 685, 121 Ga. 83.
23 C.J. p 209 note 46.

12. Ind.—Jewett & Sherman Co. v. Tindall, 134 N.E. 501, 77 Ind.App. 681.

13. Ala.—Lindsey v. Stewart Bros., 121 So. 699, 23 Ala.App. 19, certiorari denied 121 So. 700, 219 Ala. 197.

Transfer by mortgagee

Where the mortgagee of personal property subsequently acquires the property and transfers it to another under a contract of exchange, the transferee takes the full title of the transferor free of the mortgage lien. —Lindsey v. Stewart Bros., 121 So. 699, 23 Ala.App. 19, certiorari denied 121 So. 700, 219 Ala. 197.

14. Ark.—Dedman v. Earle, 12 S. W. 330, 52 Ark. 164.
Utah.—Rocky Mountain Stud Farm Co. v. Lunt, 151 P. 521, 46 Utah 299.
23 C.J. p 209 note 61.

15. Ga.—Dunlop Tire & Rubber Co. v. White, 164 S.E. 414, 45 Ga.App. 268.

16. Mich.—Pratt v. Wickham, 94 N. W. 1059, 133 Mich. 356.

17. Ariz.—Dillingham v. Anderson, 226 P. 202, 26 Ariz. 380.

Agreement to put machinery in good condition

Where plaintiff and defendant agreed to exchange boilers and engines, and defendant agreed to put his engine and boiler in good running condition, boiler and engine were placed in plaintiff's possession, but were not in good running condition, the statutory presumption that property does not pass where something remains to be done in order to put goods in a deliverable state did not apply.—Greene v. Hyden, 117 S.W.2d 985, 273 Ky. 783.

18. Vt.—Luce v. Brown, 118 A. 530, 96 Vt. 140.

Condition to be performed concurrent with delivery

A party who is bound to make a good conveyance of real property concurrently with the passing to him of title to a stock of goods acquires no title to the goods until he has fulfilled the condition on his part, although the goods are actually delivered.—Robinson v. Yetter, 37 N.E. 363, 238 Ill. 320.

19. Ill.—Rhea v. Riner, 21 Ill. 528—Newlin v. Prevo, 90 Ill.App. 515.

Right to possession as subject to condition

A defendant who took possession of personalty under contract to exchange deeds, personalty, and mineral rights was not guilty of conversion of personalty for failure to pay five thousand dollars on plaintiff's mortgage debt before taking possession, where contract to exchange deeds contained no provision requiring defendant to pay that sum.—Ucovich v. Basile, 79 P.2d 188, 26 Cal.App.2d 272.

precedent to the transferee's right of possession.[20] Title may vest as the result of the delivery of a bill of sale of the property involved,[21] but in order that there may be a delivery of a bill of sale the intention to deliver on the part of the person giving it must exist, and the procurement, by fraud, of the transfer of a bill of sale is ineffective.[22] It has been held that a recital in the contract to the effect that one party acknowledges payment for certain articles and thereby delivers the articles to the other party has the effect of passing title to such other party.[23] Where performance is to be concurrent and a party performs his part of the agreement by delivery to the other party of the property which the former is to transfer, it has been held that he acquires title to the property which is to be transferred to him.[24] Of course, where there has been delivery on both sides with intent to pass title, title passes,[25] but without a delivery, actual or constructive, by either party the agreement is merely executory.[26] Where a party who has agreed to exchange land for personalty discovers a defect in the title to the land which he has received, and therefore places the personalty in the hands of a third person, with instruction to deliver it to the other party to the exchange on the payment by him of a certain price, this does not operate to transfer the right to possession of the personalty.[27] A provision in a contract to the effect that a party thereto "reserves and holds a lien on the" property transferred by him until the other property is delivered does not thereby secure to such party the legal title to the property delivered by him, does not amount to a legal mortgage on the property as security for the consideration to be received from the other party, and secures to the first mentioned party no right to take possession of the property, such provision creating a lien or equitable mortgage enforceable only in equity.[28] Where a dealer takes a buyer's old car in partial exchange for a new one, the title to the used car passes to the dealer although the new car has not been delivered.[29] An owner who delivers stock to his agent to be exchanged for other property retains title until the exchange is made.[30]

As against creditors. Delivery of the personal property has been held to be essential to pass title as against creditors of the party to the exchange who owns such property,[31] and the mere entry of a record of the exchange in the books of one of the parties to the contract and the execution by him of a trust or consignment receipt to the other party do not constitute a constructive delivery as against creditors of the former,[32] but there is other authority to the effect that after all of the conditions of the exchange are fulfilled the mere fact that the property remains in the possession of the former owner does not entitle creditors of the former owner to seize it.[33]

(2) Real Property

(a) In general
(b) Equitable title or interest
(c) Estoppel of transferee
(d) Possession
(e) Improvements, rents, profits, and losses

(a) In General

A contract for the exchange of real property may be executory or executed dependent on whether the reciprocal conveyances have been made.

A contract for the exchange of lands may be executory on both sides,[34] except where it operates, per se, as a reciprocal conveyance of the thing given and of the thing given in exchange.[35] Where only one of the parties has performed, the contract is not an executed one.[36] A contract to exchange land when executory does not of itself convey title, although it is attested as a deed.[37] A grantee is entitled to a proper deed to the land conveyed.[38] Realty which is transferred in an exchange becomes

20. Ill.—Newlin v. Prevo, 90 Ill. App. 515.

21. Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.

22. Mo.—Poplin v. Brown, supra.

23. U.S.—Marsh v. McPherson, Neb., 105 U.S. 709, 26 L.Ed. 1139.

24. N.Y.—Morgan v. Powers, 66 Barb. 35.
Vt.—Russell v. Phelps, 50 A. 1101, 73 Vt. 390.

25. Ga.—Cook v. Pinkerton, 7 S.E. 171, 81 Ga. 89, 12 Am.S.R. 297.

26. Mich.—Crapo v. Seybold, 35 Mich. 169.
Pa.—Hazard v. Hamlin, 5 Watts. 201.
23 C.J. p 209 note 56.

27. Neb.—Barrett v. Turner, 2 Neb. 172.

28. Ala.—Jones v. Anderson, 76 Ala. 427.

29. N.Y.—Bronner v. Van Cortlandt Vehicle Corp., 198 N.Y.S. 525.
42 C.J. p 767 note 8.

30. Cal.—McClory v. Dodge, 4 P.2d 223, 117 Cal.App. 148.

31. U.S.—In re Ricketts, Ill., 234 F. 285, 148 C.C.A. 187.
La.—Saul v. His Creditors, 7 Mart. N.S. 594.

32. U.S.—In re Ricketts, Ill., 234 F. 285, 148 C.C.A. 187.

33. Miss.—E. E. Forbes Piano Co. v. Hennington, 67 So. 483, 108 Miss. 849.

34. Or.—Garland v. Shrier, 64 P.2d 530, 155 Or. 387.
23 C.J. p 209 note 65.

35. U.S.—Preston v. Keene, La., 39 U.S. 133, 10 L.Ed. 387.

36. Iowa.—Cloud v. Burnett, 206 N. W. 283, 201 Iowa 733.

37. Ga.—Edwards v. Hunt, 136 S.E. 409, 163 Ga. 439.

38. Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

the property of the transferee,[39] and a party is vested with the legal title as conveyed by the deed.[40] The title to the property conveyed dates from the execution and delivery of the deed rather than from a judgment upholding the deed.[41] A person who by fraud induces the exchange acquires title to the property conveyed to him subject to be divested by a rescission of the contract at the suit of the defrauded party.[42]

(b) Equitable Title or Interest

Under an executory contract to exchange, the equitable title to each parcel passes and and each party holds the legal title to the land which he has contracted to convey as trustee for the other party.

From the date of an executory contract, the equitable title to each parcel passes and each party holds the legal title to the land which he has contracted to convey as trustee for the other party.[43] Moreover, a party who has performed all things by him to be performed,[44] or who has delivered possession of his land to the other party and who is in possession of the land to be conveyed to him,[45] has a complete equitable title to the land to be so conveyed superior to the legal title of the other party to the contract. Where one of the parties, each having executed title bonds, agrees that the other party may mortgage the property to be conveyed by him, the former thereby waives his equities under his title bond in favor of the mortgagee.[46] A party to a contract pursuant to which a deed of the standing timber on land subject to a vendor's lien is given to him acquires an equitable title to such timber subject to such lien, and acquires legal title free from any lien when his grantor discharges the vendor's lien.[47]

(c) Estoppel of Transferee

A transferee in undisputed possession under the contract cannot deny the existence of the contract, nor can he dispute the title of the other party and retain the land.

A party cannot, while in undisputed possession under the contract, deny the existence of the agreement, receive the benefits thereof, and hold both tracts, nor can he dispute the title of the other party to the contract and retain the latter's land.[48] Where a grantee receives an escrow deed before the condition of the escrow has been performed, and subsequently conveys the property to others, he will be estopped to avoid the escrow deed and to say that no title passed to him thereby.[49]

(d) Possession

A mere contract to exchange gives no right to possession before delivery of deeds without an express agreement to that effect, but the parties are impliedly required to deliver possession when the transaction is completed.

At common law in the case of an exchange of lands entry must be made on both sides.[50] A mere contract to exchange lands gives no right to possession before its completion by the delivery of the deeds, without an express agreement to that effect, either in the contract itself or out of it.[51] Where a deed to one of the parcels is placed in escrow to be delivered on performance by the grantee who is let into possession, the transaction is substantially a sale with a reservation of title to secure performance, the grantee giving a bond for title binding him to convey on such performance;[52] and in such case the party who is given possession has the right to cut a reasonable quantity of wood where the security is not impaired.[53] The parties are impliedly required to deliver possession when the deal is closed.[54]

(e) Improvements, Rents, Profits, and Losses

In the absence of a provision in the contract, the

Description of land

Plaintiffs who contracted with defendants for exchange of realty and personalty and thereafter ascertained by survey that fence which defendants had pointed out was located beyond true boundary line, had right to demand warranty deed for land pointed out and to be furnished with abstract showing merchantable title to entire tract and were not required to accept deed tendered by defendants describing lands by legal subdivisions only.—Garland v. Shrier, 64 P.2d 530, 155 Or. 387.

39. Wash.—Duke v. Benson, 236 P. 77, 134 Wash. 495.

40. Tex.—Summit Place Co. v. Terrell, Civ.App., 207 S.W. 145, reversing, Civ.App., 203 S.W. 1110, and affirmed Terrell v. Summit Place Co., Com.App., 232 S.W. 282, motion overruled, Com.App., 235 S.W. 198.

41. Ky.—Babb v. Dowdy, 17 S.W 2d 1014, 229 Ky. 767.

42. Ohio.—Stevens v. McCoy, 54 N. E. 517, 60 Ohio St. 540.

43. Minn.—Boeck v. Johnson, 201 N. W. 311, 161 Minn. 248.
28 C.J. p 209 note 67.

Transfer effected by contract

Under completed exchange of land contract, equitable titles to properties were transferred as effectively as though deeds had been delivered. —Wilson v. Mundy, 238 Ill.App. 575.

44. Pa.—Warren v. Mount, 67 A. 742, 218 Pa. 397.
23 C.J. p 210 note 68.

45. Ga.—Baldwin v. Sherwood, 45 S.E. 216, 117 Ga. 827—Temples v. Temples, 70 Ga. 480.

46. Ga.—Kirklin v. Atlas Sav. & Loan Assoc., 33 S.E. 83, 107 Ga. 313.

47. Tex.—Hatton v. Bodan Lumber Co., 123 S.W. 163, 57 Tex.Civ.App. 478.

48. Tex.—Lasater v. Premont, Civ. App., 209 S.W. 753.

49. Ind.—Balue v. Taylor, 36 N.E. 269, 136 Ind. 368.

50. Cal.—Bixby v. Bent, 59 Cal. 522.

51. Minn.—Boeck v. Johnson, 201 N.W. 311, 161 Minn. 248.
N.Y.—Brennan v. Chapin, 19 N.Y.S. 237.

52. Or.—Thienes v. Francis, 138 P. 845, 69 Or. 171.

53. Or.—Thienes v. Francis, supra.

54. Wash.—Le Marinel v. Bach, 196 P. 22, 114 Wash. 651.

right to rents is in the person holding the legal title. A loss before conveyance falls on the owner where he has not complied with a condition precedent.

It has been held that a person in possession of real property of another is not entitled to reimbursement for improvements made by him, where possession was taken under an unenforceable agreement, improvements were made voluntarily, and the owner of the land was deprived of possession for a considerable period.[55] The right to the rentals is in accordance with the express provisions of the contract,[56] and a delay in passing deeds to property does not render ineffective provisions with regard to ownership of rentals after a specified date.[57] In the absence of a provision in the contract, the right to the rents is in the person holding the legal title.[58] A party to whom real property is to be conveyed in exchange for other real property is not required to bear the burden of every injury which may be inflicted on the land so to be conveyed, intermediate the contract and delivery of possession, in the absence of a contrary provision in the contract.[59] Where property involved in an executory contract of exchange is in the possession of the owner and he has not complied with the conditions of the contract as to perfecting title or showing good title on his part to be performed, and the property is destroyed, the loss falls on him.[60]

i. Rights and Liabilities of Third Persons

The rights and liabilities of third persons who acquire property exchanged or subject to a contract of exchange are largely dependent on their status as bona fide or innocent purchasers. One who acquires the rights of a party is entitled to no more than his grantor.

The rights and liabilities of third persons who acquire or deal with property exchanged or subject to a contract of exchange are largely dependent on whether such persons do or do not occupy the status of bona fide or innocent purchasers or encumbrancers.[61] This rule applies to persons claiming under the transferee[62] or to persons claiming under the transferor.[63] The equitable interest acquired by a party to an executory contract prevails against any subsequent encumbrance or conveyance acquired by a third person through the other party, where such third person has notice of the facts.[64] A third person who acquires the rights of one of the parties to the contract is entitled to no more than his grantor, and he is not entitled to the other property where his grantor has failed to perform,[65] but he is entitled to a conveyance of the property where performance in full has been rendered.[66] A third person to whom a party to an exchange of property transfers his right to the property received is entitled to claim the property transferred by such party where it reverts to the latter because of failure of title to the property received on the exchange.[67] Rights of third persons which have been acquired under a party to a completed exchange cannot be defeated by an executory contract for a reëxchange.[68] Where the establishment of a cause of action against a party to an exchange is a condition precedent to the liability of a third person, such third person cannot be subjected to liability where such cause of action was not, or could not, be sustained.[69] A vendor who takes a quitclaim deed from the assignee of his vendee does not thereby assume the obligations of a contract of exchange of the land entered into by the assignee and a third person.[70] A party who accepts notes and a trust deed from a nominal vendee under his own agent's misrepresentations as to his solvency cannot establish liability of the real vendee for the amount of the notes.[71] Where a party to a contract exchanging equities takes the other's note for the

55. Wash.—Nelson v. Davis, 172 P. 1178, 102 Wash. 313.

56. Cal.—Marshall v. Swaim, 282 P. 423, 102 Cal.App. 119.

Payment for collecting

Where one party collects rentals which under the provisions of the contract are owned by the other party, the fact that there was no provision in the contract for payment of the service of collecting does not destroy the owner's right to the rentals.—Stimson v. Reese, Tex.Civ.App., 25 S.W.2d 205.

57. Tex.—Stimson v. Reese, supra.

58. Cal.—Marshall v. Swaim, 282 P. 423, 102 Cal.App. 119.
Ky.—Babb v. Dowdy, 17 S.W.2d 1014, 229 Ky. 767.

Recovery from third person collecting rents

Right to recover rentals collected by a third person after exchange is not affected by question whether defendant has a right of set-off against the former owner.—Marshall v. Swaim, 282 P. 423, 102 Cal.App. 119.

59. Ky.—Durrett v. Simpson, 3 T. B.Mon. 517, 16 Am.D. 115.

60. Mich.—Frankiewicz v. Konwinski, 224 N.W. 368, 246 Mich. 473.
23 C.J. p 210 note 83.

61. Iowa.—Bedau v. Bryan, 56 N. W. 512, 89 Iowa 348.
23 C.J. p 210 note 85.

62. Neb.—Smith v. Myers, 76 N.W. 1084, 56 Neb. 503.
23 C.J. p 210 note 86.

63. D.C.—Nichols v. Bealmear, 36 App.D.C. 352.

64. D.C.—Nichols v. Bealmear, supra.
23 C.J. p 211 note 88.

65. Ga.—Edwards v. Hunt, 136 S.E. 409, 163 Ga. 439.

66. La.—Cognevich v. Blazio, 106 So. 550, 159 La. 1019.

67. Tex.—Davidson v. Bodan Lumber Co., Civ.App., 143 S.W. 700.

68. Pa.—Hazard v. Hamlin, 5 Watts 201.
23 C.J. p 211 note 90.

69. Mo.—Torbit v. Warner, 217 S. W. 40.
23 C.J. p 211 note 91.

70. Neb.—Scheer v. Nelson, 205 N. W. 250, 113 Neb. 821.

71. Mo.—Fuchs v. Leahy, 9 S.W.2d 897, 321 Mo. 47.

amount of taxes due, he is liable to the owner of the property who is forced to pay the taxes.[72]

j. Party to Exchange as Bona Fide Purchaser

A purchase of land by exchange of other land of value or by a relinquishment of all interest in other property is sufficient consideration to constitute one a bona fide purchaser for value. One cannot claim the rights of a bona fide holder where he has knowledge of facts which should put him on notice.

A purchase of land by exchange of other land of value,[73] or by a relinquishment of all interest in other property,[74] has been held to be a sufficient consideration to constitute one a bona fide purchaser for value. A party who has received property on an exchange cannot claim the rights of a bona fide holder where it appears that he had notice of facts from which he could have learned that the person who transferred the property to him was not the real owner.[75] Where a conveyance of real property to a married woman in exchange for certain personal property is induced by the false representations of her husband and the transaction is for his benefit, the wife is not entitled to the rights of a bona fide purchaser for value.[76]

§ 7. —— Warranties

In a technical exchange of lands there is as incident thereto a warranty of title but not of quantity. On an exchange of personal property in the possession of the parties, there is an implied warranty of title and that the property is free from encumbrances, but there is no warranty as to quality unless expressly or impliedly made by the party transferring the property.

In the case of a technical exchange of lands there is as incident thereto a warranty of title,[77] but not of quantity, unless so intended by the parties;[78] but there is no implied warranty of title to land covered by a land office certificate assigned in exchange for other real estate, especially where the assignor declines to give an express warranty.[79] A provision that "each party to the contract is to furnish an abstract showing a good title to said lands" does not amount to a warranty of title.[80] A covenant to the effect that one of the parties guarantees to sell the land conveyed by him for a sum that shall not be less than a specific amount is a guaranty that the equitable estate conveyed is not worth less than the amount specified.[81] A party to a contract who has received land in exchange for other property may in a proper case enforce a guaranty as to the price for which such land may be sold.[82] It has been held that in a proper case damages may be recovered as for a breach of warranty where contracts for the conveyance of certain lands are transferred in exchange for other property with a warranty as to the equality of the land covered by the contracts for conveyance.[83]

Personal property. On an exchange of personal property in the possession of the parties to the exchange there is an implied warranty of title,[84] and that the property is free from encumbrances.[85] A warranty as to encumbrances on personal property is not satisfied by a subsequent agreement by a mortgagee, made without consideration, to release the mortgage.[86] There is no implied warranty on the part of a person who exchanges certificates of stock for other property that the corporation issuing them is a corporation de jure, even though the abbreviation "Inc." appears after the name of the corporation.[87] As in sales, so on an exchange of goods the law does not imply a warranty as to their goodness or quality.[88] To create an express warranty of quality or condition of personal property offered in exchange for other property, it is not necessary that the word "warrant" or any other particular or formal words of warranty shall be used.[89] Any affirmation made at the time of the exchange as to the quality or condition of the property will be treated as a warranty if it is so intended and if the other party acquires property on the faith of such affirmation.[90] The value of personal property offered in exchange for other property may

72. Wash.—Hardinger v. Fullerton, 5 P.2d 987, 165 Wash. 483.
23 C.J. p 206 note 86.

73. Fla.—Rivers v. Rivers, 20 So. 807, 38 Fla. 65.
23 C.J. p 211 note 93.

74. Tex.—Halbert v. De Bode, 40 S. W. 1011, 15 Tex.Civ.App. 615.

75. Mo.—Taaffe v. Kelly, 19 S.W. 539, 111 Mo. 127.
23 C.J. p 211 note 95.

76. Cal.—Sheer v. Hoyt, 110 P. 477, 13 Cal.App. 662.

77. Mo.—McGinness v. Brodrick, 192 S.W. 420.
Pa.—Rowe v. Thompson, 6 Pa.Dist. & Co. 133.
23 C.J. p 206 note 86.

78. N.C.—Griffin v. Barrett, 97 S. E. 394, 176 N.C. 473.
23 C.J. p 206 note 88.

79. Ind.—Johnson v. Houghton, 19 Ind. 359.

80. Ala.—Moore v. Whitmire, 66 So. 601, 189 Ala. 615.

81. D.C.—Hartman v. Ruby, 16 App.D.C. 45.

82. Ky.—Baskett v. Rash, 177 S.W. 239, 165 Ky. 468.
23 C.J. p 206 note 93.

83. Iowa.—Swain v. Waldo, 33 N. W. 78, 73 Iowa 749, 5 Am.S.R. 712.

84. S.C.—Mauldin v. Milford, 121 S. E. 547, 127 S.C. 508.
23 C.J. p 205 note 70.

85. S.C.—Mauldin v. Milford, 121 S.E. 547, 127 S.C. 508.
23 C.J. p 205 note 71.

86. Ark.—Boren v. Bettis, 194 S.W. 850, 128 Ark. 457.

87. Ill.—Marshall v. Keach, 81 N. E. 29, 227 Ill. 35, 118 Am.S.R. 247, 10 Ann.Cas. 164.

88. Mich.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74.

89. Cal.—McLennan v. Ohmen, 17 P. 687, 75 Cal. 558.
23 C.J. p 205 note 77.

90. Ky.—Greene v. Hyden, 117 S. W.2d 985, 273 Ky. 783.
23 C.J. p 205 note 78.

be made the subject of warranty.[91] A party may in express terms give a warranty against an obvious defect in personal property, where the extent of the defect cannot be determined at the time by the other party,[92] or where there is uncertainty and the representation is not glaringly inconsistent with the obvious condition and quality of the property.[93] It has been held that a party to whom a warranty is given that notes of a third person offered to him are a lien on certain real property has a right to rely on the statement, although he is in as good a position as the person making it to ascertain the facts.[94] A statement made by a party, which amounts to nothing more than a mere commendation of the goods offered by him, a puffing of wares as it is sometimes called, is not a warranty.[95] A party who in connection with the exchange warrants the income from a business is not liable on the warranty where such warranty is conditioned on the existence of certain facts and such facts are not shown to exist.[96] A provision in a contract for the exchange of lands to the effect that as part of the consideration one party "agrees to deliver" to the other certain personal property does not necessarily imply that the personal property is free from encumbrances.[97] An express warranty should be given a reasonable construction.[98]

§ 8. Modification

A contract for the exchange of property may be modified by mutual consent of the parties; the modification must be supported by a consideration and must be in writing when a written agreement is required under the statute of frauds.

The parties to a contract for the exchange of property may by agreement modify such contract.[99] A claim under the original contract may then be met by the new agreement so far as the new agreement operates to alter the original one.[1] However, the terms of the original contract which are not altered remain operative.[2]

Where personal property is transferred to two persons who contract jointly and who are not partners, one of such persons has no right to modify the terms of the contract without the concurrence of his coöwner.[3]

Requisites. A modification of a contract for the exchange of property may be effected by parol agreement,[4] provided a writing is not required under the statute of frauds.[5] The consent of both parties is essential to the modification of the con-

91. Mich.—Pickard v. McCormick, 11 Mich. 68.
N.Y.—Titus v. Poole, 40 N.E. 228, 145 N.Y. 414.

92. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.
Mo.—Irby v. Stubblefield, 162 S.W. 660, 177 Mo.App. 256.

93. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.

94. Mo.—Smithers v. Bircher, 2 Mo. App. 499.

95. N.C.—Robertson v. Halton, 72 S.E. 316, 156 N.C. 215, 37 L.R.A., N.S., 298.

96. Or.—Blakney v. Rowell, 164 P. 709, 84 Or. 363.

97. D.C.—Moebs v. Latham, 44 App. D.C. 117—Moebs v. Gardiner, 44 App.D.C. 112.

98. N.Y.—Rosenzweig v. Kitt, 108 N.Y.S. 1010, 58 Misc. 234.

Health of animals
Where on exchange of mules for a horse and mare owner warranted that horse and mare were over shipping colds, there was no warranty that the horse and mare had not had shipping colds, since the terms of the warranty necessarily implied that the horse and mare had had shipping colds, but that they were not sick at the time.—Willard v. Moye, Ark., 156 S.W.2d 202.

Title
Where a contract for the exchange of real property contains a clause providing that chandeliers, gas fixtures, ranges, and "all personal property belonging to the parties" on the premises are included in the mutual warranty of title, the words quoted being written in a blank in the printed form, the written words must be construed as relating only to chattels not specifically enumerated, and the warranty is broken if title to the enumerated chattels fails.—Rosenzweig v. Kitt, 108 N.Y.S. 1010, 58 Misc. 234.

99. Cal.—Smalley v. Holt, 165 P. 1023, 33 Cal.App. 589.
23 C.J. p 211 note 98.

Change of grantees
Parties to exchange of properties had right to agree on change of grantees after making agreement that grantee should assume and agree to pay certain indebtedness.—Smith v. Brown, 36 P.2d 1081, 1 Cal. App.2d 492.

Escrow instructions as modification
Escrow instructions in accordance with the contract did not constitute a modification.—Klegman v. Moyer, 266 P. 1009, 91 Cal.App. 333.

1. Tex.—Parker v. Anderson, Civ. App., 85 S.W. 856.
23 C.J. p 211 note 99.

Release of one of grantees
Where agreement for exchange of properties provided that grantee in deed should assume and agree to pay certain indebtedness, one of grantees, originally named who had his name stricken as grantee was released from personal obligation to pay such indebtedness, and whether such grantee was real party in interest in exchange of property was immaterial.—Smith v. Brown, 36 P. 2d 1081, 1 Cal.App.2d 492.

2. Ind.—Powell v. Nusbaum, 136 N. E. 571, 192 Ind. 358.
23 C.J. p 211 note 1.

3. Ala.—Jones v. Anderson, 76 Ala. 427.

4. Cal.—Tucker v. Newton, 256 P. 440, 83 Cal.App. 148.

Executed agreement
Failure to assign trust deed as security for defense of suit to quiet title did not show that oral agreement modifying written exchange agreement was not fully executed.—Tucker v. Newton, supra.

5. Tex.—Robertson v. Melton, 115 S.W.2d 624, 131 Tex. 325, 118 A. L.R. 1505, reversing, Civ.App., 86 S.W.2d 473.
Oral contract for exchange of lands as within statute of frauds see the C.J.S. title Frauds, Statute of § 92, also 27 C.J. p 205 note 16 et seq.

tract,[6] as is also a consideration.[7]

§ 9. Termination and Rescission

A contract for the exchange of property may be terminated by mutual consent of the parties or under an express stipulation in the contract giving one of the parties the right to rescind on the happening of certain conditions.

A contract for the exchange of real property,[8] personal property,[9] or real property for personal property[10] may be rescinded or abandoned by mutual consent. The consent of both parties is essential to a mutual abandonment or rescission.[11]

By the abandonment or rescission by mutual consent, the contract ceases to exist and neither party can thereafter invoke its terms or protection against the other;[12] and where an oral contract is abrogated by the substitution of an unconditional written agreement, nonperformance or breach of the written agreement does not reinstate the oral contract.[13] On termination of the contract by consent, the consideration or property received by a party pursuant to the agreement must be returned.[14] However, the mere agreement to rescind does not ipso facto restore to either party what he parted with, in the absence of an apparent intent that the agreement alone shall have such effect;[15] where no such intent is apparent, whatever was necessary in the first instance to constitute the original exchange a legal transfer is equally necessary to effect a reëxchange.[16] Where one party has come into possession of personal property of the other

6. Conn.—Trowbridge v. Jefferson Auto Co., 103 A. 843, 92 Conn. 569.
23 C.J. p 211 note 2.

Implied consent

Grantor's consent that name of one of grantees be stricken from deed requiring grantee to pay certain indebtedness must be implied from fact that such grantor enabled escrow to be closed by conveying property to sole remaining grantee. —Smith v. Brown, 36 P.2d 1081, 1 Cal.App.2d 492.

7. Cal.—Ucovich v. Basile, 79 P.2d 188, 26 Cal.App.2d 272.
Colo.—Eubanks v. Gonder, 6 P.2d 3, 90 Colo. 44.
Nev.—Thomas v. Palmer, 248 P. 887, 49 Nev. 438.
Tex.—Sanzo v. Pagel, Civ.App., 47 S.W.2d 632, error dismissed.
Utah.—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.
23 C.J. p 211 note 3.

Sufficiency of consideration

(1) Abandonment of written exchange agreement and substitution of new terms, whereby each party received valuable property subject to encumbrances, constituted "valuable consideration" for subsequent oral agreement.—Tucker v. Newton, 256 P. 440, 83 Cal.App. 148.

(2) Where the parties to a contract to exchange an apartment house and residence for a farm, the owner of which agreed to deliver possession by warranty deed clear of encumbrances, were ignorant of the fact that the tenant had planted crops and understood that it should be delivered without being so planted, an agreement by the apartment house owner, after the tenant's refusal to surrender possession until compensated for his work and expense, to pay part of the amount of a promissory note executed by the farm owner to the tenant for such purpose, was supported by sufficient consideration, the rule that a promise to pay something for what promisee is already bound to do by the contract is nudum pactum, being inapplicable, where unexpected obstacles which the parties could not reasonably foresee, make performance more onerous or less advantageous than anticipated and require, equitably at least, a readjustment of the contractual relations.—Silver v. Holt, 210 P. 985, 61 Utah 57.

(3) Where one making exchange of live stock took note for "boot," containing provision excluding warranties, thereafter agreed with maker of note that latter should return one mule and he would exchange it for another, that, if mules died, it should be original owner's loss, and that, if maker would feed mule, owner would pay cost thereof, agreement was supported by maker's promise to feed as well as to restore mule to vendor.—Widincamp v. Patterson, 127 S.E. 158, 33 Ga.App. 483.

(4) Other instances see 23 C.J. p 211 note 3 [a].

8. Wash.—Stoner v. Fryett, 157 P. 213, 91 Wash. 89.
23 C.J. p 212 note 8.
Oral contract for exchange of lands as within statute of frauds see the C.J.S. title Frauds, Statute of § 92, also 27 C.J. p 205 note 16 et seq.

Consent by conduct

Where property was exchanged, and plaintiff paid six hundred and twenty dollars, which was a condition precedent to be performed before the defendant became liable, and defendant notified plaintiff that he did not want to trade, plaintiff, by accepting the sum of money he paid to defendant, thereby consented to a cancellation of the contract.—Ayers v. Houston, 183 N.Y.S. 808, 193 App.Div. 145.

9. N.Y.—Dougherty v. Neville, 95 N.Y.S. 806, 108 App.Div. 89, affirmed 79 N.E. 1103, 186 N.Y. 578.
23 C.J. p 212 note 9.

10. Kan.—George v. Lane, 102 P. 55, 80 Kan. 94.
Minn.—Green v. Hayes, 139 N.W. 139, 120 Minn. 201.

11. Ark.—Lane Motor Co. v. Lowery, 291 S.W. 805, 173 Ark. 1181.
Iowa.—Flynn v. Finch, 114 N.W. 1058, 137 Iowa 378.

Conduct indicating consent or acquiescence

That plaintiff, a party to a contract for exchange of property, became dissatisfied and refused to take possession of property conveyed to him, thus obliging defendant to retain possession and operate business, did not constitute mutual rescission, or acquiescence by defendant in plaintiff's attempted rescission.—White v. Oregon Realty Exch. Inv. Co., 236 P. 269, 114 Or. 636.

12. N.Y.—Ayers v. Houston, 183 N.Y.S. 808, 193 App.Div. 145.
23 C.J. p 212 note 13.

13. Utah.—Kennison v. Lundy, 146 P. 552, 45 Utah 495.
23 C.J. p 212 note 12.

14. Minn.—Green v. Hayes, 139 N.W. 139, 120 Minn. 201.
23 C.J. p 212 note 14.

15. Cal.—Young v. New Pedrara Onyx Co., 192 P. 55, 48 Cal.App. 1.
Tex.—Knapp v. Read, Civ.App., 21 S.W.2d 705, error refused.

16. Cal.—Young v. New Pedrara Onyx Co., 192 P. 55, 48 Cal.App. 1.

Corporate resolution to rescind an executed exchange of stock, where it appears further formalities were intended to effect the reëxchange of property, cannot ipso facto repass the title, and cannot do so where neither actual nor constructive redelivery can be made because the certificates are in the hands of a banking company, claiming the stock as pledgee.—Young v. New Pedrara Onyx Co., supra.

party, an action to recover such property or its value will lie.[17] Where deeds have passed, an action of ejectment by one party will lie to recover possession of his land from the other party.[18]

Option to terminate and forfeiture. Apart from the right to terminate or rescind a contract for exchange arising by operation of law from the wrong or default of the adverse party, considered infra § 10, a party may have the right to terminate the contract under certain circumstances by virtue of a stipulation to that effect in the contract itself.[19] Where the contract does not expressly provide that it shall be null and void on the happening of a stated contingency, but merely gives a right or option to terminate, a reasonable notice of an intention to terminate is required;[20] and the contract remains binding until the option to terminate it is exercised.[21] The right to terminate or rescind the contract is not waived by the retention of the property received by the rescinding party, where the opposite party refuses or delays in accepting the property tendered to him in due time.[22]

The right to terminate the contract may be accompanied by a right to declare a forfeiture.[23] However, forfeitures are not favored and a court will not enforce a forfeiture unless the person claiming the right appears to be without fraud and the other party's default is not attributable to the former's conduct or acquiescence.[24]

Effect of death of party. An executory contract for the exchange of lands is not, it seems, discharged by the death of a party prior to the time fixed for performance,[25] but in the case of a common-law exchange of lands, if either party dies before entry, the exchange is void.[26]

Premature delivery by escrow agent. Where one of the parties to a contract of exchange has performed his obligations, the fact that the escrow agent had prematurely delivered the deed to him does not furnish the other party with a ground for rescission in the absence of injury.[27]

§ 10. —— Rescission for Wrong or Default of Adverse Party

a. In general
b. Grounds
c. Time for rescission
d. Election to rescind, notice, and demand
e. Restoration of status quo
f. Waiver or loss of right to rescind
g. Partial rescission
h. Operation and effect

a. In General

Subject to certain limitations and qualifications, a contract for exchange of property may be rescinded by either party for good cause.

Subject to the limitations and qualifications hereinafter considered in this section, a contract for the exchange of property may be rescinded by either party for good cause.[28] Where personal property is transferred to two persons who have contracted jointly and who are not partners, one of such persons has no authority to rescind the con-

17. U.S.—Dunn v. Oneida Community, C.C.N.Y., 177 F. 540.

18. N.Y.—Graves v. White, 87 N.Y. 463.
Recovery of land by ejectment see Ejectment 28 C.J.S. p 844.

19. Ga.—Bowden v. King, 106 S.E. 926, 26 Ga.App. 705—Newkirk v. Burts & Goodman, 104 S.E. 456, 25 Ga.App. 689.
Mich.—Dysarz v. Mack, 222 N.W. 94, 245 Mich. 9.
Utah.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.
23 C.J. p 212 note 18.

Ineffective acknowledgment, of contract to exchange land, by wife, and her refusal to join in conveyance, which was not induced by husband, excused him, under clause in contract that failure to complete conveyance for valid reason should terminate liability.—Koperski v. Wira, 128 A. 382, 97 N.J.Eq. 88, affirmed 129 A. 185, 98 N.J.Eq. 377.

20. Utah.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.
23 C.J. p 212 note 19.

21. N.M.—Beck v. Chambers, 133 P. 972, 18 N.M. 53.
Utah.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.

22. Mich.—Mead v. Detroit-Traverse Realty Co., 232 N.W. 355, 251 Mich. 478.

23. Utah.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.

Effect of waiver; notice
A party to a contract for the exchange of real property who has waived the right to terminate the contract because of the other party's failure to perform on the specified day cannot claim a forfeiture without giving such other party notice of his intention and allowing a reasonable time within which such other party may perform.—Beck v. Chambers, 133 P. 972, 18 N.M. 53.

24. N.D.—Kicks v. Lisbon State Bank, 98 N.W. 408, 12 N.D. 576.
23 C.J. p 212 note 22.

25. Mass.—Pead v. Trull, 53 N.E. 901, 173 Mass. 450.

26. Cal.—Bixby v. Bent, 59 Cal. 522.

27. Tex.—Arndt v. White, Civ.App., 13 S.W.2d 151.
Premature delivery of escrow instrument generally see Escrows § 11.

28. **Oral contract**
W.Va.—Wilson v. Maxon, 49 S.E. 123, 56 W.Va. 194.

Alteration of contract
A note added to a contract to exchange lands in so far as containing a provision beneficial to defendants would furnish no reason for their terminating the contract and refusing to perform, even though it may have been added after the contract was signed.—Le Marinel v. Bach, 196 P. 22, 114 Wash. 651.

Variety of parties as affecting rescission
Mere variety of parties with whom purchaser was caused to deal could not defeat purchaser's rescission of property exchange.—Gould v. James, 299 P. 275, 43 Wyo. 161.

tract without the concurrence of his coöwner.[29] The fact that a contract for the exchange of real property is executed does not prevent rescission.[30]

b. Grounds

Fraud, mutual mistake, failure of consideration, failure or refusal to perform, and breach of warranty may constitute grounds for rescission of a contract for exchange.

An executory contract for the exchange of property or the exchange itself is vitiated by fraud, and if either party has been induced by the fraud of the other to make the exchange, he may rescind.[31] The right to rescind exists although the contract is in writing.[32]

The right of a party to rescind for fraud does not depend on the relative values of the properties involved, but solely on whether he was to get under the terms of the contract what he was led to believe he was trading for,[33] although it has been held that a party to a contract for exchange is not entitled to rescission if he has suffered no injury or damage.[34]

Mistake. Mutual mistake is ground for rescission of a contract for the exchange of property.[35] However, a party to a contract for the exchange of personal property cannot avoid such contract on the ground of mistake after it has been executed, where it does not appear that the mistake was shared by the other party, or that such other party had knowledge of the mistake of the party who seeks to avoid the contract.[36]

Nonperformance and failure of consideration. While there is some authority for the view that a party to a contract for the exchange of personal property who has delivered his property and has thereby acquired title to, but has not received the other party's property, cannot rescind the contract,[37] and that an executed contract for the exchange of real property cannot be rescinded for the failure of the opposite party to perform an act in the future, in the absence of a showing that the promise to do such act was made for the purpose

29. Ala.—Jones v. Anderson, 76 Ala. 427.

30. Tex.—Richardson v. Cantrell, Civ.App., 201 S.W. 702.

31. Ala.—Ingram & Co. v. Eason, 88 So. 339, 18 Ala.App. 13.
Cal.—Stockton v. Hind, 196 P. 122, 51 Cal.App. 131—Hegel v. Hannas, 184 P. 898, 43 Cal.App. 218.
Ky.—Addison v. Wilson, 37 S.W.2d 7, 238 Ky. 143.
Mass.—Jasper v. Price, 158 N.E. 504, 261 Mass. 103—McCarthy v. Reid, 129 N.E. 675, 237 Mass. 371, 12 A.L.R. 1000.
Mich.—Hillier v. Carpenter, 173 N. W. 386, 206 Mich. 594.
N.Y.—Goins v. Atwood, 197 N.Y.S. 781, 204 App.Div. 439.
S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
Wash.—Siegel v. Schisler, 211 P. 273, 122 Wash. 570.
W.Va.—Kimmell v. Twigg, 107 S.E. 206, 88 W.Va. 531.
Wis.—Becker v. Spalinger, 183 N.W. 173, 174 Wis. 443.
23 C.J. p 212 note 30.
What constitutes fraud see supra § 4.

Analogy to sale
"A defrauded party to an exchange of personal property has the same right to rescission as would a defrauded buyer or seller at common law."—Arledge v. Ridge, 12 Tenn. App. 415, 417.

Extent of fraud
Fraud must be such as to prevent the passing of title.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74.

Fraudulent concealment
Lot owner, contracting in good faith to exchange lot for other realty after purchasing it at trustee's sale under former owner's trust deed, was not bound by constructive knowledge of state of his title or pendency of insolvency proceedings against former owner, and therefore was not guilty of fraudulent concealment entitling the opposite party to rescind.—Rogers v. Roop, 92 S.W. 2d 423, 19 Tenn.App. 579.

Danger of eviction
Innocent purchaser for value, without notice of interest held by heirs of vendor's deceased wife, was entitled to rescission of exchange of property, where deed did not cover all land which grantor said would be included, so that as to land not included in deed grantee stood in danger of eviction.—Mead v. King, Tex.Civ.App., 285 S.W. 832.

In Georgia rescission of a horse trade, where a right to rescind is not expressly reserved, cannot be had for constructive fraud or merely on account of a warranty, express or implied; there must be actual fraud, and plaintiff must show that defendant knowingly made false representations with intent to deceive, and that he was deceived and suffered damage thereby.—Johnson v. Fulford, 7 S.E.2d 574, 61 Ga.App. 805—Hendley v. Chambliss, 119 S.E. 351, 30 Ga.App. 736—Bowden v. King, 106 S.E. 926, 26 Ga.App. 705—Newkirk v. Burts & Goodman, 104 S.E. 456, 25 Ga.App. 689—West v. Thompson, 103 S.E. 688, 25 Ga.App. 454—23 C.J. p 212 note 30 [a].

32. Mich.—Warnes v. Brubacker, 65 N.W. 276, 107 Mich. 440.

33. Iowa.—Selby v. Matson, 114 N. W. 609, 137 Iowa 97, 14 L.R.A.,N.S., 1210.

34. Tex.—Bryant v. Vaughn, 33 S. W.2d 729, reversing Vaughn v. Bryant, Civ.App., 1 S.W.2d 667.

35. N.Y.—Loeschigh v. Blun, 1 Daly 49.

Innocent misrepresentation that mortgage on property was held by bank warranted rescission of contract for mutual mistake and failure of consideration.—Greene v. Adomaitis, 156 N.E. 695, 259 Mass. 605.

Prescription as curing deficiency in amount of land
Plaintiffs who contracted with defendants for exchange of realty and personalty and thereafter ascertained by survey that fence which defendants had pointed out was located beyond true boundary line were not precluded from rescinding contract for mistake on ground that defendants had acquired title to strip between true boundary line and fence by prescription, in absence of evidence as to adjoining landowner's rights.—Garland v. Shrier, 64 P.2d 530, 155 Or. 387.

Where mistake in deed is corrected as soon as it is discovered, it furnishes no ground for rescission.—Johnson v. Franks, 9 S.W.2d 796, 177 Ark. 1194.

36. Iowa.—Wilson v. Wyoming Cattle & Investment Co., 105 N.W. 338, 129 Iowa 16.
23 C.J. p 213 note 34.

37. N.Y.—Morgan v. Powers, 66 Barb. 35.

of defrauding and without any intent to fulfill it,[38] the general rule is that failure or refusal to perform in accordance with the provisions of the contract of exchange is ground for rescission,[39] at least where the contract of exchange is still executory.[40] A party is not entitled to rescind the contract on the alleged ground that the other party has not performed where he himself is in default,[41] or where his own neglect or failure is responsible for the other party's failure to perform.[42]

The failure of consideration for an exchange of property gives the right to a rescission.[43] However, there is authority to the effect that where, in a fair transaction, one commodity is given simply in exchange for another, the party receiving such commodity in exchange cannot repudiate the arrangement and demand other compensation, because the commodity which he accepted has proved to be of no value.[44] A partial failure of consideration has been held to afford no ground for disaffirming the executed portions of the contract,[45] at least where the breach is compensable in damages.[46] Where one party has received a deed of land in an exchange of property, it has been held that he cannot rescind on the mere ground of failure of title and must seek his remedy on the covenants of the deed;[47] but there is also authority to the effect that where an owner of land, agreeing to convey

38. Tex.—Long v. Calloway, Civ. App., 220 S.W. 414.

39. Ga.—Altman v. Massell Realty Co., 146 S.E. 849, 167 Ga. 828.
Iowa.—Pickett v. Comstock, 229 N. W. 249, 209 Iowa 968—Richman v. Iowa Farm Land Co., 197 N.W. 309, 197 Iowa 429.
Kan.—Pyle v. Goddard, 272 P. 144, 127 Kan. 20.
Tex.—Szanto v. Pagel, Civ.App., 47 S.W.2d 632, error dismissed.
23 C.J. p 213 note 37.

Substantial performance will prevent rescission on the ground of nonperformance.
N.C.—Jenkins v. Myers, 183 S.E. 529, 209 N.C. 312.
Tenn.—Spivey v. Roadman, 6 Tenn. App. 442.

Repudiation
In action to recover damages sustained when defendants rescinded a contract for exchange of property and refused restitution to plaintiffs, where prior to time plaintiffs' note became due, defendants denied plaintiffs' right to the property which plaintiffs were entitled to receive in exchange, threatened unlawful detainer and thus denied plaintiffs' right to pay the note when due and receive title to the property, such acts constituted a repudiation of the exchange agreement so that plaintiffs were entitled to rescind the contract and sue for damages.—McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

Acts not constituting nonperformance
(1) Defendant, assigning interest in bank stock and note after contracting to deliver them to plaintiff, did not rescind contract.—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.

(2) Failure to pay cash provided for in exchange contract was not ground for rescission, in view of payments by escrow agent to satisfy mortgages on plaintiff's property.—Malcolm v. Tate, 267 P. 527, 125 Or. 419.

(3) Where under contract of exchange of realty, defendant assumed a mortgage for twenty thousand dollars and was to pay plaintiff four thousand five hundred dollars, but could retain what he had to pay in excess of liens amounting to twenty thousand dollars against the land, his retention of part of the money agreed to be paid to reimburse for a payment in excess of the specified amount, and also to protect himself against an unpaid judgment for three thousand dollars, constituting a lien on the land was justified and did not entitle the other party to rescission.—Hamann v. Egan, 184 N. W. 236, 44 S.D. 416.

(4) Sufficiency of performance generally see infra § 12.

40. Ga.—Fletcher v. Fletcher, 124 S.E. 722, 158 Ga. 899.
Tex.—Long v. Calloway, Civ.App., 220 S.W. 414.

Nonperformance as equivalent to failure of consideration
Failure of any one of parties to exchange agreement to perform constituted failure of consideration, within statute authorizing rescission of entire transaction where there is a failure of consideration.—Lasher v. Faw, 289 P. 821, 209 Cal. 726.

Failure to pay taxes
Party to contract for exchange of properties had right to end negotiations where, after three months, other party had failed to pay taxes on her property as required by contract.—Jackson v. Thompson, Tex. Civ.App., 74 S.W.2d 1055.

41. Neb.—Te Poel v. Shutt, 78 N.W. 288, 57 Neb. 592.
Effect of failure to perform generally see infra § 11.

42. Ark.—Johnson v. Franks, 9 S. W.2d 796, 177 Ark. 1194.
Cal.—Page v. Brown, 9 P.2d 895, 122 Cal.App. 12.

43. N.C.—Harrington v. Furr, 90 S. E. 775, 172 N.C. 610.
Tex.—Hatton v. Bodan Lumber Co., 123 S.W. 163, 57 Tex.Civ.App. 478.
23 C.J. p 213 note 41.

Investment certificates illegally issued
Agreement under which land was to be exchanged for investment certificates in corporation became voidable when certificates were issued contrary to terms of permit which was issued by corporation commissioner and which prohibited issuance of investment certificates by corporation in exchange for real property.—Setchell v. Prochaska, 48 P.2d 117, 8 Cal.App.2d 541.

44. Ind.—Monticello School Town v. Grant, 1 N.E. 302, 104 Ind. 168.
Utah.—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.

45. Mo.—Shannon v. Crabtree, 71 S.W.2d 709.

46. Or.—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.

Promise to perform act in future
Where consideration for transfer of building was parol promise to open store therein for the benefit of the community, and also agreement to convey lands, and the lands were conveyed but the parol promise was not performed, the remedy of rescission was not available to the promisees.—Douthitt v. Chenoweth, Mo.App., 34 S.W.2d 556.

47. Ind.—Deford v. Urbain, 48 Ind. 219.

Defendant's failure to pay off mortgage
One exchanging for land forming a part of a larger tract covered by a mortgage, with full knowledge of the facts, is not entitled to cancellation on the ground of failure of consideration because his vendor failed to pay off the mortgage on the whole property, and it was lost on foreclosure, there being no fraud, misrepresentation, or concealment of fact.—

the same to another in exchange for personalty, fails to convey good title to the land, the owner of the personalty may affirm the contract and sue for damages, or he may rescind the contract, and demand that the owner of the land place him in statu quo by restoring to him the property delivered in fulfillment of the contract.[48] Where a contract for the exchange of realty has been executed, the burning of a building on one of the properties does not constitute a failure of consideration justifying a rescission.[49]

Breach of warranty. There is a conflict of authority with respect to the right to rescind for a mere breach of warranty of personal property; some courts recognize the right to rescind in the case of a breach of warranty of quality or condition[50] although there is no express provision for rescission,[51] and there is no fraud.[52] The right to rescind has been recognized even where the defects were obvious.[53] The right to rescind for breach of warranty of title is also recognized in some jurisdictions.[54]

In other jurisdictions, however, the right to rescind is denied where it is not reserved in the contract and no question of fraud is involved, in the case of a breach of warranty of quality, or condition,[55] or of title;[56] but the right to rescind has been recognized where the existence of an encumbrance has been fraudulently concealed.[57] Where the privilege of returning is superadded to an express warranty, the injured person has the right to rescind.[58] Where the contract provides that if the article is not as represented the party transferring it may either rescind the contract and return the property which the other party delivered in exchange, or pay the appraised value of the property delivered, on the return of, or offer to return, the consideration received by such other party, the privilege of paying the appraised value is forfeited where the party transferring the warranted article has failed to avail himself of it.[59]

c. Time for Rescission

A party who desires to rescind a contract for exchange must act promptly, or at least within a reasonable time after discovery of the facts furnishing the ground for rescission.

A party who desires to rescind a contract for the exchange of property for the wrong or default of the other party must act promptly or at least within a reasonable time after the discovery of the facts furnishing the ground for rescission,[60] or after the

MacFarland v. Hanes, D.C.N.C., 286 F. 937.

48. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.

49. Kan.—Linn County Bank v. Grisham, 185 P. 54, 105 Kan. 460.

50. Ala.—Ingram & Co. v. Eason, 88 So. 339, 18 Ala.App. 13.
23 C.J. p 214 note 46.

51. Mass.—Smith v. Hale, 33 N.E. 493, 158 Mass. 178, 35 Am.S.R. 485.
Wis.—Zitske v. Goldberg, 38 Wis. 216.

52. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.
Mass.—Smith v. Hale, 33 N.E. 493, 158 Mass. 178, 35 Am.S.R. 485.

53. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.
Mo.—Irby v. Stubblefield, 162 S.W. 660, 177 Mo.App. 256.

54. Miss.—Hatcher v. Bagwell, 72 So. 193, 111 Miss. 766.
23 C.J. p 214 note 50.

55. Ga.—Johnson v. Fulford, 7 S.E.2d 574, 61 Ga.App. 805—Hendley v. Chambliss, 119 S.E. 351, 30 Ga.App. 736—Newkirk v. Burts & Goodman, 104 S.E. 456, 25 Ga.App. 689.
23 C.J. p 214 note 51.

56. Or.—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.
23 C.J. p 214 note 52.

57. Ark.—Boren v. Bettis, 194 S.W. 850, 128 Ark. 457.

58. Md.—Miller v. Grove, 18 Md. 242.
23 C.J. p 214 note 54.

59. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.

60. Ala.—Ingram & Co. v. Eason, 88 So. 339, 18 Ala.App. 13.
Cal.—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532—Stockton v. Hind, 196 P. 122, 51 Cal.App. 131.
Ga.—Widincamp v. Patterson, 127 S.E. 158, 33 Ga.App. 483.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519—Edmunds v. Ninemires, 204 N.W. 219, 200 Iowa 805.
Mich.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74—Vernon v. Antona, 192 N.W. 681, 222 Mich. 83.
N.J.—Edelman v. Lamping, 148 A. 650, 105 N.J.Eq. 515.
N.Y.—Goldman v. Sontag, 15 N.Y.S.2d 407, 257 App.Div. 688, motion denied 20 N.Y.S.2d 415, 259 App.Div. 949, and 20 N.Y.S.2d 1005, 259 App.Div. 959, and appeal dismissed 28 N.E.2d 18, 283 N.Y. 589, reargument denied 28 N.E.2d 44, 283 N.Y. 648.
Okl.—Brown v. Privette, 234 P. 577, 109 Okl. 1.
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.
S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
S.D.—Moen v. Farmers' Implement Co., 206 N.W. 422, 49 S.D. 62.
Va.—White v. Bott, 158 S.E. 880, 158 Va. 442, modified on other grounds 163 S.E. 397, 158 Va. 442.
Wis.—Wachowski v. Lutz, 201 N.W. 234, 184 Wis. 584—Mueller v. Michels, 197 N.W. 201, 184 Wis. 324, modified on other grounds 199 N.W. 380, 184 Wis. 324.
Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.
23 C.J. p 214 note 57.

Rescission held timely

(1) Two months after discovery of fraud.
Cal.—Connell v. Crawford, 268 P. 948, 92 Cal.App. 715.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.

(2) Nine months after discovery of fraud.—Cahill v. Readon, 273 P. 653, 85 Colo. 9.

(3) Plaintiff was sufficiently prompt in demanding a rescission of an exchange for a ranch, he having done so immediately on discovery of the falsity of defendant's representations as to the capacity of the land for hay and vegetables, the quality of the soil, and the contiguity of a school, to develop and disclose which took time, although he took no action when, two months before, he discovered that a portion

discovery of facts sufficient to put him on inquiry which would disclose such facts.[61]

What is a reasonable time in which to rescind depends on the circumstances of the particular case.[62] Mere lapse of time[63] before the discovery of the fraud,[64] and even after the fraud has been discovered,[65] will not necessarily bar the right to rescind, although delay after the discovery of fraud may be material as evidence of an election to affirm.[66] A more important consideration is whether, as a result of the delay, there has been a change in the situation of the alleged wrongdoer or in the condition or value of the property to his detriment.[67] Delay caused by the wrongdoer's continuing fraud does not prevent rescission.[68]

Whether the act of avoidance is within a reasonable time is a question of law to be decided by the court on all the circumstances of the case unless something equivocal in the circumstances or material facts in dispute requires submission to the jury with instructions.[69]

d. Election to Rescind, Notice, and Demand

A party who seeks to rescind a contract for the exchange of property should take steps sufficient to show his election to rescind.

Where a party seeks to rescind a contract for the exchange of property on account of the wrong or default of the other party, he should take steps sufficient to show his election to rescind.[70] In the case of personal property, an action for the possession of the property given in exchange is a sufficiently definite disaffirmance of the contract and election to rescind.[71] Where the parties have exchanged lands, but deeds are not delivered pursuant to agreement, ejectment will not lie to recover the land for such failure, without notice and an offer to rescind the contract,[72] but there is authority that

of the seventy five acres in cultivation, and represented by defendant to be on the ranch, was on a neighbor's land.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.

(4) Plaintiff, offering to rescind contract exchanging lands immediately after discovering fraud ten months after contract, was not barred by laches from seeking rescission.—Cooper v. Whitehead, 136 S.E. 911, 163 Ga. 662.

(5) Other cases.

Iowa.—Leaman v. Wise, 200 N.W. 691, 198 Iowa 1035.

Mich.—Heth v. Oxendale, 213 N.W. 133, 238 Mich. 236.

Offer to rescind held too late

(1) After delay of eight months. —Maioran v. Calabrese, 135 A. 69, 100 N.J.Eq. 315.

(2) After delay of sixteen months. —Walloch v. Washkowiak, 207 N.W. 286, 189 Wis. 491.

(3) Vendee mortgagor failing to move to rescind exchange contract, because premises were padlocked, until after mortgage foreclosure proceedings were commenced, was not entitled to rescind.—Edelman v. Lamping, 148 A. 650, 105 N.J.Eq. 515.

(4) Other cases.—Ginsberg v. Wolters, 121 A. 730, 94 N.J.Eq. 532.

After regaining sobriety

Where plaintiff made contract for exchange of property while drunk which was voidable, suit for rescission several months after he stopped drinking was too late.—Katter v. Hardin, 288 S.W. 881, 172 Ark. 268.

61. Tex.—Barr v. McCauley, Civ. App., 240 S.W. 961, dismissed for want of jurisdiction.

62. Ark.—Hunter v. Scott, 268 S.W. 356, 168 Ark. 1.

Cal.—Connell v. Crawford, 268 P. 948, 92 Cal.App. 715—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725—Stockton v. Hind, 196 P. 122, 51 Cal.App. 131.

Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519.

Mich.—Heth v. Oxendale, 213 N.W. 133, 238 Mich. 236—Schliska v. Ross, 203 N.W. 81, 230 Mich. 225. 23 C.J. p 214 note 57 [b].

63. Cal.—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532.

Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519.

Mass.—Jasper v. Price, 158 N.E. 504, 261 Mass. 103.

Mich.—Upell v. Bergman, 224 N.W. 404, 246 Mich. 82—Heth v. Oxendale, 213 N.W. 133, 238 Mich. 236—Schliska v. Ross, 203 N.W. 81, 230 Mich. 225.

Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

64. Miss.—Brown v. Norman, 4 So. 293, 65 Miss. 369, 7 Am.S.R. 663. 23 C.J. p 215 note 58.

65. Kan.—Wicks v. Smith, 21 Kan. 412, 30 Am.R. 433.

Tex.—McDonald v. Lastinger, Civ. App., 214 S.W. 829.

66. Kan.—Wicks v. Smith, 21 Kan. 412, 30 Am.R. 433.

Waiver or loss of right see § 10 f infra.

67. Cal.—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230.

Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519.

Mass.—Jasper v. Price, 158 N.E. 504, 261 Mass. 103.

Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74—Upell v. Bergman, 224 N.W. 404, 246 Mich. 82—Heth v. Oxendale, 213 N.W. 133, 238 Mich. 236—Schliska v. Ross, 203 N.W. 81, 230 Mich. 225.

Wis.—Mueller v. Michels, 197 N.W. 201, 184 Wis. 324, modified on other grounds 199 N.W. 380, 184 Wis. 324.

68. Kan.—Wells v. Higgins, 58 P. 2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606.

Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

69. Mass.—Bassett v. Brown, 105 Mass. 551.

70. Kan.—Springer v. Keller, 259 P. 1068, 124 Kan. 369, denying rehearing 257 P. 964, 124 Kan. 33.

Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.

Va.—White v. Bott, 158 S.E. 880, 158 Va. 442, modified on other grounds 163 S.E. 397, 158 Va. 442.

Notice and filing of lis pendens

Plaintiff cannot be held not to have rescinded contract after sending rescission notice, introduced at trial without objection, to defendant's place of abode, and filing lis pendens shortly thereafter.—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.

Waiver of irregularity of notice

Defendants' refusing to consider rescission of contract for exchange of realty and personalty after plaintiffs' discovery of fraud, waived any insufficiency of notice of rescission or irregularity of tender of proceeds from sale of defendants' personalty. —Wells v. Higgins, 58 P.2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606.

71. Iowa.—Rose v. Eggers, 127 N. W. 196, 148 Iowa 306.

72. Ohio.—Maynard v. Cable, Wright 18.

Conditions precedent to action for ejectment see Ejectment § 27.

the party who has legal title to lands, possession of which was given pursuant to an oral exchange of lands, may maintain ejectment without making an offer to rescind.[73]

Demand for performance. It has been held that a party has no right to rescind the contract and to recover the value of the property transferred by him without properly demanding of the other party that he complete performance of his obligations under the contract which he has almost entirely performed.[74]

e. Restoration of Status Quo

As a general rule a contract for the exchange of property may not be rescinded unless the parties are restored to the status quo.

A rescission of a contract for the exchange of property on account of the wrong or default of the other party demands, as a general rule, the restoration of the status quo of the parties.[75] Until a party has returned the property which he himself has received, or has made a valid tender of the return thereof, he cannot ordinarily rescind an exchange for fraud,[76] mutual mistake,[77] breach of warranty,[78] nonperformance,[79] failure of title,[80] or, it seems, duress.[81] A party is not entitled to rescission if he has rendered impossible the restitution of the property or interest therein by permitting its

73. Ala.—Alexander v. Wheeler, 69 Ala. 332.

74. Iowa.—McConnell v. Newell, 111 N.W. 17, 133 Iowa 736.
23 C.J. p 215 note 63.

75. Ala.—Hafer v. Cole, 57 So. 757, 176 Ala. 242.
Cal.—Wainwright v. Weske, 23 P. 12, 82 Cal. 193.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552—Brady v. Cole, 45 N. E. 438, 164 Ill. 116.
Ind.—Rohrof v. Schulte, 55 N.E. 427, 154 Ind. 183.
Iowa.—In re Gensicke's Estate, 237 N.W. 333—Campbell v. Moorehouse, 120 N.W. 79, 141 Iowa 568.
Kan.—Neal v. Reynolds, 16 P. 785, 38 Kan. 432.
Ky.—Beattie v. Friddle, 17 S.W.2d 246, 248, 229 Ky. 361, citing **Corpus Juris.**
Mich.—Szarkowski v. Pfister, 247 N. W. 163, 262 Mich. 226—Hillier v. Carpenter, 173 N.W. 386, 206 Mich. 594.
N.Y.—Francis v. New York & B. E. R. Co., 15 N.E. 192, 108 N.Y. 93.
Or.—Elgin v. Snyder, 118 P. 280, 60 Or. 297—Scott v. Walton, 52 P. 180, 32 Or. 460.
Tenn.—Spivey v. Roadman, 6 Tenn. App. 442.
Tex.—Chambers v. Grisham, Civ. App., 157 S.W. 1177.
Wash.—Blum v. Smith, 119 P. 183, 66 Wash. 192—Stelter v. Fowler, 113 P. 1096, 62 Wash. 345, motion denied 114 P. 879, 62 Wash. 345.
23 C.J. p 215 note 70.

Restoration of status quo:
On rescission by mutual consent of contract for exchange see supra § 9.
Sales of personalty see the C.J.S. title Sales § 107, also 55 C.J. p 277 note 78 et seq.
Sales of realty see the C.J.S. title Vendor and Purchaser §§ 137, 170, also 66 C.J. p 761 note 69 et seq, p 819 note 29 et seq.

Rescinding party, as well as opposite party, is entitled to be restored to the status quo.—Rudnick v. Rudnick, 183 N.E. 348, 281 Mass. 205—23 C.J. p 213 note 41.

Restoration to status as lessee
Exchange of plaintiff's home for defendant's lease of an apartment house, accomplished by defendant having his lease canceled and another lease executed to plaintiff, can be rescinded on tender of an assignment of the lease without consent of the lessor, the lease containing no provision against assignment.—Spencer v. Deems, 185 P. 671, 43 Cal.App. 601.

Balancing receipts and disbursements
(1) Where defendants took possession of plaintiff's land under parol contract of exchange and received sufficient rents and profits to discharge debt secured by plaintiff's deed of such land to defendant, given prior to such contract, plaintiff could sue for rescission of contract, and accounting and recovery of land, and since an accounting between parties was necessary to fix amount of debt, if any, no formal tender of amount due defendant was necessary.—Fletcher v. Fletcher, 124 S. E. 722, 158 Ga. 899.

(2) Where defendant in suit to rescind exchange of property received some eight hundred dollars more from sale of oil leases on land than amounts paid to discharge mortgage and back taxes, other party to exchange who received land to which title was bad was entitled to rescind, notwithstanding defendant's discharge of mortgage and back taxes.—Sherman v. Sipper, Tex. Civ.App., 129 S.W.2d 458, reversed on other grounds, Sup., 152 S.W.2d 319.

76. Ala.—Harris v. Nichols, 134 So. 798, 223 Ala. 58—Ingram & Co. v. Eason, 88 So. 339, 18 Ala.App. 13.
Cal.—Thompson v. Moore, 65 P.2d 800, 8 Cal.2d 367, 109 A.L.R. 1027—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664.
Ill.—Farris v. Cavender, 154 N.E. 111, 323 Ill. 227—Huslad v. Cerney, 151 N.E. 871, 321 Ill. 354.
Kan.—Springer v. Keller, 259 P. 1068, 124 Kan. 369, denying rehearing 257 P. 964, 124 Kan. 33.
Ky.—Addison v. Wilson, 37 S.W.2d 7, 238 Ky. 143.
Mich.—Papciak v. Morawski, 219 N. W. 601, 243 Mich. 157—Vernon v. Antona, 192 N.W. 681, 222 Mich. 83.
N.Y.—Goldman v. Sontag, 15 N.Y. S.2d 407, 257 App.Div. 688, motion denied 20 N.Y.S.2d 415, 259 App. Div. 949, and 20 N.Y.S.2d 1005, 259 App.Div. 959, and appeal dismissed 28 N.E.2d 18, 283 N.Y. 589, reargument denied 28 N.E.2d 44, 283 N.Y. 648—Goins v. Atwood, 191 N.Y.S. 781, 204 App.Div. 439.
S.C.—Manship v. Newsome, 198 S E. 428, 188 S.C. 6.
23 C.J. p 215 note 71.

Mere demand for rescission without an offer to make restoration of the personal property received in exchange for other personality is not sufficient although the defrauded party has with him at the time the property received.—Samples v. Guyer, 24 So. 942, 120 Ala. 611.

Tender of deed
Mere written offer to rescind exchange of realty without executing necessary deed of reconveyance is ineffective; there must be a tender of a deed.—Milton v. Hare, 280 P. 511, 130 Or. 590.

77. Ala.—Craft v. King, 167 So. 332, 232 Ala. 155.

78. Ala.—McCoy v. Prince, 66 So. 950, 11 Ala.App. 388.
23 C.J. p 216 note 72.

79. Cal.—Bandy v. Westover, 252 P. 593, 200 Cal. 222.
23 C.J. p 216 note 73.

80. Wis.—Pfeifer v. Layton Park Oil & Soap Co., 149 N.W. 395, 159 Wis. 1.
23 C.J. p 216 note 74.

81. Ind.—Reynolds v. Copeland, 71 Ind. 422.

forfeiture or the foreclosure of an encumbrance thereon,[82] or by placing additional encumbrances on it.[83]

Reservation of the right to rescind, within a certain time on certain conditions, does not entitle the party in whose favor the reservation is made to reclaim the property given by him without returning the property received by him or tendering a return thereof.[84] Ordinarily, the fact that the defrauded party returned all but a small part of the consideration received does not aid him,[85] even though the retention was the result of a mistake.[86]

Property to be restored. The party seeking to rescind need not return property received by him which was not involved in the exchange.[87] Where the defrauded party receives money in addition to goods, and the other party has sold the goods received by him on the exchange, it has been held that the defrauded party need not offer to return the money as well as the goods.[88] Where the defrauded party elects to treat a fraudulent exchange as void, and the title of the chattel received by him has wholly failed, he may rescind the exchange without transferring to the other party a good title to such chattel which he has subsequently obtained from a third person.[89]

Bailees of property. A person who has received certain property of which the transferor was a mere bailee, in exchange for other property, cannot rescind the contract of exchange without returning to the bailor the property received on the exchange where the bailor has succeeded to the bailee's possessory right to the property so received.[90] The mere fact that the rescinding party has retained the property after the refusal of the other party to receive it and uses it occasionally does not affect the rescission where his possession is that of a bailee.[91] Even where in such case the rescinding party uses the retained property regularly, his rights with respect to rescission are not lost where such use does not amount to an assertion of title in himself nor a denial of the other party's ownership.[92] However, in such case the rescinding party should hold the property retained merely as the bailee of the owner.[93]

When restoration unnecessary. Both in the case of fraud[94] and breach of warranty,[95] the return of the property received is not required where the injured party has been rendered unable to make restoration by the conduct or fault of the other party. Where without fault on the part of the injured party the property received has been so changed or lost that it cannot be restored in specie, the contract may nevertheless be rescinded on equitable terms.[96]

82. Mich.—Augustyn v. Zawacki, 229 N.W. 453, 250 Mich. 218—Lemmon v. Kenas, 225 N.W. 558, 247 Mich. 378.
Wis.—Mueller v. Michels, 199 N.W. 380, 184 Wis. 324, modifying 197 N.W. 201, 184 Wis. 324.

83. Tex.—Ed S. Hughes Co. v. Scott, Civ.App., 46 S.W.2d 1111.
Placing property in wife's name
Remedy by rescission is not lost by party to exchange because of title being taken in name of wife, she joining him in suit.—Jasper v. Price, 158 N.E. 504, 261 Mass. 103.
Termination of litigation involving property
Rescission of contract for exchange of property was not defeated because property became involved in litigation, which plaintiff successfully cleared up in reasonable time, so that he was able to reconvey free of all encumbrances.—Pyle v. Goddard, 272 P. 144, 127 Kan. 20.

84. N.Y.—Stoddard v. Graham, 23 How.Pr. 518.

85. Ga.—Widincamp v. Patterson, 127 S.E. 158, 33 Ga.App. 483.
Ind.—Jarrett v. Cauldwell, 94 N.E. 790, 47 Ind.App. 478.
Retention of money as damages
In rescinding an exchange of property for fraud, where plaintiff tendered reconveyance, but retained, as damages, one thousand dollars paid him by defendant, subject to being charged therewith if not entitled thereto, this sufficiently restored the status quo as respects plaintiff.—Stanford v. Smith, 260 S.W. 435, 163 Ark. 583.

86. Ind.—Jarrett v. Cauldwell, 94 N.E. 790, 47 Ind.App. 478.

87. Cal.—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664.
N.D.—Mulroy v. Jacobson, 139 N.W. 697, 24 N.D. 354.

88. Ga.—Straus v. Herman, 45 Ga. 222.

89. N.H.—Moody v. Drown, 58 N.H. 45.
23 C.J. p 217 note 91.

90. Or.—Freeman v. Trummer, 91 P. 1077, 50 Or. 287.

91. Ala.—Hays v. Woodham, 40 So. 511, 145 Ala. 597.

92. Ala.—Smith v. Thomas, 78 So. 820, 201 Ala. 442.
23 C.J. p 217 note 95.

93. Ala.—Smith v. Thomas, supra—McCoy v. Prince, 66 So. 950, 11 Ala.App. 388.

94. Kan.—Wells v. Higgins, 58 P. 2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606.
Mo.—Parish v. Casner, 282 S.W. 392.
N.Y.—Nuccio v. 103 East 114th St. Realty Corporation, 241 N.Y.S. 333, 136 Misc. 485, affirmed 249 N.Y.S. 909, 232 App.Div. 802.
S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
Tenn.—Saint v. Taylor, 12 Heisk. 488.
23 C.J. p 216 note 80.

95. Ala.—McCoy v. Prince, 66 So. 950, 11 Ala.App. 388.

96. Iowa.—Stroff v. Swafford, 44 N.W. 293, 79 Iowa 135.
Mich.—Szarkowski v. Pfister, 247 N.W. 163, 262 Mich. 226.
Tex.—Vaughn v. Bryant, Civ.App., 1 S.W.2d 667, reversed on other grounds, Bryant v. Vaughn, Sup., 33 S.W.2d 729—Long v. Calloway, Civ.App., 220 S.W. 414.
Doing equity where property not returned see infra this subdivision of this section.
Property encumbered
(1) Where defendants were guilty of fraud in effecting an exchange of land, plaintiff may obtain rescission of the contract, even though she had, before discovery of the fraud, entered into a cropping contract, judgment that defendant shall receive the share of the crops which plaintiff would otherwise have received being a sufficient provision

No return of the property is necessary where nothing would be saved to the wrongdoer by its return.[97] Where the consideration received is absolutely worthless, no tender or return is necessary in the case of either fraud,[98] or breach of warranty.[99]

The injured party is not required to deliver personalty which is already in the constructive possession of the other party,[1] and he need not offer to make restitution where the agreement is purely executory on the part of his adversary.[2] No tender before bringing suit is necessary, it has been held, where the injured party seeks rescission and cancellation by decree of court, at least where the suit for rescission and cancellation is in equity.[3]

Where the defrauded party is unable to locate the other party because he has left the neighborhood, a failure to return the property is excused.[4]

Waiver. A party may waive the requirement that the goods must be returned to the place of delivery as a condition precedent to rescission on the part of the defrauded party and may accept the goods at another place.[5] A positive refusal to rescind an exchange excuses the necessity for a formal tender of the property received.[6] A ground for the refusal by the wrongdoer to accept the return of the property transferred in exchange may be waived by placing such refusal on a different ground.[7]

The rescinding party may waive the requirement that his adversary must restore him to the status quo.[8]

Doing equity where property not returned. Restoration of the status quo is necessary only to the extent that the equities of the case require.[9] Although a return of the property or a tender thereof may be excused, the rescinding party is not relieved of the obligation of doing equity;[10] and, indeed, it has been held proper for such party to offer, at the time of rescission or in the petition for rescission and cancellation, as the case may be, to do whatever equity or a court of equity may require toward restoring the opposite party to the status quo.[11]

for restoration.—Hegel v. Hannas, 184 P. 898, 43 Cal.App. 218.

(2) Cancellation of contract of exchange, except as to certain property, was not precluded by mortgage placed on defendant's property by rescinding party, in view of credit given defendant on property not to be reconveyed equal to the amount of the mortgage.—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.

Sale to minimize damages

The right to rescission is not barred where after discovering the facts on which the rescission is based and for the purpose of minimizing damages the injured party sells part of the property.

Kan.—Wells v. Higgins, 58 P.2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606.

Or.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.

97. Neb.—Faulkner v. Klamp, 20 N. W. 220, 16 Neb. 174.
23 C.J. p 216 note 82.

98. Mich.—Sheldon Axle Co. v. Scofield, 48 N.W. 511, 85 Mich. 177.
23 C.J. p 216 note 84.

Restoration of "everything of value"

Under a statute requiring the restoration of "everything of value," worthless things need not be returned.

Cal.—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.

Okl.—McAtee v. Garred, 91 P.2d 1095, 185 Okl. 314.

99. Ala.—McCoy v. Prince, 66 So. 950, 11 Ala.App. 388.

Mo.—Smith v. Means, 155 S.W. 454, 170 Mo.App. 158.

1. Or.—Garland v. Shrier, 64 P.2d 530, 155 Or. 387.

2. Mich.—Heth v. Oxendale, 213 N. W. 133, 238 Mich. 236.

3. Mich.—Augustyn v. Zawacki, 229 N.W. 453, 250 Mich. 218—Chaffee v. Raymond, 217 N.W. 22, 241 Mich. 392.

Equitable jurisdiction of suits to cancel instruments see Cancellation of Instruments § 50.

Restoration in decree of rescission see infra this subdivision of this section.

4. Neb.—Faulkner v. Klamp, 20 N. W. 220, 16 Neb. 174.

5. Ala.—Young v. Arntze, 5 So. 253, 86 Ala. 116.

Cal.—Spencer v. Deems, 185 P. 671, 43 Cal.App. 601.

6. Cal.—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.

Kan.—Wells v. Higgins, 58 P.2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606.

Mich.—Salata v. Dylewski, 207 N. W. 895, 234 Mich. 331—Burns v. Misura, 199 N.W. 606, 228 Mich. 152.
23 C.J. p 216 note 87.

7. Iowa.—Rose v. Eggers, 127 N.W. 196, 148 Iowa 306.

8. Ark.—Stanford v. Smith, 260 S. W. 435, 163 Ark. 583.

9. Cal.—Spencer v. Deems, 185 P. 671, 43 Cal.App. 601.

Or.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.

Tex.—Vaughn v. Bryant, Civ.App., 1 S.W.2d 667, reversed on other grounds Bryant v. Vaughn, Sup., 33 S.W.2d 729.

Wash.—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.

"Restoration does not require that the opposite party shall be placed in the exact situation in which he was before the exchange, but only that he be placed substantially in his original position, and that the party rescinding shall derive no unconscionable advantage from the rescission."—Fletcher v. Fletcher, 124 S.E. 722, 723, 158 Ga. 899.

10. Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.

Mich.—Szarowski v. Pfister, 247 N. W. 163, 262 Mich. 226.

Tex.—Vaughn v. Bryant, Civ.App., 1 S.W.2d 667, reversed on other grounds Bryant v. Vaughn, Sup., 33 S.W.2d 729.

11. Ga.—Fletcher v. Fletcher, 124 S. E. 722, 158 Ga. 899.

Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.

Mich.—Chaffee v. Raymond, 217 N. W. 22, 241 Mich. 392—Burns v. Misura, 199 N.W. 606, 228 Mich. 152.

Or.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.

Tex.—Vaughn v. Bryant, 1 S.W.2d 667, reversed on other grounds Bryant v. Vaughn, Sup., 33 S.W.2d 729.

Insanity of person to whom property conveyed

That one seeking to rescind contract for exchange of lands for fraud was unable to tender land received because of insanity of husband, to whom title was conveyed, did not excuse offer to make what

Effect of refusal to accept property. A tender of the consideration received made within a reasonable time after the discovery of the ground for rescission is, although refused, as effectual to rescind the contract as if the party to whom the offer is made had accepted it,[12] and the loss or destruction of the property thereafter without fault on the part of the rescinding party does not defeat his right of rescission.[13]

Decree of rescission. A decree rescinding a contract for the exchange of property should effect a restoration of the status quo to the extent that the equities of the case require.[14] Where one party is entitled to rescission and does rescind, the opposite party, if unable to restore the property he received, will be required to make compensation in money.[15] In addition to the return of the properties, the decree in a suit for rescission should make an equitable adjustment of other values received and surrendered by the respective parties before the termination of the contract.[16]

f. Waiver or Loss of Right to Rescind

A party waives his right to rescind a contract for exchange where after discovering the facts furnishing a ground for rescission he uses and deals with the property as his own or does any other act inconsistent with his right to rescind.

Where after the discovery of a fraud,[17] breach of warranty,[18] or inability of the other party to perform in full,[19] entitling a party to an exchange

restitution court in equity would decree.—Farris v. Cavender, 154 N.E. 111, 323 Ill. 227.

12. S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
23 C.J. p 217 note 92.

Second tender during trial

Tender of bill of sale for reconveyance of automobile during trial of suit to rescind contract and recover value of property exchanged therefor was in time, where defendant had previously refused to take the automobile.—Evans v. Hartman, Tex.Civ.App., 286 S.W. 326.

13. Kan.—Pyle v. Goddard, 272 P. 144, 127 Kan. 20.
S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
Wash.—Hillman v. Gordon, 219 P. 46, 126 Wash. 614.

Mortgage foreclosure

The foreclosure of a mortgage on the property after notice of rescission and tender of the property does not bar rescission.
Tex.—Garrett v. Butler, Civ.App., 260 S.W. 1069.
Wyo.—Gould v. James, 299 P. 275, 43 Wyo. 161

14. Cal.—Hegel v. Hannas, 184 P. 898, 43 Cal.App. 218.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Mich.—Chaffee v Raymond, 217 N. W. 22, 241 Mich. 392.
Or.—Larsen v. Lootens, 203 P. 621, 102 Or. 579.
Wash.—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.
Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

15. Mass.—Rudnick v. Rudnick, 183 N.E. 348, 281 Mass. 205.
Doing equity where property not returned see supra this subdivision of this section.

Measure of restitution

(1) On rescission, for defendant's false representations, of an exchange of property, defendant having sold the property which he received from plaintiff, plaintiff is entitled to recover its fair cash value, not its speculative value.—Nordstrom v. Hover, 189 P. 999, 111 Wash. 176.

(2) The measure of restitution is the value of farm conveyed by plaintiff when trade was made, and not what defendant thereafter received on its sale.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.

16. Wash.—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.

Improvements

Party rescinding exchange of lands agreement, not being in default, would be entitled to allowance for value of permanent, substantial improvements erected by him on land of his adversary.—Fletcher v. Fletcher, 124 S.E. 722, 158 Ga. 899.

Payments received and rental value

(1) Defrauded transferee of land contract should account for payments received thereon and have credit for rent on property exchanged.—Gadzinski v. Rola, 224 N.W. 334, 246 Mich. 10.

(2) Vendor on rescission of contract for exchange of properties was entitled to recover interest on mortgage and taxes accruing during purchaser's possession.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

(3) On rescission of exchange of lands, plaintiff was entitled to recover value of land which he conveyed to defendant in part payment and which defendant had sold, without interest, but was chargeable with rental value of premises occupied by him.—McMillan v. Benfield, 126 S. E. 246, 159 Ga. 457.

Services

Purchaser of hotel property on rescission of exchange agreement was entitled to recover value of services in managing hotel.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

17. Kan.—Springer v. Keller, 259 P. 1068, 124 Kan. 369, denying rehearing 257 P. 964, 124 Kan. 33.
Mich.—Vernon v. Antona, 192 N.W. 681, 222 Mich. 83.
Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.
Mont.—Beebe v. James, 8 P.2d 803. 807, 91 Mont. 403, citing **Corpus Juris.**
N.Y.—Goldman v. Sontag, 15 N.Y.S. 2d 407, 257 App.Div. 688, motion denied 20 N.Y.S.2d 415, 259 App Div. 949, and 20 N.Y.S.2d 1005, 259 App.Div. 959, and appeal dismissed 28 N.E.2d 18, 283 N.Y. 589, reargument denied 28 N.E.2d 44, 285 N.Y. 648.
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.
Tex.—Stevens v. Farmers First Nat Bank of Stephenville, Civ.App., 114 S.W.2d 651.
Va.—White v. Bott, 158 S.E. 880, 158 Va. 442, modified on other grounds 163 S.E 397, 158 Va. 442.
23 C.J. p 217 note 7.
Time for rescission see supra subdivision c of this section.

Acceptance of benefits

Retention of real property more than year after discovering facts and selling merchandise received and entering into agreement modifying original contract amounted to "acceptance of benefits" under contract, precluding rescission.—Zuniga v. Leone, 297 P. 1010, 77 Utah 494.

Conveyance of property

Plaintiff conveying to third party property received under contract for exchange, after discovery of defendants' fraudulent representations, was barred from securing equitable relief.—Ebel v. Roller, Mo.App., 21 S. W.2d 214.

18. Ala.—McCoy v. Prince, 66 So. 950, 11 Ala.App. 388.
Ky.—Yeiser v. Russell, 83 S.W. 574, 26 Ky.L. 1151.

19. Minn.—Abernethy v. Halk, 166 N.W. 218, 139 Minn. 252.

to rescind, such party uses and deals with the property received by him as his own or does any other act inconsistent with his right to rescind, he thereby waives such right. Rescission for delay in performance cannot be had when the delay beyond the agreed date is assented to, or requested by, the complaining party.[20] After an attempted rescission a party may lose his right to rescind by his subsequent conduct inconsistent with his claim of such right.[21]

When right not lost. Unless the delay or acts of the defrauded or injured party amount to an actual waiver, or involve some act which will prevent the other party from being put in as good condition as he was before, the right to rescind will not be lost,[22] and this is true even though the party seeking to rescind may actually retain[23] or use[24] the property. The right of rescission is not waived or lost by possession of, and dominion over, the property where the rescinding party was at the time not familiar with the facts entitling him to rescind,[25] and his acts of ownership were induced by the continuing fraud of the other party.[26]

While an election to sue for damages for the fraud binds the defrauded party and he cannot thereafter rescind the contract,[27] where he merely offers to rescind he still has his election to sue in equity for rescission or at law for damages.[28]

The right to rescind because of the fraudulent concealment of the existence of a mortgage on personal property cannot be defeated by the procurement by the guilty party of a release of the mortgage.[29] An act performed by the defrauded party which is merely for the purpose of preventing further loss without any purpose to give up whatever right he may have either at law or in equity to rescind does not affect such right.[30] Where one of the parties returned a horse received by him, on the ground that it was not as represented, and received another horse in its stead which he also returned for the same reason, it cannot be said as a matter of law that the party affirmed the first exchange by receiving the second horse.[31]

A party does not lose his right to rescind in so far as the contract affects third persons, who are not bona fide purchasers, by acts performed by him without knowledge of the facts affecting the rights of such third persons.[32]

g. Partial Rescission

Unless the provisions of a contract for exchange are divisible, a rescission must be in toto.

A rescission of a contract for exchange must be in toto; a party cannot affirm an entire contract in part and repudiate it in part.[33] The right to rescind in part has been recognized where provisions of the contract were divisible.[34]

h. Operation and Effect

The rescission of a contract for exchange terminates the contract and in the case of personalty, title may revest in the injured party.

After a rescission of a contract for the exchange of property, the rescinding party cannot insist on performance.[35] The original contract cannot be restored without the consent of the rescinding party.[36] The mere fact that after a party to a contract has rescinded he expresses a willingness to go on with the transaction, which proposal is ignored by the other party, does not operate to reinstate the contract.[37]

20. Or.—Malcolm v. Tate, 267 P. 627, 125 Or. 419.
23 C.J. p 218 note 10.

21. Ill.—Chrisman First Nat. Bank v. Watson, 115 N.E. 156, 277 Ill. 186.

22. Mich.—Martin v. Ash, 20 Mich. 166.
23 C.J. p 218 note 14.

23. Ga.—Barnett v. Speir, 21 S.E. 168, 93 Ga. 762.
23 C.J. p 218 note 15.

24. Ala.—Young v. Arntze, 5 So. 253, 86 Ala. 116.
23 C.J. p 218 note 16.

25. Kan.—Pyle v. Goddard, 272 P. 144, 127 Kan. 20.

26. Wyo.—Baylies v. Vanden Boom, 278 P. 551, 40 Wyo. 411, 70 A.L.R. 924.

27. U.S.—Stuart v. Hayden, Neb., 18 S.Ct. 274, 169 U.S. 1, 42 L.Ed. 639, affirmed 72 F. 402, 18 C.C.A. 618.
23 C.J. p 218 note 17.
Remedies generally see infra § 14–17.

28. Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.

29. Ark.—Merritt v. Robinson, 35 Ark. 483.

30. Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.
23 C.J. p 218 note 20.

31. Mass.—Whiteside v. Brawley, 24 N.E. 1088, 152 Mass. 133.

32. Kan.—Wicks v. Smith, 21 Kan. 412, 30 Am.R. 433.

33. Kan.—Springer v. Keller, 259 P. 1068, 124 Kan. 369, denying rehearing 257 P. 964, 124 Kan. 33.
N.Y.—Goins v. Atwood, 197 N.Y.S. 781, 204 App.Div. 439.
23 C.J. p 217 note 97.

Avoidance of part of liability while retaining entire consideration
Rescission in part, while retaining all property conveyed in exchange, is not permissible.
Iowa.—In re Gensicke's Estate, 237 N.W. 333.
Tex.—Whittley v. Howerton, Civ. App., 18 S.W.2d 687, error dismissed.

34. Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.
23 C.J. p 217 note 98.

35. Ill.—Chrisman First Nat. Bank v. Watson, 115 N.E. 156, 277 Ill. 186.
Effect of rescission by mutual consent see supra § 9.

36. Ill.—Chrisman First Nat. Bank v. Watson, supra.

37. N.D.—Mulroy v. Jacobson, 139 N.W. 697, 24 N.D. 354.

Where, in the case of fraud and false representation or a false warranty as to personal property, the injured party tenders the property received by him and demands a rescission of the contract then by operation of law, although the demand is refused, the ownership of the property transferred by the injured party becomes revested in him together with the right of immediate possession of such property.[38] The rescinding party may take possession of the property transferred by him at any time when he can do so without a breach of the peace or a trespass.[39] The equity of the rescinding party in the property he transferred to the party in default is superior to the equity of a donee claiming under a gift from the party in default.[40]

§ 11. Performance

a. In general
b. Time for performance
c. Demand
d. Tender
e. Excuses for nonperformance and waiver of performance

a. In General

A contract for exchange must be performed in accordance with its terms and a party who has not so performed, or is not ready, able, and willing to do so, cannot ordinarily take advantage of the other party's default.

As a general rule a contract for the exchange of property must be performed in accordance with its terms.[41] A party who has not performed or tendered performance,[42] or who is not ready, willing,[43] and able[44] to perform cannot ordinarily take advantage of an alleged default of the adverse party, although it seems that he can recover back such part of the consideration as he may have advanced.[45]

A provision in a contract for the exchange of real property that, in case one of the parties shall not be able to give a deed, he will pay to the other party a specified amount on a day named is intended as security to indemnify such other party against loss in case a merchantable title cannot be conveyed, and does not contemplate that the agreement shall be in the alternative for the conveyance or for the payment of the amount specified in case a good title cannot be conveyed.[46]

Conditions and dependent and independent covenants or promises. A party cannot rely on an alleged default of the other party where the former has failed to comply with certain provisions of the contract which constitute a condition prece-

38. S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
23 C.J. p 217 note 3.

Creation of new contract

Where plaintiff and defendant traded mule teams, defendant stating that his team was "sound as a dollar," and subsequently one of the mules traded to plaintiff appeared lame, and defendant agreed to take back the team but before plaintiff could return the team the lame mule died, no new contract was made between the parties requiring actual redelivery of the respective mule teams, as regards plaintiff's right to maintain action in claim and delivery based on rescission, plaintiff having promptly rescinded and tendered return of the mules, and title to his mules revested in him.—Manship v. Newsome, supra.

39. Mass.—Smith v. Hale, 33 N.E. 493, 158 Mass. 178, 35 Am.S.R. 485.
23 C.J. p 217 note 4.

40. Ga.—Fletcher v. Fletcher, 124 S.E. 722, 158 Ga. 899.

Rights of innocent purchaser

Purchaser under subcontract purchasing equity in original contract from one fraudulently securing it will, on cancellation, be required to proceed under subcontract.—Reich v. Schmidt, 218 N.W. 671, 242 Mich. 130.

41. Cal.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.
Mich.—Efrusy v. Mack, 188 N.W. 374, 219 Mich. 85.
23 C.J. p 218 note 23.

42. Cal.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.
Mich.—Frankiewicz v. Konwinski, 224 N.W. 368, 246 Mich. 473.
23 C.J. p 218 note 24.

43. Neb.—Pryor v. Hunter, 48 N.W. 736, 31 Neb. 678.
23 C.J. p 218 note 25.

44. Ill.—Thackaberry v. Kibbe, 119 N.E. 897, 284 Ill. 199.
Ky.—Stewart v. Black, 67 S.W.2d 684, 252 Ky. 511.
Tex.—Robertson v. Melton, Civ.App., 86 S.W.2d 473, reversed on other grounds, 115 S.W.2d 624, 131 Tex. 325, 118 A.L.R. 1505.
23 C.J. p 219 note 26.

Ability at time performance is due

In an action for specific performance, or in the alternative to enforce payment of the penalty, of a contract to exchange realty which was made in good faith, it was only necessary for plaintiffs to be able to convey a good title at the time for performance.—Thompson, Swan & Lee v. Schneider, 221 P. 334, 127 Wash. 533.

Conveyance free of encumbrance

Where realty exchange contract provided that plaintiff would convey tract to defendant free of encumbrance, and would put in suitable sewer service for the tract, and plaintiff subsequently dedicated six-foot strip across the tract for sewer designed to serve other property as well as the tract, plaintiff put it out of his power to convey the tract free from "encumbrance" and could not have performed his contractual obligations, and therefore was not entitled to recover on contract for defendant's failure to perform.—Miller v. Schwinn, Inc., 113 F.2d 748, 72 App.D.C. 282.

45. N.Y.—Bilger v. Morgan, 77 N.Y. 312.

46. Iowa—Kettering v. Eastlack, 107 N.W. 177, 130 Iowa 498, 8 Ann. Cas. 357.
Wis.—Gross v. Salsich, 129 N.W. 396, 144 Wis. 419.
Construction and operation of provisions generally see supra § 6.

Forfeiture of deposit in lieu of performance

Clause of contract for exchange of property providing for forfeiture of deposit in event of breach constituted provision to secure performance rather than to give absolution for nonperformance.—Vittor v. Szymanski, 184 A. 27, 321 Pa. 345.

dent to performance by the other party.[47] A contract to exchange real estate which the parties do not own, "provided title can be procured and made," is a contingent contract, and is not binding if the parties are unable to comply with the conditions.[48]

In the absence of anything to show a contrary intention, the contract must be performed on both sides concurrently in the case of an exchange of real property,[49] of personal property,[50] or of real property for personal property.[51] Neither party therefore can put the other party in default except by full performance on his own part or a proper tender thereof unless performance and tender have been excused.[52] Where, however, a contract for the exchange of personal property contains independent covenants, it is not necessary to show performance of such a covenant in order to recover on the agreement of the adverse party.[53] Where one of the parties to an exchange of personal property performs without insisting on contemporaneous performance by the other party, the right of contemporaneous performance is waived.[54]

b. Time for Performance

Where no time for performance is fixed in a contract for exchange a reasonable time is allowed. Provisions as to time of performance may be waived.

A party is entitled to a reasonable time for performance of a contract for exchange of property where no time is fixed in the contract,[55] but he must act in good faith[56] and perform or tender performance within a reasonable time.[57] What constitutes a reasonable time for delivery of certain personalty in exchange for other personalty does not depend on the ability to deliver of the party who agrees to make such delivery.[58] The entire contract and the various duties imposed on the parties should be considered in determining the date from which the time limit fixed in the contract for exchanging deeds is to run.[59]

Where time is not of the essence, performance by one party substantially within the time fixed has been held sufficient to entitle him to damages for breach by the other party;[60] but it has also been held that at law substantial compliance with a provision as to time does not entitle a party to recover damages against the other party for breach of contract,[61] although it is sufficient to entitle him to specific performance.[62]

Waiver. Provisions of the contract as to the time of performance, including provisions which make time of the essence, may be waived.[63] A party to a contract under which the consideration for real property transferred by him is to be paid by the delivery of personal property in installments may waive as to any installment the provision of the contract making time of the essence.[64] Where

47. Mich.—Efrusy v. Mack, 188 N.W. 374, 219 Mich. 85.
Mo.—Redman v. Adams, 65 S.W. 300, 165 Mo. 60.
Tex.—Robertson v. Melton, 115 S.W. 2d 624, 131 Tex. 325, 118 A.L.R. 1505, reversing, Civ.App., 86 S.W. 2d 473.
23 C.J. p 219 note 30.

48. Pa.—Lacy v. Hall, 37 Pa. 360.
23 C.J. p 219 note 31.

49. Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
23 C.J. p 219 note 32.

50. Pa.—Siebraecht v. Stewart, 68 Pa.Super. 520.
23 C.J. p 219 note 33.

51. Ill.—Robinson v. Yetter, 87 N.E. 363, 238 Ill. 320.
23 C.J. p 219 note 34.

52. Ga.—Bush v. Black, 82 S.E. 530, 142 Ga. 157.
La.—Brandon v. Smith, 133 So. 489, 16 La.App. 130.
Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
23 C.J. p 219 note 33.

53. N.H.—Putnam v. Mellen, 34 N.H. 71.

54. N.Y.—Morgan v. Powers, 66 Barb. 35.
Waiver of performance see § 11 e infra.

55. Iowa.—McCormick v. McIntire, 183 N.W. 589, 192 Iowa 746, modified on other grounds 185 N.W. 454, 192 Iowa 746.
23 C.J. p 224 note 55.

56. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.
23 C.J. p 224 note 56.

57. D.C.—Hartman v. Ruby, 16 App. D.C. 45.
22 C.J. p 224 note 55, p 225 note 57.

Inability to clear title seasonably
Where plaintiff, party to contract for exchange of land, could not obtain final judgment clearing title, based on limitation, until two years after commencing action, contract was not performable within "reasonable time."—Szanto v. Pagel, Tex. Civ.App., 47 S.W.2d 632, error dismissed.

58. Ala.—Jones v. Anderson, 2 So. 911, 82 Ala. 302.

59. Neb.—Te Poel v. Shutt, 78 N.W. 288, 57 Neb. 592.

60. Tex.—Branom v. Scott, Civ.App., 24 S.W.2d 499.

61. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.
Time as essential in actions at law see Contracts § 504.

62. Ky.—Stewart v. Black, supra.
Time as essential in:
Equity see Contracts § 504.
Suits for specific performance see the C.J.S. title Specific Performance § 106, also 58 C.J. p 1087 note 2 et seq.

Delay of one day
Where time is not of the essence of the contract for the exchange of real property, the mere fact that a satisfactory title policy is not furnished on the day appointed for the settlement does not justify a refusal to accept such a policy and a good title on the following day.—Lamb v. Adams, 18 Pa.Dist. 110.

63. Iowa.—Richman v. Iowa Farm Land Co., 197 N.W. 309, 197 Iowa 429.
23 C.J. p 225 note 65.

Estoppel
Offerer, who took no steps to rescind contract to exchange land for bank stock, was estopped to claim stock was not forwarded "at once," under terms of acceptance.—Harris v. Bills, 213 N.W. 929, 203 Iowa 1034.

64. N.D.—Timmins v. Russell, 99 N.

a party stipulates that he will give written notice of his election to take advantage of a breach where time is of the essence of the agreement, an unreasonable delay in giving this notice is equivalent to an assurance that as to that default the provision with respect to time has been waived.[65]

Where one of the parties grants the other party time after default but fixes no certain time, the law will allow a reasonable time.[66]

c. Demand

Under certain circumstances a demand for performance of a contract for exchange is necessary in order to put the other party in default.

Where no time is fixed by the contract for delivery of personal property in exchange for other property a demand is necessary in order to put in default the party who was to deliver such personal property;[67] but there is authority for the view that usually demand is not necessary, although no time is fixed for performance, where a reasonable time has elapsed.[68] Where plaintiff by complete performance has waived simultaneous performance on the part of defendant, it seems that a demand is necessary in order to maintain an action for the recovery of the personal property which was to have been delivered to plaintiff, or its value.[69] A demand which would be unavailing need not be made where there is a failure to transfer personal[70] or real[71] property.

Where under the terms of the contract one of the parties is entitled to deliver property other than money or to pay in cash, the other party must make a demand for performance in the alternative.[72] A demand need not be made as a condition precedent to an action of assumpsit for goods sold and delivered where there is a mere reservation by defendant of a privilege to deliver goods in payment.[73]

Sufficiency. Where one of the parties is to designate the kind of property which is to be delivered to him in exchange for other property already delivered, the demand must include a designation of the kind selected.[74] Where by the terms of the exchange one of the parties is not to deliver the property to be transferred by him unless a written order from one of two partners who made the exchange with the first mentioned party is presented, a demand by the other partner is insufficient where no written order is produced.[75]

d. Tender

(1) Real property
(2) Personal property

(1) Real Property

A tender of performance of an obligation to transfer real property in exchange must be unconditional, and must be made in good faith, in due time, and in accordance with the terms of the contract. Under some circumstances formal tender is not necessary.

In order to be effective, a tender of performance of an obligation to transfer real property under a contract for exchange must be unconditional,[76] must be made in good faith,[77] in due time,[78] and in accordance with the provisions of the contract,[79] and, likewise, such tender of per-

W. 48, 13 N.D. 487—Fargusson v. Talcott, 73 N.W. 207, 7 N.D. 183.

65. N.D.—Fargusson v. Talcott, supra.
23 C.J. p 225 note 67.

66. Iowa.—Legvold v. Olson, 189 N. W. 737, 194 Iowa 1000.

67. Ill.—Edwards v. Hartt, 66 Ill. 71.
23 C.J. p 219 note 37.
Demand for performance of contract for delivery of articles other than money generally see Contracts § 478.

68. Vt.—Nelson v. Gibson, 98 A. 1006, 90 Vt. 423.

69. N.Y.—Morgan v. Powers, 66 Barb. 35.

70. Vt.—Stearns v. Haven, 16 Vt. 87—Harrington v. Wells, 12 Vt. 505.

71. Minn.—Greenwood v. Hoyt, 43 N.W. 8, 41 Minn. 381.

72. Cal.—Dozier v. National Borax Co., 170 P. 638, 35 Cal.App. 612.

73. Vt.—Way v. Wakefield, 7 Vt. 223.

74. Vt.—Russell v. Ormsbee, 10 Vt. 274.

75. Wis.—McBain v. Austin, 16 Wis. 87, 82 Am.D. 705.

76. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.
Neb.—Te Poel v. Shutt, 78 N.W. 288, 57 Neb. 592.

77. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.

78. **Tender held seasonable**
Plaintiff's tender of complete performance of contract to exchange properties, made thirty days from date of original offer of defendant, was made within reasonable time specified by contract within which to tender complete performance.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.
Time for performance see supra subdivision b of this section.

79. Ky.—Dupre v. Hortsman, 38 S. W.2d 236, 238 Ky. 382.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.
23 C.J. p 226 note 72.

Tender held sufficient
(1) Party to agreement to exchange realty who complied with all conditions except to execute necessary deed, trust deeds, and releases, which were to be executed, delivered, and recorded through title company when other party paid agreed sum of money to company, made sufficient tender of performance when other party refused to pay money and repudiated agreement.—Herman v. Savage, 61 P.2d 1195, 17 Cal.App. 2d 238.

(2) Under a contract wherein defendant agreed to exchange land subject to thirty thousand dollars mortgage, to be extended, defendant's offer to have the mortgage extended in the sum of twenty five thousand dollars, plaintiff to give defendant a second mortgage for five thousand dollars, was a substantial performance, defendant being unable to obtain a loan of thirty thousand

formance must be kept good,[80] and must be made to the party entitled to receive it.[81] Actual production of the agreed difference in value may be waived by a party to a contract for the exchange of real property.[82]

When unnecessary. A formal tender may be rendered unnecessary by a party's notice that he does not intend to comply with the contract,[83] or that he will not accept tender if it should be made,[84] or by his having put it out of his power to perform by conveying his property.[85] However, it has been held that the conveyance of a party's interest in real property involved to a third person does not excuse a tender where the conveyance is made for the purpose of getting the title under the control of the grantor and such third person is ready and willing to convey in accordance with the terms of the contract of exchange.[86]

Effect of death of party. A party is not in default, although there was no tender by him during the period fixed by the contract where the other party died during such period and an administrator was not appointed until a subsequent time.[87]

Examination after tender. The party to whom a tender of a deed of land is made is entitled to a reasonable opportunity to examine and determine what is tendered where the contract provides that he is to pay the land for a stock of goods.[88]

Intermediate injuries to property. A party whose property has been injured intermediate the making of the contract and the date on which possession is to be given should offer compensation to the other party on offering possession, where under the contract the burden of such injuries is not to be borne by the other party.[89]

(2) Personal Property

In order to put the opposite party in default, a party must tender performance of an obligation to transfer personal property in exchange in accordance with the terms of the contract, unless such tender would be useless.

In order to put a party in default, the other party must tender performance of an obligation to transfer personal property in exchange in conformity with the terms of the contract,[90] unless such tender would be useless.[91] The party to whom the tender is made must by himself or his agent have knowledge of such tender.[92] The tender must be made in good faith.[93]

The mere fact that one of the parties waits several days before tendering performance and demanding performance by the other party after the latter has stated that he will not deliver does not affect the first mentioned party's right to recover.[94]

e. Excuses for Nonperformance and Waiver of Performance

Failure to perform a contract for exchange of property is excused where performance is prevented by the acts of the opposite party, or where the other party absolutely repudiates the contract or is unable to perform. Strict performance may be waived.

The inability of a party to a contract for the exchange of real property to perform because of accident, want of means, insolvency, or other such reason, does not excuse nonperformance.[95] Where

dollars.—Thackaberry v. Kibbe, 119 N.E. 897, 284 Ill. 199.

Tender held insufficient

Tender of deed subject to sixty thousand dollars mortgages was not tender of performance in accordance with agreement requiring conveyance subject to mortgages aggregating fifty-five thousand dollars.—Hosmer v. Butler, 143 A. 526, 108 Conn. 465.

80. Ill.—Newlin v. Prevo, 90 Ill. App. 515.
23 C.J. p 226 note 73.

81. Mo.—Ranck v. Wickwire, 164 S. W. 460, 255 Mo. 42.
23 C.J. p 226 note 74.

82. Iowa.—Billick v. Davenport, 145 N.W. 470, 164 Iowa 105.

83. Kan.—White v. Immenschuh, 187 P. 667, 106 Kan. 333.
Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
Wis.—Bitof v. Hoppe, 202 N.W. 699, 186 Wis. 409.
23 C.J. p 226 note 76.

84. Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
Wash.—Calhoun v. Pederson, 149 P. 25, 85 Wash. 630.

85. Mass.—Lowe v. Harwood, 29 N. E. 538, 139 Mass. 133.
Mo.—Way v. Miller, 80 Mo.App. 382.

86. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.

87. Mass.—Pead v. Trull, 53 N.E. 901, 173 Mass. 450.
23 C.J. p 226 note 81.

88. Ill.—Newlin v. Prevo, 90 Ill.App. 515.

89. Ky.—Currett v. Simpson, 3 T. B.Mon. 517, 16 Am.D. 115.

90. Conn.—Trowbridge v. Jefferson Auto Co., 103 A. 843, 92 Conn. 569.
23 C.J. p 226 note 84.

91. Mass.—Newcomb v. Brackett, 16 Mass. 161.
23 C.J. p 226 note 85.

92. Ohio.—Jenkins v. Mapes, 41 N. E. 137, 53 Ohio St. 110.

93. Ill.—Gibson v. Brown, 73 N.E 578, 214 Ill. 330.

94. R.I.—Bicknall v. Waterman, 5 R.I. 43.

95. Mich.—Frankiewicz v. Konwinski, 224 N.W. 368, 246 Mich. 473
23 C.J. p 226 note 90.

Decline in price of produce

Material decline in price of farm products did not justify delay in consummating exchange of properties under contract requiring removal of certain liens, where this set of circumstances was not in parties' contemplation when contract was executed.—Rayburn v. Blechschmidt, 23 P.2d 550, 143 Or. 640.

Disappearance of escrow agent with papers

Plaintiff was not entitled to specific performance of contract for exchange of properties, where plaintiff's paper evidence of title was lost through disappearance of depositary under escrow agreement.—Frankiewicz v. Konwinski, 224 N.W. 368, 246 Mich. 473.

a party has accepted a conveyance with covenants against encumbrances, it has been held that he cannot refuse to convey to the other party merely because of the existence of encumbrances, or because he has not been reimbursed for expenditures which he has been compelled to make on account of such encumbrances.[96] A party cannot take advantage of any default of the other party occasioned by his own laches.[97]

A failure to perform or to perform further in accordance with the contract is excused where performance is prevented by the acts of the opposite party,[98] or where the other party absolutely repudiates the contract and refuses to perform[99] or is unable to perform.[1] However, the fact that one party refused to perform does not excuse the other party from showing that he was ready, willing, and able to perform,[2] especially where he declines to accept the refusal as final and the party who refuses indicates before the final day for performance his willingness to carry out the contract.[3] The mere fact that a party who seeks to take advantage of a breach of the other party was in a position to make a more favorable contract with a third person does not excuse such breach.[4]

Waiver. Strict performance of the provisions of the contract may be waived.[5] Thus objections as to the performance by one party may be waived by the other party's reliance on other and different objections.[6]

Government control of railroad

Instructions relieving plaintiff of liability for not completing railroad, as agreed in exchange of lands, because of government's control of railroad as war measure, was error. —Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

96. Minn.—Greenwood v. Hoyt, 43 N.W. 8, 41 Minn. 381.

97. Neb.—Te Poel v. Shutt, 78 N.W. 288, 57 Neb. 592.

98. Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
23 C.J. p 227 note 94.

99. Cal.—Herman v. Savage, 61 P. 2d 1195, 17 Cal.App.2d 238—Pyle v. Benjamin, 283 P. 372, 102 Cal. App. 691.
Ga.—Smith v. David, 148 S.E. 265, 168 Ga. 511.
Ind.—Kocsis v. Wroblewski, 196 N.E. 367, 100 Ind.App. 653.
La.—Brandon v. Smith, 133 So. 489, 16 La.App. 130.
Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
Tex.—Burks v. Neutzler, Com.App., 2 S.W.2d 416, reversing, Civ.App., 289 S.W. 436, and motion denied, Com.App., 7 S.W.2d 65.
23 C.J. p 227 note 95.

1. Okl.—Bushey v. Dale, 75 P.2d 193, 195, 181 Okl. 481, quoting **Corpus Juris.**
23 C.J. p 227 note 96.

2. La.—Brandon v. Smith, 133 So. 489, 16 La.App. 130.
23 C.J. p 227 note 97.

3. Tex.—Carlisle v. Green, Civ.App., 131 S.W. 1140.

4. Conn.—Trowbridge v. Jefferson Auto Co., 103 A. 843, 92 Conn. 569.

5. Cal.—Bandy v. Westover, 252 P. 593, 200 Cal. 222.
Or.—Malcolm v. Tate, 267 P. 527, 135 Or. 419.
Tex.—Arndt v. White, Civ.App., 13 S.W.2d 151.
23 C.J. p 227 note 1.
Waiver of delay in performance see supra § 11 b.

Failure to comply with decree

Failure of a party to agreement to exchange properties to comply with court's decree granting ten days to examine the abstract and furnish a statement of objections and requirements of his attorney thereto was held not to be allowed to prejudice his right to demand and receive a merchantable title, together with an abstract showing the same.—McCormick v. McIntire, 185 N.W. 454, 192 Iowa 746.

Performance held waived

(1) Where a contract provided that plaintiff was to receive a bond for a warranty deed, the acceptance by plaintiff of a bond requiring the conveyance of a good title, free and clear of all liens and encumbrances, was a waiver of any right to a bond for a warranty deed.—Bowe v. Wright, C.C.A.Colo., 281 F. 946.

(2) Defendant by turning over his cattle to plaintiff, which by the terms of their contract of exchange he was not to do until plaintiff had performed his part of the contract, must be considered as having accepted the mere inclusion of water stock in a deed of land from plaintiff to defendant, as a transfer thereof, which plaintiff was to make.—Rubey v. Clammer, 194 P. 360, 69 Colo. 329.

(3) That with knowledge that plaintiff had not reduced mortgage on her land defendant consummated land exchange agreement constituted waiver of plaintiff's obligation to secure reduction.—Tulburt v. Hourscht, 248 N.W. 192, 61 S.D. 231.

Performance held not waived

(1) Party contracting to exchange property doing rightful acts, although waiving right to timely abstract, did not waive right to have it examined and defects rectified as provided.—Powell v. Dorton, 12 S. W.2d 453, 321 Mo. 639.

(2) Failure to return deed not complying with contract, and left with agent refusing to accept it, was not acceptance thereof.—Hosmer v. Butler, 143 A. 526, 108 Conn. 465.

(3) Existence of two years' lease and year's unpaid taxes on land, agreed to be exchanged, was waived by purchaser's failure to object thereto or to take steps to rescind.—Harris v. Bills, 213 N.W. 929, 203 Iowa 1034.

Estoppel

(1) Where the contract provided that defendant deliver the deed and certificate of title to the escrow agent who in turn would deliver it to plaintiff, the retention by plaintiff of the deed alone before defendant had delivered the certificate of title to the escrow agent, did not estop plaintiff from claiming a defect in title on subsequent receipt of the certificate of title, where defendant was not misled and did not change his position.—Imes v. MacDonald, 298 P. 173, 113 Cal.App. 427.

(2) Where realty exchange contract provided that plaintiff would convey tract to defendant free of encumbrance, and would put in suitable sewer service for the tract, and plaintiff subsequently dedicated six-foot strip across the tract for sewer designed to serve other property as well as the tract, duty to inform defendant of dedication was on plaintiff, and defendant who first learned of dedication after action was commenced on exchange contract was not precluded or "estopped" from asserting as a defense to the action that plaintiff had put it out of his power to convey tract free of encumbrance.—Miller v. Schwinn, Inc., 113 F.2d 748, 72 App.D.C. 282.

6. Ill.—Gibson v. Brown, 73 N.E. 578, 214 Ill. 330.
Kan.—Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

When a contract is fully performed by one of the parties, an offer of part performance by the other is no consideration for an alleged waiver of full performance.[7]

§ 12. —— Sufficiency

a. In general
b. Estate and title
c. Delivery and acceptance of property

a. In General

If the party seeking to enforce a contract for the exchange of property has substantially and in good faith complied with his obligations, it is ordinarily sufficient, although strict performance has been held essential in actions for damages.

If the party seeking to enforce a contract for the exchange of property has substantially and in good faith complied with his obligations thereunder, it is sufficient,[8] at least for the purposes of a suit in equity, as for specific performance;[9] but in an action for damages for breach of contract strict compliance with the provisions of the contract has been held essential.[10]

Where a contract provides that one of the parties shall have a specified time to reject the property traded to him, a statement by him, written on the contract, to the effect that he accepts the above property does not constitute an acceptance by him of other property, where a description of such other property is inserted in the contract after the date of the above acceptance.[11]

A provision of a contract to the effect that each party is "to be the judge" as to representations with respect to the real property involved does not give the right arbitrarily to reject the property offered, but there must be a fair and candid judgment such as an honest and reasonable man would exercise.[12]

b. Estate and Title

(1) In general
(2) What constitutes "good" or "marketable" title
(3) Encumbrances
(4) Abstracts of title
(5) Sufficiency of deed
(6) Bond to perfect title
(7) Objections to title and waiver

(1) In General

A party is not bound to accept a title to real property which is not in accordance with the contract for exchange.

A party to a contract for the exchange of property is not bound to accept a title to real property which is not in accordance with the contract.[13] It has been held or stated that he is entitled to a deed conveying a good title,[14] a good and marketable title,[15] an indefeasible legal title,[16] a perfect legal title,[17] or a perfect title, clear of all defects and encumbrances.[18] A party is not required to accept a doubtful title to land.[19] A party to a contract for the exchange of real estate by warranty deeds impliedly agrees to deliver a marketable title to the other party to the exchange.[20]

A provision authorizing a rejection of title "if any defect should be found in the title" does not

7. Mo.—Wilson v. Wilson, 92 S.W. 145, 115 Mo.App. 641.
8. Conn.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.
Kan.—White v. Immenschuh, 187 P. 667, 106 Kan. 333.
Tex.—Branom v. Scott, Civ.App., 24 S.W.2d 499—Herrington v. Holman, 25 Tex.Supp. 256.
Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.
23 C.J. p 219 note 48.
9. N.J.—Young v. McLaughlan-Conover Co., 162 A. 633, 111 N.J.Eq. 424—Pozzi v. Shenier, 159 A. 396, 110 N.J.Eq. 167.
Substantial performance as sufficient in suits for specific performance see the C.J.S. title Specific Performance § 112, also 58 C.J. p 1113 note 92 et seq.
10. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.
Strict and substantial performance of contracts see Contracts § 508.
11. Mo.—Ozias v. Paustian, App., 209 S.W. 587.
12. Kan.—Ramey v. Thorson, 146 P. 315, 94 Kan. 150.
13. Tex.—Burks v. Neutzler, Civ. App., 289 S.W. 436, reversed on other grounds, Com.App., 2 S.W.2d 416, motion denied 7 S.W.2d 65.
23 C.J. p 220 note 51.
Sufficiency of estate and title:
Contracts for sale of land see the C.J.S. title Vendor and Purchaser §§ 182–227, also 66 C.J. p 844 note 61 et seq.
Specific performance of land contract see the C.J.S. title Specific Performance § 112, also 58 C.J. p 1114 note 6 et seq.
Dedication to public
Defendant's objection, to title offered by plaintiff, that the land as originally platted had an alleyway across a part of it which had been dedicated by the plat to the public, was not a valid objection, where the alley was never opened and never accepted or used by public, and all the deeds made to the addition did not refer to the alley.—Holloway v. Wheeler, Tex.Civ.App., 261 S.W. 467, reversed on other grounds Wheeler v. Halloway, Com.App., 276 S.W. 653.
14. Iowa.—Blackledge v. Davis, 105 N.W. 1000, 129 Iowa 591.
23 C.J. p 220 note 52.
15. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.
Wash.—Le Marinel v. Bach, 196 P. 22, 114 Wash. 651.
23 C.J. p 220 note 53.
16. Ala.—Martin v. Brown, 74 So. 241, 199 Ala. 134.
17. Ky.—Calhoon v. Belden, 3 Bush. 674.
18. Minn.—Donlan v. Evans, 42 N. W. 472, 40 Minn. 501.
19. Tenn.—Topp v. White, 12 Heisk. 165.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.
20. Mo.—McPherson v. Kissee, 144 S.W. 410, 239 Mo. 664.
Va.—Greer v. Doriot, 120 S.E. 291, 137 Va. 589.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.

condemn title for lack of record evidence,[21] but it does not require a party to take a record title if it is overshadowed by a title outside the record.[22]

Satisfaction of party or approval by third person. In the case of a provision in a contract for the exchange of lands that the title shall be "satisfactory," the party to be satisfied is the judge of his own satisfaction.[23] However, such party should fairly and candidly investigate and consider the matter, reach a genuine conclusion and express the true state of his mind, and he cannot act arbitrarily or capriciously or merely feign dissatisfaction.[24] It is of no consequence that a court or a jury might believe that a party should be satisfied or that a reasonably prudent purchaser would be satisfied.[25]

A contract may properly provide that the attorney for the party who is to receive a conveyance may determine whether the title as shown by the abstract is in accordance with the terms of the contract;[26] but such provision must be carried out in good faith and the attorney may not arbitrarily and without just reason decide that the title is defective.[27]

(2) What Constitutes "Good" or "Marketable" Title

In contracts for exchange a good title, as applied to realty, refers to a fee simple estate and a marketable title is one which can be sold or mortgaged to a person of reasonable prudence.

In contracts for the exchange of property the phrase "good title," as applied to land means an estate in fee simple,[28] and requires the transfer of a "marketable" title.[29] A contract by which a party is to receive a good unencumbered title to real estate entitles him to a title reasonably free from faults which would affect the value or security of possession.[30] A clear title means one free from material defects.[31]

A marketable title is one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money,[32] or one about which there can be no fair and reasonable doubt.[33] A title in litigation is not marketable,[34] and a party to a contract providing for the exchange of deeds conveying good and marketable titles to the respective properties cannot be required to accept title from the other party with an equitable title outstanding in a third person.[35] The question as to whether a title tendered is a marketable title is one of law.[36]

A provision for a "merchantable" title requires a title which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence for a loan of money.[37]

Title based on estoppel or adverse possession. A party need not accept a title resting only on an estoppel in pais.[38]

Unless the contract otherwise provides,[39] a title based on adverse possession may constitute a good[40] or a marketable[41] title, which must be ac-

21. Mo.—Scannell v. American Soda Fountain Co., 61 S.W. 889, 161 Mo. 606.

22. Mo.—Scannell v. American Soda Fountain Co., supra.

23. Kan.—Hollingsworth v. Colthurst, 96 P. 851, 78 Kan. 455, 130 Am.S.R. 382, 18 L.R.A.,N.S., 741.

Validity dependent on extrinsic evidence

While such a condition is satisfied by tender of a title to which there is no reasonable objection, such title should be deducible from the record without reference to extrinsic evidence; if resort to extrinsic evidence is necessary, the objection of the party to be satisfied is reasonable.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.

24. Kan.—Hollingsworth v. Colthurst, 96 P. 851, 78 Kan. 455, 130 Am.S.R. 382, 18 L.R.A.,N.S., 741.
23 C.J. p 220 note 61.

25. Kan.—Hollingsworth v. Colthurst, supra.

26. Mich.—Dikeman v. Arnold, 40 N.W. 42, 71 Mich. 656.

Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.

27. Mo.—Poplin v. Brown, supra.

28. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.

29. Iowa.—Fagan v. Hook, supra.

30. Mo.—Devero v. Sparks, 176 N. W. 1056, 189 Mo.App. 500.

31. Ark.—First Nat. Bank v. Russell, 27 S.W.2d 90, 181 Ark. 654.

32. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.
"A good or marketable title, such as would be conveyed by an ordinary warranty deed."—Genske v. Jensen, 205 N.W. 548, 549, 188 Wis. 17.

Nonjoinder of wife

Where, in trade of houses, under the contract and construction of it by the parties, plaintiff could require marketable title to defendant's house, a deed from defendant, without his wife uniting therein, did not convey such title, and plaintiff could reject it and maintain action for failure to deliver deed in which the wife joined.—Greer v. Doriot, 120 S. E. 291, 137 Va. 589.

33. Tex.—Lawson v. Goodwin, 84 S.W. 279, 37 Tex Civ.App., 484.

34. Tex.—Lawson v. Goodwin, supra.

35. D.C.—Nichols v. Bealmear, 36 App.D.C. 352.

36. Ark.—First Nat. Bank v. Russell, 27 S.W.2d 90, 181 Ark. 654.
Mich.—Frederick v. Hillebrand, 165 N.W. 810, 199 Mich. 333.

37. Iowa.—Billick v. Davenport, 154 N.W. 470, 164 Iowa 105.
23 C.J. p 220 note 73.

38. Tenn.—Topp v. White, 12 Heisk. 165.

39. Kan.—Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann.Cas.1912A 748.
23 C.J. p 221 note 77.

40. Tex.—Milby v. Hester, Civ.App., 94 S.W. 178.
23 C.J. p 221 note 78.

41. N.Y.—Freedman v. Oppenheim, 79 N.E. 841, 187 N.Y. 101, 116 Am. S.R. 595.
23 C.J. p 221 note 79.

Unadjudicated title

Under contract for marketable rec-

When a contract is fully performed by one of the parties, an offer of part performance by the other is no consideration for an alleged waiver of full performance.[7]

§ 12. —— Sufficiency

a. In general
b. Estate and title
c. Delivery and acceptance of property

a. In General

If the party seeking to enforce a contract for the exchange of property has substantially and in good faith complied with his obligations, it is ordinarily sufficient, although strict performance has been held essential in actions for damages.

If the party seeking to enforce a contract for the exchange of property has substantially and in good faith complied with his obligations thereunder, it is sufficient,[8] at least for the purposes of a suit in equity, as for specific performance;[9] but in an action for damages for breach of contract strict compliance with the provisions of the contract has been held essential.[10]

Where a contract provides that one of the parties shall have a specified time to reject the property traded to him, a statement by him, written on the contract, to the effect that he accepts the above property does not constitute an acceptance by him of other property, where a description of such other property is inserted in the contract after the date of the above acceptance.[11]

A provision of a contract to the effect that each party is "to be the judge" as to representations with respect to the real property involved does not give the right arbitrarily to reject the property offered, but there must be a fair and candid judgment such as an honest and reasonable man would exercise.[12]

b. Estate and Title

(1) In general
(2) What constitutes "good" or "marketable" title
(3) Encumbrances
(4) Abstracts of title
(5) Sufficiency of deed
(6) Bond to perfect title
(7) Objections to title and waiver

(1) In General

A party is not bound to accept a title to real property which is not in accordance with the contract for exchange.

A party to a contract for the exchange of property is not bound to accept a title to real property which is not in accordance with the contract.[13] It has been held or stated that he is entitled to a deed conveying a good title,[14] a good and marketable title,[15] an indefeasible legal title,[16] a perfect legal title,[17] or a perfect title, clear of all defects and encumbrances.[18] A party is not required to accept a doubtful title to land.[19] A party to a contract for the exchange of real estate by warranty deeds impliedly agrees to deliver a marketable title to the other party to the exchange.[20]

A provision authorizing a rejection of title "if any defect should be found in the title" does not

7. Mo.—Wilson v. Wilson, 92 S.W. 145, 115 Mo.App. 641.
8. Conn.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.
Kan.—White v. Immenschuh, 187 P. 667, 106 Kan. 333.
Tex.—Branom v. Scott, Civ.App., 24 S.W.2d 499—Herrington v. Holman, 25 Tex.Supp. 256.
Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.
23 C.J. p 219 note 48.
9. N.J.—Young v. McLaughlan-Conover Co., 162 A. 633, 111 N.J.Eq. 424—Pozzi v. Shenier, 159 A. 396, 110 N.J.Eq. 167.
Substantial performance as sufficient in suits for specific performance see the C.J.S. title Specific Performance § 112, also 58 C.J. p 1113 note 92 et seq.
10. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.
Strict and substantial performance of contracts see Contracts § 508.
11. Mo.—Ozias v. Paustian, App., 209 S.W. 587.
12. Kan.—Ramey v. Thorson, 146 P. 315, 94 Kan. 150.
13. Tex.—Burks v. Neutzler, Civ. App., 289 S.W. 436, reversed on other grounds, Com.App., 2 S.W.2d 416, motion denied 7 S.W.2d 65.
23 C.J. p 220 note 51.
Sufficiency of estate and title:
Contracts for sale of land see the C.J.S. title Vendor and Purchaser §§ 182–227, also 66 C.J. p 844 note 61 et seq.
Specific performance of land contract see the C.J.S. title Specific Performance § 112, also 58 C.J. p 1114 note 6 et seq.
Dedication to public
Defendant's objection, to title offered by plaintiff, that the land as originally platted had an alleyway across a part of it which had been dedicated by the plat to the public, was not a valid objection, where the alley was never opened and never accepted or used by public, and all the deeds made to the addition did not refer to the alley.—Holloway v. Wheeler, Tex.Civ.App., 261 S.W. 467, reversed on other grounds Wheeler v. Halloway, Com.App., 276 S.W. 653.
14. Iowa.—Blackledge v. Davis, 105 N.W. 1000, 129 Iowa 591.
23 C.J. p 220 note 52.
15. Ky.—Stewart v. Black, 67 S.W. 2d 684, 252 Ky. 511.
Wash.—Le Marinel v. Bach, 196 P. 22, 114 Wash. 651.
23 C.J. p 220 note 53.
16. Ala.—Martin v. Brown, 74 So. 241, 199 Ala. 134.
17. Ky.—Calhoon v. Belden, 3 Bush. 674.
18. Minn.—Donlan v. Evans, 42 N. W. 472, 40 Minn. 501.
19. Tenn.—Topp v. White, 12 Heisk. 165.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.
20. Mo.—McPherson v. Kissee, 144 S.W. 410, 239 Mo. 664.
Va.—Greer v. Doriot, 120 S.E. 291, 137 Va. 589.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.

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24. Kan.—Hollingsworth v. Colthurst, 96 P. 851, 78 Kan. 455, 130 Am.S.R. 382, 18 L.R.A.,N.S., 741.
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25. Kan.—Hollingsworth v. Colthurst, supra.

26. Mich.—Dikeman v. Arnold, 40 N.W. 42, 71 Mich. 656.

Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.

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33. Tex.—Lawson v. Goodwin, 84 S.W. 279, 37 Tex.Civ.App., 484.

34. Tex.—Lawson v. Goodwin, supra.

35. D.C.—Nichols v. Bealmear, 36 App.D.C. 352.

36. Ark.—First Nat. Bank v. Russell, 27 S.W.2d 90, 181 Ark. 654.
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23 C.J. p 220 note 73.

38. Tenn.—Topp v. White, 12 Heisk. 165.

39. Kan.—Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann.Cas.1912A 748.
23 C.J. p 221 note 77.

40. Tex.—Milby v. Hester, Civ.App., 94 S.W. 178.
23 C.J. p 221 note 78.

41. N.Y.—Freedman v. Oppenheim, 79 N.E. 841, 187 N.Y. 101, 116 Am. S.R. 595.
23 C.J. p 221 note 79.

Unadjudicated title

Under contract for marketable rec-

cepted.[42]

Title of third person. As a general rule under a contract providing that a party shall transfer certain land, tender of the deed of a third person is insufficient.[43] However, a party to a contract for the exchange of lands may waive the requirement of a personal deed from the other party and accept title from another source in full discharge of such other party's obligation.[44] It has been held that the fact that a party agreed to convey by full covenant deed when the title was in a third person is not ground for the other party's refusal to perform when at the time for passing title the first mentioned party tenders a full covenant deed to the property, executed by such third person, and offers to join in such deed in order to be bound by the covenants.[45]

(3) Encumbrances

A party to an exchange contract is not bound to accept property subject to an encumbrance not contemplated by the contract, or which is less favorable to him in its terms than one provided for in the agreement.

A party to a contract for the exchange of real property is not bound to accept property subject to an encumbrance which is not contemplated by the contract,[46] or which is less favorable to him in its terms than the one provided for in the agreement,[47] even though the encumbrance is a matter of record.[48] However, it has been held that a party cannot avoid liability on his agreement merely because the amount of the encumbrances on the property to be conveyed by him is represented by several mortgages instead of one as was represented to him.[49]

The existence of a private right of way[50] or of oil and gas leases[51] not in the contemplation of the parties when the contract was made has been held sufficient ground for a refusal to perform. Nevertheless the establishment of a levee and a drainage ditch has been held not to be a taking or encumbrance of land constituting a breach of contract providing for conveyance with covenants of warranty.[52]

It has been held that encumbrances on real property of a trifling character do not constitute ground

ord title, purchaser was not required to accept title based on adverse possession not adjudicated.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.

42. Kan.—Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann.Cas.1912A 748.
23 C.J. p 221 note 80.

43. Ala.—Moore v. Whitmore, 66 So. 601, 189 Ala. 615.
23 C.J. p 221 note 94.

44. Cal.—Riggins v. Sweatt, 114 P. 824, 159 Cal. 559.
23 C.J. p 222 note 95.

45. N.Y.—Macdonald v. Bach, 64 N. Y.S. 831, 51 App.Div. 549, affirmed 62 N.E. 1097, 169 N.Y. 615, and 60 N.Y.S. 557, 29 Misc. 96.

46. Cal.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.
Kan.—Pyle v. Goddard, 272 P. 144, 127 Kan. 20.
23 C.J. p 221 note 81.

Property held encumbered

(1) Encumbrance for public improvement existed when contract for exchange of property was made, and on date fixed for performance, although amount had not been calculated, where all work had been completed except finishing filling of ditch in which sewer pipe was laid. —Stewart v. Black, 67 S.W.2d 684, 252 Ky. 511.

(2) Where realty exchange contract provided that plaintiff would convey tract to defendant free of encumbrance and would put in suitable sewer service for the tract, and plaintiff subsequently dedicated a six-foot strip across tract for sewer designed to serve other property as well as the tract, and record disclosed that it would have been feasible to furnish the tract, sewer facilities without dedication of portion thereof for common sewer line, and defendant was not informed that dedication would be made, provision requiring plaintiff to put in sewer facilities did not except dedication incident thereto from constituting an "encumbrance" and the dedication violated the plaintiff's undertaking to convey the tract free from encumbrance.—Miller v. Schwinn, Inc., 113 F.2d 748, 72 App.D.C. 282.

(3) Lease on property, vacant when exchanged and to be occupied by purchaser, authorized purchaser to rescind exchange.—Altman v. Massell Realty Co., 146 S.E. 849, 167 Ga. 828.

Property held not unduly encumbered

(1) Where one-month lease was, by consent of parties to contract for exchange of property, included in adjustment of rents, and not considered an encumbrance, the existence thereof did not constitute an encumbrance in violation of the contract.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.

(2) The statutory lien on a farm for the future payment of annual assessments levied by a drainage district was not an encumbrance, as that term is used in an ordinary contract for exchange of farms.—Cramblitt v. Sherwood, 199 P. 925, 109 Kan. 458.

(3) The organization of a drainage district does not constitute an encumbrance on the land in the district within the meaning of the contract for the exchange of real property, and the apportionment of assessments for improvements is not such an encumbrance until they have ripened into a tax and the tax has become a lien on the land under the general tax law.—White v. Immenschuh, 187 P. 667, 106 Kan. 333.

47. N.Y.—Tiffany Realty Co. v. Estey Const. Corporation, 228 N.Y.S. 490, 223 App.Div. 458, affirmed 166 N.E. 319, 250 N.Y. 546, reargument denied 166 N.E. 334, 250 N.Y. 588.
Tex.—Robertson v. Melton, 115 S.W. 2d 624, 131 Tex. 325, 118 A.L.R. 1505, reversing, Civ.App., 86 S.W. 2d 473.
23 C.J. p 221 note 82.

48. N.Y.—Link Realty & Const. Co. v. Public Constr. Co., 153 N.Y.S. 1032, 169 App.Div. 88.

49. Ill.—See Haberer v. Kunstman, 194 Ill.App. 306.
Pa.—Evans v. Fox, 8 Pa.Dist. 383.

50. Idaho.—Newmyer v. Raush, 120 P. 464, 21 Idaho 106, Ann.Cas.1913 D 433.

51. Kan.—Linscott v. Moseman, 114 P. 1088, 84 Kan. 541.

52. Iowa.—Johnston v. Robertson, 162 N.W. 66, 179 Iowa 838.

for the adverse party's refusal to perform,[53] and substantial compliance with provisions as to encumbrances on real property may be sufficient.[54] The fact that an encumbrance has been placed on the property as the result of collusion between one of the coöwners of such property and the party to the contract to whom it is to be conveyed does not excuse the latter from performing where the enforcement of the contract is sought by the innocent owner of the property in question.[55] The fact that certain encumbrances are discharged with money obtained from a different source from that originally agreed on between the coöwners of such real property does not warrant a refusal of performance by the latter.[56]

Where a party with encumbered property is prepared to transfer the lien to the property he is acquiring coincidentally with the exchange so that the other party will acquire a clear title, the other party cannot refuse to perform on the ground that the lien had not been removed earlier.[57]

(4) Abstracts of Title

Where a contract for exchange requires an abstract of title showing the title contracted for, such abstract is, unless waived, essential to complete performance by one party and a condition precedent to performance by the other party.

The contract may provide that an abstract of title shall be furnished, and in such cases the furnishing of an abstract of the title contemplated in compliance with the terms of the contract is necessary to the complete performance of the contract by one party,[58] and a condition precedent to the necessity of performance by the other;[59] but the party entitled to such an abstract may waive either his right to receive it[60] or objections to one that has been furnished.[61]

As a general rule the abstract cannot be aided by anything aliunde,[62] such as a mere statement of the party offering it[63] or his agent,[64] an affidavit made on information and belief and without personal knowledge of the facts,[65] or the affidavit of a third person where the conditions are such that the party to whom the abstract is offered may be unable to procure the evidence of such third person if it should become necessary for such party's protection.[66] It is not sufficient that the title is in fact good,[67] merchantable,[68] or perfect,[69] where the contract provides for an abstract showing such a title, but it should so appear on the records as epitomized in the abstract.[70]

The fact that an abstracter's signature to the abstract is illegible is not a ground for refusing

53. N.J.—Pozzi v. Shenier, 159 A. 396, 110 N.J.Eq. 167.
23 C.J. p 221 note 89.

Amount of mortgage debt and taxes

The fact that defendant learned that the amount of the mortgage debt which he was to assume was three thousand three hundred and fifty-five dollars and twenty cents instead of three thousand three hundred dollars and the fact that plaintiff's deed contained provision defendant should pay taxes for 1928, which plaintiff had burden of paying under statute, in absence of contrary agreement, did not authorize defendant to repudiate exchange agreement where he had two hundred dollars which he was to pay to plaintiff for farming implements, and was thus amply protected against these additional encumbrances.—Huff v. Begley, 25 S.W.2d 75, 233 Ky. 181.

54. Ill.—Gibson v. Brown, 73 N.E. 578, 214 Ill. 330.
23 C.J. p 221 note 90.

55. Ill.—McKennan v. Mickelberry, 89 N.E. 717, 242 Ill. 117.

56. Ill.—McKennan v. Mickelberry, 89 N.E. 717, 242 Ill. 117.

57. Ky.—Hurt v. Sands Co., 33 S. W.2d 653, 236 Ky. 729.

58. Tex.—Anderson v. Hutto, Civ. App., 126 S.W.2d 709, error refused.
Wash.—Scott v. Stanley, 270 P. 110, 149 Wash. 29.
23 C.J. p 222 note 99.

Showing merchantable title

(1) Under exchange contract requiring the furnishing of "clear title," parties were bound only to furnish abstract showing merchantable title before receiving credit on note.—First Nat. Bank v. Russell, 27 S. W.2d 90, 181 Ark. 654.

(2) In an action for breach of a contract for the exchange of lands, providing that each party was to furnish an abstract showing a merchantable title, where plaintiff produced an abstract showing title outstanding in a stranger, the court properly directed a verdict for defendants, plaintiffs claiming under a land contract which was not shown by the abstract.—Efrusy v. Mack, 188 N.W. 374, 219 Mich. 85.

(3) A contract for exchange of property requiring abstract of title showing it to be "merchantable" means a good, marketable title, such as would be conveyed by an ordinary warranty deed, and failure to furnish such an abstract is nonperformance.—Genske v. Jensen, 205 N. W. 548, 188 Wis. 17.

(4) Other cases see 23 C.J. p 222 note 99 [c].

59. Tex.—Branom v. Scott, Civ. App., 24 S.W.2d 499.
23 C.J. p 222 note 1.

60. Cal.—Riggins v. Sweatt, 114 P. 824, 159 Cal. 559.
23 C.J. p 222 note 2.

61. Ill.—McKennan v. Mickelberry, 89 N.E. 717, 242 Ill. 117.

62. Iowa.—Billick v. Davenport, 145 N.W. 470, 164 Iowa 105.
Mich.—Efrusy v. Mack, 188 N.W. 374, 219 Mich. 85.

63. Iowa.—Spooner v. Cross, 102 N. W. 1118, 127 Iowa 259.
23 C.J. p 222 note 5.

64. Mo.—Greene v. Musson, 155 S. W. 849, 169 Mo.App. 680.
23 C.J. p 222 note 6.

65. Ill.—Clark v. Jackson, 78 N.E. 6, 222 Ill. 13.

66. Kan.—Linscott v. Moseman, 114 P. 1088, 84 Kan. 541.

67. Iowa.—Fagan v. Hook, 105 N. W. 155, 111 N.W. 981, 134 Iowa 381.
23 C.J. p 222 note 9.

68. Iowa.—Billick v. Davenport, 145 N.W. 470, 164 Iowa 105.

69. Iowa.—Lessenich v. Sellers, 93 N.W. 348, 119 Iowa 314.

70. Mich.—Efrusy v. Mack, 188 N. W. 374, 219 Mich. 85.
23 C.J. p 222 notes 9–12.

performance.[71] Where the contract merely requires that the abstracter shall be reliable it is not necessary that he should be bonded.[72] Where a contract provides merely that a party to the contract shall take land subject to a mortgage it is not necessary that the abstract should show such mortgage.[73] Under a provision that in case the abstract of title furnished by either party should be defective, such party shall have a reasonable time for having such abstract corrected, a default cannot be imputed to a party offering a defective abstract until the expiration of a reasonable time.[74]

The interpretation and effect of an abstract[75] and of the accompanying affidavits[76] is for the court.

(5) Sufficiency of Deed

An executory exchange contract providing for a general warranty deed calls for a deed with full covenants; and in the absence of a contrary stipulation, a party is entitled to a warranty deed.

An executory contract for exchange which provides for a general warranty deed calls for a deed with full covenants.[77] In the absence of special stipulations to the contrary, a party is entitled to a warranty deed of the land which is to be conveyed to him.[78] A contract which provides that the parties are to make a good and lawful title clear of all charges, costs, disputes, encumbrances, etc., requires deeds with general warranties.[79]

A provision that a party is to make or cause to be made a deed in fee for certain land requires a deed not merely good in form but one fully operative to pass an indefeasible fee simple estate.[80] A party may properly refuse to accept a deed purporting to convey a smaller number of acres than as represented by the other party, although the contract provides for a transfer in gross, where the representation is constructively fraudulent.[81]

Quitclaim deed. Where the contract provides for a quitclaim deed, such a deed is sufficient.[82] It has been held that an agreement to give "good title" to the land does not necessarily entitle the opposite party to a warranty deed since the right of property and of exclusive possession which constitutes good title may be effectually vested in him by a deed of quitclaim.[83]

(6) Bond to Perfect Title

A party to a contract for exchange is not ordinarily bound to accept a bond to perfect title, although he may, and sometimes under the terms of the contract must, do so.

While a party to a contract for exchange by which the other party is to convey land may,[84] and sometimes under the terms of the contract must,[85] accept a bond to perfect title, ordinarily he is not obliged to accept such a bond.[86]

(7) Objections to Title and Waiver

Objections to the title tendered in performance of an exchange contract should be seasonably made, and the party tendering it should be given an opportunity to remedy the defects. Defects in the title offered may be waived.

Objections to a deed offered in performance of a contract for exchange of property should be seasonably made.[87] However, where there is an apparent encumbrance of record, the party to whom the land is offered is entitled to demand a reasonable time for investigation.[88]

Ordinarily a party should make all his objections to the title disclosed by the abstract furnished him by the other party when he returns such abstract,[89] but a failure to do so may not be fatal.[90]

71. Mo.—McGinness v. Brodrick, 192 S.W. 420.

72. Mo.—McGinness v. Brodrick, supra.

73. Mo.—McGinness v. Brodrick, supra.

74. Ill.—Watson v. Mickleberry, 145 Ill.App. 624.

75. Kan.—Denser v. Gunn, 87 P. 1132, 74 Kan. 748.
Mich.—Frederick v. Hillebrand, 165 N.W. 810, 199 Mich. 333.

76. Mich.—Frederick v. Hillebrand, supra.

77. Ind.—Bethell v. Bethell, 92 Ind. 318.

78. Mo.—McGinnis v. Brodrick, 192 S.W. 420.

79. Ky.—Overton v. French, Ky. Dec. 297.

80. Tenn.—Topp v. White, 12 Heisk. 165.

81. N.Y.—Flickinger v. Glass, 170 N.Y.S. 459.

82. Kan.—Sanford v. Shepherd, 14 Kan. 228.
23 C.J. p 224 note 43 [a].

83. Mass.—Kyle v. Kavanaugh, 103 Mass. 356, 4 Am.R. 560.

84. Minn.—Blied v. Barnard, 139 N. W. 714, 120 Minn. 399.

85. Minn.—Blied v. Barnard, supra.
23 C.J. p 223 note 36.

Bond conditioned on conveyance by surety

Where plaintiff agreed to convey his land in Colorado to defendant, and defendant agreed to deliver to plaintiff a bond of a surety company, in which this company obligated itself to convey land in Mexico to plaintiff, defendant's delivery of such a bond constituted a full performance, and the fact that lawless conditions in Mexico made it impossible to deliver a good title to the Mexican land was of no avail to plaintiff in an action against defendant for the value of the Mexican land.—Bowe v. Wright, C.C.A. Colo., 281 F. 946.

86. Tex.—Carlisle v. Green, Civ. App., 131 S.W. 1140.
23 C.J. p 224 note 37.

87. Kan.—Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

88. Mich.—Frederick v. Hillebrand, 165 N.W. 810, 199 Mich. 333.

89. Kan.—Linscott v. Moseman, 114 P. 1088, 84 Kan. 541.

90. Kan.—Linscott v. Moseman, supra.
23 C.J. p 223 note 22.

A party who is aware of alleged defects in the title of the other party should notify the other party before refusing to carry out the agreement in order that the title may be cleared, if possible.[91] However, it seems that the application of this rule is less strict in the case of an agreement to furnish a deed with an abstract of a perfect title.[92] A party is usually entitled to a reasonable time to meet the objections of the other party to the title to land which the former offers on the exchange.[93]

A contract providing fully for the manner and time in which objections to the title tendered should be presented is binding as respects the right of the party tendering title to specific performance.[94]

Waiver and estoppel. A party may waive defects in the title of the other party to real property involved,[95] as by failing to raise an objection[96] or seasonably to do so.[97] Taking and retaining possession of the land after knowledge of a defect in the title may constitute a waiver of such defect.[98] However, where a party takes possession of the real estate which is to be conveyed to him, before the deed is executed, he is not thereby precluded from requiring a deed in accordance with the contract.[99]

As a general rule, retention of an abstract by the party to whom it is delivered for an unreasonable time without objection constitutes a waiver of defects shown by the abstract.[1] The making of specific objections to alleged defects in an abstract or deed may be deemed a waiver of others not mentioned.[2] However, a party is not estopped to object to a defect in the title of the other party on the ground that he has already objected to the title because of another defect where at no time has there been a definite rejection of the title based on such other defect.[3] It has been held that the act of one party in accepting an abstract believing that the time had expired in which the other party could require him to accept was not a waiver of a requirement that it show clear title.[4]

c. Delivery and Acceptance of Property

Full performance of a contract for the exchange of personal property requires delivery and acceptance of the property to be transferred. Delivery may be symbolic.

The mere fact that the contract recites that one of the parties acknowledges payment for certain articles and thereby delivers all thereof to the other party does not show that there was an actual delivery.[5] There may be a symbolic delivery of personal property involved in an exchange.[6]

Acceptance and inspection. Performance by a party to a contract for the exchange of personal property is not complete until the goods tendered are accepted by the other party.[7] In order to hold a party to an implied acceptance of personal property which is to be delivered in exchange for other personal property, knowledge on his part that the tender was made or the delivery attempted must be shown,[8] unless there are peculiar and special circumstances or an established custom under or by which the party to whom delivery is to be made is bound to possess such knowledge.[9] Loss of property agreed to be exchanged has been held not a sufficient excuse for a refusal to accept the property tendered by the other party.[10]

Opportunity to inspect must be given the party to whom a tender of personal property is made; otherwise he will not be charged with a wrongful rejection.[11] On an exchange for goods which are to be exchanged at the invoice value, the party

91. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.
23 C.J. p 223 note 23.

92. Iowa.—Lessenich v. Sellers, 93 N.W. 348, 119 Iowa 314.
23 C.J. p 223 note 24.

93. Iowa.—Lewis v. Woodbine Sav. Bank, 165 N.W. 410, 182 Iowa 190.
Where contract so provides
Exchange contract, giving sufficient additional time to remove defects in title, precluded default before expiration of reasonable time.—Pyle v. Benjamin, 283 P. 372, .102 Cal.App. 691.

94. Mich.—Cohen v. Bredfeld, 216 N.W. 376, 241 Mich. 173.

95. Mass.—Sleeper v. Nicholson, 87 N.E. 473, 201 Mass. 110.
23 C.J. p 223 note 26.

96. N.Y.—Bigler v. Morgan, 77 N.Y. 312.
23 C.J. p 223 note 27.

97. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.
23 C.J. p 223 note 28.

98. Kan.—Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann.Cas.1912A 748.

99. Idaho.—Newmyer v. Roush, 120 P. 464, 21 Idaho 106, Ann.Cas. 1913D 433.

1. Iowa.—Lessenich v. Sellers, 93 N.W. 348, 119 Iowa 314.
23 C.J. p 223 note 31.

2. Cal.—Royal v. Dennison, 42 P. 39, 109 Cal. 558.
Iowa.—Lessenich v. Sellers, 93 N.W. 348, 119 Iowa 314.

3. N.Y.—Thornton Bros. Co. v. Thomas H. Tully Constr. Co., 145 N.Y.S. 156, 160 App.Div. 171.

4. Tex.—Gaut v. Dunlap, Civ.App., 188 S.W. 1020.

5. U.S.—Marsh v. McPherson, Neb., 105 U.S. 709, 26 L.Ed. 1139.

6. Mo.—Poplin v. Brown, 205 S.W. 411, 200 Mo.App. 255.
23 C.J. p 224 note 47.

7. Ohio.—Jenkins v. Mapes, 41 N.E. 137, 53 Ohio St. 110.
Mere tender does not pass title, where the opposite party for good reason refuses to accept.—McNabb v. Juergens, Iowa, 180 N.W. 758, modified on other grounds 185 N.W. 581.

8. Ohio.—Jenkins v. Mapes, 41 N.E. 137, 53 Ohio St. 110.

9. Ohio.—Jenkins v. Mapes, supra.

10. Tex.—Herrington v. Holman, 25 Tex.Supp. 256.

11. Ohio.—Jenkins v. Mapes, 41 N.E. 137, 53 Ohio St. 110.

to whom the goods are to be transferred is entitled to be permitted to verify the footings of the invoice before performing on his part.[12]

§ 13. Conditional Exchange

General principles governing conditional sales are applicable to conditional exchanges.

General principles governing conditional sales of personal property, considered in the C.J.S. title Sales § 553 et seq, also 55 C.J. p 1192 note 2 et seq, are applicable to conditional exchanges in which a party delivers possession of property to another while retaining title until he receives payment in other property in accordance with the terms of the contract.[13]

II. REMEDIES

§ 14. Breach of Contract or Nonperformance in General

a. Right of action
b. Pleading; issues, proof, and variance
c. Evidence
d. Trial
e. Damages

a. Right of Action

(1) In general
(2) Form of action
(3) Failure of title to real property
(4) Deficiency or excess in quantity

(1) In General

Depending on the facts of the particular case, a party to an exchange contract may have a right of action to recover the value of property transferred, or a right of action for damages, or he may sue for specific performance.

Where one of the parties has fully performed the contract by conveying or delivering the thing which he agreed to give in exchange, and the other party fails to perform,[14] or where neither party has performed and one of them, on being called on to perform, fails or refuses to comply with his contract,[15] the party who is not in default but is ready and willing to perform[16] may maintain an action for

12. Ill.—Gibson v. Brown, 73 N.E. 578, 214 Ill. 330.

13. **Remedies of seller**
(1) Where the transfer of personal property by one of the parties is in the nature of a conditional sale, he must comply with the requirements of the statute applicable in order to enforce his right to retake the property transferred by him.—Dougherty v. Neville, 95 N.Y.S. 806, 108 App.Div. 89, affirmed 79 N.E. 1103, 186 N.Y. 578.

(2) Where a contract was made to exchange a beet pulp drier for products to be manufactured thereby, defendant having refused to deliver such products to complainant, the latter, having retained title to the drier until paid for, was entitled to sue at law to recover possession thereof and damages for defendant's breach of contract, or for the balance of the price unpaid in money.—Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., C.C.N.Y., 161 F. 215.

14. Cal.—Hahn v. Wilde, 39 P.2d 473, 3 Cal.App.2d 422—Feagins v. Burton, 279 P. 460, 100 Cal.App. 7.
Mass.—Bachinsky v. Rogers, 173 N. E. 549, 273 Mass. 381.
Mo.—Bay v. Bedwell, App., 21 S.W. 2d 203.
Tex.—Victory Motor Co. v. Erwin, Civ.App., 12 S.W.2d 1059, error dismissed.
23 C.J. p 227 note 15.

Acquiescence to rescission
Where plaintiff acquiesced in defendant's rescission of an exchange contract, it was held that he was not entitled to recover damages.—Reader v. Frank H. Applegate, Inc., 271 N.W. 839, 224 Wis. 574.

Proximate cause
Plaintiff's breach of contract to reduce first mortgage from thirty three thousand dollars to twenty seven thousand dollars on her farm, which she exchanged for defendant's land, which was subject to mortgages aggregating forty four thousand dollars, was not proximate cause of loss of farm to defendant by foreclosure, so as to entitle defendant to the damages claimed for the loss thereof.—Tulburt v. Hourscht, 248 N.W. 192, 61 S.D. 231.

15. Ky.—Linde v. Ellis, 6 S.W.2d 1089, 1090, 224 Ky. 649, citing **Corpus Juris.**
Mo.—Douthitt v. Chenoweth, App., 34 S.W.2d 556.
23 C.J. p 227 note 16.

16. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 426, 137 Cal.App. 240, citing **Corpus Juris.**
23 C.J. p 228 note 17.

Both parties in default
Where a party to an executory contract for the exchange of realty executes a note for two thousand dollars conditioned to be void on performance of the contract, it is a good defense, in an action on such note, that plaintiff has likewise defaulted by failure to deliver an abstract showing marketable title as called for by the contract.—Crandall v. Jacobs, 190 N.W. 379, 195 Iowa 296.

Party breaching contract
(1) Plaintiff could not recover damages under contract to exchange property if she breached contract herself or was party to defendant's breach thereof.—Bayer v. Gage, 168 N.E. 749, 33 Ohio App. 108.

(2) Where defendant was sued for specific performance of a contract to exchange realty and defended against the action and cross-petitioned for damages, and evidence showed that defendant first breached the contract, trial court was authorized in denying defendant damages.—Johnson v. Powers, Okl., 111 P.2d 191.

Liquidated damages
(1) Party to contract for exchange of property had option to treat contract as ended or to bring action for liquidated damages provided therein when other party without qualification renounced contract and refused to perform thereunder.—Kocsis v. Wroblewski, 196 N.E. 367, 100 Ind. App. 653.

(2) Party defaulting was liable to other parties for liquidated damages, notwithstanding impossibility of performance known to broker employed by all.—Green v. Kaempf, 212 N.W. 405, 192 Wis. 635.

Contract not specifically enforceable
Party to exchange of property was entitled to full performance by other party, who had received all benefits thereunder, or reimbursement for deficiency, regardless of insuffi-

damages for the breach of contract against the party who fails or refuses to perform, or in a proper case may sue for specific performance as shown in the C.J.S. title Specific Performance § 63, also 58 C.J. p 1025 notes 63–68, but there can be no action at law for the consideration agreed to be exchanged.[17]

A party not in default who rescinds the contract may recover the specific property with which he has parted[18] or the value thereof.[19] However, a suit to recover property transferred to defendant, who breached the contract, is a waiver of the right to sue for damages for the breach.[20] Where the title to personal property which was to have been transferred to plaintiff in exchange for other property has passed to plaintiff, he may maintain an action to recover such personal property[21] or its value;[22] but where the contract is wholly executory, neither party having obtained possession of the property which was to have been transferred to him, an action to recover the property to be so transferred will not lie;[23] and a like rule applies with respect to the recovery of personal property which under the contract is to be exchanged for real property.[24]

Boot money. Boot money as part of the consideration of an exchange of property may be considered as part of the purchase price with respect to which the parties may avail themselves of the usual remedies.[25] However, a party may lose his right to claim the balance of boot money from the other party by the method of dealing with the latter and their common agent.[26]

Defenses. In an action on a contract for the exchange of property, defendant may set up any defense he has relating thereto,[27] unless estopped.[28] On defendant's admission of the only reason for not carrying out the exchange, all other inconsistent defenses become immaterial.[29]

In a proper case fraud may be set up as a defense[30] or as a basis of claim for damages by way of recoupment, set-off, or counterclaim[31] in an action for breach of contract for the exchange of property. Fraud with respect to a separate and independent contract may not be relied on as a defense to an action on the contract.[32] It has been held that, where a counterclaim based on an alleged fraud which did not render the contract void in its inception is withdrawn, defendant cannot thereafter rely on the alleged fraud as a defense to an action on the contract.[33] In an action to recover personal property which was to have been transferred to plaintiff in exchange for certain real property, defendant may set up a defense of fraud where the contract is not under seal.[34]

Time to sue. A party, having effected rescission, need not sue to recover his loss before expiration of the time within which he would be required to rescind,[35] and conversely, where defendant's acts amount to a refusal to perform, plaintiff may sue without waiting for the expiration of the contract.[36]

(2) Form of Action

An action for breach of an exchange contract should be on the agreement and for breach of it and ordinarily should not be brought on the common counts for goods sold and delivered.

In general where goods are sold to be paid for wholly or in part by other goods the action must be on the agreement and for breach of it,[37] and not on the common counts for goods sold and delivered.[38] A like rule has been held to apply where defendant agrees to convey real property in ex-

ciency of contract to support specific performance.—Jacks v. Manning, Tex.Civ.App., 297 S.W. 588.

17. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 137 Cal.App. 240.

18. Iowa.—Jewell v. Norris, 62 N. W. 740, 94 Iowa 241.
Tex.—Victory Motor Co. v. Erwin, Civ.App., 12 S.W.2d 1059, error dismissed.
23 C.J. p 228 note 21.

19. Ga.—Tifton Chevrolet Co. v. Mathis, 163 S.E. 308, 44 Ga.App. 839, citing **Corpus Juris.**
23 C.J. p 228 note 22.

20. Tex.—Victory Motor Co. v. Erwin, Civ.App., 12 S.W.2d 1059, error dismissed.

21. Ill.—Rhea v. Riner, 21 Ill. 526.
N.Y.—Morgan v. Powers, 66 Barb. 35.

22. Vt.—Russell v. Phelps, 50 A. 1101, 73 Vt. 390.
23 C.J. p 228 note 24.

23. Miss.—Wachstetter v. Brown, 58 So. 530, 101 Miss. 546.

24. Neb.—Barrett v. Turner, 2 Neb. 172.

25. N.C.—Copeland v. Fowler, 66 S. E. 215, 151 N.C. 353.
23 C.J. p 228 note 28.

26. Kan.—O'Meara v. Heer, 102 P. 478, 80 Kan. 435.
23 C.J. p 228 note 29.

27. Cal.—Hahn v. Wilde, 39 P.2d 473, 3 Cal.App.2d 422.

28. Ga.—Dunlop Tire & Rubber Co. v. White, 164 S.E. 414, 45 Ga.App. 268.

29. Tex.—Veselka v. Forres, Civ. App., 283 S.W. 303.

30. Tex.—Crosslands v. Evans, Civ. App., 102 S.W.2d 498.
23 C.J. p 228 note 30.

31. Mass.—Davis v. Elliott, 15 Gray 90.
23 C.J. p 228 note 31.

32. Kan.—Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

33. Kan.—Bierer v. Fretz, supra.

34. Ill.—Robinson v. Yetter, 87 N. E. 363, 238 Ill 320.

35. Minn.—Krzyzaniak v. Maas, 233 N.W. 595, 182 Minn. 83.

36. Cal.—Feagins v. Burton, 279 P. 460, 100 Cal.App. 7.

37. Ga.—Adams v. Fleming, 127 S. E. 819, 33 Ga.App. 742.
23 C.J. p 229 note 45.

38. Me.—Slayton v. McDonald, 73 Me. 50.
23 C.J. p 229 note 46.

change for goods delivered to him and there is nothing to show that the property involved was priced at its cash value;[39] but an action for goods sold and delivered has been permitted on defendant's failure to transfer property in exchange where the price of the goods delivered is fixed by the contract.[40] A like rule has been held to apply where there is a mere reservation on the part of defendant of a privilege to make payment in goods.[41] Where one of the parties has departed from the special contract by bringing an action of assumpsit for goods sold and delivered, the other party has been permitted subsequently to recover in such an action for the goods delivered by him.[42]

It seems that a person who has delivered goods pursuant to a contract by which he was to receive therefor certain real property may, on the other party's refusal to convey, rescind the contract and recover in assumpsit the actual value of the property delivered.[43] Where in the case of an agreement for the exchange of real property defendant's contract is enforceable, plaintiff should plead the special contract and defendant's failure to perform pursuant thereto,[44] and in such case there can be no recovery under the common counts where the contract is wholly executory.[45] So the person who conveys land in exchange for personal property to be transferred to him should usually plead the special contract.[46] Where defendant's promise to convey land is void and unenforceable, on his refusal to convey there arises an implied promise to pay for what he has received under the contract, and plaintiff can recover in an action of assumpsit the value of the property transferred by him.[47] An action to recover the difference in value arising on an oral contract for the exchange of lands should not be based on the oral agreement, but on the exchange as executed.[48]

One entitled to rentals after an exchange can maintain an action for money had and received, notwithstanding an agreement entitling him to such rentals.[49]

An action to recover a stipulated sum on failure of defendant to make title has been held not one to enforce a forfeiture or to recover a penalty.[50]

Trover. A party to a contract of exchange to whom title in the property which was to be delivered to him has passed may maintain trover where the other party refuses to make delivery.[51] So, also, trover may lie to recover personal property delivered by plaintiff to defendant and converted by the latter, where plaintiff may and does rescind the contract.[52]

(3) Failure of Title to Real Property

On a technical exchange of real property, a party may, on the failure of title, make a reëntry on the land given by him in exchange.

Where the contract has been executed and deeds exchanged and the transaction is not a technical exchange, there is no right of reëntry on the land conveyed by the injured party,[53] and his remedy is an action for damages on the covenants or warranty in the deed.[54] However, where the contract is still executory, the injured party may sue for damages for a breach of the contract,[55] or he may recover the property transferred,[56] or its value,[57] in an appropriate action for that purpose.

Questions as to the right to maintain an equitable action for cancellation because of failure of title are treated in Cancellation of Instruments.

39. Mich.—Pierson v. Spaulding, 27 N.W. 865, 61 Mich. 90.
23 C.J. p 229 note 47.

40. Ill.—McKinnie v. Lane, 82 N.E. 878, 240 Ill. 544, 120 Am.S.R. 338.
23 C.J. p 229 note 48.

41. Vt.—Way v. Wakefield, 7 Vt. 223.

42. Mass.—Goodrich v. Lafflin, 18 Mass. 57.

43. Minn.—Reynolds v. Franklin, 43 N.W. 53, 41 Minn. 279.

44. Mich.—Nugent v. Teachout, 35 N.W. 254, 67 Mich. 571.
23 C.J. p 229 note 53.

45. Ill.—Miller v. Walker, 158 Ill. App. 276.

46. Ga.—Butler v. Sams, 75 S.E. 1127, 138 Ga. 748.

47. Mass.—Basford v. Pearson, 9 Allen 387, 85 Am.D. 764.
23 C.J. p 230 note 56.

48. N.Y.—Ing v. Roberts, 1 N.Y.City Ct. 371.

49. Cal.—Marshall v. Swaim, 282 P. 423, 102 Cal.App. 119.

Person liable

One entitled to rentals after exchange could sue grantor's wife receiving rentals for money had and received aside from contractual relation.—Marshall v. Swaim, supra.

50. Cal.—Imes v. MacDonald, 298 P. 173, 113 Cal.App. 427.

51. Ill.—Newlin v. Prevo, 90 Ill. App. 515.
23 C.J. p 230 note 59.

52. Ga.—Dunlop Tire & Rubber Co. v. White, 164 S.E. 414, 45 Ga. App. 268—Tifton Chevrolet Co. v. Mathis, 163 S.E. 308, 44 Ga.App. 839.
23 C.J. p 230 note 60.

Money verdict may be taken by plaintiff.—Trippe v. Crescent Farms, 197 S.E. 330, 58 Ga.App. 1.

53. Or.—Windsor v. Collinson, 52 P. 26, 32 Or. 297.
23 C.J. p 237 note 21.

54. U.S.—McFarland v. Hanes, D.C. N.C., 286 F. 937.
23 C.J. p 237 note 22.

Suit by agent

A party to an indenture for the exchange of lands is not prevented from recovering on the covenants therein by the mere fact that the indenture recites that he is to receive possession of the other party's land as agent for a specified third person.—Couch v. Ingersoll, 2 Pick., Mass., 292.

55. Minn.—Donlan v. Evans, 42 N. W. 472, 40 Minn. 501.

56. Ky.—Thacker v. Belcher, 11 S. W. 3, 10 Ky.L. 853.
23 C.J. p 237 note 24.

57. Mass.—Basford v. Pearson, 9 Allen 387, 85 Am.D. 764.
23 C.J. p 237 note 25.

In case of a technical exchange of land there is as incident thereto a warranty of title, and either party may, on the failure of the title to the property received by him, make a reëntry on the land given by him in exchange.[58] Under the technical rules of the common law, the injured party was given the right to vouch and recover over in value.[59] Only the parties to the exchange or their heirs may vouch by force of the warranty; therefore an assignee of one of the parties can neither reënter nor vouch, but a party to the exchange may reënter, although the land conveyed by him has been transferred by the other party.[60]

The foregoing rules do not apply to an exchange of chattels.[61]

(4) Deficiency or Excess in Quantity

Where quantity is material, a party is entitled to relief for a deficiency in quantity of the property conveyed to him.

Where an exchange is made without reference to the number of acres and the value received by each party is substantially equal, there can be no recovery for shortage,[62] but where it appears that the quantity is material, a party to the contract has been permitted to recover as for breach of contract for a deficiency in the quantity of land conveyed to him.[63] A party is not entitled to recover for an alleged excess in the quantity of the land conveyed where it appears that in making the exchange he joined with his coöwner in a deed to the other party to the exchange and that he is liable on the joint warranty for a deficiency, although his agreement with the other party to the exchange was for a transfer of his several interests.[64] There can be no recovery based on the alleged fact that a portion of the goods transferred by the party seeking a recovery in exchange for certain lands was omitted from the invoice of such goods where the evidence does not authorize a finding that there was such an omission.[65] Where there is an agreement to exchange one class of goods for another class, one of the parties is not entitled to recover from the other the value of goods delivered in excess of the value of the goods received without proof of a breach of the agreement on the other's part by a refusal to deliver goods to the extent of the value of the goods delivered to such other.[66]

Mistake. Where there is a mutual mistake concerning the number of acres to be conveyed, the injured party may obtain relief either at law[67] or in equity.[68] It seems that in order to obtain relief because of a mistake as to the quantity of the property conveyed the injured party must on discovery of the deficiency give prompt notice to the other party to the contract and demand a correction.[69] A party who knowingly transfers more than a specified number of acres is not entitled to recover the value of the excess over such number on the ground of mistake.[70]

Excess on sale of exchanged property. Where a contract requires one party to sell to a third person property which such party receives in exchange and account for the price received in excess of a certain amount, and such party elects in making the sale to take property in exchange for part of the price, he must account therefor at the value at which he agrees with such third person to take it.[71]

Set-off of notes. Where certain notes given by a party to an exchange of land constitute a part of the consideration, such notes are subject to set-off for a deficiency in the land conveyed to the maker of the notes.[72]

b. Pleading; Issues, Proof, and Variance

The general rules of pleading in civil actions apply in actions based on nonperformance of contracts for the exchange of property.

The general rules of pleading in civil actions apply in actions based on nonperformance of contracts for the exchange of property, including the bill, dec-

58. Ky.—Grimes v. Redmon, 14 B. Mon. 234.
23 C.J. p 237 note 30.

59. Pa.—Bixler v. Saylor, 68 Pa. 146.
23 C.J. p 237 note 31.

60. Pa.—Dean v. Shelly, 57 Pa. 426, 98 Am.D. 235.

61. Pa.—Bixler v. Saylor, 68 Pa. 146.

62. Tex.—Barnum v. Howard, Civ. App., 167 S.W. 745.

63. Minn.—Reynolds v. Franklin, 43 N.W. 53, 41 Minn. 279.
23 C.J. p 237 note 43.

64. W.Va.—Currey v. Lawler, 11 S. E. 897, 29 W.Va. 111.

65. Iowa.—Harm v. Voss, 82 N.W. 753.

66. N.Y.—Long Island R. Co. v. Verree, 69 N.Y. 486.

67. N.C.—Griffin v. Barrett, 97 S.E. 394, 176 N.C. 473.
23 C.J. p 238 note 50.

68. Iowa.—Fisher v. Trumbauer, 138 N.W. 528, 141 N.W. 419, 160 Iowa 255.
23 C.J. p 238 note 51.

69. Ky.—Barton v. Jones, 267 S.W. 214, 206 Ky. 238.
Wis.—Selleck v. Griswold, 5 N.W. 213, 49 Wis. 39.
Lapse of time has been held not to work an estoppel or prevent recovery for shortage where there had been no change in the condition of the parties.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.

70. Ky.—Brown v. Geiger, 11 Ky. Op. 240.

71. Colo.—Benford v. Yockey, 164 P. 725, 63 Colo. 96.
23 C.J. p 238 note 54.

72. Tenn.—Frame v. Tabler, Ch.A., 52 S.W. 1014.

laration, or complaint,[73] the plea or answer,[74] and other pleadings.[75] Thus an allegation which constitutes a mere legal conclusion will not be considered,[76] mere matters of surplusage may be disregarded,[77] and defective allegations in the petition may be cured by the allegations in the answer,[78] or by amendments.[79]

The complaint should allege a performance by plaintiff or readiness and willingness to perform,[80] including the performance by him of conditions precedent,[81] or an excuse for nonperformance.[82] However, in the case of independent covenants, plaintiff may declare for a breach without taking notice of his own covenants.[83] The provision of the contract with respect to which a breach is claimed should be alleged in the complaint,[84] and the nature and character of the breach should be defined and specified.[85] The complaint should contain a claim for damages sought to be recovered,[86] as well as a statement of facts on which such damages may be predicated.[87]

In trover for conversion of property transferred by plaintiff only the ultimate facts constituting the cause of action need be alleged,[88] and plaintiff need not allege the facts on which his right to rescind is based.[89]

In an action for boot money the complaint need not allege that the goods transferred by plaintiff to defendant were of the kind and quality contracted for, or that they were free from liens.[90] The complaint in an action setting forth a special agreement for the exchange of personal property and the nonpayment of boot money is sufficient where the nonpayment is averred generally with no particular statement of the manner and periods of payment, where such boot money is due.[91]

Issues, proof, and variance. General rules as to issues, proof, and variance apply.[92] Where an al-

73. Ga.—Byrd v. Atlanta Title & Trust Co., 155 S.E. 190, 171 Ga. 251.
23 C.J. p 230 note 63.

Complaint held sufficient
(1) In general.
Cal.—Yoakum v. Hogan, 265 P. 531, 89 Cal.App. 649.
Ga.—Eller v. McMillan, 163 S.E. 910, 174 Ga. 729.
Tex.—Liberto v. Sanders, Com.App., 259 S.W. 1080, reversing, Civ.App., 248 S.W. 120.

(2) To show offer to restore status quo.
Ga.—Fletcher v. Fletcher, 124 S.E. 722, 158 Ga. 899.
N.Y.—Nuccio v. 103 East 114th St. Realty Corporation, 241 N.Y.S. 333, 136 Misc. 485, affirmed 249 N.Y.S. 909, 232 App.Div. 802.

Complaint held insufficient
(1) In general.
Cal.—Martin v. Pritchard, 199 P. 846, 52 Cal.App. 720.
Ga.—Woodruff v. Cooper, 179 S.E. 104, 180 Ga. 476.

(2) To show offer to restore status quo.—Woodruff v. Cooper, supra.

(3) To state cause of action for damages.—Miller v. Dyer, Cal.App., 120 P.2d 52.

Description of land
It is not sufficient to allege that by the imperfect description of the land involved given in the contract the parties intended to convey certain property, but the complaint must contain averments of such extrinsic matter as may be necessary to render complete the description of the land given in the written contract where such description is incomplete.—Marriner v. Dennison, 20 P. 386, 78 Cal. 202.

74. Tex.—Crossland v. Evans, Civ. App., 102 S.W.2d 498.
23 C.J. p 230 note 64.

Answer held sufficient
(1) In general.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

(2) To show fraud.
Ind.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind. App. 93.
Tex.—Nesbitt v. Hudson, Civ.App., 230 S.W. 746.

(3) To show existence of condition precedent.—Savage Realty Co. v. Lust, 196 N.Y.S. 296, 203 App.Div. 55.

Answer held insufficient
In action to recover for defendants' failure to restore city realty to plaintiffs after defendants' rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, where defendants' answers were general denials, defense of no demand for return of city realty was not open to defendants.—McMillion v. Triplett, 118 S.W.2d 515, 233 Mo. App. 325.

75. Iowa.—Ruegnitz v. Harrington, 183 N.W. 605.
23 C.J. p 230 note 65.

Counterclaim defensive only
Iowa.—Ruegnitz v. Harrington, supra.

76. Iowa.—Johnston v. Robertson, 162 N.W. 66, 179 Iowa 838.
23 C.J. p 230 note 66.

77. Cal.—Laughlin v. Pacific Coast Motor Car Co., 169 P. 996, 177 Cal. 86.
23 C.J. p 230 note 67.

78. Kan.—Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

79. Tex.—Garrett v. Butler, Civ. App., 260 S.W. 1069.

80. Ala.—Ferlesie v. Cook, 78 So. 915, 201 Ala. 571.
La.—Brandon v. Smith, 133 So. 489, 16 La.App. 130.

Complaint held sufficient
Tex.—Cowsar v. Rhodes, Civ.App., 41 S.W.2d 115.

81. Mass.—Couch v. Ingersoll, 2 Pick. 292.
23 C.J. p 230 note 76.

82. Mass.—Couch v. Ingersoll, 2 Pick. 292.

83. Mass.—Couch v. Ingersoll, supra.

84. Ala.—Ferlesie v. Cook, 78 So. 915, 201 Ala. 571.
23 C.J. p 230 note 77.

85. Ala.—Ferlesie v. Cook, supra.

86. Cal.—Yoakum v. Hogan, 265 P. 531, 89 Cal.App. 649.
Iowa.—Lewis v. Woodbine Sav. Bank, 165 N.W. 410, 182 Iowa 190.

Complaint held sufficient
Ariz.—Clark v. Matley, 5 P.2d 415, 39 Ariz. 263.

87. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 137 Cal.App. 240—Martin v. Pritchard, 199 P. 846, 52 Cal. App. 720.
Tex.—Thurman v. Day, Civ.App., 68 S.W.2d 238.
23 C.J. p 230 note 80.

88. N.D.—Mulroy v. Jacobson, 139 N.W. 697, 24 N.D. 354.

89. N.D.—Mulroy v. Jacobson, supra.

90. Ind.—Sharp v. Radebaugh, 70 Ind. 547.

91. N.Y.—Porter v. Talcott, 1 Cow. 359.

92. What must be proved
Makers of vendor's lien note given

legation in the petition is not denied, it stands as an admitted fact in the cause and requires no testimony to support it.[93] The evidence offered should be material to the issues raised by the pleadings,[94] and a material variance is fatal.[95] Thus, an averment of a contract of sale is not supported by proof of an exchange,[96] and an allegation of full performance is not supported by proof of an unpleaded waiver of performance.[97] Under a complaint framed on the theory that plaintiff has rescinded a contract for the exchange of real property and is entitled to recover the value of the land conveyed by him, he is not entitled to recover damages as for a breach of the contract.[98]

c. Evidence

The rules of evidence applicable in civil actions generally are controlling in actions for breach of a contract for the exchange of property.

In accordance with general rules, plaintiff must prove the facts on which his right to recover depends.[99] In an action for breach of contract defendant has the burden of proving an affirmative defense,[1] such as mistake[2] or fraud.[3] Defendant has also the burden of proving the averments of his counterclaim.[4]

General rules are applicable with respect to presumptions in actions on exchange contracts,[5] and fraud will not be presumed.[6]

The general rules as to admissibility of evidence apply in actions based on a breach of such contracts,[7] and all competent evidence is admissible, under proper pleadings, to establish the cause of action[8] or defense,[9] or to disprove matters relied on as a defense.[10]

The general rules as to the weight and sufficiency of evidence are applicable in actions based on nonperformance of contracts for the exchange of property.[11]

in exchange of land to be relieved of liability thereon on ground of fraud perpetrated in exchange were not required to show their total damage but only that such damage exceeded amount due on note.—Crossland v. Evans, Tex.Civ.App., 102 S.W.2d 498

93. Cal.—Aycock v. Carr, 288 P. 448, 105 Cal.App. 675.

94. Idaho.—Foss v. Dahlquist, 279 P. 407, 48 Idaho 30.
Iowa.—Golden v. Bilbo, 184 N.W. 643, 192 Iowa 319.
Vt.—Flint v. Davis, 8 A.2d 671, 110 Vt. 401.
23 C.J. p 231 note 88.

95. Ala.—Moore v. Whitmore, 66 So. 601, 189 Ala. 615.

No variance
Cal.—Klegman v. Moyer, 266 P. 1009, 91 Cal.App. 333.

96. Vt.—Vail v. Strong, 10 Vt. 457.

97. N.Y.—Imperator Realty Co. v. Tull, 167 N.Y.S. 210, 179 App.Div. 761.

98. Iowa.—McConnell v. Newell, 111 N.W. 17, 133 Iowa 736.

Recovery of consideration paid, and not value of land, held authorized.—Sietsema v. Anderson, 176 N.W. 611, 188 Iowa 651.

99. Cal.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.
Tex.—Files v. Spencer, Civ.App., 62 S.W.2d 161, error dismissed.
Wis.—Hinze v. Kurtz, 181 N.W. 720, 173 Wis. 579.
23 C.J. p 231 note 96.

Plaintiff has burden of proof
(1) As to performance or tender of performance on his part.—Lewis v. Van Hooser, 227 S.W. 618, 206 Mo.App. 618.

(2) As to damage and extent thereof.
Cal.—Hahn v. Wilde, 293 P. 30, 211 Cal. 52.
Iowa.—Lewis v. Woodbine Sav. Bank, 165 N.W. 410, 182 Iowa 190.
Wash.—Hall v. Mathewson, 74 P.2d 209, 192 Wash. 651.

1. Mo.—Miller v. Snyder, 129 S.W. 1073, 149 Mo.App. 97.
Tex.—Bennett v. Giles, Civ.App., 12 S.W.2d 843.

2. Iowa.—McCann v. Clark, 148 N.W. 1025, 166 Iowa 705.

3. Mo.—Dyer v. Cowden, 154 S.W. 156, 168 Mo.App. 649.

4. Conn.—Trowbridge v. Jefferson Auto Co., 103 A. 843, 92 Conn. 569.

5. **Value of property**
Presumption, that par value of stock is prima facie actual value does not warrant presumption, in action to recover exchange price, that stock was actually purchased or accepted at par value.—Hahn v. Wilde, 293 P. 30, 211 Cal. 52.

6. Iowa.—Sutton v. Greiner, 159 N.W. 268, 177 Iowa 532.

7. Ark.—Wildrick v. Raney, 282 S.W. 17, 170 Ark. 1194.
Cal.—Sherwood v. Turner, 217 P. 816, 62 Cal.App. 740.
Mo.—Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639.
R.I.—Northway Motor Sales Co. v. Pugh, 116 A. 485.
23 C.J. p 231 note 3, p 234 note 60 [b].

8. Ala.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.
Mass.—Bachinsky v. Rogers, 173 N.E. 549, 273 Mass. 381.
S.D.—Ward v. Reisdorf, 226 N.W. 339, 55 S.D. 322.
23 C.J. p 231 note 4.

Evidence held admissible
(1) In general.—Klegman v. Moyer, 266 P. 1009, 91 Cal.App. 333.

(2) Contract for exchange of property.—Golden v. Bilbo, 184 N.W. 643, 192 Iowa 319.

(3) Evidence as to value of property.—Henderson v. Rowe, Tex.Civ.App., 93 S.W.2d 589, error dismissed.

(4) Evidence to show repudiation of contract.—McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

9. Ky.—Gordon v. Wanless, 21 S.W. 2d 815, 231 Ky. 498.
Tex.—Anderson v. Hutto, Civ.App., 126 S.W.2d 709, error refused—Bennett v. Giles, Civ.App., 12 S.W. 2d 843—Williams v. Craig, Civ. App., 252 S.W. 876.
Vt.—Luce v. Brown, 118 A. 530, 96 Vt. 140.
23 C.J. p 232 note 5.

10. Mich.—Dikeman v. Arnold, 44 N.W. 407, 78 Mich. 455.
23 C.J. p 232 note 6.

11. Neb.—Weary v. Westering, 192 N.W. 324, 109 Neb. 764.
23 C.J. p 232 note 8.

Evidence held sufficient
(1) In general.
Ark.—Crowe v. Davidson, 72 S.W.2d 763, 189 Ark. 414.
Cal.—Hackler v. Tubach, 19 P.2d 295, 129 Cal.App. 680—Klegman v. Moyer, 266 P. 1009, 91 Cal.App. 333—McGowan v. Burg Bros., 210 P. 545, 59 Cal.App. 219.
Colo.—Kitt v. Runge, 282 P. 1067, 86 Colo. 479.
Conn.—Hosmer v. Butler, 143 A. 526, 108 Conn. 465.
Iowa.—Bandemer v. Benson, 270 N.

d. Trial

Questions of law are for the court, but questions of fact arising on conflicting evidence are for the jury. In accordance with general rules, instructions should be correct, warranted by the evidence, and should not be misleading.

In accordance with general rules, questions of law are for the court.[12] Unless the court is trying the case without a jury,[13] questions of fact on which there is sufficient evidence to be submitted to the jury,[14] but which is conflicting or of a doubtful character,[15] are for the jury. Questions held to be for the jury include questions as to the value of the property agreed to be exchanged,[16] the existence of fraud where fraud is set up as a defense,[17] the waiver of the right to rescind for fraud,[18] whether the contract has been abandoned,[19]

W. 353—McGregor Subdivision Co. v. Mable, 191 N.W. 117, 194 Iowa 1259.
Kan.—Owen v. Christopher, 62 P.2d 860, 144 Kan. 765.
La.—Morris v. Miller, 141 So. 500, 19 La.App. 776—Petosia v. Semple, 125 So. 759, 12 La.App. 213.
Mich.—Krysinski v. Whipple, 226 N. W. 828, 248 Mich. 195.
Mo.—Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639—McMillion v. Triplett, 118 S.W.2d 515, 233 Mo. App. 325—Field Bros. v. Green, App., 236 S.W. 1076.
N.M.—Moritzky v. Bobo, 72 P.2d 24, 41 N.M. 571.
Or.—Malcolm v. Tate, 267 P. 527, 125 Or. 419.
R.I.—Lavallee v. Carle, 148 A. 808—Smith v. Morgan, 131 A. 81.
S.D.—Overgaard v. Goodhope, 184 N. W. 2, 44 S.D. 379.
Tex.—Anderson v. Hutto, Civ.App., 126 S.W.2d 709, error refused—Szanto v. Pagel, Civ.App., 47 S.W. 2d 632, error dismissed—Branom v. Scott, Civ.App., 24 S.W.2d 499—Mazac v. Conner, Civ.App., 296 S. W. 641—Garrett v. Butler, Civ. App., 260 S.W. 1069.
Wash.—Hardinger v. Fullerton, 5 P. 2d 987, 165 Wash. 483.

(2) To establish exchange contract.
Ky.—Colwell v. Holliday, 63 S.W.2d 776, 250 Ky. 584.
Tex.—Pridgen v. Furnish, Civ.App., 11 S.W.2d 844, affirmed, Com.App., 23 S.W.2d 307.

(3) To show no contract existed. —Cloud v. Burnett, 206 N.W. 283, 201 Iowa 733.

(4) To sustain judgment for plaintiff.
Iowa.—In re Gensicke's Estate, 237 N.W. 333.
La.—Harkness v. Leggett, 131 So. 190, 171 La. 405.
Okl.—Berry-Tidwell, Inc., v. Tanner, 6 P.2d 793, 154 Okl. 93.
R.I.—Northway Motor Sales Co. v. Pugh, 116 A. 485.
Tex.—Henderson v. Rowe, Civ.App., 93 S.W.2d 589, error dismissed.

(5) To sustain judgment for defendant.—Puterbaugh v. Headberg, 89 P.2d 889, 149 Kan. 753.

(6) To show rescission.
Ark.—Robertson v. Lain, 269 S.W. 574, 168 Ark. 210.
Wash.—Sherman v. Nilson, 290 P. 693, 158 Wash. 702.

(7) To show exchange of land was in gross and not by acre.
Ky.—Cook v. McKee, 29 S.W.2d 571, 235 Ky. 1.
Va.—Huffman v. Landes, 177 S.E. 200, 163 Va. 652.

(8) To show mutual mistake.—Ward v. Reisdorf, 226 N.W. 339, 55 S.D. 322.

Evidence held insufficient

(1) In general.
Ala.—Davidson v. Brown, 110 So. 384, 215 Ala. 205.
Iowa.—Legvold v. Olson, 189 N.W. 737, 194 Iowa 1000.
Ky.—Jones v. Brammer, 17 S.W.2d 736, 229 Ky. 649—Kentucky Portland Cement & Coal Co. v. Steckel, 175 S.W. 663, 164 Ky. 420.
La.—Odell v. Babcock, 141 So. 407, 19 La.App. 622.
Minn.—Bauman v. Peters, 231 N.W. 613, 181 Minn. 85.
Mo.—Jones v. Reeves, App., 41 S.W. 2d 605.
N.J.—Ginsberg v. Wolters, 121 A. 730, 94 N.J.Eq. 532.
Okl.—Jones v. Harper, 278 P. 349, 137 Okl. 143.
Tex.—Cowsar v. Rhodes, Civ.App., 41 S.W.2d 115.
Utah.—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.

(2) To support judgment for plaintiff.
Cal.—Ellwood v. Niedermeyer, 56 P. 2d 279, 12 Cal.App.2d 699.
Mont.—Larose v. O'Connell, 216 P. 796, 68 Mont. 160.
Wash.—Hall v. Mathewson, 74 P.2d 209, 192 Wash. 651.

(3) To show incompetency to contract.—Richardson v. Brown, 225 N. W. 488, 247 Mich. 298.

(4) To show performance by defendant.—Ellwood v. Niedermeyer, 56 P.2d 279, 12 Cal.App.2d 699.

(5) To warrant recovery for deficiency in acreage.—Shaffer v. Glaser, 197 N.W. 998, 198 Iowa 291.

(6) To show mistake.—White v. Greenwood, 199 P. 1095, 52 Cal.App. 737.

12. Ark.—First Nat. Bank v. Russell, 27 S.W.2d 90, 181 Ark. 654.
Construction of written contract of exchange is for the court.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

13. Ky.—Jobe v. Brown, 53 S.W.2d 532, 245 Ky. 260.

14. Ala.—Curtis v. McLin, 119 So. 861, 23 Ala.App. 25.

Evidence held sufficient to go to jury
Minn.—McCrabb v. Graf, 180 N.W. 1018, 148 Minn. 35.
Tex.—Ballew v. McElroy, Civ.App., 10 S.W.2d 213.

Evidence held insufficient to go to jury
S.D.—Stewart v. Halvorson, 211 N. W. 457, 50 S.D. 590.

15. Colo.—Kestle v. Preuit, 298 P. 415, 88 Colo. 419.
Ga.—Trippe v. Crescent Farms, 197 S.E. 330, 58 Ga.App. 1.
Ill.—See Moran v. Grim, 196 Ill.App. 185.
Kan.—White v. Immenschuh, 187 P. 667, 106 Kan. 333.
Mo.—McMillion v. Triplett, 118 S. W.2d 515, 233 Mo.App. 325.
S.D.—Moen v. Farmers' Implement Co., 206 N.W. 422, 49 S.D. 62.
Tex.—Keene v. Gold, Civ.App., 27 S. W.2d 631, error refused Gold v. Keene, 31 S.W.2d 1071, 119 Tex. 448—Saunders v. Wilson, Civ.App., 241 S.W. 515.

Partial question of fact
Whether there was an acceptance of a contract of exchange of properties according to terms of contract, or whether offer was withdrawn before such acceptance, was partially a question of fact.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

16. Ill.—Plummer v. Rigdon, 78 Ill. 222, 20 Am.R. 261.
Tex.—Ed S. Hughes Co. v. Scott, Civ.App., 46 S.W.2d 1111—Evans v. Hartman, Civ.App., 286 S.W. 326.

17. Mich.—Frederick v. Hillebrand, 165 N.W. 810, 199 Mich. 333.
Mo.—Dyer v. Cowden, 154 S.W. 156, 168 Mo.App. 649.

18. Ala.—Young v. Arntze, 5 So. 253, 86 Ala. 116.
Mich.—Lindow v. Mudge, 226 N.W. 656, 247 Mich. 624.

19. Iowa.—Strahn v. Johnson, 196 N.W. 731, 197 Iowa 1324.

what constitutes a reasonable time for performance,[20] whether time is of the essence of the contract,[21] or whether plaintiff has furnished or offered to furnish reasonably satisfactory evidence of the cost of the goods to be exchanged by him for other property.[22] However, in an action for damages, a directed verdict for defendant is warranted under evidence showing a mutual abandonment of the contract.[23]

Instructions. The rules governing instructions generally are applicable in actions based on a failure to perform a contract for the exchange of property.[24] The instructions should not be misleading,[25] and correct instructions requested by a party and warranted by the evidence should be given,[26] but an instruction which is not based on the evidence should not be given.[27] An instruction should be considered with reference to the issue to which it relates.[28]

Verdicts, findings, and judgment. General rules as to verdicts, findings, and judgments apply in actions based on a breach of a contract for the exchange of property.[29] In decreeing rescission, the court may properly take into account the disbursements, benefits, and the like, so as to restore the status quo;[30] and a defendant cannot question the ability of plaintiff to restore the property where the judgment was rendered in the alternative.[31]

e. Damages

(1) In general
(2) On failure of title to realty
(3) On deficiency or excess of quantity

(1) In General

On breach of a contract for an exchange of property, the damages recoverable are such as are the natural, direct, and proximate result of the breach, and different rules, depending on the extent of performance of the contract, have been applied in determining the amount of damages.

In an action for a breach of a contract for an exchange of property, the damages recoverable are such as are the natural, direct, and proximate result of the breach,[32] and such as reasonably might be presumed to have been within the contemplation of the parties.[33] The rule as to damages may

20. Iowa.—Legvold v. Olson, 189 N. W. 737, 194 Iowa 1000.

21. Tex.—Finley v. Messer, Civ. App., 9 S.W.2d 756.

22. Mo.—Inlow v. Bybee, 99 S.W. 785, 122 Mo.App. 475.

23. Ohio.—Bayer v. Gage, 168 N.E. 749, 33 Ohio App. 108.

24. Mo.—Chandler v. Guenther, App., 96 S.W.2d 638.
23 C.J. p 232 note 10.

Instructions held proper or erroneously refused
Cal.—Sherwood v. Turner, 217 P. 816, 62 Cal.App. 740.
Wis.—Hinze v. Kurtz, 181 N.W. 720, 173 Wis. 579.

Instructions held erroneous or properly refused
Mo.—McMillion v. Triplett, 118 S. W.2d 515, 233 Mo.App. 325.
Wis.—Hinze v. Kurtz, 181 N.W. 720, 173 Wis. 579.

25. Ala.—Cornett v. Brooks, 90 So. 787, 206 Ala. 566.
23 C.J. p 232 note 11.

26. Mo.—McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

27. Mass.—Bachinsky v. Rogers, 173 N.E. 549, 273 Mass. 381.
23 C.J. p 232 note 12.

28. Mich.—Pratt v. Wickham, 94 N. W. 1059, 133 Mich. 356.
23 C.J. p 232 note 13.

29. Ga.—Fletcher v. Fletcher, 124 S.E. 722, 158 Ga. 899.
Ky.—Fields v. Cornett, 70 S.W.2d 954, 254 Ky. 35—Milam v. Young, 277 S.W. 1018, 211 Ky. 714.
Mich.—Bojarski v. Milus, 198 N.W. 182, 226 Mich. 475.

Rescission or damages
In suit to rescind exchange of realty, chancellor could, without granting rescission, allow plaintiff three hundred dollars, representing excess of street assessment on property obtained above amount represented.—Jobe v. Brown, 53 S.W.2d 532, 245 Ky. 260.

Foreclosure of mortgage could not be awarded in an action to rescind a trade for deceit.—Campbell v. Jones, Tex.Civ.App., 230 S.W. 710.

Judgments or orders held proper
(1) In general.—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664.
(2) Where decree provided for rescission of exchange of properties unless defendants brought up to date payments required by mortgage on property traded in by defendants, which defendants had agreed to pay, and filed statement of mortgagee showing payment of all arrears, mortgagee's statement that loan was in "good standing" was not compliance with decree; hence subsequent order providing for execution of rescission was authorized.—Weaver v. Stinson, 31 P.2d 510, 177 Wash. 140.

Findings held sufficient to sustain judgment
Cal.—Wild v. Arrand, 286 P. 480, 104 Cal.App. 511.

30. Mich.—Mezak v. Fox, 235 N.W. 172, 253 Mich. 326.

31. Cal.—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664.

32. Ky.—Linde v. Ellis, 6 S.W.2d 1089, 1090, 224 Ky. 649, citing Corpus Juris.
Tex.—Henderson v. Rowe, Civ.App., 93 S.W.2d 589, error dismissed.
23 C.J. p 232 note 23.

Failure to furnish abstract
Where defendant breached contract to furnish abstract, plaintiff's damages were held merely cost thereof, and not profits on sale lost through inability to furnish abstract. —Curtner v. Bank of Jonesboro, 299 S.W. 994, 175 Ark. 539.

Recovery of property and damages erroneous
Plaintiff is not entitled to recover money in addition to land in suit on quantum meruit for value of standing timber sold defendant, who agreed to convey such land to plaintiff.—Bay v. Bedwell, Mo.App., 21 S.W.2d 203.

Expense of protecting property
Vendor paying interest and taxes on land received in exchange for land sold, under implied contract for reimbursement, could not recover attorney fees expended to protect land. —Phipps v. Fuqua, Tex.Civ.App., 32 S.W.2d 660, error refused.

Failure to build railroad
Damages for breach of agreement to construct railroad on land exchanged were held difference in value with and without railroad at time of exchange.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

33. Conn.—Gray v. Greenblatt, 155 A. 707, 113 Conn. 535.

be affected by the custom of dealing between the parties[34] or by special provisions of the contract,[35] as where values are agreed on, or fixed by, the parties.[36] As shown infra this section, in the application of the foregoing principles, different rules, depending on the extent of performance of the contract, have been applied in determining the amount of damages.

Where plaintiff has performed. Where plaintiff has fully performed, and defendant has not performed, the measure of damages has been held to be the value of the property which was to have been delivered to plaintiff,[37] and in such case the value at the time of the breach governs.[38] However, in some cases it has been held that where defendant has failed to convey in accordance with his agreement, the measure of damages is the value of the property conveyed by plaintiff,[39] at least where defendant is free from fraud.[40] In an action for property transferred by plaintiff in partial performance of the contract, the amount recoverable is the reasonable value of such property and not the price fixed in the contract;[41] although in such case the price fixed in the contract as the value of the property delivered is prima facie evidence of their reasonable value.[42] After rescission because of nonperformance by the other party, a party to a contract of exchange cannot recover the profits of his bargain.[43]

Defendant not performing a contract to exchange lands, but entering into possession of plaintiff's land, has been held liable for rent, less a reasonable amount for any permanent improvements he has placed on such land.[44]

Where defendant has only partially performed, it has been held that the measure of damages is the difference between the market value of the prop-

Ky.—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.

34. Wis.—Studebaker Corp. v. Gollmar, 150 N.W. 442, 159 Wis. 336.
23 C.J. p 233 note 29.

35. Conn.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.
23 C.J. p 233 note 30.

Attorney's fee
Real estate exchange contract, providing for payment of costs arising from enforcement thereof, including attorney's fee, by defaulting party, did not entitle party suing for forfeiture of contract to allowance of attorney's fee.—Leone v. Zuniga, 34 P.2d 699, 84 Utah 417.

Reconveyance
Where contract required plaintiff to reconvey defendant's property to him as soon as plaintiff had determined not to consummate the agreement of exchange, plaintiff's failure to reconvey did not entitle defendant to damages, where defendant did not prepare and present a deed for purposes of reconveyance.—Reilly v. Magee, 116 A. 310, 272 Pa. 406.

36. Cal.—Imes v. MacDonald, 298 P. 173, 113 Cal.App. 427.
23 C.J. p 233 note 31.

37. U.S.—Clark v. Belt, S.D., 223 F. 573, 138 C.C.A. 1.
Cal.—Barnhart v. Blackburn, 30 P.2d 424, 137 Cal.App. 240.
Conn.—Fernandez v. Thompson, 132 A. 895, 104 Conn. 366—Wells v. Abernethy, 5 Conn. 222.
Ga.—Adams v. Fleming, 127 S.E. 819, 33 Ga.App. 742.
Ill.—See Blemaster v. Rockey, 200 Ill.App. 320.
Minn.—Nelson v. McElroy, 168 N. W. 179, 140 Minn. 429, rehearing denied 168 N.W. 587, 140 Minn. 429.
N.J.—Fairchild v. Llewellyn Realty Co., 82 A. 924, 82 N.J.Law 423.
N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.
Tenn.—Melton v. Nat. City Bank, 5 Tenn.App. 641.
23 C.J. p 233 notes 24, 25.

Price fixed in contract as the value of the goods is not necessarily controlling, and other circumstances can be properly considered.—Henderson v. Rowe, Tex.Civ.App., 93 S. W.2d 589, error dismissed.

Partial performance by plaintiff
(1) One suing for breach of contract for exchange could recover only market value of property which he should have received, determined as of time and place of delivery fixed by contract, less balance to be paid therefor.
Conn.—Fernandez v. Thompson, 132 A. 895, 104 Conn. 366.
Ga.—Ryals v. Livingston, 163 S.E. 286, 45 Ga.App. 43.

(2) On breach of a contract to exchange property, plaintiffs were entitled to recover the difference in value between what defendants were to give plaintiffs and what plaintiffs were to give defendants, and in addition thereto, the value of what was already advanced on account of the contract.—Schwartz v. Goldman, 189 N.Y.S. 165.

38. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 137 Cal.App. 240.
Ga.—Adams v. Fleming, 127 S.E. 819, 33 Ga.App. 742.
23 C.J. p 233 notes 26, 27.

39. Cal.—Lasher v. Faw, 289 P. 821, 209 Cal. 726.
Ind.—Jewett & Sherman Co. v. Tindall, 134 N.E. 501, 77 Ind.App. 681.
Ky.—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.
Neb.—Reed v. Beardsley, 6 Neb. 493.
Pa.—Praid v. Klein Motor Car Co., 13 Pa.Dist. & Co. 6, 13 Lehigh Co. L.J. 171.

Depreciation
In a suit on an implied contract to return the property on defendant's repudiation of the contract, plaintiff cannot recover for depreciation of the property restored to him. —Victory Motor Co. v. Erwin, Tex. Civ.App., 12 S.W.2d 1059, error dismissed.

Value of land
In an action for the value of lands conveyed, after rescission for nonperformance, it is proper to permit a recovery of the difference between the price fixed in the contract on the land conveyed, less the amount of a mortgage thereon which the other party was to pay, and less also the amount of a mortgage thereon which the grantor has not paid pursuant to the contract and which has not been paid by the other party to the contract.—Nugent v. Teachout, 35 N.W. 254, 67 Mich. 571.

40. Iowa.—Sietsema v. Anderson, 176 N.W. 611, 188 Iowa 651.
Nev.—Thomas v. Palmer, 248 P. 887, 49 Nev. 438.

41. Mo.—Redman v. Adams, 65 S. W. 300, 165 Mo. 60.
Neb.—McCaw v. Swallow, 199 N.W. 726, 112 Neb. 458.
Tex.—McDonald v. Whaley, Com. App., 244 S.W. 596, reversing, Civ. App., 228 S.W. 313—Victory Motor Co. v. Erwin, Civ.App., 12 S.W.2d 1059, error dismissed.

42. Mo.—Redman v. Adams, 65 S.W. 300, 165 Mo. 60.

43. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.

44. N.C.—Parish v. Hill, 137 S.E. 868, 193 N.C. 665.

erty received by plaintiff and that given by him in exchange therefor,[45] and not the value of the property which defendant failed to transfer.[46] However, it has also been held that the measure of damages is the difference between the value of what was transferred to plaintiff and what should have been transferred.[47]

Contract executory on both sides. Where one of the parties refuses to perform or puts it out of his power to perform, the other party may, if there is no default on his part, recover substantial damages,[48] but damages which are not within the contemplation of both parties at the time the contract is made, as a probable result of the breach, are not usually recoverable.[49] The measure of damages is the difference in value between the respective properties which are to be exchanged,[50] less any liens on such property.[51] As a general rule the value at the time of the breach will govern,[52] and the actual value and not the price named in the contract will govern where it appears that the price was specified merely for trading purposes,[53] but where property is to be taken on the exchange at a fixed price such price will be considered in determining the damages.[54]

Expenses incurred. While on an exchange of property the right of recovery has been held to include certain expenses incurred by plaintiff in connection with the transaction,[55] it has been held that there can be no recovery for counsel's fees paid by

45. Tex.—Patterson v. McMinn, Civ. App., 152 S.W. 223.

46. Tex.—Patterson v. McMinn, supra.

47. Ga.—Adams v. Fleming, 127 S. E. 819, 33 Ga.App. 742.
Ind.—Shirk v. Lingeman, 59 N.E. 941, 26 Ind.App. 630.
Kan.—Wheeler v. Barr, 4 P.2d 441, 134 Kan. 33.
Pa.—Aubertin v. Seaman, 33 Berks Co.L.J. 23.
Wash.—Hall v. Mathewson, 74 P.2d 209, 192 Wash. 651.

Value only; not price in contract
Party to exchange could recover only value of missing property where property was exchanged regardless of value.—Denton v. White, 4 S.W.2d 412, 223 Ky. 640.

Boot money
Where defendant has failed to pay the specified boot money on an exchange of property, plaintiff is ordinarily entitled to recover the amount so specified.—Copeland v. Fowler, 66 S.E. 215, 151 N.C. 353—23 C.J. p 233 note 38.

Exchange on credit
Where property is sold at a price agreed on, on credit, to be paid for thereafter in other property at a fixed price, the amount recoverable is the balance of the purchase money for the property so sold, remaining unpaid, with interest thereon from the time payment was due.—Herrick v. Carter, 56 Barb., N.Y., 41.

Claim against third person
Where defendant has failed to transfer a claim against a third person pursuant to the contract which has otherwise been fully performed, the measure of damages is the value or amount of such claim and not the difference in value between the properties actually exchanged.—Thomas v. Dickinson, 12 N.Y. 364.

Breach of covenant to sell exchanged property
(1) The measure of damages for breach of a covenant in a contract for the exchange of real property, by which covenant the owner agrees to sell encumbered property, exchanged by him for unencumbered property, for at least a specified sum, is the difference between the value of the unencumbered land and the encumbered land over and above the encumbrances, provided such difference does not exceed such specified sum, and in the discretion of the jury interest on the sum found to be due, from a date not earlier than the commencement of the action.—Hartman v. Ruby, 16 App.D.C. 45.

(2) In an action for damages based on the failure of one party to the contract to produce a purchaser for a one-half interest in a stock of goods transferred by him in exchange for other property, at a certain price, the measure of damages is the difference between the price so specified and the market value of the one-half interest.—George v. Lane, 102 P. 55, 80 Kan. 94.

48. Iowa.—Warren v. Chandler, 67 N.W. 242, 98 Iowa 237.

49. Ky.—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.
23 C.J. p 234 note 46.

Inability to close another trade
It has been held that damages resulting from inability to close another trade are not recoverable.—Montgomery v. McCaskill, Tex.Civ. App., 189 S.W. 797.

50. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 137 Cal.App. 240.
Conn.—Fernandez v. Thompson, 132 A. 895, 104 Conn. 366.
Ill.—See Moran v. Grim, 196 Ill.App. 185.
Iowa.—Carter v. Schrader, 175 N.W. 329, 187 Iowa 1245.
Kan.—Owen v. Christopher, 62 P.2d 860, 144 Kan. 765.
Tex.—Victory Motor Co. v. Erwin, Civ.App., 12 S.W.2d 1059, error dismissed—Mazac v. Conner, Civ. App., 296 S.W. 641.
Va.—Greer v. Doriot, 120 S.E. 291, 137 Va. 589.
23 C.J. p 234 notes 47–49.

Nominal damages
Plaintiff could recover only nominal damages for defendant's breach of exchange contract, where value of properties was equal.
Conn.—Gray v. Greenblatt, 155 A. 707, 113 Conn. 535.
Ky.—Faulkner v. Denniston, 63 S.W. 2d 286, 250 Ky. 373.

51. Ky.—Gordon v. Wanless, 21 S. W.2d 815, 231 Ky. 498.

52. Cal.—Barnhart v. Blackburn, 30 P.2d 424, 426, 137 Cal.App. 240, citing **Corpus Juris.**
23 C.J. p 234 note 50.

53. Ky.—Gordon v. Wanless, 21 S.W. 2d 815, 231 Ky. 498.
Neb.—Rea v. Pierson, 206 N.W. 760, 114 Neb. 173.
23 C.J. p 234 note 51.

54. R.I.—Bicknall v. Waterman, 5 R.I. 43.

55. Ariz.—Clark v. Matley, 5 P.2d 415, 39 Ariz. 263.
Kan.—Owen v. Christopher, 62 P.2d 860, 144 Kan. 765.
23 C.J. p 234 note 54.

Before contract was made
Plaintiff could not recover traveling expense, incurred before contract to exchange property was made, from defendant failing to perform.—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.

Expenses not recoverable
Damages for breach of realty exchange agreement were held not to include costs of drawing deed or commission paid for subsequently disposing of plaintiff's property.—Gordon v. Wanless, 21 S.W.2d 815, 231 Ky. 498.

plaintiff in a prior action by defendant for specific performance of such contract,[56] or for the expenses incurred by plaintiff in making an investigation in relation to the land which defendant agreed to convey,[57] or for expenses incurred to procure an abstract of title to land which plaintiff agreed to transfer, where no question as to such expenses was raised in the pleadings.[58] Although it has been held that a commission paid to a broker is a proper element of damages,[59] at least where the contract provides for the payment of commissions,[60] it has also been held that a commission paid to a broker cannot be recovered where such expense was not within the contemplation of the parties at the time the contract was made.[61]

(2) On Failure of Title to Realty

The measure of damages in an action based on a failure of title to land conveyed to plaintiff is the value of such land at the time of the conveyance.

The measure of damages in an action based on a failure of title to land conveyed to plaintiff is the value of such land at the time of the conveyance[62] with legal interest on that sum.[63] On a rescission by plaintiff because of defendant's failure to make good title to land which was to be transferred by the latter, plaintiff is entitled to recover the fair or reasonable market value of the personal property transferred by him pursuant to the contract.[64]

(3) On Deficiency or Excess of Quantity

In an action for deficiency in property received in an exchange, the measure of damages is the difference between the value of the property given and that actually received in exchange at the time of the exchange.

In an action for deficiency in property received in an exchange, the measure of damages is the difference between the value of the property given and that actually received in exchange at the time of the exchange.[65] Proof of the value of the land to be conveyed to the party making claim for a deficiency has been required in order to warrant a recovery,[66] and in the absence of a finding as to value of the respective properties the court cannot render a proper judgment.[67] Compensation has been allowed for the number of acres representing the shortage at a rate per acre equal to the actual value per acre of the parcel in which the deficiency occurred.[68] In case of a deficiency in the quantity of land which is transferred to plaintiff in exchange for other property the amount recoverable is governed by the actual value of the land where it appears that the price named in the contract was fixed merely for trading purposes.[69]

§ 15. Breach of Warranty as to Personal Property

a. In general
b. Pleadings, issues, and evidence
c. Trial
d. Damages

a. In General

On breach of a warranty of quality or title, it has been held that the injured party may sue for damages because of the breach of the warranty or he may rescind and recover the property transferred.

The injured party may rely on the warranty and maintain an action for damages for the breach in the case of a warranty of quality,[70] or title.[71] There is authority to the effect that for breach of an express warranty the remedy in the absence of

56. Pa.—Kaufman v. Kirker, 22 Pa. Super. 201.

57. N.Y.—Dey v. Nason, 2 N.E. 382, 100 N.Y. 166.

In Kentucky

(1) It has been held that the damages for a breach of a contract to exchange property do not include the cost of having defendant's title examined.—Gordon v. Wanless, 21 S.W. 2d 815, 231 Ky. 498.

(2) However, it was held in an earlier case that plaintiff may recover expenses in investigating title from defendant failing to perform contract to exchange land.—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.

58. Ala.—Moore v. Whitmire, 66 So. 601, 189 Ala. 615.

59. Ariz.—Clark v. Matley, 5 P.2d 415, 39 Ariz. 263.
Kan.—Owen v. Christopher, 62 P.2d 860, 144 Kan. 765.

60. Conn.—Romanoff v. De Santo, 126 A. 694, 101 Conn. 504.

61. Ky.—Odem Realty Co. v. Dyer, 45 S.W.2d 838, 242 Ky. 58—Dupre v. Hortsman, 38 S.W.2d 236, 238 Ky. 382—Linde v. Ellis, 6 S.W.2d 1089, 224 Ky. 649.
23 C.J. p 234 note 57.

62. Iowa.—Stewart v. Jack, 42 N. W. 633, 78 Iowa 154.
23 C.J. p 237 note 38.

Partial failure

In exchange of lands, where there is a partial failure of title which is the consideration for the conveyance of the other, the grantor, whose consideration has partly failed, may recover damages as for unpaid purchase price.—Liberto v. Sanders, Tex.Com.App., 259 S.W. 1080, reversing, Civ.App., 248 S.W. 120.

63. Minn.—Dunlan v. Evans, 42 N. W. 472, 40 Minn. 501.

64. Iowa.—Fagan v. Hook, 105 N.W. 155, 111 N.W. 981, 134 Iowa 381.

65. Tex.—Liberto v. Sanders, Com. App., 259 S.W. 1080, reversing, Civ. App., 248 S.W. 120—Parker v. Cameron, Civ.App., 125 S.W.2d 353, error refused—Rahl v. Compton, Civ.App., 112 S.W.2d 509, error dismissed.
23 C.J. p 238 note 59.

66. Tex.—Parker v. Cameron, Civ. App., 125 S.W.2d 353, error refused.
23 C.J. p 238 note 61.

67. Tex.—Foster v. Atlir, Com.App. 215 S.W. 955.

68. Ark.—Polack v. Steinke, 139 S. W. 538, 100 Ark. 28.
23 C.J. p 238 note 62.

69. Iowa.—Fisher v. Trumbauer, 138 N.W. 528, 141 N.W. 419, 160 Iowa 255.

70. Ky.—Talbott v. Krahwinkle, 124 S.W. 323.
23 C.J. p 234 note 62.

71. Or.—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.
23 C.J. p 234 note 63.

fraud or concealment of facts is an action for damages,[72] and that an action to recover the property given in exchange will not lie.[73] After rescinding an exchange for breach of warranty as to personal property received by him, the injured party may recover in an action at law the property given by him in exchange where the warranty is as to quality or fitness, or title.[74] The injured party may in a proper case maintain an action for the value of the property transferred by him.[75]

On rescinding the contract for a breach of warranty, the same conflict as to the availability of remedies exists in exchange cases as in analogous cases of sales of personal property.[76] After rescission for breach of warranty the property transferred may be recovered in an action of replevin,[77] detinue,[78] or trover.[79]

Election of remedy. The remedies by rescission and by action on the warranty are inconsistent, and an election to pursue one of the remedies prevents the party making such election from pursuing the other. Where a party vested with such election does some decisive act evincing his choice, he cannot recede from the position taken by him, with some exceptions in the case of mistake or ignorance of the material facts.[80]

Defenses. The honesty of intention of the person giving the warranty is not a defense to an action based on a breach of warranty. Whether or not the warrantor knew that his statements as to quality were untrue is immaterial.[81] The right of action for a breach of warranty of title is not lost by a failure to purchase an outstanding hostile title.[82] In an action based on a warranty to the effect that the note of a third person offered in exchange for other property is a first lien on certain real property, the fact that the note is not due when judgment is entered in the action on the warranty is no bar to recovery, and the fact that plaintiff has pledged such note does not prevent a recovery by him.[83]

A party to a contract for the exchange of personal property who receives property transferred to him with full knowledge that it has been stolen is not entitled to recover the property transferred by him.[84]

Third person claiming property. In case of an alleged breach of warranty of title it has been held that an action to recover the property given on the exchange will not lie while an action by a third person is pending to recover the property received on the exchange.[85] An action for damages for breach of a warranty of title cannot be maintained on the ground that plaintiff has surrendered the property unless he shows that the property in question was taken from him by the judgment of a competent tribunal after notice was given to the warrantor as to the pendency of the action,[86] or that the right and title of the person who recovered the property is better than that of the warrantor.[87]

b. Pleadings, Issues, and Evidence

General rules apply with respect to pleadings, issues, and evidence in actions based on a breach of warranty of property.

The general rules of pleading apply in actions based on a breach of warranty.[88] Where plaintiff relies on a representation which he alleges is a false warranty as to personal property, the action is founded on contract and the contract must be proved as laid. An allegation of a sale with warranty is not supported by proof of an exchange of personal property.[89] It is not necessary for plaintiff to prove fraud or deceit in an action based on a rescission of the contract.[90]

Evidence. The rules applicable to evidence gen-

72. Ark.—Mason v. Bohannan, 96 S. W. 181, 79 Ark. 435.
Ga.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

73. Ark.—Mason v. Bohannan, 96 S. W. 181, 79 Ark. 435.
Ga.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

74. Mo.—Irby v. Stubblefield, 162 S. W. 660, 177 Mo.App. 256.
23 C.J. p 235 notes 67, 68.

75. Cal.—Coats v. Hord, 154 P. 491, 29 Cal.App. 115.
23 C.J. p 235 note 69.

76. Mich.—Hunt v. Sackett, 31 Mich. 18.
23 C.J. p 235 note 85.

77. Miss.—Hatcher v. Bagwell, 72 So 193, 111 Miss. 766.
23 C.J. p 235 note 86.

78. Ala.—Thompson v. Harvey, 5 So. 825, 86 Ala. 519.

79. Ga.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

80. Wis.—Smeesters v. Schroeder, 101 N.W. 363, 123 Wis. 116.
23 C.J. p 235 notes 72, 73.

81. Mass.—Avery v. Miller, 118 Mass. 500.
Mo.—Smithers v. Bircher, 2 Mo.App. 499.

82. Ala.—Hafer v. Cole, 57 So. 757, 176 Ala. 242.

83. Mo.—Smithers v. Bircher, 2 Mo. App. 499.

84. Pa.—Bixley v. Saylor, 68 Pa. 146.
23 C.J. p 235 note 79.

85. Minn.—Close v. Crossland, 50 N. W. 694, 47 Minn. 500.
23 C.J. p 235 note 80.

86. W.Va.—Byrnside v. Burdett, 15 W.Va. 702.
23 C.J. p 235 note 81.

87. W.Va.—Byrnside v. Burdett, supra.

88. No particular phraseology need be used in pleading a warranty.—Smithers v. Bircher, 2 Mo.App. 499—23 C.J. p 236 note 90.

89. Vt.—Vail v. Strong, 10 Vt. 457.

90. Mo.—Smith v. Means, 155 S.W. 454, 170 Mo.App. 158.

erally apply in actions involving breaches of warranty, with respect to burden of proof,[91] admissibility,[92] and sufficiency.[93]

c. Trial

The rules relating to instructions and questions of law and fact in civil actions generally are applicable in actions involving a breach of warranty.

The rules applicable to instructions in civil actions generally apply in actions involving a breach of warranty.[94]

Questions of law and fact. The general rules determining whether a question is one of law or fact apply in cases involving a breach of warranty.[95]

d. Damages

The damages recoverable on breach of a warranty are ordinarily such as are the natural and proximate result of the breach.

In an action for damages for breach of warranty plaintiff may recover such damages as are the natural and proximate result of the breach.[96] In case of an action for breach of warranty of quality or fitness the difference in actual value between the article as warranted and the article as delivered is the measure of damages, unless in exceptional cases of special damage,[97] and in such case the value of the property given in exchange for the warranted article is immaterial.[98] In the case of a warranty of fitness for a particular purpose a fair compensation for the loss incurred in attempting, in good faith, to use it for such purpose, may also be allowed.[99]

For breach of warranty of title there is authority to the effect that the amount recoverable is the value of the chattel received by the injured party;[1] but it has also been held that the measure of damages is the amount of the consideration given by the injured party with interest.[2] The measure of damages in an action for damages based on a breach of warranty of title may be affected by special circumstances.[3] It has been held that the costs paid in a proceeding to defend the title may be allowed in a proper case, but not the amount paid to an attorney for the defense of the prior action.[4] However, it has been held that expenses incurred in the defense of an action of replevin brought for the property received on the exchange are not recoverable where the warrantor acted bona fide and without fraud.[5]

In an action for the recovery of property delivered by plaintiff, brought after a rescission for breach of warranty of quality, there can be no recovery in the absence of proof of the value of such property.[6] Where there has been no rescission plaintiff is not entitled to recover the value of the property transferred by him in an action based on the existence of a chattel mortgage on the property received by him, in the absence of any evidence as to the value of other property covered by such mortgage.[7]

§ 16. Fraud

a. In general
b. Pleading
c. Evidence

91. **Burden of proof** is on party alleging existence and breach of warranty.—Battles v. Whitley, 82 So. 573, 17 Ala.App. 125.

92. Ind.—Graham v. Nowlin, 54 Ind. 389.
23 C.J. p 236 note 97.

93. Ark.—Willard v. Moye, 156 S.W. 2d 202—Bowden v. Dennis, 217 S. W. 798, 144 Ark. 642.
23 C.J. p 236 note 98.

94. Ky.—Greene v. Hyden, 117 S.W. 2d 985, 273 Ky. 783.
23 C.J. p 236 note 1.

95. N.C.—Robertson v. Halton, 72 S.E. 316, 156 N.C. 215.
23 C.J. p 236 note 4.

96. Or.—Ziegler v. Stinson, 224 P. 641, 111 Or. 243.

97. Ky.—Greene v. Hyden, 117 S.W. 2d 985, 273 Ky. 783.
23 C.J. p 236 note 6.

Loss of business

In action for breach of warranty of an engine and boiler traded to plaintiff, where plaintiff pleaded damage by way of loss of business as a direct result of the breach of warranty, plaintiff would be entitled to recover such damage on proper proof thereof for such a reasonable time as would have been required to put the engine and boiler in good running condition or to have secured substitute power, and plaintiff could not retain the engine and boiler without attempting to have defendant put it in order or do so herself, or without attempting to secure other power to replace the engine and boiler so as to minimize damages.—Greene v. Hyden, 117 S.W.2d 985, 273 Ky. 783.

Second exchange

Where after an exchange of personalty one of the parties claims that the property received by him is not as warranted and the other party delivers other personalty in place of that first delivered by him, in an action on the false warranty it is improper as a general rule to permit an assessment of damages as to both transactions, recovery being permitted only as to the second transaction.—Robertson v. Halton, 72 S.E. 316, 156 N.C. 215, 37 L.R.A., N.S., 298.

98. N.J.—Rutan v. Ludlam, 29 N.J. Law 398.
Tex.—Evans v. Hartman, Civ.App., 286 S.W. 326.

99. Cal.—McLennan v. Ohmen, 17 P. 687, 75 Cal. 558.

1. Minn.—Close v. Crossland, 50 N. W. 694, 47 Minn. 500.

2. N.Y.—Armstrong v. Percy, 5 Wend. 535.
23 C.J. p 236 note 12.

3. Ga.—Childers v. Adams, 42 Ga. 352.
23 C.J. p 237 note 18.

4. N.Y.—Armstrong v. Percy, 5 Wend. 535.

5. N.B.—Mercer v. Cosman, 13 N.B. 240.

6. N.Y.—Richardson v. Elliott Ranney Co., 165 N.Y.S. 211.

7. Mich.—Hunt v. Sackett, 31 Mich. 18.

d. Trial
e. Findings and judgment
f. Damages

a. In General

A party who has been defrauded in an exchange of property has an election as to several remedies, but an election of one ordinarily prevents him from pursuing another and inconsistent one.

Where there has been actual fraud in an exchange of property, the party defrauded has his election as to several courses of action that he may pursue.[8] Thus he may rescind and maintain an action to recover the property which he has given in exchange,[9] or its value,[10] and where it develops in a suit for rescission that restitution in kind cannot be had the court is not divested of jurisdiction to proceed.[11] Another remedy open to the defrauded party is to affirm the exchange and institute an action for damages for the fraud which has been practiced upon him.[12] An action

8. S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.

Suit on warranty or recovery of property

Where there has been actual fraud mixed with deceit and corruption in an exchange of personalty, the party defrauded has his election to sue on the warranty or bring his action for the property sold or exchanged by him.—Manship v. Newsome, supra.

Damages, rescission, etc.

Where defendant transferred land by way of exchange, the contract being induced by fraud and conspiracy, he may either affirm the contract and sue for damages for the deceit, or set up his damages, when sued on the contract, or he may rescind, and sue for damages caused by the fraud, or recover back anything paid under the contract, or resist an action at law brought against him on the contract, or a suit in equity for specific performance, or he may himself sue in equity to have the contract canceled and set aside.—Van Gilder v. Bullen, 74 S.E. 1059, 159 N.C. 291.

Assumpsit

Where a parcel of real estate is to be received in exchange for other real property at the price for which it can be purchased from a third person, an action of assumpsit to recover the difference between such purchase price and the amount for which the party who purchased it from such third person fraudulently stated to be the purchase price has been permitted.—Jordan v. Dyer, 34 Vt. 104, 80 Am.D. 668.

9. Ark.—Meier v. Hart, 220 S.W. 819, 143 Ark. 539—Danielson v. Skidmore, 189 S.W. 57, 125 Ark. 572.
Conn.—Bitondi v. Sheketoff, 99 A. 505, 91 Conn. 123.
Iowa.—Shuttlefield v. Neil, 145 N.W. 1, 163 Iowa 470.
N.Y.—Radel v. One Hundred Thirty-Four West Twenty-Fifth St. Bldg. Corporation, 226 N.Y.S. 560, 222 App.Div. 617, appeal dismissed 164 N.E. 605, 249 N.Y. 615, motion denied 166 N.E. 334, 250 N.Y. 586.
Pa.—Yonker v. Vaneer, 91 Pa.Super. 157.
23 C.J. p 239 note 66.

Fraud as to part of property

Where an exchange of properties is induced by fraudulent representations as to part of a number of parcels of property exchanged by one of the parties, the defrauded party has the same right to a rescission or damages as when fraudulent misrepresentations relate to all the property, and he may rescind, restore what he has received, and recover back what he has parted with, or retain what he has received and recover what he has lost, although an agreed price is placed on the property of the defrauded party and the property of the other party collectively.—Graf v. Holcombe, C.C.A. Neb., 277 F. 687.

Action in detinue held proper.—Cornett v. Brooks, 90 So. 787, 206 Ala. 566.

Replevin may be maintained to recover personal property given in exchange by the injured party.—Yonker v. Vaneer, 91 Pa.Super. 157—23 C.J. p 239 note 66 [b].

Where there was no testimony raising issue of conspiracy between corporation and building and loan association to perpetrate fraud on husband and wife so as to warrant rescission of contract whereby husband and wife promised to pay corporation two thousand five hundred and fifty dollars with interest at 6 per cent per annum, in addition to lots given in exchange, release by corporation of its eight hundred and fifty dollar note and lien securing note more than compensated for any damages sustained by reason of corporation's conveyance of realty to third person and his execution of note to association with which husband and wife were subsequently required to deal.—Powell v. Pioneer Building & Loan Ass'n, Tex.Civ.App., 111 S.W.2d 764, error dismissed.

10. N.H.—Moody v. Drown, 58 N.H. 45.
23 C.J. p 239 note 67.

Condition precedent

Where real estate is to be transferred to plaintiff in exchange for personal property transferred by him, he must, as a condition precedent to the maintenance of an action to recover the value of such personal property, make a demand therefor.—Sonnesyn v. Aikin, 104 N.W. 1026, 14 N.D. 248.

11. Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.

12. U.S.—Graf v. Holcombe, C.C.A. Neb., 277 F. 687.
Ark.—Meier v. Hart, 220 S.W. 819, 143 Ark. 539—Danielson v. Skidmore, 189 S.W. 57, 125 Ark. 572.
Conn.—Bitondi v. Sheketoff, 99 A. 505, 91 Conn. 123.
Ill.—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.
Iowa.—Shuttlefield v. Neil, 145 N.W. 1, 163 Iowa 470.
Mo.—Messerli v. Bantrup, App., 216 S.W. 825.
N.C.—Van Gilder v. Bullen, 74 S.E. 1059, 159 N.C. 291.

Equitable action improper

N.J.—Maioran v. Calabrese, 135 A. 69, 100 N.J.Eq. 315.

Rescission improper

(1) Where the parties defrauded on an exchange of property elected to affirm the contract and sue for cancellation of a mortgage given by them, and defendants asked no affirmative relief, and the property previously owned by plaintiffs had passed through several hands, been neglected, and could not be returned in the same condition as at the time of the exchange, plaintiffs were entitled to relief in accordance with their election, and the court erred in decreeing a rescission and requiring them to amend to conform to that theory.—Vanek v. Soumar, 187 N.W. 396, 218 Mich. 282.

(2) Fair dealing required plaintiff suing to rescind contract for exchange of plaintiff's burned dwelling house for defendants' apartment house to seek her remedy, if plaintiff was entitled to relief, in action for damages, where defendants had expended large sum of money in rebuilding burned dwelling house, and plaintiff, under judgment of rescission, would receive without consideration the benefit of such expenditures and the rent from the apartment house for six months and two hundred fifty dollars paid by mortgagee for transfer of apartment house property to mortgagee in lieu of foreclosure.—Goldman v. Sontag, 15 N.Y.S.2d 407, 257 App.Div. 688, motion denied 20 N.Y.S.2d 415,

in equity to recover the difference in the value of the property as represented to the defrauded party and its real value has also been permitted,[13] and equity will, in a proper case, grant relief on the ground of fraud or misrepresentation as to the quantity of land to be conveyed.[14] While an action to rescind an oral contract of exchange has been permitted,[15] where there is a written contract it has been held that a party thereto cannot maintain an action of assumpsit based on an alleged prior oral contract on the ground that he was induced to enter into the transaction by fraudulent representations with respect to real property which was to be transferred to him on the exchange.[16] Questions as to the right to a cancellation in equity of deeds or written agreements for fraud are treated in Cancellation of Instruments.

One defrauded in an exchange of properties must assert his remedial rights with diligence and without delay,[17] but if the fraud is not known, or could not have been reasonably ascertained, no delay will defeat the right of action.[18] Whether the facts constitute laches depends on the circumstances of each case.[19] It has been held that the fraud of plaintiff is no defense to an action to recover, on a rescission for fraud, personal property given in exchange for other personalty.[20]

Effect of election of remedy. The remedies by rescission and by action for damages are inconsistent, and an election to pursue one of the remedies prevents the party who makes such election from pursuing the other.[21] However, where a perfect rescission on the ground of fraud does not place the injured party in statu quo, as where he has suffered injury which the rescission and the remedies based thereon cannot repair, he may thereafter maintain an action of deceit.[22]

Counterclaim. In a suit by the grantor to rescind a contract for exchange of property for fraud, the purchaser may deny the fraud and counterclaim for rents and profits lost by reason of plaintiff keeping him out of possession.[23]

b. Pleading

The rules applicable in civil actions generally are applied to pleadings and issues, proof, and variance in actions based on fraud in contracts for exchange of property.

The rules of pleading applicable generally in civil proceedings apply in an action to recover, after a rescission for fraud, property given on an exchange or its value,[24] and in an action to recover

259 App.Div. 949 and 20 N.Y.S.2d 1005, 259 App.Div. 959, and appeal dismissed 28 N.E.2d 18, 283 N.Y 589, reargument denied 28 N.E.2d 44, 283 N.Y. 648.

13. Mich.—Hubert v. Joslin, 280 N. W. 780, 285 Mich. 337.
23 C.J. p 239 note 71.

Want of equity

Where suit in equity by party to an exchange of property to secure money judgment against other party for fraud and to cancel a note, made a charge on the property transferred to complainant, and owned by such other party but held by a bank as collateral, must fail because of want of equity as against such party, it must fail also as to the bank, as its liability depends on establishing cause of action against such party. —Torbit v. Warner, Mo., 217 S.W. 40.

14. Tex.—Barton v. Cox, Civ.App., 176 S.W. 793.
Va.—Atkinson v. Beckett, 12 S.E. 717, 34 W.Va. 584.

15. Ky.—Austin v. Evans, 128 S.W. 1088.

16. Mich.—Warnes v. Brubaker, 85 N.W. 276, 107 Mich. 440.
23 C.J. p 239 note 73.

17. Ill.—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.

18. Ill.—Hinkley v. Wynkoop, supra.

19. Mich.—Hubert v. Joslin, 280 N. W. 780, 285 Mich. 337.

Laches not shown

(1) In general.
D.C.—Hill v. Chambers, 68 F.2d 781, 63 App.D.C. 36.
Mich.—Gothe v. Kakis, 241 N.W. 136, 257 Mich. 364.
N.D.—Moon v. Martin State Bank, 230 N.W. 11, 59 N.D. 352.
Or.—Billups v. Colmer, 244 P. 1093, 118 Or. 192.

(2) Where one defrauded in an exchange of property was soon after adjudged of unsound mind, and she had a large estate, and the property taken by her was subject to several mortgages and also drainage assessments, while the farm conveyed by her was in another state, a delay of almost a year on the part of the conservator in suing to set aside the transaction was not laches, barring the suit.—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.

Action held barred by laches

(1) In general.
Ill.—Velcich v. Malesh, 1 N.E.2d 278, 284 Ill.App. 63.
Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74—Bowen v. Stocklin, 183 N.W. 946, 215 Mich. 341.

(2) Action to rescind contract for exchange of realty and personalty on ground of fraud was barred by "laches" and by two-year limitations, where not brought until more than two years after plaintiff took possession of the property which she received in the exchange, and where, on the day that she took possession, she had notice that some of the representations allegedly made to her were false, and that she did not get all that she had bargained for.—Turner v. Jarboe, 100 P.2d 675, 151 Kan. 587.

20. Ala.—Whitworth v. Thomas, 3 So. 781, 83 Ala. 308, 3 Am.S.R. 725.
23 C.J. p 239 note 75.

21. N.J.—Maloran v. Calabrese, 135 A. 69, 100 N.J.Eq. 315.
N.Y.—Merry Realty Co. v. Shamokin & Hollis Real Estate Co., 130 N.E. 306, 230 N.Y. 316, reversing 174 N.Y.S. 627, 186 App.Div. 538—Goins v. Atwood, 197 N.Y.S. 781, 204 App.Div. 439.
23 C.J. p 239 note 76.

Alternative prayer for accounting held not condonation of fraud and election to stand on contract.—Parish v. Casner, Mo., 282 S.W. 392.

22. N.C.—Fields v. Brown, 76 S.E. 8, 160 N.C. 295.

23. Ind.—Woodruff v. Garner, 27 Ind. 4, 89 Am.D. 477.

24. Tex.—Rankin v. Parker, Civ. App., 4 S.W.2d 227.
23 C.J. p 240 note 79.
Pleadings in action to cancel instru-

damages for the fraud.[25] In an action on note given for difference on exchange of land for corporate stock, in which defendant cross claimed for misrepresentation, asking cancellation and damages, defendant's laches must be pleaded.[26]

The rules applicable to issues, proof, and variance in civil actions generally are applicable in actions based on fraud in contracts for exchange of property.[27] The allegations must fairly indicate the facts sought to be proved.[28]

c. Evidence

Fraud will not be presumed and ordinarily the burden of proving it is on the person alleging the fraud. The evidence of fraud should be clear, satisfactory, and convincing.

In actions based on fraud in a contract for an exchange of property, general rules are applicable with respect to the evidence.[29] Fraud will not be presumed or lightly inferred,[30] and, ordinarily the burden of proving fraud is on the person alleging it,[31] although where a confidential relation-

ment see Cancellation of Instruments §§ 55–67.

Petition held sufficient

Ga.—Disharoon v. Eskew, 127 S.E. 271, 160 Ga. 102.

Minn.—Gable v. Niles Holding Co., 296 N.W. 525.

Or.—Burggraf v. Brocha, 145 P. 639, 74 Or. 381.

Tex.—Ballew v. McElroy, Civ.App., 10 S.W.2d 213.

23 C.J. p 240 note 79 [a] (1).

Amendment held proper

Kan.—Woods v. Nicholas, 140 P. 862, 92 Kan. 258.

25. Okl.—Crowl v. Box, 288 P. 942, 144 Okl. 25.

Deficiency in acreage

(1) Petition held sufficient.—Liberto v. Sanders, Tex.Com.App., 259 S.W. 1080, reversing, Civ.App., 248 S.W. 120.

(2) In an equitable action to obtain compensation for an alleged deficiency in the quantity of land received by plaintiff it is not necessary for him to allege that the representations made to him were fraudulent, although he relies on fraud, where the facts actually alleged show that the representations were fraudulent.—Ashley v. Holland, Tex.Civ.App., 180 S.W. 635.

26. Tex.—McDonald v. Lastinger, Civ.App., 214 S.W. 829.

27. What must be proved

(1) Party to exchange agreement, to warrant recovery of difference between value of property as represented and actual value, must allege and prove respective values.—Bryant v. Vaughn, Tex., 33 S.W.2d 729, reversing Vaughn v. Bryant, Civ. App., 1 S.W.2d 667.

(2) Stockholder suing corporation on rescinded contract to recover value of property transferred by plaintiff in exchange for stock, on ground of misrepresentations as to earnings of corporation's predecessor, was not required to prove financial loss but only legal injury.—Kaufman v. Jaffee, 279 N.Y.S. 392, 244 App.Div. 344.

(3) There can be no recovery for a shortage in property conveyed on an exchange, on the ground of fraud or mutual mistake, where there is no evidence of the value of the land actually conveyed.—Rahl v. Compton, Tex.Civ.App., 112 S.W.2d 509, error dismissed—23 C.J. p 240 note 93 [b].

(4) In an action based on fraud to recover for a deficiency, plaintiff must show not only that there is a shortage, but also the number of acres within the established lines and boundaries of the property conveyed to him in order that a proper foundation may be laid for estimating his loss.—Billick v. Davidson, 162 N.W. 603, 178 Iowa 1153.

(5) In an action in equity to recover the difference in value between the invoice price of goods transferred by plaintiff and their actual value based on an alleged fraudulent scheme to reduce the invoice price on an appraisal, there can be no recovery in the absence of evidence of fraud in the selection of the appraisers or of the existence of a combination to reduce invoice price. —Harm v. Voss, Iowa, 82 N.W. 753.

28. Minn.—Krzyzaniak v. Maas, 233 N.W. 595, 182 Minn. 83.

Tex.—Childress v. Pyron, Civ.App., 285 S.W. 1100.

General denial

In an action by a piano dealer to recover a balance due on an oral contract in exchange of pianos, general denial of the answer held sufficient for reception of testimony offered by defendants as to the entire history of the piano transactions.—Ruegnitz v. Harrington, Iowa, 183 N.W. 605.

Evidence not admissible

In an action to recover a horse exchanged for a mule, and damages for its detention, brought after a rescission for fraud, evidence as to value of use of mule by plaintiff after rescission has been held not admissible, where defendant did not file a plea to set off such use against plaintiff's damages for detention of the horse.—Smith v. Thomas, 78 So. 820, 201 Ala. 442.

29. Factors properly considered

(1) Elderly plaintiff's mental and physical condition was a factor to be considered in connection with the alleged fraud of defendant.—Westerbeck v. Cannon, 104 P.2d 918, 5 Wash.2d 106.

(2) False representations made in beginning of negotiations, although propositions originally proposed failed, could be considered in determining whether fraudulent representations induced agreement.—Proctor v. Arakelian, 280 P. 368, 208 Cal. 82.

Evidence held admissible

Cal.—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532.

Ga.—Ryals v. Livingston, 163 S.E. 286, 45 Ga.App. 43.

Iowa.—Skeels v. Porter, 145 N.W. 332, 165 Iowa 255.

Minn.—Otterstetter v. Steenerson Bros. Lumber Co., 174 N.W. 305, 143 Minn. 442.

23 C.J. p 240 note 82 [b].

30. Mich.—Achenbach v. Mears, 261 N.W 251, 272 Mich. 74—Vernon v. Antona, 192 N.W. 681, 222 Mich. 83—Leser v. Smith, 180 N.W. 464, 212 Mich. 558.

Representation presumed innocently made

In action by one who had exchanged his city property and a sum of money for a farm, to recover a portion of the purchase price on the ground that the contract was induced by false representations as to the amount of land in the farm, there being no claim that such representation was in writing, or allegation that it was falsely or fraudulently made, the presumption would be indulged that it was innocently made.—Beckley v. Gilmore, 234 S.W. 459, 192 Ky. 744.

Presumption under statute

By virtue of statutory provision, fraud was presumed, where grantor in exchange misrepresented agricultural qualities of land —Graham v. Apple, Tex.Civ.App., 287 S.W. 1107.

31. Iowa.—Ragan v. Lehman, 216 N.W. 717.

Mass.—Rosenberg v. Rome, 175 N. E. 171, 275 Mass. 64.

Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74—Kukielka v. Ranyak, 200 N.W. 964, 229 Mich. 13.

Mo.—Gross v. Byler, 297 S.W. 391.

ship exists between the parties the burden is on the person in whom trust and confidence was reposed to show that the transaction was fair and free from artifice.[32]

While it has been held that fraud must be proved by a preponderance of the evidence,[33] it has also been held that proof of fraud must be clear, satisfactory, and convincing.[34] In the notes will be found cases in which the evidence was held sufficient,[35] or cases in which the evidence was held in-

Neb.—Johnson v. Hastings & Heyden, 241 N.W. 91, 122 Neb. 610.
23 C.J. p 240 note 82 [a].

32. Pa.—Sell v. Gup, 32 Berks Co. L.J. 32, exceptions dismissed 32 Berks Co.L.J. 73, affirmed 12 A.2d 1, 338 Pa. 134.

33. Mich.—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74—Leser v. Smith, 180 N.W. 464, 212 Mich. 558.

34. Iowa.—Ragan v. Lehman, 216 N.W. 717.

35. Evidence held sufficient
(1) In general.
Ark.—Boone v. Trezevant, 26 S.W.2d 582, 181 Ark. 504.
Cal.—Ellwood v. Niedermeyer, 56 P. 2d 279, 12 Cal.App.2d 699—Bernstein v. Timmerman, 23 P.2d 793, 133 Cal.App. 202—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678—Faull v. Johnson, 270 P. 993, 94 Cal.App. 230—Dvorak v. Latimer, 267 P. 578, 91 Cal.App. 664—Sherlock v. Gerlach, 229 P. 65, 68 Cal.App. 341.
Colo.—Lewis v. Winslow, 234 P. 1070, 77 Colo. 95.
Ill.—Hinkle v. Sallee, 167 N.E. 46, 335 Ill. 468—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.
Iowa.—Hogan v. Ross, 205 N.W. 208, 200 Iowa 519.
Mich.—Touma v. Holly Lumber & Supply Co., 292 N.W. 576, 294 Mich. 96—Kukielka v. Ranyak, 200 N.W. 964, 229 Mich. 13—Hillier v. Carpenter, 183 N.W. 758, 215 Mich. 259.
Mo.—Vodicka v. Sette, 223 S.W. 573.
Okl.—Crowl v. Box, 288 P. 942, 144 Okl. 25.
Or.—White v. Oregon Realty Exch. Inv. Co., 236 P. 269, 114 Or. 636.
Tex.—Terrell v. Summit Place Co., Com.App., 232 S.W. 282, affirming Summit Place Co. v. Terrell, Civ. App., 207 S.W. 145, and motion overruled Terrell v. Summit Place Co., Com.App., 235 S.W. 198.
Wash.—Patricio v. Scott, 65 P.2d 215, 189 Wash. 302—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333—Wisner v. Carter, 201 P. 918, 117 Wash. 623.
23 C.J. p 240 note 82 [c] (3).
(2) To establish fraud.
U.S.—Brach v. Moen, C.C.A.Iowa, 35 F.2d 475, certiorari denied 50 S. Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
Ark.—Stanford v. Smith, 260 S.W. 435, 163 Ark. 583.
Cal.—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678—Connell v. Crawford, 268 P. 948, 92 Cal.App. 715—Dvorak v. Latimer, 267 P 578, 91 Cal.App. 664.
Colo.—Cahill v. Readon, 273 P. 653, 85 Colo. 9.
Ill.—Thatcher v. Kramer, 180 N.E. 434, 347 Ill. 601—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Iowa.—Baumhover v. Gerken, 203 N. W. 15, 200 Iowa 551—Leaman v. Wise, 200 N.W. 691, 198 Iowa 1035—Peterson v. Higgins, 190 N.W. 407, 194 Iowa 759—Ellis v. Sullivan, 190 N.W. 140—Henderson v. Maaskant, 182 N.W. 791, 191 Iowa 658—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408—Rodenkirch v. Layton, 176 N.W. 897, 189 Iowa 430.
Kan.—Wells v. Higgins, 58 P.2d 1097, 144 Kan. 155, modified on other grounds 62 P.2d 444, 144 Kan. 606—Keplar v. Weir, 31 P. 2d 49, 139 Kan. 234—Payne v. Adams, 3 P.2d 630, 133 Kan. 643.
Ky.—Bankers Bond Co. v. Bergen, 128 S.W.2d 776, 278 Ky. 270—Addison v. Wilson, 37 S.W.2d 7, 238 Ky. 143—Southeastern Land Co. v. Jonnard, 249 S.W. 789, 198 Ky. 504.
Me.—Levine v. Hamlin, 150 A. 120, 129 Me. 106.
Mich.—Bacon v. Fox, 255 N.W. 340, 267 Mich. 589—Gothe v. Kakis, 241 N.W. 136, 257 Mich. 364—Gadzinski v. Rola, 224 N.W. 334, 246 Mich. 10—Chaffee v. Raymond, 217 N.W. 22, 241 Mich. 392—Larzelere v. Conlin, 207 N.W. 802, 234 Mich. 337—Noble v. Shears, 202 N.W. 921, 230 Mich. 376.
Minn.—Peterson v. Schober, 256 N. W. 308, 192 Minn. 315—Lowrie v. Christenson, 206 N.W. 390, 165 Minn. 181—Roman v. Lorence, 202 N.W. 707, 162 Minn. 198—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.
Mo.—Parish v. Casner, 282 S.W. 392.
N.D.—Moon v. Martin State Bank, 230 N.W. 11, 59 N.D. 352.
Okl.—Noblin v. Wilson, 101 P.2d 805, 187 Okl. 173—McAtee v. Garred, 91 P.2d 1095, 185 Okl. 314—Crowl v. Box, 288 P. 942, 144 Okl. 25.
Pa.—Sell v. Gup, 12 A.2d 1, 338 Pa. 134.
S.C.—Scarborough v. Crosland, 170 S.E. 453, 170 S.C. 321.
Tex.—Barton v. Warner, Civ.App., 142 S.W.2d 303—Sherman v. Sipper, Civ.App., 129 S.W.2d 458, reversed on other grounds, Sup., 152 S.W.2d 319—Graham v. Apple, Civ. App., 287 S.W. 1107.
Wash.—Westerbeck v. Cannon, 104 P.2d 918, 5 Wash.2d 106—Nauman v. Raddue, 260 P. 963, 145 Wash. 435.
23 C.J. p 240 note 82 [c] (2).
(3) To show absence of fraud.
Ark.—Boone v. Trezevant, 26 S.W. 2d 582, 181 Ark. 504.
Cal.—Gunther v. Thompson, 296 P. 611, 211 Cal. 631—Bernstein v. Timmerman, 23 P.2d 793, 133 Cal. App. 202—Atwood v. Shea, 18 P. 2d 783, 129 Cal.App. 279—Coleman v. Dawson, 294 P. 13, 110 Cal.App. 201.
Minn.—Olson v. Shepard, 206 N.W. 711, 165 Minn. 433—Eurich v. Bartlett, 186 N.W. 138, 151 Minn. 86.
Neb.—Johnson v. Hastings & Heyden, 241 N.W. 91, 122 Neb. 610.
Or.—Elliott v. Mork, 24 P.2d 1036, 144 Or. 246.
Pa.—Walter's Ex'r v. Martin, 118 A. 434, 274 Pa. 529.
Tex.—Jones v. Herring, Civ.App., 16 S.W.2d 325, error dismissed.
Utah.—Fritsch Loan & Trust Co. v. Sherrick, 15 P.2d 323, 80 Utah 367.
(4) To show value of property.
Ark.—Horsnell v. Gilliland, 224 S. W. 722, 148 Ark. 653.
Cal.—Schlake v. McConnell, 257 P 1175, 83 Cal.App. 725.
Ill.—Hinkley v. Wynkoop, 137 N.E 154, 305 Ill. 115.
Mich.—Przytulski v. Jozwiak, 202 N. W. 924, 230 Mich. 521.
Minn.—Bauer v. O'Brien Land Co., 174 N.W. 736, 144 Minn. 130.
Wash.—Westerbeck v. Cannon, 104 P.2d 918, 5 Wash.2d 106.
(5) To show reliance on representations.
Cal.—Davison v. Finneran, 47 P.2d 271, 4 Cal.2d 51—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.
Ill.—Noll v. Peterson, 170 N.E. 756, 338 Ill. 552.
Wash.—Nordstrom v. Hover, 189 P. 999, 111 Wash. 176.
(6) To show that person did not rely on representations.
Cal.—Yates v. Eudemiller, 1 P.2d 434, 213 Cal. 26.
Mass.—Shikes v. Gabelnick, 173 N.E. 495, 273 Mass. 201, 87 A.L.R. 1339.
Tex.—Campbell v. Jones, Civ.App., 230 S.W. 710.
Utah.—Showell v. Upton, 230 P. 1023, 64 Utah 380.
Wash.—Reilly v. Hopkins, 234 P. 13, 133 Wash. 421.
23 C.J. p 240 note 82 [c] (1).

sufficient[36] to prove fraud or other matters.

d. Trial

In accordance with general rules, the instructions must be correct and questions of fact should ordinarily be submitted to the jury.

General rules applicable in civil actions govern as to instructions in actions based on fraud in a contract for an exchange of property.[37]

Questions of law and fact. Unless the court is trying the case without a jury,[38] and provided there is sufficient evidence with respect thereto,[39] questions of fact are for the jury.[40]

In an action for fraud, a verdict is properly directed for defendant where there is no evidence showing damage suffered by plaintiff.[41]

e. Findings and Judgment

The findings and judgment must be supported by the evidence and should give plaintiff the relief to which he is entitled.

In actions based on fraud in contracts for exchange of property, the findings must be in accord with the pleadings and evidence.[42] That no find-

36. Evidence held insufficient

(1) In general.

Ark.—Scroggins v. Beard, 285 S.W 354, 171 Ark. 1189.
Cal.—Bird v. Thompson, 8 P.2d 481 215 Cal. 70.
Ill.—Page v. Keeves, 199 N.E. 131 362 Ill. 64—Hustad v. Cerney, 151 N.E. 871, 321 Ill. 354.
Mo.—Gross v. Byler, 297 S.W. 391—Chapman v. Kraehe, App., 22 S.W. 2d 845.
Ohio.—Ford v. Bachman, App., 32 N E.2d 511.
Tex.—Blankenship v. Stricklin, Civ App., 77 S.W.2d 339, followed in Blankenship v. Lusk, 77 S.W.2d 341—Walker v. Ramming, Civ. App., 243 S.W. 564.
Wash.—Hudson v. Beers, 188 P. 454, 110 Wash. 225.

(2) To show fraud.

U.S.—Herschberger v. Woodrow-Parker Co., C.C.A.Ohio, 275 F. 908, certiorari denied Woodrow-Parker Co. v. Herschberger, 42 S.Ct. 270, 257 U.S. 661, 66 L.Ed. 422.
Ala.—Barley v. Wright, 171 So. 247, 233 Ala. 283—Brennen v. Kent, 90 So. 790, 206 Ala. 561.
Ark.—Scroggins v. Beard, 285 S.W. 354, 171 Ark. 1189.
Cal.—Hedden v. Waldeck, 265 P. 345, 89 Cal.App. 497.
Ill.—Binder v. Hejhal, 178 N.E. 901, 347 Ill. 11—Schweitzer v. Gibson, 151 N.E. 865, 321 Ill. 336.
Iowa.—Ragan v. Lehman, 216 N.W. 717—Putnam v. Moyers, 190 N.W. 1—Johnson v. Ford, 186 N.W. 906—McCormick v. McIntire, 183 N. W. 589, 192 Iowa 746, modified on other grounds 185 N.W. 454, 192 Iowa 746.
Ky.—Hornsby v. Powell, 21 S.W.2d 433, 231 Ky. 363.
Mass.—Wilkisius v. Sheehan, 155 N. E. 5, 258 Mass. 240.
Mich.—Hake v. Youngs, 236 N.W. 858, 254 Mich. 545—Shultz v. McCarty, 235 N.W. 215, 253 Mich. 445—Ponke v. Rusinowski, 217 N. W. 765, 241 Mich. 629—Kaiser v. Wojewoda, 213 N.W. 83, 237 Mich. 620—Clark v. Purchase, 197 N.W. 518, 226 Mich. 374—Zimmerman v. Feldman, 196 N.W. 495, 217 Mich. 390—Vernon v. Antona, 192 N.W. 681, 222 Mich. 83—Dennis v. Slyman, 184 N.W. 584, 216 Mich. 202—Leser v. Smith, 180 N.W. 464, 212 Mich. 558.
Mo.—Shannon v. Crabtree, 71 S.W.2d 709—Drown v. Tough, 38 S.W.2d 736, 225 Mo.App. 1017.
N.J.—Ginsberg v. Wolters, 121 A. 730, 94 N.J.Eq. 532—Robertson v. Criterion Const. Co., 140 A. 574, 6 N.J.Misc. 91.
Okl.—Menca v. Holmes, 108 P.2d 1022.
Tex.—Nesbitt v. Hudson, Civ.App., 230 S.W. 746.
Utah.—Wilson v. Guaranteed Securities Co., 23 P.2d 921, 82 Utah 224—Combined Metals v. Bastian, 267 P. 1020, 71 Utah 535.
Va.—School Board of Sand Lick Dist. v. Smith, 113 S.E. 868, 134 Va. 98.
Wash.—Savinovich v. Winbigler, 284 P. 77, 155 Wash. 333.
23 C.J. p 240 note 82 [d].

(3) To show ratification or estoppel.

U.S.—Brach v. Moen, C.C.A.Iowa, 35 F.2d 475, certiorari denied 50 S. Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
Iowa.—Baumhover v. Gerken, 203 N. W. 15, 200 Iowa 551.
Minn.—Peterson v. Schober, 256 N. W. 308, 192 Minn. 315.

(4) To show reliance on representations.

U.S.—Horton v. Reynolds, C.C.A. Iowa, 65 F.2d 430.
Ark.—Lange v. Mayo, 294 S.W. 12, 173 Ark. 583.
Neb.—Dyck v. Snygg, 292 N.W. 119, 138 Neb. 121.

(5) To show confidential relationship.

Ill.—Velcich v. Malesh, 1 N.E.2d 278, 284 Ill.App. 63.
Ky.—Jobe v. Brown, 53 S.W.2d 532, 245 Ky. 260.

37. Instructions held correct

Ga.—Newkirk v. Burts & Goodman, 104 S.E. 456, 25 Ga.App. 689.

Instructions held incorrect or properly refused

Mich.—Noble v. Shears, 202 N.W. 921, 230 Mich. 376.
N.Y.—Kaufman v. Jaffee, 279 N.Y.S. 392, 244 App.Div. 344.
Tex.—Summers v. Campbell, Civ. App., 254 S.W. 356.

Instructions held sufficient

(1) In general.—Newkirk v. Burts & Goodman, 104 S.E. 456, 25 Ga.App. 689.

(2) As to whether representation as to soundness of a horse was intended as a mere expression of opinion.—Parker v. Boyd, 156 S.W. 440, 108 Ark. 32.

38. Or.—Pugh v. Shull, 297 P. 366, 135 Or. 636.

39. Evidence held sufficient to go to jury

Mo.—Field Bros. v. Green, App., 236 S.W. 1076.
Okl.—Crowl v. Box, 288 P. 942, 144 Okl. 25.

Evidence held insufficient to go to jury

Mo.—Tighe v. Locke, App., 299 S.W. 105.
Okl.—Winter v. Harvell, 52 P.2d 717, 175 Okl. 315.
Tex.—Brenan v. Eubank, Civ.App., 56 S.W.2d 513—Jones v. Herring, Civ. App., 16 S.W.2d 325, error dismissed.

40. Cal.—Page v. Brown, 9 P.2d 895, 122 Cal.App. 12—Vah Dah Dunshee v. Boadway, 7 P.2d 325, 119 Cal.App. 678.
Mass.—Rosenberg v. Rome, 175 N.E. 171, 275 Mass. 64.
Minn.—Beulke v. Broadway State Bank, 220 N.W. 550, 175 Minn. 190.
Neb.—Advance-Rumely Thresher Co. v. Bartzat, 206 N.W. 7, 114 Neb. 35.
Or.—Rayburn v. Norton, 43 P.2d 919, 150 Or. 140.
S.C.—Manship v. Newsome, 198 S.E. 428, 188 S.C. 6.
23 C.J. p 240 note 87.

41. Tex.—Locke v. Melton, Com. App., 61 S.W.2d 814, reversing Melton v. Locke, Civ.App., 44 S.W. 2d 799.

42. Cal.—Schlake v. McConnell, 257 P. 175, 83 Cal.App. 725.

ing was made as to some alleged representations is immaterial where the court found that other representations were made entitling plaintiff to relief,[43] and it is immaterial that the court's findings included representations which are not actionable.[44]

The judgment must be supported by the evidence,[45] and should give plaintiff all the relief to which he is entitled.[46] Where a court of equity grants a rescission for fraud, a money judgment may be entered, if it is the only means by which the party seeking relief can be placed, as nearly as may be, in statu quo.[47] The fact that a judgment or decree is rendered in the alternative has been held not to render it objectionable.[48]

f. Damages

The relief to which a party to a fraudulent exchange of property is entitled in an action for cancellation or rescission is discussed in the title Cancellation of Instruments §§ 77–86; and the damages recoverable in an action based on the fraud are considered in the C.J.S. title Fraud §§ 139–144, also 27 C.J. p 94 note 65, p 95 notes 73, 74, p 96 note 97, 23 C.J. p 240 note 93–p 241 note 95.

§ 17. Liens and Enforcement Thereof

Questions as to the right to a lien under a contract for an exchange of property are discussed in the C.J.S. title Vendor and Purchaser § 382, also 66 C.J. p 1226 note 22–p 1227 note 31, and 23 C.J. p 241 notes 99, 1.

Finding held immaterial
Cal.—Connell v. Crawford, 268 P. 948, 92 Cal.App. 715.

43. Mass.—Baskes v. Cushing, 170 N.E. 42, 270 Mass. 230.

44. Cal.—Fisher v. Brotherton, 255 P. 854, 82 Cal.App. 532.

45. Ill.—Pustelniak v. Vilimas, 185 N.E. 611, 352 Ill. 270.

46. Ill.—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.

One who secretly purchased services of another's confidential agent in effecting an exchange of properties is legally and equitably responsible for, and is liable to make good to such other person, whatever loss the latter has legally or equitably sustained.—Forrest v. Wardman, 40 App.D.C. 520.

47. Iowa.—Gray v. Bricken, 166 N.W. 284, 182 Iowa 816.
Mich.—Schliska v. Ross, 203 N.W. 81, 230 Mich. 225.
Wash.—Pletcher v. Porter, 33 P.2d 109, 177 Wash. 560—Barnett v. Cobb, 250 P. 57, 140 Wash. 538.

48. Cal.—Marks v. Howkins, 203 P. 1035, 55 Cal.App. 664.
Ill.—Hinkley v. Wynkoop, 137 N.E. 154, 305 Ill. 115.

Reconveyance should be permitted
Decree ordering defendants to pay plaintiff trade price, instead of permitting them to reconvey realty, as they offered to do, should be modified to permit reconveyance, although offer was belated.—Bacon v. Fox, 255 N.W. 340, 267 Mich. 589.

EXCHANGES

This Title includes bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definitions, Kinds, and Purposes

An exchange is an association of persons engaged in business of the same nature to provide facilities for the transaction of their individual business. The principal purposes of an exchange are to provide a place and other facilities for the convenience of its members, and to maintain fair standards of business dealings.

An exchange is an association of persons engaged in business of the same nature who for convenience have combined to provide at the common expense and under uniform rules a common place for the transaction of their individual business.[1]

The principal purposes and objects of an exchange are the affording to members of facilities for the transaction of their individual business and providing for a convenient exchange or salesroom for the transaction of such business and the maintenance of rectitude and honorable dealings with those members in their business transactions.[2] In some of the associations a declared purpose is to make provision for the widows and families of deceased members.[3] It is not one of the functions of a stock exchange to hold property or to accumulate profits for the benefit of its members.[4]

1. N.Y.—Belton v. Hatch, 17 N.E. 225, 109 N.Y. 593, 595, 4 Am.S.R. 450.
23 C.J. p 243 note 1, p 244 note 5 [a], [c].
"Chamber of commerce" defined see 14 C.J.S. p 351 note 14.

Brokers' board
N.Y.—Manning v. Heidelbach, 138 N.Y.S. 750, 153 App.Div. 790.

Distinguished from bucket shop
An exchange in the text sense is distinguished from a bucket shop in that in the bucket shop there is no delivery and no expectation or intention of receiving or delivering securities or commodities said to be bought or sold.
U.S.—In re A. B. Baxter & Co., N.Y., 152 F. 137, 81 C.C.A. 355, 11 Ann.Cas. 437.
Ind.—Western Union Tel. Co. v. State, 76 N.E. 100, 165 Ind. 492, 3 L.R.A.,N.S., 153, 6 Ann.Cas. 880.

2. N.Y.—Pirnie Simons & Co. v. Whitney, 259 N.Y.S. 193, 144 Misc. 812.
23 C.J. p 243 note 3.

3. N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847.
23 C.J. p 244 note 4.
Property rights of members in fund see infra § 5 c (3).

4. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162.

§ 2. Nature, Status, and Incorporation or Organization

Some exchanges are unincorporated voluntary associations, distinguishable from partnerships, joint stock companies, or corporations although possessing some of the characteristics of those organizations. Other exchanges have assumed a corporate form of organization.

Many exchanges are unincorporated voluntary associations[5] not organized in pursuance of any statute or legislative act,[6] on which no special privileges are conferred by the state, and which owe no special duties to the public.[7] Such exchanges are not partnerships,[8] joint stock companies,[9] or corporations,[10] although possessing some of the characteristics of each of those types of organization,[11] such as association[12] and being governed by regulations adopted by themselves for that purpose.[13] More specifically, unincorporated exchanges resemble partnerships with respect to the property rights of members, see infra § 5, are like corporations in that such exchanges may adopt constitutions and sets of by-laws which are binding on members, see infra § 3, and, like corporations, have a continued existence, unless voluntarily dissolved, and are unaffected by the death, resignation, suspension, or removal of members.[14] The same rules of law and equity apply to such exchanges, so far as regards the control of them, and the adjudication of their reserved and inherent powers to regulate their conduct and to expel their members, as to corporations and joint stock companies.[15]

A number of important exchanges have moreover either taken advantage of general incorporation laws or secured special charters;[16] but it has been held that an exchange, although incorporated, is a voluntary association.[17] Unlike ordinary business corporations, these associations do not carry on business for pecuniary gain, see Corporations § 13, and, because the successful carrying out of the purposes for which produce exchanges and like associations are organized depends on the personal character and conduct of the members, they possess a power of suspending or expelling members which does not exist in ordinary business corporations, see infra § 7.

Approval by courts. In view of the worthy and beneficent aims of exchanges as stated in § 1, they are regarded by the courts with approval.[18]

Powers. Aside from certain inherent powers possessed by exchanges as such,[19] an incorporated exchange, as in the case of corporations generally see Corporations § 935, derives its authority to

5. U.S.—Hyde v. Woods, 94 U.S. 523, 24 L.Ed. 264.
23 C.J. p 244 note 8.

6. N.Y.—White v. Brownell, 2 Daly 329.
23 C.J. p 244 note 9.

7. N.Y.—Commercial Tel. Co. v. Smith, 47 Hun 494.
23 C.J. p 244 note 10.

8. N.Y.—Belton v. Hatch, 17 N.E. 225, 109 N.Y. 593, 4 Am.S.R. 495.
23 C.J. p 244 note 11.

9. N.Y.—White v. Brownell, 2 Daly 329.
Pa.—Leech v. Harris, 2 Brewst. 571.

10. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr.,N.S., 318.
Pa.—Leech v. Harris, 2 Brewst. 571.

11. U.S.—Hyde v. Woods, 12 F.Cas. No.6,975, 2 Sawy. 655, affirmed 94 U.S. 523, 24 L.Ed. 264.
23 C.J. p 245 note 14.

12. Pa.—Leech v. Harris, 2 Brewst. 571.

13. Pa.—Leech v. Harris, supra.

14. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 192.

15. Pa.—Leech v. Harris, 2 Brewst. 571.

16. Del.—Read v. Tidewater Coal Exchange, 118 A. 304, 13 Del.Ch. 253.
23 C.J. p 245 note 18.

Incorporating statutes not contrary to public policy
Acts authorizing incorporation of exchanges are not against public policy as being in restraint of trade. —Reynolds v. Plumbers' Material Protective Assoc., 63 N.Y.S. 303, 30 Misc. 709—23 C.J. p 245 note 23.

Requisites of application for charter
Pa.—In re Pittsburgh Stock Exch., 26 Pittsb.Leg.J.,N.S., 308.
23 C.J. p 245 note 18 [a].

Amendment of articles, certificate, or charter
(1) Articles of association of an incorporated exchange may be amended under statutes applicable to corporations generally in the absence of special provision for amendments in the specific statute under which such exchange is incorporated.—Detroit Chamber of Commerce v. State Secretary, 67 N.W. 897, 109 Mich. 691.

(2) The certificate of incorporation of an exchange may be amended.—In re Walker, 295 N.Y.S. 283, 251 App.Div. 28, affirmed 12 N.E.2d 579, 276 N.Y. 567.

(3) The charter of an incorporated exchange may be amended by the legislature of the state creating such corporation.—Tapper v. Boston Chamber of Commerce, 144 N.E. 89, 249 Mass. 235.

(4) Amendment of articles, certificate, or charter of corporations generally see Corporations § 61.

(5) Amendment of constitution, by-laws and rules see infra § 3.

Corporate status as manager of pools
The status of an incorporated coal exchange, organized by railroads and coal shippers to facilitate the handling of coal at the seaboard, has been held to be merely that of a manager of a series of pools, the coal in which was owned by the members of each pool collectively, and not itself the owner of the coal.—Read v. Tidewater Coal Exchange, 118 A. 304, 13 Del.Ch. 253.

Reorganization
N.Y.—Kronfeld v. Haines, 45 N.Y.S. 92, 20 Misc. 102.
23 C.J. p 245 note 18 [b].

17. Ill.—People v. Chicago Bd. of Trade, 79 N.E. 611, 224 Ill. 370.
23 C.J. p 245 note 19.

18. N.Y.—Reynolds v. Plumbers' Material Protective Assoc., 63 N.Y.S. 303, 30 Misc. 709.
23 C.J. p 245 note 22.

19. Minn.—Evans v. Minneapolis Chamber of Commerce, 91 N.W. 8, 86 Minn. 448.
Inherent power of exchange to:
Fine, suspend, or expel members see infra § 7.
Make rules and regulations to carry out its purposes see infra § 3.

act from the statute under which it is organized[20] and the charter issued thereunder.[21]

In the absence of restrictive provisions in the incorporating statute the mere use of a particular word in the corporate name of an exchange may not be permitted to operate as a limitation on the jurisdiction or powers of such exchange.[22]

When subject to public regulation. Exchanges engaged in a business affecting a public interest are by virtue of that fact subject to reasonable regulation in the public interest,[23] being required to submit to such reasonable regulation as the state may see fit to impose in the exercise of its police power,[24] and particular regulatory statutes have been held constitutional.[25] Accordingly the rules, regulations, and methods of an exchange engaged in a business affecting a public interest are subject to regulation by the legislature.[26] For example, the rules of an exchange governing its conduct are subject to regulation with a view to preventing abuses and securing freedom from undue discrimination in its operations.[27] More specifically, an exchange engaged in business affecting a public interest may as a condition to its operation, see infra § 5 b, be required to admit certain persons to membership, precluded, see infra § 7, from suspending members for certain causes, and prohibited from enforcing a by-law forbidding members from dealing with nonmembers, see infra § 5 a.

An exchange which makes application to be accorded the status of a contract market, under a statutory plan permitting certain exchanges to be so designated, is subject to having such designa-

20. Mass.—Tapper v. Boston Chamber of Commerce, 144 N.E. 89, 249 Mass. 235.

Minn.—Evans v. Minneapolis Chamber of Commerce, 91 N.W. 3, 86 Minn. 448.

21. Minn.—Evans v. Minneapolis Chamber of Commerce, supra.

22. "Produce"

The word "produce" as a part of the corporate name does not indicate the purpose of a statute creating an exchange to limit its jurisdiction to contracts relating to agricultural products—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414, reversing 36 N.Y.S. 427, 15 Misc. 42.

23. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600.

Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.

Chicago board of trade

(1) The board of trade of the city of Chicago is engaged in a business affecting a public interest within the meaning of the text rule and is accordingly subject to regulation by the state.—New York & Chicago Grain Exchange v. Chicago Board of Trade, 19 N.E. 855, 127 Ill. 153, 2 L.R.A. 414, 11 Am.S.R. 107.

(2) Such board is also engaged in a business affecting a national public interest and as such is subject to national regulation by congress.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839—Board of Trade of City of Chicago v. Wallace, C.C.A., 67 F.2d 402, certiorari denied Wallace v. Board of Trade of City of Chicago 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067 and Farmers' Nat. Grain Corporation v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067—Bartlett Frazier Co. v. Hyde, C.C.A.Ill., 65 F.2d 350, affirming, D.C., 56 F.2d 245, certiorari denied Bartlett Frazier Co. v. Wallace, 54 S.Ct. 70, 290 U.S. 654, 78 L.Ed. 567.

Wichita board of trade is engaged in a business affecting public interest within the meaning of the text.—Farmers' Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S.Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

24. Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.

25. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839.

Commodities Exchange Act

U.S.—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600.

Grain Futures Acts

U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed 548—Bennett v. Board of Trade of City of Chicago, 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600—Board of Trade of City of Chicago v. Wallace, C.C.A., 67 F.2d 402, certiorari denied Wallace v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067 and Farmers' Nat. Grain Corporation v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067—Bartlett Frazier Co. v. Hyde, C.C.A.Ill., 65 F.2d 350, affirming, D.C., 56 F.2d 245, certiorari denied Bartlett Frazier Co. v. Wallace, 54 S.Ct. 70, 290 U.S. 654, 78 L.Ed. 567.

Kan.—Farmers' Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S.Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

Securities Exchange Act

U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

26. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839.

Kan.—Farmers' Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S.Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.

23 C.J. p 245 note 24.

27. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839.

tion suspended or revoked for sufficient cause as provided by the statute.[28]

In the absence of provision in a statute for incorporation of exchanges authorizing them to pay dividends on shares of members, an exchange incorporated under such statute is not required to file reports required by a statute applicable to stock corporations.[29]

§ 3. Constitution, By-Laws, and Rules

a. In general
b. Right to make rules and validity thereof
c. Construction; retroactive operation
d. Amendment
e. Persons bound
f. Interference by courts

a. In General

The constitution, by-laws, and rules of an exchange constitute a contract as between the members and also as between them and the exchange.

As in the case of associations generally, see Associations § 11 b, the constitution, rules, and by-laws of an exchange, organized as an association, constitute a contract both as between the members themselves and as between the exchange on one side and its members on the other,[30] and such contract must be interpreted like any other contract, and cannot be remade or altered by the court.[31]

The rules of an exchange do not establish a general custom or usage[32] nor constitute a rule of evidence binding or controlling the courts.[33]

b. Right to Make Rules and Validity Thereof

Except as affected by public regulation, an exchange has inherent power to make such rules as are necessary to enable it to carry out its purposes, provided such rules are not contrary to public policy or the law of the land and are not unreasonable or uncertain.

Subject to public regulation of the rules, regulations, and methods of an exchange, when it is engaged in a business affecting a public interest, see supra § 2, exchanges have inherent power to enact such rules and regulations concerning the government of their affairs as may be necessary to carry out their purposes.[34] To be valid and binding, however, the constitution and by-laws of an exchange must not contravene public policy or the law of the land,[35] or be unreasonable[36] or uncertain.[37] Rules must be adopted in accordance with the methods, if any, prescribed by the constitution or charter of the exchange,[38] and by-laws of incorporated exchanges must be within the scope of the powers conferred by their charter.[39] The mere fact that a by-law of an exchange differs from the common-law rule does not render such by-law invalid.[40]

28. U.S.—Board of Trade of City of Chicago v. Wallace, C.C.A., 67 F.2d 402, certiorari denied Wallace v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067, and Farmers' Nat. Grain Corporation v. Board of Trade of City of Chicago, 54 S. Ct. 529, 291 U.S. 680, 78 L.Ed. 1067.

29. N.Y.—Stationers' & Publishers' Board of Trade v. Flynn, 235 N. Y.S. 58, 226 App.Div. 496.

30. Cal.—Milton G. Cooper & Son v. William R. Davis & Bro., 2 P.2d 823, 116 Cal.App. 468.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App. Div. 847.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., Civ. App., 242 S.W. 1067.
23 C.J. p 247 note 53, p 250 note 3.

31. N.Y.—Cohen v. Thomas, 103 N. E. 708, 209 N.Y. 407, affirming 127 N.Y.S. 1116, 142 App.Div. 937.

32. U.S.—The Innocenta, D.C.N.Y., 13 F.Cas.No.7,050, 10 Ben. 410.
23 C.J. p 248 note 62.

33. S.C.—Riordan v. Doty, 27 S.E. 939, 50 S.C. 537.
23 C.J. p 248 note 63.

34. La.—Walsh v. New Orleans Cotton Exchange, 177 So. 68, 188 La. 338.
N.Y.—Franklin v. Dick, 28 N.Y.S. 2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App. Div. 847—Pirnie Simons & Co. v. Whitney, 259 N.Y.S. 193, 144 Misc. 812.
Pa.—Whelen v. Craig, 98 Pa.Super. 103.
23 C.J. p 246 note 29.

35. U.S.—Middleton v. Fidelity-Philadelphia Trust Co., C.C.A.Pa., 35 F.2d 851, affirming, D.C., In re McCown, 31 F.2d 334, and followed in, C.C.A.Pa., Middleton v. Dussoulas, 35 F.2d 857.
Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App. Div. 847—Pirnie Simons & Co. v. Whitney, 259 N.Y.S. 193, 144 Misc. 812.
23 C.J. p 246 note 30.

Motive
In applying the text rule the motive of an exchange in adopting a certain resolution need not be considered further than to discover the purpose of such resolution since the courts will assume that the exchange has been guided by proper motives.—Pirnie Simons & Co. v. Whitney, supra.

36. Ill.—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill.App. 71.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App. Div. 847.
23 C.J. p 246 note 31.

37. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.
23 C.J. p 246 note 32.

38. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.
23 C.J. p 246 note 33.

39. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.
23 C.J. p 247 note 34.

40. Mo.—Goddard v. Merchants' Exch., 9 Mo.App. 290, affirmed 78 Mo. 609.

The right and power of an exchange to make rules governing its members generally is discussed in § 5 infra.

Partial invalidity. The court cannot sustain a rule which is in part invalid, unless it is severable.[41]

c. Construction; Retroactive Operation

The usual rules of construction apply to the constitution, rules, and by-laws of exchanges. Exchange rules are not retroactive in operation.

The constitution, rules, and by-laws of an exchange should be given a reasonable construction,[42] and should be construed not by the jury but by the court,[43] which will regard the substance of the whole matter[44] and disregard grammatical errors.[45] In a proper case resort may be had to practical construction by the parties concerned.[46] Penal provisions should be strictly construed.[47]

In case of conflict between the constitution and the by-laws the constitution must prevail.[48]

Exchange rules[49] and amendments thereof[50] are not retroactive in operation.

d. Amendment

The constitution and by-laws of exchanges may be amended.

The constitution and by-laws of an exchange are subject to amendment.[51] The amendment, to be valid and effective, must be adopted in accordance with the organic law of the organization itself and its by-laws,[52] and when so adopted is ordinarily binding on the member provided his vested property rights are not interfered with, see infra this section subdivision e (1). An amendment which deprives a nonmember of a substantial vested right is not binding on him, see infra this section subdivision e (2).

An amendment to the constitution in general terms will not be deemed to relate to a particular case only, where the ruling was at first applied in terms to that case, and afterward made general and inserted in the constitution.[53]

e. Persons Bound

(1) Members
(2) Nonmembers

(1) Members

Members of an exchange are bound by the provisions of its regularly adopted constitution, rules, and by-laws.

In accordance with the rule that the constitution, by-laws, and rules of exchange constitute a contract between the exchange and its members, see supra this section subdivision a, one who becomes a member of an exchange submits himself to the operation of its constitution and by-laws, and agrees to be bound thereby, so far as they are valid and within its powers to make,[54] and is ordinarily bound by amendments to the constitution and by-laws regularly adopted,[55] provided they

41. N.Y.—Parish v. New York Produce Exch., 61 N.E. 977, 169 N.Y. 34, 56 L.R.A. 149.
23 C.J. p 247 note 37.

42. Cal.—Milton G. Cooper & Son v. William R. Davis & Bro., 2 P. 2d 823, 116 Cal.App. 468.

43. N.Y.—Matthews v. New York City Associated Press, 32 N.E. 981, 136 N.Y. 340, 32 Am.S.R. 741.
23 C.J. p 247 note 44.

44. N.Y.—National League of Commission Merchants v. Hornung, 129 N.Y.S. 437, 72 Misc. 181, reversed on other grounds 132 N.Y.S. 871, 148 App.Div. 366.
Pa.—Sexton v. Commercial Exch., 10 Pa.Co. 607.

45. Pa.—Sexton v. Commercial Exch., 10 Pa.Co. 607.

46. U.S.—New River Collieries Co. v. Snider, C.C.A.N.Y., 286 F. 667, affirming, D.C., 284 F. 287.
N.Y.—In re Hayes, 76 N.Y.S. 312, 37 Misc. 264.
Tex.—Western Union Telegraph Co. v. Gardner, Civ.App., 276 S.W. 278.

47. Colo.—Denver Chamber of Commerce & Board of Trade v. Green, 47 P. 140, 8 Colo.App. 420.
Mo.—Albers v. Merchants' Exch., 120 S.W. 139, 140 Mo.App. 446.

48. Pa.—Powell v. Abbott, 9 Wkly. N.C. 231.

49. Ill.—Caldwell v. Hornblower, 246 Ill.App. 545.
N.Y.—M. Roth & Co. v. New York Mercantile Exchange, 262 N.Y.S. 687, 146 Misc. 644, affirmed 262 N.Y.S. 693, 238 App.Div. 779.

50. N.Y.—M. Roth & Co. v. New York Mercantile Exchange, supra.
23 C.J. p 247 note 49.

51. N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329—In re Walker, 295 N.Y.S. 283, 251 App.Div. 28, affirmed 12 N.E.2d 579, 276 N.Y. 567
23 C.J. p 247 note 46.
Transfer of power
Power to amend by-laws originally given to groups within the exchange may be properly transferred to its membership as a whole.—In re Walker, supra.

52. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847—In re Walker, 295 N.Y.S. 283, 251 App.Div. 28, affirmed 12 N.E.2d 579, 276 N.Y. 567.

53. N.Y.—Weston v. Ives, 97 N.Y. 222, reversing 14 N.Y.Wkly.Dig. 413.

54. U.S.—In re Rosenbaum Grain Corporation, D.C.Ill., 13 F.Supp. 601.
La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 246 note 29 [c], p 247 note 53.

55. N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal

do not interfere with his vested property rights.[56] Moreover, members are presumed to know the rules of the exchange and to have assented to them.[57] Since members go in voluntarily, they cannot complain of an unnecessarily harsh rule or severe penalty which the majority in adopting have decided is in the interest of the body,[58] and it has been held that a member is estopped to deny the reasonableness of rules existing at the time of his admission.[59]

Members are not, on the other hand, bound by invalid rules of the exchange or those beyond its power to make,[60] this being particularly true as regards rules made subsequent to the admission of such members,[61] and a member is not bound by an exercise of power on the part of his fellow members to which he has not assented by becoming a member, or which is not derived from the law of the land.[62]

(2) Nonmembers

Generally nonmembers of an exchange are not bound by its laws and customs.

It is generally held that persons who are not members of the exchange are not bound by its laws and customs,[63] unless they contract with reference to them,[64] although there exists authority to the effect that nonmembers are presumed to have dealt with the member with reference to rules and customs of the exchange.[65] At any rate nonmembers are not bound by an exchange resolution, rule, or custom of which they have no knowledge,[66] or which is contrary to the general rules of law.[67] Provision in a contract whereby a nonmember agrees to be bound by exchange regulations "and all the amendments that are made thereto" does not apply to amendments made subsequent to such contract.[68] A nonmember whose rights are merely derived from a member, such as his judgment creditor, is, like the member himself, see supra this section subdivision e, bound by the provisions of the exchange constitution, rules, and by-laws.[69] A nonmember who undertakes to exercise the rights of a member is bound by the rules and customs of the exchange by estoppel.[70] A nonmember is not bound by an amendment which operates to deprive him of a substantial vested right.[71]

f. Interference by Courts

The courts are not disposed to interfere with the enforcement of the constitution, rules, and regulations, and by-laws of an exchange but may under certain circumstances interfere to see that its rules are fairly and honestly administered.

The courts will not attempt to enforce the constitution, rules and regulations, and by-laws of an exchange,[72] especially where they require acts contrary to law,[73] nor will they interfere to control their enforcement, if valid, but the exchange will be left to enforce them in the manner which

granted 29 N.Y.S.2d 146, 262 App. Div. 847—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329.
23 C.J. p 247 note 46.

56. N.Y.—Franklin v. Dick, 28 N. Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847.
23 C.J. p 247 note 47.

57. N.Y.—White v. Brownell, 2 Daly 329.
Rule relating to member acting as agent not violated
Mo.—Esmar v. Haeussler, 115 S.W. 2d 54, 234 Mo.App. 217, transferred, see 106 S.W.2d 412, 341 Mo. 33.

58. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.

59. Ill.—Bostedo v. Chicago Bd. of Trade, 130 Ill.App. 560, affirmed 81 N.E. 42, 227 Ill. 90.

60. N.Y.—Pirnie Simons & Co. v. Whitney, 259 N.Y.S. 193, 144 Misc. 812.
23 C.J. p 247 note 85.

61. N.Y.—Pirnie Simons & Co. v. Whitney, supra.

62. Pa.—Leech v. Harris, 2 Brewst. 571.

63. Mich.—Kernahan v. Wallace, 248 N.W. 904, 263 Mich. 572.
N.Y.—Ford v. Snook, 199 N.Y.S. 630, 205 App.Div. 194, affirmed 148 N.E. 732, 240 N.Y. 624.
23 C.J. p 248 note 59.

64. Mass.—Weisberg v. Hunt, 131 N.E. 471, 239 Mass. 190.
Mich.—Kernahan v. Wallace, 248 N. W. 904, 263 Mich. 572.
Pa.—Whelen v. Craig, 98 Pa.Super. 103.
23 C.J. p 248 note 60.

65. Ill.—Green v. Chicago Bd. of Trade, 51 N.E. 599, 174 Ill. 585, 49 L.R.A. 365, affirming 63 Ill. App. 446—Bailey v. Bensley, 87 Ill. 556.

66. N.Y.—Ford v. Snook, 199 N.Y. S. 630, 205 App.Div. 194, affirmed 148 N.E. 732, 240 N.Y. 624.

67. Mass.—Hall v. Paine, 112 N.E. 153, 224 Mass. 62, L.R.A.1917C 737.
N.Y.—Pirnie Simons & Co. v. Whitney, 259 N.Y.S. 193, 144 Misc. 812.
23 C.J. p 248 note 65.
Destroying business
A nonmember conducting a proper and lawful business, without complaint by the public, or public officials charged with enforcement of law and possessing power to stop abuses and fraud, is not subject to an exchange resolution or rule which, contrary to law, operates to eliminate or destroy such business. —Pirnie Simons & Co. v. Whitney, supra.

68. Ill.—Thomson v. Thomson, 220 Ill.App. 486.

69. N.Y.—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329.

70. Ill.—Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547.

71. Ill.—Thomson v. Thomson, 220 Ill.App. 486.

72. U.S.—U. S. v. New York Coffee & Sugar Exch., N.Y., 44 S.Ct. 225, 263 U.S. 611, 68 L.Ed. 475—In re Rosenbaum Grain Corporation, D. C.Ill., 13 F.Supp. 601.
Ill.—Chicago Bd. of Trade v. Nelson, 44 N.E. 743, 162 Ill. 431, 53 Am.S.R. 312.

73. N.Y.—People v. Manufacturers' & Dealers' Protective Ass'n, 104 N.Y.S. 575, 54 Misc. 332.
23 C.J. p 248 note 70.

it has prescribed.[74] There must be a fair and honest administration of the rules, however, and the courts will interfere to see that this is done.[75] The courts will apply a restraining hand where exchanges have acted fraudulently, capriciously, or in violation of their own laws,[76] or in accordance with rules contrary to law.[77] Unincorporated exchanges are within an act giving chancery jurisdiction to control unincorporated societies or associations.[78]

§ 4. Officers and Agents

General rules as to corporations or associations are applicable as regards officers and agents of incorporated or incorporate exchanges respectively.

General rules relating to the officers and agents of Corporations, see Corporations §§ 715–932, 993–1087, or of Associations, see Associations §§ 19–21, are applicable to officers and agents of incorporated or unincorporated exchanges respectively.

Accordingly the board of directors or trustees of an incorporated exchange is, subject to limitation by constitution, statute, charter, or by-law, vested with the management of the ordinary affairs of the corporation including the management of its property.[79] Under appropriate rules of the exchange its executive committee may be authorized, on closing a member's account, to change his status from that of a member to a debtor of the exchange.[80]

The acts of officers and agents of an exchange, when done within the scope of their authority, are binding on the exchange.[81] An incorporated exchange is not, however, liable in tort for the acts of its officers and agents where they themselves are not individually liable.[82] An exchange employing persons, not to conduct business on behalf of the exchange as agent for the members, but merely to afford facilities for the members to transact business with each other, is not liable for negligence of the employees, but only for negligence in employing them.[83]

Officers of an incorporated exchange, exercising their discretion under their charter powers, are not liable for mere errors in judgment, resulting in damage to a member, in the absence of malice.[84] Officers who fail in their duty to resist enforcement of an alleged unconstitutional statute operating to injure the value of the exchange to its members and the pecuniary value of their membership may, however, be subject to suit in equity to prevent compliance with such statute.[85]

§ 5. Membership

a. In general
b. Admission of members
c. Rights of members

a. In General

The power of an exchange to make rules governing the rights and obligations of its members in contravention of the general law is limited to the field legitimately covered by the business of such exchange.

The inherent power of an exchange to make rules governing its affairs, see supra § 3 b, is, as regards rules governing the rights and obligations of its members in contravention of the general law,

74. U.S.—In re Rosenbaum Grain Corporation, D.C.Ill., 13 F.Supp. 601.
La.—Walsh v. New Orleans Cotton Exchange, 177 So. 68, 188 La. 338.
23 C.J. p 249 note 71.

75. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162.
23 C.J. p 249 note 72.

76. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.
N.Y.—Weston v. Ives, 97 N.Y. 222.

77. N.Y.—Heim v. New York Stock Exch., 118 N.Y.S. 591, 64 Misc. 529, affirmed 122 N.Y.S. 872, 138 App. Div. 96.
Wis.—State v. Milwaukee Chamber of Commerce, 3 N.W. 760, 47 Wis. 670.

78. Pa.—Leech v. Harris, 2 Brewst. 571.

79. Mass.—Tapper v. Boston Chamber of Commerce, 126 N.E. 464, 235 Mass. 209.
Authorizing purchase of membership certificates
Mass.—Tapper v. Boston Chamber of Commerce, 144 N.E. 89, 249 Mass. 235—Tapper v. Boston Chamber of Commerce, 126 N.E. 464, 235 Mass. 209.
Charging members for use of trading facilities
Mass.—Tapper v. Boston Chamber of Commerce, 144 N.E. 89, 249 Mass. 235.
Who may vote and number authorized to act
Mass.—Tapper v. Boston Chamber of Commerce, 144 N.E. 89, 249 Mass. 235—Tapper v. Boston Chamber of Commerce, 126 N.E. 464, 235 Mass. 209.

80. U.S.—Coyle v. Morrisdale Coal Co., D.C.N.Y., 284 F. 294, affirmed, C.C.A., 289 F. 429—New River Collieries Co. v. Snider, D.C.N.Y., 284 F. 287, affirmed, C.C.A., 286 F. 667.

81. **Liability of members**
(1) The members of an unincorporated exchange are individually and collectively liable for the acts of the president and the authorized agent of the exchange in receiving and disbursing money.—Hassey v. Ruggels, 156 P. 989, 30 Cal.App. 19.
(2) Individual members of an exchange incorporated for the purpose of dealing in gambling and wagering contract are liable for money received by the agent of the exchange.—McGrew v. City Produce Exch., 4 S.W. 38, 85 Tenn. 572, 4 Am.S.R. 771.

82. Minn.—Melady v. South St. Paul Live Stock Exch., 171 N.W. 806, 142 Minn. 194.
23 C.J. p 249 note 79 [a].

83. Mo.—Warren v. Merchants' Exch., 52 Mo.App. 157.
23 C.J. p 249 note 80.

84. Mo.—Albers v. Merchants' Exch., 39 S.W. 473, 138 Mo. 140.

85. U.S.—Hill v. Wallace, Ill., 42 S.Ct. 453, 259 U.S. 44, 66 L.Ed. 822.

strictly limited to the field legitimately covered by the business of such exchange.[86] An exchange may prescribe the conditions on which the continuance of membership will depend;[87] and may properly make a rule forbidding its members from using exchange information in a certain manner.[88] On the other hand, under public regulations applicable to exchanges engaged in a business affecting a public interest an exchange may be prohibited from enforcing a by-law forbidding members from dealing with nonmembers.[89] However, under such regulations, members may be required to record in writing certain transactions,[90] or to make a report of business dealings to certain public officials and to permit inspection of such members' records,[91] particularly when such requirements are only the legitimate means of enforcing statutory regulations within the power of the legislature.[92] Moreover, members of an exchange engaged in a business affecting a public interest may be prohibited by public regulation from dealing in indemnities,[93] and from commingling funds of customers with funds of members or using a customer's funds to margin or guaranty the trade of another person.[94]

General rules of estoppel apply to the claim of an individual that an exchange is estopped to deny his membership,[95] and to the claim that an individual is estopped to claim membership.[96]

b. Admission of Members

Subject to applicable public regulations an exchange has power to make rules defining eligibility for membership and to prescribe the procedure for admission.

Subject to public regulations applicable to exchanges engaged in a business affecting a public interest, see supra § 2, an exchange, whether incorporated or not, has full power to make rules defining eligibility to membership in the association, and prescribing the mode to be followed by applicants for admission;[97] and the courts cannot compel the admission of an applicant who is ineligible

86. U.S.—Seattle Curb Exchange v. Knight, C.C.A.Wash., 59 F.2d 39.

Contract of employment

Curb exchange rule that contracts with regard to payment of money should be subject to rules of exchange did not, under the text rule, apply to contract of employment.—Seattle Curb Exchange v. Knight, supra.

87. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr.N.S. 318.

88. Radio advertising

Rule of exchange forbidding member from using exchange information on radio broadcasts to advertise his own individual business is not unreasonable as restriction of competition.—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill.App. 71.

89. Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.

90. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839.

91. U.S.—Bartlett Frazier Co. v. Hyde, D.C.Ill., 56 F.2d 245, affirmed, C.C.A., 65 F.2d 350, certiorari denied Bartlett Frazier Co. v. Wallace, 54 S.Ct. 70, 290 U.S. 654, 78 L.Ed. 567.

Supersedeas or stay pending appeal

In absence of specific statutory provision for supersedeas or suspension of penalty imposed for noncompliance with the text requirement, the court hearing an appeal from an order imposing such penalty has power to grant such supersedeas or suspension pending such hearing.—Bartlett Frazier Co. v. Hyde, C.C.A. Ill., 65 F.2d 350, affirming, D.C., 56 F.2d 245, certiorari denied Bartlett Frazier Co. v. Wallace, 54 S.Ct. 70, 290 U.S. 654, 78 L.Ed. 567.

92. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839—Bartlett Frazier Co. v. Hyde, D.C.Ill., 56 F.2d 245, affirmed, C.C.A., 65 F.2d 350, certiorari denied Bartlett Frazier Co. v. Wallace, 54 S.Ct. 70, 290 U.S. 654, 78 L.Ed. 567.

93. U.S.—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F. 2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600.

Purpose of prohibition

"It is apparent that the prohibition of dealings in indemnities was to prevent wide fluctuations resulting from wild forms of speculation. The evidence seems to support the view . . . that wide fluctuation due to such speculation is harmful and should be avoided. Likewise, that dealings in indemnities are promotive of speculations. Indemnities induce speculation and the latter promotes wide fluctuation."—Moore v. Chicago Mercantile Exchange, C. C.A.Ill. 90 F.2d 735, 740, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, 740, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U. S. 744, 82 L.Ed. 600.

94. U.S.—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 744, 82 L.Ed. 600.

Object of prohibition

One object of the legislative prohibition stated in the text is to avoid the evil speculative influence which might result if a member holding the deposits of many customers should undertake to influence the market.—Moore v. Chicago Mercantile Exchange, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U. S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, C.C.A.Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L. Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 744, 82 L.Ed. 600.

95. Minn.—McCarthy Bros. Co. v. Minneapolis Chamber of Commerce, 117 N.W. 923, 105 Minn. 497, 21 L.R.A.,N.S., 589.
23 C.J. p 250 note 99.

96. N.Y.—Allien v. Wotherspoon, 50 N.Y.Super. 417.
23 C.J. p 250 note 1.

97. N.Y.—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329—Charles F. Garrigues Co. v. New York Produce Exch., 211 N.Y.S. 13, 213 App.Div. 625.
23 C.J. p 249 note 90.

or who has failed to comply with the prescribed mode in which membership can be gained.[98] Under such regulations, however, an exchange falling within their terms may be required to admit certain persons to membership.[99] Except as affected by such public regulations, rules relating to the admission of members, whether they appear to be reasonable or unreasonable, will not be interfered with by the courts so long as they are not immoral or hostile to the policy of the law.[1] Moreover, subject to such regulations, a seat can be acquired only by an election to membership in accordance with the constitution, or charter, and by-laws,[2] and the good standing of a prospective member may be investigated before admission.[3] Assent to the constitution and by-laws by the applicant in the manner prescribed therein may be a condition of acquiring membership or a seat.[4] Where an application for membership is improperly rejected, the applicant may, irrespective of statute, resort to the courts to determine his right, but prior to such determination he is not justified in going upon or remaining upon the premises of the exchange in violation of its rules.[5]

c. Rights of Members

(1) In general

(2) In property of exchange

(3) In gratuity fund

(1) In General

The rights of exchange members are subject to its constitution, by-laws, and rules.

In accordance with the rule that the constitution, by-laws, and rules of an exchange constitute a contract binding on the member, see supra § 3 a, d, e, the rights of such member are subject to their provisions[6] and a judgment creditor of the member has no greater rights than the member himself.[7] A member is not estopped from relying on the constitution and by-laws merely because he has induced others in different matters to yield obedience to unauthorized orders of the board of directors.[8] The rights and remedies of members with respect to the property of the exchange, and its gratuity fund, are discussed infra subdivisions (2) and (3) of this section, respectively; members' rights and remedies as regards other matters are considered under appropriate heads in subsequent sections, see infra §§ 7–9. Liability of exchange officers to suit by members for failure to observe duty to resist enforcement of statute is discussed supra § 4.

(2) In Property of Exchange

Subject to modification by constitution, rules, and by-laws of the exchange, the interest of each member in exchange property is equal.

Unless otherwise provided by the laws of the exchange, the interest of each member in the property of the exchange is equal,[9] the rights of mem-

98. N.Y.—Charles F. Garrigues Co. v. New York Produce Exch., supra. 23 C.J. p 249 note 91.

99. U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839—Board of Trade of City of Chicago v. Wallace, C.C.A.7, 67 F.2d 402, certiorari denied Wallace v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067, and Farmers' Nat. Grain Corporation v. Board of Trade of City of Chicago, 54 S.Ct. 529, 291 U.S. 680, 78 L.Ed. 1067.

Kan.—Farmers' Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S.Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

Representatives of cooperative associations

U.S.—Board of Trade of City of Chicago v. Olsen, Ill., 43 S.Ct. 470, 262 U.S. 1, 67 L.Ed. 839.

1. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.

2. N.Y.—Chas. F. Garrigues Co. v. New York Produce Exch., 211 N.Y.S. 13, 213 App.Div. 625. 23 C.J. p 250 note 93.

3. N.Y.—Bernheim v. Keppler, 69 N.Y.S. 803, 34 Misc. 321.

4. Ill.—American Live Stock Commn. Co. v. Chicago Live Stock Exch., 32 N.E. 274, 143 Ill. 210, 36 Am.S.R. 385, 18 L.R.A. 190. 23 C.J. p 250 note 95.

5. Mo.—Babcock v. Merchants' Exch., 60 S.W. 732, 159 Mo. 381.

6. N.Y.—Jackson v. New York Cotton Exchange, 19 N.Y.S.2d 207, 259 App.Div. 329.

7. N.Y.—Jackson v. New York Cotton Exchange, supra.

8. Mo.—Moffatt v. Kansas City Bd. of Trade, 157 S.W. 579, 250 Mo. 168.

9. N.Y.—Belton v. Hatch, 17 N.E. 225, 109 N.Y. 593, 4 Am.S.R. 495.

Separate corporation holding real estate

(1) Where a corporation is organized to hold real estate for an unincorporated exchange the property of such a corporation is in equity the property of the members of the exchange.—Clute v. Loveland, 9 P. 133, 68 Cal. 254—Hassey v. Ruggles, 156 P. 989, 30 Cal.App. 19.

(2) The membership of such corporation being the same as the membership of the exchange, its action with reference to the property and as to disposition of its proceeds is immaterial as affecting the rights of the members.—Hassey v. Ruggles, supra.

Stock exchange

(1) Notwithstanding it is not a function of stock exchanges to hold property or to accumulate profits for the benefit of their members, see supra § 1, such bodies possess more or less property as a necessary incident to their existence.—White v. Brownell, 2 Daly, N.Y., 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr., N.S., 318.

(2) A member of such exchange has no severable proprietary interest in such property or a right to any proportional part of it upon withdrawing.—White v. Brownell, supra.

(3) He has merely the enjoyment and use of it while he is a member, and the property remains with, and belongs to, the body while it con-

bers in such property being similar to the rights of partners in partnership property,[10] but since there is no stock issued to the members of an unincorporated exchange they cannot claim any rights to its property as stockholders.[11] The right or interest of a member in exchange property is, however, subject to applicable provisions of the constitution, rules, and by-laws of the exchange.[12] Such property or its proceeds may be distributed by agreement of the members,[13] and this rule has been applied in determining the interest of a deceased member.[14]

(3) In Gratuity Fund

The rights of members or those claiming under them in a gratuity fund are, subject to constitutional and statutory provisions, determined largely by the exchange constitution, rules, and by-laws.

The rights and interests of members, or those claiming under them, in gratuity or benefit funds which have been established by some exchanges for the purpose of making payments to certain beneficiaries on the death of a member, and maintainable by members of the association by payment of dues and assessments,[15] are, except as affected by applicable constitutional and statutory provisions, determined by the constitution, rules, and by-laws of the particular exchange considered.[16] Payment from such fund is a mere gift from the surviving members of the exchange to the persons mentioned;[17] a member has no severable, proprie-

tinues to exist, and when it ceases to exist the members become entitled to their proportional shares of its assets.—White v. Brownell, supra.

10. N.Y.—Belton v. Hatch, 17 N.E. 225, 109 N.Y. 593, 4 Am.S.R. 495.
Interest of partners in firm property see the C.J.S. title Partnership § 85, also 47 C.J. p 780 note 99—p 782 note 19.

11. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr.,N.S., 318.

12. U.S.—New River Collieries Co. v. Snider, D.C.N.Y., 284 F. 287, affirmed, C.C.A., 286 F. 667.
23 C.J. p 260 note 61.

Coal

(1) Under the rules of a particular coal exchange, title to coal shipped by members and placed in the several pools did not pass to the exchange, but remained in the shippers as co-owners in proportion to their contributions.—New River Collieries Co. v. Snider, D.C.N.Y., 284 F. 287, affirmed, C.C.A., 286 F. 667.

(2) However, under a government order confiscating all coal shipped after it went into effect and providing that, when seized, coal should be treated as belonging to the consignor regardless of any previous passage of title, loss resulting from seizure of a shipment of coal by a particular member must be borne by him rather than by the exchange or shared by its other members.—Coyle v. Archibald McNeil & Sons Co., D.C.N.Y., 284 F. 298.

(3) Since the coal in the several pools is owned by the members of each pool collectively, the exchange has no right of action against a member for failure to restore in kind coal withdrawn from any particular pool until the closing of his account, when it is authorized to commute his obligation into a money debt to the exchange, and the amount of such debt is determined by the market price of the coal due at the time the account is closed.—Coyle v. Morrisdale Coal Co., D.C.N.Y., 284 F. 294, affirmed, C.C.A., 289 F. 429.

13. Cal.—Hassey v. Ruggles, 156 P. 989, 30 Cal.App. 19.

14. Cal.—Hassey v. Ruggles, supra.
23 C.J. p 260 note 63 [a].

Weight and sufficiency of evidence

General rules as to the weight and sufficiency of evidence are applicable in determining the sufficiency of evidence of claims of other members against the distributive share of a deceased member in the proceeds of sale of exchange property.—Hassey v. Ruggles, supra—23 C.J. p 261 note 65.

15. N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847.
23 C.J. p 261 note 69.

16. N.Y.—Franklin v. Dick, supra.
23 C.J. p 261 note 75.

Amendment

(1) Under the text rule the rights of members in a gratuity fund are subject to regularly adopted amendments to the constitution, rules, or by-laws of the exchange.—Franklin v. Dick, supra—23 C.J. p 261 note 75 [c] (1), (2).

(2) Such rights are not, however, subject to an amendment to by-laws operating to impair vested rights in such fund.—Parish v. New York Produce Exch., 61 N.E. 977, 169 N.Y. 34, 56 L.R.A. 149—23 C.J. p 261 note 75 [c] (3).

Assignability

N.Y.—Holmes v. Seaman, 77 N.E. 724, 184 N.Y. 486, reversing 91 N.Y.S. 1098, 99 App.Div. 624—Holmes v. Seaman, 102 N.Y.S. 616, 117 App.Div. 381, affirmed 84 N.E. 1114, 191 N.Y. 512.
23 C.J. p 261 note 75 [b].

Beneficiaries

(1) It is generally provided that on the death of a member a specified sum of money is payable out of the fund to such persons or objects as have been designated by the member, and certain parties are designated in the constitution to whom the sum is payable in case a member fails to make a designation
Cal.—Swift v. San Francisco Stock & Exchange Board, 8 P. 94, 67 Cal. 567.
Pa.—MacDowell v. Ackley, 93 Pa. 277.

(2) Under some statutes, and exchange by-laws contemplated thereby, payment is to be made to the widow, children, next of kin, or other dependent of the deceased member.—Parish v. New York Produce Exch., 69 N.Y.S. 764, 60 App.Div 11, 18, affirmed 61 N.E. 977, 169 N.Y. 34, 56 L.R.A. 149—23 C.J. p 261 note 71 [a].

(3) Where assessments are required by the charter and by-laws on the death of a member, those entitled to the fund may compel the levy.—Dillingham v. New York Cotton Exch., C.C.N.Y., 49 F. 719.

Continuation or transfer of membership

(1) As affecting rights in a gratuity fund the report of trustees as to continuation of membership until death is not conclusive on the courts.—Dillingham v. New York Cotton Exch., supra.

(2) Transfer of membership is not, however, shown by hypothecation thereof for debt exceeding value of such membership, where the member continued to exercise his privileges until death, and dues paid for him were charged against him.—Dillingham v. New York Cotton Exch., supra.

17. N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847.
23 C.J. p 261 note 74.

tary interest in such fund;[18] there is no contract of insurance;[19] and the exchange, in setting up and administering such fund, is not engaged in the business of life insurance.[20]

§ 6. —— Dues, Fines, and Assessments

Members of an exchange may be required to pay dues, fines, and assessments.

A new member may be required to pay an initiation fee,[21] or to sign an agreement to pay the fees and dues required by the constitution and by-laws,[22] the extent of a member's liability under an agreement to pay "annual dues" as fixed by the board of directors being limited to the amount necessary to pay the current expenses incident to the purposes of the exchange.[23] A suspended member may, when the rules so provide, be required to pay annual dues as though in good standing.[24] The effect of failure to pay dues is determined by the laws of the exchange.[25] It is generally within the power of an exchange to provide for fines of members.[26] Storage charges by an exchange against its members have been held not to amount to a fine or penalty notwithstanding they are designated a penalty in the by-law under which they are imposed,[27] and notwithstanding the total amount of such charges is in excess of the amount of penalty allowed to be imposed by statute for violation of a by-law they do not, even when regarded as a penalty, violate such statute when based on a specified rate per day per unit of space used by the member charged.[28]

§ 7. —— Discipline of Members; Suspension or Expulsion, and Reinstatement

a. Discipline of members; suspension or expulsion
b. Reinstatement

a. Discipline of Members; Suspension or Expulsion

(1) In general
(2) Validity and construction of regulations or rules
(3) Particular grounds or offenses
(4) Prosecution of charges
(5) Effect of suspension or expulsion

(1) In General

Subject to certain restrictions members of an exchange may be disciplined, fined, suspended, or expelled for their acts.

Subject to governing legislative restrictions on the power of exchanges, engaged in a business affecting a public interest, see supra § 2, and to the presumption against the power to expel a member since expulsion is in the nature of a forfeiture and not favored by the law,[29] to a limited extent an exchange has inherent power to fine, suspend, or expel a member for certain acts, although such power is not conferred by its charter or constitution.[30] So, in the absence of a contrary regulation an unincorporated exchange may expel a member by a vote of the majority,[31] after he has been notified of the charge against him, and afforded an opportunity of being heard in his defense.[32] The law will not, however, permit the exercise of indefinite powers of expulsion;[33] a member cannot arbitrarily be suspended or expelled on

18. N.Y.—McCord v. McCord, 57 N. Y.S. 1049, 40 App.Div. 275.

19. Cal.—Swift v. San Francisco Stock & Exchange Board, 8 P. 94, 67 Cal. 567.
N.Y.—Franklin v. Dick, 28 N.Y.S.2d 426, 262 App.Div. 299, appeal granted 29 N.Y.S.2d 146, 262 App.Div. 847.

20. Cal.—Swift v. San Francisco Stock & Exchange Board, 8 P. 94, 67 Cal. 567.

21. N.Y.—Platt v. Jones, 96 N.Y. 24—Londheim v. White, 67 How. Pr. 467.

22. Colo.—Denver Chamber of Commerce & Board of Trade v. Green, 47 P. 140, 8 Colo.App. 420.

Consideration; support for action
Such an agreement is based on a sufficient consideration and will support an action on proof of failure to pay, so long as membership continues.—Denver Chamber of Commerce, etc. v. Green, supra.

23. Mich.—Johnson Electric Service Co. v. Detroit Chamber of Commerce, 82 N.W. 795, 124 Mich. 115.
23 C.J. p 250 note 6 [a].

24. Ill.—Peo. v. Chicago Bd. of Trade, 79 N.E. 611, 224 Ill. 370.

25. La.—Vaudry v. New Orleans Cotton Exch., 2 McG. p 154.
23 C.J. p 250 note 9.
Ground for suspension or expulsion § 7.

26. Forfeiture of seat
Power to fine is not inconsistent with the right to forfeit a member's seat.—Turner v. Chicago Bd. of Trade, Ill., 244 F. 108, 156 C.C.A. 536, certiorari denied 38 S.Ct. 133, 245 U.S. 667, 62 L.Ed. 538.

27. U.S.—Eastern Coal & Export Corporation v. Sewalls Point Coal Exch., C.C.A.Va., 288 F. 721.

28. U.S.—Eastern Coal & Export Corporation v. Sewalls Point Coal Exch., supra.

29. N.Y.—Peo. v. New York Cotton Exch., 8 Hun 216.

30. N.Y.—Gerseta Corporation v. Silk Ass'n of America, 192 N.Y.S. 370, 200 App.Div. 890, appeal dismissed 135 N.E. 911, 233 N.Y. 544.
Cal.—Otto v. Journeymen Tailors' Protective & Benevolent Union, 17 P. 217, 75 Cal. 308, 7 Am.R. 156.
23 C.J. p 250 note 11.

31. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb Pr.,N.S., 318.

32. N.Y.—White v. Brownell, supra.

33. Mo.—Albers v. Merchants' Exch., 39 Mo.App. 583.
N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615.
Pa.—Leech v. Harris, 2 Brewst. 571.

insufficient grounds or through the caprice of its officers or other members with no proof of conduct on his part in contravention of the charter or by-laws of the corporation;[34] and when the association possesses property, nothing but an express power in its charter or articles of association can authorize it to expel one of its members.[35] Moreover, a member may not be liable to suspension or expulsion for conduct not amounting to a violation of duty.[36]

Under statutory regulations of exchanges engaged in a business affecting a public interest members may be suspended or expelled for certain conduct denounced as unlawful by the statute.[37] On the other hand under such regulations an exchange may be prohibited from suspending members for certain causes.[38] Particular public regulations in so far as they provide for the withholding of trading privileges from a member for certain causes have been held not retroactive in operation.[39]

(2) Validity and Construction of Regulations or Rules

Subject to applicable public regulations rules relating to the discipline of members are governed by the exchange charter or constitution, statute, and public policy; and grounds for discipline, other than those within the inherent power of the exchange, are to be determined by a proper construction of its by-laws and rules.

Subject to public regulations, which may be controlling when the exchange is engaged in a business affecting a public interest, see supra § 2 subdivision (1) of this section, and infra this subsection, the extent to which particular offenses may be made ground for discipline by specific rules must be consistent with, and may be controlled by, the charter, constitution, or by-laws of the exchange,[40] by the statute under which the exchange is organized,[41] and by public policy.[42] The exchange must not transcend the limits of natural justice, or violate its own rules.[43] Where the disciplinary power is conferred in general terms, it may be exercised only to accomplish the objects of the creation of the exchange.[44] A rule or by-law relating to the discipline of members must not be unreasonable,[45] and must be clear, definite, and certain.[46] Refusal to do business in violation of law cannot be made a ground for suspension.[47] The grounds for discipline other than those under the inherent power of the exchange, see supra subdivision (1) of this section are, ordinarily, to be determined by a proper construction of the by-laws and rules of the exchange.[48]

Public regulations in the form of statutes governing the suspension or expulsion of members have been upheld.[49] The conduct of an exchange in suspending a coöperative association as a mem-

34. N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App. Div. 565.
23 C.J. p 251 note 17.

35. Pa.—Leech v. Harris, 2 Brewst. 571.

36. **Resisting unlawful authority**
In resisting unlawful authority of the exchange, a member does not violate his duty as such.—Leech v. Harris, 2 Brewst., Pa., 571.
Submission to arbitration
Where an action at law is pending, the refusal of a member to submit the same dispute to arbitration or to abide the decision of the arbitration committee is not a violation of his duty as a corporator, which justifies his expulsion or suspension.—State v. Milwaukee Chamber of Commerce, 20 Wis. 63.

37. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

38. Kan.—Farmers Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S. Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

39. U.S.—Wallace v. Cutten, 56 S. Ct. 753, 298 U.S. 229, 80 L.Ed. 1157, affirming, C.C.A., Cutten v. Wallace, 80 F.2d 140, certiorari granted Wallace v. Cutten, 56 S.Ct. 596, 297 U.S. 701, 80 L.Ed. 990.

40. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 251 note 19.

41. Minn.—Evans v. Minneapolis Chamber of Commerce, 91 N.W. 8, 86 Minn. 448.

42. Ill.—Central Stock, etc., Exch. v. Chicago Bd. of Trade, 63 N.E. 740, 196 Ill. 396.
23 C.J. p 251 note 21.

43. Mo.—Farmer v. Kansas City Bd. of Trade, 78 Mo.App. 557.

44. Wis.—State v. Milwaukee Chamber of Commerce, 20 Wis. 63.

45. Ill.—Board of Trade v. Riordan, 94 Ill.App. 298.
Mo.—Albers v. Merchants' Exch., 39 Mo.App. 583.

46. N.Y.—Lamborn v. New York Cotton Exchange, 197 N.Y.S. 57, 203 App.Div. 565.
Degree of certainty required
The rule or by-law must state the causes of expulsion with such a reasonable degree of certainty that a member may know the transgressions which will subject him to the penalty.—Peo. v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.

47. N.Y.—Matter of Lurman, 35 N.Y.S. 956, 90 Hun 303, affirmed 44 N.E. 1125, 149 N.Y. 588.
23 C.J. p 251 note 24.

48. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
N.Y.—Lamborn v. New York Cotton Exchange, 197 N.Y.S. 57, 203 App. Div. 565—Gerseta Corporation v. Silk Ass'n of America, 192 N.Y.S. 370, 200 App.Div. 890, appeal dismissed 135 N.E. 911, 233 N.Y. 544.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 251 note 31.

49. U.S.—Wright v. Securities and

ber for violation of an exchange rule forbidding rebates or refunds of commissions has been held improper, being in violation of a regulatory statute prohibiting exchanges from construing their rules so as to forbid coöperative associations from returning their profits to their members on a pro rata basis.[50]

Strict construction. Regulations providing for forfeiture of membership, being penal in character, are to be strictly construed, and nothing taken by intendment or implication,[51] this being particularly true as regards public regulations providing for expulsion for certain violations which may also subject one to punishment for crime.[52]

Place affected or person concerned. Disciplinary regulations may be made applicable not only to conduct on the floor of the exchange and concerning the exchange or its members, but also to conduct on the part of members without regard to place or to the person concerned therein.[53] However, under a by-law referring to the "conduct" of a member, suspension of a member for acts committed by employees of his firm, without his knowledge and against his orders, is improper.[54] Proceeding on the theory that relations of a member with a person outside the exchange are outside the jurisdiction of an exchange committee empowered merely to hear disputes between members, it has been held that violation of the findings of such committee with respect to such relations cannot be made ground for expulsion.[55] The fact that a member has made contracts between customers may not prevent the exchange from expelling him, as such contracts can be enforced by the customers in their own names.[56]

(3) Particular Grounds or Offenses

Various grounds or offenses may subject an exchange member to suspension or expulsion.

Particular grounds or offenses which may subject an exchange member to suspension or expulsion include such conduct as clearly violates the fundamental objects of the association as stated in one of its rules,[57] breach of contract,[58] failure to pay dues and assessments,[59] misconduct,[60] dishonorable[61] or unmercantile[62] conduct, circulation of false reports about an officer of the exchange,[63] making or reporting false or fictitious purchases or sales,[64] proceedings inconsistent with just and equitable principles of trade,[65] acting in antagonism to power of exchange to establish just and equitable principles in trade,[66] running[67] or dealing with bucket shop,[68] violation of the charter

Exchange Commission, C.C.A., 112 F.2d 89.

Security Exchange Act of 1934, by authorizing the securities and exchange commission to determine whether the protection of investors requires that an exchange member be suspended or expelled, is valid as providing sufficiently definite standards to guide the commission as against the contention that the statute constitutes an unlawful delegation of legislative powers.—Wright v. Securities & Exchange Commission, supra.

50. Kan.—Farmers Co-op. Commission Co. v. Wichita Board of Trade, 246 P. 511, 1120, 121 Kan. 348, 54 A.L.R. 295, error dismissed Wichita Board of Trade v. Farmers' Co-op. Commission Co., 48 S. Ct. 17, 275 U.S. 574, 72 L.Ed. 433.

51. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.
N.Y.—Lamborn v. New York Cotton Exchange, 197 N.Y.S. 57, 203 App. Div. 565.
23 C.J. p 252 note 32.

52. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

Matching orders

Provisions of the Securities Exchange Act, making it unlawful to match orders in order to create false impression of active trading, must be strictly construed under the text rule.—Wright v. Securities and Exchange Commission, supra.

53. Wis.—Wood v. Milwaukee Chamber of Commerce, 96 N.W. 835, 119 Wis. 367.
23 C.J. p 252 note 33.

54. N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.

55. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.

56. Ill.—Greene v. Chicago Bd. of Trade, 51 N.E. 599, 174 Ill. 585, 49 L.R.A. 365, affirming 63 Ill.App. 446.

57. Neb.—Ihnen v. South Omaha Live Stock Exch., 162 N.W. 422, 101 Neb. 195.

58. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414, reversing 36 N.Y.S. 427, 15 Misc. 42.
23 C.J. p 252 note 36.

59. Ill.—People v. Chicago Bd. of Trade, 79 N.E. 611, 224 Ill. 370.
23 C.J. p 252 note 37.

60. Colo.—Drovers' Nat. Bank v. Denver Live Stock Exchange, 220 P. 402, 74 Colo. 212.
23 C.J. p 252 note 38.

61. U.S.—Drovers' Nat. Bank v. Denver Live Stock Exchange, supra.
23 C.J. p 253 note 39.

62. Colo.—Drovers' Nat. Bank v. Denver Live Stock Exchange, supra.
23 C.J. p 253 note 40.

63. Mo.—Moffatt v. Kansas City Bd. of Trade, 157 S.W. 579, 250 Mo. 168.
23 C.J. p 253 note 41.

64. Wis.—Wood v. Milwaukee Chamber of Commerce, 96 N.W. 835, 119 Wis. 367.

65. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.
23 C.J. p 253 note 43.

66. N.Y.—People v. New York Cotton Exch., 8 Hun 216.
23 C.J. p 253 note 44.

67. Ill.—Central Stock, etc., Exch. v. Chicago Bd. of Trade, 63 N.E. 740, 196 Ill. 396.
23 C.J. p 253 note 45.

68. Ill.—Bostedo v. Chicago Bd. of Trade, 130 Ill.App. 560, affirmed 81 N.E. 42, 227 Ill. 90.
23 C.J. p 253 note 46.

or by-laws,[69] refusal to submit to arbitration,[70] resorting to tribunals other than those of the exchange,[71] fraud,[72] insolvency,[73] and obtaining goods under false pretenses.[74]

Under Securities Exchange Act. Under the Securities Exchange Act of 1934 manipulation of security prices may constitute ground for suspension or expulsion of stock exchange members.[75]

(4) Prosecution of Charges
- (a) In general
- (b) Nature of proceedings
- (c) Jurisdiction of tribunal and qualifications of its members
- (d) Preliminary proceedings
- (e) Hearing
- (f) Waiver of objections and laches
- (g) Adjudication
- (h) Review

(a) In General

Disciplinary proceedings against a member of an exchange must be in strict compliance with its constitution and by-laws.

Proceedings to discipline a member must comply strictly with the constitution and the by-laws of the exchange;[76] but the exchange is not bound to act with the strict regularity which obtains in judicial proceedings.[77]

(b) Nature of Proceedings

Disciplinary proceedings are judicial in their nature.

Proceedings to discipline members are judicial in their nature,[78] and the tribunal, when acting within the powers conferred on it in investigating charges of misconduct, constitutes a corporate court,[79] and it is declared that there is a strong analogy between the principles which govern in arbitration and those which relate to proceedings of this character.[80]

(c) Jurisdiction of Tribunal and Qualifications of Its Members

Jurisdiction of disciplinary proceedings may, under charter or constitution of an exchange, be conferred on a body elected from exchange membership.

An exchange is generally authorized by its charter or constitution to delegate the power to try and punish offending members to a board of officers to be elected from its number,[81] but not to a lay tribunal;[82] and a statute giving the power in general terms to admit or expel members does not necessarily authorize a delegation of that power to the board of directors.[83] The tribunal may determine its own jurisdiction when the rules relating thereto reasonably admit of two constructions, but not otherwise.[84] Where a member refuses to comply with a valid contract on a false pretext, the board of managers has jurisdiction to determine whether such conduct is inconsistent with the charter and by-laws.[85] The properly designated tribunal or committee is not deprived of jurisdiction because a contract involved is unenforceable at law,[86] because the complaint against a member shows that the transaction in question is illegal,[87] or because accused attempted to transfer his membership without consent of the exchange.[88] That one has had business dealings with complainant is not sufficient to disqualify one as

69. Colo.—Drovers' Nat. Bank v. Denver Live Stock Exchange, 220 P. 402, 74 Colo. 212.
La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
23 C.J. p 253 note 47.

70. N.Y.—Gerseta Corporation v. Silk Ass'n of America, 192 N.Y.S. 370, 200 App.Div. 890, appeal dismissed 135 N.E. 911, 233 N.Y. 544.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 253 note 49.

71. Mo.—Moffatt v. Kansas City Bd. of Trade, 157 S.W. 579, 250 Mo. 168.
23 C.J. p 253 note 50.

72. U.S.—Turner v. Chicago Bd. of Trade, Ill., 244 F. 108, 156 C.C.A. 536, certiorari denied 38 S.Ct. 133, 245 U.S. 667, 62 L.Ed. 538.
23 C.J. p 253 note 51.

73. N.Y.—Kuehnemundt v. Smith, 2 N.Y.S. 625.

74. N.Y.—People v. New York Commercial Assoc., 18 Abb.Pr. 271.
23 C.J. p 254 note 53.

75. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

76. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 254 note 54.

77. Mo.—Albers v. Merchants' Exch., 39 Mo.App. 583.

78. Mo.—Farmer v. Kansas City Bd. of Trade, 78 Mo.App. 557.
Pa.—Leech v. Harris, 2 Brewst. 571.

79. Mo.—Albers v. Merchants' Exch., 39 S.W. 473, 138 Mo. 140.

80. N.Y.—Hutchinson v. Lawrence, 67 How.Pr. 38.
Wis.—Bartlett v. L. Bartlett, etc., Co., 93 N.W. 473, 116 Wis. 450.
Proceedings by and before arbitrators see Arbitration and Award §§ 55-70.

81. Ill.—Pitcher v. Chicago Bd. of Trade, 13 N.E. 187, 121 Ill. 412, affirming 20 Ill.App. 319.
23 C.J. p 254 note 60.

82. N.Y.—Matter of Lurman, 35 N.Y.S. 956, 90 Hun 303, affirming 44 N.E. 1125, 149 N.Y. 588.
23 C.J. p 254 note 61.

83. Wis.—State v. Milwaukee Chamber of Commerce, 20 Wis. 63.

84. Wis.—Bartlett v. L. Bartlett, etc., Co., 93 N.W. 473, 116 Wis. 450.

85. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414.

86. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.

87. N.Y.—Moyse v. New York Cotton Exch., 129 N.Y.S. 173, 70 Misc. 609, affirmed 128 N.Y.S. 112, 143 App.Div. 265.

88. Ill.—Bostedo v. Chicago Bd. of Trade, 130 Ill.App. 560, affirmed 81 N.E. 42, 227 Ill. 90.

a member of the committee to try charges against another member of the exchange,[89] and it is held that a member may be tried by a tribunal one of whose members has preferred the charges.[90]

(d) Preliminary Proceedings

Preliminary proceedings to determine whether charges shall be preferred against a member are sometimes provided for; accused is entitled to notice of the hearing at which charges against him are to be investigated.

The exchange may provide for a preliminary investigation as to whether charges shall be preferred. The member is not entitled to notice of such preliminary investigation.[91] A person not a member of the exchange, if in its employ, may prefer charges against a member for a violation of its rules.[92] So may a member of the exchange, although personally aggrieved by the alleged wrongdoing.[93] The specification of charges should fairly inform the member with what he is charged,[94] but it is not to be tested by the strict rules of criminal pleading, either as to sufficiency[95] or construction.[96]

Notice to accused. An accused member is entitled to notice of the hearing at which the charges are to be investigated,[97] even though the rules of the exchange do not so provide.[98] Strict compliance with rules contained in the constitution and by-laws as to notice is essential,[99] but an evident error in the notice, which cannot mislead the member, does not render it insufficient.[1]

Notice as to transfer of hearing see infra subdivision (e) of this section.

(e) Hearing

Unless he admits the existence of the ground for discipline, an accused member is entitled to a hearing on the merits, conducted in accordance with the charter or constitution and by-laws of the exchange.

An accused member is entitled to a hearing on the merits,[2] unless he admits the existence of the ground for discipline.[3] He is not entitled to a trial conducted in accordance with the rules which govern the proceedings of courts, but only to the trial prescribed by the charter or constitution and by-laws of the exchange.[4] Under the Securities Exchange Act of 1934 it is discretionary with the commission, in proceedings to suspend or expel a member of a stock exchange, to order the hearings to be conducted where numerous witnesses and original records of market transactions are located,[5] although error on the part of a trial examiner in failing to notify such member of a transfer of hearings from such place is not fatal where the evidence taken at the place to which the hearing has been transferred is merely cumulative and not indispensable to the finding of the commission.[6] Proceedings under charges presented, notice given, and a hearing afforded are to be considered without too much regard to any technicalities.[7] A constitutional provision securing the right of trial by jury does not apply to a proceeding taken by an exchange for the removal of a member for offenses against its constitution or by-laws.[8]

Counsel. A rule of the exchange denying the right of accused to professional counsel on the trial of charges against him is valid;[9] but, in the

89. N.Y.—Moyse v. New York Cotton Exch., 129 N.Y.S. 173, 70 Misc. 609, affirmed 128 N.Y.S. 112, 143 App Div. 265.

Reason for rule

Since the committee is appointed necessarily from the membership and the principal purpose of the exchange is to facilitate and encourage business transactions among members, were any other rule than the text rule to prevail any defaulting member might escape accountability to the exchange.—Moyse v. New York Cotton Exch., supra.

90. Ill.—Green v. Chicago Bd. of Trade, 51 N.E. 599, 174 Ill. 585, 49 L.R.A. 365.

91. Ill.—Green v. Chicago Bd. of Trade, 51 N.E. 599, 174 Ill. 585, 49 L.R.A. 365, affirming 63 Ill.App. 446.

92. Mo.—Albers v. Merchants' Exch., 39 Mo.App. 583.

93. Neb.—Jackson v. South Omaha Live Stock Exch., 68 N.W. 1051, 49 Neb. 687.

94. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414.
23 C.J. p 254 note 76.

95. Ill.—Chicago Bd. of Trade v. Nelson, 44 N.E. 743, 162 Ill. 431, 53 Am.S.R. 312.
23 C.J. p 254 note 77.

96. N.Y.—Young v. Eames, 79 N.Y.S. 1068, 78 App.Div. 229, affirmed 73 N.E. 1134, 181 N.Y. 542.
23 C.J. p 255 note 78.

97. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401, reversing 29 N.Y.S. 307, 8 Misc. 552.
23 C.J. p 255 note 79.

98. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414.
23 C.J. p 255 note 80.

99. N.Y.—Quentell v. New York Cotton Exch., 106 N.Y.S. 228, 56 Misc. 150.

1. Ill.—Murphy v. Traders' Live Stock Exch., 183 Ill.App. 126.

2. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 255 note 84.

3. Pa.—Moxey's App., 9 Wkly.N.C. 441.

4. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 255 note 86.

5. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

6. U.S.—Wright v. Securities and Exchange Commission, supra.
Notice of hearing generally see supra subdivision (d) of this section.

7. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 255 note 87.

8. N.Y.—People v. New York Commercial Ass'n, 18 Abb.Pr. 271.

9. Ill.—Green v. Chicago Bd. of Trade, 51 N.E. 599, 174 Ill. 585, 49 L.R.A. 365, affirming 63 Ill.App. 446.

absence of such rule, an accused member may be entitled to be represented by counsel.[10] The trial board also is entitled to counsel if the by-laws so provide.[11]

Examination of witnesses. An accused member is entitled to examine his own witnesses and to cross-examine the prosecuting witnesses against him.[12]

Evidence. An exchange is not bound by strict rules of evidence in the trial of an offending member;[13] nor is the commission, under the Securities Exchange Act of 1934, bound by strict rules of evidence in proceedings to suspend or expel a member of a stock exchange for violation of the statute;[14] such violation need not be proved beyond a reasonable doubt,[15] it being sufficient that there exist substantial evidence in support of a finding that such violation has occurred.[16] Particular evidence before such commission has been held to be sufficient[17] or insufficient[18] to authorize findings in support of its order expelling an exchange member as provided by statute, or sufficient to authorize the opinion of the commission that action by that body was "necessary or appropriate for the protection of investors" as provided by statute.[19]

(f) Waiver of Objections and Laches

The right of an accused member to object to irregularities in disciplinary proceedings may be waived by him or lost by his laches.

An accused member may waive irregularities and the infraction of various rights by failing to take proper action at the trial with reference thereto,[20] or by laches.[21]

(g) Adjudication

The decision on disciplinary proceedings against exchange members must be within the jurisdiction of the tribunal making such decision.

The decision must be within the scope of the jurisdiction conferred on the tribunal of the exchange by the constitution or charter and by-laws.[22] Sentence by a tribunal acting within the powers prescribed by the exchange is like an award made by a tribunal of the party's own choosing.[23] The order of expulsion authorized by the Securities Exchange Act of 1934 for unlawful conduct with respect to securities does not constitute a penalty or punishment for past offenses but is a remedial means of protection for investors.[24]

On charges against a firm it is not necessary to convict or acquit the whole firm, but one member found guilty may be convicted.[25]

Conclusiveness and finality. Where a member is expelled by proceedings in good faith in accordance with the lawful disciplinary regulations enacted in the charter, constitution, or by-laws of the association, the sentence of expulsion is final and conclusive.[26] A void adjudication of guilt is not a bar to a subsequent proceeding against the member for the same offense, however,[27] and a member on trial is not bound by the judgment if the investigation is not conducted in accordance with the charter and by-laws[28] or if the result reached by the triers is not within the legitimate field in which they are entitled to go.[29]

Under the Securities Exchange Act of 1934 § 25, 15 U.S.C.A. § 78 y, the findings of fact by the

10. N.Y.—Gebhard v. New York Club, 21 Abb.N.Cas. 248.
23 C.J. p 255 note 90.

11. Mo.—Albers v. Merchants' Exch., 39 S.W. 473, 138 Mo. 140.
23 C.J. p 255 note 91.

12. N.Y.—Hutchinson v. Lawrence, 67 How.Pr. 38.

13. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.
23 C.J. p 256 note 93.

14. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

15. U.S.—Wright v. Securities and Exchange Commission, supra.

16. U.S.—Wright v. Securities and Exchange Commission, supra.

17. **Series of transactions; raising price**
Evidence held sufficient to authorize finding that a member had effected a series of transactions creating actual or apparent active trading and raising price of securities within contemplation of statute.—Wright v. Securities and Exchange Commission, supra.

18. **Matching orders**
Evidence insufficient to authorize finding that member matched orders for the purpose of creating a false appearance of active trading in violation of statute.—Wright v. Securities and Exchange Commission, supra.

19. **Manipulation**
Proof of market manipulation resulting in higher prices at which stock was sold to investing public was held to justify opinion that action was necessary or appropriate within the meaning of the text.—Wright v. Securities & Exchange Commission, supra.

20. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 256 note 94.

21. Cal.—Meherin v. San Francisco Produce Exch., 46 P. 1074, 117 Cal. 215.
23 C.J. p 256 note 95.

22. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J Misc. 1102.
23 C.J. p 256 note 96.

23. Wis.—Bartlett v. L. Bartlett & Son Co., 93 N.W. 473, 116 Wis. 450.
Award in arbitration proceedings generally see Arbitration and Award §§ 71–113.

24. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

25. Ohio.—Blumenthal v. Cincinnati Chamber of Commerce, 8 Ohio Dec., Reprint, 622, 9 Cinc.L.Bul. 76.

26. Ill.—Chicago Bd. of Trade v. Nelson, 44 N.E. 743, 162 Ill. 431, 53 Am.S.R. 312.
23 C.J. p 256 note 99.

27. Wis.—State v. Milwaukee Chamber of Commerce, 3 N.W. 760, 47 Wis. 670.

28. Ill.—Board of Trade v. Riordan, 94 Ill.App. 298.

29. Wis.—Bartlett v. L. Bartlett & Son Co., 93 N.W. 473, 116 Wis. 450.

commission in proceedings to suspend or expel a member of a stock exchange are conclusive when supported by substantial evidence.[30]

(h) Review

A member may be entitled to a review of disciplinary proceedings.

A member is entitled to an appeal authorized by the constitution of the exchange, although the by-laws make the decision of the arbitration committee final.[31] On petition for judicial review of an order of the securities and exchange commission expelling a member from exchanges, the court is without power to supervise the commission's discretionary determination that expulsion is necessary and appropriate for protection of investors,[32] although, on finding by the court that the evidence is insufficient to support one of two findings by the commission, the court may reverse the order of expulsion and remand the case in order that the commission may determine in its discretion whether or not to modify its order of expulsion to one of suspension.[33] Judicial remedies open to stock exchange members are discussed infra § 8.

(5) Effect of Suspension or Expulsion

Expulsion not only terminates membership but destroys all rights incidental thereto; suspension, on the other hand, may not interfere with the member's vested rights or affect his financial interest in the exchange property.

An expulsion not only terminates the membership but destroys all rights incidental thereto.[34] A suspension in accordance with the by-laws is not, on the other hand, an interference with the offending member's vested rights of property where he has expressly agreed on entering the corporation to abide by its by-laws, and the suspension does not affect his financial interest in the property of the exchange;[35] nor may suspension of a member affect his liability to pay dues, see supra § 6. A contract of a client to reimburse a member for incidental losses, if he would suffer suspension, is valid, and damages may be recovered for its breach;[36] and customers of an expelled member can enforce their legal rights as against him.[37]

Forfeiture as excusing nonperformance. The mere fact that performance by a member of his contractual obligations may result in forfeiture of his membership does not constitute an excuse for nonperformance.[38]

b. Reinstatement

A member who has been wrongfully suspended or expelled may be entitled to be reinstated to membership.

A member of an exchange who has been wrongfully suspended or expelled may be entitled to be reinstated to membership,[39] and under certain circumstances may be entitled to the aid of the courts in enforcing his rights in this respect, see infra § 8.

Where an exchange is authorized to expel a member for certain conduct, it may properly impose certain conditions for reinstatement of such member after suspension.[40] Conditions precedent to equitable relief by reinstatement see infra § 8 c.

§ 8. —— Judicial Remedies of Members

a. General rules
b. Grounds for interference
c. Injunction
d. Right of action for damages
e. Procedure

a. General Rules

Ordinarily, the courts will not interfere to control the enforcement of lawful disciplinary regulations, nor interfere with exchange rules regardless of their reasonableness so long as they are not immoral or hostile to the policy of the law.

In accordance with general principles, whereby the courts refuse to interfere with the enforcement

30. U.S.—Wright v. Securities and Exchange Commission, C.C.A., 112 F.2d 89.

Constitutionality

The statute referred to in the text is not rendered unconstitutional by reason of provisions making such findings conclusive.—Wright v. Securities and Exchange Commission, supra.

31. Pa.—Powell v. Abbott, 9 Wkly. N.C. 231.

32. U.S.—Wright v. Securities & Exchange Commission, C.C.A., 112 F.2d 89.

33. U.S.—Wright v. Securities & Exchange Commission, supra.

34. Neb.—O'Brien v. South Omaha Live Stock Exch., 164 N.W. 724, 101 Neb. 729.

23 C.J. p 256 note 7.

35. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N.Y. 414, reversing 36 N.Y.S. 427, 15 Misc. 42.

36. N.Y.—White v. Baxter, 71 N.Y. 254.

37. Ill.—Green v. Chicago Bd. of Trade, 51 N.E. 699, 174 Ill. 585, 49 L.R.A. 365.

38. Ill.—Thomson v. Thomson, 220 Ill.App. 486.

39. N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.

40. Colo.—Drovers' Nat. Bank v. Denver Live Stock Exchange, 220 P. 402, 74 Colo. 212.

Reimbursement of exchange

On suspension of a member for failure to account for certain money of its customers and on payment of such money by the exchange, it may properly make payment of such amount a condition for reinstatement to membership.—Drovers' Nat. Bank v. Denver Live Stock Exchange, supra.

of the constitution, by-laws, and rules of an exchange, see supra § 3, and in consonance with the judicial attitude of noninterference in disputes arising out of dealings between exchange members, see infra § 10, the courts will not, as a general rule, interfere to control the enforcement of lawful disciplinary regulations.[41] In the absence of fraud, imposition, or gross injustice, a member will not be heard to impeach in the courts the validity of proceedings against him, and the courts will not examine the merits of the controversy;[42] but the association will be left to enforce its rules and regulations in the manner it has adopted for its own government.[43] Rules relating to the expulsion of members, whether they appear to be reasonable or unreasonable, will not be interfered with by the courts so long as they are not immoral or hostile to the policy of the law.[44] The law cannot restore a member who has been deprived of the privilege of membership for not complying with the conditions on which the enjoyment of it was made to depend.[45]

The regularity of a proposed trial on charges against a member will not be inquired into by the courts.[46]

Ordinarily the member must avail himself of the rights and remedies provided by the rules of the exchange before he can appeal to the courts for relief;[47] but this rule requires only that the member resort to such remedies as are provided by the exchange for review of its determination by appeal;[48] does not require resort to higher authority within the organization when it appears that such action would be futile;[49] and applies only where the proceedings are commenced and conducted in conformity with the constitution and by-laws.[50]

b. Grounds for Interference

On behalf of a member who has been subjected to disciplinary action of an exchange, the courts may interfere to correct abuses in the administration of its rules and to determine whether its tribunals have acted within their jurisdiction.

The courts will entertain jurisdiction to correct abuses by inquiring into the regularity of the proceedings under the constitution and rules of the association for the purpose of holding the association to a fair administration of its rules;[51] also whether the proceedings are within the jurisdiction of the tribunal,[52] and a total absence of evidence to support a sentence of expulsion should have the same force as the absence of jurisdiction.[53] So the court will interfere to reinstate a member who has been unlawfully disciplined.[54] As to whether a member who has been suspended or expelled for violating a by-law which is against public policy is entitled to come into the courts for a decree reinstating him, the cases are in conflict. In some jurisdictions, it seems, a member is entitled to relief under these circumstances,[55] while in others it is held that his right to be restored to membership is vested in the contract between himself and the exchange, which

41. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 257 note 11.

42. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
23 C.J. p 257 note 12.

43. La.—Fire & Marine Agency v. New Orleans Ins. Exch., supra.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 257 note 13.

44. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
Mo.—Moffatt v. Kansas City Bd. of Trade, App., 141 S.W. 894, reversed on other grounds 157 S.W. 579, 250 Mo. 168.

45. La.—Fire & Marine Agency v. New Orleans Ins. Exch., 98 So. 658, 154 La. 1039.
23 C.J. p 257 note 15.

46. Ill.—Chicago Bd. of Trade v. Riordan, 94 Ill.App. 298.

47. N.Y.—Lewis v. Wilson, 2 N.Y.S. 806, 50 Hun 166, affirmed 24 N.E. 474, 121 N.Y. 284.
23 C.J. p 257 note 16.

48. N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.
Reinstatement
Since an application, within the exchange, for reinstatement to membership would be merely a matter of grace and not a reversal of the exchange's determination whereby a member is suspended, and would not in any way involve a review of questions considered in such determination, under the text rule he is not required to make such application before resorting to the courts.—Lamborn v. New York Cotton Exch., supra.

49. N.Y.—Quentell v. New York Cotton Exch., 106 N.Y.S. 228, 56 Misc. 150.
23 C.J. p 257 note 18.

50. N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.
23 C.J. p 257 note 17.

51. N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 258 note 28.

52. N.J.—Stevenson v. Atlantic City Real Estate Board, 134 A. 289, 4 N.J.Misc. 674, affirmed 139 A. 11, 103 N.J.Law 615—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
23 C.J. p 258 note 29.

53. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.

54. Mo.—Albers v. Merchants' Exch., 39 Mo.App. 583.
N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J. Misc. 1102.
Right of member to reinstatement generally see supra § 7 b.

55. Ill.—American Livestock Commn. Co. v. Chicago Livestock Exch., 32 N.E. 274, 142 Ill. 210, 36 Am. S.R. 385, 18 L.R.A. 190, affirming 42 Ill.App. 149.
23 C.J. p 258 note 32.

he must accept in its entirety, and that so long as he insists on the rights of a member he cannot base any right of action on the illegal character of any of its by-laws.[56]

c. Injunction

Ordinarily, disciplinary action by an exchange against its members is not subject to injunction, although an injunction may issue under certain conditions.

Ordinarily, the courts will not restrain the exchange from proceeding to a trial of an accused member. It cannot be assumed in advance that his trial will not be a fair one so as to justify the issuance of an injunction,[57] and ordinarily a court will not interfere in a contest between an exchange and a member thereof who has been suspended or expelled to grant an injunction against the enforcement of the judgment of the exchange.[58] It has been stated broadly that an expelled member cannot be reinstated by injunction, his remedy, if any, being at law;[59] but the better rule appears to be that a member may invoke the equitable power of the court by injunction to compel his restoration to the rights and privileges of membership where he is threatened with an unlawful suspension or expulsion under proceedings contrary to natural justice[60] and in violation of the constitution or by-laws of the association,[61] or pursuant to an invalid rule.[62]

Conditions precedent to relief. A member must do equity by performing or offering to perform his obligations to the exchange before he is entitled to equitable relief.[63] Accordingly, a member expelled for nonpayment of dues may, as a condition to relief by reinstatement, be required to show a tender of the amount due or an unsuccessful application on his part to ascertain such amount.[64] Right of exchange to require suspended members to comply with certain conditions for reinstatement by exchange see supra § 7 b.

d. Right of Action for Damages

A member may, in a proper case, sue the exchange for damages for his wrongful suspension or expulsion. In absence of bad faith or malice, however, a member, wrongfully suspended cannot sue the exchange or its members, or its officers.

A member of an exchange may in a proper case maintain an action against the association for damages for his wrongful suspension or expulsion.[65] In the absence of bad faith and malice, a member who has been wrongfully suspended cannot recover damages either from the exchange or its members,[66] or its officers;[67] nor can there be a recovery without a showing of damages.[68]

e. Procedure

The procedure for enforcement of such judicial remedies as are available to members of an exchange is governed by general rules.

In alleging violation of the rules, the rules and the acts constituting the violation should be set out.[69]

A court on an application for an injunction cannot review findings of fact of the directors of an exchange, unless the evidence adduced before the directors has been embodied in a bill of exceptions.[70]

The issues before the court are limited by the scope of the pleadings.[71] The courts will not review the evidence on which the exchange based its determination,[72] further than to ascertain whether the case is so bare of evidence that no honest mind could have reached the conclusion arrived at by the exchange,[73] or unless there is no evidence tending to support the charge on which a member is disciplined.[74] The question is not

56. U.S.—Greer, Mills & Co. v. Stoller, C.C.Mo., 77 F. 1.
23 C.J. p 258 note 33.

57. Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 258 note 34.

58. Ill.—Pitcher v. Chicago Bd. of Trade, 13 N.E. 187, 121 Ill. 412.
23 C.J. p 259 note 35.

59. Ill.—Pitcher v. Chicago Bd. of Trade, supra.
23 C.J. p 259 note 36.

60. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894. See 157 S.W. 579, 250 Mo. 168.
23 C.J. p 259 note 37.

61. Ill.—Ryan v. Cudahy, 41 N.E. 760, 157 Ill. 106, 46 Am.S.R. 305, 49 L.R.A. 353.
23 C.J. p 259 note 38.

62. Minn.—Kolff v. St. Paul Fuel Exch., 50 N.W. 1036, 48 Minn. 215.
23 C.J. p 259 note 39.

63. Mo.—Konta v. St. Louis Stock Exch., 87 S.W. 969, 189 Mo. 26.

64. Mo.—Konta v. St. Louis Stock Exch., supra.

65. N.Y.—Sewell v. Ives, 61 How. Pr. 54.
23 C.J. p 259 note 42.

66. N.Y.—Lurman v. Jarvie, 81 N. Y.S. 468, 82 App.Div. 37, affirmed 70 N.E. 1102, 178 N.Y. 559.
23 C.J. p 259 note 43.

67. Mo.—Albers v. Merchants' Exch., 39 S.W. 473, 138 Mo. 140.
23 C.J. p 259 note 44.

68. Mo.—Albers v. Merchants' Exch., supra.
23 C.J. p 259 note 45.

69. Ill.—Olds v. Chicago Open Bd. of Trade, 13 Ill.App. 465.
23 C.J. p 260 note 47.

70. Neb.—Jackson v. South Omaha Live Stock Exch., 68 N.W. 1051, 49 Neb. 687.

71. N.Y.—Young v. Eames, 79 N. Y.S. 1068, 78 App.Div. 229, affirmed 73 N.E. 1134, 181 N.Y. 542.
23 C.J. p 258 note 26.

72. N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.
23 C.J. p 258 note 19.

73. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401.
23 C.J. p 258 note 20.

74. N.Y.—Lamborn v. New York Cotton Exch., 197 N.Y.S. 57, 203 App.Div. 565.

whether, passing on the evidence as res nova, the court would have reached the same conclusion as that of the exchange tribunal or whether the conclusion was reasonable or unreasonable,[75] but only whether the tribunal of the exchange had jurisdiction to entertain the proceeding, and, on the evidence presented to it, to adjudge the disfranchisement,[76] and whether the proceedings before that tribunal were regular.[77] The court cannot determine questions affecting the interests of persons not made parties to the proceedings before it.[78] There is a presumption that a decision expelling a member was founded on sufficient evidence, and in order to sustain the expulsion in the courts, the exchange is not bound to produce sufficient of the evidence on which its decision rests to show that the charges were sustained.[79] In an action for damages, where malice is not alleged, it should not be inferred, if the facts are open to an inference of good faith.[80] Where a member attacks the validity of the proceedings for his expulsion, the good faith in which they were conducted, and the justice of the action of the governing committee, and his averments are put in issue by the answer, the burden is on him to establish his averments.[81] Where plaintiff claimed that his expulsion was due to passion and prejudice, the record of the evidence on which the committee on admissions acted in reporting his case to the governing committee is admissible to disprove such claim, although such record was not before the governing committee.[82]

On examination before trial. A member is not entitled, on an examination of the president of the exchange before trial, to a production of evidence obtained by a special subcommittee on whose report the governing committee tried the member, unless the laws of the exchange required the charges served on the member to be accompanied by the information on which they were based.[83]

§ 9. —— Property in Seat or Membership, and Transfer Thereof

a. Nature and status
b. Voluntary transfer in general
c. Pledge or assignment as security
d. Seat of defaulting member
e. Seat of deceased member

a. Nature and Status

"Seat" or "membership" in an exchange, sometimes used synonymously, represent the rights of the member in the exchange. A seat or membership in an exchange is usually regarded as a species of property.

The term "seat" in a stock or produce exchange is used as synonymous with "membership" in the association,[84] the seat representing the member's rights in the exchange.[85] A membership in an unincorporated exchange is the right to participate as a member in a voluntary private organization,[86] and may denote nothing more than the privilege of the individual elected as a member to engage in transactions on the floor of the place of business.[87] A seat or membership in an exchange is analogous, in some respects, to membership in a social club but is distinguishable from such membership;[88] is not a tangible thing;[89] and is not a franchise.[90]

It is generally held that in a certain sense a seat or membership in an exchange is a species of property,[91] although it has been stated that such seat

75. N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401, reversing 29 N.Y.S. 307, 8 Misc. 552.

76. N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 692, 3 N.J.Misc. 1102.
23 C.J. p 258 note 22.

77. N.J.—Stevenson v. Atlantic City Real Estate Board, supra.
N.Y.—People v. New York Produce Exch., 44 N.E. 84, 149 N.Y. 401, reversing 29 N.Y.S. 307, 8 Misc. 552.

78. N.Y.—White v. Brownell, 2 Daly 329, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr.,N.S., 318.
23 C.J. p 258 note 25.

79. N.Y.—Young v. Eames, 79 N.Y.S. 1068, 78 App.Div. 229, affirmed 73 N.E. 1134, 181 N.Y. 542.

80. N.Y.—Lurman v. Jarvie, 81 N.Y.S. 468, 82 App.Div. 37, affirmed 70 N.E. 1102, 178 N.Y. 559.

81. N.Y.—Cohen v. Thomas, 103 N.E. 708, 209 N.Y. 407.

82. N.Y.—Cohen v. Thomas, supra.

83. N.Y.—Young v. Eames, 53 N.Y.S. 678, 24 Misc. 432.

84. N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App. Div. 847.
Pa.—In re McLaughlin's Estate, 14 Pa.Dist. & Co. 665.
23 C.J. p 262 note 78.

85. Cal.—Lowenberg v. Greenebaum, 33 P. 794, 99 Cal. 162, 37 Am.S.R. 42, 21 L.R.A. 399.
N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App. Div. 847.

86. N.Y.—Schwabacher v. Ehrich, supra.
23 C.J. p 262 note 80.

87. N.Y.—Schwabacher v. Ehrich, supra.

88. Minn.—In re Personal Property Tax in St. Louis County, 145 N.W. 108, 124 Minn. 398, 50 L.R.A., N.S., 255, Ann.Cas.1915C 538.
23 C.J. p 262 note 83 [a].

89. N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App. Div. 847—McCabe v. Emmons, 51 N.Y.Super. 219, affirmed 17 N.E. 869, 109 N.Y. 665.

90. N.Y.—White v. Brownell, 2 Daly 329, 358, 4 Abb.Pr.,N.S., 162, affirming 3 Abb.Pr.,N.S., 318.
23 C.J. p 262 note 87.

91. U.S.—In re Rosenbaum Grain Corporation, D.C.Ill., 13 F.Supp. 601.
Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
Minn.—State v. Blasius, 245 N.W. 612, 187 Minn. 430, certiorari granted State of Minnesota v. Blasius, 53 S.Ct. 656, 289 U.S. 717, 77

or membership does not constitute property.[92] At any rate, exchange membership, because of the valuable facilities it affords to the owner, possesses a pecuniary value,[93] and its value is capital invested in business.[94] A seat or membership in an exchange is not subject to absolute acquisition, ownership, or disposition,[95] but is acquired, held, and disposed of subject to the conditions and restrictions of the constitution and by-laws of the association,[96] is subject to the terms and conditions of the contract between the member and the exchange,[97] and may be subject to the police power of the state.[98] The status of membership in an exchange as property for particular purposes depends on the terms of the law involved. As property within laws relating to: Bankruptcy, see Bankruptcy § 185; Creditors' Suits see Creditors' Suits § 34; Execution see the C.J.S. title Executions § 26, also 23 C.J. p 333 notes 12, 13; Receivers see the C.J.S. title Receivers § 108, also 53 C.J. p 98 note 9 [a]; Taxation see the C.J.S. title Taxation § 91, also 61 C.J. p 204 notes 36, 37.

b. Voluntary Transfer in General

Subject to limitations imposed by exchange rules, a seat in an exchange is commonly transferable by the member.

A seat in an exchange is commonly transferable by the member,[99] subject, however, to limitations imposed by rules of the exchange.[1] A transfer

L.Ed. 1470, reversed on other grounds 54 S.Ct. 34, 290 U.S. 1, 78 L.Ed. 131—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271—In re Personal Property Tax in St. Louis County, 145 N.W. 108, 124 Minn. 398, 50 L.R.A.,N.S., 255, Ann.Cas. 1915C 538.

Ohio.—Anderson v. Durr, 10 Ohio App. 329, affirmed 126 N.E. 57, 100 Ohio St. 251, 17 A.L.R. 82, affirmed Citizens' Nat. Bank v. Durr, 42 S.Ct. 15, 257 U.S. 99, 66 L.Ed. 10.

23 C.J. p 262 note 83.

Test to determine whether chose in action

Whether in a given case a seat or membership in an exchange is a chose in action depends on whether the party entitled to it has rights under it which a purchaser from him or a transferee by operation of law can enforce.—McCabe v. Emmons, 51 N.Y.Super. 219, affirmed 17 N.E. 869, 109 N.Y. 665.

92. Pa.—In re Reilly's Estate, 20 Pa.Dist. & Co. 10, 49 Montg.Co. 244.

23 C.J. p 262 note 85.

93. Minn.—In re Personal Property Tax in St. Louis County, 145 N.W. 108, 124 Minn. 398, 50 L.R.A., N.S., 255, Ann.Cas.1915C 538.

23 C.J. p 262 note 81.

94. N.Y.—People v. Feitner, 60 N.E. 265, 167 N.Y. 1, 82 Am.S.R. 698—Matter of Glendinning, 74 N.Y.S. 190, 68 App.Div. 125, affirmed 64 N.E. 1121, 171 N.Y. 684.

95. Minn.—In re Personal Property Tax in St. Louis County, 145 N.W. 108, 124 Minn. 398, 50 L.R.A., N.S., 255, Ann.Cas.1915C 538.

N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App.Div. 847.

23 C.J. p 262 note 88.

96. Minn.—In re Personal Property Tax in St. Louis County, 145 N.W. 108, 124 Minn. 398, 50 L.R.A.,N.S., 255, Ann.Cas.1915C 538.

N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App.Div. 847.

23 C.J. p 262 note 89.

97. U.S.—In re Rosenbaum Grain Corporation, D.C.Ill., 13 F.Supp. 601.

98. Minn.—Grisim v. South St. Paul Live Stock Exch., 188 N.W. 729, 152 Minn. 271.

99. Ill.—Levy v. Rosen, 21 N.E.2d 653, 300 Ill.App. 523.

N.Y.—Bank of New York & Trust Co. v Snedeker, 16 N.Y.S.2d 930, 173 Misc. 126, affirmed 13 N.Y.S.2d 278, 257 App.Div. 939.

Pa.—In re McLaughlin's Estate, 14 Pa.Dist. & Co. 666.

23 C.J. p 262 note 91.

1. U.S.—Board of Trade of City of Chicago v. Johnson, Ill., 44 S.Ct. 232, 264 U.S. 1, 68 L.Ed. 533, reversing, C.C.A., 283 F. 374.

Mass.—Austin v. Hayden, 138 N.E. 576, 244 Mass. 286.

N.Y.—In re Pinney's Estate, 282 N.Y.S. 680, 156 Misc. 844, reversed on other grounds 294 N.Y.S. 29, 250 App.Div. 60, affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.

23 C.J. p 263 note 92.

Excusing nonperformance of contract

Provision of an exchange constitution restricting membership to citizens may not constitute an excuse for nonperformance of a contract by an alien to purchase the seat of a member.—Levy v. Rosen, 21 N.E.2d 653, 300 Ill.App. 523.

Posting notice

(1) Rules requiring that notice of intention to transfer a seat be posted for a certain length of time are binding on the members.—Keyer v. Memphis Cotton Exch., 186 S.W. 593, 135 Tenn. 414.

(2) However, prior to action by the exchange board of directors on an application to transfer, such rules may not operate as a statute of limitations barring objections made after notice has been posted for the required length of time.—Board of Trade of City of Chicago v. Johnson, Ill., 44 S.Ct. 232, 264 U.S. 1, 68 L.Ed. 533, reversing, C.C.A., 283 F. 374.

Repudiation of contract by purchase

On repudiation of the contract by one who has agreed to purchase the seat of a member, he is not required to do anything further, but is entitled to sue on the contract at once.—Levy v. Rosen, 21 N.E.2d 653, 300 Ill.App. 523.

Subordination agreements

(1) Under exchange rules one who proposes to buy the seat with funds advanced by another may be required to file with the exchange a subordination agreement whereby the lender agrees to subordinate his right to repayment, to the payment of claims arising out of the purchaser's membership in the exchange.—Bank of New York & Trust Co. v. Snedeker, 16 N.Y.S.2d 930, 173 Misc. 126, affirmed 13 N.Y.S.2d 278, 257 App.Div. 939.

(2) Such an agreement must be considered in its entirety in determining the purpose and object of the parties, and ambiguities should be resolved in favor of the lender and against the borrower.—Bank of New York & Trust Co. v. Snedeker, supra.

(3) Such agreement does not operate to cancel the indebtedness of the borrower to the lender who subsequent to the execution of such agreement advances money to purchase the seat.—McManus v. Biddison, 272 N.Y.S. 199, 152 Misc. 239, affirmed 271 N.Y.S. 1099, 242 App.Div. 623.

(4) Nor does such agreement affect the obligation of the borrower to pay interest to the lender under the contract existing between them.—Bank of New York & Trust Co. v. Snedeker, supra.

cannot be enforced as against the exchange.[2] The transfer is generally subject to the condition that the proposed transferee is elected to membership.[3] A condition in an agreement to transfer a seat is effective as between the parties.[4]

c. Pledge or Assignment as Security

Except as precluded by the laws of the exchange a member thereof may assign or pledge his seat as security for a debt.

Except as precluded by the constitution or rules of the exchange[5] a member may assign or pledge his seat as security for a debt;[6] and a valid pledge may be created by delivery of certificate of membership without formal assignment of such certificate[7] but the assignee or pledgee acquires only the rights of the assignor or pledgor subject to the rules of the exchange.[8] The assignment need not be recorded.[9] The rules of construction of contracts of pledge in general as to debts secured, see the C.J.S. title Pledges § 28, also 49 C.J. p 936 note 88–p 942 note 75, apply to pledges or assignments of exchange seats as security.[10] The seat cannot be sold by the pledgee,[11] but the lien may be enforced against the proceeds accruing to the member on sale of the seat by the exchange.[12] The ordinary rules as to waiver, see the C.J.S. title Liens § 17, also 37 C.J. p 333 note 8–p 340 note 20, apply to this class of liens.[13]

d. Seat of Defaulting Member

Proceeds from the sale of the seat of a defaulting member may be applied to his debts to other members under exchange rules giving members a lien on the seat of each member.

The rules of an exchange generally give the members a lien on the seat of each member[14] and authorize the exchange to sell the seat of a defaulting member or of a member who has been expelled or becomes ineligible for reinstatement,[15] and to apply the proceeds to the payment of debts due from him to members of the exchange, the nature of the debts thus entitled to preferred pay-

(5) Pledge or assignment of seat as security see infra this section subdivision c.

2. Tenn.—Keyer v. Memphis Cotton Exch., 186 S.W. 593, 135 Tenn. 414.
23 C.J. p 263 note 93.

3. Cal.—Clute v. Loveland, 9 P. 133, 68 Cal. 254.
23 C.J. p 263 note 94.

4. Wis.—State v. Milwaukee Chamber of Commerce, 98 N.W. 930, 121 Wis. 110.
23 C.J. p 263 note 95.

5. N.Y.—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 331, 254 App. Div. 847.

Nonassignability of seat or proceeds
Under an exchange constitution prohibiting pledge of a member's seat either directly or indirectly, neither such seat nor the proceeds thereof may be assigned.—Schwabacher v. Ehrich, supra.

Trust for repayment of money advanced
(1) Under exchange rules requiring that members own their seats free and clear, an agreement whereby a member agrees to hold his seat in trust for repayment of money advanced by a nonmember is void as a fraud on the customers of such member.—In re M. J. Hoey & Co., C.C.A.N.Y., 19 F.2d 764, certiorari denied Norwegian American Securities Corporation v. Kaufman, 48 S. Ct. 86, 275 U.S. 550, 72 L.Ed. 420.

(2) In a particular case it was held that the evidence was sufficient to sustain a finding that there was no agreement whereby a purchaser of a seat agreed to hold his seat in trust for the benefit of the seller and others advancing money to purchase such seat.—McCabe v. Peck, 296 N.Y.S. 637, 251 App.Div. 829.
Subordination agreements between purchaser and lender see supra subdivision b of this section.

6. U.S.—In re Smith-Flynn Commission Co., C.C.A.Minn., 292 F. 465.
Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
Mo.—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W.2d 722, 223 Mo.App. 623, 224 Mo.App. 40.
Tenn.—Memphis Cotton Exchange v. Pope, 13 Tenn.App. 518.
23 C.J. p 263 note 97.

Consent to transfer of membership
The text rule is not affected by an exchange rule requiring its consent to a transfer of membership.—In re Smith-Flynn Commission Co., C.C.A.Minn., 292 F. 465.

7. U.S.—In re Smith-Flynn Commission Co., supra.

8. Colo.—Drovers' Nat. Bank v. Denver Live Stock Exchange, 220 P. 402, 74 Colo. 212.
23 C.J. p 263 note 98.

Fund payable at member's death
Where the member has no separable proprietary interest in a fund payable at death the assignee of his seat acquires no interest in such fund.—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W.2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

9. Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
Mass.—Nashua Sav. Bank v. Abbott, 63 N.E. 1058, 181 Mass. 531, 92 Am.S.R. 430.

10. Mass.—Nashua Sav. Bank v. Abbott, supra.
23 C.J. p 263 note 2.

11. N.Y.—Ketcham v. Provost, 141 N.Y.S. 437, 156 App.Div. 477, affirmed 109 N.E. 1080, 215 N.Y. 681.

12. Mass.—Nashua Sav. Bank v. Abbott, 63 N.E. 1058, 181 Mass. 531, 92 Am.S.R. 430.
Tenn.—Memphis Cotton Exchange v. Pope, 13 Tenn.App. 518.
23 C.J. p 263 note 4.

13. Mo.—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W.2d 722, 223 Mo.App. 623, 224 Mo.App. 40.
23 C.J. p 263 note 6.

Permitting assignor to remain in dominion
Assignee of an exchange seat may waive his right to a lien by permitting assignor to remain in complete dominion of such seat.—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, supra.

14. Mass.—Austin v. Hayden, 138 N. E. 576, 244 Mass. 286.
23 C.J. p 264 note 8.

15. U.S.—Page v. Edmunds, Pa., 23 S.Ct. 200, 187 U.S. 596, 47 L.Ed. 318, affirming 107 F. 89, 46 C.C.A. 160, 59 L.R.A. 94.
23 C.J. p 264 note 9.
Effect of defaulting member's assignment for benefit of creditors see Assignments for Benefit of Creditors § 360.

ment depending on the rules of the exchange,[16] the effect of such rules being to make the seat of each member a continuing security to all members with whom the owner of the seat may deal, for the performance and fulfillment of his exchange contracts and engagements, in preference to the claims of third persons.[17]

Except as affected by statute[18] such regulations as these are within the power of the exchange,[19] and are binding on the member and all those claiming under him.[20]

It has been held that, where a member becomes honestly insolvent and fails to qualify under the rules for readmission, or if he dies after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, but that in case a member should by misconduct forfeit his right to membership he is deprived of all claim upon the association,[21] although it has been held that the termination of the right to membership does not ipso facto cause a forfeiture to the exchange of the money value of the membership.[22]

Where the constitution of an exchange makes its president a trustee of the fund arising from the sale of a member's seat, the levy of attachment and execution by notice to the president is sufficient to fix the creditor's lien on the fund.[23]

A member claimant may be precluded by his own acts or omissions from submitting claims, and may be enjoined from so doing by a court of competent jurisdiction.[24]

Rules governing a member in default in dealings with other members are discussed infra § 10 d.

e. Seat of Deceased Member

Under exchange rules the seat of a member may be sold on his decease and the proceeds applied in accordance with such rules.

The rules of the exchange generally authorize it to sell the seat of a member on his decease, and provide that the proceeds shall be applied to the payment of debts due members of the exchange, and the balance, if any, paid to the deceased member's personal representative.[25] These regulations are binding on the personal representative of the deceased member.[26] The nature of the debts entitled to participate in the proceeds of sale depends on the rules of the exchange.[27] A rule requiring the seat of a deceased member to be disposed of by the exchange for the benefit of his successors in interest may be enforced by them as against the exchange.[28]

16. Mass.—Austin v. Hayden, 138 N.E. 576, 244 Mass. 286.
23 C.J. p 264 note 10.

Claim of corporation
Under exchange rules excluding corporations from membership claim of corporation is not payable from proceeds of sale of seat.—Seattle Curb Exchange v. Knight, C.C.A. Wash., 59 F.2d 39.

Contract of employment
Claim on account of contract of employment to represent a member on the floor of the exchange is not entitled to payment from proceeds of his seat under particular exchange rules.—Seattle Curb Exchange v. Knight, C.C.A.Wash., 59 F.2d 39.

Effect of prior attachment
Pa.—Sheppard v. Barrett, 17 Phila. 145.
23 C.J. p 264 note 10 [d].

Interest
Under statute providing for payment of interest on all deferred obligations for payment of money, an exchange may be required to pay interest on its misapplication of proceeds from sale of member's seat. —Seattle Curb Exchange v. Knight, C.C.A.Wash., 59 F.2d 39.

Limited partnership agreement
A limited partnership agreement between a member and a nonmember providing for the application of proceeds from sale of member's seat is not invalid as in fraud of other creditors of such member in absence of evidence of fraud and duress, and particularly where such agreement has been filed with, and approved by, the exchange.—Rubin v. Whitney, 295 N.Y.S. 255, 162 Misc. 821.

Practical construction by parties
may be proved where the constitution is ambiguous as to the disposition of the proceeds of a membership of an insolvent member.—In re Hayes, 75 N.Y.S. 312, 37 Misc. 264.

Retroactive operation
In accordance with rules stated in § 3 c supra, an amendment to the exchange constitution relating to the mode in which the proceeds of a sale of a seat in the exchange shall be distributed among the creditors of a former member does not govern the distribution of the proceeds of a seat sold before the amendment was made.—Weston v. Ives, 97 N.Y. 222, 20 N.Y.Wkly.Dig. 255, reversing 14 N.Y.Wkly.Dig. 413.

17. Cal.—Rorke v. San Francisco Stock & Exchange Board, 33 P. 881, 99 Cal. 196.
23 C.J. p 265 note 17.

18. **Grain shippers' lien**
A statute conferring on shippers of grain a first lien on the proceeds of the sale of the seat of a defaulting member of a grain exchange notwithstanding any rule or by-law of the exchange to the contrary has been upheld.—Tait v. Schmahl, 204 N.W. 637, 164 Minn. 122.

19. U.S.—Hyde v. Woods, Cal., 94 U.S. 523, 24 L.Ed. 264.
23 C.J. p 264 note 11.

20. Md.—Zell v. Baltimore Stock Exch., 62 A. 808, 102 Md. 489, 4 L.R.A.,N.S., 435.
23 C.J. p 265 note 12.

21. N.Y.—Belton v. Hatch, 17 N.E. 225, 109 N.Y. 593, 4 Am.S.R. 496.

Rule criticised
U.S.—In re Gaylord, D.C.Mo., 111 F. 717.

22. U.S.—In re Gaylord, supra.

23. Cal.—Ruggles v. Helfrich, 123 P. 369, 162 Cal. 533.

24. U.S.—In re Currie, N.Y., 185 F. 263, 107 C.C.A. 369, certiorari denied 31 S.Ct. 724, 220 U.S. 621, 55 L.Ed. 613.

25. U.S.—Page v. Edmunds, Pa., 23 S.Ct. 200, 187 U.S. 596, 47 L.Ed. 318.
23 C.J. p 265 note 20.

26. Pa.—Thompson v. Adams, 93 Pa. 55, 12 Phila. 484.
23 C.J. p 265 note 21.

27. N.Y.—Bernheim v. Keppler, 69 N.Y.S. 803, 34 Misc. 321.
23 C.J. p 265 note 22.

28. Cal.—Hassey v. Ruggles, 156 P. 989, 30 Cal.App. 19.
23 C.J. p 265 note 23.

§ 10. —— Dealings between Members

a. In general
b. Regulation by exchange
c. Arbitration and adjustment within exchange
d. Defaulting members
e. Interference by courts

a. In General

Mutual dealings between exchange members, as such, are discussed in detail in subsequent subdivisions of this section. Rights and liabilities of such members as brokers are considered in Brokers §§ 23–147. Speculative transactions as gambling will be found treated in the C.J.S. title Gaming §§ 1, 9–17, 42–45, also 27 C.J. p 991 note 2–p 995 note 76, p 1053 note 40–1066 note 19, p 1088 note 81–1092 note 28.

b. Regulation by Exchange

Valid rules and regulations of an exchange relating to dealings between members are binding on them. General rules are applicable in determining the validity, construction, and operation of such exchange rules and regulations.

As between members of an exchange, rules concerning their mutual dealings, when valid, have the same effect as rules of law, and in so far as they are applicable they enter into and form a part of all contracts made by members in connection with transactions on change,[29] and members who have accepted the benefits of such rules should not be relieved of their consequential burdens except for the most compelling reasons.[30] The stipulations of such rules may, however, be waived.[31] The principles heretofore stated as to the constitution charter, by-laws, and rules in general, see supra § 3, apply to these rules in determining their validity[32] and construction and operation.[33]

c. Arbitration and Adjustment within Exchange

(1) In general
(2) Procedure

(1) In General

Exchange rules and regulations usually provide for arbitrations of disputes arising out of dealings between members.

Provision for a domestic forum or board, or committee of arbitration, before which violations of the association's laws and regulations are inquired into and certain matters of dispute arising out of transactions among the members are investigated and determined is a common feature of the organization of an exchange.[34] Such rules are generally held valid,[35] and are not invalid as ousting the courts of jurisdiction even when they impose a

29. U.S.—In re Tidewater Coal Exch., D.C.N.Y., 292 F. 225, affirmed, C.C.A., 296 F. 701, certiorari denied Davis v. Coyle, 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868—Coyle v. Morrisdale Coal Co., C.C.A.N.Y., 289 F. 429, affirming, D.C., 284 F. 294, and Coyle v. Johnstown Coal & Coke Co., D.C., 284 F. 301.
Mass.—Brickley v. Wrenn, 146 N.E. 797, 252 Mass. 16.
Neb.—Holmquist Elevator Co. v. Omaha Elevator Co., 194 N.W. 800, 110 Neb. 655.
23 C.J. p 265 note 25.

30. Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S.E. 471, 148 Va. 140, certiorari denied 48 S.Ct. 207, 276 U.S. 615, 72 L.Ed. 732.

31. U.S.—Watjen v. Louisville Tobacco Warehouse Co., Ky., 240 F. 919, 153 C.C.A. 605.
23 C.J. p 266 note 26.

32. Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S.E. 471, 148 Va. 140, certiorari denied 48 S.Ct. 207, 276 U.S. 615, 72 L.Ed. 732.
23 C.J. p 266 note 28 [a], [b].

Disposition of pooled coal
Exchange rule, prohibiting disposition of pooled coal to other members of pool, has been held not invalid as violating a demurrage tariff recognizing such transfers.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., supra.

33. N.Y.—M. Roth & Co. v. New York Mercantile Exchange, 262 N.Y.S. 687, 146 Misc. 644, affirmed 262 N.Y.S. 693, 238 App.Div. 779.
Tex.—Western Union Telegraph Co. v. Gardner, Civ.App., 278 S.W. 278.
23 C.J. p 266 note 29 [a]-[f].

"Contracts" between members; existing contracts
(1) An exchange rule relating to "contracts" between its members is not applicable to a transaction wherein one member of the exchange transfers a customer's account to another member.—Appenzellar v. McCall, 270 N.Y.S. 748, 150 Misc. 897.

(2) A resolution prohibiting members from making certain purchases or sales except in liquidation of existing contracts does not forbid performance of an existing option obligating one member to sell to another.—Young v. Lanyon, Mo.App., 242 S.W. 685.

Exchange as purchaser
Under rules of exchange providing that under certain circumstances the exchange shall, with respect to transactions in which its members participate, be substituted as buyer to the seller and seller to the buyer, such exchange has been held to be buyer of certain commodities from a member as seller.—M. Roth & Co. v. New York Mercantile Exchange, 262 N.Y.S. 687, 146 Misc. 644, affirmed 262 N.Y.S. 693, 238 App.Div. 779.

Retroactive operation
N.Y.—M. Roth & Co. v. New York Mercantile Exchange, supra.
23 C.J. p 266 note 29 [a].

Transaction subsequent to time fixed
Rule that members cannot buy or offer to buy after a specified hour of the day has been held not to invalidate contract completed after such hour.—Western Union Telegraph Co. v. Gardner, Tex.Civ.App., 278 S.W. 278.

34. Mo.—Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.
N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J. Misc. 1102.
Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., Civ. App., 242 S.W. 1067.
23 C.J. p 267 note 31.

35. Mo.—C. H. Albers Commn. Co.

penalty of expulsion or suspension for refusal to arbitrate.[36] In the case of an incorporated exchange, such rules must be within the powers conferred by charter[37] or statute.[38] Such rules are binding on the members[39] and have the same effect as an agreement in writing to submit to arbitration.[40]

The pendency of an action at law precludes arbitration without plaintiff's consent;[41] but an offer to arbitrate before nonmembers does not preclude a reference under rules of the exchange.[42]

(2) Procedure

Jurisdiction of the exchange tribunal contemplated by exchange rules providing for arbitration of disputes arising out of dealings between members, is special and limited and must be exercised in accordance with the exchange constitution and by-laws.

Jurisdiction of an arbitration committee is special and limited.[43] The jurisdiction of these bodies is confined to matters which arise out of transactions conducted by the members as such.[44] It has been held that the committee cannot be the judge of its own jurisdiction as that would be usurping the authority of the court,[45] but it has also been held that the committee has power to construe rules as to its jurisdiction when such rules reasonably admit of two constructions, although not otherwise.[46] Jurisdiction must be exercised in accordance with the constitution and by-laws.[47] Within these limits, the mode of procedure is within the discretion of the committee.[48] A member will not be required to submit his dispute to a court composed of interested persons.[49] A change in the personnel of an appeals committee by the substitution of one member thereof may not, however, constitute prejudice to an exchange member as a party;[50] nor may conduct on the part of a member of such committee, not amounting to fraud constitute such prejudice as will invalidate proceedings before that body.[51]

The judgment must be reasonably certain[52] and in conformity with the rules and regulations of the exchange.[53] If, however, the committee proceeds regularly, its adjudication is conclusive on the parties;[54] and failure of exchange by-laws to provide who should appoint arbitrators may not

v. Spencer, 103 S.W. 523, 205 Mo. 105, 11 L.R.A.,N.S., 1003.
23 C.J. p 267 note 32.

36. Ill.—Pecaud v. Waite, 75 N.E. 779, 218 Ill. 138, 2 L.R.A.,N.S., 672.
23 C.J. p 267 note 33.

Reason for rule
The penalty imposed for refusal to arbitrate does not offend against the rule against agreements to arbitrate future differences, thus ousting the courts of jurisdiction, but is merely imposed for violation of exchange rules which the member has agreed to obey.—Farmer v. Kansas City Bd. of Trade, 78 Mo.App. 557.

37. Ill.—Pacaud v. Waite, 75 N.E. 779, 218 Ill. 138, 2 L.R.A.,N.S., 672.
23 C.J. p 267 note 34.

38. Minn.—Evans v. Minneapolis Chamber of Commerce, 91 N.W. 8, 86 Minn. 448.
23 C.J. p 267 note 35.

39. Ohio.—Paddock Hodge Co. v. Grain Dealers' Nat. Ass'n, 18 Ohio App. 66.
23 C.J. p 267 note 36.

40. N.Y.—Heath v. Gold Exch., 7 Abb.Pr.,N.S., 251.

Right of member to revoke power to arbitrate
N.Y.—Heath v. Gold Exch., supra.
23 C.J. p 267 note 37 [a].
Arbitration of controversies submitted by agreement of parties thereto generally see Arbitration and Award.

41. Wis.—State v. Milwaukee Chamber of Commerce, 20 Wis. 63.

42. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 149 N. Y. 414, reversing 36 N.Y.S. 427, 15 Misc. 42.

43. N.Y.—Morris v. Grant, 34 Hun 377.
23 C.J. p 267 note 40.

44. N.Y.—Bernheim v. Keppler, 69 N.Y.S. 803, 34 Misc. 321.
Pa.—Cochran v. Adams, 36 A. 854, 180 Pa. 289.

45. N.Y.—Bernheim v. Keppler, 69 N.Y.S. 803, 34 Misc. 321.

46. N.Y.—Wheat Export Co. v. New Century Co., 173 N.Y.S. 679, 185 App.Div. 723.
Wis.—Bartlett v. L. Bartlett & Son Co., 93 N.W. 473, 116 Wis. 450.

47. Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., Civ. App., 242 S.W. 1067.
23 C.J. p 268 note 44.

Jurisdiction of, and procedure before, appeals committee
Mo.—Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.
Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., Civ.App., 242 S.W. 1067.

Rehearing on remand from appeals committee
Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., supra.

48. N.Y.—Sonneborn v. Lavarello, 2 Hun 201.
23 C.J. p 268 note 45 [a], [b].

Appeals committee
Mo.—Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.

49. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894, reversed on other grounds 157 S.W. 579, 250 Mo. 168.
23 C.J. p 268 note 46.

50. Where party declines to proceed
Objection that there was change of one member on appeals committee between time award was rendered and time of overruling motion for rehearing was not prejudicial, where complainant at time for hearing of motion for rehearing declined to proceed further, and filed prepared statement attacking whole procedure, since having declined to proceed further complainant could not be prejudiced by the only action the committee could take.—Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.

51. Remarks relating to affiant and his testimony
Mo.—Fernandes Grain Co. v. Hunter, supra.

52. Ill.—Redmond v. Bedford, 40 Ill. 267.
23 C.J. p 268 note 47.

53. Cal.—Christenson v. Cudahy Packing Co., 247 P. 207, 198 Cal. 685.

Opportunity to present facts
An award made before one of the parties has an opportunity to present the facts of his claims under exchange rules providing for such presentation has been held invalid.—Christenson v. Cudahy Packing Co., supra.

54. N.Y.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
Tex.—Russell-Coleman Cotton Oil

invalidate an award regularly arrived at by arbitrators appointed by an exchange officer.[55] The decision of such committee is not, on the other hand, binding on a person who is not a member and has not submitted his claim to arbitration by that body.[56]

Waiver and estoppel. Objections to the mode of procedure may be waived.[57] A member may be estopped to deny the jurisdiction of the committee by his failure to challenge such jurisdiction.[58]

d. Defaulting Members

General principles govern the construction of the constitution, charter, and by-laws as regards a member in default in dealings between members.

The general principles heretofore stated, see supra § 3, governing the construction of the constitution or charter and by-laws apply in determining the validity and construction of exchange rules relating to a member who is in default in dealings between members.[59] Default of a member as ground for disciplinary action is considered supra § 7, and rules relating the sale of a defaulting member's seat are discussed supra § 9.

e. Interference by Courts

(1) Right of action
(2) Limitation of action
(3) Pleading
(4) Evidence

(1) Right of Action

Under certain circumstances a member may resort to the courts in an action involving dealings between members of an exchange.

Awards and decisions of the exchange tribunals are reviewable by the courts so far as the legal rights of the parties are concerned, as in the case of awards of other arbitrators,[60] this being particularly true where the by-laws and rules of the exchange make no provision for appeal from the awards of arbitrators within the exchange.[61] Where property rights are involved, the courts may supervise the action of an exchange to determine whether it has proceeded in accordance with its rules, and if it has failed in a substantial manner, may correct abuses.[62] If the tribunal of the exchange unlawfully takes cognizance of matters which the members have not agreed to submit to the arbitration of the domestic forum, the courts may interfere by injunction to prevent the unauthorized determination.[63] A member may resort to the courts where he is made a victim of an open and arbitrary violation of the organic law by the officers.[64] A member may sue another member for deceit, although he procures an inspection of the subject matter of the transaction pursuant to the rules of the exchange.[65]

Where a submission is revocable before award, the member is not, however, entitled to injunction against making an award.[66] A member cannot maintain a bill of interpleader between his principal and another member because of the losses which he will sustain through enforcement of the rights of his principal on one hand and the rules of the exchange on the other.[67]

Generally a member cannot maintain suit on an exchange transaction without first seeking relief by proceeding in the manner prescribed by the rules of the exchange,[68] but the right of a member to appeal to another tribunal will not be denied on a

Co. v. C. R. Garner & Co., Civ.App., 242 S.W. 1067.
23 C.J. p 268 note 48.

55. Cal.—Christenson v. Cudahy Packing Co., 247 P. 207, 198 Cal. 685.
Chairman
Cal.—Christenson v. Cudahy Packing Co., supra.

56. N.Y.—Muller v. Ralston, 179 N. Y.S. 860, 190 App.Div. 329.
Broker's principal
N.Y.—Muller v. Ralston, supra.

57. Mo.—Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.
N.J.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.
Tex.—Russell-Coleman Cotton Oil Co. v. C. R. Garner & Co., Civ. App., 242 S.W. 1067.
23 C.J. p 268 note 49.
Members of committee
Objection that hearing is had before an exchange committee consisting of fewer members than specified in by-laws may be waived by submitting to such hearing.—Stevenson v. Atlantic City Real Estate Board, 130 A. 662, 3 N.J.Misc. 1102.

58. Ill.—Ryan v. Cudahy, 41 N.E. 760, 157 Ill. 108, 48 Am.S.R. 305, 49 L.R.A. 353.
23 C.J. p 267 note 40 [b].

59. Cal.—Rorke v. San Francisco Stock & Exchange Bd., 33 P. 881, 99 Cal. 196.
23 C.J. p 268 note 52 [a]-[c].
Closing contracts with insolvent member
Mass.—Brickley v. Wrenn, 146 N.E. 797, 252 Mass. 16.

60. Cal.—Christenson v. Cudahy Packing Co., 247 P. 207, 198 Cal. 685.
Ga.—Savannah Cotton Exch. v. State, 54 Ga. 668.

61. Cal.—Christenson v. Cudahy Packing Co., 247 P. 207, 198 Cal. 685.

62. Ill.—Ryan v. Cudahy, 41 N.E. 760, 157 Ill. 108, 48 Am.S.R. 305, 49 L.R.A. 353.
23 C.J. p 269 note 58.

63. Wis.—Bartlett v. L. Bartlett & Son Co., 93 N.W. 473, 116 Wis. 450.

64. Mo.—Moffatt v. Kansas City Bd. of Trade, App., 111 S.W. 894, reversed on other grounds 157 S.W. 579, 250 Mo. 168.
23 C.J. p 269 note 60.

65. Ill.—Thorne v. Prentiss, 83 Ill. 99.
23 C.J. p 269 note 68.

66. N.Y.—Heath v. Gold Exch., 7 Abb.Pr.,N.S., 251, 38 How.Pr. 168.

67. Ill.—Ryan v. Lamson, 44 Ill. App. 204, affirmed 39 N.E. 979, 153 Ill. 530.

68. Mo.—C. H. Albers Co. v. Spen-

doubtful construction of a by-law.[69] The courts will not review an adjudication of an exchange arbitration committee further than to determine whether it was regularly and fairly made.[70]

(2) Limitation of Action

Exchange rules postponing right to commence an action between members also postpone accrual of the cause of action within general statutes of limitation.

Rules postponing the right to commence an action between members also postpone the accrual of the cause of action within statutes of limitation.[71]

(3) Pleading

General rules apply to actions between members of an exchange.

The rules of pleading in general, see the C.J.S. title Pleading §§ 1–602, also 49 C.J. p 30 note 2–p 886 note 58, apply to actions between members of an exchange.[72]

(4) Evidence

General rules of evidence apply in actions between members of an exchange.

In an action on a contract between members, the constitution and by-laws are competent evidence.[73] Where defendant relied on an award which had been reversed on appeal to the general committee, he could not introduce evidence of a judgment of the board of managers, which had no control over the arbitrators, finding plaintiff guilty of misconduct in procuring the reversal.[74] Where the rules make oral contracts of a broker for the purchase of stock binding on him, although void under the statute of frauds, it will not be presumed that the broker received and paid for stock orally purchased by him because of a receipt by him of margin from his customer after the stock was ordered.[75]

The rules as to the weight and sufficiency of evidence in general, see Evidence §§ 1016–1052, apply to actions between members of exchanges.[76]

§ 11. Rights, Duties, and Liabilities of Exchanges as to Third Persons

a. In general
b. Determination of exchange tribunal

a. In General

The indirect operation of exchange rules on nonmembers does not ordinarily entitle them to relief as against exchanges or their members.

Ordinarily nonmembers have no right to relief against the enforcement of rules of the exchange which operate directly on the members and only affect nonmembers indirectly;[77] nor can they avail themselves of such rules as against a member,[78] particularly as regards rules which are not mandatory.[79] So in the absence of some ulterior motive of the exchange exclusively directed against a third person it may not ordinarily be liable for loss resulting to such person as a result of exchange action in accordance with its by-laws, rules, and regulations.[80] A nonmember engaged in a proper and lawful business may, however, be entitled to relief from the operation of an exchange rule which, although operating directly on members, in effect threatens such business with destruction contrary to law.[81] Moreover, nonmembers may be entitled to a remedy against members for noncompliance with exchange rules made for

cer, 103 S.W. 523, 205 Mo. 105, 11 L.R.A.,N.S., 1003.

69. N.Y.—People v. New York Cotton Exch., 8 Hun 216.

70. Ill.—Alton Grain Co. v. Norton, 105 Ill.App. 385.
23 C.J. p 269 note 65.

71. Minn.—Mohler v. Minneapolis Chamber of Commerce, 153 N.W. 617, 130 Minn. 288.
23 C.J. p 269 note 69.

72. Mo.—Albers v. Moffitt, App., 187 S.W. 903.
23 C.J. p 269 note 71.

73. N.Y.—Peabody v. Speyers, 56 N. Y. 230.

74. Pa.—Herron v. Henry, 89 A. 590, 242 Pa. 494.

75. N.Y.—Brownson v. Chapman, 63 N.Y. 625.

76. **Evidence held sufficient** to show that a member had a fair trial on a claim of lien by another member before the board of directors.—Mohler v. Minneapolis Chamber of Commerce, 153 N.W. 617, 130 Minn. 288.

Evidence held insufficient

(1) Evidence held insufficient to show conspiracy to corner wheat market invalidating settlement of wheat sale contract.—Albers v. Moffitt, Mo.App., 187 S.W. 903.

(2) Evidence held insufficient to show that member of grain and cotton exchange was allegedly coerced to submit dispute to arbitration by knowledge that he would lose his membership in exchange if he refused.—Smith v. Gladney, Civ.App., 70 S.W.2d 342, reversed on other grounds 98 S.W.2d 351, 128 Tex. 354.

77. Ill.—American Livestock Co. v. Chicago Livestock Exch., 32 N.E. 274, 143 Ill. 210, 36 Am.S.R. 385, 18 L.R.A. 190—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill.App. 71.
23 C.J. p 270 note 79.

Reason for rule

The injury, if any, resulting to such nonmembers is merely the indirect or secondary consequence of such rule operating as a remote rather than a proximate cause of such injury.—Downes v. Bennett, 66 P. 623, 63 Kan. 653, 88 Am.S.R. 256, 55 L.R.A. 560—23 C.J. p 270 note 79 [a].

Constitution, by-laws, and rules of exchange as binding on nonmembers see supra § 3.

78. U.S.—Jacobs v. Hyman, C.C.A. Tex., 286 F. 346.

79. U.S.—Jacobs v. Hyman, supra.

80. N.Y.—Garcia Sugars Corporation v. New York Coffee & Sugar Exchange, 7 N.Y.S.2d 532.

81. N.Y.—Pirnie Simons & Co. v.

the protection of such nonmembers.[82] Further, exchange rules may become the basis of a binding custom in dealings between members and nonmembers.[83]

In the absence of its undertaking to be bound an exchange may not be bound by an agreement made with third persons on behalf of members for whose benefit such agreement is entered.[84]

The doctrine of respondeat superior applies to questions as to liability of an exchange for tort.[85]

Excluding nonmembers from premises. An exchange has the right to exclude from its premises persons who are not members and have entered thereon against its wishes.[86]

Arbitration under rules of exchange. An agreement to arbitrate disputes under the rules of an exchange does not necessarily require the application of such rules as are not within the contemplation of the parties or involved in the arbitration agreement.[87]

Assignments for benefit of creditors. In the absence of any conflict with, or violation of, statutory law the courts are not inclined to interfere with the practice of local exchanges in procuring assignments, executed in good faith, for the benefit of creditors generally.[88]

b. Determination of Exchange Tribunal

The determination of an exchange tribunal in enforcing its own rules and regulations is usually regarded as conclusive as to their construction and as to matters within its jurisdiction.

In consonance with the policy of the courts not to interfere with the enforcement by an exchange of its own constitution, rules, or by-laws, see supra § 3, or on behalf of exchange members, see supra § 8, the courts will not, ordinarily, entertain jurisdiction of an action by a third person to review the determination of an exchange tribunal in enforcing its rules and regulations.[89] Although by-laws requiring arbitration between a member and a nonmember may be beyond the powers of the exchange, they are not illegal in a sense that defendant would not be bound after having submitted himself to the jurisdiction created thereby.[90]

A member is not bound by the determination of an exchange tribunal in proceedings involving third persons which are not conducted in accordance with the constitution of such exchange.[91] A nonmember cannot be bound by proceedings of a committee of an exchange where he is not given notice or an opportunity to be heard.[92] Even where nonmembers subject themselves to the rules of the exchange by their course of dealing, they are not bound by an adjudication of a committee of the exchange beyond the jurisdiction given by its by-laws or constitution.[93]

That a member of the bodies to which appeals are taken within the exchange was one of the arbitration committee which in the first instance decided adversely to a member does not affect his qualification.[94]

On an appeal in an arbitration proceeding under the rules of the exchange no interested party is of right entitled to be present.[95] In court proceedings to review arbitration proceedings between a member and a nonmember, the presumption is that the evidence sustained the decisions of the tribunal within the exchange.[96]

The dismissal of a claim against a nonmember

Whitney, 259 N.Y.S. 193, 144 Misc. 812.

82. Iowa.—Watkins Grain Co. v. Fraser Smith Co., 267 N.W. 115, 221 Iowa 1164.

Rule requiring written authorization for sale of futures

Iowa.—Watkins Grain Co. v. Fraser Smith Co., supra.

83. N.Y.—Jennie Clarkson Home for Children v. Union Pac. R. Co., 87 N.Y.S. 348, 92 App.Div. 491, affirmed 74 N.E. 1118, 182 N.Y. 507.
23 C.J. p 270 note 81.

84. U.S.—In re Tidewater Coal Exch., D.C.N.Y., 292 F. 225, affirmed, C.C.A., 296 F. 701, certiorari denied Davis v. Coyle, 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868.

85. Minn.—Melady v. South St. Paul Live Stock Exch., 171 N.W. 806, 142 Minn. 194.
23 C.J. p 270 note 83.

86. Mo.—Babcock v. Merchants' Exch., 60 S.W. 732, 159 Mo. 381.
23 C.J. p 270 note 78.

87. N.Y.—Wheat Export Co. v. New Century Co., 173 N.Y.S. 679, 185 App.Div. 723.
23 C.J. p 270 note 84.

88. Cal.—Brainard v. Fitzgerald, 44 P.2d 336, 3 Cal.2d 157.

89. La.—Walsh v. New Orleans Cotton Exchange, 177 So. 68, 188 La. 338.

Action by employee for wrongful discharge

La.—Walsh v. New Orleans Cotton Exchange, supra.

90. N.Y.—National League Commn. Merchants v. Hornung, 132 N.Y.S. 871, 148 App.Div. 355.
23 C.J. p 271 note 86.

91. Cal.—Milton G. Cooper & Son v. William R. Davis & Bro., 2 P.2d 823, 116 Cal.App. 468.

Settlement

A member was not, under the text rule, bound by the determination of an unincorporated merchants' association committee which made settlement with common debtor of members without full investigation contemplated by constitution.—Milton G. Cooper & Son v. William R. Davis & Bro., supra.

92. N.Y.—Morris v. Grant, 34 Hun 377.
23 C.J. p 271 note 87.

93. N.Y.—Morris v. Grant, supra.

94. N.Y.—National League Commn. Merchants v. Hornung, 132 N.Y.S. 871, 148 App.Div. 355.

95. N.Y.—National League Commn. Merchants v. Hornung, supra.

96. N.Y.—National League Commn. Merchants v. Hornung, supra.

is a sufficient compliance with a rule requiring a decision as to its justice.[97]

§ 12. —— Quotations

a. In general
b. Right to discriminate

a. In General

Except as modified by public regulations, when applicable, an exchange has a property right in its quotations.

Except as modified or limited by public regulation when the exchange is regarded as engaged in a business affecting the public interest, see supra § 2, until voluntary publication of its market quotations an exchange has a right of property in them.[98] It may accordingly withhold them entirely from the public,[99] or, if it elects to permit their dissemination, it may lawfully do so.[1] It does not lose its right by communicating the quotations to persons, even if many, in confidential relations to itself, under a contract not to make them public.[2] It may impose on its licensees such conditions regarding their use as are necessary to prevent the use of the quotations for unlawful purposes.[3] Publications in breach of contract do not affect the rights of the exchange.[4] The quotations of an exchange engaged in a business affecting a public interest are subject to reasonable public regulations.[5]

The exchange is entitled to the protection of its property right, in its quotations, in equity,[6] subject to the usual rules of remedy and procedure,[7] even though the quotations are used for unlawful as well as for lawful purposes,[8] and a telegraph company to whom the exchange sells quotations for distribution is also entitled to protection.[9]

b. Right to Discriminate

The right of an exchange to discriminate in authorizing use of its quotations depends on whether they affect the public interest.

Where it is not a public corporation,[10] and its quotations are not impressed with a trust in favor of the public,[11] an exchange may give out its quotations only to such persons as it sees fit to nominate, excluding all others,[12] and no rule of public policy is violated by discrimination in the nomination of licensees.[13] Where, however, an exchange is engaged in a business to which the interest of the public attaches it may be subject to public regulations prohibiting discrimination in authorizing use of its quotations,[14] and there are cases to the effect that a public interest attaches to the quotations, where they are given out, which entitles nonmembers to receive them for a lawful purpose without unjust discrimination, and on the same terms given by the exchange to others.[15] At any rate, it may be within the province of the

97. N.Y.—People ex rel. Huber Co. v. Manufacturers' & Dealers' Protective Ass'n, 104 N.Y.S. 575, 54 Misc. 332.

98. U.S.—Moore v. New York Cotton Exch., C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, and affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.
Mass.—Western Union Telegraph Co. v. Foster, 113 N.E. 192, 224 Mass. 365, reversed on other grounds 38 S.Ct. 438, 247 U.S. 105, 62 L.Ed. 1006.
23 C.J. p 271 note 95.

99. U.S.—Moore v. New York Cotton Exch., C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, and affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.
23 C.J. p 271 note 96.

1. U.S.—Cleveland Tel. Co. v. Stone, C.C.Ill., 105 F. 794.
23 C.J. p 271 note 97.

2. U.S.—Moore v. New York Cotton Exch., C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, and affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.
23 C.J. p 271 note 98.

3. U.S.—Moore v. New York Cotton Exch., C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, and affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.
23 C.J. p 271 note 99.

4. U.S.—Chicago Bd. of Trade v. Christie Grain & Stock Co., Mo., 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.

5. U.S.—Chamber of Commerce of Minneapolis v. Federal Trade Commission, C.C.A., 13 F.2d 673.

6. U.S.—Chicago Bd. of Trade v. Christie Grain & Stock Co., Mo., 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.
23 C.J. p 272 note 2.

7. U.S.—Chicago Bd. of Trade v. Ellis, C.C.Mich., 122 F. 319.
23 C.J. p 272 note 3 [a]-[e].

8. U.S.—Chicago Bd. of Trade v. Christie Grain & Stock Co., Mo., 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.
C.J. p 273 note 4.

9. U.S.—Illinois Commn. Co. v. Cleveland Tel. Co., Ill., 119 F. 301, 56 C.C.A. 205.
23 C.J. p 273 note 5.

10. U.S.—Metropolitan Grain & Stock Exch. v. Chicago Bd. of Trade, C.C.Ill., 15 F. 847, 11 Biss. 531.

11. U.S.—Chicago Bd. of Trade v. Christie Grain & Stock Co., C.C. Mo., 116 F. 944, reversed on other grounds 125 F. 161, 61 C.C.A. 11, affirmed 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.
N.Y.—Matter of Renville, 61 N.Y.S. 549, 46 App.Div. 37.
23 C.J. p 273 note 8.

12. U.S.—Moore v. New York Cotton Exchange, N.Y., 46 S.Ct 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370, affirming, C.C.A., 290 F. 61, which affirmed, D.C., 291 F. 681.
Mass.—Western Union Telegraph Co. v. Foster, 113 N.E. 192, 224 Mass. 365, reversed on other grounds 38 S.Ct. 438, 247 U.S. 105, 62 L.Ed. 1006.
23 C.J. p 273 note 6.

13. N.Y.—Commercial Tel. Co. v. Smith, 47 Hun 494.

14. U.S.—Chamber of Commerce of Minneapolis v. Federal Trade Commission, C.C.A., 13 F.2d 673.

15. U.S.—Chicago Bd. of Trade v. Hadden-Krull Co., C.C.Wis., 109 F. 705.
23 C.J. p 273 note 10.

exchange to prohibit the use of its quotations for certain purposes.[16] An exchange cannot be compelled to furnish its quotations for an unlawful use.[17]

§ 13. Actions by or against Exchanges

General rules apply in actions by or against exchanges.

General rules apply to actions by or against exchanges, such as rules relating to process,[18] parties,[19] evidence,[20] or trial.[21]

§ 14. Dissolution

General rules are applicable to the dissolution of exchanges.

As in the case of private corporations generally, see Corporations §§ 1638–1673, an incorporated exchange may be dissolved by the court either at the suit of the state[22] or at the suit of a stockholder.[23] Dissolution may be decreed on a ground prescribed by statute[24] or for abuse of franchise.[25]

Rules governing dissolution of associations generally, see Associations §§ 9, 10, are applicable to the dissolution of unincorporated exchanges.[26]

EXCHEQUER. That department of the English government which has charge of the collection of the national revenue.[1]

Exchequer bill. In England a kind of bill of credit which is issued by the officers of the exchequer, when a temporary loan is necessary to meet the exigencies of government.[2]

Exchequer division. A division of the English high court of justice, to which the special business of the court of exchequer was specially assigned by section 34 of the Judicature Act of 1873.[3]

EXCISE. The word "excise," as the name implies, means something cut off.[4] Originally it was some-

16. Ill.—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill.App. 71.

Advertising or solicitation of business

An exchange may properly prohibit its members from using quotations for advertising purposes or the solicitation of business.—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, supra.

17. U.S.—Chicago Bd. of Trade v. Donovan Commn. Co., Mo., 145 F. 31, 76 C.C.A. 16.
23 C.J. p 273 note 11.

18. **Service**

Los Angeles Stock Exchange is an "association engaged in business," within meaning of statute permitting service on unincorporated association by service on members.—Jardine v. Superior Court in and for Los Angeles County, 2 P.2d 756, 213 Cal. 301, 79 A.L.R. 291, appeal dismissed Jardine v. Superior Court of California in and for Los Angeles County, 52 S.Ct. 197, 284 U.S. 592, 76 L.Ed. 510, and superseding in part Jardine v. Superior Court of Los Angeles County, App., 293 P. 117.

19. **Joinder**

Stock commission company may be properly joined with its officers holding memberships in exchange in an action against an exchange, in seeking relief against exchange rule against radio advertising with market reports.—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill.App. 71.

20. **Burden of proof**

(1) One suing an exchange for unlawful interference with contractual rights has the burden of proving his cause of action.—Garcia Sugars Corporation v. New York Coffee & Sugar Exchange, 7 N.Y.S.2d 532.

(2) On application by a nonmember for an injunction to restrain an exchange and its members from tendering certain commodities in performance of contract, movant has the burden of showing that he is entitled to such relief.—Osmond v. New York Cotton Exchange, 230 N.Y.S. 355, 132 Misc. 659.

Weight and sufficiency

(1) In action against exchange, evidence held sufficient to sustain determination of exchange clearing house committee as to a matter in issue.—Lewis Mears Co. v. Chicago Mercantile Exch., C.C.A.Ill., 1 F.2d 281.

(2) Evidence held insufficient to establish claim of applicant for injunction against an exchange.—Osmond v. New York Cotton Exchange, 230 N.Y.S. 355, 132 Misc. 659.

(3) Evidence in an action against an exchange held insufficient to sustain claim to a fund on the ground of mistake.—Diamond Coal Co. v. Compagne Navigazione Sota y Aznar, C.C.A.Md., 295 F. 278, affirming, D.C. Compagne Navigazione Soto y Aznar v. Diamond Fuel Co., 288 F. 564.

21. **Question of law or fact**

An action against an exchange for unlawful interference with contractual rights by issuance of an edict in accordance with exchange by-laws and regulations has been held not to present a question of fact for determination by jury.—Garcia Sugars Corporation v. New York Coffee & Sugar Exchange, 7 N.Y.S.2d 532.

22. Ill.—People v. Chicago Live Stock Exch., 48 N.E. 1062, 170 Ill. 556, 62 Am.S.R. 404, 39 L.R.A. 373.

23. N.Y.—Hitch v. Hawley, 30 N.E. 401, 132 N.Y. 212, affirming 8 N.Y.S. 319, 15 Daly 413.

24. N.Y.—Hitch v. Hawley, supra.
23 C.J. p 249 note 88.

25. Ill.—People v. Chicago Live Stock Exch., 48 N.E. 1062, 170 Ill. 556, 62 Am.S.R. 404, 39 L.R.A. 373.
23 C.J. p 249 note 89.

26. **Distribution of assets**

U.S.—New River Collieries Co. v. Snider, C.C.A.N.Y., 286 F. 667, affirming, D.C., 284 F. 287.

Del.—Read v. Tidewater Coal Exchange, 118 A. 304, 13 Del.Ch. 253.

1. Black L.D.

So named from the chequered cloth, resembling a chess-board, which anciently covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters."—Black L.D., citing 3 Blackstone Comm. p 44.

2. **First termed** "tallies of loan" and "orders of repayment" charged on the credit of the exchequer in general, and made assignable from one person to another.—Briscoe v. Kentucky Bank, Ky., 11 Pet., U.S., 257, 328e, 9 L.Ed. 709, 928.

3. **Later merged** in the queen's bench division from and after 1881, by order in council under § 31 of that act.—Black L.D.
See also Courts § 11 text and notes 40, 41.

4. U.S.—Northern Commercial Co., of Alaska v. Territory of Alaska, C.C.A.Alaska, 289 F. 786, 787.

thing cut off from the price paid on a sale of goods, as a contribution to the support of government;[5] but it has come to have a broader scope, as meaning every form of taxation which is not a burden laid directly on persons or property, or every form of charge imposed by public authority for the purpose of raising revenue on the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.[6] In the subjoined note examples are given of what, in particular connections, the term has been held to include and not to include.[7]

For further uses of the term as applied in the law of taxation see the C.J.S. titles Internal Revenue, also 33 C.J. p 278 notes 7, 8, p 291 note 8–p 294 note 30; and Taxation § 19, also 61 C.J. p 154 note 84–p 156 note 95, discussing power to impose; § 47, also 61 C.J. p 144 notes 85–88, as double taxation; §§ 121–124, also 61 C.J. p 242 note 74–p 244 note 3, as to persons or property subject to excise tax; § 134, also 61 C.J. p 252 note 36–p 259 note 31, with reference to corporate franchises and privileges.

EXCITEMENT. The act of exciting, or the state of having increased action; that which excites or rouses; that which moves, stirs, or induces action; agitation; impulsion. Also a motive.[8] The term has been distinguished from "anger" see 3 C.J.S. p 1073 note 67.

EXCLUDE. A word in common usage,[9] defined as meaning to shut out,[10] whether by thrusting out or by preventing admission; to thrust out or expel; to eject, reject, or extrude;[11] to debar, dispossess, or prohibit;[12] to preclude;[13] also to except, or

Mass.—In re Opinion of the Justices, 85 N.E. 545, 546, 196 Mass. 603.

5. Ark.—Buckstaff Bath House Co. v. McKinley, 127 S.W.2d 802, 806, 198 Ark. 91.
Idaho.—Idaho Gold Dredging Co. v. Balderston, 78 P.2d 105, 112, 58 Idaho 692—Diefendorf v. Gallet, 10 P.2d 307, 313, 51 Idaho 619.
Ky.—City of Louisville v. Churchill Downs, 102 S.W.2d 10, 13, 267 Ky. 339.
Mass.—In re Opinion of the Justices, 85 N.E. 545, 546, 196 Mass. 603.

6. Ark.—Buckstaff Bath House Company v. McKinley, 127 S.W.2d 802, 806, 198 Ark. 91.
Idaho.—Idaho Gold Dredging Co. v. Balderston, 78 P.2d 105, 112, 58 Idaho 692—Diefendorf v. Gallet, 10 P.2d 307, 313, 51 Idaho 619.
With relation to internal revenue and as distinguished from other terms see the C.J.S. title Internal Revenue § 1, also 33 C.J. p 278 notes 7–9.

Similarly expressed

"The term 'excise' was said in President, etc., of Portland Bank v. Apthorp, 12 Mass. 252, 256, to be 'of very general signification, meaning tribute, custom, tax, tollage, or assessment.'"—In re Opinion of the Justices, 186 N.E. 490, 491, 282 Mass. 619.

7. **Held to be "excises"**

(1) A capital stock tax.—United States Steel Products Co. v. U. S., D.C.N.J., 36 F.Supp. 368, 375.

(2) Estate or succession tax.
U.S.—Chickering v. Commissioner of Internal Revenue, C.C.A., 118 F.2d 254, 258.
Mass.—Boston Safe Deposit & Trust Co. v. Commissioner of Corporations and Taxation, 33 N.E.2d 704, 707, 309 Mass. 37—Beals v. Magenis, 31 N.E.2d 20, 22, 307 Mass. 547.
Mont.—State v. Jones, 261 P. 356, 358, 80 Mont. 574, 60 A.L.R. 551.

(3) The franchise tax imposed on a foreign corporation.—Hollingsworth & Whitney Co. v. State, Ala., 1 So.2d 387, 388.

(4) Gasoline taxes imposed on the business of selling or dealing in gasoline.
Minn.—Arneson v. W. H. Barber Co., 297 N.W. 335, 338.
Ohio.—City of Cincinnati v. Cincinnati Oil Works Co., 175 N.E. 699, 700, 123 Ohio St. 448.

(5) Gross income tax.—Storen v. J. D. Adams Mfg. Co., 7 N.E.2d 941, 944, 212 Ind. 343.

(6) A gross premium tax imposed on insurance companies.
Cal.—Camden Fire Ins. Ass'n v. Johnson, 109 P.2d 447, 449, 42 Cal. App.2d 528.
Mass.—Commissioner of Insurance v. Commonwealth Mut. Liability Ins. Co., 32 N.E.2d 231, 232, 308 Mass. 385.

(7) A motor vehicle license.—Ziemer v. Babcock & Wilcox Co., D.C. Nev., 22 F.Supp. 384, 385.

(8) A sales or use tax levied by city ordinance.—Mouledoux v. Maestri, 2 So.2d 11, 19, 197 La. 525.

(9) A sales tax imposed by a state excise revenue act.—O'Neil v. United Producers & Consumers Co-op., Ariz., 113 P.2d 645, 647.

(10) A tax imposed by the Social Security Act.—Griswold v. U. S., D. C.Mass., 36 F.Supp. 714, 717.

(11) A tax imposed on foreign corporations, measured by property and income which may fairly be allocated to business conducted in the state.—Commissioner of Corporations & Taxation v. Ford Motor Co., 33 N.E.2d 318, 322, 308 Mass. 558.

(12) A tax on employers under the Unemployment Compensation Act.—Friedman v. American Surety Co. of New York, Tex., 151 S.W.2d 570, 576.

(13) A tax on the use of personal property.
Cal.—Brandtjen & Kluge v. Fincher, Super., 111 P.2d 979, 980.
Wash.—City of Spokane v. State, 89 P.2d 826, 832, 198 Wash. 682.

Held not to be "excises"

(1) A graduated charge for filing certificate of increase of capital stock is only a "fee" and not an "excise" tax.—Pacific Gas & Electric Co. v. State, 6 P.2d 78, 81, 214 Cal. 369.

(2) A sea-wall tax levied by a county board of supervisors.—U. S. Fidelity & Guaranty Co. v. Rice, 152 So. 832, 834, 169 Miss. 75.

Phrases construed

(1) "Excise law" see the C.J.S. title Internal Revenue § 1, also 33 C.J. p 278 note 9.

(2) "Excise tax measure," as distinguished from "police measure."—Ziemer v. Babcock & Wilcox Co., D.C.Nev., 22 F.Supp. 384, 385.

8. Okl.—Morris v. Territory, 99 P. 760, 768, 1 Okl.Cr. 617.

9. N.Y.—Board of Education of Union Free School Dist. No. 1 of Town of Queensbury v. Robinson, 196 N.Y.S. 554, 555, 119 Misc. 496.

10. U.S.—Palmer v. Warren Ins. Co., C.C.Mass., 18 F.Cas.No.10,698, 1 Story 360, 365.
Or.—Portland v. Meyer, 52 P. 21, 22, 32 Or. 368, 67 Am.S.R. 538.

11. Or.—Portland v. Meyer, supra.

12. N.Y.—Board of Education of Union Free School Dist. No. 1 of Town of Queensbury v. Robinson, 196 N.Y.S. 554, 555, 119 Misc. 496, citing **Corpus Juris.**
Or.—Portland v. Meyer, 52 P. 21, 22, 32 Or. 368, 67 Am.S.R. 538.

13. Idaho.—Lindsay v. People, 1 Idaho 438, 456.

reserve.[14] In a particular connection, the word has been held to mean debarred, precluded, or hindered from entering into or holding, rather than an ouster from or dispossession.[15]

The term is frequently used as equivalent to "except," but it has also been distinguished therefrom see 32 C.J.S. p 1149 note 54.

Excluded. In the sense of shutting out, the term has been limited by the context to mean nearly, not absolutely, excluded.[16]

It has been held equivalent to "disallowed" see 26 C.J.S. p 1328 note 83.

Excluding. The customary meaning of the word has been held not to differ greatly from "prohibiting" or "prohibited from."[17]

It has also been held synonymous with "excepting" see 32 C.J.S. p 1150 note 60, and "reserving."[18]

EXCLUSA. See Ex 32 C.J.S. p 1143 note 59 (7).

EXCLUSION. The act of excluding or shutting out, whether by thrusting out or by preventing admission; a debarring; ejection; extension; prohibition; rejection.[19] In the plural, the word has been defined as meaning things barred and not admitted.[20] The term has been distinguished from "deportation" see 26 C.J.S. p 721 note 60, also Aliens §§ 33–120, and from "exceptions" see Exception 32 C.J.S. p 1152 note 98.

EXCLUSIVE. The word is derived from "ex," out, and "claudere," to shut,[21] and precludes the idea of coexistence.[22] In its usual and generally accepted sense, as given by lexicographers, and in the ordinary speech of the people it means possessed to the exclusion of others;[23] possessed and enjoyed to the exclusion of others; debarred from participation or enjoyment;[24] not including, admitting, or pertaining to any other; pertaining or appertaining to the subject alone; hence undivided or sole;[25] not to be taken into account;[26] over and above;[27] individual.[28]

The term has been held equivalent to, or synonymous with, "only"[29] and "sole."[30] It has been compared with, or distinguished from "cumulative"[31] and "inclusive."[32]

As used in defining adverse possession see Adverse Possession § 47, and easements see Easements § 15.

Phrases employing the word are collected in the subjoined note.[33] Other phrases as to which more

14. N.H.—Smith v. Furbish, 44 A. 398, 406, 68 N.H. 123, 47 L.R.A. 226.

15. Idaho.—Lindsay v. People, 1 Idaho 438, 456.

16. U.S.—Long v. Pope Mfg. Co., C.C.Mass., 70 F. 855, 858.

Phrase construed

"Excluded from a vested or contingent interest in."—Board of Education of Union Free School Dist. No. 1 of Town of Queensbury v. Robinson, 196 N.Y.S. 554, 555, 119 Misc. 496.

17. Mass.—Parker v. China Mut. Ins. Co., 41 N.E. 267, 164 Mass. 237, 238.
See also the C.J.S. title Insurance § 295, and 38 C.J. p 1026 note 10 [a] (5).

"Excluding commercial delivery," as not prohibiting incidental use for delivery but only habitual use for such purpose.—Firemen's Ins. Co. of Newark v. Rye, 254 S.W. 465, 466, 160 Ark. 212.
See also the C.J.S. title Insurance § 512, and 28 C.J. p 205 note 39.

18. N.H.—Smith v. Furbish, 44 A. 398, 406, 68 N.H. 123.

19. Or.—City of Portland v. Meyer, 52 P. 21, 22, 32 Or. 368, 67 Am.S.R. 538.

20. N.H.—Raymond v. Great American Indemnity Co., 163 A. 713, 716, 86 N.H. 93.

21. Mont.—Davenport v. Kleinschmidt, 13 P. 249, 255, 6 Mont. 502.
23 C.J. p 274 note 25.

22. Miss.—Dunn Const. Co. v. Craig, 2 So.2d 166, 173.
N.Y.—People v. Fuchs, 152 N.Y.S. 445, 446, 166 App.Div. 811.

23. Ill.—Rogers Park Water Co. v. Chicago, 131 Ill.App. 35, 53.
Miss.—Dunn Const. Co. v. Craig, 2 So. 2d 166, 173.
Pa.—Commonwealth v. Superintendent House of Correction, 64 Pa.Super. 613, 623.

24. Neb.—Omaha Y. M. C. A. v. Douglas County, 83 N.W. 924, 926, 60 Neb. 642, 52 L.R.A. 123.
Pa.—Commonwealth v. Superintendent House of Correction, 64 Pa. Super. 613, 623.

25. N.Y.—Fellows v. Seymour, 13 N.Y.S.2d 803, 805, 171 Misc. 833.
23 C.J. p 274 notes 30, 33, 35, 36.

26. Pa.—Coale v. Smith, 4 Pa. 376, 381.

27. Pa.—Coale v. Smith, supra—Waller v. Gibbs, 1 Yeates 255, 259.

28. Pa.—Commonwealth v. Superintendent House of Correction, 64 Pa. Super. 613, 623.

29. U.S.—Bacon v. Federal Reserve Bank of San Francisco, D.C.Wash., 289 F. 513, 519.

30. Mich.—Webb Academy v. Grand Rapids, 177 N.W. 290, 296, 209 Mich. 523.

31. Ill.—Kosicki v. S. A. Healy Co., 38 N.E.2d 525, 528, 312 Ill.App. 307.

32. **Opposed to "inclusive"**
Ill.—Bass v. Pease, 79 Ill.App. 308, 318.
N.J.—Dillemuthe v. Efinger, 20 A.2d 435, 436, 126 N.J.Law 579.
Pa.—Commonwealth v. Superintendent House of Correction, 64 Pa. Super. 613, 623.

33. **"Exclusive jurisdiction"**
(1) Discussed generally.
N.Y.—People ex rel. Folk v. McNulty, 9 N.Y.S.2d 380, 386, 256 App.Div. 82—People ex rel. Kawiecki v. Carhart, 13 N.Y.S.2d 293, 294, 170 Misc. 894.
Tex.—Webb v. Chicago, R. I. & G. Ry. Co., Civ.App., 136 S.W.2d 245, 251.
23 C.J. p 275 note 48.
See also Courts § 18.

(2) As not meaning all jurisdiction of lands given to United States by state.—Buttery v. Robbins, Va., 14 S.E.2d 544, 548.

(3) As referring to police jurisdiction and not intended to deprive a state of its prerogatives of sovereignty.—Clarke v. Ackerman, 278 N.Y.S. 75, 78, 243 App.Div. 446.

recent adjudications have not been found see 23 C.J. p 274 note 41–p 275 note 76.

EXCLUSIVELY. Strictly speaking, a word of limitation,[34] restriction and exclusion,[35] although it is sometimes inadvertently used, not as a word of limitation, but as a word of emphasis to draw particular attention to the matter referred to.[36] It has been defined as meaning apart from all others;[37] in a manner to exclude;[38] to, or with, the exclusion of all others; without admission of others to participation.[39] In a particular connection, the word is given a practical construction as meaning substantially all or for the greater part.[40]

The term has been held equivalent to, or synony-

(4) Distinguished from "final jurisdiction."—Small v. State, Ohio, 192 N.E. 790, 791, 128 Ohio St. 548.

Other phrases construed

(1) "Exclusive agency" and "exclusive agent" see Agency §§ 114 b (1) (b), 161 b, Brokers §§ 20, 94.

(2) "Exclusive control" and other phrases employing these words see Control 18 C.J.S. p 31 note 19–p 32 note 22.

(3) "Exclusive easement" as unusual interest amounting almost to a conveyance of the fee.—City of Pasadena v. California-Michigan Land & Water Co., Cal., 110 P.2d 983, 985, 133 A.L.R. 1186.

(4) "Exclusive franchise," as applied to a ferry lease or license.—Chamberlain Ferry & Cable Pontoon Bridge Co. v. King, 170 N.W. 145, 146, 41 S.D. 246.

(5) "Exclusive license" and "exclusive licensee" see the C.J.S. titles Licenses § 10, also 37 C.J. p 183 notes 19–22, and Patents §§ 250, 314, also 48 C.J. p 268 notes 76–81, p 339 notes 98–8.

(6) "Exclusive moving picture rights," held to include talking motion pictures.—L. C. Page & Co. v. Fox Film Corporation, C.C.A.N.Y., 83 F.2d 196, 199.

(7) "Exclusive of," as distinguished from "in addition to."—In re Daggett's Estate, 9 N.Y.S. 652, 654, 2 Conn.Surr. 230.

(8) "Exclusive of any outbuildings."—Dillingham v. Kahn, 67 S.W. 2d 735, 737, 188 Ark. 759.

(9) "Exclusive of interest and costs."—Athan v. Hartford Fire Ins. Co., C.C.A.N.Y., 73 F.2d 66, 67—23 C. J. p 275 note 55.

(10) "Exclusive original jurisdiction in all cases in equity."—In re Niernsee's Estate, Fla., 2 So.2d 737, 739.

(11) "Exclusive ownership."

N.J.—U. S. Casualty Co. v. Timmerman, 180 A. 629, 630, 118 N.J.Eq. 563.

Wis.—Comstock v. Boyle, 128 N.W. 870, 872, 144 Wis. 180, 186.

(12) "Exclusive possession."

U.S.—Weisman v. U. S., C.C.A.Mo., 1 F.2d 696, 698.

Ky.—Whittaker v. Farmers' Nat. Bank of Somerset, 36 S.W.2d 18, 19, 237 Ky. 596.

Pa.—Parks v. Pennsylvania R. Co., 152 A. 682, 684, 301 Pa. 475.

Tex.—W. T. Carter & Bro. v. Holmes, 113 S.W.2d 1225, 1226, 131 Tex. 365.

Utah.—State v. Crawford, 201 P. 1030, 1032, 59 Utah 39.

23 C.J. p 275 note 61.

(13) "Exclusive power."

Me.—Moore v. Emery, 18 A.2d 781, 788, 792.

N.Y.—In re Skidmore's Estate, 266 N. Y.S. 312, 318, 148 Misc. 569.

23 C.J. p 275 note 62.

(14) "Exclusive privilege or immunity."—Carney v. Lowe, 9 A.2d 418, 419, 336 Pa. 289.

(15) "Exclusive remedy" contrasted with "cumulative remedy."—Kosicki v. S. A. Healy Co., 38 N.E.2d 525, 528, 312 Ill.App. 307.

(16) "Exclusive right."

Mass.—American Telephone & Telegraph Co. of Massachusetts v. McDonald, 173 N.E. 502, 503, 273 Mass. 324.

Wash.—Downie v. City of Renton, 298 P. 454, 457, 162 Wash. 181—Sunnyside Land & Investment Co. v. Bernier, 205 P. 1041, 1042, 119 Wash. 386, 20 A.L.R. 1261.

23 C.J. p 275 note 67.

(17) "Exclusive sale."

Conn.—Harris v. McPherson, 115 A. 723, 724, 97 Conn. 164, 24 A.L.R. 1530.

S.D.—Lewis v. Jones, 178 N.W. 1001, 1002, 43 S.D. 282.

Wis.—Roberts v. Harrington, 169 N. W. 603, 604, 168 Wis. 217, 10 A.L. R. 810.

23 C.J. p 275 note 73.

(18) "Exclusive selling agency contract."—White Co. v. W. P. Farley & Co., 292 S.W. 472, 474, 219 Ky. 66.

(19) "Exclusive statute."—Dillemuthe v. Efinger, 20 A.2d 435, 436, 126 N.J.Law 579.

(20) "Exclusive use."

U.S.—McKesson & Robbins v. Charles H. Phillips Chemical Co., C.C.A. Conn., 53 F.2d 1011.

Fla.—Johnson v. Board of Public Instruction, 88 So. 308, 309, 81 Fla. 503.

Idaho.—Bistline v. Bassett, 272 P. 696, 698, 47 Idaho 66, 62 A.L.R. 323.

Ill.—Rush v. Collins, 8 N.E.2d 659, 662, 366 Ill. 307—Look v. Bruninga, 180 N.E. 816, 818, 348 Ill. 183.

Mont.—Hays v. De Atley, 212 P. 296, 298, 65 Mont. 558.

N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 589, 591.

Va.—Clatterbuck v. Clore, 107 S.E. 669, 672, 130 Va. 113.

Wash.—Hendrickson v. Sund, 177 P. 808, 809, 105 Wash. 406.

23 C.J. p 275 note 75.

(21) "Liability . . . shall be exclusive."—Hall v. Hill, 285 N.Y.S. 815, 816, 158 Misc. 341.

(22) "Personal or exclusive advertising," as distinguished from "canned advertising."—Norm Co. v. City Drug Stores, Tex.Civ.App., 59 S.W.2d 270, 272.

(23) "This agreement is not exclusive," as meaning that the contracting party had the right to sell its service to competitors of the other party to the contract.—Alexander Film Co. v. Brittain, Ga.App., 11 S.E. 2d 66, 68.

34. In its ordinary sense it strictly limits the subjects to which it refers.

Kan.—Kansas Wesleyan University of Salina v. Board of Com'rs of Saline County, 243 P. 1055, 1056, 120 Kan. 496.

Mich.—Webb Academy v. City of Grand Rapids, 177 N.W. 290, 296, 209 Mich. 523.

35. W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 400, 102 W.Va. 374.

36. Neb.—Drawbridge v. State, 213 N.W. 839, 841, 115 Neb. 535.

37. Fla.—Lee v. Gulf Oil Corporation, 4 So.2d 868, 870, 871.

38. Neb.—Omaha Y. M. C. A. v. Douglas County, 83 N.W. 924, 926, 60 Neb. 642, 52 L.R.A. 123.

Tex.—Standard Oil Co., of Texas v. State, Civ.App., 142 S.W.2d 519, 522, quoting **Corpus Juris.**

39. N.Y.—People v. Lawler, 77 N. Y.S. 840, 842, 74 App.Div. 553.

Pa.—Lackawanna County Undertakers' Ass'n v. State Board of Undertakers, 11 Pa.Dist. & Co. 503, 504, 32 Dauph.Co. 80.

Tex.—Standard Oil Co., of Texas v. State, Civ.App., 142 S.W.2d 519, 522, quoting **Corpus Juris.**

40. Minn.—Anoka County v. City of St. Paul, 261 N.W. 588, 592, 194 Minn. 554, 99 A.L.R. 1137.

mous with, "only,"[41] "purely,"[42] "solely,"[43] and "wholly."[44] It has been contrasted with "principally."[45]

Phrases employing the word are set out in the footnote.[46] Other phrases as to which more recent adjudications have not been found see 23 C.J. p 275 note 80–p 276 note 2.

EXCLUSIVENESS. The state or quality of being exclusive, in any sense of that word;[47] and, in a particular connection, described as being, by definition, a rare attribute.[48]

EX COMITATE OB RECIPROCAM UTILITATEM.[49]

EXCOMMENCEMENT. See Ex 32 C.J.S. p 1143 note 59 (8).

EXCOMMUNICATION. See the C.J.S. title Religious Societies § 14, also 54 C.J. p 18 note 9–p 19 note 17, as affecting membership rights or duties, § 88, also 23 C.J. p 276 note 4 and 54 C.J. p 91 note 24–p 92 note 35, as disciplinary action of church tribunal. See also 3 C.J.S. p 1063 note 50, as distinguished

41. Fla.—Lee v. Gulf Oil Corporation, 4 So.2d 868, 870, 871.
Tex.—Standard Oil Co., of Texas v. State, Civ.App., 142 S.W.2d 519, 522, citing **Corpus Juris.**
W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 400, 102 W.Va. 374.

42. Ohio.—Watterson v. Halliday, 82 N.E. 962, 968, 77 Ohio St. 150, 11 Ann.Cas. 1096.
Tenn.—Memphis Chamber of Commerce v. City of Memphis, 232 S.W. 73, 74, 144 Tenn. 291—Cumberland Lodge No. 8 F. & A. M. v. Nashville, 154 S.W. 1141, 1145, 127 Tenn. 248.
Tex.—Standard Oil Co., of Texas v. State, Civ.App., 142 S.W.2d 519, 522, citing **Corpus Juris**—Benevolent & Protective Order of Elks, Lodge No. 151, v. City of Houston, Civ.App., 44 S.W.2d 488, 493.
51 C.J. p 100 note 86.

43. Kan.—Kansas Wesleyan University of Salina v. Board of Commissioners of Saline County, 243 P. 1055, 1056, 120 Kan. 496.
Mich.—Webb Academy v. Grand Rapids, 177 N.W. 290, 296, 209 Mich. 523.
Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 1044, 156 Or. 522.
Tenn.—Provident Life & Accident Ins. Co. v. Campbell, 79 S.W.2d 292, 296, 18 Tenn.App. 452.
W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 400, 102 W.Va. 374.
Wyo.—Hotelling v. Fargo-Western Oil Co., 238 P. 542, 544, 32 Wyo. 240.

44. Va.—Commonwealth v. City of Richmond, 81 S.E. 69, 73, 116 Va. 69, L.R.A.1915A 1118.

45. Tex.—Standard Oil Co., of Texas v. State, Civ.App., 142 S.W.2d 519, 522.

46. **Phrases construed**
(1) "Exclusively applied for support and care of."—B'Nai B'Rith Club v. City of New York, 277 N.Y.S. 803, 806, 243 App.Div. 484.

(2) "Exclusively appropriated and used."—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 400, 102 W.Va. 374.

(3) "'Exclusively' as therein provided."—Lente v. Lucci, 119 A. 132, 133, 275 Pa. 217, 24 A.L.R. 1462.

(4) "Exclusively . . . charitable, educational, or scientific."—Old Colony Trust Co. v. Welch, D.C. Mass., 25 F.Supp. 45, 49.

(5) "Exclusively for a public purpose."—Anoka County v. City of St. Paul, 261 N.W. 588, 592, 194 Minn. 554, 99 A.L.R. 1137.

(6) "Exclusively for charitable purposes."—People v. Rockford Lodge No. 64, B. P. O. E., 181 N.E. 432, 433, 348 Ill. 528.

(7) "Exclusively for dwelling purposes."—People ex rel. Three Hundred Park Ave. v. Goldfogle, 209 N.Y.S. 14, 15, 124 Misc. 422.

(8) "Exclusively for educational purposes."—Cochran v. Commissioner of Internal Revenue, C.C.A., 78 F.2d 176, 178—Leubuscher v. Commissioner of Internal Revenue, C.C.A., 54 F.2d 998, 1000.

(9) "Exclusively for public charity."—St. Louis Southwestern Ry. Co. v. Yates, C.C.A.Ark., 23 F.2d 283, 285.

(10) "Exclusively for religious purposes."—Congregation Gedulath Mordecai v. City of New York, 238 N.Y.S. 525, 528, 135 Misc. 823.

(11) "Exclusively for school purposes."—Dunne v. Rock Island County, 119 N.E. 591, 592, 283 Ill. 628—23 C.J. p 276 note 84.

(12) "Exclusively interstate."—Conlin Bus Lines v. Old Colony Coach Lines, 185 N.E. 350, 352, 282 Mass. 493.

(13) "Exclusively in the . . . selling . . . of petroleum products."—Standard Oil Co., of Texas v. State, Tex.Civ.App., 142 S.W.2d 519, 522.

(14) "Exclusively manufacturing corporation."—In re Olivia Creamery & Produce Ass'n, 246 N.W. 480, 198 Minn. 52.

(15) "Exclusively of all other causes."—Williams v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 62 P.2d 856, 857, 144 Kan. 755.

(16) "Exclusively residential district."—Burke v. Hollinger, 146 A. 115, 117, 296 Pa. 510.

(17) "Exclusively residential property."—Perry Mount Park Cemetery Ass'n v. Netzel, 264 N.W. 303, 304, 274 Mich. 97.

(18) "Exclusively used," as referring to primary and inherent use rather than a mere secondary and incidental use.
Kan.—Kansas Wesleyan University of Salina v. Board of Com'rs of Saline County, 243 P. 1055, 1056, 120 Kan. 496.
Mo.—Young Women's Christian Ass'n v. Baumann, 130 S.W.2d 499, 502.

(19) "'Exclusively used' by an institution of purely public charity."—Santa Rosa Infirmary v. City of San Antonio, Tex.Com.App., 259 S.W. 926, 932.

(20) "Exclusively used for educational purposes."—In re Syracuse University, 209 N.Y.S. 329, 339, 124 Misc. 788.

(21) "Exclusively used for religious purposes."
Ill.—Muldoon v. De Kalb Board of Review, 98 N.E. 673, 254 Ill. 336, 337.
N.Y.—St. Barbara's Roman Catholic Church v. City of New York, 277 N.Y.S. 538, 540, 243 App.Div. 371.

(22) "Resulted from external, violent, and accidental means, exclusively."—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 1044, 156 Or. 522.

(23) "Used exclusively for . . educational . . . purposes."—Kansas Wesleyan University of Salina v. Board of Commissioners of Saline County, 243 P. 1055, 1056, 120 Kan. 496.

47. Century D.

48. U.S.—Belmont Laboratories v. Federal Trade Commission, C.C.A., 103 F.2d 538, 541.

49. A maxim meaning "From considerations of utility and mutual convenience."—Norton's Case, 15 Wkly. N.C., Pa., 395, 398.

from "anathema."

EXCOMMUNICATO CAPIENDO. In ecclesiastical law, a writ issuing out of chancery, founded on a bishop's certificate that defendant had been excommunicated, and requiring the sheriff to arrest and imprison him, returnable to the king's bench.[50]

EXCOMMUNICATO DELIBERANDO. A writ to the sheriff for delivery of an excommunicated person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction.[51]

EXCOMMUNICATO INTERDICITUR OMNIS ACTUS LEGITIMUS, ITA QUOD AGERE NON POTEST, NEC ALIQUEM CONVENIRE; LICET IPSE AB ALIIS POSSIT CONVENIRI.[52]

EXCOMMUNICATO RECAPIENDO. A writ commanding that persons excommunicated, who for their obstinacy had been committed to prison, but were unlawfully set free before they had given caution to obey the authority of the church, should be sought after, retaken, and imprisoned again.[53]

EXCOMUNIÓN. In Spanish ecclesiastical law, excommunication which, says Escriche, was sometimes abused on account of ignorance, being imposed for insufficient causes.[54]

EX CONTRACTU. See Ex 32 C.J.S. p 1144 note 60–64.

EX-CONVICT. See Ex 32 C.J.S. p 1143 note 58.

EXCREX. In the old Spanish law of Aragon, the gift which the groom made to the bride at marriage.[55]

EXCULPATION, LETTERS OF. In Scotch law, a warrant granted at the suit of a prisoner for citing witnesses in his own defense.[56]

EXCULPATORY. Clearing, or tending to clear, from alleged fault or guilt; excusing;[57] as in the phrase "Exculpatory statements" see Criminal Law § 816 b.

EXCURSION. A journey, specifically, a short journey, jaunt, or trip to some point for a special purpose, with the intention of speedy return.[58]

Phrases employing the word are set out in the subjoined note.[59]

EXCUSA. In Spanish law, extenuation or justification. In the plural the term is used in the sense of exemptions.[60]

EXCUSABLE. Admitting of excuse[61] or palliation.[62]

Excusable neglect. The term is a compound one, "excusable" implying an act done or omitted admitting of an excuse, and "neglect" being the omission or forbearance to do a thing that can be done, or that is required to be done.[63] As used in a rule permitting performance of an act after the period limited therefor where the failure to act was the result of "excusable neglect," the words are not to be interpreted so as to defeat the purpose of rules or statutes fixing definite periods of limitation.[64]

50. Black L.D., citing 4 Blackstone Comm. p 415.

51. Black L.D.

52. A maxim meaning "Every legitimate act is forbidden an excommunicated person, so that he cannot act, nor sue any person; but he may be sued by others."—Black L.D.

53. Black L.D.

54. Escriche Diccionario.

55. Escriche Diccionario.

56. Black L.D.

57. Tex.—Moore v. State, 60 S.W.2d 453, 454, 124 Tex.Cr. 97.

58. Century D.

59. **Phrases construed**

(1) "Excursion ticket" see Carriers § 603 a.

(2) "Excursion train," compared with "passenger train," and described as a train which, like others, goes from one place to another; it may or may not stop and pick up passengers on the road, but it is a train which goes from one place to another with a view to people getting to that other place on cheap terms, and very frequently upon the condition that the railway's operation is not to be delayed or inconvenienced by people taking luggage with them. —Burnett v. Great North of Scotland R. Co., 10 App.Cas. 147, 167.

60. Escriche Diccionario.

61. Ind.—Davis v. Steuben School Tp., 50 N.E. 1, 5, 19 Ind.App. 694.

62. Black L.D.

"As used in the law, this word implies that the act or omission spoken of is on its face unlawful, wrong, or liable to entail loss or disadvantage on the person chargeable, but that the circumstances attending it were such as to constitute a legal 'excuse' for it, that is, a legal reason for withholding or foregoing the punishment, liability, or disadvantage which otherwise would follow."—Black L.D.

63. Ind.—Davis v. Steuben School Tp., 50 N.E. 1, 5, 19 Ind.App. 694.

64. U.S.—Anderson v. Brady, D.C. Ky., 1 F.R.D., 589, 591.

Held to be "excusable neglect"

(1) Failure to demand a jury trial within the specified time due to unfamiliarity with new rules.—Alfred Hofmann, Inc. v. Textile Mach. Works, D.C.Pa., 27 F.Supp. 431, 432.

(2) Failure to file a remittitur within the limited period due to failure of clerk to notify attorney of the court's order for new trial unless remittitur was filed.—Thornton v. Atlantic Coast Line R. Co., 13 S.E. 2d 442, 450, 196 S.C. 316.

Held not to constitute

(1) Failure to act due to carelessness and negligence.—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 981, 28 Cal.App.2d 18.

(2) Failure to make timely application for revivor of action or substitution of parties where reliance was placed on previously existing practice.—Anderson v. Brady, D.C. Ky., 1 F.R.D. 589, 591.

The term has been compared with, or distinguished from, "carelessness" and "negligence,"[65] "gross negligence,"[66] "inadvertence," "mistake," and "surprise."[67]

As ground for granting new trial see the C.J.S. title New Trial § 82, also 46 C.J. p 215 notes 87–p 217 note 21, and for opening or vacating judgment see the C.J.S. title Judgments § 280, also 34 C.J. p 302 note 58–p 307 note 79.

Other phrases are listed in the note.[68]

EXCUSADO. In Spanish law, one who enjoys exemptions, as from taxes.[69]

EXCUSADOR. In Spanish law, one who offers excuses for another, especially for one accused of crime.[70]

EXCUSARE. See Ex 32 C.J.S. p 1143 note 59 (9).

EXCUSAT AUT EXTENUAT DELICTUM IN CAPITALIBUS QUOD NON OPERATUR IDEM IN CIVILIBUS.[71]

EXCUSATIO. See Ex 32 C.J.S. p 1143 note 59 (10).

EXCUSATIO NON PETITA FIT ACCUSATIO MANIFESTA.[72]

EXCUSATOR. See Ex 32 C.J.S. p 1143 note 59 (11).

EXCUSATUR QUIS QUOD CLAMEUM NON APPOSUERIT, UT SI TOTO TEMPORE LITIGII FUIT ULTRA MARE QUACUNQUE OCCASIONE.[73]

EXCUSE.

As a Noun

Derived from "ex causa,"[74] hence, a justification, a plea offered in extenuation of a fault or neglect;[75] a matter alleged as a reason for relief or exemption from some duty or obligation, or a reason alleged for doing or not doing a thing;[76] that which is offered as a reason for being excused, or that which extenuates or justifies a fault;[77] also an authority or a reasonable belief in authority.[78] In a particular connection, the word has been defined as that plea or statement made by the accused which arises out of the state of facts constituting and relied on as the cause.[79] The term presupposes the imposition of a duty and a qualification to perform it.[80]

The noun has been held synonyomus with "defense" see 26 C.J.S. p 674 note 88. It has been distinguished from "just cause" see 14 C.J.S. p 44 note 43, although the distinction has been said to be largely metaphysical.[81]

For references to specific uses see 23 C.J. p 277 note 27.

Phrases employing the noun are set out in the subjoined note.[82]

65. Cal.—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 981, 28 Cal.App. 2d 18.

66. Ga.—Deering Harvester Co. v. Thompson, 42 S.E. 772, 773, 116 Ga. 388—Brucker v. O'Connor, 41 S.E. 245, 246, 115 Ga. 95.

67. Ind.—Davis v. Steuben School Tp., 50 N.E. 1, 5, 19 Ind.App. 694.

68. **Phrases construed**

(1) "Excusable assault," defined as an assault committed by accident and misfortune, in doing any lawful act by lawful means, with ordinary caution, and without any unlawful intent.—People v. O'Connor, 81 N.Y.S. 555, 561, 82 App.Div. 55. See also Assault and Battery §§ 14, 87.

(2) "Excusable homicide" see the C.J.S. title Homicide §§ 97, 98, also 30 C.J. p 36 note 95–p 38 note 41.

(3) "Excusable homicide in self-defense" see the C.J.S. title Homicide § 114, also 30 C.J. p 43 notes 27–31, 38–p 44 note 43.

(4) "Excusable mistake," held not applicable to failure to call a witness where the witness was available at the time of the trial but his counsel saw fit not to call him.—People v. McArthur, 283 Ill.App. 467, 470.

69. Escriche Diccionario.

70. Escriche Diccionario.

71. A maxim meaning "That excuses or extenuates an offense or wrong in capital causes which does not operate [have the same effect] in civil causes."—Adams Gloss.

72. A maxim meaning "An exculpation which is not called for, [becomes a clear accusation] betrays the guilt of him who makes it."—Adams Gloss.

73. A maxim meaning "He is excused who does not bring his claim if, during the whole period in which it ought to have been brought, he has been beyond sea for any reason."—Black L.D., citing Coke Litt. p 260.

74. S.C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

75. Mo.—State v. Weagley, 228 S.W. 817, 820, 286 Mo. 677.
S.C.—State v. McDaniel, 47 S.E. 384, 387, 68 S.C. 304.

Similarly expressed

A plea offered in extenuation of a fault or irregular deportment.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

76. Black L.D.

77. S.C.—State v. Craig, supra.

78. Hawaii.—Hawaii v. Lo Kam, 13 Hawaii 14, 16.

79. S.C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

80. Ohio.—Glassinger v. State, 24 Ohio St. 206, 207.

81. S.C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

82. **Phrases construed**

(1) "Excuse for the charge set forth in the indictment."—State v. Weagley, 228 S.W. 817, 820, 286 Mo. 677.

(2) "Good excuse."—Austine v. People, 110 Ill. 248, 254.

(3) "Just and legal excuse."—Reed v. Duluth, S. S. & A. Ry. Co., 59 N.W. 144, 145, 100 Mich. 507.

(4) "Just excuse."—Re Ayotte, 15 Man. 156, 9 Can.Cr.Cas. 133, 134.

(5) "Reasonable excuse."—Thomas v. Hughes, [1929] 1 K.B. 226—52 C. J. p 1186 note 90.

"Reasonable cause" synonymous see 14 C.J.S. p 50 note 3.

(6) "Without lawful authority or excuse."—Reg. v. Harvey, L.R. 1 C. C. 284, 285.

As a Verb

The past tense, "excused," has been defined generally as meaning exempted;[83] and in a particular connection as meaning relieved from duty at one's own request, for one's own convenience, or for reasons personal to one's self,[84] being distinguished from "set aside."[85]

The present participle "excusing" has been defined as acquitting, exculpating, extenuating, or releasing.[86]

Phrases employing the verb are set out in the subjoined note.[87]

EXCUSIÓN. In Spanish law, the proceeding against a principal debtor or another before resorting to the surety, sometimes spelled "excursión."[88]

EXCUSS and **EXCUSSIO.** See Ex 32 C.J.S. p 1143 note 59 (12), (13).

EX DAMNO ABSQUE INJURIA NON ORITUR ACTIO.[89]

EX DELICTO. See Ex 32 C.J.S. p 1145 notes 65–67.

EX DELICTO NON EX SUPPLICIO EMERGIT INFAMIA.[90]

EX DELICTO NON ORITUR ACTIO.[91]

EX DEM. See Abbreviations 1 C.J.S. p 276 note 5.

EX DEMISSIONE. See Ex 32 C.J.S. p 1142 note 53.

EX DIUTURNITATE TEMPORIS, OMNIA PRÆSUMUNTUR SOLEMNITER ESSE ACTA.[92]

EX DOLO MALO NON ORITUR ACTIO.[93]

EXEAT. Literally "He may go out," or "let him go out," hence a leave to go out generally; and, more specifically, a permission which a bishop grants to a priest to go out of his diocese.[94]

Used in the negative form as a writ forbidding a person to leave the country, state, or jurisdiction of the court see the C.J.S. title Ne Exeat § 1, also 45 C.J. p 589 notes 1–3.

EXECUTE and **EXECUTION.**

In General

The words "execute," "executed," and "execution"

83. Ont.—Reg. v. Hammond, 29 Ont. 211, 219, 1 Can.Cr.Cas. 373.

84. N.Y.—Santee v. Standard Pub. Co., 55 N.Y.S. 361, 362, 36 App.Div. 555.

85. N.Y.—Santee v. Standard Pub. Co., supra.

See also the C.J.S. title Juries § 205 and 35 C.J. p 306 note 74–p 309 note 33.

86. Wash.—State v. Saffron, 254 P. 463, 464, 143 Wash. 34.

87. Phrases construed

(1) "Excused by the directors."—Rogers v. Public Service Employees Credit Union, Tex.Civ.App., 112 S.W. 2d 258, 262.

(2) "Excused or set aside."—Santee v. Standard Pub. Co., 55 N.Y.S. 361, 362, 36 App.Div. 555.

88. Escriche Diccionario.

89. A maxim meaning "From damage without injury no action arises."—Transportation Co. v. Standard Oil Co., 40 S.E. 591, 592, 50 W.Va. 611, 88 Am.S.R. 895, 56 L.R.A. 804.

See also Damnum absque injuria 25 C.J.S. p 996 notes 21–24, where the maxim is written, Ex damno sine injuria non oritur actio, and generally Actions § 15 b.

90. A maxim meaning "Infamy arises from the crime, not from the punishment."—Black L.D.

91. A maxim meaning "From a crime no action arises."—Bayley v. Taber, 5 Mass. 286, 288, 4 Am.D. 57.

92. A maxim meaning "From length of time [after lapse of time] all things are presumed to have been done in due form."—Black L.D., citing Coke Litt. p 6b.

Applied in Valle v. Fleming, 19 Mo. 454, 461, 61 Am.D. 566—23 C.J. p 277 note 39 [a].

93. A maxim meaning "A right of action cannot arise out of fraud."—Broom Leg. Max.

Applied in

U.S.—Harris v. Runnels, Miss., 12 How. 79, 83, 13 L.Ed. 901—Levy v. Kansas City, Kan., 168 F. 524, 525, 93 C.C.A. 523, 22 L.R.A.,N.S., 862.

Iowa.—Doyle v. Burns, 99 N.W. 195, 204, 123 Iowa 488.

N.J.—Reconstruction Finance Corporation v. Gohl, 21 A.2d 693, 695, 19 N.J.Misc. 545.

1 C.J. p 958 note 38 [a] (2)—23 C.J. p 277 note 40 [c].

See also Actions § 13.

The maxim discussed

(1) It "is a maxim which lies at the foundation of a general rule of public policy, the rule that the courts will not sustain an action which arises out of the moral turpitude of the plaintiff or out of his violation of a general law enacted to carry into effect the public policy of the state or nation."—Levy v. Kansas City, Kan., 168 F. 524, 525, 93 C.C.A. 523, 22 L.R.A.,N.S., 862.

(2) "Reduced to its simplest terms it has become a common-law axiom that, 'Fraud vitiates everything.' "—State v. Dougherty, 96 A. 56, 59, 88 N.J.Law 209.

(3) Wherever organized society has existed, this has been a recognized maxim of the law.—Harris v. Harris, 23 Gratt. 737, 766, 64 Va. 737, 766.

(4) "The maxim . . . is qualified by another, viz., in pari delicto melior est conditio defendentis."—Irwin v. Curie, 64 N.E. 161, 162, 171 N. Y. 409, 58 L.R.A. 830—Tracy v. Talmage, 14 N.Y. 162, 181, 67 Am.D. 132.

Similarly rendered

"Out of fraud no action arises; fraud never gives a right of action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."—Black L D., citing Broom Max. p 729.

Similar maxims compared

"There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: 'Ex dolo malo non oritur actio;' 'Ex pacto illicito non oritur actio;' 'Ex turpi causa non oritur actio.' "—McMullen v. Hoffman, Or., 19 S.Ct. 839, 845, 174 U.S. 639, 43 L. Ed. 1117.

94. Black L.D.

are used with a variety of meanings,[95] generally determinable from the context.[96] They are derived from the Latin "ex sequi," meaning to follow out, follow to the end, or perform, and equivalent to the French "executer,"[97] so that, when used in their proper sense, all three convey the meaning of carrying out some act or course of conduct to its completion.[98] Thus, when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument importing the intended obligation, or of every act required to give the instrument validity, to carry it into effect, or to give it the forms required to render it valid;[99] and in a technical sense the words necessarily include the performance of three acts which are signing, sealing, and delivery,[1] and, in some instances, a fourth act, namely, the acknowledgment of the instrument;[2] but the act of delivery is not always included;[3] and not infrequently the terms are employed to express merely the acts of signing and sealing,[4] or of signing only.[5]

As applied to contracts the terms may convey two meanings, one relating to the formal requisites, see Contracts § 53 et seq, the other relating to the performance, see Contracts § 451 et seq. With relation to deeds see Deeds §§ 32–36, and to wills see the C.J.S. title Wills § 167, also 68 C.J. p 648 note 86–p 652 note 35. As the carrying out of the judgment and sentence in criminal cases see Criminal Law §§ 1556, 1557, 2001, and of the provisions of a

95. Ill.—George v. Haas, 143 N.E. 54, 55, 311 Ill. 382.

96. Neb.—Solt v. Anderson, 93 N.W. 205, 207, 67 Neb. 103.
23 C.J. p 280 note 68.

97. N.Y.—Harrity v. Steers, 185 N. Y.S. 704, 195 App.Div. 11.

98. U.S.—Northwest Steel Rolling Mills v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 286, 290, quoting **Corpus Juris.**
Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**
23 C.J. p 278 notes 48–50.

Similarly expressed
(1) The terms imply a complete contract.—National Fire Ins. Co. v. Patterson, 41 P.2d 645, 647, 170 Okl. 593—23 C.J. p 278 note 52 [a].

(2) "Both in legal parlance and in its ordinary usage, the term imports the idea that nothing remains to be done; that the transaction is complete and finished."—Pacific Finance Corporation v. Hendley, 7 P. 2d 391, 393, 119 Cal.App. 697.

Applied to a particular statute, it has been said that its "execution" cannot be complete until its purpose has been accomplished.—Greene v. Wheeler, C.C.A.Wis., 29 F.2d 468, 469.

99. U.S.—Northwest Steel Rolling Mills v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 286, 290, quoting **Corpus Juris.**
Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E. 823, 825, 311 Ill. App. 286, citing **Corpus Juris.**
Ky.—Hofgesang v. Silver, 3 S.W.2d 185, 186, 223 Ky. 101, quoting **Corpus Juris.**
23 C.J. p 278 notes 51–55.

1. Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**
Ky.—Hofgesang v. Silver, 3 S.W.2d 185, 186, 223 Ky. 101, quoting **Corpus Juris.**
N.J.—Erie R. Co. v. S. J. Groves & Sons Co., 166 A. 205, 207, 111 N.J. Law 100, quoting **Corpus Juris.**
23 C.J. p 278 note 56.

Similarly expressed
(1) When spoken of such instruments as deeds, it includes all acts such as signing, sealing, and delivering, which are necessary in order to give effect to the instrument. —U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670.

(2) "To execute a deed is to sign, seal and deliver it."—Collins v. Cornwell, 30 N.E. 796, 797, 131 Ind. 20—23 C.J. p 278 note 56 [a].

(3) Other similar statements.—National Fire Ins. Co. v. Patterson, 41 P.2d 645, 647, 170 Okl. 593.

Technically, delivery is implied or required
U.S.—McCarthy Co. v. Commissioner of Internal Revenue, C.C.A., 80 F. 2d 618, 620.
Ala.—Stocks v. Inzer, 168 So. 877, 878, 232 Ala. 482—Kirby v. Baker, 104 So. 128, 213 Ala. 12.
Cal.—Hinkel v. Crowson, 256 P. 479, 482, 83 Cal.App. 87.
Fla.—Lance v. Smith, 167 So. 366, 369, 123 Fla. 461.
Ga.—American Surety Co. v. Citizens' Bank of Colquitt, 172 S.E. 801, 803, 48 Ga.App. 448, citing **Corpus Juris.**
Ind.—W. T. Rawleigh Co. v. Snider, 194 N.E. 356, 357, 207 Ind. 686.
Minn.—First Nat. Bank v. Quevli, 234 N.W. 318, 319, 182 Minn. 238—State v. Young, 23 Minn. 551, 560.
N.J.—Trustees System Co. of Newark v. Stoll, 179 A. 372, 373, 13 N.J.Misc. 490, citing **Corpus Juris.**
Okl.—National Fire Ins. Co. v. Patterson, 41 P.2d 645, 647, 170 Okl. 593.
Tex.—Planters' Oil Co. v. Hill Printing & Stationery Co., Civ.App., 208 S.W. 192, 193.
Wyo.—Perko v. Rock Springs Commercial Co., 259 P. 520, 522, 37 Wyo. 98.
23 C.J. p 279 note 58 [a].

2. Cal.—Le Mesnager v. Hamilton, 35 P. 1054, 1055, 101 Cal. 532, 40 Am.S.R. 81.
Neb.—Solt v. Anderson, 93 N.W. 205, 207, 67 Neb. 103.
23 C.J. p 279 note 57.

Acknowledgment not required
Miss.—Salter v. Polk, 159 So. 855, 856, 172 Miss. 263.

3. Ariz.—Acacia Mut. Life Ass'n v. Berry, 94 P.2d 770, 773, 54 Ariz. 208.
Cal.—King v. Tarabino, 199 P. 890, 891, 53 Cal.App. 157.
Minn.—First National Bank v. Quevli, 234 N.W. 318, 319, 182 Minn. 238.
23 C.J. p 279 note 58.

Colloquially, a more restricted meaning is often intended, not including delivery.—Erie R. Co. v. S. J. Groves & Sons Co., 166 A. 205, 207, 111 N.J.Law 100, citing **Corpus Juris** —23 C.J. p 279 note 58 [a], [c].

4. Ga.—Buffington v. Thompson, 25 S.E. 516, 517, 98 Ga. 416.
23 C.J. p 279 note 59.

5. Ill.—George v. Haas, 143 N.E. 54, 55, 311 Ill. 382.
23 C.J. p 279 note 60.

"In common parlance, the word 'execution' may mean the signing alone."—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**

Includes signing
"To 'execute' an instrument includes signing it."—Hailey First Nat. Bank v. Glenn, 77 P. 622, 626, 10 Idaho 224, 109 Am.S.R. 204.
Signature by mark as execution see the C.J.S. title Signatures §§ 4, 8, also 58 C.J. p 721 note 45–p 722 note 48, p 730 notes 48–56.

will by an administrator or executor see the C.J.S. title Executors and Administrators § 145, also 23 C.J. p 1172 note 36–p 1173 note 40. For other references to specific uses see 23 C.J. p 278 note 47.

Execute

——**Present Tense.** To accomplish, or carry through so as to effect, to finish, follow out into effect, pursue to the end, or put into force;[6] to carry into effect;[7] to do, follow out, make, or perform;[8] to enforce;[9] to fulfill;[10] to obey, obey the injunctions of, or perform the commands of;[11] also to complete;[12] to complete, as a legal instrument, to perform what is required to give validity to, as by signing, perhaps sealing and delivering, as to execute a deed, lease, mortgage, or will;[13] to do all those things essential to a completed, effective conveyance;[14] to make an instrument, to give it being;[15] to sign, seal, and deliver;[16] sometimes merely to sign, or to sign and deliver.[17]

The term has been held equivalent to, or synonymous with, "perform,"[18] and, in a particular connection, with "enforceable" see Enforceable 30 C.J. S. p 245 note 38. It has been compared with, or distinguished from, "sign" see the C.J.S. title Signatures § 1, also 58 C.J. p 718 note 5 [b].

Phrases employing the word are set out in the subjoined note.[19]

——**Executed.** Described as a very general word,[20] of wide import,[21] and defined generally as meaning carried into effect;[22] carried into full effect, completed, already done or performed, now in existence or possession; also conveying an immediate right or possession, or taking effect immediately;[23] consummated;[24] done;[25] fully performed;[26] and specifically applied to instruments as meaning made;[27] signed, or signed, sealed, and delivered.[28]

6. U.S.—Greene v. Wheeler, C.C.A. Wis., 29 F.2d 468, 469.
Similarly expressed
To carry out according to its terms, or to fulfill the purpose of.—Black L.D.

7. Ind.—Tucker v. State, 35 N.E.2d 270, 291.

8. Tex.—Glover v. American Mortgage Corporation, Civ.App., 94 S. W.2d 1235, 1236.

9. Iowa.—Tennant v. Kuhlemeier, 120 N.W. 689, 693, 142 Iowa 241, 19 Ann.Cas. 1026.

10. N.Y.—Harrity v. Steers, 185 N. Y.S. 704, 195 App.Div. 11.
23 C.J. p 278 note 48 [b].

11. Black L.D.

12. N.Y.—Harrity v. Steers, supra.
Tex.—Glover v. American Mortgage Corporation, Civ.App., 94 S.W.2d 1235, 1236.
Wyo.—Perko v. Rock Springs Commercial Co., 259 P. 520, 522, 37 Wyo. 98.
23 C.J. p 278 note 48 [b].

13. Neb.—Brown v. Westerfield, 66 N.W. 439, 47 Neb. 399, 403, 53 Am. S.R. 532.

14. Ala.—Kirby v. Baker, 104 So. 128, 213 Ala. 12.

15. U.S.—U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670.

16. Wyo.—Perko v. Rock Springs Commercial Co., 259 P. 520, 522, 37 Wyo. 98.

17. Wyo.—Kennedy & Parsons Co. v. Lander Dairy & Produce Co., 252 P. 1036, 1038, 36 Wyo. 58, 51 A.L.R. 315.

18. N.Y.—Harrity v. Steers, 185 N. Y.S. 704, 195 App.Div. 11.

19. **Phrases containing "execute"**
(1) "Able . . . to execute a lease."—Harrity v. Steers, supra.

(2) "Did execute."—Kirby v. Baker, 104 So. 128, 213 Ala. 12.

(3) "Execute a contract" and "executed contract" see Contracts § 7.

(4) "Execute all process."—Cassady v. Sholtz, for Use and Benefit of Edwards, 169 So. 487, 489, 124 Fla. 718.

(5) "Execute and deliver," as implying a selling; but not synonymous with "transfer."
Ill.—McCormick v. Unity Co., 87 N. E. 924, 927, 239 Ill. 306.
S.D.—Britton Milling Co. v. Williams, 187 N.W. 159, 160, 45 S.D. 274, 21 A.L.R. 1352.

(6) "Execute a sale of the properties," as meaning to sign and make a contract for the sale of the properties.—Glick v. Daniel, 42 S.W.2d 1007, 1008, 184 Ark. 576.

(7) "Execute a writ," as meaning to perform its mandate, to do all that the writ commands.—State v. Miller, 139 S.E. 711, 712, 104 W.Va. 226.

(8) "Execute process."—Andrews v. Keep, 38 Ala. 315, 317.

(9) "Execute the use" see the C.J. S. title Trusts § 176, also 65 C.J. p 516 note 15–p 520 note 44.

(10) "Execute well and faithfully," as equivalent to "faithful discharge of his duties."—Yard v. Lea, 3 Yeates, Pa., 335, 350.

(11) "Falsely or fraudulently executes."—U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670.

Phrases containing "executing"
(1) "Executing the same."—Bradley v. Louisville Food Products Co., 114 A. 913, 914, 139 Md. 385.

(2) "Party executing the deed."—Killingsworth v. Portland Trust Co., 23 P. 66, 68, 18 Or. 351, 17 Am. S.R. 737, 7 L.R.A. 638.

20. Eng.—Sutherland v. Wills, 5 Exch. 715, 718, 155 Reprint 315.

21. Neb.—Solt v. Anderson, 93 N.W. 205, 207, 67 Neb. 103.

22. N.Y.—Scott v. Guernsey, 60 Barb. 163, 175.

23. Black L.D.

24. Ky.—Kirwan v. Parkway Distillery, 148 S.W.2d 720, 723, 285 Ky. 605.

25. Ark.—Republic Power & Service Co. v. Gus Blass Co., 263 S.W. 785, 787, 165 Ark. 163.

26. Cal.—Klein Norton Co. v. Cohen, 290 P. 613, 616, 107 Cal.App. 325.

27. Ala.—Farrior v. New England Mortgage Security Co., 7 So. 200, 88 Ala. 275.

28. N.Y.—Lynch v. Figge, 192 N.Y. S. 873, 876, 200 App.Div. 92.
Involves the act of delivery
Ala.—Farrior v. New England Mortgage Security Co., 7 So. 200, 88 Ala. 275.
"A deed is executed when it is signed, sealed, and delivered."
Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, citing **Corpus Juris.**
N.J.—Erie R. Co. v. S. J. Groves & Sons, 166 A. 205, 207, 111 N.J.Law 100, citing **Corpus Juris.**
An allegation that one made and executed a note to the payee named, in legal effect, includes an allegation of its delivery.—Morgan v. Baum, Tex.Civ.App., 116 S.W.2d 1180, 1181, citing **Corpus Juris.**

It has been held synonymous with "made,"[29] "signed,"[30] and "subscribed."[31] It has been distinguished from "attested" see 7 C.J.S. p. 692 note 39, "executory,"[32] and "issued."[33]

Phrases employing the word are set out in the subjoined note.[34]

Execution

The term primarily means accomplishment of a thing, or the completion of an act or an instrument;[35] performance;[36] the act or process of carrying out in accordance with a plan, a purpose, or an order;[37] the fulfillment of an undertaking;[38] the carrying into effect by such means as are provided by law for enforcement;[39] the subscribing and delivering of an instrument, with or without affixing a seal.[40] In each of the applications the execution of a deed, of a writ,[41] or even the execu-

29. Ga.—MacIntyre v. McLean, 133 S.E. 471, 475, 162 Ga. 280.
Ind.—W. T. Rawleigh Co. v. Snider, 194 N.E. 356, 357, 207 Ind. 686.

30. Wyo.—Perko v. Rock Springs Commercial Co., 259 P. 520, 522, 37 Wyo. 98.

31. Okl.—National Fire Ins. Co. v. Patterson, 41 P.2d 645, 647, 170 Okl. 593.
28 C.J. p 279 note 60 [b].

32. Ala.—Bassett Lumber Co. v. Hunter-Benn & Co. Company, 193 So. 175, 178, 238 Ala. 671.
Iowa.—State v. Associated Packing Co., 192 N.W. 267, 269, 195 Iowa 1318.
Ky.—Kirwan v. Parkway Distillery, 148 S.W.2d 720, 723, 285 Ky. 605.
Mo.—Rockhill Tennis Club of Kansas City v. Volker, 56 S.W.2d 9, 17, 331 Mo. 947.
Mont.—Lewis v. Lambros, 194 P. 152, 154, 58 Mont. 555.
Tex.—Hausler v. Harding-Gill Co., Civ.App., 6 S.W.2d 445, 446.

33. Cal.—Hooker v. East Riverside Irr. Dist., 177 P. 184, 185, 38 Cal. App. 615.

34. Phrases construed

(1) "Executed agreement," as meaning one the terms of which have been fully performed.—Keeler v. Murphy, 3 P.2d 950, 951, 117 Cal. App. 386—Storm & Butts v. Lipscomb, 3 P.2d 567, 571, 117 Cal.App. 6—Anderson v. Adler, 184 P. 42, 43, 42 Cal.App. 776.

(2) "Executed and delivered in this state."—George v. Haas, 143 N. E. 54, 55, 311 Ill. 382.

(3) "Executed and/or delivered."—Erie R. Co. v. S. J. Groves & Sons Co., 166 A. 205, 207, 111 N.J.Law 100.

(4) "Executed by the supervisor and clerk," as meaning written or printed, signed, and sealed by the supervisor and clerk of the township, and not importing the final delivery.—Young v. Clarendon Tp., Mich., 10 S.Ct. 107, 110, 132 U.S. 340, 33 L.Ed. 356.

(5) "Executed consideration" defined and compared with "executory consideration" see Contracts §§ 94–96.

(6) "Executed contract" see Contracts § 7.

(7) "Executed estate" see Estates § 14.

(8) "Executed fine," defined as the fine "sur cognizance de droit, come ceo que il ad de son done;" or a fine upon acknowledgment of the right of the cognizee, as that which he has of the gift of the cognizor. Abolished by 3 & 4 Wm. IV c 74.—Black L.D.

(9) "'Executed' on the Sabbath day."—Hofgesang v. Silver, 3 S.W. 2d 185, 186, 223 Ky. 101.

(10) "Executed remainder" see Estates § 69.

(11) "Executed right," defined as a present vested property right, and distinguished from "executory right."—Parks v. Classen Co., 9 P.2d 432, 435, 156 Okl. 43.

(12) "Executed sale" as equivalent to "consummated sale" and distinguished from "executory sale."—Kirwan v. Parkway Distillery, Ky., 148 S.W.2d 720, 723, 285 Ky. 605.

(13) "Executed sale to a buyer."—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 393, 119 Cal.App. 697.

(14) "'Executed' the waiver."—McCarthy Co. v. Commissioner of Internal Revenue, C.C.A., 80 F.2d 618, 620.

(15) "Executed trust" see the C. J.S. title Trusts § 16, also 65 C.J. p 225 note 88–p 227 note 4.

(16) "Note . . . executed by the defendants."—Kennedy & Parsons Co. v. Lander Dairy & Produce Co., 252 P. 1036, 1038, 36 Wyo. 58, 51 A.L.R. 315.

(17) "'Obligation executed' by a corporation."—Ovsiovitch v. Federal Tool & Mfg. Co., 121 A. 671, 672, 94 N.J.Eq. 744.

(18) "When the will is executed."—MacIntyre v. McLean, 133 S.E. 471, 475, 162 Ga. 280.

35. Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**
Neb.—Brown v. Westerfield, 66 N.W. 439, 47 Neb. 399, 403, 53 Am.S.R. 532.

36. U.S.—Wood & Selick v. Compagnie Generale Transatlantique, C.C.A.N.Y., 43 F.2d 941, 942.

37. U.S.—Kriebel v. U. S., C.C.A.Ill., 10 F.2d 762, 764.

38. Ill.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N.E.2d 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**

Similarly expressed

The completion, fulfillment, or perfecting of anything, or the carrying of it into operation and effect.—Black L.D.

39. Cal.—Bank of America N. T. & S. A. v. Katz, App., 113 P.2d 759, 760.

40. U.S.—McCarthy Co. v. Commissioner of Internal Revenue, C.C.A 80 F.2d 618, 620.

Under Missouri law, the "execution" of a written contract includes signing, unconditional delivery by promisor, and acceptance by promisee.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393, 397.

Technically includes

(1) Both signing and issue or delivery.—American Surety Co. v. Citizens' Bank of Colquitt, 172 S.E. 801, 803, 48 Ga.App. 448, citing **Corpus Juris.**

(2) The signing and delivery of an instrument with the intention that it shall take effect.—Illinois Nat. Bank & Trust Co. v. Holmes, 35 N. E. 823, 825, 311 Ill.App. 286, citing **Corpus Juris.**

41. Puerto Rico.—U. S. Mortgage & Trust Co. v. Central San Cristobal, 7 Puerto Rico Fed. 693, 703.

Execution of various writs

(1) Attachment.
Cal.—Wood v. Lowden, 49 P. 132, 133, 117 Cal. 232.
Pa.—Wallace v. Scholl, 9 Pa.Super. 284, 288.

(2) Capias.
Mo.—Wilson v. Jackson, 10 Mo. 329, 337.
N.J.—State v. Hamilton, 16 N.J.Law 153, 155.

(3) Execution.—Wills v. McKinney, 41 N.J.Law 120, 123—23 C.J. p 280 note 65 [c].

(4) Fieri facias.
Ala.—Andrews v. Keep, 38 Ala. 315, 317.
N.J.—Waterman v. Merrill, 33 N.J. Law 378, 381.

(5) Scire facias.
Mo.—State v. Williamsen, 57 Mo. 192, 198.

tion of a criminal, and in fact in every application of the word, there is, when it is used in its strict sense, the same meaning, namely, that of completing or performing what the law either orders or validates.[42]

"Execution" has been held interchangeable or synonymous with "issuing"[43] and "signing."[44] It has been compared with, or distinguished from, "attempt" see 7 C.J.S. p 689 note 50, "attestation" see 7 C.J.S. p 693 note 71, "issuance,"[45] and "probating."[46]

Phrases employing the word are set out in the subjoined note.[47]

EXECUTIO. See Ex 32 C.J.S. p 1143 note 59 (14), (15).

EXECUTIO EST EXECUTIO JURIS SECUNDUM JUDICIUM.[48]

EXECUTIO EST FINIS ET FRUCTUS LEGIS.[49]

EXECUTIO EST FRUCTUS, FINIS, ET EFFECTUS LEGIS.[50]

EXECUTIO JURIS NON FACIT INJURIAM.[51]

EXECUTIO JURIS NON HABET INJURIAM.[52]

EXECUTIONE FACIENDA. A writ commanding execution of a judgment.[53]

EXECUTIONE FACIENDA IN WITHERNAMIUM. A writ that lay for taking cattle of one who had conveyed the cattle of another out of the county, so that the sheriff could not replevy them.[54]

EXECUTIONE JUDICII. A writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return some reasonable cause wherefore he delays the execution.[55]

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.[56]

Pa.—Kennedy v. Baker, 28 A. 252, 254, 159 Pa. 146.

(6) Summons.—Blackburn v. Jackson, 26 Mo. 308, 310.

42. Puerto Rico.—U. S. Mortgage & Trust Co. v. Central San Cristobal, 7 Puerto Rico Fed. 693, 703.

43. Fla.—Lance v. Smith, 167 So. 366, 369, 123 Fla. 461.

44. Cal.—King v. Tarabino, 199 P. 890, 893, 53 Cal.App. 157.

45. Eng.—Allis Chalmers Co. v. Fidelity, etc., Co., 111 L.T.Rep.,N. S., 327, 329.

46. Mich.—In re Lamb, 80 N.W. 1081, 1082, 122 Mich. 239, 241.

47. Phrases construed

(1) "Altered, after its execution."—King v. Tarabino, 199 P. 890, 891, 53 Cal.App. 157.

(2) "Charged with the execution of this chapter."—Greene v. Wheeler, C.C.A.Wis., 29 F.2d 468, 469.

(3) "Execution in duplicate" see 28 C.J.S. p 591 note 45.

(4) "Execution of a deed" as requiring its delivery.—Barnes v. Aycock, 13 S.E.2d 611, 612, 219 N.C. 360.

(5) "Execution of a mortgage," as sometimes equivalent to "assumption of a mortgage."—Klegman v. Moyer, 266 P. 1009, 1012, 91 Cal. App. 333.

(6) "'Execution' of a narcotic prescription," as meaning the act of preparation and delivery of the prescription by the person authorized to do so.—U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670.

(7) "Execution of an hypothecation," defined in the civil law as the seizure which the creditor makes of the thing hypothecated and the judicial sale which is ordered thereof. —The Young Mechanic, C C.Me., 30 F.Cas.No.18,180, 2 Curt. 404.

(8) "Execution of an ordinance."—People v. King, 210 N.W. 235, 236, 236 Mich. 405, 48 A.L.R. 742.

(9) "Execution . . . of the indenture," as meaning executed with all the formalities necessary to the completion of the deed.—National Fire Ins. Co. v. Patterson, 41 P.2d 645, 647, 170 Okl. 593.

(10) "Exécution parée," in French law defined as a right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney.—Black L.D.

(11) "Execution thereof."—Edwin E. Hallenbeck, Inc., v. Hadley, 167 A. 574, 575, 312 Pa. 176.

(12) "In execution of a public statute for the public benefit."—Daugherty v. Superior Court in and for City and County of San Francisco, 74 P.2d 549, 551, 23 Cal.App.2d 739.

(13) "In the execution of said distress warrant."—State v. Miller, 139 S.E. 711, 712, 104 W.Va. 226.

(14) "Labor and material furnished 'in the execution of a contract,'" as including all labor and material which contributes directly or indirectly to the completion of the work. —Franzen v. Southern Surety Co., 246 P. 30, 34, 35 Wyo. 15, 46 A.L.R. 496.

(15) "Litigations arising out of interpretation or execution of this contract."—Wood & Selick v. Compagnie Generale Transatlantique, C. C.A.N.Y., 43 F.2d 941, 942.

(16) "Procure the execution of a contract."—Glick v. Daniel, 42 S.W. 2d 1007, 1008, 184 Ark. 576.

48. A maxim meaning "An execution is the execution of the law according to the judgment."—Black L. D.

49. A maxim meaning "An execution is the end and the fruit of law." —Adams Gloss, citing Coke Litt. p 289b.

Applied in Kentzler v. Chicago, M. & St. P. R. Co., 3 N.W. 369, 47 Wis. 641, 642.

50. A maxim meaning "Execution is the fruit, the end and effect of the law."—Adams Gloss.

51. A maxim meaning "The execution of the law does no injury."—Adams Gloss.

52. A maxim meaning "The law will not in its executive capacity work a wrong."—Broom Leg.Max.

Applied in

Ohio.—Moore v. Adams, 8 Ohio 372, 374, 32 Am.D. 723.

Pa.—Lincoln v. Pennsylvania Warehousing Co., 20 Phila. 217, 220.

53. Black L.D.

54. Black L.D.

55. Black L.D.

56. Black L.D.

EXECUTIONS

This Title includes enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.

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I. NATURE AND ESSENTIALS IN GENERAL

§ 1. Definition and Nature

a. In general
b. Nature of as action or cause of action

a. In General

An execution is a judicial writ issuing from the court where the judgment is rendered, directed to an officer thereof, and running against the body or goods of a party, by which the judgment of the court is enforced.

An execution is a judicial writ[1] issuing from the court where the judgment is rendered,[2] directed to an officer thereof, and running against the body or goods of a party,[3] by which the judgment of the court is enforced.[4] It has also been defined as the end of the law;[5] final process and the end of the law;[6] the end and fruit of the law;[7] the act of carrying into effect the judgment or decree of a court;[8] the final judgment of a court,[9] or other jurisdictions, and the writ which authorizes the officer so to carry into effect such judgment;[10] a writ which authorizes the officer to carry a judgment into effect;[11] the process by which the debt, or damages, or other things recovered, and the costs adjudged, is obtained;[12] the embodied power of the court, in the shape of a command to a ministerial officer,[13] respecting the rights of the parties to the judgment, and imposing on the officer certain duties and liabilities prescribed by law.[14]

The term has also been applied to the writ to give possession of anything recovered,[15] and as including the acts done under the writ.[16] It is a "mandate" as that term is defined by some statutes,[17] and is the only method of enforcing a money judgment in an action at law.[18] The commitment for failure to pay a fine for contempt has been held an execution, using the term in a broad sense.[19] A tax warrant, while in the nature of an execution, is not, strictly speaking, an execution.[20] Execution is not an indispensable adjunct of judicial process.[21]

In many jurisdictions the writ of execution is statutory.[22] As used in statutes the term "execution" is often construed in a broad sense as including more than the writ as already defined,[23] al-

1. Me.—Hamant v. Creamer, 63 A. 736, 101 Me. 222, 8 Ann.Cas. 165.
Tex.—Chandler v. Riley, Civ.App., 210 S.W. 716.

2. N.C.—Gooch v. Gregory, 65 N.C. 142.
23 C.J. p 305 note 4.
Similar definition
Mass.—Miller v. London, 1 N.E.2d 198, 294 Mass. 300.
23 C.J. p 305 note 4 [a].

3. U.S.—Brown v. U. S., 6 Ct.Cl. 171, 178.
Kan.—Webber v. Harshbarger, 47 P. 166, 167, 5 Kan.App. 185.
23 C.J. p 305 note 5.
Distress distinguished
A distress is not a judicial process, and under it only such property can be taken as is tangible and capable of seizure and sale.—Acme Harvesting Mach. Co. v. Hinkley, 122 N.W. 482, 23 S.D. 509, 513, 21 Ann. Cas. 743—18 C.J. p 1290 note 73 [b].

4. Cal.—Painter v. Berglund, 87 P. 2d 360, 31 Cal.App.2d 63.
N.M.—Crowell v. Kopp, 189 P. 652, 653, 26 N.M. 146.
N.C.—Hyman v. Jones, 171 S.E. 103, 205 N.C. 266.
Va.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.
23 C.J. p 305 note 6.

5. Ind.—McKinster v. Sager, 72 N. E. 854, 163 Ind. 671, 106 Am.S.R. 268, 68 L.R.A. 273.
23 C.J. p 305 note 8.

6. N.H.—Hurlbutt v. Currier, 38 A. 502, 68 N.H. 94.
23 C.J. p 305 note 9.

7. Mo.—Weniger v. Weniger, App., 32 S.W.2d 775, 776, citing **Corpus Juris.**
23 C.J. p 305 note 10.
Similar definitions
N.C.—Scott Register Co. v. Holton, 157 S.E. 433, 200 N.C. 478.
23 C.J. p 305 note 10 [a].

8. Idaho.—Bacon v. Federal Mining & Smelting Co., 112 P. 1055, 19 Idaho 136.
23 C.J. p 305 note 11.

9. Tex.—Lockridge v. Baldwin, 20 Tex. 302, 70 Am.D. 385.
23 C.J. p 305 note 12.

10. Fla.—Raulerson v. Peeples, 87 So. 629, 81 Fla. 206.
23 C.J. p 305 note 13.

11. Kan.—Webber v. Harshbarger, 47 P. 166, 5 Kan.App. 185.
23 C.J. p 306 note 14.

12. Ala.—Steele v. Johnson, 62 Ala. 323, 327.
23 C.J. p 306 note 15.

13. Ohio.—Kelley v. Vincent, 8 Ohio St. 416.
23 C.J. p 306 note 16.

14. Ark.—Beard v. Wilson, 12 S.W. 567, 52 Ark. 290.
23 C.J. p 306 note 17.

15. Pa.—Girard Life Ins. Annuity & Trust Co. v. Farmers' & Mechanics' Nat. Bank, 57 Pa. 388, 397.
23 C.J. p 306 note 18.

16. Tex.—Shields v. Stark, Civ.App., 51 S.W. 540.
23 C.J. p 306 note 19.
To execute writ is to perform fully its mandate.—State v. Miller, 139 S.E. 711, 104 W.Va. 226.

17. N.Y.—Belfer v. Ludlow, 126 N. Y.S. 130, 69 Misc. 486, affirmed 127 N.Y.S. 623, 143 App.Div. 147.

18. N.Y.—Belfer v. Ludlow, 126 N. Y.S. 130, 69 Misc. 486.

19. Mo.—Ex parte Shull, 121 S.W. 10, 221 Mo. 623, 133 Am.S.R. 496.
23 C.J. p 306 note 22.

20. S.D.—Acme Harvesting Mach. Co. v. Hinkley, 122 N.W. 482, 23 S. D. 509, 21 Ann.Cas. 743.
61 C.J. p 1045 notes 24–27.

21. U.S.—Federal Housing Administration, Region No. 4 v. Burr, 60 S.Ct. 488, 309 U.S. 242, 84 L.Ed. 724, affirming 286 N.W. 169, 289 Mich. 91, certiorari granted Federal Housing Administration Region No. 4 v. Burr, 60 S.Ct. 129, 308 U.S. 541, 84 L.Ed. 456.

22. Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

23. N.J.—Smith v. Young, 12 N.J. Law 300.
23 C.J. p 306 note 26.
Attachment
The term "executions" as used in New Mexico Code 1915 § 1267, dealing with commissions which the sheriff may charge in cases, where the sheriff has collected a judgment on execution without making a sale of the judgment debtor's property, is sufficiently broad to include attach-

though it is sometimes used as merely equivalent to a fieri facias.[24] Thus, it sometimes embraces all the appropriate means to execution of the judgment;[25] all means by which the judgments or decrees of courts are enforced;[26] all processes issued to carry into effect the final judgment of a court;[27] all processes and proceedings in aid of, or supplemental to, execution that are customary in civil cases;[28] and it is sometimes used as the equivalent of "order of sale"[29] of "judgment,"[30] or seizure of property.[31] Generally, the term as used in a statute is broad enough to include both executions against property and executions against the person.[32] It is to be distinguished from "a copy of the judgment,"[33] and "garnishment."[34] The words "levy and sale" may be equivalent to the word "execution."[35] The term "executions" sometimes includes a special execution under an attachment act.[36] As used in certain statutes, an execution has been distinguished from a judgment.[37]

Executory proceedings operate in rem and not in personam.[38]

b. Nature of as Action or Cause of Action

While the issuance and levy of an execution is a remedy by which the creditor seeks to secure satisfaction of his debt, it is not a cause of action, an action, or a special proceeding.

The issuance and levy of execution against a judgment debtor is a remedy by which the creditor seeks to secure satisfaction of his debt, but it is no part of the remedy by which it is determined whether there is a debt or demand owing to him.[39] An execution is neither a cause of action,[40] an action,[41] nor a special proceeding,[42] although certain execution proceedings have been held to be actions or suits.[43] Moreover, it is held that a statute providing that there shall be but one form of civil action includes in the term "civil action" the remedies provided for the enforcement of judgments.[44]

§ 2. Constitutional and Statutory Provisions

Constitutional and statutory provisions relating to executions, where enacted, are controlling.

Various statutory provisions have been enacted in the different jurisdictions, relative to executions, to which the general rules as to the constitutionality, interpretation, operation, and effect of statutes in general have been applied.[45] Generally, statutes authorizing or prohibiting executions will

ment, under circumstances of some cases.—Jones-Noland Drilling Co. v. Bixby, 282 P. 382, 384, 34 N.M. 413.

24. U.S.—In re Teuscher, C.C.Mo., 23 F.Cas.No.13,846.
23 C.J. p 306 note 27.

25. Cal.—Bank of America N. T. & S. A. v. Katz, 113 P.2d 759, 45 Cal. App.2d 138.
23 C.J. p 306 note 28.

26. U.S.—Pierce v. U. S., Mo., 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199, and modified on other grounds 41 S.Ct. 365, 255 U. S. 398, 65 L.Ed. 697.
23 C.J. p 306 note 29.

27. Tex.—Blanscet v. Palo Duro Furniture Co., Civ.App., 68 S.W.2d 527.
23 C.J. p 306 note 30.

"Final process" as used in particular statutes has been held to comprise writs of execution.—Amis v. Smith, Miss., 16 Pet. 303, 313, 10 L.Ed. 973.

Mandamus may be considered as execution.
N.C.—Maryland Casualty Co. v. Leland, 199 S.E. 7, 214 N.C. 235.
Tex.—Yett v. Cook, 268 S.W. 715, 717, 115 Tex. 175.
28 C.J. p 19 note 56 [a], [b].

28. U.S.—Pierce v. U. S., Mo., 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199, and modified on other grounds 41 S.Ct. 365, 255 U.S. 398, 65 L.Ed. 697.

29. Okl.—Bartlett Mortg. Co. v. Morrison, 81 P.2d 318, 322, 183 Okl. 214.
Tex.—Blanscet v. Palo Duro Furniture Co., Civ.App., 68 S.W.2d 527—Carlton v. Hoff, Civ.App., 292 S.W. 642, 645.
23 C.J. p 306 note 32—46 C.J. p 1131 note 12 [a].

Process on judgment decreeing foreclosure
Tex.—Chandler v. Riley, Civ.App., 210 S.W. 716.

30. Ga.—Georgia R. & Banking Co. v. Wright, 53 S.E. 251, 124 Ga. 596, reversed on other grounds 28 S.Ct. 47, 207 U.S. 127, 52 L.Ed. 134, 12 Ann.Cas. 463.
23 C.J. p 307 note 33.

31. La.—Frank v. Currie, App., 172 So. 843, 848.

32. N.J.—Kemble v. Harris, 36 N.J. Law 526, 529.

33. U.S.—Brown v. U. S., 6 Ct.Cl. 171, 179.

34. Tex.—Shields v. Stark, Civ.App., 51 S.W. 540.

35. Kan.—Miami County v. Wanzoppeche, 3 Kan. 364, 370.

36. Ill.—Union Nat. Bank v. Byram, 22 N.E. 842, 131 Ill. 92.

37. S.C.—Ingram v. Belk, 19 S.C.Eq. 111, 112.

38. La.—Landry v. Grace, 120 So. 770, 167 La. 1042.

39. Ohio.—Chandler v. Horne, 154 N.E. 748, 23 Ohio App. 1.

40. N.D.—Weisbecker v. Cahn, 104 N.W. 513, 514, 14 N.D. 390.

41. U.S.—Lahman v. Supernaw, D. C.Okl., 47 F.2d 610.
23 C.J. p 309 note 84.

42. N.Y.—Matter of Warner, 56 N. Y.S. 585, 39 App.Div. 91.

43. Pa.—McDonald v. Stear, 7 Pa. Dist. 190.
23 C.J. p 309 note 86.

44. Cal.—Humiston v. Smith, 21 Cal. 129.

45. **Construction of statutes**
(1) Statutes relating to execution must be construed to give effect, whenever possible, to every one of them.—Hecht v. Sanger, 215 N.Y.S. 409, 126 Misc. 735, reversed on other grounds 218 N.Y.S. 675, 128 Misc. 380.

(2) Statute amending statute on executions is remedial and should be liberally construed.—Harcum v. Greene, 166 A. 717, 111 N.J.Law 129.

(3) The Execution Act must be considered in its entirety.—Moran v. Joyce, 11 A.2d 420, 124 N.J.Law 255.

(4) All statutes providing for collection of debts, liens, proceedings supplementary to execution, and other methods of attaching property and satisfying judgments, householder's exemption laws, and laws against assignment of wages, must be construed in pari materia when dealing with question of executions

not be considered as retroactive unless the language employed expressly so warrants,[46] although a statute in general terms exempting certain property from levy and sale on execution has been held applicable to debts contracted previous to the passage thereof.[47] The state may provide that some forms of property may be reached by creditors through execution or other process.[48] Statutes relating to attachments are generally not applicable to executions.[49]

§ 3. Assignability of Writ

Subject to statutory provisions applicable thereto, the writ is assignable.

It has been said that there might be a legal difficulty in transferring the writ so that the assignee could maintain a suit founded on it, although the right of receiving the money on it and of directing the officer in its execution is clearly assignable.[50] In other cases, however, the assignment has been held to be valid,[51] and under some statutes a transfer must be made under certain conditions.[52] Statutes sometimes provide that a transfer, to be valid, must be in writing.[53] When the transfer is in writing and entered on the fieri facias with intention to pass title, possession and actual delivery is not essential to the validity of its transfer by the plaintiff in fieri facias or his assignee.[54] Whether a payment by a third person constitutes a satisfaction or a transfer depends on the intention of the parties.[55] An assignment by an attorney in fact, having only a naked power to act in the suit in plaintiff's name, is no evidence that the assignee is a purchaser for valuable consideration.[56] An execution which is void in the hands of the original judgment creditor is void and without effect even though transferred and assigned to another for valuable consideration.[57]

§ 4. Actions and Proceedings in Which Executions Authorized

Executions are authorized in various actions or proceedings, including actions and proceedings for the recovery of a money judgment.

It may be broadly stated that executions are authorized in any actions or proceedings in which a money judgment is recoverable, and in any other actions or proceedings where authorized by statute. A statute providing that judgments for penalties may be enforced by execution in like manner as judgments in civil cases are enforced applies to all judgments for penalties, whether recovered by civil or criminal proceedings.[58]

In the code states where judgments at law and decrees in equity are all denominated judgments, a judgment requiring the payment of money, although

and exemptions.—Martin v. Loula, 195 N.E. 881, 208 Ind. 346, denying rehearing 194 N.E. 178, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.

Construction of federal statute

U.S.—In re Chateaugay Ore & Iron Co., N.Y., 9 S.Ct. 150, 128 U.S. 544, 554, 32 L.Ed. 508.

23 C.J. p 310 note 92 [a].

State statutes construed

Mo.—Lindell v. Wash, 3 Mo. 512.

46. Ga.—Lockhart v. Tinley, 15 Ga. 496.

23 C.J. p 309 note 90.

47. N.Y.—Morse v. Goold, 11 N.Y. 281, 62 Am.D. 103.

23 C.J. p 309 note 91.

48. N.Y.—Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N.Y.S. 789, 244 App.Div. 784.

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

Delivery of personal property at appraisement

The constitution of the United States, prohibiting the states from making anything but gold and silver a legal tender and from passing any law impairing the obligation of contracts did not, as to antecedent debts, repeal the Acts Assem. 1716c 16, relating to the execution of a fieri facias, by delivering up the personal estate at an appraisement, and the delivery over to the creditor of sufficient to satisfy his execution. —Donaldson v. Harvey, 3 Harr. & M., Md., 12.

Statutes held constitutional

U.S.—Endicott-Johnson Corporation v. Encyclopedia Press, 45 S.Ct. 61, 266 U.S. 285, 69 L.Ed. 288, affirming Encyclopedia Press, Inc. v. Endicott-Johnson Corporation, 138 N.E. 474, 234 N.Y. 627, affirming 191 N.Y.S. 924, 200 App.Div. 847.

49. Or.—Miller v. Shute, 107 P. 467, 55 Or. 603.

50. N.J.—Ayres v. Swayze, 5 N.J. Law 812.

51. Ga.—Hill v. McCulloch, 20 Ga. 637.

23 C.J. p 310 note 96.

52. Ga.—Fuller v. Dowdell, 11 S.E. 773, 85 Ga. 463.

23 C.J. p 310 note 97.

Authority to transfer

Without express authority a sheriff cannot transfer a fieri facias in his hands for collection.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683—23 C.J. p 310 note 97 [a].

Duty to transfer

While an attorney of record may transfer an execution subject to ratification of plaintiff therein, in view of Civ.Code 1910 § 5970, he is not required to make such transfer on tender of the amount due by a third person or by defendant with a request for transfer to another who advanced the money with which such tender was made.—Shurley v. Black, supra.

53. Ga.—Colter v. Livingston, 114 S.E. 430, 154 Ga. 401.

23 C.J. p 310 note 98.

54. Ga.—Colter v. Livingston, supra.

55. Mass.—Hunneman v. Lowell Inst. for Sav., 91 N.E. 526, 205 Mass. 441.

56. Ky.—Caldwell v. Dean, 6 Litt. Sel.Cas. 239.

57. Ga.—Winn v. Armour & Co., 193 S.E. 447, 184 Ga. 769.

58. U.S.—Pierce v. U. S., Mo., 41 S. Ct. 365, 255 U.S. 398, 65 L.Ed. 697, modifying 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C. C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199.

in the form of a decree in equity, is enforceable by execution.[59]

§ 5. Judgment, Decree, or Order as Basis of Writ

a. In general
b. Several executions on one judgment
c. One execution on separate judgments

a. In General

Except as it may be otherwise provided by statute, an execution cannot lawfully issue other than on a final judgment or decree pronounced by a competent court which has determined the respective rights and liabilities of the parties.

Except as it may be otherwise provided by statute, an execution cannot be lawfully issued on other than a final judgment or decree pronounced by a competent court which has determined the respective rights and liabilities of the parties litigant,[60] and an execution issued without a judgment or decree to support it is void and confers no authority on the officer to whom it is directed.[61] The courts adhere to this rule with strictness; the parties to the action cannot by agreement confer on a clerk authority to issue execution for a debt not evidenced by a judgment,[62] and a mere verdict[63] or finding,[64] or copy of the judge's bench notes,[65] or a decree or order that money be brought into court,[66] or an award,[67] or an order of the probate court stating a guardian's account and ordering him to pay to his successor the balance found due from him on such accounting,[68] is not sufficient where no judgment has been rendered. So, too, a filing of the necessary papers authorizing an entry of judgment by confession in vacation without such entry actually being made is not sufficient.[69] A judgment rendered after the issuance of the execution will not have a retrospective effect so as to validate the execution.[70] An agreed order of settlement has been held not a judgment on which execution might issue, although entered of record.[71]

A replevin bond, having the force of a judgment, is sufficient basis for the issuance of an execution.[72]

Orders for the payment of money are, by statute in some jurisdictions, enforcible by execution;[73] but it has been held that such a statute does not apply where money is directed to be paid into court as distinguished from to a party or other person.[74]

b. Several Executions on One Judgment

Separate executions cannot be taken out on different portions of a single judgment.

Plaintiff cannot divide his judgment and take out separate executions for different portions thereof.[75]

59. Ind.—Hord v. Bradbury, 59 N.E. 31, 156 Ind. 30.
23 C.J. p 315 note 6.
Enforcement of decrees in equity generally see Equity § 617.

60. Ky.—Carmical v. Broughton's Adm'x, 61 S.W.2d 612, 249 Ky. 749.
Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
Mo.—Bovard v. Bovard, 128 S.W.2d 274, 277, 233 Mo.App. 1019, quoting **Corpus Juris.**
23 C.J. p 314 note 87.

"Judgment" is usually imposed in invitum, although it may be for enforcement of an indebtedness previously contracted, and it is immediately payable and enforceable by execution against the property of a judgment debtor who has property which is not exempt from execution. —Cherey v. City of Long Beach, 26 N.E.2d 945, 282 N.Y. 382, affirming 17 N.Y.S.2d 541, 258 App.Div. 986.

Necessity in particular actions or proceedings

Although common-law rule that a judgment must precede an execution is subject to statutory innovations, in an action for commissions for services rendered in procuring a loan, no execution for the debt could issue without a final judgment being entered against defendant.—Le Menager v. Northwestern Barb Wire Co., 16 N.E.2d 824, 296 Ill.App. 568.

Proceeding to establish claim against estate

A proceeding under the statute providing that, when notice is given of a disputed claim against an estate, the judge of the court having jurisdiction of the administration shall on written application hear and pass on its validity, does not lead to a money judgment on which execution may issue, but is intended only to fix the rights of parties to a fund in trust, being administered in that court, so as to determine who is entitled thereto on distribution.—Tillery v. Commercial Nat. Bank of Anniston, 4 So.2d 125, 241 Ala. 653.

61. U.S.—Salinas v. Jones, D.C. Tex., 60 F.2d 1049.
Idaho.—Evans v. City of American Falls, 11 P.2d 363, 368, 52 Idaho 7, citing **Corpus Juris.**
Mo.—Bovard v. Bovard, 128 S.W.2d 274, 277, 233 Mo.App. 1019, quoting **Corpus Juris.**
23 C.J. p 314 note 88.

62. La.—Strother v. Richardson, 30 La.Ann. 1269.

63. Wash.—Bassett v. McCarty, 101 P.2d 575, 3 Wash.2d 488.
23 C.J. p 314 note 90.

64. Ind.—Sare v. Butcher, 40 N.E. 749, 141 Ind. 146.

65. Ala.—Brightman v. Merriwether, 25 So. 994, 121 Ala. 602.

66. Md.—United Lines Tel. Co. v. Stevens, 8 A. 908, 67 Md. 156.
23 C.J. p 314 note 93.

67. Pa.—Book v. Edgar, 3 Watts 29.

68. Ill.—Kingsberry v. Hutton, 30 N.E. 600, 140 Ill. 603, affirming 40 Ill.App. 424.

69. Ill.—Knights v. Martin, 40 N.E. 358, 155 Ill. 486.
23 C.J. p 314 note 96.

70. Mo.—Bovard v. Bovard, 128 S.W.2d 274, 277, 233 Mo.App. 1019, quoting **Corpus Juris.**
23 C.J. p 314 note 97.

71. Ky.—S. L. Crook Corporation v. Deboe, 113 S.W.2d 445, 271 Ky. 832.

72. Ky.—Moss v. Moss, 5 Ky.Op. 464—Minor v. Clarkson, 1 Ky.Op. 389.
23 C.J. p 315 note 99.

73. N.Y.—Kane v. Rose, 84 N.Y.S. 111, 87 App.Div. 101, affirmed 69 N.E. 1125, 117 N.Y. 557.
23 C.J. p 315 note 9.

74. N.Y.—Devlin v. Hinman, 57 N.Y.S. 663, 40 App.Div. 101, affirmed 55 N.E. 386, 161 N.Y. 115.

75. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305, 312, quoting **Corpus Juris.**
23 C.J. p 315 note 12.

Thus, a money judgment being an entirety, separate executions cannot issue on each of the counts of the complaint, although there were findings and a judgment on each count separately;[76] but where a judgment decrees a distinct and separate amount in favor of particular plaintiffs, a separate execution may issue in favor of each.[77] Where plaintiff recovers a money demand and defendant is awarded costs, the costs should be set off against plaintiff's recovery and only one execution awarded for the recovery in excess of the costs;[78] but executions may issue severally to complainant in original bill and to complainant in cross bill for the sums adjudged to them respectively.[79]

c. One Execution on Separate Judgments

Each judgment must carry its own execution, and a single execution cannot be issued on two or more judgments.

While a judgment creditor is entitled to issue execution on each judgment obtained against defendant,[80] each judgment must carry its own execution, and a single execution cannot be issued on two or more separate judgments.[81] Thus, when separate judgments are recovered against several defendants in different suits, it is not permissible to issue one execution on such separate judgments, although they are all in favor of the same plaintiff.[82] Likewise, where two or more plaintiffs in separate actions obtain separate judgments against the same defendant, an execution should not be issued as if on a joint judgment, but an execution should be issued on each judgment;[83] but where, in one action, judgments against one or more are entered at one time and against others at another time, one execution may be issued against all.[84] So plaintiff who holds several judgments against a debtor, and different sureties or indorsers, may, in the absence of any agreement to the contrary, issue execution on any one of the judgments.[85]

Void or voidable. A single execution on several judgments has been held not merely voidable but void.[86] On the other hand, such execution has been held not void;[87] and it has been held that such an execution, while irregular, is not void if sufficient to identify the two judgments or if it contains sufficient recitals to indicate where the records of the judgment can be found, and if such records fully identify each judgment.[88]

§ 6. —— Form and Requisites in General

a. General rules
b. Direction for execution in judgment
c. Necessity for final judgment
d. Amount

a. General Rules

In general, so long as the judgment is valid no particular form is necessary to support an execution thereon, but there must be a judicial ascertainment of the party to whom the money is due, and a clear statement of the final determination of the court.

The judgment need be in no particular form to support an execution thereon so long as its validity is unaffected,[89] although where the statute prescribes a certain form of execution and judgment a substantial compliance therewith is necessary.[90] There must, however, be a judicial ascertainment of the party to whom the money is due,[91] and a clear statement of the final determination of the court.[92] Thus an execution cannot issue on a decree which leaves with the clerk for settlement a question not within his jurisdiction.[93] There must be an absolute money judgment.[94] A judgment directing restitution of money is a judgment for a sum of mon-

76. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, supra.
23 C.J. p 315 note 13.

77. Tex.—Stewart v. Morrison, 17 S.W. 15, 81 Tex. 396, 26 Am.S.R. 821.

78. N.Y.—Johnson v. Ferrell, 10 Abb.Pr. 384.

79. Va.—Stuart v. Heiskell, 9 S.E. 984, 86 Va. 191.

80. Mo.—Steffen v. American Surety Co. of New York, App., 224 S.W. 102.

81. Ark.—Bigham v. Dover, 110 S. W. 217, 86 Ark. 323.
23 C.J. p 315 note 17.

82. Vt.—Rider v. Alexander, 1 D. Chipm. 267.
23 C.J. p 316 note 18.

83. Va.—Stuart v. Heiskell, 9 S.E. 984, 86 Va. 191.
23 C.J. p 316 note 19.

84. Va.—Walker v. Commonwealth, 18 Gratt. 13, 59 Va. 13, 98 Am.D. 631.

85. Pa.—Marshall v. Franklin Bank, 25 Pa. 384.
23 C.J. p 316 note 21.

86. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
23 C.J. p 316 note 22.

87. Okl.—Keaton v. Shiflett, 63 P.2d 102, 178 Okl. 587.

88. Kan.—Dugan v. Herman, 102 P. 465, 80 Kan. 302, 133 Am.S.R. 209.

89. Tex.—Ryan v. Raley, 106 S.W. 750, 48 Tex.Civ.App. 187.
23 C.J. p 316 note 24.

90. Ga.—Atlanta v. Grant, 57 Ga. 340.

91. Miss.—Hines v. Noah, 52 Miss. 192.

92. Iowa.—Winter v. Coulthard, 62 N.W. 732, 94 Iowa 312.
23 C.J. p 316 note 27.

93. Conn.—Donalds v. Plumbs, 8 Conn. 447.

94. Cal.—Baar v. Smith, 255 P. 827, 201 Cal. 87.
23 C.J. p 316 note 29.

Personal judgment for money

Judgment, ordering defendants to pay over to plaintiffs stated sum "loaned by defendants as trustees . . . in violation of their trust," is a personal judgment for such sum, not merely an order to pay it over if and when loans were repaid, so that plaintiffs were entitled to exe-

ey within an execution statute.[95] A judgment for the payment of money and the delivery of property may be enforced by execution.[96] Execution on a decree establishing a general lien on all of defendant's property could be levied on particular lots without a special lien on such lots, even if a portion of the decree which established a special lien on such lots was void.[97] If judgment is vacated as to deceased defendant, and entered nunc pro tunc against the survivors, only one execution can issue thereon.[98]

b. Direction for Execution in Judgment

It is not necessary that the judgment or decree direct issuance of execution.

An execution is authorized, although no provision to that effect is contained in the judgment[99] or decree[1] on which the execution is based.

c. Necessity for Final Judgment

To be a sufficient basis for an execution the judgment or decree must be final.

It is essential that the judgment, to be a sufficient basis for a valid execution, be not a mere interlocutory order, or dependent on a mere contingency, but it must be a final determination of the contention between the parties;[2] and must dispose of all the parties;[3] and where a joint judgment is opened as to one of the joint debtors, execution cannot issue against the other until the final determination of the liability of his coöbligor.[4] A judgment is final within this rule, although not expressly disposing of all the issues, where it impliedly does so.[5] So, also, a judgment is final which determines the rights of the parties but reserves for future consideration some independent branch of the case.[6] So where the matters at issue are clearly divisible, and a judgment is rendered on one point, which it is clear is in no way affected by a judgment on the other point, execution may issue on the former judgment.[7] Where there is a default judgment against one defendant, and the jury finds adversely to the codefendant, the subsequent judgment against both is a final judgment authorizing execution.[8] Under the common law a judgment did not become final until the end of the term and the court had no power to direct execution thereon during such term.[9] This rule has been modified by statute.[10] A judgment becomes final so as to authorize execution when the losing party has either waived or lost the right to move for a new trial or appeal.[11] Where defendant has a right of set-off, a judgment for plaintiff could not become final so as to be enforced

cution thereon, reference to loans being surplusage.—Avakian v. Dusenberry, 58 P.2d 1306, 15 Cal.App.2d 55.

95. Colo.—Scott v. Woodhams, 246 P. 1027, 79 Colo. 528, followed in 246 P. 1029, 79 Colo. 532.

96. Wash.—Gustin v. Klingenberg, 70 P.2d 308, 190 Wash. 590.

97. Ga.—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.

98. Ala.—Hood v. Mobile Branch Bank, 9 Ala. 335.

99. Ark.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.
23 C.J. p 316 note 31.

1. Tex.—Ryan v. Raley, 106 S.W. 750, 48 Tex.Civ.App. 187.
23 C.J. p 316 note 32.

2. Tex.—McMillan v. McMillan, Civ. App., 67 S.W.2d 342.
23 C.J. p 316 note 34.

Judgments held final

(1) In mortgage foreclosure, judgment fixing amount due plaintiffs and amount of first lien on property, ordering property sold, directing manner of sale, providing for distribution of proceeds of sale, and ordering that after sale defendants would be foreclosed from any interest in property, was "final judgment" on issues between plaintiffs and defendants, as regards issuance of execution, notwithstanding pending cross petition by one defendant against a codefendant.—MacKenchnie v. Voight, 86 P.2d 991, 184 Okl. 291.

(2) Judgment for certain amount, with interest and costs, against partnership, and authorizing execution thereon, is "final" and enforceable by execution against partners individually.—Baria v. Taylor, Tex.Civ.App., 57 S.W.2d 858.

In Louisiana

(1) An executory judgment is subject to execution.—Wetherbee v. Lodwick Lumber Co., 193 So. 671, 194 La. 352.

(2) Decree of court of appeal affirming judgment became final on registration thereof in parish wherein suit originated, and hence execution issued thereon was not invalid on ground that judgment was executory. Registration before receipt of record used by such court does not render judgment executory so as to invalidate execution issued thereon, where district judge who was defendant in suit, had record in his possession when decree was registered; and minute entry in district court of affirmance of judgment is not condition precedent to right to have execution issued thereon.—Jones v. Scott, La.App., 167 So. 117.

3. Tex.—Gathings v. Robertson, Com.App., 276 S.W. 218, reversing, Civ.App., 264 S.W. 173.

4. N.Y.—Ford v. Whitridge, 9 Abb. Pr. 416.
Pa.—Struthers v. Lloyd, 14 Pa. 216.

When judgment obtained by default against joint debtors is allowed to stand as security pending further litigation with respect to the liability of a defendant who has been permitted to come in and defend, no execution can issue thereon until the final determination of his liability.—Ford v. Whitridge, 9 Abb.Pr., N.Y., 416.

5. Tex.—Powell v. Smith, Civ.App., 242 S.W. 1115.
23 C.J. p 317 note 36.

6. Cal.—Perry v. West Coast Bond & Mortgage Co., 29 P.2d 279, 136 Cal.App. 557.

7. La.—Hereford v. Babin, 14 La. Ann. 333—Bourguignon v. Boudousquie, 7 Mart.,N.S., 156.

8. Mo.—People's Bank of Glasgow v. Yager, 46 S.W.2d 585, 329 Mo. 767.

9. Va.—Carney v. Poindexter, 196 S. E. 639, 170 Va. 233.

10. Va.—Carney v. Poindexter, supra.

11. Tex.—McMillan v. McMillan, Civ. App., 67 S.W.2d 342.

by execution until defendant's claims by way of set-off were finally adjudicated.[12]

Judgment nisi. An execution may issue in some states on a judgment nisi entered on filing the circuit record and posted, although such execution becomes void if the rule to show that cause is made absolute.[13]

d. Amount

There must be a specification of the amount to be recovered in the judgment before execution can issue thereon.

It is essential that there be a specification of the amount to be recovered in the judgment before execution can issue thereon,[14] and where the judgment is rendered for a debt or damages, and for costs, execution cannot be issued for the collection of such costs, if the amount thereof is not designated, except in cases where the law authorizes the clerk to tax the costs and include them in the execution.[15]

§ 7. —— Particular Judgments

a. Contingent or conditional judgment
b. Dormant judgment
c. Foreign judgment
d. Judgment by confession
e. Judgment after revival
f. Judgment without personal notice
g. Judgment on appeal

a. Contingent or Conditional Judgment

A judgment on condition can be enforced by execution only in pursuance of the conditions thereof.

A judgment on condition can be enforced by execution only in pursuance of the conditions thereof,[16] and where plaintiff recovers subject to the condition of making certain payments, an execution cannot issue to enforce such payments;[17] but where it appears that the condition or contingency on which the judgment might be satisfied from a different source or for a lesser amount has not been complied with, execution may at once issue for the amount of the same.[18] A decree conditioned that, on return of a deposit on the purchase price a purchaser's bill for specific performance would be dismissed is not a final decree as regards execution.[19]

b. Dormant Judgment

Ordinarily, an execution cannot issue on a dormant judgment. Generally speaking, if such execution is issued, it is voidable, although it has been held void.

Except where otherwise provided by statute,[20] an execution cannot be issued on a dormant judgment,[21] but a scieri facias must issue to revive it;[22] and since, as stated infra § 8, an execution on a judgment that is void is of no avail, it follows that if the statutes specifically declare a dormant judgment void an execution and sale thereon are also void.[23] Generally speaking, although an execution issued on a dormant judgment has been held absolutely void,[24] it is not void, but only voidable,[25] and it may be set aside at the instance of defendant unless the judgment has been properly revived;[26] and the principle that an innocent purchaser will be protected where the only informality of a judgment is its dormancy does not apply where defendant may also set up as a defense the statute of limitations.[27] However, an execution issued while a judgment is yet alive is good, and may be completed by the officer after the expiration of the statutory period of limitation.[28]

c. Foreign Judgment

Execution cannot properly issue on a foreign judgment.

There is, in the absence of statutory permission, no way of proceeding on a foreign judgment other than by action,[29] and the constitutional provision

12. Tex.—Nalle v. Harrell, 12 S.W. 2d 550, 118 Tex. 149.

13. N.J.—Russell v. Russell-Robinson Co., 91 A. 329, 86 N.J.Law 13—Ackerson v. Erie R. Co., 33 N.J.Law 33.

14. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Standard Oil Co. of California, 73 P.2d 903, 10 Cal.2d 90.
23 C.J. p 317 note 38.

15. N.J.—Cook v. Brister, 19 N.J. Law 73.

16. Pa.—Triveley v. Krouse, 2 Pa.C. Pl. 254.

17. Kan.—Jeffries v. Clark, 23 Kan. 448.

18. Wis.—Baird v. McConkey, 20 Wis. 297.
23 C.J. p 317 note 42.

19. Mass.—Booras v. Logan, 164 N. E. 921, 266 Mass. 172.

20. Pa.—Second Nat. Bank of Altoona for Use of Federal Reserve Bank of Philadelphia, v. Faber, 2 A.2d 747, 332 Pa. 124.
23 C.J. p 317 note 44.

21. Ky.—Gotee v. Graves, 154 S.W. 386, 153 Ky. 26.
23 C.J. p 317 note 45.

22. Md.—Salmon v. Yates, 1 Harr. & J. 488.

23. Ga.—Smith v. White, 63 Ga. 236.
23 C.J. p 317 note 47.

Preventing judgment becoming dormant
Ga.—First Nat. Bank v. McCaskill, 108 S.E. 819, 27 Ga.App. 391.
23 C.J. p 317 note 47 [a].

24. Kan.—Denny v. Ross, 79 P. 502, 70 Kan. 726.

25. Tex.—Spiller v. Hollinger, Civ. App., 148 S.W. 338.
23 C.J. p 317 note 49.

26. Ill.—Weis v. Tiernan, 91 Ill. 27.
23 C.J. p 317 note 50.

27. N.C.—Lytle v. Lytle, 94 N.C. 683.

28. Wis.—Brown v. Hopkins, 77 N. W. 899, 1198, 101 Wis. 498.
23 C.J. p 317 note 52.

29. Mo.—Cook's Estate v. Brown,

that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state does not apply to the subsequent acts under a judgment, such as issuing and returning executions thereon.[30] In any event, an execution cannot issue on a foreign judgment where the debtor is a nonresident and has no property in the state.[31]

d. Judgment by Confession

In general, an execution may issue on a judgment by confession.

An execution may issue on a judgment by confession the same as on any other judgment unless otherwise provided by statute,[32] although in some jurisdictions such issuance is under the equitable control of the court in which the judgment may be rendered;[33] and a party issuing execution on a judgment entered by warrant of attorney proceeds at his peril,[34] and the power of the attorney to confess such judgment must clearly appear.[35]

e. Judgment after Revival

Where a judgment is revived, in some jurisdictions execution should issue on the original judgment, in others it must issue on the scire facias judgment, and in others it has been held immaterial on which of the judgments it issues.

Where judgment is revived it is held in some jurisdictions that the execution should be issued on the original judgment,[36] although it has been held that the issuing of the execution on the judgment recovered on the scire facias is but an irregularity.[37] On the other hand, in some states it is held to be immaterial on which of the judgments the execution issues, since it is legal in either case.[38] In other jurisdictions, where a judgment is renewed by scire facias, it is the rule that execution can thereafter issue only on the scire facias judgment and not on the original judgment.[39] An execution issued on a judgment not regularly revived is voidable merely, and not void;[40] but on the other hand a judgment of revival entered without bringing necessary parties before the court has been held insufficient to support an execution issued on it.[41]

f. Judgment without Personal Notice

In general, a personal service on defendant, or his appearance in the proceedings in which the judgment is obtained, is necessary to authorize a general execution against him.

A personal service on defendant, or his appearance in the proceedings in which the judgment is obtained, is necessary to authorize a general execution against him,[42] and a mere entry on the docket of "judgment by default" has been held insufficient to support execution,[43] although by virtue of statutory provisions in some jurisdictions execution may be taken out against a nonresident defendant, or one who has had no personal notice, on giving a proper bond.[44]

140 S.W.2d 42, 346 Mo. 281, 128 A.L.R. 1396.
23 C.J. p 318 note 54.

In Louisiana

(1) An early statute permitted executions on foreign judgments.—Miller v. Gaskins, 3 Rob., La., 94—Armstrong v. Levy, 14 La. 157.

(2) By a later act the provisions of this statute were repealed.—Kilgore v. Planters' Bank, 3 La.Ann. 693.

30. Or.—De Vall v. De Vall, 109 P. 755, 110 P. 705, 57 Or. 128.
23 C.J. p 318 note 55.

31. U.S.—Sherrard v. Ponsonby, D. C., 21 F.Cas.No.12,772, 1 Cranch C. C. 131.

32. Ill.—St. Clair v. Goldie, 244 Ill. App. 357—Bauer Grocer Co. v. McKee Shoe Co., 87 Ill.App. 434.
La.—Decker v. Decker, 125 So. 875, 169 La. 743.
23 C.J. p 318 note 58.

Contingent liability

(1) Execution could not issue on judgment entered by confession until default in separate agreement making liability contingent, and then only for amount due.—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454.

(2) Where judgment note was given vendee as security against vendor's failure to perform on date specified, it was improper to issue execution on such note prior to vendor's default.—Durso v. Fiorini, 98 Pa.Super. 111.

33. Pa.—McCann v. Farley, 26 Pa. 173.
23 C.J. p 318 note 59.

34. Pa.—Jones v. Dilworth, 63 Pa. 447.
23 C.J. p 318 note 60.

35. La.—Tildon v. Dees, 1 Rob. 407.
23 C.J. p 318 note 61.

36. Miss.—Eastin v. Vandern, 1 Miss. 214.
23 C.J. p 318 note 66—34 C.J. p 683 note 30.

Execution on filing original transcript

Under statute requiring revival of original judgment where execution sale is irregular and purchaser fails to obtain possession, the judgment so revived to have the same effect as would an original judgment of the date of revival, where personalty was sold under execution, satisfaction of judgment was entered, sale was declared void, and original judgment was revived, sale of realty under execution issued from another county, wherein transcript of original judgment was filed after its survival, was valid as between judgment debtor and creditor, notwithstanding that transcript failed to show satisfaction and revival.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543.

37. Pa.—Grover v. Boon, 16 A. 885, 124 Pa. 399.

38. Mo.—Littlefield v. Ramsey, 80 S. W. 949, 181 Mo. 613.
23 C.J. p 318 note 69.

39. Md.—Wright v. Ryland, 48 A. 163, 49 A. 1009, 92 Md. 645, 53 L. R.A. 702.
34 C.J. p 683 note 28.

40. Miss.—Mitchell v. Evans, 6 Miss. 548, 37 Am.D. 169.

41. Tex.—Rowland v. Harris, Civ. App., 34 S.W. 293.

42. Ky.—Aultman, etc., Co. v. Meade, 89 S.W. 137, 121 Ky. 241, 28 Ky. L. 208, 123 Am.S.R. 193.
23 C.J. p 318 note 63.

43. Ala.—Page v. Coleman, 9 Port. 275.

44. Conn.—Smith v. Silliman, 8 Conn. 111.
23 C.J. p 318 note 65.

On service of notice by publication. A service of notice on defendant by publication only is usually held to be insufficient to authorize a personal judgment on which a general execution can issue where there was no appearance by defendant or on his behalf,[45] and an execution sale thereunder passes no title.[46]

g. Judgment on Appeal

Where an appeal has been taken, executions may issue on the judgment rendered by the appellate court; and whether the lower or higher court should issue the execution depends on the particular case.

The remedy by execution on judgments rendered by an appellate court exists the same as on judgments rendered by an inferior tribunal.[47] If the judgment is wholly affirmed the execution should issue from the lower court.[48] On the other hand, if the judgment on appeal fixes the liability of parties whose liability was not determined by the lower court, execution should issue on the judgment rendered by the appellate tribunal rather than on that rendered by the lower court.[49] If the judgment is reversed or a new judgment is rendered by the appellate court, execution may issue from such court or from the lower court on the judgment of the appellate court,[50] but not on the judgment which has been reversed.[51] In reversing a judgment for defendant, where the defense was not established, the appellate court may order issuance of execution in favor of plaintiff.[52] If the appeal is dismissed by consent of parties, execution may be taken out as if no appeal had been taken.[53]

§ 8. —— Validity

An execution to be valid must have a valid judgment to support it. A valid execution may issue on a judgment which while not void is irregular or erroneous, or voidable.

Where, because of want of jurisdiction of the court rendering judgment,[54] fatal defects in the proceedings,[55] uncertainty of the verdict,[56] fraud,[57] or for any other cause,[58] the judgment is void, an execution issued thereon is of no validity and no title can be acquired under it; nor can such execution be validated by an amendment to the judgment subsequent to the issuance of the writ, the reason being that if the amendment were valid the execution would show a different judgment than the one on which it was issued, and would therefore on that account be a nullity; and if the amendment were invalid, the judgment on which the execution was issued would still be void.[59] Where the judgment is void, the court cannot compel an officer to issue an execution to the creditor.[60] However, if a judgment is valid as to a certain sum but is invalid as to the balance, an execution is not subject to collateral attack because thereof.[61] Of course, where the judgment is valid a valid execution can issue.[62] It is not improper to issue a writ of fieri facias on a judgment rendered by a judge who had nothing to do with the trial of the case, where the judgment was entered by direction and with the consent of the trial judge.[63] A judgment of a court of a Confederate state during the Civil War was enforceable by execution after the war.[64]

Irregular, erroneous, or voidable judgment. The rule that a valid execution cannot be issued on a

45. U.S.—Pennoyer v. Neff, Or., 95 U.S. 714, 24 L.Ed. 565.
23 C.J. p 318 note 66.

46. Tex.—Horst v. Lightfoot, 132 S. W. 761, 103 Tex. 643, reversing, Civ.App., 122 S.W. 606.

47. N.Y.—Keeler v. Clark, 18 Abb. Pr. 154.
Tex.—Schmidt v. Huff, 28 S.W. 1053, 7 Tex.Civ.App. 593.
23 C.J. p 319 note 71.

48. Mo.—Walter v. Tabor, 21 Mo. 75.
23 C.J. p 319 note 72.
Powers and duties of lower court see Appeal and Error § 1978.

49. Tex.—Irvin v. Ferguson, 18 S. W. 820, 83 Tex. 491.

50. Mo.—Meyer v. Campbell, 12 Mo. 603.

51. Ky.—Commonwealth v. Shanks, 6 Ky.Op. 79.

52. Vt.—Noyes v. Pierce, 122 A. 896, 97 Vt. 188.

53. La.—Clark v. Farrar, 3 Mart. 212.

54. Mich.—Beier v. Pacholka, 235 N. W. 811, 253 Mich. 673.
23 C.J. p 319 note 78.

Leave of court to sue on judgment is not jurisdictional, and certificate of execution sale cannot be attacked for failure to obtain leave.—Wright v. McKenzie, 226 N.W. 270, 55 S.D. 300.

55. Ga.—Beall v. Blake, 13 Ga. 217, 58 Am.D. 513.
Md.—Koechlept v. Hook, 10 Md. 173, 69 Am.D. 133.

56. Ga.—Butt v. Oneal, 51 Ga. 358.

57. Ill.—Kingman v. Reinemer, 46 N. E. 786, 166 Ill. 208, affirming 58 Ill.App. 173.
N.C.—Dudley v. Cole, 21 N.C. 429.

58. Cal.—First-Trust Joint Stock Land Bank of Chicago v. Meredith, 64 P.2d 977, 19 Cal.App.2d 103.
Ill.—Ring v. Palmer, 32 N.E.2d 956, 309 Ill.App. 333.
Iowa.—Crawford v. Zieman, 185 N.W. 61, 192 Iowa 559.
Mo.—State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106.
Va.—Hill School v. Buchanan, 6 S.E. 2d 622, 174 Va. 281.
23 C.J. p 319 note 82.

59. Ga.—Beall v. Blake, 13 Ga. 217, 58 Am.D. 513.
Tex.—Underwood v. Brown, 68 S. W. 206, 29 Tex.Civ.App. 163.
23 C.J. p 319 note 83.

60. Tenn.—State v. Thompson, 102 S.W. 349, 118 Tenn. 571, 20 L.R.A., N.S., 1.

61. Tex.—Reitz v. Mitchell, Civ.App., 256 S.W. 697.
23 C.J. p 319 note 85.

62. S.D.—Security Nat. Bank of Sioux Falls v. Lowrie, 238 N.W. 304, 59 S.D. 102.

Judgments held valid
Ga.—Georgia Power Co. v. Friar, 171 S.E. 210, 47 Ga.App. 675, affirmed 175 S.E. 807, 179 Ga. 470.
Tex.—Bridges v. Wilder, Civ.App., 72 S.W.2d 644.

63. Mich.—Donohue v. Merriam, 213 N.W. 150, 238 Mich. 253.

64. Ala.—Parks v. Coffey, 52 Ala. 32.

void judgment applies only to judgments which are legally of no force or effect, and may therefore be attacked collaterally, and has no application to judgments which are merely erroneous[65] or voidable,[66] or subject merely to some irregularity or informality;[67] and the amendment of an imperfectly entered judgment, making it perfect as originally ordered, imparts validity to an execution previously issued.[68] Where defendant acquiesces in a particular form of judgment against himself, an execution issued thereunder is not only not void but not even irregular.[69] An execution based in part on a valid judgment, to which it is shown on its face to relate, is not wholly void, although in part based on another void judgment, rendering it excessive and voidable, or subject to correction.[70] So, where a judgment was a valid lien to the extent of the portion not assigned by the judgment creditor, an alias execution for the sale of land was not invalid because for the full amount of the judgment.[71]

§ 9. —— Rendition and Entry or Docketing

While in some jurisdictions an official entry or docketing is a condition precedent to the right to the writ, in others such entry or docketing is not essential to enable a party to issue an execution on a judgment which has been duly rendered.

While the entry or docketing of a judgment is necessary for the purpose of creating a lien, see the C.J.S. title Judgments § 463, also 34 C.J. p 576 note 68 et seq, yet at common law an execution was issuable on the signing of a final judgment and before its entry of record, providing there was no writ of error pending or agreement to the contrary,[72] and such entry or docketing is not essential, in many jurisdictions, to enable a party to issue an execution thereon where the judgment has otherwise been duly rendered,[73] and the failure of the clerk to enter of record the judgment rendered, within any particular time, does not render invalid an execution valid when issued.[74] Where statutes so provide, entry of the verdict in the minutes will sustain an execution issued before entry of the judgment.[75] However, in some states, by virtue of statutes or otherwise, an official entry or docketing is a condition precedent to the right to the writ,[76] especially where the judgment is by confession.[77] Statutes requiring entry of judgment as a condition precedent do not, however, include the making up of the judgment roll,[78] and the general rule is that execution may issue before filing or making up the judgment roll,[79] but such a requirement is not universal.[80] If the statute merely requires an entry of the judgment it seems that it need not be docketed.[81]

Time of entry and effect of failure to enter. The time when the judgment must be entered, where necessary, is generally regulated by statutory provisions, and filing within such time will permit issuance of execution.[82] The law will not notice fractions of a day in order to determine whether or not the record was thus complete before the execution issued, unless it is clearly necessary to prevent an injustice;[83] and it seems that, where the record is subsequently completed, the execution becomes effective from that time,[84] since an entry nunc pro tunc is sufficient to support and validate an execution.[85] The irregularity of issuing execution before entry of judgment or before the filing of the judgment roll may generally be cured by subsequent entry of the judgment[86] or filing of the roll.[87] So, too, for the purpose of the validity of an execution, a judgment entered in term time will

65. Ill.—Smith v. People, 99 Ill. 445.
23 C.J. p 319 note 86.

66. Ga.—Welch v. Butler, 24 Ga. 445.
23 C.J. p 319 note 87.

67. Tex.—Star Cash Grocery Co. v. Retailers' Fire Ins. Co., Civ.App., 12 S.W.2d 608.
23 C.J. p 319 note 88.

68. Ala.—Ware v. Kent, 26 So. 208, 123 Ala. 427, 82 Am.S.R. 132.

69. N.Y.—Matter of Long Island L. & T. Co., 142 N.Y.S. 273, 157 App. Div. 310.

70. Tex.—Simmons v. Arnim, 220 S. W. 66, 110 Tex. 309.

71. Tex.—Ives v. Culton, Com.App., 229 S.W. 321, affirming, Civ.App., 197 S.W. 619.

72. Me.—Stevens v. Manson, 32 A. 1002, 87 Me. 436.
23 C.J. p 320 note 93.

73. Wash.—Cinebar Coal & Coke Co. v. Robinson, 97 P.2d 128, 1 Wash. 2d 620.
23 C.J. p 320 note 94.

74. Ill.—People v. Petit, 107 N.E. 830, 266 Ill. 628.

75. N.J.—Epps v. Bowen, 191 A. 110, 118 N.J.Law 50.

76. Ga.—Tanner v. Wilson, 192 S.E. 425, 184 Ga. 628.
23 C.J. p 320 note 96.

77. Ill.—Knight v. Martin, 40 N.E. 358, 155 Ill. 486.
23 C.J. p 320 note 97.

78. Mont.—Burton v. Kipp, 76 P. 563, 30 Mont. 275.

79. U.S.—Galpin v. Page, C.C.Cal., 9 F.Cas.No.5,205, 1 Sawy. 309, reversed on other grounds 18 Wall. 350, 21 L.Ed. 959.
Cal.—Sharp v. Lumley, 34 Cal. 611.

80. N.Y.—Blashfield v. Smith, 27 Hun 114.
23 C.J. p 320 note 1.

81. Wis.—Hyman v. Landry, 116 N. W. 236, 135 Wis. 598, 128 Am.S.R. 1044.

82. Ala.—Jefferson County Sav. Bank v. Miller, 40 So. 513, 145 Ala. 237.
23 C.J. p 320 note 3.

83. N.Y.—Clute v. Clute, 4 Den. 241.
23 C.J. p 320 note 4.

84. N.Y.—Stoutenburgh v. Vandenburgh, 7 How.Pr. 229.
23 C.J. p 320 note 5.

85. Iowa.—Doughty v. Meek, 74 N. W. 744, 105 Iowa 16, 67 Am.S.R. 282.
23 C.J. p 321 note 6.

86. Iowa.—Doughty v. Meek, supra.
23 C.J. p 321 note 7.

87. N.Y.—Clute v. Clute, 4 Den. 241.

be presumed to have been entered up during the actual session of the court;[88] and a failure to make formal entry is an irregularity which may be waived by failing to make a motion to vacate until several months after the execution has been issued.[89] Generally the failure formally to enter or docket the judgment before issuing execution renders the execution voidable only,[90] but where such entry is essential to the existence of a valid judgment, an execution issued prior thereto is void.[91]

Defective entry. Where the amount of the judgment is inadvertently omitted from the judgment entry, a correction nunc pro tunc validates an execution theretofore issued.[92]

Where a judgment is registered for the purpose of creating a lien, the execution is nevertheless issued on the original judgment.[93]

§ 10. —— Transcript of Judgment of Inferior Court

When so provided by statute, and on compliance therewith, one having judgment in an inferior court may, by filing a transcript thereof in a superior court, obtain execution against all properties for which an execution could issue when sued out on a judgment originally obtained in such superior tribunal.

Under the statutory provisions in some jurisdictions a creditor having a judgment in a justice's or other inferior court may, by filing a transcript thereof in the circuit or other superior court, obtain execution against all properties for which an execution could issue when sued out on a judgment originally obtained in such superior tribunal;[94] but it is essential that the filing be made within the period prescribed by statute,[95] and an execution issued without the filing of a transcript is void.[96] So if the judgment of the inferior court is void, the transcript is void and the execution of no effect.[97]

§ 11. Effect of Acts or Proceedings after Judgment

a. In general
b. Loss or destruction of record
c. Discharge of judgment
d. Vacating or modifying judgment

a. In General

Any condition of affairs arising subsequent to the rendition of judgment, to operate as a suspension of the right to execution, must change the legal relationship of the parties.

Any condition of affairs arising subsequent to the rendition of judgment, to operate as a suspension of the right to execution, must of course change the legal relationship of the parties in some particular.[98] The right is not suspended by permitting a nonresident defendant to come in and enter a defense after judgment,[99] nor does the mere taking of security operate to suspend the execution, in the absence of an agreement to that effect.[1] A compromise and settlement after rendition of a judgment will bar a subsequent issuance of execution.[2]

b. Loss or Destruction of Record

Execution may issue notwithstanding the loss or destruction of the record of the judgment.

Where a judgment is once recovered, it remains in force until satisfied or barred by limitation, although the evidence of its recovery may be lost or destroyed, and in such case if the party desires to enforce it the correct practice, it seems, is to make an application to the court and introduce such evidence of destruction as may be in his possession showing the fact of rendition, and the loss or destruction of the record, and where such evidence is satisfactory an execution should be awarded;[3] but

88. Ill.—Hansen v. Schlesinger, 17 N.E. 718, 125 Ill. 230—Jasper v. Schlesinger, 22 Ill.App. 637.

89. N.Y.—Bowman v. Tallman, 25 N.Y.Super. 632, 19 Abb.Pr. 84, 28 How. Pr. 482.

90. S.C.—Mason & Risch Vocalion Co. v. Killough Music Co., 22 S.E. 755, 45 S.C. 11.
23 C.J. p 321 note 11.

91. Ill.—Knights v. Martin, 40 N.E. 358, 155 Ill. 486, affirming 56 Ill. App. 65.
23 C.J. p 321 note 12.

92. Iowa.—Brooks v. Owen, 202 N.W. 505, 200 Iowa 1151, modified on other grounds 206 N.W. 149.

93. Ala.—Jefferson County Sav. Bank v. Miller, 40 So. 513, 145 Ala. 237.

94. Okl.—Price v. Banes, 43 P.2d 476, 173 Okl. 302.
Pa.—See Ward v. Bostick, 29 Del.Co. 231.
23 C.J. p 321 note 16.

Abstract of city court judgment
Filing of abstract of city court judgment in district court vests the latter with jurisdiction to issue execution and citation. Such abstract, giving date as 10-14-1927, is not void for failure to specify date of judgment, nor is it void because it was filed, in the district court on the same day on which it was rendered, or because it was certified by clerk instead of by judge.—Gulager v. Bickford, 293 P. 209, 146 Okl. 49.

95. Tenn.—Baker Watkins Supply Co. v. Fowlkes, 163 S.W. 153, 129 Tenn. 663.
23 C.J. p 322 note 17.
Filing and sufficiency of transcript see infra § 61.

96. Va.—Sterringer v. Mackie, 49 S.E. 942, 57 W.Va. 63.

97. Pa.—Feger v. Kroh, 6 Watts 294.

98. Cal.—Troy v. Clarke, 30 Cal. 419.
23 C.J. p 322 note 21.

99. N.Y.—Carswell v. Neville, 12 How.Pr. 445.

1. Pa.—State Bank v. Potius, 10 Watts 148.
23 C.J. p 322 note 23.

2. Mo.—State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, App., 110 S.W.2d 865.

3. Kan.—Davidson v. Beers, 25 P. 859, 45 Kan. 365.
23 C.J. p 322 note 25.

this ought not to be done without notice to the party against whom the judgment was rendered and before it is restored.[4] If part of the transcript is lost, the circuit court may make an order supplying the original papers.[5]

c. Discharge of Judgment

(1) In general
(2) Fees and charges of officer
(3) What constitutes a discharge

(1) In General

When the judgment becomes in legal contemplation in effect satisfied, no execution can lawfully issue thereon.

When, on any state of facts, the judgment becomes in legal contemplation in effect satisfied, no execution can lawfully issue thereon.[6] Satisfaction of a judgment is also a satisfaction of an execution issued thereon.[7] The writ should not be issued after a tender of the amount of the judgment and all proper costs and fees;[8] but an execution issued on a satisfied judgment of which no entry has been made is not void but merely voidable.[9] If the discharge is adjudged void, execution may issue.[10]

Partial satisfaction does not preclude the right to issue execution for the balance due on the judgment,[11] and in such a case an execution for the entire amount of the judgment is voidable but not void,[12] and is amendable.[13]

Payment of a judgment by a third person will as a rule operate as a satisfaction in the absence of any evidence of an assignment, and no execution can issue thereon after such payment,[14] although where he pays in consideration for its assignment and not in satisfaction he may sue out execution.[15] Thus the purchase of a judgment by the judgment debtor's agent constitutes payment thereof, precluding execution.[16]

(2) Fees and Charges of Officer

Where a judgment is satisfied or discharged, an officer who may be entitled to fees is not entitled to levy an execution to collect them.

An officer has no interest in a judgment sufficient to authorize him to interfere with or control any settlement or agreement which the parties thereto may think proper to make; his fees are but incidental to the judgment, and if it is satisfied or discharged he must look to the parties for them and cannot levy an execution for the purpose of their collection.[17] There is, however, authority to the contrary.[18] So it is held that no execution can issue for fees due a witness when the judgment has been satisfied.[19]

(3) What Constitutes a Discharge

(a) In general
(b) Payment by joint debtor

(a) In General

A discharge of a judgment may, among other matters, result from a discharge in bankruptcy, collection of a note for the amount of the judgment, payment of one of two judgments for the same debt, etc.

A discharge of a judgment, whereby an execution rendered thereon is a nullity, may result, inter alia, from a discharge of defendant in bankruptcy,[20] the collection of a note given for the amount of the

4. Tex.—Cyrus v. Hicks, 20 Tex. 483, approved in Beckham v. Medlock, 46 S.W. 402, 19 Tex.Civ.App. 61.

5. Tenn.—Baker Watkins Supply Co. v. Fowlkes, 168 S.W. 153, 129 Tenn. 663.

6. Cal.—Salveter v. Salveter, 53 P. 2d 381, 11 Cal.App.2d 335.
Mass.—Thompson v. Horgan, 157 N. E. 599, 260 Mass. 589.
23 C.J. p 322 note 29.
Title and rights of purchaser see infra § 285.

Equitable relief
A sale of property under an execution which has been satisfied is void and is assailable in equity.—Mayor and Council of City of Millen v. Clark, Ga., 17 S.E.2d 742.

7. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
23 C.J. p 322 note 31.

8. Cal.—Eppinger v. Scott, 62 P. 460, 130 Cal. 275.
23 C.J. p 323 note 32.

9. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
23 C.J. p 323 note 33.

10. N.Y.—Small v. Wheaton, 4 E.D. Smith 306, 427, 2 Abb.Pr. 175.

11. Colo.—Greene v. Wilson, 11 P. 2d 225, 90 Colo. 562.
Iowa.—Baker v. First Nat. Bank, 219 N.W. 611.
Mo.—Guels v. Mississippi Valley Trust Co., 49 S.W.2d 60, 63, 329 Mo. 1154, quoting **Corpus Juris.**
23 C.J. p 323 note 35.

12. S.D.—La Penotiere v. Kellar, 137 N.W. 382, 29 S.D. 496.
Wash.—Otis v. Nash, 66 P. 111, 26 Wash. 39.
23 C.J. p 323 note 36.

13. Mass.—Thompson v. Horgan, 157 N.E. 599, 260 Mass. 589.

14. Mo.—St. Francis Mill Co. v. Sugg, 83 Mo. 476.

Payment by insurer
Execution on judgment against defendant fully satisfied by defendant's insurer is unauthorized, although judgment was assigned to keep it alive against codefendant.—McIlvane v. T. J. M. Contracting Co., 147 A. 333, 7 N.J.Misc. 825.

15. Mo.—Fiske v. Lamoreaux, 48 Mo. 523.
W.Va.—Neely v. Jones, 16 W.Va. 625, 37 Am.R. 794.
Right of assignee to execution see infra § 14 b.

16. Tex.—Hart v. Harrell, Civ.App., 17 S.W.2d 1093.

17. N.Y.—Craft v. Merrill, 14 N.Y. 456.
23 C.J. p 323 note 39.

18. Pa.—Ellsbre v. Ellsbre, 28 Pa. 172.

19. N.C.—Poor v. Deaver, 23 N.C. 391.

20. Pa.—Curtis v. Slosson, 6 Pa 285.
23 C.J. p 323 note 42.

judgment,[21] the allowance of a set-off,[22] the payment of one of two judgments for the same debt,[23] or compliance with certain statutory provisions.[24] The mere service of a garnishment under an execution is not a satisfaction precluding the subsequent issuance of an execution.[25]

(b) Payment by Joint Debtor

Except as otherwise provided by statute, a joint debtor may not pay off the debt, take an assignment of the judgment, and collect it from his codebtors by execution.

Except where it is otherwise provided by statute,[26] one of several joint debtors against whom judgment has been obtained cannot pay off the debt, take an assignment of the judgment, and collect it from his codebtors by execution.[27] Hence, a guarantor, surety, or indorser who pays for the principal is not entitled to take out execution on the judgment against a cosurety, guarantor, or indorser,[28] or against the principal, in the absence of compliance with statutory provisions governing the right of the surety to the benefit of the judgment;[29] but this rule is limited to an ordinary judgment against several jointly, and does not apply where the judgment itself provides otherwise.[30]

d. Vacating or Modifying Judgment

Execution cannot issue if the judgment is reversed, canceled, vacated, or annulled, but a mere modification will not prevent issuance.

Where a judgment is reversed,[31] canceled,[32] vacated or annulled, the execution falls with it.[33] Since, as stated in the C.J.S. title New Trial § 210, also 46 C.J. p 436 note 77 et seq, the effect of an order for new trial is to vacate the judgment, an execution cannot issue after a motion for new trial has been granted,[34] although the court may have acted illegally and erroneously.[35] Where a decree has been ordered opened for the purpose of a rehearing, an execution issued by the clerk of court should be perpetually stayed.[36] An order, on opening a default, that the judgment stand as security, prevents the issuance of an execution.[37] The opening of a default judgment to let in a meritorious defense does not affect the right to execution.[38] If the judgment is merely modified, the execution is controlled thereby only to the extent of the modification.[39] An attempt of a court, without jurisdiction, to amend a valid decree after term does not affect execution issued on the valid decree.[40]

§ 12. Particular Forms of Writ

Writs for the enforcement of judgments are of various forms, and if there is a writ peculiarly applicable to the enforcement of a particular judgment it should be invoked. A special execution is one directing a levy on some particular property, while a general execution demands a levy on the debtor's property generally.

While if there is a writ peculiarly applicable to the enforcement of a judgment of a specific nature, it must be invoked by the creditor,[41] yet on many judgments the creditor has an option as to the form of writ he may employ.[42] So too certain writs have been more often invoked than others in different jurisdictions. On the other hand, some writs in use under the common law have been wholly or partially discarded by modern practice. In some jurisdictions

21. N.Y.—Craft v. Merrill, 14 N.Y. 456.

22. N.Y.—Doty v. Russell, 5 Wend. 129.
23 C.J. p 323 note 44.

23. Ala.—Lockhart v. McElroy, 4 Ala. 572.
23 C.J. p 323 note 45.

24. N.Y.—Crotty v. McKenzie, 42 N. Y.Super. 192.
23 C.J. p 323 note 46.

25. Tenn.—Beaumont v. Eason, 12 Heisk. 417.
23 C.J. p 323 note 47.

26. Ga.—Miller v. Perkerson, 57 S. E. 787, 128 Ga. 465.
23 C.J. p 323 note 48 [a].

27. Mo.—Johnson v. Sherrodd, 125 S.W. 212, 141 Mo.App. 366.
23 C.J. p 323 note 49.

28. Tex.—Huggins v. Johnston, 35 S.W.2d 688, 120 Tex. 21, affirming, Civ.App., 3 S.W.2d 937.
23 C.J. p 323 note 50.

29. Okl.—Miller v. Andrews, 43 P. 2d 415, 171 Okl. 479.

30. Tex.—Polk v. Seale, Civ.App., 144 S.W. 329.

31. Cal.—First-Trust Joint Stock Land Bank of Chicago v. Meredith, 64 P.2d 977, 19 Cal.App.2d 103.

Second judgment for plaintiff in action on note secured by mortgage is insufficient justification for order denying defendant's motion to set aside execution and sale under prior judgment, where second judgment was reversed.—First-Trust Joint Stock Land Bank of Chicago v. Meredith, supra.

32. N.J.—Manowitz v. Kanov, 154 A. 326, 107 N.J.Law 523, 75 A.L.R. 1464.

33. Mo.—Thompson v. Baer, App., 139 S.W.2d 1080.
23 C.J. p 324 note 60.

34. Cal.—Bishop v. Superior Court in and for Los Angeles County, 209 P. 1012, 59 Cal.App. 46.
23 C.J. p 324 note 54.

35. La.—Smith v. Delahoussaye, 9 Rob. 50.

36. Fla.—Childs v. Boots, 152 So. 214, 112 Fla. 282.

Where reopening unauthorized

Where money judgment had been decreed, but chancellor unauthorizedly granted rehearing after time therefor had expired, execution could be had by obtaining vacation of rehearing order and thereafter directing clerk to issue execution.—Childs v. Boots, supra.

37. Ill.—Wenham v. International Packing Co., 72 N.E. 1079, 213 Ill. 397, reversing 114 Ill.App. 121.

38. N.J.—Paterson Stove Repair Co. v. Ritzer, 8 A.2d 133, 123 N.J.Law 145.

39. Ind.—Weaver v. Field, 1 Blackf. 334.

40. Ark.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.

41. La.—Martel v. Jennings-Heywood Oil Syndicate, 36 So. 612, 114 La. 903.
23 C.J. p 307 note 47.

42. U.S.—Dobbin v. Allegheny County, C.C.Pa., 7 F.Cas.No.3,941.
23 C.J. p 307 note 48.

statutes provide for executions in special cases,[43] or provide for the issuance of a writ for the purpose of enforcing a judgment directing a sale of property.[44]

A fieri facias, generally referred to as a fi. fa., is the process to enforce the collection of a claim which has gone to a judgment which has become final and executory.[45] In Pennsylvania, a fieri facias is not the appropriate writ where specific lands only are to be sold,[46] although it is the appropriate writ on judgments in personam, followed by venditioni exponas if inquisition and condemnation are not waived.[47]

A capias ad satisfaciendum, often called a ca. sa., is, as shown infra § 407, a writ authorizing the arrest of defendant and his imprisonment until the satisfaction of the demand against him.

Distringas is a form of execution in detinue and a command to distrain for a debt or appearance.[48]

Writs of elegit and extent, the latter sometimes called extendi facias, are defined and considered infra § 403.

Levari facias is used in some jurisdictions to enforce a claim on the goods of a debtor and the profits of his land.[49] In Pennsylvania it is the common and proper process against land on judgments in rem.[50]

A special execution is one that directs a levy on some special property, while a general execution is one that makes no such requirement but demands a levy on the debtor's property generally.[51] A further distinction exists in the fact that ordinarily a special execution issues only in proceedings where defendant has not been brought into court by personal process, but his property has been seized.[52] It is proper where the property has already been levied on by a writ of attachment,[53] or to enforce decrees in mortgage foreclosure proceedings.[54] A judgment creditor has no right to a special execution except in the cases expressly allowed by statute,[55] and in the absence of statute the court has no right to restrict plaintiff to a special execution.[56] The statutory right of the party in whose favor the writ is issued to elect on what property not exempt from execution he will have the same levied, does not give him a right to a special execution.[57] One reason why a special execution should not be issued

43. Kan.—Norton v. Reardon, 72 P. 861, 67 Kan. 302, 304.
23 C.J. p 309 note 81.

44. Cal.—Southern California Lumber Co. v. Ocean Beach Hotel Co., 29 P. 627, 94 Cal. 217, 28 Am.S.R. 115.
23 C.J. p 309 note 82.

45. La.—American Nat. Bank v. Childs, 22 So. 384, 49 La.Ann. 1359, 1366.
25 C.J. p 1121 note 11.

Distinguished from other remedies
U.S.—Dobbin v. Allegheny County, C.C.Pa., 7 F.Cas.No.3,941—25 C.J. p 1121 note 11 [a].

46. Pa.—McClelland v. Devilbiss, 1 Pa.Co. 613.

47. Pa.—Provident Trust Co. of Philadelphia v. Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa. Super. 352.
Venditioni exponas see infra § 200.

48. La.—Avery v. Iberville Police Jury, 15 La.Ann. 223.
23 C.J. p 307 note 54.
Distringas to enforce judgment in detinue see Detinue § 22 d (2).

49. Pa.—Stewart v. Miller, 2 Pearson 358.
23 C.J. p 308 note 59—36 C.J. p 993 notes 20–23.

50. Pa.—Provident Trust Co. of Philadelphia v. Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa. Super. 352.
23 C.J. p 308 note 60.

51. Iowa.—Tice v. Tice, 224 N.W. 571, 208 Iowa 145—Farmers' Grain & Mercantile Co. v. Benson, 193 N.W. 14, 195 Iowa 695.
Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris.**
23 C.J. p 308 note 62.

Execution and special execution compared
"Execution" is putting into effect of final judgment of court, and "special execution" is putting into effect judgment against particular property specified in decree.—Tice v. Tice, 224 N.W. 571, 572, 208 Iowa 145.

Provision for return not determining feature
Writ following form prescribed by statute for general fieri facias is a "general execution," returnable only at next or second succeeding term of court, notwithstanding execution was returnable forthwith since such fact alone would not make writ a "special execution" which is distinguished from a "general execution" in that a "special execution" specifies property to be sold and follows judgment with respect to distribution of proceeds.—State ex rel. Madden v. Padberg, 101 S.W.2d 1003, 340 Mo. 667.

52. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris.**
23 C.J. p 308 note 63.

53. Ill.—Haller v. Rieth, 247 Ill. App. 541.
Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris.**
23 C.J. p 308 note 64.

General and special executions proper
Judgment creditor obtaining judgment in attachment is entitled to special execution against attached property and general execution against judgment debtor's unexempt property.—Epley v. Hunter, 281 P. 327, 154 Wash. 163.

54. Kan.—Pool v. Gates, 240 P. 580, 581, 119 Kan. 621.
Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris**—Johnson v. Taylor, 173 P. 1039, 1040, 68 Okl. 229.
23 C.J. p 308 note 65.

55. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris.**
23 C.J. p 308 note 66.

56. Iowa.—Farmers' Grain & Mercantile Co. v. Benson, 193 N.W. 14, 195 Iowa 695.

57. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 1007, 122 Okl. 128, quoting **Corpus Juris.**
23 C.J. p 308 note 67.

on an ordinary judgment in personam is that it would deprive the debtor of his right under the statute to point out property to be levied on.[58] On the other hand, where a special execution is the proper one to be issued, it has been held that general execution may not issue.[59] Thus if the action is commenced by attachment, and there is no personal service, the execution must be a special one against the property attached and no other,[60] even though the judgment is a general one;[61] and even where the suit is in personam because of defendant's appearance, a special execution may issue.[62] Generally, however, where the judgment is general, a special writ is improper.[63] A general execution issued to a sheriff who has seized property under an attachment is in effect a venditioni exponas, although not such in form.[64] In an attachment case, where there is both a personal judgment and a judgment of condemnation, a fieri facias may be issued on the personal judgment, and it is not necessary to issue a special writ against the property condemned.[65] A writ commanding the seizure and sale of specific property, issued irregularly instead of a general execution, may be set aside on motion; but if defendant makes no objection and permits a sale to be made under it, he will not be permitted thereafter to object that it is void.[66] So an execution against the goods generally of defendant is not void where the sale was of the attached goods only.[67] If the execution is general when it should be special, or special when it should be general, and the acts done thereunder are such only as were authorized by the judgment, the acts are valid.[68]

Writ of restitution is a writ of execution where issued after a judgment requiring the payment of money and delivery of real property.[69]

§ 13. Existence of or Resort to Other Remedy

While the judgment creditor may enforce his judgment by execution, he may adopt any method permitted by law for its collection, although in some cases he must elect between remedies.

The purpose of the issuance of execution is to obtain a more direct means of enforcement against the property of the debtor than that offered by proceedings to punish for contempt.[70] Where a valid judgment is unpaid, the creditor may adopt for its collection any method permitted by law,[71] but in some cases he may be compelled to elect between remedies.[72] It follows that the successful party on appeal, where money is deposited in lieu of the statutory bond on appeal, is not required as matter of law to resort to the fund instead of issuing execution.[73] The power to issue execution is inherent in the judgment, and the courts may not assume legislative power by providing other means of enforcement.[74] Execution statutes providing different methods of enforcement have been held to provide concurrent rather than exclusive remedies.[75]

Action or execution. Statutes giving the right to an execution on judgments under conditions or circumstances where they could not issue at common law are cumulative only, and do not preclude the enforcement of the same by an action.[76] So too an execution and an action, not being inconsistent rem-

58. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, supra, quoting **Corpus Juris.**
23 C.J. p 308 note 68.

59. Me.—Annis v. Gilmore, 47 Me. 152.
23 C.J. p 308 note 69.

60. Mo.—Stuckert v. Thompson, 164 S.W. 692, 184 Mo.App. 518.
23 C.J. p 309 note 70.

61. Mo.—State v. Vogel, 14 Mo.App. 187, 190.
23 C.J. p 309 note 71.

62. Ill.—Kerr v. Swallow, 33 Ill. 379.

63. Mo.—Philips v. Stewart, 69 Mo. 149.
23 C.J. p 309 note 73.

64. N.C.—May v. Getty, 53 S.E. 75, 140 N.C. 310.

65. D.C.—Adriance v. Heiskell, 8 App.D.C. 240.

66. Kan.—Pracht v. Pister, 1 P. 638, 30 Kan. 568.
23 C.J. p 309 note 76.

67. Ark.—Boothe v. Estes, 16 Ark. 104.

68. Iowa.—Farmers' Grain & Mercantile Co. v. Benson, 193 N.W. 114, 195 Iowa 695.

It is unnecessary for the court to direct the issuance of a special execution in order to continue a lien on attached property, since the writ is amendable, and, if the defendant objects to the character thereof, the court will decide the objection in the light of the judgment, and the antecedent proceedings under Code §§ 3772, 3924.—Farmers' Grain & Mercantile Co. v. Benson, supra.

69. Wash.—Gustin v. Klingenberg, 70 P.2d 308, 190 Wash. 590.

70. N.Y.—Rosenthal v. Graves, 6 N.Y.S.2d 766, 168 Misc. 845.

71. Minn.—Spear v. Johnson, 126 N.W. 402, 111 Minn. 74, 137 Am.S.R. 535.

Statutory provisions controlling
Burns' St.Annot.1926 §§ 743, 744, providing for issue of execution, is controlling as method for enforcing judgment lien.—Petrovitch v. Witholm, 152 N.E. 849, 85 Ind.App. 144.

Election
A judgment creditor by filing action in equity elected to secure satisfaction of her execution lien and, having done so, could not withdraw "election" five years thereafter and proceed to sell under execution, so that such sale and sheriff's deed obtained pursuant thereto were ineffective, and writ of possession was properly denied.—Mullins v. Staton, 152 S.W.2d 939, 287 Ky. 296.

72. La.—Weimprender v. Fleming, 8 Mart.N.S. 95.
23 C.J. p 313 note 65.

73. Minn.—Spear v. Johnson, 126 N. W. 402, 111 Minn. 74, 137 Am.S.R. 535.

74. Tex.—Wheeler Motor Sales Co. v. Guerguin, Civ.App., 16 S.W.2d 309, error dismissed.

75. N.J.—Otten v. Cavalli, 184 A. 442, 14 N.J.Misc. 296.

76. Ala.—Kingsland v. Forrest, 18 Ala. 519, 52 Am.D. 232.

edies, the one may be instituted, although the enforcement of the judgment is at the same time being sought by a use of the other.[77]

Fieri facias or capias ad satisfaciendum. The creditor may choose between a body execution and one against property,[78] and of course a statute authorizing the issuing of a fieri facias does not prohibit a party from resorting to a capias ad satisfaciendum.[79]

Attachment or execution. In some states a creditor may elect between an attachment on mesne process or execution,[80] but in some jurisdictions an execution should not issue after a levy on attachment, until the property attached has been legally disposed of.[81] Acceptance of a bond given to prevent the levying of attachment does not deprive the attaching parties, subsequently obtaining a judgment, of the right to levy execution on the property of the debtor who gave the bond.[82]

Enforcement of lien or execution. A pledgee may waive his right to sell pursuant to his lien and proceed by execution.[83]

§ 14. Persons Entitled to Execution

a. In general
b. Assignees
c. Joint creditors

a. In General

The person in whose favor a judgment is rendered, or those acting for him, have the exclusive right to and control of the issuance of execution and may order it at their option.

The right to execution is a substantial right,[84] and the rule is that the person in whose favor a judgment is rendered, or those acting for him, have the exclusive control of the issuance of an execution thereon and may order it at their option;[85] and the fact that plaintiff has, after rendition of the judgment, become an alien enemy does not alter the rule.[86] By virtue of statutes in some jurisdictions the permission of the court may under certain circumstances and conditions be necessary;[87] and, where it is sought to be issued by the personal representative of a deceased judgment plaintiff, the preliminary statutory requirements must be observed.[88] The equitable owner of a judgment may issue execution.[89] Where a statute authorizing execution to collect an order for payment of money permits the writ to be issued "by any person or party" to whom the money is made payable by the order, execution cannot issue where the money is required to be paid to an officer of the court.[90] A mortgagee having secured a money judgment on a note secured by a mortgage may have execution and collect his judgment the same as any judgment cred-

77. N.C.—McDonald v. Dickson, 85 N.C. 248.
23 C.J. p 313 note 68.

78. S.C.—Robertson v. Shannon, 33 S.C.L. 419.
23 C.J. p 313 note 69.

79. Tenn.—Hodge v. Dillon, Cooke 279.

80. Mass.—In re Plymton, 82 N.E. 715, 196 Mass. 571.

81. Ky.—Craig v. Saven, Hard. p 46.
23 C.J. p 313 note 72.

82. Cal.—Bettandorff v. Chronister 41 P.2d 337, 2 Cal.App.2d 425.

83. N.Y.—Sickles v. Richardson, 23 Hun 559.

84. Neb.—Barry v. Horton, 238 N. W. 763, 122 Neb. 20—Halmes v. Dovey, 89 N.W. 631, 64 Neb. 122.

Of equal moment as rendition of judgment

Right to execution for collection of money judgments, when time for execution arrives, and no lawful supersedeas has intervened, is of equal moment as is rendition of judgment. —Ex parte Moore, 164 So. 210, 231 Ala. 209.

85. La.—Blunson v. Brocato, 172 So. 180, 181, citing **Corpus Juris**, and affirmed 175 So. 441, 187 La. 637.
Mo.—Bovard v. Bovard, App., 128 S. W.2d 274.
N.Y.—Earl v. Brewer, 289 N.Y.S. 150, 154, 248 App.Div. 314, citing **Corpus Juris**, and reversing 282 N.Y.S. 922, 156 Misc. 881, and affirmed 8 N.E.2d 339, 273 N.Y. 669.
23 C.J. p 310 note 3.

Representatives of deceased

Judgment in favor of estate of deceased person may be enforced by execution only after proper legal representative has issued it.—Klemstine v. Allen, 16 Pa.Dist. & Co. 221,

Attorney

Although attorney's fee for which judgment was rendered in suit by drainage district for drainage taxes, penalty, and attorney's fee was not paid to attorney, attorney was unauthorized to order an execution to be issued in the cause after district compromised judgment with landowners against whom judgment was obtained.—State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, Mo. App., 110 S.W.2d 865.

Holder of money judgment as a second lien on interest in realty could obtain satisfaction thereof by execution, notwithstanding holder of first lien was by his judgment given right to sell his interest and "equity of redemption."—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

Loss of right

Under L.1919 c 194, where a judgment creditor, in ignorance of the statute, and in the exercise of his rights as he understood them, and as they had previously existed, at first declined, when tendered payment of the judgment by the surety defendant, to transfer it to a third person on payment for the benefit of the surety defendant, but shortly after, before any lien had been lost, or the rights of the surety as affected by the judgment in any way impaired, offered to make the transfer, such creditor was not finally deprived of his remedy on the judgment, and execution was properly permitted to issue.—Bank of Davie v. Sprinkle, 104 S.E. 477, 180 N.C. 580.

86. La.—Taylor v. Morgan, 2 Mart. 263—Brofield's Heirs v. Lynd, 2 Mart. 213.
23 C.J. p 310 note 4.

87. N.Y.—Cooper v. Bailey, 74 N.Y. S. 667, 69 App.Div. 358.
23 C.J. p 310 note 5.

88. Ky.—Williams v. Staton, 4 Ky. L. 225.

89. Pa.—Tilden v. Evans, 3 Phila. 124.

90. N.Y.—Devlin v. Hinman, 57 N.Y. S. 663, 40 App.Div. 101, 29 N.Y. Civ.Proc. 127, affirmed 55 N.E. 386, 161 N.Y. 115.

itor.[91] A judgment creditor is entitled to seize property to satisfy his judgment after agreement to assign, where the parties understand that the agreement is merely to sell, and is not a sale of the judgment;[92] and an agreement whereby a judgment creditor authorized another to collect the judgment, which contained no words of grant or assignment, is not such an assignment of the judgment as will prevent the judgment creditor from having execution thereon.[93] A defendant is not entitled to an execution in favor of plaintiff against a codefendant.[94] Where the owner of personal property recovers a judgment for possession subject to a lien, the lienors are not entitled to execution.[95]

b. Assignees

Execution may be issued at the instance of the assignee of the judgment. In some jurisdictions it should be issued in the name of the assignor; but in others it may be issued in the name of the assignee or the assignor.

Execution may be issued at the instance of the assignee of the judgment,[96] provided there is a valid assignment,[97] although since an execution is but a proceeding under the judgment its validity is not affected by a mere irregularity in the assignment of the judgment.[98] Generally it is held that, inasmuch as the execution must conform to the judgment, the execution should be issued at the instance of the assignee in the name of the assignor,[99] although by virtue of statutory provisions or otherwise in some jurisdictions[1] if the assignment is filed,[2] or is evidenced by the act of a notary,[3] or permission of the court is obtained,[4] the execution may issue in the name of the assignee; and it has been held that in the absence of a statute to the contrary execution may be issued either in the name of the assignor or of the assignee.[5] If an action is brought by an assignee of a chose in action in the name of the assignor, execution may be issued in the name of the assignor, under the direction of the assignee.[6] The irregularity of issuing an execution in the name of the assignee of the judgment creditor does not make the writ subject to collateral attack.[7] Where the rights which vest in an assignee of a judgment arise as a consequence of subrogation, and there is a disputed question of fact in respect of the equities claimed to exist in favor of the judgment debtor against the assignee, it has been held that it would be inequitable to permit the assignee to issue execution, since he has an adequate remedy by action for money paid by him or on the judgment, in which action the claimed equities could be asserted and adjusted.[8] Where a judgment against a partnership is sold to a third person with subrogation to the judgment creditor's rights, a member of the partnership is not entitled to notice of subrogation before execution can issue against him, in the absence of a showing of payment to the original judgment creditor.[9]

The assignor is not entitled to take out an execution nor has he any right to control an execution issued by the assignee.[10] However, where the assignor has expressly retained the right to issue execution, the execution may of course issue in his name, regardless of the assignment, and is in no way affected thereby.[11]

c. Joint Creditors

Execution may issue in favor of one of several joint creditors.

Either of several joint judgment creditors may take out execution, without consulting the others, unless there is some agreement to the contrary.[12] If one of two joint plaintiffs dies, execution should,

91. Colo.—Greene v. Wilson, 11 P.2d 225, 90 Colo. 562.

92. La.—Continental Supply Co. v. Browder, 124 So. 580, 11 La.App. 631.

93. Okl.—Jarecki Mfg. Co. v. Fleming, 38 P.2d 925, 170 Okl. 70.

94. Ky.—Davis v. Kentland Coal & Coke Co., 57 S.W.2d 542, 247 Ky. 642.

95. Cal.—Smith v. Wilson, 36 P.2d 715, 1 Cal.App.2d 297.

96. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 448.
Tex.—Scruggs v. McCart, 32 S.W.2d 823, 119 Tex. 464.
23 C.J. p 311 note 10.

97. Ala.—Reese v. Waller, 45 So. 468, 154 Ala. 453.
23 C.J. p 311 note 11.

98. Del.—Campbell v. Johnston, 3 Del.Ch. 94.

99. Kan.—Gilmore v. State Nat. Bank, 133 P. 726, 90 Kan. 405.
23 C.J. p 311 note 13.

1. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

2. N.H.—Lyford v. Dunn, 32 N.H. 81.
23 C.J. p 311 note 15.

3. La.—Hebert v. Doussan, 8 La. Ann. 267.

4. Mont.—McGregor v. Wells, 1 Mont. 142.

5. La.—Montgomery v. Bouanchaud, 137 So. 199, 173 La. 415—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.
Mich.—Cook v. Casualty Ass'n of America, 224 N.W. 341, 246 Mich. 278.
23 C.J. p 311 note 18.

6. N.H.—Gerrish v. Clough, 36 N. H. 519.

7. Ill.—Schuck v. Gerlach, 101 Ill. 338.
23 C.J. p 311 note 22.

8. N.Y.—Jamaica Nat. Bank of New York v. Bach, 21 N.Y.S.2d 195, 259 App.Div. 1049, reargument denied 22 N.Y.S.2d 927, 260 App.Div. 809.

9. La.—Roane v. Bourg, App., 177 So. 373.

10. Tex.—Arthur v. Driver, 127 S.W. 891, 60 Tex.Civ.App. 100.
W.Va.—Clarke v. Hogeman, 13 W.Va. 718.
Agreement held not assignment which would prevent creditor from having execution issued on judgment. —Jarecki Mfg. Co. v. Fleming, 38 P. 2d 925, 170 Okl. 70.

11. Wis.—Collins v. Smith, 44 N. W. 510, 75 Wis. 392.

12. N.Y.—Hawley v. Cramer, 4 Cow. 717.

on proper evidence of his death, be issued in favor of the survivor,[13] unless the statute necessitates the substitution of his personal representatives;[14] and where the damages adjudged in favor of several joint plaintiffs are several and distinct as to each of them, execution in favor of each may be issued on the judgment.[15] Where judgment has been obtained by one of several minors in a suit on a bond, it has been held that the others may, by scire facias, have executions for the several amounts due them.[16]

§ 15. Persons against Whom Execution May Issue

In general execution may be issued against any party against whom a judgment may be rendered, but it cannot issue against one not a party to the action.

As a general rule, an execution may be issued against any party against whom a judgment may be rendered.[17]

As limited to parties. Since the execution must pursue and conform to the judgment, it follows that it can be issued only against the judgment debtor,[18] and cannot be issued against one not a party[19] even though he is interested in the judgment, or in fact the real party in interest in the suit.[20] If the parties to the action have appeared in a representative capacity execution must issue against them in that capacity,[21] and vice versa.[22] If in an action on a contract by a legal plaintiff for the use of plaintiff assignee a verdict and judgment against plaintiff on a counterclaim are general, execution can properly issue against whichever of the plaintiffs was legally responsible.[23]

A mistake in the name of defendant, in the action in which judgment was rendered, precludes the issuing of an execution against the party intended, until the judgment is amended.[24]

Including all parties. The rule that the execution must follow the judgment does not, however, necessitate the making of all the parties to a judgment parties to the execution; but, where the obligation devolves jointly and severally on judgment debtors, execution may be issued against a part of them only.[25] A fortiori, if separate judgments are rendered against different defendants, an execution issued against one of defendants alone is proper.[26] If the liability is several only, executions must issue severally against each of the debtors, although but one satisfaction can be had.[27]

§ 16. Simultaneous and Successive Executions

a. Simultaneous executions
b. Successive executions

a. Simultaneous Executions

In general it may be stated that two executions should not issue on one judgment at the same time. Different species of execution may be sued out simultaneously, but only one at a time may be proceeded on. In a proper case, two writs may issue simultaneously on the same judgment in different counties.

Since it would be oppressive and against equity to carry on two executions at the same time, it has been held that two should not be issued at the same time on one judgment,[28] nor can a second execution be issued to the same county until a legal return and disposal of the first has been made.[29] It is well settled, however, that a party may sue out different species of execution at the same time on a judgment, but can proceed on but one of them at

13. Me.—Mitchell v. Cunningham, 29 Me. 367.

14. Pa.—Freiler v. Freiler, 1 Pa.Co. 265.

15. Mass.—Dawes v. Bell, 4 Mass. 106.
23 C.J. p 311 note 28.

16. Ohio.—Case v. State, 1 Ohio Dec., Reprint, 486, 10 West.L.J. 163.

17. La.—Terrail v. Tinney, 20 La. App. 444.
Pa.—See Roesch v. Kern, 20 Erie Co. 61.
23 C.J. p 311 note 31.

18. U.S.—Walker v. Colby Wringer Co., C.C.Wis., 14 F. 517.
23 C.J. p 312 note 43.
Owner or operator of motor vehicle
Provision in statute imposing liability on owner of automobile for negligence of person operating automobile with owner's permission that on recovery of judgment by injured party recourse shall first be had against property of operator who has been served being for owner's benefit may be waived by owner and applies only where judgment is recovered against operator and owner. —Holland v. Kodimer, 77 P.2d 843, 11 Cal.2d 40—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256.

19. Mass.—West Boylston Mfg. Co. v. Board of Assessors of Easthampton, 178 N.E. 531, 277 Mass. 180.

20. Iowa.—Berry v. Wood, 76 N.W. 799, 106 Iowa 327.
23 C.J. p 312 note 44.

21. N.Y.—Reid v. Stegman, 15 Abb. N.Cas. 422—Tompkins County v. Smith, 11 Wend. 181.

22. Ky.—Bostick v. Keizer, 4 J.J. Marsh. 597, 20 Am.D. 237.
23 C.J. p 312 note 46.

23. Pa.—Blue Star Nav. Co. v. Emmons Coal Mining Corporation, 120 A. 459, 276 Pa. 352.

24. La.—Formento v. Robert, 27 La. Ann. 445.
23 C.J. p 312 note 50.

25. Tex.—Hicks v. Price, Civ.App., 81 S.W.2d 116.
23 C.J. p 312 note 47.

26. Tenn.—Hyder v. Butler, 52 S.W. 876, 103 Tenn. 289.

27. Md.—Columbia Bank v. Ross, 4 Harr. & M. 456.

28. N.J.—State v. Stout, 11 N.J.Law 362.
23 C.J. p 312 note 52.

29. Iowa.—Merritt v. Grover, 15 N. W. 860, 61 Iowa 99.
23 C.J. p 312 note 53.

a time for the satisfaction of his debt,[30] and where different processes are served at the same time defendant may elect which shall stand, and the court may set aside the others,[31] although it has been held that the objection to the irregularity of simultaneous issuance must come from defendant, and not his creditors.[32] Two writs may, however, issue simultaneously on the same judgment to two different counties.[33] A mandatory statutory provision that only one execution shall be in existence at one time may be waived by the party for whose benefit it was enacted.[34] Where the statutes so provide, a judgment creditor is entitled to execution on each judgment obtained against defendant.[35]

b. Successive Executions

Successive executions may be issued where necessary for the proper satisfaction of the judgment.

The levy of an execution is not of itself a satisfaction of the judgment, and does not preclude a plaintiff from again resorting to this remedy if the fruits of the first levy are insufficient to satisfy his debt; his remedies are cumulative and he may successively sue out and levy writs until he reaches that point at which the law declares the debt to be satisfied;[36] and the institution of supplementary proceedings does not affect the right.[37] The issuance of a void execution does not operate as an abandonment of a prior execution.[38] It has been held, however, that a creditor has no absolute right to abandon a levy and issue a new execution without showing some necessity therefor.[39] Where the statutes so provide, a fieri facias can be issued while there is an execution against the body of defendant unreturned.[40] If an execution has been issued and returned satisfied, a second execution writ in a different form designed to collect the same judgment is properly quashed.[41]

§ 17. Agreement Not to Issue

A valid agreement not to issue or enforce execution may be made, and execution issued in violation of such an agreement may be set aside, or an action for damages may be brought.

Agreements not to issue execution or not to enforce an execution, in order to be binding, must be based on a valid consideration,[42] and must be definite.[43] An execution issued in violation of an agreement that it should not be issued on the judgment therein within a specified time or on the noncompliance with certain conditions is voidable only and not absolutely void;[44] and hence it is the duty of the officer to comply with the same, and not presume to determine the conflicting rights of the parties thereto.[45] So too it may issue at once upon a noncompliance with conditions on which its suspension depends;[46] but where it is issued in violation of the agreement it will be set aside at the instance of defendant,[47] or an action for damages may be brought;[48] but it is held that an execution issued in violation of an agreement is not such a fraud on other creditors as will justify or require the setting aside of the same upon their application.[49] Where the parties agree that no execution shall issue until certain questions are decided by the appellate court in another case pending on appeal, no execution can issue until the case is finally ruled on by the appellate court.[50]

Waiver of agreement. A motion in arrest of judgment or for a new trial is a waiver of the benefit of a stay of execution agreed on by the parties.[51]

30. Me.—Miller v. Miller, 25 Me. 110.
23 C.J. p 312 note 54.

31. Pa.—Young v. Taylor, 2 Binn. 218—Grant v. Potts, 2 Miles 164.

32. Pa.—Hoopes v. Robinson, 2 Chest.Co. 312.

33. Colo.—Kenfield v. Finch, 76 P. 1120, 19 Colo.App. 512.
23 C.J. p 312 note 57.

34. Iowa.—Luke v. First Nat. Bank, 278 N.W. 230, 224 Iowa 847.

35. Mo.—Steffen v. American Surety Co. of New York, App., 224 S.W. 102.

36. Iowa.—Clark v. Reiniger, 24 N. W. 16, 66 Iowa 507.
23 C.J. p 313 note 60.

37. N.Y.—Steinhardt v. Michalda, 15 N.Y.Civ.Proc. 323.

38. Iowa.—Dunham v. Bentley, 72 N. W. 437, 103 Iowa 136.

39. Ind.—McIver v. Ballard, 96 Ind. 76.
23 C.J. p 313 note 63.

40. Mich.—Karasiewicz v. Perkins, 187 N.W. 330, 217 Mich. 589.

41. D.C.—Clawans v. Carnduff, 59 F. 2d 472, 61 App.D.C. 185, certiorari denied 53 S.Ct. 319, 288 U.S. 601, 77 L.Ed. 977.

42. Miss.—Union Bank v. Govan, 18 Miss. 333.

43. La.—Johnston v. Yale, 19 La. Ann. 212.
23 C.J. p 313 note 77.
Construction of agreement
Tex.—Taylor v. American Trust & Savings Bank of El Paso, Civ.App., 265 S.W. 727.
Wash.—Barber v. Grand Summitt Mining Co., 118 P.2d 773.
23 C.J. p 313 note 77 [a].

44. U.S.—Beebe v. U. S., Ala., 16 S. Ct. 532, 161 U.S. 104, 40 L.Ed. 636

45. Ala.—Patton v. Hammer, 28 Ala 618, followed in 33 Ala. 307.
N.Y.—Grosvenor v. Hunt, 11 How. Pr. 355.

46. U.S.—Bleecker v. Bond, C.C.Pa., 3 F.Cas.No.1,535, 4 Wash.C.C. 4.
23 C.J. p 313 note 80.

47. Pa.—Feagley v. Norbeck, 17 A. 900, 127 Pa. 238.
23 C.J. p 314 note 81.

48. Ga.—Chambers v. McDowell, 4 Ga. 185.
23 C.J. p 314 note 82.

49. Pa.—Elliott v. Brinzer, 1 Pearson 39.

50. Ky.—Park v. Cline, 13 Ky.Op. 580.

51. U.S.—Brent v. Coyle, C.C.D.C., 4 F.Cas.No.1,838, 2 Cranch C.C. 348.

II. PROPERTY SUBJECT TO EXECUTION

§ 18. In General

Generally every kind of property or interest therein not otherwise exempt by statute may be reached by an execution issued on a judgment.

There being no exemptions at common law,[52] it has been said to be a general principle of the common law that all of a person's assets are liable for the payment of his debts,[53] although certain types of property have been declared to be absolved from seizure on the ground of broad public policy.[54] Usually, however, what property is subject to seizure and sale under an execution is determined by the applicable statutes,[55] it being within the power of the legislature, subject to constitutional restrictions, to authorize the levy and sale of any and every kind of property.[56]

In some jurisdictions constitutional provisions have been construed as contemplating that all of a debtor's property of whatsoever kind shall be subject to execution except property exempted by general laws,[57] and this is declared to be the public policy in other jurisdictions.[58]

In many jurisdictions under the prevailing statutes, sometimes without regard or reference to statute, every kind of property or interest therein, if not otherwise exempt, may be reached on execution,[59] the liability of property for the owner's debts being said to be as unlimited as his power of disposition thereof when there is no legal disability.[60] Under some statutes any property or interest therein which is subject to alienation or assignment may be seized and sold under an execution.[61]

Execution statutes must be construed in pari materia with exemption statutes.[62] Statutes permitting execution against specified kinds of property must be liberally construed for the benefit of the creditors.[63]

Inasmuch as property which is subject to attachment is also subject to execution and vice versa, unless otherwise provided by statute, reference should be made to Attachment §§ 71–90.

Statutory exemptions are discussed in the C.J.S. titles Exemptions §§ 26–69, also 25 C.J. p 42 note 57–p 93 note 64, and Homesteads §§ 52–92, also 29 C.J. p 821 note 75–p 855 note 2.

Conflict of laws. The general rule is that the liability of property to be sold under legal process is determined by the law of the state where it is situated, and not that of the jurisdiction where the

52. Tenn.—Cravens v. Robbins, 8 Tenn.App. 435.

53. Pa.—Mamlin v. Genoe, 17 A.2d 407, 340 Pa. 320, reversing 10 A.2d 799, 139 Pa.Super. 100.
Tenn.—Cravens v. Robbins, 8 Tenn. App. 435.

54. Pa.—Mamlin v. Genoe, 17 A.2d 407, 340 Pa. 320, reversing 10 A. 2d 799, 139 Pa.Super. 100.
Property in custody of law see infra § 55.
Wearing apparel or other property on person of debtor see infra § 19 b.

55. Ark.—Munson v. Wade, 298 S.W. 25, 174 Ark. 886.
Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
Or.—Cabler v. Alexander, 224 P. 1076, 111 Or. 257.
Execution against personal representative see the C.J.S. title Executors and Administrators § 807, also 24 C.J. p 902 note 83–p 904 note 97.
Execution on judgment of Justice of Peace see the C.J.S. title Justices of the Peace § 123, also 35 C.J. p 695 notes 50–56.
Property reached by supplementary proceedings see infra §§ 349–353.
Property subject to creditor's bill see Creditors' Suits §§ 8–34.
Property subject to garnishment see the C.J.S. title Garnishment §§ 69–118, also 28 C.J. p 92 note 25–p 189 note 48.
Property to which lien of execution attaches see infra §§ 125–126.
Special execution against wages and other credits see infra § 406.
Club membership is not property in broad sense, and hence cannot be sold for debt.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred, see 163 N. E. 707, 332 Ill 316.

56. Wash.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

57. S.D.—Swan v. Gunderson, 215 N.W. 884, 51 S.D. 588.

58. Conn.—Prudential Mortgage & Investment Co. v. City of New Britain, 195 A. 609, 123 Conn. 390.
Iowa.—Starits v. Avery, 213 N.W. 769, 204 Iowa 401.

59. Iowa.—Starits v. Avery, supra.
Kan.—Koelliker v. Denkinger, 83 P. 2d 703, 148 Kan. 503, 119 A.L.R. 1, modified on other grounds 86 P.2d 740, 149 Kan. 259, 119 A.L.R. 1525.
Mich.—Detroit & Security Trust Co. v. Gitre, 235 N.W. 884, 887, 254 Mich. 66.
Ohio.—Stewart v. Wheeling & L. E. Ry. Co., 41 N.E. 247, 51 Ohio St. 151, 29 L.R.A. 438.
Tenn.—Cravens v. Robbins, 8 Tenn. App. 435.
Wash.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

60. N.J.—Hopper v. Gurtman, 18 A. 2d 245, 126 N.J.Law 263, 133 A. L.R. 621, affirming 8 A.2d 376, 17 N.J.Misc. 289.
Reason for rule
The incurring of indebtedness for which the property may be taken is but a mode of disposition by the owner.—Hopper v. Gurtman, supra.

61. Tex.—Jensen v. Wilkinson, Civ. App., 133 S.W.2d 982, error dismissed, judgment correct.

62. Ind.—Martin v. Loula, 195 N.E. 881, 208 Ind. 346, denying rehearing 194 N.E. 178, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.

63. N.J.—Hart v. Seacoast Credit Corporation, 169 A. 648, 115 N.J.Eq. 28, affirmed 174 A. 525, 116 N.J.Eq. 573.

owner resides or where the judgment was rendered.[64] Certainly this is so in the case of real estate,[65] in accord with the general rule governing immovables as stated in Conflict of Laws § 19 a.

The law of the state where a trust is created determines whether a right or interest therein may be reached by execution.[66]

§ 19. Personal Property in General

a. General rule
b. Wearing apparel or other property on person of debtor

a. General Rule

Personal property which may be described as chattels is usually subject to seizure under an execution unless exempt by statute.

It has been said that at common law and under statute all of the personal estate of a debtor is subject to execution.[67] Generally speaking, however, any species of personal property properly described as a chattel is subject to execution, statutes expressly or in effect frequently so providing,[68] provided it is not exempted by statute, as discussed in the C.J.S. title Exemptions §§ 26–69, also 25 C.J. p 42 note 57–p 93 note 64, and provided it is in esse at the time of the levy and sale,[69] and is a vested interest at the time of the levy.[70] Stated otherwise, all kinds of personal property of the debtor which he can make the subject of a voluntary transfer of title can by execution be made the subject of an involuntary transfer.[71] In some jurisdictions it is said that in the absence of statute, the right to seize and sell is coextensive only with the power to take and deliver possession.[72]

It is sometimes stated that only property which may be sold may be taken on an execution but this is not universally true since, as discussed infra § 24, an execution may be levied on money.[73]

A perpetual scholarship granted to a person by a college in recognition of his gifts to it, authorizing him to place and keep therein one pupil without charge is not subject to execution.[74]

Effect of subsequent sale. Property sold after the lien of an execution has attached is nevertheless subject to the writ.[75]

A liquor tax certificate or license, although personal property, is not a chattel but an intangible right which is not subject to execution.[76]

Vehicles carrying United States mail. A vehicle or boat is not exempt from execution because it plies on a mail route and is used to convey mail.[77]

b. Wearing Apparel or Other Property on Person of Debtor

Personal property on the person of the debtor such as wearing apparel is not subject to seizure on execution unless means are available for enforcement of the execution without risk of personal conflict or breach of peace.

64. U.S.—Clark v. Willard, 55 S.Ct. 356, 294 U.S. 211, 79 L.Ed. 865, 98 A.L.R. 347, affirming Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P.2d 982, 97 Mont. 503, certiorari granted Clark v. Willard, 55 S.Ct. 118, 293 U.S. 546, 79 L.Ed. 650.
23 C.J. p 324 note 80.

65. U.S.—Spindle v. Shreve, Ill., 4 S. Ct. 522, 111 U.S. 542, 25 L.Ed. 512.

66. N.Y.—Sarver v. Towne, 34 N.E. 2d 313, 285 N.Y. 264, reversing 23 N.Y.S.2d 700, 260 App.Div. 615.

67. W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

Character or location immaterial

Personal property is not rendered exempt from process by mere location or character.—Starits v. Avery, 213 N.W. 769, 204 Iowa 401.

68. Ky.—Cannon Ball Cab & Bus Co. v. Maryland Casualty Co., 96 S.W. 2d 760, 265 Ky. 256.
Pa.—Real Estate-Land Title & Trust Co. v. Bankers' Trust Co. of Philadelphia, 158 A. 634, 104 Pa.Super. 493—Union Nat. Bank v. George, 86 Pittsb.Leg.J. 128, 51 York Leg.Rec. 205.
23 C.J. p 325 notes 87, 95–2—3 C.J. p 18 note 38.

Goods and chattels

Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.

69. Ky.—Goepper v. Phœnix Brewing Co., 74 S.W. 726, 115 Ky. 708, 25 Ky.L. 84.

Articles in process of making

(1) "Such articles as molten iron, or glass in the furnace, burning charcoal in the pit, and coke in the ovens, or baker's dough, or brick in a burning kiln, hides in the vat, and beer in a state of fermentation, while undeniably having the qualities of chattels, are nevertheless, in such imperfect state of transition from one thing to another that they really cannot be said to be either."—Goepper v. Phœnix Brewing Co., supra.

(2) Unfinished beer in a state of intermediate fermentation is not subject to execution for the reason that the sheriff "could not take it into his actual custody without destroying its nature and value."—Goepper v. Phœnix Brewing Co., supra.

70. Colo.—Lemmon v. Beattie, 91 P. 1102, 41 Colo. 68.
23 C.J. p 325 note 90.

71. U.S.—Turner v. Fendall, D.C., 1 Cranch 116, 2 L.Ed. 53.
23 C.J. p 325 note 91.

72. Kan.—Danville State Bank v. May, 271 P. 302, 126 Kan. 714.
Iowa—Campbell v. Leonard, 11 Iowa 489.
S.C.—Dargan & Bradford v. Richardson, 23 S.C.Law 62.

73. U.S.—Turner v. Fendall, D.C., 1 Cranch 116, 2 L.Ed. 53.

74. Tenn.—Cleveland Nat. Bank v. Morrow, 42 S.W. 200, 99 Tenn. 527, 63 Am.S.R. 853, 38 L.R.A. 758.

75. Ga.—Sumter County v. Hanes, Jones & Cadbury Co., 84 S.E. 425, 143 Ga. 124.
23 C.J. p 325 note 94.

76. N.Y.—McNeeley v. Welz, 59 N. E. 697, 166 N.Y. 124, affirming 47 N.Y.S. 310, 20 App.Div. 566, and Knapp v. Scanlin, 74 N.Y.S. 458, 36 Misc. 756.
23 C.J. p 325 note 9.

77. Cal.—Lathrop v. Middleton, 28 Cal. 257, 83 Am.D. 112.
La.—Parker v. Porter, 6 La. 169.
23 C.J. p 333 note 15.

On the theory that a contrary rule would authorize an officer to commit a trespass on the person of defendant and thereby provoke a breach of the peace, it has been held that property on the person of defendant cannot be seized on execution.[78] However, this rule has been held not to extend to property held in defendant's hand,[79] or to a horse which he is riding,[80] or as to property habitually worn by the debtor if procedure for enforcement without risk of personal conflict or breach of the peace is available.[81]

Wearing apparel. Even in the absence of statute, it has been held that the necessary wearing apparel of a debtor is exempt from levy and sale on execution, on grounds of justice and public policy,[82] and this is particularly true while such apparel is being worn by the judgment debtor.[83]

Rings and jewelry have been held not to be wearing apparel, and hence are liable to be taken on execution,[84] if appropriate procedure for enforcement without risk of personal conflict and breach of the peace is available.[85]

As it may be out of the power of the sheriff to levy on, or take possession of, them, since they are usually worn on the person, a receiver may be appointed, and an order made for their delivery to him.[86]

§ 20. Crops, Trees, and Fruits

a. Emblements or fructus industriales
b. Fructus Naturales

a. Emblements or Fructus Industriales

At common law, and under some statutes, a growing crop is subject to execution regardless of its state of maturity. Statutes in some jurisdictions restrict execution to matured crops or even to crops which have been cut and gathered.

At common law, and generally in the United States, sometimes by reason of statute, all annual crops which are raised by yearly manurance and labor, and essentially owe their annual existence to cultivation by man, termed "emblements," defined in Crops § 4, and sometimes "fructus industriales," defined in Crops § 3, irrespective of their state of maturity, may be levied on as personal property under an execution.[87] However, in several jurisdictions, sometimes by reason of statute, execution levies are restricted to mature crops and are not allowed as to unripe crops or as to growing crops not in a fit state to be gathered.[88]

78. Mass.—Mack v. Parks, 8 Gray 517, 69 Am.D. 267.
W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.
23 C.J. p 325 note 6.

79. Cal.—Green v. Palmer, 15 Cal. 411, 76 Am.D. 492.
Mo.—Richards v. Heger, 99 S.W. 802, 122 Mo.App. 512.
23 C.J. p 325 note 7.

80. N.C.—State v. Dilliard, 25 N.C. 102, 38 Am.D. 708.

81. W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

82. N.J.—Frazier v. Barnum, 19 N. J.Eq. 316, 97 Am.D. 666.
23 C.J. p 333 note 16.

83. Mass.—Cooke v. Gibbs, 3 Mass. 193.
W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.
23 C.J. p 334 note 17.

Reason for rule
Seizure of wearing apparel or other property on the person of the execution debtor would tend to breach of the peace and assault.—Ohio Valley Bank v. Minter, supra.

84. N.J.—Frazier v. Barnum, 19 N. J.Eq. 316, 97 Am.D. 666.

Considerable value
One thousand dollar diamond ring owned and habitually worn by execution debtor.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

85. W.Va.—Ohio Valley Bank v. Minter, supra.
Mode of levy see infra §§ 94–108.
Mode of sale see infra §§ 201–206.

86. N.J.—Frazier v. Barnum, 19 N. J.Eq. 316, 97 Am.D. 666.

87. U.S.—In re Buchanan, D.C.Pa., 24 F.2d 553.
Ark.—Munson v. Wade, 298 S.W. 25, 174 Ark. 880.
Del.—Cubbage v. Clements, 14 A.2d 378, 379, 1 Terry 497, citing **Corpus Juris**—Cochran v. Clements, 183 A. 632, 633, 7 W.W.Harr. 410, citing **Corpus Juris.**
Mont.—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 80 Mont. 593—Power Mercantile Co. v. Moore Mercantile Co., 177 P. 406, 55 Mont. 401.
Tenn.—Langford v. Hudson, 241 S. W. 393, 146 Tenn. 309.
23 C.J. p 329 note 61.

Fructus naturales distinguished.—Cubbage v. Clements, 14 A.2d 378, 1 Terry, Del., 497.

Effect on purchaser
The interest of an owner and occupier of a farm in a crop of growing wheat was subject to execution, and hence defendants, to whom owner sold wheat after harvesting it after levy of execution, acquired wheat subject to lien of execution.—Cubbage v. Clements, supra.

Limits on rule
Under some statutes growing crops are subject to levy and sale under execution, although exempt from seizure prior to October 1st, unless severed.—Burley Tobacco Growers' Co-op. Ass'n v. City of Carrollton, 270 S.W. 749, 208 Ky. 270.

88. Ark.—Munson v. Wade, 298 S. W. 25, 174 Ark. 880.
Ga.—Hester v. Shrouder, 13 S.E.2d 875, 64 Ga.App. 572—Barnesville Bank v. Ingram, 129 S.E. 112, 34 Ga.App. 269.
Kan.—Blattler v. Westerman, 286 P. 217, 130 Kan. 415—Danville State Bank v. May, 271 P. 302, 126 Kan. 714—C. C. Isely Lumber Co. v. Kitch, 256 P. 133, 123 Kan. 441.
23 C.J. p 329 note 62.

Reason for rule
"Growing, immature crops, which need the substance of the earth perhaps for months before they are of real value to any one, are not, from their nature, susceptible of being taken possession of under execution, and that possession transferred to a purchaser at an execution sale."—Danville State Bank v. May, 271 P. 302, 304, 126 Kan. 714.

Statutory limitations on rule
Under some statutes immature crops cannot be levied on separately from land, except where debtor absconds or removes from county or state.—Barnesville Bank v. Ingram, 129 S.E. 112, 34 Ga.App. 269.

The statutes, being in derogation of the common law, must be strictly construed.[89] Under some statutes a crop that has matured and is ready for harvest is subject to execution,[90] while under others it is necessary that the crop be gathered before it can be so reached.[91]

The statutory right of the mortgagor to possession of mortgaged land during the redemption period does not prevent enforcement of an execution against the mortgagor on a crop grown, cut, and threshed during such period.[92]

Crops raised on leased lands. Unless the landlord and tenant are tenants in common of the crop, the share of the former cannot be levied on until the crop has been divided.[93]

Interest of cropper. By analogy a cropper has no such interest in the crop as can be the subject of execution and sale while it remains en masse, since until a division is made the whole crop is the property of the landlord.[94]

Interest of tenant. Where land is leased for a share of the crops to be raised, division to be made after such crops are gathered, the title to the whole of the crops raised is in the tenant until a division is made and possession given to the landlord of his share, and prior to such division the levy of an execution on such crops in satisfaction of a judgment against the tenant is good.[95] If, however, the interest of the tenant is not assignable, either because of express prohibition in the lease or by operation of law, a growing crop is not subject to execution in favor of the tenant's creditors.[96] Where the tenant is to pay a part of the property in kind, and he delivers a part of it to the landlord, such part cannot be levied on as the property of the tenant.[97]

Interest of tenants in common. Where the owner and the occupant of land agree jointly to cultivate and divide the products of such land, such contract creates between them a tenancy in common in the products, and the share of either the owner or the occupant is liable to seizure and sale under execution against him.[98] However, the whole property cannot be sold on an execution against one cotenant only.[99]

b. Fructus Naturales

Perennial plants and their ungathered products, considered incident to the soil, are not subject to execution as personal property.

Perennial plants and their ungathered product, such as trees, bushes, grasses, timber, fruits, etc., are incident to the soil and not subject to execution as personal property.[1] This includes unpicked blackberries[2] and peaches on trees,[3] al-

Test of maturity

(1) When crops have ceased to draw sustenance from the land, they become personalty for purpose of levy and sale.—Barnesville Bank v. Ingram, 129 S.E. 112, 113, 34 Ga.App. 269.

(2) "As to crops, such as cotton, which do not mature on the stalk at one time, but whose maturity is extended throughout the latter portion of the growing season, and where, in order to preserve that which has first matured, it is necessary to harvest it prior to the maturity of those portions of the crop which mature later, the rational construction of the statute would be, not that a levy must needs be deferred until the last gathering or remnant is ready to be harvested, and the bulk of the crop has been allowed to deteriorate, be wasted, or misapplied, but that the crop is subject to levy, and to be taken charge of by the levying officer to be gathered, whenever it has reached that stage of maturity when it is ready for harvesting to commence."—Barnesville Bank v. Ingram, supra.

(3) Levy of execution on cotton, two hundred or three hundred pounds of which was opened in the field, but none of which had been picked, was valid.—Barnesville Bank v. Ingram, supra.

89. Miss.—Harris v. Harris, 116 So. 731, 150 Miss. 729.

90. Ga.—Barnesville Bank v. Ingram, 129 S.E. 112, 34 Ga.App. 269.
Miss.—Harris v. Harris, 116 So. 731, 150 Miss. 729.

91. Ala.—Faulk v. Dorsey, 166 So. 792, 232 Ala. 85.
Basis of rule is protection of husbandry and the prevention of waste.—Faulk v. Dorsey, supra.

92. Iowa.—Starits v. Avery, 213 N. W. 769, 204 Iowa 401.
Reason for rule
The matured crop was personalty owned by the mortgagor and was not part of the realty which under the statute cannot be reached by the mortgagee during the redemption period.—Starits v. Avery, supra.

93. Iowa.—Lufkin v. Preston, 3 N. W. 58, 52 Iowa 235.
23 C.J. p 330 note 64.

94. S.C.—Zimmerman v. Dean, 31 S. E. 884, 54 S.C. 90.
23 C.J. p 330 note 68.

95. Del.—Truitt v. Warrington, 84 A. 9, 26 Del. 357.
23 C.J. p 330 note 69.
Constructive severance
Crops levied on and sold under execution are constructively severed from the land.—Brown v. Jones, 278 P. 981, 130 Or. 424.

96. Wash.—Lloyd v. Woods, 5 P.2d 1000, 165 Wash. 541.
Contract personal in nature
A growing crop raised by a tenant under a lease by which he was properly to care for and harvest it, and deliver a part thereof to the landlord as rent, is not subject to levy on execution against the tenant, the contract being personal in nature and hence not assignable.—Tipton v. Martzell, 57 P. 806, 21 Wash. 273, 75 Am.S.R. 838.

97. Ga.—Durdin v. Hill, 75 Ga. 228, 58 Am.R. 467.

98. Ala.—Thompson v. Mawhinney, 17 Ala. 362, 52 Am.D. 176.
Cal.—Bernal v. Hovious, 17 Cal. 541, 79 Am.D. 147.
Joint or several property see infra § 38.

99. N.H.—Moulton v. Robinson, 27 N.H. 550.

1. Ark.—Munson v. Wade, 298 S.W. 25, 174 Ark. 880.
23 C.J. p 330 note 75.

2. Minn.—Sparrow v. Pond, 52 N. W. 36, 49 Minn. 412, 32 Am.S.R. 571, 16 L.R.A. 103.

3. Del.—State v. Gemmill, 6 Del. 9.

though as to the latter there is authority to the contrary.[4]

The test as to whether the unsevered product is an emblement, and as such personal property, is not entirely whether it is produced chiefly by the manurance and industry of the owner, since under modern improved methods nearly all fruits are cultivated, but the manner, as well as the purpose of planting, is an essential element to be taken into consideration. If the tree, bush, or vine requires to be planted but once, and will then bear successive crops for years, the planting would naturally be calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year, and hence it would be classed among fructus naturales.[5]

Hops on the vines are a possible exception to this classification, and have been held to be subject to sale as personal chattels on the theory that, although the roots are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent on annual cultivation.[6]

§ 21. Fixtures

Whether fixtures are subject to execution as personal property depends on the nature of the fixture, as being removable or otherwise, and is discussed in the C.J.S. title Fixtures §§ 54–57, also 26 C.J. p 730 note 17–p 732 note 31.

§ 22. Franchises

A franchise is subject to execution if statutory authority therefor exists.

A franchise, being an incorporeal hereditament, cannot, on the settled principles of the common law, in the absence of statute, be seized and sold under a fieri facias or execution.[7] Many statutes exist, however, which either directly or indirectly subject franchises, and property appurtenant thereto, held by individuals and corporations, to execution in satisfaction of judgments recovered against the owners thereof.[8]

Statutes making corporate franchises subject to execution have been construed as referring to the special or secondary franchises of the corporation,[9] and not to authorize a levy on the primary franchise to exist and do business as a corporation.[10] The term "franchise," in this connection, is also limited to grant of rights or privileges by public, or quasi public, authority, and does not include rights possessed by virtue of private contract, such as an Associated Press franchise to receive news service.[11] So an exclusive right to construct and operate specified utilities in streets and alleys reserved by the owner of the fee on dedication of the streets and alleys to the public without transfer of the fee is not subject to execution, as personalty in the nature of a franchise.[12]

As such statutes are in derogation of the common law, their provisions must be strictly complied with in order to make the levy and sale valid.[13]

§ 23. Intoxicating Liquors

Where a statute regulating or prohibiting the sale of intoxicating liquor destroys the right of property therein, it is not subject to execution. The authorities

4. Md.—Arnold v. Fowler, 51 A. 299, 94 Md. 497, 89 Am.S.R. 444.
23 C.J. p 331 note 78.

5. Minn.—Sparrow v. Pond, 52 N.W. 36, 49 Minn. 412, 32 Am.S.R. 571, 16 L.R.A 103.

6. N.Y.—Frank v. Harrington, 36 Barb. 415.
23 C.J. p 331 note 80.

7. Miss.—Gulf Refining Co. v. Cleveland Trust Co., 108 So. 158, 166 Miss. 759.
N.J.—Hart v. Seacoast Credit Corporation, 169 A. 648, 115 N.J.Eq 28, affirmed 174 A. 525, 116 N.J.Eq. 573.
23 C.J. p 331 note 83—51 C.J. p 886 note 9.

8. Miss.—Gulf Refining Co. v. Cleveland Trust Co., 108 So. 158, 166 Miss. 759.
23 C.J. p 331 notes 84, 85; p 332 notes 86, 87.

As "rights and credits"

Franchises have been held subject to execution under statutes covering "rights and credits."—Hart v. Seacoast Credit Corporation, 169 A. 648, 115 N.J.Eq. 28, affirmed 174 A. 525, 116 N.J.Eq. 573.

Approval of utility commission

While a franchise to operate autobusses constitutes "rights and credits" which may be levied on and sold on execution, the sale is subject to utility commissioners' approval.—Hart v. Seacoast Credit Corporation, supra.

Special writ of fieri facias

The special writ of fieri facias given by statute under which the franchises of a corporation can be sold can issue only after the personal property subject to the ordinary process of execution has been exhausted, and there has been a return of nulla bona of the writ.—Reynolds v. Reynolds Lumber Co., 32 A. 537, 169 Pa. 626, 47 Am.S.R. 935—Appeal of Philadelphia & B. C. R. Co., 70 Pa. 355—Valle v. Arnold Electric Mfg. Co., 17 Pa.Co. 33, 6 Del.Co. 69—Second Nat. Bank v. Gibbs & Sterrett Mfg. Co., 2 Del.Co. 81, 13 Wkly.N.C. 174.
Contra Williams v. Lawrenceville & E. Pass. R. Co., 9 Monig.Co.L. 126, 21 Pittsb.Leg.J. 187.

9. Miss.—Gulf Refining Co. v. Cleveland Trust Co., 108 So. 158, 166 Miss. 759.

10. Miss.—Gulf Refining Co. v. Cleveland Trust Co., supra.

Reasons for rule

The primary franchise of a corporation, the right to exist as such, is vested in the individuals who compose the corporation and not in the corporation itself, and such franchise cannot be conveyed by the corporation.—Gulf Refining Co. v. Cleveland Trust Co., supra.

11. Wash.—Lawrence v. Times Printing Co., 61 P. 166, 22 Wash. 482.

12. Miss.—Gwin v. Smith, 167 So. 62, 175 Miss. 442.

Reason for rule

Miss.—Gwin v. Smith, supra.

13. Cal.—Gregory v. Blanchard, 33 P. 199, 98 Cal. 311.
23 C.J. p 332 note 91.

are not in accord as to the effect of a statute merely regulating or prohibiting the sale of such property.

On the ground that intoxicating liquors are property, and that they are not within any enumerated exception or exemption, it has been held that they are subject to levy and sale under execution on the same basis as any other property notwithstanding the existence of statutes regulating or prohibiting the sale of intoxicating liquors, execution sales not being deemed within the prohibition of such statutes.[14] However, there is authority to the contrary, some courts holding broadly that such prohibitory statutes render intoxicating liquors not subject to levy and sale on execution.[15] Where the applicatory statute does not merely regulate or prohibit the sale of intoxicating liquor, but absolutely destroys the right of property therein, it is not subject to execution sale.[16]

§ 24. Money

Money is generally considered as subject to execution if in the possession of the debtor or capable of being identified as his property.

The rule is well established that money, whether in specie or bank notes, which are treated civiliter as money, if in the possession of defendant, or capable of being identified as his property, may be taken in execution,[17] provided, it is sometimes held, no trespass is committed in making the levy,[18] statutes sometimes so providing,[19] and in some instances providing also that money taken in execution need not be sold, but may be placed as payment on the execution.[20]

So long as such money is not paid over to the judgment creditor, there is not such title to the money in the judgment creditor as would, previous to its delivery to him, enable the officer to seize it as his property.[21]

Where money is deposited in a bank, it becomes the property of the bank and merely creates an indebtedness on the part of the latter, and therefore no specific fund can be levied on it while in the hands of the bank.[22]

§ 25. Patents, Copyrights or Literary Property, Trade-Marks, Etc.

While the physical property itself which has been copyrighted or patented is subject to seizure on an execution, in the absence of statute the copyright or patent right is not property so subject.

Patent rights[23] and copyrights[24] have no corporeal, tangible substance and, in the absence of statute, are not subject to seizure and sale by execution. The material thing itself on which the incorporeal right has been obtained, that is, the patented or copyrighted article, is, however, subject to execution.[25]

Invention before patenting. The conception of an invention so long as it is not patented is not property which can be taken in execution,[26] unless some trust or contract relation exists.[27]

Unpublished manuscripts. The decisions are conflicting as to whether or not unpublished manuscripts, or the like, are subject to levy and sale on execution, the question being affected by the peculiar nature of common-law rights in unpublished intellectual productions. Some courts hold that since the law will not permit the right of the owner to publish it or keep it back from publication to be interfered with, except as he chooses to make it public, an unpublished manuscript cannot be seized and sold on execution;[28] but this doctrine has been criticized by other authorities, and unpublished manuscripts, considered as physical property, have been held subject to seizure and sale on execution.[29]

14. Pa.—Brennan v. Pittston Brewing Corporation, 35 Lus.Leg.Reg. 249, 89 Pittsb.Leg.J. 611.
23 C.J. p 332 note 92.

15. Kan.—Hines v. Stahl, 99 P. 273, 79 Kan. 88, 131 Am.S.R. 280, 20 L.R.A.,N.S., 1118, 17 Ann.Cas. 298.
23 C.J. p 332 note 93.

16. S.C.—Lanahan v. Bailey, 31 S. E. 332, 53 S.C. 489, 69 Am.S.R. 884, 42 L.R.A. 297.

17. Pa.—General Tire Co. of Philadelphia v. Mulholland, 16 Pa.Dist. & Co. 43.
W.Va.—Lawson v. Lang, 169 S.E. 455, 113 W.Va. 815.
23 C.J. p 332 note 97.
Money not in current circulation
W.Va.—Lawson v. Lang, supra.

18. U.S.—Turner v. Fendall, D.C., 1 Cranch 117, 2 L.Ed. 53.
23 C.J. p 332 note 97.

19. Colo.—McMillen v. Yost, 194 P. 938, 69 Colo. 462.
23 C.J. p 332 note 98.

20. Conn.—Brooks v. Thompson, 1 Root 216.
23 C.J. p 332 note 99.

21. Ind.—Moormon v. Quick, 20 Ind. 67—Winton v. State, 4 Ind. 321.
Property in custodia legis see infra § 55.

22. Cal.—McMillan v. Richards, 9 Cal. 365, 70 Am.D. 655.
23 C.J. p 333 note 2.

23. Cal.—Peterson v. San Francisco, 46 P. 1066, 115 Cal. 211.
23 C.J. p 333 note 3.

24. U.S.—Stevens v. Gladding, R.I., 17 How. 447, 15 L.Ed. 155.
13 C.J. p 1100 note 92.

25. U.S.—Stevens v. Gladding, supra.
Ky.—Cooper v. Gunn, 4 B.Mon. 594.
Right to, and extent of, use of patented or copyrighted article see infra § 290.

26. U.S.—Chemical Foundation v. General Aniline Works, C.C.A.Del., 99 F.2d 276, affirming, D.C., 20 F. Supp. 509, certiorari denied 59 S. Ct. 249, 305 U.S. 654, 83 L.Ed. 423.

27. U.S.—Chemical Foundation v. General Aniline Works, supra.

28. Mich.—Dart v. Woodhouse, 40 Mich. 399, 29 Am.R. 544.
13 C.J. p 950 note 53.

29. Wash.—Washington Bank v.

The mere good will of a business apart from the control of premises is not subject to seizure and sale under an execution.[30]

A trade-mark, by itself, is not subject to execution, because a trade-mark cannot be sold or assigned apart from the good will of the business in which it has been used.[31]

Trade secrets, contained in an envelope, have been held subject to execution.[32]

§ 26. Membership or Seat in Stock Exchange

A seat or membership in an exchange has been held not subject to seizure under an execution, although more generally it has been held to be property which can be so reached by creditors.

It has been held in some jurisdictions that a seat or membership on an exchange is not such property as can be seized in execution for the debts of the members, it being the mere creation of the board, to be held and enjoyed with all the limitations and restrictions which the constitution of the board choose to put on it.[33] More generally, however, a seat or membership on a stock exchange is regarded as property, and subject to execution in the sense that it may be reached by appropriate proceedings and applied, as other property of a debtor, to the payment of his just debts,[34] such as by a creditors' suit, as discussed in Creditors' Suits § 34, or by supplementary proceedings, as discussed infra § 349.

§ 27. Wages and Salaries

While usually subject to garnishment or special execution, salaries or wages sometimes are reached by ordinary execution if not within the statutory exemptions.

While wages and salaries may ordinarily be reached by garnishment proceedings, as discussed in the C.J.S. title Garnishment § 115, also 28 C.J. p 170 note 70, statutes exist under which wages or salaries may be seized on execution,[35] a special form of execution and procedure, considered infra § 406, being sometimes provided. However, as discussed in the C.J.S. title Exemptions §§ 47–50, also 25 C. J. p 63 note 72–p 72 note 39, statutory exemptions from execution, or other compulsory process, frequently include wages and salaries.

Public officers. On grounds of public policy it is generally held that the salary or compensation of public officers and employees is not subject to execution, except under the authority of a statute broad enough to include them.[36]

§ 28. Choses in Action

Generally, a chose in action is subject to execution only when made so by some authorizing statute.

Choses in action are subject to execution only when made so by statute, or are voluntarily given up to be sold on execution.[37]

As discussed in the C.J.S. title Garnishment §

Fidelity Abstract & Security Co., 46 P. 1036, 15 Wash. 487, 55 Am. S.R. 902, 37 L.R.A. 115.

30. U.S.—Longo v. Leo Feist, Inc., C.C.A.La., 58 F.2d 767.

31. Cal.—Ward-Chandler Bldg. Co. v. Caldwell, 47 P.2d 758, 760, 8 Cal. App.2d 375, quoting **Corpus Juris.**
63 C.J. p 520 note 68.
Interest of partner see the C.J.S. title Partnership § 240, also 63 C.J. p 520 note 69; 47 C.J. p 1017 note 16 [b].

32. Pa.—Hanley v. Fidelity Ins. Trust & Safe Deposit Co., 8 Pa. Dist. 207.
23 C.J. p 333 note 11.

33. Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
23 C.J. p 333 note 12.
Statute inapplicable
Certificate of membership in corporation not for pecuniary profit, such as live stock exchange, is not within statute covering "lands, tenements, real estate, goods and chattels," nor is it within statute covering stock in a corporation.—W. G. Press & Co. v. Fahy, supra.

34. Tex.—Fort Worth Grain & Cotton Exchange v. Smith Bros. Grain Co., Civ.App., 40 S.W.2d 229, 231, quoting **Corpus Juris.**
23 C.J. p 333 note 13.

35. La.—Vance v. Lafferanderie, 4 Rob. 340.
23 C.J. p 334 note 21.

36. N.J.—Cahn v. Allen, 11 A.2d 315, 124 N.J.Law 159.
Federal employee excluded
Statute relating to execution against wages, salary, income, or profits which goes no further than to make salaries of state, county, and municipal employees subject to execution does not manifest an intent to change the public policy that the salary of a clerk in the federal post office is not subject to execution.—Cahn v. Allen, supra.
Garnishment of such salaries see the C.J.S. title Garnishment § 116, also 28 C.J. p 174 note 18–p 183 note 40.

37. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571—In re Chelsea Pure Food Corporation, D.C.N.Y., 18 F.2d 112—In re Stamford Road Const. Co., D.C.Conn., 5 F.Supp. 650.
Ariz.—Hill v. Favour, 84 P.2d 576, 52 Ariz. 561—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M., 80 P.2d 955, 958, 52 Ariz. 329.
Ga.—Fourth Nat. Bank of Macon v. Swift & Co., 124 S.E. 181, 32 Ga. App. 589, reversed on other grounds 127 S.E. 729, 160 Ga. 372, modified on other grounds 128 S E. 78, 34 Ga.App. 76.
Tex.—Moore v. Krenek, Civ.App., 283 S.W. 580, 581, citing **Corpus Juris.**
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35—Johnson v. Dahlquist, 225 P. 817, 813, 130 Wash 29, citing **Corpus Juris.**
23 C.J. p 326 note 10.
"At common law, choses in action were not subject to seizure and sale under final process of execution, and the principal still prevails except and to the extent that the same has been modified or changed by statute."—McIntosh Grocery Co. v. Newman, 114 S.E. 535, 536, 184 N. C. 370.
Personal injuries
A cause of action for personal injuries has been held not subject to execution because not such a chose in action as could be classified as "personal property."—Baker v. Tullock, 77 P.2d 1035, 106 Mont. 376—

97, also 28 C.J. p 150 note 29–p 151 note 53, in many jurisdictions statutes have been enacted by which the choses in action of the debtor may be reached by process of garnishment, and where this is the only method provided, the chose in action cannot be reached by levy and sale under general execution.[38] However, in some jurisdictions, by express statutory authority, all choses in action of a debtor may be levied on and sold under execution against him in the same manner as other personal property,[39] or under a special form of execution, discussed infra § 406. Notwithstanding such statutes, there are choses in action which from their intangible character seem to be incapable of being made the subject of direct levy and sale.[40]

Debts. Debts due or owing to the judgment debtor have been held subject to execution under statutes expressly so providing,[41] under statutes making all property so subject,[42] and under statutes providing for execution against rights and credits,[43] and this although a debt is not capable of being physically taken into possession by the levying officer, constructive possession obtained by notice of the levy being sufficient in such case.[44]

An accruing debt is included in some of these statutes.[45]

Certainty as a requirement. To be subject to execution under the statutes, it has been held that the right, credit, or debt must be liquidated and certain,[46] an unliquidated or uncertain and contingent debt, in the sense that it may never become payable, not being subject to levy and sale.[47]

§ 29. —— Bills, Notes and Other Evidences of Indebtedness

Ordinarily express statutory authority is necessary for seizure and sale under execution of instruments for payment of money or other evidence of indebtedness.

Instruments and securities for the payment of money, such as bonds and promissory notes, are not the subject of seizure and sale under execution in the absence of express statutory authority,[48] es-

Toole v. Paumie Parisian Dye House, 52 P.2d 162, 101 Mont. 74.

38. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.

39. Cal.—Everts v. Will S. Fawcett Co., 74 P.2d 815, 24 Cal.App.2d 213.
Mont.—Baker v. Tullock, 77 P.2d 1035, 106 Mont. 375.
Philippine.—Perez v. Sweeney, 8 Philippine 157, 5 Off.Gaz. 284.
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.
23 C.J. p 326 note 12.

Intent of statute
The New Jersey Execution Act which must be considered in its entirety, manifests intention to put rights and credits in every respect in the position of goods and chattels as subject to levy.—Moran v. Joyce, 11 A.2d 420, 124 N.J.Law 255.

Existence of other remedy
Under the California statutes, a judgment creditor could proceed by execution against debtors' causes of action, pending in trial court, notwithstanding that such claims might also have been reached and controlled on proceedings supplementary to execution.—Everts v. Will S. Fawcett Co., 74 P.2d 815, 24 Cal.App. 2d 213.

Claim against county
A deputy sheriff's claim against county for mileage, pursuant to deputy's agreement with sheriff by which sums to be paid for mileage accrued in connection with services of deputy were property of deputy, was subject to levy under execution issued on judgment against deputy, notwithstanding that, under the law, only sheriff might be able to assert claim against county, and that county had no knowledge of agreement, which was made before execution was issued.—De Forest v. Cascade County, Mont., 120 P.2d 425.

Claim for breach of contract
(1) Generally.—Meserve v. Superior Court in and for Los Angeles County, 38 P.2d 453, 2 Cal.App.2d 468.

(2) Term "other things in action," in statute respecting execution, includes claim for breach of contract. —Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.

(3) In such case, the judgment creditor may levy execution on his own claimed indebtedness to judgment debtor for contract breach.—Brenton Bros. v. Dorr, supra.

Legal interest in property
Subject to statutory exception, in so far as legal interests are concerned, the statute makes most property rights, whether real or personal, subject to execution, although the precise right or interest of defendant is unknown to both plaintiff and attaching officer at time of seizure and sale.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr., Del., 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W. Harr. 378.

Pending actions
Cal.—Everts v. Will S. Fawcett Co., 74 P.2d 815, 24 Cal.App.2d 213.

Rights and credits
N.J.—Cohen v. Cohen, 20 A.2d 594, 126 N.J.Law 605—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 558, affirmed in Joyce v. Moran, 23 A. 2d 396, 127 N.J.Law 562—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200.

Right to recover definite sum of money.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.

40. U.S.—In re Hoag, D.C.N.Y., 227 F. 480.
Cal.—Hoxie v. Bryant, 63 P. 153, 131 Cal. 85.

41. Cal.—Lantin v. Biscailuz, 95 P. 2d 962, 35 Cal.App.2d 422.

42. Wash.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

Judgment creditor's debt to judgment debtor
Wash.—Johnson v. Dahlquist, supra

43. N.J.—Otten v. Cavalli, 184 A. 442, 14 N.J.Misc. 296.

44. Wash.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

45. N.J.—Otten v. Cavalli, 184 A. 442, 14 N.J.Misc. 296.

46. N.J.—Otten v. Cavalli, supra.

47. N.J.—Cohen v. Cohen, 20 A.2d 594, 126 N.J.Law 605—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200.

"The right to recover unliquidated damages . . . is a right which cannot be taken on execution in an action at law."—Digney v. Blanchard, 118 N.E. 250, 229 Mass. 235, 238.

Verdict
A verdict in favor of debtor rendered his claim liquidated, even before entry of judgment record.—Zane v. Brown, 8 A.2d 367, 126 N.J. Eq. 200.

48. Ariz.—Hill v. Favour, 84 P.2d

pecially after transfer by defendant,[49] although where the debtor voluntarily turns over to the sheriff a note with the intention that it should be held subject to the execution, the officer may hold it and insist on his lien thereon, although a note is not a subject of levy on execution.[50] However, in many jurisdictions by virtue of statute, promissory notes and other evidences of debt are subject to seizure and sale under execution.[51] To be subject to seizure and sale, however, actual issuance and delivery of the instrument by its maker is essential,[52] so a county warrant before delivery to the payee thereof is not subject to levy under an execution against the payee.[53]

The unissued notes or bonds of a party in his possession and control do not, however, constitute a part of his property or assets, and are not liable to sale under execution against him.[54]

§ 30. —— Interests under Insurance Policies

Statutory authority must exist to subject insured's interest in a policy of insurance to execution.

Where it is not otherwise provided by statute, the interest of insured in a fire or life policy, being a mere chose in action, is not subject to execution.[55] Such an interest, however, has been held to be a property right which a creditor ordinarily can reach and apply.[56]

Where it is considered that every specie of property is subject to execution, money due insured on a disability health policy is subject to execution in absence of any statute exempting it.[57]

Under statutes making rights and credits subject to execution, a claim under an insurance policy must be liquidated and certain to be reachable on execution.[58]

Interest of beneficiary. An agreement between the beneficiary and insurer of a life policy for installment payment of the proceeds of the policy, insurer to pay to no one except the beneficiary, or on his order for each payment as it became due, is not a restriction against assignment by operation of law and does not preclude a levy on a payment thereafter becoming due before return of the execution.[59]

Statutory exemption of life insurance is considered in the C.J.S. title Exemptions §§ 39–42, also 25 C.J. p 72 note 41–p 77 note 21.

§ 31. —— Judgments

Ordinarily a judgment is subject to execution where choses in action may be so reached.

At common law judgments, like other choses in action, were not subject to levy and sale under execution.[60] By statute, however, which must be

575, 52 Ariz. 561—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M., 80 P.2d 955, 958, 52 Ariz. 329, citing **Corpus Juris.**
Tex.—Moore v. Krenek, Civ.App., 288 S.W. 580, citing **Corpus Juris.**
23 C.J. p 326 note 15.

County warrants
Mich.—People v. Wayne County, 5 Mich. 223.

49. Ind.—McKnight v. Knisely, 25 Ind. 336, 87 Am.D. 364.

50. N.Y.—People v. National Mut. Ins. Co., 46 N.Y.S. 102, 19 App.Div. 247, 4 N.Y.Ann.Cas. 340.

51. Wash.—Johnson v. Dahlquist, 225 P. 817, 818, 130 Wash. 29, citing **Corpus Juris.**
23 C.J. p 326 note 20.

Transfer by indorsement
The sheriff may, after levying on a note, transfer it by indorsement.—Earhart v. Gant, 32 Iowa 481.

52. Miss.—Barham v. White, 157 So. 465, 171 Miss. 303—Beckett v. McCaslin, 137 So. 519, 161 Miss. 557.

53. Miss.—Barham v. White, 157 So. 465, 171 Miss. 303—Beckett v. McCaslin, 137 So. 519, 161 Miss. 557.

54. U.S.—Washburn v. Green, Mich., 10 S.Ct. 280, 133 U.S. 30, 33 L.Ed. 516.
23 C.J. p 327 note 21—9 C.J. p 16 note 56 [b].

55. Ariz.—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M., 80 P.2d 955, 958, 52 Ariz. 329, citing **Corpus Juris.**
23 C.J. p 327 note 25.

Policy not chattel
Mo.—Industrial Loan & Investment Co. v. Missouri State Life Ins. Co., 3 S.W.2d 1046, 222 Mo.App. 1228.

Unliquidated claim
U.S.—In re Chelsea Pure Food Corporation, D.C.N.Y., 18 F.2d 112.

Right to surrender
The right or option of insured to surrender policy and demand its then cash value, to which the beneficiary can make no valid objection, cannot be levied on by insured's creditors so long as the right of the beneficiary to ultimate payment of the policy at insured's death remains in force and effect.—Murphy v. Casey, 184 N.W. 733, 150 Minn. 107.

56. Mass.—Kothe v. Phœnix Mut. Life Ins. Co., 168 N.E. 737, 269 Mass. 148.

57. Tenn.—Cravens v. Robbins, 8 Tenn.App. 435.
Statute as to life insurance inapplicable.—Cravens v. Robbins, supra.

58. N.J.—Cohen v. Cohen, 20 A.2d 594, 126 N.J.Law 605.

Beneficiary's contingent claim
Where money retained by insurer under a supplementary contract with judgment debtor respecting disposal of proceeds of life policies carried by debtor's deceased husband would not be due and payable to debtor if debtor was not alive on a certain future date, the debt was too uncertain to permit of a "fair appraisement and sale" and hence was not presently subject to levy and sale under execution laws.—Cohen v. Cohen, supra.

59. N.J.—Otten v. Cavalli, 184 A. 442, 14 N.J.Misc. 296.

60. Ariz.—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M., 80 P.2d 955, 958, 52 Ariz. 329, citing **Corpus Juris**—Haigler v. Burson, 298 P. 404, 36 Ariz. 192.
Cal.—Judnick v. Judnick, 190 P. 480, 47 Cal.App. 380.
Okl.—Melish Consol. Placer Oil Mining Ass'n in Red River v. Burk-Senator Oil Co., 20 P.2d 879, 883, 163 Okl. 20, citing **Corpus Juris.**
23 C.J. p 327 note 26.

strictly followed,[61] judgments have been made subject to execution,[62] although a statute authorizing a general execution against goods and chattels does not modify the common-law rule.[63]

In many jurisdictions which by statute allow choses in action to be subjected to execution, a judgment may be the subject of levy and sale as a credit or chose in action.[64] Some courts, however, in construing the statutes relative to choses in action, have reached the conclusion that a judgment cannot be levied on and sold, but can only be subjected by process of garnishment,[65] as discussed in the C.J.S. title Garnishment § 117, also 28 C.J. p 188 note 27–p 189 note 42. So a statute providing a method of reaching the interest of a judgment creditor by a creditors' bill, as discussed in Creditors' Suits § 11, or by supplementary proceedings, as discussed infra § 349, has been held not to be authority for a levy under a general execution.[66]

A judgment creditor cannot levy on a judgment against himself held by the judgment debtor.[67]

Alimony. While it has been held that creditors of a divorcee may reach sums due her under an alimony award,[68] it has also been held that an alimony judgment is not a "debt" which can be taken in favor of preëxisting judgment creditors.[69]

Pending appeal from a judgment in a tort action, the judgment or obligation which it represents is not subject to levy under an execution.[70]

§ 32. —— Shares of Stock

Statutory authority is necessary to authorize seizure and sale of shares of corporate stock under a general execution.

At common law, and in the absence of any statute changing the rule, corporate shares are deemed to be mere choses in action, and hence not subject to levy and sale on execution.[71] Even though the shares of a certain corporation are declared to be real estate by the incorporating act, for the purpose of rendering them inheritable, the shares are not thereby made liable to seizure and sale under a fieri facias.[72] The rule of the common law, however, has been changed by statute in many of the states, and shares of stock have been made subject to execution to the extent, and in the manner, specified in such statute.[73]

It is not necessary that the statute shall expressly mention shares of stock. If it uses terms clearly showing an intention to include such property, it will be given effect accordingly. Thus shares of stock would clearly be included under the term "choses in action,"[74] and they have been held to be included under the terms "estates,"[75] and have

61. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
S.D.—Acme Harvesting Mach. Co. v. Hinkley, 122 N.W. 482, 23 S.D. 509, 21 Ann.Cas. 743.

62. Cal.—Lantin v. Biscailuz, 95 P. 2d 962, 35 Cal.App.2d 422.
23 C.J. p 327 note 28.

63. Okl.—Melish Consol. Placer Oil Mining Ass'n in Red River v. Burk-Senator Oil Co., 20 P.2d 879, 163 Okl. 20.

64. Minn.—Henry v. Traynor, 44 N. W. 11, 42 Minn. 234.
23 C.J. p 327 note 29.
Judgment as "debt"
Cal.—Lantin v. Biscailuz, 95 P.2d 962, 35 Cal.App.2d 422.

65. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
23 C.J. p 327 note 30.

66. Okl.—Melish Consol. Placer Oil Mining Ass'n in Red River v. Burk-Senator Oil Co., 20 P.2d 879, 163 Okl. 20.

67. La.—Lemane v. Lemane, 27 La. Ann. 694.

68. N.Y.—Stevenson v. Stevenson, 34 Hun 157.

69. Minn.—Bensel v. Hall, 225 N. W. 104, 177 Minn. 178.
Reaching alimony by supplementary proceedings see infra § 349.
Rights of creditors of wife to enforce alimony decree generally see Divorce § 255 a.

70. Cal.—Pacific Gas & Electric Co. v. Nakano, 87 P.2d 700, 121 A.L.R. 417.

71. U.S.—Dixon v. Cleveland, D.C. S.C., 31 F.Supp. 1010.
Ariz.—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M., 80 P.2d 955, 958, 52 Ariz. 329, citing **Corpus Juris.**
Colo.—Snider v. Bourquin, 188 P. 727, 68 Colo. 207.
Ga.—Fourth Nat. Bank v. Swift & Co., 124 S.E. 181, 32 Ga.App. 589, reversed on other grounds 127 S. E. 729, 160 Ga. 372, modified on other grounds 128 S.E. 78, 34 Ga. App. 76.
Ill.—Alexander, for Use of Tobey Furniture Co. v. Live Stock Nat. Bank of Chicago, 282 Ill.App. 315.
Pa.—Moys v. Union Trust Co. of Pittsburgh, 119 A. 738, 276 Pa. 58—Jaski v. Leider, 34 Pa.Dist. & Co. 480.
23 C.J. p 327 note 32.
Reason for rule
The property they represented was considered of such shadowy nature that there was nothing capable of being physically seized.—Moys v. Union Trust Co. of Pittsburgh, 119 A. 738, 276 Pa. 58—Jaski v. Leider, 34 Pa.Dist. & Co. 480.
Stock in building and loan association—Dixon v. Cleveland, D.C.S. C., 31 F.Supp. 1010.

72. N.C.—Cooper v. Dismal Swamp Canal Co., 6 N.C. 195.

73. Colo.—Snider v. Bourquin, 188 P. 727, 68 Colo. 207.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Ga.—Fourth Nat. Bank v. Swift & Co., 124 S.E. 181, 32 Ga.App. 589, reversed on other grounds 127 S. E. 729, 160 Ga. 372, and modified on other grounds 128 S.E. 78, 34 Ga.App. 76.
Ill.—Trade Bond & Mortgage Co. v. Schwartz, 24 N.E.2d 892, 303 Ill. App. 165.
Pa.—Jaski v. Leider, 34 Pa.Dist. & Co. 480.
23 C.J. p 328 note 34.
Certificate of membership in nonprofit corporation is not within statute subjecting corporate stock to execution.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.
Mode and sufficiency of levy on corporate stock see infra § 99.

74. W.Va.—Lipscomb v. Condon, 49 S.E. 392, 56 W.Va. 416, 107 Am.S. R. 938, 67 L.R.A. 670.

75. Va.—Chesapeake, & Ohio R. R. Co. v. Paine, 29 Gratt. 502, 70 Va. 502.

been held included under the terms "rights,"[76] "effects,"[77] and "rights and credits."[78] There are cases, however, in which the statutes are more strictly construed, and in which shares of stock have been held not to be included under the phrase "real and personal property," or "estate, both real and personal,"[79] or goods and chattels.[80]

The remedy cannot be extended so as to apply to corporations other than those within the provisions of the statute.[81]

Under some statutes shares of stock are subject to levy and sale under an execution only where there has been a prior valid attachment against such shares.[82] Corporate stock as subject to execution against the corporation see Corporations § 1342 a.

Debtor's title or interest. While, as a general rule, the statutes allow an execution to be levied on any stock held by the judgment debtor,[83] an execution cannot be levied against stock held by the debtor in a fiduciary relation where the execution runs against him individually,[84] nor, on an execution against a stockholder, can there be a levy on shares pledged as collateral security for a debt of the stockholder and transferred on the books of the company to the pledgee.[85] The statute applies, however, although a third person has a lien on the stock,[86] or although the stockholders have agreed to pool their stock.[87]

A by-law of the corporation prohibiting the transfer of stock by a stockholder while he is indebted to it does not prevent a levy on and sale of the stock of one so indebted.[88]

Transfer on corporate books. Statutes authorizing execution against stock held by the judgment debtor do not authorize a levy of execution on stock not owned by the judgment debtor, although standing in his name on the books of the corporation,[89] unless the actual owner is estopped to deny the apparent ownership.[90] On the other hand, where statute renders void a transfer of stock not entered on the stock books, execution cannot be levied on the right of a purchaser of a stock certificate the transfer of which was not entered on the stock books.[91] Stock given as security or pledge to another but not transferred on the books in accord with the statute is subject to execution issued on a judgment against the record owner of the stock.[92]

Foreign corporations or joint stock companies. In the absence of statute, the stock of a foreign corporation is not subject to execution.[93] Statutes making corporate stock subject to execution apply only to the stock of domestic corporations,[94] including foreign corporations which have become domesticated.[95] However, it has been held that certificates of stock in a foreign corporation are personal property, which if physically within the state may be levied on and sold pursuant to statute,[96] and a like rule has been applied to certificates of shares of joint stock associations and partnerships.[97]

National bank. There is nothing in the constitution or laws of the United States which forbids

76. Ill.—Union Nat. Bank v. Byram, 22 N.E. 842, 131 Ill. 92.

77. Ill.—Union Nat. Bank v. Byram, supra.

78. N.J.—Curtis v. Steever, 36 N.J. Law 304.

79. Ga.—Haley v. Reid, 16 Ga. 437.
Mo.—Foster v. Potter, 37 Mo. 525.

80. N.Y.—Ajax Craftsmen v. Whinston, 198 N.E. 611, 269 N.Y. 7, reversing 277 N.Y.S. 517, 243 App. Div. 731, and answering certified question 278 N.Y.S. 913, 243 App. Div. 801.

81. Mich.—Lyon v. Denison, 45 N. W. 358, 80 Mich. 371, 8 L.R.A. 358.
23 C.J. p 328 note 43.

82. N.Y.—Ajax Craftsmen v. Whinston, 198 N.E. 611, 269 N.Y. 7, reversing 277 N.Y.S. 517, 243 App. Div. 731, and answering certified question 278 N.Y.S. 913, 243 App. Div. 801.

Early cases explained
N.Y.—Ajax Craftsmen v. Whinston, supra.
23 C.J. p 328 note 40.

83. Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
23 C.J. p 329 note 51.

84. Tenn.—Nashville Trust Co. v. Weaver, 50 S.W. 763, 102 Tenn. 66.

85. Mich.—Feige v. Burt, 77 N.W. 928, 118 Mich. 243, 74 Am.S.R. 390.

86. Wash.—Hardin v. White Swan Min. & Mill. Co., 67 P. 236, 26 Wash. 583.

87. Wash.—Hardin v. White Swan Min. & Mill. Co., supra.

88. Ind.—State v. Jeffersonville First Nat. Bank, 89 Ind. 302.

89. Ill.—Allen v. Williams, 212 Ill. App. 114.
23 C.J. p 329 note 52.

90. La.—Le Page v. Porée, 8 Rob. 439.
23 C.J. p 329 note 53.

91. Colo.—Snider v. Bourquin, 188 P. 727, 68 Colo. 207.

Purchaser is not owner of such stock unless shown by stock book to be such.—Snider v. Bourquin, supra.

Necessity for recording transfer as against creditors of transferee see Corporations § 434 e.

92. N.J.—Bowen v. Magee, 182 A. 28, 14 N.J.Misc. 7.

93. N.H.—Dupont v. Moore, 166 A. 417, 86 N.H. 254.

94. Wash.—Daniel v. Gold Hill Min. Co., 68 P. 884, 28 Wash. 411.
23 C.J. p 328 note 44.

95. Mo.—Dean Rapid Tel. Co. v. Howell, 144 S.W. 1135, 162 Mo.App. 100.
23 C.J. p 328 note 45.

96. Cal.—Baar v. Smith, 275 P. 861, 97 Cal.App. 398.
Pa.—Mills v. Jacobs, 200 A. 233, 131 Pa.Super. 469, modified on other grounds 4 A.2d 152, 33 Pa. 231, 122 A.L.R. 333.
23 C.J. p 328 note 46.

97. U.S.—Beal v. Carpenter, Ark., 235 F. 273, 276, 148 C.C.A. 633.

the seizure or sale under the state law of stock in a national bank.[98] Such stock has been held to be included in statutes authorizing execution against stock in corporations generally,[99] and may be sold on execution where such sale does not interfere with the operation of the bank as a governmental agency.[1]

The situs of shares of stock is within the state under whose laws the corporation was organized, and they may be there levied on, although owned by a nonresident, statutes sometimes so providing.[2]

§ 33. Real Property in General

In most jurisdictions real property or interests therein are subject to execution, if not otherwise exempt.

The liability of realty to levy and sale on execution depends entirely on statute,[3] such liability being unknown at common law.[4] Under the statutes of most jurisdictions, however, the real property of a judgment debtor or any interest therein, if not otherwise exempt, is subject to seizure and sale under an execution.[5] This rule is not universal, however, and in some states real property is not subject to execution,[6] while in others real property is not primarily liable,[7] it being provided that personalty of the debtor shall be first exhausted before the realty may be seized on execution, as discussed infra § 100. A bill in equity to subject the realty to satisfaction of the judgment is sometimes the only remedy.[8]

Where judgment not a lien. It has been held that real estate may be levied on and sold under an execution, even though no lien existed on such property prior to the levy.[9] Thus, where a judgment is not a lien on after-acquired realty, as discussed in the C.J.S. title Judgments § 477, also 34 C.J. p 590 note 45, such realty may be seized under execution and sold in satisfaction of the judgment.[10]

§ 34. Property of Corporations

As a general rule, the property of private corporations is as much subject to seizure and sale under an execution as is the property of natural persons.

As discussed in Corporations § 1342 a, as a general rule, the property of all private corporations is as much subject to execution as is the property of natural persons. So the property of a corporation which, as agent of the state, is performing a duty which devolves on the state, such as caring

98. Fla.—Bronson v. Willis, 194 So 245, 142 Fla. 64.
Pa.—Braden's Estate, 30 A. 746, 165 Pa. 184.

99. Fla.—Bronson v. Willis, 194 So. 245, 142 Fla 64.

1. Ala.—Oldacre v. Butler, 23 So. 3, 116 Ala. 652.

2. Tex.—Turner v. Cattlemen's Trust Co, Civ.App., 215 S.W. 831.
23 C.J. p 329 note 50.
Power of legislature
Legislature may fix situs of stock of domestic corporation at its domicile for purposes of execution.—Grenada Bank v. Glass, 116 So. 740, 150 Miss. 164.
Situs of shares generally see Corporations § 194 e.

3. Ill.—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 434.
Or.—Cabler v. Alexander, 224 P. 1076, 111 Or. 257.
S.C.—Dorn v. Stedham, 137 S.E. 331, 139 S.C. 66.

4. Del.—Smith v. Ford, 161 A. 214, 5 W.W.Harr. 175.
Ill.—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 434.
Mich.—Citizens Industrial Bank v. Brummeler, 265 N.W. 481, 274 Mich. 616.
N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.
Or.—Cabler v Alexander, 224 P. 1076, 111 Or. 257.
S.C.—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66.
23 C.J p 334 note 27.
Early exceptions and modifications of the common law
N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336
23 C.J. p 334 notes 27–31.

5. Del.—C. L. Pierce & Co. v. Security Trust Co., 175 A. 770, 6 W. W.Harr. 348.
D.C.—Davis v. Harper, 14 App.D.C. 463.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Ky.—Cannon Ball Cab & Bus Co. v. Maryland Casualty Co., 96 S.W.2d 760, 265 Ky. 256.
Mich.—Citizens Industrial Bank v. Brummeler, 265 N.W. 481, 274 Mich. 616.
Pa.—See Wiercinski v. Leone, 20 Erie Co. 366.
S.C.—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66.
27 C.J. p 334 note 33.
Lands and tenements
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Statute must be satisfied
Ill.—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.
Land held under unrecorded deed
(1) Generally.
N.C.—Davis v. Inscoe, 84 N.C. 396—Morris v. Ford, 17 N.C. 412—Price v. Sykes, 8 N.C. 87.
Tenn.—Coward v. Culver, 12 Heisk. 540—Simmons v. McKissick, 6 Humphr 259—Shields v. Mitchell, 10 Yerg. 1—Vance's Heirs v. McNairy, 3 Yerg. 171, 24 Am.D. 553.
(2) Failure to record conveyance under federal court sale rendered conveyance void as to creditors, and land was subject to execution as property of debtor, since as to creditors title was as if there had been no sale.—Shea v. Rucker, 72 S.W.2d 551, 167 Tenn. 550.
Execution against interest of vendor of land after contract of sale see the C.J.S. title Vendor and Purchaser § 308, also 66 C.J. p 1064 note 78–p 1065 note 99.

6. W.Va.—Dunn v. Baxter, 5 S.E. 214, 30 W.Va. 672.
23 C.J. p 335 note 35, 36.

7. Pa.—Delaware County Trust Co. v. Goldberg, 25 Pa.Dist. & Co. 123, 25 Del.Co. 472.

8. U.S.—In re McGraw, D.C.W.Va., 254 F. 442—Jackson v. Parkersburg & O. V. Electric R. Co., D.C. W.Va., 233 F. 784.
23 C.J. p 335 note 36.

9. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.
23 C.J. p 335 note 37.

10. Pa.—King v. King, 93 A. 20, 247 Pa. 89—Calhoun v. Snider, 6 Binn. 135.

for the insane, may be sold under execution, although the state will be affected thereby, provided the sale will not render the corporation unable to perform its duty.[11]

However, it has been held that the property of a charitable organization, strictly dedicated to the charity, is not subject to execution.[12] So the property of a public or quasi public corporation devoted to public use or necessary to the exercise of its franchise, is generally held not subject to execution, as discussed infra § 35.

§ 35. Property of Public or Quasi Public Corporations

a. In general
b. Property essential to enjoyment of franchise

a. In General

Ordinarily the property of a public or quasi public corporation devoted to public or governmental, as distinguished from private or quasi private, purposes is not subject to seizure under an execution.

It is considered general doctrine needing no statutory sanction that the land and property of the state or its agencies or political subdivisions is not subject to seizure under general execution in the absence of statute expressly granting such right, statutes sometimes so providing,[13] and it has been said that, as a matter of public policy, general statutory provisions making property subject to execution are construed to apply only to the property of private persons and corporations, and not to that of public corporations or bodies politic.[14] Apart from the foregoing, it is said that where property of a public or quasi public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation, the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held.[15] Thus property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, public markets, hospitals, cemeteries, and generally everything held for governmental purposes, is not subject to levy and sale under execution against such corporation, statutes sometimes so providing.[16]

11. Ky.—Hauns v. Central Kentucky Lunatic Asylum, 45 S.W. 890, 103 Ky. 562, 20 Ky.L. 246.

12. Ark.—Fordyce v. Woman's Christian Nat. Library Assoc., 96 S.W. 155, 79 Ark. 550, 561, 7 L.R.A., N.S., 485.
23 C.J. p 324 note 84.

13. Cal.—El Camino Irr. Dist. v. El Camino Land Corporation, 85 P.2d 123, 12 Cal.2d 378.
Mo.—Security State Bank v. Dent County, 137 S.W.2d 960, 345 Mo. 1050.
S.C.—Brooks v. One Motor Bus Carrying 1937-38 South Carolina License V 1357, Motor No. 45590, Serial No. 40476, 3 S.E.2d 42, 190 S.C. 379.
Execution against:
County see Counties § 336.
Municipal corporation see the C.J.S. title Municipal Corporations § 2212, also 44 C.J. p 1492 notes 29-34.
School district see the C.J.S. title Schools and School Districts § 442, also 56 C.J. p 803 notes 64-69.
State see the C.J.S. title States § 232, also 59 C.J. p 331 notes 21-26.
Town see the C.J.S. title Towns § 201, also 63 C.J. p 225 note 17-p 226 note 35.
Title in public
It has been broadly stated that property, movable or immovable, title to which is vested in the public is immune from seizure under execution.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427.
Statute inapplicable to drainage district
Provision exempting property of state, county, city, town, borough, or other "public or municipal corporation," from levy or sale under execution, does not include property of drainage district.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786.
Land obtained for delinquent assessment
Land acquired by irrigation district at sales for delinquent assessments, and deeded to the district after expiration of the redemption period, was not subject to execution on judgment against district on bonds and interest coupons.—El Camino Irr. Dist. v. El Camino Land Corporation, 85 P.2d 123, 12 Cal.2d 378.

14. Cal.—Vaughn v. Condon, 199 P. 545, 52 Cal.App. 713.

15. U.S.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F. Supp. 427, 434, quoting **Corpus Juris.**

16. U.S.—Snower v. Hope Drainage Dist., D.C Mo., 2 F.Supp. 931, 933, citing **Corpus Juris,** and reversed on other grounds, C.C.A., Groner v. U. S. ex rel. Snower, 73 F.2d 126.
Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 758, 183 Ark. 786, citing **Corpus Juris.**
Cal.—Marin Water & Power Co. v. Town of Sausalito, 193 P. 294, 49 Cal.App. 78.
Colo.—City of Pueblo v. Dye, 96 P. 969, 44 Colo. 35.
Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.
Ill.—Wicker v. City of Alton, 140 Ill.App. 135—City of Gibson v. Murray, 120 Ill.App. 296, affirmed 75 N.E. 319, 216 Ill. 589.
Mo.—Security State Bank v. Dent County, 137 S.W.2d 960, 963, 345 Mo. 1050, quoting **Corpus Juris**—State ex rel Hufft v. Knight, App., 121 S.W.2d 762.
Ohio.—Cincinnati v. Frost, Stearns & Co., 8 Ohio Dec., Reprint, 107, 5 Cinc.L.Bul. 684.
S.C.—Brooks v. One Motor Bus Carrying 1937-38 South Carolina License V 1357, Motor No. 45590, Serial No. 40476, 3 S.E.2d 42, 44, 190 S.C. 379, citing **Corpus Juris.**
Tex.—City of Laredo v. Frishmuth, Civ.App., 196 S.W. 190—City of Clarendon v. Betts, Civ.App., 174 S.W. 958.
23 C.J. p 355 note 72.
"The compelling reason underlying the rule is that levying upon and selling property used for governmental purposes . . . might work irreparable injury."—Brooks v. One Motor Bus Carrying 1937-38 South Carolina License V 1357, Motor No. 45590, Serial No. 40476, 3 S.E.2d 42, 44, 190 S.C. 379.
Drainage district
(1) Property and taxes necessary for use of drainage district in performing governmental functions

Where, however, such a corporation owns in its proprietary, as distinguished from its public or governmental, capacity property not useful or used for a public purpose but for quasi private purposes, the general rule is that such property may be seized and sold under execution against the corporation, precisely as similar property of individuals is seized and sold.[17] Property held for public purposes is not subject to execution merely because it is temporarily used for private purposes,[18] although if the public use is wholly abandoned it becomes subject to execution.[19] Whether or not property held as public property is necessary for the public use is a political, rather than a judicial, question.[20]

The rule absolving property devoted to public purposes from execution also applies to funds in the hands of a public officer,[21] or to taxes due the public as a quasi public corporation.[22]

State agencies distinguished. A distinction has been made with respect to the property of state agencies, such as irrigation or reclamation districts, it being considered that property of such agencies is held only for governmental purposes and as such cannot be seized on execution.[23]

Proceeds of exempt property. Proceeds of property which is not subject to execution have been held to be equally free from seizure.[24] Thus, if public property not subject to execution is destroyed, the insurance money stands in lieu thereof and cannot be reached by execution.[25]

Property held under public trust. Property held subject to a public trust cannot be subjected to an execution.[26]

b. Property Essential to Enjoyment of Franchise

Except as, and to the extent that, statutory or constitutional provisions provide otherwise, property of a quasi public corporation essential to the operation of its franchise is ordinarily not subject to execution.

Except where, and to the extent that, it is otherwise provided by statutory or constitutional provision,[27] in the case of corporations such as railroads, bridge companies, or the like, which, al-

may not legally be taken from district pursuant to writ of execution —State by and through State Land Board v. Blake, 20 P.2d 871, 88 Utah 584, modified on other grounds 56 P.2d 1347, 88 Utah 600.

(2) Bondholder who recovered judgment against drainage district could not enforce judgment by execution against bank holding money collected by district for payment of bonds and deposited in bank.—Snower v. Hope Drainage Dist., D.C.Mo., 2 F.Supp. 931, reversed on other grounds, C.C.A., Groner v. U. S. ex rel. Snower, 73 F.2d 126

17. U.S.—Shamrock Towing Co. v. City of New York, D.C.N.Y., 20 F. 2d 444—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427, 434, quoting **Corpus Juris.**
Ala.—Southern Ry. Co. v. Hartshorne, 43 So. 583, 150 Ala. 217, 124 Am.S.R. 68.
Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 758, 183 Ark. 786.
Cal.—Marin Water & Power Co. v. Town of Sausalito, 193 P. 294, 49 Cal.App. 78.
Del.—Eastern Union Co. of Delaware, Inc. v. Moffat Tunnel Improvement Dist., 178 A. 864, 872, 6 W.W.Harr. 488, citing **Corpus Juris.**
Ohio.—Cincinnati v. Frost, Stearns & Co., 8 Ohio Dec., Reprint, 107, 5 Cinc.L.Bul. 684.
23 C.J. p 356 note 75.

18. Ala.—Russell & Johnson v. Town of Oneonta, 73 So. 986, 199 Ala. 64—Murphree v. Mobile, 16 So. 544, 104 Ala. 532.

19. La.—New Orleans v. Werlein 24 So. 232, 50 La.Ann. 1251, reversed on other grounds 20 S.Ct. 682 177 U.S. 390, 44 L.Ed. 817—McEnery v. Pargoud, 10 La.Ann. 497.
23 C.J. p 356 note 77.

20. La.—Monroe v. Johnson, 30 So. 810, 106 La. 350.

21. N.D.—Auran v. Mentor School Dist. No. 1 of Divide County, 225 N.W. 435, 58 N.D. 934.
Puerto Rico.—Lamboglia v. Guayama School Bd., 15 Puerto Rico 299.

22. Iowa.—Hedge v. City of Des Moines, 119 N.W. 276, 141 Iowa 4
23 C.J. p 356 note 74.
Drainage district
Drainage district taxes levied for construction and repair of drainage system and for management and supervision of district are exempt from execution because such taxes are necessary for performance of governmental functions of district.—State by and through State Land Board v. Blake, 20 P.2d 871, 88 Utah 584, modified on other grounds 56 P.2d 1347, 88 Utah 600.
Tax certificates constituting liens on land in borough cannot be sold under execution.—First Nat. Bank v. Borough of Lavalette, 162 A. 106, 10 N.J.Misc. 1023.
Land obtained in lieu or payment of taxes
Tex.—City of Sherman v. Williams, 19 S.W. 606, 84 Tex. 421, 31 Am. S.R. 66.

23. Cal.—El Camino Irr. Dist. v. El Camino Land Corporation, 85 P.2d 123, 12 Cal.2d 378.

24. Cal.—El Camino Irr. Dist. v. El Camino Land Corporation, supra.
Property of state or agency
Where it is established that property is owned by the state or its agency, rather than by a municipal corporation, the rule authorizing levy of execution against proceeds of such property is inapplicable.—El Camino Irr. Dist. v. El Camino Land Corporation, supra.

25. Ala.—Ellis v. Pratt City, 20 So. 649, 111 Ala. 629, 56 Am.S.R. 76, 33 L.R.A. 264.

26. Cal.—El Camino Irr. Dist. v. El Camino Land Corporation, 85 P.2d 123, 12 Cal.2d 378.
Lands of irrigation district
The property of an irrigation district constitutes a public trust and is held by the district for public use, and hence is not subject to levy and sale by execution by creditors of district.—Moody v. Provident Irr. Dist., 85 P.2d 128, 12 Cal.2d 389—23 C.J. p 357 note 85 [a].
Property acquired by tax deed
Statute declaring that property acquired by irrigation district shall be held in trust for the uses and purposes of the statute governing irrigation districts makes lands acquired by district by tax deed exempt from execution.—El Camino Irr. Dist. v. El Camino Land Corporation, 85 P.2d 123, 12 Cal.2d 378.

27. N.C.—State v. Rives, 27 N.C. 297.
Pa.—Greensburg Fuel Co. v. Irwin Natural Gas Co., 29 A. 274, 162 Pa.

though not strictly public corporations, are created to serve public purposes, and are charged with public duties, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation is not, according to the weight of authority, apart from statutory provision, subject to execution at law,[28] although in some jurisdictions the tendency has been not to exempt corporate property from execution and sale, even where such property is essential to the enjoyment of the franchise owned by such corporation.[29] However, the property of a quasi public corporation not necessary or not used for the purposes which called the corporation into being is not exempt from seizure and sale under execution.[30] This principle is not applicable to lands held by a public corporation under an express trust where a sale of the land could not be made without doing violation to the terms of the trust.[31]

So if the corporation is purely private, and the public has no direct interest in its operations or rights concerning them, its property, although useful and necessary to the conduct of its business, may be sold under execution the same as the property of an individual.[32]

It is not sufficient to exempt the property of a corporation from execution that it receives a government subsidy or was formed to perform service of a public nature or in which the public is directly or indirectly interested, or is engaged in performing service for the government, where there is no duty imposed on the corporation requiring its performance of public service or any grant of a public franchise authorizing the taking of private property for public use, whereby property taken is stamped with a public trust.[33]

The interest of a public service company in a

St. 78—Appeal of Philadelphia & B. C. R. Co., 70 Pa. 355.
23 C.J. p 356 notes 80, 81—51 C.J. p 886 note 13.

28. U.S.—Ackroyd v. Winston Bros. Co., C.C.A.Mont., 113 F.2d 657, remanding, D.C., Ackroyd v. Brady Irr. Co., 27 F.Supp. 503.
Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786.
Ga.—Georgia Power Co. v. City of Decatur, 159 S.E. 863, 173 Ga. 219.
Ohio.—Ludlow v. Hurd, 12 Ohio Dec., Reprint, 791, 1 Disn. 522.
Pa.—Borough of Mt. Union v. Kunz, 139 A. 118, 290 Pa. 356—Bachrach v. Huntingdon & Broad Top Mountain R. & Coal Co., 133 A. 641, 286 Pa. 325—Bell v. Wood, 37 A. 201, 181 Pa. 175—Appeal of Boyd, 15 A. 736, 2 Mon. 399—Covey v. Pittsburg, Ft. W. & C. R. Co., 3 Phila. 173—Graham v. Pennsylvania & O. Canal Co., 3 Pittsb. 341, 19 Pittsb.Leg.J. 101.
23 C.J. p 356 note 82—51 C.J. p 887 notes 15–21.

Omission from exemption statute immaterial

Statute exempting from execution property used by counties, cities and towns, under maxim "inclusio unius est exclusio alterius," could not be construed to exclude from exemption, property devoted to public use by authority of the state, where it would lead to absurdity.—Ackroyd v. Winston Bros. Co., C.C.A.Mont., 113 F.2d 657, remanding, D.C., Ackroyd v. Brady Irr. Co., 27 F.Supp. 503.

Part of property

Except where otherwise provided by statute, it is a general rule that the property of a railroad company may be levied on and sold as an entirety where the necessity arises, but that parts or parcels thereof, a levy on which would affect the operation of the road as a whole, cannot be taken separately, in view of the doctrine that for no class of creditors should the indispensible means of operating a railroad be taken away until the final sale of the entire road becomes necessary.
Ohio.—Carey v. Pittsburgh, Ft. W. & C. R. Co., 2 Ohio Dec., Reprint, 85, 1 West L.Month. 338.
Pa.—Bachrach v. Huntingdon & Broad Top Mountain R. & Coal Co., 133 A. 641, 286 Pa. 325.
Wis.—Chicago, M. & St. P. Ry. Co. v. City of Janesville, 118 N.W. 182, 137 Wis. 7.
51 C.J. p 886 notes 10–12.

Presumption as to use

Any presumption that property belonging to drainage district is for public use so as to render it exempt from execution may be rebutted.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786.

Reservoir company

The property of a reservoir company which furnished water to landowners in an irrigation district which owned majority of stock of the reservoir company was not subject to execution by construction company which enlarged reservoir and obtained judgment against the reservoir company for work done, not because of district's ownership of stock but because the supplying of water to landowners of irrigation district was public service.—Ackroyd v. Winston Bros. Co., C.C.A.Mont., 113 F.2d 657, remanding, D.C., Ackroyd v. Brady Irr. Co., 27 F.Supp. 503.

Subsequently acquired property

That property levied on under an execution is subsequently acquired by a railroad company does not prevent its sale to enforce the levy.—Chapman v. Pittsburgh & S. R. Co., 26 W.Va. 299.

29. Cal.—Risdon Iron & Locomotive Works v. Citizens' Tract. Co., 54 P. 529, 122 Cal. 94, 68 Am.S.R. 25.
23 C.J. p 357 note 83.

30. Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W. 2d 755, 183 Ark. 786.
Pa.—Appeal of Philadelphia & R. R. Co., 3 A. 838, 2 Sadler 5.
23 C.J. p 357 note 84—51 C.J. p 887 notes 25–30.

Drainage district

Land acquired by drainage district at foreclosure sale for enforcement of assessments and held for resale is subject to levy and sale under execution.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786.

Procedure

(1) Such unnecessary property should first be taken to satisfy a claim.—Seasongood v. Miami Valley R. Co., 8 Ohio Dec., Reprint, 739, 9 Cinc.L.Bul. 256.

(2) Only if it proves insufficient should the entire railroad be levied on and sold.—Seasongood v. Miami Valley R. Co., supra.

31. Cal.—Tulare Irr. Dist. v. Collins, 97 P. 1124, 154 Cal. 440.
23 C.J. p 357 note 85.

32. Pa.—Reynolds v. Reynolds Lumber Co., 32 A. 537, 169 Pa. 626, 47 Am.S.R. 935, followed in East Side Bank v. Columbus Tanning Co., 32 A. 539, 170 Pa. 1.

33. Hawaii.—Inter-Island Tel. Co. v. Lilinokalani, 16 Hawaii 605.

municipal plant may be sold on execution against the company.[34]

Property seized by mortgagee. Where possession of the property has been taken by a mortgagee, it is no longer subject to execution against the corporation.[35]

On abandonment of franchise. The exemption of property of a corporation necessary for the exercise of its franchise does not continue after the use of the franchise has been abandoned.[36]

§ 36. Particular Estates or Interests in General

a. In general
b. Remainders
c. Reversions
d. Executory devises
e. Life estates
f. Estates for years
g. Estates at will or sufferance
h. Rents reserved to grantor
i. Interest of licensee

a. In General

Generally every possible interest in land which is real and substantial and which can be sold by the debtor is subject to seizure on an execution.

The general rule is that all possible interests in land, contingent or otherwise, which are real and substantial, are subject to seizure and sale on execution.[37] Mere expectancies, however, such as that of an heir apparent, are not included,[38] the rule here being analogous to that governing assignments of like interests, discussed in Assignments § 14.

The estate or interest subject to execution has been characterized in variant terms, such as every "vested interest,"[39] "every legal interest,"[40] "lands, tenements, and hereditaments,"[41] "a descendible, devisable and alienable" estate.[42]

A mere possession, see infra § 51, or a tenancy at will, discussed infra subdivision g of this section, and even a mere easement[43] has been held to be subject to sale on execution. Generally, however, if the debtor has no such interest in land as he himself can sell, he has no interest which is leviable.[44]

An estate in land determinable on the debtor's ceasing for any reason to remain in possession is too intangible to be subject to execution.[45]

Curtesy as an estate or interest subject to execution is considered in Curtesy §§ 18, 19; dower as such an estate is considered in Dower §§ 76, 112; while an estate by entirety as such an interest is considered in the C.J.S. title Husband and Wife § 34, also 30 C.J. p 572 note 84–p 574 note 2.

Ground rents. The interest of a grantor or lessor in a ground rent may be levied on and sold under an execution.[46]

Mere contingent interests or remote possibilities cannot be levied on under an execution.[47]

34. Mich.—Campbell v. Western Electric Co., 71 N.W. 644, 113 Mich. 333.

35. Ill.—Palmer v. Forbes, 23 Ill. 301.

36. Ala.—Gardner v. Mobile & N. W. R. Co., 15 So. 271, 102 Ala. 635, 48 Am.S.R. 84.
23 C.J. p 357 note 89.

37. Kan.—Koelliker v. Denkinger, 83 P.2d 703, 148 Kan. 503, 119 A.L.R. 1, modified on other grounds 86 P.2d 740, 149 Kan. 259, 119 A.L.R. 1525.
N.J.—Hopper v. Gurtman, 18 A.2d 245, 252, 126 N.J.Law 263, 133 A.L.R. 621, citing **Corpus Juris,** and affirming 8 A.2d 376, 17 N.J.Misc. 289.
23 C.J. p 335 note 41.

Legal interest
Del.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

Estate defeasible on contingency
An estate in fee or in tail, defeasible on a contingency, is liable to be taken in execution by a creditor of the tenant and held until the happening of the contingency.—Phillips v. Rogers, 12 Metc., Mass., 405.

38. Pa.—Patterson v. Caldwell, 17 A. 18, 124 Pa. 455, 10 Am.S.R. 598, distinguishing Reed's App., 11 A. 787, 118 Pa. 215, 4 Am.S.R. 588.
23 C.J. p 335 note 42.
Land equitably converted into money as subject to execution see Conversion § 45.

39. Ohio.—Columbus Nat. Bank v. Tennessee Coal, Iron & Railroad Co., 57 N.E. 450, 62 Ohio St. 564, 586.

40. Ga.—James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co., 79 S.E. 465, 140 Ga. 593—Pitts v. Hendrix, 6 Ga. 452.

41. Pa.—Roe v. Humphreys, 1 Yeates 427, 429.
23 C.J. p 335 note 47.

42. N.Y.—Higgins v. Downs, 91 N.Y.S. 937, 101 App.Div. 119, 120, 34 N.Y.Civ.Proc. 85.

43. N.Y.—Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Assoc., 64 N.Y. 561, affirming 4 Hun 419, 6 Thomps. & C. 589.

44. Ga.—Harber v. Nash, 55 S.E. 928, 126 Ga. 777.
23 C.J. p 335 note 52.

Estate disposed of
Where father conveyed life estate in præsenti to his daughter with remainder to her children, and she thereafter conveyed a life estate to him, and on his death to her children, deed by daughter conveyed all of her interest in the land, so that she owned nothing in the land subject to execution for her debts.—Calloway v. Witt, 105 S.W.2d 123, 21 Tenn.App. 74.

45. Ga.—Harber v. Nash, 55 S.E. 928, 126 Ga. 777.

46. Pa.—Heartley v. Beaum, 2 Pa. 165.
28 C.J. p 847 note 65.

47. U.S.—Farmers' Loan & Trust Co. v. Miller, D.C.N.Y., 2 F.2d 493, reversed on other grounds, C.C.A., Farmers' Loan & Trust Co. v. Hicks, 9 F.2d 848, certiorari denied

b. Remainders

Vested remainders in both realty and personalty are generally subject to seizure under an execution. There is a disagreement as to contingent remainders.

The doctrine is well established that a vested estate in remainder is subject to levy and sale under execution,[48] even before termination of the precedent estate.[49]

Contingent remainders. In some states contingent remainders are not liable to be sold under execution,[50] at least where the person to take on the happening of the event is uncertain.[51] In other states, however, a contingent remainder is subject to execution, sometimes by reason of statutory provision,[52] when clothed with the usual attributes rendering it alienable.[53]

Remainders in personalty. A remainder estate in personalty is subject to execution,[54] although this is not true of a contingent interest in a legacy.[55]

It has been held in some jurisdictions that a remainder interest in a live chattel cannot be levied upon by execution at law,[56] while in other jurisdictions it was held that the interest of a tenant in remainder in slaves was liable to be seized and sold under execution.[57]

c. Reversions

A vested estate in reversion is subject to execution, although a mere possibility of reverter is not.

A reversion being an estate vested in præsenti, although to take effect in possession and profit in futuro, may be aliened and charged as an estate in possession, and is therefore liable to be taken and sold under execution.[58] This is not so as to a mere

46 S.Ct. 120, 269 U.S. 583, 70 L.Ed. 424.

48. U.S.—In re Sanders, D.C.Ga., 20 F.Supp. 98.
Ala.—Williams v. Spears, 180 So. 266, 235 Ala. 611.
Ga.—Leach v. Stephens, 125 S.E. 192, 159 Ga. 193—Floyd v. Braswell, 166 S.E. 65, 45 Ga.App. 726—Lane v. Bradfield, 140 S.E. 417, 37 Ga. App. 395.
N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.
N.Y.—Schaefer v. Fisher, 242 N.Y.S. 308, 137 Misc. 420.
Okl.—Bierschenk v. Klein, 83 P.2d 371, 183 Okl. 494.
Tenn.—Lockwood v. Nye, 32 Tenn. 307, 2 Swan. 515, 58 Am.D. 73—Fowler v. Plunk, 7 Tenn.App. 29.
Tex.—Estes v. Estes, Com.App., 267 S.W. 709, affirming, Civ.App., 255 S.W. 649—Turner v. Miller, Civ. App., 255 S.W. 237.
23 C.J. p 335 note 55.

Reason for rule
Such an estate is considered so certain and definite as to permit fair appraisement and sale.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.

Child in esse
Under devise of life estate to daughter, at her death land to be divided equally among her children, child in esse at death of testator held to have leviable interest.—Leach v. Stephens, 125 S.E. 192, 159 Ga. 193.

Restriction against alienation
The interest of a grantee under deed reserving life estate to grantors and providing that share of any grantee selling prior to death of grantors should go to other grantees, could be sold on execution issued on judgment against such grantee, notwithstanding grantee herself could not sell or convey her interest.—Glenn v. Gross, 294 N.W. 297, 229 Iowa 146.

49. Ala.—Dunn v. Ponceler, 161 So. 450, 230 Ala. 375.
Ill.—Thomas v. Stoakes, 159 N.E. 269, 328 Ill. 115.
N.J.—Cowan v. Storms, 2 A.2d 183, 185, 121 N.J.Law 336, citing **Corpus Juris.**
Tenn.—Puryear v. Edmondson, 4 Heisk. 43.
23 C.J. p 336 note 56.

Theory of rule is that possession by the tenant of the particular estate is construed to be possession by him in remainder.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.

Undivided interest
N.J.—Cowan v. Storms, supra.

50. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882—National Bank of Commerce of St. Louis v. Ritter, 26 S.W.2d 113, 181 Ark. 439—Liberty Central Trust Co. v. Vaughan, 267 S.W. 361, 167 Ark. 219.
Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200—Riddle v. Killian, 8 N.E.2d 629, 366 Ill. 294.
Iowa.—Saunders v. Wilson, 220 N.W. 344, 207 Iowa 526, 60 A.L.R. 786.
Ohio.—Crum v. Crum, 30 N.E.2d 448, 65 Ohio App. 431.
23 C.J. p 336 note 57.

Reasons for rule
(1) Contingent remainder is not an "estate" but is merely chance of having one.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200.

(2) Such interest is not subject to alienation.—National Bank of Commerce of St. Louis v. Ritter, 26 S.W.2d 113, 181 Ark. 439.

(3) Other reasons see 23 C.J. p 336 note 57 [a].

Contingent equitable estate
Ill.—Greenough v. Peterson, 266 Ill. App. 544.
23 C.J. p 336 note 57 [b].
Equitable estates generally as subject to execution see infra § 40.

Not an estate in land under the statute.—Wright v. City of Tuscaloosa, 182 So. 72, 236 Ala. 374.

51. Iowa.—Taylor v. Taylor, 92 N.W. 71, 118 Iowa 407.

Where "the possibility is coupled with an interest," it may be subject to levy and execution.—Taylor v. Taylor, supra.

52. Kan.—Jonas v. Jones, 109 P.2d 211, 153 Kan. 108.
Mo.—Bock v. Whelan, 30 S.W.2d 607—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.
N.Y.—Schaefer v. Fisher, 242 N.Y.S. 308, 137 Misc. 420—In re Bendheim's Estate, 209 N.Y.S. 141, 124 Misc. 424, affirmed 209 N.Y.S. 794, 214 App.Div. 707.
23 C.J. p 336 note 59.

53. Mo.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

54. Tenn.—Fowler v. Plunk, 7 Tenn. App. 29—Lockwood v. Nye, 2 Swan. 515, 58 Am.D. 73.

55. Tenn.—First Nat. Bank v. Pointer, 126 S.W.2d 335, 174 Tenn. 472.

56. Tenn.—Allen v. Scurry, 1 Yerg. 36, 24 Am.D. 436.
23 C.J. p 336 note 60.

57. Ky.—Burns v. Ray, 18 B.Mon. 392.
23 C.J. p 336 note 61.

58. U.S.—Burton v. Smith, Va., 13 Pet. 464, 10 L.Ed. 248.
23 C.J. p 336 note 62.

Entry necessary
An estate forfeited by breach of condition subsequent does not revest in the grantor, before reëntry by grantor or his heirs.

possibility of reverter which is not subject to voluntary sale.[59]

d. Executory Devises

An executory devise defeasible on a contingency is subject to execution as a vested estate.

One claiming by executory devise, defeasible on a contingency, takes a vested estate in fee or in tail, defeasible on the happening of such contingency, which is subject to execution, and may be taken and held by the execution creditor until the happening of the contingency.[60] An executory devise has been held to be subject to execution even during the continuance of the previous estate.[61] However, such a devise subject to a condition which makes the estate wholly contingent and a mere possibility cannot be reached on execution.[62]

e. Life Estates

Generally a life estate is subject to levy under an execution against the life tenant.

The general rule is that the interest of a judgment debtor in an estate for life is subject to levy under execution,[63] in the absence of any statutory provisions to the contrary,[64] and in the absence of any clause in the instrument creating the estate restricting the power of alienation.[65] The tendency of modern decisions in the construction of the various statutes on this subject is to hold that, in the absence of the appointment of trustees, the power of alienation cannot be restricted so as to exempt a life estate from levy and sale under execution against a life tenant.[66]

f. Estates for Years

An estate for years may be sold on execution.

An estate for a term of years is regarded as a chattel and may be sold on execution.[67] By statute estates for years may be sold on execution as real estate.[68]

g. Estates at Will or Sufferance

The authorities are not in agreement on whether a tenancy at will is subject to execution.

There are authorities holding that the interest which a tenant at will or by sufferance has in another's real estate is such an interest in land as can be sold on execution[69] but other authorities are to the contrary.[70]

h. Rents Reserved to Grantor

There is disagreement on whether rents reserved to a grantor are subject to execution against the grantor.

It has been held that rent reserved to the grantor is such an interest as may be taken in execution against the grantor and sold.[71] However, it has also been held that a rent reserved to the grantor on a conveyance in fee of land cannot be taken on execution against the grantor, even where the conveyance contains a clause of distress and a provision for reëntry.[72]

i. Interest of Licensee

Property taken from another's land under license is

Ga.—Edmondson v. Leach, 56 Ga. 461.
Me.—Bangor v. Warren, 34 Me. 324, 56 Am.D. 657.

59. Ind.—Gushwa v. Gushwa, 177 N.E. 366, 93 Ind.App. 68.
Tex.—Jensen v. Wilkinson, Civ.App., 133 S.W.2d 982, error dismissed, judgment correct.

Deed subject to reversion
Deed conveying fee subject to reversion to grantor on grantor's surviving grantee created mere possibility of reverter not subject to execution.—Gushwa v. Gushwa, 177 N.E. 366, 93 Ind.App. 68.

60. Ohio.—Crum v. Crum, 30 N.E. 2d 448, 65 Ohio App. 431.
23 C.J. p 336 note 63.

61. Pa.—In re Packer, 92 A. 70, 246 Pa. 116—De Haas v. Bunn, 2 Pa. 335, 44 Am.D. 201.

62. Ohio.—Crum v. Crum, 30 N.E.2d 448, 65 Ohio App. 431.

63. Ala.—Dunn v. Ponceler, 161 So. 450, 230 Ala. 375.
Kan.—Alexander v. Goellert, 109 P. 2d 146, 153 Kan. 202.
N.C.—Mizell v. Bazemore, 139 S.E. 453, 194 N.C. 324.
S.D.—Tscherne v. Crane-Johnson Co., 227 N.W. 479, 56 S.D. 101.
23 C.J. p 336 note 65.

In personal property
D.C.—Palais Royal v. Calhoun, 92 F. 2d 515, 67 App.D.C. 364.
Ga.—First Nat. Bank v. Geiger, 7 S. E.2d 756, 61 Ga.App. 865.

Power of disposition
Where by the terms of a will the power and discretion to terminate a life estate are vested in a beneficiary, this power is personal; and it is not property which may be subjected to forced sale on execution.—Ryan v. Cullen, 150 P. 597, 96 Kan. 284.

64. Ky.—Redman v. Hubbard, 130 S.W. 955, 140 Ky. 71, 37 L.R.A.,N.S., 728.
Pa.—Lippard v. Spiegel, 88 Pittsb. Leg.J. 596.
23 C.J. p 337 note 66—21 C.J. p 962 note 77 [a].

65. Neb.—Hiles v. Benton, 196 N.W. 903, 111 Neb. 557, followed in Schnell v. Farmers' Bank of Dunbar, 230 N.W. 957, 119 Neb. 881.
23 C.J. p 337 note 67.

66. Ill.—Henderson v. Harness, 52 N.E. 68, 176 Ill. 302.
23 C.J. p 337 note 68.

67. W.Va.—Harvey Coal, etc., Co. v. Dillon, 53 S.E. 928, 59 W.Va. 605, 6 L.R.A.,N.S., 628.
23 C.J. p 337 note 70.
Leasehold interests see infra § 37.

68. Ind.—Comer v. Light, 93 N.E. 660, 175 Ind. 367, rehearing denied 94 N.E. 325, 175 Ind. 367, reversing, Ind.App., 92 N.E. 344.
N.Y.—Averill v. Taylor, 8 N.Y. 44, Seld. 60, affirming 5 How.Pr. 476.

69. Ga.—Pitts v. Hendrix, 6 Ga. 452.
N.Y.—Jackson v. Graham, 3 Cai. 188.
Pa.—Gerber v. Hartwig, 11 Wkly.N.C. 197.

70. Miss.—Wildy v. Doe, 26 Miss. 35.
23 C.J. p 338 note 92.

71. Pa.—Hurst v. Lithgrow, 2 Yeates 24, 1 Am.D. 326.

72. N.Y.—Payn v. Beal, 4 Den. 405, overruling People v. Haskins, 7 Wend. 463.

subject to execution against the licensee if under the agreement such property belongs wholly to the licensee. The authorities are not in accord as to whether the license is subject to execution.

Where a mere license is given by the owner of land to another, to enter thereon and plant and raise crops, or extract oil, gas, and minerals, or to operate mines, if so agreed on, such crops, oil, gas, or minerals, as the case may be, will belong wholly to the licensee, and may be levied on as his property.[73] However there is authority holding that the interest of a licensee under an oil lease cannot be seized under an execution,[74] although there is authority to the contrary,[75] and a license to remove standing trees has been held a personal trust and not subject to execution,[76] although there is authority to the contrary.[77]

§ 37. Leasehold Interests

The interest of a lessee or lessor of realty or personalty is generally subject to execution.

The lessee's interest under a lease of realty is generally subject to seizure and sale under an execution against the lessee,[78] although the lessee has sublet the property.[79] Where, however, the lease is wholly assigned, the lessee does not have a leasehold estate subject to execution.[80]

A lease pur autre vie is not subject to sale as personal property under an execution.[81]

In some states a contract of rental with only a usufruct to the tenant is not subject to levy and sale on execution.[82]

Interest of lessor. The interest of the lessor is subject to execution.[83] Where, however, the interest of a security deed grantor is not subject to execution on a subsequent judgment, see infra § 45, a leasehold executed by such grantor after the conveyance is likewise not subject to such execution.[84]

In personal property. Personal property leased for a term may be seized and sold under execution against the lessee,[85] if, under some statutes, the lessee's interest is assignable without the consent of the lessor or bailor,[86] the purchaser at the sale acquiring the right to use the property to the end of the term. However, a mere personal license to use a chattel is not an interest subject to execution.[87]

The earnings of a steamboat under charter to a transportation company cannot be seized and subjected to the payment of the owner's debts.[88]

Effect of prohibiting assignment or subletting. A clause in the lease prohibiting alienation absolutely or without the consent of the lessor will not prevent the sale of such lease under execution against the tenant, unless judgment was fraudulently confessed with a view to defeat such restric-

73. N.Y.—Harris v. Frink, 49 N.Y. 24, 10 Am.R. 318.
23 C.J. p 339 note 4.

74. Ohio.—Meridian Nat. Bank v. McConica, 8 Ohio Cir.Ct. 442, 4 Ohio Cir.Dec. 106.

75. Ohio.—Acklin v. Waltermier, 19 Ohio Cir.Ct. 372, 10 Ohio Cir.Dec. 629, where the court refused to follow Meridian Nat. Bank v. McConica, 8 Ohio Cir.Ct. 442, 4 Ohio Cir.Dec. 106.

76. Mo.—Potter v. Everett, 40 Mo. App. 152.

77. N.J.—Caldwell v. Fifield, 24 N. J.Law 150.
23 C.J. p 339 note 11.

78. Ala.—Hendon v. McCoy, 133 So. 295, 222 Ala. 515.
Ky.—Roberts v. Brown, 261 S.W. 614, 203 Ky. 11.
La.—Burglass v. Villere, App., 147 So. 727.
N.Y.—Henderson v. Tomb, 8 N.Y.S. 2d 612, 169 Misc. 737.
23 C.J. p 337 note 73.
Estate for years see supra § 36 f.
Interest in crops see supra § 20.
Levy on leasehold as realty or personalty see infra § 101 b.
Oil and timber leases see supra § 36 i.

79. Ky.—Smith v. Scanlan, 51 S.W. 152, 106 Ky. 572, 21 Ky.L. 169.

80. Ill.—Taylor v. Marshall, 99 N.E. 638, 255 Ill. 545.

81. Pa.—Commonwealth v. Allen, 2 Phila. 22.

82. Ga.—Harms v. Entelman, 94 S. E. 276, 21 Ga.App. 295, Ga.Civ.Code 1910, § 3691.

83. Pa.—Gallagher v. Hicks, 65 A. 623, 216 Pa. 243.
23 C.J. p 338 note 80.

Oil lease

Lessor's interest in oil lease can be sold separate and apart from land itself, and levy on lessor's interest is not levy on land covered thereby.—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal.App.2d 567.

84. Ga.—Miles v. Waters, 169 S.E. 783, 47 Ga.App. 25.

85. Ala.—Hendon v. McCoy, 133 So. 295, 297, 222 Ala. 515, citing **Corpus Juris.**
23 C.J. p 338 note 81.

Bailment lease

(1) Bailee, under a lease with right to purchase, who has paid more than half of the amount due under the lease, has a substantial interest in the property, and such an interest is subject to seizure and sale for his debts.—Packard Motor Car Co. v. Mazer, 77 Pa.Super. 348.

(2) The refusal of a bailor to accept the balance due him on a contract of bailment with right to purchase estops him from asserting as a breach the bailee's refusal to render that which he himself refused to accept. The bailee having tendered payment, which bailor refused to accept, the bailor cannot set up default in that payment to justify seizure of the automobile bailed, as against the rights of the execution creditor of the bailee.—Packard Motor Car Co. v. Mazer, supra.

86. Ala.—Hendon v. McCoy, 133 So. 295, 222 Ala. 515.

Determining assignability

Judgment reciting that original lessees assigned their leasehold interest to defendant in execution constituted finding that original lessees had assignable interest, and that such interest was subject to execution.—Hendon v. McCoy, 133 So. 295, 222 Ala. 515.

87. N.Y.—Reinmiller v. Skidmore, 7 Lans. 161.
23 C.J. p 338 note 82.

88. La.—Crooks v. Thorn, Mann.Unrep.Cas. 129.

tion.[89] On the other hand, statutes forbidding assignment or subletting without the consent or agreement of the lessor have been held to preclude an execution against the interest of the tenant,[90] in the absence of an agreement which permits assignment or subletting at the will of the lessee.[91]

§ 38. Joint or Several Property

The interest of a tenant in common may be reached by an execution against him.

The general rule is that the property of tenants in common is liable to be levied on under an execution against one of them, and the share of the execution debtor therein may be sold to satisfy the judgment,[92] provided the right of partition is not invaded,[93] and provided the limitations of the homestead law discussed in the C.J.S. title Homesteads § 88, also 29 C.J. p 848 note 82–p 850 note 11 are not infringed.

If the execution is issued against two named judgment debtors, the separate property of either debtor is subject to seizure and sale,[94] as is the property owned by them jointly.[95] In some jurisdictions, however, by reason of statutory provision, a judgment obtained against joint debtors not all of whom were served with a summons may be enforced out of the joint property of the joint debtors, provided the execution contains an indorsement showing the debtor not served.[96] In such case, the separate property of the debtor not served cannot be reached, however.[97]

Personal property. The undivided legal interest of defendant in chattels may be seized and sold under execution, since, in contemplation of law, his interest is perfectly distinct from that of his cotenant, and each has a several interest, although the occupation be joint.[98] Mere authority to sell property held jointly, given by one cotenant to another, does not exempt the share of the former from levy and sale under execution.[99]

Joint bank account. The interest of a coöwner of a joint bank account with a right of survivorship is subject to seizure under an execution against such owner, the execution having the effect of creating a tenancy in common and terminating the right of survivorship.[1]

§ 39. Interests in Public Lands

Generally the interest of a purchaser of government land, after entry and payment of the purchase price, is subject to execution, although levied before the issuance of the patent.

A purchaser of land from the government, by the act of entry and payment of the purchase money, acquires an inchoate legal title, and prior to the issuance of the patent the interest of such purchaser, for which he has received a certificate of final payment, may be levied on and sold under execution, the patent when issued taking effect by relation as of the day when the payment was made.[2]

89. La.—McLemore v. Abell, 125 So. 601, 12 La.App. 147.
23 C.J. p 338 note 84.

Reservation of right of approval
Secretary of Interior's retention of right of approval of transfer of lease executed under federal statute was held not to prevent levy of general execution pursuant to judgment declaring lien against owner of interest in lease, nor to prevent confirmation of execution sale subject to right of approval by Secretary of Interior.—Melish Consol. Placer Oil Mining Ass'n in Red River v. Burk-Senator Oil Co., 20 P.2d 879, 163 Okl. 20.

90. U.S.—Mexican Nat. Coal, Timber & Iron Co. v. Frank, C.C.Tex., 154 F. 217.
23 C.J. p 338 note 85.

91. Tex.—Moser v. Tucker, 26 S.W. 1044, 87 Tex. 94.

92. Cal.—Meyer v. Thomas, 100 P.2d 360, 37 Cal.App.2d 720, rehearing denied 100 P.2d 1066, 37 Cal.App. 2d 720.
S.C.—Barron v. English, 121 S.E. 782, 128 S.C. 332.
23 C.J. p 338 note 96.
Execution against firm property on judgment for individual debt see the C.J.S. title Partnership § 240, also 47 C.J. p 1017 note 16–p 1018 note 24.
Interest of tenant in common in crops see supra § 20 a.
Levy on interest of joint tenants or tenants in common see infra § 101.

93. S.C.—Barron v. English, supra.
Necessity for partition see infra § 202.

94. Md.—First Nat. Bank of Federalsburg v. Equitable Life Assur. Soc. of U.S., 145 A. 779, 157 Md. 249.
23 C.J. p 339 note 97.

As between principal and surety
In a common-law execution of fieri facias, the debtors are all equally bound to the creditor, and the whole execution may be made out of the property of a surety, although the principal has abundant property out of which it could be made.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.
Selection of property for levy see infra § 95.

95. Mich.—Sanford v. Bertrau, 169 N.W. 880, 204 Mich. 244.
N.Y.—Saunders v. Reilly, 12 N.E. 170, 105 N.Y. 12, 59 Am.R. 472.

96. N.Y.—Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555—Boyce Hardware Co. v. Saunders, 196 N.Y.S. 259, 119 Misc. 365.

Effect of noncompliance with statute
A sale under an execution of the jointly owned property not showing the joint debtor who was not served with a summons constitutes a conversion of the interest of such debtor in such property.—Boyce Hardware Co. v. Saunders, supra.

97. N.Y.—Mandell v. Moses, 205 N.Y.S. 254, 209 App Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555

98. Ga.—First Nat. Bank v. Geiger, 7 S.E.2d 756, 61 Ga.App. 865.
23 C.J. p 339 note 99.

99. Ala.—Thompson v. Mawhinney, 17 Ala. 362, 52 Am.D. 176.

1. N.J.—Dover Trust Co. v. Brooks, 160 A. 890, 111 N.J.Eq. 40.

2. Wyo.—Muir v. Bosey, 146 P. 595, 23 Wyo. 46.
23 C.J. p 339 note 13.

School lands
A purchaser of school lands who has made the first payment and received a contract of sale has an interest in the land which is subject

However, where equitable interests are not subject to execution, see infra § 40, part payment does not authorize an execution against the purchaser,[3] although it is otherwise where any interest in property is subject to execution.[4]

Land conveyed by the owner of land warrants is not subject to execution against him.[5]

The secretary of the interior's retention of the right of approval of a transfer of a lease executed by him under the federal statutes does not prevent the levy of a general execution against the interest of the lessee, nor does it prevent confirmation of the sale subject to the right of approval by the secretary of the interior.[6]

A prcëmption claim constitutes no interest in land, and therefore such a claim cannot be levied on and sold on execution.[7] However, in some states a contrary rule prevails.[8] Moreover, the interest of a miner in his location or mining claim on public lands, and the rights arising thereunder, have been held to be property or an interest which may be taken and sold on execution against him, if not exempt by statute,[9] and this even though no patent has been issued or applied for.[10]

Improvements on public lands. In some jurisdictions the improvements of settlers on public lands are regarded as property, the proper subject matter of binding contracts between individuals, and hence subject to seizure and sale under execution.[11] In other jurisdictions, however, by force of statute, improvements on public lands on which debtors reside or which they cultivate are not subject to execution.[12]

Homestead. Under the provisions of the United States Revised Statutes, no lands acquired under the provisions of the Homestead Act shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor.[13]

§ 40. Equitable Estates and Interests in General

At common law equitable estates and interests were not subject to execution; but the modern trend is to subject every equitable interest, which is not too uncertain.

At common law no property but that to which the debtor has a legal title is liable to be taken under the execution that is issued against him.[14] Merely equitable interests in real[15] or personal[16] property, although accompanied with possession, could not be seized under a fieri facias, and it was necessary for the judgment creditor to go into equity to subject such interest.[17] However, in some jurisdictions the rule was early adopted, without the aid of statute, that all real estate of the debtor whether legal or equitable was bound by a judgment against him, and might be taken in execution and sold for the satisfaction of the debt,[18]

to execution.—Brooke v. Eastman, 96 N.W. 699, 17 S.D. 339—23 C.J. p 340 note 13 [b].

3. N.Y.—Sage v. Cartwright, 9 N. Y. 49.

4. S.D.—Brooke v. Eastman, 96 N. W. 699, 17 S.D. 339.
23 C.J. p 340 note 15.

5. Tenn.—Vaux v. Pillow, 5 Hayw. 40.

6. Okl.—Melish Consol. Placer Oil Mining Ass'n v. Burk-Senator Oil Co., 20 P.2d 879, 163 Okl. 20.

7. Colo.—McMillen v. Gerstle, 34 P. 681, 19 Colo. 98.
23 C.J. p 340 note 17.

8. Ill.—Lester v. White, 44 Ill. 464.
23 C.J. p 340 note 18.

9. Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279.
Wash.—Huffman v. Ellen Mining Co., 204 P. 197, 118 Wash. 546.
23 C.J. p 340 note 19.

Right to resume work

(1) Mining company's right to resume work after failure to furnish required annual labor on claim is "interest subject to execution."—Hartman Gold Mining Co. v. Warning, 11 P.2d 854, 40 Ariz. 267.

(2) Resumption of work after default see the C.J.S. title Mines and Minerals § 77, also 40 C.J. p 838 note 14-p 839 note 26.

10. Utah—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279.
Wash.—Huffman v. Ellen Mining Co., 204 P. 197, 118 Wash. 546—Phœnix Min. & Mill. Co. v. Scott, 54 P. 777, 20 Wash. 48.

11. Ill.—Switzer v. Skiles, 8 Ill. 529, 44 Am.D. 723—Turney v. Saunders, 5 Ill. 527.

These possessory rights, however, cannot be enforced against the United States or its grantee, and may cease altogether on the alienation of the land by the government.
Cal.—McKiernan v. Hesse, 51 Cal. 594.
Ill.—Switzer v. Skiles, 8 Ill. 529, 44 Am.D. 723—Cook v. Foster, 7 Ill. 652.

12. Ark.—Healy v. Conner, 40 Ark. 352.
23 C.J. p 340 note 22.

13. S.D.—Heran v. Elmore, 157 N. W. 820, 37 S.D. 223.

14. N.C.—Rowland Hardware & Supply Co. v. Lewis, 92 S.E. 13, 173 N.C. 290.
Vt.—Noyes v. Noyes, 9 A.2d 123, 127, 110 Vt. 511, citing **Corpus Juris.**

15. Fla.—First Nat. Bank v. Peel, 145 So. 177, 107 Fla. 413.
Vt.—Noyes v. Noyes, 9 A.2d 123, 127, 110 Vt. 511, citing **Corpus Juris.**
23 C.J. p 340 note 26.

16. Del.—Woods v Spoturno, 183 A. 319, 323, 7 W.W.Harr. 295, citing **Corpus Juris,** and reversed on other grounds 192 A. 689, 8 W.W. Harr. 378.
Ohio.—Haueisen v. Szalay, 169 N.E. 602, 33 Ohio App. 350.
Vt.—Noyes v. Noyes, 9 A.2d 123, 127, 110 Vt. 511, citing **Corpus Juris.**
23 C.J. p 341 note 27.

Objects of imperfect usufruct

Things, the object of or comprehended within imperfect usufruct, are not subject to seizure under execution to satisfy debts or obligations of usufructuary.—Johnson v. Bolt, La., 146 So. 375.

17. U.S.—Smith v. McCann, Md., 24 How. 398, 16 L.Ed. 714.
23 C.J. p 341 note 28.

18. Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 45 Minn. 341, 12 L.R.A. 741.
23 C.J. p 341 note 29.

and the trend of modern legislation is to subject every real interest of the debtor to the satisfaction of his debts, and now, by statutory enactment in most of the states, every equitable interest in property,[19] whether real[20] or personal,[21] is subject to levy and sale under execution against a judgment debtor; but even under such statutes, an interest that is so undetermined, uncertain, or contingent, that it is incapable of being appraised or sold with fairness to both the debtor and creditor, cannot be levied on.[22] There is a distinction between a right to have an equity established and enforced, which is not the subject of sale under execution, and an equitable estate which may be sold.[23]

In Kentucky the statute impliedly forbids execution against equitable interests,[24] unless the debtor consents,[25] the only remedy being by action after a return of nulla bona.[26]

Right of redemption or possession after sale. It has been held that where a judgment debtor's interest in lands is sold under a valid levy, under a valid judgment and execution, or under a power of sale, his rights of redemption or possession are not subject to levy and sale under another execution,[27] and where such right of redemption has been sold and satisfaction entered, the court should vacate the entry and issue another execution;[28] but there are authorities maintaining the opposite view.[29]

19. Kan.—Koelliker v. Denkinger, 83 P.2d 703, 148 Kan. 503, 119 A.L.R. 1, modified on other grounds 86 P.2d 740, 149 Kan. 259, 119 A.L.R. 1525.

Statutes remedial in nature and liberally construed

N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.

20. Cal.—Lynch v. Cunningham, 21 P.2d 154, 131 Cal.App. 164, rehearing denied 21 P.2d 973, 131 Cal. App. 164

Kan.—Thompson v. Zurich State Bank, 260 P. 658, 124 Kan. 425.

N.C.—Davis v. Inscoe, 84 N.C. 396.

Ohio—McLeary v. Snider, 2 Ohio Dec., Reprint, 59, 1 West.L.Month. 270.

23 C.J. p 341 note 30.

Interest that is assignable is subject to sale under execution.—Jensen v. Wilkinson, Tex.Civ.App., 133 S.W.2d 982, error dismissed, judgment correct.

Equitable life estates

Mo.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

Equitable right of occupancy

Wash.—York v. Stone, 34 P.2d 911, 178 Wash. 280.

Except for equities of redemption, execution at law is confined to legal estates.—Noyes v. Noyes, 9 A.2d 123, 110 Vt. 511.

Statutory amendment excluding equitable interests

In one jurisdiction an earlier statute, construed so as to subject equitable interests to execution, was later amended, and as amended excludes equitable interests.—Culp v. Jacobs, 174 N.E. 242, 123 Ohio St. 109—Haueisen v. Szalay, 169 N.E. 602, 33 Ohio App. 350.

21. Conn.—Middletown Sav. Bank v. Jarvis, 33 Conn. 372.

N.J.—Olten v. Cavalli, 184 A. 442, 14 N.J.Misc. 296.

Wash.—York v. Stone, 34 P.2d 911, 178 Wash. 280—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

Equitable interest in note and mortgage is subject to sale under execution.—Gordon v. Hillman, 182 P. 574, 107 Wash. 574.

22. Ind.—Gushwa v. Gushwa, 177 N.E. 366, 93 Ind.App. 68.

23 C.J. p 341 note 32.

Mere equity not subject to execution.—Jensen v. Wilkinson, Tex.Civ. App., 133 S.W.2d 982, error dismissed, judgment correct—Brinkman v. Tinkler, Tex.Civ.App., 117 S.W.2d 139, error refused.

23. N.C.—Evans v. Brendle, 91 S.E. 723, 173 N.C. 149.

Tex.—Hendricks v. Snediker, 30 Tex 296.

23 C.J. p 341 note 33.

24. Ky.—Maynard v. Thompson, 234 S.W. 959, 193 Ky. 130.

23 C.J. p 341 note 34.

Interest of original owner as purchaser at decretal sale is subject to execution because he then holds, not only the equitable title by purchase, but also the legal title.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.

25. Ky.—Hart v. Smith, 1 Ky.Op. 311.

26. Ky.—Schmaus v. Whittemore, 159 S.W. 947, 155 Ky. 338.

23 C.J. p 342 note 36.

27. Ala.—McGowan v. Williams, 4 So.2d 164, 241 Ala. 588—Federal Land Bank of New Orleans v. Ozark City Bank, 142 So. 405, 225 Ala. 52.

Iowa.—Murray v. Kelroy, 275 N.W. 21, 223 Iowa 1331—Union Central Life Ins. Co. of Cincinnati v. Eggers, 237 N.W. 240, 212 Iowa 1355—Starits v. Avery, 213 N.W. 769, 204 Iowa 401—Howe v. Briden, 206 N.W. 814, 201 Iowa 179—Sayre v. Vander Voort, 205 N.W. 760, 200 Iowa 990, 42 A.L.R. 880—Hardin v. White, 16 N.W. 580, 63 Iowa 633, 19 N.W. 822.

Contra Barnes v. Cavanagh, 3 N.W. 801, 53 Iowa 27.

Kan.—Bankers' Mortg. Co. v. Robson, 256 P. 997, 123 Kan. 746—Jones v. Perkins, 225 P. 97, 115 Kan. 759.

Mont.—Hillsdale College v. Thompson, 44 P.2d 753, 99 Mont. 400—U. S. Building & Loan Ass'n v Stevens, 17 P.2d 62, 93 Mont. 11—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.

Wis.—Whalen v. Finn, 240 N.W. 188, 207 Wis. 254.

23 C.J. p 345 note 70.

Mortgagor, vendees or heirs

In Kansas, mortgagor, his vendees or heirs, may acquire right of possession during redemption period after confirmation of foreclosure sale, but his creditors may not take it from him or from his heirs or vendees by execution or otherwise.—Jones v. WaKeeney State Bank, C C A.Kan., 100 F.2d 879.

28. Ill.—Watson v. Reissig, 24 Ill. 281, 76 Am.D. 746.

29. U.S.—Lynch v. Burt, N.D., 132 F. 417, 67 C.C.A. 305.

Ky.—Rogers v. Beam's Ex'r, 183 S.W. 930, 169 Ky. 239—Bethel v. Smith, 83 Ky. 84.

Mo.—Hammond v. Horton, 37 S.W. 825, 137 Mo. 151.

N.H.—Russell v. Fabyan, 34 N.H 218.

Tenn.—Herndon v. Pickard, 5 Lea 702.

23 C.J. p 345 note 72 [a].

Corpus Juris cited as showing divergence of authorities.—Evans v. Humphrey, 5 P.2d 545, 547, 51 Idaho 268.

Where sale is set aside, a levy on redemption right gives no lien where levy on property would give no paramount lien.—P. A. Blackwell & Co. v. Canoe Creek Coal Co., 290 S.W. 700, 217 Ky. 778.

§ 41. Trust Estates

a. Interest of grantor
b. Interest of trustee
c. Interest of beneficiaries
d. Payment of consideration for title in another

a. Interest of Grantor

Generally the grantor has no such interest in the trust property as is subject to execution; but if he retains an interest it may be reached.

The general rule is that after a trust is created, the grantor has no such interest in the trust property as is the subject of sale under execution at law;[30] but if the deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on execution against him.[31]

b. Interest of Trustee

A trust estate is not subject to sale under an execution issued against a trustee where he has no beneficial interest in such estate; but the rule is generally otherwise where the trustee has a beneficial interest of his own.

To subject even a legal interest to sale under an execution, it is essential that the debtor have a beneficial interest in the property.[32] Therefore, a trust estate is not subject to sale under an execution issued against a trustee, he having no beneficial interest in such estate,[33] especially where the judgment creditor had actual notice of the existence of the trust;[34] but the rule is otherwise where the trustee has a beneficial interest of his own,[35] and where there is a conveyance to trustees, one of whom is to take a beneficial interest in the property, he takes a legal estate to the extent of such interest, which may be seized and sold under execution.[36]

c. Interest of Beneficiaries

Under the modern rule a beneficiary's interest in a trust is subject to execution provided, generally, that it is a simple inactive trust; but in some jurisdictions a spendthrift trust is not within the rule.

The interest of a cestui que trust in lands was not, at common law, liable to seizure or sale under execution;[37] but, by section 10 of the English Statute of Frauds, trust estates were made liable to execution for the debts of the cestui que trust.[38] This statute did not extend to the provinces[39] and has never been adopted in some states.[40] However, reënactments of this statute or similar enactments are in force in many of the United States.[41]

30. Iowa.—In re Selway Steel Post & Fence Co.'s Receivership, 200 N. W. 621, 198 Iowa 950.
Ky.—Evans v. Wheeler, 270 S.W. 42, 208 Ky. 1.
23 C.J. p 342 note 38.

31. Pa.—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa.Super. 363.
23 C.J. p 342 note 39.

Judgment prior to creation of trust
Where a deed from a husband and wife to a trustee for the wife is not delivered and is not placed on record until after judgments have been obtained against the husband, it is invalid as against purchasers at an execution sale against the husband. —Bauer v. Martin, 74 A. 740, 226 Pa. 45.

32. Wash.—Lee v. Wrixon, 79 P. 489, 37 Wash. 47.
23 C.J. p 342 note 41.

33. Kan.—Kindig v. Richardson, 194 P. 920, 108 Kan. 218.
Mo.—Sorrell v. Bradshaw, 222 S.W. 1024.
Tex.—Broussard Trust v. Perryman, Civ.App., 134 S.W.2d 308, 314, error refused, citing **Corpus Juris.**
23 C.J. p 342 note 42.

34. Mont.—Princeton Min. Co. v. Butte First Nat. Bank, 19 P. 210, 7 Mont. 530.

35. U.S.—French v. Edwards, C.C. Cal., 9 F.Cas.No.5,098, 5 Sawy. 266.
Pa.—Drysdale's Appeal, 15 Pa. 457.
23 C.J. p 342 note 44.

Where trustee is entitled to present conveyance, his interest is subject to execution.—Cunningham v. Bright, 117 N.E. 909, 228 Mass. 385.

Trustee not given right of present conveyance
Trust giving trustee income from real estate during his life, with right in trustee to take for his own use any part of the principal necessary for his comfortable support, is held not to give trustee an absolute right to a present conveyance of the entire trust estate so as to be subject to execution.—Gardiner v. Rogers, 166 N.E. 763, 267 Mass. 274.

36. N.J.—Bolles v. State Trust Co., 27 N.J.Eq. 308.
Tenn.—Renshaw v. Tullahoma First Nat. Bank, Ch.A., 63 S.W. 194.

Same persons holding different estates
Where the same persons are trustees and beneficiaries, but as trustees they hold a joint estate and as beneficiaries they hold an estate in common, the interest of one of such persons is not subject to execution.—Noyes v. Noyes, 9 A.2d 123, 110 Vt. 511.

37. Kan.—Koelliker v. Denkinger, 83 P.2d 703, 707, 148 Kan. 503, 119 A.L.R. 1, citing **Corpus Juris,** and modified on other grounds 86 P.2d 740, 149 Kan. 259, 119 A.L.R. 1525.
N.J.—Cohen v. Cohen, 20 A.2d 594, 126 N.J.Law 605—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.
Vt.—Noyes v. Noyes, 9 A.2d 123, 110 Vt. 511.
23 C.J. p 342 note 47.

38. Mass.—Russell v. Lewis, 2 Pick. 508.
23 C.J. p 342 note 49.

39. Mass.—Russell v. Lewis, 2 Pick 508.

40. Mass.—Rawson v. Plaisted, 23 N.E. 722, 151 Mass. 71.
23 C.J. p 343 note 51.

41. Cal.—Weiner v. Roof, 122 P.2d 896.
N.C.—Patrick v. Beatty, 163 S.E. 572, 202 N.C. 454.
23 C.J. p 343 note 52.
Test in some states is said to be whether the cestui que trust can enforce the claim against the trustee for the estate sought to be subjected.—Hopper v. Eastern Kentucky Lunatic Asylum, 85 S.W. 1187, 27 Ky.L. 649—23 C.J. p 344 note 57.

Nonassignable interests held subject to execution
Kan.—Koelliker v. Denkinger, 83 P. 2d 703, 148 Kan. 503, 119 A.L.R. 1, modified on other grounds, 86 P.2d 740, 149 Kan. 259, 119 A.L.R. 1525.

Interest in realty
(1) Interest of beneficiary of trust in real property, where beneficiary was entitled to proceeds thereof

Under many of the statutes, the rule is laid down that where the legal title is vested in the trustee under a passive, simple, or dry trust, with no duty except to convey to the person ultimately entitled, the interest of the cestui que trust is subject to seizure and sale under execution;[42] but where the land is held by the trustee under an active trust, requiring the continuance of the legal title in him to enable him to perform his duties, the equitable estate is not subject to execution.[43] It is also the generally accepted doctrine in the United States, in construing statutes based on 29 Car. II, that in order to subject the equitable estate of a cestui que trust to execution at law, the trust must be clear and simple, and for the benefit of the debtor alone, and that equitable interests held jointly with another person are not subject to sale under execution.[44]

Where cestui que trust has whole beneficial interest. In some jurisdictions, by force of statute, where the cestui que trust has the whole beneficial interest in the property, his estate and interest therein are subject to the levy of an execution, without resort to the remedies afforded by a court of equity.[45] In other jurisdictions this rule is applied where the cestui que trust is in possession of the property.[46]

Spendthrift trusts and trusts for payment of income. A beneficiary's interest in, or income from, a spendthrift trust is generally not subject to execution.[47] However, his interest in such a trust, on expiration of the trust period,[48] and property from such a trust when received by the beneficiary[49] are subject to execution.

Special executions to obtain portion of debtor's trust income are discussed infra § 406.

d. Payment of Consideration for Title in Another

Where one person furnishes the consideration for a conveyance to another and a resulting trust arises, the trustee has no such interest in the property as is subject to execution against him, but the property is usually regarded as subject to execution against the person furnishing the consideration, although there is authority to the contrary.

Where money or effects of one person are advanced and used in the purchase of property by another, who takes the title to himself, and a trust results by operation of law in favor of the party whose money or property has been used, the party in whom the naked legal title is vested has no such interest in the property as is subject to execution against him.[50] On the other hand, where property

only, was held personalty, and not interest in realty subject to attachment by levy on realty, but subject to execution as personalty.—Houghton v. Pacific Southwest Trust & Savings Bank, 295 P. 1079, 111 Cal. App. 509.

(2) However, beneficiary of realty trust, obligating trustees after twenty year trust period to convey to beneficiaries, was held to have an equitable estate in corpus, and hence "interest in realty" for purposes of execution.—Lynch v. Cunningham, 21 P.2d 154, 131 Cal.App. 164, rehearing denied 21 P.2d 973, 131 Cal.App. 164.

Contingent interests

(1) Beneficiary's interest in trust was held subject to execution whether interest was vested or contingent. —Meyer v. Reif, 258 N.W. 391, 217 Wis. 11.

(2) However, it has also been held that a beneficiary's interest which is contingent is not subject to execution.—San Diego Trust & Savings Bank v. Heustis, 10 P.2d 158, 121 Cal.App. 675.

Statute inapplicable to trust infected with fraud and not enforceable between the cestui que trust and the trustee.—Page v. Goodman, 43 N.C. 16.

42. Cal.—McAlvay v. Consumers' Salt Co., 297 P. 135, 140, 112 Cal. App. 383, citing **Corpus Juris.**
23 C.J. p 343 note 52.

43. Ark.—Driver v. Driver, 63 S.W. 2d 274, 187 Ark. 875.
Ky.—Evans v. Wheeler, 270 S.W. 42, 208 Ky. 1.
23 C.J. p 343 note 53.

44. S.C.—Spann v. Carson, 116 S.E. 427, 123 S.C. 371.
23 C.J. p 343 note 54.

Life estate

Where a testator by the terms of his will bequeathed land to trustees for the use of another, who was sui juris, for life, with remainders over, the life estate is subject to levy and sale under execution, notwithstanding there are other beneficiaries of the trust.—Armour Fertilizer Works v. Lacy, 91 S.E. 12, 146 Ga. 196—American Mortg. Co. v. Hill, 18 S.E. 425, 92 Ga. 297.

Property held mere shadow which could not be effectively grasped at by creditors.—Ulmann v. Thomas, 175 N.E. 192, 255 N.Y. 506, affirming 243 N.Y.S. 771, 229 App.Div. 855, and reargument denied 177 N.E. 156, 256 N.Y. 598.

45. Ind.—State Bank v. Macy, 4 Ind. 362.
23 C.J. p 344 note 59.

46. Ala.—Clarke v. Windham, 12 Ala. 798.
23 C.J. p 344 note 60.

47. Conn.—Reilly v. State, 177 A. 528, 119 Conn. 508—Bridgeport-City Trust Co. v. Beach, 174 A. 308, 119 Conn. 131.
Mo.—Gentemann v. Dyer, App., 140 S.W.2d 75, transferred see, Sup., 132 S.W.2d 1022.
Tex.—Wallace v. Campbell, 53 Tex. 229—Caples v. Buell, Civ.App., 234 S.W. 429, modified on other grounds, Com.App., 243 S.W. 1066.
23 C.J. p 343 note 52 [b].

Support of wife of beneficiary

(1) It has been held that a wife cannot obtain satisfaction against her husband for support and maintenance from funds of spendthrift trust.—San Diego Trust & Savings Bank v. Heustis, 10 P.2d 158, 121 Cal.App. 675.

(2) However, it has also been held that the wife of a beneficiary of a trust may reach the entire income therefrom, whether it is a spendthrift trust or otherwise, and that this right is not affected by a statute providing a special execution.—In re Stewart's Estate, 5 A.2d 910, 334 Pa. 356.

48. Neb.—Miles v. Miles, 233 N.W. 249, 120 Neb. 436.

49. Cal.—Kelly v. Kelly, 79 P.2d 1059, 11 Cal.2d 356, 119 A.L.R. 71.

50. Ga.—Hogan v. Smith, 175 S.E. 451, 179 Ga. 158.

is purchased by a judgment debtor with his own money, and the title thereto is taken in the name of another, such property is subject to sale under execution against the debtor,[51] although there is authority to the contrary,[52] and, of course, the rule is otherwise where by the local law such facts do not raise a resulting trust.[53] The rule does not apply where the title is taken in a third person in trust for still another third person.[54]

§ 42. Interests under Contracts

Rights arising under contracts for services which are merely personal rights are not liable to sale under execution.

The rule seems to be well recognized that all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there is some special agreement to the contrary, are considered as personal on the part of the obligor, and such rights, which are merely personal, are not liable to sale under execution.[55]

Contracts of sale. Whether the interest of a vendor or purchaser of real property is subject to execution is discussed in the C.J.S. title Vendor and Purchaser, as to the interest of a vendor in § 308, also 66 C.J. p 1064 note 77–p 1065 note 99; and as to the interest of a vendee in § 315, also 66 C.J. p 1083 note 15–p 1085 note 42. Whether the interest of a seller or buyer of personalty under a conditional sale is subject to execution is considered in the C.J.S. title Sales § 635, also 55 C.J. p 1328 note 93–p 1329 note 12.

§ 43. Rights or Interests Secured by Liens

Examine Pocket Parts for later cases.

§ 44. Property Mortgaged or Conveyed by Trust Deed to Secure Debt

Examine Pocket Parts for later cases.

§ 45. —— Interest of Mortgagor or Grantor

a. Mortgaged property
b. Property conveyed by trust or security deed

a. Mortgaged Property

(1) In general
(2) Personal property
(3) Real property

(1) In General

At common law, an equity of redemption from a mortgage was not subject to execution.

On the principle of the common law that no property but that in which the debtor has a legal title is liable to be taken under execution against him, an equity of redemption is not liable to sale under execution against the mortgagor,[56] but as considered infra this section, the common-law rule has been very generally changed both as to real and personal property.

(2) Personal Property

In many states, so long as the possessory right of a mortgagor of chattels remains his interest in the mortgaged property is generally held subject to sale under execution against him, although there is authority to the contrary. By the majority view the property is not subject to execution against the mortgagor after default or taking of possession by the mortgagee.

Except in a few jurisdictions,[57] the common-law rule has been abrogated either by statute or by the adoption of the equitable view of mortgages, and the doctrine is well established that a

Okl.—Weitz v. Richardson, 258 P. 262, 125 Okl. 294.
23 C.J. p 344 notes 62, 63.

Corpus Juris cited in a case protecting the interests of a party furnishing the consideration as against a judgment creditor of the trustee. —Rexburg Lumber Co. v. Purrington, Idaho, 113 P.2d 511, 514.

51. Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.
23 C.J. p 344 note 65.

Possession necessary
Under the statutes of some states the equitable title must be accompanied by actual possession, and a mere equitable interest, the judgment debtor not being in possession, cannot be seized and sold on execution at law.—Plattsmouth First Nat. Bank v. Tighe, 68 N.W. 490, 49 Neb. 299—Dworak v. More, 41 N.W. 777, 25 Neb. 735.

52. Fla.—Mayer v. Wilkins, 19 So. 632, 37 Fla. 244.
23 C.J. p 344 note 66.

53. N.Y.—Bates v. Ledgerwood Mfg. Co., 29 N.E. 102, 130 N.Y. 200.
23 C.J. p 344 note 67.

54. N.C.—Williams v. Council, 49 N.C. 206.
23 C.J. p 345 note 68.

55. Minn.—Paine v. Gunniss, 62 N. W. 280, 60 Minn. 257.
23 C.J. p 345 note 73.

Claim for liquidated damages
Claim in mechanic's lien suit, founded on contract, may be for liquidated damages as regards levy of execution to satisfy judgment against claimant.—Rank v. Kolmetsky, 148 A. 881, 106 N.J.Law 178.

56. R.I.—Zimmerman v. Andrews, 153 A. 307, 308, 51 R.I. 204, cfting **Corpus Juris.**
Vt.—Noyes v. Noyes, 9 A.2d 123, 110 Vt. 511.
23 C.J. p 345 note 76.

After debt has been discharged in full, even before satisfaction of the mortgage is executed, the mortgagor's interest in the mortgaged property is subject to execution, if he then has the whole beneficial interest and the mortgagee the naked legal title.
Kan.—Johnson v. Seneca State Bank, 52 P. 860, 59 Kan. 250.
Miss.—Boarman v. Catlett, 21 Miss. 149—Wolfe v. Doe, 21 Miss. 103, 51 Am.D. 147.
23 C.J. p 346 note 78.

57. Ark.—Erdman v. Erdman, 159 S. W. 201, 109 Ark. 151.
23 C.J. p 346 note 82.

mortgage is not a conveyance on condition, but a mere security for the mortgage debt, and that, so long as the possessory right of a mortgagor of chattels remains, his interest in the mortgaged property is subject to sale under execution against him,[58] at least so long as the mortgagor is rightfully in possession,[59] and in some jurisdictions it is necessary to pay the mortgagee or make a tender or deposit of the amount due the mortgagee on the secured debt.[60]

After default or taking possession by mortgagee. After default the equity of redemption of mortgaged chattels may be sold on execution in some states.[61] In most states, however, after the default or taking of possession by the mortgagee, the property is not subject to execution against the mortgagor,[62] on the theory that after default there is no such possessory right or interest left in the mortgagor as is capable of being seized and sold under execution against him.[63] Where this latter doctrine obtains, the rule is adhered to, even where the mortgagor is allowed to remain in possession after default,[64] since in the eye of the law he is in possession merely by sufferance and as the bailee of the mortgagee.[65] The courts in some jurisdictions have carried this doctrine to the extent of holding that even before condition broken, where the mortgagor has not the right of possession for a definite period, his interest is an equity of redemption merely, which is not the subject of levy and sale on execution, his possession being permissive merely and not a matter of right.[66] Where the statute places the legal title and right to possession in the mortgagee, the mortgagor has no interest subject to execution.[67]

Surplus in hands of mortgagee. If the property is sold by the mortgagee, a surplus in his hands is subject to execution against the mortgagor, regardless of agreements between the mortgagor and mortgagee to apply it to the claims of the general creditors of the mortgagor.[68]

(3) Real Property

A mortgagor's title or equity of redemption in realty is generally subject to execution.

By force of statute, or independent thereof, the rule in most jurisdictions at the present time is that the mortgagor's title or equity of redemption in real property is subject to seizure and sale on execution by a third person, either before or after default,[69] and it is likewise subject to sale by the

58. Ala.—Warrick v. Liddon, 160 So. 534, 230 Ala. 253.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Mo.—Green v. Powell, App., 46 S.W. 2d 915.
N.J.—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J.Law 344—Smithurst v. Edmunds, 14 N.J.Eq. 408.
R.I.—Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204.
23 C.J. p 346 note 83.

Subject to existing encumbrance
Tex.—Bell v. Lebo, Civ.App., 74 S.W. 2d 187.

59. Ill.—Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation, 7 N.E.2d 623, 289 Ill.App. 576.
N.Y.—Huss v. Plumbers' Supply House, 281 N.Y.S. 468, 156 Misc. 140—Jones v. Huter, 239 N.Y.S. 221, 136 Misc. 49.
Tex.—Baldwin Motor Co. v. De Ford, Civ.App., 282 S.W. 832.
23 C.J. p 347 note 84.

Change of possession must be actual, continued, open, notorious and unequivocal.—Schell v. F. E. Ransom Coal & Grain Co., Mo.App., 79 S.W. 2d 543.

60. Cal.—Passow & Sons v. U. S. Fidelity & Guaranty Co., 204 P. 545, 56 Cal.App. 72.
Ga.—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750—Luther Williams Bank & Trust Co. v. Sherwood, 187 S.E. 193, 53 Ga.App. 666—Bank of La Grange v. Rutland, 108 S.E. 821, 27 Ga.App. 442.
Okl.—Smith v. Southwestern Engraving Co. of Oklahoma, 11 P.2d 921, 157 Okl. 211.
23 C.J p 346 note 83 [i].

By payment of secured debt, legal title vests in the debtor and he has a leviable interest in the property.—Bank of Trion v. Parker, 160 S.E. 128, 43 Ga.App. 686.

Whether cash or property was paid by the secured creditor is immaterial.—Luther Williams Bank & Trust Co. v. Sherwood, 187 S.E. 193, 53 Ga.App. 666.

61. N.J.—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J. Law 344.
23 C.J. p 347 note 85.
Right of redemption or possession after sale see supra § 40.

Junior judgment lien
After mortgage foreclosure sale and purchase by mortgagee, holder of junior judgment lien on mortgaged premises may have execution and sale of premises thereon, subject to mortgagee's lien.—Arnold v. Haberstock, 10 N.E.2d 591, 213 Ind. 98, rehearing denied 11 N.E.2d 682, 213 Ind. 198.

62. U.S.—In re Allee, C.C.A.Ill., 55 F.2d 76.
Mo.—Green v. Powell, App., 46 S.W. 2d 915.

N.Y.—Huss v. Plumbers' Supply House, 281 N.Y.S. 468, 156 Misc 140—Jones v. Huter, 239 N.Y.S 221, 136 Misc. 49.
Ohio.—Haueisen v. Szalay, 169 N.E. 602, 33 Ohio App 350.
23 C.J. p 347 note 86.

63. Mo.—Green v. Powell, App., 46 S.W 2d 915.
Ohio.—Haueisen v. Szalay, 169 N.E. 602, 33 Ohio App. 350.
23 C.J. p 347 note 87.

64. S.C.—Ex parte Lorenz, 11 S.E. 206, 32 S.C. 365, 17 Am.S.R. 862.
23 C.J. p 347 note 88.

65. Neb.—Peckinbaugh v. Quillin, 12 N.W. 104, 12 Neb. 586.
23 C.J. p 348 note 89.

66. Wis.—Saxton v. Williams, 15 Wis. 292.
23 C.J. p 348 note 90.

67. Kan.—Anderson v. Montgomery County Nat. Bank, 67 P. 1110, 64 Kan. 587.

68. Kan.—Johnson v. Seneca State Bank, 52 P. 860, 59 Kan 250.

69. Ala.—Bernstein v. Humes, 60 Ala. 582, 31 Am.R. 52—Shaw v. Lindsey, 60 Ala. 344.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla 84.
Ga.—Sims v. Jones, 123 S.E. 614, 158 Ga. 384.
Ky.—West v. Criscillis, 46 S.W.2d 1082, 242 Ky. 549.
La.—Hudson v. Murray, 135 So. 11, 172 La. 642.

mortgagee on an execution obtained on a debt not secured by the mortgage.[70]

Absolute deed as mortgage. It has been held that the conveyance of an estate by an absolute deed, although accompanied by an agreement for reconveyance or other form of defeasance, leaves the grantor, at law, without any interest in the land which can be attached or sold on an execution at law against him,[71] but there is authority to the contrary.[72]

b. Property Conveyed by Trust or Security Deed

Contrary to the rule at common law, the interest of a grantor in a deed of trust given to secure a debt is now subject to execution in many states; but in at least one jurisdiction a debtor has no leviable interest in property conveyed by him to secure a debt until the property has been redeemed or reconveyed.

At common law the interest of a grantor in a deed of trust to secure a debt was not subject to sale under execution against him,[73] and in many jurisdictions, following the common-law rule, it was formerly held that the interest of a grantor in a deed of trust is not analogous to the interest of a mortgagor, and is not the subject of levy on execution at law.[74] Now, however, in a majority of the states, where a debtor conveys property by deed of trust to secure the payment of his indebtedness, and in the deed of trust gives the trustee power to sell the property thereby conveyed in the event of his default in the payment of the indebtedness, such conveyance is regarded as having substantially the same effect as mortgages with powers of sale, and the interest or estate in the grantor is held to be subject to execution at law.[75]

In at least one jurisdiction a debtor has no leviable interest in land conveyed by him to secure a debt until the property has been redeemed by payment of the secured debt,[76] or until the creditor has executed, filed, and recorded a deed reconveying the property to the debtor.[77]

§ 46. —— Interest of Mortgagee or Grantee

a. Mortgaged property

b. Property conveyed by trust or security deed

Mo.—Wakefield v. Dinger, 135 S.W. 2d 17, 234 Mo.App. 407, transferred see, Sup., 130 S.W.2d 490.

Mont.—Doggett v. Johnson, 267 P. 292, 82 Mont. 338.

N.J.—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J.Law 344.

23 C.J. p 348 note 94—41 C.J. p 605 note 30.

Right of redemption or possession after sale see supra § 40.

After failure to redeem within the time limited, no interest remains in the mortgagor subject to execution. —Howard v. Hunter, 13 Ky.Op. 513.

Creditor whose judgment is inferior to mortgage cannot by levy of an execution subject property held by the mortgagee under a title voidable because purchased at his own sale under a power.—Williams v. J. P. Williams Co., 50 S.E. 52, 122 Ga. 178, 106 Am.S.R. 100.

70. Ala.—Bernstein v. Humes, 71 Ala. 260.

23 C.J. p 349 note 95.

Debt secured by mortgage

Judgment creditor may levy on property mortgaged to secure note on which judgment was recovered.—Union Trust Co. of Spokane v. Wiseman, D.C.Or., 10 F.2d 558.

71. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.

23 C.J. p 349 note 96 [a], [b]—41 C.J. p 366 note 61.

72. Mont.—Isom v. Larson, 255 P. 1049, 78 Mont. 395.

23 C.J. p 349 note 96—41 C.J. p 366 note 63.

73. Miss.—Carpenter v. Bowen, 42 Miss. 28—McIntyre v. Agricultural Bank, Freem. 105.

74. Va.—Wheeler v. City Savings & Loan Corporation, 157 S.E. 726, 727, 156 Va. 402, citing **Corpus Juris.**

23 C.J. p 349 note 12.

75. Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 45 Minn. 341, 12 L.R.A. 741.

23 C.J. p 350 note 13.

76. Ga.—Cook v. Securities Inv. Co., 192 S.E. 179, 184 Ga. 544—Smith v. Borders, 156 S.E. 690, 171 Ga. 742. —Miles v. Waters, 169 S.E. 783, 47 Ga.App. 25—Corley v. Jarrell, 136 S.E. 177, 36 Ga.App. 225.

23 C.J. p 350 note 13 [a] (1), (4).

Payment of debt secured by deed revests in grantor such interest and title therein as can be levied on under execution on judgment junior in date to deed, without reconveyance to grantor and in case of cancellation without record of cancellation of deed.—Citizens' Mercantile Co. v. Easom, 123 S.E. 883, 158 Ga. 604.

Where debtor redeemed land from tax sale which he had conveyed to secure debt, and received deeds reconveying land to him, land was not subject to execution by unsecured creditor, since title conveyed to debtor was subject to existing liens. —Union Central Life Ins. Co. v. Bank of Tignall, 185 S.E. 108, 182 Ga. 233.

77. Ga.—Williams Realty & Loan Co. v. Simmons, 3 S.E.2d 580, 188 Ga. 184—Woodward v. La Porte, 184 S.E. 280, 181 Ga. 731—Bryant v. Towns, 170 S.E 669, 177 Ga 571 —Callaway v. Life Ins Co of Virginia, 144 S.E. 381, 166 Ga. 818— Durrence v. Durrence, 134 S E 164, 162 Ga. 507—Parker v. Home Mut. Building & Loan Ass'n, 40 S.E 724, 114 Ga. 702—Corley v. Jarrell, 136 S.E. 177, 36 Ga.App. 225.

23 C.J. p 350 note 13 [a] (2), (3).

Quitclaim deed

(1) Quitclaim deed made for purpose of levy and sale need not be delivered to debtor.—Terrell v. Gould, 148 S.E. 515, 168 Ga. 607— Alsabrook v. Prudential Ins. Co. of America, 167 S.E. 735, 46 Ga.App. 400, transferred, see Alsabrook v. Prudential Ins. Co., 163 S.E. 706, 174 Ga. 637.

(2) If recorded after vendor's death, but before levy, it is not invalid.—Terrell v. Gould, supra.

(3) The deed is not invalid or inoperative because no consideration passes, or because it is executed before issuance of execution against the foreclosed property, and it is sufficient although it does not describe the proceedings by which judgment was obtained.—Alsabrook v. Prudential Ins. Co. of America, supra.

Grantee's transferee of secured note may enforce judgment on note by executing deed to security deed grantor and levying on and selling property.—Edwards v. Decatur Bank & Trust Co., 167 S.E. 292, 176 Ga. 194.

a. Mortgaged Property

Before foreclosure or condition broken the mortgagee's interest in either real or personal property generally is not subject to execution.

Generally the interest of the mortgagee in personal property, where the possession remains with the mortgagor, and before condition broken, cannot be taken in execution as the property of the mortgagee,[78] and in some jurisdictions it is held that a mortgagee's interest, after breach of condition, and before foreclosure, is not subject to execution, even where the property is in his possession.[79] However, in other jurisdictions, after condition broken, it may be levied on under an execution against the mortgagee,[80] even where the property remains in the hands of the mortgagor.[81]

Real property. In the absence of statute, the estate of the mortgagee in real property, before foreclosure, is not the subject of sale under execution against him,[82] even after default, before entry for breach of condition,[83] either where he is sole defendant, or where the attempt is to levy on and sell the entire estate, under execution against both mortgagor and mortgagee.[84] The rule has been applied after entry for the purpose of foreclosure, but before foreclosure has taken place.[85] Even where land is conveyed by a deed absolute in form but intended as a mortgage, the grantee has been held to have no such estate as is subject to execution;[86] but it seems that, at least in some jurisdictions, a creditor without notice may levy thereon as the property of the grantee,[87] and it has been held that land held by absolute deed as security for a debt still unpaid is subject to levy and sale as the property of the grantee, under a judgment against him, no matter whether the judgment creditor gave credit on the faith of the property so held or not.[88]

b. Property Conveyed by Trust or Security Deed

In some jurisdictions the grantee's interest under a deed of trust is not subject to execution; but in others, where the grantor has no leviable interest in property conveyed by him to secure a debt, the grantee's interest is subject to execution.

In those jurisdictions in which the interest of the grantor in property conveyed by trust or security deed is subject to execution, by parity of reasoning, the grantee in such deed of trust has no interest in the property so conveyed as is subject to sale under execution against him.[89] On the other hand, in jurisdictions where it is held that the grantor has no leviable interest in land conveyed by him to secure a debt the grantee's interest is subject to execution.[90]

§ 47. Property Pledged or Pawned

Although at common law property pawned or pledged was not liable to be taken in execution in an action against the pledgor, now the pledgor's interest generally is subject to execution in an action by the pledgee or a third person.

At common law property pawned or pledged was not liable to be taken in execution in an action against the pledgor,[91] at least, not unless the bailment was terminated by payment of the debt, or by some other extinguishment of the pledgee's title;[92] however, by statute or otherwise, in most of the states the interest of the pledgor in the prop-

78. N.J.—Chapman v. Hunt, 13 N.J. Eq. 370.
23 C.J. p 349 note 98.

79. Mass.—Prout v. Root, 116 Mass. 410.
Wash.—Voorhies v. Hennessy, 34 P. 931, 7 Wash. 243.
23 C.J. p 349 note 2.

80. N.Y.—Tremaine v. Mortimer, 27 N.E. 1060, 128 N.Y. 1.
23 C.J. p 349 note 99.

81. N.Y.—Ferguson v. Lee, 9 Wend. 258.

82. Fla.—Ratliff v. Nowery, 136 So. 895, 102 Fla. 1072—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Pa.—Bulger v. Wilderman, 101 Pa. Super. 168.
23 C.J. p 349 note 5.

Lost mortgage of real estate, unaccompanied by any note, bond, or other evidence of indebtedness, and not recorded, cannot be the subject of levy and sale on execution.—Gale v. Battin, 16 Minn. 148.

83. Ark.—Trapnall v. State Bank, 18 Ark. 53.
23 C.J. p 349 note 5.

84. Ky.—Buck v. Sanders, 1 Dana 187.

85. Me.—Smith v. People's Bank, 24 Me. 185.

86. Ill.—Williams v. Williams, 110 N.E. 876, 270 Ill. 552.

87. Mass.—Clark v. Watson, 5 N.E. 298, 141 Mass. 248.

Purchaser's title defeasible
A creditor of the grantee, selling the land on execution, can obtain no better title than that of the grantee's, that is, a defeasible one.—Leech v. Hillsman, 8 Lea, Tenn., 747.

88. Ga.—Parrott v. Baker, 9 S.E. 1068, 82 Ga. 364.

89. Ark.—Harman v. May, 40 Ark. 146.
23 C.J. p 350 note 14.

90. Ga.—Richey v. First Nat. Bank of Commerce, 180 S.E. 740, 180 Ga. 751—Duke v. Ayers, 136 S.E. 410, 163 Ga. 444.

As against grantee's transferee of the secured notes, execution will lie when the transferee failed to obtain the deed or record it, and failed to show a retention of any equitable interest in the property.—First Nat. Bank v. Williams, 142 S.E. 532, 166 Ga. 102.

Statute held not to effect the right of creditor to levy
Ga.—City of Leesburg v. Forrester, 1 S.E.2d 584, 59 Ga.App. 503.

91. Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, 32 S.W. 2d 734, 236 Ky. 128.
23 C.J. p 350 note 15.

92. Cal.—Swanston v. Sublette, 1 Cal. 123.
23 C.J. p 350 note 16.

Sale subject to pawnee's rights
At common law, goods in pawn cannot be taken on execution against pawnor while pawnee's title is unextinguished, but a sheriff may sell

erty pledged is now liable to seizure and sale on execution, subject to the interest of the pledgee therein.[93] Where the pledgee elects to waive his lien on the property pledged, there seems to be no reason why he may not levy on such property under a writ against the pledgor.[94]

Interest of pledgee. It seems to have been formerly thought that the interest of a pledgee in the pledged property was not subject to execution for the debt of the pledgee.[95] Now, however, it is held in some jurisdictions that since the pledgee has a beneficial interest accompanied by a rightful possession, such interest is subject to levy and sale under execution against him.[96]

§ 48. Estate of Decedent

After the death of a judgment debtor, his estate is not subject to execution issued on a judgment against him, unless the judgment is revived or, in some jurisdictions, unless the judgment became a lien.

Generally the property of decedent is not subject to seizure and sale under an execution issued on a judgment against decedent, and remaining unsatisfied at the time of his death,[97] where there is no revivor of the judgment;[98] unless, in some jurisdictions, the judgment became a lien during his lifetime,[99] and the necessity of a lien has been held to exist in some jurisdictions even though the judgment has been revived.[1] The lien of a judgment on the property of deceased is not, however, impaired by a statute specifying the order in which debts of an estate shall be paid.[2] Statutes sometimes prevent issuance of an execution unless the judgment is for the recovery of real or personal property, or for the enforcement of a lien thereon,[3] and it is held thereunder that the fact that an attachment was levied does not authorize an execution on the ground that the action then became one to enforce a lien.[4] After the death of one of several judgment debtors, execution cannot be enforced against the estate of the deceased debtor without revival of the judgment, although his name properly appears in the recitals of the parties.[5]

Where judgment is entered against heirs in their representative capacity, execution may issue against the personalty of decedent in their possession, or if there is none, against the realty which has descended to them.[6]

subject to pawnee's rights, although he cannot seize the goods—J. H. & C. K. Eagle v. Kunkle, 122 A. 276, 278 Pa. 190.

93. Cal.—Raffo v. Foltz, 288 P. 884, 106 Cal.App. 51.
La.—First Nat. Bank v. Lagrone, 117 So. 741, 166 La. 626—Kirkpatrick v. Oldham, 38 La.Ann. 553—Pickens v. Webster, 31 La.Ann. 870.
Pa.—Mills v. Jacobs, 200 A. 233, 131 Pa.Super. 469, modified on other grounds 4 A.2d 152, 333 Pa. 231, 122 A.L.R. 333.
Tex.—Keystone Pipe & Supply Co. of Texas v. Milner, Civ.App., 297 S.W. 1089.
23 C.J. p 350 note 18.

94. Mass.—Legg v. Millard, 17 Pick. 140, 28 Am.D. 282.
Tenn.—Arendale v. Morgan, 5 Sneed 703.
23 C.J. p 350 note 17.

Debt different from that for which property pledged
Pa.—J. H. & C. K. Eagle v. Kunkle, 122 A. 276, 278 Pa. 190.

Assignee of pledgee
Where pledgee recovered judgment against pledgor on the indebtedness secured, and assigned judgment to third persons, the assignees were entitled to seizure and sale of pledged notes on execution issued on such judgment.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

95. Md.—Harding v. Stevenson, 6 Harr. & J. 264.

Consent
Where property held by one as pawnbroker is levied on and sold by his creditor, and he abandons his right to recover the property, he must be held to have consented to the action of the constable who levied thereon and sold the property.—New Jersey Mut. Ins. Co. v. Glore, 6 Ky.Op. 523.

96. N.Y.—Saul v. Kruger, 9 How. Pr. 569.

97. Iowa.—In re Hager's Estate, 235 N.W. 563, 212 Iowa 851—Harrington v. Clark, 202 N.W. 84, 199 Iowa 340.
N.C.—Flynn v. Rumley, 192 S.E. 868, 212 N.C. 25.
23 C.J. p 360 note 24.
"What real estate he died seized of, all passed to his heirs at law, who became the owners of the real estate, and their property could not be levied upon and sold without these heirs having their day in court."—Bickley v. Citizens Sav. Bank & Trust Co., Ohio App., 34 N.E.2d 262, 363.
Property in hands of executor or administrator generally see the C.J.S. title Executors and Administrators § 807, also 24 C.J. p 902 note 83-p 904 note 97.

Even where representative has converted or fraudulently disposed of the same, the rule applies.—Snodgrass v. Cabiness, 15 Ala. 160.

Succession property not subject to execution
La.—Succession of Williams v. Land Development Co., 3 La.App. 737—Creston Lumber Co. v. Cockerham's Estate, 2 La.App. 29.
23 C.J. p 360 note 24 [c].

98. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.
23 C.J. p 382 note 40.
Issuance, form, and requisites of writ on death of parties after judgment see infra § 65.

99. Iowa.—In re Hager's Estate, 235 N.W. 563, 212 Iowa 851—Harrington v. Clark, 202 N.W. 84, 199 Iowa 340.
23 C.J. p 383 note 42.

Although unsatisfied judgment constitutes lien on realty of deceased judgment debtor, such realty is not subject to execution.—Flynn v. Rumley, 192 S.E. 868, 212 N.C. 25.

1. Kan.—Mendenhall v. Burnette, 49 P. 93, 58 Kan. 355.

2. Wash.—In re Hackett Estates, 207 P. 11, 120 Wash. 236.

3. Mont.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486.
Tex.—Highland Park Independent School Dist. v. Thomas, Civ.App., 139 S.W.2d 299.
23 C.J. p 383 note 45.

4. Idaho.—Rose v. Dunbar, 115 P. 920, 20 Idaho 1, Ann.Cas.1912D 1046.
23 C.J. p 383 note 46.

5. Del.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. 281.
23 C.J. p 387 note 99.

6. Tenn.—Brown v. Rocco, 9 Heisk. 187.

§ 49. —— Interests of Devisees or Legatees

The interest of a devisee or legatee, provided it is vested, is subject to execution on a judgment against him.

Since each devisee or legatee has a legal estate which may be alienated or devised by him, such estate is likewise subject to execution against him, in the same manner as other beneficial legal estates,[7] provided the estate or interest is not contingent.[8] So if the estate of the devisee depends on his remaining in possession, it is not subject to execution.[9] A legacy does not vest in the legatee until the executor has assented to it, or at least until it is seen with reasonable certainty that he will not need the legacy to enable him to pay claim of a higher rank than the claim of the legatee, and until property has vested in the legatee it is not subject to be seized and sold for his debts.[10] A fortiori, if the property is sold by the executors to pay debts, under a power of sale, it is not subject to execution against the devisee.[11] The doctrine has been laid down in some states that when devisees are entitled to several parcels of land, a specific parcel cannot, before partition, be sold on execution against a single devisee, on the theory that such a sale would be an attempt to interfere with the rights of other devisees to partition.[12]

Option to purchase. Where a testator devised certain property to his children to be divided into shares, at a certain valuation, with the option to one to purchase the interests of the others, which option was exercised and fully complied with before a levy on the interest so purchased, it was held that the purchaser at the execution sale took no title.[13]

A personal power or discretion bestowed on a debtor by will cannot be sold on execution. Such a personal power is not a chose in action, to be confiscated or abridged at the instance of a judgment creditor by forced sale.[14]

§ 50. —— Interests of Heirs or Distributees

An heir's undivided interest in the realty of an ancestor may be levied on and sold under an execution against the heir, and, although there is authority to the contrary, a distributee's undivided interest in personalty is also subject to execution.

The estate of an heir is an undivided interest in each and every tract of land owned by the ancestor at the time of his death.[15] Subject to the debts of the ancestor, it may be levied on by execution or

7. Ky.—Fischer v. Porter, 92 S.W. 2d 368, 263 Ky. 372
S.D.—Hicks v. Skie, 289 N.W. 507.
Tex.—Gregg v. First Nat. Bank, Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ. App., 18 S.W.2d 772—Lozano v. Guerra, Civ.App., 140 S.W.2d 587.
23 C.J. p 360 note 28.
Land converted into personalty as subject to execution see Conversion § 45.
Particular estates or interests, such as life estates, remainders or reversions, as subject to execution see supra § 36.

Provision against alienation or execution

A direct devise with provision forbidding alienation by devisee, or declaring that the property shall not be subject to execution, cannot withdraw the property from execution, since the prohibition does not operate to divest the debtor's estate vested in another and while he retains the whole beneficial estate it must carry with it power to dispose of the property by transfer whether voluntary or involuntary.—Sternberger v. Glenn, 137 S.W.2d 269, 175 Tenn. 644.

Partial distribution by order of court or otherwise

Statutory language that, if by virtue of "order of court or otherwise" a partial distribution shall have been made by personal representative of decedent prior to service of execution, only the remainder of personal estate going to legatee or devisee shall be affected by execution, is so clear and unequivocal that rules of construction such as rule of "ejusdem generis" have no application, since statute means whether an order of court was made or not.—In re Freitag's Estate, 107 P.2d 978, 165 Or. 427.

Personalty in executor's possession

To reach interest of legatee in personal property in executor's possession by attachment or execution proceedings, provisions of statute authorizing such proceedings must be followed.—In re Bennett's Estate, Cal., 90 P.2d 84.

Controlled by statute

N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.

8. Ala.—Wright v. City of Tuscaloosa, 182 So. 72, 236 Ala. 374.
Ark.—National Bank of Commerce of St. Louis v. Ritter, 26 S.W.2d 113, 181 Ark. 439.
Tenn.—First Nat. Bank v. Pointer, 126 S.W.2d 335.
23 C.J. p 360 note 29.

Bequests held contingent

U.S.—Wallace v. Republic Nat. Bank & Trust Co. of Dallas, C.C.A.Tex., 80 F.2d 787, modifying, D.C., Meek v. Republic Nat. Bank & Trust Co., 9 F.Supp. 651, certiorari denied Crook v. Wallace, 56 S.Ct. 952, 298 U.S. 683, 80 L.Ed. 1403.

9. Ga.—Harber v. Nash, 55 S.E. 928, 126 Ga. 777.

10. Ind.—Stout v. LaFollette, 64 Ind. 365
23 C.J. p 360 note 33.

Implied assent to devise

Evidence held to show implied assent of executors to devise, authorizing levy of execution on land devised by judgment creditor of devisee's heir.—Register v. Harper, 171 S.E. 269, 177 Ga. 769.

11. N.Y.—Comrie v. Kleman, 147 N.Y.S. 589, 162 App.Div. 510.

12. Ga.—Hatcher v. Cade, 61 Ga. 145—Clarke v. Harker, 48 Ga. 596.
23 C.J. p 360 note 32.

13. Pa.—Bayer v. Walsh, 30 A. 1039, 166 Pa. 38.

14. U.S.—Jones v. Clifton, Ky., 101 U.S. 225, 25 L.Ed. 908.
Kan.—Ryan v. Cullen, 150 P. 597, 96 Kan. 284.
23 C.J. p 361 note 36.

15. S.D.—Hicks v. Skie, 289 N.W. 507, quoting **Corpus Juris.**
Tenn.—McCoy v. Bevels, 292 S.W. 459, 461, 155 Tenn. 313, quoting **Corpus Juris.**
Tex.—Carroll v. Fidelity & Deposit Co. of Maryland, Civ.App., 107 S.W.2d 771, 772, quoting **Corpus Juris,** error refused.

attachment, and sold as the property of the heir.[16] In some jurisdictions, the interest of any person in the personal property of an estate may be levied on before the distributive share of such person has been ascertained or ordered to be paid;[17] but in others, personalty rests primarily in the executor or administrator, and a distributee has no title therein subject to execution until distribution has been made.[18]

§ 51. Ownership or Possession of Property

a. In general
b. Property subject of judicial or execution sale
c. Mere possession of land without title or mere claim without possession

a. In General

A judgment creditor is entitled to take on execution only what belongs to the debtor; however, any title alleged to be in the debtor may be sold.

A judgment creditor is entitled to take on execution only what belongs to his debtor,[19] and only the actual interest of the debtor therein;[20] but a mere disclaimer of title does not defeat the right of the judgment creditor,[21] and any title alleged to be in the debtor may be sold leaving the purchaser to try the validity of it afterward in ejectment or other appropriate action.[22] The judgment debtor will not be permitted to deny the title, or to set it up in any one else.[23] An agreement by a third person to pay a judgment does not authorize a levy on his property under an execution against another.[24] In the absence of knowledge, actual or constructive, of the true title, the officer may presume that personalty is owned by the party in possession thereof.[25] If one in possession owns growing crops they may be sold on execution as his personal property.[26]

Materials of contractor. The doctrine seems to be well settled that where a contractor engages to construct a house, vessel, bridge, or other thing, and to furnish the materials therefor, that no property vests in the person for whom it is to be built, until finished and delivered, even where certain portions of the contract price are agreed to be paid, and are paid to the contractor, at specific stages of the work; but such materials, prior to completion of the contract and delivery, are subject to seizure and sale under execution against the con-

16. Cal.—Noble v. Beach, App., 120 P.2d 110.
Ga.—Perkins v. Farmers' Bank of Doerun, 120 S.E. 528, 156 Ga. 841—Floyd v Braswell, 166 S.E. 65, 45 Ga.App. 726.
La.—First Nat. Bank & Trust Co. of Vicksburg v. Drexler, App., 171 So. 151—W. B. Smith & Co. v. Lowe, 134 So. 707, 16 La.App. 425.
Or—Daisley v. Hambelton, 282 P. 1086, 131 Or. 507.
S.D.—Hicks v. Skie, 289 N.W. 507, quoting **Corpus Juris.**
Tenn.—McCoy v. Bevels, 292 S.W. 459, 461, 155 Tenn. 313, quoting **Corpus Juris.**
Tex.—Carroll v. Fidelity & Deposit Co. of Maryland, Civ.App., 107 S.W.2d 771, 772, quoting **Corpus Juris**—Pleasant v. Mims, Civ.App., 55 S.W.2d 171—Hart v. Estelle, Civ. App., 34 S.W 2d 665, reversed on other grounds Estelle v. Hart, Com.App., 55 S.W.2d 510.
23 C.J. p 361 note 38.
Execution against one of several owners in common on a particular part of a larger tract is considered infra § 101.

Property distributed before judgment held subject to execution.—Lacertoso v. Trigg, 101 P.2d 735, 39 Cal.App.2d 675.

Will held to provide for husband who, after election to take under will, had no interest in estate, subject to execution.—Brassand v. Stoner, 155 N.E. 721, 86 Ind.App. 47.

17. Or.—In re Freitag's Estate, 107 P.2d 978, 165 Or. 427.

Interest held subject to levy
Judgment debtor's interest in undistributed decedent's estate held by trustee may be levied on.—Thermoid Rubber Co. v. Dixon, 168 A. 646, 111 N.J.Law 355.

18. Miss.—Hancock v. Titus, 39 Miss. 224.
S.D.—Hicks v. Skie, 289 N.W. 507, quoting **Corpus Juris.**

19. D.C.—Palais Royal v. Calhoun, 92 F.2d 515, 67 App.D.C. 364.
Ky.—Pinson v. Williams, 155 S.W.2d 869, 288 Ky 314—Pinson v. Murphy, 295 S.W. 442, 220 Ky. 464.
Mo.—First Nat. Bank v. Polk, App., 263 S.W. 504.
N.J.—Riegelhaupt v. Russo, 177 A. 878, 13 N.J.Misc. 278.
N.C.—Higgins v. Chimney Rock Mountain, 169 S.E. 229, 204 N.C. 633.
Tenn.—Shea v. Rucker, 72 S.W.2d 551, 167 Tenn. 550.
Tex.—Leon Mercantile Co. v. Anderson, 121 S.W. 868, 56 Tex.Civ.App. 481.
23 C.J. p 351 note 22.

After-acquired title does not validate prior levy.—First Nat. Bank v. Polk, Mo.App., 263 S.W. 504.

Statute providing that goods and chattels on demised premises taken by virtue of execution and liable to distress may be sold to satisfy both rent and execution applies only to personalty of tenant liable to execution, not to personalty of stranger—National Cash Register Co. v. Sorto, 161 A. 766, 106 Pa.Super. 106.

One cannot levy on his own property.—E. L. Jones & Co. v. Unruh, 182 A. 211, 7 W.W.Harr., Del., 241.

20. Or.—Phipps v. Stancliff, 222 P. 328, 110 Or. 299, reversing 214 P. 335, 110 Or. 299.
Va.—Dingus v. Minneapolis Impl. Co, 37 S.E. 353, 98 Va. 737.

21. Ill.—Cole v. Bradner Smith & Co., 111 Ill.App. 210.

22. Ga.—Garmon v. Davis, 12 S.E. 2d 209, 63 Ga.App. 815.
Pa.—Mantz v. Kistler, 70 A. 545, 221 Pa. 142.

23. Ga.—James G. Wilson Mfg. Co. v. Chamberlain-Johnson-Du Bose Co., 79 S.E. 465, 140 Ga. 593.
23 C.J. p 351 note 26.

24. Ind.—Shipman Coal Min. & Mfg. Co. v. Pfeiffer, 39 N.E. 291, 11 Ind. App. 445.

25. Pa.—First Nat. Bank v. Allen, 1 Del.Co. 277.
23 C.J. p 351 note 28.

Property in possession of defendant presumably his
Ga.—Bennett v. Barr, 176 S.E. 681, 49 Ga.App. 831.

26. Pa.—Gordon v. Gordon, 45 Pa. Super. 95.

tractor.[27] The rule is otherwise, however, where the materials are furnished on the credit of the building,[28] or where by express agreement the materials belong to the owner, and the contractor merely has the right to an accounting after the building is sold,[29] and in any case where there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing structure as the manufacture of it proceeds, or even in the materials from which it is to be built, that intention will be effectuated.[30]

b. Property Subject of Judicial or Execution Sale

The title of a purchaser at a judicial or execution sale before a deed is executed or the time to redeem has expired has been held subject to execution, although there is authority to the contrary.

The tendency of the later decisions is to make subject to execution the title of a purchaser at judicial or execution sale before a deed is executed or the time to redeem has expired.[31] However, there are decisions that the purchaser of property at a judicial sale has not, previous to the making and delivery to him of the sheriff's or the commissioner's deed, such an interest in the property as can be levied on and sold under execution against him;[32] and that, where the judgment debtor is allowed by statute a stipulated time within which to redeem his property sold under execution, the purchaser at the execution sale acquires no leviable interest in the property prior to the expiration of the time allowed for redemption.[33] The interest of a purchaser of land at judicial sale, before a deed is executed, has been held not subject to execution, where the statute authorizes a sale on execution of only the "legal" title.[34] Likewise certificates given to purchasers of land for nonpayment of taxes have been held not subject to execution.[35]

Interest of debtor. The retention of possession by the execution debtor of property sold at a sheriff's sale is not an index of fraud, because the sale is not the act of such debtor, but of the law; and property thus purchased and left in the possession of the former owner is not liable to be taken under another execution against such debtor,[36] unless the purchase was not made in good faith,[37] or the transaction was such as to constitute a resale instead of a bailment.[38] A fortiori is this true where the purchaser has taken possession of the property.[39]

c. Mere Possession of Land without Title or Mere Claim without Possession

Although there is authority to the contrary, as a general rule the mere possession of land is such an interest as may be the subject of execution; but a mere claim without possession may not be sold on execution.

It is generally held that the naked possession of land is such an interest as may be the subject of execution,[40] although there is authority to the contrary;[41] but it has been held that a naked claim to be the owner of land, unaccompanied by possession, does not constitute a right that can be sold on execution.[42]

§ 52. —— Property Held Adversely

Where personal property is held adversely to its owner it is not liable to sale under execution against him; but as a general rule a debtor's interest in real property is subject to execution even where it is held by a third person in adverse possession.

Where personal property is held adversely to its owner, his interest therein being a mere chose in action, in the absence of statute it is not liable to sale under execution against him.[43] At common law, and by construction of the earlier statutes in many of the states, the debtor's interest in land in adverse possession was not subject to sale

27. W.Va.—Wheeling v. Baer, 15 S. E. 979, 36 W.Va. 777.
23 C.J. p 355 note 67.

28. Pa.—White v. Miller, 18 Pa. 52.

29. Pa.—Evans v. Campion, 68 Pa. Super. 522.

30. Ind.—Sandford v. Wiggins Ferry Co., 27 Ind. 522.
23 C.J. p 355 note 70.

31. Ariz.—Oliver v. Dougherty, 68 P. 553, 8 Ariz. 65.
23 C.J. p 353 note 52.

32. N.J.—Green v. Steelman, 10 N. J.Law 193.
Ohio.—Gorrell v. Kelsey, 40 Ohio St. 117.

33. Ga.—Rountree v. Williams, 25 S.E 323, 99 Ga. 222.
23 C.J. p 354 note 54.

34. Ky.—Goodin v. Wilson, 71 S.W. 866, 114 Ky. 716, 24 Ky.L. 1521.

35. Mich.—Welch v. Rogers, Howell N.P. 255.

36. Wash.—Kuhn v. Lewis, 279 P. 597, 153 Wash. 457.
23 C.J. p 354 note 57.

37. Pa.—Schott v. Chancellor, 20 Pa. 195.
23 C.J. p 354 note 58.

38. Pa.—Bennett v. Coyne & Evans Motor Co, 21 A.2d 125, 126, citing **Corpus Juris.**
23 C.J. p 354 note 59.

39. Philippine.—Mercado v. Jakosalem, 29 Philippine 192.

40. Ga.—Clements v. Stubbs, 32 S. E. 584, 106 Ga. 448.
23 C.J. p 351 note 30.

41. Tenn.—Daugherty v. Marcum, 3 Head 323—Crutsinger v. Catron, 10 Humphr. 24.
23 C.J. p 351 note 31.

42. Ky.—Shepard v. McIntire, 4 J.J. Marsh. 110.
N.Y.—Hagaman v. Jackson, 1 Wend. 502.

43. Ala.—Carlos v. Ansley, 8 Ala. 900.
23 C.J. p 352 note 35.

under execution against him;[44] but now the general rule is that the interest of a debtor in real property is subject to sale under execution against him, even where such property is held by a third person in adverse possession, the rule against champertous conveyances not applying to such sales.[45] In such a case the execution debtor will not be permitted to interpose the adverse possession to defeat the seizure.[46]

§ 53. —— Property or Rights Conveyed or Assigned

Generally where property has been sold or assigned by the judgment debtor it is not subject to execution against the seller or assignor.

Generally where property has been sold or assigned by the judgment debtor it is not leviable under execution against the seller or assignor,[47] and if creditors desire to attack the transaction on the ground of fraud the proper mode of procedure is by a creditors' bill.[48] The same rule applies where property has been sold under attachment by order of the court;[49] but if by mutual mistake all of a tract is conveyed instead of an undivided half interest, the undivided half interest intended to be retained is subject to execution against the grantor.[50] If personalty is reconveyed it may be levied on as the property of the original owner;[51] but if the debtor has bona fide conveyed all his interest in land at the time of the levy, his subsequent acquisition of title thereto will not inure to the benefit of the creditor so as to make his levy good by relation.[52] If property is levied on as belonging to the buyer, it must appear that the title is in him.[53]

§ 54. —— Property Consigned for Sale or in Custody of Agent, Factor, or Bailee

a. In general
b. Property consigned for sale

a. In General

Property in the possession of a bailee, without claim of title, is liable to execution for the debt of the bailor, but not for the debt of the bailee, unless the bailee acquires some special interest in the property.

Where property is in the possession of one other than its owner, merely as bailee, without claim of title, it is liable to execution for the debt of the bailor,[54] but not to an execution for the debt of

44. R.I.—Campbell v. Point St. Iron Works, 12 R.I. 452.
23 C.J. p 352 note 36.

45. Me.—Woodman v. Bodfish, 25 Me. 317.
23 C.J. p 352 note 37.

46. La.—State v. Judge, 19 So. 666, 48 La.Ann. 667.

47. Ga.—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488.
La.—Latter & Blum v. Ansell-Lapkin Stores Co., 129 So. 217, 170 La. 826—Mullen v. E. D. Green Realty Co., App., 147 So. 115.
Minn.—Swift & Co. v. H. B. Waite Lumber Co., 223 N.W. 776, 176 Minn. 461.
Mo.—Klaber v. Booth, 49 S.W.2d 181.
Mont.—Costello v. Shields, 43 P.2d 879, 99 Mont. 335.
Tex.—Continental Assur. Co. v. Gibner, Civ.App., 119 S.W.2d 588, error dismissed—Western Nat. Bank of Hereford v. Steele, Civ.App., 36 S.W.2d 271, error dismissed.
23 C.J. p 353 note 46.

Creditor acquired no interest in property through sale, where the debtor had assigned it prior to the evy of execution.—North v. Evans, 36 P.2d 133, 1 Cal.App.2d 64.

Assignment to coöwner
Where two persons, each of whom owned a half interest in certain lands, orally agreed that one of them might trade off as his own the interest of both in part of lands, and that the other person should be the exclusive owner of the remaining lands, and the one who thus parted with all his interest in the lands afterward became the judgment debtor of another person, the remaining lands cannot be seized and sold at execution to satisfy the judgment debt.—Kindig v. Richardson, 194 P. 920, 108 Kan. 218.

Deed recorded before execution sale will defeat title acquired at such sale.—Boland v. Kirkwood Trust Co., 298 S.W. 1052, 220 Mo. App. 1219.

Property sold after judgment is necessarily sold subject to the lien of the judgment so as to entitle the creditor to execution.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.

Transferee, not a bona fide purchaser, stands in no better position than the transferor.—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.

Property transferred by assignee
A judgment creditor was entitled to levy on property of judgment debtor which had been transferred by judgment debtor's assignee for benefit of creditors as property of judgment debtor, and judgment creditor was not limited to levying on property by way of garnishment, since statute permitting a garnishment when property is in possession of a third party does not afford exclusive remedy.—McCoy v. Justice Court of Township of Santa Ana, 71 P.2d 1115, 23 Cal.App.2d 99.

48. Wash.—Lee v. Wrixon, 79 P. 489, 37 Wash. 47.
23 C.J. p 353 note 46.

Lien attached to property conveyed
Under statute, a levy of execution by attaching all the right, title, and interest of defendant in real estate standing in the names of third persons, to whom defendant had conveyed the property, was held to give rise to a specific lien on the property.—Stone-Ordean-Wells Co. v. Strong, 20 P.2d 639, 94 Mont. 20.

49. Tex.—Murphy v. Nash, Civ.App., 45 S.W. 944.
23 C.J. p 353 note 47.

50. Tex.—Fallen v. Weatherford, Civ.App., 158 S.W. 1174.

51. Del.—Taylor v. Plunkett, 56 A. 384, 20 Del. 467.
23 C.J. p 353 note 49.

52. Mich.—McArthur v. Oliver, 27 N.W. 689, 60 Mich. 605.

53. U.S.—Arnold v. Hatch, Ill., 20 S.Ct. 625, 177 U.S. 276, 44 L.Ed. 769, affirming 89 F. 1013, 32 C.C.A. 602—Hatch v. Heim, Ill., 86 F. 436, 30 C.C.A. 171.

54. Pa.—General Tire Co. of Philadelphia v. Mulholland, 16 Pa.Dist. & Co. 43.
23 C.J. p 354 note 61—6 C.J. p 1151 note 64.

the bailee.[55] Where, however, under a contract of bailment, an interest or special property in the thing bailed passes to the bailee, such interest is liable to execution for the debts of the bailee.[56] In many jurisdictions statutes have been enacted, aimed at pretended loans on personal property, providing that uninterrupted possession by the borrower for a specified period, without demand, prosecuted by due course of law, by the lender, will render such property subject to sale on execution against the borrower, unless such alleged loan, reservation, or limitation of use or property is declared by will or deed, properly proved and recorded.[57] Where, however, the owner of a chattel lends it to another, it is not liable to an execution against the borrower in favor of a creditor whose debt was contracted before the loan was made, and where the credit could not have been given upon the faith of the supposed ownership.[58] Similarly, where the owner resumes the possession before any creditor of the borrower has acquired a lien upon it, it cannot be afterward made subject to the debts of the borrower.[59]

b. Property Consigned for Sale

Generally property consigned to an agent for sale is not subject to sale under execution on a judgment against the agent; but where the transaction amounts to an absolute sale of the property to the consignee the property is leviable under an execution against him.

The general rule is that personal property consigned to a dealer, factor, or other agent, with authority from the owner to sell such property, the agent being required to account for the proceeds when sold, is not subject to sale under execution on a judgment obtained against such agent.[60] The mere fact that one is to have an interest in the profits of certain property after it has been sold does not give him a leviable interest in the property itself.[61] Where the contract does not contemplate an absolute acquisition of title by the bailee or agent, or his becoming absolutely responsible for the purchase price, the transaction cannot be regarded as an absolute sale, or as creating an interest in his favor, so as to render the property liable to execution against him.[62]

Where transaction amounts to absolute sale. Where the instrument consigning the goods to the agent or bailee creates an apparent absolute liability on his part for the purchase price of the goods, the transaction will be regarded in law as an unconditional and absolute sale, even though the instrument declares it to be otherwise, and expressly stipulates that title shall remain in the consignor until payment of the purchase price; and such property in the hands of the consignee is leviable under execution against him.[63]

Property on which a factor has a lien for advances may be levied on subject to such lien.[64]

§ 55. Property in Custody of Law

a. In general
b. Property held under prior writs
c. Money in hands of court or officer

a. In General

As a general rule, property that is in custodia legis is not subject to execution without leave of court.

Contents of safe-deposit box

(1) The rule of the text has been applied to the contents of a safe-deposit box—Williams v. Ricca, 187 A. 722, 324 Pa. 33—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.

(2) "There can be no question but that the personal property of the judgment debtor, if any, contained in the box, whether it be considered to be in the possession of the judgment debtor as lessee of the box or in the possession of the bank as bailee, is subject to levy."—O'Connor v. McManus, N.D., 299 N.W. 22, 24.

General deposits

(1) General deposit creates relation of debtor and creditor, and money so deposited cannot be levied on as property of depositor.—McManus v. Bank of Greenwood, 171 S.E. 473, 171 S.C. 84.

(2) But it has been held that a levy made on funds of defendant deposited in bank under ordinary writ of execution was valid.—Deakman v. Odd Fellows Hall Ass'n of Jersey City, 167 A. 741, 11 N.J.Misc. 646.

Deposit with application for license

Money deposited by judgment debtor with city officials with application for purchase of liquor license was held not subject to levy for payment of judgment, where statute provided for return of ninety per cent of deposit if license was refused, notwithstanding levy was attempted before license was issued.—Riegelhaupt v. Russo, 177 A. 878, 13 N.J.Misc. 278.

55. U.S.—Haws v. Fracarol, C.C.A. Ariz., 27 F.2d 74.
La.—Durden v. Rosenberg, App., 148 So. 728.
N.J.—Gaudiosi v. Micone, 141 A. 575, 6 N.J.Misc. 425.
Ohio.—Midland Acceptance Corporation v. General Motors Acceptance Corporation, 197 N.E. 120, 49 Ohio App. 243.
Pa.—Groves v. Lewis, 53 Pa.Super. 511.
23 C.J. p 354 note 62.

56. N.J.—Herzog's Cloak & Suit Co. v. Fedorko, 105 A. 21, 92 N.J.Law 34
23 C.J. p 354 note 63.

57. Ala.—Montgomery v. Kirksey, 26 Ala. 172.
23 C.J. p 354 note 64.

58. Pa.—Davis v. Turner, 7 Kulp 85.

59. Ala.—Maull v. Hays, 12 Ala 499.

60. Wis.—McGraft v. Rugee, 19 N.W. 530, 60 Wis. 406, 50 Am.R. 378.
23 C.J. p 352 note 39.

61. Mont.—Sweeney v. Darcy, 53 P. 540, 21 Mont. 188.
23 C.J. p 352 note 40.

62. Ill.—Lenz v. Harrison, 36 N.E. 567, 148 Ill. 598, distinguishing Chickering v. Bastress, 22 N.E. 542, 130 Ill. 206, 17 Am.S.R. 309.
23 C.J. p 352 note 41.

63. U.S.—Herryford v. Davis, Mo., 102 U.S. 235, 243, 26 L.Ed. 160.
23 C.J. p 353 note 43.

64. Tex.—Joost v. Scott, 19 Tex. 473.

The doctrine is well settled that property in the hands of sheriffs, constables, clerks of court, receivers, executors and administrators, appraisers, assignees in bankruptcy, etc., is regarded as being in custodia legis, and cannot be reached by execution, in the absence of statutory authority,[65] without leave of court.[66] The doctrine of "in custodia legis" is a rule of property right, made for the benefit of litigants, as well as a rule of jurisdiction, made for the purpose of avoiding conflicts between courts,[67] and it applies until the matters involved have been finally disposed of,[68] and whether the execution issued out of the same or another court.[69] The rule does not apply to a case in which an action is pending to enforce a lien or to adjudicate a title, but in which the court has acquired, and is seeking to acquire, no possession of the property, actual or constructive, and in which no such possession is requisite to the determination of the controversy before it, and no attempt is made to withdraw that controversy to another tribunal.[70] Such cases are governed by the doctrine of lis pendens.[71]

Property released under bond. Where, after a levy on property by attachment or execution, such property is released from the custody of the officer under a bond given to try the right thereto,[72] or under a forthcoming and delivery bond,[73] the property is still regarded as being in the custody of the law, and is not subject to seizure and sale under a junior execution. However, the giving of a bond to dissolve an attachment has been held not to exempt the property, on which the attachment was released, from seizure on execution.[74]

65. Alaska.—Loussac v. Jacobson, 7 Alaska 598.
Cal.—North v. Evans, 36 P.2d 133, 1 Cal.App. 133.
Fla.—Young v. Stoutamire, 179 So. 797, 131 Fla. 535—Tippins v. Belle Mead Development Corporation, 150 So. 719, 721, 112 Fla. 372, citing **Corpus Juris.**
Ill.—Reichelt v. Anderson, 222 Ill. App. 176.
Kan.—Staker v. Gillen, 53 P.2d 821, 824, 143 Kan. 212, citing **Corpus Juris**—Uhl v. Groner, 38 P.2d 130, 131, 140 Kan. 653, quoting **Corpus Juris.**
N.J.—Rank v. Kolmetsky, 148 A. 881, 106 N.J.Law 178—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.
Pa.—Gordon v. Kuemmerle, 19 Pa. Dist. & Co. 191.
Tex.—Challenge Co. v. Sartin, Civ. App., 260 S.W. 313.
Wis.—In re Kohl's Guardianship, 266 N.W. 800, 221 Wis. 385—Selleck v. Phelps, 11 Wis. 380.
23 C.J. p 357 note 91.

Judgments and decrees are not in and of themselves subject to seizure on execution.—Edwards v. Stein, 119 A. 504, 94 N.J.Eq. 251.

When property in custody of law
Property is in "custody of law" when it has been lawfully taken by authority of legal process, and remains in possession of public officer or court officer empowered by law to hold it.—Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

Property not in custodia legis
(1) Land controlled by court's appointee to carry out will is not in custodia legis as affects execution.—Brett v. Fielder, 277 P. 216, 136 Okl. 222.

(2) Goods levied on under landlord's distress warrant are not in custody of law to extent that they may not be levied on under execution by sheriff.—Sookiasian v. Swift & Co., 100 Pa.Super. 69.

(3) Appointment of receiver for defendant corporation in suit to assert debt against it, in which other creditors were enjoined against prosecuting suit against it, does not prevent creditor of plaintiff from taking judgment and execution lien against his property, although it may happen that only property he owns is debt against corporation on which he sued.—Ivory Hill Coal & Coke Co. v. Harrison-Barbour Coal Co., 133 S.E. 628, 101 W.Va. 728.

Property taken from prisoner
(1) Property, taken for safe-keeping while prisoner is in custody on criminal charge, may be subject to levy and sale under execution.—Fidelity & Casualty Co. v. Thumm, 172 N.E. 631, 35 Ohio App. 499.

(2) However, money taken from a prisoner has been held to be in the custody of the law, and not the subject of levy under attachment or execution.
Alaska.—Pioneer Min. Co. v. Tiberg, 4 Alaska 670.
Or.—Dahms v. Sears, 11 P. 891, 13 Or. 47.

(3) Motion for application to judgment of money found in defendant's possession when arrested held proper procedure.—McMillen v. Yost, 194 P. 938, 69 Colo. 462.

66. U.S.—Irving Trust Co. v. Spruce Apartments, D.C.Pa., 44 F.2d 218.
Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.
Cal.—McCracken v. Lott, 44 P.2d 355, 3 Cal.2d 164.
Mo.—Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

67. Colo.—Gibbons v. Ellis, 165 P. 783, 63 Colo. 76.
Fla.—Tippins v. Belle Mead Development Corporation, 150 So. 719, 721, 112 Fla. 372, citing **Corpus Juris.**
Wyo.—Tibbals v. Graham, 61 P.2d 279, 282, 50 Wyo. 277, quoting **Corpus Juris.**

The test of immunity of property in custodia legis from execution is whether substantial confusion or embarrassments to initial jurisdiction would result from enforcement of process against property by another tribunal.—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.

68. Wyo.—Tibbals v. Graham, 61 P.2d 279, 282, 50 Wyo. 277, quoting **Corpus Juris.**
23 C.J. p 358 note 93.

69. Colo.—Gibbons v. Ellis, 165 P. 783, 63 Colo. 76, reversing 145 P. 285, 26 Colo.App. 454.
Fla.—Tippins v. Belle Mead Development Corporation, 150 So. 719, 721, 112 Fla. 372, citing **Corpus Juris.**
Wyo.—Tibbals v. Graham, 61 P.2d 279, 282, 50 Wyo. 277, quoting **Corpus Juris.**

70. Neb.—Ryan v. Donley, 96 N.W. 49, 2 Neb., Unoff., 6.
23 C.J. p 358 note 95.

71. Neb.—Ryan v. Donley, supra.

72. Cal.—Hawi Mill & Plantation Co. v. Leland, 205 P. 485, 488, 56 Cal.App. 224, quoting **Corpus Juris.**
23 C.J. p 359 note 8.

73. La.—Gordon v. Johnston, 4 La. 304.
23 C.J. p 359 note 9.

74. Mass.—Miller v. London, 1 N.E.2d 198, 294 Mass. 300.

When the subject of the attachment is land, the giving of a bond by defendant in attachment under statute to pay such sum as shall be adjudged due to plaintiff, does not operate to preclude plaintiff from proceeding upon his judgment and execution subsequently recovered to

b. Property Held under Prior Writs

In many jurisdictions property once levied on is not liable to be taken by another execution, but in others property of a debtor in the custody of the law under prior writs is subject to levy.

By the great weight of authority property once levied on remains in the custody of the law and is not liable to be taken by another execution or process in the hands of a different officer, and especially by an officer acting under another jurisdiction.[75] However, if title to the property sold on execution becomes revested in the judgment debtor,[76] or if the officer holds the property as agent of the parties, and not in his official capacity,[77] it may be levied on. In some jurisdictions, by statute, property of a debtor in the custody of the law under prior writs is subject to levy under subsequent writs of execution, thus giving creditors priority, according to their diligence, in any interest the creditor may have in the property after the prior execution has been satisfied;[78] but where a second execution is levied it is subordinate to the interest of the party holding under a prior writ.[79]

Where original judgment is void. Since it is only where property is lawfully taken by virtue of legal process that it can be considered as being in the custody of the law, and not otherwise,[80] property of an execution defendant levied on and seized by an officer under execution issued on a void judgment will not prevent the seizure and sale of such property under a subsequent execution issued on a valid judgment;[81] but property seized under an execution valid on its face, issued on a judgment voidable but not void, is not subject to seizure under another execution,[82] although a void judgment or an illegal levy does not put the property in custodia legis so as to preclude a levy under another execution.[83]

Replevined property. Property taken under a writ of replevin from an officer who has seized it on execution remains in custodia legis and is not subject to execution.[84]

c. Money in Hands of Court or Officer

Money realized by an officer by virtue of an execution, or money paid into court, cannot be levied on as the property of the judgment creditor.

The doctrine is well settled that money realized by an officer by virtue of an execution, or money paid into court, cannot be levied on as the property of the judgment creditor, it being regarded as in custodia legis;[85] nor can money collected on an execution, in the hands of the officer and during the life of the execution and before its return, be applied by the officer in satisfaction of other writs in his hands against plaintiff in the execution,[86] although there is considerable authority to the contrary.[87] Application of proceeds of execution sale to the satisfaction of an execution against the execution creditor is considered infra § 248; and set off of executions infra § 335. Likewise money paid to a sheriff for the redemption of lands sold on execution is in the custody of the law, and cannot be levied on, although the person entitled to receive it refuses the money when ten-

sell the land.—Cowart v. Venable, 98 So. 219, 86 Fla. 367.

75. Fla.—Adams v. Burns, 172 So. 75, 126 Fla. 685.
Ga.—Barkley v. May, 59 S.E. 440, 3 Ga App. 101.
Ky.—Commonwealth v. Straton, 7 J. J.Marsh. 90.
23 C.J. p 358 note 97.

76. Ga.—Howard v. Jones, Ga.Dec. 1890 pt II.
La.—First Nat. Bank v. Powell, 58 So. 687, 130 La. 856.
23 C.J. p 358 note 98.

77. Miss.—Planters' Bank v. Black, 19 Miss. 43.

78. Tenn.—Sweetwater Bank & Trust Co. v. Howard, 13 Tenn.App. 592.
23 C.J. p 358 note 1.

79. La.—Henry v. Tricou, 36 La. Ann. 519.

80. Iowa.—Campbell v. Williams, 39 Iowa 646.
23 C.J. p 359 note 3.

81. Mo.—Burr v. Mathers, 51 Mo. App. 470.

82. Neb.—Pitkin v. Burnham, 87 N. W. 160, 62 Neb 385, 89 Am.S.R. 763, 55 L.R.A. 280.
23 C.J. p 359 note 5.

83. Neb.—Pitkin v. Burnham, supra.

84. Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.
23 C.J. p 359 note 7.

85. Fla.—Young v. Stoutamire, 179 So. 797, 131 Fla. 535—Hooker v Wiggins, 139 So. 803, 104 Fla. 355.
Idaho.—Anderson v. Ferguson, 57 P. 2d 325, 56 Idaho 554.
Mont.—Security State Bank of Havre v. McIntyre, 228 P. 618, 71 Mont. 186.
N.J.—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.
Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.
23 C.J. p 359 note 10.

Money held not in custody of law

(1) Where, in action to set aside execution sale, plaintiffs voluntarily tendered to clerk of court amount required to satisfy judgment on which execution had been issued, money was held not in custody of the law, so as to be exempt from levy by another judgment creditor. —Colver v. W. B. Scarborough Co., 238 P. 1110, 73 Cal.App. 455.

(2) Moneys defendant in mechanic's lien suit owed creditor were not exempt from levy by execution.—Rank v. Kolmetsky, 148 A. 881, 106 N.J.Law 178.

Enforceable by court having control of fund

Levy on money in custodia legis is valid and enforceable by court having control of fund although not enforceable by court issuing writ under which levy is made.—Bernstein v New Jersey Bankers' Securities Co., 171 A. 145, 115 N.J.Eq. 347.

86. U.S.—Turner v. Fendall, D.C., 1 Cranch 117, 2 L.Ed. 53.
23 C.J. p 359 note 11.

87. Tex.—Mann v. Kelsey, 12 S.W. 13, 71 Tex. 609, 10 Am.S.R. 800.

Corpus Juris cited as showing that the authorities are in conflict upon

dered by the sheriff.[88] Property vested in the sheriff as trustee in insolvency, under state laws, is not subject to execution on a judgment against the insolvent.[89]

Liability for debts of debtor under junior execution. The doctrine seems to be, by analogy of reasoning, that money remaining in the hands of the court or court officer, after satisfaction of the execution, by virtue of which it was realized, is not subject to seizure under a junior execution against the execution debtor,[90] although in some jurisdictions such surplus must be paid over to an officer who holds other executions against the property sold,[91] or it may be applied on a second execution in the hands of the officer,[92] or it is subject to seizure under a subsequent execution against the debtor.[93] Where money is paid to the sheriff it cannot be reached by an older execution against the debtor.[94]

Liability for debts of officer. Money in the hands of or deposited by an officer in his official capacity, realized by virtue of an execution placed in his hands, is not liable to seizure and sale under an execution against him personally.[95]

III. ISSUANCE, FORM, AND REQUISITES OF WRIT

§ 56. Jurisdiction and Authority to Issue and Control

a. Courts
b. Clerks of court

a. Courts

In the absence of statute to the contrary, execution may be issued only by the court which rendered the judgment or by a court to which the record has been transferred.

The power of the state courts in general to issue executions is derived from statutory enactments,[96] and, in the absence of statute, is conferred by the common law.[97]

A court competent to pronounce judgment is generally competent to issue execution.[98] The writ must, however, be issued out of the court which rendered the judgment, unless some other court is authorized by statute to issue it,[99] or unless the record has been removed into another court, in which case the court having the record may issue the writ.[1] Writs issued out of a court other than that which rendered the judgment, or into which the record has been removed, are void.[2]

Courts of concurrent jurisdiction. It is immaterial that the court which rendered the judgment and another court are courts of concurrent jurisdiction, both sitting in the same county; each must enforce its own judgments and decrees.[3]

Abolition of court. Where a court is abolished by an act of the legislature and its jurisdiction transferred to another court, an execution issued out of the court so abolished is absolutely void, and a sale thereunder is therefore a nullity.[4]

this question.—Cooper v. Potter, 137 S.W.2d 276, 175 Tenn. 664.

88. Minn.—Davis v. Seymour, 16 Minn. 210.

89. Va.—Penn v. Spencer, 17 Gratt. 85, 58 Va. 85, 91 Am.D. 375, following Clough v. Thompson, 7 Gratt. 26, 48 Va. 26.

90. Cal.—Withington v. Shay, App., 117 P.2d 415, hearing denied, Sup., 119 P.2d 1.
23 C.J. p 359 note 16.

91. Mass.—Denny v. Hamilton, 16 Mass. 402.

92. Pa.—Smyth v. Levy, 6 Pa.Super. 23, 41 Wkly.N.C. 291.
Tex.—Turner v. Gibson, Civ.App., 152 S.W. 839.

93. W.Va.—Wiant v. Hays, 18 S.E. 807, 38 W.Va. 681, 23 L.R.A. 82.
23 C.J. p 360 note 19.

94. Ga.—Carhart v. Grier, 56 Ga. 383.

95. La.—Folger v. Marigney, 11 La. Ann. 727.

96. Pa.—Bouslough v. Bouslough, 68 Pa. 495.
Va.—Coleman v. Cocke, 6 Rand. 618, 27 Va. 618, 18 Am.D. 757.

97. Va.—Coleman v. Cocke, supra.
Inherent power of courts to enforce judgments see the C.J.S. title Judgments § 585, also 34 C.J. p 737 note 83 et seq.

98. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230—People v. Wallace, 163 N.E. 820, 332 Ill. 427, reversing 247 Ill.App. 571.
Ky.—Ruth v. Robinson, 106 S.W.2d 91, 94, 268 Ky. 843, quoting **Corpus Juris.**
23 C.J. p 362 note 67.

Judge at chambers
Circuit judge had jurisdiction at chambers to issue process for purpose of carrying judgment into effect.—Pates & Allen Co. v. Bowen, 89 S.E. 356, 104 S.C. 390.

Necessity for motion
Court may issue execution without motion, unless execution is stayed by sufficient undertaking.—Howland v. Scott, 9 P.2d 824, 215 Cal. 301.

99. U.S.—Lahman v. Supernaw, D.C. Okl., 47 F.2d 610.
Ill.—People v. Wallace, 163 N.E. 820, 332 Ill. 427, reversing 247 Ill.App. 571.
23 C.J. p 363 note 68.

1. Mich.—Altman v. Johnson, 2 Mich N.P. 41.
Issuance on:
Judgment on appeal from justice see infra § 62.
Transcript of inferior court see infra § 61.

Docketed in other court
The circuit court in which a judgment is obtained has the exclusive right to issue execution on such judgment, unless judgment is docketed in the supreme court.—Epstein v. Bendersky, 21 A.2d 815, 130 N.J. Eq. 180.

2. Okl.—Williams v. Ross, 223 P. 137, 97 Okl. 119.
23 C.J. p 363 note 70.

3. Okl.—Chandler v. Colcord, 32 P. 330, 1 Okl. 260.

4. Ill.—Harris v. Cornell, 80 Ill. 54.
23 C.J. p 363 note 80.

A court which succeeds to the jurisdiction of the abolished court usually has jurisdiction to issue execution on the judgment rendered by the abolished court,[5] on compliance with statutory conditions,[6] although some statutes abolishing courts have been held not broad enough to warrant the issuance of execution from the court succeeding to the jurisdiction of the abolished court.[7]

b. Clerks of Court

(1) In general
(2) Authority from creditor
(3) Refusal or failure to issue

(1) In General

In the absence of statute to the contrary, an execution on a judgment of a court of record may be issued by the clerk of the court, or by a person to whom the clerk has properly delegated his authority.

In the absence of statutory designation of the officer or person who may or must issue execution, the general rule is that the judge or justice of an inferior court which has no clerk shall issue it, while if the court has a clerk it shall be issued by the clerk.[8] It follows that generally, in courts of record, the clerk of the court is the proper officer to issue execution.[9] Further, as a general rule an execution should be issued only by the clerk of the court in which the judgment was rendered,[10] unless jurisdiction of the matter has been transferred, by statute, to another court.[11]

The clerk of court has no authority to issue execution, except on a judgment[12] which remains unsatisfied.[13] Where, however, satisfaction is not entered on the record, an execution issued is not void but only voidable.[14] The clerk can issue only the form of writ prescribed by the judgment, where a form is prescribed.[15]

If a party against whom judgment has been recovered appeals from the clerk's taxation of costs, the clerk has no right to issue execution until the question has been settled by a judge according to usage.[16]

Delegation of authority. It is not indispensable to the regularity of an execution that the ministerial act of issuing it should be performed by the clerk of the court or his duly qualified deputy, where the officer may delegate his authority.[17] Where, however, the clerk of the court is the only person authorized to issue an execution, one issued by an attorney is invalid.[18]

(2) Authority from Creditor

In the absence of statute to the contrary, the clerk of court has no authority to issue execution without the direction of the judgment creditor or his attorney or assignee.

Unless authorized by statute,[19] the clerk has no power to issue an execution without the direction of the judgment creditor or his attorney, because the clerk is not a party to the judgment and has no control over it.[20] The clerk has no right to issue an execution of his own motion[21] in order to collect his fees,[22] or to issue execution for the benefit or at the suggestion of interested parties, other

Execution sales see infra §§ 196–252.

5. Kan.—Hansford v. Burdge, 55 P. 472, 5 Kan.App. 162.
23 C.J. p 363 note 80.

6. Tex.—Richards v. Belcher, 25 S. W. 740, 6 Tex.Civ.App. 284.
23 C.J. p 363 note 82.

7. Ga.—Martin v. Craven, 55 S.E. 962, 126 Ga. 780.
23 C.J. p 363 note 83 [a].

8. Philippine.—Hidalgo v. Crossfield, 17 Philippine 466.

9. Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109.
23 C.J. p 363 note 85.

10. Wyo.—Wyoming Central Irr. Co. v. Laporte, 188 P. 360, 26 Wyo. 522.
23 C.J. p 363 note 86.

11. Tex.—Masterson Irr. Co. v. Foote, Civ.App., 163 S.W. 642.
23 C.J. p 363 note 87.

12. La.—Strother v. Richardson, 30 La.Ann. 1269.
23 C.J. p 364 note 88.

Judgment or decree as basis for execution see supra §§ 5–10.

13. Or.—Snipes v. Beezley, 5 Or. 420.
23 C.J. p 364 note 89.

14. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420—Boren v. McGehee, 6 Port. 432, 31 Am.D. 695.

15. Tenn.—Hurst v. Liford, 11 Heisk. 622.
23 C.J. p 364 note 92 [a].

16. Mass.—Winslow v. Hathaway, 1 Pick. 211.

17. Ala.—McMahan v. Colclough, 2 Ala. 68.
23 C.J. p 365 note 9.

Oral delegation
The delegation of power may be oral.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.

18. N.Y.—Thompson v. Jenks, 2 Abb.Pr.,N.S., 229.

19. Ga.—Byers v. Black Motor Co., 16 S.E.2d 478, 65 Ga.App. 773.
23 C.J. p 364 note 94.

Instructions by third person
As superior court clerk had right to perform ministerial act of issuing execution in the test of judge of such court after verdict and judgment thereon, without instruction by corporate plaintiff in judgment to do so, fact that corporation's stockholder requested its issuance did not invalidate execution.—Byers v. Black Motor Co., supra.

20. Ala.—Bradford v. Carson, 137 So. 426, 428, 223 Ala. 594, citing **Corpus Juris**—Kaplan v. Potera, 105 So. 177, 213 Ala. 334.
Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109.
Va.—Fitzgerald v. Campbell, 109 S. E. 308, 310, 131 Va. 486, citing **Corpus Juris.**
23 C.J. p 364 notes 94, 95, 99.

21. Mo.—People's Sav. Bank v. McDowell, App., 204 S.W. 406.
23 C.J. p 364 note 95.

22. Ill.—Wickliff v. Robinson, 18 Ill. 145.

than the party obtaining the judgment.[23] A party is not bound by a proceeding under an execution issued without his authority or that of his attorney,[24] even though it is the custom of the clerk to issue execution without such authority.[25] In the absence of proof, however, it will be presumed that the clerk issued an execution under the direction of the person who had control of it.[26]

Application by attorney. The issuance of an execution is not such an act as requires the direct agency of the attorney of record, and plaintiff may himself order the clerk to issue an execution;[27] or the application may be made through any attorney or agent.[28]

Assignee of judgment. It is the duty of the clerk to issue an execution on the demand of an assignee of the judgment, on the production by such assignee of sufficient evidence of his ownership.[29]

Ratification of unauthorized issuance. The issuance of an execution without the order of the party entitled thereto may be ratified by him, and, if he acquiesces in the issuance of the writ, the irregularity will be deemed to have been waived.[30]

(3) Refusal or Failure to Issue

Where the record of the court shows a proper judgment or decree authorizing it, the clerk of court must, on application by the proper party, issue a writ of execution.

It is the duty of the clerk to issue a writ of execution on the oral or written demand or request of the holder of the judgment,[31] specifying, where there is a choice, the particular kind of writ desired.[32] The issuance of an execution is a ministerial duty;[33] and if the application for the writ proceeds from a proper party the clerk has no judicial discretion to exercise, and the only inquiry he can make is whether the record of the court shows a judgment or decree authorizing the issuance of the writ.[34] The difficulty of executing the judgment because of the uncertainty of the decree is no concern of his.[35] Likewise it is no concern of the clerk that plaintiff applied for his execution after a long delay, if the application was made within the period of the statute of limitations.[36]

Remedy for refusal. The usual remedy for the wrongful failure or refusal of the clerk to issue execution is mandamus, see the C.J.S. title Mandamus § 97, also 38 C.J. p 638 note 3 et seq, or an action on the official bond of the clerk.[37] In some states an appeal may be taken from the clerk's refusal, which appeal can be heard at chambers in another county.[38]

§ 57. Conditions Precedent

On issuing execution, conditions precedent prescribed by statute or by the judgment must be complied with.

Compliance must be had with the provisions of statutes, or with the terms of the judgment, specifying the conditions under which an execution may be issued.[39]

§ 58. —— Notice and Demand

In the absence of statute it is not necessary that, prior to the issuance of a writ of execution, notice be given to the adverse party although in some jurisdictions it has been held necessary that a demand for payment be made.

There is authority that it is not necessary that a demand for payment be made prior to the issu-

23. Mo.—People's Sav. Bank v. McDowell, App., 204 S.W. 406.

24. Va.—Fitzgerald v. Campbell, 109 S.E. 308, 310, 131 Va. 486, quoting **Corpus Juris.**

25. Mo.—Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

26. Ill.—Niantic Bank v. Dennis, 37 Ill. 381.
23 C.J. p 364 note 4.

27. Cal.—Jones v. Spears, 56 Cal. 163.

28. Mo.—Davis v. McCann, 44 S.W. 795, 143 Mo. 172.
23 C.J. p 364 note 6.

29. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 32, 22 Tenn.App. 443, citing **Corpus Juris.**
23 C.J. p 365 note 7.

30. Ind.—Johnson v. Murray, 13 N. E. 273, 112 Ind. 154, 2 Am.S.R. 174.
23 C.J. p 365 note 8.

31. Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109.
23 C.J. p 365 notes 12, 13.

32. Vt.—Smith v. Howard, 41 Vt. 74.
23 C.J. p 365 note 14.

33. Cal.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737—Adams v. Bell, 27 P.2d 757, 758, 219 Cal. 503, citing **Corpus Juris.**
Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
23 C.J. p 365 note 16.

34. Cal.—Adams v. Bell, 27 P.2d 757, 219 Cal. 503.
23 C.J. p 365 note 17.

35. Ky.—Burton v. McFarland, 3 Ky.L. 536, 11 Ky.Op. 428.
23 C.J. p 365 note 18.[a].

36. Mo.—State v. Renick, 57 S.W. 713, 157 Mo. 292.

37. Cal.—Miller v. Sanderson, 10 Cal. 489.
23 C.J. p 365 note 21.

38. N.C.—McCaskill v. McKinnon, 28 S.E. 265, 121 N.C. 192, 61 Am.S. R. 659.

39. Neb.—General Car Advertising Co. v. Barnebey, 270 N.W. 318, 131 Neb. 850.
Okl.—Jarecki Mfg. Co. v. Fleming, 38 P.2d 925, 170 Okl. 70—Williams v. Ross, 223 P. 137, 97 Okl. 119.
Pa.—City of Philadelphia v. Lotter, 32 Pa.Dist. & Co. 169—Bernecker, to Use, v. Litzenberger, 20 Pa.Dist. & Co. 288—Logan v. Griffin, 11 Pa. Dist. 454, 26 Pa.Co. 238—Newpher v. Becker, 52 York Leg.Rec. 103.
23 C.J. p 366 note 23.
Effect of death of parties after judgment see infra § 65.

Quashing of venditioni exponas was not necessary before execution could issue on judgment.—Lansdale v. Findley, Hard., Ky., 151.

ance of an execution;[40] but in some jurisdictions, and under certain circumstances, execution will not be allowed to issue until after a demand for satisfaction of the debt.[41]

Notice. In the absence of statute, no notice is necessary before issuing an execution, since it is assumed that defendant will take notice of what will follow the judgment;[42] but a defendant cannot complain that he had notice.[43]

Under some statutes, however, notice of judgment must be served on the party against whom it is rendered before the writ can issue.[44] Thus under some statutes notice must be given where an execution against real estate is issued to a county other than that in which defendant resides;[45] but a sale of land under execution without notice to the judgment debtor who is a nonresident of the county is not necessarily void.[46]

§ 59. —— Leave of Court

a. Necessity
b. Procedure to procure

a. Necessity

(1) In general
(2) Lapse of time
(3) Effect of failure to obtain

(1) In General

In the absence of statute requiring it, leave of court is ordinarily unnecessary to authorize the issuance of an execution on an unconditional judgment.

In the absence of statutory provision requiring it, leave of court is ordinarily not necessary to authorize the issuance of an execution,[47] at least where execution is authorized in the judgment;[48] and an application for leave of court which is not required is not an election of remedies depriving the creditor of the right to issue execution without leave.[49]

Some statutes, however, prohibit the issuance of an execution without an order of court, which provisions are usually applicable to special executions or executions which are sought by plaintiff before the usual time for their issuance;[50] and a judgment which has been opened to let in a defendant cannot be enforced by execution without special leave of court.[51]

Conditional judgment. Where the judgment under which execution is sought is conditional, the authorities appear not to be in entire harmony as to the necessity for obtaining leave of court.[52]

40. Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S. W.2d 1112.

41. Wis.—Eaton v. Youngs, 41 Wis. 507.

Execution against corporation
Pa.—Hassall v. Union Canal Co., 2 Pa.Co. 147.

Absence of demand as affecting costs
The objection that a demand was not made before issuing execution affects only the costs and then only in case the money has been tendered. —Adams v. Tracy, 13 Mo.App. 579.

42. Cal.—Foster v. Young, 156 P. 476, 172 Cal. 317.
23 C.J. p 366 note 27.

Execution on report of referee
cannot issue before notice to the adverse party or until the expiration of four days.—Barre v. Affleck, 2 Yeates, Pa., 274.

43. U.S.—Ferguson v. Baron, Pa., 2 Dall. 113, 1 L.Ed. 311.

44. La.—Metairie Bank in Liquidation v. Lecler, App., 4 So.2d 573.
23 C.J. p 366 note 29.

Purpose of notice
Under statute providing that where judgment has been rendered against a defendant on whom personal service was not made, execution cannot issue until expiration of ten days counting from the notification, the requirement that such notice be given was not intended to give to defendant any right to set up any defense which should have been resorted to prior to judgment but to give him only those rights which are accorded to any defendant against whom there has been rendered a judgment which is final so far as court which rendered it is concerned, and which may be revised, set aside or reversed only in one of the statutory methods.—Metairie Bank in Liquidation v. Lecler, supra.

Notice dispensed with
Where judgment was rendered under Mexican rule, and in November, 1897, defendant brought suit to enjoin execution, in which injunction was dissolved, defendant having had his day in court, execution could issue without scire facias or other notice required by Act Congr. of the Republic, Dec. 29, 1837 (1 Cammel L. p 1462).—Clements v. Texas Co., Tex.Civ.App., 273 S.W. 993.

45. Mo.—Dougherty v. Gangloff, 144 S.W. 434, 239 Mo. 649.
23 C.J. p 366 note 33.

46. Mo.—Hobein v. Murphy, 20 Mo. 447, 64 Am.D. 194.

47. Ohio.—Kentucky Joint Stock Land Bank of Lexington, Ky., v. Hellriegel, 18 N.E.2d 620, 59 Ohio App. 467.
23 C.J. p 367 note 36.

After dissolution of injunction against execution
Where the collection of a judgment at law has been enjoined and the injunction has been subsequently dissolved, leave of court for issuance of an execution on the judgment at law is not necessary.—Young v. Davis, 1 T.B.Mon., Ky., 152 —23 C.J. p 367 note 40.

Installment payments
Where a judgment is entered on a bond or note payable in installments, leave of court is not necessary for the issuance of execution for the installments as they become due.—Chambers v. Harger, 18 Pa. 15—23 C.J. p 367 note 41 [a].

48. N.Y.—Parascandola v. Auditore, 213 N.Y.S. 463, 215 App.Div. 277, appeal dismissed 152 N.E. 432, 242 N.Y. 571.

49. N.Y.—Cooper v. Bailey, 74 N.Y. S. 667, 69 App.Div. 358.

50. Va.—Shackelford v. Apperson, 6 Gratt. 451, 47 Va. 451.
23 C.J. p 367 note 37.

51. Pa.—Savage v. Kelly, 11 Phila. 525.

52. Cal.—Adams v. Bell, 27 P.2d 757, 758, 219 Cal. 503, citing **Corpus Juris.**

According to some authorities a judgment rendered on a condition may not be enforced without special leave,[53] but according to other authorities it would appear that such leave is not essential.[54] At any rate, in such case the better and safer practice would seem to be to present to the court the facts showing nonfulfillment of the condition, and obtain an order of court directing the issuance of the execution.[55]

(2) Lapse of Time

Where the time to issue executions as of course, as prescribed by statute or fixed by the common law, has elapsed, leave of court is necessary to authorize an execution.

Where the time to issue executions as of course, as prescribed by statute or fixed by the common law, has elapsed, leave of court is necessary, by statute in many jurisdictions, to authorize an execution.[56] The fact that plaintiff has brought an action on his judgment and recovered a new judgment thereon does not prevent his obtaining leave to issue execution on a dormant judgment.[57]

Generally the granting or denial of the motion for leave is discretionary[58] and each case must be decided on its own facts.[59] Such discretion must, however, be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice;[60] and where the judgment is wholly unpaid the court under some circumstances has no discretion to deny the motion.[61] Where execution could not have been issued within the period prescribed, and where the statute of limitations has not barred the judgment or a considerable portion thereof, the issuance of an execution is regarded more as a matter of right than of judicial discretion, except in the face of unusual circumstances.[62]

A motion for leave to issue within the required time, to which motion the attention of the court was not called until after the statutory period had run, has been denied on the ground that it was the business of plaintiff to see that the motion was called to the attention of the court and acted on within the statutory period.[63] In those jurisdictions where leave of court is required for issuance after a certain period from the rendition of the judgment, leave of court will not be granted where the period of limitation of the life of the

53. Pa.—Triveley v. Krouse, 2 Pa. Com.Pl. 254.

Release on contingency

Where a judgment is to be released on performance of a certain act by defendant, leave of court is not necessary to the issue of an execution, if the act has not been performed within a reasonable time. —Miller v. Milford, 2 Serg. & R., Pa., 35.

54. **Judgment to be satisfied in part by note**

Where a decree was rendered for a specific sum of money, with leave to defendant to satisfy the same by paying a part thereof in cash and giving his note with security for the balance, on the failure of defendant to comply with the terms of the decree, plaintiff had a right to enforce it by having an execution issued without any further order or decree of the court.—Coulter v. Lumpkin, 21 S.E. 461, 94 Ga. 225.

55. Cal.—Adams v. Bell, 27 P.2d 757, 219 Cal. 503.

Assuming that clerk has authority to ascertain the facts concerning the fulfillment of the condition, the proof thereof must necessarily be factual and complete.—Adams v. Bell, supra.

56. N.Y.—Partridge v. Moynihan, 110 N.Y.S. 539, 59 Misc. 234.
Or.—Murch v. Moore, 2 Or. 189.
23 C.J. p 367 note 44.
Time for issuance of execution see infra § 66.

57. N.Y.—Small v. Wheaton, 2 Abb. Pr. 316.

58. Cal.—Saunders v. Simms, 190 P. 806, 183 Cal. 167—Atkinson v. Atkinson, 96 P.2d 824, 35 Cal.App.2d 705—Greeley v. Suey Sing Benev. Ass'n, 83 P.2d 54, 28 Cal.App.2d 536—McClelland v. Shaw, 72 P.2d 225, 23 Cal.App.2d 107—Mohr v. Riccomi, 58 P.2d 659, 14 Cal.App. 2d 416.
N.Y.—Manger v. Golding, 210 N.Y.S. 703, 214 App.Div. 786—Schiller v. Weinstein, 94 N.Y.S. 763, 47 Misc. 622.
23 C.J. p 368 note 51.

Mere lapse of time after entry of judgment does not deprive the trial court of power to order issuance of execution.—Bank of America N. T. & S. A. v. Katz, 113 P.2d 759, 45 Cal. App.2d 138—Faias v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal.App. 525—Welk v. Conner, 282 P. 963, 102 Cal.App. 286—23 C.J. p 368 note 52 [a].

Effect of denial of motion

Judgment creditor is not necessarily prejudiced by denial of motion for leave to issue execution after lapse of five years, since he may bring action on judgment.—Manger v. Golding, 210 N.Y.S. 703, 214 App. Div. 786.

59. Cal.—Brown v. Newby, 103 P.2d 1018, 39 Cal.App.2d 615.

Motion held properly granted

Cal.—Brown v. Newby, supra—Peers v. Stoll, 90 P.2d 119, 32 Cal.App.2d 511—Greeley v. Suey Sing Benev. Ass'n, 83 P.2d 54, 28 Cal.App.2d 536—Corcoran v. Duffy, 64 P.2d 735, 18 Cal.App.2d 658—Mohr v. Riccomi, 58 P.2d 659, 14 Cal.App. 2d 416—Blumer v. Madden, 16 P. 2d 319, 128 Cal.App. 22.

Motion held properly denied

Cal.—Keil v. Gray, 82 P.2d 471, 28 Cal.App.2d 297.

Motion held improperly denied

Cal.—Passow v. Bell, 81 P.2d 224, 27 Cal.App.2d 360—McClelland v. Shaw, 72 P.2d 225, 23 Cal.App.2d 107.

60. Cal.—Atkinson v. Atkinson, 96 P.2d 824, 35 Cal.App.2d 705—Keil v. Gray, 82 P.2d 471, 28 Cal.App. 2d 297—City of Los Angeles v. Forrester, 55 P.2d 277, 12 Cal. App.2d 146—Demens v. Huene, 265 P. 389, 89 Cal.App. 748.
23 C.J. p 368 note 52.

61. **Execution withheld in debtor's interest**

Where judgments are for money only and are wholly unpaid, and execution has been previously withheld in the interest of the judgment debtor, which is in financial difficulties, the court has no discretion to deny motions for leave to issue execution more than five years after the judgments were entered.—Application of Molnar, 1 N.Y.S.2d 866, 253 App.Div. 895.

62. Cal.—Atkinson v. Atkinson, 96 P.2d 824, 35 Cal.App.2d 705.

63. Mont.—Peters v. Vawter, 25 P. 438, 10 Mont. 201.

judgment has run.[64] Leave to issue execution after the lapse of the prescribed period should be denied where an agreement has been made between the parties and carried out.[65]

(3) Effect of Failure to Obtain

Execution issued without leave of court, when leave should be obtained, is ordinarily considered voidable and not void.

While execution issued without leave of court, when leave should be obtained, has been held void,[66] ordinarily the writ is deemed voidable and not void[67] and objection thereto can be raised, not by another creditor, but only by the debtor.[68]

b. Procedure to Procure

(1) At common law
(2) Under statute

(1) At Common Law

Scire facias was the proper proceeding at common law when leave was necessary to issue execution.

Scire facias was the proper proceeding at common law when leave was necessary to issue execution.[69] Scire facias to show cause why an execution should not be issued may be served on the judgment defendant alone if alive, and if dead on his executors or administrators,[70] or on his heirs or terre-tenants, as the occasion may require.[71] The defendant could plead to a scire facias;[72] and, since the object of the scire facias was merely to give defendant a day in court to show cause, defendant might waive this benefit.[73]

(2) Under Statute

(a) In general
(b) Matters considered

(a) In General

Compliance must be had with statutes prescribing the procedure to be followed in obtaining leave of court to issue an execution.

Other forms of proceedings for obtaining execution have been substituted by statute for the old proceeding by scire facias,[74] and such statutes must be complied with.[75] A motion for an order directing execution to issue, made after the termination of the period within which execution would have issued as of course, is not an action to revive a judgment, but a step in an action already commenced.[76]

Time for application. Leave of court must be applied for within the time fixed by statute.[77] The statute may permit the application to be made in vacation when sufficient reason therefor is shown to exist.[78]

Parties. An application for leave to issue execution may be made by the assignee in the name of the judgment creditor unless he objects.[79] The executrix of a deceased person may join with the survivor in an application for leave to issue after five years.[80]

Application. Under some statutes no formal pleadings are necessary in proceedings to obtain leave of court by motion;[81] but other statutes require that a petition for leave should be properly

64. N.C.—Berry v. Corpening, 90 N. C. 395.
23 C.J. p 367 note 47.

65. **Five years**
N.Y.—Manger v. Golding, 210 N.Y.S. 703, 214 App.Div. 786.

66. N.C.—Lytle v. Lytle, 94 N.C. 683.
23 C.J. p 368 note 61.

67. Wis.—Jones v. Davis, 22 Wis. 421.
23 C.J. p 368 note 63.

68. Pa.—Sherrard v. Johnson, 44 A. 252, 193 Pa. 166, 74 Am.S.R. 680.

69. Ind.—Gibson v. Green, 22 Ind. 422.
23 C.J. p 368 note 65 [a], [b].

70. Pa.—Righter v. Rittenhouse, 3 Rawle 273.

71. Ind.—Elliott v. Moore, 5 Blackf. 270.
23 C.J. p 369 note 67.

72. Ind.—Hoagland v. Roe, 8 Ind. 275.
23 C.J. p 370 note 91.

73. Va.—Beale v. Botetourt, 10 Gratt. 278, 51 Va. 278.

74. Ind.—Gibson v. Green, 22 Ind. 422.
23 C.J. p 369 note 70.

75. N.Y.—Lyons Nat. Bank v. Shuler, 101 N.Y.S. 62, 115 App.Div. 859.

76. Cal.—Peers v. Stoll, 90 P.2d 119, 32 Cal.App.2d 511.

77. **Ten years**
S.C.—First Nat. Bank v. Carolina Midland Warehouse Co., 82 S.E. 405, 98 S.C. 168.

78. Mich.—Christler v. Locke, 61 N. W. 263, 103 Mich. 86, 87.
23 C.J. p 369 note 74.

79. N.Y.—Wilgus v. Bloodgood, 33 How.Pr. 289.
23 C.J. p 369 note 71 [a].

Addition of names of successive assignees of plaintiff's claim did not vitiate latter's motion for execution on judgment for her.—Troy v. Troy, 16 P.2d 290, 127 Cal.App. 489.

Assignment of decree to one paying indebtedness
Where decree was rendered against individual defendant primarily and against banking company secondarily and trust company, assuming liabilities of banking company, paid decree and took an assignment thereof, the trust company could file motion for decree over against individual defendant and for issuance of execution and give individual defendant notice.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

80. N.Y.—In re Armstrong, 71 N.Y. S. 951, 35 Misc. 327.
23 C.J. p 369 note 72.

81. Ind.—Plough v. Reeves, 33 Ind. 181.
23 C.J. p 370 note 89.

Effect of pleadings
Although a statute which regulates the practice neither contemplates nor requires the use of pleadings on the hearing, yet the fact that the lower court determined the question on pleadings is not a ground for error.—Van Devanter v. Nixon, 21 N.E. 203, 5 Ind.App. 304.

Pleading payment
Under a former practice in some of the states, defendant might appear and, in answer to a motion for

verified.[82] An application by one not plaintiff for leave to issue execution, which avers that the applicant owns the judgment, is sufficient without setting out the facts supporting that conclusion.[83] The irregularity caused by the omission to state that the judgment was rendered in the court in which the motion is made is cured by a finding to that effect.[84]

A defect in the form or in the substance of an affidavit required by statute to accompany a motion to issue execution does not affect the jurisdiction of the court to hear the motion, but it is sufficient ground for denial of the motion unless it is cured by evidence taken at the trial.[85] The affidavit need not set forth the judgment or a copy of it;[86] it is necessary and sufficient that it show that the judgment remains wholly or partly unsatisfied.[87]

Notice of motion. Notice of the motion for leave to issue execution is ordinarily necessary,[88] although under some statutes it may be made without notice,[89] where the clerk refuses to issue execution.[90]

Service of notice of the motion is sufficient where made on the attorney for the judgment debtor, or on the attorney for the executor of such debtor.[91]

(b) Matters Considered

On a hearing to determine whether execution shall issue, the main consideration is whether or not the judgment has been satisfied.

On application for leave to issue execution the validity of the judgment and the proceedings leading up to it cannot be questioned.[92] Only circumstances arising after entry of judgment can be considered.[93] The sole question as to the judgment usually is whether or not it has been satisfied;[94] and execution cannot issue unless the judgment plaintiff establishes by satisfactory evidence that the judgment or a part thereof remains unpaid.[95] However, the court may consider matters rendering the enforcement of the judgment inequitable.[96] Conflicts in the evidence are addressed to the trial

leave to issue execution on a dormant judgment, might plead payment in satisfaction of the judgment.—Reeves v. Plough, 46 Ind. 350, limiting Plough v. Reeves, 33 Ind. 181.

82. N.Y.—Matter of Howell, 2 Redf. Surr. 299.

83. Ind.—Martin v. Orr, 96 Ind. 491.

84. Ind.—Van Devanter v. Nixon, 31 N.E. 203, 5 Ind.App. 304.

85. Cal.—Bennett v. Johansen, 103 P.2d 1011, 39 Cal.App.2d 572.

86. Ind.—Verden v. Coleman, 23 Ind. 49.

87. Cal.—Brown v. Pacific Coast Agency, 200 P. 977, 53 Cal.App. 788.
23 C.J. p 369 note 77.

Stating excuse for failure to issue execution earlier

Affidavit in support of motion for an order directing execution to issue on a judgment nineteen years after it was entered was not defective in failing to set forth excuse for not taking out execution within five years after entry of the judgment.—Peers v. Stoll, 90 P.2d 119, 32 Cal.App.2d 511.

88. Iowa.—McConkie v. Landt, 101 N.W. 1121, 126 Iowa 317.
23 C.J. p 369 note 83.

In California

(1) Under statute, notice of motion for leave to issue execution is necessary.—McColgan v. Scoble, 111 P.2d 2, 43 Cal.App.2d 335.

(2) Prior to the enactment of the statute the court had authority to grant the writ on an ex parte motion.

U.S.—In re Rebman, Cal., 150 F. 759, 80 C.C.A. 594.

Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509 —Doehla v. Phillips, 91 P. 330, 151 Cal. 488.
23 C.J. p 370 note 84 [a].

Setting aside fraudulent conveyance as motion for leave

An action to set aside a fraudulent conveyance, so that the property may be subjected to the execution of a judgment more than twenty years old, is not a proceeding, under Burns St.Annot.1914 § 717, providing that execution on a judgment over ten years old may be had only on motion after ten days' notice to the adverse party, and a showing that it has not been paid.—Pensinger v. Jarecki Mfg. Co., 136 N.E. 641, 78 Ind.App. 569.

89. U.S.—Bayley v. Davis, D.C.Or., 215 F. 165.
23 C.J. p 370 note 84 [b].

90. Va.—Commonwealth v. Hewitt, 2 Hen. & M. 181, 12 Va. 181.

91. Cal.—McColgan v. Scoble, 111 P. 2d 2, 43 Cal.App.2d 335.

Service held proper and sufficient

Cal.—Widener v. Hartnett, 85 P.2d 925, 30 Cal.App.2d 165.

N.C.—Surratt v. Crawford, 87 N.C. 372.
23 C.J. p 369 note 83 [b].

Service held insufficient

Cal.—McColgan v. Scoble, 111 P.2d 2, 43 Cal.App.2d 335.

92. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

Pa.—Newpher v. Becker, 52 York Leg Rec. 103.
23 C.J. p 370 note 92.

93. Cal.—Weldon v. Rogers, 115 P. 464, 159 Cal. 700.
23 C.J. p 370 note 93.

94. N.Y.—Schaie v. Zuchtman, 197 N.Y.S. 149, 203 App.Div. 612.
23 C.J. p 370 note 94.

95. N.Y.—Partridge v. Moynihan, 110 N.Y.S. 539, 59 Misc. 234.
23 C.J. p 370 note 95.

Ex parte statements

On a hearing to determine whether to discharge a rule to show cause why an order should not be made directing the issuance of execution, the proofs on which the order issued were exhausted, and it was not the function of the court to make comparisons of ex parte statements made in the briefs of the respective parties in order to extract from them such points of agreement as would be sufficient to form a composite factual basis for decision.—Hunterdon County Nat. Bank of Flemington v. Packer, 5 A.2d 694, 122 N.J.Law 377, affirming 1 A.2d 17, 121 N.J.Law 24.

Other suit pending

If another suit by other parties is pending, involving petitioner's right to a decree, the petition is properly dismissed.—Reese v. Waller, 45 So. 468, 154 Ala. 453.

96. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

court.[97]

It is no defense that an attachment had once been issued, the lien of which had ceased.[98] If the party against whom it is moved to have execution issue shows that he is the owner of a judgment against the movant, the court may require the former to make a motion to set off his judgment against the one on which execution is sought;[99] but if the movant on applying for execution complies with the requirements of the code, the court cannot, on mere proof of the existence of another judgment of which the party against whom it is moved to have execution is the owner, deny the application for execution.[1]

If the application is for a special execution, extrinsic evidence is admissible to show that particular property is liable for payment of the judgment.[2]

§ 60. —— Order for Issuance

While the order to issue execution must conform to the usual requirements of a valid order, no technical form seems to be necessary.

While the order to issue, or granting leave to issue, execution must conform to the usual requirements of a valid order,[3] no technical form of order seems to be necessary.[4] The denial of a motion to restrain a sale of property in custodia legis is not a granting of leave to sell.[5]

Under certain circumstances the order may be in the alternative,[6] or it may leave to the clerk the duty of ascertaining from the record the amount for which the execution may issue.[7]

On plaintiff's motion for issuance of execution, it is proper for the court of its own motion to issue an order to defendant to show cause why the motion should not be granted.[8] Ordering execution on motion after the lapse of the statutory five years, under which the judgment is partly satisfied, does not preclude a further order for the satisfaction of the balance of the judgment.[9]

An order for an execution amounts to an order for the enforcement of the judgment;[10] but such an order is void when issued on a judgment which is prima facie satisfied.[11]

§ 61. Issuance on Transcript of Inferior Court

a. In general
b. Procedure

a. In General

A statute authorizing the filing of a transcript of a judgment of an inferior court in a superior court, so as to make it a lien on real estate, does not of itself warrant the issuance of an execution from the superior court.

As shown supra § 10, statutes in many jurisdictions authorize the issuance of an execution out of the office of the clerk of a superior court, on a judgment rendered by an inferior court or a justice of the peace, on filing a transcript of the judgment in the office of the clerk; but a statute authorizing the filing of the transcript of a judgment of an inferior court in the circuit court, so as to make it a lien on real estate, does not warrant the issuing of execution from the circuit court,[12] except where the statute so provides.[13]

It has been held that real estate cannot be sold under an execution issued by a county judge, but it is necessary to file a transcript of the judgment and have execution issued by the clerk of the circuit court.[14] In some jurisdictions the clerk of the district court has no authority to issue execu-

97. Cal.—Troy v. Troy, 16 P.2d 290, 127 Cal.App. 489.

98. Cal.—Water Supply Co. v. Sarnow, 92 P. 667, 1 Cal.App. 586.

99. N.Y.—Betts v. Garr, 26 N.Y. 383, reversing 1 Hilt. 411.

1. N.Y.—Betts v. Garr, supra.

2. Minn.—Gregory Co. v. Cale, 133 N.W. 75, 115 Minn. 508, 37 L.R.A., N.S., 156.

3. N.C.—Badham v. Jones, 64 N.C. 655.
23 C.J. p 370 note 1.

Filing by clerk
Until filed by the clerk an order granting leave to issue an execution on a judgment is, under some statutes, of no force and effect.—McMahon v. Brown, 279 N.W. 538, 66 S.D. 134.

Fixing sum
Order granting motion for execution in stated sum "or in such sum as the court may determine is still due" on judgment is not meaningless as fixing no sum, where the motion was sufficiently definite and certain.—Troy v. Troy, 16 P.2d 290, 127 Cal.App. 489.

4. Mass.—Fisk v. Gray, 100 Mass 191.
23 C.J. p 370 note 2.

5. Me.—Cobb v. Camden Sav. Bank, 76 A. 667, 106 Me. 178, 20 Ann.Cas. 547.

6. N.Y.—Crouse v. Wheeler, 33 How.Pr. 337.
23 C.J. p 371 note 4.

7. U.S.—Aspen Mining & Smelting Co. v. Wood, Colo., 84 F. 48, 28 C.C.A. 276.
23 C.J. p 371 note 5 [a].

8. Cal.—McAuliffe v. Coughlin, 38 P. 730, 105 Cal. 268.

9. Cal.—Weldon v. Rogers, 115 P. 464, 159 Cal. 700.

10. Cal.—Water Supply Co. v. Sarnow, 82 P. 689, 1 Cal.App. 479

11. Cal.—Brochier v. Brochier, 112 P.2d 602, 17 Cal.2d 822.

12. Ill.—People v. Wallace, 163 N.E 820, 822, 332 Ill. 427, citing **Corpus Juris**, and reversing 247 Ill.App. 571.
Mo.—Bailey v. Winn, 20 S.W. 21, 113 Mo. 155.
Filing transcript in superior court see the C.J.S. Judgments § 129, also 34 C.J. p 92 note 85 et seq.

13. Kan.—Hansford v. Burdge, 55 P. 472, 8 Kan.App. 162.

14. Fla.—Ferrell v. Reed, 53 So. 935, 60 Fla. 62.

tion on the transcript of a probate or county court judgment.[15] The circuit court, or a similar designated court of record, of the county in which the judgment was rendered is the proper court to which a justice's judgment and proceedings should be certified.[16]

b. Procedure

(1) In general
(2) Filing and sufficiency of transcript
(3) Issuance of execution

(1) In General

Compliance must be had with the provisions of statutes prescribing the procedure to be followed and the conditions to be fulfilled in the issuance of an execution on the transcript of a judgment of an inferior court.

Compliance must be had with the provisions of statutes prescribing the procedure to be followed and the conditions to be fulfilled in the issuance of an execution on the transcript of a judgment of an inferior court.[17]

Return of execution in inferior court. The issuance and return of an execution in the inferior court is not necessary where not required by statute.[18] However, execution cannot, under some statutes, issue out of the court of record on the transcript unless an execution has previously issued from the inferior court or justice of the peace and been returned nulla bona,[19] and, under other statutes, the issuance of an execution by the justice of the peace, and a return by the officer of nulla bona, are prerequisites to the filing of a transcript in the court of record,[20] except where the action in the justice's court is aided by attachment.[21]

Where execution in the inferior court is required, proof must be made of the issuance and return;[22] and it has been held that this should appear by the certificate of the justice.[23] No presumption will be indulged from the issuance of an execution by the clerk of the court of record that the preliminary requirement has been complied with,[24] even where the execution issued by the circuit court clerk so recites.[25] In some states, however, it has been held that the certificate of execution and return may be filed, by leave of court, nunc pro tunc,[26] and that after the lapse of many years it will be presumed that the certificate was produced and filed.[27]

If an execution has issued in the inferior court and has been returned nulla bona, it must have been a valid one or it will be of no effect in fulfilling the preliminary requirement.[28] The execution must have issued out of the justice's court within the period of limitations.[29] The requirements of the statute as to the return must be strictly followed by the officer making it,[30] under the rule that in special statutory proceedings it must appear on the record that everything was done which the statute requires.[31] The fact that the execution was returned before the expiration of the time set by statute for return may[32] or may not[33] render the execution invalid. A failure to comply with the requirement of the statute as to the issuance and return nulla bona in the lower court is not a mere irregularity, but renders an execution issued on a transcript under such conditions invalid.[34]

Affidavit in lieu of execution. A method authorized by statute in some states, instead of issuing an execution out of the justice's court and having it returned nulla bona, is to make an affidavit that the judgment has not been paid,[35] stating the

15. Okl.—Garnett v. Goldman, 135 P. 410, 39 Okl. 516—McGinnis v. Seibert, 134 P. 396, 37 Okl. 272.

16. Ind.—Stroud v. Davis, 6 Blackf. 539.

17. U.S.—Hawkins v. Wills, Ark., 49 F. 506, 1 C.C.A. 339.
A bond is sometimes required.—Hawkins v. Wills, supra—23 C.J. p 390 note 59.

18. Minn.—Hanson v. Bean, 53 N.W. 871, 51 Minn. 546, 38 Am.S.R. 516.
23 C.J. p 388 note 23.

19. Ark.—Massey v. Gardenhire, 12 Ark. 638.
23 C.J. p 387 note 7.

20. U.S.—Hawkins v. Wills, Ark., 49 F. 506, 1 C.C.A. 339.
23 C.J. p 387 note 8.

21. Ark.—Massey v. Gardenhire, 12 Ark. 638.

22. Mo.—Bauer v. Miller, 16 Mo. App. 252.
23 C.J. p 387 note 10.

23. Pa.—Frankem v. Trimble, 5 Pa. 520.
23 C.J. p 387 note 11.

24. Mo.—Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.S.R. 578—Langford v. Few, 47 S.W. 927, 146 Mo. 142, 69 Am.S.R. 606.

25. Mo.—Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.S.R. 578.

26. Pa.—Guerin v. Guest, 3 Pa.L.J. R. 111, 4 Pa.L.J. 471.
23 C.J. p 388 note 14 [a].

27. Pa.—Laughlin v. Bunting, 1 Am. L.J. 271.
23 C.J. p 388 note 15 [a].

28. Ill.—Wooters v. Joseph, 27 N. E. 80, 137 Ill. 113, 31 Am.S.R. 355.
23 C.J. p 388 note 16 [a].

29. Ill.—Hay v. Hayes, 56 Ill. 342.

30. Mo.—Langford v. Few, 47 S.W. 927, 146 Mo. 142, 69 Am.S.R. 606.
23 C.J. p 388 note 18.

31. Ill.—Merrick v. Carter, 68 N.E. 750, 205 Ill. 73.
23 C.J. p 388 note 19.

32. Mo.—Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.S.R. 578.
23 C.J. p 388 note 20.

33. Ark.—Reeves v. Sherwood, 45 Ark. 520.
23 C.J. p 388 note 21.

34. Mo.—Langford v. Few, 47 S. W. 927, 146 Mo. 142, 69 Am.S.R. 606.
23 C.J. p 388 note 22.

35. Mich.—Bigelow v. Booth, 39 Mich. 622.
23 C.J. p 388 note 24.

amount due[36] and the insufficiency of defendant's goods to satisfy the judgment.[37] The affidavit that the judgment in the justice's court was unpaid need not negative payment of the judgment to the clerk.[38] Where an affidavit is necessary, it must have a venue[39] and show in whose favor and against whom the judgment was rendered.[40]

Under some statutes it is held that the want of an affidavit does not make the writ void but only voidable;[41] while under other statutes the required affidavit is jurisdictional, and a want of it is a fatal defect.[42]

(2) Filing and Sufficiency of Transcript

(a) In general

(b) Form and contents

(c) Effect of filing

(a) In General

A transcript of a judgment of an inferior court must be filed at the proper time in order that a superior court may issue execution thereon.

Proceedings with regard to transcripts of judgments of inferior courts must conform strictly to statute.[43] The failure to file a transcript renders the execution void as well as all proceedings thereunder;[44] but a transcript need not be recorded before execution may issue thereon,[45] unless such recordation is required by statute.[46]

The transcript must be certified to the proper term of court.[47]

Time of filing. Generally the transcript cannot be filed before the time when an execution can be issued by the justice of the peace, and an execution, on a transcript filed prematurely has been held void;[48] and it must be filed in the court of record before the expiration of the period of time limited for executions in a justice's court,[49] although it has been held that, where the statute limits the time to sue out execution on a justice's judgment, it applies only to executions in the justice's court, and does not prohibit the filing of a transcript of such judgment after the expiration of the statutory time, and within the statutory period for executions in courts of record, and the issuing of an execution within such latter period.[50]

The transcript must be filed without material delay after the affidavit for the transcript is sworn to,[51] but the filing is sufficiently timely if there is no such delay as might give rise to a presumption that payment was made after the date of the affidavit.[52]

(b) Form and Contents

The form and contents of the transcript of an inferior court must conform to the requirements of the statute in order that execution may issue on it.

The transcript must, with regard to its contents, comply with the statute[53] and recite the facts necessary to authorize the issuance of an execution from the court in which the transcript is filed;[54] but where a transcript of the judgment is all that is required a full and perfect record of the proceedings in the justice's court need not be filed.[55] The transcript must show the jurisdictional facts on which the judgment in the justice's or inferior court was founded, since such facts cannot be supplied after the execution is issued,[56] and hence an execution is void where issued on a transcript which does not show that there was a proper service of process on defendant,[57] or that defendant appeared either personally or by attorney,[58] or on a transcript which is not officially signed and certified by the justice or by the judge of the inferior court.[59]

36. Mich.—Shepard v. Schrutt, 128 N.W. 772, 163 Mich. 485.
23 C.J. p 389 note 25.

37. Mich.—Denver v. Connolly, 52 N.W. 1003, 92 Mich. 549.
23 C.J. p 389 note 26.

38. Ind.—Dehority v. Wright, 101 Ind. 382.

39. Mich.—Hawkins v. Castenholz, 137 N.W. 110, 171 Mich. 85.
23 C.J. p 389 note 28.

40. Showing held sufficient
Mich.—Hawkins v. Castenholz, supra.

41. Ind.—Mavity v. Eastridge, 67 Ind. 211.

42. Mich.—Bigelow v. Booth, 39 Mich. 622—Monaghan v. McKimmie, 32 Mich. 40.

43. Ill.—Merrick v. Carter, 68 N. E. 750, 205 Ill. 73.
Mich.—O'Brien v. O'Brien, 3 N.W. 233, 42 Mich. 15.

44. N.Y.—Dunham v. Reilly, 18 N.E. 89, 110 N.Y. 366.
W.Va.—Sterringer v. Mackie, 49 S.E. 942, 57 W.Va. 63.

45. Ind.—Davis v. Dietz, 2 Ind. 247.

46. Ky.—Moseley v. Stroud, 80 S.W. 1182, 118 Ky. 413, 26 Ky.L. 287.

47. Ala.—Johnson v. Dismukes, 16 So. 424, 104 Ala. 520.

48. Mich.—Vroman v. Thompson, 3 N.W. 306, 42 Mich. 145.
23 C.J. p 389 note 34.

49. S.D.—Phillips v. Norton, 101 N. W. 727, 18 S.D. 530.
23 C.J. p 322 note 17, p 389 note 35.

50. N.D.—Enderlin Inv. Co. v. Nordhagen, 123 N.W. 390, 18 N.D. 517.

51. Mich.—Bigelow v. Booth, 39 Mich. 622.

52. Mich.—Perry v. Link, 297 N.W. 68, 297 Mich. 50.

53. Tenn.—Hall v. Heffly, 6 Humphr. 444.
23 C.J. p 389 note 38.

54. Ill.—Hobson v. McCambridge, 22 N.E. 823, 130 Ill. 367.
23 C.J. p 389 note 39.

55. Mo.—Franse v. Owens, 25 Mo. 329.

56. Mich.—Wedel v. Green, 38 N.W. 638, 70 Mich. 642.

57. Mich.—Wedel v. Green, supra.
23 C.J. p 389 note 42.

58. Mich.—Wedel v. Green, supra.

59. Mich.—Bigelow v. Booth, 39 Mich. 622.
23 C.J. p 389 note 44.

If the statute requires a transcript of the judgment to be filed, it is not sufficient to file a mere abstract of the judgment.[60] The transcript must be of a judgment properly rendered;[61] but, where a transcript of the proceedings under which the judgment is revived before a justice of the peace is filed in the court of record, a transcript of the original proceedings is not necessary.[62] A certified copy of the judgment with the return need not appear in the record, and it may not be necessary that a copy of the execution issued from and returned to the lower court should be embodied in the transcript.[63]

Variance between judgment and transcript. The justice's transcript should correspond with the judgment rendered by him;[64] but as long as there is no change in meaning a variance in form is of no consequence.[65]

(c) Effect of Filing

After a transcript of a judgment has been filed in a superior court, the court which rendered the judgment ordinarily loses control over all further proceedings, including execution.

When the transcript is duly filed in a superior court the usual rule is that it stands on the same footing, as to execution, as though it were a judgment recovered in the court of record.[66] In most jurisdictions the justice of the peace, or lower court, as the case may be, can conduct no further proceedings on the judgment after it has been transcribed, but the court of record thenceforth has been held to have the control of all proceedings, including execution.[67]

(3) Issuance of Execution

(a) In general

(b) Requisites and form of writ

(a) In General

The time when an execution may issue on the transcript of a judgment of an inferior court is governed by the statute of limitations as to judgments rendered in the court in which such transcript is filed.

After the transcript has been filed in the superior court, a judgment creditor or his attorney, not the clerk, has the right under some statutes to direct the issue of execution thereon.[68]

Time of issuance. The time when an execution on the transcript of an inferior court may issue is governed by the statute of limitations as to judgments rendered in the superior court,[69] unless the statute fixes a different period for executions on transcripts of judgments.[70] This is true, although an action on such judgment would have been barred by the running of the period for actions on judgments in the justice's court.[71] The time is computed however, from the rendition of judgment by the justice or other inferior court rather than from the time of the filing of the transcript.[72]

Under some statutes, the clerk may issue an execution in vacation, since it is not necessary that there be an application to the court in term time.[73]

Alias writ. If an execution is issued within the period of limitation and returned unsatisfied, an alias may be issued on the transcript after the period of limitation.[74]

(b) Requisites and Form of Writ

Compliance must be had with statutes governing the requisites and form of writs of execution issuing on a transcript of a judgment of an inferior court.

A writ of execution issuing on a transcript of a judgment of an inferior court must comply with statutory requirements.[75] The writ is ordinarily

60. W.Va.—Sterringer v. Mackie, 49 S.E. 942, 57 W.Va. 63.

61. Ill.—Johnson v. Hubbart, 109 N.E. 975, 269 Ill. 532.
Mo.—Bain v. Chrisman, 27 Mo. 293.

62. Mo.—Bauer v. Miller, 16 Mo. App. 252.

63. Mo.—Waddell v. Williams, 50 Mo. 216.
23 C.J. p 389 note 43.

64. N.Y.—Simpkins v. Page, 1 Code Rep. 107.
23 C.J. p 390 note 49.

65. N.C.—Womble v. Little, 74 N. C. 255.

66. N.D.—Enderlin Inv. Co. v. Nordhagen, 123 N.W. 390, 18 N.D. 517.
23 C.J. p 390 note 51.
Effect of filing transcript generally see the C.J.S. title Judgments § 129, also 34 C.J. p 93 note 9 et seq.

67. Del.—Herdman v. Cann, 7 Del. 41.
23 C.J. p 390 notes 53, 54.
Execution must issue to sheriff of the county once a transcript of a judgment of the municipal court is filed in the office of the county clerk.—Corrigan v. Kahn, 198 N.Y. S. 795, 120 Misc. 161.

68. N.Y.—Brush v. Lee, 36 N.Y. 49, 1 Transcr.A. 66, 3 Abb.Pr.,N.S., 204, 34 How.Pr. 283, overruling 18 Abb. Pr. 398.
23 C.J. p 390 note 56.
Issuance of execution by clerk without creditor's authority see supra § 56 b (2).

69. Iowa.—McCoy v. Coxe, 7 N.W. 44, 54 Iowa 595.
23 C.J. p 390 note 63.
Time for issuance of execution see infra § 66.

70. Wis.—McCormick v. Ryan, 82 N.W. 137, 106 Wis. 209.

71. N.Y.—Raphael v. Mencke, 50 N. Y.S. 920, 28 App.Div. 91.
23 C.J. p 391 note 65.

72. N.D.—Holton v. Schmarback, 106 N.W. 36, 15 N.D. 38.
23 C.J. p 391 note 66.

73. Mo.—Scharff v. McGaugh, 103 S.W. 550, 205 Mo. 344.

74. Pa.—Moyer v. Sekenger, 16 Wkly.N.C. 242.
23 C.J. p 390 note 60.
Issuance of alias writs generally see infra § 85.

75. Signature of party or attorney Under some statutes the execution should be signed by the party or his attorney.—McDonald v. O'Flynn,

tested by the clerk under his official seal.[76] The fact that the execution recites the judgment as of the court of record, and not as a judgment of a justice of the peace, is not objectionable.[77] The insertion of a name in the execution which did not appear among the parties in the judgment does not render the execution invalid.[78]

The execution need not recite the previous issuance by the justice of the peace and the return thereon nulla bona;[79] but if the statute requires the execution to recite the clerk with whom the transcript is filed and the time of such filing, an execution not containing such recitals is void.[80]

Command to levy. It has been held that the execution on the transcript is not objectionable for lacking a clause commanding a levy on the goods and chattels of defendant.[81]

§ 62. Issuance on Judgment on Appeal from Justice of the Peace

Where an appeal is taken from a judgment of a justice of the peace, execution is issuable on the judgment of the appellate court, but not on the judgment of the justice.

Where an appeal is taken from a justice's judgment, the appellate court can issue an execution on its judgment,[82] since the appeal in such a case carries up the whole record for proceedings de novo.[83] The execution is issuable on the new judgment and not on the justice's judgment.[84] In such a case an execution cannot thereafter issue on a transcript of the first judgment docketed before the second judgment.[85]

Execution may ordinarily issue from the appellate court on affirmance on certiorari,[86] or on a dismissal for want of prosecution.[87] However, the appellate court ordinarily cannot issue execution where the proceeding is one in which the lower court could not have done so.[88]

§ 63. County to Which Execution May Issue

a. In general
b. Effect of irregular issuance

a. In General

Unless authorized by statute, ordinarily execution may not go beyond the territorial jurisdiction of the particular court which rendered the judgment.

In the absence of statutory authorization, execution cannot, at least in the first instance, go beyond the territorial jurisdiction of the particular court which rendered the judgment.[89]

By statute, executions, or at least certain ones, are required to be issued to the county of defendant's residence,[90] in which case execution may issue to the county or residence of any one of several joint defendants.[91] If a mistake is made as to residence, the creditor may withdraw the writ and procure the issuance of one to the proper county.[92]

Courts of general jurisdiction, that is, courts having jurisdiction throughout the territorial limits of the state, may issue an execution against property in any county in the state,[93] even though the judgment debtor has property in the county where the judgment is entered.[94] Moreover, by statutes now existing in many states, execution may be directed into any county in the state[95] where

2 Daly, N.Y., 42—Simpkins v. Page, 1 Code Rep.,N.Y., 107.

76. S.C.—Bragg v. Thompson, 19 S. C. 572.
23 C.J. p 391 note 68 [a].
Form and contents of writ generally see infra §§ 69–84.

77. Pa.—Hamilton v. Dawson, 2 Pa. L.J.R. 357, 4 Pa.L.J. 141.

78. Ind.—Hume v. Conduitt, 76 Ind. 598.

79. Ark.—Massey v. Gardenhire, 12 Ark. 638.

80. N.Y.—Dunham v. Reilly, 18 N. E. 89, 110 N.Y. 366.

81. Del.—Daniels v. Alexander, 7 Del. 39.
23 C.J. p 391 note 74.

82. S.D.—Winton v. Knott, 63 N.W. 783, 7 S.D. 179.
23 C.J. p 391 note 75.

83. Ga.—Brown v. Wilson, 59 Ga. 604.
Effect of appeal from justice generally see the C.J.S. title Justices of the Peace §§ 156–160, also 35 C.J. p 784 note 51 et seq.

84. Tex.—McKay v. Irion, App., 15 S.W. 128.

85. Ill.—Gregory v. Hough, 171 Ill. App. 334.

86. U.S.—Walker v. Gibbs, Pa., 2 Dall. 211, 1 L.Ed. 352, 1 Yeates 255.
23 C.J. p 391 note 79.

87. N.J.—Anonymous, 3 N.J.Law, 753.
23 C.J. p 391 note 80.

88. Pa.—Thomas v. Pyle, 2 Pa.Co. 258.
23 C.J. p 391 note 81.

89. Okl.—Davidson v. Finley, 222 P. 678, 96 Okl. 291.
23 C.J. p 371 notes 9, 10.

90. Miss.—Griffin v. Hickman, 46 So. 73, 92 Miss. 266.
23 C.J. p 371 note 16.

91. Ind.—Doe v. Harter, 1 Ind. 427, 2 Ind. 252.

N.C.—Cape Fear Bank v. Stafford, 47 N.C. 98.

92. Tenn.—Parrish v. Saunders, 3 Humphr. 431.

93. Ky.—Commonwealth v. Caldwell, 2 Bibb 8
23 C.J. p 371 note 11.

94. N.Y.—Brush v. Lee, 36 N.Y. 49, 1 Transcr.A. 66, 3 Abb.Pr.,N.S., 204, 34 How.Pr. 283, affirming 18 Abb.Pr. 398.

95. Fla.—Virginia-Carolina Chemical Corporation v. Smith, 164 So. 717, 121 Fla. 720—State ex rel. Shutt v. McCall, 138 So. 1, 103 Fla. 804.
23 C.J. p 371 note 13.
Special execution
Iowa.—King v. Nelson, 94 N.W. 1095, 120 Iowa 606.
Where land lies in two counties, it may, under some statutes, be levied on and sold in either county. —Cade v. Larned, 27 S.E. 166, 99 Ga. 588—23 C.J. p 371 note 19.

property of defendant is situated.[96] Other statutes authorize, under certain conditions, the issuance of an execution into counties other than the one in which the judgment was rendered, or where defendant resides, where it is made to appear by the return of an execution nulla bona, or by affidavit, or otherwise, that defendant has no property in the county in which the judgment was recovered sufficient to satisfy the judgment.[97]

Testatum fieri facias. The practice at common law of obtaining execution of property situate in a county other than that in which the venue was laid by issuing what was called a testatum fieri facias is discussed in 23 C.J. p 371 note 21–p 372 note 27.

Examine Pocket Parts for later cases.

b. Effect of Irregular Issuance

An execution irregularly issued to a county other than that in which the judgment was rendered is not absolutely void.

Where plaintiff has a choice under certain circumstances, or on the doing of certain acts, as to the county into which the writ may be sent, and is authorized to have it directed to a county other than that in which the judgment was rendered, an execution irregularly issued into a county other than that in which the judgment was rendered is not absolutely void; and the sheriff will be justified in executing it, and the title of a purchaser thereunder cannot be assailed collaterally.[98] Where the statute requires that execution shall issue in the first instance to the county in which the judgment was rendered, an execution issued in the first instance to another county is not void.[99]

It may be presumed by all innocent purchasers and by the sheriff that an execution sent beyond the county of the venue is legally sent;[1] but if the purchaser has notice of the irregularity the sale may be avoided.[2] No one who has no interest in the property levied on under an execution first issued to a county other than that in which judgment is rendered can take advantage of the irregularity.[3]

§ 64. —— Docketing or Filing Transcript

Under some statutes an execution may be issued to any county in which a transcript of the judgment has been docketed or filed.

Under some statutes a transcript of a judgment may be filed or docketed in a county other than the one where the judgment was rendered so as to become a lien on real estate in that county or for the purpose of executions.[4] Such statutes may require such docketing as a condition to the issuance of an execution to another county.[5] Under other statutes such docketing, while authorized, is not a condition precedent.[6]

County from which execution issues. The rule is that an execution can issue only from the court in which the judgment was rendered, as distinguished from the court in the county where the judgment is docketed or a transcript filed,[7] and an execution issued from the other county is void,[8] unless it is otherwise provided by statute.[9] Where an execution is issued to another county, the courts of the other county have no control thereof.[10]

Issuance to another county before docketing therein. It has been held that although an execution issued to another county before a judgment is docketed therein may be irregular it is not ab-

96. La.—Lafon v. Smith, 3 La. 473.

97. Ky.—Durham v. Farmers' Bank & Trust Co., 280 S.W. 962, 213 Ky. 208.
23 C.J. p 371 note 14, p 372 note 28.
Affidavit held sufficient
Ky.—Durham v. Farmers' Bank & Trust Co., 280 S.W. 962, 213 Ky. 208.

98. Minn.—Gowan v. Fountain, 52 N.W. 530, 50 Minn. 264.
23 C.J. p 373 note 39.
Collateral attack on sale see infra § 242.
Title, rights, and liabilities of purchaser see infra §§ 284–318.

99. Tex.—Cabell v. Orient Ins. Co., 55 S.W. 610, 22 Tex.Civ.App. 635.
Dormancy of judgment
An execution issued in the first instance to another county is sufficient to prevent the judgment from becoming dormant under statutes rendering judgments dormant unless execution is issued within a certain period of time.—Cabell v. Orient Ins. Co., supra.
Dormancy of judgment by failure to issue execution see the C.J.S. title Judgments § 532, also 34 C.J. p 655 note 63 et seq.

1. Ky.—Cox v. Nelson, 1 T.B.Mon. 94, 15 Am.D. 89.

2. Ky.—Sanders v. Ruddle, 2 T.B. Mon. 139, 15 Am.D. 148.
Opening and vacating sale see infra §§ 230–241.

3. Tex.—Gulf, C. & S. F. R. Co. v. Morris, 4 S.W. 156, 67 Tex. 692.

4. Wyo.—Wyoming Central Irr. Co. v. Laporte, 188 P. 360, 26 Wyo. 522.
23 C.J. p 372 note 30.
Filing transcript of judgment in another county see the C.J.S. title Judgments § 139, also 34 C.J. p 91 note 71 et seq.

5. Wis.—Bugbee v. Lombard, 60 N. W. 414, 88 Wis. 271.
23 C.J. p 372 note 31.

6. N.C.—Evans v. Aldridge, 45 S. E. 772, 133 N.C. 378.
23 C.J. p 372 note 32.

7. Wyo.—Wyoming Central Irr. Co. v. Laporte, 188 P. 360, 26 Wyo. 522.
23 C.J. p 373 note 33.

8. Mo.—Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.
23 C.J. p 373 note 34.

9. Miss.—Smith v. Mixon, 19 So. 295, 73 Miss. 581.
23 C.J. p 373 note 35.

10. Kan.—Duncan v. Benton & Hopkins Inv. Co., 172 P. 522, 102 Kan. 725.
Pa.—Lehigh & N. E. R. Co. v. Hanhauser, 70 A. 1089, 222 Pa. 248.

solutely void,[11] and an execution is valid which issues from the clerk's office before the docketing in the other county where it is not delivered to the sheriff until after such docketing.[12] It has even been held that the irregularity caused by issuing the execution and levying thereon several hours before the transcript of the judgment was filed was cured by the subsequent filing of the transcript.[13]

Form of execution. There is authority that an execution which does not show on its face,[14] or does not recite[15] that the transcript has been filed in the county to which it is issued is void.

§ 65. Death of Parties after Judgment

a. Sole plaintiff
b. Sole defendant
c. Several plaintiffs or defendants
d. Death after execution is awarded
e. Writ tested before death
f. Writ tested after death

a. Sole Plaintiff

At common law an execution may not be regularly issued and tested after the death of plaintiff until his personal representatives have revived the judgment; but, under statutes other methods have been introduced by which execution may be had in such case.

At common law and in those states where the rule has not been changed by statute, an execution cannot be regularly issued and tested after the death of plaintiff until his personal representatives have revived the judgment.[16] An execution could not issue in favor of one not in esse,[17] since there was no party left who could make a motion for leave to issue execution on the judgment.[18]

Under statutes in many jurisdictions, it is not necessary to sue out a writ of scire facias, and other methods have been introduced by which execution may be had on a judgment after plaintiff's death.[19] Thus, under some statutes, all that is necessary to be done is to indorse on the execution the fact of the death and the name of the personal representative.[20] Where a statute has changed the practice, execution must be sued out in the mode prescribed by the statute.[21]

Effect of failure to revive. According to some authorities the revivor of the judgment after the death of plaintiff, where required, is a mere technical form involving no substantial right, the omission of which will not render the execution void, but voidable only;[22] but other authorities maintain that without revivor the execution is absolutely void, because after plaintiff's death there is no longer a party in esse competent to sue out an execution on the judgment and receive payment or enter satisfaction thereof, and because judicial proceedings cannot be carried on in the name of a dead man.[23]

Assignment of judgment. Where the judgment had been assigned before the death of plaintiff, it has been held that the assignee may issue execution without a proceeding to revive the judgment.[24] Under some statutes the assignee may sue out a scire facias in his own name, where there is no executor or administrator;[25] but under other statutes execution must issue in the name of the judgment creditor who has died,[26] or in the name of his personal representatives.[27]

Where execution is issued in the name of plaintiff after he has assigned the judgment, the fact that the assignee is dead and that his estate is not represented will not support an affidavit of illegality, as payment to the original plaintiff will protect defendant.[28]

11. Minn.—Gowan v. Fountain, 52 N.W. 862, 50 Minn. 264.
23 C.J. p 373 note 44.

12. Minn.—Hoerr v. Meihofer, 79 N.W. 964, 77 Minn. 228, 77 Am.S. R. 674.
23 C.J. p 374 note 45.

13. N.Y.—Blivin v. Bleakley, 28 How.Pr. 124.
Wis.—Rogers v. Cherrier, 43 N.W. 828, 75 Wis. 54.

14. Wis.—Kentzler v. Chicago, Milwaukee & St. Paul R. Co., 3 N.W. 369, 47 Wis. 641—Smith v. Buck, 22 Wis. 577.

15. N.Y.—Nanz v. Oakley, 15 N.Y.S. 1, 60 Hun 432.
23 C.J. p 373 note 38.

16. Kan.—Updergraff v. Lucas, 93 P. 630, 76 Kan. 456, 13 Ann.Cas. 860, rehearing denied 94 P. 121, 76 Kan. 456, 13 Ann.Cas. 860—Ballinger v. Redhead, 40 P. 828, 1 Kan.App. 434.
23 C.J. p 380 note 15.
Revival of judgments see the C.J.S. title Judgments §§ 533-549, also 34 C.J. p 658 note 2 et seq.

17. Mo.—Welch v. St. Louis, 12 Mo. App. 516.

18. N.Y.—Thurston v. King, 1 Abb. Pr. 126—Wheeler v. Dakin, 12 How.Pr. 537.

19. Cal.—Weldon v. Rogers, 90 P. 1062, 151 Cal. 432.
Ga.—Byers v. Black Motor Co., 16 S.E.2d 478, 65 Ga.App. 773.
23 C.J. p 380 note 19.

20. N.J.—Pushcart v. New York Shipbuilding Co., 92 A. 81, 86 N.J. Law 444.
23 C.J. p 381 note 20.

21. Iowa.—Dunham v. Bentley, 72 N.W. 437, 103 Iowa 136.
23 C.J. p 381 note 21.

22. Colo.—Christ v. Flannagan, 46 P. 683, 23 Colo. 140.
23 C.J. p 381 note 22.

23. Ill.—Brown v. Parker, 15 Ill. 307.
23 C.J. p 381 note 23.

24. Kan.—Harris v. Frank, 29 Kan. 200.
23 C.J. p 381 note 24.
Assignment of judgments see the C.J.S. title Judgments §§ 512-530, also 34 C.J. p 636 note 70 et seq.

25. N.Y.—Murphy v. Cochran, 1 Hill 339.

26. Wis.—Holmes v. McIndoe, 20 Wis. 657.

27. Ill.—Adams v. Connelly, 118 Ill. App. 441.

28. Ga.—Brown v. Gill, 49 Ga. 546.

b. Sole Defendant

(1) In general

(2) Validity of writ irregularly issued

(1) In General

Where defendant dies after judgment, an execution cannot be issued, at common law, without first reviving such judgment by a writ of scire facias, but under statutes an execution may be had as by leave of court after a designated period of time has elapsed.

At common law where there is but one defendant, and he dies after judgment, an execution cannot be issued without first reviving such judgment by a writ of scire facias.[29] It is immaterial that by statute the judgment is made a lien on the debtor's property,[30] and the levy of an attachment in the lifetime of the debtor does not change the rule and enable the creditor to issue an execution after the debtor's death without revival, to reach the attached property.[31]

Where defendant dies pending an appeal, a revivor in the appellate court does not have the effect of reviving the judgment or decree so as to authorize an execution to issue on affirmance without reviving the judgment in the trial court.[32]

Under statute. Under some statutes, no execution ordinarily is issuable after the death of the judgment debtor;[33] but the statutes of many jurisdictions permit the issuance of an execution in such case, provided compliance is had with their terms.[34] Where required by statute, no execution can issue against the real estate of a deceased judgment debtor until a prescribed notice of the judgment is given to his personal representatives or heirs,[35] but such a provision does not apply where defendant conveyed his real estate to another before his death, and the grantee has come into court and opposed the issue of the process.[36]

Under some statutes, before execution may issue, a certain period of time must have elapsed since the death of the judgment debtor,[37] or since the appointment of his personal representative,[38] and leave must be obtained from the proper court in the prescribed manner.[39] The purpose of such statutes is to allow reasonable time for the administration of the estate, and to prevent creditors from embarrassing the estate and adding to the confusion caused by the death of the debtor.[40]

Under a statute which provides that, after the expiration of one year from the death of the party against whom a final judgment for a sum of mon-

29. Ind.—Coats v. Veedersburg State Bank, 38 N.E.2d 243.
Okl.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 567, 173 Okl. 285, citing **Corpus Juris.**
23 C.J. p 381 note 30, p 384 note 53 [a].
Estate of decedent as subject to execution see supra § 48.

Reason for rule

(1) The reasons given for the necessity of a scire facias are that new parties are to be affected by the execution, and that these new parties should have a day in court to show cause, if any they can, against the application of their property to the discharge of the judgment.—Wallace v. Swinton, 64 N.Y. 188—23 C.J. p 382 note 33.

(2) Liability of heirs and distributees for debts of intestate see Descent and Distribution §§ 116–138.

30. Miss.—Davis v. Helm, 11 Miss. 17.
23 C.J. p 382 note 34.

31. U.S.—Mitchell v. St. Maxent's Lessee, Fla., 4 Wall. 237, 18 L.Ed. 326.
23 C.J. p 382 note 35.

32. Ky.—Handley v. Fitzhugh, 3 A. K.Marsh. 561.

33. Mo.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137—King v. Hayes, 9 S.W.2d 538, 223 Mo. App. 138.
N.C.—Flynn v. Rumley, 192 S.E. 868, 212 N.C. 25.
23 C.J. p 382 note 41, p 384 note 53 [b].
Necessity for presenting judgment for allowance see the C.J.S. title Executors and Administrators § 398, also 24 C.J. p 332 note 59 et seq.

34. Wis.—In re Hogan's Estate, 282 N.W. 5, 229 Wis. 600.
23 C.J. p 382 note 38, p 383 note 43.

35. Pa.—Bernecker, to Use v. Litzenberger, 20 Pa.Dist. & Co. 288.
23 C.J. p 366 note 31.

36. Pa.—Randal v. Gould, 73 A. 986, 225 Pa. 42.

37. Ill.—Meusel v. Bock, 234 Ill. App. 455.
Wis.—In re Hogan's Estate, 282 N.W. 5, 229 Wis. 600.
23 C.J. p 368 notes 55, 56, p 383 note 47.

Failure of administrator to petition for sale of realty

Where administrator's petition to sell decedent's realty was not filed within the year immediately following decedent's death, administrator's petition for a stay of proceedings, instituted by judgment creditor more than a year after decedent's death, for an order permitting the issuance of an execution on his judgment, came too late.—Coats v. Veedersburg State Bank, Ind., 38 N.E.2d 243.

38. N.J.—Interstate Building & Loan Ass'n v. Zeisler, 10 A.2d 172, 126 N.J.Eq. 505.
23 C.J. p 383 note 44.

39. Wis.—In re Hogan's Estate, 282 N.W. 5, 229 Wis. 600.
23 C.J. p 368 notes 55, 57–59, p 382 note 39.

Conditional order

Where proper case existed for issuance of execution under statute authorizing issuance of execution against property on which judgment is lien after judgment debtor has been dead a year, circuit court was without authority to impose condition that execution issue against certain property only and that full amount of judgment be bid for such property.—State ex rel. Rasmussen v. Circuit Court for Kenosha County, 269 N.W. 265, 222 Wis. 628.

Order of court unnecessary

After judgment has been revived against the executors who hold, by the terms of the will, the legal title to the lands belonging to the estate, no resort to the probate court is necessary, either for a classification of plaintiff's demand or for an order for the sale of the property, for execution against such lands as are bound by the lien of the judgment.—Mendenhall v. Bunette, 49 P. 93, 58 Kan. 355.

40. Wis.—In re Hogan's Estate, 282 N.W. 5, 229 Wis. 600—State ex rel. Rasmussen v. Circuit Court for Kenosha County, 269 N.W. 265, 222 Wis. 628.

ey has been rendered, execution may issue against any property on which the judgment is a lien, the moving papers should show facts supporting a lien of the judgment, and a simple allegation of its existence is insufficient.[41] If execution is to be issued against the real estate of a deceased judgment debtor, the petition to the surrogate should show that the personal property is insufficient to pay the debts, and it is good practice to set out a description of the real estate sought to be subjected to the satisfaction of the judgment.[42]

(2) Validity of Writ Irregularly Issued

An execution issued and tested after the death of defendant without reviving the judgment by scire facias, or issued and tested in violation of statute, is generally void.

An execution issued and tested after the death of a sole defendant without reviving the judgment by scire facias, or issued and tested in violation of statute, is generally an absolute nullity, and is so far void that the officer to whom it is directed need not obey it, and a purchaser thereunder acquires no title; and it can be attacked collaterally as well as directly,[43] and cannot be relied on even for the purpose of continuing the judgment and keeping it alive.[44] In a number of decisions, however, the writ is held to be merely voidable.[45]

c. Several Plaintiffs or Defendants

Where one or more joint plaintiffs or defendants dies after the rendition of judgment and before issuance of execution, execution may generally issue in favor of, or against, the survivors without revival by scire facias; the execution should issue in the names of all the parties in the judgment, including the names of the deceased parties.

Although there is authority to the contrary,[46] as a general rule where one or more of several joint plaintiffs or defendants in the judgment dies after rendition thereof and before issuance of execution the execution may issue in favor of[47] or against[48] the survivors without revival by scire facias. It has been held that this is not the rule where the real estate of the survivor is to be subjected;[49] but there is authority to the contrary.[50]

The creditor may revive against the decedent's representative to increase his security.[51]

Form of writ. To conform to the judgment, the execution should issue in the name of all the parties plaintiff or defendant in the judgment, including deceased parties whether plaintiff[52] or defendant;[53] but it is not necessary that a writ which is issued in the name of all the parties defendant should suggest the death of any of such parties.[54] An issuance in the name of part of the judgment debtors without reciting the death of one has been held to render the execution void on its face;[55] but there is authority that such an execution is merely voidable.[56]

If the death is suggested on the clerk's docket, execution may be taken out in the name of the survivors.[57]

d. Death after Execution Is Awarded

The death of plaintiff or of defendant after execution is awarded does not ordinarily abate the execution.

If defendant dies after the execution is awarded and before it is served, it may nevertheless by

41. Miss.—Alsop v. Cowan, 6 So. 103, 66 Miss. 451.
23 C.J. p 369 note 78.

42. N.Y.—In re Bentley, 16 Abb.Pr. 89.

43. N.C.—Flynn v. Rumley, 192 S. E. 868, 212 N.C. 25.
23 C.J. p 383 note 49.
Writ tested after death see subdivision f of this section.

Reasons for rule
(1) There is no party defendant in being, against whom, or against whose property, the process can run. Kan.—Halsey v. Van Vliet, 27 Kan. 474.
Mo.—Miller v. Doan, 19 Mo. 650.

(2) By the death of defendant the rights of property are changed and other parties are interested.—Massie v. Long, 2 Ohio 287, 15 Am.D. 547.
23 C.J. p 384 note 52.

44. Kan.—Halsey v. Van Vliet, 27 Kan. 474.

45. R.I.—Hodges v. White, 36 A. 838, 19 R.I. 717.
23 C.J. p 383 note 51.

46. Kan.—Newhouse v. Heilbrun, 86 P. 145, 74 Kan. 282, 10 Ann.Cas. 955.
23 C.J. p 385 note 82.

47. Mass.—Cushman v. Carpenter, 8 Cush. 388.
23 C.J. p 385 note 83, p 386 note 85.

48. Ky.—Hatfield v. Kentland Coal & Coke Co., 57 S.W.2d 1000, 247 Ky. 825.
23 C.J. p 386 notes 84, 85.

Statute staying execution for a certain time after the death of defendant applies only where a sole defendant dies; and consequently where there is more than one defendant, and one of them dies, an execution may nevertheless be issued immediately for the purpose of seizing the property of the survivors.—Day v. Rice, 19 Wend., N. Y., 644.

49. U.S.—Erwin v. Dundas, Ala., 4 How. 58, 78, 11 L.Ed. 875.
23 C.J. p 386 note 86.

50. Ala.—Martin v. Branch Bank, 15 Ala. 587, 50 Am.D. 147.
23 C.J. p 386 note 87.

51. Ky.—Huey v. Redden, 3 Dana 488.

52. N.Y.—Howell v. Eldridge, 21 Wend. 678.
23 C.J. p 386 note 91.
Form and contents of writ generally see infra §§ 69–84.

53. Miss.—Davis v. Helm, 11 Miss. 17, 37.
23 C.J. p 386 note 92.

54. W.Va.—Holt v. Lynch, 18 W. Va. 567.
23 C.J. p 386 note 94.

55. U.S.—Ex parte Kennedy, D.C., 14 F.Cas.No.7,698, 4 Cranch C.C. 462.
23 C.J. p 386 note 95.

56. U.S.—Devlin v. Gibbs, C.C.D.C., 7 F.Cas.No.3,842, 4 Cranch C.C. 626.

57. **Parties plaintiff**
Mass.—Cushman v. Carpenter, 8 Cush. 388.

the common-law rule, and under some statutes, be served on his goods in the hands of his executor or administrator.[58] It has been held, however, that the sheriff cannot proceed unless the execution is both sued out and levied before such death,[59] unless it is otherwise provided by statute.[60]

If plaintiff dies after execution is awarded, the execution does not abate but the sheriff may nevertheless proceed.[61]

e. Writ Tested before Death

In the absence of statute to the contrary, a writ of execution may be issued after the death of either party, where it was tested before death.

If an execution is tested in defendant's lifetime, it may be taken out against his goods after his death where there is no statute requiring the writ to bear teste as of the day of its issuance.[62] The theory or fiction on which this result is arrived at is that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of defendant, and the goods being bound from the teste or presumed issuing, execution on them is deemed to have commenced in the lifetime of the party, and, being an entire thing, may be completed notwithstanding his death.[63] Consequently goods only, it would seem, can be taken on an execution so issued, and not lands,[64] although some cases apply the same rule to lands.[65] The judgment must be actually signed before the death of defendant.[66]

The doctrine of relation does not obtain where by statute it is required that the writ shall bear teste of the day on which it is issued, and consequently, after defendant's death judgment must be revived by scire facias or the writ must be sued out in the mode prescribed by statute.[67]

Before plaintiff's death. At common law it was permissible to issue an execution after plaintiff's death, provided such execution bore teste as of a day prior to his death,[68] but in some states this rule has been changed by statute.[69]

f. Writ Tested after Death

In the absence of statute to the contrary, an execution which bears teste subsequent to the death of defendant is generally void.

In the absence of statute to the contrary, an execution which bears teste subsequent to the death of defendant is generally held void,[70] although in some states it has been held merely voidable.[71]

§ 66. Time for Issuance

a. In general
b. Time within which execution must be issued
c. Computation of time

a. In General

Unless execution is stayed, or there is a statute otherwise providing, execution may issue immediately after rendition of judgment, but not before the obligation of defendant has matured.

Execution cannot ordinarily issue until the obligation of defendant has matured[72] unless defendant consents.[73] An agreement as to the time o

58. Pa.—Deering v. Wisler, 21 Pa. Co. 156.
23 C.J. p 384 note 56.

Recovery of property from grantee of purchaser
Where, prior to appointment of an administrator, property of deceased was levied on and sold to satisfy a valid execution for taxes, which was issued before death of deceased, a subsequently appointed administrator could not recover property from a grantee of purchaser at such sale for purpose of paying a claim for funeral expenses, notwithstanding under statute such claim stands ahead of claims for taxes.—Holt v. Laurens, Ga., 17 S.E.2d 571.

59. Ohio.—Massie v. Long, 2 Ohio 287, 15 Am.D. 547.
23 C.J. p 384 note 57 [a]

60. Ala.—Reddick v. Long, 27 So. 402, 124 Ala. 260.
Ind.—Blumenthal v. Tibbits, 66 N. E. 159, 160 Ind. 70.

61. Idaho.—Hill v. Joseph, 72 P.2d 283, 284, quoting **Corpus Juris.**
23 C.J. p 384 note 59.

62. U.S.—Kane v. Love, C.C.D.C., 14 F.Cas.No.7,608, 2 Cranch C.C. 429.
23 C.J. p 385 note 70.

63. U.S.—Erwin v. Dundas, Ala., 4 How. 58, 11 L.Ed. 875.
23 C.J. p 385 note 71.

64. N.Y.—Stymets v. Brooks, 10 Wend. 206.
Property of decedent subject to execution generally see supra § 48.

65. U.S.—Erwin v. Dundas, Ala., 4 How. 58, 76, 11 L.Ed. 875.
23 C.J. p 385 note 73.

66. S.C.—Fox v. Lamar, 4 S.C.L. 417.

67. N.C.—Sawyers v. Sawyers, 93 N. C. 321.
23 C.J. p 385 note 76.

68. Tenn.—Gregory v. Chadwell, 3 Coldw. 390.
23 C.J. p 385 note 76.

69. N.J.—Morgan v. Taylor, 38 N J.Law 317.
23 C.J. p 385 note 77.

70. U.S.—Mitchell v. St. Maxent's Lessee, Fla., 4 Wall. 237, 18 L.Ed 326.
23 C.J. p 385 note 79.
Validity of writ irregularly issue see subdivision b (2) of this section.

71. Miss.—Shelton v. Hamilton, 2 Miss. 496, 57 Am.D. 149.
23 C.J. p 385 note 80.

72. Del.—Otwell v. Messick, 9 De 542.
23 C.J. p 374 note 48.

Where bond is given indorser c two notes as security for his indorsements, judgment may be entered on such notes for the full amount thereof on a default in the payment of one of the notes, an execution may issue before the maturity of the second.—Smith James, 1 Miles, Pa., 162.

73. Wis.—Sloane v. Anderson, 1 N.W. 634, 15 N.W. 21, 57 Wis. 12

issuance when recorded by the court is binding on the parties.[74]

Time which must elapse. Unless execution is stayed, or there is a statute otherwise providing, execution may issue immediately after the rendition of judgment,[75] subject to the rules in particular jurisdictions, discussed § 9 supra, as to the necessity for entry or docketing of judgment.

However, execution cannot issue pending a motion to show cause why execution should not issue,[76] nor can it issue on a judgment by default before the declaration is filed;[77] and in some jurisdictions there are statutory provisions forbidding the issuance of an execution until the expiration of a certain period of time,[78] although a provision limiting the time within which execution may issue, being for the benefit of the judgment debtor, may be waived by him.[79] Failure to tax a bill of costs does not invalidate, as being prematurely issued, an execution.[80] Where the amount owing is fixed by final decree, the pendency of a claim or bill by another does not require a delay of execution.[81]

According to the practice in some jurisdictions a final judgment is not entered until the lapse of a certain number of days after the rule for judgment nisi, during which time defendant may move for a rule to show cause or present a writ of error, and execution cannot issue.[82]

Effect of premature issuance. It is generally held that a premature issuance of an execution is an irregularity which may render the execution voidable but which does not render it void,[83] although there is authority to the effect that an execution prematurely issued is void.[84]

Judgment payable in installments. Where a judgment is payable in installments falling due at different periods, an execution may be issued for each installment as it becomes due;[85] but plaintiff, if he sees fit to do so, may wait until a number of installments have fallen due, and may include whatever is due at the time of issuing the writ in one execution without issuing an execution for each installment.[86]

Duty of officer to act promptly. The officer charged with the duty of issuing writs of execution must proceed to issue the same with reasonable celerity.[87] Ordinarily, it would seem that all that he is required to do is to issue them in time to be served by the return day therein named.[88]

b. Time within Which Execution Must Be Issued

The time within which original execution must be issued is generally fixed by statute.

At common law plaintiff who had recovered a judgment in a personal action could neither sue out his original execution nor revive the judgment by scire facias after the lapse of a year and a day, but he was obliged to bring an original action in which he could offer the judgment as evidence of the debt.[89] In real actions, however, where

74. Ky.—Park v. Cline, 13 Ky.Op. 680.
Agreement not to issue execution see supra § 17.

75. Utah.—Sweetser v. Fox, 134 P. 599, 43 Utah 40, 47 L.R.A.,N.S., 145.
23 C.J. p 374 note 54.
Stay of execution see infra §§ 139–141.

Under statutes
Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Mo.—Wayland v. Kansas City, 12 S.W.2d 438, 321 Mo. 664.

Expiration of right of appeal is not necessary in the absence of statute.—Sickles v. Carroll, 10 Pa. Co. 646—23 C.J. p 375 note 64.

76. N.J.—Stille v. Wood, 1 N.J.Law 162.

77. Pa.—Jelsley v. Halter, 4 Yeates 337.

78. La.—O'Keefe & Simpson v. Main St. Pharmacy, 8 La.App. 443.
23 C.J. p 374 note 57.
Expiration of time after death of judgment debtor see supra § 65.

Commencement of period
Final decree on petition for rehearing has been held to mark commencement of period fixed by statute.—Scales v. James, 9 Tenn.App. 306.

Execution held not prematurely issued
Okl.—MacKenchnie v. Voight, 86 P. 2d 991, 184 Okl. 291.

79. Mass.—Washington Nat. Bank v. Williams, 74 N.E. 470, 188 Mass. 103
23 C.J. p 374 note 58.

Release of errors in warrant of attorney for the confession of judgment is not a waiver of error in prematurely issuing execution.—Bell v. Bell, 1 How.Pr., N.Y., 71.

80. Pa.—Irwin v. Hess, 12 Pa.Super. 163, 17 Lanc.L.Rev. 49.
23 C.J. p 375 note 61.

81. U.S.—Aspen Mining & Smelting Co. v. Wood, Colo., 84 F. 48, 28 C.C.A. 276.

82. Pa.—Barre v. Affleck, 2 Yeates 274.
23 C.J. p 375 note 63.

83. La.—O'Keefe & Simpson v. Main St. Pharmacy, 8 La.App. 443.
23 C.J. p 379 note 8.

Merely authorizes setting aside of writ
N.Y.—Finch v. Graves, 1 How.Pr. 198.

Issuance two days prior to time provided by contract was minor irregularity.—Taylor v. American Trust & Savings Bank of El Paso, Tex.Civ.App., 265 S.W. 727.

84. Mass.—Penniman v. Cole, 8 Metc. 496.
23 C.J. p 379 note 9.

85. Ohio.—Piatt v. Piatt, 9 Ohio 37.

86. Ky.—McKinney v. Carroll, 5 T.B.Mon. 96.
Ohio.—Piatt v. Piatt, 9 Ohio 37.

87. Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109.
Jurisdiction and authority to issue execution see supra § 56.

88. Mo.—State ex rel. and to Use of City of St. Louis v. Priest, supra.

89. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
23 C.J. p 375 note 66.
Scire facias to revive judgment see

land was recovered, demandant after the year might take out scire facias to revive his judgment.[90] To make the form of the procedure more uniform the Statute of Westminster II (13 Edw. I) gave scire facias to plaintiff in a personal action to revive his judgment where he had omitted to sue execution within the year after judgment was obtained.[91] The reason for forbidding the issuance without a scire facias after the lapse of a year has been said to be that a presumption is raised that the judgment was satisfied,[92] yet it may be more accurate to say that the lapse of time afforded some evidence or some probability of satisfaction.[93]

The rule requiring scire facias to the debtor, if the original execution did not issue for a year after the rendition of the judgment, was generally adopted by the states of this country without any distinction as to the personal or real actions,[94] but, as is observed infra in this subdivision, statutes now generally fix the time within which execution must issue.

The fact that the creditor has a lien on certain real estate of the debtor, created by attachment, does not excuse the failure of the creditor to sue out the writ within the year and a day, where the existence of such prior lien does not operate as a stay of execution, and the creditor is at liberty to sue out the writ and have satisfaction out of other property if any can be found.[95]

Time fixed by statute. The time within which the original execution must be issued is now generally fixed by statute,[96] and in the absence of any showing to that effect, it will not be presumed that the time within which an execution may properly issue has expired.[97] Delay is no ground for refusing the writ where the statutory time for the

the C.J.S. title Judgments § 548, also 34 C.J. p 669 note 98 et seq.

90. Md.—Mitchell v. Chesnut, 31 Md. 521.
23 C.J. p 375 note 66.

91. Md.—Mitchell v. Chesnut, 31 Md. 521.
23 C.J. p 375 note 67.

92. Ill.—Hernandez v. Drake, 81 Ill. 34.
23 C.J. p 375 note 68.

93. Vt.—Catlin v. Merchants Bank, 36 Vt. 572.
23 C.J. p 375 note 69.

94. U.S.—Azcarati v. Fitzsimmons, Pa., 2 F.Cas.No.690, 3 Wash.C.C. 134.
Ill.—Weis v. Tiernan, 91 Ill. 27—Hernandez v. Drake, 81 Ill. 34.
Ky.—Duff v. Combs, 8 B.Mon. 386.
Miss.—Bacon v. Red, 27 Miss. 469.
Tex.—North v. Swing, 24 Tex. 193.
23 C.J. p 375 note 70.

Issuing execution nearly two years after judgment without a scire facias or other proceedings to revive the judgment was erroneous.—Seely v. Norris, 3 N.J.Law 624.

Judgment of court without common-law jurisdiction

Rule is inapplicable to execution on a judgment of a court not possessing common-law jurisdiction and which was not enforceable by execution without an order of the court.—Caldwell v. Lockridge, 9 Mo. 362.

95. Vt.—Catlin v. Merchants Bank, 36 Vt. 572.
23 C.J. p 376 note 72.

96. Ark.—Hanly v. Carneal, 14 Ark. 524.
Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093.
Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
Miss.—McGraw v. Mitchell, 107 So. 423, 142 Miss. 357.
Mo.—Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401, reversing, App., 104 S.W.2d 1019—Wayland v. Kansas City, 12 S.W.2d 438, 321 Mo. 654—Steele v. Reid, 223 S.W. 881, 284 Mo. 269.
Mont.—State v. Hart Refineries, 92 P.2d 766, 109 Mont. 140, 123 A.L.R. 555.
Tex.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.
23 C.J. p 376 note 74.
Time of issuance of alias execution see § 85 infra.

"May" construed as limitation

The statute providing that executions may issue within a certain time after judgment implies that an execution shall not issue after such time unless other statutory provisions provide an exception.—Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401, reversing, App., 104 S.W.2d 1019—23 C.J. p 376 note 74 [e].

Before judgment barred

In several jurisdictions it is provided by statute that execution may issue at any time before a judgment is barred by the statute of limitations.—Koontz v. La Dow, 202 S.W. 686, 133 Ark. 523—23 C.J. p 377 note 77.

Five years

In several jurisdictions statutes have been enacted authorizing the issuance of the writ at any time within five years after the rendition of the judgment, and prohibiting its issuance after the lapse of that time without first resorting to a scire facias or motion for leave to issue the writ, or some analogous proceeding.
Cal.—Peers v. Stoll, 90 P.2d 179, 32 Cal.App.2d 511—Greeley v. Suey Sing Benev. Ass'n, 83 P.2d 54, 28 Cal.App.2d 536—Ladd v. Mathis, 73 P.2d 1012, 125 Cal.App. 535.
Iowa.—Denegre v. Haun, 13 Iowa 240.
Pa.—Smith v. Wehrly, 27 A. 700, 157 Pa. 407—City Building & Loan Ass'n v. Nickey, 21 Pa.Co. 226—Albert v. March, 6 Pa.Co. 142—Bucher v. Pringle, 16 Montg.Co.L. 196—Marx v. Goldsmith, 14 Wkly. N.C. 173—Huzzard v. Miller, 2 Woodw. 35.
Wash.—Hewitt v. Root, 71 P. 102, 31 Wash. 312.
23 C.J. p 377 note 76.

Attachment on judgment

Statute is applicable to attachment on judgment.—Boyd v. Talbott, 7 Md. 404.

Judgment recovered for fine

Statute is inapplicable to a judgment recovered in a criminal court for a fine.—Commonwealth v. Snyder, 4 Pa.Co. 261.

Special executions are sometimes governed by general statutes limiting the time within which an execution may be issued without scire facias or other proceedings.
Cal.—Dorland v. Hanson, 22 P. 552, 81 Cal. 202, 15 Am.St.R. 44.
Pa.—O'Donnell v. School-Dist., 19 A. 358, 133 Pa. 162.

Surety on sale bond may successfully defend, where more than twelve months elapse from the maturity of the bond, and no execution thereon has been issued.—Park v. Cline, 13 Ky.Op. 580.

97. S.D.—Cole v. Schamber, 155 N.W. 139, 36 S.D. 424.

issuance of the execution has not elapsed,[98] and an execution may be issued within the time fixed by statute, although the lien of the judgment has expired.[99]

While according to some authorities statutes of limitation applicable to actions and actions on judgments govern the time within which execution must issue,[1] it has also been held that a limitation as to actions, prescribing the time within which actions on judgments must be brought, is not applicable to the remedy by execution,[2] and hence a statute may authorize an execution after an action on the judgment is barred by limitation.[3]

A statute limiting the time within which an execution may be issued, relates wholly to the remedy, and applies to executions on all judgments, whether rendered before or after its enactment.[4] A statute extending the time within which executions may issue is likewise remedial and applies to all judgments against which, at the time of its passage, no limitation statute had actually run.[5] However, a statute providing that the time during which defendant is absent from the state should not be computed as a part of the period within which an action must be brought has been held not to extend the time for the issuance of an execution on a judgment rendered prior to the effective date of the statute.[6] Some jurisdictions have a period within which execution may issue as of course, which period cannot be extended by leave of court.[7]

Effect of delayed issuance. As a general rule, an execution issued after the lapse of more than a year and a day after judgment, without revival by scire facias, or after the lapse of the statutory period, without taking the steps prescribed by statute, is voidable merely, and not void, and all acts done under it before it is set aside are valid;[8] but there are some authorities to the contrary.[9] An execution issued after the lapse of a year and a day, or after the expiration of the statutory period, is a justification to the sheriff or other officer to whom it is directed, and it is his duty to perform its mandate.[10]

Waiver. The judgment debtor may waive his right to object to a delay in issuing a writ of execution.[11]

c. Computation of Time

(1) In general
(2) Suspension of running of time

(1) In General

The time within which execution must issue has been variously held to commence at the rendition, or entry or docketing of the judgment.

The time within which plaintiff must issue his execution has been variously held to begin to run

98. Mo.—State v. Renick, 57 S.W. 713, 157 Mo. 292.

99. Mo.—Steele v. Reid, 223 S.W. 881, 284 Mo. 269.
23 C.J. p 377 note 79.

Statute dispensing with scire facias construed
The statute providing that execution may issue on any judgment of record in any of the courts of the commonwealth, notwithstanding the judgment may have lost its lien on real estate without a previous writ of scire facias to revive the same, refers only to judgments originally obtained in courts of record, or which by regular proceedings according to the course of law before inferior courts have by transcript been given the force of judgments obtained in the common pleas.—Smith v. Wehrly, 27 A. 700, 157 Pa. 107.

1. Colo.—New England Electric Co v. Bowes, 5 P.2d 245, 89 Colo. 547.
N.C.—McDonald v. Dickson, 85 N.C 248.

Where action on judgment was barred by statute of limitations, execution could not thereafter issue on such judgment.—Reed v. Flood, 230 P. 108, 76 Colo. 139—Sundin v. Frost, 206 P. 1071, 71 Colo. 367.

Issuance of execution on decree charging owelty in partition is governed by statute of limitations—Hyman v. Jones, 171 S.E. 103, 205 N.C. 266—Ex parte Smith, 47 S.E 16, 131 N.C. 495.

Execution issued before judgment was outlawed is valid.—Dodge v. Barker, 204 N.W. 802, 231 Mich. 577.

2. N.Y.—Kincaid v. Richardson, 25 Hun 237.

3. N.Y.—Matter of Warner, 56 N. Y.S. 585, 39 App.Div. 94, affirming 50 N.Y.S. 940, 22 Misc 188—Agar v. Curtiss, 40 N.Y.S. 815, 8 App. Div. 337.

4. Ind.—Leonard v. Broughton, 22 N.E. 731, 120 Ind. 536, 16 Am.S.R. 347.
Iowa.—Gray v. Iliff, 30 Iowa 195.

5. Colo.—Henry v. Thisler, 155 P. 1177, 62 Colo. 1—Balfe v. Rumsey, 133 P. 417, 55 Colo. 97, Ann.Cas. 1914C 692.

6. Colo.—New England Electric Co. v. Bowes, 5 P.2d 245, 89 Colo. 547.

7. Mont.—Peters v. Vawter, 25 P. 438, 10 Mont. 201.
Utah.—Livingston v. Paxton, 2 Utah 481.
Leave of court as condition precedent to issuance after lapse of certain time see § 59 supra.

8. N.Y.—Jackson v. Bartlett, 8 Johns. 361.
Pa.—Sylvester v. De Witt, 34 Pa. Super. 205.
Tex.—Stanford v. Dumas, Civ.App., 137 S.W.2d 1071, error dismissed, judgment correct—Grissom v. F. W. Heitmann Co., Civ.App., 130 S.W.2d 1054, error refused.
23 C.J. p 379 note 10.

9. Minn.—Hanson v. Johnson, 20 Minn. 194.
23 C.J. p 380 note 11.

To support execution sale as against a purchaser for value, reasonable issuance of execution must be proved.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, Idaho, 111 P.2d 1093.

10. U.S.—Goshorn v. Alexander, C. C.Ohio, 10 F.Cas.No 5,630, 2 Bond 158.
23 C.J. p 380 note 13.

11. Filing of injunction to restrain sale under an execution cures the delay in issuing the writ.—Overton v. Perkins, Mart. & Y., Tenn., 367—
23 C.J. p 424 note 12.

from the rendition,[12] entry,[13] or docketing[14] of the judgment, and under a statute so providing, from the date of the last payment thereon.[15] On a judgment payable in installments, the period runs from the time when each installment falls due.[16]

An order of revivor made necessary by the death of the judgment debtor is not to be considered as a new judgment, and notwithstanding such order of revivor the time within which an execution is issuable is to be computed from the date of the original judgment.[17]

(2) Suspension of Running of Time

In computing the time limited for suing out an execution, the time during which execution is stayed should be excluded, and the time will be extended by any delay occasioned by the debtor.

Although there is authority to the contrary,[18] in computing the time limited for suing out an execution, as a general rule, sometimes by reason of express statutory regulation, there should not be included the time when execution is stayed,[19] either by agreement of the parties for a definite time,[20] by injunction,[21] by the taking of an appeal or writ of error so as to operate as a supersedeas,[22] or by the death of a party.[23] Any interruption or delay occasioned by the debtor will extend the time within which the writ may be issued without scire facias.[24] A period during which the judgment was satisfied by a sale of lands under a decree, the sale afterward being set aside, cannot be included.[25]

On the other hand, an action in equity by a judgment creditor to subject property to the satisfaction of the judgment does not suspend the right to issue execution, so as to lengthen the time.[26] A partial payment of the judgment does not arrest the running of the statutory time.[27]

Nonresidence. In some jurisdictions, by statute, the length of time defendant has been a nonresident of the state is not to be computed;[28] but a statute stopping the running of limitations on the commencement of actions while defendant is a nonresident has been held not to apply to executions.[29]

§ 67. Acts Constituting Issuance; Delivery to Officer

A writ of execution is not issued until it is placed where it may be executed and some efficient act done under it; until it has been delivered to the proper officer it is not issued.

A writ of execution cannot be considered as being issued as a result of mere clerical preparation and attestation.[30] The writ is not issued until

12. N.C.—McCaskill v. McKinnon, 28 S.E. 265, 121 N.C. 192, 61 Am. S.R. 659.
23 C.J. p 377 note 89.

13. N.Y.—Aultman & Taylor Co. v. Syme, 34 N.Y.S. 379, 87 Hun 295.
23 C.J. p 377 note 90.

Judgment nunc pro tunc
Conn.—Ireland v. Connecticut Co., 152 A. 614, 112 Conn. 452.

14. Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093.
23 C.J. p 377 note 91.

15. **What constitutes "payment"**
The "payment" contemplated by the statute is a "payment" made voluntarily or under and pursuant to a judgment or decree in a case such as a divorce case.—Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401, reversing, App., 104 S.W.2d 1019.

16. Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 75.

17. Kan.—Halsey v. Van Vliet, 27 Kan. 474.
23 C.J. p 376 note 73.

18. Philippine.—Compania General de Tabacos v. Martinez, 17 Philippine 160.
23 C.J. p 378 note 95.

Agreement staying judgment for definite time does not affect time within which execution could issue.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

19. N.C.—McDonald v. Dickson, 85 N.C. 248.
Va.—Straus v. Bodeker's Ex'x, 10 S. E. 570, 86 Va. 543—Dabney v. Shelton, 4 S.E. 605, 82 Va. 349.
23 C.J. p 378 note 96.
Effect of stay generally see infra § 141.

In California
(1) By statute the time during which the judgment could not be enforced must be excluded from computation of the time within which execution may issue, the purpose being to restore a creditor to the position he occupied before the issuance of execution was stayed or enjoined.—Betty v. Superior Court of Los Angeles County, 116 P.2d 947.

(2) Prior to this statute the contrary rule prevailed.—Buell v. Buell, 28 P. 443, 92 Cal. 393.
23 C.J. p 378 note 96 [a] (2).

20. N.Y.—U. S. v. Hanford, 19 Johns. 173.
23 C.J. p 378 note 97.

Agreement implying stay for a reasonable time suspends running of time.—Miller v. Milford, 2 Serg. & R., Pa., 35.

21. Ga.—Cox v. Montford, 66 Ga. 62.
Minn.—Wakefield v. Brown, 37 N.W. 788, 38 Minn. 361, 8 Am.S.R. 671.
23 C.J. p 378 note 98.

22. Ill.—Rock Island Nat. Bank v. Thompson, 50 N.E. 1089, 173 Ill. 593, 64 Am.S.R. 137.
23 C.J. p 378 note 99.

23. Ill.—Kinkade v. Gibson, 70 N. E. 683, 209 Ill. 246.
23 C.J. p 378 note 1.

24. U.S.—Muncaster v. Mason, D.C., 17 F.Cas.No.9,920, 2 Cranch C.C. 521.
23 C.J. p 378 note 2.

25. Ky.—Mulholland v. Troutman, 10 Ky.L. 263.

26. Ky.—White v. Moore, 38 S.W. 505, 100 Ky. 358, 18 Ky.L. 790.

27. N.C.—McCaskill v. McKinnon, 28 S.E. 265, 121 N.C. 192, 61 Am. S.R. 659.

28. Iowa.—Mudge v. Livermore, 123 N.W. 199, 148 Iowa 472.
23 C.J. p 379 note 5.

29. Miss.—McGraw v. Mitchell, 107 So. 423, 142 Miss. 357.
23 C.J. p 379 note 6.

30. Tex.—Cotten v. Stanford, Civ. App., 147 S.W.2d 930—Bourn v. Robinson, 107 S.W. 873, 49 Tex. Civ.App. 167.

it is placed where it may be executed and some efficient act done under it.[31]

The writ, while it remains in the clerk's office, is not issued,[32] but it must be actually or constructively delivered to the sheriff or other proper officer before it can properly be said to have been issued.[33] Moreover, such delivery must be unconditional and unlimited,[34] with the intent to have the officer execute it.[35] A delivery with instructions to do nothing is no delivery.[36] The writ must be delivered personally to the officer or one acting for him,[37] or left at his office,[38] and leaving it at the sheriff's residence in his absence is not a delivery to him.[39] Delivery to the deputy is equivalent in law to a delivery to the sheriff himself.[40]

Evidence of delivery. By statute, in some states, the officer to whom the writ is directed is required to indorse on the writ a memorandum of the day, hour, and minute when he receives it,[41] and, where there are two or more executions against the same person, to number them in the order of their precedence.[42] A sheriff's indorsement on an execution of the hour of leaving it is conclusive that the writ was in his hands at that time.[43] Such statutes are merely directory and are intended to facilitate proof as to the time of the delivery of the writ, and to prevent confusion among different executions; and when such memorandum is not made, the date of the delivery may be proved by parol.[44]

The usual presumptions in favor of official acts are applicable,[45] and unless the contrary appears it will be presumed that the writ was delivered to the sheriff on the day the levy was made.[46]

§ 68. —— Recording

Unless required by statute, writs of execution need not be recorded or indexed.

In the absence of a statutory requirement, recording or indexing of writs of execution is not a prerequisite to their validity.[47] However, such writs must be recorded or indexed where the statute so directs.[48]

Under some statutes writs of execution must be recorded or indexed before they can be executed against real estate.[49] This requirement, however, is only for the protection of innocent third persons who may acquire a contractual lien on the property affected, and is not necessary as between the parties.[50]

The absence of an entry in the execution record or index is not indisputable proof that a particular writ never existed, but is at best a negative showing that arises from the presumption that the official has not disobeyed his duty.[51]

31. Mich.—Mauch Chunk First Nat Bank v. Dwight, 47 N.W. 111, 83 Mich. 189.
N.D.—Hodge v. Anderson, 159 N.W. 79, 35 N.D. 20.

32. N.C.—McKeithen v. Blue, 62 S. E. 769, 149 N.C. 95, 128 Am.S.R 654.
23 C.J. p 361 note 44.

33. Tex.—Cotten v. Stanford, Civ. App., 147 S.W.2d 930, 933, citing **Corpus Juris.**
23 C.J. p 361 note 45.

First step after preparation of an execution is to place it in the hands of the sheriff.—Walker v. Commonwealth, 18 Gratt. 13, 59 Va. 13, 98 Am.D. 631.

34. U.S.—In re Tengwall Co., Ill., 201 F. 82, 119 C.C.A. 420, affirmed 35 S.Ct. 29, 235 U.S. 300, 59 L.Ed. 238.
23 C.J. p 362 note 46.

35. U.S.—Howes v. Cameron, C.C. Ill., 23 F. 324.
23 C.J. p 362 note 47.

36. N.J.—Cook v. Wood, 16 N.J.Law 254.
23 C.J. p 362 note 48.

37. N.Y.—Burrell v. Hollands, 29 N. Y.S. 515, 78 Hun 583.
23 C.J. p 362 note 50.

38. Pa.—Miflin v. Will, 2 Yeates 177.

39. Pa.—Grassmeyer's Appeal, 4 Pennyp. 288.

40. Me.—Humphreys v. Cobb, 22 Me. 380.
23 C.J. p 362 note 53.

41. N.Y.—Burrell v. Hollands, 29 N.Y.S. 515, 78 Hun 583.
23 C.J. p 362 note 54.

42. Tex.—Garner v. Cutler, 28 Tex. 175.

43. N.Y.—Williams v. Lowndes, 1 N.Y.Super. 579.
Pa.—Person's Appeal, 78 Pa. 145.

44. Pa.—Hale's Appeal, 44 Pa. 438.
23 C.J. p 362 note 57.

45. Ind.—Peters v. Banta, 22 N.E. 95, 120 Ind. 416.
23 C.J. p 362 note 58.
Presumption of regularity of official acts see Evidence § 146.

46. Ill.—Storey v. Agnew, 2 Ill.App. 353.

47. Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.

48. Tex.—Bendy v. W. T. Carter & Bros., supra.
23 C.J. p 362 notes 60, 61.

Execution issued to another county
A statute, which provides that, when an execution is issued to the sheriff of any county other than where the judgment was rendered, the sheriff, among other things, shall deliver the writ to the clerk of the district court of his county, who shall enter the same in the execution docket, is for the protection of bona fide purchasers from an execution debtor and nothing more.—Thrush v. Winslow, 98 P.2d 905, 186 Okl. 499.

49. Pa.—Ross' Appeal, 106 Pa. 82.
23 C.J. p 362 notes 60, 61.

Where person removes from county in which a judgment was rendered against him, it is not necessary to enter on the general execution docket of the county to which he removes an execution issued on such judgment, in order to effectuate a lien of the judgment as to his property therein.—Smith v. Howell, 29 S.E. 31, 101 Ga. 771—Bradley v. Booth, 9 S.E.2d 861, 62 Ga.App. 770.

50. Ga.—Ray v. Atlanta Trust & Banking Co., 93 S.E. 418, 147 Ga. 265.

In contest between mere judgment liens the statute is inapplicable.—Corley-Powell Produce Co. v. Allen, 157 S.E. 251, 42 Ga.App. 641.

51. Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.

§ 69. Form and Contents of Writ

As a general rule, in the absence of statutory requirements, a writ of execution is sufficient if it is in the form sanctioned by general usage, and technical objections should be disregarded.

As a general rule, in the absence of statutory requirements, a writ of execution is sufficient if it is in the form sanctioned by general usage, and technical objections should be disregarded.[52] Statutes prescribing the form and contents of executions should be followed,[53] and if the execution contains all that is required by statute it is sufficient.[54] Indeed, it is sufficient if the statutory form is substantially followed.[55]

The execution should disclose on its face the authority to issue it.[56] The fact that an original execution is expressed to be an alias does not vary the legal effect of the writ.[57] Where courts of chancery are authorized to issue executions on decrees for the payment of money, executions issued on such decrees must follow and conform to the writs issued by courts of law.[58]

An execution need not be written on a single sheet of paper, and if it is on several sheets it is sufficient that they are pinned together.[59]

Unnecessary recitals. Unnecessary recitals in the writ are ordinarily treated as surplusage and are not allowed to vitiate the writ.[60] Thus unnecessary recitals of proceedings in the action previous to final judgment do not affect the regularity of the execution.[61]

§ 70. —— Conformity to Judgment

An execution must conform to the judgment on which it is issued in every essential particular, but an immaterial variance does not vitiate the writ.

An execution must conform to the judgment on which it is issued[62] in every essential particular.[63] However, a variance between the judgment and the execution does not necessarily vitiate the execution,[64] particularly where the variance is not substantial,[65] and the judgment can readily be identified from the execution.[66] However, the variance between the execution and the judgment on which it is issued may be so material as to render the execution fatally defective.[67]

Clerical mistakes. Mere clerical mistakes do not render the execution void, but at the most only voidable.[68]

52. Tex.—Collin County Nat. Bank v. Satterwhite, Civ.App., 184 S.W. 338.
23 C.J. p 402 note 53.
Form of writ issued on transcript of inferior court see supra § 61.

Forms
Ala.—Glover v. Bass, 50 So. 125, 162 Ala. 267, 136 Am.S.R. 22.
N.Y.—Jackson v. Jones, 9 Cow. 182.

53. Mont.—Nepstad v. East Chicago Oil Ass'n, 29 P.2d 643, 645, 96 Mont. 183, citing **Corpus Juris.**
R.I.—Romoli v. Motta, 194 A. 733, 59 R.I. 201.
23 C.J. p 402 notes 54, 55.

Language
In Louisiana at one time, the writ was required to be in French and English, when French was the mother tongue of the execution debtor. —Le Blanc v. Dubroca, 6 La.Ann. 360—23 C.J. p 402 note 66.

54. Tex.—Lebreton v. Lemaire, Civ. App., 43 S.W. 31.
23 C.J. p 402 note 57.

Execution held not void because of form
Tex.—Simmons v. Arnim, 220 S.W. 66, 110 Tex. 309, affirming, Civ. App., 172 S.W. 184.
Order of sale was in substantial compliance with statute.—Teston v. Brannin, Tex.Civ.App., 261 S.W. 788.

55. Ind.—Ensley v. McCorkle, 74 Ind. 240.
23 C.J. p 402 note 56.

56. Wis.—Kentzler v. Chicago, M. & St. P. R. Co., 3 N.W. 369, 47 Wis. 641.

57. N.Y.—Jackson v. Sternbergh, 1 Johns.Cas. 153.

58. S.C.—Lowndes v. Pinckney, 18 S.C.Eq. 94.
Enforcement of decrees in equity see Equity §§ 616–621.

59. Ala.—Glover v. Bass, 50 So. 125, 162 Ala. 267, 136 Am.S.R. 22.

60. Ga.—Walls v. Smith, 19 Ga. 8.
23 C.J. p 402 note 62.

61. N.Y.—Holmes v. Rogers, 2 N.Y.S. 501.

62. Cal.—Smith v. Wilson, 36 P.2d 715, 1 Cal.App.2d 297.
Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.
Ga.—Stanfield v. Downing Co., 199 S.E. 113, 186 Ga. 568.
Miss.—Riley v. State, 168 So. 475, 175 Miss. 831.
Nev.—In re Mollart, 78 P.2d 93, 94, 58 Nev. 329, citing **Corpus Juris.**
Tenn.—Sipes v. Sanders, 66 S.W.2d 261, 17 Tenn.App. 162.
Tex.—Horton v. Garrison, 20 S.W. 773, 1 Tex.Civ.App. 31.
23 C.J. p 402 note 68.

Order of sale must conform to the judgment on which it is based.
Okl.—Kirkpatrick v. Jefferson Standard Life Ins. Co. of Greensboro, N. C., 70 P.2d 59, 180 Okl. 402.
Tex.—Taylor v. American Trust & Savings Bank of El Paso, Civ. App., 265 S.W. 727.

Where terms of execution followed literally the provisions of a judgment, there was no error in the refusal of the trial court to cancel the execution because it was directed primarily against the principal debtor, and not the bondsman.—Thorndale Mercantile Co. v. Continental Gin Co., Tex.Civ.App., 241 S.W. 260, reversed on other grounds Continental Gin Co. v. Thorndale Mercantile Co., Com.App., 251 S.W. 939.

63. Ark.—Hightower v. Handlin, 27 Ark. 20.
Ill.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182.
Mont.—Nepstad v. East Chicago Oil Ass'n, 29 P.2d 643, 644, 96 Mont. 183, quoting **Corpus Juris.**
Va.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.

64. Ill.—Mayne v. Drury, 129 N.E. 77, 295 Ill. 533.
23 C.J. p 403 note 71.

65. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.
23 C.J. p 403 notes 70, 72.

66. Conn.—Sibley v. Krauskopf, supra.
23 C.J. p 403 note 73.

67. Conn.—Sibley v. Krauskopf, supra.
23 C.J. p 403 note 74.

68. Ala.—De Loach v. Robbins, 14 So. 777, 102 Ala. 288, 48 Am.R. 46.
23 C.J. p 403 note 75.

Command to make specie. Where a judgment is payable in specie, execution should issue requiring payment of the judgment in specie.[69]

§ 71. —— Name in Which Writ Should Run

A writ of execution is required to run in the name of the state or people but an irregularity in this respect generally does not render the writ void.

Executions are directed to the sheriff or other officer, not by the court, but by the sovereign;[70] and in many states the writ is required, by either the constitution or statutes, to run in the name of the state or people.[71] An irregularity in this respect generally does not render the writ void,[72] although there is authority to the contrary.[73]

The use of the term "territory" instead of "state" is a mere irregularity.[74]

§ 72. —— Direction to Officer

An execution must be directed to the proper officer, but an irregularity in this respect is not necessarily fatal.

The direction in the writ to the officer, usually the sheriff, is what gives him his authority,[75] except in so far as otherwise provided by statute.[76]

An execution must be directed to the officer designated by the applicable statute.[77] Ordinarily the writ should be directed to the sheriff in office at the time of its issuance.[78] Where an execution is intended to be delivered to, and levied by, the sheriff of another county than that in which the judgment was rendered, it must be directed to the sheriff of such other county.[79]

Under some statutes, where an officer other than the sheriff serves the original process on which judgment is rendered, the execution must be directed to, and served by, the same officer,[80] although the cause for directing the original process to him has ceased.[81] At common law, however, an execution need not necessarily be directed to the same officer as the one who served the mesne process.[82]

If the direction is defective in not designating the officer to execute the writ, the defect is not material where what is lacking appears in another part of the writ[83] or from an accompanying instrument.[84] The fact that the direction does not exactly conform to the statutory requirement is not necessarily fatal.[85] The fact that an execution was directed to an improper officer cannot be objected to by a stranger.[86]

Disqualification of regular officer. When the sheriff is a party or otherwise disqualified, the writ should be directed to someone else, usually to the coroner;[87] or, if he is disqualified, to another officer.[88] The writ should be directed to the coroner when there is a vacancy in the office of sheriff.[89] In some jurisdictions the writ should contain a suggestion of the disqualification or nonexistence of the officer whose prior right and duty it is to act,[90] but the omission to make this appear on the face of the writ is not fatal.[91]

69. Mass.—Independent Ins. Co. v. Thomas, 104 Mass. 192.
23 C.J. p 409 note 58.

70. N.C.—Nixon v. Harrell, 50 N.C. 76.

71. Mont.—Merchants Credit Service v. Chouteau County, 114 P.2d 1074.
23 C.J. p 404 note 78.

72. Wash.—Pederson v. Lease, 93 P. 439, 48 Wash. 253, 125 Am.S.R. 922.
23 C.J. p 404 note 80.

73. Ill.—Sidwell v. Schumacher, 99 Ill. 426.
23 C.J. p 404 note 79.

74. Colo.—Carnahan v. Pell, 4 Colo. 190.
S.D.—State v. Cassidy, 54 N.W. 928, 4 S.D. 58.

75. Me.—Pillsbury v. Smyth, 25 Me. 427.
Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 1076, quoting **Corpus Juris.**

76. Ga.—Gillis v. Smith, 67 Ga. 446.
23 C.J. p 404 note 83.

77. Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 1077, citing **Corpus Juris.**
N.Y.—Corrigan v. Kahn, 198 N.Y.S. 785, 120 Misc. 161.

"Sheriff"
The word "sheriff" within statute providing that writ of execution must be directed to the sheriff, means the sheriff of county where process is to be served.—Merchants Credit Service v. Chouteau County Bank, Mont., 114 P.2d 1074.

Duty of clerk
The clerk is bound to direct the execution to such officers as the party or his attorney may require, provided such direction is in conformity to the statute.—Blanchard v. Waters, 10 Metc., Mass., 185.

78. Ark.—Cotton v. Atkinson, 13 S.W. 415, 53 Ark. 98.
23 C.J. p 404 note 94.

79. Okl.—Christy v. Springs, 69 P. 864, 11 Okl. 710.
23 C.J. p 404 note 95.

80. Ky.—Boaz v. Nail, 2 Metc. 245.

81. **Service by coroner**
Ky.—Tuggle v. Smith, 6 T.B.Mon. 76.

82. Ky.—Tuggle v. Smith, supra.

83. **Indorsement on back of writ** may be used to show to what officer it is directed.—White v. Coulter, 1 Hun 357, 358, modified on other grounds 59 N.Y. 629—23 C.J. p 404 note 87.

84. N.C.—Forsythe v. Sykes, 9 N.C. 54.

85. Ga.—Young v. Germania Sav. Bank, 64 S.E. 552, 132 Ga. 490.
23 C.J. p 404 note 92.

86. Vt.—Crane v. Warner, 14 Vt. 40.

87. S.C.—McBee v. Hoke, 29 S.C.L. 138.
23 C.J. p 405 note 2.
Substitutes for sheriff see the C.J.S. title Sheriffs and Constables §§ 31–33, also 57 C.J. p 772 note 39 et seq.

88. Ky.—Gowdy v. Sanders, 11 S.W. 82, 88 Ky. 346, 10 Ky.L. 912.

89. Mo.—Carr v. Youse, 39 Mo. 346. 90 Am.D. 470.
23 C.J. p 405 note 4.

90. Mo.—Carr v. Youse, supra.
23 C.J. p 405 note 6.

91. Ark.—Thompson v. Bremage, 14 Ark. 59.
23 C.J. p 405 note 7.

Where the sheriff is disqualified, the coroner or other officer has no power to execute the writ unless it is directed to him,[92] and consequently cannot be held liable for not executing a writ not directed to him.[93] An execution directed to the "coroner or jailer," where the sheriff is disqualified, cannot be executed by the jailer since the presumption is that the coroner is not disqualified.[94]

To person whose term of office has expired. It is a general rule that an officer who commences the execution of process must complete it, even though his term of office may have expired before such completion.[95] This rule applies to a venditioni exponas.[96] The reason of such a rule is apparent where chattels have been seized; the seizure vests the property in the sheriff.[97] Such a reason is wanting in case of a levy on land,[98] and while the rule has nevertheless been applied in such a case,[99] the better rule is that the venditioni may be directed either to the sheriff who made the levy or to the sheriff in office at the time.[1]

Where a judgment is recovered in a suit commenced by attachment, an execution issued on such judgment, according to some authorities, should be directed to, and levied by, the sheriff in office at the time of the issuance of the writ and not to the sheriff who levied the attachment.[2] In other decisions, however, it is held that the officer who served the attachment must serve the fieri facias.[3]

§ 73. —— Recital and Description of Judgment

The execution must intelligibly refer to the judgment on which it is based and it should identify the court which rendered the judgment and recite the date of the judgment, but irregularities in these respects are not necessarily fatal.

The execution must intelligibly refer to the judgment on which it is based.[4] This part of the execution should have the precision of the judgment itself;[5] but it is not essential to the validity of an execution that the utmost possible strictness should be observed in reciting the judgment,[6] and the general rule is that the failure to recite the judgment accurately does not render the writ void, as long as it can be clearly and unmistakably identified with the judgment purported to be recited, the process in such case being merely irregular.[7] Where the judgment cannot be identified from the recital the writ is void.[8]

Recital of court which rendered the judgment. The writ must identify the court which rendered the judgment.[9] A judgment of the appellate court, although sent to the lower court for execution, should be described as a judgment of the appellate court.[10] However, an execution issued on the filing of the transcript of a lower court may describe the judgment as one of the court from which the execution issues.[11] A misdescription of the court does not necessarily render the execution void as distinguished from voidable,[12] unless the execution cannot be identified from the recital.[13]

92. Ky.—Parsons v. Dills, 167 S.W. 415, 159 Ky. 471.
23 C.J. p 404 note 84.

93. Tenn.—Brown v. Barker, 10 Humphr. 346.
Liability of coroners see Coroners §§ 29–31.

94. Ky.—Gowdy v. Sanders, 11 S.W. 82, 88 Ky. 346, 10 Ky.L. 912.

95. Wis.—Holmes v. McIndoe, 20 Wis. 657.
23 C.J. p 405 note 8.

96. Md.—Purl v. Duvall, 5 Harr. & J. 69, 9 Am.D. 490.
23 C.J. p 405 note 9.

97. N.C.—Tarkinton v. Alexander, 19 N.C. 87.
23 C.J. p 405 note 10.

98. N.C.—Tarkinton v. Alexander, supra.
Wis.—Holmes v. McIndoe, 20 Wis. 657.

99. Md.—Busey v. Tuck, 47 Md. 171 —Purl v. Duvall, 5 Harr. & J. 69, 9 Am.D. 490.

1. N C.—Tarkinton v. Alexander, 19 N.C. 87.
Wis.—Holmes v. McIndoe, 20 Wis. 657.

2. Mich.—Fletcher v. Morrell, 44 N. W. 133, 78 Mich. 176.
23 C.J. p 405 note 14.

3. Idaho.—Pecotte v. Oliver, 10 P. 302, 2 Idaho, Hasb., 251.
23 C.J. p 405 note 15.

4. Ill.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182.
23 C.J. p 405 note 16.
"An execution, to be valid must show on its face, that such a judgment has been rendered by a competent court, as will justify its emanation."—Hinman v. Pope, 6 Ill. 131, 141.

Judgment held correctly described
Tex.—Simmons v. Arnim, 220 S.W. 66, 110 Tex. 309, affirming, Civ. App., 172 S.W. 184.

5. Ky.—Farmers Nat. Bank v. Lancaster Nat. Bank, 4 Ky.L. 451.
23 C.J. p 406 note 17.

6. Ky.—Graham v. Price, 3 A.K. Marsh. 522, 13 Am.D. 199.
23 C.J. p 403 note 70.

7. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.
23 C.J. p 406 note 18.

8. U.S.—McSherry v. Queen, D.C., 16 F.Cas.No.8,926, 2 Cranch C.C. 406.
23 C.J. p 406 note 19.

9. Ill.—Brown v. Duncan, 23 N.E. 1126, 132 Ill. 413, 22 Am.S.R. 545.
23 C.J. p 406 note 20.

Execution held valid
Execution stating judgment was recovered, in cause numbered, in Eighty-Eighth district court of ——— county, attested by clerk of E county, was valid.—Continental Oil & Gas Production Co. v. Austin, Tex. Civ.App., 17 S.W.2d 1114.

10. Tex.—Irvin v. Ferguson, 18 S. W. 820, 83 Tex. 491.
23 C.J. p 406 note 21.

11. Pa.—Hamilton v. Dawson, 4 Pa. L.J. 141.

12. Okl.—Gulager v. Bickford, 293 P. 209, 146 Okl. 49.
23 C.J. p 406 note 23.

13. Tenn.—Trotter v. Nelson, 1 Swan 7.
23 C.J. p 406 note 24.

Jurisdiction of court. An execution issued by a court of limited or inferior jurisdiction need not show on its face that the court had jurisdiction to render the judgment.[14]

Execution after defendant's death. An execution issued after the death of defendant should show its authority from both the original judgment and the judgment of revivor.[15]

Date of rendition or docketing. An execution should recite the date of the judgment.[16] It is proper to recite the judgment as of the date of its rendition notwithstanding the subsequent amendment of the judgment nunc pro tunc.[17] If judgment is not rendered until after a motion for a new trial is overruled at a succeeding term, the writ properly describes the judgment as rendered at the later term.[18]

By the strict rule which formerly prevailed, a misrecital as to the term in which a judgment was rendered made the writ void.[19] Under the modern rule, however, as long as the judgment may be identified, a mistake in the date of the rendition of the judgment,[20] or even an omission of the date,[21] does not make the execution void. This is especially true where the execution follows a misrecital of the record which afterward is amended.[22] An execution issued to a county in which the judgment has been docketed, which fails to state, as required by statute, the time and place of the docketing of the judgment, is not void, but is amendable.[23]

Place of filing judgment roll. Failure to state the county where the judgment roll was filed, as required by statute, does not make the execution void, where it is stated in the execution that the judgment was recovered in the superior court of a certain county named.[24]

§ 74. —— Recital and Description of Parties

The execution must follow the judgment with respect to the recitals and description of the parties, but irregularities in this respect generally do not render the writ void if the parties as recited in the writ can be plainly identified with those of the judgment.

The general rule, stated supra § 70, that the execution must follow the judgment applies with peculiar fitness to the recitals and description of the parties,[25] even where the judgment contains a misrecital as to the parties.[26] However, if the parties as recited in the writ can be plainly identified with those of the judgment, the general rule is that mistakes or omissions or other irregularities in this respect do not render the writ void.[27] An execution against a certain person "agent for"[28] or "executor"[29] is an execution against the first person alone, the added words being descriptio personae.

An execution cannot issue against a person whose first name is described as fictitious.[30]

Addition of name. The addition of a name to the execution which did not appear in the judgment has been held not to vitiate the writ;[31] but as against the person whose name is thus added it is void.[32]

14. Ga.—Hamilton v. Moreland, 15 Ga. 343.
N.Y.—Field v. Parker, 4 Hun 342.

15. Tex.—Hart v. McDade, 61 Tex. 208.
23 C.J. p 406 note 26.
Effect of death of parties after judgment see § 65 supra.

In Illinois, although in case of the death of a judgment debtor before execution, the better practice is to recite in the execution the recovery of the judgment, the death of defendant, and notice to the administrator of the judgment, and to command the sheriff to levy the execution on the land owned by defendant at his death, yet an execution issued in the name of defendant is sufficient in substance.—Wight v. Wallbaum, 39 Ill. 554.

16. Mass.—Stevens v. Roberts, 121 Mass. 555.
23 C.J. p 406 note 29.

17. Ala.—Carter v. Smith, 38 So. 184, 142 Ala. 414, 110 Am.S.R. 36.

18. Md.—Hagerstown First Nat. Bank v. Weckler, 52 Md. 30.

19. Conn.—Cutler v. Wadsworth, 7 Conn. 6.
23 C.J. p 406 note 32.

20. Ga.—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220.
Kan.—Korber v. Willis, 274 P. 239, 240, 127 Kan. 587, quoting **Corpus Juris.**
23 C.J. p 407 note 33.

21. Mich.—Perkins v. Spaulding, 2 Mich. 157.
23 C.J. p 407 note 34.

22. Mass.—Nims v. Spurr, 138 Mass. 209.

23. N.C.—Bernhardt v. Brown, 29 S.E. 884, 112 N.C. 587, 65 Am.S.R. 725.
23 C.J. p 407 note 37.

24. Cal.—Van Cleave v. Bucher, 21 P. 954, 79 Cal. 600.

25. Ga.—Bank of Tupelo v. Collier, 14 S.E.2d 59, 191 Ga. 852.
23 C.J. p 410 note 69.

26. Fla.—Brett v. Ming, 1 Fla. 447.

27. Tex.—Patton v. Crisp & White, Civ.App., 11 S.W.2d 826, error dismissed.
23 C.J. p 410 note 72.

Execution designating party as "company" without disclosing whether or not the company was a partnership or a corporation is not void.—Mills v. Churchwell Motor Co., 122 So. 773, 154 Miss. 631.

Execution not stating in whose favor judgment was rendered, although reciting the names of the parties, is sufficient where signed by the attorney for plaintiff, since the signature shows that judgment was in favor of plaintiff.—Morrison v. Austin, 14 Wis. 601.

28. Ga.—Armour Packing Co. v. Lovell, 44 S.E. 990, 118 Ga. 164—Wynn v. Irvine's Georgia Music House, 34 S.E. 582, 109 Ga. 287.

29. Ga.—Stephens v. Atlanta, 46 S.E. 872, 119 Ga. 666.
23 C.J. p 410 note 74.

30. N.Y.—Goldberg v. Markowitz, 87 N.Y.S. 1045, 94 App.Div. 237, affirmed 75 N.E. 1129, 182 N.Y. 540.

31. N.H.—Davis v. Bradford, 58 N.H. 476.
23 C.J. p 411 note 93.

32. Ky.—Bridges v. Caldwell, 2 A.K.Marsh. 195.

Omissions. While the omission of plaintiff's name from the recital of the parties may not vitiate the writ where plaintiff's identity can be fairly made out from the rest of the writ,[33] as where his name appears in the indorsement of the writ,[34] an execution on a money judgment which does not show against whose property it is sent is void.[35] In some jurisdictions the entire omission of the name of plaintiff makes the writ void.[36]

Where the judgment is joint, the execution issued thereon should be joint,[37] and this is so notwithstanding, from death or some other cause, no levy can be made on the property of some of the judgment debtors.[38] Where there is a plurality of parties plaintiff, the execution should not be issued in the name of one of them only, but should be issued in the name of all plaintiffs.[39] However, the rule that an execution, to enforce a joint judgment, must be joint cannot be allowed to work an injustice,[40] and the omission of the name of plaintiff,[41] or of defendant,[42] does not render the writ void as long as the writ can be clearly identified with the judgment, at least as against a bona fide purchaser,[43] although under some statutes, a several execution issued on a joint judgment is void.[44]

In an action against joint defendants, where separate decrees are rendered against each, an execution may be issued against one of them without issuing the same against the other.[45] An execution against two for a sum which the writ recites plaintiff has recovered against "him" is void because uncertain as against whom the judgment was rendered.[46] An execution commanding its satisfaction out of the property of several named persons is not objectionable because it refers to the judgment as obtained against one of them "and others."[47]

Mistakes and misdescriptions. A mistake in the name of a party plaintiff[48] or defendant[49] does not invalidate the writ, provided the identity of such party is not left in doubt, and the variance is not so great that the execution appears not to be issued on the judgment produced in its support,[50] except where a mandatory statute requires the execution to state correctly the names of the parties.[51] In any event, the writ is not void as against such of the parties whose names are correctly recited.[52] However, an execution which varies from the judgment in the names of both plaintiffs and defendants cannot be identified with the judgment and is void.[53]

A misrecital of the party plaintiff as an individual instead of as an administrator,[54] or as obligee instead of an assignee of an instrument,[55] has

33. Ky.—Stovall v. Hibbs, 32 S.W. 1087, 17 Ky.L. 906.

34. Tex.—Simmons v. Arnim, Civ. App., 172 S.W. 184.
23 C.J. p 410 note 78.

35. Ill.—Douglas v. Whitney, 28 Ill. 362.
23 C.J. p 410 note 79.

36. Ala.—Barrett v. Browne, 67 So. 467, 190 Ala. 613.
23 C.J. p 410 note 80.

37. Ill.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312.
Ky.—Hatfield v. Kentland Coal & Coke Co., 57 S.W.2d 1000, 247 Ky. 825.
Va.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.
23 C.J. p 411 note 84.

If plaintiff wishes to exonerate one of several defendants, he cannot do so by an irregular execution issued against the other defendants and omitting such defendant, but should issue an execution against all defendants and indorse thereon a direction to the sheriff to exonerate the favored defendant.—Farmers' & Mechanics' Nat. Bank v. Crane, 15 Abb.Pr.,N.S., N.Y., 434.

If judgment is several or joint and several, a several execution is proper.—Bohmer v. Bensinger, 133 S.W. 2d 534, 280 Ky. 382.

38. Va.—Grizzle v. Fletcher, 105 S. E. 457, 127 Va 663.
23 C.J. p 411 note 85.
Death of parties after judgment generally see § 65 supra.

39. Va.—Grizzle v. Fletcher, supra.
23 C.J. p 411 note 86.

40. Pa.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345—Sheetz v. Wynkoop, 74 Pa. 198—Mortland v. Hines, 8 Pa. 265.

41. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.

42. Conn.—Sibley v. Krauskopf, 171 A. 4, 6, 118 Conn. 158, citing **Corpus Juris.**
23 C.J. p 411 note 89.

Incidental parties

Execution was not invalid because not naming other defendants against whom judgment was rendered, where it appeared that judgment was rendered against defendant named in execution alone, and that other defendants were named only that any claim or right asserted by them to property foreclosed on would be eliminated by such foreclosure.—Alcorn v. Means, Tex.Civ.App., 273 S. W. 1016.

43. Tenn.—Wilson v. Name, 11 Humphr. 189.

44. U.S.—Ex parte Kennedy, D.C., 14 F.Cas.No.7,698, 4 Cranch C.C. 462
23 C.J. p 411 note 91.

45. Tenn.—Hyder v. Butler, 52 S.W. 876, 103 Tenn. 289.

46. Ky.—Farmers Nat. Bank v. Lancaster Nat. Bank, 4 Ky.L. 451.

47. Ind.—McCoy v. Elder, 2 Blackf. 183.

48. Ohio.—First Nat. Bank v. Hasinger, 196 N.E. 425, 427, 129 Ohio St. 642, citing **Corpus Juris.**
23 C.J. p 411 note 95.

49. Ga.—Bradford v. Columbus Water Lot Co., 58 Ga. 280.
23 C.J. p 411 note 96.

50. Neb.—Buchanan v. Edmisten, 95 N.W. 620, 1 Neb. (Unoff.) 429.
23 C.J. p 412 note 97.

51. Tex.—Harkey v. Day, 129 S.W. 1195, 61 Tex.Civ.App. 244.
23 C.J. p 412 note 98.

52. Me.—Blake v. Blanchard, 48 Me. 297.

53. Mo.—Crittenden v. Leitensdorfer, 35 Mo. 239.
23 C.J. p 412 note 1.

54. Conn.—Palmer v. Palmer, 2 Conn. 462.

55. Ky.—Pemberton v. Searce, Hard. 3.

been held to render the writ void. Yet where defendants were misdescribed as "executors," the term "executors" did not affect the validity of an execution issued against them in their individual capacity.[56] Failure to follow the judgment in not describing defendants as makers and indorsers does not render the execution void.[57] Where a judgment is rendered in favor of a guardian, execution issuing in the name of the infant does not follow the judgment.[58]

Assignment of judgment. An execution, issued by the assignees of a judgment, has been held not to be defective in omitting the name of an assignee of part of a share of one of the original assignees.[59]

Execution on judgment recovered in suit by nominal plaintiff. Where a judgment is recovered by a nominal plaintiff for the use of another, the execution should conform to the judgment and should be issued in behalf of the nominal plaintiff for the use of the usee;[60] and should not issue in favor of both the nominal plaintiff and the usee as if they were joint plaintiffs.[61] An execution which issues in the name of the usee does not follow the judgment[62] and has been held void,[63] although there are decisions to the contrary;[64] and under modern statutes execution may be issued directly in favor of the beneficial plaintiff.[65]

Where judgment has been rendered in favor of the beneficial plaintiff, an execution in favor of the nominal plaintiff for the use of the beneficial plaintiff does not conform to the judgment.[66] An execution on a judgment in favor of one for the use of another is not void because the latter recital was omitted.[67]

Judgment by or against partnership. The failure of an execution describing a judgment recovered by a partnership to include the individual names of the partners is not a fatal defect.[68]

Where a judgment is recovered against a partnership, and the individual partners have not been served with process, and no judgment has been recovered against them individually, the writ must follow the judgment and be issued against the firm and not against the partners.[69] An execution against the firm and against the individual members thereof is not variant from the judgment because it does not state that the individuals named are members of the firm, although such statement is contained in the judgment.[70]

§ 75. —— Statement of Amount

a. In general
b. Interest
c. Costs

a. In General

The execution must state the sum of money to be made and in so doing must conform to the judgment, but a variance in amount not sufficient to destroy the identity of the judgment does not invalidate the writ.

The execution must state the sum of money to be made,[71] and in doing so must follow and conform to the judgment.[72] However, a variance in amount between the execution and the judgment, which is not sufficient to destroy the identity of the judgment on which the writ issued, does not render the writ void, but voidable only, especially where the variance is small, and is due to a clerical error, or to a miscalculation of the amount remaining due on the judgment.[73] The validity of the ex-

56. Ga.—Tharpe v. Tharpe, 54 Ga. 501.
23 C.J. p 412 note 4.

57. Ga.—Powell v. Perry, 63 Ga. 417.

58. N.C.—Newsom v. Newsom, 26 N.C. 381.
23 C.J. p 412 notes 6, 7.

59. N.Y.—Kelly v. City of Yonkers, 274 N.Y.S. 781, 242 App.Div. 798.

60. Tenn.—Jennings v. Pray, 8 Yerg. 85.

61. Ga.—Shackleford v. Hooper, 65 Ga. 366.

62. Tenn.—Jennings v. Pray, 8 Yerg. 85.

63. Ga.—Shackleford v. Hooper, 65 Ga. 366.
Me.—Mysroll v. Violette, 55 Me. 108.

64. Ala.—McElhaney v. Flynn, 23 Ala. 819.
23 C.J. p 412 note 12.

65. Ga.—Whittle v. Tarver, 75 Ga. 818.

66. Ill.—Hobson v. McCambridge, 22 N.E 823, 130 Ill. 367.
23 C.J. p 412 note 14.

67. Tenn.—Stevenson v. McLean, 5 Humphr. 332, 42 Am.D. 434.

68. Tex.—Patton v. Crisp & White, Civ.App., 11 S.W.2d 826, error dismissed.
Conformance to caption of the judgment in describing plaintiff by a partnership name is sufficient without reciting the names of the partners.—Simmons v. Sharpe, 42 So. 441, 148 Ala. 217—23 C.J. p 413 note 18.

69. Ga.—Clayton v. May, 68 Ga. 27.
23 C.J. p 412 note 16.

70. Ga.—Waxelbaum v. Connor, 94 Ga. 529, 19 S.E. 805.
23 C.J. p 412 note 17.

71. **Omission as voiding writ**
Leaving the amount of the judgment and also the amount of the costs in blank renders the writ void. —Maxwell v. King, 3 Yerg. Tenn., 460.

72. Ala.—Alabama, G. S. R. Co. v. Queen City Electric Light Co., 25 So. 824, 121 Ala. 300.
23 C.J. p 407 note 41.

73. Ga.—Land v. Gormley, 170 S.E. 510, 512, 177 Ga. 497, citing **Corpus Juris.**
Idaho.—Evans v. Humphrey, 5 P.2d 545, 51 Idaho 268.
Ill.—Mayne v. Drury, 129 N.E. 77, 295 Ill. 533.
Wash.—Nuessler v. Bergman, 251 P. 578, 580, 141 Wash. 297, citing **Corpus Juris.**
23 C.J. p 408 note 42.

ecution should be tested by the intent with which it was issued; if issued for a wrong amount with fraudulent intent, it is void;[74] but in the absence of fraudulent intent an execution for a less amount,[75] or even an execution for a greater amount,[76] is generally held not void. Where the writ issues for too large an amount, the proper practice is not to move for a vacation of the writ, but to move to set aside to the extent of the excess;[77] or, if the levy is on land, for the aggrieved party to go into equity for relief.[78]

If an amount materially in excess of the judgment is commanded to be made, the writ, according to some authorities, is void, and, where but one levy on, and sale of, property are made under such an execution, and an amount materially exceeding the judgment is realized, the entire proceedings under the writ are nugatory.[79] Nevertheless, where the levy and sale is for the amount actually due on the judgment, the error in the writ will be corrected without setting aside or declaring nugatory the proceedings under the execution.[80]

After partial payment of judgment. The writ should not issue for a greater amount than is due on the judgment at the time of its issuance.[81] The writ should either recite the judgment as it was originally recovered, and state the amount that has been paid and the sum that is still due,[82] or be issued for the whole amount of the judgment, with the credit indorsed on the back of the writ,[83] it being immaterial which course is pursued.[84] However, where the record does not show, and the clerk of the court did not know, that anything had been paid on the judgment, an execution issued for the full amount of the judgment is neither void nor irregular.[85] An execution not showing a credit is not void but may be quashed only to the extent of the excess.[86]

Judgment payable in installments. Where the judgment is payable in installments, an execution issued before they have all fallen due should not command the sheriff to levy the whole debt, but only the amount that has accrued.[87]

b. Interest

The execution, in commanding the collection of interest on the judgment, must conform to the judgment, but a variance does not render the writ void and where interest on judgments is allowed by statute execution for interest may generally issue whether or not it is allowed in the judgment.

The execution, in commanding the collection of interest on the judgment, must conform to the judgment.[88] A variance between the judgment and the writ, as respects the collection of interest, does not render the writ absolutely null and void, but voidable only, and it may be amended, and the irregularity is not available on collateral attack, it being like the case of any other variance in amount between the writ and judgment.[89]

Except where a different practice has arisen so as to become part of the common law,[90] the writ should not require the collection of interest when the judgment on which it is issued does not give it, and interest is not allowed by statute.[91] This has been held to be the rule even where interest on judgments is allowed by statute, if the judgment does not include it;[92] but, as a general rule, where interest on judgments is allowed by statute, execution for interest may issue whether or not it is allowed

74. Md.—Harris v. Alcock, 10 Gill & J. 226, 32 Am.D. 158.
Pa.—Weiskircher v. Volk, 29 Pa. Super. 611, 34 Pittsb Leg.J.,N.S., 359.

75. Ill.—Newman v. Willitts, 60 Ill. 519.
23 C.J. p 408 note 44.

76. Ind.—Grim v. Adkins, 51 N.E. 494, 21 Ind.App. 106.
23 C.J. p 408 note 45.

77. Kan.—Bogle v. Bloom, 18 P. 793, 36 Kan. 512.
23 C.J. p 408 note 46.

78. N.H.—Avery v. Bawman, 40 N. H. 453, 77 Am.D. 728.

79. Ark.—Downs v. Dennis, 102 S. W. 699, 83 Ark. 71, 119 Am.S.R. 119.
23 C.J. p 408 note 48.

80. Nev.—Hastings v. Johnson, 1 Nev. 613.
23 C.J. p 408 note 49.

81. Tenn.—Barnes v. Robinson, 4 Yerg. 186.
23 C.J. p 408 note 51.

82. Vt.—Fairbanks v. Devereaux, 43 Vt. 550
23 C.J. p 408 note 52.

Execution commanding sheriff to collect only balance due on judgment is not invalid.—Alcorn v. Means, Tex.Civ.App., 273 S.W. 1016.

83. Kan.—St. Louis & S. F. R. Co. v. Rierson, 16 P. 443, 38 Kan. 359.
23 C.J. p 408 note 53.

84. Tenn.—Perry v. Royle, 9 Yerg. 18.

85. Ky.—Walker v. McKnight, 15 B.Mon. 467, 61 Am.D. 190.
Vt.—Ex parte Hunt, 82 A. 178, 85 Vt. 345.

86. Kan.—Korber v. Willis, 274 P. 239, 127 Kan. 587.
Wash.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297.
23 C.J. p 409 note 56.

Quashing execution see infra §§ 142–145.

87. N.J.—Griffith v. Jones, 3 N.J. Law 489.
23 C.J. p 408 note 60.

88. Ky.—Noe v. Conyers, 6 J.J. Marsh. 514.
23 C.J. p 409 note 59.

89. Me.—Coffin v. Freeman, 24 A. 986, 84 Me. 535.
23 C.J. p 409 note 65.
Amendment of writ see infra § 82.
Collateral attack see infra § 83.

90. N.J.—Cox v. Mariatt, 36 N.J. Law 389, 13 Am.R. 454.
23 C.J. p 409 note 60.

91. N.C.—Collais v. McLeod, 30 N. C. 221, 49 Am.D. 376.
23 C.J. p 409 note 61.

92. N.C.—Collais v. McLeod, supra.
23 C.J. p 409 note 62.

in the judgment,[93] and the addition of interest since the rendition of the judgment does not constitute a variance.[94]

c. Costs

The execution should correspond to the judgment as respects the allowance of costs, and the amount thereof, but irregularities in this respect generally do not render the writ void.

The execution should correspond to the judgment as respects the allowance of costs[95] and the amount thereof.[96] Mistakes as to the amount of costs usually do not invalidate the writ.[97]

It is sometimes provided by statute that a copy of the bill of costs shall be attached to, or indorsed on, the execution.[98] Although there is some contrary authority,[99] such statutes usually are directory only and irregularities do not render the writ void.[1]

The failure of the clerk to enter in the formal judgment the items of cost taxed by him, as required by statute does not render void or voidable an execution containing such costs.[2]

§ 76. —— Command to Levy and Make Amount

The writ should command the officer to whom it is directed to make a levy, but it need not in express words command a sale.

The writ of execution should command the officer to whom it is directed by appropriate words of command or direction, to make a levy;[3] but the execution need not, in express words, command a sale, but need only require the sheriff to make the money, etc.[4] The fact that the command of the writ does not follow exactly the order of the court,[5] or the form of the statute,[6] or that in the command the amount of the sum to be made is left blank,[7] or that the command to dispose of the goods was omitted,[8] does not render the writ void.

§ 77. —— Directions as to Property to Be Taken

a. In general
b. Specifying particular property

a. In General

The modern form of the general fieri facias generally permits the real estate as well as the goods and chattels of defendant to be taken and if there is a special statute governing, its terms must be complied with.

The modern form of the general fieri facias generally permits the real estate as well as the goods and chattels of defendant to be taken.[9] If there is a special statute governing, its terms must be complied with.[10] However, failure to comply with a statute requiring that the sheriff's authority to levy be limited to property subject to execution does not render a writ fatally defective.[11]

If goods and chattels only can be taken, the writ should not direct a levy on lands and tenements as well as goods and chattels;[12] but where plaintiff has the right to levy on lands and tenements, the writ ought to pursue the law and direct a levy on property of that character, and not a levy on chattels only.[13] It is no objection that the execution directed the sheriff to levy on lands of defendant of which he was seized on a certain day, although the direction might have been given as of a few days before.[14]

93. U.S.—Amis v. Smith, Miss., 16 Pet. 303, 10 L.Ed. 973.
23 C.J. p 409 note 63.
Direction to collect interest held proper
Ill.—Tracey v. Shanley, 36 N.E.2d 753, 311 Ill.App. 529.

94. Tex.—Taylor v. Doom, 95 S.W. 4, 43 Tex.Civ.App. 59.

95. Miss.—Riley v. State, 168 So. 475, 175 Miss. 831.

96. Ga.—Smith v. Lockett, 73 Ga. 104.
23 C.J. p 409 note 66.

97. Tex.—Brown v. Bonougli, 232 S.W. 490, 111 Tex. 275.
23 C.J. p 410 note 68.

98. Miss.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358—Mills v. Churchwell Motor Co., 122 So. 773, 154 Miss. 631.
23 C.J. p 410 note 67.

99. Miss.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358.
23 C.J. p 410 note 67 [c] (1).
However, it has been held that failure to annex copy of bill of costs does not render execution void in so far as it commands collection of principal of judgment.—Mills v. Churchwell Motor Co., 122 So. 773, 154 Miss. 631.

1. N.C.—Wingate v. Galloway, 10 N. C. 6.
23 C.J. p 410 note 67.

2. Okl.—Bierschenk v. Klein, 83 P. 2d 371, 183 Okl. 494.

3. Ind.—Gaskill v. Aldrich, 41 Ind. 338.
23 C.J. p 413 note 19.

4. U.S.—Wayman v. Southard, Ky., 10 Wheat. 1, 6 L.Ed. 253.
Ga.—Chamberlin v. Beck, 68 Ga. 346.

5. Ala.—Allen v. Best, 6 Ala. 234.

6. Ill.—West v. Krebaum, 88 Ill. 263.
23 C.J. p 413 note 22.

7. Iowa.—Cooley v. Brayton, 16 Iowa 10.

8. Vt.—Chase v. Plymouth, 20 Vt. 469, 50 Am.D. 52.

9. Ill.—Brown v. Duncan, 23 N.E. 1126, 132 Ill. 413, 22 Am.S.R. 545.
23 C.J. p 413 note 26.
Real property as subject to execution see supra § 63.

10. Me.—Caldwell v. Blake, 69 Me. 458.
23 C.J. p 413 note 32.

11. Tex.—Patton v. Crisp & White, Civ.App., 11 S.W.2d 826, error dismissed.

12. N.C.—Doe v. Stone, 8 N.C. 329.
23 C.J. p 413 note 28.

13. S.C.—Toomer v. Purkey, 8 S.C. L. 323, 12 Am.D. 634.
23 C.J. p 413 note 29.

14. N.Y.—Green v. Burnham, 3 Sandf.Ch. 110.

ecution should be tested by the intent with which it was issued; if issued for a wrong amount with fraudulent intent, it is void;[74] but in the absence of fraudulent intent an execution for a less amount,[75] or even an execution for a greater amount,[76] is generally held not void. Where the writ issues for too large an amount, the proper practice is not to move for a vacation of the writ, but to move to set aside to the extent of the excess;[77] or, if the levy is on land, for the aggrieved party to go into equity for relief.[78]

If an amount materially in excess of the judgment is commanded to be made, the writ, according to some authorities, is void, and, where but one levy on, and sale of, property are made under such an execution, and an amount materially exceeding the judgment is realized, the entire proceedings under the writ are nugatory.[79] Nevertheless, where the levy and sale is for the amount actually due on the judgment, the error in the writ will be corrected without setting aside or declaring nugatory the proceedings under the execution.[80]

After partial payment of judgment. The writ should not issue for a greater amount than is due on the judgment at the time of its issuance.[81] The writ should either recite the judgment as it was originally recovered, and state the amount that has been paid and the sum that is still due,[82] or be issued for the whole amount of the judgment, with the credit indorsed on the back of the writ,[83] it being immaterial which course is pursued.[84] However, where the record does not show, and the clerk of the court did not know, that anything had been paid on the judgment, an execution issued for the full amount of the judgment is neither void nor irregular.[85] An execution not showing a credit is not void but may be quashed only to the extent of the excess.[86]

Judgment payable in installments. Where the judgment is payable in installments, an execution issued before they have all fallen due should not command the sheriff to levy the whole debt, but only the amount that has accrued.[87]

b. Interest

The execution, in commanding the collection of interest on the judgment, must conform to the judgment, but a variance does not render the writ void and where interest on judgments is allowed by statute execution for interest may generally issue whether or not it is allowed in the judgment.

The execution, in commanding the collection of interest on the judgment, must conform to the judgment.[88] A variance between the judgment and the writ, as respects the collection of interest, does not render the writ absolutely null and void, but voidable only, and it may be amended, and the irregularity is not available on collateral attack, it being like the case of any other variance in amount between the writ and judgment.[89]

Except where a different practice has arisen so as to become part of the common law,[90] the writ should not require the collection of interest when the judgment on which it is issued does not give it, and interest is not allowed by statute.[91] This has been held to be the rule even where interest on judgments is allowed by statute, if the judgment does not include it;[92] but, as a general rule, where interest on judgments is allowed by statute, execution for interest may issue whether or not it is allowed

74. Md.—Harris v. Alcock, 10 Gill & J. 226, 32 Am.D. 158.
Pa.—Weiskircher v. Volk, 29 Pa. Super. 611, 34 Pittsb.Leg.J.,N.S., 359.
75. Ill.—Newman v. Willitts, 60 Ill. 519.
23 C.J. p 408 note 44.
76. Ind.—Grim v. Adkins, 51 N.E. 494, 21 Ind.App. 106.
23 C.J. p 408 note 45.
77. Kan.—Bogle v. Bloom, 18 P. 793, 36 Kan. 512.
23 C.J. p 408 note 46.
78. N.H.—Avery v. Bawman, 40 N. H. 453, 77 Am.D. 728.
79. Ark.—Downs v. Dennis, 102 S. W. 699, 83 Ark. 71, 119 Am.S.R. 119.
23 C.J. p 408 note 48.
80. Nev.—Hastings v. Johnson, 1 Nev. 613.
23 C.J. p 408 note 49.
81. Tenn.—Barnes v. Robinson, 4 Yerg. 186.
23 C.J. p 408 note 51.
82. Vt.—Fairbanks v. Devereaux, 43 Vt. 550.
23 C.J. p 408 note 52.
Execution commanding sheriff to collect only balance due on judgment is not invalid.—Alcorn v. Means, Tex.Civ.App., 273 S.W. 1016.
83. Kan.—St. Louis & S. F. R. Co. v. Rierson, 16 P. 443, 38 Kan. 359.
23 C.J. p 408 note 53.
84. Tenn.—Perry v. Royle, 9 Yerg. 18.
85. Ky.—Walker v. McKnight, 15 B.Mon. 467, 61 Am.D. 190.
Vt.—Ex parte Hunt, 82 A. 178, 85 Vt. 345.
86. Kan.—Korber v. Willis, 274 P. 239, 127 Kan. 587.
Wash.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297.
23 C.J. p 409 note 56.
Quashing execution see infra §§ 142–145.
87. N.J.—Griffith v. Jones, 3 N.J. Law 489.
23 C.J. p 408 note 50.
88. Ky.—Noe v. Conyers, 6 J.J. Marsh. 514.
23 C.J. p 409 note 59.
89. Me.—Coffin v. Freeman, 24 A. 986, 84 Me. 535.
23 C.J. p 409 note 65.
Amendment of writ see infra § 82.
Collateral attack see infra § 83.
90. N.J.—Cox v. Marlatt, 36 N.J. Law 389, 13 Am.R. 454.
23 C.J. p 409 note 60.
91. N.C.—Collais v. McLeod, 30 N. C. 221, 49 Am.D. 376.
23 C.J. p 409 note 61.
92. N.C.—Collais v. McLeod, supra.
23 C.J. p 409 note 62.

in the judgment,[93] and the addition of interest since the rendition of the judgment does not constitute a variance.[94]

c. Costs

The execution should correspond to the judgment as respects the allowance of costs, and the amount thereof, but irregularities in this respect generally do not render the writ void.

The execution should correspond to the judgment as respects the allowance of costs[95] and the amount thereof.[96] Mistakes as to the amount of costs usually do not invalidate the writ.[97]

It is sometimes provided by statute that a copy of the bill of costs shall be attached to, or indorsed on, the execution.[98] Although there is some contrary authority,[99] such statutes usually are directory only and irregularities do not render the writ void.[1]

The failure of the clerk to enter in the formal judgment the items of cost taxed by him, as required by statute does not render void or voidable an execution containing such costs.[2]

§ 76. —— Command to Levy and Make Amount

The writ should command the officer to whom it is directed to make a levy, but it need not in express words command a sale.

The writ of execution should command the officer to whom it is directed by appropriate words of command or direction, to make a levy;[3] but the execution need not, in express words, command a sale, but need only require the sheriff to make the money, etc.[4] The fact that the command of the writ does not follow exactly the order of the court,[5] or the form of the statute,[6] or that in the command the amount of the sum to be made is left blank,[7] or that the command to dispose of the goods was omitted,[8] does not render the writ void.

§ 77. —— Directions as to Property to Be Taken

a. In general
b. Specifying particular property

a. In General

The modern form of the general fieri facias generally permits the real estate as well as the goods and chattels of defendant to be taken and if there is a special statute governing, its terms must be complied with.

The modern form of the general fieri facias generally permits the real estate as well as the goods and chattels of defendant to be taken.[9] If there is a special statute governing, its terms must be complied with.[10] However, failure to comply with a statute requiring that the sheriff's authority to levy be limited to property subject to execution does not render a writ fatally defective.[11]

If goods and chattels only can be taken, the writ should not direct a levy on lands and tenements as well as goods and chattels;[12] but where plaintiff has the right to levy on lands and tenements, the writ ought to pursue the law and direct a levy on property of that character, and not a levy on chattels only.[13] It is no objection that the execution directed the sheriff to levy on lands of defendant of which he was seized on a certain day, although the direction might have been given as of a few days before.[14]

93. U.S.—Amis v. Smith, Miss., 16 Pet. 303, 10 L.Ed. 973.
23 C.J. p 409 note 66.
Direction to collect interest held proper
Ill.—Tracey v. Shanley, 36 N.E.2d 753, 311 Ill.App. 529.

94. Tex.—Taylor v. Doom, 95 S.W. 4, 43 Tex.Civ.App. 59.

95. Miss.—Riley v. State, 168 So. 475, 175 Miss. 831.

96. Ga.—Smith v. Lockett, 73 Ga. 104.
23 C.J. p 409 note 66.

97. Tex.—Brown v. Bonougli, 232 S.W. 490, 111 Tex. 275.
23 C.J. p 410 note 68.

98. Miss.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358—Mills v. Churchwell Motor Co., 122 So. 773, 154 Miss. 631.
23 C.J. p 410 note 67.

99. Miss.—Wilkinson v. Hutto, 128 So 93, 157 Miss. 358.
23 C.J. p 410 note 67 [c] (1).
However, it has been held that failure to annex copy of bill of costs does not render execution void in so far as it commands collection of principal of judgment.—Mills v. Churchwell Motor Co., 122 So. 773, 154 Miss. 631.

1. N.C.—Wingate v. Galloway, 10 N. C. 6.
23 C.J. p 410 note 67.

2. Okl.—Bierschenk v. Klein, 83 P. 2d 371, 183 Okl. 494.

3. Ind.—Gaskill v. Aldrich, 41 Ind. 338.
23 C.J. p 413 note 19.

4. U.S.—Wayman v. Southard, Ky., 10 Wheat. 1, 6 L.Ed. 253.
Ga.—Chamberlin v. Beck, 68 Ga. 346.

5. Ala.—Allen v. Best, 6 Ala. 234.

6. Ill.—West v. Krebaum, 88 Ill. 263.
23 C.J. p 413 note 22.

7. Iowa.—Cooley v. Brayton, 16 Iowa 10.

8. Vt.—Chase v. Plymouth, 20 Vt. 469, 50 Am.D. 52.

9. Ill.—Brown v. Duncan, 23 N.E. 1126, 132 Ill. 413, 22 Am.S.R. 545.
23 C.J. p 413 note 26.
Real property as subject to execution see supra § 63.

10. Me.—Caldwell v. Blake, 69 Me. 458.
23 C.J. p 413 note 32.

11. Tex.—Patton v. Crisp & White, Civ.App., 11 S.W.2d 826, error dismissed.

12. N.C.—Doe v. Stone, 8 N.C. 329.
23 C.J. p 413 note 28.

13. S.C.—Toomer v. Purkey, 8 S.C. L. 323, 12 Am.D. 634.
23 C.J. p 413 note 29.

14. N.Y.—Green v. Burnham, 3 Sandf.Ch. 110.

Personal property first. Under statutes so providing, the writ must direct a levy on personal property first,[15] except where a special provision is otherwise made by law,[16] but failure so to do renders the writ merely informal and not void.[17]

Property attached. Where a warrant of attachment has been levied, statutes in some jurisdictions expressly provide as to the property to be taken under execution.[18] If the summons was not served personally and the judgment debtor did not appear in the action, the writ should direct that the judgment be satisfied out of the attached property alone.[19]

In some states it has been held that a sheriff is bound to levy on the proceeds of the sale of goods attached, even without special directions.[20]

Homesteads and exemptions. The writ, in commanding a levy on the debtor's property, need not inhibit the sheriff from levying on the debtor's homestead or other property exempt from execution, since the sheriff is bound to know that he cannot take such property.[21] However, where there has been a waiver of exemption, it should appear in the body of the writ or by indorsement thereon.[22]

b. Specifying Particular Property

Ordinarily, in the absence of statute or agreement to the contrary, when a judgment is recovered in an action at law for a sum of money, the writ should not specify any particular property to be levied on.

Ordinarily, in the absence of any statute or agreement to the contrary, when a judgment is recovered in an action at law for a sum of money, the writ should not undertake to specify any particular property to be levied on.[23] However, the writ may command the levy to be made on property in the officer's county, although not referred to in the statute concerning the form of the writ.[24]

When a judgment is directed against particular property the execution should conform to the judgment by designating such property as the property to be levied on.[25] Where a writ against specific property is proper, the description should sufficiently identify the property.[26] However, a description, although loose, which follows the judgment is not void for uncertainty.[27] It has been held sufficient to designate the property as that "recovered in this suit," where it is described in the judgment.[28]

When an execution in the common form is issued instead of a special writ, if in point of fact no other property is taken and sold than that which the judgment authorized to be taken and sold, the writ is not void, but voidable only, and the sale thereunder will be upheld.[29] As a general rule, where an execution contains both specific commands which it ought to contain, and also improper general commands, the writ will be sustained provided the specific commands alone are performed, as the general commands may be treated as surplusage.[30]

Where a general writ is the proper writ to be issued, it has been held that a special writ issued instead is merely voidable and not void,[31] although it has also been held that such writ is void.[32]

§ 78. —— Directions for Return

It is generally required that the return day be stated in the writ, but an irregularity in this respect ordinarily does not render the writ void.

The return day of the execution is generally required to be stated in it for the certainty and regularity of the proceedings, but mainly for the security of the rights of the party entitled to the fruits of it.[33] By the common law, and in those jurisdic-

15. N.Y.—Guiterman v. Coutant, 111 N.Y.S. 1081, 59 Misc. 23, affirmed 112 N.Y.S. 900, 128 App.Div. 452.

16. N.Y.—Garczynski v. Russell, 27 N.Y.S. 465, 75 Hun 497.
23 C.J. p 413 note 85.

17. N.Y.—Flanders v. Batten, 3 N.Y.S. 728, 50 Hun 542, affirmed 25 N.E. 952, 123 N.Y. 627.
23 C.J. p 413 note 86.

18. Wis.—Swift v. Agnes, 33 Wis. 228.
23 C.J. p 413 note 88.

19. Mo.—Stuckert v. Thompson, 164 S.W. 692, 181 Mo.App. 513.

20. N.H.—Lucier v. Pierce, 60 N.H. 13.
23 C.J. p 414 note 40.

21. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.
23 C.J. p 415 note 51.

22. Pa.—Wilson v. Arnold, 33 A. 552, 172 Pa. 264.

23. Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.
23 C.J. p 414 note 42.
Authority to issue special execution see § 12 supra.

Agreement not shown
Pa.—Speier v. Michelson, 154 A. 127, 303 Pa. 66.

24. Wis.—Bunker v. Rand, 19 Wis. 253, 88 Am.D. 684.

25. Ga.—Winslow v. O'Pry, 56 Ga. 138—Clinch v. Ferril, 48 Ga. 365.

Levari facias is proper writ in some jurisdictions to enforce a judgment against specific property.—McClelland v. Devilbiss, 1 Pa.Co. 613.

Election by holder of judgment
The owner of a judgment which is a lien on separate properties may elect which property execution should first issue against.—Stoffiett v. Kress, 21 A.2d 31, 342 Pa. 332.

26. Md.—Dorsey v. Dorsey, 28 Md. 388.
23 C.J. p 414 note 45.

27. Ga.—Western Union Tel. Co. v. Hill, 12 S.E. 877, 86 Ga. 500.

28. Tex.—Simmons v. Arnim, Civ. App., 172 S.W. 184.

29. Miss.—Swayze v. McCrossin, 21 Miss. 317.
23 C.J. p 414 note 48.

30. Kan.—Merwin v. Hawker, 1 P. 640, 31 Kan. 222.
23 C.J. p 414 note 49.

31. Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

32. Tex.—Midkiff v. Bedell, Civ. App., 127 S.W. 271.

33. Miss.—Brown v. Thomas, 26 Miss. 335.

tions in which the return day is not fixed by statute, the proper practice is to make the writ returnable in term time during the term next succeeding its issuance;[34] but the intervention of a term is not material.[35]

By statutes in many states the rule of the common law has been changed regarding the time at which an execution should be made returnable, and in such cases the writ should be made returnable in accordance with the applicatory statute.[36] Where a designated number of days is required to elapse between the issuance of the writ and the return day, the day of its issuance is the day when it is placed in the hands of the sheriff to be executed.[37]

Designation of return day. The return day need not be stated on the face of the writ, but may be contained in an indorsement thereon;[38] and it has been held that it may be omitted altogether,[39] in which case the writ will be regarded as returnable on the last day on which it might have been made returnable.[40] If the statute fixes a time within which the officer who executes the writ must make return, a direction to make "due return" thereof or to make return "according to law" is sufficient.[41] If the direction shows when the writ is returnable, the omission of proper words in the direction is immaterial.[42]

Effect of errors as to the return day. In some jurisdictions it has been held that an execution which is not made returnable at the proper time is void,[43] but generally such an execution is not void, but voidable only.[44] An execution ordinarily is not void where a return is directed within a period less than[45] or greater than[46] the period of time fixed by statute. An execution usually is not void where the writ is made returnable out of term,[47] or on Sunday,[48] or even where it is made returnable within an impossible year.[49]

§ 79. —— Teste, Date, Signature, and Seal

a. In general
b. Date
c. Signature
d. Seal

a. In General

Except where it is otherwise provided by statute, a writ of execution should have the proper teste, but the teste is not a material part of the writ, and defects or omissions do not render it void.

Except where it is otherwise provided by statute,[50] a writ of execution should have the proper teste;[51] but the teste is not a material part of the writ, and defects or omissions do not render it void.[52] By the ancient English practice a fieri facias should be tested in term time on a day after the judgment was or might be supposed to have been given;[53] and, if it was tested out of term, it was void.[54] However, it has been held that a writ so tested may be amended.[55]

The proper practice generally is to have the writ tested in the name of a judge of the court,[56] al-

34. Ky.—Wilson v. Huston, 4 Bibb 332.
23 C.J. p 415 note 54.

35. N.C.—State v. Ferrell, 63 N.C. 640.
23 C.J. p 415 note 55.

36. Miss.—Puckett v. Crystal Oil Co., 137 So. 486, 161 Miss. 554.
23 C.J. p 415 note 56.

37. U.S.—Mason v. Bennett, D.C. Alaska, 52 F. 343.
23 C.J. p 415 note 57.
Acts constituting issuance of writ see supra §§ 67, 68.

38. N.Y.—Park v. Church, 6 How. Pr. 381.

39. Ala.—Waldrop v. Friedman, 7 So. 510, 90 Ala. 157, 24 Am.S.R. 775.
23 C.J. p 415 note 59.

40. Ala.—Waldrop v. Friedman, supra.

41. Or.—Stephens v. Dennison, 1 Or. 19.
23 C.J. p 415 note 61.

42. Ga.—Henderson v. Zachry, 4 S. E. 883, 80 Ga. 98.
23 C.J. p 415 note 62.

43. Miss.—Puckett v. Crystal Oil Co., 137 So. 486, 161 Miss. 554.
23 C.J. p 415 note 63.

44. Mo.—Heather v. City of Palmyra, 276 S.W. 872, 311 Mo. 32.
23 C.J. p 415 note 64.

45. Mo.—Estes v. Long, 71 Mo. 605.
23 C.J. p 415 note 65.

46. Ky.—Wilson v. Huston, 4 Bibb 332.
23 C.J. p 415 note 66.

47. Mo.—Heather v. City of Palmyra, 276 S.W. 872, 311 Mo. 32.
23 C.J. p 416 note 67.

48. N.Y.—Boyd v. Vanderkemp, 1 Barb.Ch. 273.

49. Mo.—Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.
23 C.J. p 416 note 69.

50. N.Y.—Matter of Kupfer, 150 N. Y.S. 1037, 165 App.Div. 570.
23 C.J. p 416 note 71 [a].

51. Tenn.—Trotter v. Nelson, 1 Swan 7.

Purpose
The teste is for the purpose of authenticity.—Gautier Properties v. Biscayne Trust Co., 129 So. 848, 100 Fla. 403.

52. N.H.—Parsons v. Swett, 32 N.H. 87, 64 Am.D 352.
23 C.J. p 416 note 73.

"Teste" is a matter of form
Fla.—Gautier Properties v. Biscayne Trust Co., 129 So. 848, 100 Fla. 403.

53. S.C.—Dibble v. Taylor, 29 S.C.L. 308, 42 Am.D. 368.
23 C.J. p 416 note 74.

54. N.Y.—Simonds v. Catlin, 2 Cai 61.
23 C.J. p 416 note 75.

55. N.J.—Inskeep v. Lecony, 1 N.J Law 111.
Amendment of executions see infra § 82.

56. Ga.—Byers v. Black Motor Co., 16 S.E.2d 478, 65 Ga.App 773.
23 C.J. p 416 note 77.

Teste in name of judge disqualified
The fact that teste was not in trial judge's name but in the name of the regular judge of the court who was disqualified to try the case did not render execution void.—Drawdy v. Littlefield, 75 Ga. 215—

though under statutory direction the writ must bear teste in the name of the clerk.[57]

b. Date

While the date which the writ should bear is fixed by statute in many states, at common law, where the writ is issued during the term at which the judgment was rendered, it should bear teste as of the first day of the term.

At common law, where the writ is issued during the term at which the judgment was rendered, it should bear teste as of the first day of the term,[58] since the judgment, when entered during the term, relates back to the first day of the term.[59] The writ at common law had relation to its teste, and bound the goods and chattels of defendant from that time.[60] This rule has been changed by statute in many states, and executions are required to be dated as of the day of delivery,[61] or as of the day on which they are actually issued.[62]

The fact that the year of Christ is omitted when the year of the commonwealth is stated,[63] or that the execution is not dated at all,[64] or that a mistaken or impossible date is given,[65] does not render the execution void.

c. Signature

Where the rule has not been changed by statute, the writ must be signed by the officer issuing it, and in some jurisdictions, but not in others, the absence of a signature renders the writ void.

Where the rule has not been changed by statute, the writ must be signed by the officer issuing it.[66] In many jurisdictions signature by the clerk of the court is required,[67] and in some jurisdictions it is required by statute that the execution shall be signed by the party in whose favor judgment was rendered or by his attorney.[68]

The absence of the required signature renders the writ void in some jurisdictions,[69] but in other jurisdictions the writ is merely irregular and not void.[70] The omission of the designation "county clerk" does not render the writ void when the word "clerk" is added to his signature as well as the seal of the court.[71] Where process bears the seal of court and regular teste and is signed by the deputy clerk instead of by the clerk, it has been held unobjectionable,[72] or at least not void.[73]

d. Seal

At common law and under some statutes the writ must bear the seal of the court, and according to some authorities, but not others, the absence of a seal renders the writ void.

At common law the writ must bear the seal of the court.[74] The rule of the common law is declared by statute in some jurisdictions,[75] although in other jurisdictions statutes dispense with the necessity for a seal, except in the case of writs issued to another county.[76]

On the question whether the lack of a seal ren-

Byers v. Black Motor Co., 16 S.E.2d 478, 65 Ga.App. 773.

57. General statute relating to writs
Under a statute applicable to writs generally an execution should bear teste in the name of the clerk.—Stephens v. Dennison, 1 Or. 19.

58. Tenn.—Union Bank v. McClung, 9 Humphr. 91.
23 C.J. p 416 note 79.

59. N.Y.—Bond v. Willet, 1 Abb. Dec. 165, 1 Keyes 377.

60. U.S.—Erwin v. Dundas, Ala., 4 How. 58, 11 L.Ed. 875.
23 C.J. p 416 note 81.

61. Day of delivery
Term "delivery," within the statute means the day when execution is placed in hands of officer.—Gutterman v. Auerbach, 274 N.Y.S. 605, 152 Misc. 640, affirmed 271 N.Y.S. 1067, 242 App.Div. 614, motion denied 195 N.E. 225, 266 N.Y. 612, affirmed 196 N.E. 559, 267 N.Y. 521.

62. Minn.—Mollison v. Eaton, 16 Minn. 426, 10 Am.R. 150.
23 C.J. p 416 note 82.

Day of issuance
The day on which they are taken from the clerk's office is the day on which they are issued.—Mollison v. Eaton, supra.

63. Ky.—Craig v. Johnson, Hard. 520.

64. Wis.—State v. Brophy, 38 Wis. 413.
23 C.J. p 416 note 85.

65. N.C.—Williams v. Weaver, 94 N. C. 134.
23 C.J. p 416 note 86.

66. Cal.—O'Donnell v. Merguire, 63 P. 847, 131 Cal. 527, 82 Am.S.R. 389.
23 C.J. p 417 note 87.

67. Cal.—O'Donnell v. Merguire, supra.
23 C.J. p 417 note 88.

68. Wis.—Bonesteel v. Orvis, 23 Wis. 506, 99 Am.D. 201.
23 C.J. p 417 note 89.

69. N.C.—Shepherd v. Lane, 13 N.C. 148.
23 C.J. p 417 note 90.

Unauthorized signature
(1) Execution to which clerk's name was signed by one not his deputy, and not in his immediate presence and by his direction and authority, was void.—Battle v. Warren County Fertilizer Co., 118 S.E. 362, 155 Ga. 650—23 C.J. p 417 note 90 [b].

(2) An execution is not valid, where it does not appear that deputy clerk was authorized to sign the clerk's name, or that clerk's name was signed under his immediate direction.—Moore v Tippin, 104 S.E. 17, 25 Ga.App. 638.

70. Kan.—Taylor v. Buck, 60 P. 736, 61 Kan. 694, 78 Am.S.R. 346.
23 C.J. p 417 note 91.

71. Fla.—Lewis v. Russell, 36 So. 166, 47 Fla. 184.

72. U.S.—Bragg v. Lorio, C.C.La., 4 F.Cas.No.1,800, 1 Woods 209.
23 C.J. p 417 note 93.

73. U.S.—Griswold v. Connolly, C. C.La., 11 F.Cas.No.5,833, 1 Woods 193.

74. U.S.—Ætna Ins. Co. v. Hallock, Ind., 6 Wall. 556, 18 L.Ed. 948.
23 C.J. p 417 note 95.

75. Mont.—Kipp v. Burton, 74 P. 85, 29 Mont. 96, 101 Am.S.R. 544, 63 L.R.A. 325.
23 C.J. p 417 note 96.

76. N.C.—Taylor v. Taylor, 83 N.C. 116.
23 C.J. p 417 note 97.

ders the writ void, or merely voidable, the authorities are in conflict, and no attempt can be successfully made to reconcile them.[77] In several jurisdictions, it is held that a writ which is not sealed is absolutely void.[78] In other jurisdictions it has been held that the omission of the seal is a mere misprision which renders the writ voidable only.[79]

§ 80. —— Indorsements

Indorsements on the writ are in some cases required by statute and may be relied on to cure certain defects.

Indorsements on the writ are in some cases required by statute.[80] Indorsements are considered as a part of the execution and may be looked to for the purpose of curing informalities or defects;[81] but, where an execution is void on its face, an indorsement will not aid fatal defects.[82]

An indorsement not authorized by the judgment has been held to be so much a part of the writ as to vitiate it,[83] but, as a rule, unauthorized indorsements do not affect the writ and may be treated as surplusage.[84] An indorsement by the clerk on a writ purporting to be an original of "alias" or "pluries" does not affect the character of the writ.[85] An indorsement of the description of the property attached and of the persons by whom it is replevied on an ordinary fieri facias on a judgment in a suit commenced by attachment does not change the character of the writ.[86] Where the amount stated in the indorsement varies from that stated in the body of the writ, the latter controls.[87]

The fact that a statutory provision as to indorsements has not been followed generally does not render the writ void,[88] and this includes the failure of the officer to indorse the time of receiving the writ;[89] but as to some indorsements required by the statute the contrary has been held.[90] Proof that the indorsement of the time of the receipt of the writ is in the handwriting of the sheriff is admissible if the time when the writ was in his hands is a material fact in evidence.[91]

Conclusiveness. An officer's indorsement which he is required by law to make as to a fact or act or event is generally held to be conclusive.[92] At any event it is sufficient prima facie evidence to prove the fact.[93] Where the indorsement and the sheriff's deed do not agree as to the date of the levy, this is no objection to the admissibility of the execution in evidence.[94]

§ 81. —— Alteration or Spoliation of Writ

Ordinarily a material alteration by a party or his attorney invalidates the writ.

Ordinarily a material alteration of the writ, made after its issuance, by a party thereto or his attorney will render the writ void.[95] However, an alteration will not in every case void the writ,[96] and, indeed, an alteration may be authorized and proper under certain circumstances.[97]

Spoliation by the clerk,[98] or by an officer under

77. Ind.—Warmoth v. Dryden, 25 N E. 433, 125 Ind. 355.

78. U.S.—Ætna Ins. Co. v. Hallock, Ind., 6 Wall. 556, 18 L.Ed. 948.
23 C.J. p 417 note 1.

79. Tex.—Houston Oil Co. of Texas v. Randolph, Com.App., 251 S. W. 794, 28 A.L.R. 926, reversing Southwestern Settlement & Development Co. v. Randolph, Civ.App., 240 S.W. 655.
23 C.J. p 418 note 2.

80. Okl.—Wedgwood v. Boyd, 51 P. 2d 299, 174 Okl. 531.
23 C.J. p 418 note 7 [b].
Indorsement of items composing bill of costs see § 75 c supra.

Execution bearing indorsement as required by statute is not void.—Downs v. Wagnon, Tex.Civ.App., 66 S.W.2d 777, error dismissed.

Execution to another county
The statute dealing with execution to sheriff of another county does not require that entries made by the court clerk shall be indorsed on the execution writ.—Thrush v. Winslow, 98 P.2d 905, 186 Okl. 499.

81. Ky.—Nichols v. Taylor, 6 T.B. Mon. 325.
23 C.J. p 418 note 8.

82. Ala.—Cooper v. Jacobs, 2 So. 832, 82 Ala. 411.
23 C.J. p 418 note 9.

83. Kan.—Fuller v. Wells, 22 P. 561, 42 Kan. 551.
23 C.J. p 418 note 10.

84. W.Va.—Holt v. Lynch, 18 W.Va. 567.
23 C.J. p 418 note 11.

85. Ga.—Walls v. Smith, 19 Ga. 8.
N.C.—Simpson v. Simpson, 64 N.C. 427.

86. Ala.—Garey v. Himes, 8 Ala. 837.

87. Pa.—Griffith v. Lyle, 7 Phila. 244.

88. Okl.—Wedgwood v. Boyd, 51 P. 2d 299, 174 Okl. 531.
23 C.J. p 418 note 18.

Use of surety
Failure to indorse on writ that it was issued for the use of the surety did not vitiate the writ.—Edwards Bros. v. Bilbo, 103 So. 209, 138 Miss. 484.

89. Tex.—Downs v. Wagnonn, Civ. App., 66 S.W.2d 777, error dismissed—Alcorn v. Means, Civ.App., 273 S.W. 1016.
23 C.J. p 419 note 19.

90. N.Y.—Delaplaine v. Hitchcock, 6 Hill 14.
23 C.J. p 419 note 20.

91. Ala.—Stewart v. Conner, 9 Ala. 803.

92. Pa.—Person's App., 78 Pa. 145.

Hour of receipt of writ
An indorsement of the hour the writ was received is generally conclusive.—Person's App., 78 Pa. 145—In re Kinney, 2 Leg.Op., Pa., 102.

93. N.J.—Vanderveere v. Gaston, 24 N.J.Law 818.
23 C.J. p 419 note 23.

94. Ala.—Driver v. Spence, 1 Ala. 540.

95. Mo.—Trigg v. Ross, 35 Mo. 165.
23 C.J. p 419 note 25.

96. Mass.—Blanchard v. Waters, 10 Metc. 185.
23 C.J. p 419 note 26 [a].

97. Conn.—Keyes v. Chapman, 5 Conn. 169.
23 C.J. p 419 note 26 [b]-[d].

98. Mo.—Trigg v. Ross, 35 Mo. 165.
23 C.J. p 419 note 27.

authority of the clerk,[99] will not affect the validity of an execution.

Fraud will vitiate an execution altered in a material part.[1] However, an apparent alteration in an execution will be presumed to have been innocently made before issuance.[2]

§ 82. —— Amendments

a. In general
b. Particular amendments
c. Time of amendment
d. Procedure to procure
e. Effect of amendment

a. In General

Every court of record has the power to correct errors in executions and the exercise of this power rests largely in the discretion of the issuing court which will not allow an amendment when the writ is absolutely void.

The power to correct errors and mistakes in executions is unquestionable and belongs to every court of record.[3] The court which issued the execution is the proper one to make any amendment.[4] Except in so far as authorized by statute,[5] the clerk of court has no authority to amend the writ after its delivery to the officer, without an order of court.[6] Further, the officer has no authority to amend the execution without an order of court.[7]

When the writ is absolutely void, and not merely voidable, an amendment will not be allowed.[8] However, a writ which is only voidable for clerical errors or omissions or for mistakes of form may be amended,[9] and a writ which is amendable is only voidable.[10] An amendment will not be allowed where the effect of granting it will be to vary the execution from the judgment.[11]

It has been stated that if the writ is amendable it will be accorded the same effect with reference to acts done in execution of it as if it had been amended.[12] An amendment to an execution withdrawn from the office where it was lodged without complying with the statute governing such withdrawals has been held to be inadmissible in evidence.[13]

Discretion of court. The allowance of an amendment rests in the discretion of the court, and from the very nature of things the rule by which the court is guided, in exercising its discretion to amend, is of a general and somewhat indefinite character, and there can be no rule other than that the amendment must be allowed or not in furtherance of justice.[14] When it is in the furtherance of justice, the power to amend should be exercised with a liberal hand.[15] This power, however, may not be exercised arbitrarily, but only where sufficient legal reason is shown for the court's interference.[16]

Rights of third persons. It is not allowable to amend the writ in a matter of substance when the amendment will affect prejudicially the rights of innocent third persons.[17] At least the court will scan well the grounds on which its action is sought.[18] However, it has been held that the sureties on a bond given to obtain a stay of proceedings under an execution cannot object to the exercise of the court's power of amendment.[19]

Validating statute. A statute which provides

99. Ky.—Vance v. Vanarsdale, 1 Bush 504.

1. Mass.—Brier v. Woodbury, 1 Pick. 362.

2. Iowa.—Preston v. Wright, 14 N. W. 352, 60 Iowa 351.
23 C.J. p 419 note 30.
Presumption of validity of execution see infra § 86.

3. Me.—Caldwell v. Blake, 69 Me. 458.
Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
23 C.J. p 419 note 31.

4. Mass.—City of Boston v. Santosuosso, supra.
23 C.J. p 419 note 32.

5. Ga.—Gross v. Mims, 63 Ga. 563.

6. Ky.—Johnson v. Scott, 121 S.W. 695, 134 Ky. 736.
23 C.J. p 419 note 34.

7. Ky.—Sublett v. Gardner, 137 S. W. 864, 144 Ky. 190.

8. Tex.—Houston Oil Co. of Texas v. Randolph, Com.App., 251 S.W. 794.
23 C.J. p 420 note 36.

9. Me.—Hamant v. Creamer, 63 A. 736, 101 Me. 222, 8 Ann.Cas. 165.
23 C.J. p 420 note 37.

10. Cal.—Van Cleave v. Bucher, 21 P. 954, 79 Cal. 600.
Md.—Deakins v. Rex, 60 Md. 593.
23 C.J. p 423 note 93.

11. Ala.—Shorter v. Mims, 18 Ala. 655.

12. Cal.—O'Donnell v. Merguire, 63 P. 847, 131 Cal. 527, 82 Am.S.R. 389.
Me.—Hamant v. Creamer, 63 A. 736, 101 Me. 222, 8 Ann.Cas. 165.
"If the writ is amendable, it will be accorded, in another court, the same effect as if it had been amended."—Sligo Furnace Co. v. Coombs, 239 S.W. 816, 817, 292 Mo. 530.

13. Ga.—Porter Fertilizer Co. v. Cox, 150 S.E. 582, 169 Ga. 391.

14. Me.—Hayford v. Everett, 68 Me. 505.
Mass.—Chesebro v. Barme, 39 N.E. 1033, 163 Mass. 79.

15. Me.—Hamant v. Creamer, 63 A. 736, 101 Me. 222, 8 Ann.Cas. 165.

16. Pa.—Vickroy v. Borough, 102 A. 958, 259 Pa. 321.

17. N.C.—Phillipse v. Higdon, 44 N. C. 380.
23 C.J. p 420 note 43.
As against innocent and bona fide purchasers and mortgagee, judgment creditor was not entitled in equity to amendment of foreign execution by correcting name of plaintiff.—First Nat. Bank v. Houghton, 181 N.E. 109, 41 Ohio App. 305.

18. Ala.—Cawthorn v. Knight, 11 Ala. 579.

19. Ark.—Hall v. Lackmond, 6 S.W. 510, 50 Ark. 113, 115, 7 Am.S.R. 84.

that all irregularities and defects in the issuance of executions on valid judgments and against real property shall, as to sales previously made, be disregarded validates, without amendment by the court, an execution issued without a seal.[20]

b. Particular Amendments

The most common instance in which an amendment is allowed is where the execution does not conform to the judgment, yet amendments may be allowed in other cases, although a writ directed to the sheriff of one county and delivered to the sheriff of another is not amendable.

The most common instance in which an amendment is allowed is where the execution does not conform to the judgment,[21] as where there is a variance in the amount,[22] a misrecital of date of rendition of judgment,[23] or a mistake in, or omission of, the names of either the creditor[24] or the debtor.[25] An amendment is allowable in cases of variance as to the amount or rate of interest,[26] nonconformity to præcipe,[27] mistake in, or omission of, the direction to the officer,[28] omission to command to levy and to make amount,[29] mistake or omission in the directions given to the officer with respect to the property to be taken[30] or as to making his return,[31] error as to the name in which the writ runs,[32] error in describing the obligation affording the basis of the judgment,[33] omission of indorsements required by statute,[34] and in cases of erroneous teste,[35] as well as in cases of the omission of the clerk's signature,[36] except in jurisdictions where such omission is held to render the writ void.[37] Failure to indorse the time of receiving the writ may be cured by amendment after a return unsatisfied.[38]

Where the writ is directed to the sheriff of one county and is delivered to the sheriff of another county, it is not amendable.[39]

Absence of seal. An execution issued without attaching the clerk's official seal may be amended,[40] even though a motion to quash is pending,[41] unless the lack of a seal is considered fatal to the validity of the writ.[42]

c. Time of Amendment

An amendment to a writ should be seasonably made and it is generally recognized that an amendment may be allowed in matters of form even after a sale.

An amendment to a writ of execution should be seasonably made.[43] Amendments, however, may be made on a motion to quash,[44] after the levy,[45] on return day,[46] after satisfaction and return,[47] or after return day.[48]

20. Mont.—Kipp v. Burton, 74 P. 85, 29 Mont. 96, 63 L.R.A. 325.

21. Ga.—Bank of Tupelo v. Collier, 15 S.E.2d 499.
23 C.J. p 420 note 49.

Where the original decree is properly amended, the amendment of the execution in conformity to the amended decree is proper.—Bank of Tupelo v. Collier, supra.

22. Mass.—Thompson v. Horgan, 157 N.E. 599, 260 Mass. 589.
23 C.J. pp 420, 421 notes 50–52.

23. Md.—Hagerstown First Nat. Bank v. Weckler, 52 Md. 30.
23 C.J. p 421 note 53.

24. Ga.—Smith v. Bell, 33 S.E. 684, 107 Ga. 800, 73 Am.S.R. 151.
23 C.J. p 421 note 54.

25. Mich.—Wabash Ry. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593.
23 C.J. p 421 note 55.

26. Ga.—Miller County v. Bush, 110 S.E. 515, 28 Ga.App. 130.
23 C.J. p 421 notes 56, 57.

27. Pa.—Shaffer v. Watkins, 7 Watts & S. 219.

28. Okl.—Christy v. Springs, 69 P. 864, 11 Okl. 710.
23 C.J. p 421 note 59.

29. Pa.—Peddle v. Hollinshed, 9 Serg. & R. 277.

30. Mo.—Wamsley v. Snow, 53 S.W. 2d 258, 331 Mo. 261.

N.Y.—Burch v. Burch, 100 N.Y.S. 814, 51 Misc. 232, 19 N.Y.Ann.Cas 21, reversed on other grounds 102 N.Y.S. 305, 116 App.Div. 865, 38 N.Y.Civ.Proc. 377.
23 C.J. p 421 note 62.

31. Ala.—Forward v. Marsh, 18 Ala. 645.
23 C.J. p 421 note 63.

32. S.D.—State v. Cassidy, 54 N.W. 928, 4 S.D. 58.
23 C.J. p 421 note 60.

33. Ga.—Swint v. Adams, 157 S.E. 249, 42 Ga.App. 705.

34. Okl.—Wedgwood v. Boyd, 51 P. 2d 299, 174 Okl. 531.

35. N.J.—Denn v. Lecony, 1 N.J. Law 46.
23 C.J. p 421 note 64.

36. Kan.—Taylor v. Buck, 60 P. 736, 61 Kan. 694.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.

37. Cal.—O'Donnell v. Mcrguire, 63 P. 847, 131 Cal. 527, 82 Am.S.R. 389.
Effect of omission of signature see § 79 c supra.

38. Mich.—Forsythe v. Washtenaw Cir. Judge, 147 N.W. 549, 180 Mich. 633.

39. Ill.—Bybee v. Ashby, 7 Ill. 151, 43 Am.D. 47.
Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 1078, citing **Corpus Juris.**

40. Ark.—Hall v Lackmond, 6 S.W. 510, 50 Ark. 113, 7 Am.S.R. 84.
23 C.J. p 422 note 67.

41. Wis.—Develaar v. Blue Mound Inv. Co., 86 N.W. 185, 110 Wis. 470.
23 C.J. p 422 note 68.

42. Ill.—Weaver v. Peasley, 45 N.E. 119, 163 Ill. 251, 54 Am.S.R. 469.
Effect of absence of seal see § 79 d supra.

43. Ala.—Hubbert v. McCollum, 6 Ala. 221.

44. Ala.—Harrell v. Martin, 6 Ala. 587.
Wis.—Davelaar v. Blue Mt. Inv. Co., 86 N.W. 185, 110 Wis. 470.

45. N.H.—Morse v. Dewey, 3 N.H. 535.
23 C.J. p 422 note 74.

46. Ga.—Saunders v. Smith, 3 Ga. 121.

47. N.Y.—Kokomo Strawboard Co. v. Inman, 21 N.Y.S. 705.
23 C.J. p 422 note 76.

After partial satisfaction
Mass.—Thompson v. Horgan, 157 N.E. 599, 260 Mass. 589.

48. Kan.—Taylor v. Buck, 60 P. 736, 61 Kan. 694.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.
23 C.J. p 422 note 77.

Although it has been stated that no amendment can be made after a sale,[49] it is generally recognized that an amendment may be allowed in all matters of form, in the discretion of the court, as well after a sale has been made under the writ as before the sale.[50]

d. Procedure to Procure

An amendment to the writ may be obtained by motion or by some other form of application to the court by a proper person or an amendment may be made by the court of its own motion.

An amendment to a writ of execution may be obtained by motion or by some other form of application to the court[51] by a proper person,[52] or an amendment may be made by the court of its own motion.[53] Mere formal irregularities may be amended by order of the court on a motion to set aside the writ.[54]

The party asking for the amendment of a writ of execution must pay the costs of an action for trespass for the levy under the defective execution, where such an action has been brought.[55]

Notice. It is not permissible to allow an amendment to the writ, in a matter of substance, which will affect prejudicially defendant and third persons, without giving them notice.[56] In matters of form, however, the writ may be amended even after a sale has been made under it, without a rule on, or notice to, defendant.[57]

e. Effect of Amendment

An amendment nunc pro tunc of a writ of execution makes it effective as between the parties, as if the defect had never existed.

An amendment nunc pro tunc of a writ of execution makes it effective as between the parties, as if the defect had never existed.[58] Where made after levy it relates back to the date of the writ.[59] It has been held that an amendment, by striking out the name of a person not a party to the judgment, does not affect the lien of the execution,[60] and that the title of the officer seizing the goods remains unimpaired, even though the amendment destroys the writ.[61] An amendment allowed by the court without objection has been held to cure a defect in the name of the debtor.[62]

The execution is not invalidated by a change which is irregular.[63]

§ 83. —— Collateral Attack

A void execution may be attacked collaterally, but mere irregularities in an execution may not be taken advantage of in a collateral proceeding.

Mere irregularities in an execution or in the issuance thereof cannot be taken advantage of in a collateral proceeding[64] although the execution is

49. Tex.—Southwestern Settlement & Development Co. v. Randolph, Civ.App., 240 S.W. 655, reversed on other grounds, Houston Oil Co. of Texas v. Randolph, Com.App., 251 S.W. 794, 28 A.L.R. 926.
"If . . . executions are defective in particulars that may affect the title to property sold under them, it is too late after sales have been made to amend . . . [them] so as to have the effect of affecting such sales."—McKay v. Paris Exchange Bank, 12 S.W. 529, 530, 75 Tex. 181, 16 Am.S.R. 884.
Correction of name of party after sale has been refused.—Morris v. Balkham, 12 S.W. 970, 75 Tex. 111.

50. Neb.—Taylor v. Courtnay, 16 N. W. 842, 15 Neb. 190.
23 C.J. p 422 note 78.
On motion to confirm judicial sale granting permission to amend execution to show amount of judgment, interest, and cost was not error.—Wedgwood v. Boyd, 51 P.2d 299, 174 Okl. 531.

51. Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
23 C.J. p 422 note 79.
Deputy marshal had no right or authority to move to correct a special execution nunc pro tunc by inserting a clause authorizing a levy on property other than that specified, although the judgment authorized an election by the judgment creditor.—Wilson v. Bulletin Pub. Co., 185 N.W. 893, 192 Iowa 860.

53. Me.—Hamant v. Creamer, 63 A. 736, 101 Me. 222, 8 Ann.Cas. 165—Caldwell v. Blake, 69 Me. 458.

54. N.Y.—Park v. Church, 5 How. Pr. 381—Pierce v. Craine, 4 How. Pr. 257.

55. N.Y.—Porter v. Goodman, 1 Cow. 413.

56. N.C.—Simpson v. Simpson, 64 N.C. 427.
23 C.J. p 422 note 81.

57. S.C.—Giles v. Pratt, 19 S.C.L. 239, 26 Am.D. 170.

58. Fla.—Adams v. Higgins, 1 So. 321, 23 Fla. 13.
23 C.J. p 422 note 86.

59. Ark.—Hall v. Lackmond, 6 S.W. 510, 50 Ark. 113, 7 Am.S.R. 84.
23 C.J. p 422 note 87.

60. Ala.—Andress v. Roberts, 18 Ala. 387.
Loss or suspension of lien see infra §§ 132–137.

61. Ill.—Corbin v. Pearce, 81 Ill. 461.

62. **Amendment of execution against defendant "as administratrix** of the estate of (named person)" cured objection that quoted words were descriptive, and that execution was against defendant personally.—Citizens' Finance Co. v. Griffin, 165 S. E. 324, 45 Ga.App. 508.

63. **Irregular changing of return date** does not void writ where it could have been originally issued as irregularly changed.—Albright v. Collins, Tex.Civ.App., 64 S.W.2d 1096, reversed on other grounds Empire Gas & Fuel Co. v. Albright, 87 S.W. 2d 1092, 126 Tex. 485.

64. Idaho.—Evans v. Humphrey, 5 P.2d 545, 51 Idaho 268.
Ohio.—First Nat. Bank v. Hassinger, 196 N.E. 425, 129 Ohio St. 642.
Tex.—Houston Oil Co. of Texas v. Randolph, Com.App., 251 S.W. 794—Stanford v. Dumas, Civ.App., 137 S.W.2d 1071, error dismissed, judgment correct.
23 C.J. p 423 note 91.
Execution returned unsatisfied
Validity of execution, which was issued and returned unsatisfied, may not be collaterally attacked by defendants.—Feigenbaum v. Narragansett Stables Co., 215 N.Y.S. 328, 127 Misc. 114, affirmed 219 N.Y.S. 811, 219 App.Div. 729, affirmed 157 N.E. 886, 245 N.Y. 626.

so irregular that it could be set aside on motion.[65] It is only where the proceedings are so defective that they are absolutely void that defects in them can be relied on in a collateral proceeding,[66] although it is impossible to lay down any general rule as to when an execution is so irregular as to be void.[67] If the execution is not merely irregular and voidable, but absolutely void, it may be attacked collaterally[68] by any person whose interests are affected by it.[69] Ordinarily mere irregularities can be taken advantage of in a direct proceeding only by defendant or his representative,[70] and subsequent execution creditors cannot take advantage of such defects,[71] although the contrary has been held where the objection was that the amount of the execution was too large.[72]

The rules just stated have been applied to executions issued on transcript from a justice of the peace,[73] to executions issued to other counties,[74] as well as to alias executions.[75]

§ 84. —— Defects, Objections, and Waiver

The debtor may waive an irregularity in the execution.

The debtor may waive an irregularity in the execution either by some positive act,[76] by acquiescence,[77] or by laches.[78] Any error in issuing an execution while a previous one remains outstanding and unreturned cannot be complained of when only one levy and one satisfaction are being attempted.[79]

It is said that waiver by defendant will be inferred from very slight evidence.[80] However, filing a motion to stay proceedings under an execution does not estop the debtor, on subsequently discovering that the writ was not sealed, from raising such objection.[81]

§ 85. Alias, Pluries, and Renewed Writs

a. In general
b. Right to alias or pluries writ
c. Time of issuance
d. Procedure to procure
e. Form and contents
f. Renewals instead of alias writs
g. Reëstablishment of lost or destroyed writ

a. In General

The writ which follows the original is called an "alias" writ and writs following the alias are called "pluries" writs; as a general rule the mere issuance of an alias before the return of the original is insufficient to establish an abandonment of the execution and levy thereunder.

The writ which follows the original writ of execution is called an "alias" writ; writs which follow the alias are called "pluries" fieri facias.[82] Calling a writ an "alias" does not make it an alias writ.[83]

Effect of issuance. Although there are authorities to the contrary,[84] as a general rule the mere issuance of an alias writ before the return of the original is not of itself sufficient to establish an abandonment of the execution and levy thereunder,[85] especially where the second execution is

Execution not naming other defendants
If execution was invalid because it did not name other defendants against whom judgment was rendered, it should have been taken advantage of by direct proceeding.—Alcorn v. Means, Tex.Civ.App., 273 S.W. 1016.

65. U.S.—Griffith v. Bogert, Mo., 18 How. 158, 15 L.Ed. 307.
23 C.J. p 423 note 92.

66. Mo.—Wamsley v. Snow, 63 S.W.2d 258, 331 Mo. 261.
23 C.J. p 423 note 94.

67. Cal.—Hunt v. Loucks, 38 Cal. 372, 99 Am.D. 404.
23 C.J. p 423 note 95.

68. Md.—Candler v. Fisher, 11 Md. 332.
Mass.—Washington Nat. Bank v. Williams, 74 N.E. 470, 188 Mass. 103.

69. Md.—Candler v. Fisher, 11 Md. 332.
Tex.—Bennett v. Gamble, 1 Tex. 124.

70. Mo.—Wamsley v. Snow, 63 S.W.2d 258, 331 Mo. 261.
23 C.J. p 423 note 98.

71. Pa.—Roemer v. Denig, 18 Pa. 482.
23 C.J. p 423 note 99.

72. N.Y.—Jaffray v. Saussman, 5 N.Y.S. 629, 52 Hun 561, 17 N.Y.Civ. Proc. 7.

73. Mo.—Ables v. Webb, 85 S.W. 383, 186 Mo. 233, 105 Am.S.R. 610.
23 C.J. p 423 note 2.

74. Tex.—Earle v. Thomas, 14 Tex. 583.
Wis.—Rogers v. Cherrier, 43 N.W. 828, 75 Wis. 54.

75. N.Y.—Crouse v. Schoolcraft, 64 N.Y.S. 610, 51 App.Div. 160.
23 C.J. p 423 note 4.

76. N.C.—McKeithen v. Blue, 62 S.E. 769, 149 N.C. 95, 128 Am.S.R. 654.
23 C.J. p 423 note 6.

77. Tex.—Stark v. Carroll, 1 S.W. 188, 66 Tex. 393.
23 C.J. p 423 note 7.

Silence by one under duty to speak
Ga.—Powell v. Perry, 63 Ga. 417.
23 C.J. p 423 note 8.

78. Pa.—Adam Scheidt Brewing Co. v. Schuster, 87 A. 423, 240 Pa. 310.
23 C.J. p 423 note 9.

79. Fla.—Desiderio v. D'Agostino, 173 So. 682, 127 Fla. 377.

80. Vt.—Catlin v. Merchants' Bank, 36 Vt. 572.

81. Ill.—Peasley v. Weaver, 64 Ill. App. 80.

82. Ga.—Land v. Gormley, 170 S.E. 510, 511, 177 Ga. 497, citing **Corpus Juris.**
23 C.J. p 391 note 83.
Simultaneous and successive executions see § 16 supra.

Presupposition of prior valid writ
An "alias or pluries execution" presupposes an original or prior valid execution.—Saunders v. Moore, 110 S.W.2d 1046, 21 Tenn.App. 375.

83. Ga.—Kellogg v. Buckler, 17 Ga. 187.

84. Pa.—Missimer v. Ebersole, 87 Pa. 109.
23 C.J. p 400 note 26.

85. Iowa.—West v. St. John, 19 N.W. 238, 63 Iowa 287.
23 C.J. p 401 note 27.

void,[86] although such issuance of an alias is competent evidence on the question of abandonment.[87] An alias, although improperly issued, may be a legal justification to the officer to whom it is directed.[88]

The issuing of an alias while the levy under the first writ is undisposed of cannot affect the lien of the judgment.[89] An alias continues the lien of the original execution so as to preclude the satisfaction of another execution issued between the two.[90] The issuing of an alias does not preclude the judgment debtor from showing, on an issue of illegality, that the judgment had been paid before the alias was issued.[91]

b. Right to Alias or Pluries Writ

(1) In general
(2) Before return of prior writ
(3) Where there is outstanding levy
(4) After judgment satisfied or return of execution satisfied

(1) In General

The right to issue alias and pluries executions exists independently of any statute; such writs are proper where an execution is unproductive.

The right to issue alias and pluries executions exists independently of any statute conferring authority to issue them; and statutes authorizing the issuance of alias and pluries writs under certain circumstances do not, by implication, interfere with or change the rule, as established by the practice of the courts, allowing the issuance of such writs under other proper circumstances;[92] nor do statutes authorizing the renewal of executions interfere with the right to issue alias and pluries writs, where the circumstances exist under which, at common law, an alias might be issued, unless such statutes expressly or by fair intendment assume to take away the right.[93]

An alias or pluries writ is proper where an execution is unproductive,[94] as where the first or preceding writ is returned unsatisfied in whole or in part,[95] or where, as appears infra subdivision b (4) of this section, a former writ has been returned satisfied when in fact no satisfaction has been made. In other words, if satisfaction is not obtained by the original, the party interested has the right to an alias and a pluries until satisfaction is obtained.[96] Where an execution is quashed, an alias execution may issue,[97] and pending a rule to set aside a writ returned by order of court an alias or pluries writ may issue.[98] An alias execution may issue, although the judgment does not provide for its issuance,[99] and although the record of the judgment has been lost.[1] Neither the forfeiture of a claim bond[2] nor the beginning of supplementary proceedings[3] affects the right to an alias.

A creditor whose execution is enjoined for failure to credit a partial payment is not entitled to an alias writ, but his remedy is to have the injunction dissolved for the balance due.[4] There can be no alias or pluries writ against property sold under valid proceedings under a prior execution.[5]

Right of assignee. An assignee of the judg-

Abandonment, waiver, or relinquishment of levy see infra § 111.

Irregularity of alias writ

If two executions have issued to same parish, second only is irregular.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164.

86. Ind.—Ewing v. Hatfield, 17 Ind. 513.
Iowa.—Dunham v. Bentley, 72 N.W. 437, 103 Iowa 136.

87. Mich.—Friyer v. McNaughton, 67 N.W. 978, 110 Mich. 22.

88. Ark.—Ex parte Cummins, 4 Ark. 103.
23 C.J. p 401 note 31.

89. Ind.—Doe v. Hayes, 4 Ind. 117.
Loss, release, or extinguishment of judgment lien see the C.J.S. title Judgments §§ 499–509, also 34 C. J. p 628 note 38 et seq.

90. N.C.—Brasfield v. Whitaker, 111 N.C. 309.
Lien of execution see infra §§ 123–138.

91. Ga.—Lowry v. Richards, 62 Ga. 370.

92. Kan.—Richards-Conover Hardware Co. v. Sharp, 95 P.2d 360, 364, 150 Kan. 506, citing **Corpus Juris.**
S.D.—Yetzer v. Young, 52 N.W. 1054, 3 S.D. 263.

93. Minn.—Walter v. Greenwood, 12 N.W. 145, 29 Minn. 87.
S.D.—Yetzer v. Young, 52 N.W. 1054, 3 S.D. 263.

94. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1436.
23 C.J. p 392 note 89.

95. Fla.—Tedder v. Morrow, supra.
Ill.—Tracey v. Shanley, 36 N.E.2d 753, 311 Ill.App. 529.
23 C.J. p 392 note 90.

Return of writ unsatisfied against one defendant is sufficient to permit issuance of execution of whole amount against other defendant under the terms of the judgment.—Shamrock Towing Co. v. City of New York, D.C.N.Y., 20 F.2d 444.

96. Miss.—Locke v. Brady, 30 Miss. 21.
23 C.J. p 392 note 92.

Injunction against sale under execution as preventing issuance of alias writ see infra § 163 a.

97. Fla.—Mitchell v. Duncan, 7 Fla. 13.
Ky.—Lee v. Thompson, 116 S.W. 775, 132 Ky. 608.
23 C.J. p 392 note 94.

98. Pa.—Bole v. Bogardis, 86 Pa. 37.

99. Tex.—Weddington v. Carver, 100 S.W. 786, 45 Tex.Civ.App. 68.
23 C.J. p 392 note 96.

1. Tenn.—Childress v. Marks, 2 Baxt. 12.

2. Ala.—Patton v. Hamner, 33 Ala. 307.

3. N.Y.—Smith v. Mahony, 3 Daly 285.

4. La.—Salter v. McHenry, 17 La. 507.
23 C.J. p 392 note 1.

5. N.C.—Peebles v. Pate, 90 N.C. 348.
23 C.J. p 392 note 6.

ment has no greater legal right to an alias execution than had the assignor.[6]

Special execution. The rule that plaintiff is entitled to a special execution only in cases expressly allowed by statute applies to alias special executions.[7]

Waiver. The right to an alias may be waived;[8] but if the creditor has granted an indulgence to defendant on the original execution, there is no presumption that the indulgence is extended to an alias execution after its issue.[9]

(2) Before Return of Prior Writ

In the absence of a statute otherwise providing, before an alias or pluries writ can be issued the writ previously issued, with an appropriate return indorsed thereon, must have been returned, although an irregularity in this respect has been held not to render the writ void.

In the absence of a statute otherwise providing, before an alias or pluries writ can be issued, the writ previously issued, with an appropriate return indorsed thereon, must have been returned,[10] the presumption of law being that the judgment was satisfied on the first execution, until the contrary appears by the return of the officer.[11] Nevertheless it has been held that, although it is irregular to issue an alias before return of the former execution, such irregularity does not render the alias writ void.[12] An improper return will not prevent the issuance of an alias.[13]

Where alias writs have been issued, in the absence of evidence to the contrary it will be presumed that they were preceded by others regularly issued,[14] and that the alias was not issued until the return of the prior writ.[15] However, it has been stated that no presumption exists that an original writ of execution was ever returned and filed, in the absence of the writ itself or any record thereof.[16]

(3) Where There Is Outstanding Levy

(a) In general

(b) On personal property

(a) In General

As a general rule, where an execution has been levied on property, an alias or pluries execution is not issuable while such levy is still in force; but according to some authorities a levy on real estate does not affect the right to alias or pluries writs.

As a general proposition, where an execution has been levied on property, an alias or pluries execution is not issuable while such levy is still in force and remains undisposed of, by sale of the property or otherwise.[17] This rule has been considered necessary to prevent abuse and oppression.[18] The proper writ to dispose of a levy is a venditioni exponas rather than an alias.[19] Until the levy is disposed of by a sale of the property or a return of it to the debtor, a satisfaction of the judgment is presumed;[20] but this is only a presumption.[21]

On land. It is generally held that, notwithstanding a levy on real estate, plaintiff is entitled to issue alias and pluries writs,[22] or that, at most, such issue is a mere irregularity.[23] However, the

6. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.

7. Ill.—Keeley Brewing Co. v. Carr, 64 N.E. 1030, 198 Ill. 492, affirming 94 Ill.App. 225.

8. Pa.—Harrison v. Soles, 6 Pa. 393.

9. N.C.—Isler v. Moore, 67 N.C. 74.

10. Ariz.—Mosher v. Ganz, 25 P.2d 555, 42 Ariz. 314.
Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.
Ga.—Land v. Gormley, 170 S.E. 510, 512, 177 Ga. 497, quoting **Corpus Juris.**
Iowa.—Richardson v. Rusk, 245 N. W. 770, 215 Iowa 470.
La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 841, 166 La. 164, quoting **Corpus Juris.**
23 C.J. p 393 note 7.
Correct practice is not to allow issuance of another execution until first is returned and filed in clerk's office.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

11. Del.—Bishop v. Spruance, 4 Del. 114.
Evidence of satisfaction see infra § 342.

12. Mich.—Miller v. Hanley, 53 N. W. 962, 94 Mich. 253.
23 C.J. p 393 note 8.

13. Ala.—McKeagg v. Collehan, 13 Ala. 828.
N.C.—Aycock v. Harrison, 63 N.C. 145.

14. U.S.—Beebe v. U. S., Ala., 16 S.Ct. 532, 161 U.S. 104, 40 L.Ed. 636.
23 C.J. p 393 note 11.

15. Tex.—Laughter v. Seela, 59 Tex. 177.
23 C.J. p 393 note 12.

16. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.

17. La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 841, 166 La. 164, quoting **Corpus Juris.**
Pa.—Progressive Commercial Co. v. Friedman & Balasny, 81 Pa.Super. 161.
23 C.J. p 393 note 13.
Agreement releasing property on which lien was to be foreclosed to judgment debtor for certain sum to be credited on judgment sufficiently fixed deficiency to authorize issuance of alias execution.—Albright v. Collins, Tex.Civ.App., 64 S.W.2d 1096, reversed on other grounds Empire Gas & Fuel Co. v Albright, 87 S.W. 2d 1092, 126 Tex. 485.

18. Tenn.—Young v. Read, 3 Yerg. 297.
23 C.J. p 393 note 14.

19. U.S.—Kerr v. South Park Commissioners, C.C.Ill., 14 F.Cas.No.7,733, 8 Biss. 276.
Pa.—Saucon Valley Trust Co. v. Freeman, 19 Lehigh Co.L.J 225.
23 C.J. p 393 note 15, p 394 note 19.

20. Ind.—Lindley v. Kelley, 42 Ind. 294.
23 C.J. p 394 note 16.
Presumption of satisfaction of judgment by levy see the C.J.S. title Judgments § 573, also 34 C.J. p 717 note 48 et seq.

21. N.Y.—Peck v. Tiffany, 2 N.Y. 451, 456.

22. S.D.—Wood v. Conrad, 50 N.W. 903, 2 S.D. 405.
23 C.J. p 395 note 46.

23. Mich.—Spafford v. Beach, 2 Dougl. 150.
23 C.J. p 395 note 47.

contrary view has been taken, and it has been held that, where an execution has been levied on land which does not appear to have been sold or released, no other execution can be regularly issued, and that a venditioni exponas is the only proper process until it is found that the whole of the money cannot be raised by selling the land,[24] and that, where a levy has been made on real estate, and it is afterward discovered that the title to a definite portion of the property has failed either through want of ownership or invalid proceedings, the creditor is entitled to a new execution only for the amount remaining unsatisfied.[25]

(b) On Personal Property

An outstanding levy on personal property ordinarily suspends the right to issue an alias or pluries writ on the same judgment.

Inasmuch as the levy of an execution on sufficient personal property of the debtor to satisfy the judgment is prima facie, and as long as the levy continues in force, a satisfaction of the judgment, as between the parties thereto, see the C.J.S. title Judgments § 573, also 34 C.J. p 717 note 48 et seq, the right to issue an alias or pluries writ is suspended, because goods on which the levy has been made are in custodia legis, and if the same remain unsold the proper course is to have a venditioni exponas issued requiring the goods to be sold.[26]

On the other hand, if the execution fails in whole or in part, without any fault of plaintiff, he may have an alias or pluries execution.[27] It may be laid down as a general rule, that where the levy has been unavailing, and especially where the debtor has sustained no loss thereby, plaintiff may sue out an alias or pluries writ.[28] The levy is unavailing, and another execution may be issued where the levy is insufficient to satisfy the judgment,[29] or is on property not belonging to the debtor,[30] or on property not subject to execution;[31] where defendant, after the levy, disclaims title, and plaintiff refrains from further proceedings;[32] where the levy has been set aside or superseded;[33] where the execution has been discharged by a mistaken or void levy;[34] where the proceeds of the property taken are applied to the payment of older executions;[35] or where plaintiff has been enjoined from selling the property.[36] However, it must clearly appear that the property levied on is not sufficient to pay the judgment,[37] since prima facie a valid levy is sufficient.[38]

Where replevin or forthcoming bond given or forfeited. If execution is levied on the property of the debtor, it is held, although not universally,[39] that a replevin bond[40] or a forthcoming bond[41] given by the debtor operates for the time being as a satisfaction of the original judgment, and as long as the bond is in force a second execution cannot issue.

Where the original writ is levied on a chattel, and a forthcoming bond is given and subsequently forfeited, plaintiff, according to some authorities, is entitled to issue an alias;[42] but in some cases it has been maintained that the forfeiture of the bond is a full satisfaction of the judgment, and that no other execution can be issued.[43]

24. Ark.—Anderson v. Fowler, 8 Ark. 388.
23 C.J. p 395 note 48.

25. Me.—Vermeule v. York Water Co., 92 A. 513, 112 Me. 437.
23 C.J. p 392 note 93.

26. Mich.—Friyer v. McNaughton, 67 N.W. 978, 110 Mich. 22.
23 C.J. p 394 note 19.

27. U.S.—Beebe v. U. S., Ala., 16 S. Ct. 532, 161 U.S. 104, 40 L.Ed. 636.
23 C.J. p 394 note 21.

28. Me.—Bryant v. Johnson, 24 Me. 304.
Mich.—Nelson v. Ferris, 30 Mich. 497.

Property in debtor's possession

Where a levy is made on chattels and they are retained by the debtor or he regains possession of them and they are eventually lost to plaintiff, the levy does not operate as a satisfaction and does not prevent the issuance of an alias.—Binford v. Alston, 15 N.C. 351—23 C.J. p 394 note 23.

Neglect or misconduct of officer

Where property has been left in the debtor's possession and has been lost to plaintiff, through the neglect or misconduct of the sheriff or other officer, and the loss has not been occasioned by the fraud or acquiescence of the creditor, the fact that the officer and his sureties are liable to the creditor does not affect the right of the creditor to sue out an alias execution, as the remedies against the debtor and the officer are cumulative.—Cooley v. Harper, 4 Ind. 454—23 C.J. p 394 note 24.

29. S.D.—Yetzer v. Young, 62 N.W. 1054, 3 S.D. 263.
23 C.J. p 394 note 25.

30. Neb.—Ziegler v. McCormick, 13 N.W. 28, 13 Neb. 25.
23 C.J. p 394 note 26.

31. Ill.—Watson v. Reissig, 24 Ill. 281, 76 Am.D. 746.

32. Pa.—Coleman v. Mansfield, 1 Miles 56.

33. Ohio.—Bisbee v. Hall, 3 Ohio 449.
23 C.J. p 394 note 29.

34. Me.—Pillsbury v. Smyth, 25 Me. 427.
23 C.J. p 394 note 30.

35. Tex.—Garner v. Cutler, 28 Tex. 175.
23 C.J. p 394 note 31.

36. Ohio.—Bisbee v. Hall, 3 Ohio 449.
23 C.J. p 394 note 32.

37. Ark.—Anderson v. Fowler, 8 Ark. 388.
Tex.—Bryan v. Bridge, 10 Tex. 149.

38. Tex.—Bryan v. Bridge, supra.

39. Ky.—Burks v. Bass, 4 Bibb 338.

40. Va.—Taylor v. Dundass, 1 Wash. 92, 1 Va. 92.
23 C.J. p 395 note 36.

41. Va.—Downman v. Chinn, 2 Wash. 189, 2 Va. 189.
23 C.J. p 395 note 37.

42. Ill.—Trenary v. Cheever, 48 Ill. 28.
23 C.J. p 395 note 38.

43. Tenn.—Camp v. Laird, 6 Yerg. 246.
23 C.J. p 395 note 39.

Abandonment of levy. As a general rule plaintiff cannot abandon a levy which is regular and issue an alias execution,[44] although he may abandon or withdraw the writ before it has been levied, and thereupon sue out an alias.[45] However, where the levy, or the execution under which it was made, is irregular, plaintiff may abandon the levy and sue out an alias.[46] Another execution may be issued where the property is released and restored to defendant under an agreement between plaintiff and defendant, or where defendant acquiesces in the abandonment of the levy.[47]

Void or voidable. An alias or pluries writ issued while a levy made under a prior writ remains undisposed of is not absolutely void, but voidable only, and cannot be attacked collaterally.[48]

(4) After Judgment Satisfied or Return of Execution Satisfied

After the judgment has been satisfied an alias or pluries writ cannot be issued, and such writ may not issue after execution has been returned satisfied without first proceeding to set aside such satisfaction.

After the judgment has been paid or satisfied, the issuance of an alias or pluries execution is unauthorized;[49] and where an execution has been returned satisfied, an alias or pluries cannot be issued without first proceeding to have such satisfaction set aside by the court.[50]

Where a return of satisfaction has been made, it must be such as the sheriff is authorized to make or it will not prevent the issuance of an alias.[51] Where an execution is discharged[52] or satisfied[53] by mistake or accident, the creditor is entitled to an alias. Where an execution has been returned satisfied after a sale of the property of a third person, the return may be set aside and an alias may issue.[54] However, where an execution is returned satisfied, another execution cannot be issued for the costs incurred therein unless there is an order for the collection of such costs.[55]

If by mistake the writ is for an amount less than that to which the creditor is entitled under his judgment, an alias may issue for the balance,[56] but an alias may not issue where the writ is for the proper sum but the creditor directs a levy for a less sum,[57] or where the writ fails to specify that interest is to be collected on the judgment.[58]

c. Time of Issuance

An alias may issue before the return day of the original or on the same day on which the original is returned; as a general rule, if the original execution was issued within the time limited, subsequent writs may issue at any time thereafter provided the judgment remains in force.

An alias may issue before the return day of the original if the original has been returned before the return day,[59] or at least such an execution is not void as distinguished from voidable.[60] An alias may be issued on the same day on which the original is returned.[61]

Time within which writ must issue. At common law if the original writ of fieri facias was issued within a year and a day of the rendition of the judgment and thence continued regularly on the records of the court, a new writ of execution might be taken out at any time without reviving the judgment by scire facias.[62] The practice of entering the continuances on the judgment roll was merely for-

44. Ark.—Trapnall v. Richardson, 13 Ark. 543, 58 Am.D. 338.
23 C.J. p 395 note 10.
Abandonment of levy see infra § 111.
Issuance of alias as effecting abandonment of original writ see supra § 85 a.

45. Ind.—McIver v. Ballord, 96 Ind. 76—Steele v. Murray, 1 Blackf. 179.

46. N.Y.—Green v. Burke, 23 Wend. 490.
23 C.J. p 395 note 42.

47. Iowa.—Clark v. Reiniger, 24 N. W. 16, 66 Iowa 607.
23 C.J. p 395 note 43.
Property returned to debtor
The mere levy on personal property furnishes no valid objection to the issuance of another execution where the property subsequently is returned to the debtor.—Wright v. Young, 6 Or. 87.

48. Ga.—Land v. Gormley, 170 S.E. 510, 512, 177 Ga. 497, quoting **Corpus Juris.**
23 C.J. p 395 note 44.
Collateral attack see supra § 83.

49. N.C.—Taylor v. Kelly, 51 N.C. 324.
23 C.J. p 396 note 49.

50. N.C.—Poor v. Deaver, 23 N.C. 391.
23 C.J. p 396 note 50.

51. Ala.—McKeagg v. Collehan, 13 Ala. 828.
23 C.J. p 396 note 51.

52. Conn.—Langdon v. Langdon, 1 Root 453.

53. Conn.—Langdon v. Langdon, supra.
23 C.J. p 396 note 53.

54. Mich.—Omaha White Lead Co. v. Worcester, How.N.P. 274.
N.Y.—Adams v. Smith, 5 Cow. 280.

55. La.—Brooks v. Hardwick, 5 La. Ann. 675.

56. Wis.—Sheboygan Bank v. Trilling, 43 N.W. 830, 75 Wis. 163.
23 C.J. p 396 note 56.

57. N.Y.—People v. Onondaga C.Pl. Ct., 3 Wend. 331.

58. N.Y.—Todd v. Botchford, 86 N. Y. 517.

59. Mass.—Chesebro v. Barme, 39 N. E. 1033, 163 Mass. 79.
23 C.J. p 396 note 60.

60. Ala.—Berry v. Perry, 1 So. 118, 81 Ala. 103—Steele v. Tutwiler, 68 Ala. 107.

61. Minn.—Carlson v. Smith, 119 N. W. 199, 127 Minn. 203.
23 C.J. p 396 note 62.

62. N.Y.—Morse v. Goold, 11 N.Y. 281, 62 Am.D. 103.
23 C.J. p 396 note 63–p 397 note 65.
Revival of judgment by scire facias see the C.J.S. title Judgments § 548, also 34 C.J. p 669 note 98 et seq.
Time for issuance of original writ see supra § 66.

mal, since they might be entered after the writs were issued[63] and after objection had been made,[64] and it fell into disuse.[65] If the original was sued out within a year after the rendition of the judgment and returned nulla bona, it was immaterial that more than a year and a day elapsed between the return of the original and the issuance of the alias, and no scire facias was necessary.[66] The usual expression of the courts is that, if an execution is issued within the year and a day, plaintiff "may at any time thereafter take out a writ," but this language does not mean anything more than that subsequent writs may be issued while the judgment is in force and of undisputed validity, and is not intended to imply that an execution may be issued after the period of limitation.[67]

In some jurisdictions an analogous rule prevails under modern regulations as to practice and if the original is sued out within the time limited by statute the limitation of the statute does not apply to the alias which may issue as of course.[68] However, it has been held that the statutory limitation applies to the alias and pluries writs as well as to the originals.[69] The time within which a writ may issue after the date of issuance of the last preceding writ may be specially limited.[70]

Computation of time. The time for renewing an execution so as to render a scire facias unnecessary begins to run from the last day the execution has to run in court before its final return.[71] Any delay caused by an injunction out of chancery cannot be taken into account.[72] Statutes sometimes provide that certain periods of time shall not be included as part of the period of limitations.[73] Where an execution was issued and then discovered to be void, and an order for a new execution was obtained, but no new execution was issued until five years after rendition of judgment, the order did not extend the time within which the execution could issue.[74]

A void writ cannot be relied on as interrupting the running of time within which the writ may be issued and as sufficient to support the issuance of an alias or pluries;[75] but an execution which is not void, but which is voidable only, because of informalities therein, is sufficient to prevent the judgment from becoming dormant.[76]

d. Procedure to Procure

(1) In general
(2) After death of party

(1) In General

In the ordinary case, in the absence of statute, where an execution has been issued and returned unsatisfied, an alias may be issued without a scire facias or motion asking leave of court and ordinarily it is not necessary to give notice to the defendant or to renew the demand.

While an alias writ cannot be issued without an order of the court when the original writ has not been returned,[77] in the ordinary case, in the absence of a statute or rule of court otherwise providing, where an execution has been issued and returned unsatisfied, an alias may be issued without a scire facias or a motion asking leave of court.[78] If the first writ is returned not executed, a new order of seizure and sale is not necessary to the validity of an alias.[79] Where plaintiff in execution has been compelled to refund the value of a portion of the property levied on under the original execution, no order or leave of court is necessary for the issuance of a second execution for the amount so refunded.[80] In the absence of collusion between plaintiff and defendant, an execution may be renewed by the written consent of the judgment debtor indorsed on it.[81]

63. Ala.—Scull v. Godbolt, 4 Ala. 326, 327.
Ky.—Craig v. Johnson, Hard. p 520.

64. Pa.—Lewis v. Smith, 2 Serg. & R. 142.
23 C.J. p 397 note 67.

65. Tenn.—Henry v. Wilson, 9 Lea 176.
23 C.J. p 397 note 69.

66. Mo.—Dowsman v. Potter, 1 Mo. 518.
23 C.J. p 397 note 70.

67. Mich.—Parsons v. Wayne Cir. Judge, 37 Mich. 287.
23 C.J. p 397 note 71.

68. Fla.—Jordan v. Petty, 5 Fla. 326.
23 C.J. p 398 note 72.

69. S.C.—Garvin v. Garvin, 13 S.E. 625, 34 S.C. 388.

70. Miss.—Scavy v. Bennett, 2 So. 177, 64 Miss. 735.
Execution for costs issued by the clerk against the successful plaintiff has been held not to be an execution from which to date the time within which an execution in favor of plaintiff may be issued.—Scavy v. Bennett, supra—23 C.J. p 398 note 75.

71. S.C.—Gibbes v. Mitchell, 2 S.C. L. 120.
23 C.J. p 398 note 76.

72. S.C.—Gibbes v. Mitchell, supra.

73. **Civil War period**
W.Va.—Shipley v. Pew, 23 W.Va. 487.

74. N.Y.—Field v. Paulding, 1 Hilt. 187, 3 Abb.Pr. 139.
23 C.J. p 398 note 79.

75. Kan.—Halsey v. Van Vliet, 27 Kan. 474.
23 C.J. p 398 note 80.

76. Ga.—Smith v. Rust, 5 S.E. 250, 79 Ga. 519.
23 C.J. p 398 note 81.

77. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.

78. Minn.—Carlson v. Smith, 149 N. W. 199, 127 Minn. 203.
23 C.J. p 398 note 83.
Power and duty of clerk of court to issue alias writ of execution see Clerks of Courts § 38 a.

79. La.—Riddell v. Ebinger, 6 La. Ann. 407.

80. N.Y.—Richardson v. McDougall, 19 Wend. 80.
23 C.J. p 398 note 88.

81. S.C.—Carrier v. Thompson, 11

Where the writ has been levied on the property of a stranger, and satisfaction has been entered, the remedy is by scire facias or a motion addressed to the court to set aside the satisfaction and procure a new writ.[82] After satisfaction by a sale no further levy can be made until the court has set aside the sale, vacated the satisfaction, and ordered a new execution.[83] Where execution has been returned "satisfied," the clerk cannot on the ground of mistake issue a new execution without leave of court.[84]

Where by statute the party or his attorney of record has the right to issue execution, an alias issued by the clerk without authority from the execution plaintiff is an irregularity but does not render the writ so issued void.[85] In equity under a rule of court which provides that, if the decree is solely for the payment of money, final process to execute the decree may be by a writ of execution in the form used in suits at common law, an alias cannot be issued except by order of the court which rendered the decree,[86] and an alias writ issued by the clerk without an order of the court is void.[87] The maxim, He who seeks equity must do equity, may be applied to a creditor asking for an alias.[88]

Form of proceeding. The most common proceeding to obtain an alias, especially by the old practice, is scire facias.[89] Plaintiff may also obtain relief by motion in some jurisdictions;[90] and sometimes an action of debt on the judgment is held a concurrent remedy with scire facias.[91]

Notice and demand. Ordinarily it is not necessary to give notice to defendant[92] or to renew the demand[93] before issuing an alias execution. It has been held, however, that a motion for a new execution after the former execution has been returned satisfied by levy on land, the levy having been defective, will not be granted except on notice to defendant,[94] and that the rule is the same where a motion is made for reëstablishing or obtaining a new writ which has been destroyed or lost.[95]

Pleading and proof. Plaintiff must aver and prove the ground relied on for the issuance of a new execution.[96] Where a new execution is asked for on the ground that the property seized under the former writ was encumbered by a prior lien, the declaration must show that the property was taken from the execution defendant by virtue of such lien.[97]

Defenses. On a scire facias to obtain a new execution on the ground of the invalidity of the original, no facts can be properly relied on in defense which existed prior to the judgment.[98]

(2) After Death of Party

In some jurisdictions an alias execution cannot issue after defendant's death without a revival of the judgment unless a lien has been acquired by former execution issued in defendant's lifetime and continued since, and a similar rule obtains in case of plaintiff's death.

While it has been held that the issuance of an alias or pluries writ will not be affected by the death of defendant after the original is in the hands of the sheriff,[99] unless he has returned the process without a sale,[1] in some jurisdictions it is held that

S.C. 79—Guignard v. Glover, 16 S. C.L. 457.

82. Neb.—Zeigler v. McCormick, 13 N.W. 28, 13 Neb. 25.
23 C.J. p 398 note 85.

83. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.
23 C.J. p 398 note 86.

84. Ala.—Harkins v. Clemens, 1 Port. 30.
23 C.J. p 398 note 87.

85. Ind.—Johnson v. Murray, 13 N. E. 273, 112 Ind. 154, 2 Am.S.R. 174.

86. Fla.—White v. Staley, 21 Fla. 396.
23 C.J. p 399 note 89.
Enforcement of decrees in equity see Equity §§ 616–621.

87. Fla.—White v. Staley, 21 Fla. 396.

88. N.H.—Batchelder v. Wason, 8 N.H. 121.
23 C.J. p 399 note 94.

89. Mass.—Dennis v. Arnold, 12 Metc. 449.
23 C.J. p 399 note 90.

90. Conn.—Langdon v. Langdon, 1 Root 453.
23 C.J. p 399 note 91.

91. Me.—Rice v. Cook, 75 Me. 45.
23 C.J. p 399 note 92.

92. Ga.—Lowry v. Richards, 62 Ga. 370—Rogers v. Petty, 160 S.E. 128, 43 Ga.App. 771.
Ill.—Letcher v. Morrison, 27 Ill. 209.
23 C.J. p 399 note 96 [b].

After discharge of body execution
Under a statute so providing where a creditor discharges the body of a debtor committed on execution, he is entitled, as matter of right and without notice to the debtor, to an alias execution against his property. —Martin v. Kilbourne, 11 Vt. 93.

Where application made within certain time
Under a statute so providing, no notice is required where the application for an alias execution is made within a limited time after entry of the decree.—Sandford v. Wellborn, 96 A. 1018, 85 N.J.Eq. 577.

Order for another execution was erroneous where it was made on an ex parte motion and the record did not show that the amount for which it was directed to issue was due.—Browns v. Julian, 5 J.J.Marsh., Ky., 312.

93. Conn.—Roberts v. Church, 17 Conn. 142.
23 C.J. p 366 note 25.

94. Conn.—Williams v. Cable, 7 Conn. 119.
23 C.J. p 399 note 96 [a].

95. Fla.—Hard v. Smith, 17 Fla. 767.
N.Y.—Douw v. Burt, 1 Wend. 89.

96. Vt.—Baxter v. Tucker, 1 D. Chipm. 353.

97. Vt.—Baxter v. Shaw, 28 Vt. 569.

98. Mass.—Richardson v. Wolcott, 10 Allen 439.
S.C.—Trimmier v. Winsmith, 23 S.C. 449.

99. S.C.—Verdier v. Fishburne, 28 S.C.L. 346.

1. N.C.—Aycock v. Harrison, 65 N. C. 8.
23 C.J. p 384 note 63.

an alias execution cannot issue after the death of defendant without a revival of the judgment unless a lien has been acquired by former execution issued in the lifetime of defendant and properly continued since;[2] but if the continuance has not been properly maintained the lien is lost and then scire facias is necessary to revive the judgment before any subsequent execution can issue.[3] However, where an alias execution performs the office of a venditioni exponas at common law, it is valid without a scire facias.[4]

Death of plaintiff. If plaintiff dies after an execution is issued and returned wholly or partly unsatisfied, a revival of the judgment is necessary before an alias writ can issue,[5] at least where no lien has been acquired by the first execution.[6] The same rule applies where plaintiff dies before the return of the first execution.[7]

e. Form and Contents

The same formalities must be observed in the preparation of an alias or pluries execution as though it were an original; in addition, an alias or pluries writ should show that others have preceded it and should state the number of previous writs and the amount remaining unsatisfied.

The alias should consist of a new writ, and it is not proper to send forth the previous writ with alterations or indorsements thereon.[8] The same formalities must be observed in the preparation of an alias or pluries execution as though it were an original; it must conform to the judgment, must be signed and sealed, and must contain a proper direction and mandate.[9] Under the old practice an alias was properly tested as of the term to which the original was returnable,[10] or as of the day on which the original was returnable,[11] and the pluries as of the term to which or the day on which the alias was returnable and so on.[12] An alias fieri facias cannot be regularly issued for the same term to which the original is issued.[13]

Recitals as to previous execution. An execution which is not an original should show on its face that others have preceded it,[14] should purport to be an alias or pluries writ, as the case may be,[15] and in some jurisdictions should state the number of executions which have preceded it.[16]

At common law, and under some statutes, an execution not an original should recite the proceedings under a former fieri facias.[17] However, the fact that the writ does not recite the proceedings under a former fieri facias as required at common law,[18] or that it does not show the number of executions which have preceded it,[19] does not render the writ void; and it should not be quashed merely because not entitled as an alias execution.[20]

Formal errors in prior executions do not invalidate a later execution correctly issued.[21]

Recital of amount. Where an execution has been satisfied in part, an alias must state the proper amount of the judgment remaining unsatisfied and command the officer to collect such unsatisfied part in the usual form.[22] A renewal execution should issue for the balance due on the original with interest from the date of the last credit on the principal debt,[23] unless it is otherwise provided by statute.[24] As in the case of original executions, the

2. Del.—Farmers' Bank v. Reynolds, 1 Del. 513.
23 C.J. p 384 note 64.

3. Ala.—Boyd v. Dennis, 6 Ala. 55.
23 C.J. p 384 note 65.

4. Kan.—Rain v. Young, 59 P. 1068, 61 Kan. 428, 78 Am.S.R. 325.
Okl.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 173 Okl. 285.

5. N.J.—Morgan v. Taylor, 38 N.J. Law 317.

6. Tex.—Bennett v. Gamble, 1 Tex. 124.

7. N.C.—Wingate v. Gibson, 5 N.C. 492.

8. Ohio.—Faris v. State, 3 Ohio St. 159.
In Tennessee, at one time, the practice was allowed of converting the previous writ into an alias by writing the word "alias" on it.—Harlan v. Harlan, 14 Lea 107—23 C.J. p 399 note 5 [a].

9. N.C.—Huggins v. Ketchum, 20 N.C. 550.
23 C.J. p 399 note 6.
Form and contents of original writ see supra §§ 69–84.

10. S.C.—Moses v. Blackwell, 43 S.C.L. 42.

11. N.J.—Rammel v. Watson, 31 N.J.Law 281.
23 C.J. p 400 note 8.

12. S.C.—Moses v. Blackwell, 43 S.C.L. 42.

13. Pa.—Shaffer v. Watkins, 7 Watts & S. 219.
23 C.J. p 396 note 59.

14. Tex.—Scott v. Allen, 1 Tex. 508.
23 C.J. p 400 note 11.

15. N.C.—McIver v. Ritter, 60 N.C. 605.
23 C.J. p 400 note 12.

16. Tex.—Conden v. Steiner, Civ. App., 54 S.W. 277—Driscoll v. Morris, 21 S.W. 629, 2 Tex.Civ.App. 603.

17. N.Y.—Cumpston v. Field, 3 Wend. 382.
23 C.J. p 400 note 14.
Time when the first writ was issued should be subscribed on subsequent writs, according to the old rule in England.—Moses v. Blackwell, 43 S.C.L. 42, 43.

18. Pa.—Coleman v. Mansfield, 1 Miles 56.
23 C.J. p 400 note 16.

19. Tex.—Alcorn v. Means, Civ. App., 273 S.W. 1016.
23 C.J. p 400 note 17.

20. Ga.—Westbrook v. Hays, 14 S.E. 879, 89 Ga. 101.
Mo.—Rushong v. Taylor, 82 Mo. 671.

21. Me.—Corthell v. Egery, 74 Me. 41.

22. U.S.—Schroeder v. Young, Utah, 16 S.Ct. 512, 161 U.S. 334, 40 L.Ed. 721.
23 C.J. p 400 note 20.

23. S.C.—Trimmier v. Winsmith, 23 S.C. 449.

24. Mass.—Haskell v. Littlefield, 29 N.E. 626, 155 Mass. 320.
23 C.J. p 400 note 22 [a].

issuance of an alias for too great an amount does not render the writ void.[25]

The mandate. In an alias execution the mandate is, "You are commanded as you have been before;" while the mandate of a pluries writ is, "You are commanded as you have been often before."[26]

Indorsements. Plaintiff is not bound to make an indorsement required by statute on an alias after the return nulla bona on the original which was properly indorsed.[27]

f. Renewals Instead of Alias Writs

Unless it is authorized by immemorial practice or by statute, the renewal of an execution, after it has been returned, by an indorsement thereon is not proper, although a writ thus irregularly reissued is not void.

A renewed execution is not a different one from the original but derives its efficacy, not from the mere change of its date, but from the original signature of the clerk.[28] Unless it is authorized by immemorial practice[29] or by statute,[30] the renewal of an execution, after it has been returned, by an indorsement thereon is not proper. Although it is irregular to adopt this course, an execution reissued with a new date, as an alias execution, is not void, but voidable only.[31] The court may permit a sheriff to withdraw from the files a returned writ of execution for his use in making a sale of property.[32]

Under some statutes the reissuance of an execution with a renewal thereof indorsed thereon is authorized.[33] There must be a substantial compliance with the terms of these statutes;[34] and when it is so required the indorsement of the renewal must be dated[35] and signed.[36] Authority to renew an execution does not make it permissible to issue a different kind of execution.[37]

g. Reëstablishment of Lost or Destroyed Writ

If an execution has been lost or destroyed and the fact is properly shown, the plaintiff may reëstablish his writ in lieu of the original.

If an execution has been lost or destroyed and the fact is properly shown, plaintiff may reëstablish his writ in lieu of the original,[38] and the writ thus reëstablished is not an alias.[39] The new copy is made out nunc pro tunc.[40] Under some statutes or practice, however, where an execution is lost or destroyed, an order for an "alias" execution is the proper procedure.[41]

A duplicate execution issued after loss of the original while in the hands of the officer, although issued without an order of court, is voidable and not void.[42]

§ 86. Presumption as to Validity

It may be presumed that an execution has been regularly issued.

It may be presumed that a writ of execution has been regularly issued.[43]

25. Ala.—Sheppard v. Melloy, 12 Ala. 561.
23 C.J. p 400 note 23.

26. Tex.—Scott v. Allen, 1 Tex. 508.
23 C.J. p 400 note 24.

27. Ky.—Eubank v. Poston, 5 T.B. Mon. 285.

28. Conn.—Roberts v. Church, 17 Conn. 142.
23 C.J. p 401 note 35.
However, it has been held that a "renewed execution" is not the old execution with an indorsement thereon, but a new or alias writ.—McLaurin v. Kelly, 19 S.E. 143, 40 S.C. 486.

29. Conn.—Roberts v. Church, 17 Conn. 142.

30. Vt.—Sawyer v. Doane, 19 Vt. 598.
23 C.J. p 401 note 36.

31. Minn.—Millis v. Lombard, 20 N. W. 187, 32 Minn. 259.
23 C.J. p 401 note 38.

32. Cal.—Weldon v. Rogers, 108 P. 266, 157 Cal. 410.

33. N.Y.—Gutterman v. Auerbach, 274 N.Y.S. 605, 152 Misc. 640, affirmed 271 N.Y.S. 1067, 242 App. Div. 614, motion denied 195 N.E. 225, 266 N.Y. 612, affirmed 196 N. E. 559, 267 N.Y. 521.
23 C J. p 401 note 40.

34. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.
N.Y.—Barhydt v. Valk, 12 Wend. 145, 27 Am D. 124.
Time of renewal
(1) Execution may be renewed within the time prescribed by statute.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
(2) Provision permitting renewal of execution "before the expiration of the twenty days" refers to period of twenty days from receipt of execution.—Gutterman v. Auerbach, 274 N.Y.S. 605, 152 Misc. 640, affirmed 271 N.Y.S. 1067, 242 App.Div. 614, motion denied 195 N.E. 225, 266 N.Y. 612, affirmed 196 N.E. 559, 267 N.Y. 521.

35. Mo.—Decker v. Lidwell, 3 Mo. App. 586.

36. N.Y.—Barhydt v. Valk, 12 Wend. 145, 27 Am.D. 124.

37. Md.—Harden v. Moores, 7 Harr. & J. 4.

38. Del.—Morrison v. Taylor, 55 A. 335, 20 Del. 211.
23 C.J. p 401 note 47.
Affidavit of loss or destruction
Clerk could not be required to issue duplicate execution without filing of an affidavit by judgment creditor as required by statute that such execution had been lost or destroyed, although time for return of execution had long since expired.—Harrington v. Clark, 202 N.W. 84, 199 Iowa 340.

39. Ga.—Kellogg v. Buckler, 17 Ga. 187—Rushin v. Shields, 11 Ga. 636, 56 Am.D. 436.

40. N.Y.—White v. Lovejoy, 3 Johns. 448.
Pa.—Clark v. Field, 1 Miles 244.

41. Ga.—Ward v. Miller, 84 S.E. 480, 143 Ga. 164.
23 C.J. p 402 note 50.

42. N.Y.—Crouse v. Schoolcraft, 64 N.Y.S. 640, 51 App Div. 160.

43. Scire facias, if necessary to warrant issuance of execution, will be presumed.—Cary v. Clark, 3 Edw., N.Y., 274.
Proper form presumed
In view of fact that writ was issued by a lawyer and delivered to sheriff, who knew what writ should contain, after thirty years had elapsed, the court will assume that

§ 87. Effect of Invalidity

A void execution is a nullity.

A writ of execution which is void is a nullity.[44]

The effect of a void execution on particular rights and liabilities is discussed in connection with such rights and liabilities in appropriate sections in this title and in other titles of this work devoted thereto.

IV. LEVY OF WRIT, AND CUSTODY OF PROPERTY

§ 88. Definitions and Nature

The levy of an execution consists in the acts by which an officer sets apart or appropriates, for the purpose of satisfying the command of the writ, a part or the whole of a judgment debtor's property.

The levy of an execution has been defined to be the acts by which an officer sets apart or appropriates, for the purpose of satisfying the command of the writ, a part or the whole of a judgment debtor's property.[45] Its object is to take property into the custody of the law, and thereby render it liable to the lien of the execution, and put it out of the power of the judgment debtor to divert it to any other use or purpose.[46]

The service of an execution is distinguishable from the levy thereof in strictly legal parlance, and is the communication of its contents to the execution defendant, accompanied by, or followed with, a demand for its satisfaction, and in its natural order precedes the levy of the writ;[47] but it has been held the putting an execution into the hands of an officer for "service" means "to be executed" by levy and sale.[48]

The difference between levying and garnishing is that in a levy the officer takes actual or constructive possession of the property, whereas in garnishment the property is left in the garnishee's possession.[49]

§ 89. Matters Precluding Levy

An execution cannot be levied on the debtor's property after the judgment has been satisfied or after an execution against the person has been perfected.

After the judgment has been paid or otherwise satisfied, an execution, although it was issued before the payment of the judgment, cannot be levied, since the writ is functus officio;[50] and after a debtor has been taken and been discharged by the consent of the creditor,[51] or been committed to prison under a capias ad satisfaciendum,[52] no levy can be made on the debtor's personal or real estate.

§ 90. Control of Writ and Directions to Officer

a. In general
b. Directions to officer

a. In General

Subject to the power of the court, as a general rule an execution is within the exclusive control of the judgment creditor.

An execution is the judgment creditor's process,

the writ was in due form.—Leland v. Cameron, 31 N.Y. 115.

Presumption of proper direction held to exist.—Cook v. Chicago, 57 Ill. 268.

Presumption of regularity of official acts see Evidence § 146.

44. Tenn.—Saunders v. Moore, 110 S.W.2d 1046, 21 Tenn.App. 375.

45. Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 844, 190 Wash. 35, quoting **Corpus Juris.**

23 C.J. p 424 note 15.

Definition of "extent" see infra § 403.

Similar definitions

(1) "A levy is made when property is seized by virtue of the authority of a writ of execution."—Farris v. Castor, 99 P.2d 900, 902, 186 Okl. 668.

(2) "Ordinarily, a levy upon personal property means seizure thereof by the officer."—Voelkel-McLain Co. v. First Nat. Bank, Tex.Civ.App., 296 S.W. 970, 972.

(3) Other similar definitions.

Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.

N.Y.—In re Kogan, 252 N.Y.S. 116, 120, 141 Misc. 412—Bond v. Willett, 31 N.Y. 102, 102 d, 1 Abbott D. 165, 1 Keyes 377, 29 How.Pr. 47.

23 C.J. p 424 note 15 [a]—36 C.J. p 1032 notes 42–52.

46. Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.

Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.

Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 844, 190 Wash. 35, quoting **Corpus Juris.**

23 C.J. p 424 note 16.

47. Ind.—Terrell v. State, 66 Ind. 570—Lahr v. Ulmer, 60 N.E. 1009, 27 Ind.App. 107.

Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.

48. U.S.—Fallows v. Continental & Commercial Trust & Savings Bank, Ill., 35 S.Ct. 29, 235 U.S. 300, 59 L.Ed. 238, affirming 201 F. 82, 119 C.C.A. 420.

49. Iowa.—Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.

50. Ga.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86.

23 C.J. p 424 note 21.

Asserted payment, prior to judgment, of the debts for which the action was brought is no defense to a levy of execution on the judgment recovered.—O'Connor v. Solomon, 131 A. 736, 103 Conn. 744.

51. Mass.—Nowell v. Waitt, 121 Mass. 554.

52. Vt.—Dewey v. Bradbury, 2 Tyler 201.

Executions against the person see infra §§ 407–450.

and as a general rule, subject to qualifications which will appear, it is within his exclusive control.[53] After the judgment has been assigned, however, the assignee has the right to control the execution;[54] but it has been held that the assignee must inform the officer of his interest in the judgment, even though the assignment appears of record.[55] An assignor of a judgment has no control of an execution taken out by his assignee,[56] and a person not a party to the record can exercise no control over the execution.[57] So plaintiff's control over the writ cannot be interfered with by officers who are interested in the collection of their fees,[58] the rule being that an officer has no right to exercise control over an execution simply because his fees are included therein;[59] but the officers interested in a fee bill, delivered as an execution against defendant, and not the judgment creditor, have a right to control it.[60]

Withdrawal of writ. The rule has been laid down in some jurisdictions that, where the judgment creditor has placed an execution in the hands of the sheriff, he may withdraw it before it is so acted on that its withdrawal would be injurious to third parties,[61] and the direction to the sheriff not to act on the writ is equivalent to its withdrawal;[62] but the writ cannot be withdrawn after it has been executed.[63]

Control by court. It is within the power of the court to control an execution so as to prevent an injustice.[64]

b. Directions to Officer

An officer receiving a writ of execution under instructions from the court or the creditor as to the manner of executing it is bound to follow such instructions if they are proper.

The judgment creditor is not bound to instruct the officer as to his legal rights under the execution and levy,[65] but he has a right to give directions to the officer as to the time and manner of executing the writ when he delivers the process to him, and the officer receiving it under such instructions is bound to follow them if they are reasonable and not in conflict with the law,[66] but the officer need not obey instructions which are improper.[67]

Directions given by the court to the officer as to the levying of the execution should be followed.[68]

§ 91. Necessity for Levy

Generally, in the absence of waiver, a levy is an indispensable step toward the consummation of an execution sale, although in some jurisdictions a formal levy on realty subject to the lien of the judgment is unnecessary.

According to the great weight of authority, to enable the sheriff to sell the property and vest in the purchaser at the sale a valid title, a levy on the property so sold is indispensable,[69] and this is gen-

53. Ill.—People v. Cermack, 215 Ill. App. 148.
Kan.—Riffel v. Konecny, 88 P.2d 1077, 1081, 149 Kan. 533, citing **Corpus Juris.**
La.—Blomenstiel v. Tridico, App., 149 So. 912, rehearing refused 152 So. 79.
N.D.—Smith v. Hanson, 293 N.W. 551, 556, 70 N.D. 247, 129 A.L.R. 1356, citing **Corpus Juris.**
23 C.J. p 424 note 24.
Control by attorney see Attorney and Client § 97.

Creditor may stop proceedings at any stage when he sees fit.—James J. Reiss Co. v. Spinnato, 97 So. 264, 154 La. 9.

Removal of writ from files
A writ of execution may not be removed from the files of the court by the creditor unless he complies with the statutory provisions permitting such removal.—Porter Fertilizer Co. v. Cox, 150 S.E. 582, 169 Ga. 391.

54. Ill.—People v. Cermack, 215 Ill. App. 148.
23 C.J. p 425 note 25.

55. Ill.—Bressler v. Beach, 21 Ill. App. 423.

56. Ind.—State v. Herod, 6 Blackf. 444.

57. Pa.—Commonwealth to Use of Brown v. Osler, 34 Pa.Super. 138.
23 C.J. p 425 note 29.

58. Ark.—Fowler v. Pearce, 7 Ark. 28, 44 Am.D. 526.
23 C.J. p 425 note 30.

59. Ill.—Newkirk v. Chapron, 17 Ill. 344.

60. Ill.—Reddick v. Cloud, 7 Ill. 670.

61. N.C.—Isler v. Colgrove, 75 N. C. 334.
23 C.J. p 425 note 36.

62. N.C.—Isler v. Colgrove, supra.
23 C.J. p 425 note 36.

63. U.S.—Smith v. Columbia Bank, D.C., 22 F.Cas.No.13,011, 4 Cranch C.C. 143.
23 C.J. p 425 note 37.

64. La.—Frank v. Currie, App., 172 So. 843.
Pa.—International Finance Co. v. Magilansky, 161 A. 613, 105 Pa. Super. 309—Bruce v. Loeb & Loeb, 78 Pa.Super. 22.
Wash.—State v. Superior Court in and for Lincoln County, 264 P. 988, 146 Wash. 679.

Inherent equitable power
Courts of law possess inherent equitable powers so to control their executory processes as to prevent injustice.—Karel v. Davis, 194 A. 545, 122 N.J.Eq. 526.

65. N.Y.—Ansonia Brass & Copper Co. v. Babbitt, 74 N.Y. 395, reversing 8 Hun 157.

66. Ill.—People v. Cermack, 215 Ill. App. 148.
N.D.—Smith v. Hanson, 293 N.W. 551, 556, 70 N.D. 247, 129 A.L.R. 1356, citing **Corpus Juris.**
Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156.
23 C.J. p 425 note 34.
Liability of sheriff as affected by directions given see the C.J.S. title Sheriffs and Constables § 54, also 57 C.J. p 795 note 28—p 797 note 61.

67. Ill.—Swan v. Gilbert, 67 Ill.App. 236, affirmed 51 N.E. 604, 175 Ill. 204, 67 Am.S.R. 208.
23 C.J. p 425 note 35.

68. Directions held not void as commanding officer to do an impossible thing.—Ghent v. State, to Use of School Districts, 75 S.W.2d 67, 189 Ark. 747.

69. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82

erally true whether the property is personal[70] or real.[71] In some jurisdictions, however, a formal levy of an execution on real estate under a judgment which constitutes a lien on the land, is unnecessary, and the failure of the sheriff to levy an execution on the land before selling it will not vitiate the title of a purchaser.[72]

The mere issuance of an execution does not give the officer to whom it is directed the right of possession of any property until he has levied the writ thereon.[73]

A tender of payment will obviate the necessity for a levy.[74]

Presumption. The presumption is that an officer who sells property on execution has previously made a valid levy thereof.[75]

Waiver. A judgment debtor may waive a levy on his property, and where there is such a waiver, the sale passes title as effectually as if a valid levy had been actually made.[76]

§ 92. Who May Make Levy

A levy of execution must be made by an officer duly qualified to act under the writ.

A levy of execution must be made by an officer duly qualified to act under the writ,[77] and cannot be made by a private person.[78] Generally the levy must be made by the officer to whom the execution is directed, and by no other,[79] and this rule applies to an alias execution;[80] but the clerical work of writing out the levy or making an inventory may be performed by any person the sheriff sees proper to employ.[81] Where the statute prescribes the particular officer or class of officers who must execute the writ, the levy must be by the officer or one of the class of officers thus designated by statute to whom the writ is directed.[82] However, a duly appointed officer who has not given the bond required by law is a de facto officer and may make a levy,[83] and, of course, if no bond is required by statute the officer may levy, although he has given no bond.[84] A levy by an officer who has no authority is void.[85]

Effect of interest. At common law and under statutes declaratory of the common law, an officer cannot personally, or by his deputy, levy an execution in which he is personally interested,[86] as where he is a party to the action[87] or is entitled to the proceeds of the sale under the execution;[88] but this

L.Ed. 554—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.
Ariz.—Haigler v. Burson, 298 P. 404, 405, 38 Ariz. 192, citing **Corpus Juris.**
La.—Turner v. Glass, 188 So. 147, 192 La. 478.
Wash.—Swanson v. Olympia Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.
23 C.J. p 425 note 39, p 426 note 42.
Necessity for levy to create lien see infra § 124.

Substitution of property

The officer, after having levied on property and advertised it for sale, has no authority to substitute and offer for sale other property than that taken, even with the debtor's consent.—State v. Fuller, 14 Ohio 545—23 C.J. p 426 note 43 [a].

70. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
23 C.J. p 426 note 40.

71. Ky.—Leath v. Deweese, 172 S. W. 516, 162 Ky. 227.
23 C.J. p 426 note 41.

72. N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
Wis.—Hammel v. Queens Ins. Co., 11 N.W. 349, 350, 54 Wis. 72, 41 Am. R. 1.
23 C.J. p 426 notes 44, 45, p 446 note 91.

73. Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.
Mo.—Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.
N.Y.—Hathaway v. Howell, 54 N.Y. 97.

74. N.Y.—Jackson v. Law, 5 Cow. 248.
Matters precluding a levy see supra § 89.

75. Miss.—Hamblen v. Hamblen, 33 Miss. 455, 69 Am.D. 358.
23 C.J. p 426 note 48.

76. Ky.—Greer v. Wintersmith, 4 S. W. 232, 85 Ky. 516, 9 Ky.L. 96, 7 Am.S.R. 613.
23 C.J. p 426 note 49.

77. Ala.—Pickett v. Richardson, 138 So. 274, 223 Ala. 683.
Ga.—Carter v. Veal, 155 S.E. 64, 42 Ga.App. 68, transferred, see 150 S.E. 205, 169 Ga. 282.
23 C.J. p 427 note 51.

De facto officer

Where a levy is made by one who assumes to act as an officer having authority to make such levy, the levy is good, although the appointment or qualification of the person purporting to act be irregular, his acts being those of a de facto officer.—Burke v. State, 108 S.E. 119, 27 Ga.App. 314.

78. Neb.—McMillan v. Rowe, 19 N. W. 504, 15 Neb. 520.
23 C.J. p 427 notes 52, 53.

79. Tex.—Steel v. Metcalf, 23 S.W. 474, 4 Tex.Civ.App. 313.
23 C.J. p 427 note 54.

Effect of levy by another

(1) The levy of a writ by an officer to whom it was not directed has been held void.
Ariz.—Satterwhite v. Melczer, 24 P. 184, 3 Ariz. 162.
Me.—Pillsbury v. Smyth, 25 Me. 427.
23 C.J. p 427 note 54.

(2) Other decisions, however, regard it as only voidable.
Idaho.—Pecotte v. Oliver, 10 P. 302, 2 Idaho, Hasb., 251.
Okl.—Christy v. Springs, 69 P. 864, 11 Okl. 710.
23 C.J. p 404 note 89, p 427 note 54.

80. Tenn.—Alley v. Carroll, 3 Sneed 110.

81. Ga.—Cox v. Montford, 66 Ga. 62.
23 C.J. p 427 note 56.

82. Ariz.—Satterwhite v. Melczer, 24 P. 184, 9 Ariz. 162.
23 C.J. p 427 note 57.

83. Ga.—Gunn v. Tackett, 67 Ga. 725.
Mass.—Nason v. Dillingham, 15 Mass. 170.

84. Ga.—Smith v. Davis, 60 S.E. 199, 3 Ga.App. 419.

85. Ga.—Peeples v. Garrison, 81 S. E. 116, 141 Ga. 411, 51 L.R.A.,N. S., 635.
23 C.J. p 427 note 60.

86. Ky.—Stewart v. Commonwealth, 272 S.W. 906, 209 Ky. 372.
23 C.J. p 427 note 61.

87. R.I.—In re Stephanian, 56 A. 1034, 25 R.I. 541.
23 C.J. p 427 note 62.

88. Ill.—Woods v. Gilson, 17 Ill. 218.

rule does not apply where his interest is only such as arises out of his right to a fee or commission.[89]

Territorial limitations. The general rule is that an officer has no authority to levy on and sell property situated beyond the bounds of his county or district,[90] except where it is otherwise provided by statute;[91] but where a tract of land is divided by a county line the officer is sometimes authorized by statute to act in part outside his county,[92] although, independent of statute, the sale is held valid only as to the part within his county.[93]

After expiration of term of office. As appears in the C.J.S. title Sheriffs and Constables § 50, also 57 C.J. p 790 note 11 et seq, under the common law and statutes declaratory thereof all officers and their deputies may execute all precepts remaining in their hands at the time of the expiration of their terms of office, and hence an officer having an execution in his hands and commencing its service before the termination of his office may proceed afterward to complete such service;[94] but it must appear that while in office he acted on the writ to an extent amounting in law and fact to an incipient step in the execution, and duly followed up such step after leaving the office.[95]

§ 93. Time of Levy

A levy, to be valid, must be timely made on or before the return day.

A levy of execution must not be prematurely made.[96] Accordingly it must not be made until the officer has received the writ and had directions, express or implied, to make the levy.[97] It must precede the sale,[98] and must be made within the time fixed by statute.[99] The officer may levy the execution as soon as he receives it,[1] but generally, so far as concerns the power derived by the officer from the writ, he has the entire time within which the writ is returnable to make the levy.[2] The creditor, however, has a right to insist that the officer shall proceed within a reasonable time to seize the property of the debtor, even in the absence of specific instructions to the officer, if the latter knows or by reasonable effort can ascertain that the debtor has property liable to seizure,[3] and special instructions from the creditor, accompanied by information of facts constituting a necessity for an immediate levy, must be

89. Miss.—Badley v. Ladd, 12 So. 832, 70 Miss. 688.
23 C.J. p 428 note 64.

90. U.S.—Short v. Hepburn, Tex., 75 F. 113, 21 C.C.A. 252.
23 C.J. p 428 notes 65, 67.
Territorial extent of authority of sheriffs and constables generally see the C.J.S. title Sheriffs and Constables § 36, also 57 C.J. p 775 note 8–p 776 note 22.

Property of corporation
Some statutes contemplate a levy by the sheriff on property within his county, and extend the effect of such levy to other counties in which the corporation has property; but such statutes do not give the sheriff power to levy on the property of the corporation in other counties, when it has no property within his own.—Hassall v. Union Canal Co., 2 Pa Co. 147.

Sending writ to another county
Execution, directed to "the sheriffs of our several counties," may be sent by sheriff, to whom first delivered, to sheriff of another county, if circumstances require, as where it runs against judgment debtor's realty in two counties.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.

91. Ga.—Booker v. Bass, 56 S.E. 283, 127 Ga. 133.
23 C.J. p 428 note 66.

92. Ga.—Farnbrough v. Ammis, 58 Ga. 519.
Pa.—Worthington v. Worthington, 3 Pa.L.J.R. 208, 5 Pa.L.J. 74.

93. Tex.—Alred v. Montague, 26 Tex. 732, 84 Am.D. 603.
23 C.J. p 428 note 69.

94. Mich.—Stott v. Weadock, 284 N.W. 605, 287 Mich. 678.
23 C.J. p 428 note 73.
Direction to officer whose term of office has expired see supra § 72.

95. N.Y.—Mason v. Sudam, 2 Johns. Ch. 172.
23 C.J. p 428 notes 74, 75.

96. Before judgment becomes effective
A levy made before the judgment on which the writ of execution is issued becomes effective is premature.—Haas v. Buck, 162 So. 181, 182 La. 566.

Before time allowed to declare insolvency
The levy cannot be made before the time fixed by statute to enable the debtor to apply for a discharge as an insolvent debtor.—Taylor v. Crowe, 122 Ill.App. 518—23 C.J. p 429 note 84.

On entry of judgment
Execution on judgment is enforceable as soon as judgment is entered, unless appeal is immediately taken and stay bond given.—Patterson v. Pacific Indemnity Co., 6 P.2d 102, 119 Cal.App. 203.

97. Mass.—Hall v. Crocker, 3 Metc. 245.

98. Pa.—Conniff v. Doyle, 6 Phila. 630.
Delay in executing writ as affecting loss or suspension of lien see infra § 135
Levy as necessary to sale see supra § 91.

99. Cal.—Jones v. Toland, 4 P.2d 178, 117 Cal.App. 481.
La.—Riley v. Washington, App., 161 So. 896
Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 1077, citing **Corpus Juris.**
23 C.J. p 429 note 79.

Statute held inapplicable
Code declaring attachment or garnishment shall have no effect after three years after issuance relates solely to proceedings prior to judgment, and is not applicable to proceedings on execution.—Jones v. Toland, 4 P.2d 178, 117 Cal.App. 481.

1. Ky.—Goode v. Miller, 78 Ky. 235

2. Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074.
23 C.J. p 429 note 81.

Until writ withdrawn
A sheriff has authority to execute and return execution directed to him and make any entry authorized by law thereon until it is lawfully withdrawn from his possession or direction given by authorized person to suspend progress of execution.—Hill v. Joseph, 72 P.2d 283, 58 Idaho 267.

3. Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
23 C.J. p 429 note 82.

complied with when practicable.[4]

On or after return day. The general rule is well settled that an officer has no authority to make a levy of a fieri facias after the return day thereof,[5] even though plaintiff gives an indemnity bond;[6] but the levy may be made on the return day,[7] or at least, as has been said, at any time on the return day, so long as the court to which it is returnable continues in session that day.[8] A levy made after the return day is not irregular merely but is absolutely null and void.[9]

Additional levies. The fact that a levy has been made before the return day does not authorize the sheriff to make after the return day any additional levies that may be necessary.[10]

After the return of the writ. The officer is not authorized to make a levy after he has returned the writ, since the writ, on being returned, although before the return day, becomes functus officio.[11]

Presumptions. Where an officer has sold property under a writ of execution, the law presumes, his return being silent upon the subject, that he did his duty by levying the execution while it was still in full force.[12]

§ 94. Mode and Sufficiency of Levy

When the method of making a levy is prescribed by statute such method must be followed; unequivocal acts by the officer sufficient to constitute a levy are essential.

When the method of making a levy is prescribed by statute, in whole or in part, it is the duty of the officer to proceed strictly according to the statute,[13] and if he does not do so the levy, see § 109 infra, or sale, see § 231 infra, may be set aside. He must perform unequivocal acts sufficient to constitute a levy[14] and must act with the intention of making a levy.[15]

The issuance of an execution without any direction as to how it is to be enforced or as to what property is to be taken implies only an authority to do a lawful act in pursuance to its command;[16] but where the writ gives directions the officer should follow them,[17] and in doing so should do as little mischief to the debtor as possible.[18]

Against joint debtors. Where judgment is taken and execution issued jointly against two defendants, it is immaterial so far as they are concerned whether the sheriff first levies on joint property or not;[19] but under a statute authorizing a capias ad satisfaciendum he cannot take the property of one joint debtor and the body of the other.[20] This matter may be regulated by an agreement of all the parties.[21]

Levy under several writs. The sheriff may levy

4. Minn.—Guiterman v. Sharvey, 48 N.W. 780, 46 Minn. 183, 24 Am. S.R. 218.

5. Ky.—Deskins v. Coleman, 151 S.W.2d 751, 286 Ky. 624.
N.J.—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.
Tex.—Ludtke v. Bankers Trust Co., Civ.App., 251 S.W. 600.
23 C.J. p 429 note 85.

Dormant writ
Fieri facias, issued in 1859, and levied on in 1875, was held dormant, although dormancy statute was tolled from 1860 to 1868, and sheriff's deed thereunder was void.—Pearson v. Fox, 145 S.E. 875, 167 Ga. 448.

New writ required
Where a writ of fieri facias has expired before seizure is made thereunder, no action can be had except on issuance of new writ.—Riley v. Washington, La.App., 161 So. 896.

6. N.Y.—Crouse v. Bailey, 11 N.Y.S. 910, 10 N.Y.S. 273.

7. U.S.—U. S. v. Hogg, Ky., 112 F. 909, 50 C.C.A. 608, affirming, D. C., 111 F. 293.
23 C.J. p 429 note 87.

8. Mich.—Hendricks v. McCausey, 299 N.W. 847, 299 Mich. 157.
23 C.J. p 429 note 88.

9. Tex.—Ludtke v. Bankers Trust Co., Civ.App., 251 S.W. 600.
23 C.J. p 429 note 89.

10. Colo.—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 75 Colo. 440.
Mo.—McDonald v. Gronefeld, 45 Mo. 28.

11. N.J.—Cook v. Wood, 16 N.J.Law 254.
23 C.J. p 430 note 91.

12. Tex.—Ludtke v. Bankers Trust Co., Civ.App., 251 S.W. 600.
23 C.J. p 430 note 92.

13. Pa.—Hollenbach v. Kuhns, 18 Lehigh Co.L.J. 418.
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.
23 C.J. p 430 note 98.
Acceptance of property in satisfaction of execution see § 334.

Exhibiting writ
Failure to exhibit the writ to the debtor, at his request, where not required by statute, does not invalidate the levy.—Mayhew v. Smith, 95 P. 549, 42 Colo. 534.

14. Cal.—Taffts v. Manlove, 14 Cal. 47, 73 Am.D. 610.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.

15. Cal.—Taffts v. Manlove, 14 Cal. 47, 73 Am.D. 610.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.

16. N.Y.—Bowe v. Wilkins, 11 N.E. 839, 105 N.Y. 322, 26 Wkly.Dig. 306.

17. La.—Thompson v. Chauveau, 7 Mart.N.S. 331, 18 Am.D. 246.
Me.—Mysroll v. Violette, 55 Me. 108.

Under an execution against goods and chattels, seizure of real estate is unauthorized.—Thompson v. Chauveau, 7 Mart.N.S.,La., 331, 18 Am.D. 246—23 C.J. p 413 note 30.

The word "lands" within the meaning of a direction in an execution embraces any interest authorized by law to be taken.—Holmes v. Jordan, 39 N.E. 1005, 163 Mass. 147.

18. Mich.—Handy v. Clippert, 15 N.W. 507, 50 Mich. 355.

19. Or.—Anderson v. Stayton State Bank, 159 P. 1033, 82 Or. 357.
23 C.J. p 430 note 3.

20. Mo.—Usher v. Thomas, 10 Mo. 761.

21. Neb.—Gibson v. McClay, 66 N.W. 861, 47 Neb. 900.
23 C.J. p 430 note 5.

on property to satisfy several executions,[22] particularly where plaintiffs and defendants are the same in each.[23]

Question of fact. Whether there has been a legal levy is generally a question of fact.[24]

§ 95. —— Notice or Demand and Selection of Property

a. Notice or demand before levy
b. Selection of property

a. Notice or Demand before Levy

Where the statute so requires, an officer, before making a levy, should notify the judgment debtor of the issuance of the writ of execution, or make demand on him for payment of the judgment.

Although an officer, in the absence of statute to the contrary, need not notify the judgment debtor of the issuance of the writ, or make any formal demand on him for payment, before making the levy,[25] it has been said that a good officer, when it is practicable, will always inform the debtor of an execution which he may have against him, if he believes that the debtor is not aware of it, and confer with the debtor before making a levy;[26] and in many jurisdictions by force of statute the officer is required, whenever it is practicable to do so, to give notice to the debtor of the issuance of the writ or make formal demand on him for payment of the judgment before proceeding with the levy.[27] The object of such notice is to give the debtor an opportunity to pay the execution without incurring further costs or to designate the property to be levied on.[28]

Sufficiency. Under statutes requiring a formal demand on the judgment debtor for payment before the levy of the execution, it has been held that this demand must be made on the debtor personally, or at his usual place of abode.[29]

Effect of omission. The omission of such demand and notice before levy, where required, is a mere irregularity and will not render the levy invalid or void, and no relief will be granted to the judgment debtor where he does not appear to have been in any way prejudiced by the omission of the officer.[30]

b. Selection of Property

(1) By debtor
(2) By creditor
(3) By court
(4) Where there are several defendants
(5) Encumbered and aliened property

(1) By Debtor

Where the statute so provides, a judgment debtor may select and point out property on which he desires the levy to be made.

At the common law the debtor has no election as to which of his distrainable property shall be first taken;[31] but in most of the states, by force of statute, the judgment debtor is now entitled to the right to select and point out to the officer property upon which he desires the levy to be made,[32] or

22. Separate levies not required
Where a sheriff has several executions in his hands for levy and there is nothing in the record to show that any one execution has priority over the others, there is no statutory requirement that there shall be a separate levy under each execution.—Kenley v. Robb, Tex. Com.App., 245 S.W. 68, reversing, Civ.App., 193 S.W. 875.

23. Tex.—Kenley v. Robb, Civ.App., 193 S.W. 375.

24. Man.—Corona Lumber Co. v. Brereton, 27 Man. 370.

25. N.Y.—Bust v. Fortner, 197 N.Y. S. 649, 204 App.Div. 209.
23 C.J. p 431 note 10.
Notice of levy see infra § 104.

26. Mo.—Duncan v. Matney, 29 Mo. 368, 77 Am.D. 575.

27. Ill.—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73—Hobson v. Mc Cambridge, 22 N.E. 823, 130 Ill. 367.
23 C.J. p 430 note 9.

Where the debtor is absent from the jurisdiction, no notice or demand is necessary.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341—23 C.J. p 431 note 11.

28. Ind.—Guerin v. Kraner, 97 Ind. 533.
23 C.J. p 431 note 12.

29. Conn.—Dutton v. Tracey, 4 Conn. 365.
23 C.J. p 431 note 13.

30. N.M.—Pecos Valley Lumber Co. v. Freidenbloom, 168 P. 497, 23 N. M. 383.
23 C.J. p 431 note 14.

31. Ky.—Bodley v. Downing, 4 Litt. 28.

32. Ga.—City of Leesburg v. Forrester, 1 S.E.2d 584, 59 Ga.App. 503
Tex.—Kingsland v. Harrell, 1 Tex. App.Civ.Cas. § 739.
23 C.J. p 432 note 30.
Liability of officer for denial of debtor's right to designate property see the C.J.S. title Sheriffs and Constables § 69, also 57 C.J. p 833 notes 44, 45.

Possession of chattels
(1) Under Sayles Civ.St. art. 2287, the party exercising the privilege of pointing out property must, if required, put the officer in possession of chattels designated by him by such act of giving possession as the nature of the case will reasonably admit of.—Ross v. Lister, 14 Tex. 469.

(2) The possession given the officer must be such as to place the property under his control, and to enable him to make delivery to the purchaser.—Texas-Mexican R. Co. v. Wright, 31 S.W. 613, 88 Tex. 346, 31 L.R.A. 200.

(3) A request by a judgment debtor to the officer to levy on horses in a lot in town, in the absence of more specific designation, does not make it the officer's duty to levy thereon before levying on real estate under the statute requiring that levy shall first be made on property designated by defendant, provided, if it be personal property, defendant deliver it into the officer's possession.—Anderson v. Oldham, 18 S.W. 557, 82 Tex. 228.

Execution creditor as mortgagee
Under Code § 648, providing that the debtor shall not have the right of pointing out to the sheriff the property he wishes seized on execu-

to select the property which he desires to claim as exempt under the statute.[33] The judgment creditor may disregard the debtor's selection, if there is a good reason for doing so, as where the property selected is already encumbered.[34] The officer is not bound to seek the debtor and demand from him such designation,[35] and a failure to give the debtor an opportunity to point out property is a mere irregularity[36] which is harmless where it does not appear that he had any other property than that levied on.[37]

Sufficiency of designation. The debtor should give the officer sufficient information to enable him to make the levy, and should furnish a description of the property on which he desires to have the levy made;[38] and when the debtor points out real estate every reasonable evidence of title should be exhibited, and the sheriff will not be compelled to take loose memoranda which the debtor may offer.[39] The debtor has no right to designate any other property than his own.[40]

Change of election. The debtor, after once exercising his option of selecting property, is estopped from insisting that other property should be taken.[41]

Waiver or neglect or refusal to exercise right. The judgment debtor, under a statute giving him the right of designating the property to be levied on, cannot defeat a levy by neglect or refusal to exercise his statutory right.[42] This right of the judgment debtor is personal to himself and may be waived.[43]

Failure to make the levy as designated does not necessarily render the levy[44] or subsequent sale thereunder[45] invalid, although in a proper case it may be sufficient ground for setting the levy aside.[46]

(2) By Creditor

In some instances the creditor may select or point out the property he desires to be levied on.

Under some statutes the judgment creditor has, to a limited extent, a right to select the property he desires to be levied on;[47] but ordinarily he need not go with the officer to defendant or point out the property to be levied on,[48] although under some circumstances the officer may[49] and should[50] re-

tion if the execution creditor has a mortgage on part of the debtor's property, where the creditor had a mortgage on the property seized, no objection could be based on the refusal to allow the debtor to point out the property he wished seized.—Lambeth v. Sentell, 38 La.Ann. 691.

Claimant's selection superior

A statute providing that sheriff should first levy on and sell that part of property which defendant in fieri facias desires sold is not applicable where a claimant points out certain property of the defendant which the claimant desires to be levied on and sold.—City of Leesburg v. Forrester, 1 S.E.2d 584, 59 Ga.App. 503.

33. Ill.—People v. Palmer, 46 Ill. 398, 95 Am.D. 418—Bingham v. Maxcy, 15 Ill. 290.

34. La.—Todd v. Gordy, 29 La.Ann. 498.
23 C.J. p 433 note 33.
Levy on encumbered property generally see infra § 95 b (5).

35. Cal.—Frink v. Roe, 11 P. 820, 70 Cal. 296.
Ind.—Nelson v. Bronnenburg, 81 Ind. 193—Drake v. Murphy, 42 Ind. 82.

36. **A sheriff's sale of land is not void** because no opportunity was given judgment debtor to point out other property to be levied on.—Borders v. Highsmith, Tex.Civ.App., 252 S.W. 270.

37. Tex.—Yett v. Iron City Nat. Bank, Civ.App., 45 S.W. 1033.

38. Ill.—Bingham v. Maxcy, 15 Ill. 290.

Designation held sufficient

(1) In general.—Vallandingham v. Worthington, 2 S.W. 772, 85 Ky. 83, 8 Ky.L. 707.

(2) Under a statute providing that an officer levying an execution shall first levy on property pointed out by the owner, provided, if real estate, a description thereof by metes and bounds be delivered to him, a verbal description, designating the property as lots 15 and 22 in block No. 11 of Tilson & Pitcher's addition to the city of Texarkana, Tex., is sufficient.—Beck v. Avindino, 68 S.W. 827, 29 Tex.Civ.App. 500.

39. Ill.—Beaird v. Foreman, 1 Ill. 385, 12 Am.D. 197.

Execution debtor cannot complain of his own failure to produce title papers.—Vallandingham v. Worthington, 2 S.W. 772, 85 Ky. 83, 8 Ky. L. 707.

40. Tex.—Forbes v. Hill, Dall. p 486.

Land held under bond for title

The sheriff need not make a levy on land pointed out by the debtor to which he has no title, but which he holds under bonds for title.—Thompson v. Mitchell, 73 Ga. 127.

41. Ill.—Larson v. Laird, 36 Ill. App. 462.

42. Cal.—Frink v. Roe, 11 P. 820, 70 Cal. 296.
Ill.—People v. Palmer, 46 Ill. 398, 95 Am.D. 418—Cook v. Scott, 6 Ill. 333.
La.—Wheeling Pottery Co. v. Levi, 19 So. 752, 48 La.Ann. 777.

Levy is valid if debtor fails or refuses to point out other property sufficient to satisfy the execution.—Barbee v. Heflin, 1 Tex.App.Civ.Cas. § 744.

43. Ark.—Trapnall v. Richardson, 13 Ark. 543, 58 Am.D. 338.
Cal.—Frink v. Roe, 11 P. 820, 70 Cal. 296.

The right of designation is lost by refusing or neglecting to exercise it.—Hefner v. Hesse, 29 La.Ann. 149—Deville v. Hayes, 23 La.Ann. 550—Noble v. Nettles, 3 Rob., La., 152.

44. Ga.—Hollinshed v. Woodward, 52 S.E. 815, 124 Ga. 721.

45. Ind.—Tillotson v. Doe, 5 Blackf. 590.
Iowa.—Cavender v. Smith, 1 Iowa 306.
Tex.—Pearson v. Flanagan, 52 Tex. 266.

46. Tex.—Pearson v. Flanagan, 52 Tex. 266.

47. Colo.—Pappas v. Capps, 263 P. 411, 83 Colo. 222, 57 A.L.R. 834—Curry v. Equitable Surety Co., 148 P. 914, 27 Colo.App. 175.
Ill.—Thorpe v. Wheeler, 23 Ill. 495—Bingham v. Maxcy, 15 Ill. 290—Evans v. Landon, 6 Ill. 307—Colburn v. Barton, 17 Ill.App. 391.

48. Mich.—Albany City Bank v. Dorr, Walk. p 317.

Personal property
Mass.—Start v. Sherwin, 1 Pick. 521.

49. **Officer need not levy on real estate** unless it is pointed out to him by the judgment creditor.—Armstrong v. Grant, 7 Kan. 285.

50. **Insolvency of defendant**
Under Code Pract. arts 726, 727,

quire the creditor to point out property for levy. Thus, where there is any reasonable ground to induce the officer to believe that in levying an execution he may make a mistake and expose himself to an action for damages, he may require the creditor to point out the property for levy;[51] but, although the pointing out of property by the creditor on the failure of the debtor to do so is a protection to the sheriff, it is not essential to the validity of the levy.[52] On the other hand, an officer to whom a writ is delivered for execution is not compelled, in the absence of statute, to levy on the particular property pointed out by the judgment creditor, provided he levies on other property sufficient to satisfy the process;[53] nor is he bound to follow the instructions of the judgment creditor in the execution of the writ if they are oppressive or will produce a great sacrifice of the property of the judgment debtor.[54]

(3) By Court

Ordinarily the court gives no directions concerning the property to be levied on.

Ordinarily the court gives no directions concerning the property to be levied on.[55]

(4) Where There Are Several Defendants

An execution against several defendants may be levied on the property of any one or more of them.

Where an officer has an execution against a plurality of defendants, he is not bound to levy it so far as practicable equally on the property of each, or to attempt to enforce contribution among defendants, but he may, either by direction of the judgment creditor or of his own volition, levy the execution on the property of any one or more of defendants, leaving them to settle among themselves the proportion which each ought to contribute;[56] he is not bound to regard instructions from one defendant to levy on the property of another,[57] or to regard any equities subsisting between defendants, or between them and other creditors.[58] Accordingly an execution on a judgment recovered jointly against a husband and wife, without any specific directions as to the estate out of which it is to be satisfied, may, as a general rule, be levied on the property of either the husband or the wife.[59]

(5) Encumbered and Aliened Property

Encumbered or aliened property subject to the lien of the judgment may be levied on without first resorting to other property belonging to the debtor, although in a proper case equity will grant relief to the encumbrancer or purchaser.

Where the debtor has aliened or encumbered his land subject to the lien of a judgment, and an execution is thereafter issued on such judgment, the creditor who issues the execution may levy on the encumbered or aliened property without first resorting to other property belonging to the debtor,[60] and is not required so to levy his execution as to make the alienees or encumbrancers contribute,[61] or to levy on it in the inverse order in which it was aliened or encumbered.[62] It has been said, however, that where the debtor has sold property, and has other property out of which satisfaction may be made, there can be no reason but mere wantonness for levying upon the property which has been sold.[63]

A court of law out of which an execution has been issued has ordinarily no jurisdiction, on the petition of an alienee or encumbrancer, to make an order controlling plaintiff's levy.[64] Equity, however, will grant relief to encumbrancers and alienees by injunction, or, after a sale has been made, if a surplus remains after satisfying the execution, by directing the distribution of the surplus in an eq-

the fact that defendant in execution is insolvent does not excuse the sheriff from calling on plaintiff to point out property of defendant subject to execution.—Taylor v. Hancock, 19 La.Ann. 466.

51. Mass.—Bond v. Ward, 7 Mass. 123, 126, 5 Am.D. 28.

Goods sold to another

Where the officer, on sufficient grounds believes defendant's goods have been sold to another he may call on plaintiff for directions and demand indemnity before proceeding to levy on the goods in question.—Cake v. Cannon, 7 Del. 427.

52. Ga.—Benson v. Dyer, 69 Ga. 190.

53. Ark.—Lawson v. State, 10 Ark. 28, 50 Am.D. 238.
Cal.—Fraser v. Thrift, 50 Cal. 476.

54. N.Y.—McDonald v. Neilson, 2 Cow. 139, 14 Am.D. 431.

55. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill. App. 459.

56. Fla.—State v. Sweat, 162 So. 689, 691, 120 Fla. 312, citing **Corpus Juris.**
Md.—First Nat. Bank v. Equitable Life Assur. Soc. of U. S., 145 A. 779, 157 Md. 249.
Pa.—First Nat. Bank of Bellefonte v. Stevenson, 18 Pa.Dist. & Co. 508.
23 C.J. p 434 note 50.
Execution of judgment against principal and surety see the C.J.S. title Principal and Surety §§ 278, 279, also 50 C.J. p 224 note 34—p 226 note 87.

57. Ga.—Keaton v. Cox, 26 Ga. 162.

58. Vt.—Warren v. Edgerton, 22 Vt. 199, 54 Am.D. 66.
23 C.J. p 434 note 52.

59. Tex.—Howard v. North, 5 Tex. 290, 51 Am.D. 769.
23 C.J. p 434 note 53 [a].

60. Ind.—Sansberry v. Lord, 82 Ind. 521.
23 C.J. p 434 note 56.

61. U.S.—Wilson v. Hurst, C.C.Pa., 30 F.Cas.No.17,808, Peb.C.C. 140.
23 C.J. p 434 note 56.

62. Ga.—Barden v. Brady, 37 Ga. 660.
23 C.J. p 434 note 56.

63. Ind.—Sidener v. White, 46 Ind. 588.
23 C.J. p 434 note 57.

64. Fla.—Clonts v. Ritch, 12 Fla. 633, 95 Am.D. 345.
23 C.J. p 434 note 58.

uitable manner, carrying out the doctrine that where a creditor has a right to resort to two funds for the satisfaction of his debt, the party who has a subsequent or inferior claim on one fund only may compel the creditor having the superior claim to exhaust the other fund before resorting to that with relation to which such subsequent claim exists.[65]

§ 96. —— Force, Fraud, or Other Wrongful Act in Levying Writ

a. Force
b. Fraud or other wrongful act

a. Force

Generally an officer may force an entry into any enclosure except the judgment debtor's dwelling house in order to levy an execution.

As a general rule an officer may force an entry into any enclosure[66] except the dwelling house of the judgment debtor[67] in order to levy a fieri facias on the debtor's goods; and even in the case of the debtor's home,[68] when the officer is once inside, he may break open inner doors[69] or trunks[70] to come at the goods.

Accordingly an officer is justified in forcibly entering the house of a third person, if the property of defendant is therein or he has good reason for suspecting that it is, and after demand for admittance and refusal,[71] although he enters upon a third person's premises at his peril, and it has been held that he is a trespasser if it appears that defendant had no property there.[72] So, where an officer who has entered a house to levy commences a levy or is ejected, he may break open the door in order to reënter or carry off the property.[73]

b. Fraud or Other Wrongful Act

A levy procured through fraud, trickery, or trespass is invalid.

A levy which is procured through fraud, trickery or trespass is invalid,[74] as where it is made by means of an unlawful breaking or forcing of doors, see § 96 a supra; or where the officer or creditor fraudulently or wrongfully acquires possession of the property for the purpose of levying on it;[75] or where the property is brought within the jurisdiction, for the purpose of being levied on, through fraud or other wrongful act on the part of the officer[76] or of the execution creditor.[77]

§ 97. —— Levy on Personal Property or Particular Interests Therein in General

a. In general
b. Particular classes of personal property

a. In General

(1) General considerations

65. U.S.—Milmine v. Bass, C.C.Ind., 29 F. 632, affirmed 10 S.Ct. 1065, 136 U.S. 630 mem, 34 L.Ed. 553.
23 C.J. p 435 note 59.

66. Mich.—Silverman v. Stein, 217 N.W. 785, 242 Mich. 64, 57 A.L.R. 209.
N.D.—O'Connor v. McManus, 299 N. W. 22, 24, citing **Corpus Juris.**
23 C.J. p 432 note 17.

Safety deposit boxes
N.D.—O'Connor v. McManus, 299 N. W. 22.
Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.

Necessity of "break in" order
Constable of first city court of New Orleans may seize property without a break in order.—Loubat Glassware & Cork Co. v. Victor, 7 La.App. 559.

67. N.D.—O'Connor v. McManus, 299 N.W. 22, 24, citing **Corpus Juris.**
Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.
23 C.J. p 431 note 15.

Forcing outer door
(1) Under the common law and statutes declaratory thereof, an officer cannot legally break open an outer door of the judgment debtor's dwelling house for the purpose of levying a fieri facias on his goods.—Schork v. Calloway, 265 S.W. 807, 205 Ky. 346—23 C.J. p 431 notes 15, 16.

(2) The term "outer door" has been held to include an outer door of an apartment within a building. Ky.—Schork v. Calloway, supra. Mass.—Swain v. Mizner, 8 Gray 182, 69 Am.D. 244.

(3) But there is also authority for the view that such a door is not an "outer door" if the landlord or owner lives in the building with his tenants.—Cantrell v. Conner, 6 Daly, N. Y., 39—23 C.J. p 432 note 21 [a].

(4) In any event, the general rule prohibiting the forcing of outer doors applies only where the seizure is attempted under a fieri facias and not where it is sought under an order directing the seizure of specific property.—Schork v. Calloway, supra—23 C.J. p 431 note 15 [b].

Protection limited to dwelling house
(1) The protection against forcible entry of the debtor's dwelling house extends only to his dwelling house and hence any other building may be broken open in order to levy an execution.—Silverman v. Stein, 217 N.W. 785, 242 Mich. 64, 57 A.L.R. 209—23 C.J. p 432 note 17.

(2) Thus a garage within the curtilage but not connected with the dwelling house may be broken open. —Silverman v. Stein, supra.

68. Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.
23 C.J. p 432 note 21.

69. Pa.—Trainer v. Saunders, supra.
23 C.J. p 432 note 21.

70. Pa.—Trainer v. Saunders, supra.

71. Pa.—Trainer v. Saunders, supra.
23 C.J. p 432 notes 18, 19.

72. Vt.—Burton v. Wilkinson, 18 Vt. 186, 46 Am.D. 145.
23 C.J p 432 note 19.

73. Del.—Saunders v. Millward, 4 Del. 246.
23 C.J. p 432 note 20.

74. Mont.—Beyerlein v. Whitcomb, 26 P.2d 349, 95 Mont. 293.
23 C.J. p 432 note 23.

75. N.H.—Closson v. Morrison, 47 N.H. 482, 93 Am.D. 459.
23 C.J. p 432 note 25.

76. Iowa.—Pomroy v. Parmlee, 9 Iowa 140, 74 Am.D. 328.
23 C.J. p 432 note 26.

77. Mo.—Rosencranz v. Swofford Bros. Dry Goods Co., 75 S.W. 445, 175 Mo. 518, 97 Am.S.R. 609.
23 C.J. p 432 note 27.

(2) Right to enter on premises
(3) Possession or control
(4) View of property
(5) Open and notorious acts
(6) Levy on part in name of whole

(1) General Considerations

The sufficiency of a levy on personal property depends largely on the circumstances of each case, the applicable statutes if any, the character of the property levied on, and the status of the person challenging its sufficiency. The debtor's consent is never essential.

While some general rules can be laid down as to the sufficiency of a levy on personal property, yet each case is largely governed by its own circumstances,[78] and it is always necessary to take into consideration the statutes, if any, governing the sufficiency of the levy,[79] the character of the property levied on,[80] and whether the person raising objections to the levy is the debtor or a third person, since a levy may be invalid as against strangers but valid as against the debtor.[81] In general, however, it may be said that where the statute prescribes the mode of levy, strict compliance with the statutory requirements is essential.[82] Moreover, the sufficiency of a levy depends on what is done rather than on the intent with which it is done;[83] and while the debtor's knowledge and acquiescence may make it unimportant for the officer to pursue every step necessary to perfect a complete levy, with the same nicety and particularity he would be otherwise required to do, the debtor's consent is never essential to the validity of a levy.[84]

Excessive levy. Where an execution is levied on a larger interest in certain personal property than the debtor owns, the levy is nevertheless valid as to the interest actually owned.[85]

(2) Right to Enter on Premises

A levying officer may enter the debtor's premises to make a levy and he may be accompanied by the creditor or his agent.

The officer may enter on the debtor's premises to levy on his goods without committing a trespass,[86] but he is not authorized to turn the debtor out and take exclusive possession of his premises.[87] The creditor or his agent is likewise authorized to enter on the debtor's premises or enter his house with the officer, and to remain there long enough to show property to the officer, and while the officer is taking an inventory.[88]

As appears supra, § 96 a, a sheriff may also enter on the premises of a third person for the purpose of levying on the debtor's goods.

(3) Possession or Control
(a) In general
(b) Actual or constructive seizure
(c) Act amounting to trespass as test
(d) Removal of property
(e) Declaration of levy

(a) In General

To constitute a valid levy the officer must reduce the property to possession or bring it within his immediate control.

It is well settled that in order to constitute a valid levy on personal property the officer must reduce the property to possession or bring it within his immediate control.[89] A mere "paper levy," or

78. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
Ohio.—Minor v. Smith, 13 Ohio St. 79.

79. Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
Mo.—Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.

80. Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
Mo.—First Nat. Bank v. Polk, 263 S.W. 504.
Wash.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

81. Cal.—Taffts v. Manlove, 14 Cal. 47, 73 Am.D. 610.
23 C.J. p 435 note 62.
Strictly speaking, however, what is generally meant is that the debtor may waive omissions or informalities or be estopped by his conduct to set them up.
Cal.—Taffts v. Manlove, supra.
Pa.—Stuckert v. Keller, 105 Pa. 386.

82. **Delivery of copy of execution**
Failure of officer to comply with statute requiring delivery of copy of execution to person from whom personal property is taken renders levy void.—Langer v. Nultemeier, 212 N.W. 817, 55 N.D. 132.

83. Ga.—Hibbard v. Zenor, 75 Ga. 471.

84. N.Y.—Artisan's Bank v. Treadwell, 34 Barb. 553.

85. **Life estate**
Where levy on personalty covered a one-half interest in the fee, a one-half interest in life estate which had been reserved by defendant in fieri facias in transferring the property to third person, was subject to the execution without necessity of amending the levy.—First Nat. Bank v. Geiger, 7 S.E.2d 756, 61 Ga.App. 865.
Excessive levies generally see infra § 107.

86. Cal.—People v. Sylva, 76 P. 814, 143 Cal. 62.
Ky.—Parham v. Tompson, 2 J.J. Marsh. 159.
Entry by force see supra § 96 a.

87. Mich.—Bayne v. Patterson, 40 Mich. 658.

88. U.S.—U. S. v. Baker, D.C., 24 F. Cas.No 14,502, 1 Cranch C.C. 268.
23 C.J. p 435 note 69.

89. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.
Ala.—Crass v Memphis & C. R. Co., 11 So. 480, 96 Ala. 447.
Ark.—Brown v. Vaughan, 42 S.W.2d 558, 559, 184 Ark. 364, citing **Corpus Juris.**
Colo.—People, to Use of Kenfield, v. Finch, 76 P. 1120, 1123, 19 Colo. App. 512.
Mass.—Field v. Fletcher, 78 N.E. 107, 191 Mass. 494.
Mo.—First Nat. Bank v. Polk, App., 263 S.W. 504.

"pen and ink levy," as an attempted levy made by merely indorsing on the writ the fact of the levy has been called, is insufficient;[90] nor can a levy be presumed from the mere delivery of an execution to the sheriff, without any act or proceeding by him under it, to take possession of the property.[91] The officer must assume dominion and control over the property and momentarily take it into his custody, and perform distinct acts indicating his intention to pursue the property for the purpose of satisfying the writ,[92] although it is not necessary that he actually touch the property, if he does not remove it.[93] There must be some act which amounts to a change of possession, or which is equivalent to a claim of dominion over the property, coupled with power to enforce it.[94] Where chattels are in full view of the officer, they are within his power, since he can remove them or place a person in custody of them.[95]

(b) Actual or Constructive Seizure

To constitute a valid levy, seizure, either actual or constructive, is necessary.

In order to constitute a valid levy on personal property, seizure, either actual or constructive, is necessary.[96] Actual seizure is accomplished by a manucaption of the thing intended to be seized.[97] A constructive seizure is accomplished by the actual reduction by the officer of the property intended to be seized to his own control.[98] In general, it may be said that the levy shall be such a custody as to enable an officer to retain and assert his power and control over the property, so that it cannot be withdrawn or taken by another without the officer knowing it.[99]

Necessity of actual possession or seizure. Although in some jurisdictions it is required by statute that the levying officer must take actual possession of the property levied on if it is capable of manual delivery,[1] generally, in the absence of such

Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
N.C.—In re Phipps, 163 S.E. 801, 202 N.C. 642.
S.C.—McManus v. Bank of Greenwood, 171 S.E. 473, 171 S.C. 84.
Tex.—Burch v. Mounts, Civ.App., 185 S.W. 889.
23 C.J. p 435 note 71.

Where method of levy is not outlined by law, in cases of personal property, sheriff should reduce property to his possession to utmost extent of which property is susceptible.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.

Intangible interests
Sheriff should seize property when levying execution, even on intangible interest.—Warrick v. Liddon, 160 So. 534, 230 Ala. 253.

Levy held sufficient
(1) In general.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

(2) Levy on personalty was held valid where deputy sheriff locked door and subsequently placed levy sticker on property involved, notwithstanding he meanwhile permitted another to have key to premises.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.

Levy held insufficient
(1) Where officer merely told person having possession of debtor's truck to deliver it to judgment creditor.—City Fuel & Supply Co. v. Nichols Roofing Co., 223 N.W. 751, 207 Iowa 860.

(2) Where officer merely tacked up notice of levy.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.

90. Ark.—Brown v. Vaughan, 42 S.W.2d 558, 184 Ark. 364.
23 C.J. p 435 note 72.

91. N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 436 note 73.

92. Ark.—Brown v. Vaughan, 42 S.W.2d 558, 184 Ark. 364.
23 C.J. p 436 note 74.

93. N.C.—In re Phipps, 163 S.E. 801, 202 N.C. 642.
23 C.J. p 436 note 75.

94. Iowa.—City Fuel & Supply Co. v. Nichols Roofing Co., 223 N.W. 751, 207 Iowa 860—Whitaker v. Tiedemann, 205 N.W. 468, 200 Iowa 901—Hibbard v. Zenor, 39 N.W. 714, 75 Iowa 471, 9 Am.S.R. 497.

95. N.Y.—Bond v. Willet, 29 How. Pr. 47.

96. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.
Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 155, 75 Colo. 440, citing **Corpus Juris.**
23 C.J. p 437 note 85.

97. Ga.—Jones v. Howard, 27 S.E. 765, 99 Ga. 451, 59 Am.S.R. 231.

98. Ga.—Jones v. Howard, supra.
23 C.J. p 437 note 87.

Acts held not to constitute constructive seizure
(1) A mere viewing of the property.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

(2) Indorsement of levy on back of execution.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, supra.

Acts held to constitute constructive seizure
When an officer receiving an execution makes in virtue of it a just and true inventory of the debtor's goods and files it at the return of the writ, it amounts to a constructive seizure and possession of such goods whereby they become appropriated to the satisfaction of such execution.—Lloyd v. Wyckoff, 11 N.J.Law 218.

99. Cal.—Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
Colo.—Justice v. Hoch, 271 P. 1116, 1117, 84 Colo. 528, quoting **Corpus Juris.**
Ga.—Jones v. Howard, 27 S.E. 765, 99 Ga. 451, 59 Am.S.R. 231.

1. Mo.—Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.
23 C.J. p 436 notes 79, 80.

Excluding constructive possession
"The word 'levy' as defined by our statute means actual seizure, that is, the officer must take actual possession of the goods, and this language would seem to exclude all idea of a constructive possession."—Douglas v. Orr, 58 Mo. 573, 575.

However, it would seem that, even where the statute requires the taking of actual possession, any exercise or claim of dominion, although by mere words, the officer having the goods within his power, is sufficient.—Douglas v. Orr, supra.

In Washington
(1) The statutes contemplate that when it is possible to do so the levying officer must take actual possession of the property levied on.—

statutory requirement, actual seizure or the taking of manual possession is not necessary to constitute a valid levy,[2] but it is sufficient that the officer has the property in view and where he can control it at the time of making the levy, and that he assumes dominion over it for the express purpose of holding it under the writ.[3] An apparent conflict in the decisions, however, results from broad statements that in order to constitute a levy there must be an actual seizure or an actual taking of possession,[4] but this conflict is more apparent than real since what is generally meant by such expressions is that an actual seizure or manucaption is essential in the absence of the doing of that which is the equivalent thereof.[5]

(c) Act Amounting to Trespass as Test

To render a levy valid it is frequently said that the officer must do such acts as would, but for the writ, make him a trespasser, or such acts as will enable him to maintain trespass or replevin against others.

A favorite expression of the courts, in passing on the validity of a levy on chattels, is that the officer must do such acts as would, but for the protection of the process, make him a trespasser; and this is said to be the true criterion of a levy.[6] Another criterion of a levy is the doing of such acts by the officer as will enable him to maintain trespass or replevin against any stranger who interferes with the possession of the property.[7]

(d) Removal of Property

Generally an officer is not required to remove chattels levied on.

In England in order to make a valid levy on personalty the officer must enter on the premises where the goods are, and take possession of them, and either actually remove them or leave an assistant or bailiff in charge of them; and to leave the property in the possession of the debtor is considered a badge of fraud.[8] In this country the general rule is that it is not necessary that the officer levying an execution on chattels capable of manual seizure should take possession of them and actually remove them,[9] and the levy is not vitiated by the leaving of the property in the possession of the debtor,[10] un-

Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29—Monks & Miller v. Fein, 215 P. 525, 125 Wash. 230.

(2) When actual possession cannot be taken, all that is necessary is that the officer take constructive possession by giving notice to the owner that the property is levied on and will be sold—Swanson v. Olympic Peninsula Motor Coach Co., supra—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

(3) Under the statutes the sheriff may take and hold the property through an agent.—Monks & Miller v. Fein, supra.

2. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
Colo.—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 155, 75 Colo. 440, citing **Corpus Juris.**
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 436 note 82.

3. Colo.—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154 155, 75 Colo. 440, citing **Corpus Juris.**
Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.
23 C.J. p 436 note 83.

Constructive seizure equivalent of actual seizure

(1) A constructive seizure is the equivalent of an actual seizure, and of itself, without an actual seizure, may constitute a levy.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

(2) An assertion of right by an officer, by virtue of the writ and with respect to personal property within his power, is an actual taking possession thereof.—Camp v. Chamberlain, 5 Den., N.Y., 198—Green v. Burke, 23 Wend., N.Y., 490.

4. N.Y.—Camp v. Chamberlain, 5 Den. 198.
23 C.J. p 436 note 78.

"Actual possession and control" must ordinarily be taken.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.

5. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D C.Ky., 58 F.2d 305.

6. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340, applying Georgia law.
Ala.—Crass v. Memphis & C. R. Co., 11 So. 180, 96 Ala. 447.
Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 438 note 2.

Rule qualified

(1) It does not follow that any act which would constitute a trespass, but for the writ, is in all cases a sufficient levy.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.

(2) The text rule should be restricted to levies made in the ordinary way, and ought not to be applied where the debtor voluntarily gives up the property and the officer at once indorses the levy.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.
23 C.J. p 438 note 2 a (2).

7. Wis.—Gallagher v. Bishop, 15 Wis. 276.

8. Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 155, 75 Colo. 440, citing **Corpus Juris.**
23 C.J. p 437 note 89.

9. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F.Supp. 351
Cal.—Noland v. Noland, 113 P.2d 11, 44 Cal.App.2d 780.
Minn.—Wallerbeck v. Haaven, 250 N.W. 565, 567, 189 Minn. 604, citing **Corpus Juris.**
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 437 note 90.

10. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F.Supp. 351.
Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 155, 75 Colo. 440, citing **Corpus Juris.**
Idaho.—South Side Live Stock Loan Co. v. Iverson, 263 P. 481, 483, 45 Idaho 499, citing **Corpus Juris.**
Minn.—Wallerbeck v. Haaven, 250 N. W. 565, 567, 189 Minn. 604, quoting **Corpus Juris.**

less power to dispose of it is granted,[11] although the lien may be lost by so leaving the property for an unreasonable period or by direction of the creditor, see infra § 137. In some states, however, it has been held that chattels capable of manual delivery should not be allowed to remain in the possession of the debtor.[12] At any event, as against the debtor, the officer need not take chattels into his possession where they are present in view and under his control, and the debtor, either by positive or negative acts, waives an actual seizure and requests that the property shall be left in his possession, or consents to a levy being made without the removal of the chattels.[13] So, where the debtor assents to the levy and executes a forthcoming bond, he is estopped from objecting that the levy was not properly made because the property was not actually taken into the sheriff's custody and removed by him.[14] It is well settled that whether it is absolutely necessary or not to remove chattels, the officer may take them away if he chooses or sees fit to do so, especially when he thinks their removal necessary for his own security.[15]

(e) Declaration of Levy

The levying officer must assert his title to the personalty by virtue of the execution by clear and unequivocal acts or declarations.

An officer, in making a levy on personal property, must assert his title thereto by virtue of the execution by acts or declarations of a clear and unequivocal character.[16] It is not sufficient for the officer to announce that he is at the place for the purpose of making a levy.[17]

(4) View of Property

Generally, to constitute a valid levy, as against third persons at least, the officer must have the property within view when the levy is made.

The general rule is that in order to constitute a valid levy, as against third persons at least, the officer must have the property within view at the time of making the levy,[18] unless the wrongful act of the debtor makes a view impossible[19] or other legal excuse appears.[20] However, the rule is laid down in some jurisdictions that it is not necessary to the validity of the levy, at least as against the debtor, that the officer should be within view of the property at the time of the levy, provided he makes or is furnished an inventory of the property levied on, and the control of the property by the officer is acknowledged or acquiesced in by the debtor.[21] So it has been held that, where defendant acknowledges the levy by executing a forthcoming bond, the levy is sufficient, although not within the view of the officer.[22]

Goods in building. Where goods are in a building and not in sight, the officer cannot make a levy by merely making a proclamation and indorsing a levy, but he must enter and obtain a view of the goods.[23] It has been held that, where a building is locked, a levy is not sufficient merely where a guard is placed on the premises,[24] or strips are nailed across the door and the debtor notified,[25] or the officer proclaims a levy and states that he will break and enter the store in the morning.[26]

Contents of safe. A levy on a safe is a suffi-

N.C.—In re Phipps, 163 S.E. 801, 202 N.C. 642.
Pa.—C. I. T. Corporation v. Shakespeare, 95 Pa.Super. 491.
23 C.J. p 437 note 91.

11. Ind.—Wunderlich v. Roberts, 67 Ind. 421.

12. **Effect of leaving debtor in possession**
Property capable of manual delivery must be taken into the custody of the officer and not allowed to remain in the debtor's possession; otherwise the levy may be defeated by subsequent executions or conveyances.
Cal.—Dutertre v. Driard, 7 Cal. 549 —Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
La.—See Billington v. Barbin, Mann. Unrep.Cas. 430.

13. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340.
23 C.J. p 438 note 95.

14. Ga.—Roebuck v. Thornton, 19 Ga. 149.
23 C.J. p 438 note 96.

15. Del.—Boggs v. Vandyke, 3 Del. 288.
23 C.J. p 438 note 97.

16. Neb.—Miller v. Crosson, 267 N. W. 145, 131 Neb. 88.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 438 note 98.

17. Mo.—Hobbs v. Williams, 162 S. W. 334, 175 Mo.App. 409.
23 C.J. p 438 note 99.

18. Ala.—Crass v. Memphis & C. R. Co., 11 So. 480, 96 Ala. 447.
Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.
N.Y.—Camp v. Chamberlain, 5 Den. 198.
23 C.J. p 439 note 4.

19. Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.

20. **A sufficient excuse may exist where a view is made impossible:**
(1) By the federal government.—Keil v. Harris, 1 Pa.Co. 171, affirmed 6 A. 750, 4 Pa.Cas. 201.
(2) By the wrongful act of a third person having possession of the debtor's goods.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861—Stuckert v. Keller, 105 Pa. 386.

21. N.J.—Fox v. Cronan, 2 A. 444, 4 A. 314, 47 N.J.Law 493, 54 Am.R. 190.
23 C.J. p 439 note 5.

22. Tenn.—Ballard v. Dibrell, 28 S. W. 1087, 94 Tenn. 229.
23 C.J. p 439 note 6.

23. N.J.—Nelson v. Van Gazelle Valve Mfg. Co., 17 A. 943, 45 N. J.Eq. 594.
23 C.J. p 439 note 7.

24. Iowa.—Hibbard v. Zenor, 39 N. W. 714, 75 Iowa 471, 9 Am.S.R. 497.
23 C.J. p 439 note 8, p 439 note 11.

25. Tex.—Lynch v. Payne, Civ.App., 49 S.W. 406.

26. Ark.—Meyer v. Missouri Glass Co., 45 S.W. 1062, 65 Ark. 286, 67 Am.S.R. 927.

cient levy on its contents, although the contents are not known to the officer.[27]

(5) Open and Notorious Acts

The acts of an officer in making a levy should be open and unequivocal; but witnesses to a levy are not essential.

The acts of an officer in making a levy should be open and unequivocal, and nothing should be done by him to cause a concealment of the transaction.[28] A secret levy will as a rule be held to be invalid as against third persons.[29]

Witnesses. It is proper and prudent for the officer to call on some one or more persons of the neighborhood to witness his acts, and for him to indorse the fact of his having done so on the writ;[30] but this is not essential to the validity of the levy.[31]

(6) Levy on Part in Name of Whole

A seizure of a part of a parcel of goods in the name of the whole is a good seizure of the whole.

A part of a parcel of goods may be seized in the name of the whole.[32] In such case, a part of the goods is not actually seized, and may not be seen, yet the whole is levied on.[33] Thus a seizure of a part of the property of the judgment debtor in a building, by virtue of a fieri facias, in the name of the whole property, is a valid levy on all of the property, and the inventory made out by the officer furnishes the means of ascertaining what goods were levied on.[34]

b. Particular Classes of Personal Property

(1) Contents of safe deposit box
(2) Growing crops
(3) Intermingled property
(4) Livestock
(5) Mortgaged chattels
(6) Ponderous and bulky articles
(7) Property held jointly
(8) Property in possession of third persons
(9) Property sold under conditional sales contract

(1) Contents of Safe Deposit Box

Contents of a safe deposit box may be levied on by obtaining actual custody thereof or by assuming dominion over them by some act as nearly equivalent to a seizure as is practicable.

Contents of a safe deposit box may be levied on by obtaining actual custody thereof[35] or, if this is impossible, by assuming dominion over them by some act as nearly equivalent to a seizure as is practicable.[36]

(2) Growing Crops

A levy on a growing crop may be made by obtaining a view of it and assuming dominion over it by some act as nearly equivalent to a seizure as practicable, and by making a memorandum of the levy and informing the debtor thereof.

The rule requiring an actual seizure to constitute a valid levy of personal property capable of being readily removed does not apply in the case of a growing crop, since actual possession of a field of standing grain is not practicable.[37] A levy on a growing crop may be made by obtaining a view of it and assuming dominion over it by some act as nearly equivalent to a seizure as is practicable, and by making a memorandum of the levy and informing the debtor of the levy.[38] It is not necessary

27. Iowa.—Smith v. Clark, 69 N.W. 1011, 100 Iowa 605.
Mo.—Elliott v. Bowman, 17 Mo.App. 693.
23 C.J. p 439 note 12.

28. Neb.—Miller v. Crosson, 267 N. W. 145, 131 Neb. 88.
N.Y.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.
23 C.J. p 439 note 13.

29. Kan.—Crisfield v. Neal, 13 P. 272, 36 Kan. 278.
23 C.J. p 439 note 14.

30. Ill.—Davidson v. Waldron, 31 Ill. 120, 83 Am.D. 206.

31. Ohio.—Minor v. Smith, 13 Ohio St. 79.
23 C.J. p 440 note 16.

32. Ga.—Roebuck v. Thornton, 19 Ga. 149.
23 C.J. p 440 note 17.

33. Ga.—Roebuck v. Thornton, supra.
23 C.J. p 440 note 18.

34. S.C.—Brian v. Strait, 23 S.C.L. 19—Moss v. Moore, 21 S.C.L. 276.
23 C.J. p 440 note 17.

35. Actual custody required
Actual custody of the contents of a safe deposit box is required to constitute a valid levy thereon since such contents are capable of manual delivery.—Press v. Vose, 11 N.Y.S.2d 863, 171 Misc. 387.
Entering box by force see supra § 96 a.

36. Refusal to open box
Although it is ordinarily the duty of the sheriff in executing process either to take possession of the article on which he levies or at least to have it in sight, the levy will be sustained, although the property was not in view, where the wrongful act of defendant made it impossible, or where other legal excuse appeared, so that the sheriff can levy on the contents of a safe deposit box which the defendant and the lessor of the box refuse to open.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.
Compelling opening of box
Where the debtor and the bank refuse to allow an examination of the contents of the box, plaintiff may enter a rule to show cause why an examination should not be made, and, in the absence of proper excuse shown, such rule will be made absolute.—Agnes Irwin School v. Turnbull, 12 Pa.Dist. & Co. 422, 78 Pittsb. Leg.J. 12, 43 York Leg.Rec. 188.

37. Hawaii.—Ferry v. Hakalau Plantation Co., 21 Hawaii 745.
Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88.

38. Kan.—Holton Nat. Bank v. Duff, 94 P. 260, 77 Kan. 248, 127 Am.S.

that the officer shall keep a watch or guard over it.[39] It has been held that the officer may harvest the crop when it is mature,[40] but that it is not his duty to do so before the day of the sale, although it matures before such day.[41] Under some statutes crops cannot be levied on until matured.[42]

(3) Intermingled Property

Where the debtor's goods are so intermingled with the goods of another that they cannot be distinguished, the officer as a general rule may levy on the whole.

Where the goods belonging to the debtor are so mixed or confused with goods belonging to a stranger that the property of the one cannot be identified and distinguished from the property of the other, and the stranger fails to point out to the sheriff or designate the goods which are not subject to execution, the sheriff may levy on the whole.[43] The doctrine of confusion is extended, however, no further than necessity requires, and it seems that no forfeiture will result in consequence of the confusion of goods owned by two persons, unless there is a willful or wrongful invasion of rights.[44]

(4) Livestock

In levying an execution on livestock there must be some act done by the officer equivalent to a seizure.

A levy on livestock has been held sufficient where the officer counts and makes an inventory of the livestock and informs the debtor of the levy.[45] In some jurisdictions, in the case of levy on livestock running at large, an absolute manucaption is not necessary; but there must be some act done by the officer equivalent to a seizure, such as a memorandum on the writ of the number of animals seized on, and a notice to the judgment debtor or his agent of the levy.[46] Even in the case of cattle not on range, but confined in a small pasture, it is not necessary that the officer immediately remove the cattle or place some one there to guard them, provided he professes to levy and assume control of them by virtue of the writ.[47]

(5) Mortgaged Chattels

Where an execution may be levied on mortgaged chattels, the officer is generally authorized to perform all such acts as may be requisite to bring the property to a sale. Under some statutes, however, the amount due on the mortgage must be tendered or secured before taking the property.

Where an execution may be levied on mortgaged chattels, and the chattels are allowed to remain in the possession of the mortgagor, the officer is authorized to perform all such acts and take such steps as may be requisite to bring the property to a sale, and to this end he is authorized, as against the mortgagee, to take the property into his possession and custody, and to exhibit it at the sale;[48] but in whatever manner the levy is made, it must be subordinate to the rights of the mortgagee.[49] By allowing the officer to detain the mortgaged goods in a convenient and safe custody for the time requisite to bring the property to sale, the substantial interests of all concerned will generally be promoted and unseemly scrambles for possession will be averted.[50]

Goods in possession of mortgagee. While it has been denied that the officer has the right to take mortgaged chattels out of the possession of the mortgagee,[51] it has also been held that the sheriff is entitled to the custody and control of the prop-

R. 417, 16 L.R.A.,N.S., 1047, 15 Ann.Cas. 882.
23 C.J. p 440 note 23.

39. Kan.—Holton Nat. Bank v. Duff, supra.
23 C.J. p 440 note 23.

40. Mass.—Penhallow v. Dwight, 7 Mass. 34, 5 Am.D. 21.
23 C.J. p 441 note 25.

41. Mo.—Bilbye v. Hartman, 29 Mo. App. 125.
But it has also been held that, where the sheriff levied on a crop of growing fruit and allowed it to ripen and rot, there was a wrongful and oppressive levy of the writ.—State v. Fowler, 42 A. 201, 88 Md. 601, 71 Am.S.R. 452, 42 L.R.A. 849.

42. Ga.—Hixon v. Callaway, 2 Ga. App. 678, 58 S.E. 1120.

43. Mich.—McCausey v. Hoek, 124 N.W. 570, 159 Mich. 570, 18 Ann. Cas. 945.
23 C.J. p 444 note 68.

44. Tex.—Brown v. Bacon, 63 Tex. 595.
23 C.J. p 444 note 69.

45. N.Y.—Teed v. Sidney Nat. Bank, 285 N.Y.S. 140, 158 Misc. 561.

46. Ga.—Sheffield v. Key, 14 Ga. 528.
23 C.J. p 441 note 29.
Statutes regulating levy
(1) Under statutes so providing a levy on live stock running at large on a range, and which cannot be herded or penned without great inconvenience and expense, may be made by designating, by reasonable estimate, the number of animals, and describing them by their marks and brands or either, provided such levy is made in the presence of two or more credible persons, and notice thereof is given in writing to the owner or his herder or agent if residing within the county and known to the officer.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209—23 C.J. p 441 note 29 [b].
(2) No valid levy was made, where sheriff merely rode out among steers, counted them, and left them without segregating them from other steers in pasture or making arrangements to put anyone in charge, there being no "taking into possession" as required by statute.—Western Nat. Bank of Hereford v. Steele, Tex.Civ. App., 36 S.W.2d 271, error dismissed.

47. Tex.—Burch v. Mounts, Civ. App., 185 S.W. 889.
23 C.J. p 441 note 30.

48. Minn.—Barber v. Amundson, 54 N.W. 733, 52 Minn. 358.
23 C.J. p 443 note 49.
Mortgaged property as subject to execution see supra §§ 44–46.

49. Mich.—Smith v. Menominee Cir. Judge, 19 N.W. 184, 53 Mich. 560.
23 C.J. p 443 note 50.

50. Mich.—Cary v. Hewitt, 26 Mich. 228.
23 C.J. p 443 note 51.

51. N.J.—Fox v. Cronan, 2 A. 444

erty until the time of the sale, notwithstanding the mortgagee at the time of the levy is in the actual possession or has the right of possession,[52] but that, after breach of the conditions of the mortgage, if the mortgagee by the terms of the mortgage is entitled to the possession of the property, the officer has no right to take possession.[53]

Levy on part or whole of mortgaged property. Where a mortgage covers different articles of personalty, it is the duty of the officer to levy on the whole thereof, if he can find them, and sell such articles in one lot or parcel, subject to the mortgage, and not to levy on specific articles,[54] but, if it is necessary to do so, he may take possession of distinct articles separately.[55]

Tendering or securing amount due on mortgage. In some states by force of statute it is necessary to tender to the mortgagee the amount due to him under the mortgage before taking the property,[56] or within a specified time thereafter,[57] or to secure the same.[58] Under some statutes, however, a tender of the amount due is not essential where the execution creditor presents a verified statement that the mortgage is invalid for reasons therein specified, and delivers to the officer a good and sufficient indemnity bond.[59]

(6) Ponderous and Bulky Articles

In levying on ponderous or bulky articles, the officer need only go to them, assume dominion over them, forbid their removal, and indorse on his writ the fact of levy.

The officer may suffer ponderous and bulky articles, such as lumber, stone, grain, and ore, to remain in the possession of the debtor, and need only go to them and assume dominion over them and forbid their removal, and indorse on his writ the fact that he has made a levy.[60]

Fixtures and machinery. The general rule is that, fixtures and ponderous machinery being incapable of actual possession, any notorious act of the officer asserting title under a levy is sufficient.[61]

Buildings. In making a levy on a building as personal property, the officer need not take manual possession of it,[62] but it is sufficient if he goes to the building and there informs the debtor of the levy and forbids interference with any part of the property.[63]

(7) Property Held Jointly

Property owned by a judgment debtor jointly with another must be levied on in the manner prescribed by statute.

Where a judgment debtor owns personal property as tenant in common or joint owner with others, and the statute prescribes the method of levying execution on such property, the prescribed method must be followed.[64] In some jurisdictions it is the duty of the officer to levy on and take into his custody the whole of the property, although

4 A. 314, 47 N.J.Law 493, 54 Am.R. 190.
23 C.J. p 443 note 52 [b, c].

52. Ky.—McIsaacs v. Hobbs, 8 Dana 268.
23 C.J. p 443 note 52.

53. Kan.—Rankine v. Greer, 16 P. 650, 38 Kan. 343, 5 Am.S.R. 751.

54. Mich.—Baldwin v. Talbot, 8 N. W. 565, 46 Mich. 19.
23 C.J. p 443 note 54.

55. Mich.—Harvey v. McAdams, 32 Mich. 472.

56. Cal.—Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
Okl.—Ogle v. Aycock, 67 P.2d 432, 179 Okl. 626.
23 C.J. p 443 note 56.

57. Statutory requirement is for benefit of mortgagee, not mortgagor. —First Nat. Bank v. Neve, 235 N. W. 561, 213 Iowa 344.

58. Iowa.—**First Nat. Bank v. Neve,** supra.

59. The undertaking is for the indemnification of both the sheriff and the mortgagee.—Security First Nat. Bank of Los Angeles v. Sartori, 93 P.2d 963, 34 Cal.App.2d 408.

Verified statement held sufficient
Cal.—Security First Nat. Bank of Los Angeles v. Sartori, supra.

Amount of bond
Under a statute requiring the amount of the bond given by the execution creditor to the officer to be "double the amount of the mortgage debt or double the value of the mortgaged property, as the officer may determine and require," the officer is invested with authority to determine in a preliminary way the value of the mortgaged property, and in determining this question all that is required is that he make a bona fide use of his judgment; hence, the fact that his valuation is only one half that subsequently found to be correct by the court does not invalidate the levy in the absence of fraud on the part of the execution creditor.—Security First Nat. Bank of Los Angeles v. Sartori, supra.

60. U.S.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340.
Tex.—Smith v. Harvey, Civ.App., 104 S.W.2d 938, 940, citing **Corpus Juris.**
23 C.J. p 440 note 19.

61. U.S.—In re Schwab Printing Co., C.C.A.Ill., 59 F.2d 726, 727, quoting **Corpus Juris.**
23 C.J. p 440 note 20.

Levy held sufficient:
(1) Where sheriff left with person in possession of the fixtures and ponderous machinery a copy of the writ and a notice that the property was levied on.—Gilbank v. Benton, 50 P.2d 815, 9 Cal.App.2d 517.

(2) Where marshal pasted notice of levy on machine and entered levy on execution and left copy of levy with debtor's employee in charge of office, who pointed out machine to marshal, and also left copy on desk of absent president of debtor corporation who afterward found it there.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340.

62. N.Y.—Burton v. Jurgensen, 244 N.Y.S. 320, 138 Misc. 69.

63. N.Y.—Burton v. Jurgensen, supra.

64. Iowa.—Whitaker v. Tiedemann, 205 N.W. 468, 200 Iowa 901.
Levy of individual execution on firm property see the C.J.S. title Partnership § 240, also 47 C.J. p 1018 note 25—p 1019 note 33.

he can only sell the judgment debtor's undivided interest therein.[65] In other jurisdictions, however, it has been held that an execution against one part owner cannot be rightfully levied on the whole property, but only on the debtor's share therein.[66] Under some statutes the levy on personal property jointly owned by the debtor and another creates a lien but gives no authority to sell,[67] and the levying officer cannot deprive a joint owner of the possession of the property, without his written consent, except for the purpose of having it inventoried and appraised.[68] Under other statutes the undivided interest of one not in possession may be levied on by giving notice to the person in possession,[69] and the officer should not levy by taking possession.[70]

(8) Property in Possession of Third Persons

Where the statute prescribes the method of levying on the debtor's personalty in the possession of others, the prescribed method must be followed. In the case of pledged chattels possession ordinarily should not be taken.

While the general rule requiring an officer, in making a levy on personalty, to reduce it to possession or bring it within his immediate control, see supra subdivision a (3) (a), of this section, has been applied to a levy on personalty of the debtor in the possession of third persons,[71] in some states, by statute, if personalty is in the possession of one other than the debtor, the levy must be made by giving notice to the person in possession, and no lien is created by assuming to take possession of the property.[72] It has also been held that, where a chattel has been pawned, pledged, or leased, the sheriff, in levying an execution against the lessor or bailor, should not take possession of the chattel, because the lessor or bailor has no present right of possession;[73] but on the other hand, it has been held that the chattel may be taken subject to the rights of the lessee or bailee.[74]

(9) Property Sold under Conditional Sales Contract

A vendor's interest in personalty sold under a conditional sales contract may be levied on in the manner prescribed by statute.

A vendor's interest in personalty sold under a conditional sales contract may be levied on in the manner prescribed by statute.[75]

§ 98. —— Choses in Action in General

The mode prescribed by statute must be followed in making a levy on choses in action.

At common law choses in action were not subject to levy under execution, see supra § 28, and consequently the common law furnishes no rule for the method of making a levy on this species of property.[76] The statutes authorizing levies on choses in action, however, frequently prescribe the mode of levy, in which case the mode prescribed must be strictly followed.[77] Generally, under the

65. N.Y.—Henderson v. Brennecke, 49 N.Y.S. 681, 26 App.Div. 309.
23 C.J. p 443 note 58.

66. Pa.—Dixon v. White Sewing-Mach. Co., 18 A. 502, 128 Pa. 397, 15 Am.S.R. 683, 5 L.R.A. 659.
23 C.J. p 444 note 59.

67. Ky.—Vicory v. Strausbaugh, 78 Ky. 425.
23 C.J. p 444 note 60.

In Iowa
Under a statute so providing an officer having an execution against a person owning property jointly with another may levy on, and take possession of, the property sufficiently to enable him to appraise and inventory the same, and thereafter the creditor may proceed in equity to ascertain the nature and extent of the debtor's interest and to enforce his lien.—Whitaker v. Tiedemann, 205 N.W. 468, 200 Iowa 901.

68. Ky.—Vicory v. Strausbaugh, 78 Ky. 425—Farmer v. Slack, 12 Ky.L. 319.

69. Tex.—Hubert v. Hubert, 102 S. W. 948, 46 Tex.Civ.App. 503.

70. Tex.—Davis v. Jones, 75 S.W. 63, 32 Tex.Civ.App. 424.
23 C.J. p 444 note 63.

71. **Levy held insufficient** where sheriff merely demanded surrender of judgment debtor's money kept in safe of superior court clerk, who agreed to surrender possession if sheriff procured court order approving surrender, following which sheriff indorsed execution.—In re Phipps, 163 S.E. 801, 202 N.C. 642.

72. U.S.—Barbur v. Courtright, Or., 260 F. 728, 171 C.C.A. 466.
Or.—Dufur Oil Co. v. Enos, 117 P. 457, 59 Or. 528.

Levy held sufficient
The judgment creditor acquires a lien by levy where he serves a certified copy of an execution on the person holding personal property belonging to the judgment debtor, makes application to such person for a certificate showing the description and amount of the property held by him, and is furnished with a false certificate to the effect that he has no property in his hands that belongs to the debtor, and that he owes him no money, under Gen.St.1913 § 7935.—Murphy v. Casey, 195 N.W. 627, 157 Minn. 1.

73. Pa.—Srodes v. Caven, 3 Watts 258.
Wis.—Cotton v. Watkins, 6 Wis. 629.

74. La.—Kirkpatrick v. Oldham, 38 La.Ann. 553.
23 C.J. p 444 note 66.

75. **Showing of respective interests**
Where conditionally sold personalty levied on under execution against seller is claimed by buyer, levy cannot proceed unless amount due by buyer on purchase money and respective interests of seller and buyer appear.—D. A. Schulte, Inc., v. Varron, 182 S.E. 912, 181 Ga. 542, answers to certified questions conformed to 184 S.E. 356, 52 Ga.App. 683.

76. S.D.—McLaughlin v. Alexander, 49 N.W. 99, 2 S.D. 226.

77. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
Cal.—Lantin v. Biscailuz, 95 P.2d 962, 35 Cal.App.2d 422.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.
23 C.J. p 441 notes 36, 37.

Bank accounts
(1) Levy on judgment debtor's bank account held sufficient.—Press

statutes, the levy is effected by leaving a copy of the writ with the person indebted to the judgment debtor together with a notice of the levy,[78] and by giving notice of the levy to the judgment debtor.[79]

Promissory notes and the like. In jurisdictions where the rule is adhered to that, in order to constitute a valid levy on tangible property, such property must be taken into actual possession by the officer, a sale of a bond, note, or other evidence of indebtedness belonging to the judgment debtor, but never in the possession of the officer, confers no title and is void for the reason that there has never been a valid levy on such property.[80] It has been held, however, that the debt may be levied on and held, although it is evidenced by a negotiable[81] or nonnegotiable[82] note.

§ 99. —— Corporate Stock

A levy on corporate stock must be made in substantial compliance with the mode prescribed by statute.

Corporate stock being of such character and often so situated as not to be capable of actual seizure by the officer, the mode of levy on such property is regulated entirely by the applicatory statutory provisions, the usual method of making levy being by leaving a copy of the writ with the president, secretary, or other designated officer of the corporation, together with a notice setting forth the shares of stock held by the judgment debtor which are levied on under the writ,[83] or by giving notice of the levy to the proper officers or agents of the corporation[84] and to defendant.[85] Under the Uniform Stock Transfer Act, however, no levy on shares of stock for which a certificate is outstanding is valid until such certificate is actually seized by the officer making the levy, or is surrendered to the corporation issuing it, or its transfer by the holder is enjoined.[86] It is generally held that the statutory provisions regarding the manner in which the execution shall be levied are imperative,[87] and that the levy must be at least in substantial compliance with the mode prescribed;[88] otherwise the levy and sale thereunder are void.[89] Failure to give notice of the levy to the execution

v. Vose, 11 N.Y.S.2d 863, 171 Misc. 387.

(2) Where sheriff purported to levy execution on general bank deposit of judgment debtor by service of execution on bank, which refused to surrender anything but stated that it held deposit subject to judgment, and judgment debtor made no acknowledgment of levy but protested against bank's statement, attempted levy was invalid.—McManus v. Bank of Greenwood, 171 S.E. 473, 171 S.C. 84.

78. Cal.—Pavlovich v. Watts, App., 115 P.2d 511.
23 C.J. p 441 note 37.

Rule applied to judgment debt
Cal.—Lantin v. Biscailuz, 95 P.2d 962, 35 Cal.App.2d 422.

79. Iowa.—Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.
23 C.J. p 441 note 37.

Failure to give notice to judgment debtor of levy on thing in action renders levy invalid.—Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.

Interest in pending suit
(1) Generally in order to constitute a valid levy on a judgment debtor's interest in a pending lawsuit, notice of levy must be served on the debtor, and the mere service of a copy of the writ of execution together with a notice of levy on the clerk of the court before which the suit is pending is insufficient.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.
Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.

(2) Where the statute so requires, notice of levy must be served on all parties to the suit in which the interest is seized; and in such case service of notice on counsel for the parties in such suit is insufficient where the suit in which the interest is seized is not the suit in which the writ of execution is issued.—Fidelity & Casualty Co. of New York v. General Motors Acceptance Corporation, La.App., 152 So. 692.

80. La.—Pleasants v. Kemp, 28 La. Ann. 124.
23 C.J. p 442 note 38.

81. S.D.—Frederick v. Nuzum, 160 N.W. 65, 38 S.D. 72.
23 C.J. p 442 note 39.

82. Taking of possession not required
Where property levied on consisted of claim against a corporation evidenced by nonnegotiable notes, the property was not required to be taken into possession of the sheriff, since the levy was not made on personalty capable of manual delivery.—Pavlovich v. Watts, Cal.App., 115 P.2d 511.

83. Wash.—Swanson v. Olympic Peninsula Motor Coach Co., 66 P.2d 842, 190 Wash. 35.
23 C.J. p 442 note 41.
Stock as subject to execution see supra § 32.

84. Ga.—Fourth Nat. Bank v. Swift & Co., 127 S.E. 729, 160 Ga. 372, reversing 124 S.E. 181, 32 Ga.App. 589.
Iowa.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454.
23 C.J. p 442 notes 41, 42.

85. Ga.—Weaver v. Tuten, 85 S.E. 1048, 144 Ga. 8—Tompkins v. American Land Co., 103 S.E. 190, 25 Ga. App. 326.

86. N.J.—Progressive Building & Loan Ass'n v. Rudolph, 172 A. 884, 113 N.J.Law 204—Wallach v. Stein, 136 A. 209, 103 N.J.Law 470, affirming 133 A. 81, 102 N.J.Law 517, reargument denied 133 A. 396, 4 N.J.Misc. 488—Amm v. Amm, 175 A. 186, 117 N.J.Eq. 185.
Pa.—Jaski v. Leider, 34 Pa.Dist. & Co. 480.

Mere momentary seizure followed by a surrender of possession by the officer is not enough to constitute an actual seizure.—Wallach v. Stein, 133 A. 81, 102 N.J.Law 517, reargument denied 133 A. 396, 4 N.J.Misc. 488, and affirmed 136 A. 209, 103 N.J.Law 470—Mulock v. Ulizio, 131 A. 622, 102 N.J.Law 251.

87. Iowa.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454.
23 C.J. p 442 note 43.

88. Iowa.—Cramer v. McDonald, supra.
N.J.—Mulock v. Ulizio, 131 A. 622, 102 N.J.Law 251.
Pa.—In re Braden's Estate, 30 A. 746, 165 Pa. 184, 35 Wkly.N.C. 497.
23 C.J. p 442 note 44.

89. Iowa.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454.
23 C.J. p 443 note 45.

debtor is not fatal,[90] unless such notice is required by statute.[91]

§ 100. —— Exhausting Personalty before Levy on Realty

As a general rule the debtor has a right to have his personal goods exhausted before any of his real estate can be levied on.

The generally prevailing rule, adopted in some jurisdictions by statute, is that the debtor has the right to have his personal goods exhausted before any of his real estate can be taken,[92] although in some jurisdictions such an exhaustion of the personal property is not required before levying on the real estate,[93] and under some statutes personal property cannot be taken under execution until after the judgment debtor has been given an opportunity to turn over real estate.[94] A levy need not first be made on personal property if it is valueless,[95] or if it is so encumbered that it probably would not produce anything on the execution.[96] Where the debtor has both personal and real property, although the personal property is not sufficient, it should be first levied on and first sold; but the real estate may be levied on after the levy on the personal property, without awaiting a sale of the personal property.[97]

Where sufficient personalty cannot be found. An officer is justified in subjecting real property of the execution debtor under his writ if he has no knowledge of personal property out of which his levy might be made, and where there is no evidence that by the exercise of reasonable diligence he could discover such property;[98] and the officer is not bound to search for personal property beyond his bailiwick.[99] The right to levy on real property is contingent on failure to find personal property on which to levy rather than on the nonexistence thereof.[1]

Return of nulla bona. A return by the officer of "no personal property found" is sufficient to justify a levy on the real property of the judgment debtor.[2] In some states, by statute or otherwise, such a return is necessary before a levy can be made on real property,[3] but in other states no such return is necessary.[4]

An alias execution before levying on the realty is not required, the return nulla bona being equivalent thereto.[5]

Waiver of right to have personal property taken. The right of the debtor to have his land exempted until the exhaustion of his chattels may be waived or forfeited;[6] and if the debtor fails or refuses to turn out chattels, the sheriff may proceed in the first instance to levy on land,[7] and the debtor has also been held to waive such right by fraudulently conveying all his property.[8] The officer holding an execution against the judgment debtor may, at the request of the latter, levy on his real estate to the exclusion of his personalty, even where the

90. Colo.—Ellis v. Gibbons, 145 P. 285, 26 Colo.App. 454.

91. Ga.—Weaver v. Tuten, 85 S.E. 1048, 144 Ga. 8.

92. U.S.—Haws v. Fracarol, C.C.A. Ariz., 27 F.2d 74.
Ariz.—Blasingame v. Wallace, 261 P. 42, 43, 32 Ariz. 580, quoting **Corpus Juris.**
Mich.—Solomon v. Neubrecht, 1 N.W. 2d 501, 300 Mich. 177—In re Dissolution of Field Body Corporation, 215 N.W. 6, 7, 240 Mich. 28, quoting **Corpus Juris.**
Mont.—Stone-Ordean-Wells Co. v. Strong, 20 P.2d 639, 94 Mont. 20.
Neb.—Barry v. Horton, 238 N.W. 763, 122 Neb. 20.
N.J.—Alt v. Kwiatek, 17 A.2d 161, 128 N.J.Eq. 469.
Pa.—First Nat. Bank v. Stevenson, 18 Pa.Dist. & Co. 508—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 541—Raub Supply Co. v. Brandt, 28 Del.Co. 363—Lukac v. Morris, 7 Sch.Reg. 241.
23 C.J. p 445 note 72.

In England the statute of Westminster which gave the writ of elegit made it the duty of the sheriff, if there were enough personal goods, not to levy on the debtor's lands; but by the statute, 5 Geo. II c 7, lands were stripped of their sanctity, and the creditor has since had the election whether he will seize lands or goods, unless, under peculiar circumstances of equity, he is restrained from exercising his right to the prejudice of an alienee, devisee, or heir.—Hanson v. Barnes, 3 Gill & J., Md., 359, 367, 22 Am.D. 322—23 C.J. p 444 note 70.

93. Mass.—Hoar v. Tilden, 59 N.E. 641, 178 Mass. 157.
23 C.J. p 445 note 73.

94. Ill.—Pitts v. Magie, 24 Ill. 610.
23 C.J. p 445 note 74.

95. Kan.—Farmers' State Bank of Whiting v. Bokel, 235 P. 1053, 118 Kan. 491.

96. Ind.—Nelson v. Bronnenburg, 81 Ind. 193—Detrick v. State Bank, 6 Ind. 439.

97. Ariz.—Blasingame v. Wallace, 261 P. 42, 43, 32 Ariz. 580, quoting **Corpus Juris.**
23 C.J. p 445 note 76.

98. Okl.—Wright v. Craig, 87 P.2d 317, 319, 184 Okl. 371, citing **Corpus Juris.**
23 C.J. p 445 note 77.

99. Mich.—Atwood v. Bearss, 8 N. W. 55, 45 Mich. 469.

1. Okl.—Wright v. Craig, 87 P.2d 317, 184 Okl. 371.

2. N.J.—Bulat v. Londrigan, 50 A. 909, 63 N.J.Eq. 22, affirmed 60 A. 1133, 65 N.J.Eq. 718.
23 C.J. p 445 note 79.

3. S.D.—Deadwood First Nat. Bank v. Black Hill Fair Assoc., 48 N.W. 852, 2 S.D. 145.
23 C.J. p 445 note 80.

4. Pa.—Clark v. Fell, 22 A. 649, 139 Pa. 469.
23 C.J. p 446 note 81.

5. S.D.—Shuler v. Halvor, 162 N.W. 389, 38 S.D. 617.

6. La.—Schwann v. Sanders, 46 So. 573, 121 La. 461.
Pa.—Simon v. Sorrentino, 20 A.2d 805, 145 Pa.Super. 364.
23 C.J. p 446 note 83.

7. Ariz.—Oliver v. Dougherty, 68 P. 553, 8 Ariz. 65.
23 C.J. p 446 note 83.

8. N.C.—Stancil v. Branch, 61 N.C. 306, 93 Am.D. 592.
23 C.J. p 446 note 84.

personalty is sufficient to satisfy the execution.[9]

Execution against joint debtors. It is generally held that, where an execution is issued against more than one defendant, and one of them has no personal property, his land may be taken in execution regardless of the fact that the other defendants have chattels subject to execution,[10] but there is authority to the contrary.[11]

Title of purchaser when chattels are not first taken. Statutory provisions requiring personal property to be resorted to before land have been held to be so far directory that if the sheriff levies on and sells land without exhausting the debtor's chattels the sale will be valid,[12] and, as appears in § 299 c infra, the title of an innocent purchaser who has not been instrumental in causing the sheriff to violate the law will be upheld.

Presumption that officer did his duty. In the absence of evidence to the contrary, it will be presumed that the officer did his duty and levied on land because he could not find chattels.[13]

§ 101. —— Levy on Real Property and Interests Therein

a. In general
b. Moiety of, or interest in, realty

a. In General

A levy on realty must be made in the manner prescribed by law in the particular jurisdiction.

Where the statute prescribes the method of levying execution on real estate or interests therein, the prescribed method must be followed in making a levy on this species of property.[14] In the absence of contrary statute, a levy on, or seizure of, real property under an execution may be legally made either by the officer going on the land and making it, or, without going on the premises, by simply indorsing a description of the property on the writ and stating that it is levied on for the purpose thereof,[15] with notice to the owner or person in possession, see § 104 infra; or by any act on the part of the officer showing an intent to sell the specific land and subject it to the satisfaction of the judgment,[16] although it has been held that the officer must take the property into his possession and custody and that mere notice of seizure is not sufficient.[17] In some jurisdictions, by force of statute, levying, with respect to property other than chattels, is carried out by registration;[18] but

9. Ind.—Nutter v. Fough, 86 Ind. 451.
23 C.J. p 446 note 85.
Selection of property by debtor generally see supra § 95 b (1).

10. Ind.—Drake v. Murphy, 42 Ind. 82.
23 C.J. p 446 note 86.

11. In Tennessee
(1) It has been held that if some of defendants have personal property liable to the satisfaction of the debt and others have not, it is the duty of the officer to proceed against the former, or either of them, until sufficient property is found to discharge the debt.—Hassell v. Southern Bank of Kentucky, 2 Head 381.
(2) But it has also been held that in an action involving the title of the purchaser, the objection cannot be made that all the personal property of all defendants in the execution had not been exhausted before levying on land.—Crowder v. Sims, 7 Humphr. 257.

12. U.S.—U. S. v. Drennen, D.C. Ark., 25 F.Cas.No.14,992, Hempst. 320.
23 C.J. p 446 note 88.

13. Mich.—In re Dissolution of Field Body Corporation, 215 N.W. 6, 240 Mich. 28.
Pa.—Lukac v. Morris, 7 Sch.Reg. 241.
23 C.J. p 446 note 89.

14. Ky.—Pinson v. Murphy, 295 S. W. 442, 220 Ky. 464.
R.I.—Romoli v. Motta, 194 A. 733, 59 R.I. 201.
23 C.J p 446 note 92.
Necessity for levy see supra § 91.

Execution in rem
Where proceeding and execution is against land itself and not against any one or his interest therein, and naming of person in execution is only to identify land, officer is under no duty to levy on property as that of named person or to specify his interest in property.—Clarke v. Mayor and Council of Millen, 200 S. E. 698, 187 Ga. 185.

15. Wis.—Hyman v. Landry, 116 N. W. 236, 135 Wis. 598, 128 Am.S.R. 1044.
23 C.J. p 446 note 92.
Necessity for, and sufficiency of, indorsement of writ see infra § 105.

16. Colo.—Jones v. Olson, 67 P. 349, 17 Colo.App. 144.
23 C.J. p 447 note 94.

17. La.—Morgan v. Johnson, 27 La. Ann. 539.
23 C.J. p 447 note 95.

This rule does not apply to the parish of Orleans.—Major v. Hewes, 65 So. 487, 135 La. 354.

18. N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 446 notes 92 [e], p 447, note 96

Object of such statutes is to prevent confusion and litigation concerning the levying of executions and the clouding of titles of real estate attempted to be levied on by giving notice to all persons concerned.—Romoli v. Motta, 194 A. 733, 59 R.I. 201.

Construction and operation of statutes
Statutes providing that officer in levying execution on realty shall file notice with recorder of deeds or clerk of town or city in which realty lies, and providing that such filing shall be sufficient levy on realty "described in said execution," are not repugnant to statute which prescribes form of writ of execution but does not provide for description of the realty to be levied on, since words "described in said execution" are to be construed as referring to description in copy of writ of execution filed with clerk or recorder; and under such statutes the better practice is for the officer to indorse on the original execution a description of the property levied on, so that the copy filed is an actual copy of the execution retained by him.—Romoli v. Motta, supra.

in other jurisdictions this is not necessary.[19]

Entry to take momentary seizin. An entry on the premises by the officer, or by the creditor accompanied by the officer, for the purpose of taking a momentary seizin and possession without actually evicting or dispossessing the debtor or his tenants is authorized and does not constitute a trespass.[20]

Special execution or order of sale. An execution or order of sale commanding the sale of real estate therein specifically described need not be levied; nor need the officer take possession of any part of the land, put up a notice thereon, or make proclamation thereon to the effect that he has made a levy.[21]

Excessive levy. Where an execution is levied on more land than the judgment debtor owns, or on more than his share in a certain tract of land, the levy is nevertheless valid for as much of the land as he does own, or for his share thereof.[22] Where a person owning a tract of land purchases an adjoining tract and makes it a part of the same farm, the whole may be levied on as one tract.[23]

b. Moiety of, or Interest in, Realty

A levy on a moiety of, or interest in, realty should be made in the manner prescribed by law in the particular jurisdiction.

According to the better doctrine a levy on all the debtor's right, title, and interest in real property is sufficient, where the officer is unable to determine the real interest of the judgment debtor in such property, such a levy being in legal effect a levy on the property itself.[24] The rule is laid down in some jurisdictions that, where a judgment debtor has exclusive ownership of a parcel or tract of land, a levy by a judgment creditor on a mere interest therein is invalid.[25] So, also, a levy on a portion thereof may be void.[26]

Interest of joint tenants or tenants in common. Where the statute prescribes the method of levying execution on the interest of the debtor in realty owned jointly with others, the prescribed method must be followed in making a levy on such interest.[27] Ordinarily, where there is a single tract or parcel of land owned by several in common or jointly, it is not proper to levy an execution against one of the cotenants or joint tenants by selecting and taking a part of the tract by metes and bounds, and seizing it as the debtor's share of the land, or to levy on the debtor's undivided interest in such portion; but the proper course is to levy on the debtor's interest in the whole tract,[28] and a levy on the whole tract will be valid as to the debtor's undivided part;[29] but a levy on a specific and defined portion of a larger tract has been supported as a levy on the debtor's interest in such portion.[30] If the property has been partitioned before judgment, the levy must be on the part set off to the debtor in severalty.[31]

Equity of redemption. In some jurisdictions, by statute, in the case of mortgaged realty, the execu-

Erroneous cancellation of recordation

Rule is proper proceeding to reinstate inscription erroneously canceled by sheriff.—Mulling v. Jones, 7 La.App. 184, affirmed 114 So. 725, 164 La. 894.

19. Cal.—Lehnhardt v. Jennings, 48 P. 56, 51 P. 195, 119 Cal. 192.
23 C.J. p 447 note 97.

20. Me.—Butterfield v. Haskins, 33 Me. 392.
23 C.J. p 447 note 98.

21. Neb.—Burkett v. Clark, 64 N. W. 1113, 46 Neb. 466.
23 C.J. p 447 note 99.

22. Ga.—Floyd v. Braswell, 166 S. E. 65, 45 Ga.App. 726.
23 C.J. p 449 note 24.
Excessive levy generally see infra § 107.

23. Ga.—Clark v. Chambers, 1 Pittsb. 222.

24. Tex.—Smith v. Crosby, 23 S.W. 10, 86 Tex. 15, 40 Am.S.R. 818.
23 C.J. p 447 note 1.

25. Kan.—De Jarnette v. Verner, 19 P. 666, 40 Kan. 224.

26. Me.—Jewett v. Whitney, 51 Me. 233.
23 C.J. p 448 note 3.

27. **Constructive seizure**

Where the debtor owns an undivided interest in land, service of notice of seizure on him is sufficient, actual seizure being impossible.—Martel v. Rovira, 8 La.App. 385.

Statute held inapplicable

Code 1931 § 11680, prescribing mode of levy of execution on property jointly owned applies only to levies on personalty and not to levies on realty.—Bankers Trust Co. v. Knee, 270 N.W. 438, 222 Iowa 988—Kalona Savings Bank v. Eash, 109 N.W. 887, 133 Iowa 190.

28. Me.—Swanton v. Crooker, 49 Me. 455.
23 C.J. p 448 note 7.

Effect of defective levy

A levy on the debtor's undivided interest in a portion only of a tract of land is invalid only as against a cotenant who objects, and will be considered valid until the cotenant has properly made his objection.—Godwin v. Gregg, 28 Me. 188, 48 Am. D. 489—23 C.J. p 448 note 10.

Levy on portion of whole interest

If the debtor has a certain undivided interest, it has been held that the levy should be on such proportion of the debtor's interest in the whole as the amount of the execution bears to the value of his interest throughout the whole.—Hinman v. Leavenworth, 2 Conn. 244 note.

Where dower assigned

Where a part of land held in common is assigned as dower, the reversion of the dower and the residue of the land may be regarded in some respects as separate tenancies in common, so that a creditor of one of the tenants may levy on the debtor's share in them, in different proportions, or on his share in only one of them.—Peabody v. Minot, 24 Pick., Mass., 329.

29. Me.—Glidden v. Philbrick, 56 Me. 222.
23 C.J. p 448 note 8.

30. Ohio.—Treon v. Emerick, 6 Ohio 391, following White v. Sayre, 2 Ohio 110.

31. Me.—Argyle v. Dwinel, 29 Me. 29.

tion creditor has the election to restrict his levy to the equity of redemption or to levy on the land;[32] but where the title of the debtor is changed by the extinguishment of the mortgage, from an equity of redemption to an absolute estate, the execution must be levied on the land, and not as on an equity of redemption.[33] In other jurisdictions, however, where the land sought to be subjected is encumbered by a mortgage, the equity of redemption should be levied on eo nomine, and a levy on the land does not operate to pass to the purchaser the equity of redemption.[34] It has been held that a levy on an equity of redemption in mortgaged premises, if on any portion less than the whole, must be on an aliquot portion of the whole and not on a part described by metes and bounds.[35]

Leasehold interest. Under statute in some jurisdictions, leasehold interests are to be seized and levied on as realty,[36] but in the absence of such a statute a leasehold interest in land is levied on and sold as a chattel,[37] but the sheriff is not required to exercise any dominion or control over it founded on an idea of a right to the possession.[38]

§ 102. —— Property Already Levied On

Where an officer holds property of a judgment debtor by virtue of a valid levy, the reception of a second writ of execution ordinarily operates as a constructive levy on all the property held by virtue of the first writ.

Where an officer has property of a judgment debtor in his possession by virtue of a valid levy, the reception of a second writ of execution operates as a constructive levy on all the property held by him by virtue of the first writ,[39] it ordinarily being sufficient, where indorsement is required, to indorse the levy on the second writ.[40] Where, however, the levy under the original writ in the hands of the officer is void, a constructive levy of subsequent execution made by indorsement will not bind the property against subsequent executions actually levied thereon.[41]

Levy by different officer. Since an officer holding a subsequent writ is not authorized to take property into his control to the exclusion of an officer in possession thereof by virtue of a prior writ, a notification by the officer holding a subsequent writ to the officer in possession, and the indorsement of the levy on the writ, constitutes a valid levy.[42]

Property previously attached. Where an execution creditor has a lien on property by virtue of a prior valid attachment thereof, the delivery of the execution to the proper officer constitutes a valid levy on such property,[43] but this rule does not apply where the previous attachment was invalid.[44] It has been held that the officer executing a writ of attachment is not, as a matter of right, entitled to levy the execution issued in the action, but it may be given to another officer for service.[45] Where the debtor fails to point out property to be levied on, the levying officer is not bound to seize property already under attachment for a larger amount than its value.[46]

§ 103. —— Successive or Additional Levies under Same Writ

An officer, notwithstanding a prior levy, is author-

32. Ala.—Gassenheimer v. Molton, 2 So. 652, 80 Ala. 521.
23 C.J. p 449 note 17.

33. Mass.—Mansfield v. Dyer, 133 Mass. 374.
23 C.J. p 449 note 18.

34. Ky.—Glazebrook v. Brandon, 8 Ky.L. 466, 11 Ky.Op. 355.
23 C.J. p 449 note 19.

35. Vt.—Swift v. Dean, 11 Vt. 323, 34 Am.D. 693.
23 C.J. p 449 note 20.

36. Wash.—Reilley v. Anderson, 73 P. 799, 33 Wash. 58.
23 C.J. p 337 note 76.

37. N.Y.—Henderson v. Tomb, 8 N.Y.S.2d 612, 169 Misc. 737.
23 C.J. p 338 note 77, p 449 note 22.

Where rent for term of lease was due and unpaid at time of purported seizure for benefit of judgment creditor of lessee, it was essential for seizure of lease to place lessee's seizing creditor in situation where lessor could demand payment of due and unpaid rent or cancellation.—McLemore v. Abell, 125 So. 601, 12 La.App. 147.

Mere notice to lessor that officer seized recorded lease for lessee's judgment creditors is not sufficient to divest lessee of his rights under lease.—McLemore v. Abell, supra.

38. Pa.—Titusville Novelty Iron Works' Appeal, 77 Pa. 103.

39. Ind.—Brown v. Loesch, 29 N.E. 450, 3 Ind.App. 145.
23 C.J. p 449 note 26.

But it has been held that a third fieri facias coming to an officer who has property of the debtor in his possession, under former execution, is not levied ipso facto by operation of law, but that there must be an actual, and not a mere constructive levy.—Scriba v. Deane, C.C.Va., 21 F.Cas.No.12,559, 1 Brock 166.

40. Ill.—Goodheart v. Bowen, 2 Ill.App. 578.
Mo.—State v. Curran, 45 Mo.App. 142.
Necessity for indorsement of levy generally see infra § 105.

41. Ohio.—Murphy v. Swadener, 33 Ohio St. 85.

42. N.C.—Penland v. Leatherwood, 8 S.E. 234, 101 N.C. 509, 9 Am.S.R. 38.
23 C.J. p 450 note 29.

43. Mo.—Smith v. Rogers, 73 S.W. 243, 99 Mo.App. 252.
23 C.J. p 450 note 30.

Property attached in another suit

Where property is in the hands of an officer by virtue of an attachment in another suit, the mere receipt of an execution and indorsement thereon of the time of its receipt does not operate as a constructive levy of the execution on such property.—Santa Fe Bank v. Haskell County Bank, 53 P. 132, 59 Kan. 354.

44. Vt.—Keniston v. Stevens, 29 A. 312, 66 Vt. 351.

45. Mass.—Beaulieu v. Clark, 96 N.E. 319, 210 Mass. 90.

46. La.—Wheeling Pottery Co. v. Levi, 19 So. 752, 48 La.Ann. 777.
Selection of property by debtor see supra § 95.

lzed, at any time before the return day, to make such further levies as may be necessary to satisfy the execution.

The rule is universally recognized that an officer, notwithstanding a prior levy, is authorized, at any time before the return day of the writ, to make such further levies on the property of the judgment debtor as may be necessary to satisfy the execution in his hands;[47] but an insufficient levy cannot be fortified by a levy made after the return of the execution.[48] A direction to levy on only a part of the debtor's property does not prevent a subsequent levy under the same writ on other property of the debtor.[49]

Where sufficient property is levied on. Where an officer has once levied on the property of the debtor, sufficient to satisfy the execution, he cannot make a second levy, but must pursue the first levy until it has been disposed of, and until it is satisfactorily shown that the first levy is unavailing.[50] This is the rule, at least, as to a levy on personal property,[51] although the general rule as to land is that a levy thereon, of whatever value, while undisposed of, does not operate as a bar to subsequent attempts to enforce the collection of the judgment;[52] but in some jurisdictions no distinction is made between realty and personalty, and until an apparently sufficient levy whether on land or personal property is disposed of, a second or further levy cannot be made.[53] However, even as to personal property, the satisfaction is prima facie only, and the sheriff has a large discretion in determining whether a second levy may be made, because the sufficiency of the property first taken cannot be ascertained with certainty until the sale.[54] So also if the first levy is unproductive, for example, if the property is restored to the debtor and the levy is raised, the officer is authorized to make an additional levy.[55]

Property of joint defendants. Where an execution issues on a judgment against two or more joint defendants, or a principal and surety, and the execution is levied on the property of one of defendants or the principal, but nothing is realized under such levy, the fact of the former levy will not invalidate a subsequent levy on and sale of the property of the other codefendant or surety;[56] but it has been held that where there are two joint debtors and a levy has been made on sufficient property of one of them, the levy cannot be countermanded for the purpose of levying for the whole debt on the individual property of the other debtor.[57]

§ 104. —— Notice of Levy

Where the statute so provides a judgment debtor is entitled to notice of a levy on his property.

In some jurisdictions the judgment debtor is by statutory enactment entitled to notice of levy on his property, at least if land is levied on;[58] but in other jurisdictions such notice is not required.[59]

47. Ill.—Everingham v. Ottawa Nat. City Bank, 17 N.E. 26, 124 Ill. 527.
23 C.J. p 450 note 36.
Abandonment of levy and re-levy see infra § 111.
Alias and pluries writs see supra § 85.

48. N.J.—Canfield v. Browning, 55 A. 101, 69 N.J.Law 553.

49. N.J.—Moses v. Thomas, 26 N.J.Law 124, affirmed 26 N.J.Law 570.

50. Ind.—Lindley v. Kelley, 42 Ind. 294.
23 C.J. p 450 note 39.
Levy as satisfaction of judgment see the C.J.S. title Judgments § 573, also 34 C.J. p 717 note 48–p 719 note 73.

51. Ill.—Harris v. Evans, 81 Ill. 419.
23 C.J. p 450 note 40.

52. S.D.—Wood v. Conrad, 50 N.W. 903, 2 S.D. 405.
23 C.J. p 451 note 41.

53. Ind.—Neff v. Hagaman, 78 Ind. 57.
23 C.J. p 451 note 42.

54. N.Y.—Denvrey v. Fox, 22 Barb. 522.
23 C.J. p 451 note 43.

55. N.C.—Douglas v. Mitchell, 7 N. C. 239.
23 C.J. p 451 note 44.

56. Ind.—Starry v. Johnson, 32 Ind. 438.
23 C.J. p 451 note 45.

57. N.Y.—McChain v. McKeon, 9 N. Y.Super. 645.

58. La.—Fidelity & Casualty Co. of New York v. General Motors Acceptance Corporation, App., 152 So. 692—Martel v. Rovira, 8 La.App. 385—Childers v. Adair, 5 La.App. 212.
23 C.J. p 451 note 48.
Notice before levy see supra § 95.
Notice of levy on choses in action and corporate stock see supra §§ 98, 99.
Notice of sale see infra § 211.

Notice to person in possession

(1) In some jurisdictions, by virtue of statute, written notice of a levy on land should be given to the tenant, if any, in possession of the land.—Clark v. C. T. H. Corporation, 184 S.E. 592, 151 Ga. 710—Mulling v. Bank of Cobbtown, 135 S.E. 222, 36 Ga.App. 55.

(2) If the judgment debtor is in possession of the land levied on, notice of levy should be given to him. —Haynes v. Arnold, 114 S.E. 360, 154 Ga. 377.

(3) Notice to third person in possession of debtor's personalty see supra § 97 b (8).

Renewal of notice

Change of date of execution sale does not necessitate issuance of new notice of seizure.—Austin v. Currie, 134 So. 723, 16 La.App. 375.

Defects in notice of seizure which do not mislead the persons involved are not necessarily fatal to the seizure.—Concordia Oil & Gas Co. v. Keenan, La.App., 153 So. 549.

59. Md.—State v. Boulden, 57 Md. 314.
23 C.J. p 451 note 50.

In North Dakota the law does not require the service of a notice of levy of execution on real estate, on the judgment debtor, although that practice is usually followed. Even if such notice were required, it would be sufficient if it complied with Comp.L.1913 § 7549, relating to the levy of attachments, which merely requires a description of the property levied on.—Finch, Van

The statutory provisions as to such notice vary in the different states, notice of the levy being required, under some statutes, only where the property sought to be levied on is situated in a county other than that of the residence of the judgment debtor, or than that from which the execution issued;[60] and under other statutes, only when the judgment debtor is in actual occupation and possession of the property;[61] and under still others, where the officer levies on property of joint debtors in the possession of one of them, notice of the levy must be given to the other joint debtors.[62] One to whom the debtor has made a fraudulent conveyance of his land, however, is not entitled to notice.[63]

Effect of failure to give notice. The better doctrine is that the failure of the officer to give due notice of the levy to the judgment debtor, or his tenant in possession, where so required by statute, is a mere irregularity and does not render the sale made thereunder void;[64] but there are authorities to the effect that such a sale is invalid,[65] and that a debtor not served with such notice is not affected by proceedings to obtain a forced sale.[66]

Service. Under statutes requiring service of notice of the levy on the judgment debtor, it has been usually held that this service must be on the judgment debtor personally, or his authorized agent.[67] It is not sufficient to serve it on a tenant residing on the premises,[68] unless the debtor resides out of the state;[69] or to serve it on the debtor's attorney, if the debtor himself is within the state.[70]

Waiver. The statutory notice required to be given to the judgment debtor is for his benefit exclusively, and may be waived by him without prejudicing the rights of a purchaser or vitiating his title.[71] Waiver of notice on the part of the judgment debtor will be presumed from various acts, such as the execution of a forthcoming bond,[72] appearance in person or by agent at the sale and bidding on the property,[73] or the voluntary pointing out of property for levy.[74]

§ 105. —— Entry or Indorsement of Levy

a. In general
b. Time of indorsement
c. Formal requisites
d. Contents
e. Amendment
f. Construction
g. Conclusiveness

a. In General

In some jurisdictions an indorsement of the levy on the writ is essential to perfect the levy.

In making a levy, it is usual for the officer to indorse his levy on the writ, which indorsement does not constitute a levy, but is merely evidence of it.[75] An indorsement of the levy is highly proper and is to be recommended in all cases, whether it is actually necessary or not;[76] and in a number of jurisdictions, sometimes by force of statute, it is essential to a levy on land that the sheriff should make an indorsement of his levy,[77] although it has been held that an omission of such indorsement may be cured by the return.[78] In other ju-

Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.

60. Mo.—Harness v. Cravens, 28 S. W. 971, 126 Mo. 233.
23 C.J. p 451 note 52.

61. Tenn.—Cooper v. Cooper, 124 S. W.2d 264, 22 Tenn.App. 473.
23 C.J. p 451 note 53.

62. Ky.—Williams v. Smith, 4 Bush 540—Payne v. Pollard, 3 Bush 127.

63. Tenn.—Cooper v. Cooper, 124 S. W.2d 264, 22 Tenn.App. 473.

64. Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209—Clark v. C. T. H. Corporation, 184 S.E. 592, 181 Ga. 710—Mulling v. Bank of Cobbtown, 135 S.E. 222, 36 Ga. App. 55.
23 C.J. p 452 note 55.

65. Ky.—Williams v. Smith, 4 Bush 540—Payne v. Pollard, 3 Bush 127.

66. La.—Graff v. Maylan, 28 La. Ann. 75.

67. La.—Fidelity & Casualty Co. of New York v. General Motors Acceptance Corporation, App., 152 So. 692.
23 C.J. p 452 note 58.

68. Tenn.—Lafferty v. Conn, 3 Sneed 221.
23 C.J. p 452 note 59.

69. Pa.—Evans v. Sidwell, 9 Lanc. Bar 113.

70. La.—Lockhart v. Harrell, 6 La. Ann. 530.

71. La.—McDonogh v. Garland, 7 La.Ann. 143—Lockhart v. Harrell, 6 La.Ann. 530.

72. Ky.—Williams v. Smith, 4 Bush 540.

73. La.—Walker v. Allen, 19 La. 307.

74. La.—Hewitt v. Stephens, 5 La. Ann. 640.

75. Ga.—Ayers v. State, 59 S.E. 924, 3 Ga.App. 305.
23 C.J. p 452 note 67.

76. Mich.—Vroman v. Thompson, 16 N.W. 808, 51 Mich. 452.
23 C.J. p 452 note 68.

77. Iowa.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.
23 C.J. p 452 note 68.

Legalizing act

That there was a failure to comply with statutory provisions in reference to indorsement of levy on execution did not render execution invalid, in view of act legalizing all prior execution sales in which execution officer had failed to make entries.—Nelson v. Hayes, 269 N.W. 861, 222 Iowa 701.

Burden of proof

Objecting party has burden to affirmatively establish officer's failure to comply with statute requiring indorsements on execution.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., v. Block, 249 N.W. 395, 216 Iowa 401.

78. Colo.—Herr v. Broadwell, 39 P. 70, 5 Colo.App. 467.
23 C.J. p 452 note 69.

risdictions, however, it has been held unnecessary in levying on realty to indorse the levy.[79]

Levy on chattels. In some jurisdictions, sometimes by force of statute, it is necessary to indorse on the writ a levy on chattels,[80] but in other jurisdictions this is not required to perfect the levy.[81]

b. Time of Indorsement

In the absence of contrary statute an indorsement of the levy may be made at any time before the return day of the writ.

Although it is necessary in some jurisdictions, under statutes so providing, that an indorsement of the levy should be made on the writ at the time the levy is made,[82] the general rule, in the absence of contrary statute, is that the indorsement may be made at any time before the return day of the writ.[83] It has been held that an indorsement after the return day, considered as the levy and not the mere evidence thereof, is insufficient.[84]

c. Formal Requisites

The levy of execution may be indorsed on the writ itself or on a paper attached thereto; and it is the better practice for the officer to sign the entry.

The levy of execution may be indorsed on the writ itself[85] or on a separate piece of paper attached thereto.[86] It is insufficient, however, to indorse the levy in a book or on a loose sheet of paper;[87] but the officer may make a memorandum of his levy on a separate piece of paper, and thereafter, before the return of the writ, copy the memorandum on the writ.[88]

Signature. It is the better practice for the officer to sign the entry;[89] but it has been held that the indorsement need not be signed separately from the return,[90] and that, in the absence of express statutory provision, the omission of the signature of the officer from his indorsement made on the writ is a mere irregularity and not fatal to the levy, and the officer may amend the indorsement by adding his signature thereafter.[91]

d. Contents

(1) In general
(2) Description of property
(3) Statement as to ownership and interest

(1) In General

In indorsing his levy on the writ the officer should state what was done by him in making it.

In indorsing his levy on the writ the officer should state what was done by him in making it.[92] It is not necessary, however, that he should use

79. Mich.—Vroman v. Thompson, 16 N.W. 808, 51 Mich. 452.
23 C.J. p 452 note 70.

80. Iowa.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., v. Block, 249 N.W. 395, 216 Iowa 401—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.
23 C.J. p 453 note 71.

81. **In Pennsylvania** the sheriff is not required to indorse on a writ of fieri facias a schedule of the personal property levied on.—Weidensaul v. Reynolds, 49 Pa. 73—Colvin v. Crown Coal & Coke Co., 90 Pa. Super. 560.

82. Iowa.—Nelson v. Hayes, 269 N. W. 861, 222 Iowa 701—Richardson v. Rusk, 245 N.W. 770, 215 Iowa 470—Cramer v. McDonald, 239 N. W. 101, 213 Iowa 454.

Delay of six days
Officer's return not indorsed on or appended to execution six days after alleged levy was not "indorsed at time of act" within statute.—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.

Presumption
Where the date of levy is recited in the indorsement, the presumption, in the absence of evidence to the contrary, is that the officer made the indorsement on the date when the levy was made.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis. v. Block, 249 N.W. 395, 216 Iowa 401—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84.

83. Mo.—Duncan v. Matney, 29 Mo. 368, 77 Am.D. 575.
23 C.J. p 453 note 73.

84. N.C.—Barden v. McKinne, 11 N. C. 279, 15 Am.D. 519.
23 C.J. p 453 note 74.

85. N.J.—Scott v. Wuest, 122 A. 241, 98 N.J.Law 572.

86. N.J.—Scott v. Wuest, supra.
23 C.J. p 453 note 79.

87. N.C.—Dickson v. Peppers, 29 N. C. 429.
23 C.J. p 453 note 77.

Entry on encumbrance book in clerk's office is insufficient.—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84.

88. Mo.—Duncan v. Matney, 29 Mo. 368, 77 Am.D. 575.

89. Ga.—Cooney v. Atlanta, 70 S.E. 950, 136 Ga. 116.
23 C.J. p 457 note 25.

Signature by deputy
Levy on farm held valid where complete return had been signed by sheriff, although entry as to receipt of execution and levy was irregular in so far as signature was made by deputy sheriff in his own name instead of in name of sheriff by deputy.—Nelson v. Hayes, 269 N.W. 861, 222 Iowa 701.

90. Iowa.—Nelson v. Hayes, supra.
Tex.—Miller v. Alexander, 13 Tex. 497, 65 Am.D. 73.

91. Ga.—Sharp v. Kennedy, 50 Ga. 208.
23 C.J. p 458 note 27.

92. Iowa.—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.
Contents of return generally see infra § 321.

Notice of levy
(1) It has been held that an attempted levy on corporate stock is void where the entry does not show service of notice of levy on the proper corporate officers as required by statute.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454.

(2) But it has also been held that the entry need not state that notice of the levy was given to the party in possession, even though such notice is required by statute.—Keaton v. Farkas, 70 S.E. 1110, 136 Ga. 188—

technical precision in describing the acts performed, and it is sufficient if it appear, by reasonable construction, that everything necessary to constitute a valid levy has been performed;[93] but the fact of a levy must be stated in positive terms, and cannot be left to implication.[94] Whether the indorsement shows a sufficient levy is a question of law for the court.[95]

Time of seizure. It is not necessary that the time of the seizure should be mentioned[96] unless required by statute.[97] If the month and year are stated the omission of the day has been held not fatal.[98] The dating of a levy before the date of the issuance of the execution, being an evident clerical mistake, will not vitiate the levy.[99]

Time of entry. Generally the date on which the entry is made need not be stated.[1]

Place of levy. Unless required by statute, it is not necessary to state where the levy was made.[2]

(2) Description of Property
- (a) In general
- (b) Description of land
- (c) Description of personal property

(a) In General

Statutory requirements as to description of the property levied on must be substantially complied with in indorsing a levy.

Statutes prescribing the manner in which property levied on shall be described in an indorsement of the levy must be substantially complied with.[3]

(b) Description of Land
- aa. In general
- bb. Aider by, or reference to, other instruments

aa. In General

Land levied on should be properly described in the indorsement of the levy.

Although the sheriff need not have the premises surveyed,[4] yet the premises levied on should be properly described in the indorsement of the levy, and it is not sufficient merely to indorse the fact of a levy.[5] While the facts of the particular case largely govern the decisions holding certain descriptions of land sufficiently definite and certain,[6] as well as those holding the descriptions insufficient,[7] the governing rule is that the premises must be described with sufficient particularity and distinctness to enable a purchaser to know what he is buying, and to enable the officer to put the purchaser into possession of the right property,[8] but technical accuracy or great particularity is not required.[9] The description is sufficient if it enables one to locate the property and identify it when found.[10] The description need not be as accurate as where lands are sold for taxes,[11] or as is employed in a deed or conveyance,[12] but it is sufficient if it would have passed title in an ordinary deed.[13] A defective description of certain tracts of land indorsed on the writ will not vitiate the levy with regard to such tracts as are fully and properly described in the indorsement.[14] A party may be estopped from questioning the sufficiency of the description in the levy.[15]

Hopson v. Stuart Lumber Co., 95 S. E. 1015, 22 Ga App. 392.

93. Conn.—Bissell v. Nooney, 33 Conn. 411.

94. U.S.—Scriba v. Deanes, C.C.Va., 21 F.Cas No.12,559, 1 Brock. 166.

95. S.C.—Tyler v. Williams, 31 S.E. 298, 53 S.C. 367.

96. Ky.—Scott v. Scott, 3 S.W. 598, 5 S.W. 423, 85 Ky. 385, 9 Ky.L. 363.
23 C.J. p 453 note 81.

97. Iowa.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis. v. Block, 249 N.W. 395, 216 Iowa 401—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84.
23 C.J. p 453 note 82.

98. Ga.—Solomon v. Harp, 25 S.E. 402, 99 Ga. 238.

99. Ga.—Jones v. Williams, 151 S. E. 695, 696, 40 Ga.App. 819, citing **Corpus Juris.**
Mo.—Porter v. Mariner, 50 Mo. 364.

1. Iowa.—Ebinger v. Wahrer, 238 N. W. 587, 213 Iowa 84.

2. Pa.—Horning v. Harnish, 15 Pa. Dist. 70.

3. N.C.—Chasteen v. Phillips, 49 N. C. 459, 69 Am D. 760.
23 C.J. p 453 notes 87, 88, p 454 note 89.

4. S.C.—Cain v. Maples, 19 S.C.L. 304, 26 Am.D. 184.
23 C.J. p 454 note 90.

5. Ga.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.
N.J.—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.
23 C.J. p 454 note 91.

6. Ga.—Terrell v. Gould, 148 S.E. 515, 168 Ga. 607—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.
23 C.J. p 454 note 92.

7. U.S.—In re Brinn, D.C.Ga., 262 F. 527.
23 C.J. p 454 note 93.

8. Ga.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.
23 C.J. p 454 note 94.

9. N.J.—Wills v. McKinney, 41 N. J.Law 120.
23 C.J. p 455 note 95.

10. Ga.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.
23 C.J. p 455 note 96.

11. Iowa.—McCormick v. McCormick Harvesting Mach. Co., 95 N. W. 181, 120 Iowa 593.

12. Pa.—Inman v. Kutz, 10 Watts 90.
23 C.J. p 455 note 98.

13. Iowa.—McCormick v. McCormick Harvesting Mach. Co., 95 N. W. 181, 120 Iowa 593.
Ky.—Taylor & Crate v. Asher, 4 S. W.2d 385, 223 Ky. 574.

14. Vt.—Cleveland v. Allen, 4 Vt. 176.

15. Ga.—Stinson v. Hirsch, 53 S.E. 1011, 125 Ga. 149.
23 C.J. p 455 note 2.
Waiver and estoppel generally see infra § 108.

Less particularity required than in case of extent. Where a levy is made on land, to be followed afterward by a sale, such great strictness is not required in describing the premises as is necessary where land is extended, because the object of the extent is to pass the title.[16]

Repugnant and false description. The court will, if necessary to make the description certain, reject or reform so much of it as is repugnant or false.[17]

Quantity of land taken. Although the quantity of land is looked to, as it is in construing a deed, yet a mere statement as to the quantity of land taken, and its ownership, is too vague and uncertain.[18]

Metes and bounds. It is in general sufficient to describe land by metes and bounds; for example, to state that the land adjoins that of named persons, or that it is situated on a watercourse, etc.[19] When some particulars of a boundary line of land levied on are erroneously recited in the indorsement on the writ, and yet from the whole description the premises levied on can be definitely ascertained, the levy is valid.[20]

Legal subdivisions. Where land has been platted, the better description, if not the necessary one, is by reference to the plat, stating the number of the lot and block as given on the plat, together with such other descriptive facts as may be necessary to identify it.[21]

Description applicable to more than one tract. A levy which contains a description applicable to more than one piece of land is insufficient;[22] and where a levy is made on a portion of a tract of land, which tract of land is properly described, the levy is insufficient if the particular portion of the tract is not specifically described.[23]

bb. Aider by, or Reference to, Other Instruments

Land levied on may be described in the indorsement of the levy by reference to writings of record accurately describing it. A defective description in the indorsement may sometimes be cured by a proper description in a claim affidavit or the sheriff's deed.

It is not necessary that land levied on should be described in the indorsement of the levy by metes and bounds, and it is sufficient to describe it by reference to deeds or other writings of record in which the land is accurately described;[24] but the levy cannot be aided by a reference made in the levy to the newspaper advertisement of the sale.[25]

Claim affidavit. A defect in the levy may be cured by recitals in the claim affidavit.[26]

Sheriff's deed. The purchaser's title does not rest on the levy alone, but also on the sheriff's deed, and the latter instrument may sometimes be relied on to cure defects in the levy,[27] although there is authority to the contrary.[28] In any event, where the description in the sheriff's deed is indefinite and unreliable, or inconsistent with or repugnant to the levy, it cannot aid a defective description in the levy.[29]

(c) Description of Personal Property

Personal property levied on should be described in the indorsement of the levy with particularity and distinctness.

Personal property levied on should be described in the indorsement of the levy with particularity and distinctness.[30]

(3) Statement as to Ownership and Interest

Generally an entry of a levy on land should show whose land was levied on, particularly where the execution is against several defendants; and where a levy

16. N.H.—Howard v. Daniels, 2 N. H. 137.
17. Ga.—Burson v. Shields, 129 S. E. 22, 160 Ga. 723.
23 C.J. p 455 note 4.
18. Ga.—Collins v. Dixon, 72 Ga. 475.
23 C.J. p 455 note 5.
19. Ga.—Burson v. Shields, 129 S. E. 22, 160 Ga. 723.
23 C.J. p 455 note 6.
20. Ga.—Burson v. Shields, supra.
23 C.J. p 456 note 7.
21. Ga.—Young v. Germania Sav. Bank, 64 S.E. 552, 132 Ga. 490.
23 C.J. p 456 note 8.
22. Ga.—Miller v. Brooks, 47 S.E. 646, 120 Ga. 232.
23 C.J. p 456 note 9.
23. U.S.—Gault v. Woodbridge, C. C.Ohio, 10 F.Cas.No.5,275, 4 McLean 329.
23 C.J. p 456 note 10.
24. Ky.—Taylor & Crate v. Asher, 4 S.W.2d 385, 387, 223 Ky. 574, citing **Corpus Juris.**
Tex.—Gutierrez v. Rodriguez, Civ. App., 137 S.W.2d 220.
23 C.J. p 456 note 11.
25. Tenn.—Taylor v. Cozart, 4 Humphr. 433, 40 Am.D. 655.
23 C.J. p 456 note 12.
26. Ga.—Shelton v. Shelton, 68 S. E. 481, 134 Ga. 681.
23 C.J. p 456 note 13.
27. Tex.—Downs v. Wagnon, Civ. App., 66 S.W.2d 777, error dismissed.
23 C.J. p 456 note 14.
28. **Reason for rule**
Where levy on land is void for lack of proper description, defect cannot be cured by proper description in deed made by sheriff in sale under levy, because deed would not conform to levy.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723—Brown v. Moughon, 70 Ga. 756.
29. Ohio.—Throckmorton v. Moon, 10 Ohio 42.
Tenn.—Helms v. Alexander, 10 Humphr. 44.
30. Ga.—Crawford v. State, 90 S.E. 1043, 19 Ga.App. 97.
23 C.J. p 457 note 24.

Is made on property in which third persons are interested the entry should specify the interest levied on.

In levying an execution against a sole defendant, it is not necessary to state in the indorsement of the levy the ownership of the property seized since it is to be assumed that the officer pursued the authority given him, and levied on no other land than that belonging to the debtor; but it is the better practice to state that the property was levied on as the property of the judgment debtor,[31] and if the property stands in the name of another it may be described as the property of the debtor,[32] and need not be described as fraudulently standing in the name of such other.[33] Where the execution is against several defendants, the entry of levy must show whose land was levied on.[34]

Defendant's interest in the land taken. A levy on a tract of land generally, without stating the debtor's interest therein, embraces whatever interest the debtor has in it, unless there is something in the levy restricting it to a particular part or share of the land,[35] and is ordinarily sufficient as a levy on a fee simple in the land.[36] However, a levy on property in which others besides defendant are interested should specify the interest levied on,[37] unless such fact appears from other recitals in the writ.[38]

e. Amendment

An indorsement of a levy may be amended in a proper case.

While an execution is still in the hands of the officer, and before it has been returned, the officer may amend his entry of levy without leave of court;[39] but such an amendment cannot be made without leave of court by the officer after the expiration of his term of office,[40] nor can it be made by the officer's successor.[41] After the return, notice to plaintiff and leave of court is usually necessary,[42] but the court, on proper motion, will usually allow such amendment to be made nunc pro tunc,[43] and it has been held that an amendment may be made on the court's own motion.[44] For any vagueness, uncertainty, or defects of description in the levy, the proper remedy is to apply to the court for leave to have the levy amended.[45]

f. Construction

General rules of construction apply to the construction of an entry of levy.

The rules and principles governing the construction of an ordinary deed of conveyance are applicable to the interpretation of a description contained in a levy.[46] The various indorsements on the writ are to be construed together.[47] Where the language is capable of two meanings, the construction most favorable to the purchaser will be

31. Ga.—Faircloth v. Taylor, 95 S. E. 689, 147 Ga. 787.
23 C.J. p 456 note 16.

Particular entries held sufficient
(1) Recital by levying officer in entry of levy that property was levied on according to law is equivalent to allegation that property levied on belonged to defendant in execution, since all public officers are presumed to perform their duties according to law.—Bennett v. Barr, 176 S.E. 681, 49 Ga.App. 831.

(2) The entry of levy on execution dated and signed by sheriff, which stated "I have this day executed the within fi. fa. by levying upon the within described property. Tenant in possession notified," was sufficient levy on land as property of defendant in execution under general judgment and execution.—Dwight v. Acme Lumber & Supply Co., 6 S.E. 2d 586, 189 Ga. 473.

32. Mass.—Clark v. Chamberlain, 13 Allen 257.
23 C.J. p 457 note 17.

33. Mass.—Berry v. Gates, 56 N.E. 581, 175 Mass. 373.

34. Ga.—Clark v. C. T. H. Corporation, 184 S.E. 592, 181 Ga. 710.
23 C.J. p 457 note 19.

Failure to designate proper owner
Where sheriff's deed declared that land was sold as property of F, but levy on fieri facias described tract as property of J, and there was no entry of levy as property of F, sheriff's deed, under Civ.Code 1910 § 6026, was insufficient to divest title of owner and convey it to grantee named in deed.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.

35. Pa.—Inman v. Kutz, 10 Watts 90.
23 C.J. p 457 note 20.

36. Ga.—Clark v. C. T. H. Corporation, 184 S.E. 592, 181 Ga. 710.
23 C.J. p 457 note 21.

37. Ga.—Clark v. C. T. H. Corporation, supra.
23 C.J. p 457 note 22, p 448 note 11.

Specification sufficient
Levy, on "one-fifth undivided interest in" land was held not void for insufficient description of debtor's interest therein, although not mentioning outstanding life estate.—Floyd v. Braswell, 166 S.E. 65, 45 Ga.App. 726.

38. Ga.—Thornton v. Ferguson, 67 S.E. 97, 133 Ga. 825, 134 Am.S.R. 226.
23 C.J. p 457 note 23.

39. Ga.—Manley v. McKenzie, 57 S. E. 705, 128 Ga. 347.
23 C.J. p 458 note 28.

40. Ga.—Manley v. McKenzie, supra.

41. Ga.—Hudspeth v. Scarborough, 69 Ga. 777.
23 C.J. p 458 note 30.

42. N.J.—Wills v. McKinney, 41 N. J.Law 120.

43. Ga.—Dorminey v. De Lang, 61 S.E. 475, 130 Ga. 618, 124 Am.S.R. 193.
23 C.J. p 458 note 32.

Leave to amend is properly refused where too much time has elapsed between the time of levy and the offer to amend, especially where the rights of third persons are involved.—Cramer v. McDonald, 239 N.W. 101, 213 Iowa 454.

44. Ga.—Hollis v. Rodgers, 31 S.E. 783, 106 Ga. 13.

45. Pa.—Donaldson v. Danville Bank, 20 Pa. 245.

46. Mass.—Baker v. Baker, 125 Mass. 7.
23 C.J. p 458 note 35.

47. Ky.—Scott v. Scott, 8 S.W. 598, 5 S.W. 423, 85 Ky. 385, 9 Ky.L. 363.

adopted,[48] as will also a construction making the levy and sale regular and valid.[49]

g. Conclusiveness

An indorsement of levy is prima facie evidence of the levy therein recited, and cannot be contradicted by plaintiff or the officer.

An indorsement of a levy made on the writ of execution by the officer is prima facie evidence of the levy therein recited,[50] and cannot be contradicted by plaintiff or the officer.[51] The levy is conclusive as to the right or interest in the property taken, and the sheriff cannot sell, nor can the purchaser acquire, any greater estate than that embraced in the levy.[52]

§ 106. —— Inventory and Appraisement

a. Inventory
b. Appraisement

a. Inventory

It is sometimes required that an officer levying on personal property shall make an inventory of the personalty levied on.

The rule is laid down in some of the cases that it is the duty of the officer levying on personal property of a judgment debtor to make an inventory of the goods and chattels levied on.[53] However, unless otherwise provided by statute,[54] the failure of the officer to make an inventory of the goods levied on will not invalidate the levy, but will only render the officer liable for any damages resulting from his failure to perform his duty.[55] An officer who has levied on a sealed parcel or locked box may open the parcel or box to inventory the contents.[56]

Where part of property is exempt. The rule has been laid down that in levying on property of a judgment debtor, of which a certain amount is exempt by statute, failure to make the inventory required by statute, and to allow the judgment debtor to select from the property the amount so exempted, will invalidate the levy;[57] but where none of the property levied on is included in the statutory exemption a failure of the officer to make an inventory will not invalidate the levy.[58]

b. Appraisement

(1) In general
(2) Waiver
(3) Notice
(4) Selection of appraisers
(5) Proceedings of appraisers
(6) Setting aside appraisement
(7) Second appraisement
(8) Compensation of appraisers

(1) In General

Where the statute so requires, an appraisement of the property levied on must be made after the levy and before sale.

In some states, statutes provide for an appraisement of the property levied on, after the levy and before sale. The purpose of such appraisement is to prevent a sale for an amount out of proportion to the real value of the property levied on,[59] to protect the debtor's right of redemption,[60] and to inform the officer as to the sufficiency of the property levied on to satisfy the judgment.[61]

Real property. No appraisement of real estate sold on execution is necessary,[62] except in those

48. Pa.—Inman v. Kutz, 10 Watts 90.

49. Ga.—Griffin v. Wise, 41 S.E. 1003, 115 Ga. 610.

50. N.Y.—Cornell v. Cook, 7 Cow. 310.

51. Pa.—Hill v. Grant, 49 Pa. 200.
S.C.—Lawrence v. Wofford, 17 S.C. 586.

52. Ga.—Parler v. Johnson, 7 S.E. 317, 81 Ga. 254.
23 C.J. p 458 note 41.

53. Tex.—Mara v. Branch, Civ.App., 135 S.W. 661.
23 C.J. p 458 note 42.

Levy on judgment debtor's interest in decedent's estate was held not void because it did not inventory property where there was no specific property allocated to debtor.—Thermoid Rubber Co. v. Dixon, 168 A. 646, 111 N.J.Law 355.

54. Del.—Farmers' Bank v. Massey, 1 Del. 186.

55. Tex.—Mara v. Branch, Civ.App., 135 S.W. 661.
23 C.J. p 458 note 44.

In New Jersey

(1) If the officer takes actual possession of the debtor's chattels, or places a keeper in possession, it will amount to a valid levy, even though no inventory be taken.—Delaney v. Martin, 16 A. 189, 51 N.J.Law 148.

(2) But an inventory is necessary to support a levy resting on constructive seizure only.—Delaney v. Martin, supra—Nelson v. Van Gazelle Valve Mfg. Co., 17 A. 943, 45 N.J.Eq. 594.

56. R.I.—Tillinghast v. Johnson, 82 A. 788, 34 R.I. 136, 41 L.R.A.,N.S., 764, Ann.Cas.1914A 960.

57. Mich.—Town v. Elmore, 38 Mich. 305.

Time

The inventory need only be made within a reasonable time after the levy.—Tullis v. Orthwein, 5 Minn. 377.

58. Mich.—Ferguson v. Washer, 13 N.W. 788, 49 Mich. 390

59. Kan.—Lemen v. Kansas Flour Mills Co., 251 P. 427, 122 Kan. 114, rehearing denied 253 P. 547, 122 Kan. 574.
Inadequacy of price on sale see infra § 233.

60. Ky.—Mullins v. Robinson, 9 S.W.2d 988, 225 Ky. 648.

61. Kan.—Lemen v. Kansas Flour Mills Co., 251 P. 427, 122 Kan. 114, rehearing denied 253 P. 547, 122 Kan. 574.

62. **In Kansas**

(1) Under the statutes as they existed prior to 1893, an appraisement of realty sold on execution was necessary.—Lemen v. Kansas Flour Mills Co., supra—23 C.J. p 459 note 53.

states where the statute requires it, in which case of course an appraisement is necessary,[63] unless where, pursuant to statute, judgment is rendered to be executed without any relief from appraisement laws;[64] and it is generally held that a sale without appraisement, where the statute requires an appraisement, is void, unless the judgment under which the execution issues so directs.[65] Under some statutes, however, real estate which the debtor has conveyed or caused to be conveyed, with intent to defraud his creditors, may be sold under execution without an appraisement, although the original judgment and execution did not so provide.[66]

In some jurisdictions an appraisement of the rental value of real estate levied on is necessary. Thus under the statutes in Pennsylvania it is generally the duty of the sheriff after levying on any real estate to summon an inquest of six men for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy, within seven years, the judgment on which the execution is issued;[67] and a sale without an inquisition and condemnation, when required by statute, is voidable unless the record shows a waiver of the right of inquisition,[68] although it has been held that if defendant does not object to the sale he is estopped from alleging a want of inquisition as against a bona fide purchaser.[69] Where an appraisement or inquisition is required, it must be had, even though the land is mortgaged,[70] or is held adversely.[71]

Personal property. In some states, by force of statute, personal property levied on and advertised for sale on execution must be duly appraised before sale.[72]

(2) But since the repeal in 1893 of the statutory requirement of appraisal no appraisal is necessary in the case of land sold under an ordinary execution.—Lemen v. Kansas Flour Mills Co., supra—23 C.J. p 459 note 53.

(3) Under a statute so providing, however, an appraisal is required where a writ is issued directing the sale of property previously taken in execution and requiring the officer to make a further levy if that already taken is, in his opinion, insufficient to satisfy the judgment.—Lemen v. Kansas Flour Mills Co., supra

(4) But this statute applies only to writs of the character therein described and not to ordinary executions.—Lemen v. Kansas Flour Mills Co., supra.

(5) Certain provisions of the earlier statutes relating to appraisement of real estate which were not repealed became inoperative because of the repeal in 1893 of the section requiring such appraisal, and their reënactment without change in the course of subsequent revisions of the code and the general statutes did not change their status.—Lemen v. Kansas Flour Mills Co., supra.

In Nebraska

(1) Under existing statutes no appraisal of real estate sold on execution is necessary.—Conservative Savings & Loan Ass'n of Omaha v. Anderson, 218 N.W. 423, 116 Neb. 627.

(2) Formerly the contrary was held under statutory provisions which were later repealed.—Reuland v. Waugh, 72 N.W. 481, 52 Neb. 358. 23 C.J. p 459 note 54.

63. Ky.—Mullins v. Robinson, 9 S. W.2d 988, 225 Ky. 643.
La.—Austin v. Currie, 134 So. 723, 16 La.App. 375.
Okl.—Bell v. Trosper, 77 P.2d 544, 182 Okl. 316—Guaranty Bank of Oklahoma City v. Galbreath, 225 P. 971, 99 Okl. 9.
23 C.J. p 459 note 54.
Allotment and appraisal of homestead see the C.J.S. title Homesteads §§ 216–221, also 29 C.J. p 972 note 20–p 978 note 81.
Appraisement of exemption see the C.J.S. title Exemptions § 137, also 25 C.J. p 142 note 17–p 144 note 94.

Equity in land seized on execution must be appraised.—Hewitt v. Voils, 296 P. 447, 147 Okl. 270.

Undivided interest in mineral rights and unaccrued royalties under mineral deed was "lands and tenements" under statute requiring appraisement of "lands and tenements" before sale on execution.—Cuff v. Koslosky, 25 P.2d 290, 165 Okl. 135.

64. Ind.—Reily v. Burton, 71 Ind. 118.
Okl.—Cherry v. Godard, 64 P.2d 315, 179 Okl. 158.

65. Okl.—Cuff v. Koslosky, 25 P.2d 290, 165 Okl. 135.
23 C.J. p 459 note 56.

66. Ind.—Milburn v. Phillips, 34 N. E. 983, 36 N.E. 360, 136 Ind. 680.
23 C.J. p 459 note 61.

67. Pa.—Levy v. Spitz, 146 A. 548, 297 Pa. 136—States v. Stapleton, 14 Pa.Dist. & Co. 177, 79 Pittsb. Leg.J. 6.
23 C.J. p 459 note 54.

When inquisition and condemnation unnecessary

(1) Where estates of uncertain duration, such as estates for life and contingent interests, are levied on, no inquisition or condemnation is necessary to validate the sale thereunder.—Stewart v. Kenower, 7 Watts & S., Pa., 288—23 C.J. p 459 note 60.

(2) And under a statute so providing no inquisition is necessary in connection with the sale of real estate upon a writ of fieri facias issued on a judgment entered on a bond accompanying a mortgage, secured on the real estate to be sold. —Union Trust Co. of Uniontown v. Ross, 157 A. 462, 305 Pa. 131—West Arch Building & Loan Ass'n v. Nichols, 154 A. 703, 303 Pa. 434.

(3) If an inquisition has been held on one fieri facias and the land condemned, another judgment creditor may take out a venditioni exponas and sell without a new inquisition —McCormick v. Meason, 1 Serg. & R., Pa., 92.

68. Pa.—Levy v. Spitz, 146 A. 548, 297 Pa. 136.

The sale is void

Pa.—Gardner v. Sisk, 54 Pa. 506—Wray v. Miller, 20 Pa. 111.
23 C.J. p 459 note 54 [c].

69. Pa.—Wray v. Miller, 20 Pa. 111.

70. Pa.—Naples v. Minier, 3 Penr. & W. 475.

71. Pa.—McLaughlin v. Shields, 12 Pa. 283.
23 C.J. p 459 note 59.

72. Iowa.—Minneapolis Threshing Mach. Co. v. Beck, 64 N.W. 637, 95 Iowa 725.
23 C.J. p 459 note 62.

Property partially exempt

The sheriff must make an appraisement within a reasonable time where he levies on personal property of a class or species which is exempt from execution to a certain amount or value.—Tullis v. Orthwein, 5 Minn. 377.

What law governs. The rule seems to be well settled in some states that the statute in force at the date of a contract on which judgment has been rendered will govern as to the necessity and method of appraisement of property levied on under execution issued on such judgment;[73] but where it does not appear when the contract on which a judgment is obtained was made the appraisement law in force at the date of the rendition of such judgment must control.[74] If the contract was executed and is to be performed out of the state, the law in force at the date of the judgment will govern.[75]

(2) Waiver

Generally a debtor may waive his right to an appraisement.

As a general rule, the judgment debtor, for whose benefit appraisement clauses are included in statutes prescribing the mode of execution, may at his option legally waive the right of having his property appraised before sale under the execution,[76] although there is authority to the contrary.[77]

How evidenced. The judgment debtor's exercise of the waiver of his right to have his property appraised may be evidenced by his expressly authorizing it in writing, and it is frequently incorporated in the contract by which the debt on which the judgment is based is created,[78] or constructively by his acquiescence in the sale of the property by the officer, of which he has full notice, the latter on the ground of estoppel.[79]

(3) Notice

A judgment debtor is entitled to reasonable notice to choose appraisers.

Wherever the statute makes appraisement a prerequisite to a valid sale of property levied on under execution, the judgment debtor is entitled to reasonable notice to choose an appraiser or appraisers, as the statute may direct;[80] and a failure to give such notice is fatal to the levy,[81] unless the circumstances are such as to justify the officer in dispensing with the notice,[82] as where the debtor himself appoints an appraiser.[83] Such notice should be served on defendant personally, if within the jurisdiction or county,[84] otherwise on his agent or tenant,[85] or be left at his last and usual place of abode;[86] it need not be served on one to whom defendant has sold the land.[87] The notice must be given a reasonable time before the appraisement.[88]

(4) Selection of Appraisers

(a) In general
(b) Qualifications
(c) By whom chosen
(d) Oath

(a) In General

Appraisers must be selected in the manner prescribed by statute.

73. Ind.—Rawley v. Hooker, 21 Ind. 144.
23 C.J. p 459 note 63.

74. Ind.—Indiana Cent. R. Co. v. Bradley, 15 Ind. 23.
23 C.J. p 460 note 64.

75. Ind.—Hutchins v. Barnett, 19 Ind. 15—Doe v. Collins, Smith 58.

76. Okl.—Bell v. Trosper, 77 P.2d 544, 182 Okl. 316—Guaranty Bank of Oklahoma City v. Galbreath, 225 P. 971, 99 Okl. 9.
23 C.J. p 460 note 66.

Waiver of inquisition and condemnation

(1) In Pennsylvania, under a statute so providing, the defendant in any execution, being at the time of issuing thereof the owner of such real estate, or the person owning such estate by title from him, may waive an inquisition.—Levy v. Spitz, 146 A. 548, 297 Pa. 136—23 C.J. p 460 note 66.

(2) Under this statute, as a general rule, no one but the owner of the land to be sold, or one duly authorized by him, can make the waiver.—Pepper v. Copeland, 2 Miles, Pa., 419—23 C.J. p 460 note 68.

(3) Accordingly it has been held that a vendee from the debtor, whose deed antedated the entry of a judgment against the debtor containing a waiver, is not bound by such waiver.—Wolf v. Payne, 35 Pa. 97—23 C.J. p 460 note 66.

(4) But, under Pa.St.Suppl.1928 § 10470 a, one taking a conveyance from a mortgagor after recording of the mortgage which waives inquisition on sale of the property takes subject to the agreement of his vendor.—Levy v. Spitz, 146 A. 548, 297 Pa. 136.

77. Iowa.—Minneapolis Threshing Mach. Co. v. Beck, 64 N.W. 637, 95 Iowa 725.
23 C.J. p 460 note 67.

78. Okl.—Cherry v. Godard, 64 P.2d 315, 326, 179 Okl. 158, quoting **Corpus Juris.**
Pa.—Levy v. Spitz, 146 A. 548, 297 Pa. 136.
23 C.J. p 460 note 70.

79. Kan.—De Jarnette v. Verner, 19 P. 666, 40 Kan. 224.
23 C.J. p 460 note 71.

80. N.H.—Fellows v. Hoyt, 44 A. 929, 69 N.H. 179.
23 C.J. p 460 note 72.

Renewing notice

Change of date of execution sale does not necessitate issuance and service of another notice to appoint an appraiser for property under seizure.—Austin v. Currie, 134 So. 723, 16 La.App. 375.

81. N.H.—Gilbert v. Berlin, 48 A. 279, 70 N.H. 396.
23 C.J. p 460 note 73.

82. Vt.—Gilman v. Thompson, 11 Vt. 643, 34 Am.D. 714.
23 C.J. p 460 note 74.

83. La.—Foster v. Roussel, 3 La Ann. 546.

84. Del.—Wolf v. Heathers, 4 Del. 325.
Pa.—Krebs v. Hechler, 2 Leg.Rec. 363.

85. Del.—Wolf v. Heathers, 4 Del. 325.

86. Del.—Wolf v. Heathers, supra.
Me.—Buck v. Hardy, 6 Me. 162.

87. Pa.—Krebs v. Hechler, 2 Leg. Rec. 363.

88. Me.—Dwine v. Soper, 32 Me. 119, 52 Am.D. 643.
23 C.J. p 460 note 80.

Appraisers must be selected in the manner prescribed by statute.[89]

The number of appraisers appointed depends on the terms of the statute in the particular jurisdiction, the usual number being three.[90]

Different parcels of land. Where separate and distinct parcels of real estate are seized to satisfy an execution, a different set of appraisers may be chosen to appraise each separate parcel.[91]

(b) Qualifications

Each appraiser must possess the qualifications prescribed by statute.

It is essential to the validity of an appraisement that each appraiser possess the statutory qualifications,[92] which cannot be waived even by the consent of the parties.[93] Unless forbidden by statute, an infant may be an appraiser.[94]

Freeholders or householders. One of the qualifications usually required by statute is that the appraiser shall be a freeholder or householder of the county or town in which the property to be appraised is situated.[95]

Effect of interest. The statutes enumerating the qualifications of the appraiser require that he shall be impartial and disinterested,[96] and as a rule the officer or justice who appoints the appraisers is the sole judge of their disinterestedness;[97] but it has been held that it is no disqualification on the ground of interest, that an appraiser is the deputy of the sheriff executing the writ,[98] or is the brother-in-law of the officer who appoints him;[99] and under some practice the appraisement may be made by the sheriff himself.[1] The ground most frequently urged against the eligibility of an appraiser on account of interest is his relationship to one of the parties to the suit which may be so close as to disqualify him[2] or may be so remote as to be no disqualification.[3]

(c) By Whom Chosen

Appraisers should be chosen by the person or persons designated by statute.

Appraisers should be chosen by the person or persons designated by statute.[4] Under most statutes one of the appraisers is selected by the judgment creditor, and another by the judgment debtor, and the third appraiser is selected by the officer holding the writ,[5] or by the other two appraisers, if they can agree;[6] but under other statutes the power to appoint all the appraisers is in the officer.[7] The appraiser which each party to the action is entitled to select may likewise be chosen by a duly authorized agent of such party.[8]

In case of joint debtors. Where execution issues against joint debtors, and the same is levied on their joint property, the selection of one appraiser may be made by either of such debtors;[9] but where the execution is levied on the property of only one of several joint debtors, the appraiser must be selected by such debtor, and a selection by the other debtor, without the concurrence of the debtor whose property has been levied on, is void.[10]

Where debtor is absent from jurisdiction. Under most statutes where the judgment debtor is absent from, or resides out of, the state at the time of the levy, the levying officer is authorized to se-

89. Ohio.—Toohey v. Simmons, 35 N.E.2d 858, 67 Ohio App. 418, appeal dismissed 35 N.E.2d 152, 138 Ohio St. 400.

90. Ohio.—Toohey v. Simmons, supra.
23 C.J. p 460 note 81.

91. Me.—Hathorn v. Corson, 1 A. 738, 77 Me. 582.
Mass.—Boylston v. Carver, 11 Mass. 515.

92. Mich.—Flynn v. Kalamazoo Cir. Judge, 98 N.W. 740, 136 Mich. 23.
23 C.J. p 460 note 81.

93. Conn.—Mitchell v. Kirtland, 7 Conn. 229.
23 C.J. p 460 note 81.

94. Ky.—White v. Laurel Land Co., 82 S.W. 571, 26 Ky.L. 775.

95. Kan.—Kutter v. Buckout, 4 Kan. 120.
23 C.J. p 461 note 83.
In Pennsylvania the members of a sheriff's jury in an inquisition held under Act May 10, 1881, P.L. p 13, are not required to be freeholders.—States v. Stapleton, 14 Pa.Dist. & Co. 177, 79 Pittsb.Leg.J. 6.

96. Ind.—Bowles v. Stout, 60 Ind. 267.
23 C.J. p 461 note 84.

97. Vt.—Briggs v. Green, 33 Vt. 565.
23 C.J. p 461 note 85.

98. Kan.—Sullenger v. Buck, 22 Kan. 28.
23 C.J. p 461 note 86.

99. Mass.—Brown v. Washington, 110 Mass. 529.

1. Del.—Flinn v. Fennimore, 31 A. 586, 12 Del. 262.
23 C.J. p 461 note 88.

2. Conn.—Johnson v. Huntington, 13 Conn. 47.
23 C.J. p 461 note 89.

3. Mass.—Kinsman v. Warner, 113 Mass. 347.
23 C.J. p 461 note 90.

4. Ohio.—Toohey v. Simmons, 35 N.E.2d 858, 67 Ohio App. 418, appeal dismissed 35 N.E.2d 152, 138 Ohio St. 400.

5. N.H.—Fellows v. Hoyt, 44 A. 929, 69 N.H. 179.
23 C.J. p 461 note 93.

6. La.—Bermudez v. Ibanez, 2 Mart. 316.

7. Ohio.—Toohey v. Simmons, 35 N.E.2d 858, 67 Ohio App. 418, appeal dismissed 35 N.E.2d 152, 138 Ohio St. 400.
Pa.—States v. Stapleton, 14 Pa.Dist. & Co. 177, 79 Pittsb.Leg.J. 6.
23 C.J. p 462 note 95.

8. La.—Farrell v. Klumpp, 13 La. Ann. 311.
23 C.J. p 462 note 96.

9. Me.—Crafts v. Ford, 21 Me. 414.
Mass.—Herring v. Polley, 8 Mass. 113.

10. Me.—Boynton v. Grant, 52 Me. 220.
23 C.J. p 462 note 98.

lect an appraiser for him.[11]

Neglect or refusal to make selection. Where the judgment debtor, after due notice, neglects or refuses to exercise his right of selection, the officer making the levy is generally authorized to select an appraiser for him.[12]

(d) Oath

Before proceeding to the performance of their duties, it is necessary that the appraisers take the oath of office prescribed by statute.

It is necessary for the appraisers, after being duly appointed, to take the oath of office prescribed by statute before proceeding to the performance of their duties.[13] Under some statutes an appraiser, if he has conscientious scruples against taking an oath, may make an affirmation instead.[14] The statutes usually authorize the administration of the oath by the officer making the levy or by a magistrate or justice of the peace,[15] but notwithstanding such a statute it seems that the oath may be administered by any officer authorized to administer oaths in general.[16] Under the statutes in some jurisdictions, however, the oath must be administered by a justice of the peace in the county where the property to be appraised is situated.[17]

(5) Proceedings of Appraisers

(a) In general

(b) Deductions for encumbrances

(c) Certificate of appraisement

(a) In General

The proceedings of appraisers depend mainly on the terms of the statutes in the different jurisdictions which must be observed.

The proceedings of appraisers depend mainly on the terms of the statutes in the different jurisdictions, which must be observed.[18] After the appraisers have duly qualified, it is usually their duty to view or examine the property to be appraised so as to enable them to form an intelligent and just estimate of its value,[19] although it has been held not necessary that the appraisers should actually go to the property and inspect it if they can make a proper appraisement without doing so.[20] Where the appraisers have no personal knowledge as to the value of the property, it is their duty to hear testimony with respect to its value.[21] Under some statutes both real and personal property are appraised in the same manner.[22] In the absence of evidence to the contrary, the presumption is that the appraisement was properly made.[23]

Property of joint debtors. Where an execution against several debtors is levied on land of which they are severally seized, the land of each debtor must be separately appraised;[24] but where an execution is levied on the property of two joint debtors held by them in common, it is not necessary to appraise each one's share separately.[25]

Several parcels of land. Where several parcels of land belonging to the judgment debtor are levied on under execution, they may be appraised either severally or jointly.[26]

Entire interest of judgment debtor. The appraisement should embrace the entire interest of defendant in the property levied on, and the appraisers should ascertain the value of the interest set off in order that the debtor may redeem.[27]

Time. Generally the appraisement need not be made on the day of the execution sale but it may be made prior thereto.[28]

11. Mass.—Brooks v. Norris, 124 Mass. 172.
23 C.J. p 462 note 99.

12. N.H.—Fellows v. Hoyt, 44 A. 929, 69 N.H. 179.
23 C.J. p 462 note 1.

13. Okl.—Miller v. American Bank & Trust Co., 40 P.2d 1074, 171 Okl. 99.
23 C.J. p 462 note 2, p 463 note 8 [b].

Sufficiency of oath
An oath administered to appraisers is sufficient if administered substantially in the form required by statute.—Leekley v. Victor Building & Loan Ass'n, 13 P.2d 133, 158 Okl. 228.

14. N.H.—Cooper v. Bisbee, 4 N.H. 329.
23 C.J. p 462 note 3.

15. Okl.—Leekley v. Victor Building & Loan Ass'n, 13 P.2d 133, 158 Okl. 228.
23 C.J. p 462 note 4.

16. Ill.—McDaniel v. Wetzel, 106 N. E. 209, 264 Ill. 212, L.R.A.1916E 1140.
23 C.J. p 462 note 5.

17. Me.—Bamford v. Melvin, 7 Me. 14.
23 C.J. p 462 note 6.

18. Pa.—Eberly v. Billingfelt, 27 Pa.Co. 258, 19 Lanc.L.Rev. 395.

19. Okl.—Miller v. American Bank & Trust Co., 40 P.2d 1074, 171 Okl. 99—Leekley v. Victor Building & Loan Ass'n, 13 P.2d 133, 158 Okl. 228.
23 C.J. p 463 note 10.

20. Iowa.—McFerrin v. Nye & Jenks Grain Co., 264 N.W. 45, 220 Iowa 1086.
23 C.J. p 463 note 11.

21. Del.—Hosea v. Purnell, 5 Del. 364.
23 C.J. p 463 note 12.

22. Ind.—Evans v. Wadkins, Wils. 114.

23. Ky.—Kidd v. Stephens, 192 S.W. 44, 174 Ky. 381.
Pa.—States v. Stapleton, 14 Pa.Dist. & Co. 177, 79 Pittsb.Leg.J. 6.

24. N.H.—Burnham v. Aiken, 6 N. H. 306.

25. Me.—Dwinel v. Soper, 32 Me. 119, 52 Am.D. 643.

26. Me.—Hathorn v. Corson, 1 A. 738, 77 Me. 582.
23 C.J. p 463 note 17.

27. Ky.—Galot v. Pearce, 38 S.W. 892, 18 Ky.L. 1004.
23 C.J. p 463 note 18.

28. La.—Austin v. Currie, 134 So. 723, 16 La.App. 375.

Agreement of appraisers. In some jurisdictions the rule is laid down that, in order to constitute a valid appraisement, all of the appraisers must agree as to the value of the property;[29] but in other jurisdictions, where all of the appraisers act, a concurrence of two of the three appraisers may be sufficient.[30]

Approval of court. Under some statutes the appraisers' valuation of the property is subject to the approval of the court.[31]

(b) Deductions for Encumbrances

In appraising property subject to prior encumbrances, it is the appraisers' duty to ascertain the amount of such encumbrances and deduct it from the appraised value of the property.

In making an appraisement on property subject to prior encumbrances, it is the duty of the appraisers to ascertain the amount of such encumbrances and to deduct such amount from the appraised value of the property,[32] and under some statutes it is the duty of the county or city officers to certify the amount and character of all liens, in their offices, on the property.[33] Where an execution against the owner of an equity of redemption is levied on the land, it should appear from the return that the appraisers excluded the mortgage from their consideration in making the appraisement,[34] but the validity of the levy is not affected if the creditor chooses to have it made without such deduction.[35] An execution creditor levying on an equity of redemption in real estate is bound by the action of the appraisers as to the amount and validity of a prior encumbrance and is estopped from afterward showing that such encumbrance is less than the valuation of the appraisers, or founded on a usurious contract.[36]

Contingent lien. The better rule seems to be that in levying an execution on land, the appraisers may deduct from the appraised value of the property a contingent lien on it, such as the encumbrance of the inchoate right of the judgment debtor's wife to dower.[37]

Excessive allowance. Where, in the appraisement of property, an allowance is made for an encumbrance on, or estate in, the property which does not exist, the levy is invalid.[38] Likewise, where there is a valid and subsisting encumbrance on the property, but such encumbrance is materially overestimated by the appraisers, the levy is invalid.[39]

(c) Certificate of Appraisement

After an appraisement has been made it is generally the duty of the appraisers to make out and sign a certificate of appraisement which is to be filed with the clerk of the proper court.

After the duly appointed appraisers have completed the appraisement of the property taken under execution, the statutes usually require them to make out and sign a certificate of appraisement, describing the property so appraised, the interest of the debtor therein, and the value thereof, stating also the value of, and making proper deductions for, encumbrances, and that they deliver such certificate to the officer making the levy,[40] and that

29. Ill.—Evans v. Landon, 6 Ill. 307.

30. Ind.—Harrison v. Stipp, 8 Blackf. 455.

In Massachusetts

(1) The rule has been laid down that, where three appraisers are duly appointed and sworn, and there is evidence that all of them acted under their appointment, where only two of the appraisers sign the certificate of appraisement, and the third fails to sign it because he does not concur in it, the levy is valid.—Moffitt v. Jaquins, 2 Pick. 331—Barrett v. Porter, 14 Mass. 143.

(2) But it has also been held that an extent on real estate under Massachusetts statute, is not good unless all the appraisers concurred in the appraisement.—U. S. v. Slade, C. C.Mass., 27 F.Cas.No.16,312, 2 Mason 71.

31. Pa.—Eberly v. Billingfelt, 27 Pa.Co. 258, 19 Lanc.L.Rev. 395.
23 C.J. p 463 note 19.

32. Okl.—Miller v. American Bank & Trust Co., 40 P.2d 1074, 171 Okl. 99—Hewitt v. Voils, 296 P. 447, 147 Okl. 270.
23 C.J. p 464 note 20.

Delinquent taxes

Appraisement of property on which execution has been levied, showing taxes delinquent thereon, including actual amount of taxes extended against property, together with statutory penalty and costs, held proper showing of judgment debtor's interest.—Guaranty Bank of Oklahoma City v. Galbreath, 225 P. 971, 99 Okl. 9.

Property encumbered in excess of value

Where amount of taxes, penalty, and cost delinquent on property is in excess of appraised value thereof, such property is properly listed on appraisement as being of no value.—Wedgwood v. Boyd, 51 P.2d 299, 174 Okl. 531.

33. Neb.—Northwestern Mut. L. Ins. Co. v. Marshall, 95 N.W. 357, 1 Neb., Unoff., 36.
23 C.J. p 464 notes 20 [d], 21.

34. Mass.—Wadsworth v. Williams, 97 Mass. 339.
23 C.J. p 464 note 22.

35. Mass.—Pettee v. Peppard, 125 Mass. 66.
23 C.J. p 464 note 23.

36. Conn.—Delaware & Hudson Canal Co. v. Bonnell, 46 Conn. 9—Waterman v. Curtis, 26 Conn. 241.

37. Me.—Sturdivant v. Sweetsir, 12 Me. 520.
23 C.J. p 464 note 25.

38. Mass.—Whithed v. Mallory, 4 Cush. 138.
23 C.J. p 464 note 26.

39. Mass.—McGregor v. Williams, 10 Cush. 526.

40. Okl.—Wedgwood v. Boyd, 51 P. 2d 299, 174 Okl. 531.
23 C.J. p 464 note 30.

Sufficiency of certificate

An appraisal showing the total valuation of an entire tract of land sufficiently shows that the undivided one-half interest therein levied on is valued at one half the value plac-

such certificate be returned and filed with the clerk of the proper court.[41] Where a verified copy of a last inventory and appraisement satisfactorily appears to be exact, it may be substituted for the original.[42] While the general rule is that the certificate of appraisement should be signed by all the appraisers, yet it has been held that, where such certificate or the return of the officer shows that all of the duly appointed appraisers acted as such, the levy is not invalidated by the failure of one of the appraisers to sign the certificate.[43]

Amendment. The certificate of appraisement may be amended by the appraisers as of right, where the rights of third parties acquired bona fide and without notice will not be impaired.[44]

(6) Setting Aside Appraisement

An appraisement made by duly qualified appraisers acting in accordance with statutory requirements will not be set aside except for fraud or mistake, other than mere error of judgment.

Where an appraisement of property has been made by duly qualified appraisers acting in accordance with statutory requirements, such appraisement will not be set aside except for fraud or mistake, other than mere error of judgment, on the part of the appraisers.[45] Objections to the appraisement must be made before the sale.[46] If an appraisement was wrongfully allowed, the remedy of the creditor is to move to set it aside.[47]

(7) Second Appraisement

The court may order a new appraisement where an appraisement has been set aside or where the property remains unsold for want of bidders.

It is proper for the court to enter an order for a new appraisement where an appraisement has been set aside in consequence of irregularity or fraud,[48] or, under some statutes, where the property remains unsold for want of bidders.[49] Where, however, the sale is set aside for any other reason, such as inadequacy of price, no new appraisement is necessary.[50] Where there are two levies on the same land, and the land is separately appraised in both cases at a like sum, a new appraisement at a less sum under the first levy does not affect the appraisement under the other levy.[51]

(8) Compensation of Appraisers

The compensation of appraisers is governed by statute.

The compensation of appraisers is generally governed by statute.[52]

§ 107. —— Amount of Property to Be Levied on; Excessive Levy

a. In general
b. Excessive levy

ed on the entire tract.—Mullins v. Robinson, 9 S.W.2d 988, 225 Ky. 648.

In Pennsylvania, where the sheriff's jury is required to determine the yearly value of the realty levied on, the return need not show the value of the property condemned, but it is sufficient if the jury return that the clear yearly rental beyond all reprizes is not sufficient within seven years to satisfy the debt and damages.—States v. Stapleton, 14 Pa. Dist. & Co. 177, 79 Pittsb.Leg.J. 6.

41. Kan.—Jones v. Carr, 21 P. 258, 41 Kan. 329.
23 C.J. p 465 note 31.

Operation of statutory requirement
Statute requiring copy of appraisement to be filed immediately with clerk of court is directory, the purpose being to inform public concerning amount of appraisement; and if, through failure to strictly comply therewith, an injustice has been done, trial court may set aside sheriff's sale.—Wedgwood v. Boyd, 51 P.2d 299, 174 Okl. 531.

42. Del.—Gam v. Cain, 42 A. 447, 16 Del. 182.

43. Me.—McLellan v. Nelson, 27 Me. 129.
23 C.J. p 465 note 33.

44. N.C.—Gudger v. Penland, 23 S. E. 921, 118 N.C. 832.
23 C.J. p 465 note 34.

It is duty of court to allow amendment when amendable imperfections in an appraisement are called to its attention.—Wedgwood v. Boyd, 51 P.2d 299, 174 Okl. 531.

45. Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702—Hunley v. Perryman, 267 S.W. 206, 206 Ky. 243.
Okl.—Rodolf v. First Nat. Bank & Trust Co. of Tulsa, 78 P.2d 296, 298, 182 Okl. 426, citing **Corpus Juris.**
23 C.J. p 465 note 35.

Jury's return is conclusive unless there appears an apparent abuse of discretion.—States v. Stapleton, 14 Pa.Dist. & Co. 177, 79 Pittsb.Leg.J. 6.

46. Neb.—Hoover v. Hale, 76 N.W. 457, 56 Neb. 67.
23 C.J. p 465 note 36.

47. Pa.—Seibert's App., 73 Pa. 359.

48. Ind.—Thompson v. Bragg, 32 Ind. 482.
Pa.—Weaver v. Lawrence, 1 Dall. 379, 1 L.Ed. 185.

Procedure for obtaining reappraisal
Where there are any circumstances which would justify reappraisal before property is twice offered for sale, it is better practice to apply to court to set aside appraisement and order a reappraisement.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586.

By whom reappraisal made
Under statute, providing for the selection of appraisers by officer making the levy, a court order, in so far as it provided that a reappraisement of realty be made by the same persons as originally appraised it, was without authority of law.—Toohey v. Simmons, 35 N.E.2d 858, 67 Ohio App. 418, appeal dismissed 35 N.E.2d 152, 138 Ohio St. 400.

49. Neb.—Gundry v. Brown, 96 N. W. 610, 1 Neb. (Unoff.) 877.
23 C.J. p 465 note 39.

Under Oklahoma statute, where there is a valid judgment, valid order of sale, and valid appraisement, appraised property should be twice offered for sale before reappraisement.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586—23 C.J. p 465 note 39 [b].

50. Neb.—State Bank v. Green, 9 N. W. 36, 11 Neb. 303.

51. Ohio.—Daniels v. McBain, 2 Ohio St. 406.

52. Neb.—Phœnix Ins. Co. v. McEvony, 72 N.W. 956, 52 Neb. 566.
23 C.J. p 461 note 92.

a. In General

It is the officer's duty to levy on property sufficient to satisfy the execution and all proper fees and costs.

It is the duty of the officer to levy on property sufficient to satisfy the execution and all proper fees and costs.[53] A certain amount of discretion is left to the officer as to the quantity of property necessary to be taken, depending to some extent on the facts and circumstances of the particular case,[54] and taking into consideration the fact that there are prior liens, if any, on the property;[55] but it is his duty to take property sufficient to satisfy the execution, allowing for reasonable and probable depreciation of such property at a forced sale, although he should not make the levy so unreasonable and excessive as to bear on its face the appearance of oppression and unnecessary rigor.[56] If the sheriff honestly thinks that the debtor's property is not sufficient in value to pay the costs of levying on and selling it, he may refuse to levy and may return the writ unsatisfied.[57]

A direction from plaintiff to make a part only of the execution is one which plaintiff has the right to make, and it must be obeyed by the sheriff.[58]

Interest. In the absence of statute to the contrary, where an execution is issued in any action, except in debt for a penalty, the officer is not authorized to levy for interest which has accrued since the rendition of the judgment, but only for the amount of the execution.[59]

b. Excessive Levy

The officer should levy on only so much of the debtor's property as is sufficient to answer the exigency of the writ.

The officer should levy on only so much of defendant's property as is sufficient to answer the exigency of the writ, and should not levy on all of the debtor's property when a portion thereof will be sufficient,[60] unless it is not divisible.[61] It is difficult to lay down any general rule as to what amounts to an excessive levy, and the question must usually be determined by the circumstances of the particular case under consideration; but where the property levied on is of substantially greater value than the amount of the execution, the fees of the officer, and other expenses of the levy, such levy will be regarded as excessive.[62] In determining whether a levy is excessive it is proper to consider the quality, quantity, and nature of the property levied on, the prevalent prices thereof,[63] the encumbrances, if any, thereon,[64] and the general conditions prevailing at the time;[65] but the fact that the officer holds other writs, not levied, cannot be considered.[66] A levy is not excessive, of course, where the sale is insufficient to satisfy the execution.[67]

When a judgment is in rem against a described piece of property, the defense of excessive levy

53. Ark.—Bridwell v. Anderson, 156 S.W.2d 231—St. Louis, I. M. & S Ry. Co. v. Andrews, 143 S.W. 1084, 102 Ark. 175, Ann.Cas.1914A 394—Lawson v. State, 10 Ark. 28, 50 Am.D. 238.
Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209.
23 C.J. p 466 note 43.
Successive levies under same writ see supra § 103.

54. Ark.—Bridwell v. Anderson, 156 S.W.2d 231—St. Louis, I. M. & S. Ry. Co. v. Andrews, 143 S.W. 1084, 102 Ark. 175, Ann.Cas.1914A 394—Lawson v. State, 10 Ark. 28, 50 Am.D. 238.
Ga.—Wright v. Pearson, 185 S.E. 336, 182 Ga. 366.
23 C.J. p 466 note 44.

55. Ga.—Mullings v. Bothwell, 29 Ga. 706.
23 C.J. p 466 note 45.

56. Ark.—Bridwell v. Anderson, 156 S.W.2d 231—St. Louis, I. M. & S. Ry. Co. v. Andrews, 143 S.W. 1084, 102 Ark. 175, Ann.Cas.1914A 394.
23 C.J. p 466 note 46.
Liability of officer for:
Excessive levy see the C.J.S. title Sheriffs and Constables § 70, also 57 C.J. p 834 note 68.
Insufficient levy see the C.J.S. title Sheriffs and Constables § 59, also 57 C.J. p 809 note 37.

57. Wis.—In re Mowry, 12 Wis. 52.

58. N.H.—Rogers v. McDearmid, 7 N.H. 506.
23 C.J. p 466 note 49.
Control of execution by plaintiff generally see supra § 90.

59. N.Y.—Watson v. Fuller, 6 Johns. 283.
23 C.J. p 466 note 50.
Statement of interest in writ see supra § 75.

60. U.S.—McLellan v. Penick, C.C.A. La., 289 F. 366.
Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209—Wright v. Pearson, 185 S.E. 336, 182 Ga. 366.
La.—Auto Painting & Repairing Co. v. Ware, App., 159 So. 749.
Tex.—Miller v. Dunagan, Civ.App., 123 S.W.2d 363, error dismissed.
23 C.J. p 466 note 52.
Excessive levy:
Where property set off by extent see infra § 403.
With regard to ownership see supra §§ 97, 101.

61. U.S.—McLellan v. Penick, C.C.A. La., 289 F. 366.
23 C.J. p 466 note 53.
A levy is not excessive where the property is incapable of subdivision or such as can be levied on only in its entirety.—Crump v. McEntire, 10 S.E.2d 186, 190 Ga. 684—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209—Bridger v. Exchange Bank, 56 S.E. 97, 126 Ga. 821, 115 Am.S.R. 118, 8 L.R.A.,N.S., 463.

62. U.S.—McLellan v. Penick, C.C.A.La., 289 F. 366.
Ga.—Pearson v. Fox, 145 S.E. 875, 167 Ga. 448.
23 C.J. p 467 note 54.
Levy held not excessive
Ga.—Allagood v. Cook, 17 S.E. 920, 92 Ga. 570.
23 C.J. p 467 note 54 [b].

63. La.—Auto Painting & Repairing Co. v. Ware, App., 159 So. 749.

64. Ga.—Bridger v. Exchange Bank, 56 S.E. 97, 126 Ga. 821, 115 Am. S.R. 118, 8 L.R.A.,N.S., 463.

65. La.—Auto Painting & Repairing Co. v. Ware, App., 159 So. 749.

66. Ga.—Pearson v. Fox, 145 S.E. 875, 167 Ga. 448.

67. Ga.—Thompson v. Selcer, 83 S. E. 965, 142 Ga. 809.
S.C.—Ingram v. Belk, 33 S.C.L. 207, 47 Am.D. 591.

does not lie;[68] and it has been held that a levy on land cannot be open to the objection that it is excessive, because, as has been said, the mere levy and advertisement do no harm, as the possession of land is not disturbed by the levy; but where the sheriff undertakes to sell land, it is his duty to sell no more than is necessary.[69]

Remedy. As a general rule an affidavit of illegality is not a remedy for an excessive levy, see § 148 infra, but the proper remedy is by motion to the court from which the writ issued, and before sale, to set the levy aside[70] as to the excess.[71] The burden of proving excessiveness is on the party raising the objection.[72] An excessive levy may be cured by the judgment creditor releasing part of the property from the levy.[73]

Waiver or estoppel. Where the judgment debtor acquiesces in the sale of his property under execution and fails to make objection to the same, on the ground of excessive levy, for a considerable period of time, where no fraud is shown in the transaction, such delay on his part will be held to be a waiver of the objection.[74] So, if the debtor points out an entire tract of land, and not a part of it, to be levied on and sold, and it is purchased at the sale by a stranger, the debtor is estopped from impeaching the act of the officer or the title of the purchaser on the ground that the levy is excessive.[75]

Effect. The rule has been broadly laid down in a number of cases that an excessive levy will not invalidate the levy, and that until it is set aside it is valid;[76] but in some jurisdictions it is held that if the levy is entirely out of proportion to the debt, it is void[77] and, as appears in § 299 c infra, the purchaser acquires no title thereunder.

§ 108. —— Objections to Irregularities and Waiver Thereof

a. In general
b. Who may object
c. Waiver and estoppel

a. In General

The court should endeavor to sustain a levy as against minute or trivial exceptions.

Justice as well as general convenience demands that the court be astute in its endeavor to sustain a levy as against minute and trivial exceptions.[78]

b. Who May Object

Generally only such persons as are adversely affected by irregularities in levying an execution can take advantage thereof.

The general rule is that as to irregularities in levying an execution, such as failure to comply with statutory requirements, the judgment debtor alone can object, third persons not being competent to urge such objection.[79] Plaintiff cannot complain,

68. Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209—Edwards v. Decatur Bank & Trust Co., 167 S.E. 292, 176 Ga. 194—Foster v. Cotton States Electric Co., 157 S.E. 636, 172 Ga. 231.
23 C.J. p 467 note 54 [d].

69. Ind.—Drake v. Murphy, 42 Ind. 82.
23 C.J. p 467 note 57.

70. Mich.—Blair v. Compton, 33 Mich. 414.
23 C.J. p 467 note 58.
Excessive levy as ground for setting aside sale see infra § 231.

Fraudulent levy
A levy may be so excessive as to afford ground for avoiding it as fraudulent.—Fortin v. Sedgwick, 110 N.W. 460, 133 Iowa 233, 12 Ann.Cas. 337.

Unless grossly excessive, the levy will not be set aside.—Bogle v. Bloom, 13 P. 793, 36 Kan. 512.

71. Kan.—Bogle v. Bloom, 13 P. 793, 36 Kan. 512.

In Louisiana
(1) Under statutes so providing, a judgment debtor asserting excessiveness of levy may, on application to the court, demand an appraisement of the property levied on, and if the judge finds, by the appraisement made, that more property was taken than necessary to satisfy the judgment, he must reduce the seizure to such an amount only as will be sufficient for this purpose.—Auto Painting & Repairing Co. v. Ware, App., 159 So. 749.

(2) Under these statutes a reduction of the seizure is not necessarily required merely because the property seized has been appraised in excess of the amount of the judgment, a reduction being required only where the judge in his sound discretion finds that more property has been seized than is necessary to "satisfy" the judgment.—Auto Painting & Repairing Co. v. Ware, supra.

72. Ga.—Crump v. McEntire, 10 S.E.2d 186, 190 Ga. 684—Bridger v. Exchange Bank, 56 S.E. 97, 126 Ga. 821, 115 Am.S.R. 118, 8 L.R.A., N.S., 463.

73. Ark.—Black v. Nettles, 25 Ark. 606.

74. Ind.—Doe v. Rue, 4 Blackf. 263, 29 Am.D. 368.
Tex.—Cornelius v. Burford, 28 Tex. 202, 91 Am.D. 309.

75. Tex.—Cornelius v. Burford, supra.

76. Mich.—Backus v. Barber, 65 N.W. 379, 107 Mich. 468.
23 C.J. p 467 note 67.

77. Ga.—Pearson v. Fox, 145 S.E 875, 167 Ga. 448.
23 C.J. p 467 note 68.

78. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158—Huntington v. Winchell, 8 Conn. 45, 20 Am.D. 84.

79. Mo.—Young v. Schofield, 34 S.W. 497, 132 Mo. 650.
23 C.J. p 467 note 70.
Irregularities as ground for:
Collateral attack on sale see infra § 242.
Setting aside sale see infra § 231.

Mere strangers cannot object.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 216, 235 Ala. 178, citing **Corpus Juris.**

Particular objections
(1) That the levy was excessive.—Brown v. Cougot, 8 Rob., La., 14.

(2) That no notice of levy was given.—Childers v. Adair, 5 La.App. 212.

(3) That the debtor's personalty was not exhausted before resorting to his realty.
Mich.—Solomon v. Neubrecht, 1 N.W.2d 501, 300 Mich. 177.

where he gets his money, that realty was levied on before personalty.[80] Even the debtor cannot complain of irregularities not affecting him,[81] and failure to comply with statutory provisions enacted for the benefit of plaintiff cannot be relied on by others.[82]

c. Waiver and Estoppel

Defects and irregularities in the manner of levying may be waived expressly, or waiver or estoppel may arise constructively by the acts of the party.

Defects and irregularities in the manner of levying may be waived expressly,[83] or waiver or estoppel may arise constructively by the acts of the party,[84] as by consent,[85] directions to the officer,[86] failure to oppose the sale,[87] furnishing the officer with a description of the property and executing a forthcoming bond,[88] giving a claim bond,[89] or by failure to raise the objection within the period prescribed by statute[90] or at the earliest opportunity,[91] or in the proper court and by the approved procedure;[92] but estoppel does not apply to support a levy which is illegal and void.[93]

§ 109. Quashing or Setting Aside Levy

a. In general
b. Grounds

a. In General

The court out of which the writ issued has jurisdiction to quash the levy; the proceeding is usually by motion to such court, and notice must be given to all necessary parties.

The court out of which the writ issued, as between the parties thereto, has the power to set aside the levy for any irregularity appearing therein,[94] especially where the execution creditor consents thereto.[95] A court of coordinate authority has no jurisdiction to quash such levy;[96] nor can the clerk of the court vacate a levy.[97]

In modern practice the writ of audita querela which formerly was resorted to has been superseded almost entirely by a motion to quash or vacate the levy[98] where such course will furnish adequate relief.[99] In some jurisdictions a proceeding by affidavit of illegality is afforded as merely a cumulative remedy,[1] and in other jurisdictions special proceedings are provided by statute, such as by petition to the supreme court.[2]

Parties; notice. On a motion to quash a levy, all necessary parties must be before the court.[3] Ordinarily the motion cannot be made by a stranger to the record.[4]

Notice of the motion should be given to all per-

Pa.—Simon v. Sorrentino, 20 A.2d 805, 145 Pa.Super. 364.

80. N.C.—Governor v. Carter, 10 N. C. 328, 14 Am.D. 588.

81. Vt.—Perrin v. Reed, 35 Vt. 2.
23 C.J. p 468 note 72.

82. Ga.—Hammond v. Myrick, 14 Ga. 77.

83. Pa.—Albright v. Lehigh Coal & Navigation Co., 52 A. 33, 203 Pa. 65.
23 C.J. p 468 note 75.
Waiver of:
Appraisement see supra § 106 b(2).
Debtor's right to select property to be levied on see supra § 95 b (1).
Levy see supra § 91.
Notice of levy see supra § 104.
Objection to levy as excessive see supra § 107 b.
Right to have personalty first taken see supra § 100.

84. Pa.—Simon v. Sorrentino, 20 A. 2d 805, 145 Pa.Super. 364.
23 C.J. p 468 note 76.

Obtaining permission to use property
Where judgment debtor, instead of objecting to levy on certain machinery, obtained permission to use it pending sale, estoppel arose to assert insufficiency of seizure.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340.

85. Iowa.—G. W. Cable Co. v. Israel, 159 N.W. 241, 177 Iowa 579.
La.—Michel v. Orleans Sheriff Parish, 23 La.Ann. 53.

Waiver by mortgagee
Where, after levy on mortgaged chattels without paying or tendering to mortgagee amount due on mortgage, mortgagee consents to sale of mortgaged property by officer, mortagee thereby waives right to have execution quashed, but is entitled to proceeds of sale, less fees and expenses incurred subsequent to such consent.—Ogle v. Aycock, 67 P.2d 432, 179 Okl. 626.

86. Ind.—Murphy v. Hill, 77 Ind. 129.
23 C.J. p 468 note 78.

87. La.—Morgan v. Woorheis, 3 Mart. 462.

88. Tenn.—Ballard v. Dibrell, 28 S. W. 1087, 94 Tenn. 229.
Forthcoming bond as waiver generally see infra § 116.

89. Tex.—Watson v. Schultz, Civ. App., 208 S.W. 958.
23 C.J. p 468 note 81.

90. La.—Allan v. Couret, 24 La.Ann. 24.
23 C.J. p 468 note 82.

91. La.—Schwann v. Sanders, 46 So. 573, 121 La. 461.
23 C.J. p 468 note 83.

92. R.I.—East Greenwich Sav. Inst. v. Allen, 47 A. 885, 22 R.I. 337.
23 C.J. p 468 note 84.

93. Ky.—Owens v. Hudson, 1 Ky. Op. 298.

94. Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.
Mich.—Emery v. Tant, 295 N.W. 356, 295 Mich. 669.
23 C.J. p 468 note 87.
Grounds for quashing levy see subdivision b of this section.
Quashing execution see infra §§ 142–145.

95. Ga.—E. Tris Napier Co. v. Dennard, 93 S.E. 513, 20 Ga.App. 801.

96. Mo.—Mellier v. Bartlett, 1 S. W. 220, 89 Mo. 134.
23 C.J. p 468 note 89.

97. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.

98. Mich.—Emery v. Tant, 295 N. W. 356, 295 Mich. 669.
Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.
23 C.J. p 468 note 87, p 469 note 92.

99. Mich.—Jensen v. Oceana Cir. Judge, 160 N.W. 620, 194 Mich. 405.

1. Ga.—Hill v. De Launay, 34 Ga. 427.

2. Vt.—Whitefield v. Adams, 27 A. 323, 65 Vt. 632.
23 C.J. p 469 note 95.

3. Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.

4. Pa.—Smyth v. Levy, 6 Pa.Super. 23, 41 Wkly.N.C. 294.
23 C.J. p 469 note 96.

sons interested in or claiming under the writ, since they are entitled to be heard in opposition to the motion.[5] However, notice need not be given to the sheriff, especially where the levy is on real property.[6]

Matters to be determined. On a motion to quash the levy the court cannot determine whether the property levied on was real or personal property.[7] However, where the court sustains such a motion, it may determine the disposition of funds paid into court pending the proceeding.[8]

Effect of quashing levy. Where under proper proceedings the levy has been quashed or vacated, the parties stand in the same situation as if no levy had been made, and the sheriff cannot proceed to a sale of the property under such levy.[9]

Vacation of order quashing levy. An order quashing a levy will be vacated when shown to have been improvidently made.[10]

b. Grounds

A motion to quash the levy may be predicated on the omission of an essential requirement or on a lack of authority in the levying officer; but it is not a proper method of trying title to the property.

The omission of a requirement essential to the validity of the levy constitutes a ground for quashing it.[11] The motion may be made on the ground that the levying officer was not competent to act,[12] that he improperly failed to allow a party to designate the property to be levied on,[13] that the levy was made prematurely,[14] or that the judgment debtor had been discharged in bankruptcy.[15] It is also a ground for setting aside the levy that it was made on property not subject to execution,[16] such as property in custodia legis.[17] Defects in the writ itself have been held ground for vacating a levy.[18]

It is not a ground for quashing the levy that the judgment erroneously gave plaintiff a special lien on the property,[19] or that the judgment was rendered in a county other than the one in which defendant resides;[20] nor can a motion to quash, before the return day, question a return which is not then made or authorized to be made.[21] Mere irregularities in the entry of a levy on the writ are usually not a ground for setting the levy aside.[22]

Absence of evidence of levy. Since the execution and levy constitute the foundation of the proceeding, the motion must be overruled if there is no evidence thereof.[23]

Title to property. A motion to quash the levy is not a proper proceeding to try the question of title to property, and the court will not set aside a levy on the motion of a party solely on the ground that the officer has seized property of a stranger

Corpus Juris cited in holding that movants were not mere strangers.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 216, 235 Ala. 178.

5. Tex.—Inman v. Texas Land & Mortgage Co., Civ.App., 74 S.W.2d 124.
23 C.J. p 470 note 18.

6. Ky.—Demint v. Thompson, 80 Ky. 225.

7. S.D.—Cable v. Magpie Gold Min. Co., 119 N.W. 179, 22 S.D. 566.

8. Mo.—Southern Coal Co. v. Shepard, 9 S.W.2d 257, 223 Mo.App. 112.

9. Ind.—Walpole v. Smith, 4 Blackf. 304.
23 C.J. p 470 note 20.

10. Ga.—Wilson v. Herrington, 13 S.E. 129, 86 Ga. 777.

11. Ky.—Pinson v. Murphy, 295 S. W. 442, 220 Ky. 464.
23 C.J. p 469 note 98, p 468 note 87 [a].

Tender of payment of mortgage
A levy on personalty which is subject to a mortgage may be quashed on a showing of failure to comply with statutes requiring a tender of payment of the mortgage or security.—Beatrice Creamery Co. v. Golden, 263 P. 458, 129 Okl. 86—23 C.J. p 469 note 98 [a].

Failure to apprise debtor of exemption rights
In order to quash levy for failure to apprise judgment debtor of exemption rights, there must be showing that property levied on might have been held by debtor as exempt.—Poplar Bluff Trust Co. v. Bates, 31 S.W.2d 93, 224 Mo.App. 636.

Time of institution of proceedings
A motion to dismiss a levy, on the ground that the proceedings out of which the levy arose were instituted out of term time, is properly denied where it does not in fact appear that they were so instituted.—Dyal v. Watson, 162 S.E. 682, 174 Ga. 330.

12. Ga.—State v. Jeter, 60 Ga. 489.
23 C.J. p 469 note 97.

13. Ill.—Evans v. Landon, 6 Ill. 307.
23 C.J. p 469 note 99.

14. N.Y.—Jones v. McCarl, 7 Abb. Pr. 418.
23 C.J. p 469 note 1.

15. N.J.—Linn v. Hamilton, 34 N. J.Law 305.

16. Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.
23 C.J. p 469 note 4.

17. Pa.—Robinson v. Atlantic & G. W. R. Co., 66 Pa. 160.
23 C.J. p 469 note 5.

18. Wis.—Bonesteel v. Orvis, 23 Wis. 506, 99 Am.D. 201.
23 C.J. p 469 note 11.

19. Ga.—Young v. Germania Sav. Bank, 64 S.E. 552, 132 Ga. 490—Marshall v. Charland, 34 S.E. 671, 109 Ga. 306.
23 C.J. p 469 note 6.

20. Ga.—C. C. Ansley Co. v. O'Byrne, 48 S.E. 228, 120 Ga. 618.

21. Mo.—Fink v. Remick, 33 Mo. App. 624.

22. Ga.—Young v. Germania Sav. Bank, 64 S.E. 552, 132 Ga. 490.
23 C.J. p 469 note 10.

23. Mo.—John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 305 Mo. 182, followed in First Nat. Bank v. Brown, 264 S.W. 677, Nichols Wire & Sheet Co. v. Brown, 264 S.W. 677, and Oliver Chilled Plow Works v. Brown, 264 S.W. 677—Blandon v. Martin, 50 Mo.App. 114.

Corpus Juris cited but the rule of the text was held inapplicable because the omitted proof comprised matters judicially noticed.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 216, 235 Ala. 178.

to the writ,[24] or on the ground that the judgment debtor has no interest in the property levied on.[25] Neither will the court entertain a motion to vacate by a stranger who claims ownership of the property levied on, because the court will not in this manner determine conflicting titles to property; the stranger will be left to the legal methods of trying his right to the property, such as those provided by statute or by the common-law action of trespass.[26]

Where a levy has been made on property which does not belong to defendant, and plaintiff has had to refund the money to the purchaser, or has become liable to the real owner, plaintiff may, on motion, have the levy vacated and the satisfaction of record removed.[27]

§ 110. Operation and Effect of Levy

a. In general
b. Interest of debtor
c. Interest of creditor

a. In General

Property levied on is in the custody of the law and the court by appropriate measures may restrain any interference.

Property levied on is in the custody of the law,[28] and it remains in such custody until it is withdrawn by order of a competent court;[29] the court may by attachment, punishment for contempt, and writ of restitution, maintain its jurisdiction against its own officers and other persons.[30] A levy on land not belonging to the debtor does not deprive the true owner of the right to bring trespass.[31]

The creation of a lien by the levy, and the extent thereof, is discussed infra §§ 123 et seq. The levy as constituting a satisfaction of the execution is considered infra § 336.

What law governs. The law of the state where a trust has been established determines the rights derived from the levy of an execution issued by a court of such state against the trust property.[32]

b. Interest of Debtor

A levy does not, according to some authorities, divest the debtor of ownership, particularly in the case of realty.

According to some authorities a levy does not divest the debtor of his ownership in the property.[33] Thus it has been held that a levy on personal property does not change the title of the judgment debtor into a mere right of action, and that the title remains in him with a capacity of disposition in any manner which does not impair the lien of the execution,[34] at least until a sale is made which operates in law to transfer the judgment debtor's interest to another.[35] However, as shown infra § 114, there is authority that a levy on personalty vests title in the officer making the levy. A levy on the rights of plaintiff in a suit deprives him of subsequent control over such suit.[36]

24. Mo.—John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 676, 305 Mo. 182, citing **Corpus Juris**, and followed in First Nat. Bank v. Brown, 264 S.W. 677, Nichols Wire & Sheet Co. v. Brown, 264 S.W. 677, and Oliver Chilled Plow Works v. Brown, 264 S.W. 677.
Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 705, 179 Okl. 86, quoting **Corpus Juris.**
23 C.J. p 470 note 14.

25. Okl.—Lexington Land Co. v. Ambrister, supra, quoting **Corpus Juris.**
23 C.J. p 470 note 15.

26. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 424, 110 Cal.App. 385, citing **Corpus Juris.**
Ga.—Arnoldsville Trading Co. v. Brotherton, 6 S.E.2d 210, 61 Ga. App. 370.
Mo.—John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 305 Mo. 182.
Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 705, 179 Okl. 86, quoting **Corpus Juris.**
23 C.J. p 470 note 16.

27. Minn.—Osborne v. Wilson, 32 N.W. 786, 37 Minn. 8.
23 C.J. p 470 note 17.

28. Fla.—Hooker v. Wiggins, 139 So. 803, 104 Fla. 355.
Ga.—Tattnall Bank v. Smith, 14 S.E.2d 685.
N.Y.—Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 144 Misc. 733.
Tex.—Keystone Pipe & Supply Co. of Texas v. Milner, Civ.App., 297 S.W. 1089.
23 C.J. p 470 note 23.
Actual possession
(1) Although sheriff after levying execution left property on premises, it remained in sheriff's "actual possession."—Conservative Building & Loan Ass'n v. Harry Pearl & Co., 151 A. 341, 343, 300 Pa. 580.
(2) Under the Texas statutes, the levy of execution on realty brings it into custody of court rendering judgment, although marshal does not take actual possession.—Wilkinson v. Goree, C.C.A.Tex., 18 F.2d 455, reversing, D.C., 15 F.2d 399 and certiorari denied Goree v. Wilkinson, 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1332.

29. Fla.—Adams v. Burns, 172 So. 75, 126 Fla. 685.

30. W.Va.—August v. Gilmer, 44 S.E. 143, 53 W.Va. 65.

31. Mass.—Bott v. Burnell, 9 Mass. 96, 11 Mass. 163—Howe v. Bishop, 3 Metc. 26.

32. N.Y.—Sarver v. Towne, 34 N.E.2d 313, 285 N.Y. 264, reversing 23 N.Y.S.2d 700, 260 App.Div. 615.

33. La.—New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 176 La. 946.
N.Y.—Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 144 Misc. 733.
Pa.—Myanza Color & Chemical Co. v. Fertex Dyeing & Finishing Co., 12 Pa.Dist. & Co. 666.

34. N.J.—Pedrick v. Keummell, 65 A. 846, 74 N.J.Law 379
23 C.J. p 470 note 27.

35. N.Y.—Walradt v. Phoenix Ins. Co., 32 N.E. 1063, 136 N.Y. 375, 32 Am.S.R. 752, affirming 19 N.Y.S. 293, 64 Hun 129.

36. La.—Garlick v. Williams Medical & Surgical Inst., 61 So. 732, 132 La. 670.

The levy of an execution on real property of the judgment debtor does not of itself operate as a disseizin, nor does it deprive the judgment debtor of the power of transferring or selling the same, subject to any lien of the execution,[37] although it has been held otherwise as to a levy on an equity of redemption.[38]

c. Interest of Creditor

The judgment creditor acquires no title to the property by reason of the levy and his interest in the property cannot exceed that which the debtor had.

The judgment creditor does not by virtue of the levy acquire title to the property seized,[39] but only an inchoate right to payment out of its avails by legal proceeding.[40] Any interest acquired by the creditor as a result of the levy is limited to the actual interest of the debtor[41] at the time of the levy or of the attachment of the lien.[42]

The levy on a debt due from a third person to the execution debtor gives the creditor a right to have such debt applied in payment of the claim of the execution creditor, and in effect makes such person trustee of the amount due from him to the execution debtor.[43]

Interest in leased property. A judgment creditor who levies on leased property may obtain all rents subsequently accruing,[44] even though the lessee has given promissory notes to the debtor for such rents.[45]

§ 111. Abandonment, Waiver, or Relinquishment of Levy

A levy may be abandoned, but the creditor or officer cannot release one levy and impose another at will.

Where a levy is made, the creditor or officer, as a general rule, has no power to release the levy and then levy on other property, unless with the consent of the debtor,[46] or on reasonable notice to him.[47] It has also been held that, where an execution has been levied, a claim interposed, and the papers returned to court, the officer has no right, except on leave of court, to withdraw the execution and make another levy,[48] but that before the papers have been returned into court, the creditor may have a new levy made on other property without an order of court for that purpose,[49] and that a levy may be dismissed while an issue is pending thereon.[50] A levy may be abandoned or relinquished where the property levied on does not belong to the debtor,[51] or where the levy, for any other reason, is void.[52]

37. Conn.—Schroeder v. Tomlinson, 39 A. 484, 70 Conn. 348.
23 C.J. p 470 note 30.

38. Mass.—Lunt v. Cook, 55 N.E. 468, 175 Mass. 1, 78 Am.S.R. 472.
23 C.J. p 470 note 31.

39. N.Y.—Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 144 Misc. 733.
23 C.J. p 471 note 33.

40. N.H.—Mitchell v. Roberts, 50 N.H. 486.
23 C.J. p 471 note 33.

41. U.S.—In re St. Mark's Hospital of New York City, C.C.A.N.Y., 59 F.2d 1001.
Iowa.—Lee v. Lee, 223 N.W. 888, 207 Iowa 882.
Mont.—First Nat. Bank v. Citizens' State Bank of Dooley, 283 P. 420, 86 Mont. 331, followed in Dooley Implement Co. v. Citizens' State Bank of Dooley, 283 P. 423, 86 Mont. 339.
Wash.—Waddell v. Roberts, 246 P. 755, 139 Wash. 273.
Wis.—Bradt v. Beloit Dairy Co., 230 N.W. 135, 201 Wis. 319.
23 C.J. p 471 note 34.

42. Iowa.—Carlisle v. Milliman, 203 N.W. 268, 199 Iowa 949.
Neb.—Thies v. Weible, 254 N.W. 420, 126 Neb. 720.
23 C.J. p 471 note 34.

Intervening rights of third persons
The legal fiction that under a levy duly perfected the title of the creditor relates back to the first step of the process is never permitted to work injustice to a bona fide purchaser, in whom any rights may have meantime become vested.—Schroeder v. Tomlinson, 39 A. 484, 70 Conn. 348.
Priority between execution lien and title of transferee see infra § 129.

43. S.D.—Lindskog v. Schouweiler, 80 N.W. 190, 12 S.D. 176.

Levy on all credits and debts owed to judgment debtor covers all rights which the debtor has at the time of the levy to the extent of the creditor's claim.—De Forest v. Cascade County, Mont., 120 P.2d 425.

Insurance moneys
An insurance company which pays money to its insured, with notice of an execution lien thereon, is liable to the execution creditor for the sum paid.—Combs v. Hunt, 125 S.E. 661, 140 Va. 627, 37 A.L.R. 621.

44. La.—Bank of Coushatta v. Williams, 121 So. 646, 10 La.App. 571.

45. La.—Bank of Coushatta v. Williams, supra.

46. Ill.—Smith v. Hughes, 24 Ill. 270.
23 C.J. p 471 note 37.

Injunction to restrain release
A petition for rule to show cause why defendants, in suit to set aside sale of realty as fraudulent simulation to prevent enforcement of judgment against vendor, should not be enjoined from releasing sheriff's seizure thereof on execution, was not subject to exception as unauthorized attempt to set aside contract between defendants, as issue vel non of ownership of seized property was not raised by rule.—Jones v. Dietrich, La.App., 186 So. 881.

47. S.C.—Lockhart v. Smith, 27 S.E. 567, 50 S.C. 112.
23 C.J. p 471 note 38.

48. Ga.—Kendall v. Matbrook, 54 Ga. 587.
23 C.J. p 471 note 39.

49. Ga.—Wyatt v. Chapman, 66 Ga. 727.

50. Ga.—Ayers v. Lamb, 65 Ga. 627.
23 C.J. p 471 note 41.

51. Ark.—State v. Swigart, 22 Ark. 528.
23 C.J. p 471 note 42.

52. Ind.—Ezra v. Manlove, 7 Blackf. 389.
23 C.J. p 471 note 43.

Temporary surrender of writ of execution by sheriff to attorney for plaintiff for purpose of indorsing on writ fact that it was issued on judgment against husband and wife did not invalidate levy as against contention that debtor is entitled to have writ of execution remain in hands of sheriff from time of its delivery to him until its return day; but the practice was not approved.—Kolakowski v. Cyman, 281 N.W. 332, 285 Mich. 585.

Whether a levy has been abandoned or relinquished depends largely on the circumstances of the particular case,[53] and is ordinarily a question for the jury.[54]

§ 112. Restoration of Levy

Examine Pocket Parts for later cases.

§ 113. Custody and Care of Property in General

The levying officer is under a duty to retain custody of the property. If necessary, he may employ a watchman.

It is the duty of the officer making the levy to keep the property within his custody and control until sold or otherwise lawfully disposed of.[55] He must have and retain such supervision over and custody of the property as will enable him to retain and assert his power and control over it, so that it cannot be withdrawn or taken by another without his knowledge.[56]

Putting a watchman or keeper in charge of property levied on is a sufficient precaution for its protection, unless violence is apprehended,[57] but the levy is not invalidated by a mere failure to place property levied on in charge of a watchman and to prevent the owners from resuming possession and control.[58]

Retaking. If property levied on is removed by others, the officer may take possession wherever found and use all force necessary for that purpose.[59]

§ 114. Title and Rights Acquired by Officer

a. In general
b. Actions by officer

a. In General

An officer by his levy acquires a special property in goods seized; he does not acquire title to realty or, according to some authorities, the right to possession thereof.

A levy on property of the judgment debtor vests in the officer making the levy a special property in the goods seized, and the right of possession thereof for the purpose of sale under such levy.[60] The officer, rather than the judgment creditor, has the right to raise questions as to the right of possession of the property seized.[61] The special right of the officer ceases when the execution creditor is satisfied, that is, when the object of the levy is attained.[62]

There is authority holding that the levy of an ex-

53. Okl.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 173 Okl. 285.
23 C.J. p 471 note 44.

Acts constituting abandonment

(1) There is a failure to keep good a levy on goods in a store, thus letting in a chattel mortgage, made and recorded after the levy, but before such failure, where the articles are not inventoried and marked or removed, but remain in the store, the owner retains possession of the key, and the person placed in charge as keeper by the officer stays in another part of the city at night.—Smart v. Sosey, 193 P. 167, 49 Cal. App. 332.

(2) Other acts see Schaeffer v. Potzel, 238 Ill.App. 335—23 C.J. p 471 note 44 [a].

Acts not constituting waiver or abandonment

(1) Filing of claim based on judgment against estate of deceased judgment debtor is not waiver of right to proceed on execution tested during lifetime of judgment debtor.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 173 Okl. 285.

(2) Other acts see Nichols v. Bell & Rachal, 2 La.App. 16—23 C.J. p 471 note 44 [b].

54. Mich.—Vanosdall v. Hamilton, 77 N.W. 9, 118 Mich. 533.
23 C.J. p 471 note 45.

55. Cal.—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.
Custody and care of property by sheriffs generally see the C.J.S. title Sheriffs and Constables § 46, also 57 C.J. p 785 note 35–p 786 note 44.

56. Cal.—Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
23 C.J. p 472 note 50.
Permitting property to remain in possession of:
Debtor see supra § 97.
Third person already in possession see infra § 115.

57. Mich.—Stilson v. Gibbs, 9 N.W. 254, 46 Mich. 215.

58. U.S.—Dawson v. Daniel, C.C. Tenn., 7 F.Cas.No.3,669, 2 Flipp. 305.
23 C.J. p 472 note 54.

59. U.S.—Parrish v. Danford, C.C. Ohio, 18 F.Cas.No.10,770, 1 Bond 345.

Possessory warrant by debtor

Where debtor forcibly removed property seized, after claim of exemption was filed, subsequent removal by levying officer was not such taking as would authorize possessory warrant by the debtor for its recovery.—Kemp v. Price, 157 S.E. 117, 42 Ga.App. 655.

60. Del.—Cochran v. Clements, 183 A. 632, 7 W.W.Harr. 410.
N.Y.—Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 144 Misc. 733.
23 C.J. p 472 note 58, p 490 note 42, p 470 note 28.

Effect of filing exempt property schedule

The ex parte filing by defendant of schedule of exempt property, after levy of execution, does not divest levying officer of right of possession.—Kemp v. Price, 157 S.E. 117, 42 Ga.App. 655.

Concurrent possession with mortgagee

By statute the mortgagee and the officer levying may have concurrent possession of the mortgaged chattels, the officer retaining custody until the mortgagee's sale, and having a right to know the amount and conditions thereof; and when the mortgagee sells he can protect the rights of the officer as well as his own.—Haynes v. Leppig, 40 Mich. 602.

61. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75 (two cases), 290 U.S. 660, 78 L.Ed. 571.

62. Ala.—Higdon v. Warrant Warehouse Co., 93 So. 938, 10 Ala.App. 496.
S.C.—Bates v. Gest, 14 S.C.L. 493.

ecution on personalty of the debtor vests the title thereto and the right to possession thereof in the officer making the levy,[63] but, as pointed out supra § 110 b, there is also authority that the levy alone does not divest the debtor of ownership.

It has been held that the officer has no authority to thresh grain, in order to put it in the best condition for sale;[64] but that, where it is necessary for the preservation of the grain, it is his duty to thresh it.[65] The officer has no authority to work animals levied on, to pay the expense of keeping them.[66]

A levy on real property gives the officer no title to the premises;[67] nor, according to some authorities, does it give him the right to possession thereof.[68] On the other hand, there is authority indicating that a levy on, or seizure of, realty gives the officer a right of possession,[69] and vests in him the right to receive the rents and profits of such property from the date of seizure.[70] It has also been held that an officer levying on a mortgagor's equity of redemption is entitled to take the property into his possession for the purpose of effecting a sale of the equity.[71]

b. Actions by Officer

The levying officer may maintain such actions as trespass, trover, or replevin against one who wrongfully interferes with his possession of the property.

The officer may maintain an action against one who unlawfully takes from his possession property levied on.[72] An officer who has either actual possession of the property or the right to immediate possession may maintain an action of trespass against any person wrongfully disturbing him in such possession,[73] or an action of trover for its conversion;[74] but he cannot invoke a summary proceeding by attachment for contempt of court against another officer for taking the property under another writ subsequently issued.[75]

As a general rule, where the officer has actual possession by virtue of the execution, it is sufficient to enable him to maintain trespass or trover without proving or producing the judgment;[76] but it has been held that, where he sues in trespass, on a mere constructive possession, for the benefit of plaintiff in the execution, he must prove the judgment, if required to do so, and that proving the execution alone is not sufficient.[77]

Replevin. An officer who has seized chattels under valid process has such a special property therein as will authorize him to maintain replevin against one who takes them out of his possession or that of his custodian.[78] However, he has no such interest as will authorize him to maintain replevin where he has not yet levied on the property,[79] or where the levy is made on a void process,[80] or where the levy and execution have been set aside before the return day of the execution.[81] An officer who seizes goods of a stranger to the suit acquires no such interest as will entitle him to maintain replevin against the true owner.[82]

§ 115. Delivery to Bailee or Receiptor

a. In general
b. Actions

a. In General

Without relinquishing custody of the property levied

63. N.J.—Hamilton v. Hamilton, 25 N.J.Law 544.
23 C.J. p 490 note 42.

64. Mich.—Stilson v. Gibbs, 40 Mich. 42.
23 C.J. p 472 note 63.

65. Vt.—Briggs v. Taylor, 35 Vt. 57.

66. Mich.—Bushey v. Raths, 7 N. W. 802, 45 Mich. 181.

67. La.—New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 176 La. 946.
23 C.J. p 472 note 60, p 490 note 43.

68. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75 (two cases), 290 U.S. 660, 78 L. Ed. 571.
23 C.J. p 472 note 60, p 490 note 43.

69. La.—New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 176 La. 946.

70. La.—Anderson v. Comeau, 33 La.Ann. 1119—Courtney v. Hunt, 5 La.Ann. 174.

71. Mich.—Wilson v. Montague, 24 N.W. 851, 57 Mich. 638.
23 C.J. p 472 note 62.

72. Ala.—Higdon v. Warrant Warehouse Co., 63 So. 938, 10 Ala.App. 496.
23 C.J. p 472 note 66.

Sheriff alone may sue for any interference with rights secured by him through levy under execution.—Yokoyama v. San Carlos Operating Co., 259 N.Y.S. 471, 144 Misc. 733.

73. N.H.—Houston v. Blake, 43 N.H. 115.
23 C.J. p 473 note 67.
Actions against bailee or receiptor see infra § 115 b (2).

74. Del.—Cochran v. Clements, 183 A. 632, 7 W.W.Harr. 410.
23 C.J. p 473 note 68.

Necessity of levy
The officer has no right or title which will support trover until he has actually made a levy.—Cochran v. Clements, supra.

75. Ill.—Gates v. People, 6 Ill.App. 383.

76. N.Y.—Barker v. Miller, 6 Johns. 195.
23 C.J. p 473 note 70.

77. N.Y.—Pryne v. Westfall, 3 Barb. 496—Earl v. Camp, 16 Wend. 562.

78. N.Y.—Pracht v. Gunn, 74 N.Y.S. 991, 69 App.Div. 396.
23 C.J. p 473 note 72.

79. Del.—Cochran v. Clements, 183 A. 632, 7 W.W.Harr. 410.
Ill.—Mulheisen v. Lane, 82 Ill. 117.

80. Minn.—Clark v. Norton, 6 Minn. 412.

81. Ind.—Walpole v. Smith, 4 Blackf. 304.

82. Mo.—Carroll v. Frank, 28 Mo. App. 69.

on, the officer may leave it in the possession of a third person as his bailee.

It is not necessary for an officer levying on property of a judgment debtor to retain actual possession of such property himself; he may leave it in the possession of a third person as his bailee,[83] or, as pointed out supra § 97, may permit the debtor to retain possession. By so doing the officer does not relinquish possession, but merely selects an agent to retain possession in his behalf, and the property is regarded as still being in his custody.[84] A promise by a third person to hold property for the sheriff does not make such person the sheriff's agent where the promise is made before the sheriff has taken possession.[85]

Form and contents of receipt. Where a receipt is given, it need not set forth in detail, or describe minutely and with particularity, the parties, court, and other facts appearing in full on the execution.[86] The officer cannot make any agreement with the custodian which would be at variance with the officer's duty as to the property,[87] and a promise in excess of the liability of the officer to the execution creditor is void, at least as to the excess.[88]

b. Actions

(1) By bailee or receiptor
(2) Against bailee or receiptor

(1) By Bailee or Receiptor

The bailee or receiptor of goods levied on may, according to some authorities, maintain an action to recover the goods or for their conversion.

Although there is authority to the contrary,[89] it has been held that the bailee or receiptor of goods levied on has such a special property in the goods as entitles him to maintain an action to recover the property or for its conversion.[90]

It has also been held that defendant in execution, with whom the property is left after the levy, see supra § 97, is the mere servant or agent of the officer, and cannot sue for the conversion of, or injury to, the property seized.[91]

(2) Against Bailee or Receiptor

The levying officer has several remedies against a bailee for his failure to redeliver the property. The bailee may be estopped to raise certain defenses.

If the bailee or receiptor fails or refuses to deliver when delivery is due, as on demand, the officer may sue him to recover the property or for its conversion;[92] or he may sue in assumpsit for the breach of the contract.[93] The officer's right of action is dependent on his liability over to some one else,[94] and hence if he has been discharged from such liability, he cannot maintain the action unless the discharge resulted from his payment of the liability.[95] The production of an execution in support of the officer's right of action may be dispensed with by proof of its loss.[96]

Conditions precedent. Where a demand is necessary before bringing suit, the demand need not be made by the officer personally but may be made by any person properly authorized by him.[97] Under some statutes the demand need not be made within the lifetime of the execution.[98]

Defenses. The receiptor is liable unless the property is destroyed by the act of God or the public enemy.[99] It is no defense that the sheriff made an excessive levy;[1] that the property was taken out of his possession by an officer, unless a legal right so to act is shown;[2] that the deputy sheriff transcended his powers, where ratified by the sheriff;[3] that the bailee or receiptor offered to deliver the property, after the time when the officer could

83. Cal.—Noland v. Noland, 113 P. 2d 11, 44 Cal.App.2d 780.
23 C.J. p 473 note 77.

Personal engagement
An engagement by a third person to hold property which the sheriff has previously taken possession of is a personal one between the two individuals.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.

84. U.S.—Chicago Trust Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 302.
Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.
23 C.J. p 474 note 79.

85. S.C.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.

86. Mich.—Burk v. Webb, 32 Mich. 173.
23 C.J. p 474 note 81.

87. Me.—Plaisted v. Hoar, 45 Me. 380.
23 C.J. p 474 note 82.

88. N.Y.—Browning v. Hanford, 5 Hill 588, 40 Am.D. 369.

89. Mass.—Perley v. Foster, 9 Mass. 112.

90. N.J.—Browning v. Skillman, 24 N.J.Law 351.
23 C.J. p 475 note 11.

91. N.Y.—Smith v. Reeves, 33 How. Pr. 183.

92. Ga.—James v. Pepper, 73 S.E. 407, 10 Ga.App. 266.
23 C.J. p 474 note 85.

93. Ala.—Higdon v. Warrant Warehouse Co., 63 So. 938, 10 Ala.App. 496.
23 C.J. p 474 note 86.

94. Ala.—Higdon v. Warrant Warehouse Co., supra.

95. Ala.—Higdon v. Warrant Warehouse Co., supra.

96. Vt.—Bliss v. Stevens, 4 Vt. 88.

97. Mich.—Bowen v. Culp, 36 Mich. 224.

98. Mich.—Burk v. Webb, 32 Mich. 173.
23 C.J. p 474 note 92.

99. N.Y.—Cornell v. Dakin, 38 N.Y. 253.
23 C.J. p 475 note 98.

1. N.Y.—Dezell v. Odell, 3 Hill 215, 38 Am.D. 628.

2. Ky.—Stephens v. Vaughan, 27 Ky. 206, 20 Am.D. 216.

3. Ala.—Whitsett v. Womack, 8 Ala. 466.

sell it;[4] or that there were mistakes in the receipt as to the property, where they could not have misled the parties.[5] It is no defense that the execution is satisfied since in such case the officer is liable to the execution debtor for a return of the property.[6] The receiptor cannot show that the property was of less value than the sum stipulated to be paid in case of its nondelivery.[7]

Although the fact that the property was not subject to execution is not necessarily a defense,[8] the receiptor may show that the goods are exempt and have been delivered to the execution debtor.[9]

Estoppel or waiver. The receiptor is estopped from alleging the want of a sufficient legal judgment or execution,[10] and from denying a delivery to him of the property as recited in the receipt.[11] Further, the receiptor may be estopped to assert title in himself or a third person,[12] as where he conceals his ownership and suffers the goods to be seized as the property of the execution debtor.[13]

Where the receipt does not admit ownership in the execution debtor, and the receiptor at the time asserts ownership in himself or the officer has knowledge of his claim, the receiptor is not estopped from setting up his ownership in an action on the receipt.[14] A lienholder does not waive his lien by signing an acknowledgment which states that he holds the property for the sheriff, where the acknowledgment contains an express reservation of his rights.[15]

§ 116. Delivery on Forthcoming or Delivery Bond

a. In general
b. Operation and effect of bond

a. In General

Under statutes property seized on execution may be delivered to the debtor on his furnishing a forthcoming or delivery bond.

A forthcoming or delivery bond, as the term is used herein, is a bond given for the security of the sheriff, conditioned to produce the property levied on when required,[16] its object being to enable the debtor to retain in his possession the property levied on until the day of sale.[17] These bonds are of statutory origin,[18] and are to be distinguished from receipts for the delivery of the property to the officer on demand, see supra § 115, and from bonds given by third party claimant of the property seized, see infra §§ 176, 192–194.

The forthcoming bond, when given, is not binding until accepted by the officer,[19] and is of no effect until the property is released by the officer;[20] and the fact that the officer attests the bond is not conclusive evidence that he has accepted it.[21]

The owner of personalty who has given a bond to obtain the redelivery of property levied on is not required to pay the costs, including the expense of keeping the property while it is under levy and in the officer's possession, as a condition precedent to obtaining possession from the officer.[22]

Officer's rights and duties as to bond. Under some statutes it appears to be the duty of the officer to take a forthcoming or delivery bond and deliver the property where defendant so demands.[23] However, a statute authorizing a delivery bond when the property is left by the levying officer in the possession of the execution debtor, may be merely directory and remedial,[24] and although it is safer and better for the officer to take a bond,[25] it is a matter within his discretion,[26] and his fail-

4. Mich.—Bowen v. Culp, 36 Mich. 224.
5. Mich.—Burk v. Webb, 32 Mich. 173.
6. Conn.—Reed v. Tousley, 1 Root 374.
23 C.J. p 475 note 6.
7. N.Y.—Cornell v. Dakin, 38 N.Y. 253.
8. Ky.—Stephens v. Vaughan, 4 J. J.Marsh. 206, 20 Am.D. 216.
9. Wis.—Main v. Bell, 27 Wis. 517.
10. Mich.—Burk v. Webb, 32 Mich. 173.
11. Mich.—Burk v. Webb, supra.
12. N.J.—Hampton v. Swisher, 4 N.J.Law 66.
23 C.J. p 474 note 95.
13. Wis.—Perry v. Williams, 39 Wis. 339.
23 C.J. p 474 note 96.
14. S.D.—Plunkett v. Hanschka, 85 N.W. 1004, 14 S.D. 454.
23 C.J. p 474 note 97.
15. Wash.—Howard v. Mortensen, 258 P. 853, 144 Wash. 661.
16. Colo.—Nichols v. Chittenden, 59 P. 954, 14 Colo.App. 49.
Replevin bonds to suspend levy or sale see infra § 139.
17. Miss.—Skinner v. Jayne, 24 Miss. 567.
18. Miss.—U. S. Bank v. Patton, 5 How. 200, 35 Am.D. 428.
23 C.J. p 475 note 23.
19. Ga.—Fountain v. Napier, 34 S. E. 351, 109 Ga. 225.
20. La.—Ware v. Wilson, 22 La. Ann. 102.
21. Ga.—Fountain v. Napier, 34 S. E. 351, 109 Ga. 225.
22. Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.
23. **Duty of sheriff to prepare bond**
It is the duty of the sheriff to prepare the bond.—Price v. Honaker, 5 T.B.Mon., Ky., 562—57 C.J. p 785 note 19.
24. Tenn.—Nighbert v. Hornsby, 42 S.W. 1060, 100 Tenn. 82, 66 Am.S. R. 736.
However, it has been stated that "it is the duty of the sheriff to take such bond when offered; he dare not refuse it."—Cheiares v. Alderson, 7 Humphr., Tenn., 273, 274.
25. Tenn.—Nighbert v. Hornsby, 42 S.W. 1060, 100 Tenn. 82, 66 Am.S.R. 736.
26. Ill.—Snyder v. Powell, 133 Ill. App. 393.
Destruction of value by use
A bond should not be taken where continued use of the property would tend to wear it out and destroy its

ure to do so does not affect the validity of the levy.[27]

The officer has no right to take such a bond where, pursuant to statute, an execution is indorsed "No security of any kind to be taken."[28]

Time for bond. The bond may be given and accepted after the return day of the writ.[29]

Judgment or levy void. Since a forthcoming bond must be founded on a valid judgment and execution thereunder, such a bond, given under a void judgment or under a void levy of execution, is also void.[30]

Exempt property. A bond extorted by an officer to compel the delivery of exempt property is void, unless the debtor waives his rights either by act or omission.[31]

b. Operation and Effect of Bond

The giving and acceptance of a forthcoming bond entitles the debtor to possession of the property. As a general rule, the bond does not destroy the lien of the execution and it may estop the obligors from questioning the validity of the writ or of the levy.

The giving and acceptance of a forthcoming bond entitles the debtor to the custody of the property,[32] and relieves the officer from the obligation to keep the property.[33] It makes the debtor the agent of the levying officer.[34] Delivery of the property pursuant to the bond does not preclude the filing of a claim by a third person.[35]

Debtor's right to refuse possession. After giving a bond the debtor may, nevertheless, refuse to take possession of the property.[36] Under such circumstances the levying officer continues in possession by virtue of the levy;[37] he does not hold as bailee or agent for defendant.[38]

Extinguishment of levy, lien, or judgment. As a general rule, the giving of a forthcoming or delivery bond, and the consequent surrender of possession of the property, does not destroy the lien of the execution or render the original seizure a nullity.[39] In some jurisdictions, in construing statutes concerning forthcoming bonds, it has been held that such a bond is not a satisfaction of the execution, and on condition broken the judgment creditor may sue out a new execution on the judgment against defendant and the sureties on the bond, and the officer may levy again on the same property.[40] In other jurisdictions, however, the bond operates as a discharge of the levy and lien, or as a satisfaction of the original judgment, at least where forfeited by a failure to deliver the property, and the remedy thereafter is on the bond,[41] unless relief is obtained in equity.[42]

A forthcoming bond, without any, or with a fictitious, security, is absolutely void, and its forfeiture does not discharge the lien of the judgment or execution;[43] and the same rule applies where the bond is afterward quashed for any irregularity.[44] The forfeiture of a delivery bond taken without authority of law does not discharge the execution lien.[45] Where property is delivered on a void forthcoming bond, it cannot be retaken and sold under a venditioni exponas unless by consent.[46]

Estoppel or waiver. The obligors are estopped by the giving of the bond to question the validity

value.—Aleman v. Gonzales, Tex. Civ.App., 258 S.W. 243.

27. Tenn.—Nighbert v. Hornsby, 42 S.W. 1060, 100 Tenn. 82, 66 Am.S.R. 736—Brown v. Allen, 3 Head 429.

28. Ky.—Ditto v. Geoghegan, 1 Metc. 169—Poston v. Southern, 7 B.Mon. 289.

29. Tenn.—Cheaires v. Alderson, 7 Humphr. 273.
W.Va.—Harwood v. Creel, 8 W.Va. 579.

30. Miss.—Buckingham v. Bailey, 12 Miss. 538.
23 C.J. p 479 note 97.

31. Mo.—Robards v. Samuel, 17 Mo. 555.

32. Ind.—Hubbard v. Security Trust Co., 78 N.E. 79, 38 Ind.App. 156.

33. Ala.—Whitsett v. Womack, 8 Ala. 466.

34. Ga.—Peacock Hardware Co. v. Allen, 127 S.E. 780, 33 Ga.App. 654—Smith v. Davis, 60 S.E. 199, 3 Ga.App. 419.

35. Ga.—Peacock Hardware Co. v. Allen, 127 S.E. 780, 33 Ga.App. 654.

36. Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.

37. Ga.—Rogers v. Echols, supra.

38. Ga.—Rogers v. Echols, supra.

39. La.—A. Baldwin & Co. v. Le Long, App., 142 So. 879.
23 C.J. p 479 note 98.

Timely seizure is not nullified by surrender of the property on a forthcoming bond.—A. Baldwin & Co. v. Le Long, supra.

Insolvency of obligor

Where one of two judgment debtors gives a bond which is forfeited, the other is not discharged from the original judgment if the obligors on the bond prove insolvent.—Garland v. Lynch, 1 Rob. 545, 40 Va. 545.

Transfer to third person

A voluntary surrender of the property by defendant to a third person, who has no valid right thereto, subsequent to the execution of the bond, does not defeat plaintiff's lien.—Fidelity & Deposit Co. v. B. F. Sturtevant Co., 38 So. 783, 86 Miss. 509, 109 Am.S.R. 716.

40. Ill.—Trenary v. Cheever, 48 Ill. 28.
23 C.J. p 479 note 2.

41. Tex.—Aleman v. Gonzales, Civ. App., 258 S.W. 243.
23 C.J. p 479 note 99.

42. Va.—Jones v. Myrick, 8 Gratt. 179, 49 Va. 179.
23 C.J. p 479 note 1.

43. Miss.—Carleton v. Osgood, 7 Miss. 285.

44. Ky.—Southern Bank v. White, 1 Duv. 290.
Miss.—Bingaman v. Hyatt, Sm. & M. Ch. 437.

45. Tenn.—Lester's Case, 4 Humphr. 383.

46. Pa.—Frisch v. Miller, 5 Pa. 310.

of the writ[47] or of the levy,[48] or the fact of levy,[49] or to set up that the property was not subject to levy.[50] After receiving the property and getting the full benefit of the bond, the obligor is estopped from denying the validity of the bond.[51]

The estoppel does not extend, however, to the validity of the process[52] or to the authority of the officer to make the levy,[53] and there is no estoppel to assert that the judgment and execution are void.[54] A judgment debtor who has obtained a release of property by means of a forthcoming bond does not thereby waive his right to seek the reduction of an excessive seizure.[55]

§ 117. —— Form, Requisites, and Sufficiency of Bonds

a. In general
b. Conditions as to redelivery
c. Parties
d. Motions to quash

a. In General

The forthcoming bond must substantially conform to statutory requirements, but a bond which fails to comply with the statutes may nevertheless be binding as a common-law obligation. Irregularities in the bond may be waived.

While the form and requisites of the forthcoming bond vary according to the provisions of different statutes, yet, since the proceeding is statutory, it is essential that the bond should substantially conform to the requirements of the statute by which it is authorized.[56] If the statute does not prescribe the form, the bond is not void for its failure to follow the words of the statute.[57] A bond, not good as a statutory bond, for failure to comply with some provision of the statute, may yet be good as a common-law obligation.[58] The officer's fee for taking the bond may be included in it.[59]

The bond should recite the issuance and levy of the writ,[60] the name of the judgment debtor,[61] and the amount for which the execution issued.[62] Any material variance between the writ and the description thereof in the bond will be fatal to the bond,[63] but slight and unimportant variance will not be noticed.[64] A variance between the return and the bond is immaterial.[65]

Description of property. The bond should describe the property levied on, and for the proper delivery of which it is conditioned.[66] It should specify the owner thereof,[67] and, in some jurisdictions, its value.[68]

Seal. A seal is not necessary under statutes dispensing therewith,[69] and its absence is at most a mere irregularity.[70]

Blanks in bond. A bond executed and delivered in blank as to any material part thereof is void;[71] but the fact that a blank appears in part of the bond does not invalidate it, if the omission can be supplied by construction from another part thereof.[72]

Bond covering two executions. In some jurisdictions it is proper to unite two executions against the

47. W.Va.—Shaw v. McCullough, 3 W.Va. 260.

48. Ga.—Garner v. Clark, 42 S.E. 56, 115 Ga. 666.
23 C.J. p 438 note 96, p 479 note 10.

49. Ga.—Midville Fertilizer & Gin Co. v. Wade, 118 S.E. 62, 30 Ga. App. 337—Smith v. Davis, 60 S.E. 199, 3 Ga.App. 419.

50. W.Va.—Weston v. Ralston, 41 S.E. 338, 51 W.Va. 157.

51. Ga.—Hatton v. Brown, 57 S.E. 1044, 1 Ga.App. 747.

52. Ga.—Peeples v. Garrison, 81 S. E. 116, 141 Ga. 411, 51 L.R.A.,N.S., 635.

53. Ga.—Hartshorn v. Gough Bank, 82 S.E. 805, 15 Ga.App. 167, overruling in effect Smith v. Davis, 60 S.E. 199, 3 Ga.App. 419.

54. Kan.—Olson v. Nunnally, 28 P. 149, 47 Kan. 391, 27 Am.S.R. 296.

55. La.—Auto Painting & Repairing Co. v. Ware, App., 152 So. 113.

56. La.—Cutrer v. Smith, App., 142 So. 170.
23 C.J. p 476 note 41.

57. Mo.—Grant v. Brotherton, 7 Mo. 458.

58. Ga.—Mount v. Wall, 56 S.E. 298, 127 Ga. 211.
23 C.J. p 476 note 43.

59. Va.—Bronaughs v. Freeman, 2 Munf. 266, 16 Va. 266.

60. U.S.—Ambler v. McMechen, D. C., 1 F.Cas.No.273, 1 Cranch C.C. 320.
23 C.J. p 477 note 74.

61. Ala.—Nicolson v. Burke, 15 Ala. 353.
23 C.J. p 477 note 75.

62. Miss.—Barker v. Planters' Bank, 6 Miss. 566.
23 C.J. p 477 note 76.

63. W.Va.—Holt v. Lynch, 18 W.Va. 567.
23 C.J. p 477 note 77.

64. U.S.—Williams v. Lyles, D.C., 2 Cranch 9, 2 L.Ed. 191.
23 C.J. p 478 note 78.

65. Va.—Buchanan v. Maynadier, 6 Call 1, 10 Va. 1.

66. Va.—Hubbard v. Taylor, 1 Wash. 259, 1 Va. 259.
23 C.J. p 471 note 71.

Erroneous motor number

A bond given for the delivery of a vehicle is not fatally defective because of an error in the motor number where the vehicle delivered to the debtor was in fact the one taken by the sheriff.—Aleman v. Gonzales, Tex.Civ.App., 258 S.W. 243.

67. Miss.—Jones v. Miles, 2 Miss. 50.
23 C.J. p 477 note 72.

68. W.Va.—Kunst v. Findley, 80 S. E. 136, 73 W.Va. 152.

69. Ky.—Handley v. Rankins, 4 T. B.Mon. 554.

70. Miss.—McComb v. Doe, 16 Miss. 505.

71. Miss.—Dickson v. Hamer, Freem. 284.
23 C.J. p 476 note 50.

72. Va.—Bartley v. Yates, 2 Hen. & M. 398, 12 Va. 398.
23 C.J. p 476 note 51.

same party in one forthcoming bond, provided the bond recites distinctly the amount of each execution.[73]

Objections, waiver, and amendment. The obligors cannot object to the validity of the bond where the defect urged will not injure them, as where the penal sum is too small,[74] or where the officer has taken the bond without the sureties required by statute, and the judgment creditor has accepted it,[75] or where a bond executed by less than all the debtors has been accepted and they alone complain.[76] The execution defendant may waive defects in the bond.[77]

After the execution of the bond, the court may allow an amendment to correct a clerical error patent on its face, and may permit the bond to be reformed so as to make it conform to the true and evident intention of the parties at the time of its execution.[78]

b. Conditions as to Redelivery

The forthcoming bond must contain the conditions prescribed by statute relating to the redelivery of the property.

The forthcoming bond must contain the statutory conditions relating to the redelivery of the property.[79] Generally the bond should require the obligor to deliver the property to the officer at the time and place fixed for sale,[80] and in some jurisdictions the bond must be conditioned to deliver the property at the time of the sale thereof and not when demanded.[81] The day fixed for delivery may be a day after the return day of the writ,[82] and if the day of delivery is stated, it need not also be stated that that day is the day of sale;[83] failure to state the year for the delivery is not necessarily fatal.[84] A bond is not good as a statutory bond which provides for delivery on a day different from the day of sale fixed in the bond,[85] or for delivery on a day after the time prescribed by the statute,[86] or for delivery on a day already passed.[87] An impossible date for delivery, which may be corrected by reasonable intendment, does not invalidate the bond.[88] It is immaterial that there is not sufficient time stated in the condition, under the statute, between the levy and sale.[89]

To whom delivered. It is not necessary to state to whom the property is to be delivered.[90]

c. Parties

The forthcoming bond should be executed by, and made payable to, those persons designated by the governing statutes.

The question who may execute a forthcoming bond depends on the terms of the governing statute.[91] Some statutes authorize only the person whose property is levied on to execute such bond,[92] or, in case of his death, his executor or administrator.[93] When there are several defendants the better doctrine seems to be that one of them may execute such a bond even where his codefendants fail to unite with him;[94] and it has been held that, although it is irregular for the officer to allow the bond to be executed unless all the defendants join therein, yet the bond is valid and binding on the obligors, until it is quashed at the instance of the judg-

73. Va.—Winston v. Commonwealth, 2 Call 290, 6 Va. 290.
23 C.J. p 476 note 53.

74. Ala.—Anderson v. Rhea, 7 Ala. 104.
23 C.J. p 478 note 81.

75. Miss.—Coffee v. Planters' Bank, 22 Miss. 458, 49 Am.D. 68—Walker v. McDowell, 12 Miss. 118, 43 Am. D. 476.

76. Ky.—Wilson v. King, 3 Litt. 457, 14 Am.D. 84.

77. Ind.—Paul v. Arnold, 12 Ind. 197.
23 C.J. p 478 note 84.

78. Mo.—Grant v. Brotherton, 7 Mo. 458.
23 C.J. p 478 note 85.

79. Bond conditioned to pay costs and damages
A statute requiring the bond to be conditioned for return of property levied on is not satisfied by bond requiring merely payment of costs and damage incurred by delay.—Eslinger v. Land, 163 S.E. 522, 45 Ga.App. 96.

80. N.C.—Grady v. Threadgill, 35 N. C. 228.
23 C.J. p 477 note 54.

Delivery in different county
A bond is insufficient where the obligation was to deliver the property in a county other than the one where the levy was made.—Mobile Branch Bank v. Darrington, 14 Ala. 192.

Omission of place of delivery
A place of delivery need not be set forth where the governing statutes do not so require.—Burwell v. Court, 1 Wash. 254, 1 Va. 254.

81. Va.—Downman v. Chinn, 2 Wash. 189, 2 Va. 189.

82. N.C.—Grady v. Threadgill, 35 N.C. 228.
Va.—Ballard v. Whitlock, 18 Gratt. 235, 59 Va. 235.

83. Va.—Irvin v. Eldridge, 1 Wash. 161, 1 Va. 161—Wood v. Davis, 1 Wash. 69, 1 Va. 69.

84. Ark.—Cheek v. Claiborne, 22 Ark. 384.

85. W.Va.—Adler v. Green, 18 W. Va. 201.

86. Ky.—Vertrees v. Shean, 2 Metc. 291.

87. Tex.—Jenkins v. McNeese, 34 Tex. 189.
W.Va.—Wallace v. McCarthy, 8 W. Va. 193.

88. N.C.—Foster v. Frost, 15 N.C. 424.

89. Miss.—Jones v. Mississippi & A. R. Co., 6 Miss. 407.
23 C.J. p 477 note 63.

90. Ind.—Eldridge v. Yantes, 6 Blackf. 72.

91. Tex.—Harris v. Shackleford, 6 Tex. 133.

92. Tex.—Harris v. Shackleford, supra.
23 C.J. p 476 note 37.

93. Miss.—Thompson v. Ross, 26 Miss. 198.
23 C.J. p 476 note 38.

94. Ala.—Sheppard v. Melloy, 12 Ala. 561.
Miss.—Head v. Beaty, 6 Miss. 480.

ment creditor.[95]

The names of the parties at whose instance the executions have issued need not be stated.[96] Unless required by statute, a surety is not necessary,[97] and the fact that the obligee is also a surety will not render the bond void.[98]

To whom payable. To constitute a statutory bond, the provisions of the statute as to whom it must be payable must be strictly followed.[99] In most jurisdictions the statutes require the bond to be made payable to the judgment creditor;[1] but the fact that a bond is made payable to the wrong person will not prevent recovery on it as a common-law bond.[2] Where the name of the obligee is omitted, the bond is a covenant with the officer to whom it is delivered.[3]

d. Motions to Quash

A defective forthcoming bond may be attacked by motion to quash it, provided the motion is made at the proper time.

The proper mode of attacking a defective forthcoming bond is by a motion to quash it, which will usually be granted at the instance of the judgment creditor, provided it is made at the proper time,[4] but only for inherent defects.[5] In a proper case, the motion may be made by the obligors in the bond.[6]

In some jurisdictions a motion to quash must be made at the first term of court after the execution issues,[7] and where a judgment quashing the bond is void by reason of its being granted after such term, it may be wholly disregarded, and execution may issue on the bond as though no such judgment had been made.[8] It is not too late for one who is not a party to the bond to object, after such term, to the bond's operating to charge him.[9]

Motion to quash execution. A defect in the bond cannot be urged by motion to quash an execution issuing on it after forfeiture of the bond.[10]

§ 118. —— Liabilities on Bonds

a. In general
b. Liability of sureties
c. Defenses and excuses

a. In General

Liability on a forthcoming bond arises when the bond is breached.

To impose liability on a forthcoming bond, a breach of the bond is necessary,[11] and, where the execution of the bond is not denied, this is the only issue that may properly be raised in a suit thereon.[12]

As a general rule, the bond is forfeited by the failure to deliver the property at the time and place of sale,[13] or on demand where the bond so reads,[14] unless in the alternative, the obligor pays the whole amount due.[15] A subsequent act of the obligors, such as a tender of the property after the day of sale,[16] or a tender of other property as a substitute for that levied on, although of greater value,[17] does not relieve them from the previous forfeiture.

b. Liability of Sureties

Sureties on a forthcoming bond are liable on default by the principal unless they are discharged from responsibility or obtain relief in equity.

Before the sureties on a forthcoming bond may

95. Ky.—Kouns v. Commonwealth Bank, 2 B.Mon. 303.
23 C.J. p 476 note 40.

96. N.C.—Grady v. Threadgill, 35 N.C. 228.

97. Va.—Washington v. Smith, 3 Call 13, 7 Va. 13.
23 C.J. p 476 note 46.

98. Va.—Booth v. Kinsey, 8 Gratt. 560, 49 Va. 560.

99. Ind.—Thompson v. Wilson, 1 Blackf. 358.

1. Ala.—Burns v. George, 45 So. 421, 154 Ala. 626.
23 C.J. p 477 note 68.

2. Ga.—Salmon v. Lynn, 85 S.E. 203, 16 Ga.App. 298.
Enforcement of forthcoming bond as common-law obligation generally see supra subdivision a of this section.

3. Del.—Crawford v. Slack, 1 Del. 122.
23 C.J. p 477 note 70.

4. U.S.—Sutton v. Mandeville, D.C., 23 F.Cas.No.13,649, 1 Cranch C.C. 32.
23 C.J. p 478 note 86.

5. Miss.—Shields v. Graves, 7 Miss. 262.
23 C.J. p 478 note 87.

6. Va.—Couch v. Miller, 2 Leigh 545, 29 Va. 545.

7. Ky.—Hopkins v. Chambers, 7 T. B.Mon. 257.
23 C.J. p 478 note 88.

8. Miss.—Fellows v. Griffin, 20 Miss. 362—Bell v. Tombigbee R. Co., 12 Miss. 549.

9. Miss.—Smith v. Tupper, 12 Miss. 261, 43 Am.D. 483.
23 C.J. p 478 note 90.

10. Miss.—Jones v. Stanton, 8 Miss. 601.
23 C.J. p 478 note 80.

11. Ga.—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.
23 C.J. p 480 note 19.
Disposition of affidavit of illegality Where the forthcoming bond calls for delivery of the property in the event that an affidavit of illegality is dismissed or withdrawn, plaintiff suing on the bond must prove what disposition was made of the affidavit of illegality.—Futch v. Taylor, 105 S.E. 616, 26 Ga.App. 129.

12. Ga.—Salmon v. Lynn, 85 S.E. 203, 16 Ga.App. 298.

13. Ga.—Taylor v. Stripland, 191 S.E. 170, 55 Ga.App. 683—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.
23 C.J. p 480 note 21.

14. Ga.—Hatton v. Brown, 57 S.E. 1044, 1 Ga.App. 747.
23 C.J. p 480 note 22.

15. Va.—Bernard v. Scott, 3 Rand. 399, 24 Va. 399.
23 C.J. p 480 note 23.

16. Ga.—Mapp v. Thompson, 9 Ga. 42.
23 C.J. p 480 note 24.

17. Ga.—Redwine v. Street, 89 S.E. 163, 18 Ga.App. 77.

be held liable, it must be shown that the principal has breached the bond.[18]

A surety is not released by the return of a fieri facias against the principal before the return day of the writ, unless he is shown to have been injured thereby;[19] nor is he released by a voluntary surrender of the property by defendant to a third person, who has no right thereto, subsequent to the execution of the bond.[20] A judgment against one surety on a forthcoming bond does not, prior to satisfaction thereof, bar an action against another surety on the bond.[21] The fact that plaintiff in fieri facias instituted suit on one forthcoming bond does not necessarily bar an action by him against the sureties on a second bond subsequently issued.[22]

Delay in proceeding on bond. An unreasonable delay on the part of the judgment creditor in suing out execution on a forthcoming bond after it has been forfeited may discharge the sureties.[23] A reasonable delay in proceeding on the forthcoming bond will not release the sureties, especially where it is not shown that they were damaged thereby.[24]

Extent of liability. Sureties cannot be held for another or different amount than the principal,[25] and under some statutes they are not responsible for more than the value of the property specified in the bond.[26]

Relief in equity. In some cases equity has undertaken to relieve sureties on a forfeited bond, as where the surety was prevented by accident or fraud from delivering the property at the time appointed;[27] or where the obligee in the bond was a cosurety and the principal was insolvent,[28] or where the signature appearing on the bond was unauthorized,[29] unless the judgment creditor was not a party to the fraud.[30]

On the other hand, the doctrine is well settled that a court of equity will not grant relief to sureties on the ground of an irregularity in the judgment or levy on which the bond was founded,[31] unless the irregularity is such as to prevent the bond from being obligatory.[32]

c. Defenses and Excuses

Liability on forthcoming bond may be avoided, for example, where its conditions have not been wrongfully breached, or, if breached, no damage resulted.

Any proper defense relating to the performance of the condition of the forthcoming bond may be set up in avoidance of liability.[33]

Defects in, or reversal of judgment. Defects in the original judgment do not constitute a defense,[34] unless they are such as to render the judgment void.[35]

The reversal of the judgment on which the forthcoming bond was given avoids the bond and execution issued thereon, without a motion to quash.[36]

Property not subject to levy. The failure to produce exempt property has been held not to impose liability for breach of the bond.[37] It is also a good

18. Failure to deliver property, etc.
Where the condition of the bond is that the principal shall deliver the property or pay the amount of the bond when called on to do so, the surety is not liable without proof that the principal has breached the bond.—Cutrer v. Smith, La.App., 142 So. 170.

19. La.—Stewart v. Lacoume, 30 La. Ann. 157.

20. Miss.—Maryland Fidelity & Deposit Co. v. B. F. Sturtevant Co., 38 So. 783, 86 Miss. 509, 109 Am.S. R. 716.

21. Ill.—Bruce v. American Surety Co., 260 Ill.App. 321.

22. Ga.—Garmany v. Shaw, 140 S. E. 785, 37 Ga.App. 462.
Suit on second bond held barred
Where a fieri facias is levied and a forthcoming bond with security given, and pending a claim proceeding plaintiff in fieri facias withdraws the original fieri facias and levies on additional property of defendant, a verdict for defendants in a suit on second forthcoming bond given with new sureties would be authorized, where plaintiff in a suit on the first bond compromised with the solvent surety, as that amounted to a satisfaction of the fieri facias as to the sureties in the second bond, in view of governing statutes.—Garrett v. Combs, 104 S.E. 251, 25 Ga.App. 274.

23. Ky.—Brown v. Fulkerson, 8 B. Mon. 393.
23 C.J. p 481 note 45.

24. Miss.—Newell v. Hamer, 5 Miss. 684, 35 Am.D. 415.
23 C.J. p 481 note 46.

25. La.—Lemle v. Routon, 33 La. Ann. 1005—Schmidt v. Brown, 33 La.Ann. 416.

26. Tenn.—Kercheval v. Harney, Meigs 403.
23 C.J. p 481 note 42.

27. Ky.—Saddler v. Glover, 5 Dana 551.
23 C.J. p 481 note 51.

28. Va.—Booth v. Kinsey, 8 Gratt. 560, 49 Va. 560.
23 C.J. p 482 note 52.

29. Ala.—Brooks v. Harrison, 2 Ala. 209.

30. Va.—Gordon v. Jeffrey, 2 Leigh 410, 29 Va. 410.
23 C.J. p 481 note 50.

31. Miss.—Baine v. Williams, 18 Miss. 113.
23 C.J. p 481 note 47.

32. Ky.—Perry v. Hensley, 14 B. Mon. 474, 61 Am.D. 164.
23 C.J. p 481 note 48 [a].

33. Ark.—Dugan v. Fowler, 14 Ark. 132.
23 C.J. p 482 note 72.

34. Ga.—Harden v. Webster, 29 Ga. 427.
W.Va.—Reynolds v. Hurst, 18 W.Va. 648.

35. Va.—Pates v. St. Clair, 11 Gratt. 22, 52 Va. 22.

36. Va.—Rucker v. Harrison, 6 Munf. 181, 20 Va. 181.
23 C.J. p 481 note 38.
On appeal from judgment rendered on bond, where the original judgment has been reversed meanwhile, the original execution should be brought up by special certiorari, in order that the connection between the two judgments may be shown.—Barton v. Petit, Va., 7 Cranch 288, 3 L.Ed. 347.

37. Ga.—Chalker v. Thompson, 72 Ga. 478—Jones v. Spillers, 71 S.E. 777, 9 Ga.App. 473.

defense that the property was levied on without authority because the levy should have been confined to property previously attached.[38] On the other hand, it has been held to be no defense that the property for which the bond was given was not the property of the execution debtor.[39]

Absence of damage. There can be no recovery for breach of the bond where no damage results from such breach,[40] as where the property has been damaged while in the possession of the obligor in the bond, but the property even in its depreciated condition is worth more than enough to satisfy plaintiff's demand.[41]

Delivery of part of property. Defendant must account for his failure to redeliver all the property levied on.[42] The officer may refuse to receive a partial delivery and hold the obligor for the full amount of the bond.[43] Where only part of the property for which the forthcoming bond is executed is delivered according to the terms of the bond, the obligors therein are at the most only released pro tanto, and will remain liable for the remainder of the property.[44]

Injunction. A temporary injunction procured by the obligor in the bond does not excuse performance,[45] but it is otherwise where such injunction is procured by a third person before the day for delivery.[46] It is no defense that the time for a motion for rehearing of an appeal from a temporary restraining order against the sale has not passed.[47]

Other defenses and excuses. Various other defenses or excuses have been held to be good,[48] of which, among others, are the impossibility of delivering the property notwithstanding bona fide efforts to do so,[49] as where the property has been taken out of the possession or control of the obligor by seizure under prior writs or liens,[50] or under a paramount title,[51] or pursuant to valid judicial proceedings;[52] failure of the officer to have the property appraised as required by statute;[53] that the issue on an affidavit of illegality was decided in favor of the obligor in the bond;[54] or, where the bond does not recite the judgment, that there was no judgment or that it had been paid.[55]

Various other defenses or excuses have been held not to be good,[56] of which, among others, are the suing out of an alias writ, after forfeiture of the bond, and a levy on the same property;[57] the mere absence of the officer at the time and place for delivery of the property;[58] the illegality of the levy;[59] fraudulent representations of the officer relating to the bond,[60] or made by the obligor to a surety in the presence of the officer;[61] the actual and adjudged insolvency of the judgment debtor, and consequent restriction of the property by the trustee in bankruptcy;[62] the filing of a claim by a third party for the property after the execution of the bond;[63] an agreement between the debtor and the officer, varying the effect of the bond, as prescribed by statute;[64] possession by the sheriff of executions su-

Mo.—Robards v. Samuel, 17 Mo. 555.
23 C.J. p 481 note 48.

38. Iowa.—Humphreys v. Humphreys, 1 Greene 477.
23 C.J. p 483 note 76.

39. N.Y.—Burrall v. Acker, 23 Wend. 606, 35 Am.D. 582, affirming 21 Wend. 605.
23 C.J. p 483 note 81.

40. Ga.—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.
23 C.J. p 480 note 26.

41. Ga.—Grace v. Finleyson, 73 S.E. 689, 10 Ga.App. 480.

42. Ga.—Scruggs v. Bennett, 128 S. E. 703, 34 Ga.App. 131.

43. Ky.—Saddler v. Glover, 35 Ky. 5, Dana 551.
Tenn.—Galloway v. Myers, 54 Tenn. 709.

44. Ga.—Dearlso v. Sylvester First Nat. Bank, 68 S.E. 449, 7 Ga.App. 841.
23 C.J. p 481 note 36.

45. Ind.—Midland R. Co. v. Eller, 33 N.E. 265, 7 Ind.App. 216.

46. Va.—Wilson v. Stevenson, 2 Call 213, 6 Va. 213.
23 C.J. p 481 note 35.

Injunction restraining enforcement of execution

If defendant has given a forthcoming bond, an injunction, against the enforcement of the execution issued on defendant's application, excuses him, while the injunction is in force, from delivering the property levied on.—Hull v. Bloss, 27 W. Va. 654.

47. Ind.—Midland R. Co. v. Eller, 33 N.E. 265, 7 Ind.App. 216.

48. **Waiver of condition of bond**
Ga.—Mapp v. Thompson, 9 Ga. 42.
23 C.J. p 482 note 73.

49. Ky.—Laughlin v. Ferguson, 6 Dana 111.
23 C.J. p 480 note 28.

50. Ala.—Moody v. U. S. Fidelity & Guaranty Co., 137 So. 308, 309, 223 Ala. 507, citing **Corpus Juris.**
Ga.—Allen v. Allen, 45 S.E. 959, 119 Ga. 278.
23 C.J. p 482 note 74.

Prior writ of detinue
Ala.—Watson v. Simmons, 8 So. 347, 91 Ala. 567.
23 C.J. p 480 note 30.

51. Ala.—Moody v. U. S. Fidelity & Guaranty Co., 137 So. 308, 223 Ala. 507.

52. Ala.—Moody v. U. S. Fidelity & Guaranty Co., supra.

53. Iowa.—Humphreys v. Humphreys, 1 Greene 477.

54. Ga.—Brown Guano Co. v. Coker, 79 S.E. 582, 13 Ga.App. 614.

55. Ind.—Atkinson v. Starbuck, 7 Blackf. 420.

56. Ark.—Dugan v. Fowler, 14 Ark. 132.
23 C.J. p 482 note 72 [a], [b], p 483 note 88 [a].

57. Ark.—Sullivan v. Pierce, 10 Ark. 500.

58. Iowa.—Humphreys v. Humphreys, 1 Greene 477.

59. La.—McCloskey v. Wingfield, 32 La.Ann. 38.
23 C.J. p 483 note 85.

60. Ga.—Rowland v. Page, 61 S.E. 148, 4 Ga.App. 269.
23 C.J. p 483 note 88.

61. Va.—Gordon v. Jeffery, 2 Leigh 410, 29 Va. 410.

62. Tex.—Evans v. Rea, 191 S.W. 1133, 108 Tex. 260.

63. Ga.—Barfield v. Covington, 29 S.E. 759, 103 Ga. 190.
23 C.J. p 483 note 93.

64. Ga.—W. T. Arnold & Son v.

perior to the one involved and sufficient in amount to have taken the entire proceeds of the sale;[65] a mere verbal tender of the property;[66] the assignment of the judgment to a third person;[67] nondelivery because of the pendency of an application for the allotment of a homestead or exemption;[68] interposition of a claim to the property by a third person, on the day of sale, and the officer's acceptance of the claim affidavit and bond;[69] destruction of the property, unless by the act of God;[70] and inconvenience of performance, where it is not rendered impossible.[71]

§ 119. —— Actions on Bonds or Summary Judgment

a. Actions on bonds
b. Summary judgment

a. Actions on Bonds

The levying officer may sue on the forthcoming bond, although in some jurisdictions the execution creditor may also sue. The general rules of pleading, evidence, and damages ordinarily are applicable.

Statutes authorizing the issuance of execution against the obligors in a forfeited forthcoming bond are generally considered to afford a cumulative remedy, and not to preclude an action on the bond.[72] Debt is a proper form of action.[73]

Conditions precedent. Generally no demand for delivery is necessary,[74] at least unless the surrender is desired before the day specified in the bond.[75] In some jurisdictions a condition precedent to the action is a notice to the obligors of the time and place of sale of the property for which the bond was given,[76] but a legal advertisement of such sale has been held to be sufficient notice or demand.[77]

Unless required by statute, it is not a condition precedent that the bond be indorsed "forfeited";[78] and clauses in statutes requiring the forfeiture of such bond to be indorsed on it have been held to be merely directory.[79]

Persons entitled to sue and parties. Generally the levying officer may sue in his own name.[80] He may, in his petition, designate the action as being brought for the use of the execution creditor,[81] even where the bond does not comply with the statute because made payable to the officer instead of to the execution creditor.[82] The rule has been laid down that the officer has no right of action on the bond until he has been held liable to the execution creditor for the amount of the property, and then only to the amount of his actual damage.[83] It has been held that the successor in office of the sheriff cannot sue on the bond.[84] An action in the name of the officer without his consent will be dismissed unless indemnity against costs is given to him.[85] In some states the execution creditor may sue.[86]

Where a bond is executed to secure a release of property seized on several executions having equal priority, it is proper, on breach of the condition, to join the several judgment creditors as parties plaintiff in an action on the bond.[87] Where

Rhodes, 105 S.E. 453, 26 Ga.App. 86—Rowland v. Page, 61 S.E. 148, 4 Ga.App. 269.

Agreement as to constructive possession

It is no defense that the officer agreed with the obligors that it should be considered that he still had the constructive possession of the property levied on, so as to preclude the necessity of a delivery by the obligors.—Pratt v. Cook, 62 P. 438, 10 Kan.App. 144.

65. Ga.—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.

66. Ga.—Scruggs v. Bennett, 128 S. E. 703, 34 Ga.App. 131.

67. Ill.—Bruce v. American Surety Co., 260 Ill.App. 321.

68. Ga.—Whelchel v. Duckett, 16 S. E. 643, 91 Ga. 132.

69. Ga.—Aycock v. Austin, 13 S.E. 582, 87 Ga. 566.

70. Ga.—Thigpen v. Sam Weichselbaum Co., 116 S.E. 209, 29 Ga.App. 566.
23 C.J. p 483 note 90.

71. Ga.—Scruggs v. Bennett, 128 S. E. 703, 34 Ga.App. 131.
23 C.J. p 483 note 92.

72. Ark.—Dugan v. Fowler, 8 Ark. 181.
23 C.J. p 482 note 54.

73. Va.—Hewlett v. Chamberlayne, 1 Wash. 367, 1 Va. 367.
23 C.J. p 482 note 55.

74. Ind.—Hunter v. Brown, 68 Ind. 225.
23 C.J. p 482 note 67.

75. Ind.—Hunter v. Brown, supra.

76. Ga.—Mapp v. Thompson, 9 Ga. 42—Thompson v. Mapp, 6 Ga. 260.

Effect of inability to produce property

Where defendant cannot produce the property in compliance with the bond because the property has disappeared or has been consumed, it is not necessary, in order to establish a breach, to advertise the property for sale or to make a demand on defendant for the property.—Herrington v. Coleman, 151 S.E. 925, 41 Ga.App. 86—23 C.J. p 482 note 66 [b].

77. Ga.—Taylor v. Boynton, 66 S.E. 550, 7 Ga.App. 233.
23 C.J. p 482 note 66.

78. Ind.—Midland R. Co. v. Eller, 33 N.E. 265, 7 Ind.App. 216.

79. W.Va.—Cabell v. Given, 5 S.E. 442, 30 W.Va. 760.

80. Ga.—Turner v. Camp, 36 S.E. 76, 110 Ga. 631—Clark v. Horn, 25 S. E. 203, 99 Ga. 165.

81. Ga.—Turner v. Camp, 36 S.E. 76, 110 Ga. 631—Hatton v. Brown, 57 S.E. 1044, 1 Ga.App. 747.

82. Ga.—Salmon v. Lynn, 85 S.E. 203, 16 Ga.App. 298.
Tex.—Jones v. Hays, 27 Tex. 1.

83. Del.—Staats v. Herbert, 4 Del. Ch. 508.
23 C.J. p 482 note 57.

84. S.C.—Guffin v. Ingram, 8 S.C. 249.
23 C.J. p 482 note 63.

85. Ill.—Young v. Campbell, 9 Ill. 156.

86. Ga.—Bowman v. Kidd, 79 S.E. 167, 13 Ga.App. 351.
23 C.J. p 482 note 62.

87. Ind.—Koeniger v. Creed, 58 Ind.

the obligation is joint and severable, the surety may be sued alone without joining the principal.[88]

Pleading. General rules relating to pleadings usually apply in actions on forthcoming bonds.[89] The declaration, petition, or complaint should set out the condition of the bond and allege the facts which show a breach of such condition,[90] such as a failure to deliver the property on the day specified.[91] The recovery of judgment and the issuance of execution thereunder, showing that the officer had authority to seize the property and take the bond, should be pleaded;[92] but it is not necessary to set out the execution or attach it as an exhibit,[93] nor is it necessary to plead its validity.[94] The consideration for the bond need not be pleaded where a statute provides that a contract in writing imports a consideration.[95] Omission to aver the value of the property does not make the pleading subject to a general demurrer,[96] and the fact that the measure of damages is incorrectly stated does not render the pleading bad on special demurrer.[97]

A plea in an action of debt that defendants have always been and still are ready to deliver the goods according to the condition of the bond is bad;[98] but a plea of payment is good,[99] as is also a plea that defendant delivered the property on the day, at the place, and to the officer named in the condition of the bond.[1] A plea of nul tiel record has been held demurrable.[2]

Defenses to actions on the bond are treated supra § 118 c.

Presumptions and burden of proof. The usual rules as to presumptions[3] and burden of proof[4] are applicable in actions on forthcoming bonds.

Plaintiff has the burden of proving that the property involved belonged to the debtor.[5] An obligor on the bond claiming that the property was destroyed by an act of God has the burden of so proving.[6] A defendant who has permitted claimant to seize the property without judicial proceedings has the burden of showing that such claim was paramount to the lien of the levy, and that he could not have resisted legal proceedings by claimant.[7]

Admissibility of evidence. General rules governing the admissibility of evidence ordinarily apply in actions on forthcoming bonds.[8] The forthcoming bond itself is admissible.[9] The writ on which the levy in the original case was made is admissible,[10] and, indeed, has been considered indispensable.[11] Evidence of the return of the writ nulla bona is admissible to show a breach of the bond.[12]

Weight and sufficiency of evidence. General rules as to the weight and sufficiency of evidence ordinarily apply in actions on forthcoming bonds.[13] Proof of a failure to deliver the property for the production of which the bond was given, at the time and place fixed in the advertisement of the sale, makes a prima facie case.[14] Proof of the return of the writ nulla bona has been held to be sufficient evidence of a breach of the bond.[15] The taking of a second bond for delivery at an ad-

554—Mandlove v. Lewis, 9 Ind. 194.

88. Ga.—U. S. Fidelity Co. v. Murphy, 60 S.E. 831, 4 Ga.App. 13.

89. Ill.—Bruce v. American Surety Co., 260 Ill.App. 321.

90. Ga.—Thigpen v. Sam Weichselbaum Co., 116 S.E. 209, 29 Ga.App. 566.
23 C.J. p 483 note 1.

Pleading held sufficient
Ga.—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.

91. Ark.—Cunningham v. Cheatham, 8 Ark. 187.
23 C.J. p 483 note 2.

Destruction of property
An allegation that the property was destroyed is sufficient, prima facie, to show a breach of the bond. —Thigpen v. Sam Weichselbaum Co., 116 S.E. 209, 29 Ga.App. 566.

92. Ind.—Strange v. Lowe, 8 Blackf. 243—Midland R. Co. v. Eller, 33 N. E. 265, 7 Ind.App. 216.

93. Ga.—Hatton v. Brown, 57 S.E. 1044, 1 Ga.App. 747.

94. Kan.—Pratt v. Cook, 62 P. 438, 10 Kan.App. 144.

95. Kan.—Pratt v. Cook, supra.

96. Ind.—Hawkins v. Johnson, 3 Blackf. 46.

97. Ga.—Hatton v. Brown, 57 S.E. 1044, 1 Ga.App. 747.
23 C.J. p 484 note 8.

98. Ind.—English v. Finicey, 5 Blackf. 298.
Pa.—Case v. Johnson, 19 Pa. 174.

99. Ark.—McLain v. Taylor, 9 Ark. 358.

1. Ind.—English v. Finicey, 5 Blackf. 298.

2. Ill.—Bruce v. American Surety Co., 260 Ill.App. 321.

3. Ky.—Cook v. Commonwealth Bank, 5 J.J.Marsh. 163.
23 C.J. p 484 note 18.

Presumptions in support of bond
Any presumption will be indulged to support the bond after a forfeiture.—Hyman v. Seaman, 33 Miss. 185.

4. Ga.—Kaminsky v. Horrigan, 58 S.E. 497, 2 Ga.App. 332.

5. Kan.—Nevins v. Shepard, 268 P. 857, 126 Kan. 456.

6. Ga.—Thigpen v. Sam Weichselbaum Co., 116 S.E. 209, 29 Ga.App. 566.

7. Ala.—Moody v. U. S. Fidelity & Guaranty Co., 137 So. 308, 223 Ala. 507.

8. Ill.—Bruce v. American Surety Co., 260 Ill.App. 321.

9. Ill.—Bruce v. American Surety Co., supra.

10. Ill.—Bruce v. American Surety Co., supra.

11. Ga.—Harden v. Webster, 29 Ga. 427—Brown Guano Co. v. Coker, 79 S.E. 582, 13 Ga.App. 614.

12. Ga.—Bowden v. Taylor, 6 S.E. 277, 81 Ga. 199.

13. **Evidence held sufficient**
Ga.—Herrington v. Coleman, 151 S.E. 925, 41 Ga.App. 88.

14. Ga.—Redwine v. Street, 89 S. E. 163, 18 Ga.App. 77.

15. La.—Masse v. Barthet, 2 Rob. 69.

journed sale is conclusive proof of the performance of the condition of the first bond.[16]

Trial and judgment. Where it appears without dispute that the conditions of a forthcoming bond have been breached, it is not error to direct a verdict against defendant on all issues except the amount of damages.[17]

A judgment for costs obtained against the sureties on a forthcoming bond cannot be attacked collaterally in a subsequent suit brought by the principal debtor who has reimbursed the sureties.[18]

Damages. The amount of recovery is generally fixed by statute; in most jurisdictions, both by statute and independent thereof, the measure of recovery is the unpaid amount of the execution, judgment, principal, interest and costs,[19] if the value of the property equals or exceeds such amount;[20] or the value of the property, if it is less than or does not exceed the amount of the execution debt.[21] Under some statutes,[22] or by the terms of particular bonds,[23] the recovery may be for the amount of the judgment debt, although more than the value of the property.

b. Summary Judgment

In some jurisdictions the bond itself, when forfeited, has the force of a judgment while in other jurisdictions judgment on the bond may be entered on motion. The statutory procedure for obtaining summary judgment must be followed.

Under some statutes, the bond, when returned forfeited by the officer, accompanied by the execution, has the force and effect of a judgment, and no further judgment is necessary to the issuance of execution thereon,[24] although notice of motion for execution on the bond must be given.[25]

Other statutes permit or require a formal judgment to be entered by the court on the forfeited bond,[26] and an essential condition precedent thereto is the service of a notice of motion for judgment on the obligors in the forfeited bond, such motion to be made returnable to a designated term of court.[27] A notice of motion for judgment signed by the execution creditor is sufficient, although it omits to state to whom the bond is made payable.[28] On the hearing of a motion for judgment on the forthcoming bond, the pleadings are ore tenus, and formal issue need not be joined, and the court may render judgment on the evidence without the intervention of a jury.[29]

Under some statutes the bond has the force of a judgment and creates a lien on the property of the obligors only from the time it is returned forfeited and duly filed,[30] and even after it is filed it has the force of a judgment in a certain sense only, before execution on it is awarded.[31] In order to authorize a judgment, the record should affirmatively show a forfeiture of the bond and a return of the execution unsatisfied,[32] but, where the statute merely provides that, if the bond is forfeited, it shall be returned into court with the execution, there need be no indorsement of the forfeiture on the bond itself.[33] A statute requiring the clerk of court to indorse on the forfeited bond the date of its return has been held to be merely directory.[34] The sheriff's return of forfeiture is at

16. W.Va.—Adler v. Green, 18 W. Va. 201.

17. Ga.—McNeel v. Clark, 137 S.E. 99, 36 Ga.App. 358.

18. Mo.—Chicago, R. I. & P. R. Co. v. Morrow, App., 221 S.W. 768.

19. Ga.—Whelchel v. Duckett, 16 S. E. 643, 91 Ga. 132.
23 C.J. p 484 note 22.

20. Ga.—Taylor v. Stripland, 191 S. E. 170, 55 Ga.App. 683—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.
Mo.—Chicago, R. I. & P. R. Co. v. Morrow, App., 221 S.W. 768.
23 C.J. p 484 note 23.

21. Ga.—Herrington v. Coleman, 151 S.E. 925, 41 Ga.App. 88—W. T. Arnold & Son v. Rhodes, 105 S.E. 453, 26 Ga.App. 86.
Mo.—Chicago, R. I. & P. R. Co. v. Morrow, App., 221 S.W. 768.
23 C.J. p 484 note 24.

22. Tenn.—Love v. Smith, 4 Yerg. 117.
23 C.J. p 484 note 25.

23. Ga.—Gregory v. Hendricks, 77 S.E. 585, 12 Ga.App. 486.
23 C.J. p 484 note 26.

24. Ark.—Cochran v. Jordan, 16 Ark. 625.
23 C.J. p 485 note 28.

25. W.Va.—Kunst v. Findley, 80 S. E. 136, 73 W.Va. 152.
23 C.J. p 485 note 29.

26. Mo.—Chicago, R. I. & P. R. Co. v. Morrow, App., 221 S.W. 768.
23 C.J. p 485 note 30.

Merger of judgments; costs
The original judgment becomes merged in the second judgment taken on the bond against the execution defendant and sureties, and court properly may make costs in original proceeding part of judgment in second proceeding on bond.—Chicago, R. I. & P. R. Co. v. Morrow, Mo.App., 221 S.W. 768.

27. Tenn.—Camp v. Laird, 6 Yerg. 246.
23 C.J. p 485 note 30.

Notice held sufficient
W.Va.—White v. Sydenstricker, 6 W. Va. 46.

28. Va.—Lemoigne v. Montgomery, 5 Call 528, 9 Va. 528.
23 C.J. p 485 note 31.

29. Va.—Burke v. Levy, 1 Rand. 1, 22 Va. 1.
23 C.J. p 485 note 32.

30. Va.—Cabell v. Given, 5 S.E. 442, 30 W.Va. 760.
23 C.J. p 485 note 34.

31. Va.—Lipscomb v. Davis, 4 Leigh 303, 31 Va. 303.

32. Ark.—McKisick v. Brodie, 6 Ark. 375.
23 C.J. p 485 note 36.

Return must show a forfeiture of the bond.—Fields v Whitaker, Ky. Dec. 179—23 C.J. p 485 note 37.

33. Miss.—Talbert v. Melton, 20 Miss. 9—Barker v. Planters' Bank, 6 Miss. 566.

34. W.Va—Cabell v. Given, 5 S.E. 442, 30 W.Va. 760.

least presumptively correct,[35] and it has been held conclusive evidence of the fact.[36]

Execution on judgment. The general rule is that execution may issue at any time after the bond has become forfeited and, in effect, a statutory judgment.[37] Although there is authority to the contrary,[38] it has been held that an execution issued on a forfeited forthcoming bond may include defendants to the original judgment as well as obligors in the bond.[39] If the execution does not, on its face or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond.[40]

§ 120. Expenses of Keeping Property, and Compensation of Custodian

The levying officer, and his bailee or receiptor, must be reimbursed for their expenses in keeping and protecting the property.

The levying officer is entitled to reimbursement for necessary and reasonable expenses incurred by him in taking and caring for the property.[41] Such expenses are chargeable as costs[42] and may be collected out of the proceeds of the sale of the property,[43] or, under some circumstances, from plaintiff.[44] The officer should make the expense as light as possible consistent with the safekeeping of the property.[45]

Compensation of bailee. A bailee or receiptor is entitled to compensation for services rendered in keeping and protecting the property,[46] and to reimbursement for necessary expenses incurred;[47] and where the compensation has been agreed on, the right thereto cannot be defeated by the fact that the judgment on which the execution was issued was subsequently adjudged to be void, or that the bailee or receiptor was only carrying out another prior contract with a third person.[48] Under some statutes the compensation of the bailee must be fixed by the court.[49]

§ 121. Delivery of Property to Creditor in Satisfaction

Delivery of property pursuant to the writs of extent and elegit is considered infra §§ 403–405.

Examine Pocket Parts for later cases.

35. Ky.—Trotter v. Hannegan, 2 A. K.Marsh. 319.

36. Ark.—Ruddell v. Magruder, 11 Ark. 578—Ex p. Reardon, 9 Ark. 450.

37. Ark.—Ruddell v. Magruder, 11 Ark. 578.
23 C.J. p 485 note 42.

Issuance for penalty or on condition
In order to be strictly formal it ought to issue for the penalty, to be discharged by the sum mentioned in the condition, but, if it issues on the condition only, it is substantially correct.—Doak v. Duncan, Litt.Sel. Cas., Ky., 176.

38. Tenn.—Camp v. Laird, 6 Yerg. 246.
23 C.J. p 486 note 44.

39. Ala.—Sheppard v. Melloy, 12 Ala. 561.
Ky.—Trotter v. Hannegan, 2 A.K. Marsh. 319.

40. Ala.—Sheppard v. Melloy, 12 Ala. 561.

41. N.Y.—Van Pub. Co. v. Teachers' Magazine Pub. Co., 65 N.Y.S. 664, 32 Misc. 751.
23 C.J. p 472 note 57.

Conflicting claims to moneys collected by officer
Where the levying officer has received from the debtor the amount required for cartage of the property, he cannot refuse to pay over such sum to the person who furnished the cartage, by asserting that the debtor also claims such sum; he should in such case pay the money into court.—Reischmann Co. v. Mulvihill, 136 N.Y.S. 71.

42. Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.

Harvesting wheat
Where execution is levied upon growing wheat crop, expense of harvesting and hauling wheat to market is chargeable as costs.—Smart v. Vehmeyer, 21 P.2d 504, 162 Okl. 300.

Debt due before seizure
A sheriff who has levied on a stock of merchandise cannot tax an amount supposed to be due judgment debtor's landlord before the seizure was levied.—James J. Reiss Co. v. Spinnato, 97 So. 798, 154 La. 521.

43. Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.

44. Okl.—Smart v. Vehmeyer, 21 P. 2d 504, 162 Okl. 300.

Unauthorized expense
Where plaintiff's counsel, because of expense, instructed sheriff not to employ keeper for property seized under execution, plaintiff was not liable where sheriff, in face of the positive instructions, incurred expenses many times the value of the property.—James J. Reiss Co. v. Spinnato, 97 So. 264, 154 La. 9.

45. Cal.—Noland v. Noland, 113 P. 2d 11, 44 Cal.App.2d 780.

46. Mo.—Stephenson v. Porter, 45 Mo. 358.
23 C.J. p 475 note 14.

Applicability of statute prohibiting removal of property
A statute prohibiting the removal, for the purpose of sale, of personalty ordered sold by court order, and directing that sales of such property be conducted on the premises where the property was seized, had no bearing in an action against a sheriff to recover for feed and labor furnished in caring for cattle left by the sheriff in the agistor's custody. —Neugebauer v. Anstrom, 283 N.W. 74, 68 N.D. 684.

Irregularity in procedure whereby an individual who harvested wheat under sheriff's direction, filed a motion in his own name for allowance of expenses, instead of in sheriff's name, was waived, where not questioned by judgment creditors.—Smart v. Vehmeyer, 21 P.2d 504, 162 Okl. 300.

47. Iowa.—Shaw v. Roberts, 122 N. W. 932, 144 Iowa 215.
23 C.J. p 475 note 15.

48. Kan.—Burdge v. Thompson, 58 P. 484, 9 Kan.App. 146.

49. Colo.—Blyth v. People, 66 P. 680, 16 Colo.App. 526.
23 C.J. p 475 note 18.

Applicability of statute as to sheriff's fees
One to whom a sheriff had agreed to pay a reasonable value for caring for cattle levied on by the sheriff was not bound by the amount that the court might fix as costs under a statute providing that the sheriff shall be entitled to certain enumerated fees.—Neugebauer v. Anstrom, 283 N.W. 74, 68 N.D. 684.

§ 122. Criminal Responsibility for Removal or Secretion of Property Levied on

Under some statutes the wrongful removal, secretion, or destruction of property levied on constitutes a crime.

Under some statutes it is a criminal offense for any one, without the execution creditor's consent, to secrete, destroy, or remove from the county where it is situated, any property which has been levied on or seized under execution,[50] and on conviction the offender may be fined in a sum equal to the value of such property and also be imprisoned.[51] Under such a statute, it has been held an offense to secrete goods levied on, even though they were not owned by the execution debtor.[52]

V. LIEN

§ 123. Nature, Creation and Existence

The lien of an execution is a right by law to charge the property of the judgment debtor subject to levy and sale with the payment of the debt.

An execution creates a lien[53] which does not vest in the judgment creditor either a jus in re or a jus ad rem. It is simply a right by law to charge the property of the judgment debtor which is subject to levy and sale with the payment of the debt, operating as an encumbrance on it, of which all who subsequently deal with him must at their peril take notice.[54] The lien is not a right in the property itself, but a right to levy on it to the exclusion of interests subsequently acquired.[55] The fact that the lien of an execution has attached to the property of a debtor does not divest him of his title thereto,[56] nor give to either the execution creditor or the officer to whom the writ is delivered any right to or control over such property before a levy is actually made.[57] The lien of an execution is regarded as arising from the right to sell property thereunder, and where the right of sale cannot be asserted the existence of the lien must be denied.[58]

A levy on the property of the judgment debtor ordinarily, under the various statutes, gives the execution creditor a lien thereon,[59] which is a vested right.[60] Liens obtained by a levy on personalty do not, in general, require the aid of equity for their enforcement.[61] An illegal levy creates no lien.[62]

If the judgment on which an execution is issued is void, it follows, as a matter of course, that the writ and a levy thereunder give no lien.[63] Likewise, under some statutes, where no execution has issued on a judgment as such until more than a year from the date of its rendition, there is then no execution lien.[64]

Lien as independent of judgment lien on real

50. Del.—Padley v. State, 102 A. 60, 29 Del. 585.
23 C.J. p 486 note 48.

Levy under tax collector's warrant
The term "execution" as used in such a statute does not include a levy under a tax collector's warrant. —Commonwealth v. Lord, 14 Pa.Dist. & Co. 784, 5 Sam. 57.

51. Del.—Padley v. State, 102 A. 60, 29 Del. 585.

52. Del.—Padley v. State, supra.

53. Ky.—Pineville Steam Laundry v. Phillips, 71 S.W.2d 980, 254 Ky. 391.

54. Ala.—Thames v. Rembert, 63 Ala. 561.
23 C.J. p 489 note 36.

55. Ala.—McMahan v. Green, 12 Ala. 71, 46 Am.D. 242.
23 C.J. p 489 note 36.
"The lien given by the statute, like the lien of the writ at common law, does not clothe the officer with any property, special or general, nor with any present possessory right, until a valid levy has been made under the writ. The effect of the lien is merely to invest the officer, to whom it is delivered, with the right to seize the property, by levy, in the hands of persons taking it after he receives the process."—Justice v. Hoch, 271 P. 1116, 1117, 84 Colo. 528.

56. Ala.—Thames v. Rembert, 63 Ala. 561.
23 C.J. p 489 note 37.

57. Colo.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.
23 C.J. p 490 note 38.

58. Ill.—Lehman v. Cottrell, 19 N. E.2d 111, 298 Ill.App. 434.

59. Tex.—Herndon v. Cocke, Civ. App., 138 S.W.2d 298.

Privilege
Under statute, creditor acquires privilege on movables seized which entitles him to preference over other creditors unless the debtor has become bankrupt previous to the seizure.—Hankins v. Sallard, La.App., 188 So. 411—Vidalia Bank & Trust Co. v. Purcell, 8 La.App. 39.

In the Philippines the filing of a complaint, the judgment, the issue of execution, or the levy thereunder creates no lien other than the right to preference under Civ.Code art 1924.—Peterson v. Newberry, 6 Philippine 260.

60. U.S.—Williams v. Banana Distributing Co., C.C.A.Mich., 59 F.2d 645.
Fla.—Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498.

61. Mich.—Stoddard v. McLane, 22 N.W. 95, 56 Mich. 11.

62. U.S.—Lewis v. Dillard, Ark., 76 F. 688, 22 C.C.A. 488.
Ky.—McDowell v. Coleman, 2 Ky.L. 389, 11 Ky Op. 152.
23 C.J. p 490 note 40.

Levy by sheriff of another county
A writ of execution directed to sheriff of one county but sent to and served by sheriff of another county and ordering him to levy on property in his county does not create a lien on property in such other county, where there is a lack of statutory provision authorizing a sheriff to serve a writ of execution directed to sheriff of another county.—Merchants Credit Service v. Chouteau County Bank, Mont., 114 P.2d 1074.

63. Mich.—Adams v. Hubbard, 30 Mich. 104.
Neb.—Muller v. Plue, 64 N.W. 232, 45 Neb. 701.

64. Ala.—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.

estate. Where the judgment is a lien on real estate, it has been generally recognized by the courts that an execution and levy thereunder on such real estate creates no new or separate lien from the lien of the judgment,[65] and does not even extend the lien of the judgment,[66] except by virtue of a statute to that effect.[67] Where, however, land is levied on under an execution issued on a judgment which is not a lien on such land, the execution creates a lien on it.[68] The lien of a testatum execution upon land is an independent one.[69]

§ 124. Commencement

Usually, under the statutes, an execution lien attaches on delivery of the writ to the proper officer to be executed.

At common law,[70] and where the rule has not been changed by statute,[71] an execution issued on a judgment of a court of record relates back to the teste of the writ, and binds the debtor's personal property from the time the execution was awarded. To prevent the embarrassment to trade resulting from this rule, an English statute, 29 Car. II c 3 § 16, provided that no writ of execution should bind the debtor's property, except from the time of the delivery of the writ to the sheriff,[72] which has been adopted as part of the common law in some jurisdictions and, with more or less variations, incorporated into the statutory law of many jurisdictions.[73] Under such statutes the lien of the execution cannot antedate the issuance and delivery of the execution to the proper officer.[74] Under these statutes, a levy is not essential to a lien,[75] although essential to the right of possession,[76] but when possession is taken the right relates back to the time the writ came to the hands of the officer.[77]

65. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.
23 C.J. p 490 note 46.

66. Utah.—Smith v. Schwartz, 60 P. 305, 21 Utah 126, 81 Am.S.R. 670.
23 C.J. p 490 note 47.

67. Mo.—Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

68. Or.—Clark v. Salem, 121 P. 416, 61 Or. 116, Ann.Cas.1914B 205.
23 C.J. p 490 note 49.

69. Ill.—Reichert v. McClure, 23 Ill. 516.
23 C.J. p 490 note 50.

70. Colo.—Robinson v. Wright, 9 P. 2d 618, 90 Colo. 417, citing **Corpus Juris.**
Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
Ky.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.
23 C.J. p 490 note 52.

71. Tenn.—Smith v. U. S. Fire Ins. Co., 150 S.W. 97, 126 Tenn. 435, 45 L.R.A.,N.S., 266, Ann.Cas.1913E 196—John Weis, Inc., v. Reed, 118 S.W.2d 677, 22 Tenn.App. 90—Stahlman v. Watson, Ch., 39 S.W. 1055.
23 C.J. p 490 note 52.

72. Colo.—Robinson v. Wright, 9 P. 2d 618, 90 Colo. 417.
Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
23 C.J. p 491 notes 53–57.

73. U.S.—In re Miller, D.C.Ill., 45 F. 2d 909—In re New Lots Sash & Door Corporation, D.C.N.Y., 3 F. Supp. 570.
Colo.—Robinson v. Wright, 9 P.2d 618, 90 Colo. 417.
Del.—Cochran v. Clements, 133 A. 632, 7 W.W.Harr. 410—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
Fla.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Ill.—Grimes v. Rodgers, 263 Ill.App. 429—Roth v. Snow, 245 Ill.App. 582.
Ky.—Hood v. Pope, 26 S.W.2d 1043, 233 Ky. 749.
N.Y.—Baker v. Hull, 166 N.E. 175, 250 N.Y. 484, reversing 228 N.Y.S. 748, 223 App.Div. 859.
Pa.—Shriner v. Erie Concrete Steel, 21 Erie Co. 69.
W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 824, 97 W. Va. 196.
23 C.J. p 491 notes 56–58.

Personal property

Under some statutes the delivery of an execution to the proper officer effects a lien on personal property.
U.S.—First State Bank of Crook, Colo., v. Fox, C.C.A.Colo., 10 F.2d 116—In re Liberty Lumber Co., D. C.N.Y., 6 F.Supp. 397.
Va.—Drewry v. Baugh & Sons, 143 S.E. 713, 150 Va. 394.

The Corpus Juris text has been cited for the proposition that at common law a delivery of an execution to the sheriff fixed a lien on the property.—Miller v. Crosson, 267 N. W. 145, 148, 131 Neb. 88.

74. Ala.—Booth v. Bates, 112 So. 209, 215 Ala. 632.
Colo.—Bank of Steamboat Springs v. Routt County Bank, 252 P. 355, 80 Colo. 385.
N.Y.—Prudence-Bonds Corporation v. 1000 Island House Co., 252 N.Y.S. 60, 141 Misc. 39.

In Kentucky

(1) Under Ky.St. § 1660, a fieri facias on a judgment in personam does not create a lien until placed for execution in the hands of an officer who is authorized to execute it.—Fannin's Ex'r v. Haney, 140 S. W.2d 630, 283 Ky. 68—Graham v. Humm, 229 S.W. 80, 191 Ky. 28.

(2) "The binding effect of an execution is really not due to the statute. It has come over from the common law. What the statute does is to change the time of its having such effect from the date of the execution to its delivery to the sheriff." —C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305, 314.

(3) It has been stated, however, that when executions were issued they created a lien on all of the property of the debtor subject to execution.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.

75. Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
Ill.—Grimes v. Rodgers, 263 Ill.App. 429.
23 C.J. p 492 note 60.

Effectual levy

An execution lien is not avoided by failure of the sheriff to make an effectual levy as against the possession of a mortgagee.—First State Bank of Crook, Colo. v. Fox, C.C.A. Colo., 10 F.2d 116.

76. Ind.—Dixon v. Duke, 85 Ind. 434.

Trover or trespass

Officer to whom writ of execution is delivered cannot maintain either trover or trespass before making levy.—Justice v. Hoch, 271 P. 1116, 84 Colo. 528.

77. Pa.—Williams Patent Crusher & Pulverizer Co. v. Reily, 180 A. 156, 118 Pa.Super. 64.
23 C.J. p 492 note 62.

Debtor's possession

A levy made in 1933 on an execution renewed from 1931 cannot have the effect of creating a lien as of the latter date where it does not appear that the property seized was

In other words, the lien acquired by the delivery is inchoate and becomes perfected by actual levy.[78]

It has been held that the provision of the statute changing the common-law rule as above set forth applies only in favor of third persons, and does not change the common-law rule of the relation of the lien to the teste of the writ as between the execution debtor and the creditor.[79]

Under some statutes an execution is a lien on property only from the time of the levy thereof.[80] In some states, by statute, there is no lien, prior to a levy, as against purchasers and encumbrancers in good faith and without notice, whose rights attached between the delivery and the levy of the execution.[81] It is generally held, in the absence of statute to the contrary, that an execution is not a lien upon real estate, independent of the judgment lien, without a levy.[82] Under some statutes, where land outside the county is levied on, there is no lien until a certificate of levy is filed in such county.[83] Under other statutes the execution must be docketed as against third persons.[84]

Failure of officer to indorse receipt of writ. A provision of law, where the lien of an execution commences from its delivery to the proper officer, requiring him to indorse on the execution the day of its receipt, is directory merely and intended only to be evidence of such receipt. The failure of the officer to make such entry cannot prejudice the execution plaintiff,[85] and he may show the time of the delivery by extrinsic evidence.[86]

Lis pendens. In some states, to create a lien good against purchasers, a lis pendens notice must be filed.[87]

Relation back to time of attachment. An execution levy relates back to the levy of an attachment so as to hold the interest then owned by defendant.[88]

§ 125. Property or Interests Affected, and Extent of Lien

Ordinarily the lien of an execution binds all property which is subject to levy and sale under its mandate.

It may be stated as a general rule that the lien of an execution operates on and binds all property which is the subject of levy and sale in obedience to its mandate,[89] and consequently it is sometimes termed a "general lien," to distinguish it from liens which operate only on specific or particular property.[90] In the absence of a statute to the contrary, in order that property may be bound

possessed by the debtor in 1931, and no presumption arises that the property seized was the same property as possessed by the debtor in 1931 —In re Laskaris, D.C.N.Y., 4 F.Supp. 652.

78. N.J.—Olden v. Sassman, 66 A. 603, 72 N.J.Eq. 637.
23 C.J. p 492 note 63.

79. Ark.—Dodd v. McCraw, 8 Ark. 83, 46 Am.D. 301.
Tenn.—Berry v. Clements, 9 Humphr. 312.
23 C.J. p 492 note 64.

80. Neb.—Miller v. Crosson, 267 N. W. 145, 148, 131 Neb. 88, citing **Corpus Juris.**
S.C.—McManus v. Bank of Greenwood, 171 S.E. 473, 171 S.C. 84.
23 C.J. p 492 note 68.

Real estate
Under some statutes, until a judgment creditor has filed his transcript of judgment or made a levy, he has no lien on real estate.—Routt County Mining Co. v. Stutheit, 72 P.2d 692, 101 Colo. 254.

81. N.C.—Weisenfield v. McLean, 2 S.E. 56, 96 N.C. 248.
23 C.J. p 492 note 69.

82. Pa.—Wilson's App., 90 Pa. 370.
Tenn.—Anderson v. Taylor, 74 Tenn. 382.
23 C.J. p 492 note 70.

83. Colo.—People v. Finch, 76 P. 1120, 19 Colo.App. 512.
23 C.J. p 493 note 71.

84. Ga.—Moody v. Millen, 30 S.E. 258, 103 Ga. 452.
23 C.J. p 493 note 72.

85. Md.—Hanson v. Barnes, 3 Gill & J. 359, 22 Am.D. 322.
23 C.J. p 492 note 65.

86. Ala.—McMahan v. Green, 12 Ala. 71, 46 Am.D. 242—Hester v. Keith, 1 Ala. 316.

87. Ky.—Donacher v. Tafferty, 144 S.W 13, 147 Ky. 337—Low v. Skaggs, 105 S.W. 439, 31 Ky.L. 1292.
23 C.J. p 492 note 67.

88. Mich.—Avery v. Stephens, 12 N. W. 211, 48 Mich. 246.

89. Ill.—Roth v. Snow, 245 Ill.App. 582.
Tenn.—John Weis, Inc., v. Reed, 118 S.W.2d 677, 22 Tenn.App. 90.
23 C.J. p 493 note 77.
Property subject to execution see supra §§ 18–55.

Oil or gas lease
The operating or lessee's interest under a producing oil and gas lease, limited to a term of years and so long thereafter as oil or gas shall be produced from the leased premises, is a chattel real and as such is subject to the lien of an execution.—Drainer v. Travis, 180 S.E. 435, 116 W.Va. 390.

Real or personal
As a general rule, the lien of an execution operates on and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.

Thing not in being
It is obvious that an execution lien cannot attach to a thing not shown to be in being.—In re Laskaris, D.C.N.Y., 4 F.Supp. 652.

Trust funds
Under a statute permitting an execution against income from trust funds due and owing to the judgment debtor or thereafter to become due and owing to him, when an execution becomes effective it attaches as a lien on any sum which may become due and payable to the debtor from a trust fund.—In re Randolph's Will, 288 N.Y.S. 678, 159 Misc. 688.

Unadministered personal property
Lien of execution based on judgment against executor of deceased's estate was held not to attach to unadministered personal property of estate in hands of the personal representative.—Drainer v. Travis, 180 S.E. 435, 116 W.Va. 390.

90. U.S.—C. T. C. Investment Co. v.

by the lien of an execution, it is necessary that the debtor should have the title thereto;[91] and an execution does not give rise to a lien on a mere equitable estate or interest.[92] In the absence of circumstances giving an execution lien priority over other liens or claims, see infra §§ 128, 129, the lien extends only to the debtor's actual interest,[93] and an apparent interest neither extends nor restricts the operation of the lien.[94] If, however, the title or interest is such as to be subject to the lien under the statute, the lien attaches to whatever title or interest the debtor has,[95] subject to all prior equities,[96] including existing encumbrances such as liens, mortgages, and pledges.[97] Property seized by the sheriff under a prior execution has been held to be subject to the lien of a subsequent execution, subject to the lien accruing in favor of the prior execution.[98] Ordinarily, under the statutes, the lien does not cover a contingent liability,[99] unliquidated claims,[1] or amounts which may become due upon performance of an executory contract, but which are not presently due,[2] except under statutes broad enough to include such interests.[3] It is not a lien on property purchased by, and in the possession of, another creditor before the issuance of the execution.[4]

Under some statutes if the property, on which the writ is a lien, is a debt or liability of some third person to pay money or deliver property to the judgment debtor, any payment or delivery made by such third person to the judgment debtor or his assignee, before such third person has notice of the writ, is good, and such person is discharged, to the extent of such payment or delivery, from any liability to the judgment creditor.[5] On the other hand, under such statute, where one who

Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
23 C.J. p 493 note 77.

91. Tex.—Herndon v. Cocke, Civ. App., 138 S.W.2d 298.
23 C.J. p 493 note 78.

Record title
Where the record title to real property was not in the judgment debtor, a levy of execution thereon would be unavailing to create a lien. —Binz v. Michels, 220 Ill.App. 88.

92. N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336.
Tex.—Carlisle v. Holland, Civ.App., 289 S.W. 116, error refused.
Equitable estates as property subject to execution see supra §§ 40, 41.

Deed absolute on face
By virtue of execution and levy, judgment did not become a lien on realty which judgment debtor had conveyed by a deed absolute on its face, although the deed was in effect a mortgage given to secure an indebtedness.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.

Equities of redemption; equitable titles
(1) Where, under the statute, only "lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations," are subject to levy and sale under execution, an execution is a lien on all equities of redemption, although not on equitable titles.—George E. Sebring Co. v. O'Rourke, 134 So. 556, 101 Fla. 885.

(2) Accordingly a mortgage on real estate, being merely a contract lien on land, is not subject to the lien of an execution.—Evins v. Gainesville Nat. Bank, 85 So. 659, 80 Fla. 84.

Property fraudulently conveyed
Under a statute providing that, where a conveyance is fraudulent as to a creditor, such creditor may disregard the conveyance and levy execution on the property conveyed, where a judgment creditor levies on lands conveyed by his debtor he obtains valid lien thereby, if it be proved that the conveyance was fraudulent as to him.—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J Eq. 417.
Right to levy execution on property fraudulently conveyed see the C.J.S. title Fraudulent Conveyances § 308, also 27 C.J. p 704 note 16—p 706 note 40.

93. Cal.—Anglo-California Trust Co. v. Holbrook, 24 P.2d 169, 218 Cal. 531—Graves v. Arizona Cent. Bank, 272 P. 1063, 205 Cal. 715—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71.
Ill.—Drain v. La Grange State Bank, 135 N.E. 780, 303 Ill. 330.
Ky.—Hollowell v. Joe K. Exall & Co., 191 S.W. 123, 173 Ky. 422.
Md.—George L. Cramer & Sons v. Roderick, 98 A. 42, 128 Md. 422.
Okl.—Leach v. Kincaid, 244 P. 191, 116 Okl. 245.
Tex.—Steele v. Harris, Civ.App., 2 S.W.2d 537.
23 C.J. p 493 note 79.

Naked legal estate
The lien of an execution is limited to the actual interest the judgment debtor has in the property and does not attach to a mere naked legal estate when the entire equitable estate is vested in some third person. —East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.

94. Cal.—Anglo-California Trust Co. v. Holbrook, 24 P.2d 169, 218 Cal. 531—Withington v. Shay, App., 117 P.2d 415, hearing denied, Sup., 119 P.2d 1—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71.
Okl.—Leach v. Kincaid, 244 P. 191, 116 Okl. 245.
23 C.J. p 493 note 80.

95. Ill.—Monmouth Second Nat. Bank v. Gilbert, 51 N.E. 581, 174 Ill. 485, 66 Am.S.R. 306.

96. Ill.—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.
23 C.J. p 493 note 82.

97. U.S.—First State Bank of Crook, Colo., v. Fox, C.C.A.Colo., 10 F.2d 116.
23 C.J. p 493 note 83.

Where lien of chattel mortgage has expired by virtue of its own terms, the lien of an execution in the hands of the proper officer immediately attaches.—Roth v. Snow, 245 Ill.App. 582.

98. N.Y.—Newman v. Meisel-Galland Co., 260 N.Y.S. 351, 237 App. Div. 95, modifying 256 N.Y.S. 687, 143 Misc. 494, and affirmed 185 N. E. 777, 261 N.Y. 651.

99. Va.—Boisseau v. Bass, 40 S.E. 647, 100 Va. 207, 93 Am.S.R. 956, 57 L.R.A. 380.
23 C.J. p 493 note 84.

1. N.J.—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200.

2. Ind.—Beckman Supply Co. v. Newell, 118 N.E. 962, 68 Ind.App. 679.
Va.—Boisseau v. Bass, 40 S.E. 647, 100 Va. 207, 93 Am.S.R. 956, 57 L.R.A. 380.
23 C.J. p 493 note 85.

3. Va.—Hicks v. Roanoke Brick Co., 27 S.E. 596, 94 Va. 741.
23 C.J. p 493 note 86.

4. Ind.—Owens v. Gascho, 56 N.E. 224, 154 Ind. 225.

5. W.Va.—Hatfield ex rel. Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742.

holds an execution debtor's personal property or money, and thereafter, with notice of the execution, delivers or pays the same to the debtor, he is liable therefor to the execution creditor.[6] The notice contemplated by such a statute is actual knowledge or notice, at least where the statute contains no provision for the service of notice, nor prescribes any formality to make it effective.[7]

After-acquired property. The general lien of an execution binds not merely the goods and chattels which the debtor has at the time when it is placed in the sheriff's hands, but also all goods and chattels acquired by him while the writ is current and unsatisfied.[8] Conversely, in the absence of statutory provision therefor, the lien does not extend to property acquired after the return day of the execution,[9] at least where there has been no preservation of the lien by the securing of new executions within the rules hereinafter discussed in § 131. It is held in some cases that property acquired by an execution debtor, after levy of the writ is not subject to the lien of the execution,[10] unless the debtor has voluntarily mingled it with the property liable to be sold.[11]

Reducing to judgment a claim on which the liens of executions have attached and subsist, the date of the judgment postdating the return day of the executions, is not acquiring new property in a sense that defeats the liens of the executions on the indebtedness reduced to judgment.[12]

Money in the hands of the execution debtor not in current circulation is subject to an execution lien.[13]

Property not subject to levy. Generally, property not subject to levy is not bound by the lien of an execution.[14] However, under some statutes all personal estate of which the judgment debtor is possessed or to which he is entitled, although not levied on nor capable of being levied on, is subject to the lien.[15]

§ 126. —— Territorial Extent

The lien of an execution is ordinarily coextensive with the jurisdiction of the officer to whom the writ is delivered.

The general rule as to the territorial extent of the lien of an execution is that it is coextensive with the jurisdiction of the officer to whom the writ is delivered, and attaches to all defendant's goods and chattels within such territory, and as the writ is in most cases delivered to the sheriff or some other officer whose jurisdiction has the same limits, its lien usually extends throughout the county in which it is issued and no further.[16] Under some statutes, however, the rule is that the lien of an execution extends to defendant's property throughout the state.[17] Under other statutes, when a writ of execution is issued from the district court of one county to the sheriff of another, and levied on the real estate of the judgment debtor in the latter county, it is made the duty of the officer making such levy to make and file in the recorder's office of the county where the real estate is situated a certificate of levy, and until this is done the lien does not attach.[18]

§ 127. Priorities between Executions

In the absence of a statute to the contrary, the various execution creditors are ordinarily entitled to be satisfied in the order of the legal priority of their executions.

In the absence of a statute to the contrary, execu-

6. W.Va.—Hatfield ex rel. Rose v. Cruise, supra.

7. W.Va.—Hatfield ex rel. Rose v. Cruise, supra.

8. Colo.—Robinson v. Wright, 9 P. 2d 618, 619, 90 Colo. 417, citing **Corpus Juris.**
Ill.—Second Nat. Bank of Monmouth v. Gilbert, 51 N.E. 584, 174 Ill. 485.
23 C.J. p 494 note 92.

9. U.S.—Woods v. Stemple, C.C.A. W.Va., 289 F. 239.

10. N.J.—Caldwell v. Fifield, 24 N. J.Law 150.
23 C.J. p 494 note 93.

11. N.Y.—Roth v. Wells, 29 N.Y. 471, affirming 41 Barb. 194.

12. W.Va.—Lawson v. Lang, 169 S. E. 455, 113 W.Va. 815.

13. W.Va.—Lawson v. Lang, supra.

14. Fla.—Evins v. Ganesville Nat. Bank, 85 So. 659, 80 Fla. 84.
Ky.—Graham v. Humm, 229 S.W 80, 191 Ky. 28.
23 C.J. p 494 note 90.

15. W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.
23 C.J. p 494 note 91.
Contractual indebtedness
Under a statute providing that an execution shall be a lien on all the personal estate of which the judgment debtor is possessed or to which he is entitled, a fieri facias is a lien on a contractual indebtedness due the execution debtor, for which a verdict has been returned in his favor.—Mountain State Motor Car Co. v. Solof, 124 S.E. 824, 97 W.Va. 196.
Judgments
It has been held that an execution lien extends to judgments for money due the execution debtor.—Lawson v. Lang, 169 S.E. 455, 113 W.Va. 815
Stock of foreign corporation
Stock owned by judgment debtor in foreign corporation is subject to lien of writ of fieri facias.—Union Bank & Trust Co. v. Hutchinson Lumber Co., 161 S.E. 559, 111 W.Va. 330.

16. Tenn.—Smith v. U. S. Fire Ins. Co., 150 S.W. 97, 126 Tenn. 435, 45 L.R.A.,N.S., 266, Ann.Cas.1913E 196, recognizing dicta to the contrary in Cecil v. Carson, 5 S.W. 532, 86 Tenn. 139.
23 C.J. p 494 notes 96–98.

17. S.C.—Woodward v. Hill, 14 S.C. L. 241—State v. O'Conner, 24 S.C. L. 150.
23 C.J. p 494 note 99 [a].

18. Colo.—People v. Finch, 76 P. 1120, 19 Colo.App. 512.

tion creditors are entitled to be satisfied from property levied on in the order of the legal priority of their executions.[19] The time of the commencement of an execution lien has already been considered in § 124. Such priority, of course, may be defeated by loss or suspension of the lien.[20]

Priority according to teste of writs. In the jurisdictions where, and in the times when, the common-law rule as to the lien of an execution from its teste has prevailed, executions take priority according to their teste, without reference to the time of their delivery to the sheriff, provided all are delivered before their return days and before a sale of the debtor's property.[21] Under the common-law doctrine writs tested at the same term are on a perfect equality, since each is tested as of the first day of the term.[22]

Priority according to delivery of writs. Where the statute provides that an execution shall bind the debtor's property from the time the writ is delivered to the officer to be executed, it is generally held, frequently by virtue of express statutory direction, that several executions against the same debtor take priority in the order in which they are delivered, notwithstanding a levy is first made by virtue of a writ subsequently delivered, and it is the right and duty of the officer to apply the proceeds of a levy and sale under any writ to the satisfaction of all writs in his hands in the order of priority in which they were delivered to him.[23] Where the lien ceases on return of the writ, see infra § 131 if a writ is returned unsatisfied it loses its priority in favor of subsequent outstanding writs[24] which must be satisfied before an alias fieri facias subsequently issued, since such alias fieri facias ranks only from the time of its delivery,[25] except where the lien of the original execution is duly preserved and continued.[26] Likewise, if the writ first delivered becomes dormant, or functus officio, it loses its priority over writs subsequently delivered.[27] A writ, although first delivered, is not entitled to priority where it was not delivered to be executed.[28] There is no priority as between several executions delivered to the officer at the same time and all share proportionately.[29] In the absence of a statute to the contrary, it is generally held that writs delivered on the same day take priority according to the actual priority in time of delivery,[30] although under the rule that fractions of a day are not regarded, see the C.J.S. title Time § 16, also 62 C.J. p 978 note 94–p 981 note 29, it has been held, even in the absence of express statute, that writs delivered on the same day are to be deemed delivered at the same time.[31] In a few cases, on special facts superior diligence in finding and subjecting assets has been allowed to give priority to a junior writ, notwithstanding recognition of the general rule;[32] but ordinarily priority cannot be gained by diligence; delivery of the writ governs.[33]

It has been held to be the duty of a sheriff holding several executions against a common debtor, when making a levy of one, to levy them all, to the end that each levy may relate back to the time the writ was received by the sheriff.[34] It has likewise been held to be the duty of the officer to levy first the writ which first comes to his hands.[35] There is a presumption that the officer levied first

19. Property conditionally sold
A creditor who levies on property conditionally sold has a prior lien thereon where the conditional vendor caused title to vest in the vendee by subsequently levying thereon as property of the vendee.—E. L. Jones & Co. v. Unruh, 182 A. 211, 7 W.W. Harr., Del., 241.

20. N.Y.—Newman v. Meisel-Galland Co., 260 N.Y.S. 351, 237 App. Div. 95, modifying 256 N.Y.S. 637, 143 Misc. 494, and affirmed 185 N. E. 777, 261 N.Y. 651.

21. N.C.—Faircloth v. Ferrell, 63 N.C. 640.
23 C.J. p 498 note 31.

22. N.C.—Jones v. Edmonds, 7 N.C. 43.
23 C.J. p 498 note 32.

23. Ill.—People v. Traeger, 218 Ill. App. 157.
23 C.J. p 498 note 36.

24. Neb.—Hibbard v. Weil, 5 Neb. 41.
23 C.J. p 499 note 43.

25. U.S.—Cunningham v. Offutt, D. C., 6 F.Cas.No.3,484, 5 Cranch C.C. 524.
Mo.—Brown v. Cape Girardeau County, 1 Mo. 154.

26. Ind.—Chatten v. Gerber, 28 N.E. 571, 2 Ind.App. 386.
23 C.J. p 499 note 45.
Preserving lien after return unsatisfied see infra § 131.

27. Ind.—Chatten v. Gerber, supra.
23 C.J. p 499 note 47.

28. N.Y.—Robertson v. Lawton, 36 N.Y.S. 175, 91 Hun 67.
23 C.J. p 499 note 48.
Loss or suspension of lien by delay in executing writ see infra § 135.

29. Ind.—State v. Cisney, 95 Ind. 265.
23 C.J. p 500 note 51.

30. Pa.—Hale's Appeal, 44 Pa. 438.
23 C.J. p 500 note 52.

31. S.C.—Bachman v. Sulzbacher, 5 S.C. 58—Ex parte Stagg, 10 S.C.L. 405.

32. Colo.—Joslin v. Spangler, 22 P. 804, 13 Colo. 491.
N.Y.—Robertson v. Lawton, 36 N.Y.S. 175, 91 Hun 67.

33. Del.—Stuarts v. Reynolds, 4 Del. 112.
Pa.—Schuylkill County's Appeal, 30 Pa. 358.

34. N.J.—Fredd v. Darnell, 152 A. 236, 107 N.J.Eq. 249.

Several delivered at same time
If several writs are delivered to the sheriff at the same time, it is his duty to levy all at the same time so as to create no preference between them.—State v. Cisney, 95 Ind. 265—23 C.J. p 504 note 23.

35. Minn.—Albrecht v. Long, 25 Minn. 163.
23 C.J. p 504 note 22.

the writ first received,[36] and, in the absence of a showing to the contrary, where two seizures were made on the same day, by the same officer the writ first received by the sheriff is entitled to priority by virtue of the presumption that it was levied first.[37]

In some jurisdictions where the general rule prevails that priority depends on delivery of the writs, there are statutory exceptions to it. Thus under some statutes it is held that there shall be a pro rata distribution without preference between executions delivered to the officer on the same day,[38] or between writs sued out during the term in which judgment was rendered, or within a limited time thereafter,[39] but that in all other cases, the writ first delivered to the officer shall be first satisfied.[40] Under other statutes judgments rendered at the same term are deemed of equal date, and no execution thereon is entitled to any preference by reason of being first placed in the hands of the levying officer.[41]

Priority according to date of levy. Where an execution is a lien only from the time it is levied, see supra § 124, in the absence of a statute to the contrary[42] an execution first levied has priority over other executions regardless of the time when they were issued or delivered to the officer for execution,[43] notwithstanding it is the duty of the sheriff to execute writs in the order in which they are delivered,[44] and, even if the money realized on the junior execution remains in the hands of the sheriff, the court cannot order it to be applied to the satisfaction of a senior execution.[45] Generally, in the absence of any judgment or execution lien, and subject to statutory exceptions, the execution first levied has priority,[46] as where the rival executions are issued on judgments, the liens of which have all expired,[47] or where for any reason the judgment liens are all invalid.[48] Where after-acquired realty is not bound by the lien of judgments previously entered, the first execution levied takes priority.[49]

Under statutes whereby an execution binds the debtor's property from the time of delivery of the writ to the officer, it has been held that as between different execution creditors no lien or priority is created by the mere delivery of the execution, and that the writ first levied is entitled to priority.[50] Under some statutes, an execution issued out of a court not of record, if actually levied, has preference over another execution issued out of any court, of record or not of record, which has not been previously levied.[51]

Priority according to rendition or lien of judgment. As a general rule, subject to statutory variations,[52] as to property on which the judgment is a lien, executions take priority according to the dates and priorities of their respective judgment liens.[53] Where under the statute, a judgment binds all the property of the debtor, both real and personal, all executions take priority according to the priority of the judgment liens.[54] Where several judgments are actually, or in legal contemplation, all of the same date, as where they were rendered at the same term or on the same day, under some statutes no priority can be acquired by issuing or

36. La.—Louisiana Oil Refining Corporation v. Burleigh, 128 So. 705, 13 La.App. 618.

37. La.—Louisiana Oil Refining Corporation v. Burleigh, supra.

38. Neb.—State v. Hunger, 22 N. W. 457, 17 Neb. 216.
23 C.J. p 500 note 60.

39. Ohio.—Rauh v. Aknovitch, 52 N. E. 1021, 59 Ohio St. 483.
23 C.J. p 500 note 61.

40. Neb.—State v. Hunger, 22 N. W. 457, 17 Neb. 216.
23 C.J. p 500 note 62.

41. Ga.—Johnson v. Mitchell, 17 Ga. 593.
23 C.J. p 500 note 63.

42. Okl.—Burnham v. Dickson, 47 P. 1059, 5 Okl. 112.
23 C.J. p 501 note 72.

43. Wis.—Knox v. Webster, 18 Wis. 406, 86 Am.D. 779.
23 C.J. p 500 note 68.

44. Minn.—Albrecht v. Long, 25 Minn. 163.
Wis.—Knox v. Webster, 18 Wis. 406, 86 Am.D. 779.
23 C.J. p 501 note 70.

45. Wis.—Knox v. Webster, supra —Russell v. Lawton, 14 Wis. 202, 80 Am.D. 769.

46. Miss.—Gresham v. Roberts, 10 Miss. 471—Wilcox v. May, 19 Ohio 408—Patton v. Pickaway County Sheriff, 2 Ohio 395.
23 C.J. p 501 note 75.

47. Okl.—Harris v. Southwest Nat. Bank of Dallas, Tex., 271 P. 683, 133 Okl. 152.
23 C.J. p 501 note 76.

48. Tex.—Decatur First Nat. Bank v. Cloud, 21 S.W. 770, 2 Tex.Civ. App. 627.
23 C.J. p 501 note 77.

49. Pa.—Sherrard v. Johnston, 44 A. 252, 193 Pa. 166, 74 Am.S.R. 680.
23 C.J. p 501 note 78.

50. Ky.—Tilford v. Burnham, 7 Dana 109.
23 C.J. p 501 note 83.

51. N.Y.—Droege v. Baxter, 74 N. Y.S. 585, 69 App.Div. 58, affirmed 63 N.E. 1116, 171 N.Y. 654.
23 C.J. p 502 note 86.

52. Pa.—Near v. Watts, 8 Watts 319.
23 C.J. p 502 note 90.
In New Jersey
(1) Priority of execution and levy "reverses the priority of the encumbrances (of judgments) no matter in what mode the land may be sold."—I. N. L. Building & Loan Ass'n v. Halpern, 147 A. 376, 377, 105 N.J.Eq. 179.
(2) Other particulars of New Jersey rule see 23 C.J. p 502 note 90 [a].

53. N.C.—Dysart v. Brandreth, 23 S.E. 966, 118 N.C. 968.
23 C.J. p 502 note 89.
Nature of property subject to judgment lien see the C.J.S. title Judgments § 472, also 34 C.J. p 587 note 13—p 588 note 28.

54. Miss.—Smith v. Everly, 5 Miss. 178.
23 C.J. p 503 note 96.

levying execution and all share pro rata;[55] under other statutes, the execution first levied takes priority under such conditions,[56] even when the several liens are created by the same judgment or decree.[57] The same conflict of rule exists as to after-acquired property on which existing judgments become liens at the same time, some courts holding that the proceeds must be applied pro rata,[58] while others give priority to the writ first levied,[59] and still others to the judgment first docketed.[60] It has been held that a levy on an older judgment whose lien has expired will have preference over an execution on a junior judgment whose lien has not expired if such levy is made before the date of the junior judgment.[61] Under some statutes, prior levy under a junior judgment gives priority provided previous notice of intention to levy has been given to the holder of the senior judgment who nevertheless neglects to levy within the statutory time limit.[62] The issuance and levy of an execution within a limited time after judgment is sometimes required to preserve and maintain the preference given by priority of judgment lien.[63] A priority or equality of lien may be lost by election to pursue an inconsistent remedy, pending which another writ is levied.[64]

Priority as dependent on subject matter of judgment. An execution may have a priority over other executions against the same debtor on account of the subject matter of the judgment on which it is founded being in the nature of a preferred claim,[65] as in the case of executions for the enforcement of a lien.[66] In the absence of a statute to the contrary,[67] executions for purchase money have no priority because of the origin of the debt.[68] Statutes providing that property shall be subject to execution for its purchase price have been construed as merely creating an exception to the exemption statutes, and not as creating a lien or giving priority as between executions.[69] Execution for the debt of a testator has priority over one for the debt of the executor.[70] There is no inherent priority as between executions on judgments at law and decrees in equity for the payment of money.[71] At common law, and under some statutes, an execution in favor of the state takes priority over one in favor of an individual without regard to the date of lien.[72]

Different courts or officers. The rule that conflicting executions take priority among themselves from the time of delivery to the officer for execution is generally applied even to writs coming from different courts and held by the same or different officers,[73] even though the first one has been stayed,[74] and even, it has been held, although the writ first delivered has been returned nulla bona.[75] Under some statutes, either by express provision or by judicial construction, the rule is that priority of delivery determines priority of right as between writs in the hands of the same officer, but that priority of levy determines priority as between writs held by different officers,[76] and a statute providing that an execution binds the debtor's property from the time of delivery of the writ to the officer has been construed as intended to bind the debtor's property only as against voluntary transfers, and

55. Ga.—Johnson v. Mitchell, 17 Ga. 593.
Ohio.—Kentucky Northern Bank v. Roosa, 13 Ohio 334.

56. Ind.—Elston v. Castor, 101 Ind. 426, 51 Am.R. 754.
23 C.J. p 503 note 3.
Priority of liens of judgments entered on the same day and priority of judgment lien by superior diligence see the C.J.S. title Judgments § 484, also 34 C.J. p 603 note 70–p 604 note 85.

57. Mo.—Shirley v. Brown, 80 Mo. 244.

58. N.C.—Moore v. Jordan, 23 S.E. 259, 117 N.C. 86, 53 Am.S.R. 576, 42 L.R.A. 209.
Judgment liens on after-acquired property see the C.J.S. title Judgments § 477, also 34 C.J. p 590 note 45–p 591 note 54.

59. Ind.—Elston v. Castor, 101 Ind. 426, 51 Am.R. 754.
23 C.J. p 504 note 6.

60. Or.—Creighton v. Leeds, 9 Or. 215.

61. Ohio.—Shuee v. Ferguson, 3 Ohio 136.

62. Miss.—Curry v. Lampkin, 51 Miss. 91—Dabney v. Stackhouse, 49 Miss. 513—Mobile, etc., R. Co. v. Trotter, 36 Miss. 416.
23 C.J. p 504 note 9.

63. Ohio.—Shuee v. Ferguson, 3 Ohio 136.
23 C.J. p 504 note 10.

64. U.S.—Rockhill v. Hanna, Ind., 15 How. 189, 14 L.Ed. 656.
23 C.J. p 504 note 11.

65. Ga.—State v. Pemberton, Dudl. 15.
Mo.—City of St. Louis v. Wall, App., 124 S.W.2d 616.

66. N.C.—Thompson v. Peebles, 85 N.C. 418.
23 C.J. p 504 note 13.

67. Ga.—Allen v. Sharp, 65 Ga. 417.
23 C.J. p 504 note 15.

68. Ga.—Crafton v. Toombs, 58 Ga. 343.
Mo.—Straus v. Rothan, 14 S.W. 940, 102 Mo. 261.
23 C.J. p 504 note 14.

69. Mo.—Straus v. Rothan, 102 Mo. 261, overruling Boyd v. J. M Ward Furniture, Stove & Carpet Co., 38 Mo.App. 210—Bolckow Mill Co. v. Turner, 23 Mo.App. 103.

70. Pa.—Duncan v. McCumber, 10 Watts 212.
S.C.—Jones v. McNeill, 19 S.C.L. 84.

71. N.J.—Close v. Close, 28 N.J.Eq. 472.

72. Ga.—Seay v. Rome Bank, 66 Ga. 609—State v. Dickson, 38 Ga. 171.

73. Ill.—People v. Traeger, 218 Ill. App. 157.
23 C.J. p 505 note 36.

74. S.C.—Greenwood v. Naylor, 12 S.C.L. 414.

75. S.C.—Lynch v. Hanahan, 43 S. C.L. 186.
23 C.J. p 499 note 41.

76. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.
23 C.J. p 505 note 37, p 502 note 84.

not as against transfers by compulsory process.[77] Writs from different courts of the same state have been given priority according to which was first levied,[78] even where both writs were directed to the same officer.[79] A sheriff and his deputies are all considered as constituting the same officer within the meaning of these rules.[80]

Where one writ issues from a federal court and the other from a state court, the writ first actually levied has priority.[81]

The rule that the lien of an alias execution relates to the teste of the original is not affected by the fact that the alias issued from the court of another county, while a junior execution issued from the court of the county where the property lies.[82]

Priority as affected by invalidity of levy or irregularities in writ. An execution, the levy of which is defective by reason of noncompliance with some statutory provision, such as irregularity in the return,[83] or failure to record,[84] has been postponed to a junior execution, which has been levied in strict compliance with the statute. Where, however, the prior writ is not void, the fact that it is irregular or erroneous does not affect its priority over subsequent regular writs.[85]

§ 128. Priorities between Executions and Other Liens or Claims

a. In general
b. Landlord's lien
c. Unrecorded instruments

a. In General

In the absence of a statute to the contrary, an execution lien usually takes priority over all claims and liens subsequently arising, and is inferior to all valid claims and liens existing against the property at the time the lien attaches.

As a general rule an execution lien from the time it attaches and for as long as it is continued takes priority over all claims and liens subsequently arising,[86] such as subsequent mechanics' liens[87] or real estate mortgages.[88] On the other hand, an execution is subject and subordinate to all valid claims and liens existing against the property at the time the execution lien attaches,[89] such as

77. Ark.—Derrick v. Cole, 30 S.W. 760, 60 Ark. 394.
23 C.J. p 502 note 85.

78. Ala.—Jones v. Davis, 2 Ala. 730.
Neb.—Pitkin v. Burnham, 87 N.W. 160, 62 Neb. 385, 98 Am.S.R. 763, 55 L.R.A. 280.
23 C.J. p 505 note 38.

79. Okl.—Burnham v. Dickson, 47 P. 1059, 5 Okl. 112.
23 C.J. p 505 note 39.

80. Ky.—Million v. Commonwealth, 1 B.Mon. 310, 36 Am.D. 580.
23 C.J. p 506 note 40.

81. U.S.—Pulliam v. Osborne, Ala., 17 How. 471, 15 L.Ed. 154.
23 C.J. p 506 note 41.

82. N.C.—Allen v. Plummer, 63 N.C. 307.

83. N.J.—Siccardi v. Caruso, 198 A. 370, 120 N.J.Law 111.
23 C.J. p 506 notes 42, 43.

84. Me.—Pope v. Cutler, 22 Me. 105.
N.J.—Doe v. Flake, 17 Me. 249—Elmer v. Burgin, 2 N.J.Law 186.

85. Pa.—Roemer v. Denig, 18 Pa. 482.
23 C.J. p 506 note 45.

86. La.—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.
Mich.—Old Kent Bank v. Royce, 249 N.W. 838, 264 Mich. 242.
N.J.—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200—Johnson v. Lyon, 143 A. 373, 103 N.J.Eq. 315.
23 C.J. p 506 note 50.
Effect of debtor's bankruptcy on execution lien see Bankruptcy § 244 d.
Priorities arising in supplementary proceedings see infra § 395.
Priority with respect to:
Agricultural lien see Agriculture § 47 c.
Attachments see Attachment § 272 b (3).
Assignment for benefit of creditors see Assignments for Benefit of Creditors § 362 b.
Chattel mortgages see Chattel Mortgages § 297.
Creditors' suits see Creditors' Suits § 86.

Notwithstanding preference
Lien resting on valid judgment and execution cannot be set aside or diminished because, through insolvency of judgment debtor, enforcement of lien may give holder preference over less diligent creditors.—Newman v. Meisel-Galland Co., 260 N.Y.S. 351, 237 App.Div. 95, modifying 256 N.Y.S. 687, 143 Misc. 494, and affirmed 185 N.E. 777, 261 N.Y. 651.

Property fraudulently conveyed
The priority of lien obtained by a judgment creditor levying on land fraudulently conveyed is not disturbed by the subsequent filing of a bill in equity by another creditor to have the conveyance declared fraudulent.—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J.Eq. 417.
Right to levy on property fraudulently conveyed see the C.J.S. title Fraudulent Conveyances § 308, also 27 C.J. p 704 note 16—p 706 note 40.

87. N.J.—Kienzlan v. Board of Education of Borough of Keansburg, 136 A. 331, 100 N.J.Eq. 511, affirmed 140 A. 920, 102 N.J.Eq. 334.

88. Ga.—U. S. Fidelity & Guaranty Co. v. Richmond County, 163 S.E. 482, 174 Ga. 599.
Iowa.—White v. Smith, 231 N.W. 309, 210 Iowa 787.
Miss.—Harris v. Harris, 116 So. 731, 150 Miss. 729.

Use of maiden name
Judgment creditor's lien on judgment debtor's property, under judgment against debtor in her husband's surname, and fieri facias issued thereon, held superior to that of security deed holder which subsequently made loan to debtor in her maiden name.—Truitt v. American Sav. Bank, 166 S.E. 190, 175 Ga. 785.

89. Cal.—Joint Pole Ass'n v. Steele, 2 P.2d 335, 213 Cal. 233—Rosen v. Rosen, 62 P.2d 384, 17 Cal.App.2d 601.
Del.—Di Angelo v. McCormick Bros., 168 A. 79, 19 Del.Ch. 307.
Fla.—Bronson v. Willis, 194 So. 245, 142 Fla. 64.
Pa.—Miners Sav. Bank of Pittston v. Thomas, 12 A.2d 810, 140 Pa. Super. 5.
Puerto Rico.—Garriga v. O'Meara, 28 Puerto Rico 332—Fernandez v. Esmoris, 1 Puerto Rico Fed. 483.
Tenn.—Gilson v. Lacey, 55 S.W.2d 766, 165 Tenn. 252, citing **Corpus Juris.**
23 C.J. p 506 note 56.

pledges,[90] real estate mortgages,[91] or tenancy for years.[92] Of course the execution is paramount to claims and liens which are wholly void, or void as to creditors,[93] and, conversely, any fact which defeats the lien of the execution may give priority to claims otherwise subordinate.[94]

Appointment of receiver. It has been held that an execution, issued and delivered to the sheriff before a receiver was appointed for the execution debtor, is prior to the title of the receiver.[95] Likewise, where a receiver is appointed, who takes possession of property, which has been previously levied upon by the sheriff on executions issued on judgments obtained prior to the appointment of such receiver, the receiver will be required to pay first the amount of such executions out of the property in his possession.[96] Void executions,[97] or executions subsequent to the receiver's appointment,[98] or subsequent to initiation of proceedings by the attaching creditors for such appointment,[99] confer no priority.

Concurrent liens. Where an execution was delivered to the sheriff at the same time a chattel mortgage was filed for record, the liens created

Specific equitable lien

Lien of execution creditor cannot prevail over prior specific equitable lien on existing property.—In re McCrory Stores Corporation, C.C.A. N.Y., 73 F.2d 270.

90. Fla.—Bronson v. Willis, 194 So. 245, 142 Fla. 64.
49 C.J. p 926 note 32.

Pledge for future advances

The lien of a pledge for future advances has priority over the lien of an execution levied on the pledged property subsequent to the pledge, but before the advances are made, if the pledgee has obligated himself to make the advances; but where the pledgee has not bound himself to make such advances this lien is subject to the lien of an execution levied after the pledge, but before the advances are in fact made.—Napa Bank v. Ferguson Burns Estate, 192 P. 66, 48 Cal.App. 319.

91. Ga.—U. S. Fidelity & Guaranty Co. v. Richmond County, 163 S.E. 482, 174 Ga. 599—Alsabrook v. Prudential Ins. Co. of America, 167 S.E. 735, 46 Ga.App. 400, transferred, see Alsabrook v. Prudential Ins. Co., 163 S.E. 706, 174 Ga. 637.
La.—Breaux v. Ganucheau, 3 La.App. 481.
Tex.—Carlisle v. Holland, Civ.App., 289 S.W. 116.
41 C.J. p 521 note 53.

Growing crops

Levy of execution by judgment creditor on growing crops while remaining part of realty was invalid and ineffective as against a prior mortgagee under mortgage including rents, issues, and profits.—In re Bunting, D.C.Ill., 60 F.2d 605.

Loan to pay superior liens

The lien of execution creditors has been held to be superior to that of a mortgagee who loaned money to pay debts superior to the lien of execution creditors, where the mortgagee simply loaned the money to pay such debts and did not purchase the same or take an assignment thereof, and the mortgagee has no claim as against the execution creditors to be subrogated to the rights of the original creditors.—Lane v. Lloyd, 110 S.W. 401, 33 Ky. L. 670, distinguishing Bradley v. Curtis, 79 Ky. 327, and Harrod v. Johnson, 5 Ky.L. 247.

Rents

Where a mortgage which is in default conveys rents, issues, and profits of mortgaged realty to mortgagee, a judgment creditor of the mortgagor issuing an attachment execution and serving the mortgagor's tenant as garnishee, whereupon the mortgagee gave notice to and made demand on the tenant to pay rent to him, is entitled to rents accrued before such notice was given, but not to rents accruing thereafter.—Miners Sav. Bank of Pittston v. Thomas, 12 A.2d 810, 140 Pa.Super. 5.

92. Under statute providing that the right of possession of a tenant for years shall be deemed paramount to that of a purchaser at a judicial sale if, and only if, the letting to him shall precede in point of date the entry of the judgment, order, or decree on which such sale was had, and also shall precede the recording or registering of the mortgage, deed, or will, if any, through which by legal proceedings the purchaser derives title, the right of possession of a purchaser at sheriff's sale under an execution on a judgment entered on a bond accompanying a mortgage is subordinate to that of a tenant for years whose lease antedates the entry of the judgment, although not the recording of the mortgage.—Brown v. Neal, 16 Pa.Dist. 599, 54 Pittsb.Leg.J. 58, 10 North.Co. 277.

93. U.S.—Interstate Banking & Trust Co. v. Brown, Tenn., 235 F. 32, 148 C.C.A. 526.
23 C.J. p 507 note 61.

Lien on chattels

In Pennsylvania, lien on chattels except as permitted by statute, is invalid as against execution creditors.—Bucyrus-Erie Co. v. Casey, C.C.A.Pa., 61 F.2d 473.

Failure to perfect rights

It has been held that an assignee of future rents who has done nothing to perfect his rights will not prevail over an execution creditor.—In re McCrory Stores Corporation, C.C.A.N.Y., 73 F.2d 270.

Mortgage

(1) Where there was no subsisting indebtedness to support a note and mortgage to secure the same at the time an execution was levied on the lands, the mortgage was inferior to the right of the execution creditor.—People's State Bank v. Buchanan, 145 N.E. 898, 86 Ind.App. 517.

(2) Likewise, an execution is superior to a prior mortgage which has ceased to exist.—Bowman v. Manter, 33 N.H. 530, 66 Am.D. 743.

94. Ga.—Rosser v. Georgia Pac. R. Co., 29 S.E. 171, 102 Ga. 164.
Wash.—Monks & Miller v. Fein, 215 P. 525, 125 Wash. 230.
Loss or suspension of lien see infra §§ 132–137.

Failure to levy within the time prescribed by law may defeat priority of execution lien.—Rosser v. Georgia Pac. R. Co., 29 S.E. 171, 102 Ga. 164.

Posting of notice of sale

On constable's failure to post written notice, execution became dormant only as to liens attaching subsequently and certain bona fide purchasers.—Williams v. Standard Oil Co. of New York, 219 N.Y.S. 541, 219 App.Div. 193.

95. N.Y.—In re Gies Lithographic Co., 40 N.Y.S. 146, 7 App.Div. 550.

96. N.Y.—Rich v. Loutrel, 9 Abb. Pr. 356, 18 How.Pr. 121.
Va.—Gibert v. Washington City, V. M. & G. S. R. Co., 33 Gratt. 645, 74 Va. 645.

97. Del.—Hawkins v. Lewes Journal Co., 119 A. 243, 13 Del.Ch. 317.

98. Va.—Grandy v. Real Estate Trust Co., 137 S.E. 519, 147 Va. 371.
53 C.J. p 251 note 41.

99. R.I.—Jablouski v. Simons Land Co., 127 A. 3, 46 R.I. 277.
53 C.J. p 251 note 42.

thereby have been held to be concurrent.[1]

Conditional sale. In the absence of a statute to the contrary, it has been held that the lien of an execution is paramount to the rights in the property possessed by the vendor under a contract of conditional sale.[2] Where execution is issued and levy thereunder made before the conditional vendor's right to retake the property has become complete, the execution lien is superior to the vendor's right to retake, and the execution creditor is entitled to enforce his lien on the conditional vendee's interest in the property.[3] On the other hand, if there has been a default on the part of the vendee prior to the levy of execution, under some statutes the vendor's right to retake the property is complete and superior to the execution lien.[4]

Livery-stable keeper's lien. It has been held that the statutory lien of a livery-stable keeper is superior to that of an execution levied on a horse while temporarily in his owner's possession.[5]

Property previously attached. Where real estate has been attached and the attachment preserved, an execution levied under a judgment recovered in such suit operates as a lien from the date of the attachment, prior to all encumbrances created by the debtor subsequent to the levy of the writ of attachment.[6]

Widow's allowance. Although in the absence of a statute to the contrary, the lien of an execution is superior to a widow's allowance in the estate of the judgment debtor,[7] ordinarily under the statutes a widow's allowance is superior to the lien arising from the delivery of an execution to the sheriff before the death of the judgment debtor.[8] Where levy has been made before the death of the husband, it has been held that, since he had not parted with the title or surrendered ownership, the widow was entitled to her statutory allowance in preference to the right of the execution creditor,[9] although it has also been held that by the levy the officer acquires a special property in the goods, and that the husband does not die seized or possessed of the property within the meaning of the statute granting a widow's allowance.[10]

b. Landlord's Lien

A landlord's lien, under the various statutes, is usually granted priority over an execution lien.

Ordinarily, frequently by virtue of express statutory provision, a landlord's lien is paramount to the lien of an execution,[11] and accordingly the landlord's lien on the crop raised by a tenant,[12] the tenant's machinery and other chattels in a leased mill, factory, loft, or other manufacturing space,[13] or the tenant's stock of goods in the leased premises[14] has been afforded priority.

By the statute of 8 Anne c 14, which is part of the common law of some of the American states, and in others has been substantially reënacted, should there be rent in arrear at the time of seizure, but no distraint, the execution creditor, who

1. Ill.—Munson v. Commercial State Bank of Windsor, 246 Ill. App. 368.

2. Pa.—Sullivan Machinery Co. v. Griffith, 94 Pa.Super. 207.
23 C.J. p 507 note 66.

3. N.Y.—Arter v. Jacobs, 234 N.Y.S. 357, 226 App.Div. 343.

4. N.Y.—Cohocton Valley Garage v. Kellogg, 240 N.Y.S. 642, 136 Misc. 283.

5. Tenn.—Caldwell v. Tutt, 10 Lea 258, 43 Am.R. 307.

6. Me.—Snell v. Libby, 15 A.2d 148, 149, 137 Me. 62, citing **Corpus Juris.**
23 C.J. p 511 note 14.

7. **In North Carolina**
(1) It has been held that personal property allotted to a widow as her year's support is subject to seizure and sale under an execution issued on a judgment recovered against her deceased husband in his lifetime, tested before his death but issued thereafter.—Grant v. Hughes, 82 N.C. 216.

(2) **The effect of this holding was almost immediately abrogated by** statute.—See Act Relating to Widow's Year's Support, 82 N.C. 697.

8. Ark.—James v. Marcus, 18 Ark. 421.
24 C.J. p 249 note 34.
Priorities of dower rights see Dower §§ 34–41.

9. Ind.—Dixon v. Aldrich, 26 N.E. 843, 127 Ind. 296.

10. Ark.—James v. Marcus, 18 Ark. 421.
24 C.J. p 249 note 36.

11. Fla.—Lovett v. Lee, 193 So. 538.
Iowa.—Farmers' Sav. Bank of Rhodes v. Mallicoat, 228 N.W. 272, 209 Iowa 335.
36 C.J. p 506 note 9, p 564 note 69 [a].

One year's rent
Under a statute authorizing distress for rent and providing that if an outside lien attach to the property while on the leased premises, the property nevertheless shall be liable to distress, "but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien," a landlord's lien for rent within the statute takes precedence over an execution lien.—State ex rel. Hodges v. Hutchinson, 197 S.E. 359, 120 W.Va. 181.

Where right of distraint had been exercised, landlord's lien was held superior to that of an execution creditor of the tenant.—In re De Lancey Stables Co., D.C.Pa., 170 F. 860.

12. Ark.—Lunsford v. Skelton, 275 S.W. 901, 169 Ark. 547.
Ga.—Cochran v. Waits, 56 S.E. 241, 127 Ga. 93.
La.—Hemler v. Hawkins, 3 La.App. 149.
36 C.J. p 506 note 10.

13. **Such lien held valid** as against a purchaser at an execution sale, particularly where the statute provided that such lien shall have "priority and be paramount to any title, lien, interest, mortgage, judgment or other encumbrance created or acquired after machinery or other chattels are placed in the premises."—Blanos v. Eastwood Realty Co., 181 A. 144, 116 N.J.Law 1.

14. La.—Cleveland Steel Co. v. Joe Kaufman Co., 99 So. 428, 155 La. 529.

has caused to be seized the goods and chattels of a tenant on the demised premises, must pay the rent so in arrear for such premises for a period not in excess of one year, before the goods and chattels may be moved by the officer;[15] or, if not removed, but sold on the premises, the officer must pay the rent due, not in the excess of one year, out of the proceeds of the sale in his hands, see infra § 247. Ordinarily, under the statute, notice of the landlord's claim for rent must be given before the goods are removed from the premises.[16] Under some statutes, the preference given to the landlord exists only where the tenancy is in existence at the time of seizure under execution,[17] although under other statutes such preference will be given whenever the rent is in arrear and the landlord retains his title, notwithstanding the termination of the tenancy.[18] As the object of the statute is to secure to landlords the benefit of a specific lien in certain cases where otherwise they would be deprived of the right of distress by the operation of a principle of law, the statutory remedy exists only where the goods taken in execution are such as the landlord might have distrained on but for the prior levy of the execution.[19] Under some statutes the landlord is entitled to a preference only where the goods levied on under execution are the property of the tenant;[20] but under other statutes the landlord is preferred whether the goods levied on belong to the tenant or to some other person.[21] In some jurisdictions the statute is held to apply only between a landlord and his immediate lessee, and not between the landlord and a subtenant whose goods have been seized on execution;[22] and in other jurisdictions it is held that the statute extends also to the case of landlord and subtenant.[23] In some states the statute of Anne has been either superseded by legislation,[24] or entirely abolished.[25]

Under some statutes, when it appears that the premises are held at a rent certain for which the landlord might, by law, distrain, the officer is required to pay such rent before removing the tenant's goods under an execution.[26]

c. Unrecorded Instruments

Under some of the recording acts, an execution will take priority over a prior unrecorded instrument.

By virtue of statute executions sometimes take priority over prior claims based on unrecorded instruments.[27] Accordingly, under statutes requiring mortgages and conditional sales to be recorded to be valid against bona fide creditors and purchasers for value, the lien of an execution is superior to that of a prior unrecorded mortgage or sale of which the judgment creditor had no notice,[28] although the instrument was recorded before the ex-

15. Md.—First Nat. Bank v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508, 86 A.L.R. 1407.
S.C.—Fidelity Trust & Mortgage Co. v. Davis, 155 S.E. 622, 153 S.C. 400.
36 C.J. p 506 notes 13–15, p 564 note 68.

Attachment on warrant is not execution within statute of Anne.—First Nat. Bank v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508, 86 A.L.R. 1407—36 C.J. p 565 note 82.

Right to distrain

The statute does not authorize the landlord to distrain for his year's rent goods taken in execution.—Craddock v. Riddlesbarger, 2 Dana, Ky., 205—36 C.J. p 565 note 72.

Statute inapplicable

A statute providing that as against an execution creditor the landlord's lien shall not be for more than one year's rent when such creditor pays the rent in arrears, not to exceed one year, is inapplicable to invalidate the landlord's distress for rent due for more than one year, where no payment of one year's rent in fulfillment of the statute was made.—Maynard v. Bank of Kershaw, 198 S.E. 188, 188 S.C. 160.

Such statute is not superseded by a statute providing that, whenever a tenant is adjudicated a bankrupt, rent which may then be due for a period not exceeding three months shall constitute a lien upon, and shall have priority of payment in full out of, the tenant's distrainable property.—In re Seward, D.C.Md., 8 F.Supp. 865.

16. N.J.—Ayres v. Johnson, 7 N.J. Law 119.

17. Del.—In re Ellegood, 116 A. 127, 31 Del. 529.
36 C.J. p 565 note 77.

18. Pa.—Moss' Appeal, 35 Pa. 162.

19. Pa.—Wickey v. Eyster, 58 Pa. 501.
36 C.J. p 565 note 92.

20. Del.—Lupton v. Hughes, 47 A. 624, 18 Del. 515.
Md.—Fisher v. Johnson, 6 Gill 354.
36 C.J. p 565 note 93.

21. N.Y.—Russell v. Doty, 4 Cow. 576.

22. Ky.—Craddock v. Riddlesbarger, 2 Dana 205.
36 C.J. p 565 note 95.

23. Pa.—McComb's Appeal, 43 Pa. 435.
36 C.J. p 565 note 96.

24. U.S.—In re Joslyn, D.C.Ill., 13 F.Cas.No.7,550, 2 Bliss. 235.
Ill.—Herron v. Gill, 112 Ill. 247—Rowland v. Hewitt, 19 Ill.App. 450.

25. N.Y.—Miller v. Johnson, 12 Wend. 197.

26. N.J.—Olden v. Mather, 67 A. 435, 73 N.J.Eq. 217.
36 C.J. p 506 note 16.

Although taxes may be made by contract a part of the rent reserved and may be distrained for when due and payable, they are before assessment incapable of ascertainment and not entitled to priority over an execution.—In re Spies-Alper Co., D.C. N.Y., 231 F. 535.

27. Ky.—Mann Bros. v. Ball, 18 S.W.2d 946, 230 Ky. 129.
23 C.J. p 509 note 84.

Filing of notice

Under some statutes the lien obtained by filing a prescribed notice of levy on real estate is valid against all prior grantees and mortgagees of whose claims the execution creditor does not have actual or constructive notice.—In re Cobb, D.C. Mich., 11 F.Supp. 533, reversed on other grounds 14 F.Supp. 465.

28. U.S.—In re Miller, D.C.Ill., 45 F.2d 909.
Pa.—Williams Patent Crusher & Pulverizer Co. v. Reily, 180 A. 156, 118 Pa.Super. 64.
23 C.J. p 509 note 89.

ecution sale,[29] or even before levy,[30] where the lien of an execution attaches before levy, see supra § 124. In some jurisdictions, under the existing statutes, it has been held that the lien of a bona fide mortgagee under an unrecorded mortgage is entitled to priority over the lien of an execution subsequently levied, provided the mortgage is duly recorded before sale under such execution.[31] Under some statutes a levy of an execution is necessary before a lien arises superior to the rights of a seller under an unrecorded conditional sales contract.[32] Actual notice of a prior unrecorded lien will ordinarily prevent a subsequent execution from gaining priority over it,[33] actual notice supplying the place of recording.[34] Notice after levy but before sale has been held sufficient to have this effect,[35] but the rule is otherwise under some statutes.[36]

Deeds. With some exceptions,[37] under the various recording acts, an execution levied on land gives the execution creditor and the purchaser at the execution sale priority of right over the grantee in an earlier but unrecorded deed of the same land,[38] of which deed the creditor has no notice at the time of levy.[39] Under some statutes notice after levy

29. U.S.—Stevenson v. Texas & P. R. Co., Tex., 105 U.S. 703, 26 L.Ed. 1215.
Ark.—Hawkins v. Files, 71 S.W. 681, 51 Ark. 417.
23 C.J. p 509 note 90.

30. Colo.—Williams v. Mellor, 19 P. 839, 12 Colo 1
Pa.—Williams Patent Crusher & Pulverizer Co. v. Reily, 180 A. 156, 118 Pa.Super. 64.

31. Kan.—Holden v. Garrett, 23 Kan. 98.
Ky.—Righter v. Forrester, 1 Bush 278.
Mo.—Sappington v. Oeschli, 49 Mo. 244.

32. In New York, under Pers.Prop. L. § 65, as to all creditors, except those who acquire a lien by levy or attachment, a conditional sale remains valid, and no title passes to become subject to the lien of an execution. The provisions of Civ.Pract. Act § 679 that the goods and chattels of a judgment debtor are bound by the execution from the time of the delivery thereof to the proper officer does not create a lien against chattels in the hands of a conditional buyer. Consequently, where there has been no levy of an execution before a copy of the contract has been filed as required by law, chattels in the hands of a conditional buyer are not goods or chattels of a judgment debtor to which the lien of an execution might attach.—Baker v. Hull, 166 N.E. 175, 250 N.Y. 484, reversing 228 N.Y.S. 748, 223 App.Div. 859.

33. Me.—Bunker v. Gordon, 16 A. 341, 81 Me. 66.
23 C.J. p 509 note 94.

34. Pa.—Bismarck Bldg. & Loan Assoc. v. Bolster, 92 Pa. 123.
23 C.J. p 509 note 95.

35. Ky.—Armstrong v. Darbro, 10 Ky.L. 984.

36. Iowa.—Bacon v. Thompson, 14 N.W. 312, 60 Iowa 284.
Tex.—Simpson v. Chapman, 45 Tex. 560.
23 C.J. p 509 note 97.

Announcement at sale
Where judgment creditor of buyer of truck under conditional sale contract and constable levying writ of execution had no notice of the conditional sale contract and thereby acquired a lien on truck, an announcement made at execution sale from which an inference might be drawn that assignee of conditional sale contract had an interest in the truck would not affect the lien theretofore acquired.—Maryland Credit Finance Corporation v. Campbell, 195 A. 277, 8 W.W.Harr., Del., 575.

37. Md.—George L. Cramer & Sons v. Roderick, 98 A. 42, 128 Md. 422.
Mich.—Otis v. Sprague, 76 N.W. 154, 118 Mich. 61.
Philippine.—Boncan v. Smith, 9 Philippine 109, 5 Off.Gaz. 858—Fabian v Smith, 8 Philippine 496, 5 Off. Gaz. 576.
23 C.J. p 510 note 1.

Adverse possessor
Vendor's judgment creditor levying execution could not prevail over purchaser under unrecorded deed whose possessory right by adverse possession was complete without deed.—City Nat. Bank & Trust Co of Miami, Fla., v. City of Knoxville, 11 S.W.2d 853, 158 Tenn. 143.

Purchasers
Where the protection of the statute is limited to "purchasers" and does not include "creditors," an execution creditor is not entitled to priority over an unrecorded deed.—Davis v. Owenby, 14 Mo. 170, 55 Am. D. 105.

38. D.C.—Nelson v. Henry, 13 D.C. 259.
Miss.—Levis-Zuroski Mercantile Co. v. McIntyre, 47 So. 435, 93 Miss. 806, reversed on other grounds 47 So. 666.
Tenn.—Taylor v. Deakins, 9 Lea 520—Coward v. Culver, 12 Heisk. 540—Aymett v. Citizens' Nat. Bank, Ch.App., 64 S.W. 302—Sanders v. Everett, 3 Tenn.Ch. 520.
23 C.J. p 510 note 3.
Record and registration of deeds generally see Deeds §§ 71–79.

Property in two parishes
Where a purchaser acquired property which was divided by the boundary line between two adjoining parishes, and registered his deed in one of the parishes only, it was held that the part lying in the other parish was liable to sale under execution by a creditor of the grantor having no notice.—Dooley v. Delaney, 6 La.Ann. 67.

Security deed
Where defendant, by a deed absolute in form, conveyed land to R to secure a loan, and after the loan was paid R executed a reconveyance to defendant but it was not filed for record until several years later, and after plaintiff had obtained a judgment against R and had issued execution thereon, it was held that plaintiff could not subject such land to his judgment against R, since he had a lien only on the debtor's actual interest in the land and the registration statutes did not apply to such a case.—Mickael v. Knapp, 23 S.W. 280, 4 Tex.Civ.App. 464.

39. Ky.—Ashland Grocery Co v. Martin, 103 S.W.2d 72, 267 Ky. 677.
23 C.J. p 510 note 4.

Possession
(1) Possession under an unrecorded deed may operate as notice—Hodge v. Amerman, 2 A. 257, 40 N.J. Eq. 99—Lewis v. Hall, 7 N.J Eq. 107—23 C.J. p 510 note 4 [b].

(2) Under the circumstances of the particular case it was held that the possession by the vendee of an unrecorded deed was not such as to operate as notice to the execution creditor.—Ex parte City of Anderson, 62 S.E. 513, 82 S.C. 131, affirmed 63 S.E. 354, 82 S.C. 131.

In Tennessee the rule has been laid down, however, that creditors are not affected by even actual notice of any real estate deeds, and that land held by such title may be levied on and sold under execution against the grantor.—Coward v. Culver, 12 Heisk. 540.

but before sale is of no effect;[40] in others it gives priority to the elder claim.[41] Where the statutory protection is limited to bona fide purchasers without notice, a purchaser at the execution sale is protected against an unrecorded deed of which he had no notice at the time of his purchase,[42] but not against deeds of which he has actual notice[43] or which have been recorded before such sale.[44] Notice to the purchaser at the execution sale is immaterial where the execution creditor is entitled to priority by reason of want of notice, as otherwise the priority of the creditor might be illusory.[45]

Executions. In jurisdictions where the statute requires that the execution shall be entered on an execution docket within a prescribed period after its issuance, or otherwise recorded, and the statutory requirement is not complied with, a subsequent bona fide purchaser or mortgagee of such property without actual notice of the levy will take the property free from the lien of such execution.[46] So, where the levy is required to be recorded, priority is given to subsequent purchasers without notice of an unrecorded levy.[47]

§ 129. —— Transfer of Property

As a general rule a subsequent purchaser or assignee who acquires property which is subject to the lien of an execution takes such property subject to such lien, at least where he does not occupy the position of a bona fide purchaser.

The general rule is that where property, either real[48] or personal[49] is subject to the lien of an execution issued on a valid judgment, a subsequent

40. Me.—Emerson v. Littlefield, 12 Me. 148.
23 C.J. p 510 note 5.

41. Ky.—Morgan v. Eversole, 188 S.W. 645, 171 Ky. 624.
23 C.J. p 510 note 6.

42. Mo.—Davis v. Owenby, 14 Mo. 170, 55 Am.D. 105—Page v. Hill, 11 Mo. 149—Waldo v. Russell, 5 Mo. 387.

43. Mo.—Davis v. Owenby, 14 Mo. 170, 5 Am.D. 105.

44. Mo.—Potter v. McDowell, 43 Mo. 93.
23 C.J. p 510 note 9.

45. Ky.—Low v. Blinco, 10 Bush 331.
Tex.—Whitaker v. Farris, 101 S.W. 456, 45 Tex.Civ.App. 378.

46. Mich.—Lachelt v. McInerney, 152 N.W. 86, 185 Mich. 413.
23 C.J. p 510 note 11.

In Georgia

(1) Such subsequent purchaser must prove that he acted in good faith and without notice in making the purchase.—Greene v. Matthews, 120 S.E. 434, 31 Ga.App. 265—23 C.J. p 510 note 11 [b] (1).

(2) Where there is no extraneous evidence as to a consideration, a subsequent deed cannot be aided by the execution creditor's failure to obtain entry, and under such circumstances the deed must yield to the older execution lien.—Beam v. Rome Hardware Co., 191 S.E. 126, 184 Ga. 272.

(3) Under the statutes of this state, entry of an execution on the general execution docket of a county in which land of defendant is located, other than the county in which the judgment was obtained or the county in which defendant resided at the commencement of the suit, will convey constructive notice of the judgment and cause the lien of the judgment to affect the land as against a bona fide purchaser for value, without actual knowledge of the judgment, who acquires the land after the execution has been entered on the docket. Relatively to land of defendant so located, it is not necessary, in order to bind the property as against such purchaser, that the execution be entered on the general execution docket of the county in which the judgment was obtained or the county in which defendant resided.—Citizens' Bank v. Jenkins, 120 S.E. 607, 156 Ga. 874.

(4) Other particulars of Georgia rule see 23 C.J. p 510 note 11 [b].

In West Virginia under Code 1931 38-4-8, 38-4-9, providing that the lien of a writ of fieri facias shall not be good as against a purchaser or assignee of the property subject to the lien, for a valuable consideration and without notice of such lien, unless the writ shall have been actually levied on the property and the property shall have been in the actual possession of the officer or some person other than the judgment debtor, and that the docketing of an execution shall constitute constructive notice, an assignment for an antecedent obligation does not constitute a valuable consideration so as to entitle the assignee to preference over an undocketed execution. —London & Lancashire Indemnity Co. of America v. Cromwell, 190 S.E. 337, 118 W.Va. 318.

47. Me.—Swift v. Guild, 47 A. 912, 94 Me. 436, 80 Am.S.R. 406.
23 C.J. p 511 note 12.

48. Ga.—Citizens' Bank v. Jenkins, 120 S.E. 607, 156 Ga. 874.
23 C.J. p 507 note 68.

A lease made subsequent to the acquisition of an execution lien on the property is inferior to such lien. —Mosely v. Evans, 141 S.E. 207, 165 Ga. 472—23 C.J. p 507 note 68 [b].

Necessity of bill in aid of execution

Defendants' interest at time of execution levy before they sold property was properly sold without filing bill in aid of execution.—Wernik v. Kolodziejczak, 215 N.W. 360, 240 Mich. 468.

Conveyance to mortgagee

One holding a judgment lien on real estate may cause the land to be levied on and sold on execution subject to a prior lien, although the debtor may have previously conveyed the property to the mortgagee in satisfaction of the mortgage indebtedness.—Montgomery County Nat. Bank v. Backus, 196 P. 1074, 108 Kan. 779.

Where purchaser has knowledge of the execution lien, it is especially true that he takes subject to the lien.—Manning v. Manning, 283 S.W. 384, 214 Ky. 381.

49. Del.—Cubbage v. Clements, 14 A.2d 378, 1 Terry 497.
Mich.—Old Kent Bank v. Royce, 249 N.W. 838, 264 Mich. 342.
Wash.—Monks & Miller v. Fein, 215 P. 525, 125 Wash. 230.
W.Va.—Hartman v. Corpening, 178 S.E. 430, 116 W.Va. 31.
23 C.J. p 507 note 69.

Amount paid pledgor

An execution lien is entitled to priority over the rights of a pledgee to the extent of the consideration paid the pledgor for the pledged property after the levy of the execution.—Bronson v. Willis, 194 So. 245, 142 Fla. 64.

After sale of pledged property

Where pledgor consented to sale of pledge by pledgee, thereby validating the sale and ratifying any irregularities therein, the rights of an execution creditor of the pledgor who subsequently levied on the property are inferior to the rights of the purchaser, particularly where the execution creditor had notice of the claims of the purchaser.—Anglo-California Trust Co. v. Holbrook, 24 P.2d 169, 218 Cal. 531.

purchaser or assignee is bound to take notice of such outstanding lien, and acquires the property subject thereto. It is immaterial that there is other property sufficient to satisfy the execution.[50] The levy of an officer under an execution does not convert the title of defendant in execution into a mere right of action, and he may still transfer his title to the property as though no levy had been made, subject to all rights arising from the levy, so long as the property remains in custodia legis.[51] A purchaser from an execution debtor may of course acquire a good title even as against the execution creditor, by the running of the statute of limitations in his favor, and by continued adverse possession.[52] A sale of property not subject to the execution lien,[53] or before such lien has attached thereto,[54] passes a good title free from the claim of the execution creditors.

Bona fide purchasers. Ordinarily, under the statutes, bona fide purchasers who acquire their rights prior to actual levy and without notice of an outstanding execution lien are protected against such execution,[55] but if an actual levy has been made such purchasers take subject thereto, although without notice of the execution.[56]

Transfer without visible change of possession. Under the rule that retention of possession of goods and chattels by the seller is prima facie or conclusive evidence of fraud on existing creditors of the seller, see the C.J.S. title Fraudulent Conveyances §§ 188–191, also 27 C.J. p 574 note 29–p 579 note 73, the lien of an execution creditor has been held to be superior to a prior sale without actual delivery.[57]

§ 130. Proceedings to Determine Priorities

The availability of various remedies to determine priorities between execution liens, and between execution liens and other liens and claims, has been judicially determined.

The question of priority as between an execution lien and a previous conveyance or mortgage having an apparent priority, but alleged to be fraudulent or for some other reason subject to the execution, may be determined on a bill in equity.[58] Under some statutes a determination of priorities may be had in summary proceedings.[59] It has been held that priority between executions issued out of a law court should be determined by such court, and not in a court of equity.[60] The priority of the lien of an execution over a chattel mortgage has also been determined in an action of replevin.[61]

Proceedings for distribution of proceeds of an execution sale are considered infra § 252. Whether the sheriff made a particular statement, which is alleged to have released the lien, is a question of fact which is settled by the verdict of the jury.[62]

§ 131. Duration

As a general rule an execution lien continues as long as the writ remains in force.

The duration of the lien of an execution is largely a matter of statutory regulation,[63] and, subject to

50. N.C.—Bevis v. Landis, 59 N.C. 312, 82 Am.D. 418.

51. Del.—Cochran v. Clements, 183 A. 632, 634, 7 W.W.Harr. 410, citing **Corpus Juris.**
23 C.J. p 508 note 71.

52. Ala.—Barclay v. Smith, 66 Ala. 230.
23 C.J. p 508 note 72.

53. N.J.—Bloom v. Welsh, 27 N.J. Law 177.
Tenn.—Edwards v. Thompson, 4 S. W. 913, 85 Tenn. 720, 4 Am.S.R. 807.
23 C.J. p 508 note 73.

54. Iowa.—Benbow v. Boyer, 56 N. W. 544, 89 Iowa 494.
23 C.J. p 508 note 74.

55. N.C.—Weisenfield v. McLean, 2 S.E. 56, 96 N.C. 248.
23 C.J. p 508 note 75.

56. N.Y.—Bond v. Willett, 31 N.Y. 102, 29 How.Pr. 47, 1 Abb.Dec. 165, 1 Keyes 377.

57. U.S.—Meeker v. Wilson, C.C. Mass., 16 F.Cas.No.9,392, 1 Gall. 419.
23 C.J. p 508 note 78.

58. Kan.—Taylor v. Dunlap Stone & Lime Co., 16 P. 751, 38 Kan. 547.

59. Prayer for recognition of privilege in funds held under fieri facias was unnecessary where averment of privilege was deemed admitted because unanswered.—Security Bank v. National Mut. Assur. Ass'n, 126 So. 591, 13 La.App. 303, rehearing denied 128 So. 314, 13 La.App. 380.

Validity of prior deed or mortgage

(1) It has been held that the validity of a prior deed or mortgage may be tried in such a proceeding. —Bussiere v. Williams, 37 La.Ann. 387—State v. Judges, 33 La.Ann. 1351—New Orleans Canal & Banking Co. v. Recorder of Mortgages, 27 La.Ann. 291.

(2) It has also been held, however, that the validity of a prior deed or mortgage must be determined in a plenary suit, and cannot be had on a summary application by rule to show cause why it should not be canceled.—Morgan v. Wintercast, 6 La.Ann. 485.

60. Procedure

Where executions issued out of the circuit court against the same debtor but in favor of different judgment creditors, circuit court could on petition and motion order sheriff to proceed to a sale and to pay the money realized into circuit court, which should thereupon determine the priority between the executions. —Walton v. Hillier, 20 A.2d 420, 129 N.J.Eq. 330.

Scope of inquiry

In settling priorities, the circuit court is not limited to the record of the judgments and executions, but may go into extrinsic evidence of any matter pertinent to the inquiry, including even questions of fraud.—Walton v. Hillier, supra.

61. Burden of proving right of priority over lien of execution allegedly lost is on party asserting it.—Roth v. Snow, 245 Ill.App. 582.

62. Ill.—Grimes v. Rodgers, 263 Ill. App. 429.

63. U.S.—Dixon v. Cleveland, D.C. S.C., 31 F.Supp. 1010.
23 C.J. p 494 note 3.

statutory variations, it is a general rule that an execution lien continues as long as the writ remains in force, and that the lien ceases when the writ is functus officio.[64] Loss or suspension of execution liens by extrinsic events will be discussed in §§ 132–137 infra.

In the absence of a statute to the contrary, the lien of an execution ceases on the return of the writ nulla bona or on the return day of the writ, unless there is an actual levy,[65] and, where no levy is made before the return of the writ, personalty not levied on before such return may be subjected to the lien of a junior execution.[66] Under some statutes, however, except in certain specified cases, the lien of an execution continues after the return day.[67]

At common law, and unless otherwise provided by statute, the lien may be continued, or, rather, an uninterrupted succession of liens may be kept up, by delivering a new execution into the hands of the sheriff at the same time that the former writ is returned.[68] Any interval during which no execution is outstanding interrupts the continuity of the lien.[69] Under the various statutes particular methods have been prescribed for preserving and continuing the lien of an execution.[70] Under some statutes the lien of the original execution may be continued so as to preserve its priority by the issuance of successive writs at the time and in the manner prescribed, in default of which such lien terminates on return of the writ and junior liens or claims which have attached acquire priority.[71]

After return day where property levied on. In the absence of a statute to the contrary, the title vested in an officer by virtue of his levy of a writ of execution remains until divested by subsequent proceedings, and he may proceed to advertise and sell the property after the return day of the writ by virtue of his title acquired by an antecedent levy.[72] A mere demand of payment is not a substitute for a levy and does not preserve the lien.[73] The time during which this lien acquired by the levy remains in force is usually a matter of statutory regulation.[74]

Effect of expiration of judgment lien. In accordance with the rule that an execution neither extends the lien of the judgment on real estate nor creates a new lien on the property, see supra § 123, it is generally held that the lien or priority of an execution as against realty expires with the lien of the judgment.[75] Under some statutes, however, an execution issued or levied within the term of the judgment lien preserves or continues the lien, or creates a lien, until the execution of the writ or such other time as may be designated in the statute.[76] Since a judgment does not lose its lien by being opened, a levy previously made on an execution outstanding also retains its lien after the judgment on which it

64. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
Iowa.—Whitaker v. Tiedemann, 205 N.W. 468, 200 Iowa 901.
23 C.J. p 494 note 2.

The Corpus Juris text has been cited for the proposition that the lien of the levy, in absence of a statute to the contrary, extends during the life of the writ, which is until its return day, when the writ becomes functus officio.—Denny v. Wilmington Ice & Coal Co., 128 A. 123, 124, 14 Del.Ch. 352.

65. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305—In re New Lots Sash & Door Corporation, D. C.N.Y., 3 F.Supp. 570—Indemnity Ins. Co. of North America v. Empire Tube & Steel Corporation, D. C.N.Y., 295 F. 518.
Ky.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.
23 C.J. p 495 note 5, p 496 notes 17, 18.

66. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
N.J.—Olden v. Sassman, 66 A. 603, 72 N.J.Eq. 637.

67. W.Va.—Southern Co-op. Foundry Co. v. Warlick Furniture Co., 185 S.E. 773, 117 W.Va. 336.
23 C.J. p 495 note 7.

68. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
23 C.J. p 495 note 9.
Alias, pluries, and renewal writs see supra § 85.

69. U.S.—In re Liberty Lumber Co., D.C.N.Y., 6 F.Supp. 397.
23 C.J. p 495 note 10.

On same day
Lien did not remain in force after sheriff returned executions, unless other executions were immediately issued and placed in sheriff's hands on same day.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.

70. Ark.—McCabe v. Lee, 184 S.W. 448, 123 Ark. 82.
23 C.J. p 496 note 11.

Entry on docket
In Georgia an execution may be kept alive by an entry of nulla bona by the sheriff every seven years, provided such entry is also made on the general execution docket. If the nulla bona entry is not made on the general execution docket the execution becomes dormant.—General Discount Corporation v. Chunn, 3 S.E. 2d 65, 188 Ga. 128.

71. U.S.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 305.
Ky.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.
23 C.J. p 496 note 13.

72. Del.—Denny v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
Tenn.—Sampson v. Maury Nat. Bank, 8 Tenn.App. 275.
23 C.J. p 496 note 19.

73. N.Y.—Abeel v. Anderson, 39 Hun 514.

74. Mich.—Bliss v. Slater, 108 N.W. 86, 144 Mich. 648.
23 C.J. p 497 note 21.

75. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.
23 C.J. p 497 note 23.

76. Mich.—Dodge v. Barker, 204 N. W. 802, 231 Mich. 577.
23 C.J. p 497 note 24.

was issued is opened.[77]

§ 132. Loss or Suspension

As a general rule an execution lien cannot be lost without some fault on the part of the execution creditor.

The general rule is that when the lien of an execution has once attached to the property of defendant it cannot be lost without some fault on the part of plaintiff or some act with which he is chargeable.[78] In other words, a neglect or dereliction of duty on the part of the officer subsequent to the levy of the writ, to which the judgment creditor is not a party, will not invalidate the levy or destroy the lien.[79] In some cases, however, it has been held that if an officer elects to relinquish a levy, or if by any act of his it is in effect relinquished, it is discharged beyond reclamation, and the remedy of the judgment creditor is then against the officer on his official bond.[80]

§ 133. —— Abandonment or Release of Levy

An execution lien may be lost by an abandonment or release of the levy.

A plaintiff in execution may waive the benefit of a levy under his writ, and abandon the lien thereby acquired,[81] but such abandonment must be distinctly and clearly proved[82] by showing acts of plaintiff clearly evincing an intention to abandon, or omissions of such a nature as to amount to an abandonment.[83] Under a statute providing that an unexplained dismissal of a levy on personal property sufficient to pay the debt is an abandonment of the lien so far as third persons are concerned, the mere fact of dismissal of the levy by plaintiff when shown to be unproductive does not destroy the lien.[84]

§ 134. —— Death of Party

In the absence of a statute to the contrary, the lien of an execution is generally not suspended or lost by the subsequent death of either the judgment creditor or the judgment debtor.

Since the writ is deemed to be in process of execution from its teste at common law, and from its delivery to the officer under statutes where the common-law fiction of relation to the day of the teste has been abolished, see supra § 124, in the absence of express statutory provision, a writ of execution in the hands of an officer is not abated by the death of the judgment creditor, and it is the duty of the officer to proceed to execute the writ against the personal or real property of defendant notwithstanding the death of the judgment creditor, no scire facias or other revival being necessary, and the lien of the execution continues.[85] However, in several jurisdictions it has been held that, where a personal judgment is taken and plaintiff dies before the levy of an execution, the action must be revived in the name of the personal representative of such plaintiff before the writ can be executed.[86]

Judgment debtor. If no execution lien has been obtained prior to the death of the judgment debtor, the property cannot be sold under the writ.[87] In the absence of a statute to the contrary,[88] the lien of an execution, when it once attaches, is not lost by the subsequent death of the judgment debtor, nor

77. Pa.—Markofski v. Yanks, 146 A. 569, 297 Pa. 74.

78. Colo.—Hereford v. Benton, 80 P. 499, 20 Colo.App. 500.
23 C.J. p 511 note 18.

For loss or suspension of an execution lien by:
- Appeal or writ of error acting as supersedeas see Appeal and Error § 667.
- Appointment of receiver see the C.J.S. title Receivers § 135, also 53 C.J. p 129 notes 94, 95.
- Debtor's bankruptcy see Bankruptcy §§ 177, 490, 491.
- Expiration of writ see supra § 131.
- Giving forthcoming bond see supra § 116.
- Failure to indemnify the levying officer see the C.J.S. title Sheriffs and Constables § 136, also 57 C.J. p 926 notes 15–24.
- Insolvency proceedings see the C.J.S. title Insolvency § 11, also 32 C.J. p 855 note 7–p 856 note 11.
- Setting aside of writ by court see infra § 145.

79. N.Y.—Lopez v. Rowe, 57 N.E. 501, 163 N.Y. 340, reversing 46 N.Y.S. 91, 18 App.Div. 427.
23 C.J. p 511 note 19.

80. S.C.—Lockhart v. Smith, 27 S.E. 567, 50 S.C. 112.
23 C.J. p 511 note 20.

81. Iowa.—McConnell v. Denham, 34 N.W. 298, 72 Iowa 494.
23 C.J. p 512 note 23.

82. W.Va.—Southern Co-op. Foundry Co. v. Warlick Furniture Co., 185 S.E. 773, 774, 117 W.Va. 336, quoting **Corpus Juris.**
23 C.J. p 512 note 24.

83. Ky.—Darland v. Springfield First Nat. Bank, 197 S.W. 826, 177 Ky. 261.
23 C.J. p 512 note 25.

Purchase at receiver's sale
That execution plaintiff purchased property at sale of receiver of execution defendant, who was appointed the day after execution levies, did not constitute abandonment of execution liens.—Louden v. B. F. Goodrich Co., 185 N.E. 669, 97 Ind.App. 433.

84. Ga.—Rawson v. Davis, 36 Ga. 511.

85. Idaho—Hill v. Joseph, 72 P.2d 283, 58 Idaho 267
23 C.J. p 512 note 28.

86. Md.—Trail v. Snouffer, 6 Md. 308.
23 C.J. p 512 note 29.

87. Ill.—People v. Bradley, 17 Ill. 485.
Ind.—James v. Anderson, Smith 394.
Mass.—Jewett v. Smith, 12 Mass. 309.
23 C.J. p 512 note 30.

In Texas, under a statute providing that, if a sole defendant dies after a judgment for money against him, execution shall not issue thereon, a sale made under execution issued after the death of the judgment debtor is void in the sense that it is inoperative to pass title, and may be attacked either directly or collaterally.—Grissom v. F. W. Heitmann Co., Civ.App., 130 S.W.2d 1054, error refused.

88. Tex.—Grissom v. F. W. Heitmann Co., supra.
23 C.J. p 512 note 31.

need proceedings be taken to revive the judgment, but the officer may proceed to sell, or levy and sell.[89] However, in some states a revival of the judgment is necessary.[90] It has also been held, sometimes by virtue of statute, that death before a levy precludes further execution of the writ,[91] although the lien obtained by a valid levy may be enforced by sale after the death of the execution debtor.[92] In the absence of a statute to the contrary, in case of a judgment against plural defendants, of whom one or some may be dead, the sheriff may levy an execution on the goods of a surviving defendant without plaintiff being required to revive his judgment against the heirs or representatives of the deceased defendants.[93]

§ 135. —— Delay in Executing Writ

Delay in executing a writ of execution may cause a loss or suspension of the lien, at least as to intervening rights of third persons.

Since the only proper use of an execution is to enforce the collection of a debt and to enforce it with a considerable degree of diligence,[94] an attempt to make use of it for purposes of security merely, or to shield the property of the debtor from seizure by other creditors, is a perversion of the writ, and will postpone it to other executions subsequently issued.[95] Hence, if plaintiff delivers an execution to the sheriff with a direction not to levy at all, or until further orders, or to levy and hold without sale, or if similar orders are given after delivery or after the levy, it creates no lien on defendant's property as against a creditor issuing and proceeding with a subsequent execution,[96] or as against bona fide purchasers or other lienholders,[97] although under some statutes the rule has been limited to creditors as distinguished from purchasers.[98] As against defendant in execution and all others not acquiring rights or liens, however, the mere suspension of the execution will not affect the lien.[99] The general rule has been held not applicable to real estate on which the judgment is an independ-

89. Pa.—Connell v. O'Neil, 26 A. 607, 154 Pa. 582.
23 C.J. p 512 note 33.

90. Tenn.—Stockard v. Pinkard, 6 Humphr. 119—Overton v. Perkins, 10 Yerg. 328.
23 C.J. p 513 note 34.

91. Cal.—Stanley v. Westover, 269 P. 468, 93 Cal.App. 97.
23 C.J. p 513 note 35.

92. Ohio.—Massie v. Long, 2 Ohio 287, 15 Am.D. 547.
23 C.J. p 513 note 36.

93. **A statute** providing that in case of death of any of the defendants in any judgment, plaintiff, on a suggestion supported by affidavit of the death of any of said defendants, shall be entitled to have an execution issued against the defendant still alive, does not deprive a judgment creditor of the remedy available under the text rule before the passage of the act.—First Nat. Bank v. Equitable Life Assur. Soc. of U. S., 145 A. 779, 157 Md. 249.

94. Md.—Henry B. Myers · Co. v. Arundel Supply Co.'s Trust Estate, 183 A. 543, 170 Md. 198.
23 C.J. p 513 note 39.

95. Colo.—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 75 Colo. 440.

At common law the rule was that any delay in an execution sale deprived the execution of its force until restored by a countermand, and if in the meantime a second execution were taken out and levied the former must be postponed.—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F. Supp. 351.

Fraud

An execution not placed in the sheriff's hands with the bona fide intention of collecting the debt is fraudulent as to other creditors.—Raskin v. Nasow, 97 Pa.Super. 281.

Seizure essential to lien

Under a statute providing that goods are bound by the execution from the time of the delivery thereof to the proper officer to be executed, where renewals of the execution were issued with the intent to permit the officer to withhold making a levy pending payments, the judgment creditor obtained no lien until actual seizure of the property was made.—In re Laskaris, D.C.N.Y., 4 F.Supp. 652.

Statute of Elizabeth

With a view to prevent collusion and fraud and other abuses of the writ, the statute of Elizabeth, 13 Eliz. c 5, was enacted, declaring that executions taken out with intent to hinder, delay, or defraud creditors or others should be as against such persons utterly void.
N.J.—Williamson v. Johnston, 12 N. J.Law 86—Matthews v. Warne, 11 N.J.Law 295.
Pa.—Snyder v. Kunkleman, 3 Penr. & W. 487.
23 C.J. p 513 note 38.

96. U.S.—In re Schwab Printing Co., C.C.A.Ill., 59 F.2d 726—In re Boswell, D.C.N.Y., 8 F.Supp. 231.
Md.—Henry B. Myers Co. v. Arundel Supply Co.'s Trust Estate, 183 A. 543, 170 Md. 198.
Pa.—Geha v. Baltimore Life Ins. Co., 168 A. 527, 110 Pa.Super. 242—Raskin v. Nasow, 97 Pa.Super. 281.
23 C.J. p 514 note 40.

Duty of officer

A direction not to levy the senior writ operates as a waiver of priority and makes it the duty of the officer to levy and satisfy junior writs in his hands.
Ind.—Moore v. Fitz, 15 Ind. 43.
Miss.—Michie v. Planter's Bank, 5 Miss. 130, 34 Am.D. 112.
23 C.J. p 514 note 40 [b] (1).

97. Colo.—Robinson v. Wright, 9 P. 2d 618, 90 Colo. 417—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 75 Colo. 440.
Ky.—Hood v. Pope, 26 S.W.2d 1043, 233 Ky. 749.
23 C.J. p 514 note 41.

Alias execution

A mortgage placed on land in the interval between the issuing of a first execution, which is stayed by order of plaintiff or allowed to lapse, and the issuing of an alias execution, will prevail over the lien of such alias writ.—Gamble v. Fowler, 58 Ala. 576—Bates v. Bailey, 57 Ala. 73—41 C.J. p 521 note 54.

Burden of proof

The burden is on the party asserting the loss of the lien to prove that the service of the execution was intentionally withheld.—Roth v. Snow, 245 Ill.App. 582.

98. N.C.—Arrington v. Sledge, 13 N. C. 359—Palmer v. Clarke, 13 N.C. 354, 21 Am.D. 340.
23 C.J. p 514 note 42.

99. U.S.—Minnich v. Gardner, Pa., 54 S.Ct. 567, 292 U.S. 48, 78 L.Ed. 1116, reversing, C.C.A., 66 F.2d 561, certiorari granted 54 S.Ct. 378, 291 U.S. 654, 78 L.Ed. 1047.
Ga.—Jones v. Parker, 55 Ga. 11.
Ky.—Pinson v. Williams, 155 S.W.2d 869, 288 Ky. 314.
W.Va.—Southern Co-op. Foundry Co. v. Warlick Furniture Co., 185 S.E.

ent lien.[1] A short statute of limitations has been enacted in some states for the protection of bona fide purchasers against dormant executions.[2]

What constitutes a direction not to proceed such as will terminate the lien depends on the circumstances of the particular case.[3] There need not be express instructions not to proceed but there may be such a course of conduct as will have the same effect.[4] A mere failure, neglect, or refusal, on the part of plaintiff, to give directions as to the manner or time of executing the writ does not constitute such interference with its execution as will have the effect of rendering it dormant.[5] Likewise a failure to put the sheriff in funds to secure his sales fee is not equivalent to a direction not to execute the writ, where a statute makes sheriffs responsible to counties for all fees and costs of executing writs and enables them to exact prepayment for their personal protection.[6] Of course, if the creditor instructs the officer to delay but he refuses or neglects to comply, the lien is not lost.[7] The owner of two judgments, one the first and the other the last lien, where personalty has been levied on under execution issued on both judgments and left in possession of defendant, may stay the first and release its levy, and secure the last, without postponement of so much of the first judgment as is realized on the second to an intermediate lien creditor.[8]

Where an execution creditor has once lost his priority of lien by a perversion of the writ, he cannot, by thereafter giving the officer instructions to execute the writ in good faith, regain his original lien as against other executions which have acquired liens while his writ was stayed.[9] In the absence of any intervening rights or liens, however, a direction to the sheriff to proceed with the sale has the effect of reviving the rights obtained by the original levy, that is to say, of reviving not the lien, but the priority of the lien as against all other liens and rights acquired after such direction.[10]

Delay in selling. The lien acquired by a levy under an execution, like any other right, may be lost, at least as to third persons, through the laches of the execution creditor in neglecting to enforce his execution by a sale within a reasonable time.[11] It has been held, however, that since the adoption of a lis pendens statute, that delay in selling under an execution does not amount to an abandonment of the lien.[12]

Delay not attributable to execution creditor. An execution which is delayed by no fault or direction of the judgment creditor will not be postponed as being fraudulent as against a junior execution or claim.[13] An execution plaintiff does not lose the benefit of his lien by mere acquiescence in the delay of the officer to whom the process has been intrusted; but, in order for such delay to have this effect, it must appear that it resulted from the instructions of plaintiff in execution, or his attorney.[14] However, acquiescence, where the delay continues for an unreasonable length of time, is sometimes held to render the writ dormant.[15] Where a junior creditor consents to the delay, the first writ does not lose its priority.[16]

Fraudulent intent. The general rule applies in

773, 775, 117 W.Va. 336, citing **Corpus Juris.**
23 C.J. p 514 note 43.

Mere volunteers who have not paid value stand in no better position than the judgment debtor.
U.S.—Crane v. Penny, D.C.N.Y., 2 F. 187.
Pa.—Kent's Appeal, 87 Pa. 165.
23 C.J. p 515 note 44.

1. Mo.—Slattery v. Jones, 8 S.W. 554, 96 Mo. 216, 9 Am.S.R. 344.
23 C.J. p 515 note 45.

2. Ga.—Braswell v. Plummer, 56 Ga. 594—Ruker v. Womack, 55 Ga. 399.

3. Pa.—Snyder v. Kelly, 4 Pa.Super. 636.
23 C.J. p 515 note 49.

4. Pa.—Weir v. Hale, 3 Watts & S. 285.
23 C.J. p 515 note 46.

5. Pa.—Stroudsburk Bank's Appeal, 17 A. 868, 126 Pa. 523.
23 C.J. p 515 note 50.

6. N.J.—I. N. L. Building & Loan Ass'n v. Halpern, 147 A. 376, 105 N.J.Eq. 179.

7. Ill.—Payne v. Brownlee, 196 Ill. App. 108.
Pa.—Lancaster Sav. Inst. v. Weigand, 2 Pa.L.J.R. 246, 3 Pa.L.J. 523.

8. Pa.—Burk's Appeal, 89 Pa. 398.

9. U.S.—In re Boswell, D.C.N.Y., 8 F.Supp. 231.
23 C.J. p 515 note 55.

10. U.S.—Minnich v. Gardner, Pa., 54 S.Ct. 567, 292 U.S. 48, 78 L.Ed. 1116, reversing, C.C.A., 66 F.2d 561, certiorari granted 54 S.Ct. 378, 291 U.S. 654, 78 L.Ed. 1047—In re Schwab Printing Co., C.C.A.Ill., 59 F.2d 726—In re B. W. Scott Book & Art Store, D.C.N.Y., 12 F.Supp. 18—In re Boswell, D.C.N.Y., 8 F. Supp. 231.
23 C.J. p 515 note 56.

11. U.S.—In re Zeis, C.C.A.N.Y., 245 F. 737, 158 C.C.A. 139, reversing, D. C., 229 F. 472.
Ohio.—Everson v. Rule, 32 Ohio N. P.,N.S., 501.
23 C.J. p 516 note 62.

12. Ky.—Bailey v. Bailey, 151 S.W. 2d 374, 286 Ky. 582—Donacher v. Tafferty, 144 S.W. 13, 147 Ky. 337—Park v. McReynolds, 64 S.W. 517, 111 Ky. 651, 23 Ky.L.R. 894.

13. Pa.—Sweet v. Williams, 29 A. 350, 162 Pa. 94.
23 C.J. p 516 note 58.

14. Pa.—Gillespie v. Keating, 36 A. 641, 180 Pa. 150, 57 Am.S.R. 622, affirming 17 Pa.Co. 418.
23 C.J. p 516 note 59.

15. Colo.—Williams v. Mellor, 19 P. 839, 12 Colo. 1.
23 C.J. p 515 note 47.

Presumption
When an officer holds a writ for a long period of time without enforcing it, the presumption arises that he held it by direction of plaintiff.—Robinson v. Wright, 9 P.2d 618, 90 Colo. 417—First Nat. Bank v. Monte Vista Hardware Co., 226 P. 154, 75 Colo. 440.

16. Pa.—Fletcher's Appeal, 17 Leg. Int. 300.

some jurisdictions, although the creditor had no actual fraudulent intent;[17] but in other jurisdictions it has been held that, where an execution is stayed by order of the judgment creditor, this of itself is no evidence of fraud, and that there must be some proof of actual fraud, or intention to hinder and delay other creditors, in order to subject a senior execution to postponement.[18]

Perversion of prior writs. When an alias or pluries writ of execution is issued in good faith to be executed, its lien from its teste or delivery, as the case may be, is not postponed on account of a perversion of the original writ on which it is based, or any intermediate writ.[19]

What delay permissible. An execution cannot be considered dormant or fraudulent merely because the execution creditor seeks to make the most of the goods levied on, although some delay is caused thereby, in consequence of postponing the sale to avoid sacrificing the property.[20] It is not necessary that a creditor, in order to preserve the priority of his lien, should at once proceed to push his debtor to the wall, and he may, without losing his priority, if he acts in good faith, grant the debtor a reasonable indulgence to allow him to save his goods from sacrifice,[21] or to avoid subjecting his family to unnecessary inconvenience or annoyance,[22] as by not interfering with his possession of his goods for a reasonable time.[23] Beyond the statement that a reasonable delay will not affect the lien,[24] unless coupled with an intent to waive or abandon it,[25] or with an intent to defraud,[26] it is impossible to lay down any fixed rule as to how long a delay will extinguish the lien, and each case must be governed by its own circumstances; a delay which would be unreasonable in one case, on account of the parties, or the subject matter of the levy, might under other circumstances, be entirely reasonable and proper.[27] Where the levy has been filed or recorded pursuant to statute, considerable delay thereafter in making a sale has been permitted without defeating priority of lien.[28] The reasonableness of the delay under the particular circumstances is a question for the jury.[29]

§ 136. —— Payment or Satisfaction of Judgment, or Arrest of Debtor under Execution against the Person

An execution lien may be lost by payment or satisfaction of the judgment on which it is issued, or by the arrest of the judgment debtor under an execution against the person.

The lien of an execution is absolutely extinguished by a full satisfaction of the judgment, decree, or order on which the writ is based,[30] such as by payment[31] or tender of payment.[32] So it is generally considered that, when a levy is made on particular property of the execution debtor, the general lien on all his property is merged, or transmuted into a special lien on the property seized,[33] and the balance of his property is, as to junior creditors or bona fide purchasers, relieved from the encumbrance.[34] This rule, however, is not universal.[35]

Effect of taking body of defendant under capias

17. Ill.—Sweetser v. Matson, 39 N. E. 1086, 153 Ill. 568, 46 Am.S.R. 911, 27 L.R.A. 374.
23 C.J. p 515 note 53.

18. U.S.—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F.Supp. 351.
23 C.J. p 515 note 54.

19. Ala.—Huntsville Branch Bank v. Robinson, 5 Ala. 623—Wood v. Gary, 5 Ala. 433.
N.C.—Roberts v. Oldham, 63 N.C. 297.

20. N.Y.—Power v. Van Buren, 7 Cow. 560.
23 C.J. p 516 note 63.

21. Pa.—Smith v. Nicola Bros. Co., 44 A. 574, 193 Pa. 562.
23 C.J. p 516 note 64.

22. Pa.—Landis v. Evans, 6 A. 908, 113 Pa. 332—Schwartz v. Gabler, 8 Pa.Super. 227.

Mere pity for family's straitened circumstances, while creditable from one point of view, is not a sufficient justification as against another creditor who has a right to subject the debtor's goods to payment of his judgment.—Raskin v. Nasow, 97 Pa. Super. 281.

23. Pa.—Broadhead v. Cornman, 33 A. 360, 171 Pa. 322.
23 C.J. p 516 note 66.

24. Pa.—Raskin v. Nasow, 97 Pa. Super. 281.
23 C.J. p 517 note 67.

25. N.C.—Dancy v. Hubbs, 71 N.C. 424.

26. N.J.—Fischel v. Keer, 45 N.J. Law 507.
23 C.J. p 517 note 69.

27. Ark.—State Bank v. Etter, 15 Ark. 268.
23 C.J. p 517 note 70.

Delay held not sufficient to postpone lien

(1) Sixty days, where levy was made four days after notice was received that debtor had acquired property levied on.—Robinson v. Wright, 9 P.2d 618, 90 Colo. 417.

(2) Other cases see 23 C.J. p 517 note 70 [b].

28. Ky.—Donacher v. Tafferty, 144 S.W. 13, 147 Ky. 337.
Mich.—Ward v. Citizens' Bank, 9 N. W. 437, 46 Mich. 332.

29. Ohio.—Acton v. Knowles, 14 Ohio St. 18.

30. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
23 C.J. p 520 note 8.
Discharge of judgment as affecting right to issue a writ see supra § 11.

31. Mo.—Bradley v. Heffernan, 57 S.W. 763, 156 Mo. 653.
23 C.J. p 520 note 9.

32. N.Y.—Tiffany v. St. John, 65 N. Y. 314, 22 Am.R. 612.

33. Ark.—Patterson v. Fowler, 23 Ark. 459.
23 C.J. p 520 note 11.

34. Colo.—Joslin v. Spangler, 22 P. 804, 13 Colo. 491.
23 C.J. p 520 note 12.

35. Ind.—Johnson v. McLane, 7 Blackf. 501, 43 Am.D. 102.
W.Va.—Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co., 76 S.E. 972, 77 W.Va. 507.

ad satisfaciendum. An execution will lose its lien on the property of defendant, if his body is taken under a writ of capias ad satisfaciendum sued out by the execution creditor, since the debtor's arrest under such process is prima facie a satisfaction of the debt.[36]

§ 137. —— Other Acts or Omissions Destroying or Suspending Lien

Various acts or omissions other than those which have previously been specifically considered may, under the circumstances of particular cases, have the effect of destroying or suspending an execution.

After the levy of an execution, a resort to other remedies,[37] such as filing a creditor's bill,[38] or filing claim against the estate of a deceased debtor,[39] or claiming as a general creditor under an assignment for the benefit of creditors,[40] is not a waiver or abandonment of the lien or levy; but the lien may be waived by pursuing an inconsistent remedy, as by filing a petition in bankruptcy.[41]

Leaving property in possession of defendant. The general rule is that leaving defendant in possession of personal property after a levy does not destroy the execution lien or constitute an abandonment of the levy, since this is not sufficient to establish fraud in the use of the writ.[42] Where, however, the property is allowed to remain in the possession of the debtor, particularly where the circumstances indicate that the execution lien was being used for purposes of security, see supra § 135, the lien may be lost or postponed as to subsequent levies or persons who in good faith acquire rights in the property.[43] If the sale is delayed, and the debtor is allowed to continue in possession for an unreasonable time,[44] by the direction or consent of the creditor,[45] the lien is lost. Another view is that if the goods are left in defendant's possession for an unusual or unreasonable time, and he is permitted to use and enjoy them as before the levy, these facts will amount to evidence, more or less strong according to circumstances, that the execution is kept on foot for fraudulent purposes, but they will not per se postpone the execution in favor of a junior writ,[46] although a bona fide purchaser from defendant will be protected.[47] The lien may be lost where the creditor permits the debtor to remove the goods to another county or precinct.[48]

Removal of property. It has been held that an officer forfeits any lien he may have on property levied on by allowing it to be taken out of the state.[49] If an execution is regularly kept alive, its lien on goods of defendant which have become subject thereto is not lost, but is merely suspended, by reason of the goods being carried beyond the limits of the county,[50] and the lien revives immediately, and relates back to the time when it first attached, upon the property being brought back within the county, whether by the execution debtor or by a purchaser from him.[51] This rule applies to property which has been removed beyond the limits of the state,[52] unless the statute of limitations of the state to which it was removed has perfected the title of a purchaser.[53] There are decisions to the effect that the lien follows the property to another county to which it is removed, and binds it while in such county.[54]

Return of writ without sale. The return of an

36. Mich.—Baehr v. Decker, 274 N. W. 339, 280 Mich. 590.
23 C.J. p 520 note 14.

37. Cal.—Weldon v. Roger, 108 P. 266, 157 Cal. 410.
N.J.—Moses v. Thomas, 26 N.J.Law 124, affirmed Van Waggoner v. Moses, 26 N.J.Law 570.

38. Ill.—Amick v. Young, 69 Ill. 542.
23 C.J. p 519 note 96.

39. Mass.—Ramsdell v. Creasey, 10 Mass. 170.

40. N.J.—Van Waggoner v. Moses, 26 N.J.Law 570, affirming Moses v. Thomas, 26 N.J.Law 124.

41. U.S.—In re Sheehan, D.C.Mich., 21 F.Cas.No.12,737.

42. N.Y.—Bond v. Willett, 31 N.Y. 102.
Pa.—Smith v. Nicola Bros. Co., 44 A. 574, 193 Pa. 562.
23 C.J. p 518 note 82.

Placing manager in charge
That deputy sheriff, after making execution levies and taking property into possession, placed manager of execution defendant in charge of property until deputy received further orders from sheriff, did not divest execution liens as against defendant's receiver appointed next day, there being no showing of fraud.—Louden v. B. F. Goodrich Co., 185 N.E. 669, 97 Ind.App. 433.

43. U.S.—In re B. W. Scott Book & Art Store, D.C.N.Y., 12 F.Supp. 18.
Cal.—Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
23 C.J. p 509 note 79, p 518 note 83.

44. Ill.—Davidson v. Waldron, 31 Ill. 120, 83 Am.D. 206.
23 C.J. p 518 note 84.

45. Wash.—Wunsch v. McGraw, 29 P. 832, 4 Wash. 72.
23 C.J. p 518 note 85.

46. N.J.—Fischel v. Keer, 45 N.J. Law 507.
23 C.J. p 519 note 86.

47. N.J.—Caldwell v. Fifield, 24 N.J. Law 150.

48. Ala.—Chaney v. Buford Lumber Co., 31 So. 369, 132 Ala. 315.
23 C.J. p 519 note 88.

49. U.S.—Fields v. Crawford, C.C. D.C., 30 F.Cas.No.18,296, 2 Hayw. & H. 256.
Miss.—Morton v. Walker, 2 Miss. 554.
Pa.—Wood v. Keller, 2 Miles 81.

50. Ala.—Hamilton v. Phillips, 24 So. 587, 120 Ala. 177, 74 Am.S.R. 29.
23 C.J. p 519 note 90.

51. Ala.—McMahan v. Green, 12 Ala. 71, 46 Am.D. 242—Hill v. Slaughter, 7 Ala. 632.
23 C.J. p 519 note 91.

52. Ala.—Hamilton v. Phillips, 24 So. 587, 120 Ala. 177, 74 Am.S.R. 29—McMahan v. Green, 12 Ala. 71, 46 Am.D. 242.

53. Ala.—Newcombe v. Leavitt, 22 Ala. 631.

54. Ala.—Street v. Duncan, 23 So. 523, 117 Ala. 571.
Ky.—Mitchell v. Ashby, 78 Ky. 254.

execution by the officer after levy without sale is a surrender of his authority, and leaves such property as free from his control as though no levy had been made on it.[55] In some states such a return does not operate as a discharge of the lien;[56] where part of the property taken under execution is improperly levied on, a direction by the judgment creditor to the officer not to sell such property does not constitute an abandonment of the levy as to the other property rightfully taken.[57] A return that the property was not sold for want of bidders does not discharge the lien.[58] As to land which the execution debtor had fraudulently conveyed to avoid paying the judgment, it has been held that the execution lien was not lost by a return by the sheriff, without sale, stating that he had levied on the debtor's right, title, and interest in such property and also that the execution was wholly unpaid and unsatisfied.[59] It has been held that a return of the writ, unsatisfied, by the sheriff, where neither a copy of the writ nor an alias or alternative writ was retained by him, releases such seizure as has been made by him, and that any lien the seizing creditor may have had as a result of such seizure is lost.[60] Under a statute providing that where goods and chattels levied on by execution cannot be sold for want of bidders, or want of time, the officer making the return shall attach a true and perfect inventory of the goods and chattels remaining unsold, a judgment creditor does not lose his execution lien on items of property remaining unsold which are omitted from the inventory.[61]

Issuing alias or other writs. The general rule is that the issuance of a second writ of execution before the return of that under which a levy has been made, while irregular, does not necessarily amount to an abandonment of the levy, even though the same property is again seized under the second writ.[62] The issuance of a second writ prior to the return or satisfaction of the first one may be evidence tending to show an abandonment of the former, but it is not usually regarded as conclusive, and may be overcome by evidence showing the contrary;[63] but it has been held that where plaintiff, after the levy of his writ, abandons it and sues out an alias writ, the benefit of the first levy is lost.[64] So there may be an abandonment of the first levy if the second writ is levied on different property.[65]

Reversal or vacation of judgment. Where the judgment under which the execution was issued and the levy made is reversed or vacated, the lien created by the levy of the execution is extinguished.[66]

Setting off property as exempt. Where property seized under execution is claimed by an execution debtor as exempt, and it is set off to him by the officer, it is relieved from the lien of the execution.[67]

Dissolution of attachment does not destroy the lien created by a levy of execution on the attached property.[68]

Judicial stay or release. The general rule is that an execution does not lose any lien acquired at the time of its issuance by being subsequently suspended in its operation by a judicial stay. On the dissolution thereof, such execution is entitled to priority over junior executions whose liens have attached to the property of the judgment debtor in the interim.[69] Under the practice in some jurisdictions on the opening of the judgment on which the writ is issued, on petition for a rule to obtain such relief, the court may release the lien of the execution on the giving of security to secure judgment, interest, and costs.[70]

§ 138. Restoration of Lien

Restoration of lien lost by delay by subsequent direction to proceed with sale see supra § 135.

Examine Pocket Parts for later cases.

55. Iowa.—Whitaker v. Tiedemann, 205 N.W. 468, 200 Iowa 901.
23 C.J. p 519 note 2.

56. Ohio.—Wheeling, L. E. & P. Coal Co. v. Smithfield First Nat. Bank, 45 N.E. 630, 55 Ohio St. 233.
Abandonment of a levy is not necessarily implied by the sheriff's indorsing on the writ of execution the fact of his levy and the words: "I hereby return the within execution to the clerk of the court . . . as I am commanded by . . . plaintiff."—Vroman v. Thompson, 16 N.W. 808, 51 Mich. 452.

57. Ill.—Richardson v. Rardin, 88 Ill. 124.

58. Ind.—Wolfe v. Wolfe, 4 Ind. 255.

59. Mont.—Stone-Ordean-Wells Co. v. Strong, 20 P.2d 639, 94 Mont. 20.

60. La.—Associated Motors v. Burk, 130 So. 472, 14 La.App. 361, dismissing appeal 129 So. 196, 14 La. App. 361.

61. Ohio.—Beeler v. Willis, 194 N. E. 46, 48 Ohio App. 368.

62. Ohio.—Mason v. Hull, 45 N.E. 632, 55 Ohio St. 256.
Tenn.—Sampson v. Maury Nat. Bank, 8 Tenn.App. 275.
23 C.J. p 517 notes 73, 74.

63. Mich.—Friyer v. McNaughton, 67 N.W. 978, 110 Mich. 22.
23 C.J. p 517 note 75.

64. N.J.—Schneider v. Schmitt, 98 A. 418, 86 N.J.Eq. 366.
23 C.J. p 517 note 76.

65. Pa.—Missimer v. Ebersole, 87 Pa. 109—Knelly v. Bachert, 28 Pa. Co. 446.

66. N.Y.—Newman v. Meisel-Galland Co., 260 N.Y.S. 351, 237 App. Div. 95, modifying 256 N.Y.S. 687, 143 Misc. 494, and affirmed 185 N. E. 777, 261 N.Y. 651.
23 C.J. p 520 note 6.

67. Ind.—Hall v. Hough, 24 Ind. 273.
Neb.—France v. Larkin, 148 N.W. 86, 96 Neb. 365.

68. Mass.—Dunbar v. Kelly, 75 N.E. 740, 189 Mass. 390.

69. Tex.—Warnock v. Martin, Civ. App., 93 S.W.2d 793.
23 C.J. p 517 note 78.

70. **Order construed** and held to mean that the lien is released on the

VI. STAY, QUASHING, VACATION, AND RELIEF AGAINST EXECUTION

§ 139. Stay of Execution

a. In general
b. Stay in furtherance of justice
c. Stay on furnishing or possessing security
d. Length of stay
e. Persons entitled to seek or oppose stay; waiver
f. Application and proceedings

a. In General

A stay of execution is the stopping or arresting of execution on a judgment, or of the creditor's right to issue execution, for a limited period; it can be effected only by legal proceedings for that purpose, and cannot be substituted for a proper legal remedy.

A stay of execution has been defined as the stopping or arresting of execution on a judgment, that is, of the judgment creditor's right to issue execution, for a limited period,[71] although in practice the phrase is also used to denote a term during which no execution can issue on a judgment.[72]

Since the right to an execution on a judgment is a substantial right, see § 14 supra, it can be taken away or suspended only by some legal proceeding for that purpose.[73] Where there is no statutory stay, and no stay granted on motion or otherwise, the pendency of other actions or proceedings do not of themselves stay execution.[74] Similarly, since the writ of execution is in many jurisdictions statutory, see § 1 supra, the power of a court to suspend or withhold execution on a judgment has been held to depend solely on statute;[75] and in order that a stay be warranted the requirements of the statute must be met.[76]

As substitute for other remedies. A stay cannot be substituted for a proper legal remedy, such as an appeal,[77] audita querela,[78] action at law,[79] or bill in equity.[80]

b. Stay in Furtherance of Justice

(1) In general
(2) Grounds

(1) In General

A court, or the judge thereof, has the power tem-

entry of approved security, and not before.—Commonwealth Brewing Co. v. White, 117 A. 344, 273 Pa. 578.

71. Black L.D.
Stay of execution:
Against executors or administrators see the C.J.S. title Executors and Administrators § 810, also 24 C.J. p 905 note 13—p 906 note 26.
By:
Agreement of parties see supra § 17.
Death of party see supra § 65.
Stay of proceedings:
Defined see Actions § 131.
As effected by discharge in bankruptcy see Bankruptcy § 563.
In connection with:
Issuance of certiorari see Certiorari §§ 108–113.
Motions for new trial see the C.J.S. title New Trial § 128, also 46 C.J. p 304 note 4—p 305 note 20.
Taking of appeal or writ of error see Appeal and Error §§ 625–679.
On judgments of justices of the peace see the C.J.S. title Justices of the Peace § 123, also 35 C.J. p 702 note 71—p 704 note 92.

72. Okl.—Brown v. State Nat. Bank of Shawnee, 271 P. 833, 834, 133 Okl. 173, quoting Bouvier L.D.

73. Neb.—Barry v. Horton, 238 N. W. 763, 122 Neb. 20.

74. Neb.—Halmes v. Dovey, 89 N.W. 631, 64 Neb. 122.
23 C.J. p 521 note 36.
Pendency of other proceedings as ground for stay see subdivision b (2) of this section.
Particular proceedings
(1) Motion to vacate judgment does not stay execution.
Minn.—Hart v. Marshall, 4 Minn. 294.
Okl.—Wright v. Craig, 87 P.2d 317, 184 Okl. 371.

(2) Rule to show cause why judgment should not be opened does not stay execution.—Spang v. Commonwealth, 12 Pa. 358.

(3) Rule to show cause why verdict should not be set aside does not of itself stay execution; and this rule applies under statute providing that the court or a judge may stay execution pending an application for a new trial.—Mumma v. Schmitter, 142 A. 245, 1 N.J.Misc. 455.

(4) Appeal from order refusing new trial does not stay execution on original judgment.—Espy v. Balkum, 45 Ala. 256.

(5) However, writ of error and bail within specified period has been held to supersede execution.—Jackson v. Schauber, 7 Cow., N.Y., 417, 490.

75. Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.
Stay unless execution contains certain indorsement
Some states at one time gave defendant the right to a stay unless plaintiff indorsed on the execution that he would receive bank paper in discharge of the execution.—Eubank v. Poston, 5 T.B.Mon., Ky., 285—23 C.J. p 521 note 35.

76. Neb.—Department of Banking v. Modrow, 278 N.W. 559, 134 Neb. 336.

77. Pa.—Lewis v. Linton, 53 A. 999, 204 Pa. 234.

78. N.Y.—Wardell v. Eden, 2 Johns. Cas. 258.
Scope of remedy of audita querela see Audita Querela § 1.
Effect of merger of judgment
If a final judgment rendered against defendant was merged into a judgment subsequently obtained by plaintiff on scire facias against defendant's debtors who were factorized into the action, a stay of execution will not be granted, defendant's remedy to prevent the enforcement of the judgment against it being by a proceeding in the nature of an equitable action, or of audita querela, a judgment in which proceeding would be final and appealable.
Ala.—Russell Lumber Co. v. Smith, 74 A. 949, 82 Conn. 517.
Conn.—Russell Lumber Co. v. Waterbury Nat. Bank, 74 A. 950, 82 Conn. 518.

79. N.Y.—Myers v. Kelsey, 19 Johns. 197.
23 C.J. p 521 note 39.

80. Pa.—Smith v. Kiskadden, 5 Pa. Co. 138.
23 C.J. p 521 note 40.

porarily to stay execution on its judgments whenever it is necessary to accomplish the ends of justice.

As stated in Corpus Juris, which has been quoted and cited with approval, all courts of law, under statutes or under their general supervisory powers over their process, have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice.[81] A judge in chambers also has this power, since the authority which a judge in chambers exercises over process of the court in a case pending is usually that of the court itself.[82] The judgment itself may contain a stay of execution[83] which may be conditional.[84] The court in an equity suit has power to make provisions for the time when the judgment is to be carried into effect.[85] If a judgment has been set aside, there can be no stay of execution because there is no execution.[86]

Postponement of sales. The power of the courts to postpone the enforcement of a judgment by sale has been held to be limited to cases where the sale would sacrifice the debtor's interest and the postponement would not prejudice the creditor,[87] and to cases where the power is conferred by statute.[88]

(2) Grounds

A stay of execution may be granted when it would be unjust to permit execution of the judgment, as where there are equitable grounds for a stay, there has been a garnishment of the debtor, or where certain other proceedings are pending.

A stay in furtherance of justice, under or apart from statute, may be granted whenever it would be unjust to further execute or enforce the judgment,[89] or where, although it is proper to enforce the judgment, there is good reason why execution should be postponed.[90] However, the ground of relief must rest either on facts occurring subsequent to the decree or judgment, or on antecedent facts which show fraud in its rendition, or want of jurisdiction of the court apparent on the record.[91] Thus a stay cannot be granted because of

81. Cal.—California Cotton Credit Corporation v. Superior Court in and for Madera County, 15 P.2d 1108, 127 Cal.App. 472—Vickich v. Superior Court of Los Angeles County, 288 P. 127, 105 Cal.App. 587.

Fla.—City of Sarasota v. State ex rel. Evans, 172 So. 728, 730, 127 Fla. 126, citing **Corpus Juris.**

Iowa.—Brenton Bros. v. Dorr, 239 N. W. 808, 810, 213 Iowa 725, citing **Corpus Juris.**

Neb.—Wassung v. Wassung, 286 N. W. 340, 342, 136 Neb. 440, citing **Corpus Juris**—General Car Advertising Co. v. Barnebey, 270 N.W. 318, 320, 131 Neb. 850, quoting **Corpus Juris.**

N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.

Pa.—Augustine v. Augustine, 139 A. 585, 291 Pa. 15—International Harvester Co. of America v. Farmer & Ochs Co., 28 Pa.Dist. & Co. 643—Schad v. Carr & Schad, Inc., 20 Pa. Dist. & Co. 505, 26 Berks Co.L.J. 81.

Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, 990, error dismissed, quoting **Corpus Juris.**

23 C.J. p 521 note 41.

Object of statute

"The object of the statute was to expressly authorize courts of law to correct, restrain, and control their own processes, either in term time or vacation, without resort to equity."—City of Coral Gables v. Hepkins, 144 So. 385, 388, 107 Fla. 778.

Arbitrary exercise of power

Rule that court can control its process requires some showing that process should not be executed.—Lockwood v. Superior Court of Navajo County, 254 P. 232, 31 Ariz. 460.

Self-executing judgments

Execution of self-executing judgment, as well as of one not self-executing, may be suspended by court rendering it.—Ætna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.

Stay on amounts not yet due

In salesman's action for breach of contract, where evidence showed that commissions earned by salesman were to be credited at end of his contract year, but that, where purchase price was to be paid in more than one year, payment of a part of the commissions was to be postponed, the court had right to stay execution on amounts not due.—Fairbanks, Morse & Co. v. Carsey, Tex.Civ.App., 109 S.W.2d 985, error dismissed.

82. S.C.—Yancy's Ex'rs v. Tallman, 1 McCord 474.

23 C.J. p 522 note 42.

However, it has been held that a judge at chambers has no jurisdiction to set aside an execution issued on a judgment and perpetually stay the enforcement thereof.—Bond v. Pacheco, 30 Cal. 530.

83. Neb.—General Car Advertising Co. v. Barnebey, 270 N.W. 318, 320, 131 Neb. 850, quoting **Corpus Juris.**

Perpetual stay

Md.—Kendrick v. Warren Bros., 72 A. 461, 110 Md. 47.

84. Neb.—General Car Advertising Co. v. Barnebey, 270 N.W. 318, 320, 131 Neb. 850, quoting **Corpus Juris.**

23 C.J. p 522 note 44.

85. N.Y.—Markey v. Markey, 13 N. Y.S. 925.

23 C.J. p 522 note 45.

86. Puerto Rico.—Fernandez v. Calaf, 7 Puerto Rico Fed. 371.

87. Ky.—First Nat. Bank v. Williamson, 126 S.W.2d 826, 277 Ky. 369.

Postponement of sale by officer see infra § 209.

88. Tex.—Dickson v. Carroll, Civ. App., 61 S.W.2d 1033.

Statute held not applicable

Order postponing execution sale held long after adjournment of term at which judgment was obtained was held void as attempting to change effect of judgment in case not then "pending" within statute authorizing postponement.—Dickson v. Carroll, supra.

89. Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.

90. Fla.—City of Coral Gables v. Hepkins, supra.

91. Ala.—Gravette v. Malone, 54 Ala. 19.

23 C.J. p 522 note 47.

Entry of answer after judgment

That defendant entered answer four days after entry of judgment is not ground for stay of execution, other remedies being available, and stay is beyond court's jurisdiction.—Lockwood v. Superior Court of Navajo County, 254 P. 232, 31 Ariz. 460.

matters which would have constituted a defense to the action in which the judgment was rendered,[92] or which could have been, or were, urged and considered on the trial.[93]

Stays have been held proper where specially authorized by statute,[94] or where the execution is improper, unfair, or unnecessary.[95] Thus stays have been held proper when an execution is unauthorized by the judgment[96] or has been improvidently issued,[97] where the judgment has been satisfied,[98] where the execution is unwarranted against the person complaining,[99] or where the parties made a valid agreement for a stay of execution.[1]

On the other hand, it has been held that a stay is not warranted by the fact that the goods levied on, in the debtor's possession, belonged to another,[2] that the land on which the levy was made is in the adverse possession of another claiming under a paramount title[3] or had been assigned for the benefit of creditors,[4] that defendant is temporarily absent from the jurisdiction,[5] or that the execution has been levied on exempt property,[6] although on the last point there is also some authority to the contrary.[7]

After appeal and affirmance a stay may not be granted because of matters appearing in the record and concluded by the appeal;[8] and this rule precludes a stay on the ground that the judgment was not authorized by the verdict.[9] That one of two joint tort-feasors was insolvent is not a ground for staying execution on the judgment against the other tort-feasor or his surety.[10]

Equitable grounds. A stay is frequently allowed on grounds which are in their nature peculiarly equitable, as, for instance, to give defendant opportunity to set off a claim against plaintiff,[11] or to permit the filing of an equitable defense,[12] although a stay is not proper because of a mere pos-

92. Ala.—Mervine v. Parker, 18 Ala. 241.
23 C.J. p 522 note 48.

93. Pa.—Lewis v. Linton, 53 A. 999, 204 Pa. 234.

94. Ill.—Wood v. Child, 20 Ill. 209.
23 C.J. p 522 note 61.

Moratorium law authorizing stay of executions for designated time is valid.—Williams v. Holmes, Tex.Civ. App., 74 S.W.2d 1040.

95. Improper levy
(1) Stay is proper where levy does not conform to statutory requirements.—Brenton Bros v. Dorr, 239 N.W. 808, 213 Iowa 725.

(2) Stay is proper where levy is on wrong kind of property in first instance.—Farrell v. McKee, 36 Ill. 225—23 C.J. p 522 note 55.

Death of debtor
Where execution is issued after death of judgment debtor, stay is proper to allow sale of land by probate court.—Perret v. Lepper, 75 A. 723, 226 Pa. 528—23 C.J. p 522 note 58.

Vested rights
Where rights have vested or been acquired in good faith under a decree which has become final, courts generally refuse to stay or withhold execution.—Pottinger v. Pottinger, 182 So. 762, 133 Fla. 442.

Nothing to be gained
Stay will not be granted on behalf of junior mortgagee where there is no assurance that property will, within reasonable time, be worth more than amount of first mortgage.—Moyer v. J. Miller Kalbach Co., 21 Pa.Dist. & Co. 189, 26 Berks Co. L.J. 143.

Opposed by real party in interest
Pa.—Schad v. Carr & Schad, Inc., 20 Pa.Dist. & Co. 505, 26 Berks Co.L.J. 81.

96. N.C.—Cason v. Shute, 189 S.E. 494, 211 N.C. 195.
23 C.J. p 522 note 53.

Where demurrer was sustained
In suit for dissolution of partnership, wife of absent partner was entitled to stay of execution where demurrer to her intervening petition was sustained.—Stokes v. Dollard, 29 P.2d 706, 94 Colo. 206.

Defendant not properly identified
Where return of sheriff on summons was insufficient properly to identify defendant, and judgment was taken by default, execution should have been stayed.—Bartlett v. Cohn, 120 So. 357, 97 Fla. 256.

Noncompliance with court rule
A defendant was entitled to stay an execution issued on a judgment in action for injuries, which was obtained in absence and without knowledge of, or negligence of, counsel for defendant, and without compliance with court rule providing that either plaintiff or defendant may at least fifteen days before commencement of term of court serve on opposing party a written notice that case is ready for trial and will be placed on trial calendar at next term, and that if such notice is filed clerk shall enter case on trial docket.—National Trucking Co. v. Gill, 182 So. 220, 132 Fla. 844.

97. Pa.—Lewis v. Linton, 56 A. 874, 207 Pa. 320.
23 C.J. p 522 note 54.

98. Pa.—Lewis v. Linton, 56 A. 874, 207 Pa. 320.

99. N.Y.—Campbell v. Bristol, 19 Wend. 101.
Pa.—Commonwealth v. Lacy, 15 Pa. Dist. 199.
23 C.J. p 522 note 57.

1. Neb.—General Car Advertising Co. v. Barnebey, 270 N.W. 318, 131 Neb. 850
Wash.—State v. Smith, 203 P. 373, 118 Wash. 194.

2. Pa.—Commonwealth Ins. Co. v. Ketland, 1 Binn. 499.

3. Pa.—Jarrett v. Tomlinson, 3 Watts & S. 114.

4. Pa.—Neel v. Lewistown Bank, 11 Pa. 17.

5. Me.—King v. Jeffrey, 77 Me. 106.

6. Fla.—City of Coral Gables v. Hopkins, 144 So. 385, 107 Fla. 778

7. N.Y.—C. Ludwig Baumann & Co. v. Christenson, 262 N.Y.S. 303, 146 Misc. 435.

Property held not exempt
Granting motion to stay marshal from executing judgment on ground that property was exempt was error, where judgment was for purchase money of articles levied on, since such property is specifically not exempt.—C. Ludwig Baumann & Co. v. Christenson, 262 N.Y.S. 303, 146 Misc. 435.

8. Mo.—Warren v. Chicago, B. & Q. R. Co., 99 S.W. 16, 122 Mo.App. 254.

9. Mo.—Warren v. Chicago, B. & Q. R. Co., supra.

10. N.C.—Hamilton v. Southern Ry. Co., 164 S.E. 834, 203 N.C. 136, followed in 164 S.E. 836 (two cases), 203 N.C. 140

11. Miss.—Lancaster v. Jordan Auto Co., 187 So. 535.
23 C.J. p 522 note 66.

12. U.S.—American R. Co. of Puerto Rico v. Ponce & G. R. Co., Puerto Rico, 246 F. 925, 159 C.C.A. 197.

sibility that the debtor may acquire a claim which may be set off.[13] The stay on this ground is all the more just when plaintiff is insolvent;[14] but, if plaintiff on his part furnishes security to the amount of the execution, there is then no reason for the stay.[15] A stay has been granted to prevent fraud or great injustice,[16] to avoid crippling a quasi-public corporation,[17] or to save the expense of numerous sales to satisfy different liens on the same property, or to determine the equities of numerous parties in a complex situation by one suit in chancery.[18] A stay will not be granted, however, if justice can be done without it.[19]

Garnishment of judgment debtor. The fact that the debtor has been garnisheed at the suit of a third person is quite generally held to be good ground for a stay.[20] However, the granting of a stay on this ground is discretionary,[21] and should be denied if the garnishment is the result of collusion between the debtor and the garnisheeing creditor.[22] In some jurisdictions, as in Pennsylvania, if attachment execution is served on defendant by creditors of plaintiff, the practice is to rule the sheriff to pay the proceeds of the execution into court and then refer the matter to an auditor to determine the respective rights of the parties.[23] In other jurisdictions the garnisheed defendant has the right to require the claimants to interplead, and it is improper to stay execution until the garnishment suit is disposed of.[24]

The garnishment of the debt in another state has been held sufficient ground for a stay until the garnishee is released from the garnishment;[25] but in accordance with the general rule that the garnishment of a judgment debt by process from a court of different jurisdiction will not be permitted, see the C.J.S. title Garnishment § 94, also 28 C.J. p 143 note 41–p 144 note 55, it has also been held that a motion to stay execution in such a case will be overruled.[26]

Pendency of other proceedings. The mere pendency of another action or proceeding is not necessarily a ground for a stay.[27] However, an execution will ordinarily be stayed pending the termination of other proceedings connected with the principal case,[28] or of a motion to quash or vacate the writ,[29] where grounds for the stay are shown,[30] or a motion to vacate the judgment.[31] It is proper to stay execution pending a certiorari to deter-

13. U.S.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 F. 332, 63 C.C.A. 62, certiorari denied 24 S.Ct. 854, 193 U.S. 672, 48 L.Ed. 841.
23 C.J. p 523 note 68.

14. N.H.—Wiggin v. Janvrin, 47 N. H. 295.
R.I.—Steere v. Stafford, 12 R.I. 131.

15. Pa.—Patterson v. Patterson, 27 Pa. 40.

16. R.I.—Sawin v. Mt. Vernon Bank, 2 R.I. 382.
23 C.J. p 523 note 71.

17. Puerto Rico.—Ramos v. Wood, 7 Puerto Rico Fed. 127.

18. N.Y.—Pitman v. Smith, 120 N.Y. S. 193, 135 App.Div. 904.
23 C.J. p 523 note 73.

To compel payment of other debt
Court could stay execution by plaintiff against defendant until payment of sum which plaintiff owed to intervener.—Western Smelting & Refining Co. v. Benj. Harris & Co., 24 N.E.2d 255, 302 Ill.App. 535.

19. Pa.—Tombaugh v. Tombaugh, 24 Pa.Co. 110.
23 C.J. p 523 note 74.

20. Mo.—In re Morrison's Estate, App., 17 S.W.2d 560, 561, citing **Corpus Juris.**
23 C.J. p 523 note 76.

21. Mo.—In re Morrison's Estate, supra, citing **Corpus Juris.**
23 C.J. p 523 note 77.

22. Mo.—In re Morrison's Estate, supra, citing **Corpus Juris.**
23 C.J. p 523 note 78.

What constitutes collusion
Assistance rendered garnishing creditor by judgment debtor does not constitute collusion, preventing stay of execution, unless given to defraud; but that garnishment proceedings were prosecuted and financed by judgment debtor does constitute collusion and evidence thereof should be admitted on motion to stay execution.—In re Morrison's Estate, Mo.App., 17 S.W.2d 560.

23. Pa.—Phelps v. Morgan, 18 Phila. 655.
23 C.J. p 523 note 79.

24. Tex.—Foy v. East Dallas Bank, Civ.App., 28 S.W. 137.

25. Miss.—McPherson v. Matthews, 108 So. 494, 143 Miss. 299.
Mo.—Howland v. Chicago, R. I. & P. R. Co., 36 S.W. 29, 134 Mo. 474.

26. U.S.—Henry v. Gold Park Min. Co., C.C.Colo., 15 F. 649, 5 McCrary 70.
23 C.J. p 524 note 83.

27. R.I.—White v. Almy, 82 A. 994.
23 C.J. p 524 note 94.

Partition proceedings
Pa.—North Wales Nat. Bank v. Lapetina, 36 Pa.Dist. & Co. 167, 55 Montg.Co. 241.

Proof of other proceeding
Motion for stay is properly denied where no evidence is offered to show pendency of such other action.—Fidelity Deposit Co. v. Cooney, 127 Ill. App. 523.

28. U.S.—Minnesota & Ontario Paper Co. v. Swenson Evaporator Co., C.C.A.Minn., 281 F. 622.

Proceedings as to certain claims
Where judgment does not determine all issues in case, and proceedings as to certain claims are still pending, it is proper, provided payment of the judgment is secured, to withhold execution on any part of judgment until entire litigation is determined.—Minnesota & Ontario Paper Co. v. Swenson Evaporator Co., supra.

Execution of judgment on counterclaim
Proceedings under execution levied on claim in counterclaim for breach of contract against judgment plaintiffs were properly stayed pending disposition of case in which counterclaim was filed.—Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.

29. Ill.—Pearce v. Miller, 66 N.E. 221, 201 Ill. 188, affirming 99 Ill. App. 424.
23 C.J. p 524 note 84.

30. Mont.—State v. Clements, 94 P. 837, 37 Mont. 96, 127 Am.S.R. 701.

31. Pa.—Bradley v. Stephenson, 8 Pa.Co. 397.
23 C.J. p 524 note 87.

mine the validity of the judgment,[32] or until an application can be made to vacate the proceedings of the officer under an execution irregularly and informally issued,[33] or pending a replevin suit relating to the property levied on.[34] So it has been held proper to stay execution until the return of the service of the writ is amended.[35]

While an execution may be stayed by the taking of various steps to have the judgment reversed or set aside, execution may not be stayed where the unsuccessful party is merely contemplating the taking of such steps.[36]

c. Stay on Furnishing or Possessing Security

(1) In general
(2) Freeholder defendant

(1) In General

Under various statutes a stay is authorized by the deposit of security as specified.

Under some statutes a stay of execution is authorized on defendant's furnishing sufficient security.[37] Under other statutes a stay of execution is authorized on tendering the interest and costs.[38] Where authorized by statute, the debtor may execute a bond called a replevin bond, to suspend a levy or a sale of property levied on;[39] and the judgment is extinguished by such bond and all further proceedings must be on the bond in which the judgment is merged.[40] In any event, where the debtor claims a statutory stay by filing a security bond, he must bring himself strictly within the statute granting it.[41] If a successful appellee takes, instead of an affirmance, a new and original judgment in the appellate court, he is subject to all the statutory rights to a stay which attach to original judgments in other courts.[42]

Matters relating to the necessity and sufficiency of security, liability thereon, and proceedings to enforce such liability are considered infra § 140.

(2) Freeholder Defendant

Under statutes a stay is allowed in certain cases if the debtor is possessed of a freehold sufficient to secure the creditor. The statutory requirements must be met, and the proper procedure followed.

In some jurisdictions a stay of a definite length of time on money judgments is allowed the judgment debtor if he possesses a freehold of sufficient value to secure the creditor.[43] To justify a plea of freehold to an execution, the property must be unencumbered.[44] Since the stay is granted on the ground of security rather than of privilege, it will be allowed to all judgment defendants on the application of one of them who as a freeholder is entitled to it.[45] A defendant who has defaulted is also entitled to the stay.[46] The statute applies in favor of a corporation defendant as well as an individual;[47] but it does not apply in favor of counties or townships,[48] or against the state.[49]

Under such a statute which provides for a freehold stay in actions instituted by writ for the recovery of money due by contract or for damages arising from a breach of contract, no stay can be had where the damages arise from the exercise of the right of eminent domain,[50] or where the

32. U.S.—Boston & M. R. Co. v. Gokey, D C Vt., 150 F. 686.
Ga.—Herrington v. Block, 25 S.E. 426, 98 Ga. 236.

33. Ill.—Greenup v. Brown, 1 Ill. 252.

34. N.Y.—Peo. v. New York Super. Ct., 19 Wend. 701.
23 C.J. p 524 note 92.

35. S.C.—Wotton v. Parsons, 15 S.C. L. 368.

36. Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.

37. Pa.—Sweigard v. Consumers' Ice Mfg. & Coal Co., 48 A. 495, 198 Pa. 253.
23 C.J. p 524 note 97.

38. U.S.—Snowden v. Hemming, Pa., 1 Dall. 83, 1 L.Ed. 47.

39. Ky.—Hardwick Woolen Mills v. Ball Bros., 3 S.W.2d 175, 223 Ky. 185.
23 C.J. p 524 note 99, p 475 note 28 [a].

Invalid replevin bond as common-law bond
Intended replevin bond, invalid as replevin bond, is enforceable as common-law bond.—Hardwick Woolen Mills v. Ball Bros., supra.

Signing by surety alone
Replevin bond signed by surety alone and not by principal is void.—Ewing v. Union Central Bank, 72 S.W.2d 4, 254 Ky. 623.

Duress and want of consideration
A bond executed under duress and without consideration is void.—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671.

Bond executed by heirs may not be avoided by them on the ground that the execution was against the administrator who did not join in the bond.—Williamson v. Logan, 1 B. Mon., Ky., 237.

40. Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418—Ewing v. Union Central Bank, 72 S.W.2d 4, 254 Ky. 623—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

41. Pa.—Erie City Bank v. Compton, 27 Pa. 195.
23 C.J. p 525 note 1.

42. Iowa—Peoria F. & M. Ins. Co. v. Dickerson, 29 Iowa 98.

43. Pa.—Farmers' & Mechanics' Bank v. Schreiner, 1 Miles 291.
23 C.J. p 525 note 3.

44. Pa.—Farmers' & Mechanics' Bank v. Schreiner, supra.
23 C.J. p 525 note 4.

45. Pa.—Robinson v. Narber, 65 Pa. 85.

46. Pa.—Farmers' & Mechanics' Bank v. Schreiner, 1 Miles 291.

47. Pa.—Allinson v. Philadelphia & R. R. Co., 5 Pa.Co. 344.

48. Pa.—Morgan v. Moyamensing Tp., 2 Miles 397.
23 C.J. p 525 note 9.

49. Pa.—Com. v. Myers, 22 Pa.Dist. 1062.
23 C.J. p 525 note 10.

50. Pa.—Harrisburg & P. R. Co. v.

land is specially charged with the judgment on which the execution sought to be stayed is issued,[51] or where the judgment has been rendered against defendant in scire facias on a recognizance bail;[52] and defendant has been held not entitled to a stay in an action upon an administration bond.[53]

Procedure in claiming stay. While it has been held that it is not necessary for a defendant to file a plea of freehold and to justify it, although it is the usual practice,[54] it has also been held that this privilege must be claimed.[55] The fact of defendant's being a freeholder should appear from the record;[56] but defendant need not show title as in ejectment, possession under color of title being sufficient.[57] If the estate of freehold is in the county where the plea is filed, defendant need show only the existence and value of the freehold, and it then rests on plaintiff to show an encumbrance, if he makes an objection to the plea on that ground.[58] If the freehold is in another county, defendant must not only show its existence and value, but must produce evidence, by the usual certificates of search, of its being clear from encumbrances,[59] and plaintiff may examine defendant, on oath, on the subject of the alleged freehold.[60] The court may pronounce on the value from an inspection of the title papers merely, or, at its discretion, may order additional evidence on that subject to be taken.[61]

Procedure in opposing stay. After the plea of freehold has been filed plaintiff may move to dismiss it for insufficiency,[62] or may make oath against it.[63] It is then a question for the court to decide whether defendant is a freeholder, so as to entitle him to the benefit of the statute,[64] and the decision of the court is not reviewable by the supreme court.[65]

Effect of claiming privilege. After the plea has been filed plaintiff may issue execution, but only at his peril.[66]

d. Length of Stay

Statutes governing the length of the stay are controlling; a perpetual stay may be granted in a proper case.

The length of the stay, where governed by statute, depends on the statute which confers the right to it,[67] and the stayer cannot consent to a shorter time.[68] Where the stay is granted on motion it should be within the limits allowed by statute;[69] and it has been held that it should not be for any given number of days but should be limited by the time when the party can make application for the relief he asks.[70] Successive stays are sometimes not allowed,[71] at least unless notice is given.[72]

Perpetual stay. The power of the court to stay execution in the interest of justice has been exercised even to the extent of giving relief by a perpetual stay, when it was clear that it was just so to do,[73] as where a discharge in bankruptcy[74] or insolvency[75] was obtained too late to be pleaded, where the execution was issued on a void judgment,[76] where the judgment was obtained by fraud, mistake, and surprise,[77] where judgment was awarded against plaintiff in a suit prosecuted in his name but without his authority,[78] or where the judgment has been satisfied.[79]

Reckoning time of stay. In accordance with

Peffer, 84 Pa. 295—Boyer v. Northern Cent. R. Co., 1 Pearson 113.

51. Pa.—Haughton v. Otterson, 2 Wkly.N.C. 490.
23 C.J. p 525 note 12.

52. Pa.—Gorgas v. Zeop, 2 Miles 101.

53. Pa.—Com. v. Rigg, 2 Leg.Op. 57.

54. Pa.—Riegal v. Wilson, 60 Pa. 388.

55. Del.—Hearn v. Ralph, 2 Del. 6.
23 C.J. p 525 note 15.

56. Del.—Hearn v. Ralph, supra.

57. Pa.—Bidlichimer v. Sterne, Tr. & H.Pr. 250.

58. Pa.—Marseilles v. Garrigues, 2 Miles 347—Hill v. Ramsey, 2 Miles 342.

59. Pa.—Hill v. Ramsey, supra.

60. Pa.—Hill v. Ramsey, supra.

61. Pa.—Hill v. Ramsey, supra.

62. Pa.—Harrison v. Hyneman, 1 Phila. 204.
23 C.J. p 525 note 23.

63. Del.—Hearn v. Ralph, 2 Del. 6.
23 C.J. p 525 note 24.

64. Pa.—Robinson v. Narber, 65 Pa. 85.

65. Pa.—Robinson v. Narber, supra.

66. Pa.—Marseilles v. Garrigues, 2 Miles 347.
23 C.J. p 525 note 27.

67. Pa.—Campbell v. Wade, 5 Pa. Dist. & Co. 528.
23 C.J. p 526 note 28.

68. Tenn.—Roberts v. Cross, 1 Sneed 233.
23 C.J. p 526 note 29.

69. N.Y.—Carter v. Hodge, 44 N.E. 1101, 150 N.Y. 532, 537.

70. N.Y.—Sales v. Woodin, 8 How. Pr. 349.

71. Tenn.—Noel v. Scoby, 2 Heisk. 20.
23 C.J. p 526 note 32.

72. Wis.—Holmes v. McIndoe, 20 Wis. 657.
23 C.J. p 526 note 33.

73. Fla.—Kellerman v. Commercial Credit Co., 189 So. 689, 138 Fla. 133.
23 C.J. p 526 note 34.

74. Minn.—Cavanaugh v. Fenley, 103 N.W. 711, 94 Minn. 505, 110 Am.S.R. 382.
23 C.J. p 526 note 35.

75. N.Y.—Starr v. Patterson, 11 N.Y.S. 371, 58 Hun 604.
23 C.J. p 526 note 36.

76. Cal.—Sanchez v. Carriaga, 31 Cal. 170.
23 C.J. p 526 note 37.

77. Fla.—Kellerman v. Commercial Credit Co., 189 So. 689, 138 Fla. 133.

78. N.Y.—Campbell v. Bristol, 19 Wend. 101.

79. Pa.—Harrison v. Soles, 6 Pa. 393.

rules governing the reckoning of time generally, see the C.J.S. title Time § 13, also 62 C.J. p 987 note 22–p 990 note 47, when the time of the stay is reckoned from a certain day, that day should be excluded;[80] but if from an act done, the day on which it is done must be included.[81] Where a statute provides that a stay authorized by it is to be reckoned from the return day of the original process, the reckoning should begin from the return day of the first original process which was effective in bringing defendant into court.[82] In some jurisdictions a stay is reckoned from the rendition[83] or entry[84] of the judgment. In others the stay operates from the time the bond is filed.[85]

e. Persons Entitled to Seek or Oppose Stay; Waiver

Generally only parties can apply for a stay of execution; the right to a stay may be waived.

Generally no one but a party can apply for a stay.[86] However, a partial stay has been ordered in behalf of bona fide purchasers where the lien of the judgment had ceased by lapse of time.[87] It has been held that a stranger in the case is not entitled to a stay where the statutory requirements are not complied with.[88]

A statute providing that wage earners' claims shall be preferred and first paid out of the proceeds of sale gives holders of such claims no right to object to the staying of execution issued on a judgment obtained by another person against their debtor.[89]

Waiver of right to stay. The right of a party to a stay of execution may be lost by acts or omissions which constitute a waiver of the right,[90] although a waiver will not be readily implied.[91] An intended waiver of a stay is not affected by a statute which gives a stay of execution on contracts waiving it, since such a statutory provision is unconstitutional.[92] On the other hand it has been held that, where there is no statute authorizing a judgment without stay of execution, an agreement of the maker of a note to pay it without relief from the stay laws does not authorize a judgment of that character.[93]

f. Application and Proceedings

A motion or application, on notice to the opposite party, is the proper procedure to obtain a stay of execution. Generally the court which would or did issue the execution has jurisdiction of the motion. The granting of the motion rests in the court's discretion.

A motion or application to the court or judge,[94] with the requisite notice thereof to the opposite party,[95] is the proper procedure to obtain a stay

80. Pa.—Boyer v. Northern Cent. R. Co., 1 Pearson 113.

81. Ky.—Mooar v. Covington City Nat. Bank, 3 Ky.L. 674.

82. Pa.—Panagulias v. Sappas, 24 Pa.Dist. & Co. 216, 83 Pittsb.Leg. J. 342—Campbell v. Wade, 5 Pa. Dist. & Co. 528.
23 C.J. p 526 note 42.

83. Iowa.—Okey v. Sigler, 47 N.W. 911, 82 Iowa 94.
23 C.J. p 526 note 43.

84. N.Y.—Wall St. Exch. Bldg. Assoc. v. New York & W. Cons. Oil Co., 107 N.Y.S. 884.

85. Wash.—American Surety Co. v. Fishback, 163 P. 488, 95 Wash. 124.

86. Ill.—Bonnell v. Neely, 43 Ill. 288.
23 C.J. p 526 note 46.

Sureties on appeal bond
Sureties on supersedeas bond executed by defendant appealing from judgment for plaintiff, having made themselves parties to the suit by entering into appeal bond, are defendants within the statute relating to stay of execution in the hands of an officer.—Morse Bros. Lumber Co. v. F. Burkart Mfg. Co., 244 S.W. 350, 155 Ark. 350.

87. N.Y.—Wilson v. Smith, 2 Code Rep. 18.

88. Puerto Rico.—Sanchez v. Negron, 17 Puerto Rico 286.
23 C.J. p 526 note 50.

89. Pa.—Mettfett v. Mohn, 33 A. 367, 171 Pa. 395.

90. Pa.—Campbell v. Wade, 5 Pa. Dist. & Co. 528.
Taking appeal and filing bond in which defendant agreed to pay judgment on affirmance constitutes waiver.—Campbell v. Wade, supra.
Excessive delay in applying
Pa.—First Nat. Bank of Harrisville v. Coulter, 18 Pa.Dist. & Co. 732.

91. Pa.—Huntzinger v. Brock, 3 Grant 243.

92. Pa.—Billmeyer v. Evans, 40 Pa. 324.
23 C.J. p 526 note 52.

93. Ind.—Develin v. Wood, 2 Ind. 102.

94. N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.
23 C.J. p 527 note 63.
Injunction for permanent stay
Bill for injunction rather than petition or motion is proper form of remedy where permanent stay is sought.—Umberger v. Bord, 2 Chest. Co. 318—23 C.J. p 527 note 68.
Motion as independent proceeding
Motion to stay execution, which did not attack regularity or legality of execution, but referred to original suit, did not constitute independent proceeding within statute.—Leesburg State Bank v. Lyle, 131 So. 374, 100 Fla. 1520.
Order or rule to show cause is sometimes used.—Lewis v. Linton, 56 A. 874, 207 Pa. 320—23 C.J. p 527 note 64.
In Louisiana
(1) Execution of writ in executory proceedings can be stayed only by enjoining sale or by suspensive appeal with bond.—Trimble v. Chavis, 123 So. 513, 11 La.App. 208.
(2) Other cases see 23 C.J. p 527 note 63 [a].

95. N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.
23 C.J. p 527 note 71.
Absence of person to receive notice
Notice is not necessary where there is no one on whom to serve it, as where plaintiff was dead.—Kramer v. Holster, 55 Miss. 243.
Contents of notice
End to be attained by stay must be indicated in notice.—Sales v. Woodin, 8 How.Pr., N.Y., 349—Chubbuck v. Morrison, 6 How.Pr., N.Y., 367.

of execution. The application should be made promptly on discovering the facts,[96] and must be made within the period of time limited by statute.[97]

The affidavit, petition, or other form of application should set forth the applicant's ground for relief with sufficient particularity.[98] The applicant must show facts to warrant the exercise of judicial discretion,[99] and the court will not stay summarily if the case is doubtful, but will leave the party to seek his remedy by action.[1]

Jurisdiction to grant stay. Except in so far as the rule is changed by statutory provision,[2] only the court which rendered the judgment or issued the execution has jurisdiction to stay execution.[3] Ordinarily a stay cannot be issued in another action brought for an entirely different purpose.[4] However, a temporary stay may be granted by a federal district court,[5] even where the execution was issued by a territorial court, if the necessity of the case requires it.[6]

Discretion of court. The granting of a stay usually rests in the discretion of the court[7] which will not be reviewed unless capriciously exercised or abused.[8]

Matters considered or determined. In determining whether a stay should be allowed, consideration must be given to the equities of both plaintiffs and defendants.[9] Questions of fact may not, it has been held, be determined on a motion for a stay of execution.[10]

Terms and conditions. Where a statute authorizes a stay on such terms as shall be just, it is in the discretion of the judge whether to impose any terms and as to what terms shall be imposed.[11] Where a motion is improperly denied, the error is not cured by the fact that the order is made without prejudice to an application after sale to have the proceeds paid into court and the rights of the parties then determined.[12]

Order. General rules relating to orders ordinarily apply to orders to stay execution on a judg

96. Mich.—Roach v. Wayne Cir. Judge, 75 N.W. 465, 117 Mich. 242.
Minn.—Cavanaugh v. Fenley, 103 N. W. 711, 94 Minn. 505, 110 Am.S.R. 382.

97. Pa.—Campbell v. Wade, 5 Pa. Dist. & Co. 528.

98. U.S.—U. S. v. Wells, Pa., 28 F. Cas.No.16,664, 3 Wash.C.C. 245.
23 C.J. p 527 note 69.

99. Pa.—Schad v. Carr & Schad, Inc., 20 Pa.Dist. & Co. 505, 26 Berks Co.L.J. 81.
23 C.J. p 527 note 66.

1. Pa.—Pearce v. Affleck, 4 Binn. 344.

2. R.I.—White v. Almy, 82 A. 994.

Effect of denial of stay by other judge

Where statute authorizes any justice of named courts to stay execution on any judgment rendered in "any" court, denial of motion to stay by justice of one court does not bar like motion before justice of another court.—White v. Almy, supra.

3. **Judgment of appellate court**

Lower court has no power to stay execution on judgment of appellate court.—Marysville v. Buchannon, 3 Cal. 212—23 C.J. p 527 note 54.

Court of another county

(1) If execution is issued to another county, court that issued execution, not court of county to which execution was sent, has jurisdiction to stay execution.
Pa.—Com. v. Smith, 4 Phila. 419.
Wis.—State v. Brophy, 38 Wis. 413.

(2) If judgment has been docketed in another county, the rule that court which rendered judgment has control of execution would still appear to apply.—King v. Mimick, 34 Pa. 297—23 C.J. p 527 note 56.

Transcript in higher court

(1) Where transcript of case has been removed to higher court for purpose of issuing execution, that court may stay proceedings.—Kreamer v. Purvis, 4 Walk., Pa., 283.

(2) Where, however, the judgment rendered in lower court is void, execution issued thereon in higher court may be recalled by lower court, and execution stayed by motion in that court.—Gates v. Lane, 49 Cal. 266.
23 C.J. p 527 note 58.

4. N.Y.—Gilroy v. Everson-Hickok Co., 105 N.Y.S. 188, 120 App.Div. 207.
23 C.J. p 527 note 59.

5. U.S.—Eaton v. Cleveland, St. L. & K. C. R. Co., C.C.Mo., 41 F. 421.

6. Puerto Rico.—Ramos v. Wood, 7 Puerto Rico Fed. 127.

7. U.S.—Lineker v. Dillon, D.C.Cal., 275 F. 460.
Cal.—California Cotton Credit Corporation v. Superior Court in and for Madera County, 15 P.2d 1108, 1109, 127 Cal.App. 472, citing **Corpus Juris.**
Fla.—Leesburg State Bank v. Lyle, 131 So. 374, 100 Fla. 1520—Bartlett v. Cohn, 120 So. 357, 97 Fla. 256.
Iowa.—Brenton Bros. v. Dorr, 239 N. W. 808, 810, 213 Iowa 725, citing **Corpus Juris.**
23 C.J. p 528 note 74.

Question of fact

A motion to stay execution and set aside default and final judgment for plaintiff, predicated on fraud, mistake, and surprise, presented a fact question for trial court.—Kellerman v. Commercial Credit Co., 189 So. 689, 138 Fla. 133.

8. Iowa.—Brenton Bros. v. Dorr, 239 N.W. 808, 810, 213 Iowa 725, citing **Corpus Juris.**
Pa.—Augustine v. Augustine, 139 A. 585, 291 Pa. 15.
23 C.J. p 528 note 75.

9. Pa.—People's Bank of Steelton v. Terris, 20 Pa.Dist. & Co. 158, 48 York Leg.Rec. 8, 37 Dauph.Co. 426.

10. N.Y.—C. Ludwig Baumann & Co. v. Christenson, 262 N.Y.S. 303, 146 Misc. 435.

Whether property is exempt

Judgment debtor may move to stay sheriff or marshal from executing judgment where property is exempt, but, if questions of fact are raised on motion, it should not prevail, but judgment debtor should be relegated to action at law.—C. Ludwig Baumann & Co. v. Christenson, supra.

Rule to stay execution discharged

Pa.—Flowers v. Curry, 86 Pittsb. Leg.J. 248—Brooks v. Kunkle, 21 West.Co.L.J. 301.

11. Mont.—State v. Clements, 94 P. 837, 37 Mont. 96, 127 Am.S.R. 701.
23 C.J. p 528 note 83.

Payment of costs incurred on execution

Pa.—Wert v. Wildermuth, 8 Sch.Reg. 48.

12. Pa.—Lewis v. Linton, 56 A. 874, 207 Pa. 320.

ment.[13] Where a judgment is payable by installments, provision may be made in the order as to future installments;[14] and it has been considered good practice for an order temporarily staying execution to contain a stipulation that the lien remain.[15] The stay, in a proper case, may be as to one only of the execution debtors;[16] and where granted by a judge pro tempore until a case made is settled, it has reference to an effectual settlement made before the judge has lost jurisdiction.[17] The stay may be by a military order.[18]

Service of the order should be made as directed in the order, where it contains such a direction.[19] Showing it to the sheriff has been held sufficient to terminate his right to proceed further.[20]

The order may be set aside in a proper case,[21] on application to the court that made it.[22] If plaintiff is prejudiced by a stay, his remedy is by application to the court which granted it for an order vacating or modifying the stay as the case may require; he has no remedy in equity.[23]

§ 140. —— Security

a. In general
b. Liability on bond and enforcement thereof

a. In General

Unless required by statute or order of court, security is unnecessary for a stay of execution. The security must comply substantially with the statute or order of court requiring it, must be approved by a proper officer, and must be filed within the specified time.

Unless required by statute,[24] the judge granting a stay need not require security as a condition,[25] although this is often done,[26] even where defendant is solvent,[27] and it is said to be the settled rule of equity to require security.[28]

The furnishing or possessing of security as authorizing a stay of execution is considered in § 139 c supra.

Time for giving security. Where the statute specifies no time, the undertaking may be given at any time before execution of the judgment.[29] However, where the time is prescribed by law, the undertaking must be given within such time to operate as a statutory stay of execution,[30] although this rule does not prevent the execution from being stayed by agreement after the time fixed by statute.[31] The requirement as to time may be waived by plaintiff.[32]

Sufficiency of security. The security, to be sufficient, must substantially comply with the terms of the governing statute, or, in the absence of statute, with the terms of the order of the court.[33] It may not be necessary, however, to comply with all the provisions of the statute, since some may be

13. Clerical errors are amendable
Mont.—Kendall v. O'Neal, 40 P. 599, 16 Mont. 303.
23 C.J. p 528 note 81.

Description of judgment
It is sufficient if judgment is described with reasonable certainty.—Cannon v. Trail, 1 Head, Tenn., 282—23 C.J. p 528 note 76.

14. Ind.—Allen v. Parker, 11 Ind. 504.
23 C.J. p 528 note 80.

15. Pa.—Lancaster's Est., 2 Luz. Leg.Reg. 227, 21 Pittsb.Leg.J. 105.

16. Ill.—Merrifield v. Western Cottage Piano & Organ Co., 144 Ill. App. 289.

17. Kan.—Missouri Pac. R. Co. v. Preston, 66 P. 1050, 63 Kan. 819, affirming, Sup., 63 P. 444.

18. La.—Humphreys v. Browne, 19 La.Ann. 158.
23 C.J. p 528 note 82.

19. Wis.—Campbell v. Smith, 9 Wis. 305.
23 C.J. p 528 note 86.

20. Vt.—Hopkinson v. Sears, 14 Vt. 494, 39 Am.D. 236.

21. Cal.—Duke v. Levy, 281 P. 496, 208 Cal. 376.
23 C.J. p 528 note 88.

Want of formal motion as ground
Want of formal written motion is insufficient reason for setting aside order granting stay.—Morrill v. Seip, 26 Kan. 148.

22. R.I.—In re Allen, 5 R.I. 384.
23 C.J. p 528 note 89.

23. N.Y.—Steffin v. Steffin, 4 N.Y. Civ.Proc. 179.

24. N.Y.—Eastman v. Starr, 22 Hun 465.
23 C.J. p 528 note 92.

25 Iowa.—Brenton Bros. v. Dorr, 239 N.W. 808, 810, 213 Iowa 725, citing **Corpus Juris.**
23 C.J. p 528 note 93.

Discretion of court
Where party applying for a stay showed that opposite party was not prejudiced, the refusal of court to require security is not an abuse of discretion.—Brenton Bros. v. Dorr, 239 N.W. 808, 213 Iowa 725.

26. Iowa.—Brenton Bros. v. Dorr, 239 N.W. 808, 810, 213 Iowa 725, citing **Corpus Juris.**
23 C.J. p 528 note 94.

27. U.S.—Fisher v. Meyer, C.C.N.Y., 10 F. 268, 20 Blatchf. 273.

28. Tenn.—Clark v. Henderson, 1 Tenn.Ch. 506.
23 C.J. p 529 note 96.

29. Cal.—Howland v. Lampton, 280 P. 173, 100 Cal.App. 462.

30. Ohio.—Mosebach v. Reis, 2 Ohio Dec., Reprint, 295, 2 West.L.Month. 321.
23 C.J. p 529 note 97.

31. Ohio.—Duckwall v. Rogers, 15 Ohio St. 544.
23 C.J. p 529 note 98.

32. Pa.—Roup v. Waldhouer, 12 Serg. & R. 24.
23 C.J. p 529 note 99.

33. Pa.—Perlasca v. Sparcella, 3 Binn. 427, reversing 1 Browne 260.
23 C.J. p 529 note 2.

Deposit of money
Entry on clerk's journal of deposit of sum of money in lieu of undertaking is not sufficient.—Shamokin Bank v. Street, 16 Ohio St. 1.

Provisions as to amount of liability assumed must be complied with.—Hogle v. Wayne Cir.Judge, 125 N.W. 712, 160 Mich. 573—23 C.J. p 529 note 3.

Signature of principal
(1) Bond signed by sureties alone, to which debtor is not party, is insufficient.—Gregory v. Cameron, 7 Neb. 414.

(2) However, it has also been held that signature of debtor is not necessary.—Walker v. Nestor, 6 Wkly. N.C., Pa., 541.

merely directory.[34] Additional security may be required, under statutes in some states, where the creditor deems his debt in danger from the insolvency of the stayor.[35]

Under a general power of amendment given by statute, a debtor who has in good faith filed a bond, which has been approved by the proper officer, but is subsequently discovered to be insufficient in law, may amend it to conform to the law so that he may have the stay.[36] Moreover, where the statute so provides, the debtor has the right to substitute a new bond;[37] and leave to do so has been granted even where the court has denied its power to amend.[38]

Approval and filing. The statutes usually require that the security offered by defendant must be approved by some person or officer, such as the clerk[39] or the court in which the judgment was rendered or a judge thereof.[40] If the security is not approved as required by law the creditor may treat it as a nullity and issue execution.[41] However, the creditor may waive the approval since it is for his benefit; and neither the debtor nor the security can take advantage of the want of it.[42]

The undertaking need not be filed unless the statute requires it.[43]

Effect of giving security. Under some statutes the mere giving of security operates ipso facto in some instances as a stay.[44] Under other statutes the bond, recognizance, or obligation given to obtain a stay has the effect and force of a judgment confessed in a court of record against the person or persons acknowledging the same and against their estates;[45] but it is not a judgment which under the constitution of the United States is entitled to "full faith and credit" in the courts of another state.[46] Entry of security to obtain a stay operates as a discharge of a recognizance in the nature of special bail.[47]

Apart from statute, the judgment creditor's acceptance of security for payment of the judgment has been held to extend the debtor's time for payment.[48]

b. Liability on Bond and Enforcement Thereof

(1) In general
(2) Defenses
(3) Proceedings to enforce liability

(1) In General

The liability of a surety on a stay bond is governed by the terms of the bond. Authorities differ as to whether the creditor may proceed against the stayor without first proceeding against the principal; as between the stayor and a surety on the original obligation, the stayor is ordinarily entitled to have the surety proceeded against first.

A contract of suretyship on a stay bond imposes on the surety or stayor the single, simple, and unqualified obligation of paying the amount of the judgment which has been rendered against his principal in the event that his principal does not pay it within the prescribed time;[49] and the courts are careful not to hold the stayor liable for any more than his undertaking requires.[50] Where a defendant retains his property, under a statute, on giving bond for a stay of execution on condition that he will neither remove, secrete, assign, nor in any way dispose of it until plaintiff's demand shall have been satisfied, an assignment of the property to other creditors is a breach of the bond.[51] The bond binds the property of the stayor from the date of its execution,[52] or from the date of its approval, where approval is required.[53] Where the execution is superseded on account of some matter

34. Idaho.—Miller v. Pine Mining Co., 32 P. 207, 3 Idaho, Hasb., 603.
23 C.J. p 529 note 5.

35. Tenn.—Rothchilds v. Forbes, 2 Heisk. 13.
23 C.J. p 530 note 9.

36. Ohio.—Negley v. Jeffers, 28 Ohio St. 90.
23 C.J. p 529 note 6.

37. Mich.—Small v. Newaygo Cir. Judge, 153 N.W. 703, 187 Mich. 532.
23 C.J. p 529 note 7.

38. Pa.—Welsh v. Brown, 2 Miles 108.
23 C.J. p 529 note 8.

39. Ind.—Ensley v. McCorkle, 74 Ind. 240.
23 C.J. p 530 note 16.

40. Nev.—Frevert v. Swift, 13 P. 6, 19 Nev. 400.
23 C.J. p 530 note 17.

41. Pa.—Eichman v. Belvedere Bank, 3 Whart. 68—Stettler v. Schmoyer, 3 Walk. 356.

42. Pa.—Stroop v. Gross, 1 Watts & S. 139.
23 C.J. p 530 note 20.

43. Pa.—Stettler v. Schmoyer, 3 Walk. 356.
23 C.J. p 530 note 21.

44. W.Va.—August v. Gilmer, 44 S.E. 143, 53 W.Va. 65.
23 C.J. p 530 note 11.

45. Kan.—McGlothin v. Madden, 16 Kan. 466.
23 C.J. p 530 note 12.

46. Mo.—Foote v. Newell, 29 Mo. 400.
Recognition of judgments of sister states see the C.J.S. title Judgments § 889 et seq., also 34 C.J. p 1125 note 42 et seq.

47. Pa.—Crutcher v. Commonwealth, 6 Whart. 340—Roup v. Waldhouer, 12 Serg. & R. 24.

48. Chattel mortgage
N.Y.—Weast v. Annis, 221 N.Y.S. 776, 220 App.Div. 507.

49. Ga.—Walker v. Lott-Lewis Co., 84 S.E. 195, 15 Ga.App. 767.
Extent of liability on bonds generally see Bonds §§ 50–58.

50. Ind.—Skelton v. Ward, 51 Ind. 46.
23 C.J. p 530 note 24.

51. Pa.—White v. Doak, 3 Pa.L.J.R. 259, 5 Pa.L.J. 154.
23 C.J. p 530 note 28.

52. Ga.—Hayden v. Anderson, 57 Ga. 378.

53. Pa.—Stettler v. Schmoyer, 3 Walk. 356.
23 C.J. p 530 note 26.

of discharge after judgment, the security of the petitioner for the supersedeas is bound only for the costs of the new proceeding.[54] A bond given to stay an execution of an order subsequently held void is without consideration and creates no liability.[55]

Where a stay bond does not conform to the statutory requirements, and is therefore not binding and effective as a statutory undertaking, the stayor may, nevertheless, be bound on his undertaking as on a common law contract if it is supported by sufficient consideration.[56]

Liability by estoppel. A person may be liable on a bond not signed by him or by his authority by estoppel resulting from his acquiescence;[57] but an acknowledgment of liability by a stayor is of no effect where made after the time when execution could be stayed.[58]

Original surety as stayor. Where a surety on the original debt, or on a prior bond to secure such debt, signs a stay bond, his liability is that of a principal and not of a surety.[59]

Rights and remedies of stayor. In some jurisdictions plaintiff may proceed against either principal or stayor or both at his option.[60] In other jurisdictions the stayor cannot be held liable until after the judgment debtor has been proceeded against,[61] unless the property of the principal is not immediately subject to execution.[62] However, mere delay in proceeding against the principal does not discharge the stayor, especially where he fails to make use of the statutory remedy afforded him in such a case.[63] As between the stayor on the bond and a surety on the original obligation, the stayor is ordinarily entitled to have the surety proceeded against before he himself is held for his liability of stayor, provided the stay has not violated the contract of suretyship,[64] or the surety has raised no objection.[65] Where the owner of the judgment releases a levy on the original surety's property during the stay, the stayor is discharged.[66]

If the stayor is obliged to discharge the judgment, he is entitled to be subrogated to the rights of the creditor against the judgment debtor,[67] except in so far as the rights of other creditors may be thereby affected.[68]

(2) Defenses

General rules governing the termination and release of liability of sureties ordinarily apply in proceedings against sureties on stay bonds.

General rules governing the termination and release of liability of sureties, see the C.J.S. title Principal and Surety §§ 116–244, also 50 C.J. p 92 note 28–p 190 note 76, ordinarily apply in proceedings against sureties on stay bonds.[69] The sureties are discharged by any act or omission of the creditor which is injurious to them or inconsistent with their rights.[70] The sureties are released by an extension of time to the debtor,[71] provided there is a consideration therefor,[72] and a definite time fixed for the extension,[73] and by a refusal to accept an offer to pay the debt in full,[74] or a satisfaction of the original judgment,[75] provided it occurs after the execution of the bond.[76]

On the other hand, the sureties are not released by revival of judgment against the principal by scire facias issued against him alone,[77] by lack of diligence on the part of the judgment creditor in not enforcing the execution,[78] or by neglect on the

54. Tenn.—Edde v. Cowan, 1 Sneed 290, 296.
55. N.Y.—Breuchaud v. Rudiger, 147 N.Y.S. 1001, 162 App.Div. 720.
56. Ohio.—Duckwall v. Rogers, 15 Ohio St. 544.
23 C.J. p 531 note 52.
57. Tenn.—Fite v. Wiel, Ch., 46 S. W. 330.
23 C.J. p 531 note 30.
58. Tenn.—Mayfield v. McLary, 3 Head 159.
59. Ark.—Morse Bros. Lumber Co. v. F. Burkart Mfg. Co., 244 S.W. 350, 155 Ark. 350.
Ky.—Milliken v. Dinning, 69 Ky. 646, 6 Bush 646.
60. Mich.—Sweeney v. Lustfield, 75 N.W. 136, 116 Mich. 696.
23 C.J. p 532 note 64.
61. Ohio.—Burr v. Moody, Wright 449.
23 C.J. p 532 note 58.
62. Ind.—Edwards v. Haverstick, 53 Ind. 348.
23 C.J. p 532 note 59.
63. Tenn.—Anderson v. Lithgro, 5 Baxt. 603.
23 C.J. p 532 note 60.
64. Tenn.—Stephens v. Taylor, Ch., 45 S.W. 228.
23 C.J. p 532 note 62.
65. Iowa.—Chase v. Welty, 10 N.W. 648, 57 Iowa 230.
23 C.J. p 532 note 63.
66. Tenn.—Woodward v. Walton, 7 Heisk. 50.
67. Ind.—Reissner v. Dessar, 80 Ind. 307.
23 C.J. p 532 note 65.
68. Pa.—In re Armstrong's Appeal, 5 Watts & S. 352.
69. Tenn.—Stockard v. Granberry, 3 Lea 668.
23 C.J. p 531 note 32.
70. Tenn.—Stockard v. Granberry, supra.
71. La.—Perkins v. State Bank, 5 La.Ann. 222.
72. Tenn.—Chaffin v. Rose, 5 Baxt. 696.
23 C.J. p 531 note 35.
73. Miss.—McGee v. Metcalf, 20 Miss. 535, 51 Am.D. 122.
74. Tenn.—West v. Gordon, 3 Lea 370.
23 C.J. p 531 note 37.
75. Cal.—Meredith v. Santa Clara Min. Assoc., 60 Cal. 617.
23 C.J. p 531 note 38.
76. Ill.—Millhouse v. Krotz, 184 Ill. App. 507.
23 C.J. p 531 note 39.
77. Ind.—Stockwell v. Walker, 8 Ind. 215.
78. Ga.—Walker v. Lott-Lewis Co., 84 S.E. 195, 15 Ga.App. 767.

part of the officer to file the bond with the execution.[79] It is no defense that the original debtor had become a bankrupt within four months after the date of the rendition of the original judgment against him.[80] Conditions not mentioned in the bond are not a defense.[81]

Attack on instrument. The principal and the surety on the bond are estopped to deny the validity of the bond after they have received the benefit of it.[82] Moreover, mere mistakes or immaterial omissions in a bond do not constitute a valid defense.[83] However, the failure of sureties on the bond to justify may be a defense;[84] and since a penalty and a condition are indispensable to constitute a recognizance, the plea of nul tiel record to an action on a recognizance lacking these requisites will be sustained.[85] Fraudulent representations inducing the stayor to sign the bond are a defense only where made by the judgment plaintiff or someone acting for him.[86]

Attack on judgment and prior proceedings. The surety on a stay bond is estopped to deny that a valid judgment was in force at the time of the execution of the bond;[87] and as long as the judgment remains in force the stayor cannot go behind it in search of irregularities in the proceedings in order to be discharged from his liability.[88] Moreover, it has been held that the fact that the judgment has since been set aside is not a defense to an action on the bond given for the stay of execution on the judgment.[89] However, it has also been held that the fact that the execution is unauthorized by the judgment is a good defense.[90]

(3) Proceedings to Enforce Liability

Liability on a stay bond may be enforced by action or motion depending on the local practice, although where the bond is, by statute, equivalent to a confession of judgment, execution may issue.

Plaintiff may enforce liability on the bond by action[91] or motion,[92] according to the practice in the particular jurisdiction. It is necessary only to file a copy of the recognizance.[93] Where the judgment is assigned after a bond is given, but the assignee is merely a nominal party acting for one of the judgment debtors, the assignee may sue thereon.[94]

Issuance of execution on bond. In jurisdictions where, by statute, the bond is equivalent to a confession of judgment by the stayor for the amount of the judgment stayed, with interest and costs, see § 140 a supra, on the expiration of the stay, execution may issue against the stayor as well as against the original judgment debtor,[95] unless the bond fails to conform to the statute.[96] However, it has been held that while such a bond is in the nature of a confession of judgment, and for some purposes is so considered, yet strictly considered it is not so,[97] and if the stay is not for the whole judgment it is void and cannot be enforced by execution.[98] If the principal is dead, an execution may issue against the stayor alone on a suggestion

79. La.—Evans v. Nash, 3 Mart., N. S., 669.

80. Pa.—Arms Pocket-book & Leather Novelty Co. v. Posey, 40 Pa.Super. 361.

81. Ind.—Jones v. Swift, 94 Ind. 516.

82. Ill.—Kotite v. Title Guaranty & Surety Co., 191 Ill.App. 555.

Unconstitutionality of law

Surety is estopped to set up unconstitutionality of law under which stay was allowed.—Daniels v. Tearney, W.Va., 102 U.S. 415, 26 L.Ed. 187—23 C.J. p 531 note 44.

Time of giving bond

Surety may not set up fact that bond was not given within time prescribed by law.—Walker v. Lott-Lewis Co., 84 S.E. 195, 15 Ga.App. 767.

83. Ohio.—Baker v. Morath, 40 Ohio St. 157.
23 C.J. p 531 note 50.

84. N.Y.—Montrose v. Levenson, 114 N.Y.S. 136.

85. Pa.—Caldwell v. Brindle, 11 Pa. 293.

86. Ind.—Vincennes Nat. Bank v. Cockrum, 64 Ind. 229.
23 C.J. p 531 note 54.

87. Ill.—Millhouse v. Krotz, 184 Ill. App. 507.

88. Pa.—Winsor v. Farmers' & Mechanics' Nat. Bank, 81 Pa. 304.
23 C.J. p 532 note 56.

89. Pa.—Jones v. Bomberger, 97 Pa. 432.
23 C.J. p 532 note 57.

90. Ky.—Faught v. Byrne, Hard. 330.

91. Ohio.—Whalon v. Glenn, 1 Ohio Dec., Reprint, 57, 1 West.L.J. 396.
23 C.J. p 532 note 66.

Pleading

(1) Petition to enforce liability on bond given to secure stay pending new trial must show that case was one of which trial court had jurisdiction and in which new trial was proper.—Edgarton v. Gill, 2 Ohio Dec., Reprint, 70, 1 West.L.Month. 316.

(2) Other cases see 23 C.J. p 532 note 66 [c].

Effect of pending appeal

Bond conditioned to pay state court judgment on denial of motion for new trial is enforceable in action in federal court, notwithstanding appeal was pending and appellate court had stayed proceedings.—Merchants' Nat. Bank of Lowell v. Leland, C.C.N.Y., 17 F.Cas.No.9,452, 38 How.Pr. 31.

92. W.Va.—White v. Sydenstricker, 6 W.Va. 46.
23 C.J. p 533 note 67.

93. Pa.—Jones v. Raiguel, 97 Pa. 437.

94. Pa.—Shaw v. McClellan, 1 Pa.L.J.R. 384, 2 Pa.L.J. 387.
23 C.J. p 533 note 69.

95. Neb.—State v. Fleming, 32 N.W. 73, 21 Neb. 321.
23 C.J. p 533 note 71.

96. Tenn.—Apperson v. Smith, 5 Sneed 372.
23 C.J. p 531 note 51.

97. Ind.—Eberwine v. State, 79 Ind. 266.
23 C.J. p 533 note 72.

98. Ind.—Vincennes Nat. Bank v. Cockrum, 80 Ind. 355.

made of the principal's death.[99] Scire facias may issue to obtain such an execution.[1]

§ 141. —— Effect of Stay

A stay of execution usually operates on all subsequent proceedings within the scope of the stay order; an execution cannot issue pending the stay. The authorities differ as to the right of defendant to dispose of his property pending the stay, and as to the effect of the stay on the levy or lien of the execution.

A stay usually operates on all subsequent proceedings,[2] within the purpose of the stay order.[3] Thus a sale made after a stay has been effected is void;[4] and a subsequent levy will be vacated on motion.[5] However, the stay does not affect the binding force of the judgment itself,[6] and it does not discharge the obligation.[7]

Other holdings with respect to the effect of a stay are that if the stay does not bind plaintiff, it does not bind the officer,[8] and a stay by order of court prevents the execution from becoming dormant.[9] Removal of the case to the supreme court does not affect the stay.[10]

The granting of a debt moratorium does not nullify a writ of fieri facias but merely suspends it during the moratorium period, which time is not to be computed in determining the expiration date of the writ.[11]

Disposal of debtor's property. While some authorities hold that when a stay is granted it is assumed, or an order is implied, that the party granted the stay will do nothing to impair his financial responsibility and the rights of the other party,[12] there is also authority for the view that no such order is implied.[13]

On lien, levy, and priority. It is generally held that the levy and lien of an execution,[14] and the right of the officer to hold possession of personal property levied on,[15] are not affected by an order staying execution. Thus the writ does not lose its priority by a stay.[16]

In some jurisdictions, however, a stay of execution will release a levy theretofore made and free

99. Ark.—Stevenson v. McKissick, 12 Ark 394.
23 C.J. p 533 note 74.

1. Ind.—Smith v. Smith, 8 Blackf. 59.
23 C.J. p 533 note 75.

2. Mont.—Plaisted v. Nowlan, 2 Mont. 359.
23 C.J. p 533 note 77.

Persons protected by stay

(1) Where execution is stayed as to only one defendant it may be enforced against the others.—Merrifield v. Western Cottage Piano & Organ Co., 144 Ill.App. 289.

(2) Where stay is as to principal only, execution may be enforced against surety.—Williams v. Kennedy, 67 S.E. 821, 134 Ga. 339.

(3) However, where stay is entered on judgment against principal and surety it is prima facie stay for all parties.—Stephens v. Taylor, Tenn.Ch.A., 45 S.W. 228.

Executions for debt and costs

Where separate executions for debt and costs are provided for by statute, stay of execution for debt does not stay execution for costs.—Greenwood v. McGilvray, 120 Mass. 516.

3. S.D.—Frederick First Nat. Bank v. McIlvaine, 142 N.W. 468, 32 S.D. 177.
23 C.J. p 533 note 78.

Stay of earlier writ

Stay of earlier writ does not affect levy on another writ which is then in officer's hands.—Miller v. Westerhoff, 14 Pa.Super. 604.

Stay as to particular property

Staying sale of property levied on does not prevent levy on other property.—Southern Bank v. White, 1 Duv., Ky., 290.

4. Tex.—McConnell v. Libecap, Civ. App., 38 S.W.2d 408.
W.Va.—August v. Gilmer, 44 S.E. 143, 53 W.Va. 65.

5. N.J.—Korn v. Coombs, 142 A. 16 6 N.J.Misc. 375.
Quashing or setting aside levy see supra § 109.

Burden of proving that levy was subsequent to stay is on moving party.—Korn v. Coombs, 142 A. 16, 6 N.J.Misc. 375.

6. Ind.—Burton v. Burton, 28 Ind. 342.

7. Tenn.—Davis v. Home Ins. Co., 155 S.W. 131, 127 Tenn. 330, 44 L.R.A.,N.S., 626.

8. Ky.—Hogan v. Hisle, 4 Ky.L. 370.
23 C.J. p 534 note 89.

9. U.S.—In re Bruce, D.C.N.Y., 158 123.

10. Vt.—Perry v. Ward, 20 Vt. 92.

11. La.—Williams v. Bush, App., 184 So. 583.

12. U.S.—Lineker v. Dillon, D.C. Cal., 275 F. 460.
N.Y.—Fass & Wolper v. Burns, 31 N.Y.S.2d 67, 177 Misc. 430—Advance Piece Dye Works v. Zeller, 270 N.Y.S. 487, 150 Misc. 908.
Disposal of assets during stay of execution as contempt see Contempt § 11.

Reason for rule

Stay of execution is granted defendant against whom judgment has been rendered to afford him an opportunity of arranging either to pay judgment or to allow him sufficient time to determine what further proceedings he deems necessary to pursue to protect his rights, and litigant is not justified in making use of stay for purpose of disposing of his property in order to avoid satisfaction of judgment by levy under execution.—Fass & Wolper v. Burns, 31 N.Y.S.2d 67, 177 Misc. 430—Jedelkin v. Long, 278 N.Y.S. 464, 154 Misc. 835.

13. U.S.—Berry v. Midtown Service Corporation, C.C.A.N.Y., 104 F.2d 107, 122 A.L.R. 1341, certiorari granted 60 S.Ct. 114, 308 U.S. 536, 84 L.Ed. 452, certiorari dismissed 60 S.Ct. 297, 308 U.S. 629, 84 L.Ed. 525, criticizing Lineker v. Dillon, D.C.Cal., 275 F. 460.

14. R.I.—Steere v. Stafford, 12 R.I. 131.
23 C.J. p 534 note 93.

Special direction preserving lien

Order staying execution but providing that lien is to remain does not deprive creditor of lien.—Latsha v. Latsha, 23 Pa.Dist. & Co. 224, 40 Dauph.Co. 314—23 C.J. p 534 note 93 [a].

Vacation of levy pending disposition of rule

Levy antedating rule to show cause why judgment should not be vacated will not be set aside pending disposition of rule.—Korn v. Coombs, 142 A. 16, 6 N.J.Misc. 375.

15. N.Y.—Steffin v. Steffin, 4 N.Y. Civ.Proc. 179.

16. Pa.—Reid v. Lindsey, 104 Pa. 156.
23 C.J. p 534 note 95.

the property from any lien acquired thereby,[17] and the officer should restore the property to the owner[18] who may sell it to whom he pleases.[19] Moreover, where the court, on the filing of a stay bond by defendant, orders the return of the property seized, the sheriff is justified in returning the property,[20] even though the filing of the bond would not have authorized such return,[21] or the order directing its return.[22]

In other jurisdictions a stay releases the levy so far as the levy being a satisfaction of the judgment is concerned.[23] According to the practice in some states a supersedeas bond destroys the effect of a levy on personalty, the bond being considered security for the debt;[24] but it is in no sense a merger of the original liability as it existed prior to the levy.[25]

Where the court pursuant to statutory authorization extends the time within which the debtor may pay the debt, a sale of the levied property a reasonable time before the return day of the execution as extended is not invalid;[26] but such sale cannot affect the right of the debtor to satisfy the debt on the return day.[27]

A stay of execution in the entry of the judgment suspends the running of the statute limiting the duration of the judgment lien until the expiration of the stay, even though the stay is longer than the period of limitation.[28] If the stay does not appear on the record, the time runs from the date of the judgment.[29]

Validity of writ issued pending stay. An execution cannot be issued pending a stay of execution,[30] except where otherwise provided by statute, as in case of failure to furnish additional security as required by the court under statutory authority.[31] In some jurisdictions an execution issued within the period of the stay is voidable,[32] while in others it has been held void;[33] but there is a presumption that the writ was not issued while the stay was in effect.[34]

Under proper circumstances exemplary damages may be recovered from plaintiff for the issuance of execution pending the stay;[35] but the recognizance of defendant is not thereby discharged.[36] The fact that a surety gave bond to take advantage of the insolvent laws,[37] or that he died before the end of the stay and defendant did not furnish additional security,[38] is no reason for the issuing of execution before the end of the stay.

§ 142. Quashing Execution

A motion to quash an execution is equivalent to a motion to set aside or recall the writ. Tender of the amount of the judgment is not a condition precedent.

A motion to "quash" an execution has been said to be the same as one to "set aside" or "recall" the writ.[39]

However, quashing the writ of execution is to be distinguished from setting aside or quashing the levy, return, and sale had thereunder,[40] considered respectively supra § 109, infra §§ 325 and 230-242.

Conditions precedent. A judgment debtor is not required to allow his property to be sacrificed under excessive or incorrect execution merely because he cannot tender the amount actually owing on the judgment.[41]

17. N.C.—Hamilton v. Henry, 27 N. C. 218.

18. Va.—Rucker v. Harrison, 6 Munf. 181, 20 Va. 181.

19. N.C.—Hamilton v. Henry, 27 N. C. 218.

20. Cal.—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.

21. Cal.—First Nat. Bank v. McCoy, supra.

Filing during period for objections
Filing of bond to stay execution does not authorize sheriff to release property levied on, unless judgment creditor fails to object to sufficiency of sureties for five days.—First Nat. Bank v. McCoy, supra.

22. Cal.—First Nat. Bank v. McCoy, supra.

Premature order
Order directing sheriff to return property to judgment debtor was premature where it was made before expiration of period during which creditor could object to sureties on bond.—First Nat. Bank v. McCoy, supra.

23. Cal.—Mulford v. Estudillo, 32 Cal. 131.

24. Miss.—Parker v. Dean, 45 Miss. 408.
Tenn.—Fry v. Manlove, 1 Baxt. 256, 25 Am.R. 775.

25. Tenn.—Fry v. Manlove, supra.

26. Pa.—Derr v. New York Joint Stock Land Bank, 6 A.2d 899, 335 Pa. 309.

27. Pa.—Derr v. New York Joint Stock Land Bank, supra.

28. U.S.—Mercantile Trust Co. v. St. Louis & S. F. R. Co., C.C.Ark., 69 F. 193.
23 C.J. p 534 note 8.

29. Pa.—Bombay v. Boyer, 14 Serg. & R. 258, 16 Am.D. 494.

30. Cal.—Holcomb v. Juster, 179 P. 445, 39 Cal.App. 462.
23 C.J. p 534 note 6.

31. Tenn.—Rothchilds v. Forbes, 2 Heisk. 13.
23 C.J. p 534 note 7.

32. Minn.—Wickstrand v. Pure Oil Co., 198 N.W. 811, 159 Minn. 263.
23 C.J. p 534 note 8.

33. Pa.—Milliken v. Brown, 10 Serg. & R. 188.
23 C.J. p 534 note 9.

34. **Stay by agreement**
Miss.—Jones v. Bailey, 6 Miss. 564.

35. Pa.—Milliken v. Brown, 10 Serg. & R. 188.

36. Pa.—Milliken v. Brown, supra.
23 C.J. p 534 note 13.

37. Pa.—Warner v. Bancroft, 2 Miles 95.

38. Pa.—Wriggins v. Stevens, 2 Miles 427.

39. Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.
23 C.J. p 535 note 18.

40. Tex.—Scott v. Allen, 1 Tex. 508.

41. Tex.—Harris v. Ware, Civ.App., 144 S.W.2d 647, 650, citing Corpus Juris.

§ 143. —— Grounds

a. In general
b. Want of authority to issue
c. Attack on judgment
d. Matters of defense to action
e. Discharge or satisfaction of judgment
f. Irregularities in writ generally
g. Variance between judgment and writ
h. Acts of officers

a. In General

Generally a writ of execution will be quashed if it has been improvidently or irregularly issued or if it would be illegal or inequitable to permit its further use.

To justify the quashing of a writ of execution there must, of course, be sufficient ground therefor.[42] As a general proposition, the writ will be quashed or recalled if it would be illegal or inequitable to permit its further use or enforcement,[43] or whenever it is made to appear that it has been improvidently or irregularly issued,[44] or that it is informal or defective in some matter of substance,[44] as, for instance, where it has been issued for or against the wrong party,[45] or against the wrong property,[46] or on a different judgment from the one in which the execution issued.[47] However, mere clerical errors or mistakes which have not resulted, and cannot result, in injury to the party complaining are not sufficient to justify the quashal of the writ, and the court in such instances will either deny the motion or allow an amendment where the writ is readily amendable and leave is asked to amend.[48]

As a general rule the quashal of an execution presupposes the right of the party entitled to the execution to have it again issued.[49]

As discussed infra § 144 a, if the court has improperly made an order directing execution to issue, it will on motion recall the execution, although the order is appealable.

The garnishment of the execution defendant for the judgment debt has been held a sufficient ground.[50]

Violation of agreement as to issuance of execution is a ground for quashing it,[51] but where, after reasonable time, the agreement has not been carried out on the part of defendant, a rule to set aside the writ will be discharged.[52]

Removal of grounds. Where, on the hearing of a motion to quash a voidable execution, it appears that the matter which caused its original issuance to be erroneous or irregular has been removed, the court will deny the motion.[53]

b. Want of Authority to Issue

Want of authority in its issuance is ground for quashing a writ of execution.

As a general rule, the writ may be quashed where it was issued without authority,[54] either stat-

42. Cal.—Demens v. Huene, 265 P. 389, 89 Cal.App. 748—Brown v. Pacific Coast Agency, 200 P. 977, 53 Cal.App. 788.
Ill.—Tracey v. Shanley, 36 N.E.2d 753, 311 Ill.App. 529.
Mo.—Farrell v. Kingshighway Bridge Co., App., 117 S.W.2d 693.
N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.
W.Va.—Arnold v. Given, 5 W.Va. 257.
Discretion of court as factor see infra § 144 h.

Absence of notice of assignment of judgment
Transcript execution in favor of assignee of judgment was not vulnerable to motion to quash on ground that defendant had no notice of assignment, of judgment, where assignment was theretofore attached to justice docket and original transcript containing assignment filed for record.—Weaver v. Mitchell, Mo. App., 107 S.W.2d 945.

Motive for execution is no ground for vacating.
Ill.—Kane County Bank & Trust Co. v. Winterhalter, 3 N.E.2d 894, 286 Ill.App. 621.
Pa.—Stoffiett v. Kress, 21 A.2d 31, 342 Pa. 332.

Other action pending
In action on note, mere fact that plaintiff had another pending action predicated on contract constituting part consideration for note was not sufficient ground to recall execution issued on judgment for defendants on their cross petition for damages because of defects in plaintiff's construction of building under such contract.—Rodberg v. Eversole, Ohio App., 35 N.E.2d 851.

43. Ill.—Sandburg v. Papineau, 81 Ill. 446—Commercial Nat. Bank v. Stoddard, 70 Ill.App. 79.

44. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Me.—Bean v. Ingraham, 153 A. 294, 130 Me. 47.
Mo.—Weniger v. Weniger, App., 32 S.W.2d 773, 774, citing **Corpus Juris.**
23 C.J. p 535 note 28.

45. Ky.—Sayer v. Samuel, 5 Ky.Op. 796.

46. Pa.—Commonwealth v. Lacy, 15 Pa.Dist. 199.

47. Ky.—Sayer v. Samuel, 5 Ky Op. 796.

48. Ill.—Perkins v. Webb, 67 Ill. App. 474, affirmed 48 N.E. 322, 169 Ill. 86.
23 C.J. p 535 note 34.

49. Ky.—Sayer v. Samuel, 5 Ky.Op. 796.

50. Pa.—Ulrich v. Hower, 27 A. 243, 156 Pa. 414.
As ground for:
Injunction see Garnishment § 190, also 28 C.J. p 267 notes 94, 95, p 268 note 4 [c]—23 C.J. p 561 note 22, p 562 note 25.
Stay see supra § 139.

51. N.Y.—Jackson v. Davis, 18 Johns. 7.
N.C.—Wood v. Bagley, 34 N.C. 83—Cody v. Quinn, 28 N.C. 191, 44 Am. D. 75.
23 C.J. p 536 note 40.

52. Pa.—Carrick v. Dougherty, 1 Phila. 399.

53. Ariz.—Mosher v. Ganz, 25 P.2d 555, 42 Ariz. 314—Douglass v. Neel, 247 P. 132, 30 Ariz. 375.

54. Mo.—Weniger v. Weniger, App.,

utory or decretal,[55] as where it is issued by a person who has no authority to issue it,[56] or where there is no order, decree, or judgment as a basis therefor,[57] or, as is discussed infra in subdivision c of this section, where the order, decree, or judgment is void, or where unauthorized by the judgment,[58] or in case of the failure to file a transcript of the judgment of the justice where execution is issued from a higher court.[59]

That the execution has issued after appeal from the judgment has been duly taken and perfected is ground for quashing the writ.[60] So, where an appeal from the judgment has been taken and an undertaking given for a stay of proceedings, an execution issued upon the judgment may be set aside on motion.[61] However, an order of execution will not be vacated merely because subsequently defendant filed an appeal bond which was approved.[62]

If plaintiff and sheriff have been enjoined from executing the original fieri facias, an alias issued after the injunction will be quashed.[63] So an execution bearing teste after the death of plaintiff[64] or defendant,[65] where unauthorized, see supra § 65, will be set aside, as will an execution irregularly issued after the lapse of a year and a day without proceeding by scire facias to revive it, or where the time allowed for its issuance by statute has elapsed, and it has been issued in contravention of statute without any motion or other proceeding to revive the judgment.[66] Where, however, the writ has been issued under circumstances such that plaintiff would have been entitled to leave of the court to issue it if he had made a formal application, the court may in its discretion refuse to set aside the execution.[67]

It is not a ground for quashal that a defendant corporation is in process of voluntary dissolution, no permanent receiver having been appointed, since the creditor is entitled to any benefits derived from an execution up to the time of the appointment of a permanent receiver.[68]

Premature issuance of writ. It has frequently been held to be a ground for quashing the writ that it was issued prematurely or before the performance of acts required to be done before its issuance;[69] but an execution which has been prematurely issued will not be quashed on motion where it appears that nothing has been done except what, at the time of making the objection to the writ, is authorized.[70]

c. Attack on Judgment

Mere errors or irregularities in the judgment or the proceedings leading up thereto do not ordinarily constitute a ground for quashing the execution on motion. The writ may be thus quashed if the judgment has been rendered without jurisdiction or is otherwise null and void.

32 S.W.2d 773, 774, citing **Corpus Juris.**

Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.

23 C.J. p 536 note 43.

Authority revoked

Cal.—Creditor's Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

Issuance without leave of court

It is ground for quashing the writ that it was irregularly issued without leave of court, where leave is required.

Va.—Shackelford v. Apperson, 6 Gratt. 451, 47 Va. 451.

W.Va.—State v. Brookover, 18 S.E. 476, 38 W.Va. 141.

55. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37.

56. Mo.—State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, App., 110 S.W.2d 865, followed in State ex rel Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, App., 110 S.W.2d 868 (first case), State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, App., 110 S.W.2d 868, (second case), State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, App., 110 S.W. 2d 869, and State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S. W.2d 870—Weniger v. Weniger, App., 32 S.W.2d 773.

23 C.J. p 536 note 44.

57. Mo.—Weniger v. Weniger, App., 32 S.W.2d 773, 774, citing **Corpus Juris.**

23 C.J. p 536 note 45.

58. Mass.—City of Boston v. Santouosso, 31 N.E. 572, 308 Mass. 202.

Mo.—Weniger v. Weniger, App., 32 S.W.2d 773.

23 C.J. p 536 note 47.

59. W.Va.—Sterringer v. Mackie, 49 S.E. 942, 57 W.Va. 63.

60. Tex.—Inman v. Texas Land & Mortgage Co., Civ.App., 74 S.W.2d 124.

61. Or.—Bentley v. Jones, 8 Or. 47.

62. Mich.—Castor v. Allegan Cir. Judge, 20 N.W. 60, 54 Mich. 318.

23 C.J. p 535 note 36.

63. La.—Byrne v. Mithoff, 24 La. Ann. 297.

23 C.J. p 536 note 49.

64. Ala.—Moore v. Bell, 13 Ala. 469.

Md.—Trail v. Snouffer, 6 Md. 308.

23 C.J. p 536 note 50.

65. Miss.—Harrington v. O'Reilly, 17 Miss. 216, 48 Am.D. 704.

23 C.J. p 536 note 51, p 385 note 78.

The fact that one of defendants died is not sufficient ground to set aside the execution at the instance of defendant.—Lucas v. Johnson, 6 How.Pr., N.Y., 121.

66. W.Va.—State v. Brookover, 18 S.E. 476, 38 W.Va. 141.

23 C.J. p 536 note 53.

67. N.Y.—Frean v. Garrett, 24 Hun 161.

23 C.J. p 536 note 54.

68. N.Y.—Fox v. Union Turnp. Co., 75 N.Y.S. 464, 37 Misc. 308.

69. Mo.—Weniger v. Weniger, App., 32 S.W.2d 773.

23 C.J. p 537 note 56.

70. Vt.—Hapgood v. Goddard, 26 Vt. 401.

23 C.J. p 537 note 57.

Amendment of return on prior execution

Although better practice might dictate that sheriff's erroneous return on writ of fieri facias be corrected before another writ is issued, where new writ was issued and it was established contradictorily with debtor that creditor was entitled to it, issuance of new writ is not so irregular as to require that it be quashed.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.

Mere errors or irregularities in the judgment or the proceedings leading up thereto and which may and should be availed of on appeal or writ of error do not ordinarily constitute grounds for quashing the execution on motion.[71] The jurisdiction not being questioned, and the judgment not having been reversed, vacated, or set aside, such a motion would constitute a collateral attack on it.[72] It is, however, ground for quashing the writ that the judgment on which it was issued was rendered without jurisdiction or is otherwise absolutely null and void, the defendant in such case not being confined to a bill in equity for relief against the judgment.[73]

Applying these rules, it is held that the rendition of a judgment for a greater amount than that to which plaintiff was entitled would not be a ground for quashing the execution.[74] So an objection that the declaration, petition, or complaint did not state a cause of action,[75] or an objection that there has been a mistake as to the parties,[76] or that the verdict is not responsive to the issue,[77] or that the judgment was not authorized by the verdict[78] cannot be made on a motion to quash.

Judgment transcribed from justice of the peace. Errors and irregularities in a justice's court which are not jurisdictional in their nature cannot be made a ground for a motion to quash an execution issued on the transcript of a judgment out of the court of record where the transcript was filed.[79] However, it is good ground for quashal that the proceeding before the justice was a nullity on account of lack of jurisdiction,[80] or that a condition precedent to the filing of the transcript in the court of record had not been fulfilled.[81]

d. Matters of Defense to Action

Matters of defense available at time of the trial of the action do not constitute grounds for quashing the execution.

An execution will not be vacated on account of any defense which could have been made at the time of the trial.[82] This includes a plea of discharge in bankruptcy[83] or of a discharge as an

71. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Miss.—Jackson v. Redding, 138 So. 295, 296, 162 Miss. 323, citing **Corpus Juris**, and suggestion of error overruled 139 So. 317, 162 Miss. 323.
Mo.—Hoffman v. Hogan, 152 S.W.2d 1046—Butler Bros. v. Cantwell, App., 287 S.W. 794.
Wyo.—Lawer Auto Supply Co. v. Teton Auto Co., 284 P. 1001, 1003, 41 Wyo. 263, 67 A.L.R. 1492, citing **Corpus Juris.**
23 C.J. p 537 note 58.

Want of, or defect in, service of summons

(1) Insufficiency of service of the summons is no ground to quash execution where defendant knew of action at time of judgment and made no defense.—Looney v. West Virginia Hardwood Co., 168 S.E. 138, 113 W.Va. 385.

(2) Want of service is no ground for quashing execution where the judgment was valid on its face, and it did not appear that defendant had any valid defense thereto.—Flowers v. U. S. Fidelity & Guaranty Co., 117 S.W. 547, 89 Ark. 506.

(3) Where a justice of the peace appoints a private person as special deputy for the service of summons, return of such person is not conclusive, but is merely prima facie evidence of fact of service, and is open to attack by motion to quash execution, after transcript has been filed in circuit court and execution issued thereon.—Jones v. Overall, 13 S.W.2d 581, 223 Mo.App. 266.

Judgment not appealed

Setting aside execution issued on judgment from which no valid appeal was taken was held erroneous.—Betts v. Young Men's Christian Ass'n, 88 Pa.Super. 568.

Indirect attack on verdict

Court cannot at subsequent term set aside judgment for error of law or indirectly mold verdict by setting aside execution.—Betts v. Young Men's Christian Ass'n, supra.

72. Cal.—Adams v. Bell, 27 P.2d 757, 219 Cal. 503, citing **Corpus Juris.**
Mo.—Hammett v. Hatton, 176 S.W. 1078, 189 Mo.App. 567.
Wyo.—Lawer Auto Supply Co. v. Teton Auto Co., 284 P. 1001, 1003, 41 Wyo. 263, 67 A.L.R. 1492, citing **Corpus Juris.**
34 C.J. p 524 note 84.

73. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Miss.—Jackson v. Redding, 138 So. 295, 162 Miss. 323, suggestion of error overruled 139 So. 317, 162 Miss. 323.
Mo.—State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106—Dewey v. Union Electric Light & Power Co., App., 83 S.W.2d 203— Weniger v. Weniger, App., 32 S.W.2d 773—Butler Bros. v. Cantwell, App., 287 S.W. 794.
23 C.J. p 537 note 60.

Judgment obtained by fraud

Ga.—Kelsey v. Wyley, 10 Ga. 371.

74. Tenn.—Dorman v. Benham Furniture Co., 52 S.W. 38, 102 Tenn. 303.
23 C.J. p 538 note 61.

75. Cal.—Edwards v. Hellings, 37 P. 218, 103 Cal. 204.
23 C.J. p 538 note 62.

76. Ala.—Shorter v. Mims, 18 Ala. 655.
Md.—Jones v. George, 30 A. 635, 80 Md. 294.
Mo.—Henry v. Gibson, 55 Mo. 570.

77. Mo.—Hodgson v. Banking House, 9 Mo.App. 573.

78. Mo.—Hodgson v. Banking House, supra.

79. Mo.—Grissom v. Allen, 10 Mo. 303.
23 C.J. p 538 note 66.

80. W.Va.—Rousey v. Stilwagon, 74 S.E. 732, 70 W.Va. 570, Ann.Cas. 1914A 1084.
23 C.J. p 538 note 67.

Defect in service of summons as ground, see supra note 71.

81. Mo.—Johnson v. Latta, 84 Mo. 139.
23 C.J. p 538 note 68.

82. Mo.—Scientific American Club v. Horchitz, 151 S.W. 475, 168 Mo.App. 35.
Pa.—Kennett Square Nat. Bank v. Pierson, 2 Chest.Co. 320.

Defense to action not considered

Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

83. Ala.—Ewing v. Peck, 17 Ala. 339.
23 C.J. p 538 note 70.

insolvent.[84] However, as discussed infra subdivision e of this section, if the discharge is not obtained until subsequent to the entry of judgment, a motion to quash is proper.

e. Discharge or Satisfaction of Judgment

The discharge or satisfaction of the judgment is generally ground for quashing the writ.

It is ground for quashing an execution that before it was issued the judgment which is relied on as authority for its issuance had been paid or otherwise satisfied.[85] So payment or satisfaction after the issuance of the writ is a ground for its quashal.[86]

A mere tender of payment, however, will not authorize the court to quash the execution, unless the money is paid into court or the tender is otherwise made good;[87] nor will an attachment of money of defendant in the hands of a third person, where nothing is realized thereon,[88] or a deposit of money with the sheriff conditioned to abide the outcome of an action by the debtor against the execution plaintiff[89] furnish any ground to set aside the execution; and where an officer, without authority, receives depreciated currency in payment of the execution, the court will refuse to quash second writ.[90]

Part payment. Where the judgment has been paid or satisfied in part, it is proper to quash or supersede the writ except as to the amount remaining due,[91] but the quashal of the writ in its entirety is not authorized.[92]

Discharge. A discharge of the judgment or judgment debtor as by a discharge in bankruptcy constitutes ground for quashing the execution.[93]

f. Irregularities in Writ Generally

Defects or irregularities in the writ of execution rendering it void are grounds for quashing the writ, as are irregularities rendering the writ voidable if not subject to amendment.

Errors or defects in a writ of execution which render it void are available as grounds for quashing or setting aside the writ.[94] So omissions or irregularities which merely render the writ voidable also constitute grounds for quashing the writ,[95]

84. N.J.—Linn v. Hamilton, 34 N.J. Law 305.

85. Cal.—Reily v. Young, 68 P.2d 1015, 21 Cal.App.2d 181.
Mo.—State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, App., 110 S.W.2d 865, followed in State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, App., 110 S.W.2d 868, first case, State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, App., 110 S.W.2d 868, second case, State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, App., 110 S.W.2d 869 and State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, App., 110 S.W.2d 870—Weniger v. Weniger, App., 32 S.W.2d 773.
Okl.—Richardson v. Marrs, 110 P.2d 606.
23 C.J. p 540 note 8.

Assignment of judgment
On motion by motor carrier to quash execution issued on judgment against carrier, which shipper had assigned to carrier's insurer "for value received," the inference arose that judgment was paid in money and hence trial court did not err in sustaining motion to quash on ground, as contended by insurer, that motion pleaded a payment of the judgment and that there was no proof of payment.—Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

Satisfaction by surety
Pa.—Grant v. Grant, 20 Erie Co. 244.

86. Mo.—State ex rel. Lane v. Montgomery, 17 S.W.2d 586, 223 Mo. App. 492.
23 C.J. p 540 note 9.

87. Va.—Shumaker v. Nichols, 6 Gratt. 592, 47 Va. 592.

Joint judgment
When two persons own a judgment in equal shares and one has been paid in full for his one-half interest and claims nothing further, and execution is issued for more than one-half of the judgment, and judgment debtors tender full one-half of judgment which other judgment creditor is entitled to collect with proper interest and costs, it is proper to recall execution.—Richardson v. Marrs, Okl., 110 P.2d 606.

88. Pa.—Grove v. Nes, 11 York Leg. Rec. 9.

89. La.—Richardson v. Gurney, 8 La. 255.

90. U.S.—Griffin v. Thompson, Miss., 2 How. 244, 11 L.Ed. 253.

91. Ill.—Sandburg v. Papineau, 81 Ill. 446.
23 C.J. p 540 note 14.

92. Miss.—Morris v. Lake, 17 Miss. 521, 48 Am.D. 724.
W.Va.—Williamson v. Ong, 1 W.Va. 84.
23 C.J. p 540 note 15.

Satisfaction as to one of judgment debtors
Where judgment creditor and assignee of judgment filed satisfactions thereof as to only one of two judgment debtors, in consideration of such debtor's payment of sum less than full amount of judgment, superior court erred in granting other debtor's motion to recall writ of execution levied on her realty and satisfy judgment as against her.—Bank of America Nat. Trust & Savings Ass'n v. Duer, Cal.App., 117 P.2d 405.

93. Cal.—Van Denburgh v. Goodfellow, App., 112 P.2d 949.
23 C.J. p 538 notes 73½, 75.
Motion to quash as proper remedy on discharge of judgment is considered infra § 144.

94. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37.

95. Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.
Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.
23 C.J. p 539 note 96.

Erroneous directions as to sale
Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.
Correctness must be challenged, or the writ will be assumed correct.—Buchholtz v. Buchholtz, 132 S.W.2d 208, 210, 175 Tenn. 87, citing **Corpus Juris.**

Unjustified proviso
A rule to set aside a writ of fieri facias under the deficiency judgment act of July 2, 1937, 21 P.S. § 821a et seq. wherein the release of personal liability contained a proviso that the release was to be null and void should the act be declared unconstitutional, was made absolute and the writ was quashed. There is nothing in the act to justify such a safeguard to the execution plain-

unless it is subject to amendment, as discussed supra § 82. Thus an unauthorized indorsement on an execution,[96] or the fact that it lacks a seal,[97] has been held not a ground for a motion to quash; but an execution issued with interest from the time of the judgment at a rate in excess of the statutory rate has been held subject to be set aside,[98] as has a writ not subscribed by the party issuing it or by his attorney, as required by statute.[99]

For a consideration of the form and sufficiency of the writ of execution see supra §§ 69–84.

Irregularities in direction for return. Unless no direction for the return of the writ is required[1] the writ may be quashed for irregularities in the direction for its return,[2] as where it has been made returnable prematurely,[3] or where, in violation of statute, a term intervenes between its teste and the return day.[4]

The fact that the execution runs against exempt property is not ground for quashing the writ, where the levy is limited to property not exempt.[5] However it has been held proper to quash an execution when the property levied on was considered not subject to the lien of the execution.[6]

g. Variance between Judgment and Writ

An essential and prejudicial variance between the writ of execution and the judgment is a ground for quashing the writ; but this is not so ordinarily as to a variance which constitutes a mere irregularity which may and should be corrected by amendment.

The writ may be quashed where there is an essential and prejudicial variance between the judgment and the writ.[7] In accord with the general rule, however, where there is only a clerical mistake, the execution will not be quashed, but amended so as to conform to the judgment,[8] unless the variance is so great that the execution cannot be identified with the judgment, in which case it must be quashed.[9]

A variance between a judgment and the recital of it in the execution, which variance is immaterial and does not work any prejudice to the debtor, is not a ground for quashing the writ.[10]

Variance as to amount. It has frequently been held to be ground for quashing the writ that it does not correspond to the judgment in amount, especially if the amount named in the execution is excessive.[11] So it has been held that a writ may be set aside when issued for an amount less than the amount of the judgment.[12] More frequently, however, it is held that instead of setting aside the writ in its entirety, where it is more or less than the amount of the judgment, the court should quash it in part only and direct an amendment.[13] So the fact that costs are erroneously taxed,[14] or the failure of the writ to include deductions of credits,[15] is held not to be ground for quashing the writ, although there are decisions to the contrary on the latter proposition.[16]

A variance as to the time from which interest is to be calculated has been held ground for quashing.[17]

tiff.—Commonwealth Trust Co. v. Kane, 86 Pittsb.Leg.J., Pa., 31, 51 York Leg.Rec. 164.

96. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.
23 C.J. p 539 note 98.

97. Ark.—Hall v. Lackmond, 6 S.W. 510, 50 Ark. 113, 7 Am.S.R. 84.
23 C.J. p 539 note 99.

98. Ill.—Mason v. Eakle, 1 Ill. 83.
23 C.J. p 540 note 1.

99. Wis.—Bonesteel v. Orvis, 23 Wis. 506, 99 Am.D. 201.

1. N.Y.—Carpenter v. Simmons, 24 N.Y.Super. 360, 28 How.Pr. 12.

2. Ala.—Powell v. Summers, 17 Ala. 647.
23 C.J. p 540 note 4.

3. Ala.—Brown v. Hurt, 31 Ala. 146.
23 C.J. p 540 note 5.

4. N.Y.—Gibbons v. Larcom, 3 Wend. 303.
23 C.J. p 540 note 6.

5. Puerto Rico.—Ramos v. People, 7 Puerto Rico Fed. 106.

6. Ill.—Easter v. Holcomb, 221 Ill. App. 485.

7. Miss.—Jackson v. Redding, 138 So. 295, 162 Miss. 323, suggestion of error overruled 139 So. 317, 162 Miss. 323.
Okl.—Jarecki Mfg. Co. v. Fleming, 265 P. 628, 130 Okl. 95, 57 A.L.R. 802.
Pa.—Geraci v. Lerner, 18 Pa.Dist. & Co. 112.
23 C.J. p 538 note 79.

8. U.S.—Murphy v. Lewis, Super. Ark., 17 F.Cas.No.9,950a, Hempst. 17.
Ga.—Moughon v. Brown, 68 Ga. 207.
Ky.—Horn v. Minor, 7 Ky.Op. 166.

9. N.J.—Dawes v. Dawes, Sup., 43 A. 984.
23 C.J. p 539 note 81.

10. Ky.—Graham v. Price, 3 A.K. Marsh. 522, 13 Am.D. 199.

11. Miss.—Jackson v. Redding, 138 So. 295, 296, 162 Miss. 323, citing **Corpus Juris**, and suggestion of error overruled 139 So. 317, 162 Miss. 323.
Okl.—White v. Oklahoma Savings & Loan Ass'n, 253 P. 977, 124 Okl. 24.
Tex.—Harris v. Ware, Civ.App., 144 S.W.2d 647, 650, citing **Corpus Juris.**
23 C.J. p 539 note 83.

12. Ky.—Browns v. Julian, 5 J.J. Marsh. 312.
23 C.J. p 539 note 84.

13. Pa.—Geraci v. Lerner, 18 Pa. Dist. & Co. 112, 113, quoting **Corpus Juris.**
23 C.J. p 539 note 86.
Request for amendment of execution necessary.—Jackson v. Redding, 138 So. 295, 162 Miss. 323, suggestion of error overruled 139 So. 317, 162 Miss. 323.

14. W.Va.—Deveny v. Cook, 73 S.E. 921, 70 W.Va. 282.
23 C.J. p 539 note 87—15 C.J. p 186 note 9.

15. Kan.—St. Louis & S. F. R. Co. v. Rierson, 16 P. 443, 38 Kan. 359.
23 C.J. p 539 note 88.

16. Ky.—Davie v. Long, 4 Bush 574.
23 C.J. p 539 note 89.

17. Ky.—Noe v. Conyers, 6 J.J. Marsh. 514.

Variance as to parties. Where the execution fails to follow the recitals and description of the parties in the judgment it may be a ground for quashing;[18] so a variance as to the parties, so great as to preclude identification of the judgment, is fatal on motion to quash.[19] However, so long as the writ can be identified with the judgment, a misrecital of the parties is not ground for quashing.[20] Thus, if the writ is issued against one only of a plurality of defendants, the error may be corrected by amendment.[21] It has also been held that where an execution is issued against proper persons, and also against others, the additional names may be stricken out instead of quashing the writ,[22] although in some decisions this has been held ground for quashing the writ.[23] Where a judgment is rendered in favor of a guardian, execution issuing in the name of the infant does not follow the judgment and may be quashed.[24]

As to return. Designation in a writ of execution for possession of property of a particular place for delivery of the property, although the judgment contained no such designation, has been considered surplusage and no ground for quashing the execution, if the place of delivery was a reasonable and proper one.[25]

h. Acts of Officers

The acts of the officer to whom the writ is directed do not ordinarily constitute a ground for quashing the writ.

While it has been said that the proceedings of the officer to whom the execution is directed are a proper subject of inquiry by the court on a motion to quash or recall the execution, see infra § 144, it is usually held that the court has no power to vacate an execution for acts of omission or commission on the part of such officer after the writ had duly come to his hands.[26] Hence a levy on property not subject to the execution is not ground for quashing the writ,[27] as where exempt land has been levied on or is about to be levied on,[28] or where the property levied on is claimed by a third person.[29]

It is not a ground for quashal that there are other lands in the hands of purchasers from defendant after the judgment and liable to contribute to the payment of the debt.[30]

§ 144. —— Jurisdiction and Proceedings

a. Nature and form of remedy
b. Jurisdiction and venue
c. Who may move; parties
d. Time
e. Notice of motion
f. Form and sufficiency of application
g. Evidence
h. Trial or hearing; matters considered
i. Order
j. Costs

a. Nature and Form of Remedy

A motion in the original cause is the usual and proper procedure to follow to obtain a recall or quashal of a writ of execution.

The recall, setting aside, or quashing of a writ of execution is ordinarily and properly accomplished by a motion in the original cause,[31] and

18. Ky.—Commonwealth v. Fisher, 2 J.J.Marsh. 137.
19. Pa.—Geraci v. Lerner, 18 Pa.Dist. & Co. 112, 113, quoting **Corpus Juris.**
23 C.J. p 539 note 91.
20. Pa.—Geraci v. Lerner, supra, quoting **Corpus Juris.**
23 C.J. p 539 note 92.
21. U.S.—In re St. Albans First Nat. Bank, C.C.Vt., 49 F. 120.
Pa.—Shaffer v. Watkins, 7 Watts & S. 219—Geraci v. Lerner, 18 Pa. Dist. & Co. 112.
However it has been held that the writ must be quashed.—Boyken v. State, 3 Yerg., Tenn., 426.
22. Ala.—Goodman v. Walker, 38 Ala. 142.
23 C.J. p 539 note 94.
23. Ky.—Debard v. Crow, 7 J.J. Marsh. 7, 22 Am.D. 113—Morrel v. Barner, 4 Litt. 10—Bridges v. Caldwell, 2 A.K.Marsh. 195.
24. Ala.—Smith v. Knight, 11 Ala. 618.
N.C.—Newsom v. Newsom, 26 N.C. 381.
25. Okl.—Jarecki Mfg. Co. v. Fleming, 265 P. 628, 130 Okl. 95, 57 A. L.R. 802.
26. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 424, 110 Cal.App. 385, citing **Corpus Juris.**
23 C.J. p 540 note 16.
27. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Pa.—Tradesmen's Bldg. & Loan Ass'n v. Maher, 9 Pa.Super. 340, 43 Wkly. N.C. 422.
Defendant obtaining nonsuit
That sheriff, directed to satisfy judgment from judgment debtors' property, levied on property of defendant obtaining nonsuit did not justify court in quashing execution.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
28. Cal.—Associated Oil Co. v. Mullin, supra.
23 C.J. p 541 note 18.
29. Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.
23 C.J. p 541 note 19.
30. U.S.—Wilson v. Hurst, Pa., 30 F.Cas.No.17,808, Pet.C.C. 140.
23 C.J. p 541 note 20.
31. Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.
Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.
23 C.J. p 542 note 42.
Action treated as motion
An independent action to restrain levy and sale under execution issued on judgment against plaintiff and to have judgment canceled of record should have been treated as a motion in the original cause, to the end that the issues raised by the pleadings could be determined and the rights of the parties adjudicated.—Abernethy Land & Finance Co.

not by independent action,[32] whether the application is by a party to the action or by a third person prejudicially affected.[33] However, such a motion has been said to be a new and original proceeding.[34] A motion to quash is a proper remedy, as well when the process is absolutely void,[35] as when it is merely voidable.[36]

A motion is unnecessary after notice that execution has been withdrawn,[37] or after the writ has been returned and becomes functus officio.[38]

The fact that the order granting the writ is appealable does not restrict an attack on it to an appeal or writ of review.[39]

Matters arising after judgment and before issuance of writ. Where the matter of discharge of a judgment debtor is subsequent to the judgment, motion to quash is the proper remedy,[40] a remedy which very early in this country was substituted for audita querela,[41] which remedy is discussed in the title Audita Querela. Thus where a discharge in bankruptcy or insolvency is not obtained until subsequent to the entry of judgment, a motion to quash is proper.[42] In such case, however, it has been held that the court will give plaintiff an opportunity to show that the discharge was inoperative as against his debt,[43] and when necessary will direct an issue to try the facts, as discussed infra subdivision h of this section. In some cases the proper mode of testing the validity of such a discharge is said to be by suit on the judgment, and the question cannot be raised in opposition to a motion to quash.[44]

b. Jurisdiction and Venue

The court out of which execution issued ordinarily has jurisdiction of the motion and is the court to which the motion should ordinarily be addressed.

As long as the court retains jurisdiction of the main case,[45] its jurisdiction to entertain a motion to quash an execution issuing therefrom is unquestioned, and has been maintained in numerous cases, since every court has the inherent power, for the advancement of justice, to correct the errors of ministerial officers and to control its own process.[46] This power of the court is essential to the admin-

v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

Bill in equity for injunction not entitled in the original action will not be regarded as a motion in the cause.—Foard v. Alexander, 64 N.C. 69.

Petition for supersedeas

(1) The petition for a supersedeas may be considered a motion to quash.—Rice v. Dillahunty, 20 Ala. 399—23 C.J. p 544 note 77.

(2) This is proper even where it has improvidently issued.—Oswitchee Co. v. Hope, 5 Ala. 629.

Under statute

Order for issuance of execution granted ex parte after lapse of statutory period after entry of judgment is subject to review by motion to quash.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

In Tennessee certiorari is the proper process by which to bring the execution into court for the purpose of enabling defendant to make the motion to quash.—Barnes v. Robinson, 4 Yerg. 186.

Action to annul judgment is no bar to motion to quash the execution.—Piernas v. Milliet, 10 La.Ann. 286.

32. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

33. Utah.—State v. Salt Lake County Third Judicial Dist. Ct., 108 P. 1121, 37 Utah 418.

34. Cal.—Buell v. Buell, 28 P. 443, 92 Cal. 393.

35. Ala.—Atkins v. Siddons, 66 Ala. 453.
Cal.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 193, 219 Cal. 737, citing **Corpus Juris.**

36. Ala.—Atkins v. Siddons, 66 Ala. 453.
Me.—Bean v. Ingraham, 153 A. 294, 130 Me. 47.
Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

37. N.Y.—Brown v. Ferguson, 2 How.Pr. 178.

38. Wis.—Chouteau v. Hooe, 1 Pinn. 663.

39. Cal.—Buell v. Buell, 28 P. 443, 92 Cal. 393—Dorland v. Hanson, 22 P. 552, 81 Cal. 202, 15 Am.S.R. 44.

40. Ill.—Butterfield v. Dickman, 200 Ill.App. 627.
Tenn.—Barnes v. Robinson, 4 Yerg. 153.
23 C.J. p 538 note 73½.
Discharge of judgment as affecting right to execution see supra § 11.
Matters arising after judgment as affecting issuance of execution see supra § 11.

41. N.J.—Linn v. Hamilton, 34 N.J. Law 305.
Va.—Smock v. Dade, 5 Rand. 639, 26 Va. 639, 16 Am.D. 780.

42. Ala.—Ewing v. Peck, 17 Ala. 339.
23 C.J. p 538 note 75.

43. Ala.—Mabry v. Herndon, 8 Ala. 848, 849.
N.J.—Linn v. Hamilton, 34 N.J.Law 305.

44. N.Y.—Stuart v. Salhinger, 14 Abb.Pr. 291.
23 C.J. p 538 note 78.

45. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 122 Okl. 128—Sautbine v. U. S. Cities Corporation, 243 P. 499, 114 Okl. 110.

46. Cal.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737.
Ill.—Sandburg v. Papineau, 81 Ill. 446.
Mass.—City of Boston v. Santosuosso, 31 N.E.2d 572, 308 Mass. 202.
N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.
Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 122 Okl. 128—Sautbine v. U. S. Cities Corporation, 243 P. 499, 114 Okl. 110.
23 C.J. p 535 note 20.

Writ of assistance in nature of execution
N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.

Relief in equity

(1) A court of equity, authorized to issue execution on its decrees, has the same jurisdiction over the process as a court of law.—Snavely v. Harkrader, 30 Gratt. 487, 71 Va. 487—23 C.J. p 535 note 25.

(2) However, it is not necessary or proper to go into equity if the va-

istration of justice, and is coequal with the common-law courts, and does not depend on statutory enactments.[47]

No attempted levy or other effort on the part of the officer to execute the writ is essential to the court's jurisdiction.[48]

Particular court. One court having no power to quash the executions of another court, see Courts § 496 b (3), a motion to quash should be addressed to the court out of which the writ issued.[49] However, the motion need not be made to the same department of the court which granted the order authorizing the issuance of the writ.[50]

If an execution is issued to a county other than the one in which the judgment was rendered, the motion must be made in the county where the judgment was rendered.[51]

In some instances an appellate court may grant relief.[52]

In vacation. Application to quash may be made to a judge in vacation under the practice in some jurisdictions.[53] Under some statutes, an application to the judge at chambers or in vacation may be made to stay proceedings until he can hear the motion to quash in term time.[54]

On transcript of inferior court judgment. As discussed supra § 61, the judgment of an inferior court such as that of a justice of the peace transcribed to a court of record is usually deemed the judgment of the court where the transcript is filed to be enforced, and such court of record having power to quash executions issued after it acquired jurisdiction in cases where it is just and proper to do so.[55] It has been held, however, that the court of record is not absolutely bound by the transcript, but has the right to examine the proceedings to see whether the justice acted within his jurisdiction.[56]

In some states, where a transcript of a judgment of a lower court is filed in a higher court and execution issued there, the lower court is the only one which can quash the execution,[57] while in others the motion to recall may be made, in some cases, before the clerk of the court.[58]

c. Who May Move; Parties

Except as statutes provide otherwise, ordinarily none but parties to the principal action who are liable to be injured may move to quash the execution. The court may act on its own motion in the case of a void writ.

Unless and except as changed by statute,[59] or unless the judgment or writ be absolutely void on the face thereof,[60] it is the general rule that none but parties to the original or principal action who are liable to be injured can move the court to recall or quash an execution.[61] This rule is, how-

cation of the execution of a law court is all the relief asked.
Ind.—Murphy v. Blair, 12 Ind. 184.
Vt.—Shedd v. Brattleboro Bank, 32 Vt. 709.
23 C.J. p 541 note 24.

47. Cal.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 193, 219 Cal. 737, citing **Corpus Juris.**
Ill.—Sandburg v. Papineau, 81 Ill. 446.

48. Vt.—Hovey v. Niles, 26 Vt. 541.

49. Tex.—Inman v. Texas Land & Mortgage Co., Civ.App., 74 S.W.2d 124.
23 C.J. p 541 note 21.

50. Cal.—Dorland v. Hanson, 22 P. 552, 81 Cal. 202, 15 Am.S.R. 44.

51. Ky.—Gorman v. Glenn, 78 S.W. 873, 25 Ky.L. 1755.
23 C.J. p 541 note 25.

52. Ky.—Gano v. Davis, Ky.Dec. 207.
23 C.J. p 541 note 26.

53. La.—Folger v. Roos, 40 La.Ann. 602, 4 So. 457.
Mo.—Ex parte James, 59 Mo. 280.

54. Mo.—O'Neal v. Milburn, App., 112 S.W.2d 124.
23 C.J. p 541 note 27 [a].

55. N.Y.—Ex parte Thompson, 5 Cow, 31.
Or.—Gobbi v. Refrano, 52 P. 761, 33 Or. 26.
23 C.J. p 541 note 29.

56. N.Y.—Rowe v. Peckham, 51 N.Y. S. 889, 30 App.Div. 173.

57. Mont.—Pierson v. Daly, 143 P. 957, 49 Mont. 478.
23 C.J. p 541 note 31.

58. N.C.—Williams v. Dunn, 74 S.E. 99, 158 N.C. 399.
At any time before sale a motion to recall it may be made before the clerk of the superior court, but after return the motion should be made before the judge in term.—Williams v. Dunn, supra.
23 C.J. p 541 note 32.

59. **Statute construed**
Mo.—Nelson v. Nelson, 258 S.W. 1007, 302 Mo. 440.

60. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

61. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 424, 110 Cal.App. 385, citing **Corpus Juris.**
23 C.J. p 541 note 33.
Stranger to judgment has no standing.
Mo.—Nelson v. Nelson, 258 S.W. 1007, 302 Mo. 440.
Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.
Privy of party not stranger
(1) Holders of notes secured by deed of trust, who were strangers to suit to recover taxes on the land but were privies of former holder of the notes, which was a party to such suit, were not "strangers" to the judgment rendered in such suit, and hence they could maintain motion to quash execution obtained by assignee of the tax judgment.—State ex rel. Gilkison v. Andrews, Mo.App., 133 S.W.2d 695.
(2) A purchaser of the property under a former execution against the same defendant stands in privity of estate with the administrator of defendant and when the property is levied on is entitled to move that the execution be quashed.—Harrington v. O'Reilly, 17 Miss. 216, 48 Am. D. 704.
Representative of representative
Where an administrator who is sued dies before levy of execution, his administrator is not a party to the record nor in privity to the subject matter of the execution and should not be heard by motion to quash it.—Henderson v. Winchester, 31 Miss. 290.

ever, subject to the exception that third persons, who will necessarily be prejudiced by the enforcement of the writ, such as subsequent purchasers, lien holders, and execution or judgment creditors, may move.[62] However, an execution prematurely issued will not necessarily be set aside at the instance of creditors,[63] and even the debtor cannot complain, in some cases, where in no way injured.[64]

Where statute permits actions to be continued by original parties after transfer of their interest, a motion to quash may be made by one made a party to the original action as having an interest in the property involved, but subsequently parting with such interest by transfer to another,[65] particularly where the transferor in such case agreed to save the transferee harmless against the claim of the execution creditor.[66]

A judgment debtor who is entitled to have an execution quashed because the judgment has been satisfied by a codebtor, although he has neglected to move to quash, may nevertheless on the same ground supersede and quash an execution issued on a judgment against a garnishee under that execution.[67]

A bankrupt[68] or a corporation in voluntary dissolution[69] may sometimes move to quash a writ against his or its property.

Court's own motion. In the case of a writ utterly void as lacking in statutory or decretal authority, it is the duty of the court of its own motion to order quashal, regardless of how or by whom the essential invalidity of the writ is brought to the court's attention.[70] In such case an order to quash should issue regardless of whether or not the moving parties are qualified to urge the motion.[71]

Necessary and proper parties. While it has been held that where plaintiff in the writ does not make the motion, he is a necessary party defendant,[72] it has also been held that a party to the original action parting with his interest is not a necessary party to the proceedings,[73] as where the original judgment creditor assigned his interest without recourse,[74] although his presence as a party is not harmful.[75]

It seems that the officer to whom the execution is directed is not a necessary party defendant to the motion, although it is proper to make him a party.[76] It has been held, however, that the clerk of the court issuing the execution is not a proper party.[77]

The attorney for the judgment creditor is not a party to the action and is improperly made the party to whom the rule or motion is directed.[78]

d. Time

A motion to quash a writ of execution must ordinarily be made before the return thereon which renders it functus officio. Unreasonable delay, however, may bar the motion in the discretion of the court unless the writ is absolutely void and no harm results from the delay.

Although, as a general rule, courts have power to quash executions at any time,[79] before return

Claimant

Levy of fieri facias was held not dismissible on motion of claimant to property levied on, to whom no injury was shown, because of inclusion in judgment on which fieri facias was issued of finding of attorney's fees which was void because of noncompliance with statute.—Boone v. Rabun, 188 S.E. 524, 183 Ga. 318.

62. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37—Associated Oil Co. v. Mullin, 294 P. 421, 424, 110 Cal.App. 385, citing **Corpus Juris.**
Mo.—State ex rel. Gilkison v. Andrews, App., 133 S.W.2d 695.
23 C.J. p 542 note 34.

Execution on judgment in rem

Where judgment recovered in proceedings against movant's father was in rem and affected land, of which movant was record owner, movant could properly file motion to quash execution, irrespective of whether movant acquired the land by purchase or inheritance from movant's father.—State ex rel. Ross, and to Use of Drainage Dist. No. 8 v. Robertson, 137 S.W.2d 492, 234 Mo. App. 813.

63. N.Y.—Healy v. Preston, 14 How. Pr. 20.
Pa.—Hanika's Estate, 22 A. 90, 138 Pa. 330, 21 Am.S.R. 907.

64. Ala.—Howard v. Deens, 44 So. 550, 151 Ala. 608.
23 C.J. p 542 note 36.

65. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37.

66. Cal.—Montgomery v. Meyerstein, supra.

67. Tenn.—Baldwin v. Merrill, 8 Humphr. 132.
23 C.J. p 542 note 37.

68. Eng.—Pinches v. Harvey, 1 Q.B. 868, 41 E.C.L. 815, 113 Reprint 1364.
23 C.J. p 542 note 38.

69. N.Y.—Fox v. Union Turnp. Co., 75 N.Y.S. 464, 37 Misc 308.
23 C.J. p 542 note 39.

70. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

71. Cal.—Montgomery v. Meyerstein, 231 P. 730, 195 Cal. 37.

72. Va.—Wallop v. Scarburgh, 5 Gratt. 1, 46 Va. 1.

73. Mo.—State ex rel. Gilkison v. Andrews, App., 133 S.W.2d 695.

74. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

75. Mo.—State ex rel. Gilkison v. Andrews, App., 133 S.W.2d 695.

76. Cal.—Buffandeau v. Edmondson, 17 Cal. 436, 79 Am.D. 139.
23 C.J. p 542 note 41.

77. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

78. La.—G. A. Wiegand & Co. v. Villemeur, 136 So. 105, 17 La.App. 457.

79. Va.—Lowenbach v. Kelley, 69 S.E. 352, 111 Va. 439.
23 C.J. p 542 note 47.

Statutory execution, issued without court order, may be quashed at any time, term of issuance of judgment being immaterial.—Leath v. Lister, 173 So. 59, 233 Ala. 595.

term,[80] unless otherwise provided by statute,[81] any considerable or unreasonable delay in moving to quash for an irregularity will be treated as a waiver of the irregularity and an irrevocable renunciation of the right to quash the writ,[82] especially where a sale has been made under the execution and to set aside the writ would affect prejudicially innocent purchasers who have paid their money,[83] the reasonableness of the delay resting primarily in the sound discretion of the court.[84] Thus an execution on a dormant judgment cannot be set aside after property has been sold under it.[85] If, however, the writ is void, and no prejudice has resulted from the delay, laches is no defense.[86]

A motion to quash on the ground that the writ was issued more than a year and a day after rendition of judgment is not barred by the lapse of the time for bringing writs of error[87] or certiorari,[88] or for interfering with or changing judgments.[89]

Prior to levy. It has been held that a motion to quash an execution made before a levy thereunder was made or intended is premature.[90]

After return. As discussed infra § 327, an execution which has performed its office and been returned into court becomes functus officio, and a motion to quash made thereafter will not lie.[91] The proper remedy at this stage is to set aside the levy and return, and the sale, if any has been had,[92] for, as discussed supra § 142, there is a distinction between quashing the writ and setting aside the levy, return and sale had thereunder. Nevertheless, it has been held, at least in terms, that an execution may be quashed after its return,[93] especially if it still has virtue as the basis for further proceedings.[94]

Continuance of a motion timely made to a time when the motion would not otherwise lie does not deprive the court of its jurisdiction in the matter.[95]

e. Notice of Motion

A timely notice of motion setting forth the grounds of irregularity must ordinarily be served on the parties to be affected.

Notice of motion to quash a writ of execution must ordinarily be given to the parties to be affected, statutes sometimes so requiring.[96] Want of notice, however, is waived by an appearance and resistance of the motion.[97]

The grounds of irregularity relied on must be stated in the notice,[98] and it is not sufficient if stated in the moving affidavits alone.[99]

It is no objection that the notice of motion is signed by attorneys other than those who appeared in the original action and that there has been no order of substitution, since the motion to recall an execution is an original proceeding.[1]

On whom served. The notice of motion must be served on the real parties in interest, not on

Wage execution
A motion to vacate a wage execution is always proper provided legal grounds exist therefor and the motion need not be filed within the time required for the filing of an application for new trial.—De Voe & Co. v. Currie, 22 A.2d 575, 19 N.J. Misc. 634.

80. **After sale**
Court has jurisdiction of motion to quash execution filed after execution sale, but before return term.—Butler Bros. v. Cantwell, Mo.App., 287 S.W. 794.

81. Ala.—Henderson v. Henderson, 66 Ala. 556.

82. Mo.—Hathaway v. St. Louis, K. & S. R. Co., 68 S.W. 109, 94 Mo. App. 343.
23 C.J. p 542 note 49.

83. N.C.—Murphrey v. Wood, 47 N. C. 63.
23 C.J. p 543 note 50.

84. Ky.—Bristow v. Payton, 2 T.B. Mon. 91, 15 Am.D. 134.

85. N.C.—Murphrey v. Wood, 47 N. C. 63.

86. Va.—Lowenbach v. Kelley, 69 S. E. 352, 111 Va. 439.

87. Ky.—Miller v. Anderson, Litt. Sel.Cas. 169.
23 C.J. p 543 note 53.

88. Tenn.—Baldwin v. Merrill, 8 Humphr. 132.

89. Ala.—Harrison v. Hamner, 12 So. 917, 99 Ala. 603.
23 C.J. p 543 note 55.

90. Ky.—Lincoln v. Security Bank, 287 S.W. 532, 216 Ky. 297.

91. Miss.—Wanzer v. Barker, 5 Miss. 363.
23 C.J. p 543 note 57.

92. Tex.—Scott v. Allen, 1 Tex. 508.
Quashing or vacating levy see supra § 109.
Quashing return see infra § 325.
Setting aside sale see infra §§ 230–242.

93. Iowa.—Gohring v. Koonce, 278 N.W. 283, 285, 224 Iowa 1186, citing **Corpus Juris**.
23 C.J. p 543 note 61.

Irregular execution
Where only two of eight beneficiaries under will of deceased judgment creditor were represented in garnishment proceeding, motion to quash the original execution under which garnishment was had, filed before special execution was issued under garnishment judgment, was timely as between the parties, and hence order quashing the execution was valid in absence of appeal therefrom.—Gohring v. Koonce, 278 N.W. 283, 224 Iowa 1186.

94. Ala.—Isaacs v. Jefferson County Judge, 5 Stew. & P. 402.
23 C.J. p 543 note 62.

95. Mo.—Butler Bros. v. Cantwell, App., 287 S.W. 794.

96. N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.
23 C.J. p 543 note 63.

Mortgagee
Tex.—Inman v. Texas Land & Mortgage Co., Civ.App., 74 S.W.2d 124.

97. W.Va.—Sterringer v. Mackie, 49 S.E. 942, 57 W.Va. 63.

98. Cal.—Buell v. Buell, 28 P. 443, 92 Cal. 393.
23 C.J. p 543 note 65.

99. N.Y.—Montrait v. Hutchins, 49 How.Pr. 105.

1. Cal.—Buell v. Buell, 28 P. 443, 92 Cal. 393.
23 C.J. p 544 note 67.

their attorneys.[3] The sheriff, not being a necessary party, as has been noted in subdivision c of this section, need not be served.[8]

f. Form and Sufficiency of Application

The motion to quash the writ, even though in form of a complaint or petition, must be entitled in the original cause and set forth the grounds relied on for relief.

The motion to quash the writ may be made in the shape of a complaint or petition,[4] but it should be entitled in the original cause.[5]

It must set forth the grounds relied on for the quashal of the writ,[6] although not necessarily with the strictness of a bill in equity,[7] and should allege facts as distinguished from conclusions of law.[8]

In some jurisdictions a copy or an accurate description of the execution must accompany the petition or application,[9] but in others this is unnecessary.[10]

In some jurisdictions the motion may be made ore tenus in term time without any preceding petition for a supersedeas in the same court.[11] Although, as discussed supra subdivision a of this section, a petition for supersedeas may be treated as a motion to quash, plaintiff is not confined to the grounds therein disclosed.[12]

Verification. An ordinary motion to quash made in open court in term time need not be verified.[13] Statutes, however, sometimes require a petition to a judge in vacation or during the recess of the court to be verified.[14] Any requirement of verification is waived by a failure to object before the final hearing.[15]

g. Evidence

The burden is on the moving party to establish the grounds for quashing the writ, competent, relevant, and material evidence, both oral and written, being admissible. In some jurisdictions the evidence is required to be in affidavit form.

Ordinarily a motion to quash an execution is based on matters appearing on the face of the proceedings.[16] However, a motion to quash an execution resting on facts outside the record in the case must be established by evidence on the hearing of the motion.[17]

In some jurisdictions the proper practice is for the court to require evidence in support to be in the form of affidavits, and it is proper to refuse to permit oral testimony.[18] Generally, however, oral evidence is admissible,[19] provided it is relevant and material,[20] as is competent relevant and material documentary evidence.[21]

Affidavits not controverted are assumed to be true,[22] but moving affidavits may be aided by oral evidence.[23] The unsupported affidavit of defendant is sometimes insufficient.[24]

The burden of proof is on defendant who moves to quash an execution on the ground that the judgment has been paid,[25] and the presumptions are in favor of the regularity of the execution.[26]

Where a levy has been made and thereafter a

2. S.C.—Duncan v. Brown, 15 S.C. 414.
23 C.J. p 544 note 68.

3. Cal.—Buffandeau v. Edmondson, 17 Cal. 436, 79 Am.D. 139.

4. N.C.—Foard v. Alexander, 64 N. C. 69.
Prayer for injunction unnecessary. —Foard v. Alexander, supra.

5. N.C.—Foard v. Alexander, supra.
23 C.J. p 544 note 72.
Bill in equity for an injunction not entitled in the original action as a motion in the cause see supra subdivision a this section.

6. Okl.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.
23 C.J. p 544 note 73.
Vacation of judgment
Where, after rendition of default judgment, execution was issued thereon, defendant's verified motion seeking to recall execution on ground that court had vacated judgment and granted defendant leave to file answer, in view of silence of record as to such order of court, and fact that judge giving such judgment had no recollection of order, is insufficient to recall execution and order of sale thereon.—McAdams v. C. D. Shamburger Lumber Co., supra.

7. Ala.—Thompson v. Lassiter, 6 So. 33, 86 Ala. 536.
23 C.J. p 544 note 74.

8. Ala.—Wilson v. Auld, 7 Ala. 302.

9. Ala.—Summerhill v. Trapp, 48 Ala. 363.
23 C.J. p 544 note 81.

10. Ind.—Fuller v. Indianapolis & C. R. Co., 18 Ind. 91.
23 C.J. p 544 note 82.

11. Ala.—Phillips v. Brazeal, 14 Ala. 746.

12. Ala.—Rountree v. Weaver, 8 Ala. 314.

13. Mo.—Henring v. Williams, 65 Mo. 446—State v. Howe Scale Co., 218 S.W. 359, 203 Mo.App. 350.

14. Mo.—Henring v. Williams, 65 Mo. 446—State v. Howe Scale Co., 218 S.W. 359, 203 Mo.App. 350.

15. Ark.—Hargis v. Jordan, 45 S.W. 2d 525, 184 Ark. 1136.

16. Md.—Frantz v. Lane, 182 A. 337, 169 Md. 703.

17. Mo.—State Bank of Sugar Creek v. Anderson, 36 S.W.2d 138, 225 Mo.App. 118.
23 C.J. p 544 note 90.

18. Md.—Union Nat. Bank v. Shriver, 13 A. 332, 68 Md. 435.

19. W.Va.—Cockerell v. Nichols, 8 W.Va. 159.
23 C.J. p 545 note 92.

20. Mo.—Cope v. Snider, 74 S.W. 10, 99 Mo.App. 496—Ryan v. Bradbury, 89 Mo.App. 665.
23 C.J. p 545 note 93.

21. Mo.—Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

22. Or.—Bentley v. Jones, 8 Or. 47.

23. Mo.—Harbert v. Durden, 92 S. W. 746, 116 Mo.App. 512.
23 C.J. p 545 note 95.

24. Ill.—Keefer v. Mason, 36 Ill. 406.
23 C.J. p 545 note 96.

25. Mo.—Sturdevant Bank v. Peterman, 21 Mo.App. 512.

26. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.
23 C.J. p 545 note 98.

second writ issued, the burden is on the execution creditor to show that the former levy was insufficient.[27]

One moving to quash an execution as issued more than a year after rendition of judgment, without revivor, must show that the judgment was not recorded within a year, which would bring such issuance within the statutory exception.[28]

Where it is shown by defendant that he has paid the judgment to plaintiff's attorney of record, it is then the duty of plaintiff to show a revocation of authority of the attorney to receive the money before it was paid to him and that defendant had notice of the revocation.[29]

The sufficiency of the evidence is governed by the rules applicable in civil cases generally.[30]

h. Trial or Hearing; Matters Considered

A motion to quash a writ of execution is ordinarily determinable by the court in the exercise of a sound discretion, although in particular cases it may and sometimes must direct an issue to the jury. The court usually considers on such motion only such matters as constitute valid grounds for quashing the writ and are properly raised.

Questions of fact arising on motion are tried by the court,[31] the court having the right to consider the motion and decide it in a summary way[32] without the intervention of a jury,[33] unless by consent,[34] and it will sometimes for its own satisfaction direct an issue.[35]

In some jurisdictions a motion to quash the writ raising the question of ownership of the property levied on must be heard on the merits by a jury if either party so demands.[36] Both parties agreeing, however, the motion and such question may be heard by the court summarily.[37]

Discretion of court. The quashal of an execution rests largely in the discretion of the court,[38] which will quash the writ when necessary to prevent injustice,[39] provided the case is plain and the equity of the party asking the interposition of the court is free from doubt or difficulty.[40]

The motion is properly denied where a granting thereof would necessitate the exercise of equitable jurisdiction over the judgment and process of the court,[41] or where the question at issue is involved in a pending action.[42]

Matters considered. As a general rule only such matters as constitute a ground for quashing the writ, see supra § 143, and which are properly raised may be considered by the court,[43] the motion ordinarily challenging the validity of the judgment on the face of the record, the regularity of the issuance of the execution, the sufficiency of its form, and the regularity of the proceedings of the officer.[44] Thus matters rendering enforcement of the judgment inequitable may be considered,[45] and the court may examine previous proceedings subsequent to the judgment to ascertain whether there has been any irregularity in the orders of the court or in the action of the clerk.[46] However, questions which should properly be considered on an appeal can-

27. Ark.—Ford v. Bigger, 97 S.W. 65, 80 Ark. 300.

28. Ala.—State v. Ham, 69 So. 253, 13 Ala.App. 648.

29. W.Va.—Yoakum v. Tilden, 3 W. Va. 167, 100 Am.D. 738.

30. **Evidence held sufficient**
Ark.—Hargis v. Jordan, 45 S.W.2d 525, 184 Ark. 1136.
Cal.—Reily v. Young, 68 P.2d 1015, 21 Cal.App.2d 181.
Md.—Frantz v. Lane, 182 A. 337, 169 Md. 703.
Mo.—Schuchman v. Roberts, 133 S. W.2d 1030, 234 Mo.App. 509.
Neb.—Chitwood Packing Co. v. Warner, 295 N.W. 882, 138 Neb. 800.
Utah.—Lashbrook v. Copenhaver, 259 P. 191, 70 Utah 163.
Evidence held insufficient
Mo.—Castle v. Terry, 134 S.W. 78, 154 Mo.App. 213.
Okl.—McAdams v. C. D. Shamburger Lumber Co, 240 P. 124, 112 Okl. 173.

31. Ark.—Hargis v. Jordan, 45 S.W. 2d 525, 184 Ark. 1136.
Satisfaction or payment of judgment.—Hargis v. Jordan, supra.

32. Md.—Gover v. Barnes, 15 Md. 576, following Lamden v. Bowie, 2 Md. 334.
Pa.—Loomis v. Lane, 29 Pa. 242, 72 Am.D. 625.

33. Ark.—Woolum v. Kelton, 13 S. W. 78, 52 Ark. 445.
Pa.—Loomis v. Lane, 29 Pa. 242, 72 Am.D. 625.

34. Ark.—Woolum v. Kelton, 13 S. W. 78, 52 Ark. 445.

35. Va.—Smock v. Dade, 5 Rand. 639, 26 Va. 639, 16 Am.D. 780.
23 C.J. p 544 note 88.

36. Md.—Frantz v. Lane, 182 A. 337, 169 Md. 703.

37. Md.—Frantz v. Lane, supra.

38. Okl.—Oklahoma Salvage & Supply Co. v. First Nat. Bank, 251 P. 1006, 122 Okl. 128—Sautbine v. U. S. Cities Corporation, 243 P. 499, 114 Okl. 110.
23 C.J. p 545 note 4.

39. U.S.—Boyle v. Zacharie, Md., 6 Pet. 648, 8 L.Ed. 532.
23 C.J. p 545 note 4.
Effect of statute
(1) Under statute giving court discretion to issue execution after lapse of five years from entry of judgment, court has discretion to quash execution issued ex parte after lapse of such period.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.
(2) Such an order for issuance of an execution should not be vacated unless there is adequate ground therefor.—Demens v. Huene, 265 P. 389, 89 Cal.App. 748.

40. N.Y.—Brown v. Ferguson, 2 How.Pr. 178.
23 C.J. p 545 note 4.

41. Colo.—Irwin v. Beggs, 132 P. 385, 24 Colo.App. 158.

42. Tex.—Skinner v. Sullivan, Civ. App., 134 S.W. 426.

43. Tenn.—Going v. Going, 8 Tenn. App. 690.

44. Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.

45. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

46. Ohio.—Buckingham v. Granville Alexandria Soc., 2 Ohio 360.

not be presented on the motion.[47] In such a proceeding, when constituting a collateral attack on the judgment, the court will assume in support of the judgment that all issues necessary thereto were presented and tried without objection.[48] So on a motion to vacate an execution issued ex parte after lapse of the statutory period, defenses to the original action cannot be considered,[49] nor can matters or circumstances leading up to the judgment.[50]

On a motion to quash a second execution, the validity of the first execution will not ordinarily be inquired into,[51] nor will the alleged fraudulent character of a sale under a prior execution.[52]

If the motion is made by the judgment debtor, the court should not be influenced by any considerations as to the rights of other creditors.[53]

Equities will not be adjusted on such a motion.[54]

If the motion is on the ground that the judgment has been released by the creditor, the court will investigate whether the judgment has been assigned, or whether the release was obtained by fraud or misrepresentation.[55]

Property affected. Ownership or title to property will not ordinarily be inquired into or adjudicated on such a motion,[56] nor will the court ordinarily inquire whether the judgment is a lien on the property levied on,[57] or whether such property is subject to execution.[58] In some jurisdictions, however, the question of the ownership of the property levied on has been raised and considered on such motion,[59] such motion being considered the equivalent of a statutory claim, discussed infra §§ 169–195.

i. Order

The order may vacate the writ in part, and is not subject to collateral attack if the court had jurisdiction.

The writ may be vacated in part,[60] but the writ should not be set aside where the only proper relief is the setting aside of the levy in part.[61]

The term "irregular" in an order setting aside a writ for irregularity has been construed to mean "void."[62]

The order cannot be collaterally attacked if the court had jurisdiction.[63]

As res judicata. It has been held that where it is determined on a motion to quash that the execution is valid and binding on defendants, that question and others proper to be litigated at the time are henceforth res judicata.[64] Other cases hold that only the issues litigated on the motion are determined,[65] and that the ruling on a motion to quash is not res judicata on a bill to enjoin a sale under execution.[66] Notwithstanding the foregoing, the granting or refusing of a motion to quash does not necessarily prevent a subsequent renewal of the motion on the same or different grounds where jurisdiction over the subject matter remains in the same tribunal.[67]

If the adjudication quashing an execution has been on an immaterial matter, the order is not res judicata on a subsequent motion for the issuance of

47. Md.—Union Nat. Bank v. Shriver 13 A. 332, 334, 68 Md. 435.
Mo.—Hoffman v. Hogan, 152 S.W.2d 1046.

48. Cal.—Adams v. Bell, 27 P.2d 757, 219 Cal. 503.
Motion as demurrer to writ
Pa.—Geraci v. Lerner, 18 Pa.Dist. & Co. 112.

49. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

50. Cal.—Creditors' Adjustment Co. v. Newman, supra.

51. Va.—Jett v. Walker, 1 Rand. 211, 22 Va. 211.

52. N.Y.—Cairns v. Smith, 8 Johns. 337.

53. Pa.—Roemer v. Denig, 18 Pa. 482.

54. N.Y.—Duryee v. Botsford, 24 Hun 317.
23 C.J. p 545 note 14.
Respective liability of several defendants not inquired into.—Geraci v. Lerner, 18 Pa.Dist. & Co. 112.

55. Kan.—Bogle v. Boom, 13 P. 793, 36 Kan. 512.
23 C.J. p 545 note 15.

56. Mo.—Kelley v. Parman, App., 51 S.W.2d 231.
Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.
23 C.J. p 541 note 19 [a].
Conflicting claims of title to realty will not be determined on motion to recall execution levied on such realty, but parties to dispute will be left to proper action at law to try title.—Lexington Land Co. v. Ambrister, supra.

57. N.Y.—Flagg v. Cooper, 11 N.Y. Civ.Proc. 421.
In Pennsylvania, in a case of an extent, the court will inquire whether the judgment is a lien.—Pray v. Brock, 1 Pa.L.J.R. 354, 2 Pa.L.J. 341.

58. Ky.—Columbia Bldg. Loan & Savings Assoc. v. Gregory, 112 S. W. 608, 129 Ky. 489, 33 Ky.L. 1011.

59. Md.—Frantz v. Lane, 182 A. 337, 169 Md. 703.

60. Tex.—Jackson v. Finlay, Civ. App., 40 S.W. 427, 1032.

61. Pa.—Deardorff v. Pepple, 36 Pa. Super. 224.
23 C.J. p 546 note 18.

62. N.Y.—Woodcock v. Bennet, 1 Cow. 711, 13 Am.D. 568.

63. Pa.—Loomis v. Lane, 29 Pa. 242, 72 Am.D. 625.

64. Ind.—Parker v. Obenchain, 39 N.E. 869, 140 Ind. 211.

65. Ala.—Smith, Stewart Co. v. Dean, 52 So. 335, 166 Ala. 116.

66. Ky.—Schneider v. Artsman, 16 Ky.L. 350.
Okl.—Rader v. Gvozdanovic, 130 P. 159, 35 Okl. 421.

67. Colo.—Rockwell v. Lake County Dist. Ct., 29 P. 454, 17 Colo. 118, 31 Am.S.R. 265.
23 C.J. p 546 note 25.
Established practice
It is established practice to submit a preliminary petition to the court for leave to renew a motion which has been denied, which preliminary petition, however, may be waived by the court in its discretion.—Rockwell v. Lake County Dist.Ct., supra.

an execution.[68] In a proceeding to vacate an execution issued ex parte by the court under statute after lapse of statutory period after entry of judgment, the order of vacation has been held res judicata as to the right to enforce the judgment in a subsequent proceeding to vacate an execution to enforce such judgment based on the same grounds.[69]

j. Costs

Costs are usually discretionary although, as a rule, they are awarded to the successful party on the motion.

As a general rule, costs are allowed to the successful party on the motion,[70] but the allowance of costs is usually in the discretion of the court.[71] Costs to abide the event may be awarded under proper circumstances.[72]

§ 145. —— Effect of Quashing

The quashing of the writ ordinarily vitiates the levy made thereunder but does not affect the validity of the judgment or the right to issue another execution thereon.

It has been held that, when the execution is quashed, all rights or proceedings based thereon fall therewith,[73] as, for example, the levy made pursuant to the execution,[74] and any title to the property vested in the sheriff by the levy,[75] or even the right to enforce the judgment against particular property.[76] However, the quashing or dismissal of the writ does not affect the judgment on which it was issued,[77] and the judgment creditor may obtain the issuance of another execution.[78] Under certain circumstances the quashing of the writ does not vitiate a sale of property made in pursuance of the execution.[79]

A judgment quashing an execution after the supreme court had reversed the trial court's refusal to quash relates back to the original judgment, and its effect, so far as respects the parties to that judgment, is to vacate all process issued for its satisfaction.[80]

The quashing of the execution destroys the lien created by a levy on personal property,[81] but a lien on land acquired by a levy is not destroyed by bonds given in proceedings brought to quash the execution.[82]

If the writ is quashed merely as to the excess in amount, it may be proceeded on for the balance.[83]

A rule to quash the writ does not of itself suspend the execution of the writ.[84]

The quashing of an alias, which issued contrary to a personal agreement between the parties, in favor of other creditors, does not avoid the lien of the first execution, in the absence of any mention of the first execution in the proceedings to quash.[85]

If money has been taken from an agent of the execution debtor, and the writ is subsequently vacated, the debtor can recover such money from the execution creditor.[86]

§ 146. Stay, Quashing, or Withdrawal at Instance of Creditor

An execution creditor may recall the writ at any time prior to the sale unless defendant would be injured thereby.

68. Wyo.—Lawer Auto Supply v. Teton Auto Co., 284 P. 1001, 41 Wyo. 263, 67 A.L.R. 1492.

Condition for issuance

In action to recover possession of autotruck where judgment allowed defendants ten days in which to return truck or, if not so returned, required payment of value thereof, and execution was thereafter quashed on ground that it was in form execution on money judgment only, order quashing execution was not res judicata, since whatever adjudication existed was on an immaterial matter, it being conceded that truck was not returned within ten days.—Lawer Auto Supply v. Teton Auto Co., supra.

69. Cal.—Creditors' Adjustment Co. v. Newman, 197 P. 334, 185 Cal. 509.

70. Ark.—Hall v. Lackmond, 6 S.W. 510, 50 Ark. 113, 7 Am.S.R. 84.
23 C.J. p 546 note 27.

Special proceeding

A motion by judgment debtors to quash execution is a "special proceeding" so that costs thereof must be allowed the prevailing party.—Van Denburgh v. Goodfellow, Cal., 120 P.2d 20, prior opinion, App., 112 P.2d 949.

71. Ark.—Hall v. Lackmond, 6 S.W. 510, 50 Ark. 113, 7 Am.S.R. 84.
23 C.J. p 546 note 28.

72. N.Y.—Brown v. Burdick, 18 Wend. 511.

73. Cal.—Parker v. Howe, 299 P. 553, 114 Cal.App. 166.

74. Cal.—Hulse v. Davis, 253 P. 136, 200 Cal. 316—Wellington v. Sedgwick, 12 Cal. 469.

75. Cal.—Hulse v. Davis, 253 P. 136, 200 Cal. 316—Wellington v. Sedgwick, 12 Cal. 469.

76. Cal.—Parker v. Howe, 299 P. 553, 114 Cal.App. 166.

77. Ala.—Smith, Stewart Co. v. Dean, 52 So. 335, 106 Ala. 116.
Miss.—Vertner v. Martin, 18 Miss. 103.

Effect of quashing levy see supra § 109.

78. Ky.—Lee v. Thompson, 116 S.W. 775, 132 Ky. 608—Davie v. Long, 4 Bush 574.

79. Ky.—Cox v. Nelson, 1 T.B.Mon. 94, 15 Am.D. 89.
Miss.—Van Campen v. Snyder, 4 Miss. 66, 32 Am.D. 311.
23 C.J. p 546 note 33.

80. Ala.—Ewing v. Peck, 26 Ala. 413.

81. Cal.—Wellington v. Sedgwick, 12 Cal. 469.
23 C.J. p 546 note 35.

82. Tenn.—Littleton v. Yost, 8 Lea 267.

83. Tenn.—Littleton v. Yost, supra.

84. La.—Levi v. Converse, 20 La. Ann. 558.

85. Va.—Baer v. Ingram, 37 S.E. 905, 99 Va. 200.

86. N.Y.—Bradley v. Blue Ridge Hosiery Mill, 106 N.Y.S. 1107, 56 Misc. 125.

An execution creditor may recall a writ of execution at any time prior to a sale thereunder,[87] and may issue as many writs as he pleases, and stay them as long as he pleases, so long as there are no intervening writs.[88] However, a party cannot on his own motion quash his execution, if it is regular and if defendant would be injured,[89] some sufficient ground being required to warrant the interposition of the court.[90]

Plaintiff may make the motion where the writ has been irregularly issued without his knowledge or consent.[91] If the writ is issued unadvisedly it may be withdrawn before anything is done on it,[92] and the creditor may stop the sale of property not subject to the execution.[93] However, a defective or irregular writ cannot be withdrawn after a sale.[94]

A verbal order by the creditor to the officer to stay the writ has been held insufficient.[95]

The taking of a note from the judgment debtor, as collateral, on purchasing a judgment after levy, has been held to raise no absolute presumption of an engagement for stay of execution.[96]

Suing out execution on a replevy bond does not estop the creditor from afterward having such bond quashed on motion.[97]

After assignment. A judgment creditor who has assigned his rights to another may not ex parte arrest an execution issued in his name so as to effect the rights of the assignee.[98]

Effect. The right to issue a second writ is not affected by a voluntary stay.[99]

Staying the execution after levy does not discharge the debt.[1]

An agreement between plaintiff and the debtor to suspend a levy is no bar to the enforcement of the execution.[2] An agreement for a stay for the principal of the judgment does not prevent execution issuing in behalf of the court officers for their costs.[3]

If the creditor, on motion, quashes an elegit, he may pursue any remedy which was before open to him.[4]

§ 147. Affidavit of Illegality

Relief against an execution illegally issued may, where the statute provides such remedy, be had by an affidavit of illegality.

87. Okl.—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

Payment of sheriff's poundage unnecessary

It seems that any plaintiff, at any time and for any consideration of property, money, or mercy, may stay an execution without paying the sheriff's poundage under the Act of June 1, 1933, P.L. p 1141, 16 Pub.St. § 2661-a et seq., and he may certainly do so if he is in a position to proceed under and claim the benefits of the Act of April 20, 1846, P.L. p 411, 12 Pub.St. § 2511, because, as lien creditor, he is entitled to receive at least a portion of the proceeds of any sale.—Hornak v. Kennedy, 31 Pa.Dist. & Co. 515.

Return on order of plaintiff

The purpose of the statutory provision that an execution shall be returned on order of plaintiff or his agent is to permit plaintiff, for whose benefit execution was issued, to bring an end to the proceeding on reaching a settlement with judgment debtor, or for any other reason satisfactory to plaintiff.—U. S. Gypsum Co. v. Moore, Ind.App., 36 N.E.2d 951, rehearing denied 37 N.E.2d 682.

88. Pa.—Philip Kling Brewing Co. v. Mosher, 23 Pa.Co. 265.

89. Ill.—Taylor v. Winters, 1 Ill. 130.
23 C.J. p 582 note 87.

90. Pa.—Hunt v. McClure, 2 Yeates 387.
23 C.J. p 582 note 88.

91. W.Va.—Reinhard v. Baker, 13 W.Va. 805.

92. N.Y.—Cairns v. Smith, 8 Johns. 337.
23 C.J. p 582 note 90.

93. Tenn.—State Bank v. Turney, 7 Humphr. 271.

94. N.Y.—Thomas v. Bogert, 33 Hun 11.

95. Ky.—Hogan v. Hisle, 4 Ky.L. 370.

96. Pa.—Spangler v. Sheffer, 69 Pa. 255.

97. Ky.—Skinner v. Robinson, Hard. 4.

98. La.—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.

99. Pa.—Philip Kling Brewing Co. v. Mosher, 23 Pa.Co. 265—Wilkinson v. Hiyer, 22 Pa.Co. 667.

1. Ky.—McGinnis v. Lillard, 4 Bibb 490.

Liability on bond

(1) Judgment enforceable against defendant is enforceable against sureties on bond to stay execution. —Hecker v. Hogan, 265 P. 956, 90 Cal.App. 416.

(2) Substituted plaintiff is entitled to enforce obligation against sureties on bond to stay execution, where undertaking showed obligation inured to benefit of plaintiff, not particular person.—Hecker v. Hogan, supra.

(3) Stay bond surety was released where judgments were released and compromised by contract of judgment creditor bank's receiver with debtor's bankruptcy trustee.—State v. American Bonding & Casualty Co., 238 N.W. 709, 213 Iowa 211.

(4) Even though the sureties on a stay bond become principals as to the creditors under Crawford & M. Dig. § 4306, giving such bond the force of a judgment on which execution may issue, so that the creditor may issue execution against them alone, the creditors cannot, after having levied execution on property of the principal, release such property over the protest of the sureties without thereby releasing the liability of the sureties, at least to the extent of the value of the property.—White, Wilson, Drew Co. v. Ahrens, 247 S.W. 73, 156 Ark. 588.

2. Conn.—Derby Bank v. Landon, 2 Conn. 417.

3. Tex.—Clegg v. De Bruhl, 45 Tex. 141.

4. Va.—Claiborne v. Gross, 7 Leigh 331, 34 Va. 331.
23 C.J. p 583 note 1.

Relief against execution by way of affidavit of illegality is a purely statutory procedure.[5] It is a substitute for the writ of audita querela.[6]

The remedy is limited to the relief expressly conferred by the statute, strictly construed.[7] Under the statutes it applies only to executions and judgments issuing out of and returnable to the court,[8] and has no application to executions issued ex parte by a ministerial officer,[9] except as specially authorized.[10]

Who may be affiant. The remedy by affidavit of illegality lies only in favor of a defendant in execution[11] against whom the execution is proceeding; a codefendant whose goods have not been seized cannot make affidavit.[12] One not party to the action who claims title to the property levied on cannot proceed by affidavit of illegality.[13] The affidavit may be filed by an attorney in fact,[14] without exhibiting or attaching his written authority.[15]

Necessity of levy. An affidavit of illegality will not lie unless there has been a levy.[16] A fortiori, an affidavit of illegality is not proper where an execution has not been issued.[17] The proceeding will not lie where defendant's funds have been impounded by garnishment.[18] When the statute so provides, the giving of a bond is a prerequisite to obtaining a stay.[19] Under the particular statute, no bond may be required in the case of an affidavit interposed to a levy on realty,[20] and in the case of personalty it may be necessary only where possession of the property is sought to be retained by the debtor.[21] In other words, the debtor may replevy the property levied on by giving bond and security for its forthcoming, but is not bound to do so.[22] The bond must conform to the statute.[23] The obligation of the bond is to redeliver the property at the time and place of sale,[24] and the burden is on the surety to show why the identical property levied on is not delivered.[25] If the bond sued on is not a statutory bond but is a good common-law obligation to produce the property and to pay the eventual condemnation money, and defendant fails to produce the property on demand, the measure of damages is not the value of the property but is the amount of the judgment rendered in the illegality case.[26]

Return of affidavit and bond. When an affidavit of illegality is filed on the levy of an execution, it is the duty of the levying officer to return the execution, affidavit and bond to the next term of the court from which the execution issued.[27]

An affidavit of illegality may be withdrawn by the party interposing it, subject to the right of

5. Fla.—Mitchell v. Duncan, 7 Fla. 13.
Ga.—Fidelity & Casualty Co. of New York v. Whitaker, 158 S.E. 416, 172 Ga. 663—Norris v. Carter & Nelson, 124 S.E. 144, 32 Ga.App. 607—Cook & Kimbrel v. City of Colquitt, 116 S.E. 37, 29 Ga.App. 494.
23 C.J. p 546 note 42, p 547 notes 43, 49.

6. Ga.—Manning v. Phillips, 65 Ga. 548.
Audita querela generally see Audita Querela.

7. Ga.—River v. Cox, 125 S.E. 729, 33 Ga.App. 189—McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82.

8. Ga.—Fidelity & Casualty Co. of New York v. Whitaker, 158 S.E. 416, 172 Ga. 663—Manning v. Phillips, 65 Ga. 548—Cook & Kimbrell v. City of Colquitt, 116 S.E. 37, 29 Ga.App. 494.

9. Ga.—Fidelity & Casualty Co. of New York v. Whitaker, 158 S.E. 416, 172 Ga. 663—Cook & Kimbrel v. City of Colquitt, 116 S.E. 37, 29 Ga.App. 494.
23 C.J. p 547 note 47.

10. Ga.—Lee County v. Walden, 68 Ga. 664.
23 C.J. p 547 note 53.

11. Ga.—Leitch v. City of Dublin, 128 S.E. 889, 160 Ga. 691—Carmichael v. Mobley, 178 S.E. 418, 50 Ga. App. 574—Ragan v. Smith, 174 S.E. 180, 49 Ga.App. 118.
23 C.J. p 549 note 94.

Execution against stockholder
Where by statutory provision an execution against a corporation is made to operate against a stockholder, an affidavit of illegality lies in his favor.—Force v. Dahlonega Tanning & Lumber Mfg. Co., 22 Ga. 86.

12. Ga.—Van Dyke v. Besser, 34 Ga. 268.

13. Ga.—Leitch v. City of Dublin, 128 S.E. 889, 160 Ga. 691—Ragan v. Smith, 174 S.E. 180, 49 Ga.App. 118.

14. Ga.—Clinch v. Ferril, 48 Ga. 365.

15. Ga.—Lewis v. Beck & Gregg Hardware Co., 73 S.E. 739, 137 Ga. 515.

16. Ga.—Ben Hill County v. Massachusetts Bonding & Ins. Co., 87 S.E. 15, 144 Ga. 325—Norris v. Carter & Nelson, 124 S.E. 144, 32 Ga. App. 607.
23 C.J. p 549 note 95.

17. Ga.—Robbins v. Kinman, 169 S. E. 304, 177 Ga. 46.

18. Ga.—Norris v. Carter & Nelson, 124 S.E. 144, 32 Ga.App. 607.

19. Fla.—Griffin v. Lacourse, 12 So. 665, 31 Fla. 125.

20. Ga.—Murphey v. Smith, 85 S.E. 791, 16 Ga.App. 472.

Defect in bond
The giving of a forthcoming bond not being essential to the validity of an affidavit of illegality filed to a common-law execution, an affidavit to what appears to be such an execution which sets up a legal defense against the levy proceeding was improperly dismissed on the grounds that the forthcoming bond, which was actually given to the sheriff accompanying the affidavit, did not contain a proper surety, in view of Civ. Code 1910, §§ 5305 and 6040.—Humphreys v. Avery & Co., 113 S.E. 49, 28 Ga.App. 787.

21. Ga.—Crayton v. Fox, 28 S.E. 510, 100 Ga. 781.
23 C.J. p 551 note 44.

22. Ga.—Wynn v. Knight, 53 Ga. 568.
23 C.J. p 552 note 45.

23. Ga.—Brantley v. Baker, 75 Ga. 676.

24. Ga.—Kaminsky v. Horrigan, 58 S.E. 497, 2 Ga.App. 332.

25. Ga.—Kaminsky v. Horrigan, supra.

26. Ga.—Gregory v. Hendricks, 77 S. E. 585, 12 Ga.App. 486.

27. Ga.—Padgett v. Waters, 61 So. 293, 4 Ga.App. 306.
23 C.J. p 552 notes 50, 51.

plaintiff to proceed as in claim cases where the claims are withdrawn.[28]

§ 148. —— Grounds

Defendant may proceed against an execution by affidavit of illegality only on such grounds as are authorized by statute. Under the statute an affidavit of illegality may be the proper procedure where the judgment is void or has become unenforceable.

An affidavit of illegality will lie only on the grounds provided for by the statute.[29] Under the statute, defendant may proceed by affidavit of illegality where an execution against property "shall issue illegally, or shall be proceeding illegally."[30] Unless the judgment is void, an affidavit of illegality is proper only if some fact or situation has arisen subsequent to the judgment which warrants a stay of the execution proceedings.[31] Thus an affidavit of illegality is proper where the judgment has become unenforceable,[32] as where the judgment has been satisfied or settled,[33] or has become dormant through failure to enforce it for a specified period of time.[34] It is not ground for an affidavit of illegality that the property levied on does not belong to defendant,[35] that the execution was issued in the interim between the time when the remittitur of the appellate court was filed in the lower court and the time when it became the judgment of the lower court,[36] or that a levy on property of a codefendant was dismissed by plaintiff without an order of court and the execution afterward levied on property of affiant,[37] although it has been held that an execution founded on an award against administrators in their representative capacity, but levied on the individual property of the administrator is ground.[38] It is not a ground that the execution debtor has an unliquidated demand against the execution creditor,[39] even though plaintiff is a nonresident and has no property in the state,[40] but it is ground that affiant has recovered a judgment against plaintiff in an amount as great as the sum for which plaintiff is levying execution.[41] Such an affidavit is not a remedy for an excessive levy,[42] refusal of the officer to levy on the property pointed out by defendant,[43] failure to give defendant an opportunity to point out property,[44] failure to give notice of levy to a tenant in possession,[45] disobedience of instructions to make the amount out of the principal first,[46] or for errors in the advertisement of property levied on.[47]

28. Ga.—Thomas v. Parker, 69 Ga. 283.

29. Ga.—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220.

Absence of affidavit as to taxes

Where a statute requires the judgment creditor to file an affidavit of payment of taxes, the want of such an affidavit is a good ground of illegality.—Wilson v. Ansley, 47 Ga. 278—Brown v. Gill, 44 Ga. 613—Connally v. Peck, 44 Ga. 430—23 C.J. p 548 note 73.

Discharge in bankruptcy

Defendant's discharge in bankruptcy is no ground of illegality in levy of execution on judgment for plaintiff in trover.—Barnes v. Moseley, 154 S.E. 388, 41 Ga.App. 713.

Pendency of motion to arrest judgment is not ground for affidavit of illegality.—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340.

30. Ga.—Savannah v. Wade, 94 S.E. 1042, 21 Ga.App. 784.
23 C.J. p 547 note 51.

31. Ga.—McConnell v. Mason, 116 S. E. 658, 30 Ga.App. 82.

32. Ga.—Roberts v. Seanor, 166 S. E. 375, 46 Ga.App. 5.

33. Ga.—Felker v. Johnson, 7 S.E. 2d 668, 189 Ga. 797—Taylor v. Jordan, 195 S.E. 215, 57 Ga.App. 285.
23 C.J. p 547 note 54.

Resort to equity is not necessary in order to establish illegality of an execution because of payment thereof.—Taylor v. Jordan, supra.

Transfer of judgment

When one of two joint defendants in a judgment pays off the judgment with funds belonging to both and takes a transfer of the judgment and the execution to himself and afterward transfers it to another, who levies on the property of codefendant, the latter by an affidavit of illegality may set up the payment of the judgment and execution.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86.

Partial payment

The amount admitted to be due must be paid in order to stay the execution.—Equitable Mortg. Co. v. Montfort, 49 S.E. 715, 121 Ga. 696—Levadas v. Beach, 46 S.E. 864, 119 Ga. 613—23 C.J. p 547 note 55.

34. Ga.—Bryant v. Freeman, 16 S.E. 2d 113, 65 Ga.App. 590.

35. Ga.—Tanner v. Wilson, 187 S.E. 625, 183 Ga. 53.
23 C.J. p 547 note 56.

Preëxisting security deed to third party

Defendant in fieri facias cannot by affidavit of illegality set up preëxisting security deed in favor of third person to defeat levy.—Lewis v. Moultrie Banking Co., 136 S.E. 554, 36 Ga.App. 347.

36. Ga.—Anderson v. First Nat. Bank, 103 S.E. 806, 25 Ga.App. 610.

37. Ga.—Steele v. Atlanta Land Impr. Co., 16 S.E. 257, 91 Ga. 64.

38. Ga.—Horne v. Spivey, 44 Ga. 616.
Contra Padgett v. Waters, 61 S.E. 293, 4 Ga.App. 306.

39. Ga.—Leavel v. Frey, 66 S.E. 916, 133 Ga. 723—Miles v. Swift, 142 S.E. 472, 38 Ga.App. 42.

40. Ga.—Allen v. Duval Motors Co., 136 S E. 479, 36 Ga.App. 336.

41. Ga.—Taylor v. Jordan, 195 S.E. 215, 57 Ga.App. 285.

42. Ga.—Rogers v. Felker, 77 Ga. 46.
23 C.J. p 547 note 60.

43. Ga.—Douglass v. Singer Mfg. Co., 27 S.E. 664, 102 Ga. 560.
23 C.J. p 547 note 61.

44. Ga.—Mulling v. Bank of Cobbtown, 135 S.E. 222, 36 Ga.App. 55—Banks v. Giles, 92 S.E. 651, 20 Ga.App. 97.

45. Ga.—Banks v. Giles, 92 S.E. 651, 20 Ga.App. 97.

Statute directory

The statutory provision for giving notice of the levy to the tenant in possession is directory.—Mulling v. Bank of Cobbtown, 135 S.E. 222, 36 Ga.App. 55.

46. Ga.—Keaton v. Cox, 26 Ga. 162.

47. Ga.—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340—Mulling v. Bank of Cobbtown, 135 S.E. 222, 36 Ga.App. 55.
23 C.J. p 547 note 65.

A levy on corporate stock without the statutory notice to defendant is insufficient and may be arrested on affidavit of illegality.[48]

Variance. To be good as a ground of illegality, the variance between a fieri facias and the judgment on which it is founded must be material.[49]

Breach of agreement. Defendant may resist an execution by successfully showing that he had a good defense to the suit, which he was induced to abandon because of an agreement with plaintiff, made on sufficient consideration, that the judgment to be rendered was to be discharged against him on his doing certain acts subsequent to the judgment, and that he had performed such acts conformably with his agreement.[50] Where land is conveyed to one who agrees in consideration therefor to pay off a judgment, instead of which he takes an assignment of the judgment and proceeds to enforce the same by levy and sale, the proper remedy is by an affidavit of illegality and not by injunction.[51] So where the creditor agrees with a surety, on a sufficient consideration, to look to the principal alone, but issues an execution against the surety, it is ground for illegality.[52] An unauthorized settlement agreement is not ground,[53] nor is a mere voluntary promise on the part of plaintiff that he would not enforce a judgment against defendant, and that it would not be necessary for defendant to file any defense.[54] Where defendant appeared at the trial and defended the case on the merits, he cannot urge illegality of the execution on the ground that plaintiff violated an agreement to dismiss the action before judgment.[55] It is not ground for an affidavit of illegality that in a former levy on different land under the same execution plaintiff and defendant entered into an agreement by which the purchase price of the land at a sheriff's sale would be depressed and plaintiff would acquire title, either in himself or some other person designated by him, in full settlement of the debt.[56] On an affidavit of illegality to arrest a levy in favor of an administrator, on the ground that on a previous levy the administrator and plaintiff had agreed to depress bidding and that the indebtedness should be discharged, an alternative prayer for the cancellation of the fieri facias in lieu of cancellation of the deed of the prior sale is without equity where founded on the theory that the administrator has no interest in the property but that it has passed into the hands of an innocent purchaser and there is no allegation that any benefit from the sale has accrued to the estate.[57]

Dismissal of levy on property of principal. Inasmuch as plaintiff has the option of proceeding against the property of the principal or of the surety when the execution is against both, the dismissal of a levy on the lands of the principal is no ground for illegality on the part of the surety.[58]

Attack on judgment. A defendant in execution, who has had his day in court, cannot ordinarily, by means of an affidavit of illegality, go behind the judgment on which the execution is based,[59] and set up defenses which he urged or might have

Remedy against officer

Errors in the advertisement of property levied on cannot properly be made the ground of an affidavit of illegality, but the party suffering thereby will be remitted to his remedy against the officer.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797.

48. Ga.—Weaver v. Tuten, 85 S.E. 1048, 144 Ga. 8.

49. Ga.—Zachry v. Zachry, 68 Ga. 158.
23 C.J. p 547 note 67.

50. Ga.—Monroe v. Security Mut. Life Ins. Co., 56 S.E. 764, 127 Ga. 549.
23 C.J. p 547 note 68.

51. Ga.—Flournoy v. Silman, 59 Ga. 195.

52. Ga.—Wimberly v. Adams, 51 Ga. 423.
23 C.J. p 548 note 70.

53. Ga.—Whatley v. Citizens' & Southern Nat. Bank, 172 S.E. 685, 48 Ga.App. 326.

54. Ga.—Monroe v. Security Mut. Life Ins. Co., 56 S.E. 764, 127 Ga. 549—Wilcox v. Bank of Hazlehurst, 102 S.E. 45, 24 Ga.App. 516.

55. Ga.—Felker v. Johnson, 7 S.E. 2d 668, 189 Ga. 797.

56. Ga.—Guthrie v. Gaskins, 192 S. E. 36, 184 Ga. 537.

57. Ga.—Guthrie v. Gaskins, supra.

58. Ga.—Steele v. Atlanta Land Impr. Co., 16 S.E. 257, 91 Ga. 64—Manry v. Shepperd, 57 Ga. 68.
23 C.J. p 548 note 72.

59. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Griffin v. H. C. Whitmer Co., 194 S.E. 895, 57 Ga.App. 203—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Courson v. Manufacturers' Finance Acceptance Corporation, 153 S.E. 624, 41 Ga.App. 551—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220—Anderson v. Trowbridge Hardware Co., 138 S.E. 250, 36 Ga.App. 776—Rivers v. Cox, 125 S.E. 729, 33 Ga.App. 139—Ragan-Malone Co. v. Padgett, 125 S.E. 605, 33 Ga.App. 111—Childs v. State Bank of Chicago, 121 S.E. 254, 31 Ga.App. 533—McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82—Fowler v. King, 116 S.E. 54, 29 Ga.App. 500.
23 C.J. p 548 note 74.

Judgment in trover, although rendered for money, is conclusive as to plaintiff's title to property, which cannot be inquired into by affidavit of illegality.—Barnes v. Moseley, 154 S.E. 388, 41 Ga.App. 713.

Default judgment

A defendant on whom service has been perfected and against whom judgment has been rendered, although he was in default and made no appearance by plea or answer, has had his "day in court" within Civ. Code 1910 § 5311.—Barnes v. West Pub. Co., 127 S.E. 668, 33 Ga.App. 626.

Unauthorized consent to judgment

Although an attorney consented to a judgment against his client in direct opposition to the client's instructions, the client cannot go behind the judgment by affidavit of illegality in view of Civ.Code 1910 § 5311, providing that if defendant has had his day in court he cannot go behind the judgment by such an affidavit.—Pat-

urged at the trial.[60] An affidavit of illegality cannot be used to test the validity of the judgment unless the judgment is absolutely void,[61] in that the court was without jurisdiction of the subject matter or defendant did not have his day in court.[62] In such case defendant need not show a valid defense to the suit wherein the judgment was rendered.[63] The remedy by affidavit of illegality is not a substitute for certiorari[64] or other procedure for review;[65] and it cannot be used to correct errors in the proceedings prior to judgment,[66] or irregularities in the judgment.[67]

terson v. Georgia Gravel Co., 108 S.E. 237, 151 Ga. 813.

Denial that judgment ought to have been rendered because of pre-existing facts is to go behind judgment.—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.

60. Ga.—Stewart v. Youmans, 7 S.E. 2d 582, 61 Ga.App. 773—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga. App. 55—Drake v. Ludden & Bates Southern Music House, 169 S.E. 213, 46 Ga.App. 745—Felker v. Still, 133 S.E. 519, 35 Ga.App. 236—Rivers v. Cox, 125 S.E. 729, 33 Ga. App. 139—Ragan-Malone Co. v. Padgett, 125 S.E. 605, 33 Ga.App. 111—McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82.
23 C.J. p 548 note 75.

Prematurity of suit

Judgment cannot be attacked by affidavit of illegality because suit was instituted prematurely.—Nix v. Baxter, 167 S.E. 115, 46 Ga.App. 153.

Lack of service on codefendant is a matter for defense, and is not ground for an affidavit of illegality. —Foster v. J. R. Watkins Co., 121 S.E. 861, 31 Ga.App. 609.

Premature seizure of property

There being an affidavit of illegality to a judgment rendered against affiant as surety on a bond given by defendant in a proceeding to foreclose a sawmill lien on lumber and it appearing that the defense set up by affiant was that plaintiff had taken possession of the lumber and converted it before judgment had been rendered on the bond, it was proper to dismiss the affidavit, since such defense could have been made by affiant before judgment.—Waters v. Scott, 121 S.E. 865, 31 Ga.App. 690.

Payment

Defendant in execution may not by affidavit of illegality make defense of payment of a debt, but may make only the defense of the payment of the execution itself.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797.

61. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529—Rivers v. Cox, 125 S.E. 729, 33 Ga. App. 139.
23 C.J. p 548 note 78.

Even where judgment has been obtained by fraud, defendant's remedy is not by affidavit of illegality.—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.

Fraud depriving defendant of hearing

Defendant who has had his day in court and against whom a judgment has been rendered cannot go behind the judgment by an affidavit of illegality because he was by plaintiff's fraud, unmixed with negligence on his own part, deprived of a hearing. His proper remedy is by a petition in equity to set aside the judgment. —Nix v. Baxter, 167 S.E. 115, 46 Ga. App. 153—23 C.J. p 549 note 93.

Perjured evidence

Illegality attacking judgment on which fieri facias was issued on ground that it was obtained by perjured evidence was properly dismissed.—Swords v. Roach, 166 S.E. 185, 175 Ga. 774.

Joint judgment against defendant and garnishee being void as to garnishee, affidavit of illegality to execution thereon should be sustained. —Donaldson v. Tripod Paint Co., 158 S.E. 640, 43 Ga.App. 3.

Judgment against principal defendant vacated by bankruptcy

Surety may by affidavit of illegality attack judgment against him on garnishment dissolution bond by showing proceedings necessary to validate judgment became void when principal debtor was adjudicated a bankrupt.—Roberts v. Seanor, 166 S.E. 375, 46 Ga.App. 5.

Invalidity as to others

Decree vesting title in person represented, subject to execution, could not be attacked by affidavit of illegality, regardless of whether conclusive on others not represented. —Brown v. Bowman, 144 S.E. 353, 38 Ga.App. 507.

62. Ga.—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Brown v. Bowman, 144 S.E. 353, 38 Ga.App. 507 —McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82.
23 C.J. p 549 notes 79, 80.

Jurisdiction if defendant resided in district

(1) Where, if defendant resided in the district, the court would have jurisdiction of the subject matter and the return of process asserts residence in the district, the judgment cannot be attacked by affidavit of illegality.—Sanford v. Bates, 25 S.E. 35, 99 Ga. 145—Hartsfield v. Morris, 15 S.E. 363, 89 Ga. 254—Jackson v. Hitchcock, 48 Ga. 491.

(2) Judgment against nonresident defendants by default is subject to attack by affidavit of illegality, notwithstanding service, where resident defendant was held not liable.—Rhodes v. Southern Flour & Grain Co., 163 S.E. 237, 45 Ga.App. 13.

Void as to surety

The principal debtor cannot attack the judgment on the ground that it is void as to sureties.—Levadas v. Beach, 46 S.E. 864, 119 Ga. 613.

Change of plaintiff without notice to defendant

Affidavit of illegality alleging that, in suit on note, wherein affiant, maker, and plaintiff in execution, payee and indorser, were codefendants, plaintiff in execution against whom defendant had a defense, was made party plaintiff, without notice to defendant, and obtained judgment in question, was held not dismissible, since it showed affiant had not had his day in court.—Courson v. Crosby, 167 S.E. 310, 46 Ga.App. 226.

63. Ga.—Cochran v. Whitworth, 94 S.E. 609, 21 Ga.App. 406.
23 C.J. p 549 note 83.

64. Ga.—Slaton v. Hinman, 100 S.E. 24, 24 Ga.App. 64.
23 C.J. p 549 note 84.

65. Ga.—Ogletree v. Andrews, 24 S.E. 842, 99 Ga. 133.
23 C.J. p 549 note 85.

66. Ga.—Sikes v. Bird, 183 S.E. 825, 52 Ga.App. 654—Edison Provision Co. v. Armour & Co., 179 S.E. 829, 51 Ga.App. 213—Anderson v. Trowbridge Hardware Co., 138 S.E. 250, 36 Ga.App. 776—Barnes v. West Pub. Co., 127 S.E. 668, 33 Ga.App. 626.

Disqualification of juror

Objection to validity of verdict on ground that juror rendering it was disqualified is not available by affidavit of illegality.—Owen v. Federal Land Bank of Columbia, 140 S.E. 425, 37 Ga.App. 394—Fairburn Supply Co. v. Crumley-Sharp Hardware Co., 124 S.E. 67, 32 Ga.App. 520.

67. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Georgia Power Co. v. Friar, 171 S.E. 210, 47 Ga.App. 675, affirmed 175 S.E. 807, 179 Ga. 470—Rivers v. Cox, 125 S.E. 729, 33 Ga.App. 139.
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48. Ga.—Weaver v. Tuten, 85 S.E. 1048, 144 Ga. 8.

49. Ga.—Zachry v. Zachry, 68 Ga. 158.
23 C.J. p 547 note 67.

50. Ga.—Monroe v. Security Mut. Life Ins. Co., 56 S.E. 764, 127 Ga. 549.
23 C.J. p 547 note 68.

51. Ga.—Flournoy v. Silman, 59 Ga. 195.

52. Ga.—Wimberly v. Adams, 51 Ga. 423.
23 C.J. p 548 note 70.

53. Ga.—Whatley v. Citizens' & Southern Nat. Bank, 172 S.E. 685, 48 Ga.App. 326.

54. Ga.—Monroe v. Security Mut. Life Ins. Co., 56 S.E. 764, 127 Ga. 549—Wilcox v. Bank of Hazlehurst, 102 S.E. 45, 24 Ga.App. 516.

55. Ga.—Felker v. Johnson, 7 S.E. 2d 668, 189 Ga. 797.

56. Ga.—Guthrie v. Gaskins, 192 S. E. 36, 184 Ga. 537.

57. Ga.—Guthrie v. Gaskins, supra.

58. Ga.—Steele v. Atlanta Land Impr. Co., 16 S.E. 257, 91 Ga. 64—Manry v. Shepperd, 57 Ga. 68.
23 C.J. p 548 note 72.

59. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Griffin v. H. C. Whitmer Co., 194 S.E. 895, 57 Ga.App. 203—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Courson v. Manufacturers' Finance Acceptance Corporation, 153 S.E. 624, 41 Ga.App. 551—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220—Anderson v. Trowbridge Hardware Co., 138 S.E. 250, 36 Ga.App. 776—Rivers v. Cox, 125 S.E. 729, 33 Ga.App. 139—Ragan-Malone Co. v. Padgett, 125 S.E. 605, 33 Ga.App. 111—Childs v. State Bank of Chicago, 121 S.E. 254, 31 Ga.App. 533—McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82—Fowler v. King, 116 S.E. 54, 29 Ga.App. 500.
23 C.J. p 548 note 74.

Judgment in trover, although rendered for money, is conclusive as to plaintiff's title to property, which cannot be inquired into by affidavit of illegality.—Barnes v. Moseley, 154 S.E. 388, 41 Ga.App. 713.

Default judgment

A defendant on whom service has been perfected and against whom judgment has been rendered, although he was in default and made no appearance by plea or answer, has had his "day in court" within Civ. Code 1910 § 5311.—Barnes v. West Pub. Co., 127 S.E. 668, 33 Ga.App. 626.

Unauthorized consent to judgment

Although an attorney consented to a judgment against his client in direct opposition to the client's instructions, the client cannot go behind the judgment by affidavit of illegality in view of Civ.Code 1910 § 5311, providing that if defendant has had his day in court he cannot go behind the judgment by such an affidavit.—Pat-

urged at the trial.[60] An affidavit of illegality cannot be used to test the validity of the judgment unless the judgment is absolutely void,[61] in that the court was without jurisdiction of the subject matter or defendant did not have his day in court.[62] In such case defendant need not show a valid defense to the suit wherein the judgment was rendered.[63] The remedy by affidavit of illegality is not a substitute for certiorari[64] or other procedure for review;[65] and it cannot be used to correct errors in the proceedings prior to judgment,[66] or irregularities in the judgment.[67]

terson v. Georgia Gravel Co., 108 S.E. 237, 151 Ga. 813.

Denial that judgment ought to have been rendered because of pre-existing facts is to go behind judgment.—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.

60. Ga.—Stewart v. Youmans, 7 S.E. 2d 582, 61 Ga.App. 773—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga. App. 55—Drake v. Ludden & Bates Southern Music House, 169 S.E. 213, 46 Ga.App. 745—Felker v. Still, 133 S.E. 519, 35 Ga.App. 236—Rivers v. Cox, 125 S.E. 729, 33 Ga. App. 139—Ragan-Malone Co. v. Padgett, 125 S.E. 605, 33 Ga.App. 111—McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82.
23 C.J. p 548 note 75.

Prematurity of suit

Judgment cannot be attacked by affidavit of illegality because suit was instituted prematurely.—Nix v. Baxter, 167 S.E. 115, 46 Ga.App. 153.

Lack of service on codefendant is a matter for defense, and is not ground for an affidavit of illegality. —Foster v. J. R. Watkins Co., 121 S.E. 861, 31 Ga.App. 609.

Premature seizure of property

There being an affidavit of illegality to a judgment rendered against affiant as surety on a bond given by defendant in a proceeding to foreclose a sawmill lien on lumber and it appearing that the defense set up by affiant was that plaintiff had taken possession of the lumber and converted it before judgment had been rendered on the bond, it was proper to dismiss the affidavit, since such defense could have been made by affiant before judgment.—Waters v. Scott, 121 S.E. 865, 31 Ga.App. 690.

Payment

Defendant in execution may not by affidavit of illegality make defense of payment of a debt, but may make only the defense of the payment of the execution itself.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797.

61. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529—Rivers v. Cox, 125 S.E. 729, 33 Ga. App. 139.
23 C.J. p 548 note 78.

Even where judgment has been obtained by fraud, defendant's remedy is not by affidavit of illegality.—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.

Fraud depriving defendant of hearing

Defendant who has had his day in court and against whom a judgment has been rendered cannot go behind the judgment by an affidavit of illegality because he was by plaintiff's fraud, unmixed with negligence on his own part, deprived of a hearing. His proper remedy is by a petition in equity to set aside the judgment. —Nix v. Baxter, 167 S.E. 115, 46 Ga. App. 153—23 C.J. p 549 note 93.

Perjured evidence

Illegality attacking judgment on which fieri facias was issued on ground that it was obtained by perjured evidence was properly dismissed.—Swords v. Roach, 166 S.E. 185, 175 Ga. 774.

Joint judgment against defendant and garnishee being void as to garnishee, affidavit of illegality to execution thereon should be sustained. —Donaldson v. Tripod Paint Co., 158 S.E. 640, 43 Ga.App. 3.

Judgment against principal defendant vacated by bankruptcy

Surety may by affidavit of illegality attack judgment against him on garnishment dissolution bond by showing proceedings necessary to validate judgment became void when principal debtor was adjudicated a bankrupt.—Roberts v. Seanor, 166 S.E. 375, 46 Ga.App. 5.

Invalidity as to others

Decree vesting title in person represented, subject to execution, could not be attacked by affidavit of illegality, regardless of whether conclusive on others not represented. —Brown v. Bowman, 144 S.E. 353, 38 Ga.App. 507.

62. Ga.—Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—Brown v. Bowman, 144 S.E. 353, 38 Ga.App. 507 —McConnell v. Mason, 116 S.E. 658, 30 Ga.App. 82.
23 C.J. p 549 notes 79, 80.

Jurisdiction if defendant resided in district

(1) Where, if defendant resided in the district, the court would have jurisdiction of the subject matter and the return of process asserts residence in the district, the judgment cannot be attacked by affidavit of illegality.—Sanford v. Bates, 25 S.E. 35, 99 Ga. 145—Hartsfield v. Morris, 15 S.E. 363, 89 Ga. 254—Jackson v. Hitchcock, 48 Ga. 491.

(2) Judgment against nonresident defendants by default is subject to attack by affidavit of illegality, notwithstanding service, where resident defendant was held not liable.—Rhodes v. Southern Flour & Grain Co., 163 S.E. 237, 45 Ga.App. 13.

Void as to surety

The principal debtor cannot attack the judgment on the ground that it is void as to sureties.—Levadas v. Beach, 46 S.E. 864, 119 Ga. 613.

Change of plaintiff without notice to defendant

Affidavit of illegality alleging that, in suit on note, wherein affiant, maker, and plaintiff in execution, payee and indorser, were codefendants, plaintiff in execution against whom defendant had a defense, was made party plaintiff, without notice to defendant, and obtained judgment in question, was held not dismissible, since it showed affiant had not had his day in court.—Courson v. Crosby, 167 S.E. 310, 46 Ga.App. 226.

63. Ga.—Cochran v. Whitworth, 94 S.E. 609, 21 Ga.App. 406.
23 C.J. p 549 note 83.

64. Ga.—Slaton v. Hinman, 100 S.E. 24, 24 Ga.App. 64.
23 C.J. p 549 note 84.

65. Ga.—Ogletree v. Andrews, 24 S.E. 842, 99 Ga. 133.
23 C.J. p 549 note 85.

66. Ga.—Sikes v. Bird, 183 S.E. 825, 52 Ga.App. 654—Edison Provision Co. v. Armour & Co., 179 S.E. 829, 51 Ga.App. 213—Anderson v. Trowbridge Hardware Co., 138 S.E. 250, 36 Ga.App. 776—Barnes v. West Pub. Co., 127 S.E. 668, 33 Ga.App. 626.

Disqualification of juror

Objection to validity of verdict on ground that juror rendering it was disqualified is not available by affidavit of illegality.—Owen v. Federal Land Bank of Columbia, 140 S.E. 425, 37 Ga.App. 394—Fairburn Supply Co. v. Crumley-Sharp Hardware Co., 124 S.E. 67, 32 Ga.App. 520.

67. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55—Georgia Power Co. v. Friar, 171 S.E. 210, 47 Ga.App. 675, affirmed 175 S.E. 807, 179 Ga. 470—Rivers v. Cox, 125 S.E. 729, 33 Ga.App. 139.
23 C.J. p 548 note 76.

Service of process. An ordinary affidavit of illegality is sufficient to raise the question of service of the original process where there is no official return thereon;[68] but a return of service is conclusive on that question in the absence of a timely traverse, and in such case an affidavit of illegality denying service raises no issue.[69]

§ 149. —— Form and Requisites

The asserted grounds of illegality must be alleged clearly, distinctly, and positively.

The affidavit of illegality must be in the form and contain the allegations required by the statute.[70] The allegations of the affidavit must be construed most strongly against affiant.[71] The venue of the affidavit must be that of the court issuing the execution.[72] The grounds of illegality alleged must be sworn to,[73] and such facts must be stated positively and not on information and belief.[74] The grounds of illegality must be stated clearly and distinctly,[75] and the fact that the affidavit uses the exact language contained in the statute does not necessarily render it sufficiently full to withstand a special demurrer.[76] The affidavit should state facts and not mere conclusions of law.[77] An affidavit is insufficient where it asserts facts negativing or rendering immaterial the claimed illegality.[78] The affidavit need not specifically allege that the property levied on belonged to defendant.[79] An affidavit which does not identify the premises levied on otherwise than by reference to the entry of levy where the premises are fully described is sufficient.[80] An affidavit that execution was levied on property set apart as a homestead to affiant's deceased husband is not demurrable for failing to state that the execution plaintiff had not made affidavit that his claim was within

It is not ground that judgment was not signed
Ga.—Pollard v. King, 62 Ga. 103—Foster v. J. R. Watkins Co., 121 S.E. 861, 31 Ga.App. 609.

Failure of judgment to separate principal and interest was not ground for illegality.—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340.

That amount awarded for costs is left blank in the judgment is not a defect that can be raised by affidavit of illegality.—Juhan v. Robertson, 152 S.E. 915, 41 Ga.App. 326.

Plea undisposed of
An affidavit of illegality is not the proper remedy to arrest execution and set aside the judgment, on the ground that at the time of its rendition by the court as being by default there was an issuable plea on file and undisposed of.—Taylor v. Holmes, 103 S.E. 687, 25 Ga.App. 422.

Proper procedure is motion made in court rendering judgment.—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340.

68. Ga.—Davis v. H. C. Whitmer Co., 166 S.E. 425, 46 Ga.App. 15.
23 C.J. p 549 note 86.

69. Ga.—Benton v. Maddox, 16 S.E. 2d 141, 65 Ga.App. 540—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132—Davis v. H. C. Whitmer Co., 166 S.E. 425, 46 Ga.App. 15—Scott v. Darien Motor Co., 163 S.E. 246, 45 Ga.App. 102.
23 C.J. p 549 note 87.

70. Fla.—Griffin v. Lacourse, 12 So. 665, 31 Fla. 125, 128—Mitchell v. Duncan, 7 Fla. 13, 14.

71. Ga.—Ragan v. Smith, 174 S.E. 180, 49 Ga.App. 118.

72. Ga.—Manning v. Phillips, 65 Ga. 548.

73. Ga.—Goodwyn v. Bennett, 152 S. E. 605, 41 Ga.App. 285—Burgess v. Calhoun Nat. Bank, 112 S.E. 292, 28 Ga.App. 534.
23 C.J. p 550 note 7½.

Defect in jurat
The jurat being no part of the affidavit, a general demurrer to the sufficiency of the affidavit will not reach a defect in the jurat, such as the failure to state the official title of the person who administered the oath.—Smith v. Walker, 18 S.E. 830, 93 Ga. 252.

74. Ga.—City of Macon v. Whittington, 154 S.E. 139, 170 Ga. 612.
23 C.J. p 550 note 18.

Cure of defect
Verifying affidavit of illegality to best of one's knowledge and belief is insufficient, but affidavit may be amended by verifying grounds positively.—City of Macon v. Whittington, supra.

75. Ga.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797—Davis v. Conley, 185 S.E. 526, 53 Ga.App. 259—Mobley v. Goodwyn, 146 S.E. 28, 39 Ga. App. 64, followed in 146 S.E. 31, 39 Ga.App. 70.
23 C.J. p 550 note 15.

If one of grounds of affidavit presents legal defense against the further progress of the execution a motion to dismiss the affidavit should be denied.—American Mortg. Co. v. Tennille, 13 S.E. 158, 87 Ga. 28, 12 L.R.A. 529.

Discharge in bankruptcy
Where the affidavit alleges that the judgment debt has been discharged in a court of bankruptcy, it is error to dismiss the affidavit because of failure to set forth or attach a copy or abstract of the record of the proceedings in that court; it is not necessary that the affidavit shall contain this, but it should be submitted as evidence on the trial.—Murphey v. Smith, 85 S.E. 791, 16 Ga.App. 472.

Date of judgment
Ground of affidavit of illegality, alleging execution showed judgment was rendered on Sunday, but not alleging judgment was in fact rendered on Sunday, was held without merit.—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220.

76. Ga.—Dixon v. Savannah, 93 S.E. 274, 20 Ga.App. 511.

77. Ga.—Gormley v. Shiver, 187 S.E. 382, 182 Ga. 750—Taliaferro v. Farkas, 166 S.E. 426, 46 Ga.App. 9.
23 C.J. p 550 note 17.

Allegation that specified persons were necessary parties and were not joined is insufficient as a mere conclusion; the affidavit should specify why the persons were necessary parties.—Georgia Creosoting Co. v. Moody, 154 S.E. 294, 41 Ga.App. 701, transferred, see 150 S.E. 153, 169 Ga. 322.

Facts not supporting general allegation of discharge
That surety's affidavit of illegality alleged discharge from all liability because plaintiffs in fieri facias had removed principal's property from the county, which only discharged the surety in part, did not make the affidavit subject to be stricken on general demurrer.—Dasher v. I. A. Brannen & Bro., 116 S.E. 206, 29 Ga. App. 253.

78. Ga.—Taliaferro v. Farkas, 166 S. E. 426, 46 Ga.App. 9.

79. Ga.—Bennett v. Barr, 176 S.E. 681, 49 Ga.App. 831—Oliver v. Rutland, 172 S.E. 660, 48 Ga.App. 326—Byrd v. Byrd, 141 S.E. 673, 37 Ga. App. 735.

80. Ga.—Wacter v. Marshall, 29 S.E. 703, 102 Ga. 746.

one of the exceptions to the Homestead Act.[81] An allegation that there was no judgment or that the judgment on which the execution was issued was set aside on motion for a new trial is not demurrable.[82] An affidavit alleging falsity of a constable's return that there was no personal property to be found must distinctly aver that defendant had personal property subject to execution at the time of the levy on the realty.[83] If the land levied on is misdescribed in the execution the affidavit should set out the misdescription.[84]

Lack of jurisdiction. An affidavit which alleges lack of jurisdiction of the person must distinctly negative all grounds of jurisdiction and all methods of service.[85] It must also allege that the traverse of the return of service was made at the first term after notice thereof.[86] An affidavit which alleges that the judgment was rendered by a justice of the peace at a place in his district where he had no authority to sit is good, without alleging the place at which the justice ought to have held court.[87]

Payment. An allegation to the effect that the amount for which the execution has been issued has been paid or otherwise satisfied must be clear and unequivocal.[88] Such an affidavit should set out the facts, showing when payment was made, and to whom and the manner in which the debt was paid.[89] An allegation that the execution has been fully paid off since the rendition of judgment is sufficient on general demurrer, although it is not alleged to whom payment was made;[90] but such an allegation is insufficient against a special demurrer.[91] If part of the amount of the execution is admitted to be due, and it is not paid or tendered, such ground of affidavit is demurrable.[92]

New affidavit. Defendant is bound at his peril to state all the grounds of illegality which may exist at the time of filing his affidavit; if he fails, he will not be allowed to file a second affidavit for the same causes,[93] unless it is affirmatively shown that the grounds on which it is based were not known to affiant at the time of filing the first affidavit,[94] and, in the exercise of reasonable diligence, could not have been known at such time;[95] and it is incumbent on affiant to allege how and wherein he has exercised diligence,[96] and otherwise to state fully and specifically the reasons why the grounds therein contained could not have been known to him at the time of filing the first affidavit.[97] The fact that the first affidavit was dismissed or withdrawn, without a trial of the issues raised or attempted to be raised by it, does not make an exception to the rule.[98] If, pending the issue on an

81. Ga.—Buchanan v. Willingham, 65 Ga. 303.

82. Ga.—Hamlin v. Coleman, 74 Ga. 831.
23 C.J. p 550 note 10.

83. Ga.—McKoy v. Edwards, 65 Ga. 328.

84. Ga.—Zachry v. Zachry, 68 Ga. 158.
23 C.J. p 550 note 12.

85. Ga.—Oliver v. Rutland, 172 S.E. 660, 48 Ga.App. 326—Georgia Creosoting Co. v. Moody, 154 S.E. 294, 41 Ga.App. 701, transferred, see 150 S.E. 153, 169 Ga. 322.
23 C.J. p 550 note 19.

86. Ga.—Clements v. Haskins, 134 S.E. 125, 35 Ga.App. 484.
23 C.J. p 550 note 20.

87. Ga.—Hilson v. Kelley, 36 S.E. 966, 111 Ga. 866.

88. Ga.—Hill v. Sterchi Bros. Stores, 177 S.E. 353, 50 Ga.App. 193—Smith v. Tokio Marine Ins. Co., 121 S.E. 846, 31 Ga.App. 631.
23 C.J. p 550 note 22.

89. Ga.—Hill v. Sterchi Bros. Stores, 177 S.E. 353, 50 Ga.App. 193—Wilkes v. Branch, 90 S.E. 722, 18 Ga.App. 780.

Part payment

Where an affidavit of illegality based on part payment does not in express terms allege the amount due and unpaid on the execution, it must nevertheless be regarded as sufficiently alleging such amount, the sum being computable mathematically by a comparison of the amounts appearing to be due on the execution with the amounts alleged in the affidavit as having been paid thereon.—Smith v. Tokio Marine Ins. Co., 121 S.E. 846, 31 Ga.App. 631.

Payment by check

Affidavit of illegality which failed to allege that check payable to plaintiff in fieri facias and delivered to its attorney and accepted by him was paid, or that acceptance as payment was authorized or ratified, was insufficient.—Fairburn Supply Co. v. Crumley-Sharp Hardware Co., 124 S.E. 67, 32 Ga.App. 520.

90. Ga.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86—Griffin v. Frick, 23 S.E. 833, 97 Ga. 219.

91. Ga.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86.
23 C.J. p 551 note 25.

92. Ga.—Monk v. Foy, 76 S.E. 379, 138 Ga. 852.
23 C.J. p 551 note 26.

93. Ga.—Elders v. Beasley, 144 S.E. 902, 167 Ga. 122—Ryals v. Widincamp, 161 S.E. 292, 44 Ga.App. 315—Almond v. Monley, 156 S.E. 278, 42 Ga.App. 405—Anderson v. Georgia State Bank, 143 S.E. 461, 38 Ga.App. 225—Anderson v. Bank of Chatsworth, 97 S.E. 255, 22 Ga.App. 736.
23 C.J. p 551 note 29.

First affidavit void

Super.Ct. Rules, rule 29, providing that no second affidavit of illegality shall be received for causes existing and known, or which in exercise of reasonable diligence might have been known at filing of first, has no application, where first affidavit was void.—Bridges v. Melton, 129 S.E. 913, 34 Ga.App. 480.

94. Ga.—Binder v. Ragsdale, 28 S.E. 165, 100 Ga. 400.
23 C.J. p 551 note 30.

95. Ga.—Binder v. Ragsdale, supra.

96. Ga.—Binder v. Ragsdale, supra—Burnett v. Fouché, 77 Ga. 550.

97. Ga.—Binder v. Ragsdale, 28 S.E. 165, 100 Ga. 400—Hunter v. Davidson, 59 Ga. 260—Rawlings v. Brown, 82 S.E. 803, 15 Ga.App. 112.
23 C.J. p 551 note 33.

98. Ga.—Elders v. Beasley, 144 S.E. 902, 167 Ga. 122—Anderson v. Georgia State Bank, 143 S.E. 461, 38 Ga.App. 225—Bell v. Atlanta Tel.

affidavit of illegality, leave is granted to withdraw the execution to be levied on other property of defendant, he may make another affidavit when the levy is made and the property advertised for sale.[99] A prior affidavit by one defendant whose property was not seized will not bar a subsequent affidavit by a codefendant after his property has been levied on.[1]

Amendment. The court may, by order, permit an amendment of an affidavit of illegality.[2] Such is the rule as to an amendment which does not add a new and independent ground of illegality, but which merely amplifies or amends a ground in the original affidavit,[3] and such an amendment need not be sworn to.[4] An affidavit cannot be amended by the addition of new and independent grounds, whether of fact or of law, which existed and were known or, in the exercise of reasonable diligence, might have been known at the time of the filing of the original affidavit;[5] an amendment asserting new and independent grounds of illegality will be permitted only if defendant did not know of such grounds and he takes oath to such lack of knowledge.[6] A counteraffidavit cannot be amended after its return into court so as to change the issue thereby presented.[7] An amendment traversing the return of service may be permitted where affiant did not at time of filing the affidavit have notice of the existence of the return.[8] Where the levying officer wrongfully continues with the sale despite the receipt by him of an affidavit of illegality, defendant cannot set up such fact by amendment and have the sale set aside since such relief is not available in a proceeding by affidavit of illegality.[9] The denial of a motion to strike an amendment to an affidavit does not preclude the court from sustaining a general demurrer to the amended affidavit.[10]

Delivery to levying officer. Under the statute, the affidavit should be delivered to the levying officer and by him returned to the court, but the filing of the affidavit with the court by defendant is not such an irregularity as warrants a dismissal of the proceeding.[11] If the affidavit is insufficient to arrest the writ, the officer may refuse to receive it,[12] but he must be governed by an inspection of the paper and not inquire into the truth of its recitals.[13] Where the levying officer accepts and returns into court an affidavit which admits any indebtedness due on the execution, it is presumed that the amount admitted as due has been paid, and if such is not the case, it must be urged by defense and not by demurrer.[14]

§ 150. —— Hearing and Determination

Where the statute so provides, if issue is joined, the questions of fact raised by the affidavit of illegality will be submitted to a jury; if issue is not joined, the court will decide on the facts as they appear on the face of the affidavit.

While it has been held that the court may and should hear evidence where there is a motion made to set aside the affidavit and permit execution to proceed,[15] under another statute it is held that, if the facts set up in the affidavit are not controverted, the illegality is to be determined by the court at the first term[16] on the face of the record, from an inspection of the execution and affidavit of illegality.[17] If there is no written joinder of issue, the facts stated in the affidavit of illegality must be taken as true,[18] unless the debtor waives a joinder

& Tel. Co., 84 S.E. 175, 15 Ga.App. 680.

99. Ga.—Gunn v. Woolfolk, 66 Ga. 682.

1. Ga.—Clary v. Haines, 61 Ga. 520.

2. Ga.—Clark v. J. R. Watkins Co., 159 S.E. 911, 43 Ga.App. 697.

Order necessary

Amendment to affidavit of illegality, filed within designated period after sustaining demurrer with leave to amend, should be disallowed where there was no separate order allowing amendment within period.—Clark v. J. R. Watkins Co., supra.

3. Ga.—Taylor v. Jordan, 195 S.E. 215, 57 Ga.App. 285.

4. Ga.—Head v. Wilkinson, 198 S. E. 782, 18 Ga. 739.
23 C.J. p 551 note 40.

5. Ga.—Savannah v. Wade, 98 S.E. 464, 148 Ga. 766—Baker v. Smith, 16 S.E. 967, 91 Ga. 142—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

Conclusive presumption of knowledge of legal grounds

In so far as an amendment to an affidavit of illegality raises only questions of law, defendant in execution is conclusively presumed to have knowledge of such grounds at time of filing his original affidavit.—Head v. Wilkinson, 198 S.E. 782, 186 Ga. 739.

6. Ga.—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540—Carmichael v. Mobley, 178 S.E. 418, 50 Ga.App. 574—Kile v. City of Marietta, 155 S.E. 498, 42 Ga.App. 169.
23 C.J. p 551 note 38.

7. Ga.—Story v. Flournoy, 55 Ga. 56.

8. Ga.—Benton v. Maddox, 16 S.E. 2d 141, 65 Ga.App. 540.

9. Ga.—Tanner v. Wilson, 187 S.E. 625, 183 Ga. 53.

10. Ga.—Rutland v. Oliver, 179 S.E. 859, 51 Ga.App. 206.

11. Ga.—Roberts v. Seanor, 166 S.E. 375, 46 Ga.App. 5.

12. Ga.—Sullivan v. Hearnden, 11 Ga. 294.

13. Ga.—Williams v. MacArthur, 36 S.E. 301, 111 Ga. 28.

14. Ga.—Smith v. Tokio Marine Ins. Co., 121 S.E. 846, 31 Ga.App. 631.

15. Fla.—Houstoun v. Bradford, 17 So. 664, 35 Fla. 490—Mathews v. Hillyer, 17 Fla. 498.

16. Ga.—Tatham v. Lanier, App., 14 S.E.2d 765.
23 C.J. p 552 note 52.

17. Ga.—Thompson v. Fain, 77 S.E. 166, 139 Ga. 310—Tatham v. Lanier, App., 14 S.E.2d 765.

18. Ga.—Beavers v. Cassells, 192 S. E. 249, 56 Ga.App. 146—Bolton v. Keys, 144 S.E. 406, 38 Ga.App. 573—Barton v. J. R. Watkins Co., 120

of issue,[19] as by introducing evidence to sustain the truth of the affidavit, without objecting to proceeding to trial before joinder of issue.[20] Issue can be joined only by a writing, unless an oral statement of joinder is not objected to.[21] If issue is joined, the facts must be tried by a jury.[22] The affidavit cannot be sustained on oral motion without the introduction of evidence where trial by jury has not been waived.[23] Where the affidavit alleges among other grounds of illegality that there was no jurisdiction over the person of defendant, it is not an abuse of discretion on the part of the trial judge but is good practice to direct a separate issue to be formed and first tried on that ground.[24]

Although, strictly speaking, the writ and the affidavit of illegality are not pleadings,[25] they are treated as the pleadings in this proceeding.[26] The issues are those made by the affidavit,[27] and defendant cannot, by demurrer or motion to quash, raise issues and matters of defense which could have been included in the original affidavit of illegality, or could have been added to it by way of amendment.[28] The question of title to the property levied on is not involved in such proceeding and neither party can make it an issue.[29]

Notice of the time and place of hearing need not be given to the party filing the affidavit.[30]

Order of proceedings. When the case on trial is made by an affidavit of illegality, a motion by plaintiff in the fieri facias to dismiss the illegality takes precedence of a motion by defendant to quash the fieri facias.[31]

Evidence. All evidence relevant and material to the issues is admissible.[32] The evidence must be confined to the grounds stated in the affidavit,[33] and the debtor may be estopped to contradict his affidavit.[34] In a proceeding on an amended affidavit, the original affidavit is admissible in evidence.[35] The execution is admissible,[36] but it need not be formally introduced since it is before the court as part of the pleadings.[37] The pleadings in the action in which the judgment was recovered must be introduced in evidence to be considered by the court.[38] Evidence as to the merits of the claim on which the judgment was entered is irrelevant.[39]

Burden of proof. On the trial of an affidavit of illegality, the burden is on plaintiff in fieri facias to make a prima facie case by putting in evidence an execution, fair on its face, and a legal levy thereon.[40] When this is done, the burden is shifted from plaintiff to defendant to support his allegation of the illegality of the execution or levy,[41] and such proof shifts the burden back to plaintiff again.[42]

S.E. 643, 31 Ga.App. 301—McLeod v. Bird, 80 S.E. 207, 14 Ga.App. 77.

19. Ga.—Thompson v. Fain, 77 S.E. 166, 139 Ga. 310—McLeod v. Bird, 80 S.E. 207, 14 Ga.App. 77.

20. Ga.—Barton v. J. R. Watkins Co., 120 S.E. 643, 31 Ga.App. 301—McLeod v. Bird, 80 S.E. 207, 14 Ga.App. 77.

21. Ga.—Thompson v. Fain, 77 S.E. 166, 139 Ga. 310.

22. Ga.—Rogers v. Petty, 160 S.E. 128, 43 Ga.App. 771.
23 C.J. p 552 note 57.

23. Ga.—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55.

24. Ga.—Le Master v. Orr, 29 S.E. 32, 101 Ga. 762.

25. Ga.—Thompson v. Fain, 77 S.E. 166, 139 Ga. 310.

26. Ga.—Citizens' Finance Co. v. Griffin, 165 S.E. 324, 45 Ga.App. 508.
23 C.J. p 552 note 66.

27. Ga.—Citizens' Finance Co. v. Griffin, supra.
23 C.J. p 552 note 58.

28. Ga.—Glynn County v. Dubberly, 96 S.E. 992, 22 Ga.App. 603.

29. Ga.—Harris v. Woodard, 65 S.E. 250, 133 Ga. 104—Shadrick v. Toms, 127 S.E. 666, 33 Ga.App. 687—Morris-Bell Co. v. Wall, 124 S.E. 814, 32 Ga.App. 774.

30. Ga.—Berry v. Jordan, 49 S.E. 607, 121 Ga. 537.

31. Ga.—Sims v. Hatcher, 3 S.E. 92, 77 Ga. 389.
23 C.J. p 552 note 69.

32. Ga.—Maddox v. Benton, 199 S.E. 563, 58 Ga.App. 746—Peebles v. McCrary, 113 S.E. 233, 28 Ga.App. 716.

33. Ga.—Sigman v. Treadwell, 29 S.E. 761, 102 Ga. 766.
23 C.J. p 552 note 72.

34. Ga.—Smith v. Camp, 10 S.E. 539, 84 Ga. 117.
23 C.J. p 553 note 73.

35. Ga.—Felker v. Still, 153 S.E. 781, 41 Ga.App. 462.

36. Ga.—Peebles v. McCrary, 113 S.E. 233, 28 Ga.App. 716.

37. Ga.—Miller v. Perkerson, 57 S.E. 787, 128 Ga. 465—Montgomery v. Nunnally, 157 S.E. 911, 43 Ga.App. 93.

38. Ga.—Bolton v. Keys, 144 S.E. 406, 38 Ga.App. 573.

39. Ga.—Byrd v. Byrd, 141 S.E. 673, 37 Ga.App. 735.

40. Ga.—Hill v. City of Calhoun, 171 S.E. 459, 47 Ga.App. 753—Herrington v. Moore, 165 S.E. 867, 45 Ga.App. 636.
23 C.J. p 553 note 76.

41. Ga.—Manley v. Mobley, 162 S.E. 536, 174 Ga. 228—Alston v. Mobley, 155 S.E. 81, 42 Ga.App. 98.
23 C.J. p 553 note 77.

If defendant in fieri facias assumes burden, he must prove essential allegations in affidavit.—Felker v. Still, 133 S.E. 519, 35 Ga.App. 236.

Affirmative defenses

Where an affidavit of illegality contains allegations of fact in the nature of affirmative defenses, on issue joined, the burden of establishing them rests on affiant.—Thompson v. Fain, 77 S.E. 166, 139 Ga. 310—Hill v. City of Calhoun, 171 S.E. 459, 47 Ga.App. 753—Herrington v. Moore, 165 S.E. 867, 45 Ga.App. 636.

Want of service

Burden was upon defendant, in proceedings wherein defendant filed an affidavit of illegality to the levy on defendant's personalty of an execution, to show not only that defendant was not served with petition and process in action in which judgment upon which execution was issued was rendered, but that defendant traversed the sheriff's entry of service at the first term of court after notice to defendant of entry and before pleading to merits.
Ga.—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

42. Ga.—McLeod v. Bird, 80 S.E. 207, 14 Ga.App. 77.

Taking issue from jury. Where the evidence is in conflict, the matter should be submitted to the jury;[43] but, where the evidence is such that the jury could not properly reach any other verdict, a verdict may be directed.[44] If the uncontradicted evidence shows that one of defendants had been duly served and the other had not, it is proper to direct a verdict that the writ proceed only as to the party served.[45] When no evidence in support of an affidavit of illegality is admitted, there should be no submission of the case to the jury, but the illegality should be dismissed or sustained as matter of law.[46]

Weight and sufficiency. The general rules as to the weight and sufficiency of the evidence required to support a verdict or finding have been applied to affidavit of illegality proceedings.[47]

Determination. An order dismissing the affidavit may be made in a proper case.[48] The affidavit will be dismissed where the illegality urged is one that cannot be raised by affidavit of illegality,[49] or where defendant fails to appear at, or refuses to proceed with, the trial.[50] Where no evidence is introduced in support of certain grounds of alleged illegality, these grounds should not be treated as abandoned, but should be overruled.[51] The court may quash the execution in addition to sustaining the affidavit.[52]

Effect of determination. The questions determined, as well as those which should have been litigated, in a proceeding on an affidavit of illegality are, as to the parties and their privies, henceforth res judicata.[53] It follows that such questions cannot be later raised on a subsequent proceeding by affidavit of illegality,[54] on a motion to set aside the execution,[55] or in defense to an action on the bond given on the filing of the affidavit.[56] So a judgment that the writ had not been paid is a bar to a motion that it be entered satisfied,[57] or to an injunction against the execution.[58] If the debtor acquiesces in a judgment on the merits instead of a judgment of dismissal, on his failure to appear it is conclusive as to him.[59] However, the dismissal of the affidavit of illegality is not an adjudication of the merits of the issue therein tendered.[60] A judgment sustaining a demurrer to an affidavit for insufficiency is no bar to a new proceeding containing allegations stating a good case.[61] A judgment overruling a demurrer and sustaining the affidavit except as to a certain sum will bar a subsequent application to amend the demurrer by introducing new and distinct grounds.[62] A motion to set aside an affidavit of illegality which sets up that what purported to be a judgment was entered without authority involves the legal sufficiency of that judgment, and a denial of the motion is a decision that the judgment is void.[63]

Proof of service lost

(1) In proceeding to enforce judgment by issuance of execution where record of proceedings in which judgment was rendered has been lost, and it cannot be determined whether court rendering judgment had before it evidence of service, person attacking judgment by affidavit of illegality makes out prima facie case by showing that he was never served, and it is unnecessary to show that no entry of service was made by officer of court.—Maddox v. Benton, 199 S.E. 563, 58 Ga.App. 746.

(2) If plaintiff replies by introducing evidence authorizing a finding that an entry of service was made, defendant would then be required to traverse that entry and make the officer a party, or plaintiff might overcome defendant's prima facie case by showing that there was a valid entry of service and that defendant had notice thereof at or before preceding term of court, or by showing that defendant had been actually served.—Maddox v. Benton, supra.

23 C.J. p 553 note 78 [a].

43. Ga.—Benton v. Maddox, 16 S.E. 2d 141, 65 Ga.App. 540—Peebles v. McCrary, 118 S.E. 233, 28 Ga.App. 716.

44. Ga.—Ogburn v. Calhoun, 191 S.E. 476, 55 Ga.App. 825—Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.

23 C.J. p 552 note 63.

45. Ga.—Crayton v. Fox, 33 S.E. 42, 106 Ga. 853.

46. Ga.—Brown v. Conner, 81 S.E. 901, 141 Ga. 622.

23 C.J. p 552 note 62.

47. Ga.—Manley v. Mobley, 162 S. E. 536, 174 Ga. 228—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540—Wofford Oil Co. v. Strickland Motor Co., 194 S.E. 228, 56 Ga.App. 876—Nix v. Baxter, 167 S.E. 115, 46 Ga.App. 153—Crouch v. Fisher, 159 S.E. 746, 43 Ga.App. 484—Nevil v. Mobley, 153 S.E. 434, 41 Ga.App. 470.

48. Ga.—Spence v. Miller, 171 S.E. 158, 47 Ga.App. 625, transferred, see 167 S.E. 188, 176 Ga. 96.

23 C.J. p 553 note 80.

49. Ga.—Walker v. Tate, 170 S.E. 403, 47 Ga.App. 340.

50. Ga.—Lancaster v. Ralston, 7 S.E. 2d 792, 61 Ga.App. 853—Herrington v. Moore, 165 S.E. 867, 45 Ga. App. 636.

Ex parte trial

If the execution defendant does not appear, the proceedings must be dismissed and not tried ex parte.—Wade v. Wisenant, 12 S.E. 645, 86 Ga. 482.

51. Ga.—Georgia Securities Co. v. Arnold, 193 S.E. 366, 56 Ga.App. 532.

52. Ga.—Beavers v. Cassells, 192 S. E. 249, 56 Ga.App. 146.

53. Ga.—Mathews v. Green, 110 S.E. 507, 28 Ga.App. 190.

23 C.J. p 553 note 82.

54. Ga.—Mathews v. Green, 110 S. E. 507, 28 Ga.App. 190.

55. Ga.—Field v. Sisson, 40 Ga. 67.

56. Ga.—Bowden v. Taylor, 6 S.E. 280, 81 Ga. 204.

57. Ga.—Tucker v. Respass, 28 Ga. 613.

58. Ga.—Neal v. Henderson, 72 Ga. 209.

59. Ga.—Morris v. Murphey, 22 S.E. 635, 95 Ga. 307.

60. Ga.—Kinney v. Avery, 80 S.E. 663, 14 Ga.App. 180.

61. Ga.—Peters v. Baker, 54 Ga. 339.

62. Ga.—Goldsmith v. Georgia R. Co., 62 Ga. 542.

63. Fla.—McGee v. Ancrum, 15 So. 231, 33 Fla. 499.

Where an affidavit is dismissed, the case is out of court and no further proceeding can be had therein in the absence of some procedure to bring the parties before the court.[64]

Costs and damages. The costs are ordinarily in the discretion of the court.[65] Where it is so provided by statute, if it is made to appear on trial of an issue formed on an affidavit of illegality that the interposition was only for delay, the jury trying the case may assess on the principal debt such damages, not exceeding twenty-five per cent, as may seem reasonable and just.[66]

§ 151. Injunction

a. In general
b. Existence of, or resort to, other remedy; adequacy of remedy at law

a. In General

An execution sale may be enjoined, the matter ordinarily resting in the court's discretion. An injunction restraining a levy or sale under execution may be waived or abandoned.

Under certain circumstances an injunction may issue to restrain a sale under execution.[67] Whether an injunction will be granted is often a matter of discretion with the court,[68] which should be exercised with caution,[69] but under certain statutes an injunction issues of right against a writ of seizure.[70]

Waiver or abandonment of injunction. A complainant who has obtained an injunction may waive or abandon it.[71]

b. Existence of, or Resort to, Other Remedy; Adequacy of Remedy at Law

Injunctive relief against a levy or sale under execution ordinarily will not be granted where there is an adequate remedy at law.

The rule that an injunction will not be granted where the remedy at law for the injury complained of is full, adequate and complete, discussed in the C.J.S. title Injunctions § 25, also 32 C.J. p 57 note 34, is generally applied to suits for an injunction against a levy or sale under an execution; if there is an adequate remedy at law an injunction will not be granted,[72] while if there is not an adequate remedy at law an injunction will ordinarily be

64. Ga.—Tilley v. Cooke & Flake, 122 S.E. 610, 158 Ga. 191, answers to certified questions conformed to, App., 122 S.E. 908.

65. Ga.—Sims v. Hatcher, 3 S.E. 92, 77 Ga. 389.
23 C.J. p 553 note 91.

66. Ga.—Folker v. Still, 171 S.E. 838, 48 Ga.App. 24, transferred, see 169 S.E. 15, 176 Ga. 735—Day v. Bank of Sparks, 107 S.E. 272, 26 Ga.App. 718.
23 C.J. p 553 note 92.

67. Pa.—Fortna v. Donaldson, 85 Pa.Super. 99.
Injunction:
Against enforcement of judgment see the C.J.S. title Judgments §§ 341–400, also 34 C.J. p 432–p 501 note 2.
Against levy or sale under execution:
For:
Alimony see Divorce § 265 a.
Bank Stockholders' liability see Banks and Banking § 105 b.
Costs see Costs § 422 g.
Of:
Community property see the C.J.S. title Husband and Wife § 552, also 31 C.J. p 161 note 60 [a].
Separate property of married woman see the C.J.S. title Husband and Wife § 458, also 30 C.J. p 1052 note 69–p 1053 note 83, and 23 C.J. p 567 note 99–p 568 note 7.
On judgment in replevin see the C.J.S. title Replevin § 258, also 54 C.J. p 602 notes 93–97.
To prevent execution of a judicial decree of sale see the C.J.S. title Judicial Sales § 11, also 35 C.J. p 24 note 10–p 25 note 14.
To protect exempt property:
Generally see the C.J.S. title Exemptions §§ 153, 154, also 25 C.J. p 153 note 91–p 154 note 13.
Homesteads see the C.J.S. title Homesteads § 228, also 29 C.J. p 982 note 58–p 983 note 68.
To restrain:
Execution from justice of the peace see the C.J.S. title Justices of The Peace § 123, also 35 C.J. p 704 note 5–p 705 note 16.
Improper seizure of partnership property see the C.J.S. title Partnership § 240 also 47 C.J. p 1019 notes 31–33.

68. Ga.—Gillen v. Coconut Grove Bank & Trust Co., 154 S.E. 787, 171 Ga. 162.
Tex.—Hart v. Fakes & Co., Civ.App., 19 S.W.2d 462—Turner v. Parker, Civ.App., 14 S.W.2d 931.
23 C.J. p 556 note 17.
Discretion held not abused in granting temporary injunction.—Walker v. Beacham, 111 S.E. 560, 153 Ga. 120—Giles v. Cook, 91 S.E. 411, 146 Ga. 436.

69. Puerto Rico.—Rio v. Vasquez, 17 Puerto Rico 158.

70. La.—State v. Gaudet, 32 So. 328, 108 La. 601.
23 C.J. p 556 note 19 [a].
Compelling party to sue for injunction
Seller of engine, who took it back from buyer and resold it before seizure by first buyer's judgment creditors, could not compel second buyer to exercise his right to arrest seizure and sale by injunction.—Haas v. McCain, 108 So. 305, 161 La. 114.

71. S.C.—Duckett v. Dalrymple, 20 S.C.L. 143.
23 C.J. p 579 note 29.

72. U.S.—Munoz v. Auburn Lumber Co., C.C.A.Cal., 38 F.2d 561.
Ark.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.
Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 701, 98 Fla. 186, citing **Corpus Juris.**
Ga.—Vittur v. McClure Ten-Cent Co., 139 S.E. 799, 164 Ga. 878.
Mich.—Asiulewicz v. Pietrazewski, 190 N.W. 659, 220 Mich. 690.
Or.—Parker v. Reid, 273 P. 334, 127 Or. 578.
W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W.Va. 490.
23 C.J. p 553 note 96.
Equity jurisdiction as dependent on adequacy of remedy at law see Equity §§ 19–38.

granted.[73] If the remedy at law is doubtful and obscure, an injunction will be granted.[74]

In applying the foregoing rules it has been held that if defendant can obtain a satisfactory remedy by a simple motion to the court which issued the execution it would be absurd to go into equity to obtain relief; equity will not listen to such a case.[75] Likewise, where a claimant is entitled to attack the judgment or execution, see infra § 173, equity will not enjoin the execution at the suit of the claimant and defendant in execution.[76] Injunction will not lie where the remedy is by appeal[77] or supersedeas,[78] or where defendant may have relief by affidavit of illegality,[79] interpleader,[80] by trespass to try title,[81] or by the statutory remedy of trial of the right of property.[82] Further, an injunction will not be granted because of matters which complainant should have asserted as defenses in the action in which the judgment was rendered.[83]

On the other hand, an injunction has been considered an appropriate remedy where the writ has been issued beyond the territorial limits of the court's jurisdiction,[84] or where the situation presents several complicated questions of law and fact.[85] Similarly an injunction will be granted against an execution on a supersedeas bond where the sureties claim a discharge by reason of a release of property from an attachment lien pending appeal, such fact not being proper for presentation in the record on appeal because transpiring subsequent to the record and pending disposition of the appeal.[86] There is also authority that where a complainant has exhausted his remedy at law by way of an affidavit of illegality,[87] or where such remedy is not available,[88] an injunction will issue.

Where relief at law denied. The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court; the denial of that court to grant relief gives to the court of equity the same authority to interfere as though the other court were powerless to render aid.[89]

Independent ground for relief in equity. Where there is independent equitable ground such as fraud, accident, or mistake, equity has jurisdiction regardless of a remedy at law.[90] However, mistake is not ground where coupled with negligence of complainant or his attorney.[91] Where independent eq-

73. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 98 Fla. 186.
23 C.J. p 554 note 97.

74. Mich.—Asiulewicz v. Pietrasewski, 190 N.W. 659, 220 Mich. 690.

75. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369—Scott Register Co. v. Holton, 157 S.E. 433, 200 N.C. 478—Hight v. Taylor, 124 S.E. 130, 188 N.C. 814.
Okl.—Fay State Bank v. Boster, 224 P. 513, 98 Okl. 151.
23 C.J. p 554 note 98.

Motion to set aside judgment
Where a party against whom a judgment by default was rendered had not moved to set it aside, although one year had not elapsed, and cause of action alleged by him could have been set up as a counterclaim in the original action he was not entitled to injunction against execution and supplemental proceedings.—Hight v. Taylor, 124 S.E. 130, 188 N. C. 814.

76. Ga.—Beacham v. Nobles, 113 S. E. 6, 153 Ga. 718.

77. Md.—Commercial Sav. Bank v. Quall, 142 A. 488, 156 Md. 16.
23 C.J. p 555 note 99.

78. Miss.—Ricks v. Richardson, 11 So. 935, 70 Miss. 424.

79. Ga.—Jackson v. Becker Roofing Co., 180 S.E. 822, 180 Ga. 769—Williamson v. Williamson, 115 S.E. 805, 154 Ga. 788—Daniel v. Joseph Rosenheim Shoe Co., 109 S.E. 504, 152 Ga. 278.
23 C.J. p 555 note 2.
Affidavit of illegality see supra §§ 147–150.

Failure to appeal from a determination in a proceeding on an affidavit of illegality prevents resort to injunctive relief against a sale under execution, where there is no independent equity.—Hayes v. Frohock, 47 So. 343, 56 Fla. 794.

80. Miss.—Rose v. Brister, 111 So. 129, 145 Miss. 78.
Pa.—Eckfelt v. Starr, 5 Phila. 497.

81. Tex.—Hahn v. Willis, 73 S.W. 1084, 31 Tex.Civ.App. 643.

82. Ga.—James v. Upton, 129 S.E. 100, 160 Ga. 819—Eslinger v. Herndon, 124 S.E. 169, 900, 158 Ga. 823—Atlanta Mut. Ass'n v. Swift & Co., 113 S.E. 8, 153 Ga. 722—Douglas v. Jenkins, 91 S.E. 49, 146 Ga. 341.
Tex.—Williams v. Farmers' Nat. Bank, 56 S.W. 261, 22 Tex.Civ.App. 581.

83. La.—Burt v. Watson Oil & Gas Co., App., 150 So. 425.

84. Okl.—Needles v. Frost, 35 P. 574, 2 Okl. 19, 22.
23 C.J. p 555 note 6.

85. Colo.—Whitlock v. Alliance Coal Co., 214 P. 546, 548, 73 Colo. 205, citing **Corpus Juris.**
N.M.—Williams v. Kemp, 273 P. 12, 14, 33 N.M. 593, quoting **Corpus Juris.**
23 C.J. p 555 note 7.

86. Tex.—Martin v. Perfection Rubber Co., Civ.App., 285 S.W. 626.

87. Ga.—Scogin v. Beall, 50 Ga. 88.

Second affidavit of illegality
Where an affidavit of illegality has been filed and sustained, the court dismissing the "case and levy for want of prosecution," but the execution is proceeding, and a second affidavit has been dismissed in the absence of the attorney making the affidavit, an injunction against the execution sale will be granted, either because of the fact that any further affidavit of illegality is barred or because of the absence of the attorney when the affidavit was dismissed.—Scogin v. Beall, supra.

88. Ga.—Ben Hill County v. Massachusetts Bonding & Ins. Co., 87 S. E. 15, 144 Ga. 325.
23 C.J. p 555 note 2 [b].

89. Cal.—Eppinger v. Scott, 62 P. 460, 130 Cal. 275.
23 C.J. p 555 note 8.

90. Ga.—Robinson v. Carmichael, 68 S.E. 582, 134 Ga. 654.
23 C.J. p 555 note 9.

91. Minn.—Erlitz v. Barclay, 164 N. W. 905, 138 Minn. 480.
23 C.J. p 555 note 10.

uitable grounds exist, an injunction may be granted even though complainant also has the equitable remedy of rule to open the judgment,[92] unless he has previously resorted to such other remedy.[93]

Where right to equitable relief not raised. A bill for injunction may be entertained where the right to relief is clear, and there has been an answer to the merits without making any objection to the jurisdiction in equity, notwithstanding the existence of an adequate remedy by a motion to quash.[94] The objection that there was an adequate remedy at law may be waived, as where the objection was not interposed until the case had been pending for several years and was about to proceed to trial.[95]

Where process issued by court of equity. The rule against an injunction where there is an adequate remedy at law does not affect the control of a court of equity over process issued upon its own decree.[96]

A temporary injunction may be granted[97] unless there is an adequate remedy at law,[98] although an adequate remedy at law does not prevent the granting of a temporary injunction until the remedy at law can be obtained.[99]

Defendant's arrest on execution will not be enjoined.[1]

§ 152. —— Grounds

a. In general
b. Prevention of cloud on title generally
c. Errors or irregularities prior to entry of judgment
d. Irregularities in writ or proceedings thereunder
e. Irreparable injury
f. Property not subject to execution
g. Property of third persons
h. Protection of other creditors or interested persons
i. Satisfaction of debt; tender of payment
j. Void judgment or writ
k. Miscellaneous grounds

a. In General

An injunction restraining a levy or sale under execution will be granted in aid of justice, or to prevent injustice or vexation or the circumvention of the law.

Equity will grant an injunction to prevent a party making use of a legal writ of execution for the purposes of vexation and injustice,[2] and in some cases an injunction has been granted merely in aid of justice.[3] Conversely, equity will not grant an injunction where to do so would be unjust.[4] The use of an execution as a subterfuge

92. Pa.—Sherwood Bros. Co. v. Kennedy, 200 A. 689, 132 Pa.Super. 154.

93. Pa.—Sherwood Bros. Co. v. Kennedy, supra.

Phrase "opportunity to be heard," as used in rule that where a defendant has been heard or has had the "opportunity to be heard," on a petition to open a judgment, he cannot be heard on a bill to restrain the issuing of execution thereon, means that defendant has obtained a rule wherein opportunity to be heard was given.—Sherwood Bros. Co. v. Kennedy, supra.

94. Cal.—Wood v. Currey, 49 Cal. 359.
Ohio.—Miller v. Longacre, 26 Ohio St. 291.

95. Tex.—Rogers v. Driscoll, Civ. App., 125 S.W. 599.
Waiver of objection generally see Equity § 88.

96. Tenn.—Anderson v. Mullenix, 5 Lea 287.

97. Idaho.—McMahon v. Cooper, 130 P. 456, 23 Idaho 413.
23 C.J. p 556 note 14.

Possession as sufficient to maintain suit
Ownership of personal property prima facie rests with one who has possession, as respects his right to have a temporary injunction issued against threatened levy thereon under writ of execution where he has no adequate remedy at law.—Berwald's, Inc., v. Brown, 69 S.W.2d 221.

98. Ga.—Dunahoo v. Dunahoo, 182 S.E. 848, 181 Ga. 494—Rowland v. Bartlett, 128 S.E. 786, 160 Ga. 652.

Affidavit of illegality
Where complainant has an adequate remedy at law by use of an affidavit of illegality, an interlocutory injunction against a sale under execution will not be granted.—Rowland v. Bartlett, 128 S.E. 786, 160 Ga. 652.

Statutory claim proceedings afford an adequate remedy at law so as to bar granting an interlocutory injunction.—Dunahoo v. Dunahoo, 182 S.E. 848, 181 Ga. 494.

Resale
A resale under execution on failure of the purchaser to comply with his bid, see infra § 220, may not be temporarily enjoined where an adequate remedy at law by statutory penalty exists.—Warman v. Wurzbach, Tex.Civ.App., 51 S.W.2d 751.

99. Va.—Snavely v. Harkrader, 30 Gratt. 487, 71 Va. 487.
23 C.J. p 556 note 15.

1. N.Y.—Hurlbutt v. Reid, 179 N.Y. S. 421, 190 App.Div. 176.

2. Pa.—Fortna v. Donaldson, 85 Pa. Super. 99.
23 C.J. p 556 note 20.

Equal indebtedness
Where the judgment creditor is indebted to the judgment debtor in an amount equal to, or in excess of, the amount of the judgment, in order to prevent an injustice equity may enjoin the execution.—Parker v. Reid, 273 P. 334, 127 Or. 578.

3. N.J.—Brady v. Carteret Realty Co., 57 A. 814, 66 N.J.Eq. 243, affirmed 60 A. 938, 67 N.J.Eq. 641, 110 Am.S.R. 502, 3 Ann.Cas. 421.
23 C.J. p 556 note 21.

Holder not in due course
Where plaintiff suing on note was not holder in due course before maturity, sheriff should be enjoined from proceeding in executory process.—Grau v. Consolidated Dredging & Mfg. Co., 110 So. 202, 162 La. 205.

Set-off against judgment debtor
Execution on judgment for defendant was properly enjoined on proof of defendant's insolvency to enable adjudication of claims of set-off and lien against judgment.—Odom v. Attaway, 157 S.E. 871, 172 Ga. 311.

4. Ga.—Saffold v. Evans, 91 S.E. 21, 146 Ga. 180.
23 C.J. p 556 note 22.

to circumvent the law may be enjoined.[5]

b. Prevention of Cloud on Title Generally

Equity may, in its discretion, enjoin a levy or sale under execution to prevent a cloud on title.

Whether by reason of statute,[6] or independently thereof, in order to prevent a cloud upon the title, equity may enjoin a levy or sale of lands under execution.[7] This jurisdiction is coextensive with its jurisdiction to set aside and order to be canceled a deed of the property,[8] and it is not necessary for the legal owner to wait until such cloud has been cast before calling on a court of equity for relief.[9] A levy or sale under execution will be enjoined as a cloud on title where the property is not subject to execution.[10]

Although there is contrary authority,[11] as a general rule a sale of real property under an execution void on its face would not cast a cloud on the title and therefore a court of equity will not interfere to enjoin the sale;[12] and where the cloud to be cast on the title exists only on the supposition of an incorrect legal view being taken of facts which are patent to all, an injunction will not issue.[13] To justify injunctive relief in behalf of a record owner in possession, the title, lien, or claim alleged to cast a cloud on the title must be one apparently valid on the face of the record, requiring resort to extrinsic evidence to establish its invalidity.[14]

5. Ga.—Fears v. State, 29 S.E. 463, 102 Ga. 274.

Intoxicating liquors

(1) Where intoxicating liquors are deemed subject to levy and sale under execution, the mere fact that a local option law forbids the sale of intoxicating liquors is no reason for enjoining the execution sale.—Fears v. State, supra.

(2) However, if there is collusion between the judgment creditor and judgment debtor to evade the local option law, an injunction will be granted.—Fears v. State, supra.

Intoxicating liquors as subject to levy and sale under execution see supra § 23.

6. **In Missouri**

(1) It was formerly held that sales under execution would not be enjoined on the ground they would pass no title and might cast a cloud on the title of the true owner.—Kuhn v. McNeil, 47 Mo. 389—Drake v. Jones, 27 Mo. 428.

(2) Subsequently it was held that, in view of Rev.St.1899 § 3649, injunction would be granted to restrain a sale under execution which would cast a cloud on plaintiff's title.—Neeley v. Independence Bank, 89 S.W. 907, 114 Mo.App. 467.

(3) The same was held under Rev. St.1909 § 2534.—Long v. Palisades Bank, App., 198 S.W. 1129—Payne v. Daviess County Savings Ass'n, 105 S.W. 15, 126 Mo.App. 593.

(4) This rule is continued under Rev.St.1919 § 1969.—Marsala v. Gentry, App., 232 S.W. 1046.

(5) Moreover, without reference to statute, it has been held that when a sale under execution will cast a cloud on the title injunction will be granted.—Hunter Land & Development Co. v. Jackson, 243 S.W. 436, 210 Mo.App. 543.

(6) Likewise, without reference to statute, it has been held that when execution is levied on land the legal title to which is held by a trustee for the use of a religious association, which equitable title is not a matter of record, the sale will be enjoined as a cloud on the title.—South Presbyterian Church v. Hintze, 5 Mo.App. 578, affirmed 72 Mo. 363.

In North Carolina

(1) Formerly a levy or sale under execution could not be enjoined as a cloud on the title, a judgment lien not being an "estate" or "interest" within the meaning of L.1893 c 6.—McLean v. Shaw, 34 S.E. 634, 125 N. C. 491.

(2) However, under the amendment of Pub.L.1903 c 763, it was held that an injunction could be granted. —Crockett v. Bray, 66 S.E. 666, 151 N.C. 615.

(3) The same is true under more recent statutes.—Mizell v. Bazemore, 139 S.E. 453, 194 N.C. 324—Harris v. Carolina Distributing Co., 89 S.E. 789, 172 N.C. 14, Ann.Cas.1918C 329.

In Texas

(1) Without reference to statute it has been held that, where a sale under execution would create a cloud upon the title, injunction lies.—San Barnado Townsite Co. v. Hocker, Civ. App., 176 S.W. 644—Ward v. Caples, Civ.App., 170 S.W. 816.

(2) However, the remedy of injunction in such case is conferred by statute.—Rose v. Wylie, Civ.App., 95 S.W.2d 523, error dismissed.

7. Ala.—Martin v. Hewitt, 44 Ala. 418.
Cal.—Englund v. Lewis, 25 Cal. 337.
Fla.—Lewton v. Hower, 18 Fla. 872.
Mo.—Irwin v. Lewis, 50 Miss. 363.
Wis.—Goodell v. Blumer, 41 Wis. 436.
23 C.J. p 564 note 62—51 C.J. p 167 notes 24, 25.

Inherent power

Equity has inherent power to enjoin a sale of land under execution on the ground of a cloud on title.—Goodell v. Blumer, 41 Wis. 436.

Execution sale under a satisfied judgment will, in order to prevent a cloud on title, be enjoined by a court of equity.—Cox v. Smith, 10 Or. 418.

Injunction against levy or sale on execution of homestead property see the C.J.S. title Homesteads § 228, also 29 C.J. p 982 note 58–p 983 note 68.

Levy on property of third person see infra subdivision g of this section.

8. Cal.—Pixley v. Huggins, 15 Cal. 127.

9. Del.—Johnson v. Messick, 106 A. 58, 11 Del.Ch. 454.
S.D.—Dyar v. Hazel, 193 N.W. 666, 46 S.D. 427, quoting **Corpus Juris.**

10. U.S.—Getty v. A. Hupfel's Son, D.C.Pa., 292 F. 178, affirmed, C.C. A., A. Hupfel's Sons v. Getty, 299 F. 939.

Schoolhouse not being vendible under execution, equity will interfere to prevent a cloud from being cast on the title by reason of a void sale. —State v. Tiedemann, 69 Mo. 306, 33 Am.R. 498.

11. Or.—George v. Nowlan, 64 P. 1, 38 Or. 537—White v. Espey, 28 P. 71, 21 Or. 328.

12. Cal.—Sanchez v. Carriaga, 31 Cal. 170.
Mo.—Marsala v. Gentry, App., 232 S.W. 1046.
S.C.—Kirk v. Duren, 23 S.E. 954, 45 S.C. 597.
23 C.J. p 564 note 66.

Summons in wrong name

A judgment against one in the wrong name, who was not served, is null and void, and an execution sale and sheriff's deed executed thereunder will not cast such a cloud on title as to authorize an injunction restraining a sale under execution.—Marsala v. Gentry, Mo.App., 232 S.W. 1046.

13. Mo.—Haeussler v. Thomas, 4 Mo.App. 463.

14. Mo.—South Presbyterian Church v. Hintze, 72 Mo. 363—Marsala v.

Discretion of court. The issuance of an injunction restraining a levy or sale under execution to prevent a cloud on title is ordinarily within the discretion of the court,[15] and it will not exercise its jurisdiction to the injury of strangers.[16]

c. Errors or Irregularities Prior to Entry of Judgment

Errors or irregularities rendering the judgment voidable do not justify enjoining the execution sale.

It is not a ground for injunction to restrain an execution sale that the judgment is voidable because of errors preceding its entry,[17] a suit to enjoin execution being a collateral attack on the judgment.[18] Thus, where service of a writ of garnishment is irregular and a default judgment rendered, the irregularity of service does not constitute a ground for enjoining the sale under execution.[19] However, an interlocutory injunction has been granted to restrain a sale under execution on a judgment including attorney's fees where it was admitted that statutory notice of such fees had not been given.[20]

d. Irregularities in Writ or Proceedings Thereunder

(1) In general
(2) Delay in issuing execution
(3) Execution for excessive sum
(4) Issuance of writ contrary to agreement

(1) In General

Irregularities in the writ of execution or in proceedings thereunder may or may not constitute a ground for enjoining the levy or sale.

The decisions are not in agreement as to whether irregularities in the execution writ or in the proceedings thereunder constitute grounds for restraining a levy or sale under execution. In a number of instances injunctions have been granted be-

Gentry, App., 232 S.W. 1046—Long v. Palisades Bank, App., 198 S.W. 1129—Payne v. Daviess County Savings Ass'n, 105 S.W. 15, 126 Mo.App. 593.

What constitutes cloud on title in suits to quiet title see the C.J.S. title Quieting Title §§ 12–15, also 51 C.J. p 149 note 82 et seq.

15. Cal.—Goldstein v. Kelly, 51 Cal. 301.

S.D.—Dyar v. Hazel, 193 N.W. 666, 46 S.D. 427, quoting **Corpus Juris.**

Injunction against levy or sale under execution as discretionary generally see supra § 151 a.

Discretion held not abused

S.D.—Dyar v. Hazel, 193 N.W. 666, 46 S.D. 427.

16. Cal.—Goldstein v. Kelly, 51 Cal. 301.

S.D.—Dyar v. Hazel, 193 N.W. 666, 46 S.D. 427, quoting **Corpus Juris.**

17. N.M.—Sowder v. Citizens Nat. Bank of Lubbock, Tex., 50 P.2d 856, 39 N.M. 508.

23 C.J. p 557 note 52.

Particular errors

(1) An injunction against an execution under a judgment of an appellate court will not be granted because of lack of jurisdiction to render the judgment, based on the theory that the judgment appealed from was not final.—Ware v. Jones, Tex. Civ.App., 248 S.W. 429, affirmed, Com.App., 250 S.W. 663.

(2) A judgment that a ditch and its bed and banks were plaintiff's property is not subject to attack, in a suit to restrain execution, because it gave plaintiff fourteen feet of defendant's land as the necessary width of one bank to secure plaintiff in the reasonable enjoyment of its easement over defendant's land, although the complaint did not allege that plaintiff was the owner of any part thereof, the amount of land necessary for such purpose being for the court rendering the judgment, and any error in awarding more than was necessary being an error within jurisdiction which cannot be inquired into in such a suit.—Schultz v. Mexican Dam & Ditch Co., 224 P. 804, 47 Nev. 453.

(3) Error in awarding special damages under general allegations of damage is error, within the court's jurisdiction, which can be corrected only on new trial or appeal, and not in a suit to restrain execution of the judgment.—Schultz v. Mexican Dam & Ditch Co., supra.

(4) Where defendant not legally served with process made general appearance, remedy for erroneous decree is by appeal, and not collateral attack by suit to enjoin execution.—Hulsey v. Commercial Inv. Trust, 138 So. 766, 103 Fla. 609.

(5) However, it has been said that lack of service of summons and knowledge of suit may justify resort to equity to restrain execution.—Parker v. Berryman, 198 A. 708, 174 Md. 356.

(6) There is dictum that if the return of a sheriff showing service, is false, a remedy for the person purported to have been served is to enjoin execution on the judgment.—Board of Com'rs of Labette County v. Abbey, 100 P.2d 720, 151 Kan. 710.

(7) Where complainant sought an injunction to restrain levy of execution on the ground that he was tricked into coming into the county for the purpose of service of process, but this defense was not raised at the trial of the case, it was held that he had waived his right by failure to raise the question at the trial.—Sharp v. Kennedy, 13 Tenn.App. 170.

(8) That certain witnesses had testified falsely in order to obtain the judgment is not a ground for enjoining levy of execution.—Sharp v. Kennedy, supra.

(9) Error of a judge when not qualified for office in rendering a default judgment with a writ of inquiry in a suit on a written instrument, followed by rendition of final judgment after qualification, is a mere irregularity available by appeal or writ of error, and not by injunction to restrain the execution.—Stoudenmeier v. First Nat. Bank, Tex.Civ.App., 246 S.W. 761.

Writ of inquiry see Damages § 171.

18. Fla.—Fisher v. W. T. Rawleigh Co., 193 So. 747, 141 Fla. 717.

19. Tex.—Ellis v. Lamb-McAshan Co., Civ App., 278 S.W. 858.

Knowledge of agent

Where service of a writ of garnishment is irregular because commanding the party's appearance before the court at a day of the term other than the first day of the ensuing term, such irregularity does not constitute a ground for enjoining the sale under execution where the agent served knows the requirement of the law.—Ellis v. Lamb-McAshan Co., supra.

20. Ga.—Chamlee v. Austin, 103 S. E. 490, 150 Ga. 279.

cause of such irregularities,[21] especially where an independent ground for equitable relief appears.[22] Thus a sale without required indorsements,[23] or without notice of seizure,[24] or a sale of excessive interest,[25] has been enjoined. Likewise, a sale of an entire tract of land at one time instead of by separate parcels may be enjoined,[26] especially where it appears that the land will be sold at a sacrifice by that method.[27] An order of sale prior to a valid entry of judgment has been held a ground for injunction,[28] as has also the sale of property other than that described in the advertisement and notice.[29] Where two pieces of property are to be sold in a manner which would make the sale void and prevent competition, an injunction is proper.[30]

On the other hand, it has been held that, where an execution is irregularly issued,[31] or the writ is irregular in form,[32] or no valid levy has been made,[33] or the writ is being executed in an irregular, oppressive, or fraudulent manner,[34] an injunction will not be granted, unless the remedy at law is inadequate,[35] since relief can be obtained by motion or otherwise out of the court which issued the writ,[36] or by appeal.[37] Thus a threatened sale without an appraisement as required by law,[38] or a levy on real property before a levy on per-

21. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.
23 C.J. p 558 note 68.

Irregularities in advertisement of sale

(1) Irregularities in advertisement of sale sufficient to avoid the sale to a purchaser with notice are sufficient to uphold an injunction to prevent removal or interference with property until validity of sale can be determined.—Triumph Ice Mach. Co. v. Sandersville Ice Co., 94 S.E. 570, 147 Ga. 468.

(2) Failure to advertise execution sale for the statutory time constitutes a ground for issuance of injunction against the sale.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

Issuance of second writ to the same parish prior to a return on the first writ will be enjoined.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164.

Where two writs are issued simultaneously, and one of them is acted on, execution of the other, if attempted, may be enjoined.—Newell v. Morton, 3 Rob., La., 102—Hudson v. Dangerfield, 2 La. 63, 20 Am.D. 297.

Writ not in name of judgment creditor may be enjoined.—Snavely v. Harkrader, 30 Gratt. 487, 71 Va. 487.

22. Ga.—Hall v. Boyd, 52 Ga. 456.
23 C.J. p 559 note 69.

23. Iowa.—Meek v. Bunker, 33 Iowa 169.

Indorsement as to appraisement

Where a clerk of court is required to indorse on the execution whether the sale shall be with or without appraisement, the failure to make such indorsement is a ground for enjoining the sale.—Robinson v. Perry, 4 Tex. 278.

Sale under levy without indorsement required by law on an execution issued after death of judgment plaintiff will be enjoined on application of defendant.—Meek v. Bunker, 33 Iowa 169.

24. La.—Lapene v. McCan, 28 La. Ann. 749.

25. Kan.—Leslie v. Harrison Nat. Bank, 154 P. 209, 97 Kan. 22, 26.
23 C.J. p 558 note 68 [d].

26. Pa.—Williams v. Klein, 9 Kulp 442, followed in Donaldson v. Danville Bank, 20 Pa. 245.

27. Ga.—Reynolds & Hamby Est. Mortg. Co. v. Kingsberry, 45 S.E. 235, 118 Ga. 254.
23 C.J. p 559 note 71.

28. Tex.—Hubbart v. Willis State Bank, Civ.App., 152 S.W. 458.

29. La.—Dauchite Lumber Co. v. Lane & Bodley Co., 28 So. 232, 52 La.Ann. 1937.

30. La.—Mullins v. Hanneman, 49 So. 271, 123 La. 643.

31. Ga.—Camp v. Shuman, 132 S.E. 74, 161 Ga. 895.
23 C.J. p 557 note 53.

Premature writ

(1) Neither a preliminary writ of injunction nor a restraining order will issue because of a premature writ of execution.—Martel v. Rovira, 8 La.App. 385.

(2) An execution prematurely issued should not be perpetually enjoined where it appears at the time when the injunction is sought that the immediate issuance of another execution would be rightful and proper.—Dayton v. Natchez Commercial Bank, 6 Rob., La., 17.
23 C.J. p 557 note 53 [c].

Tender of affidavit of illegality

Refusal to enjoin constable's sale because plaintiff had tendered affidavit of illegality was not error, where claimed payments were made prior to judgment and sale and the proceeds were used to pay execution costs.—Camp v. Shuman, 132 S.E. 74, 161 Ga. 895.

Evidence not justifying writ

Defendant in executory proceedings has no right to injunction on ground authentic evidence does not justify order of seizure and sale.—Weber v. Dawson, 133 So. 751, 172 La. 213.

32. Tex.—Kelley v. Stubblefield, Civ.App., 26 S.W.2d 281.
23 C.J. p 558 note 54.

Absence of indorsement that writ is issued for the use of a surety who has paid the judgment, although such indorsement is required by statute, is not a ground for restraining the execution sale.—Edwards Bros. v. Bilbo, 103 So. 209, 138 Miss. 484.

33. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936—Gusman v. De Poret, 33 La.Ann. 333.

Noncompliance with statute

A sale under execution of the life estate of a debtor without compliance with statutory requirements in making the levy will not be enjoined.—Fortna v. Donaldson, 85 Pa. Super. 99.

34. Conn.—Johnson v. Connecticut Bank, 21 Conn. 148.
23 C.J. p 558 note 56.

That notice of intended levy and advertisement for sale has been given the judgment debtor, even if intended to compel payment of the judgment debt rather than suffer publicity, is not a ground for enjoining the execution, where nothing appears that such levy or advertisement would be improper or illegal.—Foster v. Cotton States Electric Co., 157 S.E. 636, 172 Ga. 231.

35. Ky.—Plummer v. Talbott, 50 S. W. 1097, 21 Ky.L. 30.
23 C.J. p 558 note 57.

36. Miss—Edwards Bros. v. Bilbo, 103 So. 209, 138 Miss. 484.

37. La.—Weber v. Dawson, 133 So. 751, 172 La. 213.

In absence of suspensive appeal from the judgment neither a preliminary injunction nor a restraining order will be granted because of a premature writ of execution.—Martel v. Rovira, 8 La.App. 385.

38. Ill.—Robinson v. Chesseldine, 5 Ill. 332.

sonalty,[39] or vice versa,[40] or an excessive seizure or levy,[41] unless fraudulent or oppressive,[42] or a mere irregularity in the notice of sale,[43] are not grounds for an injunction.

(2) Delay in Issuing Execution

In some jurisdictions the remedy is by motion in the original cause where execution is issued after the lapse of the time prescribed, but in other jurisdictions execution on a dormant judgment will be enjoined.

In some jurisdictions it is held that where execution is issued after the lapse of time provided by law for issuing it, the remdy is by motion in the original cause, and not by injunction,[44] and where the time limited for the enforcement of a judgment is fixed by statute, laches short of the statutory time is not ground for an injunction.[45] In other jurisdictions injunction has been held proper to restrain execution on a dormant judgment.[46]

(3) Execution for Excessive Sum

Execution for an excessive sum is not a ground for an injunction, unless statutes otherwise provide.

Except where it is otherwise provided by statute,[47] or where execution is for the penalty of a bond,[48] injunction should not issue against an execution merely because issued for too large an amount, the remedy being a motion or application to court of issuance.[49] It follows that the fact that by mistake or omission credits were not entered on an execution is not ground for an injunction.[50]

(4) Issuance of Writ Contrary to Agreement

In some jurisdictions a levy or sale under execution contrary to an agreement of the parties may be enjoined; in other jurisdictions an injunction will not be granted in such a case.

It has been held that a writ issued in violation of an agreement of the parties will not be enjoined.[51] However, it has been also held that an

39. N.J.—Palladino v. Hilpert, 65 A. 721, 72 N.J.Eq. 270.

40. Ill.—Farrell v. McKee, 36 Ill. 225.

41. La.—Martel v. Rovira, 8 La. App. 385.
23 C.J. p 558 note 64.

42. Ga.—Miller v. Baxter, 34 S.E. 169, 108 Ga. 600.

43. Tex.—Teague v. Burk, Civ.App., 3 S.W.2d 461.
23 C.J. p 558 note 66.

Omission of recital of amount due
on judgment from notice of sale affords no ground for enjoining the sale.—Teague v. Burk, Tex.Civ.App., 3 S.W.2d 461.

44. Cal.—Mayo v. Bryte, 47 Cal. 626.
23 C.J. p 559 note 84.

45. S.C.—Ex parte Anderson, 63 S.E. 354, 82 S.C. 131.

46. Tex.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.
23 C.J. p 559 note 86.

Delay due to proceedings by debtor
(1) Failure to have execution issued within the statutory time will not constitute a ground for enjoining its issuance, where the delay was due to judicial proceedings by the judgment debtor and execution is issued within the required time after termination of such proceedings.—Bridges v. Wilder, Tex.Civ.App., 72 S.W.2d 644.

Death of judgment debtor
Plaintiff is entitled to injunction restraining sale of land under a pluries writ of execution where judgment debtor, who was alive when judgment was recovered, had died before issuance of pluries execution and land sought to be sold thereunder had devolved on plaintiff and there had not been an administration on debtor's estate, the judgment not being dormant.—Grisson v. F. W. Heitmann Co., Tex.Civ.App., 130 S.W.2d 1054, error refused.

47. **In Louisiana**
(1) A statutory remedy of injunction exists to prevent collection by execution of more than is due.—Hamilton v. Antoine, App., 157 So. 795—23 C.J. p 559 note 79 [a].

(2) However, an injunction issued on such ground should be limited to the excess.—Hamilton v. Antoine, supra—23 C.J. p 559 note 79 [a] (2).

(3) Other matters see 23 C.J. p 559 note 79 [a] (4), (5).

48. Del.—Ætna Casualty & Surety Co. v. Mayor and Council of Wilmington, 160 A. 747, 17 Del.Ch. 280.

Judgment under warrant of attorney
Where judgment is entered by warrant of attorney for penalty of bond whose condition is for performance of some collateral undertaking and not for payment of money, if creditor takes execution after breach for larger sum than damages actually sustained, equity will restrain execution.—Ætna Casualty & Surety Co. v. Mayor and Council of Wilmington, supra—Staats v. Herbert, 4 Del.Ch. 508.

49. Ala.—Henderson v. Holman, 69 So. 424, 193 Ala. 262.
23 C.J. p 559 note 81.

50. Ga.—Wade v. Calhoun Nat. Bank, 89 S.E. 407, 145 Ga. 394.
23 C.J. p 559 note 82.

51. Cal.—Moulton v. Knapp, 24 P. 803, 85 Cal. 385.
23 C.J. p 559 note 75.

Adequate remedy at law
Equity court had no jurisdiction of suit to restrain execution and have judgment satisfied on ground judgment was entered in violation of oral agreement, since remedy was by application to law court for leave to file answer.—Schierstead v. Somers, 169 A. 730, 115 N.J.Eq. 140.

Lack of consideration
Judgment creditor's promise to delay execution on part payment being without consideration, creditor cannot be enjoined from proceeding with execution.—Druid Hills v. Doughman, 156 S.E. 229, 171 Ga. 521.

Where no meeting of minds
Where parties agreed to settle defendant's action against complainants for personal services by defendant's taking judgment for fifteen thousand dollars, and withholding execution, but minds of parties never met as to whether payment should be in cash or stock, complainant could not restrain defendant from executing judgment and require him to accept stock in satisfaction thereof.—Girard Trust Co. v. Peacock, 169 A. 645, 115 N.J.Eq. 128.

Premature execution
Issuance of writ prior to the time specified by the parties is not a ground for injunction, particularly when the agreed time has arrived prior to the institution of the injunction suit.—Taylor v. American Trust & Savings Bank of El Paso, Tex.Civ. App., 265 S.W. 727.

injunction may properly issue in such a case,[52] except where defendant would not be harmed,[53] or where the agreement for delay was made before judgment and might have been pleaded.[54]

e. Irreparable Injury

A levy or sale under execution may be enjoined where it causes irreparable injury, such as loss of credit or commercial ruin.

Where the injury will be irreparable, an injunction may issue to restrain a levy or sale under execution.[55] Thus injunction lies where the remedy at law is inadequate because of the property having a peculiar value not capable of being fully compensated in damages.[56] This rule has been applied in the case of an execution against a mercantile business which will prevent the carrying on of the business and mean loss of credit and commercial ruin.[57]

On the other hand, if no irreparable injury can result an injunction will not be granted,[58] especially where the property is personal property.[59]

f. Property Not Subject to Execution

Property in the custody of the law generally will be protected by injunction from levy and sale if the legal remedy is inadequate.

There is some conflict of authority as to whether an injunction against a levy or sale under execution will lie where the property is not exempt by statute but is nevertheless such property as is not subject to execution. Generally property in the custody of the law will be protected by injunction from levy and sale,[60] if the remedy at law is deemed inadequate.[61] Where the parties contract that certain property shall be exempt, injunction lies to restrain an execution sale of such property.[62] Injunction also will be granted in order to prevent a multiplicity of suits,[63] or, as stated in subdivision b of this section, to prevent a cloud on title.

On the other hand, it has been held that the sale of land or an interest therein, which is not subject to execution, cannot be enjoined, since the remedy at law is adequate;[64] nor will injunction lie in behalf of the judgment debtor on the ground that the property levied on is an equitable estate and therefore not subject to execution, where the creditor claims the estate is a legal estate.[65] Where a personal judgment based on an indebtedness secured by a deed to realty need not be satisfied by a levy on the security before it can be enforced against other property of the debtor, equity will not enjoin a levy on other property until the security is exhausted, simply because it would be to the debtor's advantage and best interest that such

52. Neb.—Gibson v. McClay, 66 N. W. 851, 47 Neb. 900.
23 C.J. p 559 note 76.

53. La.—Leblanc v. Walsh, 8 La. Ann. 67.
23 C.J. p 559 note 77.

54. La.—Livingston v. Winfrey, 5 La.Ann. 670.

55. Tex.—W. L. Pearson & Co. v. Harding, Civ.App., 30 S.W.2d 403, reversed on other grounds Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964.
23 C.J. p 557 note 43.

56. Fla.—First Nat. Bank v. Mackenzie, 131 So. 790, 100 Fla. 1674.
Mich.—Prochnow v. Anderson, 221 N. W. 619, 244 Mich. 525.
23 C.J. p 557 note 44.

Specially valuable
Stockholder unable to replace specially valuable stock levied on could restrain sale.—Prochnow v. Anderson, supra.

Slaves
(1) The rule of the text was applied, in some jurisdictions, to the case of an execution levied against slaves, at least to a limited extent.
Tenn.—Williams v. Wright, 9 Humphr. 493.
Va.—Randolph v. Randolph, 6 Rand. 194, 27 Va. 194.
23 C.J. p 557 note 46.

(2) In other jurisdictions the rule did not prevail unless it appeared that the remedy at law would be inadequate.—Nesmieth v. Bowler, 3 Bibb, Ky., 487.
23 C.J. p 557 note 48.

57. Mich.—Asiulewicz v. Pietrazewski, 190 N.W. 659, 660, 220 Mich. 690, quoting **Corpus Juris.**
23 C.J. p 557 note 45.

58. Minn.—Hart v. Marshall, 4 Minn. 294.
23 C.J. p 557 note 50.

59. Fla.—First Nat. Bank v. Mackenzie, 131 So. 790, 100 Fla. 1674.
23 C.J. p 557 note 51.
Personal property of third persons see subdivision g (3) of this section.

Ordinary remedy for levy on personal property is by trespass, or other appropriate legal remedy.—First Nat. Bank v. Mackenzie, supra—Florida Packing & Ice Co. v. Carney, 38 So. 602, 49 Fla. 293, 111 Am.S.R. 95.

60. Kan.—Ryan v. Parris, 30 P. 172, 48 Kan. 765.
23 C.J. p 561 note 18.

Property under attachment
An execution on property attached, both writs issuing in the same action, is not an interference with property in custodia legis, justifying injunction against execution sale.—Wagner v. Farmers' Co-op. Exch. Co. of Good Thunder, 180 N.W. 231, 147 Minn. 376, 14 A.L.R. 279.

61. Miss.—Cooper v. Newell, 36 Miss. 316.

62. Tex.—Taylor v. American Trust & Savings Bank of El Paso, Civ. App., 265 S.W. 727.

Increase of animals
Under a contract providing that the owner shall be entitled to retain possession of a specified number of animals, a sale under execution of calves of such animals will be enjoined.—Taylor v. American Trust & Savings Bank of El Paso, supra.

63. Mo.—State v. Tiedemann, 69 Mo. 303, 33 Am.R. 498.

64. W.Va.—Dunn v. Baxter, 5 S.E. 214, 30 W.Va. 672.
23 C.J. p 561 note 20.

Intervention and third opposition
Where there is a remedy by a proceeding called an intervention and third opposition, where property is not subject to execution, there is no necessity for resorting to equity to restrain the sale of personal property belonging to a state seminary of learning after it has been levied on.—Featherman v. Louisiana State Seminary, C.C.La., 8 F.Cas.No.4,713, 2 Woods 71.

65. N.J.—Smith v. Collins, 86 A. 957, 81 N.J.Eq. 348.
23 C.J. p 561 note 21.

course be pursued.[66] The owner of property subject to a mortgage is not entitled to an injunction because the levy is made without redeeming the property from the mortgage, where an adequate remedy at law exists by means of an affidavit of illegality.[67]

Whether an injunction will lie to restrain a sale under execution of property exempted by law is discussed in the C.J.S. title Exemptions § 153, also 25 C.J. p 153 notes 91–99, and injunctions against a sale under execution of homesteads, in the C.J.S. title Homesteads § 228, also 29 C.J. p 982 note 58–p 983 note 68.

Moratorium statutes. In some jurisdictions the statutory remedy of injunction against execution sales, conferred by moratorium acts, is limited to execution sales of real property.[68]

g. Property of Third Persons

(1) In general
(2) Real property
(3) Personal property
(4) Fraudulent conveyances
(5) Compelling exhaustion of other property of debtor

(1) In General

Except where injunctive relief is authorized by statute, a third person whose property is seized under execution against a judgment debtor is not, in the absence of special circumstances, entitled to an injunction restraining the sale.

Unless otherwise provided by statute,[69] one whose property is levied on as the property of another is not, as a rule, entitled to an injunction to restrain a sale of the property under the execution, since he has an adequate remedy at law as by motion to have the levy discharged, by replevin or ejectment, by proceedings under statutes providing for the trial of the right of property,[70] or by statutory proceedings to establish the claim.[71] However, where from the peculiar character of the property or the circumstances of the particular case the remedy at law is inadequate, an injunction against a sale may be granted at the instance of a stranger to the execution.[72]

Whether an injunction will lie against a levy or sale under execution of the separate property of a married woman under a judgment against the husband is discussed in the C.J.S. title Husband and Wife § 458, also 30 C.J. p 1052 note 69–p 1053 note 83, and 23 C.J. p 567 note 99–p 568 note 6.

(2) Real Property

As a general rule, where the real estate of a third person is levied on as the property of the debtor, an injunction will not issue at the instance of such third person.

The general rule is that where the real estate of a third person is levied on as the property of the judgment debtor, the third person is not entitled to an injunction[73] for the reason that he has an adequate remedy at law,[74] although there are decisions which seem to warrant an injunction in such

66. Ga.—Shedden v. National Florence Crittenton Mission, 12 S.E.2d 618, 191 Ga. 428.

Restraining levy on personalty until realty exhausted

Where personal judgments based on notes secured by deeds to land were obtained against plaintiff, and judgments were declared to be special liens on land, that plaintiff, as defendant in fieri facias, could not direct sheriff to levy on land because title thereto was in plaintiff did not give plaintiff ground for relief in equity by injunction to restrain judgment creditor from levying executions issued on judgments on plaintiff's personal property until land had been levied on and sold.—Shedden v. National Florence Crittenton Mission, supra.

67. Ga.—Foster v. Cotton States Electric Co., 157 S.E. 636, 172 Ga. 231.

68. **What constitutes real property**

Under L.1934 c 247, authorizing injunctions against execution sales of real estate pending the emergency declared therein, an execution against a reservation of the exclusive right to construct and operate specified utilities, contained in a dedication of real estate for streets and alleys, will be enjoined; such reserved right in the dedication is not personalty, but realty within the meaning of the statute.—Gwin v. Smith, 167 So. 62, 175 Miss. 442.

69. **In Louisiana**

The remedy of injunction provided by Code Pract. art 298 par. 7, authorizing an injunction against defendant when the sheriff, in the execution of a judgment, has seized property not belonging to defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner, is not of a chancery nature, but simply a petition or motion, with notice to the sheriff.—Van Norden v. Morton, La., 99 U.S. 378, 25 L.Ed. 453.

70. U.S.—Van Norden v. Morton, supra.
Pa.—Seese v. Sibel, 3 Fay.L.J. 148.
23 C.J. p 564 note 67.

71. Ga.—Payne v. Royal Indemnity Co., 147 S.E. 95, 168 Ga. 77.

Judgment in claim case as conclusive

The issue in a claim case comprehends all the attacks which the claimant could make on the validity of the fieri facias, and after he has litigated through a claim case, and the property is found subject, and a judgment has been affirmed, equity will not enjoin a sale under the levy on any ground which the claimant might have urged in the claim case to discharge the judgment.—Hollinshead v. Woodward, 57 S.E. 79, 128 Ga. 7.

72. U.S.—Watson v. Sutherland, Md., 5 Wall. 74, 18 L.Ed. 580.
23 C.J. p 564 note 68.

73. Ga.—Hope v. Glass, 185 S.E. 803, 182 Ga. 514—Perry v. Gormley, 170 S.E. 223, 117 Ga. 372.
Pa.—Simon v. Sorrentino, 20 A.2d 805, 145 Pa.Super. 364—Brackin v. P. E. Welton Engineering Co., 128 A. 818, 283 Pa. 91—Fortna v. Donaldson, 85 Pa.Super. 99.
23 C.J. p 564 note 69.

74. Ga.—Hope v. Glass, 185 S.E. 803, 182 Ga. 514—Perry v. Gormley, 170 S.E. 223, 117 Ga. 372.
Pa.—Simon v. Sorrentino, 20 A.2d 805, 145 Pa.Super. 364—Fortna v. Donaldson, 85 Pa.Super. 99.
23 C.J. p 564 note 69.

cases.[75] Much less will an injunction issue in favor of a complainant who, out of possession, claims land levied on pending a suit against defendant in execution for the possession thereof.[76]

On the other hand, an injunction will lie where the remedy at law is deemed not adequate,[77] or there is no remedy at law,[78] or where an execution is being used to harass or annoy another,[79] or where there is some recognized ground for equitable relief,[80] or where the effect of a sale would be to cast a cloud on complainant's title;[81] but an injunction should not be granted to prevent a cloud on title where there are serious doubts as to the title of complainant.[82] Equity will protect an equitable interest in land, as otherwise complainant would be without remedy.[83] Where a claim to real estate is filed but is rejected by the officer levying execution and the property is sold, equity will restrain the officer from turning over possession to the purchaser and the purchaser from taking possession.[84]

Debtor's purchaser. Where the judgment is for any reason not a lien on the land of the debtor, a bona fide purchaser from the debtor may, in many jurisdictions, obtain an injunction restraining the creditor from selling the land purchased on the ground that the sale would cast a cloud on his title;[85] but it is otherwise where the judgment is a

75. Okl.—Leach v. Kincaid, 244 P. 191, 116 Okl. 245.
23 C.J. p 565 note 71.

76. Ga.—McPhee v. Veal, 76 Ga. 656.

77. Wash.—Cline Piano Co. v. Sherwood, 106 P. 742, 57 Wash. 239.
23 C.J. p 565 note 73.

78. In Georgia third persons who own land which has been levied on, and who, by reason of their not being parties to the execution, are not competent to make an affidavit of illegality, are entitled to an injunction.—Leitch v. City of Dublin, 128 S.E. 889, 160 Ga. 691—23 C.J. p 565 note 74 [a].

79. Pa.—Natalie Anthracite Coal Co. v. Ryon, 41 A. 462, 88 Pa. 138.
23 C.J. p 565 note 75.

80. N.J.—Alpern v. Behrenburg, 77 A. 803, 77 N.J.Eq. 373.
23 C.J. p 565 note 76.

Proceeding by original bill

The legal owner of land, who has an equity to restrain a judgment creditor of a former owner from resorting to the land for payment of his judgment, must do so by original bill in equity.—Dent v. Ross, 35 Pa. 337.

81. N.Y.—New York Cent. R. Co. v. First Nat. Bank, 133 N.E. 908, 232 N.Y. 330, reversing 184 N.Y.S. 938, 193 App.Div. 926.
23 C.J. p 565 note 77.
Cloud on title as ground for enjoining execution levy or sale see supra subdivision b of this section.

In Missouri

(1) Prior to the amendment in 1899 of what is contained in Rev.St.1939 § 1683, the rule was that where a person had complete and perfect record title to land equity would not enjoin a sale under execution issued against another person having no interest in the land, since the owner had an adequate remedy at law by defense against any action by the purchaser at the execution sale, so that there would be no cloud on title and title could be proved by the record title without the use of extrinsic evidence or parol evidence outside the record.—Kuhn v. McNeil, 47 Mo. 389—23 C.J. p 565 note 77 [b] (2). Dictum to same effect see Rookery Realty, Loan & Inv. Co. v. Johnson, 243 S.W. 123, 294 Mo. 461—Madden v. Fitzsimmons, App., 150 S.W.2d 761.

(2) However, it was further held that if the title was not perfect and complete, and the execution debtor had some apparent interest in the land so as to require the owner to prove title by extrinsic evidence, injunction could be had.—Rookery Realty, Loan & Inv. Co. v. Johnson, supra—Madden v. Fitzsimmons, supra.

(3) Following the amendment of 1899, it was held that the owner could enjoin an execution issued against a stranger from being levied on his lands, provided such a cloud on title existed as had formerly been required.—Long v. Palisades Bank, App., 198 S.W. 1129—23 C.J. p 565 note 77 [b] (1).

(4) Subsequent cases have removed this limitation.—Rookery Realty, Loan & Inv. Co. v. Johnson, supra—Madden v. Fitzsimmons, supra.

(5) Hence the Missouri rule may be summarized: A suit may be maintained to enjoin the sale of land by virtue of an execution on a judgment against one having no interest in the land subject to the execution at the time of sale, whether the defense of the title against the execution purchaser would depend on extrinsic evidence, or whether no title or apparent title would pass by virtue of the sale.—Macklind Inv. Co. v. Ferry, 108 S.W.2d 21, 341 Mo. 493—Madden v. Fitzsimmons, supra.

In Texas

(1) Formerly a sale of real estate under execution, issued against a third person, could not be enjoined by the owner of the property where the evidence of the superiority of his title was a matter of record.—Mann v. Wallis, 12 S.W. 1123, 75 Tex. 611—23 C.J. p 565 note 77 [c] (1).

(2) Complainant was deemed to have an adequate remedy at law.—Mann v. Wallis, supra—23 C.J. p 565 note 77 [c] (1).

(3) This rule, although followed, was criticized and deplored.—Chamberlain v. Baker, 67 S.W. 532, 28 Tex. Civ.App. 499.

(4) Where the evidence that would defeat the apparent claim being sold through the execution sale was not a matter of record, an injunction would lie for the reason that an innocent purchaser might thus acquire title and irreparable injury result—Gardner v. Douglass, 64 Tex. 76—Barr v. Simpson, 117 S.W. 1041, 54 Tex.Civ.App. 105—23 C.J. p 565 note 77 [c] (2).

(5) Under subsequent statutes an owner of real property will be granted an injunction against a levy or sale under execution against another as a cloud upon the title, irrespective of any legal remedy at law.—Mostyn v. Griffith, Civ.App., 130 S.W.2d 906, error dismissed, judgment correct—Pacheco v. Allala, Civ.App., 261 S.W. 148—Boykin v. Pierce, Civ.App., 240 S.W. 1114, error refused—23 C.J. p 565 note 77 [c] (4).

82. Colo.—Crawford v. Lamar, 47 P. 665, 9 Colo.App. 83.
23 C.J. p 566 note 79.

83. Ky.—Orr v. Pickett, 3 J.J.Marsh. 269.

84. Ga.—Cook v. Dixon, 114 S.E. 429, 154 Ga. 373.

85. La.—Peterman v. Vermont Sav. Bank, 159 So. 598, 181 La. 403.
N.Y.—Stark v. Weisner, 214 N.Y.S. 292, 126 Misc. 620.
Okl.—Ratliff v. Lamar, 30 P.2d 689, 169 Okl. 487.
23 C.J. p 566 note 81.

Materiality of remedy at law

Under statute, the right to temporary injunction restraining sale under execution against party alleged to have no interest in land involved is not dependent on showing that peti-

lien.[86] In other jurisdictions the purchaser is left to his remedy at law,[87] except that equity will interpose where there are other grounds for its intervention.[88]

Where purchasers claim under deeds from the judgment debtor, but defects in the deeds affirmatively appear so as to render them void as against creditors, an injunction will not lie.[89] An execution purchaser cannot restrain another creditor from selling the property under an alleged prior encumbrance.[90]

(3) Personal Property

Except when compensation in damages cannot be had or there is no adequate remedy at law, or some equitable feature exists, a sale under execution of personal property of a person other than the judgment debtor will not be enjoined.

Ordinarily equity will not enjoin the sale of the personal property of complainant under an execution against another,[91] unless such property has a special value, rendering compensation in damages impossible,[92] or the consequential damages would result in great injustice,[93] or the claim of one party involves or depends on some equitable interest or feature.[94] Complainant should resort to the remedy given him at law by replevin,[95] or detinue,[96] or interpleader,[97] or sue the officer in trespass,[98] or proceed by affidavit and bond to try the right of property.[99]

Where the remedy at law is not adequate an injunction pending declaratory judgment will not lie.[1] Equity will not enjoin the sale of personal property under execution where the judgment debtor has a mere equitable interest in the property.[2] Equity will not enjoin the sale of property under execution where the judgment debtor has a mere equitable interest in the property.[3] Equity will not enjoin the sale of property under execution where the judgment debtor has a mere equitable interest in the property.[4] Equity will not enjoin the sale of property under execution where the judgment debtor has a mere equitable interest in the property.[5] Equity will not enjoin the sale of property under execution where the judgment debtor has a mere equitable interest in the property.[6] Equity will not enjoin the sale of property under execution where the judgment debtor has a mere equitable interest in the property.[7] Equity will not enjoin the sale of property under execution where the 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tioners had no adequate remedy at law.—Shirey v. Trust Co. of Texas, Tex.Civ.App., 69 S.W.2d 835, error refused.

Sale constituting cloud on title

A sale under execution against a judgment debtor where the real property has been conveyed several times by warranty deed and also mortgaged constitutes a cloud on the title of the warrantors and the mortgagee.—Shirey v. Trust Co. of Texas, supra.

86. Ind.—Decker v. Gilbert, 80 Ind. 107.
23 C.J. p 566 note 82.

87. N.J.—Englese v. Hyde, 155 A. 373, 108 N.J.Eq. 403.
23 C.J. p 566 note 83.

88. N.J.—Englese v. Hyde, supra.
23 C.J. p 566 note 84.

Equitable estate

Md.—Hampson v. Edelen, 2 Harr. & J. 64, 3 Am.D. 530.
23 C.J. p 566 note 86.

Fraud

S.C.—Wheeler v. Alderman, 13 S.E. 673, 34 S.C. 533, 27 Am.S.R. 842.
23 C.J. p 566 note 85.

Injunction pending declaratory judgment

Where equity has no jurisdiction to determine whether the title of a purchaser from the judgment debtor is superior to the lien of the judgment, and no remedy is provided at law for the determination of such question until after the lien of the judgment has been transformed into an absolute title, the purchasers should be permitted time to avail themselves of the remedy under the Declaratory Judgments Act, and, pending a determination in such proceeding, the execution sale will be enjoined.—Englese v. Hyde, 155 A. 373, 108 N.J.Eq. 403.

Injury to purchaser caused by judgment creditor

Where judgment debtor and judgment creditor, relatives, lived in the same household, and the judgment was docketed in a name differently spelled so that a transferee of the property had no knowledge of the existence of the judgment, such transferee is entitled to have the execution sale enjoined, it appearing that the judgment creditor knew of the error in name and that he instructed his attorney not to press execution.—Stark v. Weisner, 214 N.Y.S. 292, 126 Misc. 620.

89. Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.

90. N.C.—Fox v. Kline, 85 N.C. 173.

91. Ga.—Citizens' Finance Co. v. Griffin, 172 S.E. 339, 178 Ga. 153.
Ohio.—Ford v. Anderson, 162 N.E. 708, 28 Ohio App. 287.
Tex.—West Texas Utilities Co. v. Farmers' State Bank in Merkel, Civ.App., 68 S.W.2d 648.
W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W.Va. 490.
23 C.J. p 567 note 89.

92. Ohio.—Ford v. Anderson, 162 N.E. 708, 28 Ohio App. 287.
W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W.Va. 490.

Prejudicial circumstances

Claimant has grounds for temporary injunction, where the taking of personal property by writ of execution may be prejudicial to him and for which he has no specific statutory remedy, but is left exclusively to a common-law action for damages.—Berwald's, Inc., v. Brown, Tex.Civ.App., 69 S.W.2d 221.

93. W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W.Va. 490.
23 C.J. p 567 note 91.

94. Tex.—Sowell v. Best, Civ.App., 146 S.W.2d 817.
23 C.J. p 567 note 92.

Discretion of court

In action based on alleged wrongful levy on plaintiff's property which constituted stock in trade and fixtures of drugstore, as that of third person, the granting of temporary injunction restraining sale of the property by the defendants, and commanding return of storeroom in which property was located, was within discretion of trial court.—Herndon v. Cocke, Tex.Civ.App., 138 S.W.2d 298.

Cloud on title

Owner could enjoin sale of interest in oil leases on execution of judgment rendered against judgment debtor who had no interest in leases, where sale would result in cloud on owner's title.—Newton v. McCarrick, Tex.Civ.App., 75 S.W.2d 472, error dismissed.

Fraud

Where fraud infects the transactions of the parties equity will take jurisdiction.
Ark.—Beckler v. Berry, 114 S.W.2d 1060, 195 Ark. 932.
W.Va.—McFarland v. Dilly, 5 W.Va. 135.

Pending suspensive appeal from a decree denying injunctive relief, buyer of cows on credit is entitled to injunction against sheriff's sale thereof under fieri facias on judgment against seller, who delivered them to buyer before seizure.—Harmon v. Moore, La.App., 169 So. 174, affirmed 172 So. 175.

95. U.S.—Van Norden v. Morton, La., 99 U.S. 378, 25 L.Ed. 453.
23 C.J. p 567 note 93.

96. W.Va.—Zanhizer v. Hefner, 35 S.E. 4, 47 W.Va. 418.

97. Pa.—Eckfelt v. Starr, 5 Phila. 497.

98. U.S.—Van Norden v. Morton, La., 99 U.S. 378, 25 L.Ed. 453.
23 C.J. p 567 note 95.

99. Ga.—Citizens' Finance Co. v. Griffin, 172 S.E. 339, 178 Ga. 153.
Tex.—West Texas Utilities Co. v.

junction can be obtained,[1] as, for instance, where the levy would mean loss of credit and commercial ruin.[2]

(4) Fraudulent Conveyances

A transferee under a fraudulent conveyance is not entitled to an injunction against a levy or sale under execution of the property transferred.

Where a judgment creditor may levy execution on the property fraudulently transferred by his debtor, as shown in the C.J.S. title Fraudulent Conveyances § 308, also 27 C.J. p 704 note 15–p 706 note 28, injunctive relief at the instance of the transferee will not be granted,[3] and it has been so held although the levy and sale would constitute a cloud on the title.[4] If the husband makes a fraudulent conveyance to his wife, injunction will not issue against execution levied on the property thus conveyed.[5]

(5) Compelling Exhaustion of Other Property of Debtor

In some jurisdictions the purchaser from a judgment debtor is entitled to an injunction to compel the creditor to resort to property still in the debtor's possession.

The doctrine of marshaling assets has been invoked in some jurisdictions in aid of the purchaser of a judgment debtor to compel the creditor to resort to the property still in the possession of the debtor before selling the land of the debtor's purchaser to satisfy the judgment; injunction may issue against the creditor who insists on proceeding first against the purchaser,[6] although in some cases the injunction has been denied as improper.[7] The doctrine will not be extended so far as to interfere with the creditor's rights under his lien, or impose unreasonable delay or litigation and expense in the enforcement of his remedies.[8]

h. Protection of Other Creditors or Interested Persons

(1) In general
(2) Lien creditors
(3) Joint property
(4) Trust property

(1) In General

An injunction against a levy or sale under execution ordinarily will not be granted to protect creditors.

Creditors ordinarily cannot obtain an injunction against a levy or sale under execution by the judgment creditor.[9] A simple contract creditor should reduce his claim to a judgment to secure a standing in a court of equity to enjoin the disposition of his debtor's property under judgments alleged to have been obtained in fraud of his claim.[10] An attaching creditor who has not yet reduced his claim to judgment stands in no better position.[11] Where a person has an interest in land which will not pass by an execution sale against another, such person cannot be injured by the sale and hence is not entitled to an injunction.[12]

Farmers' State Bank in Merkel, Civ.App., 68 S.W.2d 648.
23 C.J. p 567 note 96.

1. Ga.—Solomon v. Dunlap-Huckabee Auto Co., 164 S.E. 185, 174 Ga. 782.
Ohio.—Ford v. Anderson, 162 N.E. 708, 28 Ohio App. 387.
Tenn.—Summers & Lewis v. Sanderson, 7 Tenn.App. 624.
23 C.J. p 567 note 97.

2. Ohio.—Ford v. Anderson, 162 N. E. 708, 28 Ohio App. 387.
Tex.—Berwald's Inc., v. Brown, Civ. App., 69 S.W.2d 221.
23 C.J. p 557 note 45 [b].
Loss of credit and commercial ruin as ground for enjoining execution levy or sale generally see subdivision e of this section.

3. Minn.—Doland v. Burns Lumber Co., 194 N.W. 636, 156 Minn. 238.
23 C.J. p 568 notes 10, 11.

4. Tex.—Chamberlain v. Baker, 67 S.W. 532, 28 Tex.Civ.App. 499.

Applicability of statute authorizing injunction

(1) The statute authorizing injunctive relief against a proposed execution sale of realty as a cloud on title is not intended to be a means of depriving a judgment creditor of a fraudulent grantor from the right to proceed under execution against land fraudulently conveyed for purpose of hindering or delaying such judgment creditor.—Madden v. Fitzsimmons, Mo.App., 150 S.W.2d 761.

(2) If property has been conveyed to plaintiff by judgment debtor in fraud of defendant as judgment creditor, an injunction will not be granted, and defendant will be permitted to proceed with sale as though there had been no such conveyance.—Madden v. Fitzsimmons, supra.

5. Okl.—Akers v. Rennie, 77 P.2d 1112, 182 Okl. 378.
Pa.—Sauber v. Nouskajian, 133 A. 642, 286 Pa. 449.
Tex.—Rockwell Bros. & Co. v. Lee, Civ.App., 21 S.W.2d 30.
23 C.J. p 568 note 7.

6. Ind.—Sidener v. White, 46 Ind. 588.
23 C.J. p 568 note 14.
Marshaling assets see the C.J.S. title Marshaling Assets and Securities, also 38 C.J. p 1365 note 1–p 1383 note 10.

7. S.C.—Latimer v. Ballew, 19 S.E 792, 41 S.C. 517, 44 Am.S.R. 748.
23 C.J. p 568 note 15.

8. N.C.—Francis v. Herren, 8 S.E. 353, 101 N.C. 497.
23 C.J. p 568 note 16.

9. S.C.—Montgomery & Crawford v. Arcadia Mills, 176 S.E. 589, 173 S. C. 464.
23 C.J. p 562 note 28.

Prior seizure under distress warrant

A sheriff cannot be enjoined from selling property which complainant claims he has taken without process, and which complainant had caused to be seized under a distress warrant, since the remedy against the sheriff is for damages or for the recovery of the property itself in the hands of the sheriff.—Demmitt v. Garnier, 2 Tex.Unrep.Cas. 333.

10. Pa.—Artman v. Giles, 26 A. 668, 155 Pa. 409.
23 C.J. p 562 note 26.

11. Pa.—Artman v. Giles, 26 A. 668, 155 Pa. 409—Meyers v. Rauch, 4 Pa.Dist. 331.

12. Widow
Ind.—Mead v. McFadden, 68 Ind. 340.

(2) Lien Creditors

(a) In general

(b) Mortgagees or bondholders

(a) In General

Under certain circumstances equity may enjoin a sale under execution at the instance of lienors.

A senior lienor or encumbrancer has no occasion for an injunction, since the sale cannot affect his lien.[13] Nevertheless injunction may be granted in such cases,[14] as far as necessary to protect such prior rights.[15] An injunction is proper pending proceedings to determine the priority of liens.[16] Equity will not generally enjoin a senior encumbrancer at the instance of the junior,[17] but the junior may restrain the sale on the ground that the senior lien has been paid,[18] or that it was void.[19]

It is no ground for injunction that the complaining lienor is without means to bid at the sale,[20] or that claims to the property are pending which will cause the property to be sold at a reduced price.[21]

(b) Mortgagees or Bondholders

Equity generally will not enjoin an execution sale to protect mortgagees, although an injunction may be granted under certain circumstances.

Generally a mortgagee cannot obtain an injunction against the sale of the mortgaged property under execution,[22] unless necessary to prevent the conversion or destruction of the property[23] or the impairment of his security,[24] or unless the writ is illegal,[25] or equity is the only forum having jurisdiction to determine his rights.[26] Injunction will not generally lie in favor of a mortgagee against an execution levied on land by the holder of a junior encumbrance, since the senior lien will not as a rule be impaired.[27] However, where the record does not disclose the priority of the mortgage, the mortgagee has a right to interfere and restrain an attempted sale of a full title and interest.[28] Where a senior mortgagee has agreed with the debtor to cancel a portion of the mortgage debt and to take an unsecured note for the balance in consideration of a deed of the land unencumbered, and he has advanced the money necessary to enable the debtor to secure a release of junior encumbrances, but by mistake the release discharged only a junior mortgage and not a judgment lien, he is entitled to have an execution sale under such judgment restrained, the mistake being one of excusable neglect and not such as changes the position of the execution creditor.[29]

A purchaser of mortgaged property at a foreclosure sale cannot enjoin a sale of the mortgagor's remaining equity of redemption as ordered in another action to which he was not a party.[30] If through another who acts without authority, the mortgagee's rights are not evidenced in whole by

13. Tex.—Bell v. Lebo, Civ.App., 74 S.W.2d 187.
23 C.J. p 562 note 30.

Landlord claiming lien on tenant's property generally is not entitled to injunction restraining execution sale of such property to satisfy judgment against tenant.—Bell v. Lebo, supra.

14. Tex.—Bell v. Lebo, supra.
23 C.J. p 562 note 31.

Landlord may have an execution sale against property of the tenant enjoined where such sale probably will result in waste, removal of the property, or other injury.—Bell v. Lebo, supra.

15. Kan.—Bowling v. Garrett, 31 P. 135, 49 Kan. 504, 33 Am.S.R. 377.
23 C.J. p 562 note 32.

16. Neb.—Northfield Knife Co. v. Shapleigh, 39 N.W. 788, 24 Neb. 635, 8 Am.S.R. 224.
23 C.J. p 562 note 33.

17. Okl.—Boviard Supply Co. v. Harris, 268 P. 223, 131 Okl. 180.
23 C.J. p 562 note 34.

18. Iowa.—Brigham v. White, 44 Iowa 677.
23 C.J. p 562 note 35.

19. Tex.—Orr v. Moore, 1 Tex.A.Civ. Cas. § 588.
23 C.J. p 562 note 36.

20. Ga.—Sanders v. Foster, 66 Ga. 292.

21. Ga.—Sanders v. Foster, supra—Robinson v. Thompson, 30 Ga. 933.

22. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 701, 98 Fla. 186, citing **Corpus Juris.**
La.—Riley v. Washington, App., 161 So. 896.
23 C.J. p 562 note 39.

23. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 701, 98 Fla. 186, citing **Corpus Juris.**
N.J.—Freeman v. Freeman, 17 N.J. Eq. 44.

24. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 701, 98 Fla. 186, citing **Corpus Juris.**
N.J.—Zimmer v. Dunlap, 133 A. 514, 99 N.J.Eq. 610.
23 C.J. p 562 note 41.

25. La.—Riley v. Washington, App., 161 So. 896.

Unauthorized alteration of writ

Where a writ of execution expires before delivery to the officer for the levy, and a court officer attempts to extend it by inserting a different date, a mortgagee is entitled to have an injunction against a sale under such illegal writ.—Riley v. Washington, supra.

26. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 701, 98 Fla. 186, citing **Corpus Juris.**
23 C.J. p 563 note 42.

27. Iowa.—Ramsdell v. Tama Water-Power Co., 51 N.W. 245, 84 Iowa 484.
23 C.J. p 563 note 43.

Record satisfaction

A chattel mortgagee who has accepted the property in satisfaction of the mortgage is not entitled to an injunction against a junior execution sale where the mortgage has been canceled of record.—Lathem v. Smith, 4 S.E.2d 27, 188 Ga. 472.

28. Kan.—Plumb v. Bay, 18 Kan. 415.
23 C.J. p 563 note 44.

29. Mont.—Little Horn State Bank of Wyola v. Gross, 300 P. 277, 89 Mont. 472.

30. Cal.—Macovich v. Wemple, 16 Cal. 104.

title of record, execution may be enjoined to prevent a cloud on his title.[31]

The mortgagee who comes into equity to foreclose his lien may have injunction to prevent a sale of the property under executions and attachments at law, in order to prevent a multiplicity of suits and a cloud on the title.[32] The trustee of a deed of trust of all the property of a company may enjoin the sheriff from seriously damaging the freehold by the removal of machinery from the premises in execution of a judgment, although the sheriff claims that the deed is fraudulent.[33]

Assignee of mortgage. An assignee of a mortgage is not entitled to an injunction against a sale under execution, unless it appears that an injury would thereby result for which there is no full, complete, and adequate remedy at law.[34]

Execution against quasi public property. Property of a railroad company[35] or other quasi-public corporation[36] may be protected from sale by injunction in favor of mortgagees or bondholders of the company, where their security would otherwise be affected. Thus, under a statute which makes all railroad property subject to a mortgage on it, injunction will be granted the bondholders of the road if execution is levied on a part of the property.[37]

(3) Joint Property

An injunction may issue to restrain an execution sale of the interest of a joint owner under a judgment against his coöwner, but the court will not restrain a sale of the interest of the coöwner.

While a joint owner who is not a judgment debtor cannot have a sale under execution enjoined as to the interest of his coöwner against whom the judgment was rendered,[38] an injunction lies to restrain a sale of his own interest, as where such sale would cast a cloud on his title.[39] Where goods are intermingled after complainant purchases an interest in part of the goods, and he fails to point out his goods to the officer, the execution will not be enjoined.[40]

Injunction has been issued to prevent the removal of the property that the debtor's share in it might first be determined,[41] and to protect the equity of one coöwner when the execution was issued at the instance of another coöwner.[42]

The availability of relief by injunction by one partner to restrain a levy or sale under execution against a copartner is considered in the C.J.S. title Partnership § 240, also 47 C.J. p 1019 notes 31–33.

(4) Trust Property

In a proper case an execution sale of trust property may be enjoined.

A sale of land held in trust under execution against the trustee would cloud the equitable title of a cestui que trust and will therefore be enjoined.[43] So an injunction is properly issued to protect infants' shares in real property held in trust.[44] An injunction also is proper where the sale would work irreparable injury to the title of the trustee.[45]

However, where there is an adequate remedy at law, neither the trustee nor the cestui que trust can obtain an injunction against a sale of the property under execution.[46] The grantee of land subject to a trust who subsequently receives an interest in the land discharged of the trust cannot enjoin an execution against his interest in it.[47]

i. Satisfaction of Debt; Tender of Payment

Ordinarily an injunction will not be granted because the judgment has been paid or satisfied, although in some cases injunctive relief has been decreed. The enforcement of an execution may be restrained where proper tender of the amount due has been made and the tender is kept good.

There is not entire harmony in the authorities on the question of the right to interpose by way of injunction to enjoin the enforcement of a judgment which has been fully paid.[48] In some cases

31. Tex.—Ivory v. Kempner, 21 S. W. 1006, 2 Tex.Civ.App. 474.
23 C.J. p 563 note 46.

32. Ala.—Alabama L. Ins. & Trust Co. v. Pettway, 24 Ala. 544.

33. Ill.—Jenney v. Jackson, 6 Ill. App. 32.
23 C.J. p 563 note 48.

34. Ark.—Stillwell v. Oliver, 35 Ark. 184.

35. Ohio.—Ludlow v. Hurd, 1 Disn. 552, 12 Ohio Dec., Reprint, 791.
23 C.J. p 563 note 49.

36. Canal franchises
Md.—Brady v. Johnson, 26 A. 49, 75 Md. 445, 20 L.R.A. 737.

37. Minn.—New York Central Trust Co. v. Moran, 57 N.W. 471, 56 Minn. 188, 192, 29 L.R.A. 212.
23 C.J. p 563 note 51.

38. Tex.—Rose v. Wylie, Civ.App., 95 S.W.2d 523, error dismissed.

39. Statutory right to injunction where levy or sale under execution would cast a cloud on title may be invoked.—Rose v. Wylie, supra.

40. Md.—Chappell v. Cox, 18 Md. 513.

41. N.C.—Wheeler v. Wheeler, 39 N. C. 210.

42. R.I.—Greene v. Haskell, 5 R.I. 447.

43. Ga.—Simms v. Phillips, 51 Ga. 433.
23 C.J. p 563 note 56.

44. Ga.—Simms v. Phillips, supra.
23 C.J. p 564 note 60.

45. Tex.—Sumner v. Crawford, Civ. App., 41 S.W. 825.

46. W.Va.—Kuhn v. Mack, 4 W.Va. 186.

47. Mass.—Stevens v. Mulligan, 44 N.E. 1086, 167 Mass. 84.

48. Kan.—Worden v. Jones, 40 P. 1071, 1 Kan.App. 501.

an injunction has been granted,[49] particularly where injustice otherwise would result.[50]

Ordinarily, however, the fact that the execution, or the judgment on which it has been issued, has been paid or satisfied, does not entitle defendant to an injunction,[51] except where complicated questions of law or fact arise which can only be properly presented and tried on appropriate pleadings,[52] or where the execution is being fraudulently used to oppress defendant.[53]

Partial satisfaction. Where a judgment has been partially paid but execution is issued for the full amount, an injunction will lie restraining the sale of the entire property for the whole amount of the judgment debt;[54] but an injunction will not issue to restrain the collection of that part of the judgment debt which remains unpaid.[55]

Tender of payment. Where a judgment debtor is willing to satisfy the judgment in toto, and tenders an amount sufficient to discharge the same, which is refused,[56] or where the money is in the hands of the clerk, who refuses to apply the same,[57] an injunction should be granted to restrain the enforcement of the execution; but the court will refuse to interfere where the tender is not kept good.[58] Where the tender is made to a person not authorized to receive payment, and it does not appear that the debtor made any effort to find the creditor, injunction should be refused.[59]

j. Void Judgment or Writ

As a general rule the fact that the execution or judgment is void will not justify enjoining an execution levy or sale.

It is generally held that an injunction will not lie to restrain an execution levy or sale where the execution is void,[60] or where the execution was issued on a void judgment,[61] since there is an ade-

49. Ill.—Reardon v. Taft, 235 Ill. App. 75.
Kan.—Oldfield v. Phelps, 207 P. 650, 111 Kan. 423.
Me.—Drake v. Bicknell, 113 A. 35, 120 Me. 544.
23 C.J. p 561 note 8.
Injunction against execution on judgments within operation of discharge in bankruptcy see Bankruptcy § 563 a.

Indorser whose secondary liability not determined

The indorser, or one who is secondarily liable on note, is entitled to have fact of his secondary liability determined in action by indorsee against maker and indorser, and where there has been no such determination indorser may enjoin the levy of an execution by maker who seeks contribution, in view of Rev. St. § 52—902.—Baumgarten v. Harding, 230 P. 297, 117 Kan. 59.

50. Md.—McClellan v. Crook, 4 Md. Ch. 398.
23 C.J. p 561 note 8 [c].

Decree in equity

Execution issued on a decree after the decree has been satisfied may be restrained in order to prevent injustice, since a court of equity thereby takes its own method of regulating its own process.—McClellan v. Crook, supra.

51. Ga.—Elders v. Beasley, 144 S.E. 902, 167 Ga. 122.
23 C.J. p 560 note 4—p 561 note 6.

Adequate remedy at law

(1) Equity will not interpose when there is an adequate remedy at law.—Donovan v. McDevitt, 92 P. 49, 36 Mont. 61—23 C.J. p 560 note 4.

(2) Complainant has three remedies: He can first, sue the officer in trespass, second, move to quash the execution, or third, replevy the property sold thereunder.—Parker v. Oxendine, 85 Mo.App. 212.

(3) Complainant may have relief by motion to recall the execution and have satisfaction entered of record.—Donovan v. McDevitt, supra—23 C.J. p 561 note 5.

(4) Complainant may proceed by affidavit of illegality.—Mathews v. Gelders, 58 S.E. 649, 129 Ga. 103.

(5) Defendant in fieri facias dismissing affidavit of illegality could not enjoin execution on legal defense, although unable to file second affidavit.—Elders v. Beasley, 144 S.E. 902, 167 Ga. 122.

52. N.M.—Williams v. Kemp, 273 P. 12, 33 N.M. 593.
23 C.J. p 561 note 7.

53. Ga.—Rogers v. Atkinson, 1 Ga. 12.

54. Ky.—Beatty v. Curtis, 11 Ky. Op. 768—Matheny v. Davis, 1 Ky. Op. 244.

55. Ky.—Matheny v. Davis, supra.

56. Tex.—Karnes v. Barton, Civ. App., 272 S.W 317.
23 C.J. p 561 note 11.

57. Iowa.—Fisher v. Moore, 19 Iowa 84.

58. Tex.—Karnes v. Barton, Civ. App., 272 S.W. 317.
Va.—Shumaker v. Nichols, 6 Gratt. 592, 47 Va. 592.

59. Ill.—Clark v. Conrad, 117 N.E. 59, 279 Ill. 393, reversing 201 Ill. App. 549.

60. Cal.—Sanchez v. Carriaga, 31 Cal. 170.
23 C.J. p 560 note 87.

Premature execution

Where judgment is entered by warrant of attorney for the penalty of a bond, the condition of which is for performance of some collateral undertaking and not for payment of money, execution taken before a breach of the condition will be restrained.—Ætna Casualty & Surety Co. v. Mayor and Council of Wilmington, 160 A. 747, 17 Del.Ch. 280—Staats v. Herbert, 4 Del.Ch. 508.

61. Ga.—Jackson v. Becker Roofing Co., 180 S.E 822, 180 Ga. 769.
La.—Castor State Bank v. Smith Bros., 110 So. 890, 162 La. 647.
N.M.—Sowder v. Citizens Nat. Bank of Lubbock, Tex., 50 P.2d 856, 858, 39 N.M. 508, citing **Corpus Juris.**
Tex.—Miller v. Burnet Mercantile Co., Civ.App., 65 S.W.2d 505, error dismissed—Southern Sales Co. v. Parker, Civ.App., 54 S.W.2d 217.
23 C.J. p 560 note 88.

Jurisdictional defect

La.—Castor State Bank v. Smith Bros., 110 So. 890, 162 La. 647.

Agreement as to judgment

Where it was sought to enjoin collection of an execution on ground that attorney by whom agreement for entry of judgment had been made had never been employed by and did not represent defendant, but the evidence showed not only that attorney admittedly employed by defendant consented thereto, and that attorney who made agreement was employed by defendant, interlocutory injunction was properly denied, in absence of evidence that defendant had restricted attorney's authority by prohibiting the making of such an agreement.—Reece v. McCormack, 4 S.E.2d 575, 188 Ga. 665.

Statutory finality of judgment, barring appeal, does not authorize an injunction to restrain the issuance of, or to correct, an execution.

quate remedy at law[62] by such proceedings as stay,[63] motion to quash,[64] affidavit of illegality,[65] an action for malicious abuse of process and attorneys' fees and costs,[66] or by appeal or writ of error.[67]

Cases are not wanting, however, in which injunction has been held a proper remedy,[68] at least, where the proof requisite to establish the fact that a judgment is void rests outside of the record.[69] Where a judgment is vacated, it has been held that injunction lies to restrain execution thereon.[70] While it has been held that where there is no judgment whatever on which to base an execution an injunction will not be granted,[71] there are contrary decisions.[72]

k. Miscellaneous Grounds

Injunctions against a levy or sale under execution have been granted or refused on certain other grounds in addition to the various grounds already discussed.

In addition to the grounds discussed supra this section warranting the issuance of an injunction, other grounds may be sufficient to justify injunctive relief.[73] Thus, for example, an injunction may issue to prevent the issuance of an execution in behalf of one not entitled to an execution.[74]

An injunction will be refused where demanded on grounds which existed before the rendition of the judgment or which might have been discovered by ordinary diligence by complainant.[75] Hard times, preventing a fair purchase price,[76] or the motives of the judgment creditor,[77] or any hardship or misfortune from which complainant may suffer,[78] or the fact that a sale by receivers would be better for all the creditors of a cor-

—Urbanec v. Jezik, Tex.Civ.App., 138 S.W.2d 1098.

62. Tex.—Southern Sales Co. v. Parker, Civ.App., 54 S.W.2d 217.

63. Cal.—Sanchez v. Carriaga, 31 Cal. 170.

64. **Execution on transcript from justice court**
(1) Where a transcript of a judgment of a justice of the peace is filed in a court of record and execution issued thereon, enforcement of the execution will not be enjoined for false return of the process in the suit, an adequate remedy at law existing by motion to quash execution.—Jones v. Overall, 13 S.W.2d 581, 223 Mo.App. 266.

(2) Other cases see 23 C.J. p 554 note 98 [c].

65. Ga.—Jackson v. Becker Roofing Co., 180 S.E. 822, 180 Ga. 769.

66. Ga.—Jackson v. Becker Roofing Co., supra.

67. Fla.—Wordehoff v. Evers, 18 Fla. 339.
La.—Castor State Bank v. Smith Bros., 110 So. 890, 162 La. 647.
Tex.—Miller v. Burnet Mercantile Co., Civ.App., 65 S.W.2d 505, error dismissed—Southern Sales Co. v. Parker, Civ.App., 54 S.W.2d 217.

68. Colo.—Whitlock v. Alliance Coal Co., 214 P. 546, 548, 73 Colo. 205, citing **Corpus Juris.**
Fla.—Fisher v. W. T. Rawleigh Co., 193 So. 747, 141 Fla. 717.
La.—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La.App. 645.
Miss.—Delta Cotton Oil Co. v. Planters' Oil Mill, 107 So. 764, 142 Miss. 591.
R.I.—Sahagian v. Sahagian, 137 A. 221, 48 R.I. 267.
23 C.J. p 560 note 93.

Agreement as to judgment
That agreement whereby plaintiff's counsel promised defendant's counsel not to enter default judgment without notice was oral instead of written does not preclude defendant from seeking injunction temporarily to restrain execution on default judgment entered by plaintiff without notice.—Wilkenfeld v. Ballard, Tex.Civ.App., 84 S.W.2d 279.

Judgment of appellate court
Where an appeal in a civil suit is taken from a justice of the peace to a court having no jurisdiction and that court renders a judgment for plaintiff, neither the failure of defendant to object, nor even the consent of both parties, could give the court authority to enter a judgment, and execution on such a void judgment may be enjoined.—Monterey & New Columbus Turnp. Co. v. Davis, 3 Ky.L. 465, 11 Ky.Op. 336.

Recital in return of execution of process does not deprive petitioner of his remedy in chancery.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42.

Judgment held not void
Fla.—Fisher v. W. T. Rawleigh Co., 193 So. 747, 141 Fla. 717.

69. Mo.—Henman v. Westheimer, 85 S.W. 101, 110 Mo.App. 191.

70. Tex.—West v. Dugger, Civ.App., 278 S.W. 239.
23 C.J. p 560 note 1.

71. Mo.—Farris v. Smithpeter, 166 S.W. 655, 180 Mo.App. 466.

72. Miss.—Hammond-Gregg Co. v. Bradley, 80 So. 489, 119 Miss. 72.
23 C.J. p 560 note 2.

73. **Conflict of jurisdictions**
Sale under an execution will be enjoined to prevent a conflict of jurisdictions.—Hall v. Boyd, 52 Ga. 456.

74. Ky.—Hyden v. Calames, 171 S. W. 186, 161 Ky. 598.
Wash.—Humptulips Driving Co. v. Cross, 118 P. 827, 65 Wash. 636, 37 L.R.A.,N.S., 226.

75. Tex.—Friedrich v. Brand, Civ. App., 28 S.W.2d 279.

Husband's withdrawal of wife's answer
(1) Injunction will not lie to restrain execution on a judgment against a married woman in an action on her promissory note because of alleged fact that her husband, in collusion with plaintiff in the action, withdrew her answer in such action where the answer, admitting the indebtedness but denying that the note was secured by deed, set up no defense to the action, and the wife, through ignorance, failed to set up the valid defense that a married woman cannot bind herself as security for her husband.—Dunson v. First Nat. Bank, 164 S.E. 815, 175 Ga. 79.

(2) Likewise, the fact that by the withdrawal she was deprived of her right to set up the valid defense by amendment is no ground for enjoining the execution, where no such amendment was filed.—Dunson v. First Nat. Bank, supra.

Grounds which might have been pleaded in defense in the action in which judgment was rendered do not authorize the granting of an injunction against a levy or sale under execution.—Wrenn v. Miller, La. App., 161 So. 882.

76. Ga.—Dyar v. Mobley, 152 S.E. 74, 170 Ga. 65.
23 C.J. p 556 note 27.

77. N.J.—Brady v. Carteret Realty Co., 57 A. 814, 66 N.J.Eq. 243, affirmed 60 A. 938, 67 N.J.Eq. 641, 110 Am.S.R. 502, 3 Ann.Cas. 421.

78. Iowa.—Moyers v. Stubblefield, 200 N.W. 488, 199 Iowa 631.
N.J.—Brady v. Carteret Realty Co., 57 A. 814, 66 N.J.Eq. 243, affirmed

poration,[79] or the existence of cross demands,[80] or an agreement by a third person with the execution debtor to pay the debt,[81] or the fact that the execution creditor is an insolvent nonresident,[82] is not a ground for injunction. A sale of an oil painting valued at several thousand dollars will not be enjoined because there is no market for such property except in another state.[83] Since enforcement of the writ does not imply an entry on the premises of the judgment debtor, see supra § 101, an injunction cannot be predicated on the assumption of a continuing or other trespass.[84] A consent judgment agreed to by judgment creditors in another action relating to the property does not authorize the granting of an injunction against a sale and execution under a judgment not involved in the consent judgment.[85]

Assignment of judgment. The fact that the judgment debtor was not notified of an assignment of the judgment is not sufficient to justify an injunction.[86]

Pending other proceedings. Where a trial of the right of property levied on is pending, an injunction is proper to stay proceedings on other executions issued on the same judgment and levied on the same property.[87] Where the judgment debtor has a claim against the judgment creditor which he must assert in a separate action and not by way of set-off or recoupment and the judgment creditor is insolvent, a temporary injunction may issue restraining the sale under execution pending the determination of the separate suit.[88] Where an accounting between a guardian and a ward is necessary, pending such accounting a temporary injunction may issue to restrain the enforcement of a judgment against the sureties on the guardian's bond.[89] Injunction lies to restrain a levy and sale of the interest of a tenant in common pending a partition of the property to ascertain his share and to have a homestead set off.[90] Where an appeal acts as a supersedeas, a sale under the writ will be enjoined,[91] but not where the statute provides for the execution of certain judgments notwithstanding an appeal.[92] A temporary injunction may issue pending an appeal from the decree granting an injunction.[93]

Equity which follows the law will not enjoin judgment creditors from pressing their executions, until the applicant for homestead exemption can have the property set apart for the benefit of another creditor, no matter how just the claim of that creditor may be;[94] nor will execution be enjoined because the execution debtor claims a homestead in the land.[95] The mere pendency of an application for receivership as to a corporate judgment debtor does not authorize a temporary injunction restraining the sale under execution of corporate assets.[96] A party has no right to enjoin the execution of a judgment absolute and unconditional in its terms, as to the matter it professes to decide, during a litigation as to other matters in controversy reserved by the judgment.[97] A fortiori, this cannot be done in respect of matters reserved which have not yet been brought into litigation.[98] Where a deceased husband's lands are set apart for the support of the

60 A. 938, 67 N.J.Eq. 641, 110 Am. S.R. 502, 3 Ann.Cas. 421.

Injury to financial reputation

A temporary injunction does not lie to restrain a resale of the property after a purchaser has failed to comply with his bid, on the ground of injury to complainant's financial reputation.—Warman v. Wurzbach, Tex.Civ.App., 51 S.W.2d 751.

79. Pa.—Lowry v. Philadelphia Optical & Watch Co., 28 A. 1004, 161 Pa. 123—Pairpont Mfg. Co. v. Philadelphia Optical & Watch Co., 28 A. 1003, 161 Pa. 17, 34 Wkly. N.C. 216.

80. Ky.—Duncan v. Rule, 7 Ky.L. 370.

La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

81. Ky.—Triplett v. Turner, 2 J.J. Marsh. 475.

82. Ga.—Parker-Hensel Engineering Co. v. Shuler, 66 S.E. 800, 133 Ga. 696.

83. Tenn.—Nashville Trust Co. v. Weaver, 50 S.W. 763, 102 Tenn. 66.

84. Or.—Barnes v. Esch, 169 P. 512, 87 Or. 1.

85. N.C.—Church v. Vaughn, Hemphill & Co., 109 S.E. 634, 182 N.C. 574.

Conclusiveness of consent judgments see the C.J.S. title Judgments § 705, also 34 C.J. p 890 note 90—p 891 note 94.

86. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

Reason for rule

The only effect of failure to give such notice, as between judgment debtor and assignees, would be that, had judgment debtor paid judgment to judgment creditor, payment would be valid, notwithstanding the assignment, or that had judgment debtor owned claim, compensable against judgment, compensation would take place, notwithstanding transfer.—Zibilich v. Rouseo, supra.

87. Ala.—Huntington v. Bell, 2 Port. 51.

88. Miss.—Lancaster v. Jordan Auto Co., 187 So. 535.

89. Fla.—Henderson v. Henderson, 100 So. 792, 87 Fla. 470.

90. S.C.—Barron v. English, 121 S.E. 782, 128 S.C. 332

91. La.—Aubert v. Robinson, 6 Rob. 463.

92. La.—State v. Pitot, 11 Mart. 535.

93. Tex.—Ellis v. Lamb-McAshan Co., Civ.App., 278 S.W. 858.

94. Ga.—Christian v. Hutchison, 73 Ga. 130.

95. Ga.—Adams v. Grizzard, 156 S.E. 689, 171 Ga. 780.

96. La.—Duval v. T. P. Ranch Co., 91 So. 656, 151 La. 142.

97. La.—New Orleans v. Bilgery, 32 So. 429, 108 La. 191—Hereford v. Babin, 14 La.Ann. 333.

98. La.—New Orleans v. Bilgery, 32 So. 429, 108 La. 191.

23 C.J. p 557 note 40.

widow and minor children, subject to the debts of the estate, and subsequently creditors obtain judgment against the estate, a sale of the lands under execution will not be enjoined pending the setting apart of property for further support on the theory that the first award was void.[99]

Whether the pendency of garnishment proceedings against the execution debtor will authorize an injunction against levy or sale under execution is discussed in the C.J.S. title Garnishment § 190, also 28 C.J. p 267 notes 94, 95, p 268 note 4 [c], and 23 C.J. p 561 note 22–p 562 note 25.

A release of the levy pending the suit authorizes a denial of the injunction.[1]

§ 153. —— Procedure in General

Whether an injunction against a levy or sale under execution should be sought by independent suit or by motion in the original action is governed by the practice in the particular jurisdiction.

While it has been said that an injunction against an execution is not a new suit but a part of the original action,[2] the suit cannot be treated as a motion in the original action, if it is not so entitled, and the only relief prayed for is a perpetual injunction.[3] In some states, one not a party to the judgment may apply by petition for injunctive relief in the original action and need not bring an independent action in equity,[4] but in other states he cannot intervene in the action at law to which he is not a party.[5]

A suit by a third person to enjoin a sale on execution is one to remove a cloud from the title, rather than a suit to quiet title.[6]

§ 154. —— Jurisdiction and Venue

Equity has general jurisdiction to enjoin an execution sale. The injunction should be sought in the court having jurisdiction of the subject matter. Objections to jurisdiction or venue must be timely raised.

Equity has general jurisdiction to enjoin a sale under a levy of execution to satisfy a judgment.[7] A bill to enjoin a levy or sale under execution may be brought in any court having jurisdiction of the subject matter.[8] Thus a court rendering the judgment has jurisdiction to restrain the issuance of execution thereon pending other proceedings.[9] A court having no jurisdiction to try certain issues cannot issue an injunction based on such matters.[10]

While it has been held that a bill may be filed in the courts of one state to enjoin proceedings on a judgment recovered on a judgment rendered in the court of another state where the original judgment has been reversed,[11] as discusssed in Courts § 500, one court cannot control the process of another court and, therefore, as a general rule, cannot enjoin the enforcement of a judgment, or the levy of an execution issued on the judgment of another tribunal. Whether a state court may enjoin execution from a federal court is discussed in Courts § 542, and whether a federal court will enjoin execution from a state court is discussed in § 543 of the same title.

Venue. The venue of a suit to enjoin a levy or sale under execution, as dependent on general principles or venue statutes generally, is discussed in the C.J.S. title Venue § 38, also 23 C.J. p 570 notes 35–38. Statutory provisions prescribing that petitions for equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed apply to

99. Ga.—Jackson v. Lee, 131 S.E. 893, 161 Ga. 818.

1. Tex.—Thompson v. Gooldsby, 106 S.W. 936, 48 Tex.Civ.App. 23.

2. Tex.—Citizens Nat. Bank v. Interior Land, etc., Co., 37 S.W. 447, 14 Tex.Civ.App. 301.
23 C.J. p 568 note 18.

3. N.C.—Whitehurst v. Green, 69 N. C. 131—Foard v. Alexander, 64 N. C. 69.

4. Wis.—Jackson Mill. Co. v. Scott, 110 N.W. 184, 130 Wis. 267.

5. Pa.—Randalls v. Davidson, 1 Pa. C.Pl. 13.
23 C.J. p 569 note 21.

6. Mich.—Manistique Lumber Co. v. Lovejoy, 20 N.W. 899, 55 Mich. 189.
Suit to quiet title distinguished from suit to remove cloud generally see the C.J.S. title Quieting Title § 2, also 51 C.J. p 134 notes 13–19.

7. Mich.—Hartsema v. Addison Coal & Coke Co., 282 N.W. 155, 286 Mich. 296.

8. Mass.—Licker v. Gluskin, 164 N. E. 613, 265 Mass. 403, 63 A.L.R. 231.

Original jurisdiction
The original jurisdiction conferred by constitutions in certain courts includes power to restrain executions in proper cases.—Frank v. Currie, La.App., 172 So. 843.

Statutory jurisdiction
Where by statute specified courts are given jurisdiction of all suits and proceedings arising out of the provisions of law governing banks, such courts have jurisdiction of suits by the banking commissioner who has closed a bank to enjoin execution against the bank by a judgment creditor.—Attorney General ex rel. State Banking Com'r v. Hyde, 251 N.W. 570, 265 Mich. 363.

Nonresident defendant
The fact that defendant is a nonresident is immaterial, if the court has jurisdiction of the subject matter of the original action.—Rio v. Vasquez, 17 Puerto Rico 158.

9. Ark.—Papan v. Arkansas Light & Power Co., 277 S.W. 1, 169 Ark. 855.
Cal.—Wright v. Superior Court in and for Calaveras County, 110 P.2d 529, 43 Cal.App.2d 181.

Reason for rule
A court has inherent jurisdiction over process issued out of it.—Papan v. Arkansas Light & Power Co., 277 S.W. 1, 169 Ark. 855.

10. Del.—Davis v. Frantz, 104 A. 779, 12 Del.Ch. 41.
Tex.—S. K. McCall Co. v. Page, Civ. App., 155 S.W. 655.

11. Ill.—McJilton v. Love, 13 Ill. 486, 54 Am.D. 449.

suits to enjoin a levy or sale under execution, as is shown in the C.J.S. title Venue § 95, also 67 C.J. p 105 note 58 [d] (2) and 23 C.J. p 570 note 41. The levy of an execution and advertisement of land for sale are not "pending proceedings" within the meaning of statutes discussed in the C.J.S. title Injunctions § 170, also 32 C.J. p 292 notes 71–75, specifying that suits for injunctions to stay proceedings at law may be brought in the county in which the proceedings are pending.[12]

Objections. The objection to the jurisdiction in equity should be made before answering to the merits, or defendant will generally be considered to have waived the defense.[13] Objections to venue are likewise waived by failure to raise them at the proper time.[14]

§ 155. —— Time to Sue and Limitations

A complainant seeking an injunction against a levy or sale under execution must be diligent. In some jurisdictions statutes of limitation control.

Injunction will not ordinarily issue until a levy is actually made[15] or at least until plaintiff threatens to enforce his judgment.[16]

The party asking an injunction must be diligent,[17] although, where the judgment is void, he need not act until an attempt is made to enforce it.[18]

Statutory limitations may govern,[19] but they have been held in some states not to apply to a suit by one not a party to the judgment,[20] to a suit to enjoin for causes which have arisen since the rendition of the judgment,[21] to a suit for injunction which is auxiliary to a direct suit in equity to set aside the judgment,[22] or to suits relating to invalid judgments.[23]

Where by statute a court may issue an injunction in a pending action only, after final judgment an injunction against an execution may not be granted.[24] The fact that an instrument attached to the petition shows a bar of prescription on its face does not indicate that it is in fact prescribed as regards the right to a preliminary injunction restraining the sale of property seized.[25]

§ 156. —— Conditions Precedent

Notice to the officer levying the execution and an offer to do equity have been held conditions precedent to obtaining an injunction against a levy or sale under execution. An injunction bond is usually, but not always, required.

Notice to the officer making the levy, so as to permit him to abandon the levy, is sometimes held a condition precedent to a suit for an injunction.[26]

Offering to do equity. The maxim that he who seeks equity must first do equity applies to an applicant for an injunction against an execution.[27] Where complainant has made absolute conveyances of land to secure the debt on which judgment was obtained, in order to have execution restrained he must pay or tender the money due on the secured debt.[28] Where it is admitted that the judgment is valid and payable as to part of its amount, the amount admitted to be due must be tendered as a condition to the right to an injunction.[29]

12. Ga.—Bank of East Point v. Dupre, 110 S.E. 240, 152 Ga. 547—Rounsaville v. McGinnis, 21 S.E. 123, 93 Ga. 579.

13. Miss.—Byrne v. Anderson, 18 Miss. 81.
23 C.J. p 570 note 45.

14. Tex.—Foust v. Warren, Civ. App., 72 S.W. 404.

15. La.—Deville v. Hayes, 23 La. Ann. 550.
23 C.J. p 570 note 49.

16. Ind.—Ke-tuc-e-mun-guah v. McClure, 23 N.E. 1080, 122 Ind. 541, 7 L.R.A. 782.
23 C.J. p 570 note 50.

17. Or.—Parker v. Reid, 273 P. 334, 127 Or. 578.
23 C.J. p 570 note 47.

Delay held to bar injunction
Or.—Parker v. Reid, supra.

18. Iowa.—Cooley v. Barker, 98 N. W. 289, 122 Iowa 440, 101 Am.S.R. 276.
R.I.—Sahagian v. Sahagian, 137 A. 221, 48 R.I. 267.

19. Tex.—Realty Trust Co. v. Gabert, Civ.App., 40 S.W.2d 869—Ellis v. Lamb-McAshan Co., Civ. App., 278 S.W. 858—West v. Dugger, Civ.App., 278 S.W. 239.
23 C.J. p 570 note 51.

Computation of time
Day of rendition of judgment is not included within the statutory time.—West v. Dugger, supra.

Suit held barred
Tex.—Bullitt v. Jesse French Piano & Organ Co., Civ.App., 158 S.W. 782, error refused.

20. Tex.—Kempner v. Ivory, Civ. App., 29 S.W. 538.

21. Tex.—Realty Trust Co. v. Gabert, Civ.App., 40 S.W.2d 869.
23 C.J. p 570 note 53.

22. Tex.—West v. Dugger, Civ.App., 278 S.W. 239.

23. Tex.—Ellis v. Lamb-McAshan Co., Civ.App., 278 S.W. 858.

Default judgment entered by court having no jurisdiction over defendant is not a "valid and subsisting judgment," within a statute prohibiting injunction staying execution on such judgments after one year.—West v. Dugger, Tex.Civ.App., 278 S.W. 239.

24. N.D.—Security State Bank of Crosby v. Peterson, 229 N.W. 921, 59 N.D. 341.

25. La.—American Nat. Bank v. Bauman, 137 So. 54, 173 La. 336.

Reason for rule
It may be that the course of prescription was interrupted by acknowledgments, or suspended by the holding of something in pledge by the creditor.—American Nat. Bank v. Bauman, supra.

26. Mich.—Hinkle v. Baldwin, 53 N. W. 534, 93 Mich. 422—Manistique Lumber Co. v. Lovejoy, 20 N.W. 899, 55 Mich. 189.

27. Ga.—Duke v. Ayers, 136 S.E. 410, 163 Ga. 444.
23 C.J. p 569 note 24—32 C.J. p 68 note 25 [g].
Maxim generally see Equity §§ 90–92.

28. Ga.—Duke v. Ayers, supra.

29. Tex.—Taylor v. American Trust

Bond or security. In some jurisdictions statutory provisions requiring an injunction bond when a judgment at law has been obtained have been construed to require such bond in injunction suits to restrain a levy or sale under execution.[30] Further, under express statutory regulation, a bond is required of a party asking an injunction against an execution, particularly in the case of a preliminary or temporary injunction.[31] Likewise, a bond may be required by the injunction decree.[32] The amount depends on the terms of the various statutory provisions.[33] As a general rule an injunction issued without a bond or deposit, where necessary, may be set aside;[34] but there are cases where equity will issue an injunction without the filing of a bond by complainant.[35]

& Savings Bank of El Paso, Civ. App., 265 S.W. 727.
23 C.J. p 569 note 25.

30. Ala.—Ex parte Fechheimer, 15 So. 647, 103 Ala. 154.
Ind.—State Bank v. Macy, 4 Ind. 362.
Iowa.—Hardin v. White, 16 N.W. 580, 19 N.W. 822, 63 Iowa 633.
N.J.—Prusakowski v. Woodward Lumber & Supply Co., 103 A. 194, 87 N.J.Eq. 665—Marlatt v. Perrine, 17 N.J.Eq. 49.
S.C.—Ex parte Ziegler, 64 S.E. 513, 916, 83 S.C. 78, 21 L.R.A.,N.S., 1005.
Tenn.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682.
Liability on bond see infra § 164.

Purpose of bond

Injunction bond, in action to enjoin execution, is taken in lieu of deposit of money with master as was the English practice.—Phillips v. Landess, supra.

Judgment entered by confession on a bond with warrant of attorney is within the provisions of the statute, requiring defendant to give security before the issuing of an injunction to stay proceedings at law in any personal action after verdict or judgment.—Marlatt v. Perrine, 17 N. J.Eq. 49.

Injunction as incidental relief

(1) Where an injunction is sought as incidental relief, the statutory requirement as to an injunction bond is inapplicable.—Jaffe v. Hooper, 247 Ill.App. 449.

(2) In such case the bond need not be conditioned for the payment of the judgment.—Jaffe v. Hooper, supra.

Judgment for mortgage deficiency

The statutory proceeding for recovery of a mortgage deficiency is not a personal action within the meaning of a statute requiring security before the issuance of an injunction to stay proceedings at law in any personal action, so that the statutory bond is not required in a suit to enjoin execution on such judgment.—Meranus v. Lawyers' & Homemakers' Building & Loan Ass'n, 174 A. 150, 116 N.J.Eq. 402, reversed on other grounds 180 A. 665, 118 N. J.Eq. 586.

In New York

(1) Code Civ.Proc. § 613, required applicant for an injunction to stay proceedings on a judgment to pay the full amount of the judgment, including interest and costs, into court, or give an undertaking in lieu thereof and also to give an undertaking to pay to the party enjoined all damages and costs in the action wherein the injunction is granted.—New York, etc., Tel. Co. v. Rosenthal, 112 N.Y.S. 612, 128 App.Div. 220.

(2) A similar provision is contained in Civ.Pract. Act § 886.—Deichmiller v. Grindle, 225 N.Y.S. 171, 130 Misc. 752.

31. Tex.—Herndon v. Cocke, Civ. App., 138 S.W.2d 298.
23 C.J. p 569 note 29.

Effect of bond

Bond prevents a "waiver" of damages for seizure.—Herndon v. Cocke, supra.

32. Ky.—Pell v. Lander, 8 B.Mon. 554.

33. Iowa.—Hardin v. White, 16 N. W. 580, 19 N.W. 822, 63 Iowa 633.
23 C.J. p 569 note 30.

In Tennessee

(1) Even though Shannon Code § 6257 provides that the penalty of an injunction bond to enjoin a money demand after judgment shall be in double the judgment or sum sought to be enjoined, such provision was not intended to deprive the court of his inherent right to fix the penalty of the bond.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682.

(2) Hence, where the court fixed the penalty of an injunction bond in a suit to restrain levy or sale under execution at less than double the money judgment, a bond conditioned on such penalty substantially conforms to the statutory requirement. —Phillips v. Landess, supra.

In Texas

(1) Rev.St. art. 4650, providing that, where the injunction is to restrain the execution of a money judgment or the collection of a debt, the injunction bond shall be fixed in double the amount of such judgment or debt requires the amount of the bond to be fixed in the order for the injunction, and is essential to directing the issuance of the writ.—Sanders v. Bledsoe, Civ.App., 173 S. W. 539.

(2) This provision is inapplicable to an injunction to restrain a sale under execution of real estate, and in such case the court may fix bond in such amount as seems appropriate under the facts of the case.—Pacheco v. Allala, Civ.App., 261 S.W. 148.

(3) Moreover, even if the statute should be deemed applicable to injunction suits against execution sales of real estate, it has no application to cases where the judgment on which the execution is based is not against the owner of the land seeking the relief.—Pacheco v. Allala, supra.

34. N.J.—Marlatt v. Perrine, 17 N. J.Eq. 49.
23 C.J. p 569 note 31.

Injunction void or voidable

Stay of execution is voidable on motion to vacate, and not void, where security is filed as required by statute.—Deichmiller v. Grindle, 225 N.Y.S. 171, 130 Misc. 752.

35. Mich.—Attorney General ex rel. State Banking Com'r v. Hyde, 251 N.W. 570, 265 Mich. 363.
23 C.J. p 569 note 32.
Pleading specified grounds see infra § 158.

In Louisiana

(1) Under Code of Practice art 739 eight grounds for injunction against levy or sale under execution exist as to which complainant need not give a bond.—Marine Bank & Trust Co. v. Shaffer, 92 So. 353, 151 La. 831—23 C.J. p 569 note 32 [c] (1), (2).

(2) Thus an allegation that consideration of mortgage note has failed authorizes injunction without bond under the provision that the debtor can arrest the sale of the thing seized if the debt be extinguished by transaction, novation, or in some other legal manner.—United Motor Co. v. Drumm, 1 La.App. 762.

(3) Likewise, under art. 741, defendant in executory proceedings may obtain a writ of injunction without bond on allegation that debt has been paid or that recovery of the debt is barred by prescription.—Platt v. Bouanchaud, 75 So. 91, 141 La. 391.

(4) Under arts 739, 740, only defendant in executory proceedings can arrest the sale by an injunction without bond.—O'Reilly v. Pietri, 64 So. 922, 135 La. 1.

(5) This statutory enumeration of grounds on which an injunction may

§ 157. —— Persons Entitled to Sue, Parties, and Notice

a. In general
b. Parties plaintiff
c. Parties defendant
d. Notice

a. In General

All parties to the judgment must be made parties to a suit to enjoin the execution for fraud.

The rule that in suits to annul judgments upon the ground of fraud all parties to the judgment, whether favorably or adversely affected by the judgment, must be made parties applies to suits to enjoin execution upon such judgment for fraud.[36]

b. Parties Plaintiff

A person who has no title or interest in the property to be sold or who would not be injured is not entitled to maintain a suit to enjoin a levy or sale under execution.

A person who has no title or interest in the property to be sold cannot enjoin the execution against the property.[37] No person, whether or not a party, may sue if he would not be injured by the execution sale.[38] Ordinarily a mere lienholder cannot sue.[39] A party cannot in his representative capacity enjoin the sale of his individual property.[40]

However, the owner of the land levied on, although not a party to the judgment, may sue for an injunction.[41] A third person having a prior interest in the property levied on is ordinarily authorized to sue.[42] Thus the vendor who has conveyed land with covenants of warranty may sue where the sale would create a cloud on the purchaser's title.[43] In some jurisdictions purchasers whose property has been seized for the payment of the purchase price are by statute entitled to have the sale enjoined.[44]

Trust property. Where trust property has been levied on, the trustee is the proper party to ask for an injunction;[45] if he neglects or refuses to act, or if he has resigned and his successor has not been appointed, the cestui que trust may take measures to protect the estate,[46] but some necessity for an injunction must appear.[47]

issue without bond applies to executory process in its true sense as defined by the code.—Marine Bank & Trust Co. v. Shaffer, 92 So. 353, 151 La. 831.

(6) Art 739 is not intended to prevent the issuance of injunctions with bonds as to causes other than those specified.—T. Hofman-Olsen v. Northern Lumber Mfg. Co., 107 So. 593, 160 La. 839.

23 C.J. p 569 note 32 [c] (5), (6).

Injunction suit by state

Where the state seeks to enjoin a levy or sale under execution, it need not give an injunction bond.—Attorney General ex rel. State Banking Com'r v. Hyde, 251 N.W. 570, 265 Mich. 363.

36. La.—O'Sullivan v. Knop, App., 195 So. 366, annulled on other grounds 198 So. 191.

Parties in equitable suits against judgment see the C.J.S. title Judgments § 384, also 34 C.J. p 484 note 18–p 486 note 49.

37. Ga.—Everett v. Bank of Newton County, 145 S.E. 665, 167 Ga. 380.

23 C.J. p 571 note 55.

Life tenant and remaindermen signing notes secured by interest in land devised, could not enjoin execution sale of land, having no interest in the property.—Everett v. Bank of Newton County, supra.

Principal on supersedeas bond

Where judgment was rendered against principal defendant and sureties on his supersedeas bond, principal defendant is not entitled to sue to enjoin execution against surety's property, without showing that he had any interest therein.—Holden v. Ryan, Tex.Civ.App., 268 S.W. 1022.

Plaintiff, as taxpayer and producer of oil, is without such special interest in sale of four hundred fifty thousand barrels of crude oil under execution in another county as would entitle him to maintain suit to enjoin sale on ground that sale would reduce price of crude oil and injure him as a taxpayer and oil producer.—Railroad Commission v. McDonald, Tex.Civ.App., 100 S.W.2d 155.

38. U.S.—American Mut. Liability Ins. Co. v. Volpe, C.C.A.N.J., 284 F. 75.

23 C.J. p 571 note 56.

Principal on supersedeas bond

Where judgment is recovered against a principal and the sureties on his supersedeas bond, but execution is levied against property of a surety, such execution sale will not be enjoined at the suit of the principal where his liability will not be increased by the sale.—Holden v. Ryan, Tex.Civ.App., 268 S.W. 1022.

39. Ind.—Messmore v. Stephens, 83 Ind. 524.

23 C.J. p 571 note 60.

40. La.—Marsoudet v. Clancy, Mann. Unrep.Cas. 38.

41. Tex.—First Nat. Bank v. Coffman, Civ.App., 27 S.W.2d 567, error refused.

23 C.J. p 571 note 57.

Owner's indemnity insurer and surety on appeal bond could temporarily enjoin execution against owner to enable recovery against lessee's surety undertaking to pay judgment.—Commercial Casualty Ins. Co. v. Capital City Surety Co., 231 N.Y.S. 494, 224 App.Div. 553.

42. Iowa.—Moore v. Kleppish, 73 N.W. 830, 104 Iowa 319.

23 C.J. p 571 note 58.

Action by heir see Descent and Distribution § 85 b.

Surety's right to restrain execution see the C.J.S. title Principal and Surety § 299, also 50 C.J. p 242 notes 90–95.

43. Or.—De Carli v. O'Brien, 41 P.2d 411, 415, 150 Or. 35, 97 A.L.R. 693, citing **Corpus Juris.**

23 C.J. p 571 note 59.

Common-law rules govern in administration of equitable jurisdiction.—De Carli v. O'Brien, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

44. La.—Bowers v. Riegal, 96 So. 680, 153 La. 851.

45. Ind.—Zimmerman v. Makepeace, 52 N.E. 992, 152 Ind. 199.

23 C.J. p 571 note 62.

Trustee's equitable actions against third persons generally see the C.J.S. title Trusts § 361, also 65 C.J. p 863 note 27–p 864 note 34.

46. Ind.—Zimmerman v. Makepeace, supra.

Equitable actions against third persons by cestui que trust generally see the C.J.S. title Trusts § 361, also 65 C.J. p 864 notes 35–48.

47. Tex.—Brown v. Ikard, 77 S.W. 967, 33 Tex.Civ.App. 661.

23 C.J. p 572 note 64.

Subsequent execution creditor. Where a judgment creditor is proceeding by execution to raise the full amount of his judgment, when that amount is not due, but has been reduced by payments or otherwise, a subsequent execution creditor has a right to an injunction to restrain the prior creditor from selling under his execution until the payments are ascertained, and the creditor gives credit for them.[48]

Joinder. Persons who have no common interest or whose causes of action did not arise out of the same transaction cannot be joined as parties plaintiff.[49] On the other hand, all persons having an interest in the subject matter which can be affected by the decree may join as parties plaintiff.[50] Where complainant's equity is a mere incident to the equity of another it must be set up through or under the other and therefore the other is a necessary party plaintiff.[51] Where one of several joint judgment debtors sues to restrain the enforcement of the judgment against himself alone, he need not join the others as parties plaintiff.[52] The fact that a judgment debtor, whose right to injunctive relief is barred by his appeal from the judgment, joins with creditors as complainants does not bar granting injunctive relief to such creditors.[53]

c. Parties Defendant

(1) In general
(2) Officers

(1) In General

Persons materially interested in the subject matter of a suit to enjoin execution are necessary parties defendant while persons having no interest need not be made defendants.

All persons materially interested in the subject matter of a suit to enjoin execution are necessary parties defendant.[54] Conversely persons having no interest therein need not be made defendants.[55] Plaintiff in execution is a proper,[56] and usually a necessary,[57] party, but it has been held that he is not a necessary party, his interest being sufficiently represented by the sheriff.[58] The attorney who obtained the judgment for plaintiff is not a proper party except in case of fraud.[59] Where complainant is a person other than the judgment debtor, the judgment debtor is a necessary or proper party.[60] In a suit to enjoin execution on a judgment on a delivery bond the surety of the bond should be made a party.[61]

48. N.J.—Peshine v. Binns, 11 N.J. Eq. 101.

49. N.J.—Titus v. Bennett, 8 N.J. Eq. 267.
W.Va.—Baker v. Rinehard, 11 W.Va. 238.
23 C.J. p 572 note 69.

50. Ala.—May v. Granger, 139 So. 569, 224 Ala. 208.
Tex.—Shirey v. Trust Co. of Texas, Civ.App., 69 S.W.2d 835, error refused.

Husband and wife

In petition for injunction, it is not a fatal misjoinder of action for wife and husband to join and allege that property standing in the wife's name is her separate paraphernal property, and as such not liable to seizure, and, in the alternative, that, if it should be held the property was community, then it was exempted from seizure under the homestead law.—Knight v. Kaufman, 29 So. 711, 105 La. 35.

Judgment debtor and mortgagees

Where the judgment debtor has mortgaged the property on which execution is levied, the judgment debtor and the mortgagees have such a common interest as to permit joinder in a suit to restrain the execution sale.—Battle v. Warren County Fertilizer Co., 118 S.E. 362, 155 Ga. 650.

Judgment debtor and purchaser

Judgment debtor and his grantee by warranty deed are properly joined as complainants.—May v. Granger, 139 So. 569, 224 Ala. 208.

51. N.C.—Emmons v. McKeeson, 58 N.C. 92.
23 C.J. p 572 note 67.

52. Cal.—Merriman v. Walton, 38 P. 1108, 105 Cal. 403, 45 Am.S.R. 50, 30 L.R.A. 786.
Kan.—McGill v. Sutton, 72 P. 853, 67 Kan. 234.

53. N.M.—Mozley v. Helmick, 18 P. 2d 1024, 37 N.M. 97.

54. Minn.—Cheney v. Bengtson, 259 N.W. 59, 193 Minn. 586, 106 A.L.R. 611.
23 C.J. p 572 note 70.

Assignee of judgments is necessary party defendant to suit to restrain sale under execution until determination of priority between judgment and mortgage liens.—Zimmer v. Dunlap, 133 A. 514, 99 N.J.Eq. 610.

55. Mont.—Pittsmont Copper Co. v. O'Rourke, 141 P. 849, 49 Mont. 281.
23 C.J. p 572 note 71.

Persons not directly interested need not be joined as defendants.—Wight v. Roethlisberger, 74 N.W. 474, 116 Mich. 241—23 C.J. p 572 note 81.

56. Ind.—Bishop v. Moorman, 98 Ind. 1, 49 Am.R. 731.
Kan.—Barnett v. Schad, 85 P. 411, 91 P. 539, 73 Kan. 414.

57. Ga.—Swift & Co. v. First Nat. Bank, 132 S.E. 99, 161 Ga. 543—Gober v. Richards, 128 S.E. 668, 160 Ga. 565—Ponsell v. Baxter, 104 S.E. 633, 150 Ga. 664.
Minn.—Cheney v. Bengtson, 259 N.W. 59, 193 Minn. 586, 106 A.L.R. 611.
Tex.—Keystone Pipe & Supply Co. of Texas v. Milner, Civ.App., 297 S.W. 1089—Cunningham v. Carpenter, Civ.App., 258 S.W. 607—Nail v. Taylor, Civ.App., 223 S.W. 719.
23 C.J. p 572 note 73.

Assignee of judgment levied on is a necessary party.—Scruggs v. McCart, 32 S.W.2d 823, 119 Tex. 464.

Suit cannot be maintained against the officer alone to whom an execution has been given by the judgment creditor.—Gober v. Richards, 128 S.E. 668, 160 Ga. 565—23 C.J. p 572 note 73 [a].

58. Kan.—Yount v. Hoover, 149 P. 408, 95 Kan. 752, L.R.A.1915F 1120, Ann.Cas.1918C 148—Barnett v. Schad, 85 P. 411, 91 P. 539, 73 Kan. 414.

59. Iowa.—Lyon v. Tevis, 8 Iowa 79.
Agent as proper party defendant in actions by third persons see Agency § 303 b (2).
Attorney as necessary or proper party in suits in equity generally see Equity § 135 g.

60. Ala.—Planters' & Merchants' Bank v. Laucheimer, 14 So. 776, 102 Ala. 454.
23 C.J. p 572 note 76.

61. Ark.—Jamison v. May, 13 Ark. 600.
23 C.J. p 572 note 77.

If several execution creditors have levied on the property, all may be joined as defendants,[62] but separate defendants acting in different capacities on different rights and not chargeable with any joint liability or interests in the relief sought cannot be joined,[63] except where no inconvenience will thereby be occasioned to defendants, and no complications will arise.[64]

(2) Officers

The decisions are conflicting as to whether the officer holding the execution is a proper or necessary party defendant to a suit for injunctive relief against the execution. Except where injunction is sought against the sovereignty, a clerk of court is not a proper party defendant.

It is quite usual to make the officer who holds the execution a party to a suit for injunctive relief against the execution,[65] and he has been held to be a necessary party.[66] On the other hand, it has been held in some jurisdictions that he is not a necessary party,[67] and in some that he is not even a proper party;[68] a decree against plaintiff in the execution as sole defendant would be as effectual as though the officer having the process had been made a party and included in the decree.[69]

The clerk, being a mere minister of the law and having no interest in the suit, is not ordinarily a proper party.[70] However, in a suit to enjoin execution under a judgment in favor of the state, the clerk,[71] the state's attorney and the county attorney,[72] and other interested persons[73] are properly made parties defendant, since the state cannot be sued.[74]

d. Notice

A levy or sale under execution will not be enjoined in the absence of notice to the defendant.

Generally an injunction to restrain an execution levy or sale cannot be granted without notice to defendant,[75] but notice to counsel for the judgment creditor has been held sufficient.[76]

§ 158. —— Pleading

a. Bill, complaint, or petition
b. Subsequent pleadings
c. Exhibits
d. Verification
e. Issues, proof, and variance

a. Bill, Complaint, or Petition

(1) In general
(2) Want or inadequacy of remedy at law
(3) Property of third persons
(4) Attack on judgment
(5) Refusal to levy on property pointed out
(6) Satisfaction of debt

(1) In General

General rules of pleading and rules governing bills for injunction ordinarily apply to bills in suits to restrain an execution levy or sale.

General rules of pleading and rules relating to pleadings in suits for injunction ordinarily apply in suits to restrain an execution levy or sale.[77] The bill, complaint, or petition must state facts sufficient to show a cause of action for an injunction.[78] The bill, complaint or petition must not be

Execution on delivery bond see supra § 119.

62. Ark.—Oliphint v. Mansfield, 36 Ark. 191.
Tex.—Wills Point Bank v. Bates, 13 S.W. 309, 76 Tex. 329.

63. Pa.—Artman v. Giles, 26 A. 668, 155 Pa. 409.
23 C.J. p 572 note 79.

64. La.—Speyrer v. Miller, 32 So. 524, 108 La. 204, 61 L.R.A. 781.

65. Utah.—Arnold v. Pope, 108 P. 351, 37 Utah 204.
23 C.J. p 573 note 83.

66. Ga.—Gober v. Richards, 128 S.E. 668, 160 Ga. 565.
Mich.—Burpee v. Smith, Walk. 327.

67. Fla.—Fairchild v. Knight, 18 Fla. 770—Alston v. Rowles, 13 Fla. 110.
23 C.J. p 573 note 85.

68. Fla.—Mast v. Baker, 68 So. 769, 69 Fla. 585—Fairchild v. Knight, 18 Fla. 770—Alston v. Rowles, 13 Fla. 110.
23 C.J. p 573 note 86.

Reasons for rule

(1) Notice to the officer of the injunction is sufficient to render him liable to contempt if he proceeds with the sale.
N.C.—Edney v. King, 39 N.C. 465.
S.C.—Hext v. Walker, 26 S.C.Eq. 5.

(2) He is already under the mandate of one court and should not be put in peril for disobedience by discordant orders of conflicting jurisdictions.—Artman v. Giles, 26 A. 668, 155 Pa. 409.

69. Mo.—Holthaus v. Hornbostle, 60 Mo. 439.

70. N.C.—Edney v. King, 39 N.C. 465.
Ohio.—Olin v. Hungerford, 10 Ohio 268.

71. Ky.—Commonwealth v. Salyer, 142 S.W. 1015, 146 Ky. 453.
23 C.J. p 573 note 90.

72. Ky.—Commonwealth v. Salyer, supra.

73. Ky.—Commonwealth v. Salyer, supra.

74. Ky.—Bramlett v. McVey, 15 S.W. 49, 91 Ky. 151, 12 Ky.L. 760.

75. N.C.—Faison v. McIlwaine, 72 N.C. 312.
Notice in injunction suits generally see the C.J.S. title Injunctions §§ 179, 180, also 32 C.J. p 305 note 50—p 310 note 99.

76. U.S.—Sawyer v. Gill, C.C.Me., 21 F.Cas.No.12,399, 3 Woodb. & M. 97.

77. Or.—Gatt v. Hurlburt, 286 P. 151, 132 Or. 415, denying rehearing 284 P. 172, 131 Or. 554.

78. Ala.—Oden v. King, 114 So. 1, 216 Ala. 597.
23 C.J. p 573 note 94.

Clear right to injunctive relief, based on an unquestionable, or reasonably clear, equity, must be stated, where the execution sale is un-

vague or uncertain,[79] or contain inconsistent allegations.[80] The facts and not the conclusions or opinions of the pleader must be stated.[81] Defenses need not be anticipated.[82] Allegations of the answer may cure the defects of the bill.[83]

Allegations which are necessarily implied need not be specifically set out.[84] Thus where it is alleged that there was no judgment, or that complainant was not served with summons, it is not necessary to allege that complainant did not owe the debt.[85] Where a sale, under execution, is sought to be enjoined as a cloud on title it is sufficient to allege facts which show that the sale would cast a cloud on complainant's title,[86] and it is not necessary to allege that plaintiff is in possession of the premises.[87]

Where defects in proceedings are relied on, they must be specifically alleged.[88] If a statute fixes the time for an injunction suit at one year except under certain circumstances, and the suit is brought after the year, the complaint must clearly bring the case within the statute.[89]

Construction against pleader. The pleading will be construed against the pleader,[90] particularly where the injunction is sought on purely technical grounds.[91]

der a valid judgment and execution.—Kearley v. Crawford, 151 So. 293, 112 Fla. 43.

Equitable set-off

A petition for an injunction against a sale under execution on a money judgment in a bail trover suit, hinting that the judgment creditor breached a forthcoming bond by electing to take a money judgment, fails to state a cause of action for an equitable set-off when the amount of damages for the alleged breach of the forthcoming bond is not alleged.—Shepard v. Veal, 173 S.E. 644, 178 Ga. 535.

Points not appearing from bare documents must be set forth in a petition for a preliminary injunction against a public seizure and sale under execution.—McCrory v. Harp, D.C.La., 31 F.Supp. 354.

Excessive levy

Execution against realty could not be enjoined as excessive where defendant in execution did not point out personalty to the officer or show that realty was divisible.—Dyar v. Mobley, 152 S.E. 74, 170 Ga. 65.

Threatened levy

(1) It must be alleged not merely that the officer has an execution in his hands, but that he is threatening and preparing to levy such execution on the property of plaintiff, and that unless he is restrained therefrom, he will immediately levy on and sell plaintiff's property.—Elson v. O'Dowd, 40 Ind. 300.

(2) Moreover, in the absence of some allegation that a writ duly issued and placed in the hands of an officer is not authorized by law, or violates some legal or equitable right of complainant, or that the officer has done some act in excess of powers conferred, an injunction is unauthorized.—Gatt v. Hurlburt, 284 P. 172, 131 Or. 554, rehearing denied 286 P. 151, 132 Or. 415.

(3) Mere allegation that the officer threatens to do unauthorized act where nothing has been done is insufficient to warrant an injunction.—Gatt v. Hurlburt, supra.

Where dates are essential to the cause of action, a demurrer will be sustained on account of their being left blank.—Knightstown First Nat. Bank v. Deitch, 83 Ind. 131.

Petition not subject to general demurrer

Ga.—Solomon v. Dunlap-Huckabee Auto Co., 164 S.E. 185, 174 Ga. 782.

Bill or petition held sufficient

Ga.—Dollar v. Fred W. Amend Co., 191 S.E. 696, 184 Ga. 432—Odom v. Attaway, 157 S.E. 871, 172 Ga. 311—Battle v. Warren County Fertilizer Co., 118 S.E. 362, 155 Ga. 650.

N.J.—Meranus v. Lawyers' & Homemakers' Building & Loan Ass'n, 174 A. 150, 116 N.J.Eq. 402, reversed on other grounds 180 A. 665, 118 N.J.Eq. 586.

Tex.—Wilkenfeld v. Ballard, Civ.App., 84 S.W.2d 279.

23 C.J. p 573 note 94 [d].

Bill or petition held insufficient

Ga.—Shedden v. National Florence Crittenton Mission, 12 S.E.2d 618, 191 Ga. 428.

N.C.—Hood ex rel. People's Bank of Burnsville v. Wilson, 179 S.E. 425, 208 N.C. 120.

Or.—Gatt v. Hurlburt, 284 P. 172, 131 Or. 554, rehearing denied 286 P. 151, 132 Or. 415.

Tex.—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 329—Texas Nat. Bank of Beaumont v. Hahn, Civ.App., 84 S.W.2d 263—Moreland v. Wise, Civ.App., 82 S.W.2d 169—Taylor v. American Trust & Savings Bank of El Paso, Civ.App., 265 S.W. 727.

79. Ala.—Harton v. Enslen, 62 So. 696, 182 Ala. 408.
23 C.J. p 573 note 95.

80. La.—McInnis v. Wingate, 70 So. 610, 138 La. 682.
23 C.J. p 573 note 96.

81. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.
Or.—Gatt v. Hurlburt, 286 P. 151, 132 Or. 415, denying rehearing 284 P. 172, 131 Or. 554.
23 C.J. p 573 note 98.

Particular allegations held conclusions or opinions

(1) "The advertisement of said notes and all proceedings leading thereto are illegal, null and void."—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

(2) That the sheriff does not hold in his hands a valid or legal writ of fieri facias.—Zibilich v. Rouseo, supra.

82. Ind.—Royal v. Aultman-Taylor Co., 19 N.E. 202, 116 Ind. 424, 2 L.R.A. 526.

83. Colo.—Bell v. Murray, 57 P. 488, 13 Colo.App. 217.
Tex.—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, error dismissed.

84. Ky.—W. W. Woodruff Hardware Co. v. Wender Blue Gem Coal Co., 132 S.W. 401, 141 Ky. 210.
23 C.J. p 573 note 2.

85. Ky.—Robinson v. Carlton, 96 S.W. 549, 123 Ky. 419, 29 Ky.L. 876.

86. Colo.—Bell v. Murray, 57 P. 488, 13 Colo.App. 217.
23 C.J. p 574 note 6.

87. Or.—East Marshfield Land Co. v. Werley, 135 P. 315, 67 Or. 57.

88. Mich.—Manistique Lumber Co. v. Lovejoy, 20 N.W. 899, 55 Mich. 189.
Tex.—Wichita County Lumber Co. v. Maer, Civ.App., 235 S.W. 990.

Allegations held sufficient

Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42.

89. Tex.—McCray v. Freeman, 43 S.W. 37, 17 Tex.Civ.App. 268.

90. Or.—Pursel v. Deal, 18 P. 461, 16 Or. 295.

91. Tex.—Gothard v. Reiley, 14 Tex. 461.

Petition construed

In judgment debtor's suit to enjoin sale of land under execution on ground that debtor held legal title to land in trust for coplaintiffs, language in petition respecting intention

Description of property. A description in the bill of the property levied on has been held necessary,[92] and attaching to the complaint an exhibit containing such description is insufficient.[93]

Dispensing with bond. Under statutes dispensing with a bond by complainant where injunction is sought on specified grounds, discussed supra § 156, in order to justify an injunction without bond it is necessary that the bill contain a sworn allegation of the existence of one or more of the grounds specified by the statute.[94] Where both specified and unspecified grounds are alleged, and no bond is furnished, the injunction will issue only on the statutory grounds.[95]

Negativing facts. To show his equity it is sometimes necessary for complainant to negative the existence of certain facts,[96] particularly where there is a question of jurisdiction[97] or of notice to an adverse party.[98]

Offering equity. Under the maxim that he who asks for equity must first offer to do equity, complainant must make his offer in the bill to do equity or must show that he has already done equity.[99]

Pleading defense not available at trial. A bill which discloses matters which would, if proved, have established a good defense to the original action, does not show equity if no reason is given why the defense was not interposed in the original action, or why complainant has not resorted to the legal remedies afforded him.[1]

Prayer for relief. A general prayer for relief is insufficient.[2] However, the petition need not contain an express prayer for the particular kind of injunction sought, if from the context of the bill the particular injunction desired may be ascertained.[3] Plaintiff may demand that the judgment or debt be decreed satisfied, and, in the alternative, that the judgment be decreed void because rendered without proper citation.[4]

(2) Want or Inadequacy of Remedy at Law

In the bill to restrain an execution, the absence or exhaustion of a remedy at law, or a satisfactory reason

of parties to a deed could not be construed as alleging that a trust provision was expressed in such deed — W. T. Rawleigh Co. v. Cowan, Tex Civ.App., 152 S.W.2d 796.

92. Ind.—Armstrong v. Farmers' Nat. Bank, 30 N.E. 695, 130 Ind. 508.
La.—McRae v. Brown, 12 La.Ann. 181.

93. Ind.—Armstrong v. Farmers' Nat. Bank, 30 N.E. 695, 130 Ind. 508.

Reason for rule

The practice of attaching exhibits to complaints is at best confined to writings, or copies thereof, on which the complaint is founded, but the use of a so-called exhibit to cure an essential averment omitted from the complaint is unauthorized —Armstrong v. Farmers' Nat. Bank, supra.

94. La.—Marine Bank & Trust Co. v. Shaffer, 92 So. 353, 151 La. 831.
23 C.J. p 569 note 32 [c] (1).

Sufficiency of allegations

(1) An injunction without bond will not be granted where the bill contains allegations of grounds not specified by statute for the issuance of injunction without bond.—Marine Bank & Trust Co. v. Shaffer, supra.

(2) Thus, allegations in a bill to arrest the execution of an ordinary judgment recognizing a mortgage under an act importing a confession of judgment that the debt had been paid before judgment, or that the judgment was rendered without citation and without issue joined by answer or otherwise will not authorize an injunction without bond. —Marine Bank & Trust Co. v. Shaffer, supra.

95. La.—Jones v. Bouanchaud, 103 So. 393, 158 La. 27—United Motor Car Co. v. Drumm, 1 La.App. 607, reversed on other grounds 1 La. App. 762.

96. La.—Bowers v. Riegal, 96 So. 680, 153 La. 851.
Tex.—Collins v. Citizens' State Bank of Houston, Civ.App., 241 S.W. 633.
23 C.J p 574 note 11.

Particular facts

(1) Where complainant alleges that the judgment creditor has released the judgment for a valuable consideration, it must also be alleged that at the time of the release the judgment creditor had title to the judgment and had not assigned or conveyed it to any other person.—Holden v. Ryan, Tex.Civ.App., 268 S.W. 1022.

(2) A railroad company cannot enjoin an execution on its locomotives where it does not allege that execution was not issued on a valid judgment, or for a just debt, or inability to pay.—Midland R. Co. v. Stevenson, 29 N.E. 385, 130 Ind. 97—23 C.J. p 572 note 66.

(3) Other facts see 23 C.J. p 574 note 11 [a].

97. Cal.—Farrington v. Brown, 4 P. 26, 65 Cal. 320.
Ind.—Krug v. Davis, 85 Ind. 309.
23 C.J. p 574 note 12.

98. Tex.—Wichita County Lumber Co. v. Maer, Civ.App., 235 S.W. 990.
23 C.J. p 574 note 13.

99. Ga.—Shepard v. Veal, 173 S.E. 644, 178 Ga. 535.
Tex.—Refrigeration Discount Corporation v Meador, Civ.App., 134 S. W.2d 329.
23 C.J. p 574 note 15.
Offer to do equity as condition precedent see supra § 156.

Petition held insufficient

Ga.—Shepard v. Veal, 173 S.E. 644, 178 Ga. 535.

1. Tex.—Texas Nat. Bank of Beaumont v. Moore, Civ.App., 118 S.W.2d 934—Friedrich v. Brand, Civ.App., 28 S.W.2d 279—Wichita County Lumber Co. v. Maer, Civ.App., 235 S.W. 990.
23 C.J. p 574 note 14.

Allegations held insufficient

Allegations that makers were informed after inquiry that original note was not sued on did not relieve makers from making further inquiry. —Hesser v. First Nat. Bank, 150 A. 723, 159 Md. 251.

2. Tex.—Panhandle Const. Co. v. Plain, Civ.App., 52 S.W.2d 504.

Sufficiency of prayer

Prayer for "a most gracious writ of injunction or temporary restraining order" is insufficient to warrant granting injunction.—Panhandle Const. Co. v. Plain, supra.

3. Tex.—Wilkenfeld v. Ballard, Civ. App., 84 S.W.2d 279.

4. La.—McInnis v. Wingate, 70 So. 610, 138 La. 682.

for not utilizing an adequate remedy at law, must be averred. Irreparable injury need not be expressly alleged where facts showing such injury appear.

Generally the bill or complaint for injunctive relief against an execution is defective where it does not show that plaintiff has no adequate remedy at law,[5] or that he has exhausted his legal remedies,[6] or some satisfactory reason for failing to seek a legal remedy.[7]

Irreparable injury need not be expressly averred if the facts showing such injury are alleged,[8] or where a different degree of injury is required by statute.[9] If the facts showing inadequacy of the remedy at law are otherwise alleged, the insolvency of defendant need not be alleged.[10]

(3) Property of Third Persons

A third person seeking to enjoin a sale of property levied on as the property of the judgment debtor must allege facts showing his title or interest.

If property of complainant has been levied on as the property of the judgment debtor, complainant in his bill to enjoin the sale must show his title to the property or his interest therein,[11] so that the court may determine whether he would be injured by a sale thereof,[12] except in the case of a complainant who as a defendant in replevin has given a forthcoming bond.[13] If he claims as a bona fide purchaser from the judgment debtor he must show the facts as to the purchase which evidence a prior equity,[14] although it need not be alleged that complainant was a purchaser in good faith or for value.[15]

A substantial averment of ownership is sufficient if the averment is not met by an exception calling for greater particularity of statement.[16]

(4) Attack on Judgment

As a general rule, in suits to restrain execution a meritorious defense must be pleaded where the judgment itself is attacked.

In suits to enjoin execution allegations as to errors of law in the trial resulting in the judgment on which the execution is based are ordinarily to be disregarded.[17] While as a general rule a meritori-

5. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 98 Fla. 186.
Ga.—Rowland v. Bartlett, 128 S.E. 786, 160 Ga. 652.
Tex.—Mann v. Wallis, 12 S.W. 1123, 75 Tex. 611—Herndon v. Cocke, Civ. App., 138 S.W.2d 298.
23 C.J. p 560 note 96, p 574 note 18.
Pleading in injunction suits generally see the C.J.S. title Injunctions § 182, also 32 C.J. p 328 note 23-r 329 note 26.

Bill or petition held sufficient
Tex.—Herndon v. Cocke, Civ.App., 138 S.W.2d 298.
23 C.J. p 574 note 18 [a] (3).

Bill or petition held insufficient
Fla.—McClelland v. Marion Holding Co., 137 So. 887, 103 Fla. 646.
23 C.J. p 574 note 18 [a] (1), (2).

6. Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 98 Fla. 186.
Neb.—Minton v. Palmer, 112 N.W. 610, 79 Neb. 351.
Okl.—Harris v. Smiley, 128 P. 276, 36 Okl. 89.

7. Or.—Hume v. Rice, 167 P. 578, 86 Or. 93.
Tex.—Hawkins v. Graham, Civ.App., 81 S.W.2d 754, error refused—Walter Connally & Co. v. Browning, Civ.App., 72 S.W.2d 412—West Texas Utilities Co. v. Farmers' State Bank in Merkel, Civ.App., 68 S.W.2d 648—Clayton v. Stephenson, Civ.App., 254 S.W. 507—George v. Dyer, 1 Tex.A.Civ.Cas. § 780.

Fraud inducing dismissal of affidavit of illegality
A petition alleging that defendant's fraud induced petitioner to dismiss an affidavit of illegality is insufficient where facts sufficient to show such fraud are not alleged.—Felker v. Still, 169 S.E. 896, 177 Ga. 163.

Ignorance, neglect, or mistake of attorney
An allegation of ignorance, neglect, or mistake on the part of plaintiff's attorney as an excuse for not seeking legal remedies is insufficient to justify an injunction.—Clayton v. Stephenson, Tex.Civ.App., 254 S.W. 507.

8. Ky.—Robinson v. Carlton, 96 S.W. 549, 123 Ky. 419, 29 Ky.L. 876.
La.—Dupuy v. Phillips, 133 So. 796, 16 La.App. 267.
Tex.—Herndon v. Cocke, Civ.App., 138 S.W.2d 298—Magee v. Palm, Civ. App., 233 S.W. 321.
Pleading irreparable injury in injunction suits generally see the C.J.S. title Injunctions § 182, also 32 C.J. p 329 note 27-p 331 note 43.

9. **In Indiana,** under Burns St.Annot. 1908 § 1205, authorizing injunction to restrain the commission or continuance of an act producing great injury, a complaint to enjoin a sale of real estate under execution on a judgment for defendant against a third person need not aver that plaintiff will suffer irreparable injury if the relief is not granted, but need only aver facts showing that he will suffer great injury.—Ft. Wayne First Nat. Bank v. Savin, 94 N.E. 347, 47 Ind.App. 266.

10. Ind.—Ft. Wayne First Nat. Bank v. Savin, supra.
Ky.—Robinson v. Carlton, 96 S.W. 549, 123 Ky. 419, 29 Ky.L. 876.
Pleading insolvency of defendant in injunction suits generally see the C.J.S. title Injunctions § 182, also 32 C.J. p 332 note 44-p 333 note 62.

11. Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.
23 C.J. p 575 note 24.

Allegations held sufficient
Ga.—Solomon v. Bateman-Freeman Co., 155 S.E. 6, 171 Ga. 266.
Tex.—Wyatt v. Hoke, Civ.App., 149 S.W.2d 1019—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, error dismissed.

Allegations held insufficient
Ga.—James v. Upton, 129 S.E. 100, 160 Ga. 819.
La.—Dupuy v. Phillips, 133 So. 796, 16 La.App. 267.

12. Tex.—Davis v. Beall, 50 S.W. 1086, 21 Tex.Civ.App. 183.

13. Miss.—Cooper v. Newell, 36 Miss. 316.
23 C.J. p 575 note 28.

14. Md.—Wenzel v. Milbury, 49 A. 618, 93 Md. 427.
23 C.J. p 575 note 26.

15. Cal.—Austin v. Union Paving & Contracting Co., 88 P. 731, 4 Cal. App. 610.

16. La.—Hart v. Conolly, 22 So. 809, 49 La.Ann. 1587.
Mo.—Madden v. Fitzsimmons, 150 S.W.2d 761, 765, 235 Mo.App. 1074, citing **Corpus Juris.**

17. N.J.—Monmouth County Electric Co. v. Eatontown Tp., 70 A. 994, 74 N.J.Eq. 578.

ous defense must be pleaded where the judgment itself is attacked,[18] yet if the judgment is attacked as void it has been held that plaintiff need not plead a meritorious defense,[19] although in some states a defense or some equity must be set up,[20] unless the invalidity appears on the face of the record.[21]

(5) Refusal to Levy on Property Pointed Out

A bill seeking an injunction on the ground of refusal of the officer to levy on property pointed out to him must contain allegations that the property was pointed out, that complainant had unencumbered title thereto, that it was tendered to the officer, and allegations negativing defenses.

If the ground for injunction relied on is the refusal of the officer to levy on other property pointed out to him, the bill or petition must specify the property on which the levy should be made,[22] and contain allegations that complainant had title thereto,[23] and that it was tendered to the officer.[24] Complainant must also specifically allege that the property so pointed out was clear of encumbrances,[25] and negative similar defenses.[26]

(6) Satisfaction of Debt

Where satisfaction of the debt or tender is relied on as a ground for enjoining an execution sale, the facts must be alleged.

If the ground relied on for injunctive relief against an execution sale is the satisfaction of the debt,[27] or part payment,[28] the facts must be stated. If a tender of the whole amount or the amount unpaid is relied on, the tender must be properly pleaded.[29]

b. Subsequent Pleadings

In suits to enjoin execution all parties defendant need not answer. The answer must allege the facts relied on as a defense, and if the answer pleads in the alternative each alternative must constitute a complete and sufficient defense.

In suits to enjoin an execution, it is not always necessary for every party defendant to answer,[30] and the failure of the officer to answer does not preclude the judgment creditor from asserting his rights.[31]

The answer must state the facts relied on as a defense.[32] Where the answer pleads in the alter-

18. Ill.—Lang v. Smith, 238 Ill.App. 196.

19. Kan.—O'Neil v. Eppler, 133 P. 705, 90 Kan. 314.
Miss.—Molpus v. Bostic Lumber & Mfg. Co., 71 So. 16, 110 Miss. 883.
23 C.J. p 560 note 97.

20. Tex.—Texas Nat. Bank of Beaumont v. Moore, Civ.App., 118 S.W. 2d 934.
23 C.J. p 575 note 34.

Pleading held sufficient
Tex.—Wilkenfeld v. Ballard, Civ.App., 84 S.W.2d 279.

21. Tex.—Galveston, H. & S. A. R. Co. v. Ware, 11 S.W. 918, 74 Tex. 47.

22. Tex.—Dickinson v. Comstock, Civ.App. 199 S.W. 863.
23 C.J. p 575 note 35.

23. Tex.—Dickinson v. Comstock, supra.
23 C.J. p 575 note 36.

24. Tex.—Anderson v. Oldham, 18 S. W. 557, 82 Tex. 228.
23 C.J. p 575 note 37.

25. Tex.—Pierson v. Connellee, Civ. App., 145 S.W. 1039.

26. Tex.—Pierson v. Connellee, supra.

27. Ark.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.
23 C.J. p 575 note 40.

Acceptance of payment in merchandise
Where complainant relies on payment of the judgment as the ground for enjoining a sale under execution, an allegation of payment by merchandise without an allegation that the creditor agreed to accept such merchandise as payment on the judgment is insufficient.—Garner v. Powell, 278 P. 625, 137 Okl. 8.

Judgment on replevy bond
Petition for injunction against execution of judgment on replevy bond, alleging that property was delivered to plaintiff in original action and to sheriff and sold by them, and alleging facts invalidating sale, is not demurrable, where the facts showed a "delivery" within the statute providing for discharge of judgment by delivery of replevined property.—Weaver v. O'Banion, Tex.Civ.App., 77 S.W.2d 288.

Allegations held sufficient
(1) Complaint alleging that the demand sued on was liquidated by the execution of a note and mortgage sufficiently alleges a defense of payment.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.

(2) Other allegations see 23 C.J. p 575 note 40 [a] (1).

Allegations held insufficient
Ky.—Stewart v. Commonwealth, 272 S.W. 906, 209 Ky. 372.
23 C.J. p 575 note 40 [a] (2).

28. Ky.—Hunter v. Bertram, 6 Ky. L. 593.
23 C.J. p 575 note 41.

Assumption is that additional payment, alleged to have been made, was made in connection with other dealings between the parties.—Frank v. Costigan, 118 A. 144, 141 Md. 106.

29. Ga.—Cooper v. Whaley, 15 S.E. 824, 90 Ga. 285.
23 C.J. p 575 note 42.
Necessity of pleading tender generally see the C.J.S. title Tender § 54, also 62 C.J. p 687 notes 14, 15.

30. Ill.—Beaird v. Foreman, 1 Ill. 385, 12 Am.D. 197.
23 C.J. p 576 note 46.

31. Tex.—McCord v. Rea, Civ.App., 178 S.W. 649.

32. Ky.—Sears v. Cain, 47 S.W.2d 513, 242 Ky. 702.
23 C.J. p 576 note 48.

Adequacy of remedy at law
(1) The mere fact that the legal remedy appears from the face of the bill to be adequate does not deprive a court of equity of jurisdiction to consider the case, it being necessary that defendant in his answer aver the adequacy of the remedy at law.—Hartsema v. Addison Coal & Coke Co., 282 N.W. 155, 286 Mich. 296.

(2) An answer merely denying that equity affords a remedy, without expressly averring the adequacy of the legal remedy, is insufficient.—Hartsema v. Addison Coal & Coke Co., supra.

Fraud
(1) Where complainant seeks to enjoin an execution sale as the real owner of the property, an answer alleging that complainant's title is fraudulent must state facts showing the fraud.—Reaves v. Meredeth, 48 S.E. 199, 120 Ga. 727—23 C.J. p 576 note 49.

native, each alternative pleaded must be a complete and sufficient ground of defense.[33]

On a general demurrer to the bill, matters not appearing on the face of the bill cannot be considered.[34]

Reconvention. In a suit to enjoin an execution on the ground that the judgment has become dormant, defendant may plead the judgment in reconvention.[35]

c. Exhibits

In suits to restrain execution, neither the execution nor collateral papers are required as exhibits.

In suits to restrain execution, the execution need not be made an exhibit[36] nor need collateral papers.[37]

d. Verification

General rules governing the verification of pleadings in injunction suits ordinarily control in suits to enjoin an execution levy or sale.

General rules governing the verification of pleadings in suits for injunctions ordinarily apply in suits to restrain an execution levy or sale.[38] The bill, complaint, or petition, seeking final relief, need not be under oath.[39] The only effect of want of verification is that complainant is not entitled to a temporary injunction, and defendant is not entitled to dissolution of the injunction during the pendency of the proceeding.[40] On the other hand, a petition for a temporary injunction must be under oath.[41]

The same rules control as to the necessity of a verified answer.[42]

e. Issues, Proof, and Variance

General rules governing issues, proof, and variance usually apply in suits to enjoin an execution levy or sale.

General rules relating to issues, proof, and variance ordinarily apply in suits to restrain an execution levy or sale.[43] Only the grounds for injunction set forth in the complaint can be relied on,[44] and defenses other than those set up in the answer cannot be urged.[45] If the answer sets up that the deed to plaintiff was fraudulent, the fraudulent character of the deed is an issue without a reply.[46] Defendant need not prove the existence of a judgment where the complaint proceeded on the theory that there was a judgment and an execution.[47]

The capacity of sheriff duly commissioned cannot be inquired into,[48] nor can matters at issue and adjudicated in the original suit be reopened on the ground of newly discovered evidence.[49]

§ 159. —— Evidence

Complainant who seeks to enjoin a levy or sale under execution has the burden of proof, but the burden of

(2) Other cases see 23 C.J. p 576 note 57 [a].

Lack of notice of prior conveyance

An execution creditor must allege, as against debtor's purchaser, that at the time he acquired his lien on property which the judgment debtor had previously conveyed to third persons he had no notice of such conveyance.—Sears v. Cain, 47 S.W.2d 513, 242 Ky. 702.

Quashing of execution return

Where the bill alleges that a previous execution on the same bond had been satisfied, an answer alleging that the previous execution and return had been quashed, but failing to show that the execution debtor was before the court or notified of the motion to quash, fails to state a good defense.—Lock v. Slusher, 43 S.W. 471, 102 Ky. 415.

Waiver of irregularities

An answer which shows that the irregularities which are the ground of the injunction sought were waived by agreement is sufficient.—Egbert v. Mercer, 66 Ind. 305.

33. Ky.—Lock v. Slusher, 43 S.W. 471, 102 Ky. 415.
23 C.J. p 576 note 50.

34. Mich.—Wight v. Roethlisberger, 74 N.W. 474, 116 Mich. 241.

35. Tex.—Oldham v. Erhart, 18 Tex. 147.

36. Ind.—Trueblood v. Hollingsworth, 48 Ind. 537—Hall v. Hough, 24 Ind. 273.

37. Ind.—Hall v. Hough, supra.
23 C.J. p 576 note 64.

38. Tex.—Eccles v. Daniels, 16 Tex. 136.

39. Tex.—Eccles v. Daniels, supra.
23 C.J. p 577 note 66.
Verified bill in injunction suits generally see the C.J.S. title Injunctions § 187, also 32 C.J. p 336 note 9.

40. Tex.—Eccles v. Daniels, supra.

41. Tex.—Eccles v. Daniels, supra.

Reason for rule

Defendant has rights which should not be disturbed, unless on real and substantial grounds.—Eccles v. Daniels, supra.

42. Tex.—Eccles v. Daniels, supra.
Verified answer in injunction suits generally see the C.J.S. title Injunctions § 187, also 32 C.J. p 340 notes 82–86.

43. La.—Parks v. Hughes, 103 So. 261, 157 La. 914.

Issues where injunction sought without bond

The issues, where an injunction is sought without bond, are limited to the grounds enumerated in the statute.—Koch v. Godchaux, 16 So. 181, 46 La.Ann. 1382.
23 C.J. p 577 note 76.

Issue of title in purchaser

In suit to enjoin execution sale of certain realty, debtor's interest in which was allegedly sold to plaintiff by parol sale, evidence that judgment debtor sold interest in land to plaintiff reserving one half mineral right, and that plaintiff paid him a certain sum for interest and entered on the land and improved it, built fences, and other structures, was sufficient to raise issue of title in plaintiff under parol sale.—Wyatt v. Hoke, Tex.Civ.App., 149 S.W.2d 1019.

44. Colo.—Jones v. Olson, 67 P. 349, 17 Colo.App. 144.
23 C.J. p 577 note 69.

45. Mont.—Pittsmont Copper Co. v. O'Rourke, 141 P. 849, 49 Mont. 281.
23 C.J. p 577 note 70.

46. Ky.—Carter v. Goodman, 11 Bush 228.

47. Kan.—Miller v. Wilkerson, 62 P. 253, 10 Kan.App. 576.

48. La.—Turner v. Hill, 21 La.Ann. 543.

49. La.—Gusman v. De Poret, 33 La. Ann. 333.

evidence may shift to defendant. Presumptions will be indulged in as in other actions, subject to being rebutted. General rules ordinarily govern as to the admissibility and the weight and sufficiency of the evidence.

General rules of evidence ordinarily are applicable in suits to enjoin an execution levy or sale.[50]

Presumptions will be indulged in as in other actions,[51] but they may be overcome by testimony.[52] Every presumption must be indulged in favor of the regularity of the judgment attacked.[53]

The burden of proof is on complainant,[54] but the burden of evidence may be shifted to defendant.[55] In some jurisdictions, plaintiff, where he attacks the judgment, must prove that he had a valid defense to the cause of action on which the judgment was based.[56]

Admissibility. The admissibility of evidence ordinarily is governed by the rules relating to the admissibility of evidence in other equitable proceedings.[57] Deeds which are a link in the chain of title are admissible.[58] If the ground for injunction is excessiveness of the levy, evidence of the value of plaintiff's equity in the land above encumbrances is not admissible.[59]

Weight and sufficiency. A complainant who seeks an injunction against a levy or sale under execution must present a strong case.[60] The principles discussed in Equity § 479, and in the C.J.S. title Injunctions § 192, also 32 C.J. p 349 note 55–p 352 note 88, ordinarily govern the sufficiency of evidence,[61] such as evidence of satisfaction of the judgment,[62] or the inadequacy of the price paid for realty.[63] In jurisdictions in which complainant must show a meritorious defense to the judgment in order to be entitled to an injunction, it is sufficient if a prima facie meritorious defense is established.[64] Where a third person complainant asks an injunction against an execution on his

50. Ga.—Towers v. City Land Co., 125 S.E. 837, 159 Ga. 486.

51. Mich.—Wight v. Roethlisberger, 74 N.W. 474, 116 Mich. 241.
23 C.J. p 577 note 81.

52. Iowa.—Knudson v. Litchfield, 54 N.W. 199, 87 Iowa 111.

53. Nev.—Schultz v. Mexican Dam & Ditch Co., 224 P. 804, 47 Nev. 453.
Presumption generally as to regularity of judicial proceedings see Evidence § 145.

54. Iowa.—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84.
Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42.
23 C.J. p 577 note 78

Particular matters

(1) Where an injunction is sought on the ground of absence of service of process so that the judgment is void, and the return recites execution of process, complainant has the burden of showing lack of service.—Myers v. Wolf, supra.

(2) Party seeking to enjoin execution of judgment must establish that refusal of equitable jurisdiction will result in injustice.—Parker v. Reid, 273 P. 334, 127 Or. 578.

(3) In action by wife to enjoin sale of her property under general execution growing out of foreclosure of mortgage and sale of mortgaged land, under claim of fraud and inadequate consideration paid by mortgagee for land, and that, as her husband's surety on mortgage and note, she was entitled to discharge from liability, burden as to proof of value of land, as bearing on fraud, was on plaintiff.—Moyers v. Stubblefield, 300 N.W. 488, 199 Iowa 631.

(4) Complainant, claiming as purchaser of property seized under execution against another, has the burden of proving the validity of the sale when such is placed in issue by defendant's answer.—Carruth v. Jones, La.App., 138 So. 655.

(5) Complainants suing to restrain execution on judgment taken by defendant under agreement for settlement of action had burden of proving terms of alleged contract of defendant to accept stock in satisfaction of judgment.—Girard Trust Co. v. Peacock, 169 A. 645, 115 N.J.Eq. 128.

(6) Other matters see 23 C.J. p 577 note 78 [a] (1), (2), (4)–(6).

55. Ky.—Sears v. Cain, 47 S.W.2d 513, 242 Ky. 702.
23 C.J. p 577 note 79.

Admission filed prior to trial

Where in order to obtain the right to open and close, defendants have complied with a rule of court by filing an admission admitting plaintiff's prima facie case, they thereby assume the burden of proof.—Caffarelli v. Pool, Tex.Civ.App., 122 S.W.2d 1074, error dismissed, judgment correct.
Admissions as affecting right to open and close generally see the C.J.S. title Trial § 43, also 64 C.J. p 75 note 42 [a].

Title in third person

(1) Where the title to land levied on stands in the name of another than the debtor, the creditor must show that the debtor has an interest therein.—Hahnsen v. Qualley, 120 N.W. 625, 142 Iowa 282.

(2) Execution creditor had burden to prove that he acquired lien without notice of prior unrecorded conveyance, in action by purchaser under such conveyance.—Sears v. Cain, 47 S.W.2d 513, 242 Ky. 702.

56. Tex.—Collin County Nat. Bank v. McCall Hardware Co., Civ.App., 161 S.W. 950.

57. La.—Frank Melat, Consol. v. Cooper, App., 150 So. 432.
23 C.J. p 577 note 83.

58. Ind.—Sedgwick v. Tucker, 90 Ind. 271.

59. Mo.—Cantwell v. Johnson, 139 S.W. 365, 236 Mo. 575.

60. Or.—Parker v. Reid, 273 P. 334, 127 Or. 578.

61. Okl.—DeMatte v. Clark, 50 P.2d 342, 174 Okl. 297.
23 C.J. p 578 note 87.

Evidence held sufficient

Ga.—Dollar v. Fred W. Amend Co., 191 S.E. 696, 184 Ga. 432.
Okl.—DeMatte v. Clark, 50 P.2d 342, 174 Okl. 297.
Tex.—W. T. Rawleigh Co. v. Cowan, Civ.App., 152 S.W.2d 796—Cotten v. Stanford, Civ.App., 147 S.W.2d 930.
23 C.J. p 559 note 86 [c].

Evidence held insufficient

La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936—Durr v. Winn, App., 194 So. 63—Hamilton v. Antoine, App., 157 So. 795—Frank Melat, Consol. v. Cooper, App., 150 So. 432—Nichols v. Bell & Rachal, 2 La. App. 16.
Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 318, 320 Mo. 310.
Tex.—Ricketts v. Ferguson, Civ. App., 64 S.W.2d 416, error refused.

62. Ky.—W. W. Woodruff Hardware Co. v. Wender Blue Gem Coal Co., 132 S.W. 401, 141 Ky. 210.

63. N.J.—Palladino v. Hilpert, 65 A. 721, 72 N.J.Eq. 270.

64. Tex.—National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 39 S.W.2d 926.

property, he must establish his title with legal certainty.[65]

If the application for the injunction is grounded on fraud the fraud if denied must be clearly proved,[66] and fraud as a defense against an injunction must likewise be clearly proved.[67]

Pleadings as evidence. Where the allegations of the bill are traversed by the answer, injunction should not be granted,[68] and, as stated infra § 160, if a temporary injunction has been granted, it will be dissolved. However, where the answer to a petition for an interlocutory injunction admits the illegality of the intended sale, the injunction will be granted.[69]

§ 160. —— Hearing, Determination, and Relief

a. Hearing and determination
b. Relief

a. Hearing and Determination

In some jurisdictions a temporary injunction against a levy or sale under execution may be granted only after a hearing on a rule nisi; in other jurisdictions such injunction may be granted ex parte. Where the injunction is sought because of a defective judgment, the court will consider the character and force of the judgment so far as is necessary to dispose of the application.

Under some statutes a temporary injunction against the levy or sale under execution can be granted only after a hearing on a rule nisi;[70] in other jurisdictions it may, within the discretion of the court, be granted ex parte, as where otherwise irreparable injury to the applicant would result.[71] Under some statutes the suit must be heard by the court rendering the judgment,[72] but the statutes are inapplicable where execution is levied on property of a person not a party to the judgment.[73]

Where an injunction is sought against a sale under execution because based on an alleged defective judgment, the court will consider and ascertain the true character and force of the judgment, not necessarily for the purpose of declaring the judgment void, but in order to ascertain the equitable circumstances in the case in order to dispose of the application for injunction.[74] Questions relating to persons not parties to the suit cannot be determined.[75]

Findings must be supported by the evidence,[76] and must be sufficient to authorize the decree.[77]

b. Relief

A court taking jurisdiction of a suit to enjoin a levy or sale under execution will determine all the issues between the parties, but generally will not award relief beyond the necessities of the case. Dismissal of the bill

Defense to part of judgment
A temporary injunction against the levy or sale under execution will issue where complainant shows a prima facie meritorious defense to part of the judgment.—National Loan & Investment Co. v. L. W. Pelphrey & Co., supra.

65. Tex.—Wyatt v. Hoke, Civ.App., 149 S.W.2d 1019.
23 C.J. p 578 note 91.

Evidence held sufficient
Tex.—Wyatt v. Hoke, Civ.App., 149 S.W.2d 1019.

Evidence held insufficient
La.—Carruth v. Jones, App., 139 So. 655.

66. Iowa.—Hamilton v. Bishop, 22 Iowa 211.
Pa.—Lebanon Mut. Ins. Co. v. Erb, 2 Chest.Co. 537, affirmed 2 Chest.Co. 570.

67. Wash.—Choukas v. Carras, 81 P.2d 841, 195 Wash. 659.

Evidence held insufficient
Wash.—Choukas v. Carras, supra.

68. D.C.—Magruder v. Schley, 18 App. 288.
23 C.J. p 576 note 55.
In injunction suits generally see the C.J.S. title Injunctions § 196, also 32 C.J. p 355 note 46—p 357 note 65.

69. Ga.—Johnson v. Hayne, 29 S.E. 914, 103 Ga. 542.

70. In Louisiana
(1) In view of Act 1924 p 39, a temporary injunction enjoining a sale under execution cannot be granted until after a hearing on a rule nisi, although a temporary restraining order may issue ex parte in the meantime.—American Nat. Bank v. Bauman, 137 So. 54, 173 La. 336.

(2) The act has been construed to modify the statutory provisions governing the issuance of injunction against proceedings by executory process.—American Nat. Bank v. Bauman, supra.

(3) Its purpose was to rid the state of the abuse occasioned by ex parte issuance of the writ of injunction merely on the facts alleged in the application.—American Nat. Bank v. Bauman, supra.

71. Tex.—Wilkenfeld v. Ballard, Civ.App., 84 S.W.2d 279.

72. Tex.—Maier v. Davis, Civ.App., 72 S.W.2d 308.

Temporary injunction
Temporary injunction against execution of judgment rendered by county court, which had jurisdiction of parties and subject matter of suit, against sureties on mortgagor's replevy bond for reduction in value of mortgaged automobile because of abuse or injury while in mortgagor's hands after it was replevied and bond executed, by reason of statute should have been made returnable to such court.—Baum v. Dunbar, Tex Civ.App., 90 S.W.2d 643, error dismissed.

73. Tex.—Maier v. Davis, Civ.App., 72 S.W.2d 308.

74. Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.

75. Ga.—Shepard v. Veal, 173 S.E. 644, 178 Ga. 535.
Or.—Gatt v. Hurlburt, 286 P. 151, 132 Or. 415, denying rehearing 284 P. 172, 131 Or. 554.

76. Ark.—Menees v. Strickland, 34 S.W.2d 772, 183 Ark. 1153.
Ky.—Cook's Committee v. Reaves, 90 S.W.2d 345, 262 Ky. 372.

Evidence held to support findings
Ark.—Menees v. Strickland, 34 S.W. 2d 772, 183 Ark. 1153.
Kan.—Duke v. Central State Bank, 242 P. 471, 120 Kan. 99.
Mich.—Asiulewicz v. Pietrazewski, 190 N.W. 659, 220 Mich. 690.
R.I.—Di Iorio v. William H. Considine & Co., 167 A. 129, 53 R.I. 382.

Evidence held not to support finding
Tex.—Moreland v. Wise, Civ.App., 82 S.W.2d 169.

77. Tex.—Martin v. Cage, Civ.App., 135 S.W.2d 151.

Findings sufficient to authorize injunction.—Martin v. Cage, supra.

may be ordered, and an injunction which has been granted may be continued or dissolved.

Where the court once takes jurisdiction of a suit to restrain an execution levy or sale, it may proceed to determine all the issues between the parties,[78] but it will not, as a general rule, grant any relief beyond the necessities of the case.[79] In a proper case a temporary injunction may be granted.[80]

The sale should not be enjoined where the object of the bill will be answered by restraining the payment over of the proceeds of the sale.[81] A decree perpetually enjoining a sale is improper where the proper relief is merely to enjoin a sale under a venditioni exponas.[82] If the execution issues for more than is due, an injunction should be sustained only as to the excess.[83]

The court may, in a proper case, prohibit a sale of a particular interest in property.[84] Under some circumstances, the decree should not enjoin all further proceedings on the judgment but should limit the injunction to the particular property levied on.[85] An injunction will not issue because of alleged satisfaction of the judgment debt where the evidence shows that complainant, in proceedings to amend the judgment, has admitted that there was no payment of the debt.[86] While a court of equity has no power to order a new trial of the case at law,[87] it may decree that unless the opposite party submits to a new trial of the case in which the judgment and execution was rendered and ordered the levy of execution will be enjoined.[88]

Under some circumstances, defects in the original judgment may be corrected,[89] but in a suit to enjoin collection of a paid judgment errors in the judgment cannot be corrected,[90] and on application for a temporary injunction a final decree correcting an error in the execution is improper.[91]

Provisions in the decree cannot be complained of by a party not affected thereby.[92]

Relief to defendant. Where defendant seeks affirmative relief in his pleadings, such relief may be awarded.[93] Moreover, on granting relief to plaintiff, the court may properly grant to defendant the relief to which he is entitled, although he does not pray therefor.[94] Where, under the circumstances, a cross bill would have been a mere formality, a decree rendered as if a cross bill had been filed, is proper.[95]

Dismissal and nonsuit. The bill may be dismissed in a proper case.[96] Thus, when there is

78. Tex.—Young v. Hollingsworth, Civ.App., 16 S.W.2d 844, error refused—Karnes v. Barton, Civ.App., 272 S.W. 317.
23 C.J. p 578 note 96.

Partition
If administration on mother's estate was unnecessary, court in suit to enjoin sale of her property under judgment against son, could, under proper pleadings, partition estate.—Young v. Hollingsworth, Tex.Civ.App., 16 S.W.2d 844, error refused.

79. Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.
23 C.J. p 578 note 98.

Barring suit to cancel deeds
Decree permanently and perpetually restraining judgment creditor from doing any act or thing under judgment and execution, or under any other execution so as to deprive the judgment creditor of the right to sue to cancel deeds is erroneous.—Weil v. Richardson, supra.

Judgment based on original judgment improper
Tex.—McDonald v. Brown, Civ.App., 36 S.W.2d 774, error dismissed.

80. Cal.—Einstein v. California Bank, 69 P. 616, 137 Cal. 47.
23 C.J. p 578 note 93.

Postponement of sale
Court, in action to enjoin sale under execution of interest in estate, should, to avoid sacrifice, postpone sale until estate is ready for distribution, making necessary orders to protect property against sale or encumbrance by judgment debtor.—Washington Trust Co. v. Blalock, 285 P. 449, 155 Wash. 510.

81. Md.—Wenzel v. Milbury, 49 A. 618, 93 Md. 427.
23 C.J. p 578 note 99.

82. Ind.—Berry v. Nichols, 96 Ind. 287.

83. La.—Millaudon v. Percy, 9 La. 441.
23 C.J. p 579 note 3.

84. Ga.—Jones v. Crawley, 68 Ga. 175.

85. U.S.—Ford v. Douglas, La., 5 How. 143, 12 L.Ed. 89.

86. Ga.—Duke v. Ayers, 136 S.E. 410, 163 Ga. 444.

87. Ark.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.

88. Ark.—Sledge-Norfleet Co. v. Matkins, supra.

89. Ind.—Kent v. Fullenlove, 38 Ind. 522.
23 C.J. p 579 note 5.

90. N.M.—Williams v. Kemp, 273 P. 12, 33 N.M. 593.

91. Ga.—Johnson v. Hayne, 29 S.E. 914, 103 Ga. 542.
23 C.J. p 579 note 6.

92. Mich.—Schneider v. Dayton, 69 N.W. 829, 111 Mich. 396.

93. Mo.—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.

Cancellation of deeds of purchasers
In a suit by purchasers from the judgment debtor seeking to enjoin an execution sale, where it appears that the deeds under which complainants claim are fatally defective as against creditors of the debtor, and such creditors ask affirmative relief in their answer, such relief will be awarded, rather than compel them to resort to an independent suit.—Weil v. Richardson, supra.

94. Iowa.—Shedenhelm v. Cafferty, 156 N.W. 340, 174 Iowa 195.

95. Va.—Taylor v. Beale, 4 Gratt. 93, 45 Va. 93.

96. Fla.—Kearley v. Crawford, 151 So. 293, 112 Fla. 43.
23 C.J. p 579 note 10.

Dismissal held proper
Pa.—Fortna v. Donaldson, 85 Pa. Super. 99.

no equity in the bill, it should be dismissed and the injunction dissolved;[97] but it is not proper to decree a sale under the execution.[98]

Where the bill is not devoid of equity on its face and the case has not been set down for hearing on bill and answer and has not been at issue long enough to justify a trial, it is error to dismiss the bill.[99] Where by statute the resort to the wrong kind of remedy is not ground for dismissal, a failure to proceed at law where there is a complete and adequate remedy at law is not ground for dismissal.[1] Of course, where plaintiff makes out a prima facie case, a nonsuit should be denied.[2]

Where a petition is filed in the original action instead of bringing an independent suit in equity, it is not ground for dismissal that it was addressed to the judge instead of to the court or that it prayed for a judgment instead of an order.[3]

Continuance of injunction. Where proper grounds exist, a temporary injunction may be continued.[4]

Dissolution of injunction. A temporary injunction may be dissolved in a proper case,[5] as where it has accomplished its purpose,[6] or where the bill is not timely filed,[7] or the writ of injunction has not been timely served,[8] or where the injunction was granted on the allegation of nullity of the judgment on which the execution issued, and the action of nullity is barred by prescription.[9]

Where the allegations of the bill are traversed by the answer, a temporary injunction which has been granted may be dissolved,[10] but it has been held that dissolution does not follow as a matter of course in such case.[11] Where the answer raises issues properly triable at law, the injunction will be dissolved.[12] Where the answer by its admissions shows that equity remains with the complainant after all the allegations have been taken as true the injunction will not be dissolved.[13] An injunction will not be entirely dissolved for error when a modification will better serve the ends of justice.[14] A legislator's privilege does not prevent a court from acting on a motion to dissolve an injunction in his favor to stay proceedings.[15] An injunction against a provisional seizure is null if it does not reach the sheriff until after seizure, and may be dissolved on motion.[16] An injunction will not be dissolved on giving bond where the dissolution will work irreparable injury to complainant.[17]

Whether dissolution will be granted rests in the discretion of the court.[18] The judgment or order

97. Ark.—Lovette v. Longmire, 14 Ark. 339.

Partial insufficiency of petition

That petition fails to make a case for recovery by some, but not all, plaintiffs does not authorize its dismissal as a whole.—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248.

98. Ark.—Lovett v. Longmire, 14 Ark. 339.

99. Tenn.—Grant v. Chester, Ch., 58 S.W. 485.

1. Ark.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.

Dismissal for error as to nature or form of remedy generally see Dismissal and Nonsuit § 58.

2. Cal.—Fitzgibbon v. Laumeister, 51 P. 1078, 5 Cal.Unrep.Cas. 939.

3. Wis.—Jackson Mill. Co. v. Scott, 110 N.W. 184, 130 Wis. 267.

4. Minn.—Moss v. Pettingill, 3 Minn. 217.

23 C.J. p 578 note 95.

Continuance of injunction generally see the C.J.S. title Injunctions § 234, also 32 C.J. p 396 note 33.

Answer interposing new matter

Where the answer does not deny the complaint, but sets up new matter as a defense, the injunction will, unless the new matter is admitted, be continued until a hearing.—Moss v. Pettingill, supra.

5. N.C.—Harden v. Stockard, 200 S.E. 409, 214 N.C. 848.

Okl.—Campbell v. Phillips Petroleum Co., 49 P.2d 705, 173 Okl. 424.

23 C.J. p 579 note 15.

Public record controlling

Whether a temporary injunction will be dissolved depends on the public record as controlling the rights of the judgment creditor, mortgagees, and debtors.—Harden v. Stockard, 200 S.E. 409, 214 N.C. 848.

6. Okl.—Logan v. Yoes, 118 P. 353, 30 Okl. 65.

23 C.J. p 579 note 16.

7. **Four months' delay**

N.J.—Stimson v. Bacon, 9 N.J.Eq. 144.

8. Tex.—Morris v. Hughes Bros. Mfg. Co., Civ.App., 27 S.W.2d 849.

Duty of court, advised that enjoined execution sale had been made before service of injunction, is to dissolve injunction on own motion. —Morris v. Hughes Bros. Mfg. Co., Tex.Civ.App., 27 S.W.2d 849.

9. La.—Weber v. Frost, 22 La.Ann. 348.

10. D.C.—Magruder v. Schley, 18 App.D.C. 288.

23 C.J. p 576 note 56.

Reason for rule

The allegations of the answer which are responsive to the bill will be regarded as true.—Wensel v. Milbury, 49 A. 618, 93 Md. 427.

11. Cal.—Porter v. Jennings, 26 P. 965, 89 Cal. 440.

23 C.J. p 576 note 57.

12. N.J.—Freeman v. Elmendorf, 7 N.J.Eq. 475, affirmed 7 N.J.Eq. 655.

13. Ga.—Johnson v. Hayne, 29 S.E. 914, 103 Ga. 542.

N.J.—Peshine v. Binns, 11 N.J.Eq. 101.

23 C.J. p 576 note 59.

14. N.Y.—Heath v. Hand, 1 Paige 329.

23 C.J. p 579 note 19.

15. Va.—Botts v. Tabb, 10 Leigh 647, 37 Va. 647.

16. La.—Bagley v. Johnston, 4 La. 332.

17. La.—Long v. Charles A. Kaufman Co., 56 So. 357, 129 La. 429—Long v. Charles A. Kaufman Co., 53 So. 984, 127 La. 764.

Dissolution of injunctions on giving bond see the C.J.S. title Injunctions § 231, also 32 C.J. p 427 note 76–p 428 note 90.

18. Tex.—Meyer v. Cockcroft, Civ. App., 273 S.W. 665.

Discretion held not abused

(1) Overruling motion to dissolve temporary injunction.—Hudson v. Kerby, Tex.Civ.App., 5 S.W.2d 1007—Meyer v. Cockcroft, Tex.Civ.App., 273 S.W. 665.

(2) Granting motion to dissolve temporary injunction.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42.

of dissolution need not contain the reasons therefor.[19] A statute providing that when an injunction to stay proceedings on a judgment is dissolved the decree of dissolution shall include the amount of principal, interest, damages and costs, including officer's fees and commissions due on the judgment at the date of dissolution and an award of execution against the defendant in the judgment, has been held not to apply when strangers to the judgment obtain the injunction.[20]

As a general rule the dissolution of the injunction restores the parties to the same position which they occupied before it was granted.[21] If the injunction is dissolved during the life of the execution, the sheriff may proceed to sell without making a second levy,[22] but if it is not dissolved until after the return day of the execution, he should return the execution, detailing the facts in his return.[23] However, in jurisdictions where the lien created by the levy is released by the injunction, stated infra § 163, it is not restored by dissolution thereof, and it is necessary for the creditor to sue out a new fieri facias and not a venditioni exponas[24] which, if issued, is void and the proceedings thereunder may be quashed on motion.[25]

§ 161. —— Successive Applications

A second application to enjoin a levy or sale under execution is permissible where it appears that there is new matter not existing at the time of the first application or that existing matter was not then known to complainant.

If complainant brings a second bill for injunctive relief against an execution levy or sale, he must show that the new matter alleged did not exist at the time the first bill was filed or that, if it existed, it was unknown to him.[26]

§ 162. —— Damages and Costs

Damages, interest, costs, or attorney's fees may in a proper case, and usually as a result of statutory regulation, be allowed on the dissolution or modification of an injunction restraining execution.

Statutes in some jurisdictions authorize an assessment of damages in the injunction suit on dissolution or modification of the injunction, under certain circumstances.[27] In some states statutes expressly provide for a certain per cent damages where the judge is satisfied that the injunction was obtained only for delay.[28] However, the allowance of damages has been held to be in the discretion of

(3) Dissolving temporary injunction to restrain execution is not abuse of discretion, where evidence regarding mortgagee's actual notice of prior lien was conflicting.—Hart v. Fakes & Co., Tex.Civ.App., 19 S.W.2d 462.

19. La.—Mallein v. Carstens, 4 La. 172.

20. W.Va.—Croker v. Brown, 168 S.E. 370, 113 W.Va. 380.

21. S.C.—Duckett v. Dalrymple, 30 S.C.L. 143.

Duty to pay judgment

When the owner of a judgment caused an execution to issue and be served, and an injunction is obtained to prevent the sale, after which so much of the judgment as was enjoined is paid to have the injunction dissolved, the judgment debtor is bound to pay such judgment.—Carder v. Murray, 9 Ky.Op. 634.

22. Minn.—Knox v. Randall, 24 Minn. 479.
23 C.J. p 579 note 23.

23. Minn.—Pettingill v. Moss, 3 Minn. 222, 74 Am.D. 747.

24. Ky.—Lockridge v. Biggerstaff, 2 Duv. 281, 87 Am.D. 498.

25. Ky.—Keith v. Wilson, 3 Metc. 201.

26. Miss.—Bass v. Nelms, 56 Miss. 502.
23 C.J. p 580 note 30.

Amendment of petition after dissolution

Party, knowing of facts set out by amended petition to enjoin execution at time of filing original petition for injunction, is not entitled to injunction after dissolution of injunction on original petition.—Ellis v. Lamb-McAshan Co., Tex.Civ.App., 278 S.W. 858.

27. Ky.—Proctor v. Dickey, 9 Ky. Op. 566
La.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.
23 C.J. p 580 note 32.

Improper seizure of exempt personalty does not affect the right to damages in the injunction suit on dissolution of an injunction against sale of realty.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.

Void order for injunction

Damages cannot be avoided by showing that the order of injunction was illegal and void.—Proctor v. Dickey, 9 Ky Op. 566.

In Mississippi

(1) Code, 1906, § 623, Hemingway Code § 383, provides for the recovery of damages at the rate of five per cent of the amount found due, including the costs, on the dissolution, in part, of an injunction obtained to stay proceedings on a judgment at law for money.—Courtney v. John Deer Plow Co., 84 So. 185, 122 Miss. 232.

(2) The decree should be limited to the dissolution and the award of a personal decree on the injunction bond for such damages as defendant may have sustained, and it is error to award a personal decree against the obligors on the injunction bond for the amount of the judgment or debt sought to be enjoined.—Gotelli v. Fountain, 90 So. 250, 127 Miss. 577.

Punitory character

Statutory damages allowable to defendant on dissolution of injunction against enforcement of judgment are punitory in character.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.

Limitation to execution on money judgments

(1) In some jurisdictions the right to damages in the injunction suit is limited to cases where a money judgment execution is enjoined.—Brantley v. Pruitt, supra.

(2) However, dissolution of injunction against sale of specific property seized under execution on money judgment is within the limitation.—Brantley v. Pruitt, supra.

28. Tex.—Kelton v. Jones, Civ.App., 253 S.W. 868—Citizens' Nat. Bank v. Interior Land & Immigration Co., 37 S.W. 447, 14 Tex.Civ.App. 301.

Proof of injury is unnecessary.—Kelton v. Jones, Tex.Civ.App., 253 S.W. 868.

the court, reviewable only in case of clear abuse,[29] but an excessive allowance of damages may be reduced.[30] If plaintiff in execution has not been delayed in the collection of his judgment,[31] or if the injunction was against the collection of the amount out of a particular piece of property without any restraint of satisfaction elsewhere,[32] the execution creditor is not entitled to damages on dissolution of the injunction. So, if the property levied on was never legally seized, the owner of the property cannot recover damages.[33] If no injunction has been granted, and none dissolved, statutory damages are not recoverable.[34]

If a third person attempts to enjoin an execution against his property instead of pursuing his remedy at law, the only damages which plaintiff in execution can recover are in reconvention for the wrongful suing out of the injunction.[35] A third person claimant is not subject to damages resulting from a delay because of a temporary restraining order allowed to expire by limitation where the expiration was due to the pendency of a rule for a temporary injunction based on the same grounds on which the restraining order was issued.[36]

Persons liable. Statutes providing that, where the enforcement of a judgment is enjoined and the injunction is subsequently dissolved, the court may, in the injunction suit, assess damages against both the principal and the surety on the injunction bond, discussed in the C.J.S. title Injunctions § 289, also 32 C.J. p 445 note 62, have been held applicable where an injunction against a levy or sale under execution is dissolved.[37] If an execution on a forthcoming bond against the principal and surety has been enjoined at the instance of the principal alone, the surety is not liable for the damages incurred by the principal for retarding the execution.[38] So one of several judgment debtors who does not apply with the others for an injunction should not be charged with damages.[39]

The measure of damages for the delay caused by a temporary injunction is the amount of debt and interest lost by reason of the wrongful issuance of the injunction;[40] on a partial dissolution, the damages are allowed on the portion of the judgment for which the injunction is dissolved.[41] Where a lessor obtains a preliminary injunction against the sale of the lessee's interest, on dissolution of the injunction the amount of rent obtained by the lessor from a new tenant for the unexpired term of the lease represents the value of the right seized by the judg-

29. Ky.—Proctor v. Dickey, 9 Ky. Op. 566.
La.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.
Tex.—Grimes v. Cline, Civ.App., 5 S.W.2d 847, error dismissed.
23 C.J. p 580 note 34.

Proof is not required in order that statutory damages be allowed in the injunction suit.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.

Discretion not abused
Ky.—Proctor v. Dickey, 9 Ky.Op. 566.
Tex.—Clare v. Maroney, Civ.App., 152 S.W.2d 410, error dismissed.

30. La.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.

Damages held excessive
La.—Brantley v. Pruitt, supra.

Damages held not excessive
La.—Roque v. Henry, App., 189 So. 358.

31. Ill.—State Bank of Warrensburg v. Keck, 229 Ill.App. 230.
23 C.J. p 580 note 35.

32. Ark.—Stanley v. Bonham, 12 S. W. 706, 52 Ark. 354.
Tenn.—Hammond v. St. John, 4 Yerg. 107.

33. Tex.—Sumner v. Crawford, Civ. App., 41 S.W. 825.

34. La.—Hersh v. Steinau, App., 140 So. 163.

35. Tex.—Ferguson v. Herring, 49 Tex. 126, following in Carlin v. Hudson, 12 Tex. 202.

36. La.—Riley v. Washington, App., 161 So. 896.

37. La.—Brantley v. Pruitt, 144 So. 604, 175 La. 879—Roque v. Henry, App., 189 So. 358.
Mo.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo.App. 1237.

Liabilities of sureties before assessment

(1) Sureties on undertaking for temporary injunction enjoining enforcement of judgment are not liable until damages are assessed.—Cockerham v. First Nat. Bank, 287 P. 223, 136 Or. 176.

(2) Hence, defendants sued for accounting on judgment were not entitled to judgment against plaintiff's sureties on bond for defendants' damages from injunction enjoining enforcement of judgment.—Cockerham v. First Nat. Bank, supra.

In Texas

(1) Where the injunction is wrongfully sued out to the damage of defendant, he may reconvene for his damages in the same suit, or recover them by an action on the injunction bond.—Foster v. Shephard, 33 Tex. 687—Carlin v. Hudson, 12 Tex. 202, 62 Am.D. 521.

(2) Judgment against the sureties who are strangers to the original execution cannot be rendered, without first requiring plaintiff in the original judgment to execute a refunding bond as required by statute. —Foster v. Shephard, supra.

(3) Recovery of damages is not automatic on dissolution of the injunction, since the original judgment remains in full force and effect.—Green v. Hodge, Tex.Civ.App., 102 S. W.2d 500.

(4) So recovery of damages is not allowable if the property was still in possession of constable, and would bring as much as it would have brought, had writ not been sued out. —Green v. Hodge, supra.

(5) Evidence was held insufficient to support finding that property, on dissolution of injunction, was not in possession of constable and available for sale in satisfaction of judgment. —Green v. Hodge, supra.

38. Va.—Garnett v. Jones, 4 Leigh 633, 31 Va. 633.

39. W.Va.—Graham v. Citizens' Nat. Bank, 32 S.E. 245, 45 W.Va. 701.

40. Tenn.—Winslow v. Mulchey, Ch., 35 S.W. 762.
Tex.—Green v. Hodge, Civ.App., 102 S.W.2d 500.

41. Tex.—Coates v. Caldwell, 8 S. W. 922, 71 Tex. 19, 10 Am.S.R. 725.
23 C.J. p 580 note 43.

ment creditor of which he was illegally deprived by the injunction.[42]

Under applicable statutes interest may be allowed, the amount being specified by the statutes,[43] and, where the statutory rate is mandatory, the court has no discretion to vary the rate.[44]

The rule that, where the main suit is so blended with a temporary injunction proceeding that it is impossible to separate the two, the expenses incurred in connection with the trial of the main suit should be included as damages, stated in the C.J.S. title Injunctions § 315, also 32 C.J. p 471 note 47, applies to a suit on an injunction bond given to enjoin a levy or sale under execution.[45]

Attorney's fees. In some jurisdictions attorney's fees may be allowed complainant by way of damages,[46] unless an allowance is inequitable under the particular circumstances,[47] or unless the expense is not due to the injunction, but would have been incurred in any event;[48] but such fees cannot be awarded for obtaining a dissolution of a temporary restraining order which by its terms had expired prior to the proceedings for dissolution.[49] The amount to be awarded as attorney's fees depends on the value of the property illegally seized, the damage or inconvenience that might be sustained by the debtor by reason of such seizure if it were not terminated, and the skill and labor required to secure the debtor in his rights.[50]

Costs are generally awarded to defendant on granting his motion to dissolve.[51] Costs are awarded against defendant where the injunction is perpetuated.[52] Where an injunction is obtained to prevent a sale under execution for an excessive sum, costs of the injunction will be assessed against the execution creditor.[53] If an execution on a void money judgment is enjoined and a judgment on a claim for affirmative relief was granted complainant, the costs of the injunction suit should be taxed against defendant in injunction.[54]

§ 163. —— Effect of Injunction

a. In general
b. As affecting levy, custody, and lien

a. In General

The full intent of an injunction against an execution levy or sale is not confined to the letter, but may be judged from its spirit and purpose.

The full intent of an injunction against a levy or sale under execution is not necessarily confined to the letter, but may sometimes be judged from its spirit and purpose.[55] The effect of a temporary injunction is merely to preserve the existing status until a regular trial of the issues involved can be had.[56]

An injunction taken out against an executory process is, regardless of form, in substance and effect a defense against the demand of the execution creditor.[57] An injunction against the issuance of an execution bars a suit against the clerk for refusal to issue it.[58]

An injunction restraining the execution sale precludes a levy on the property, even though no sale is made.[59] Such an injunction prevents a sale under the levy covered thereby, even where there is a claim of improper issuance,[60] although the

42. La.—Burglass v. Villere, App., 147 So. 727.

43. La.—Brantley v. Pruitt, 144 So. 604, 175 La. 879.

44. La.—Brantley v. Pruitt, supra.

45. Colo.—Duncan v. Commercial Bank of Las Animas, 300 P. 572, 89 Colo. 153.

46. La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164—Soniat v. Whitmer, 74 So. 916, 141 La. 235—Harmon v. Moore, App., 169 So. 174, affirmed 172 So. 175—First Nat. Bank v. Corell, App., 145 So. 393, rehearing denied 146 So. 479, and amended on other grounds 149 So. 326.
Mo.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo.App. 1237.
23 C.J. p 580 note 32 [e].

Invalid seizure under execution as a ground for enjoining the execution will not authorize awarding attorney's fees as damages.—McLemore v. Abell, 125 So. 601, 12 La.App. 147.

Where no basis exists, attorney's fees cannot be allowed as damages. —Goldman v. Sugar Bros. Co., 8 La. App. 562.

47. La.—Iberville Land & Securities Co. v. Hurdle, App., 151 So. 254—First Nat. Bank v. Corell, App., 146 So. 479, denying rehearing 145 So. 393, amended 149 So. 326.

48. Ill.—Moriarty v. Galt, 17 N.E. 714, 125 Ill. 417, affirming 23 Ill. App. 213.

49. La.—Falgout v. Boudreaux, App., 188 So. 421.

50. La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164.

Allowance held excessive
La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164.

51. Tex.—Modisett v. Kalamazoo Nat. Bank, 56 S.W. 1007, 23 Tex. Civ.App. 589.
W.Va.—Graham v. Citizens' Nat. Bank, 32 S.E. 245, 45 W.Va. 701.
23 C.J. p 580 note 44.

52. Tex.—Dearborn v. Phillips, 21 Tex. 449
23 C.J. p 581 note 45.

53. La.—Clark v. O'Banion, 3 La. App. 531.

54. Tex.—Hickman v. White, Civ. App., 29 S.W. 692.

55. Vt.—Campbell v. Tarbell, 55 Vt. 455.
23 C.J. p 581 note 65.
Injunction as excusing nondelivery of property obtained under forthcoming bond see supra § 118.

56. Tex.—Meyer v. Cockcroft, Civ. App., 273 S.W. 665.

57. La.—Parks v. Hughes, 103 So. 261, 157 La. 914.

58. Tex.—Kruegel v. Jones, Civ. App., 143 S.W. 989—Kruegel v. Murphy, Civ.App., 126 S.W. 680.

59. Miss.—Sugg v. Thrasher, 30 Miss. 135.

60. Ill.—People v. Cermack, 215 Ill. App. 148.

court may permit the sheriff to sell perishable property in his hands, and deposit the proceeds in court.[61] If an officer proceeds to sell property he has levied on before the injunction, he becomes a trespasser ab initio,[62] but, where the property is sold pending an injunction, the debtor's title is not prejudiced thereby.[63] A sheriff enjoined from further proceedings under a seizure should not return the writ, but retain it, to be proceeded with if unfettered.[64]

If the judgment creditor and the sheriff have been restrained from executing the original fieri facias, an alias cannot be issued.[65] However, enjoining the execution of the original judgment does not affect an execution issued on a forfeited forthcoming bond taken on the execution on the original judgment.[66]

b. As Affecting Levy, Custody, and Lien

In some jurisdictions an injunction against a sale under execution releases the levy and the lien thereunder, although in others the injunction merely suspends the levy but does not release it.

There is considerable conflict in the decisions as to the effect of the injunction as a release of the execution lien.[67]

In several jurisdictions while the effect of an injunction on the execution lien is said to be dependent on the character of the bond required,[68] it is held that an injunction releases the levy and the lien created by it,[69] even though the injunction is wrongfully issued,[70] and, where the property levied on is personal property, its return to the debtor is authorized,[71] although it has been held that the issuance of an injunction does not destroy the officer's right to retain possession,[72] or interfere with the right again to levy on and sell property after dismissal of the injunction proceedings.[73] The rule is said to be otherwise in the case of a levy on land, which is not perishable, and where the debtor's possession is not divested by the levy.[74] A further distinction is drawn between an injunction sued out at the instance of the execution debtor and one procured by a stranger; in the latter case the lien is not destroyed, even though an injunction bond is given,[75] at least where only a nominal bond to indemnify for costs and damages was required;[76] but this distinction has been repudiated.[77] In other jurisdictions it is held that the injunction merely suspends the lien and does not release it.[78]

If the injunction is made perpetual, the lien is lost.[79] In order that the time during which an injunction operates shall not be considered in the reckoning of the limitation of a judgment lien on land, the injunction must be against the enforcement of the judgment itself, and not an injunction restraining the sale of a tract of land claimed by a third person.[80]

Levy of junior writ. If an elder execution is enjoined, the sheriff should go ahead and levy a junior which he has in his office.[81] The proceeds cannot be applied to the elder execution,[82] and the rule is said to be the same, although the injunction is dissolved by a consent order after the sale and before the return of the process,[83] which is protected by security given when the injunction was obtained,[84] although, where notice of the consent to the dissolution was given the sheriff before the sale, the elder execution is entitled to be first paid out of the proceeds.[85]

61. N.Y.—Heath v. Hand, 1 Paige 329.

62. Ky.—Turner v. Gatewood, 8 B. Mon. 613.

63. La.—Dosson v. Bieller, 10 La. Ann. 570.

64. La.—Cochrane v. U. S. Bank, 11 Rob. 64—Dugat v. Babin, 8 Mart., N.S., 391.
Return of writ see infra §§ 314–330.

65. La.—Byrne v. Mithoff, 24 La. Ann. 297.
23 C.J. p 581 note 63.
Alias writ see supra § 85.

66. Miss.—Davis v. Dixon, 2 Miss. 64, 26 Am.D. 695.

67. **Conflict in decisions reviewed**
U.S.—In re Randolph, D.C.W.Va., 187 F. 186.

68. Ala.—Bartlett v. Gayle, 6 Ala. 305, 41 Am.D. 52.
23 C.J. p 582 note 74.

69. Ky.—Mallory v. Dauber, 83 Ky. 239.
23 C.J. p 581 note 69.

70. Ky.—Keith v. Wilson, 3 Metc. 201.

71. Ky.—Keith v. Wilson, supra.
23 C.J. p 582 note 71.

72. Tex.—Green v. Hodge, Civ.App., 102 S.W.2d 500.

73. Tex.—Green v. Hodge, supra.

74. Ohio.—Bisbee v. Hall, 3 Ohio 449.
23 C.J. p 582 note 72.

75. Ala.—Bartlett v. Gayle, 6 Ala. 305, 41 Am.D. 52.

76. U.S.—In re Randolph, D.C.W. Va., 187 F. 186.

77. Tenn.—Telford v. Cox, 83 Tenn. 298.

78. Ark.—Johnson v. Gillenwater, 87 S.W. 439, 75 Ark. 114.
23 C.J. p 582 note 73.

79. Tex.—Snow v. Nash, 50 Tex. 216.

Decree as self-executing
Decree permanently enjoining execution sale of, and releasing lien of levy on, stock is self-executing.—Hewitt v. Hawkeye Casualty Co. of Des Moines, 232 N.W. 835, 212 Iowa 316.

80. Ind.—Shanklin v. Sims, 11 N.E. 32, 110 Ind. 143.

81. S.C.—Mitchell v. Anderson, 19 S.C.L. 69, 26 Am.D. 158.

82. N.C.—Newlin v. Murray, 63 N. C. 566.

83. N.C.—Newlin v. Murray, 63 N. C. 566.

84. N.C.—Newlin v. Murray, supra.
Ohio.—Bisbee v. Hall, 3 Ohio 449.

85. S.C.—Duckett v. Dalrymple, 30 S.C.L. 143.

§ 164. Liabilities on Bonds

The extent of liability of the obligors on an injunction bond to stay execution depends on statute and the terms of the bond. Liability may be enforced by action on the bond or, in some jurisdictions, by summary proceedings.

Injunction bonds are construed so as to accomplish the purpose for which they are designed, namely, to protect defendant from any wrongful interference with his rights, and to reimburse him for all damages and costs incurred by reason of an injunction improperly issued.[86] The extent of liability depends on the statutes and terms of the bond.[87] Where the statute prescribes the condition of a bond, the surety will not be liable beyond the statutory requirements, although the conditions may be broader and express.[88] If an injunction is granted to restrain the sale of property levied on, in order that plaintiff may have the benefit of its value if found entitled to it, the obligors on the bond are liable only for the costs and damages occasioned by enjoining the sale.[89] The liability would be otherwise where the entire debt has been enjoined on a ground which, if sustained, would give full relief, although the injunction is also in part to enjoin the sale of property levied on by execution.[90]

Where an injunction bond is valid,[91] and liability thereon has accrued,[92] a recovery may be had thereon, either by action or, where permitted by statute, by summary proceedings.[93] However, a bond is not statutory, or summarily enforceable, unless it contains, in substance, the very conditions required by the statute for the particular case.[94]

VII. CLAIMS BY THIRD PERSONS

A. IN GENERAL

§ 165. Intervention in Original Action

In the absence of authorizing statute, it is commonly, although not always, held that a stranger to an action in which execution has issued cannot intervene in the action to claim property levied on.

In the absence of statute authorizing such procedure, it is commonly held that a third person, not a party to the action in which execution has issued, cannot intervene in the original action to claim property levied on under such execution.[95] However, in some instances an interpleader or intervention has been allowed;[96] and in Louisiana stat-

86. Ky.—Pugh v. White, 78 Ky. 210.

87. Ill.—Warner v. Wende, 228 Ill. App. 153.
23 C.J. p 581 note 53.
Liability for damages see supra § 162.

Custodian's fees
Ill.—Warner v. Wende, 228 Ill.App. 153.

Conditioned "to perform the decree"
The provision of Shannon Code § 6256 that the bond be conditioned "to perform the decree of the court" renders the surety liable to pay the amount of the decree.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682.

88. Tenn.—Hubbard v. Fravell, 12 Lea 304.

Penalty less than statutory amount
Fixing of penalty of injunction bond to stay execution on money judgment at slightly less than double amount of judgment, as prescribed by statute, is not open to objection by surety.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682.

89. La.—Castor State Bank v. U. S. Fidelity & Guaranty Co., 134 So. 406, 172 La. 497.
Tenn.—Hubbard v. Fravell, 12 Lea 304.

90. Tenn.—Wood v. McFerrin, 2 Baxt. 493.
23 C.J. p 581 note 56.

91. La.—Collins v. Welsh, 3 Mart., N.S., 82.

92. Ky.—Pugh v. White, 78 Ky. 210.
23 C.J. p 581 note 50.

93. Ark.—Ford v. C. M. Ferguson & Son, 43 S.W.2d 546, 184 Ark. 670.
23 C.J. p 581 note 51.

Judicial dissolution of injunction
is not a prerequisite to a summary judgment on the bond.—Ford v. C. M. Ferguson & Son, supra.

Suit by assignee of judgment
Assignee owning judgment at time of another's procuring injunction to restrain sale of property on execution could sue on injunction bond.—Ætna Casualty & Surety Co. v. Silvestro, 180 N.E. 374, 125 Ohio St. 24.

In Mississippi
(1) Where injunction to restrain execution on money decree was dissolved, execution could issue against sureties on injunction bond for amount of decree.—Russ v. Stockstill, 124 So. 359, 155 Miss. 368.

(2) Execution could issue within seven years after dissolution of decree enjoining execution on money decree, although original decree was barred.—Russ v. Stockstill, supra.

(3) Execution may issue under judgment against injunction bond, regardless of alleged error of clerk in ordering execution under prior barred judgment.—Stockstill v. Campbell, 111 So. 93, 145 Miss. 528.

94. Ala.—Halsey v. Murray, 20 So. 575, 112 Ala. 185, overruling to this extent McCalley v. Wilburn, 77 Ala. 549.

95. Pa.—Dent v. Ross, 35 Pa. 337.
23 C.J. p 583 note 8.
Right to intervene to enjoin levy or sale under execution see supra § 153.

Mortgagee held not entitled to assert claim to property of mortgagor seized under execution by intervening in original action by mortgagor's creditor.—Langford v. Fanning, Mo. App., 7 S.W.2d 726.

96. Ind.—Stroup v. Myers, 21 N.E. 2d 75, 106 Ind.App. 538.
Va.—Alexandria First Nat Bank v. Turnbull, 32 Gratt. 695, 73 Va. 695, 34 Am.R. 791.

Defaulting claimant
Where claimant to property levied on pursuant to execution executed bond to interplead before next term of court, and was in default, court did not err in dismissing belated intervention.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.

utory provision is made for the intervention in an action by way of a third opposition by one not originally a party thereto who claims an interest in property seized on execution in the action.[97]

§ 166. Statutory Trial of Right of Property

The statutes in the various jurisdictions commonly provide a mode by which the rights of claimants of property taken under execution may be tried and the title to such property ascertained. The nature and form of the remedy provided by these statutes and the procedure thereunder are considered infra §§ 169–195.

Examine Pocket Parts for later cases.

§ 167. Motion

Except where allowed by statute, a third party claimant may not proceed by motion for relief against an execution.

Unless so provided by statute,[98] motion is not a proper remedy by which to procure the delivery to claimant, or to prevent the sale, of property seized under execution,[99] although a rule will lie to compel an officer to comply with the requirements of law with reference to the return of the execution and claim papers.[1] A motion or other proceeding to stay, quash, or vacate the execution will not lie in favor of a claimant to the property levied on.[2]

§ 168. Action by Claimant

Since the summary statutory remedy of a third party claimant is not exclusive, he may elect to bring a common-law or equitable action. Giving notice of claim to the levying officer is generally a condition precedent to such an action, and the sufficiency of the notice depends on the governing statute.

As stated infra § 169, the summary statutory remedy of trial of right of property does not preclude a resort to a common-law action or suit in equity, except where claimant has elected his remedy. As appears in the C.J.S. title Sheriffs and Constables § 147, also 57 C.J. p 941 note 87–p 943 note 33, a claimant of personal property levied on may bring trespass or trover; as appears in the C.J.S. title Replevin §§ 28, 29, also 54 C.J. p 428 note 84–p 429 note 6, an action of replevin may also be allowed; and an action of detinue has been held to lie.[3] Claimant may elect between replevin and an action against the officer for conversion.[4] Under indemnity statutes, a mere lienor may lose his right to pursue property sold under execution where the execution creditor has given a statutory indemnity bond.[5] In Pennsylvania, a judgment creditor alleging his debtor's interest in real estate may proceed with the execution, and, if there be any question as to title, it may be raised and determined afterward in an action of ejectment.[6]

Notice as condition precedent. As a prerequisite to the prosecution by a third person of a claim to property taken in execution, he is very generally required to give written notice of his claim to the officer levying the execution.[7] No notice, however, is required where the property levied on was, at the time of the levy, in the possession of claimant himself;[8] and it is held that a married woman need not give notice of her claim to property levied on as that of her husband.[9] A sworn petition in replevin cannot take the place of notice.[10] Notice

97. U.S.—Norton v. Walton, C.C.A. La., 288 F. 359.
La.—Caldwell v. Laurel Grove Co., 153 So. 17, 179 La. 53—Mouton v. Southern Sawmill Co., 57 So. 934, 130 La. 299.
46 C.J. p 1121 note 18 [b]—62 C.J. p 920 notes 97–99.
Third opposition in proceedings for distribution of proceeds of sale see infra § 252.

Waiver of objection

Where prior judgment creditor intervened between debtor and execution creditor, who joined issue without objecting to intervention, objection was waived.—Penn Liberty Oil Co. v. Crescent Magnolia Planting & Mfg. Co., 132 So. 254, 15 La.App. 670.

98. Ky.—Hawkins v. Dean, 6 Ky.Op. 511.

99. Ark.—Lawson v. Johnson, 5 Ark. 168.

In New York

(1) A stay of proceedings has been granted on motion of a third party where the merits of his claim clearly appeared.—Davis v. Tiffany, 1 Hill 642.

(2) In prior cases, however, the court declined to grant a third party relief from the execution on his motion and remitted him to less summary remedies.—Hewson v. Deygert, 8 Johns. 333—Howland v. Ralph, 3 Johns. 20.

1. Ga.—Brannon v. Barnes, 36 S.E. 689, 111 Ga. 850.

2. N.Y.—C. Ludwig Baumann & Co. v. Christenson, 262 N.Y.S. 303, 146 Misc. 435.
23 C.J. p 586 note 85.
Stay, quashing, and vacation of execution generally see supra §§ 139–150.

3. Ala.—Pruett v. Gunn, 48 So. 492, 158 Ala. 123.
Va.—Tavenner v. Robinson, 2 Rob., 41 Va., 280.
Detinue for wrongful seizure under process generally see Detinue § 11.

4. Ohio.—Sammis v. Sly, 4 Ohio Cir. Dec. 60.

5. Va.—Wheeler v. City Savings & Loan Corporation, 157 S.E. 726, 156 Va. 402.

6. Pa.—Wiercinski v. Leone, 20 Erie Co. 366.

7. Iowa.—Allen v. Wheeler, 7 N.W. 111, 54 Iowa 628.
23 C.J. p 586 note 94.
Notice of claim as condition precedent to action against sheriff generally see the C.J.S. title Sheriffs and Constables § 68, also 57 C.J. p 831 note 4–p 832 note 26.
Notice to adverse party of claim proceedings see infra § 181.

8. Minn.—Haubrich v. Heaney, 200 N.W. 930, 161 Minn. 92.
23 C.J. p 586 note 95.

9. Mont.—Webster v. Sherman, 84 P. 878, 33 Mont. 448.
Tex.—Schneider v. Fowler, 1 Tex.A. Civ.Cas. § 856.

10. Iowa.—Chicago, B. & Q. R. Co. v. Pierce, 116 N.W. 594, 138 Iowa 508.

to a deputy who makes the levy is generally sufficient;[11] but notice may be served on the sheriff, even though the levy was made by a deputy.[12]

The purpose of such notice is to enable the officer to secure an indemnifying bond; and it is not for the benefit of the execution creditor;[13] and claimant is not estopped by any recitals in the notice.[14]

The sufficiency of the notice generally depends on the terms of the governing statute.[15] The officer cannot waive defects in the notice of claim, as against the execution creditor.[16] If the notice of ownership is merely to enable the officer to secure a proper indemnifying bond, all defects in form or substance are waived where that purpose is accomplished.[17] The giving of an indemnifying bond to the officer waives objections to the sufficiency of a notice of claim.[18]

Notice need not be given prior to levy; it is sufficient if it is given while the property or funds are still in the hands of the levying officer.[19] Receipt of notice may be shown by a notation on the back thereof,[20] or by the admission of the officer when testifying.[21]

Demand. In an administrator's action to set aside judgments against deceased and to enjoin a sheriff's sale of property, it was held not error to award possession of the property to interveners claiming under assignment from deceased, although no demand had been made on the judgment creditor for possession before action was instituted.[22] The necessity and sufficiency of a demand on the officer before claimant brings suit are considered in the C.J.S. title Sheriffs and Constables § 68, also 57 C.J. p 831 note 4–p 832 note 26.

B. STATUTORY PROCEEDINGS TO ESTABLISH CLAIMS

§ 169. Nature and Form

a. In general
b. Sheriff's interpleader
c. Sheriff's jury

a. In General

Statutory proceedings providing for the trial of claims of third persons to property levied on under execution are usually summary in their nature, sometimes being confined to personalty, and cumulative to remedies by which claimant may assert his title either at common law or in equity.

In some jurisdictions, under governing statutes, a trial of the right to property levied on under execution, where claimed by third persons, is provided for.[23] Proceedings under these statutes are regarded as special[24] or supplementary[25] proceedings, and ordinarily summary in their nature,[26] and they may be ancillary and in aid of the remedy afforded by the writ of execution[27] or may be in the nature of a separate and independent suit,[28] or of an equitable proceeding.[29] The object of such statutes is to give to the claimant of property seized under process of law a summary method of asserting his title or right of possession, without a resort to an

11. Minn.—Kiewel v. Tanner, 117 N. W. 231, 105 Minn. 50, 25 L.R.A., N.S., 772.
23 C.J. p 587 note 98.

12. Iowa.—Headington v. Langland, 21 N.W. 650, 65 Iowa 276.

13. Iowa.—Mitchell v. McLeod, 104 N.W. 349, 127 Iowa 733.

14. Iowa.—Mitchell v. McLeod, supra.

15. Iowa.—Shaw v. Tyrrell, 105 N. W. 1006, 129 Iowa 556.
23 C.J. p 587 note 3.

16. N.Y.—Olcott v. Frazier, 5 Hill 562.

17. Iowa.—Mitchell v. McLeod, 104 N.W. 349, 127 Iowa 733.

18. Mo.—State v. Johnson, 1 Mo. App. 219.

19. Mont.—Yank v. Bordeaux, 58 P. 42, 23 Mont. 205, 75 Am.S.R. 522.

20. Iowa.—Murray v. Thiessen, 87 N.W. 672, 114 Iowa 657.

21. Iowa.—Peterman v. Jones, 63 N. W. 338, 94 Iowa 591.

22. Ind.—Stroup v. Myers, App., 21 N.E.2d 75.

23. Cal.—Wilson v. Dunbar, 97 P.2d 262, 36 Cal.App.2d 144—Peterson v. Groesbeck, 64 P.2d 495, 20 Cal.App. 2d Supp. 753.
Fla.—Kent v. Polk Grocery Co., 179 So. 136, 131 Fla. 139.
Ga.—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30—Rowland v. Gregg, 50 S.E. 949, 122 Ga. 819.
Tex.—Merrill v. Dunn, Civ.App., 140 S.W.2d 320, error dismissed, judgment correct.
23 C.J. p 583 note 10.

In Louisiana the opposition of a third person, claiming the ownership and possession of property seized under execution, is a petitory action. —Moulton v. Southern Sawmill Co., 57 So. 934, 130 La. 299.

24. Cal.—Peterson v. Groesbeck, 64 P.2d 495, 20 Cal.App.2d Supp. 753—Misrach v. Liederman, 58 P.2d 746, 14 Cal.App.2d Supp. 757.

Creditor's bill in equity
Measured by the relief the hearing affords the judgment creditor, a third party claim proceeding resembles, although it is not, a creditor's bill in equity.—Misrach v. Liederman, supra.

Replevin action
A third party claim proceeding, from the viewpoint of the third party claimant, has some of the characteristics of an action in replevin, but is not a replevin action. —Misrach v. Liederman, supra.

25. Cal.—Wilson v. Dunbar, 97 P.2d 262, 36 Cal.App.2d 144.

26. Cal.—Wilson v. Dunbar, supra —Peterson v. Groesbeck, 64 P.2d 495, 20 Cal.App.2d Supp. 753.

27. Cal.—Misrach v. Liederman, 58 P.2d 746, 14 Cal.App 2d Supp. 757.

28. Fla.—Kent v. Polk Grocery Co., 179 So. 136, 131 Fla. 139.

29. Ga.—Carter v. Moody, 129 S.E. 163, 160 Ga. 849—Douglas v. Jenkins, 91 S.E. 49, 146 Ga. 341—Hollinshead v. Woodward, 57 S.E. 79, 128 Ga. 7.
23 C.J. p 583 note 12.

ordinary suit for a recovery of the property or its value.[30]

Effect on other remedies. The remedy given by such a statute is cumulative merely, and does not take from the claimant his right to assert title either at common law[31] or in equity.[32] Where, however, an election of remedy has once been made, the claimant will be bound thereby.[33] In cases where the statutory remedy is inapplicable, the claimant is necessarily remitted to such other remedies as the law affords.[34]

In a proper case the aid of equity may be invoked by the execution creditor as well as by the claimant;[35] but while a claimant may file equitable proceedings in aid of his claim, and may make such allegations therein as he deems necessary to show that in equity his claim of title is superior to the judgment levied on the property claimed,[36] he should not be allowed to stop the trial of a claim case in order to foreclose a mortgage and thereby obtain a judgment which would be superior to the judgment levied on the land.[37] Where a plaintiff in execution must litigate the same question with each of several claimants, and afterward the claimants must seek an adjustment among themselves, a court of equity may, on petition of one claimant against all other claimants, adjust all the controversies in one proceeding;[38] but a court of equity will not interpose for the purpose of consolidating a claim case involving particular property with another controversy between the same parties relative to the proceeds arising from the sale of other property under an execution.[39]

Property to which statute applicable. In some states it is held that the statutory remedy applies only to personal property,[40] but another statute has been held to apply to both personalty and realty.[41]

Status of parties. Under some statutes the execution creditor is regarded as the plaintiff and the claimant as the defendant.[42]

Retroactive operation of statutes. A statutory remedy has been held not retroactive.[43]

b. Sheriff's Interpleader

In the absence of statutory authorization, authorities differ as to whether an officer may interplead adverse claimants to property levied on under execution. Under Pennsylvania statutes, the sheriff or claimant may apply for a rule for an interpleader, on the return of which the court makes a preliminary inquiry into the good faith of the claims; if a case appears to be clearly within the statute, an issue is a matter of right, but otherwise the court may in its discretion deny an issue; where an issue is granted the subsequent procedure should conform to the statutes and rules of court.

In the absence of statutory authorization, it has been held that the officer cannot, by bill of interpleader, compel adverse claimants to litigate the title in a suit between themselves;[44] but other authority opposes this view.[45]

In Pennsylvania the statutory mode of procedure to determine claims to property taken in execution

30. Tex.—White v. Jacobs, 1 S.W. 344, 66 Tex. 462.
23 C.J. p 583 note 11.

The proceeding aids execution from the viewpoint of the execution creditor.—Peterson v. Groesbeck, 64 P.2d 495, 20 Cal.App.2d Supp. 753—Misrach v. Liederman, 58 P.2d 746, 14 Cal.App.2d Supp. 757.

31. Cal.—Hawi Mill & Plantation Co. v. Leland, 205 P. 485, 56 Cal. App. 224.
Md.—Frantz v. Lane, 182 A. 337, 338, 169 Md. 703, citing **Corpus Juris.**
Mo.—State ex rel. American Asphalt Roof Corporation v. Trimble, 44 S.W.2d 1103, 329 Mo. 495.
Pa.—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 583 note 18.

32. Wash.—Sheffield Co. v. R. Hoe & Co., 23 P.2d 876, 173 Wash. 489.
23 C.J. p 584 note 19.
Injunction see supra §§ 151–163.

In Texas
"In a suit involving only the issue as to the ownership of personal property, taken by writs of execution, attachment, or other like writs, considered of itself and standing alone, a statutory remedy is exclusive, but, where the taking of personal property by such writs is attended by circumstances that are, or may be, prejudicial to the claimant, for which he has no specific statutory remedy, but is left exclusively to a common-law action for damages, then the statute . . . making the principles and practice of equity applicable is not in conflict with the statutory remedy."—Berwald's, Inc. v. Brown, Civ.App., 69 S.W.2d 221, 222.

33. Mo.—Kesse v. Wilson, 119 S.W. 508, 139 Mo.App. 1.
23 C.J. p 584 note 20.

34. Tex.—Berwald's, Inc. v. Brown, Civ.App., 69 S.W.2d 221.
23 C.J. p 584 note 21.

35. Ga.—Sattes & Wimer Lumber Co. v. Hales, 75 S.E. 898, 11 Ga. App. 569.
Who may institute proceedings generally see infra § 170.

36. Ga.—Cabot v. Armstrong, 28 S.E. 123, 100 Ga. 438.

37. Ga.—Cabot v. Armstrong, supra.

38. Ga.—Chamblee v. Atlantic Brewing, etc., Co., 62 S.E. 1032, 131 Ga. 554.

39. Ga.—Cochran v. Waits, Johnson & Co., 56 S.E. 241, 127 Ga. 93.

40. Cal.—First Nat. Bank v. Kinslow, 65 P.2d 796, 8 Cal.2d 339—Yokohama Specie Bank v. S. Kitasaki, App., 117 P.2d 398.
Miss.—Leffel v. Miller, 7 So. 324.
23 C.J. p 585 note 48.

"Rights and credits" held within a statute providing for summary trial by jury of claims by third parties to "goods and chattels" levied on.—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 553, affirmed Joyce v. Moran, 23 A.2d 396, 127 N.J.Law 562.

41. Kan.—Bennett v. Wolverton, 24 Kan. 284.

42. Ala.—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala.App. 282, certiorari denied 115 So. 223, 217 Ala. 225—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
Ga.—Griffin v. Securities Investment Co., 192 S.E. 909, 184 Ga. 692.

43. Ala.—Snediker v. Boyleston, 4 So. 33, 83 Ala. 408.

44. N.Y.—Shaw v. Coster, 8 Paige 339, 35 Am.D. 690.

45. Va.—Baird v. Rice, 1 Call. 18, 5 Va. 18, 1 Am.D. 497.

is by interpleader whereby, on claim being made, the sheriff or claimant may apply to the court for a rule on the interested parties to appear before the court, contest their respective rights, and abide the further order of the court.[46] Such statutes were originated for the relief of the sheriff and similar officers,[47] and when the sheriff complies with their requirements, he is relieved of liability;[48] but the interests of other parties are protected also.[49] These statutes differ from the claim statutes in other jurisdictions in that the initiative may be taken by the officer.[50] It is not imperative on him to ask an issue, and in clear cases he should not demand it,[51] unless the statute in force at the time is deemed to be mandatory on him, and to require him to ask an issue in all cases where he has notice that goods which have been levied on by him belong to any person other than defendant in the writ.[52] Actual levy is not necessary.[53]

On the petition for a rule, a full inventory of the property should be made by the officer and annexed to the petition with the claimant's affidavit.[54] An appraisement ordered by the sheriff and made without notice either to the claimant or to the execution creditor will be set aside;[55] but if a party to be affected by such appraisement has been given the opportunity to be present when the valuation is to be made, and is either then heard or does not appear, it will be set aside only for fraud, misconduct, or some kindred cause.[56]

Unqualified and absolute ownership of the property has been required, in a sheriff's interpleader, in order to dispute the title of the defendant in the execution as against an execution creditor.[57] It has been held that an interpleader should not be awarded to try the title to a leasehold estate,[58] and that it is not ground for interpleader that the goods are mortgaged or pledged to a third person;[59] nor will an interpleader be awarded to try the title to goods acquired after the levy.[60] A tenant by the entirety has a claim cognizable in a sheriff's interpleader where property so owned has been levied on as belonging to the other tenant by the entirety, even where the other tenant is not joined in the interpleader.[61]

The claimant should file an answer to the rule for an interpleader within the time[62] and in the

46. Pa.—Bain v. Funk, 61 Pa. 185—Zeldin v. George Hess Co., 189 A. 729, 125 Pa.Super. 87—Welsch v. Grossman, 25 Pa.Dist. & Co. 394—Troutman v. Wagner, 19 Pa.Dist. & Co. 600—Ickes v. Brechbill, 18 Pa.Dist. & Co. 167—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498—U. S. v. Kemmerer, 19 Lehigh Co.L.J. 301, 10 Som.Leg.J. 389.

23 C.J. p 584 note 27.

Affidavit of claim see infra § 175.

Notice or demand see infra § 181.

Bona fide claim, but no affidavit, required

Pa.—Waterman v. Langdon, 15 Phila. 211.

Public policy does not deny the claimant a trial of her title where a husband conducts a business, and execution against him is levied on wines, liquors, and cigars on the premises, and the wife of defendant claims certain of the liquors and cigars which she had purchased subsequent to the creation of the husband's debt to the plaintiff in the execution.—Saba v. McElwaine, 57 Pa.Super. 369.

47. Pa.—Maurer v. Sheafer, 9 A. 869, 116 Pa. 339—Lamberton Nat. Bank of Franklin v. Kineston, 174 A. 622, 114 Pa.Super. 365—Troutman v. Wagner, 19 Pa.Dist. & Co. 600—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498—Waterman v. Langdon, 15 Phila. 211.

23 C.J. p 584 note 28.

48. Pa.—Liquid Carbonic Co. v. Shuster Gormley Co., 64 Pa.Super. 74.

49. Pa.—Zeldin v. George Hess Co., 189 A. 729, 125 Pa.Super. 87—Necker v. Sedgwick, 35 Pa.Co. 65.

Rights of parties paramount

While the interpleader act is in large measure intended for the protection of the sheriff, after the issue is ordered to be framed the rights of the respective parties become paramount.—Hertzog v. Forry, 21 Pa Dist. & Co. 691, 44 Lanc.L.Rev. 303.

50. Pa.—Bain v. Funk, 61 Pa. 185.

51. Pa.—Bank v. Allen, 1 Del.Co. 277.

52. Pa.—Meyer v. Jeske, 8 Pa.Dist. 239.

53. Pa.—Phillips v. Reagan, 75 Pa. 381.

54. Pa.—Bank v. Allen, 1 Del.Co. 277.

Failure to pay fees as abandonment of claim

Claimant's failure to pay sheriff appraisement and official fees at time of presenting claim for goods levied on under fieri facias does not amount to abandonment of claim and require discharge of rule for interpleader issue as to ownership of goods.—Breyer Ice Cream Co. v. Rudley, 171 A. 96, 111 Pa.Super. 604.

55. Pa.—Northampton Trust Co. v. Ernest-Weiner Co., 23 Pa.Dist. 595.

56. Pa.—Northampton Trust Co. v. Ernest-Weiner Co., supra.

57. Pa.—Faust v. Stevens, 18 Pa.Co. 14.

58. Pa.—Maurer v. Sheafer, 9 A. 869, 116 Pa. 339.

23 C.J. p 585 note 49.

59. Pa.—Manning v. Boothe, 14 Pa. Co. 95.

23 C.J. p 585 note 50.

60. Pa.—Rodgers v. Douglass, 9 Wkly.N.C. 191.

Institution of claim proceedings by subsequent purchaser see infra § 170.

61. Pa.—Bruzas v. Sellersville Nat. Bank, 16 Pa.Dist. & Co. 134.

62. Pa.—Amerith, Inc. v. Medoff, 17 Pa.Dist. & Co. 82.

Penalty not prescribed

Where no time for filing the answer is fixed by the statute and the rules of court prescribe no penalty for failure to file it on the return day of the rule for an interpleader, the court may allow a subsequent filing unless the execution plaintiff moves to discharge the rule for an interpleader.—Lukac v. Morris, 22 Pa.Dist. & Co. 449.

Under prior statutes

(1) The rule for interpleader was discharged on failure of the claimant to file his answer within the time prescribed by the rules of court.—Strouse v. Bard, 8 Pa.Super. 48.

form[63] prescribed by rules of court.

Successive interpleaders are not allowed.[64]

The same principles which govern the disposition of a rule to interplead should control in disposing of a rule to intervene in an interpleader.[65]

In general, the granting or refusing of an issue is largely a matter within the discretion of the court,[66] and will not be set aside except for a clear abuse;[67] but there are certain fundamental and well settled principles on which such questions should be determined.[68] Where a case is clearly within the statutes, an interpleader is a matter of right, not of grace.[69] Where the claimant files a sufficient answer and the plaintiff in the execution files a reply specifically agreeing that the interpleader be granted, the rule may be made absolute;[70] but, where two claims are in the sheriff's hands at the same time, priority of right cannot be given to one by reason of the fact that the sheriff's rule for interpleader regarding it was first made absolute.[71] There should be a preliminary inquiry by the court on the return of the rule to show cause,[72] and on this inquiry the court is not to inquire into the merits of the respective claims further than to see that they are not merely colorable or fraudulent or collusive.[73] If the facts are undisputed, and the inferences to be deduced therefrom clear and unconflicting, the question of title becomes one of law and is to be passed on by the court.[74] On the other hand, if the facts are disputed, the parties are entitled to an issue;[75] and if claimant's evidence is undisputed, and shows a prima facie title in him, the rule should not be discharged, but he is at least entitled to an issue.[76] If the claimant fails to produce evidence sufficient to warrant the submission of the question of his ownership to a jury, the issue should be refused, and the sheriff directed to proceed on his writ;[77] and if the execution creditor fails to produce any evidence which would be sufficient to warrant the submission to the jury of the question of the ownership of the goods by the execution debtor, or that they were fraudulently sold or disposed of, then the court is not required to submit to an abuse of its process, or to impose on the claimant the burden of a useless litigation, and may refuse an issue and order the sheriff to surrender the custody of the goods.[78] So, where the answer of the claimant sets forth a bill of sale, but fails to state whether it was delivered before or after the issuing of the execution, or whether possession was ever given, it is not an abuse of discretion to refuse an issue.[79] Either the claim-

(2) Where a rule of court providing for the discharge of the rule for interpleader on default of the claimant in filing his answer was not self-executing, the execution plaintiff was required to proceed by motion in order to obtain the discharge.—Lukac v. Morris, 22 Pa.Dist. & Co. 449.

(3) Where a statute provided that the rule for an interpleader be made absolute on the failure of the interested parties to file sufficient exceptions, the court would dismiss exceptions filed subsequent to the time the rule became absolute.—Warfel v. McBarron, 9 Pa.Dist. & Co. 756, 18 Del.Co. 131.

(4) In the absence of specific provision of statute or rule of court, the rule was made absolute on the failure of the parties to answer.—Meyer v. Jeske, 8 Pa.Dist. 239.

63. Pa.—Callahan v. Automobile Banking Corporation, 27 Pa.Dist. & Co. 717.

64. Pa.—Fyan v. Brown, 11 Pa.Dist. 105, 25 Pa.Co. 640.

65. Pa.—Epstein v. Bush, 31 Pa.Co. 511.

66. Pa.—Horn v. Devling, 173 A. 284, 315 Pa. 495—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 585 note 54.

67. Pa.—Horn v. Devling, 173 A. 284, 315 Pa. 495.

Granting held not abuse
Pa.—Horn v. Devling, supra.

68. Pa.—Book v. Day, 41 A. 998, 189 Pa. 44.

69. Pa.—Reigel's Appeal, 1 Walk. 72—Lamberton Nat. Bank of Franklin v. Kineston, 174 A. 622, 114 Pa. Super. 365—Breyer Ice Cream Co. v. Rudley, 171 A. 96, 111 Pa.Super. 604—Troutman v. Wagner, 19 Pa. Dist. & Co. 600—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.

Direction to prothonotary
A sheriff, on merely filing his petition, may direct the prothonotary by præcipe to enter the rule, in the absence of other statutory provision.—Troutman v. Wagner, 19 Pa. Dist. & Co. 600.

70. Pa.—Hun Shoe Company, Inc. v. Silverman, 22 Pa.Dist. & Co. 396.

71. Pa.—J. B. Van Sciver Co. v. New Irving Hotel, 148 A. 513, 298 Pa. 463.

72. Pa.—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 585 note 57.

On hearing exceptions ex parte, court on its own motion will pass on admissibility of evidence offered solely by exceptant and may consider improperly rejected evidence in finally disposing of the rule.—Morris Lumber Co. v. Harrington, 12 Pa. Dist. & Co. 501.

73. Pa.—Lamberton Nat. Bank of Franklin v. Kineston, 174 A. 622, 114 Pa.Super. 365—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 585 note 58.

74. Pa.—Lamberton Nat. Bank of Franklin v. Kineston, 174 A. 622, 114 Pa.Super. 365—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 501—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 585 note 59.

75. Pa.—Lamberton Nat. Bank of Franklin v. Kineston, 174 A. 622, 114 Pa.Super. 365—Carpenter & Pierce Co. v. Rothwell, 88 Pa. Super. 346—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 498.
23 C.J. p 585 note 60.

76. Pa.—Breyer Ice Cream Co. v. Rudley, 171 A. 96, 111 Pa.Super. 604.
23 C.J. p 585 note 61.

77. Pa.—Carpenter & Pierce Co. v. Rothwell, 88 Pa.Super. 346—Commonwealth v. Burns, 14 Pa.Super. 248—Ickes v. Brechbill, 18 Pa.Dist. & Co. 167.

78. Pa.—Commonwealth v. Burns, 14 Pa.Super. 248—Morris Lumber Co. v. Harrington, 12 Pa.Dist. & Co. 501.

79. Pa.—Berger v. Juergen, 7 Pa.

ant or execution creditor may have the issue framed, and the prothonotary may make docket entries thereof without any special order of the court.[80] On the rule becoming absolute, the claimant should file a statement of claim in conformity with the statute and the rules of court of the particular forum,[81] even though an issue has not been framed.[82] The execution creditor should file an affidavit of defense containing the averments required by statute.[83] On the failure of a party to file a sufficient statement or affidavit at the required time, his opponent may move for judgment of non prosequitur.[84]

An amendment of an affidavit of claim may be permitted on the hearing of the rule, but not afterward;[85] and it has been held that, after the giving of a bond, the claimant cannot amend his statement of claim by withdrawing his claim to part of the property.[86]

English and Canadian decisions under similar statutes are summarized in 23 C.J. p 584 note 27–p 585 note 70.

c. Sheriff's Jury

In some jurisdictions, the sheriff may, on claim being made, impanel a jury to determine the ownership of property levied on, even against the objection of claimant. Such proceedings are not judicial, are not conclusive on the parties, and do not, apart from statute, protect the officer in a suit by the claimant.

In some jurisdictions the sheriff, on claim being made, may impanel a jury to determine the ownership of the property levied on.[87] Such an inquiry is authorized only when there has been a taking of personal property under a writ of execution regularly issued at the suit of a plaintiff against a defendant,[88] and a claim has been interposed by a third person.[89] The sheriff need not wait, before instituting the proceeding, until a jury is demanded by claimant;[90] he may summon a jury even against the objection of claimant.[91]

Such proceedings, not being judicial in their nature,[92] are never conclusive on the parties, and are at best merely a method whereby the sheriff seeks to avoid the danger of trespassing upon the property of a stranger;[93] generally the only effect of a verdict in favor of claimant is to require the execution creditor to furnish the officer a sufficient indemnity bond,[94] or, on failure of the creditor to give such bond, to justify the officer in delivering the property to the claimant.[95] A verdict against the claimant is no protection to the officer in a suit brought against him by the claimant,[96] except where the statute so provides.[97]

§ 170. Who May Institute

A claimant must have a superior right to the property to institute a claim proceeding, and any interest which renders the property not subject to the levy or is inconsistent with the execution creditor's right to proceed in selling it will support a claim. An equitable title or right may be sufficient. The claimant need not be in possession, but must have a right thereto.

A third person claimant of property levied on under execution must be one having a superior right

Super. 388, 42 Wkly.N.C. 198—Brown v. Cohen, 44 Pa.Co. 589.

80. Pa.—Hertzog v. Forry, 21 Pa. Dist. & Co. 691, 44 Lanc.L.Rev. 303.

81. Pa.—Hun Shoe Company, Inc. v. Silverman, 22 Pa.Dist. & Co. 396—Provost v. Algeo, 8 Pa.Dist. 517, 22 Pa.Co. 592.

Pleadings on trial of issue generally see infra § 183.

No default before rule absolute

Until the sheriff's rule is made absolute, the claimant cannot be considered in default for failure to file a statement of title.—Zeldin v. George Hess Co., 189 A. 729, 125 Pa.Super. 87.

Extension of time denied

Pa.—Mull v. Snyder, 17 Pa.Dist. & Co. 140, 5 Som.Leg.J. 310.

A prior statute was held merely directory and not mandatory as to the time for filing a statement of claim, so that the court could permit a nunc pro tunc filing after expiration of the statutory time.—Earnest v. Alexander, 43 Pa.Co. 540.

82. Pa.—Hertzog v. Forry, 21 Pa. Dist. & Co. 691, 44 Lanc.L.Rev. 303.

83. Pa.—Scalamonti v. Stoehr & Fister, 27 Pa.Dist. & Co. 666.

Affidavit held sufficient

Pa.—Doll v. Crooks, 20 Pa.Dist. & Co. 168.

84. Pa.—Hertzog v. Forry, 21 Pa. Dist. & Co. 691, 44 Lanc.L.Rev. 303.

Notice of motion

Service of the rule for an interpleader issue and of a rule to file a statement of title was sufficient notice to the claimants on an execution creditor's motion for judgment of non prosequitur.—Hertzog v. Forry, supra.

85. Pa.—Leedom v. Zierfuss, 3 Del. Co. 129.

86. Pa.—Bricker v. Doyle, 64 Pa. Super. 474.
23 C.J. p 590 note 87.

87. Or.—Tallman v. Havill, 291 P. 387, 133 Or. 307.
23 C.J. p 586 note 71.

88. Ill.—Mason v. Illinois State Bank, 1 Ill. 183.

89. Ill.—Mason v. Illinois State Bank, supra.

90. Ky.—Philips v. Harriss, 3 J.J. Marsh. 122, 19 Am.D. 166.
Or.—Vulcan Iron Works v. Edwards, 36 P. 22, 39 P. 403, 27 Or. 563.

91. Or.—Vulcan Iron Works v. Edwards, supra.

92. Or.—Tallman v. Havill, 291 P. 387, 389, 133 Or. 307, citing **Corpus Juris.**
23 C.J. p 586 note 76.

93. Or.—Tallman v. Havill, 291 P. 387, 133 Or. 307.
23 C.J. p 586 note 77.

94. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.
23 C.J. p 586 note 78.

95. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, supra.
N.D.—Pfeifer v. Hatton, 115 N.W. 191, 17 N.D. 99, 138 Am.S.R. 698.

96. Cal.—Sheldon v. Loomis, 28 Cal. 122.
23 C.J. p 586 note 80.

97. Or.—Tallman v. Havill, 291 P. 387, 133 Or. 307.
23 C.J. p 586 note 81.

to the property,[98] and hence one who bought the property after it was levied on cannot resort to this remedy.[99] Claimant's title may be legal[1] or equitable.[2] While an uninterested person cannot interpose and maintain a statutory claim on the levy of an execution,[3] it is not essential that the claimant have absolute title in order to show a basis or standing in court as claimant;[4] any interest which renders the property not subject to the levying fieri facias, or which is inconsistent with the execution creditor's right to proceed in selling the property, will support a claim.[5] An agent who has no interest in the property cannot interpose a claim in his own name for the purpose of protecting his principal.[6] A mortgagee having rights prior to the judgment creditor cannot interpose a claim so as to prevent any sale at all.[7]

Right and necessity of possession. In any event, the title must be accompanied by the right to the possession or control of the property;[8] so persons having estates in the property, but who are not entitled to immediate possession, cannot interpose a claim.[9] However, the claimant need not be in possession,[10] provided he has a right to immediate possession,[11] nor need the sheriff take possession under the levy;[12] it is enough that one's possession is disturbed or that he has been deprived of the exercise of his right to possession.[13] However, under at least one statute a lienor has the right to interpose a claim regardless of possession or the right to possession.[14] A pledgee is entitled to the remedy only where the officer takes posses-

98. Ala.—Sewell v. Farmers' & Merchants' Bank, 96 So. 197, 209 Ala. 416.
Fla.—Stansel v. Rountree, 25 So. 277, 40 Fla. 428.
Ga.—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30—Rowland v. Gregg, 50 S.E. 949, 122 Ga. 819—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750—Nolley v. Elliott, 178 S.E. 309, 50 Ga.App. 382—H. B. Ehrlich & Co. v. King, 131 S.E. 524, 34 Ga.App. 787.
Ill.—Osborn v. Albers, 4 N.E.2d 396, 286 Ill.App. 624, reversed on other grounds 7 N.E.2d 447, 365 Ill. 631.
La.—Gandy v. People's State Bank, App., 152 So. 353.
Wash.—Simon v. Olympic Securities Co., 226 P. 1019, 130 Wash. 247.
23 C.J. p 587 note 14.
Interpleader by sheriff see supra § 169.
Parties see infra § 180.
A claimant who lent money to an execution debtor to pay title retention notes given for property levied on has no title to such property as against the execution creditor.—Blanchard, Humber & Co. v. Hagan Gas Engine & Mfg. Co., 106 S.E. 604, 26 Ga.App. 538.

99. Ga.—R. L. Dearlso & Co. v. Lawrence, 60 S.E. 330, 3 Ga.App. 580.
23 C.J. p 587 note 15.

1. Ala.—Alford v. Colson, 8 Ala. 550.
Tex.—Parker v. Portis, 14 Tex. 166.
Mortgagee
Ala.—Brantley & Crowley v. Fort Deposit Bank, 142 So. 54, 225 Ala. 19.

2. Ill.—Citizens' State Bank of Manteno v. Senesac, 267 Ill.App. 288.
Mo.—Langford v. Fanning, App., 7 S.W.2d 726, 728, citing **Corpus Juris.**
23 C.J. p 587 note 18.
Equitable title and possession of property
Cal.—Maryland Casualty Co. v. Hollman, 280 P. 1034, 100 Cal.App. 669.
Claim based on security deed
Ga.—Penn Mut. Life Ins. Co. v. Troup, 170 S.E. 359, 177 Ga. 456.
An existing equitable title is necessary, and one which can only be established and enforced in a court of equity is insufficient.—Rea v. Keller, 112 So. 211, 215 Ala. 672.
In Louisiana
(1) The claimant must own or have a privilege on the property.—Boubede v. Aymes, 29 La.Ann. 274—23 C.J. p 587 note 18 [e].
(2) The owner of articles seized in possession of another under a writ of fieri facias has no lien and privilege thereon, but is entitled either to possession thereof or to lien thereon as vendor.—Faber v. Gondrella, App., 4 So.2d 245.

3. Ga.—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488—Greenway v. Reese, 139 S.E. 358, 37 Ga.App. 201.
23 C.J. p 588 note 20.

4. Ga.—Butler v. La Grange Banking & Trust Co., 170 S.E. 918, 177 Ga. 714—Wheeler v. Martin, 88 S.E. 951, 145 Ga. 164—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488.
Ill.—Grimsley v. Klein, 2 Ill. 343.
Wash.—Simon v. Olympic Securities Co., 226 P. 1019, 130 Wash. 247.

5. Ga.—Butler v. La Grange Banking & Trust Co., 170 S.E. 918, 177 Ga. 714—Wheeler v. Martin, 88 S.E. 951, 145 Ga. 164—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488.
Fractional interest
(1) A fractional interest in the property is sufficient.—H. B. Ehrlich & Co. v. King, 131 S.E. 524, 34 Ga.App. 787.
(2) A right to a portion of the crops grown on land, given to a wife and minor son, is a sufficient basis for a claim.—Pritchett v. Bagby, 169 S.E. 211, 46 Ga.App. 772.
Grantee's children without remainder
Where, under a deed by father to son, children of grantee did not have a remainder interest, there was no error, on trial of statutory claim interposed by them to levy of fieri facias on land on behalf of grantee's creditors, in ordering fieri facias to proceed, although deed prohibited sale during son's life or his children's minority.—Kennedy v. First Nat. Bank, 129 S.E. 90, 160 Ga. 807.

6. Ga.—Rowland v. Gregg, 50 S.E. 949, 122 Ga. 819—Arnoldsville Trading Co. v. Brotherton, 6 S.E.2d 210, 61 Ga.App. 370.
Right to interpose title of third person see infra § 172.

7. Ga.—Ward v. Kennesaw Fertilizer Co., 56 S.E. 123, 127 Ga. 106.

8. Fla.—Stansel v. Rountree, 25 So. 277, 40 Fla. 428.
Wash.—Simon v. Olympic Securities Co., 226 P. 1019, 130 Wash. 247.
23 C.J. p 588 note 23.

9. Tex.—Allen v. Russell, 19 Tex. 87.
23 C.J. p 588 note 24.
A remainderman has no right where the execution debtor has a life estate in the land levied on.—American Mortg. Co. v. Hill, 18 S.E. 425, 92 Ga. 297.

10. Tex.—White v. Jacobs, 1 S.W. 344, 66 Tex. 462.

11. Tex.—Steiner v. Anderson, Civ. App., 130 S.W. 261.

12. Tex.—Marsh v. Thomason, 25 S.W. 43, 6 Tex.Civ.App. 379.

13. Tex.—Jones v. Lawrence, Civ. App., 151 S.W. 584.

14. Miss.—Thomas v. Shell, 24 So.

sion of the property to the exclusion of the pledgee.[15]

A person who is a party to the execution cannot interpose a claim,[16] and hence, where an execution is against one person "as agent for" another, it is an execution against the agent so as to preclude him from filing a claim in his own right.[17] However, an execution debtor who holds title merely as trustee or agent may assert a claim on behalf of the beneficiary.[18]

Joint owners. Where property levied on belongs to joint owners who are not parties to the writ, one may interpose a claim to the property in his own name and rely on the joint title.[19] The claimant cannot succeed where the other joint owner is the execution debtor.[20]

Time when title existed. Want of title at the time of the interposition of the claim,[21] although claimant had title at the time of the levy,[22] has been held to preclude the right to file a claim; but under other authority a claimant in an ordinary case may sustain his claim by showing title, or a right of possession, at the time of the levy.[23]

A sale of the property by the claimant pending the proceedings does not preclude the right to continue the proceedings.[24] If the claimant transfers his title to a third person pending the proceeding, the transfer is valid.[25]

§ 171. Rights of Claimants in General

A claimant may under the statute be empowered to have property released from the levy by serving an affidavit of claim on the officer, unless the execution creditor furnishes a bond. A statute permitting execution on property despite a fraudulent conveyance thereof does not abrogate third persons' rights to advance their claims thereto.

Under statutory provisions it has been held that a third person claimant may have the property, or the lien created by the levying of execution, released by serving the officer with an affidavit of claim, unless the execution creditor furnishes a bond to secure the claimant,[26] and that a mortgagee in possession interposing a claim when the levy is not confined to the judgment debtor's equity in the property is entitled to hold the property until the execution creditor pays the mortgage debt.[27]

A statute permitting a judgment creditor to disregard a fraudulent conveyance and levy execution on the property conveyed does not abrogate the rights of third persons to advance their claims to such property.[28]

§ 172. Right to Interpose Title of Third Person

A claimant cannot for the purpose of protecting the property show paramount title in a third person.

The party who has the burden of proof, whether claimant[29] or execution creditor,[30] must recover on

876, 76 Miss. 556—Trice v. Walker, 15 So. 787, 71 Miss. 968.

15. Tex.—Cleburne Nat. Bank v. Citizens' Nat. Bank, 93 S.W. 209, 41 Tex.Civ.App. 535.

16. Cal.—Redwine v. Trowbridge, 279 P. 666, 99 Cal.App. 762.
Ga.—Goolsby v. Board of Drainage Com'rs of Cedar Creek Drainage Dist., 119 S.E. 644, 156 Ga. 213—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286.
23 C.J. p 588 note 35.

Judgment in assumed name
A person against whom judgment is obtained in assumed or trade-name is a party to the judgment, and cannot file claim to the property levied on.—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286.

17. Ga.—Wynn v. Irvine's Georgia Music House, 34 S.E. 582, 109 Ga. 287.

18. N.J.—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 558, affirmed Joyce v. Moran, 23 A.2d 396, 127 N.J.Law 562.
Tex.—Walmsley v. Hubbard, 24 Tex. 612—Parker v. Portis, 14 Tex. 166.

19. Pa.—Finn v. Shive, 19 A. 489, 134 Pa. 158.
23 C.J. p 589 note 45.

Member of partnership had legal right to file third party claim to property levied on under fieri facias, although title was in partnership.—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488.

20. Pa.—Booth v. Gest, 17 Pa.Co. 43—McDermott v. Kline, 6 Phila. 553.

21. Ala.—Sewell v. Farmers' & Merchants' Bank, 96 So. 197, 209 Ala. 416.

22. Ga.—Oatts v. Wilkins, 35 S.E. 345, 110 Ga. 319—Rucker v. Womack, 55 Ga. 399.

23. Wash.—Lanham v. Longmire, 171 P. 237, 100 Wash. 413.

24. Ga.—Thomas v. Parker, 69 Ga. 283.
Wash.—Lanham v. Longmire, 171 P. 237, 100 Wash. 413.

25. Ala.—Jackson v. Gewin, 9 Ala. 114.

26. Cal.—Mercantile Acceptance Corporation v. Pioneer Credit Indemnity Co., 12 P.2d 988, 124 Cal. App. 593—Duncan v. Superior Court, City and County of San Francisco, 285 P. 732, 104 Cal.App. 218.
Affidavit of claim generally see infra § 175.

27. Ala.—Brantley & Crawley v. Fort Deposit Bank, 142 So. 54, 225 Ala. 19.

Good faith required of mortgagee
Pending the claim suit, a mortgagee in possession of property levied on must exercise the same good faith toward the execution creditor, in handling the property, as he would owe the mortgagor.—Brantley & Crawley v. Fort Deposit Bank, supra.

28. N.Y.—Simon v. Bailey, 14 N.Y.S.2d 822, 172 Misc. 186.

29. Ala.—Sewell v. Farmers' & Merchants' Bank, 96 So. 197, 209 Ala. 416—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala. App. 282, certiorari denied 115 So. 223, 217 Ala. 225.
Fla.—Sarasota County v. Weeks, 130 So. 599, 100 Fla. 1064—Cameron & Barkley Co. v. Law-Engle Co., 124 So. 814, 98 Fla. 920.
Ga.—Burt v. Rubley, 39 S.E. 409, 113 Ga. 1144.
Burden of proof see infra § 185.

30. Ala.—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala.App.

the strength of his own right to the property, and not on the weakness or want of right of his adversary. Thus a claimant cannot for the purpose of protecting the property levied on, show paramount title in a third person.[31]

§ 173. Attack on Judgment or Execution

Authorities differ as to whether a claimant may attack the judgment or execution.

Under some authorities, a claimant cannot inquire into the regularity of the judgment or execution,[32] but others permit him to show that it is void,[33] or that it has been quashed and set aside.[34] So it is held that the giving of a bond by the claimant estops him from inquiring into the validity of the levy, unless the writ is void on its face.[35]

In Georgia, a claimant, unless he has no right to file a claim,[36] may show that the judgment or execution is void or invalid;[37] he may attack an execution for any reason which defendant in execution could urge against it at the time of the trial of the claim case;[38] but his rights in this respect rise no higher than those of defendant.[39]

Objections to the jurisdiction[40] or to process[41] which have been waived by the judgment debtor cannot be urged; nor can the claimant move to quash the writ or the judgment.[42] The act of filing the claim will estop claimant from denying the sufficiency of entry of the levy.[43]

A long delay may estop claimants to attack the judgment.[44]

Where a claimant claims through a judgment rendered in another case, plaintiff may impeach that judgment and prove it fraudulent.[45]

§ 174. Time for Interposing Claim

A claimant must institute the proceeding within the time, if any, prescribed by statute. A claim must be interposed before a sale or other legal disposition of the property.

282, certiorari denied 115 So. 223, 217 Ala. 225.

31. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559—Sewell v. Farmers & Merchants Bank, 96 So. 197, 209 Ala. 416—Brashear v. Williams, 10 Ala. 630.
Ga.—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30—Deloach v. Myrick, 6 Ga. 410—Bull v. Johnson, 12 S.E.2d 96, 63 Ga. App. 750—Arnoldsville Trading Co. v. Brotherton, 6 S.E.2d 210, 61 Ga. App. 370—Chattooga County Bank v. Selman, 173 S.E. 465, 48 Ga.App. 488—Rucker v. Hunt, 163 S.E. 612, 44 Ga.App. 836—Jones v. Empire Furniture Co., 150 S.E. 563, 40 Ga. App. 556.
23 C.J. p 589 note 49.
Agent as claimant see supra § 170.
Joint ownership see supra § 170.

32. Ill.—Fisher v. Bollman, 258 Ill. App. 461.
La.—Henderson v. Hollingsworth, 105 So. 14, 158 La. 921—Flaspoller Co. v. Siess, 6 La.App. 827.
23 C.J. p 589 note 50.

33. Ala.—Bradford v. Haris, 44 So. 60, 151 Ala. 669—Bradford v. Bassett, 44 So. 59, 151 Ala. 520—Jordan Bros. v. Gordon, 62 So. 1023, 3 Ala.App. 479.

34. Ala.—Brown v. Hurt, 31 Ala. 146.

35. Ala.—Bradford v. Bassett, 44 So. 59, 151 Ala. 520.
23 C.J. p 589 note 53.

36. Ga.—Parker v. Matthews, 31 S. E. 784, 106 Ga. 49—Zimmerman v. Tucker, 64 Ga. 432—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286—Greenway v. Reese, 139 S.E. 358, 37 Ga.App. 201.

37. Ga.—Calhoun v. Williamson, 5 S. E.2d 41, 189 Ga. 65—Preetorius v. Tootle, 179 S.E. 711, 180 Ga. 558—Eslinger v. Herndon, 124 S.E. 169, 900, 158 Ga. 823—Campbell v. Board of Drainage Com'rs of Cedar Creek Drainage Dist., 118 S.E. 720, 156 Ga. 64—Beacham v. Nobles, 113 S. E. 6, 153 Ga. 718—Wheeler v. Martin, 88 S.E. 951, 145 Ga. 164—Irwin v. Shuford, 87 S.E. 674, 144 Ga. 532—McCrory v. Hall, 30 S.E. 881, 104 Ga. 666—Pearce v. Renfroe, 68 Ga. 194—Smith v. Lockett, 73 Ga. 104—Suydam v. Palmer, 63 Ga. 546—Hines v. Kimball, 47 Ga. 587—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286.

38. Ga.—Ryals v. Widencamp, 190 S.E. 353, 184 Ga. 190—Preetorius v. Tootle, 179 S.E. 711, 180 Ga. 558—Payne v. Royal Indemnity Co., 147 S.E. 95, 168 Ga. 77—D. G. Bland Lumber Co. v. Perkins, 167 S.E. 707, 46 Ga.App. 401—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286.
23 C.J. p 589 note 54.

Payment of judgment or execution

(1) The claimant may show that the judgment or execution has been paid.—Preetorius v. Tootle, 179 S.E. 711, 180 Ga. 558—Winship v. Phillips, 54 Ga. 237—Robinson v. Schly, 6 Ga. 515.

(2) However, where the claimant shows no title or interest in the property, the execution cannot be attacked on the ground that it has been paid.—Parker v. Matthews, 31 S.E. 784, 106 Ga. 49—Smith v. Lockett, 73 Ga. 104—Hines v. Kimball, 47 Ga. 587.

39. Ga.—Payne v. Royal Indemnity Co., 147 S.E. 95, 168 Ga. 77—Haynes v. Armour Fertilizer Works, 92 S.E. 648, 146 Ga. 832—Gunnin v. Carter, 131 S.E. 523, 34 Ga.App. 788.

Failure of defendant's prior attack on levy

Claimant to property levied on under fieri facias who acquired title from defendant in fieri facias after levy and after latter had filed affidavit of illegality in proceeding which terminated adversely to him held not entitled to prevail on proof of same grounds as presented or for causes which existed and were known or in exercise of reasonable diligence might have been known and presented in illegality proceeding.—Ryals v. Widencamp, 190 S.E. 353, 184 Ga. 190.

40. Ga.—Collier v. Forman, 124 S. E. 710, 158 Ga. 768.

41. Ga.—Young v. Germania Sav. Bank, 68 S.E 321, 134 Ga. 602.

42. Ga.—Morrison v. Anderson, 36 S.E. 462, 111 Ga. 847.

43. Ga.—Calhoun v. Williamson, 5 S.E.2d 41, 189 Ga. 65.

Description of property

The levy will not be dismissed because the entry thereof on the fieri facias did not sufficiently describe the property.—Hilton & Dodge Lumber Co. v. Clements, 33 S.E. 951, 108 Ga. 791.

44. Ga.—Tift v. Keaton, 2 S.E. 690, 78 Ga. 235.

45. Ga.—Williams v. Martin, 7 Ga. 377.

A claimant has been held entitled to begin an action to determine the right to property immediately on the levying of execution.[46] A statute may prescribe the time within which the claimant must institute the proceeding provided for,[47] and on his failure to do so the property will be conclusively presumed to be the property of the party in possession.[48] A claim is too late which is interposed after a sale or other legal disposition of the property,[49] or on appeal.[50] A premature trial of a claim will render a judgment founded thereon void,[51] although the fact that a claim under a deed of trust has been interposed before, but tried after, the breach of the condition entitling the trustee to possession will not invalidate it.[52] The mere delivery of an execution to the sheriff will not stop the running of the statute of limitations in favor of a claimant in possession; to effect this, an actual seizure is necessary.[53]

§ 175. Affidavit of Claim

An affidavit of ownership or claim is generally required by statute in order to commence a claim proceeding, and substantial compliance with the statute regarding such affidavits is sufficient. Amendment of such affidavits has been permitted.

An affidavit of ownership or claim is generally required by statute in order to commence a statutory claim suit.[54] The affidavit is not a pleading,[55] and the source or character of title set up therein is not binding on the affiant.[56]

A levying officer, receiving an affidavit of claim, may be required to return it to the proper court.[57] However, the mere tender of an affidavit does not make a claim case where the officer refuses to accept and return it;[58] and a filing with the clerk, instead of the levying officer, is insufficient.[59]

Sufficiency; signature. A substantial compliance with the statute with reference to the affidavit of claim is all that is necessary.[60] Patent errors, such

46. Cal.—Miller v. Price, 234 P. 1035, 103 Cal.App. 650.

47. Kan.—Gardner v. Quick, 54 P. 1034, 8 Kan.App. 559.
Va.—Fields-Watkins Co. v. Hensley, 86 S.E. 113, 117 Va. 661.

48. Va.—Kiser v. Hensley, 96 S.E. 777, 123 Va. 536—Fields-Watkins Co. v. Hensley, 86 S.E. 113, 117 Va. 661.

49. Minn.—Barry v. McGrade, 14 Minn. 163.
23 C.J. p 589 note 64.

Failure to ask for separate sale or appraisement
Where seized property was appraised as a whole, and sold for a lump sum, an intervener who claimed under prior attachment of part of such property, but who failed to ask for a separate sale or separate appraisement of property seized under his attachment, is not entitled to a preference.—Caldwell v. Laurel Grove Co., 153 So. 17, 179 La. 53.

50. Ala.—Hawkins v. May, 12 Ala. 673.

51. Ala.—Johnson v. Johnson, 19 So. 306, 108 Ala. 124.

52. Miss.—Dodds v. Pratt, 8 So. 167, 64 Miss. 123.

53. Ark.—Dodd v. McCraw, 8 Ark. 83, 46 Am.D. 301.

54. Ala.—Stephenson & Bernard Realty Co. v. Sheehan, 144 So. 370, 25 Ala.App. 269—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Ga.—Commercial Credit Co. of Georgia v. Jones Motor Co., 167 S.E. 768, 46 Ga.App. 464.
N.Y.—Burton v. Jurgensen, 244 N.Y.S. 320, 138 Misc. 69.
23 C.J. p 590 note 70.

An agent of the claimant may make the affidavit of claim.—General Motors Acceptance Corporation v. Allen, 1 S.E.2d 705, 59 Ga.App. 614.

When memorandum has been made by party claiming title to automobile levied on by judgment creditor and process issued and served and petition filed, there has been such appeal to court as to bring controversy within purview of statute relating to rights of third party to intervene and claim title to property levied upon.—Sauls v. Thomas Andrews & Co., 175 S.E. 760, 163 Va. 407.

55. Tex.—Hargadine - McKittrick Dry-Goods Co. v. Jacksboro First Nat. Bank, 37 S.W. 622, 14 Tex.Civ.App. 416.

56. Tex.—Hargadine - McKittrick Dry-Goods Co. v. Jacksboro First Nat. Bank, supra.

57. Ga.—Cook v. Dixon, 114 S.E. 429, 154 Ga. 373.

Absence of statutory requirement
Where a statute does not require the officer to return an affidavit of claim, his failure to do so cannot prejudice the claimant.—Ellis v. Abercrombie, 18 Miss. 474.

58. Ga.—Jolley v. Hardeman, 36 S.E. 952, 111 Ga. 749.

59. Ga.—Mincey v. Edwards, 101 S.E. 305, 24 Ga.App. 478.

60. Ga.—Gee v. Hall, 106 S.E. 816, 26 Ga.App. 709.
Iowa.—Rosander v. Knee, 271 N.W. 292, 222 Iowa 1164.
23 C.J. p 590 note 77.

That the affidavit was sworn to held sufficiently shown.—Cook v. Dixon, 114 S.E. 429, 154 Ga. 373.

Date of execution need not be stated.—Rodgers v. Murray, Tex.Civ.App., 247 S.W. 888.

Nature or basis of claim
(1) When so required by statute, the affidavit must state nature of the claim.—Hammond v. White, 108 So. 347, 214 Ala. 431—Drennen Co. Department Stores v. Brown, 103 So. 588, 212 Ala. 524—23 C.J. p 590 note 77 [c] (1).

(2) However, the failure of an affidavit to state the nature of the claim does not excuse denial of day in court if, without fault or negligence of claimant, judgment nil dicit was rendered against him.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.

(3) One filing a claim to land levied on under a fieri facias is not required to attach an abstract of title to the land, or to show title.—Cook v. Dixon, 114 S.E. 429, 154 Ga. 373.

(4) A recital of qualified ownership has been held sufficient, although ownership was in fact absolute.—Solar v. University State Bank, 192 N.W. 292, 195 Iowa 553.

Mode of attack
Where an affidavit of claimant to property seized under execution was regular on its face and did not disclose that the officer before whom it was made was in any way interested in the purposes for which it was to be used, it could be attacked only by plea in abatement supported by proof, and could not be attacked by motion to quash.—R. Piel Gin Co. v. Independent Farmers' Gin Co. of Perry, Tex.Civ.App., 257 S.W. 630.

as in names or dates, which may be corrected by other papers in the case, are immaterial;[61] but there must not be material omissions.[62]

An unsigned affidavit, properly certified by the officer before whom it was made, is sufficient where the statute does not require signature.[63] Where required to be signed, an affidavit signed by a firm name is insufficient.[64]

Amendment. Amendments, if germane to the issue,[65] may be allowed by the court to a notice and affidavit of claim of a third person,[66] provided, it has been held, such amendments are authorized by statute.[67] Error, however, cannot be predicated on the allowance or refusal of immaterial amendments to the affidavit.[68] The affidavit is not amendable by counsel for the claimant who refuses to make the amendment under oath.[69]

§ 176. Security by Claimant

Statutory provisions govern the claimant's obligation to give a bond, the parties thereto, its form and contents, and the time for giving it.

A bond may be required of claimant, under governing statutes;[70] it may be necessary to the jurisdiction of the court,[71] or to prevent a sale of the property,[72] or as security for damages from delay,[73] or where claimant desires to acquire or retain the immediate possession of the property.[74]

Where executions in favor of different creditors are levied, it has been held that claimant should give a separate forthcoming bond in each case;[75] but under other authorities, where there are several executions, one bond is sufficient.[76] The latter rule does not apply to executions subsequently issued.[77]

The bond takes the place of the goods and inures to all persons who may have a right in the goods,

61. Ala.—Gayle v. Bancroft, 22 Ala. 316.
23 C.J. p 590 note 78.

62. Mo.—Smith v. White, 48 Mo. App. 404.

63. Ala.—Albritton v. Williams, 32 So. 636, 132 Ala. 647, 649.

64. Tex.—Flint v. McCarty, 1 Tex. A.Civ.Cas. § 1018.

65. Ga.—Cox v. Cox, 48 Ga. 619.

66. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.
Ga.—General Motors Acceptance Corporation, for Use of Dickey & Anderson, v. Allen, 1 S.E.2d 705, 59 Ga.App. 614—Gee v. Hall, 106 S.E. 816, 26 Ga.App. 709.
23 C.J. p 590 note 83.

Striking out name of one of joint claimants held not error.—First Nat. Bank v. Roberson, 184 S.E. 887, 53 Ga.App. 142.

Time for amendment
An affidavit of claim may be amended at any time before final judgment.—Putman v. Williams, 150 So. 701, 25 Ala.App. 552, certiorari denied 150 So. 702, 227 Ala. 428—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.

A claimant who gave a bond and took possession of property levied on could not amend his affidavit by striking out a part of the property without first delivering the property to the court for the satisfaction of the execution or rendition of judgment against him for the property released from the claim.—Putman v. Williams, 150 So. 701, 25 Ala.App. 552, certiorari denied 150 So. 702, 227 Ala. 428.

67. Ga.—Blackwell v. Pennington, 66 Ga. 240.

68. Ga.—Williamson v. Harry L. Winter, Inc., 120 S.E. 602, 156 Ga. 779.
23 C.J. p 590 note 85.

69. Ga.—Kimbrough v. Pitts, 63 Ga. 496.

70. Tex.—Zadek v. Dixon, 3 S.W. 247—Green v. Banks, 24 Tex. 508.
Forthcoming bonds in general see supra §§ 116–119.
Indemnity bonds given to officer see the C.J.S. title Sheriffs and Constables § 128–145, also 57 C.J. p 918 note 83 et seq.

A claimant financially unable to give bond may be allowed, under some statutes, to prosecute his claim on filing a proper affidavit setting out the facts.—Hadden v. Larned, 10 S.E. 278, 83 Ga. 636—23 C.J. p 591 note 97.

Effect of failure to file
(1) If claimant fails to give bond, the property claimed may be ordered sold.—Mahoning Savings & Loan Assoc. v. Cozad, 22 Pa.Dist. & Co. 607.

(2) Where claimant fails to file a bond, the execution must proceed, even though such failure was due to the sheriff's neglect to perform his statutory duty of making an appraisement; however, the sheriff will be directed to impound the proceeds of the sale of the property pending the determination of the issue as to the ownership thereof.—Ott v. Ott, Pa., 33 Dist. & Co. 625.

71. Ala.—Stephenson & Bernard Realty Co. v. Sheehan, 144 So. 370, 25 Ala.App. 269—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Va.—Fields-Watkins Co. v. Hensley, 86 S.E. 113, 117 Va. 661.

72. Cal.—Castera v. Gabellieri, 48 P.2d 179, 8 Cal.App.2d 716—Mazuran v. Finn, 200 P. 769, 53 Cal. App. 656.
23 C.J. p 590 note 93.

73. Ga.—Hand v. Frank W. Hall Merchandise Co., 16 S.E. 644, 91 Ga. 130—Mutual Fertilizer Co. v. F. M. White & Son, 106 S.E. 19, 26 Ga.App. 134.

74. U.S.—U. S. v. Kinney, D.C.Pa., 264 F. 542, error dismissed 41 S. Ct. 64, 254 U.S. 663, 65 L.Ed. 464.
Pa.—J. B. Van Sciver Co. v. New Irving Hotel, 148 A. 513, 298 Pa. 463.
23 C.J. p 591 notes 95, 96.

The fact that another proceeding is pending between claimant and the execution creditor involving property levied on does not preclude claimant's right to immediate possession on giving bond.—Conservative Building & Loan Ass'n v. Harry Pearl & Co., 151 A. 341, 300 Pa. 580.

Sheriff cannot proceed with an execution sale where bond has been substituted for goods by claimant in interpleader proceedings.—Barlly v. Danzig, 190 A. 188, 126 Pa.Super. 124.

Proof of failure to file bond
The certificate of the prothonotary that no bond has been filed is conclusive of the fact, especially in the absence of any proof to the contrary.—McEnery v. Nahlen, 21 Erie Co., Pa., 241.

75. Fla.—Moody v. Hoe, 22 Fla. 309.

76. Pa.—Rinehart v. Bodine, 3 Kulp 85.
23 C.J. p 591 note 99.

77. Pa.—Beamish v. Loper, 20 Pa. Dist. 26.

until it is exhausted.[78]

Parties to bond. The claimant, if the legal owner and not claiming title under the execution debtor, is the proper person to give the statutory security.[79] The beneficial owner of the property seized has been permitted to execute a bond.[80] One of two claimants may give a bond which will authorize a trial of the right of property;[81] but a bond given by one holding jointly with the execution debtor has been declared of no effect.[82] A forthcoming bond may be required to be made payable to the execution creditor, so that it is insufficient if made to his assignee;[83] or it may be required to be payable to the sheriff,[84] in which case, however, such a bond payable to the creditor is enforceable as a common-law obligation.[85] Acceptance of a bond by the officer, without objection, amounts to an approval of the sureties therein,[86] and the officer cannot thereafter erase the name of one of such sureties and substitute another, so as to relieve from liability the surety whose name was erased.[87]

Form and contents. The bond must comply with the governing statute as to its terms and conditions,[88] and an officer has no power to take a bond not complying with such statute[89] or not authorized by court order.[90] Unless approval is required by statute,[91] it is not necessary to have the bond approved;[92] nor is attestation by the levying offi-

78. Pa.—Bricker v. Doyle, 64 Pa. Super. 474.

79. Pa.—American Finance Co. v. Trachtman, 157 A. 692, 103 Pa. Super. 289—Liberal Finance Co. v. Lempert, 14 Pa.Dist. & Co. 724—Whiting v. Landau's, Inc., 34 Luz. Leg.Reg. 140—Harvey v. Conshohocken Building & Loan Ass'n, 53 Montg.Co. 290.
23 C.J. p 591 note 3.

Degree of proof to negate title through defendant
The claimant need not, on application for leave to file his own bond, prove that he does not derive title through defendant by the clear and satisfactory evidence, sufficient to repel all adverse presumptions, which is required to establish his ownership at the trial.—Secretary of Banking v. Promislo, 42 Pa.Dist. & Co. 386.

A nonresident claimant may not file his own bond.—De Saville v. Shive, 12 Wkly.N.C., Pa., 250—Scatchard v. Landenberger Mfg. Co., 10 Wkly.N.C., Pa., 452.

An agent executing a bond for his principal may also individually become a surety thereon.—Whitley v. Foster, 63 S.E. 698, 132 Ga. 32.

80. Ala.—Graham v. Lockhart, 8 Ala. 9.

81. Ala.—Marrs v. Gantt, Minor 406.
23 C.J. p 591 note 5.

82. Ky.—Vicory v. Strausbaugh, 78 Ky. 425.
Pa.—James v. Swayne, 22 Pa.Dist 764.

Husband and wife
(1) In Pennsylvania, under the Act of June 22, 1931, P.L. 883, 12 P.S. § 2362, a married woman may file her own bond where the goods levied on are in the joint possession of the claimant wife and her husband, the judgment debtor, provided she alleges that she acquired title to the goods for herself alone and by some means other than through her husband.—Anders & Jervis Motor Co. to Use of v. Gander, 40 Pa.Dist. & Co. 459.

(2) The wife of a judgment debtor, claiming ownership of personal property levied on as his, will be permitted to file her own bond, under such statute, on oral but uncontradicted evidence that the items claimed were either given her by persons other than her husband or were purchased by her with her own money.—Secretary of Banking v. Promislo, 42 Pa.Dist. & Co. 386.

(3) Under such statute, a wife who files a property claim in execution proceedings against her husband alone, on the ground that the property levied on, which is in her possession, is owned by her and her husband as tenants by entireties, may file her own bond, since one tenant by entireties is just as much the owner of the whole as the other, and cannot be said to derive title from or through the other.—Gombka v. Kowalski, 38 Pa.Dist. & Co. 197.

(4) The word "possession", as used in such statute, providing that if goods levied on are found to be in the possession of claimant the court may under certain circumstances permit claimant to file his own bond, does not mean exclusive possession, but includes joint possession of a husband and wife.—Anders & Jervis Motor Co. to Use of v. Gander, 40 Pa.Dist. & Co. 459.

(5) However, a husband claiming property in joint possession of husband and wife has not been permitted to file his own bond.—Whiting v. Landau's, Inc., 34 Luz.Leg.Reg., Pa., 140.

(6) Cases under earlier statutes see 23 C.J. p 591 note 3 [a].

83. Ky.—Lair v. Wilson, 13 Bush 589—Watson v. Gabby, 18 B.Mon. 658.

84. Ga.—Wall v. Mount, 49 S.E. 778, 121 Ga. 831—Webb v. Rehberg, 90 S.E. 100, 18 Ga.App. 537.

The claim bond was also required, under an early Georgia Act, to be payable to the sheriff [later changed to plaintiff in execution].—Anthony v. Brooks, 5 Ga. 576.

85. Ga.—Wall v. Mount, 49 S.E. 778, 121 Ga. 831.

86. Tex.—Sumner v. Swink, Civ. App., 163 S.W. 355.

87. Tex.—Sumner v. Swink, supra.

88. La.—Louisiana Central Lumber Co. v. Bridger, 125 So. 502, 12 La. App. 266.
23 C.J. p 591 note 15.

Substantial compliance is sufficient.
Cal.—Mazuran v. Finn, 200 P. 769, 53 Cal.App. 656.
Ga.—Mutual Fertilizer Co. v. F. M. White & Son, 106 S.E. 19, 26 Ga. App. 134.

The date of the execution is not required to be stated, and the fact that incorrect dates were included in forms used is of no consequence in the absence of a showing of injury by the error.—Rodgers v. Murray, Tex.Civ.App., 247 S.W. 888.

89. La.—Staples v. Bouligny, 10 Rob. 424—Louisiana Central Lumber Co. v. Bridger, 125 So. 502, 12 La.App. 266.

90. La.—Louisiana Central Lumber Co. v. Bridger, supra.

91. Tex.—Texas Banking & Investment Co. v. T. S. Reed Grocery Co., Civ.App., 137 S.W. 162.

Discretion of court
The approval of, or the refusal to approve, a bond rests in the sound discretion of the court.—Raphael v. Western Pennsylvania Amusement Co., 172 A. 316, 113 Pa.Super. 147.

Refusal to approve held not error
Pa.—Raphael v. Western Pennsylvania Amusement Co., supra.

92. Ga.—General Motors Acceptance Corporation, for Use of Dickey & Anderson, v. Allen, 1 S.E.2d 705, 59 Ga.App. 614.

cer, or other person, required.[93] A bond which is conditioned to deliver real as well as personal property is not enforceable as a statutory bond where the statute authorizes a trial of property only as to personal property.[94]

In Pennsylvania, the security has been required to be double the amount of the debt, if the goods are worth so much, otherwise double the value of the goods.[95]

The time for giving the bond is regulated by statute or governed by the practice of the particular jurisdiction.[96]

Objections and amendments. The mere fact that a bond is voidable does not authorize the officer to proceed,[97] and where the bond given is merely defective it may be amended or a new bond given in its place.[98] Objections must be taken within a reasonable time.[99] Where many years have elapsed since the framing of the issue, further security will not be required.[1]

Payment of costs of appraisement. Where a married woman's goods are levied on in the house in which she lives with her husband, and sold for her husband's debt, she is not required in making a claim for the goods to pay the cost of the appraisement, under a statute providing that such cost shall be paid by claimant, if the execution defendant is found in possession of the goods.[2]

§ 177. Effect of Pendency of Proceeding

Pending adjudication of a claim, the lien of the execution is not lost, but merely suspended; the property is still in the custody of the law, even after the claimant has given a bond, although he is entitled to the actual custody.

Pending the adjudication of a claim to property under execution, the lien of the execution is not lost; it is at most merely suspended, and the property is regarded as still in the custody of the law,[3] except where the statutory period for the duration of the lien expires while such claim is being contested.[4] The lien revives immediately on a determination adverse to claimant;[5] if the claim is sustained, the lien of the execution is, of course, lost as to the property in dispute.[6]

The lien still attaches, and the property is still in the custody of the law, after the claimant has given a bond.[7] The claimant who has given bond is, as a rule, entitled to the actual custody of the property,[8] and until the trial of the issue the sheriff

93. Ga.—General Motors Acceptance Corporation, for Use of Dickey & Anderson, v. Allen, supra.

94. Ala.—King v. Walton, 3 Port. 289.

95. Pa.—Lowry v. Letzelter, 45 Pa. Super. 143.
23 C.J. p. 592 note 19.

96. **In Georgia** the bond should be given at the time of the interposition of the claim.—Hand v. F. W. Hall Merchandise Co., 16 S.E. 644, 91 Ga. 130.

In Pennsylvania

(1) The bond should be given at the return of the rule requiring it to be given.—Wolf v. Wolf, 1 Del.Co. 380.

(2) The bond is premature if given before the rule for interpleader is made absolute but is not thereby invalidated.—Commonwealth v. Beary, 9 Pa.Super. 246.

(3) Under the Act 1897 § 11 the bond and claimant's statement of title, are required to be filed within two weeks after the sheriff's rule for an issue shall be made absolute, unless the court, for cause shown, shall extend the time for so doing.—Mull v. Snyder, 17 Pa.D. & C. 140—Walker v. Christner, 19 Pa.Dist. 540, 542.

(4) The statute is mandatory.—Haas v. Schmidt, 26 Pa.Dist. 293.

(5) Extension of time can be had only on application made while the rule is yet open.—Walker v. Christner, supra.

(6) Laches of claimant may defeat the right to extension of time for filing the bond.—Walker v. Christner, supra.

(7) In a proper case, however, the court may permit the bond to be filed nunc pro tunc.—American Finance Co. v. Trachtman, 157 A. 692, 103 Pa.Super. 289—Chase v. Kemble, 17 Pa.Dist. 1063—Suburban Bldg. Ass'n v. Furman, 35 D. & C. 509, 55 Montg.Co. 147.

(8) The court may permit the filing of a bond within a reasonable time after the expiration of the statutory period, provided execution creditor has not moved to take advantage of default.—McEnery v. Nahlen, 21 Erie Co. 241.

(9) The court will not permit a filing where, without extenuating circumstances, claimants have permitted more than a year to elapse after the issue has been made absolute.—Suburban Bldg. Ass'n v. Furman, supra.

(10) A claimant is not in default for failure to file a bond where the sheriff's rule for issue has not been made absolute.—Zeldin v. George Hess Co., 189 A. 729, 125 Pa.Super. 87.

97. Miss.—Moore v. Chambers, 19 Miss. 408.

98. Ala.—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Cal.—Mazuran v. Finn, 200 P. 769, 53 Cal.App. 656.
Ga.—Edmonds Shoe Co. v. Colson, 152 S.E. 608, 41 Ga.App. 283.
23 C.J. p 592 note 23.

99. Ga.—Fulgham v. Connor, 25 S. E. 406, 99 Ga. 237.
23 C.J. p 592 note 24.

1. Pa.—Makinson v. Calely, 11 Pa. Dist. 516.

2. Pa.—Morrison v. Nipple, 39 Pa. Super. 184.

3. U.S.—Hagan v. Lucas, Ala., 10 Pet. 400, 9 L.Ed. 470.
23 C.J. p 592 note 28.

4. Wash.—Adams v. National Bank of Commerce, 70 P. 105, 30 Wash. 20.

5. Ala.—Street v. Duncan, 23 So. 523, 117 Ala. 571.
23 C.J. p 592 note 30.

6. Ala.—Sandlin v. Anderson, 3 So. 28, 82 Ala. 330.
23 C.J. p 592 note 31.

7. U.S.—Hagan v. Lucas, Ala., 10 Pet. 400, 9 L.Ed. 470.
Contra
Miss.—Planters' Bank v. Black, 19 Miss. 43.
Pa.—Meyer v. Knight, 21 Pa.Super. 1.

8. Ga.—United Glass Co. v. Chamlee, 68 S.E. 796, 135 Ga. 152.
23 C.J. p 592 note 34.

has no authority to take or receive it back from him;[9] but the giving of a delivery bond by a claimant in possession does not prevent a subsequent judgment creditor from levying on the property.[10] The fact that an indemnity bond has been given by the execution creditor does not affect the claimant's right to the property, as against either such creditor or the purchaser at the execution sale.[11]

The pendency of a claim suit does not preclude an action at law by a third person to recover the goods of claimant.[12]

§ 178. Estoppel to Assert or Deny Claim

A claimant may be estopped by his conduct to assert his claim; similarly, the execution creditor may be estopped to deny the claimant's right.

A claimant may by his conduct estop himself to assert his claim,[13] as by representing the property to be that of defendant;[14] but there is no estoppel where the acts done or omitted do not fulfill all the conditions necessary to an estoppel in pais in general.[15] Likewise, under the general rules governing estoppels, an estoppel may similarly arise against the execution creditor to deny claimant's right.[16]

§ 179. Jurisdiction and Venue

Claims of third persons to property seized on execution are commonly adjudicated in the court from which the execution issued. The court trying the claim should have jurisdiction of the amount in controversy.

The claims of third persons to property seized on execution are ordinarily adjudicated in the court from which the execution issued;[17] at any rate, the court from which the execution issued has jurisdiction to determine the question whether it or some other court had jurisdiction to try the right to the property seized under the execution.[18] In some states a court of a certain class has jurisdiction of all claims to property levied on regardless of whether the execution issued from that court or another court;[19] in another state a court of a certain class has been held to have jurisdiction to determine claims made by a person under a mortgage or deed of trust to property taken in execution on behalf of the state or the commonwealth.[20] Where the levy is made in a county other than that in which the execution issued, the coordinate court of the former county has jurisdiction.[21]

The court trying the claim should have jurisdiction of the amount in controversy.[22]

Under a statute or decision conferring on claimant a right to trial in the county of his domicile,[23] and providing for a change of venue thereto on his application,[24] it is optional with him whether the issue shall be tried in the county in which the execution issued or in the county in which the property levied on is situated and in which he resides.

§ 180. Parties

All interested persons may be made parties to the claim proceedings. The claimant, the judgment creditor, and the levying officer are regarded as necessary parties, and the judgment debtor may be one also.

All persons interested in the disposition of property under execution which is claimed by a person not a party to the writ may be made parties to the claim proceedings.[25]

A claimant is a necessary party to a claim proceeding.[26] Where there are two or more claimants jointly interested, all may join,[27] or one may

9. Ga.—Nessmith v. Hendry, 94 S. E. 256, 21 Ga.App. 257.
23 C.J. p 592 note 35.

10. Ark.—Harris v. Stewart, 47 S. W. 634, 65 Ark. 566.

11. Mo.—Hanson v. McKerrall, 57 Mo.App. 56.
23 C.J. p 592 note 37.

12. Ala.—Oden v. Stubblefield, 2 Ala. 684.

13. Idaho.—Lick v. Munro, 69 P. 285, 8 Idaho 510.
23 C.J. p 593 note 39.

14. Ga.—Wright v. McCord, 39 S.E. 510, 113 Ga. 881.

15. Philippine.—Johnson v. Balantacbo, 9 Philippine 647, 6 Off.Gaz. 228.
23 C.J. p 593 note 40.

16. Pa.—Moore v. Whitney, 10 Lanc.Bar 122, 1 Leg.Chron. 1, 7 Lus.Leg.Reg. 158.
23 C.J. p 593 note 41

17. Ga.—Akin v. Peck & Allen, 64 Ga 643.
23 C.J. p 593 note 43.
Waiver of objections to jurisdiction by general appearance
Va.—Sauls v. Thomas Andrews & Co., 175 S.E. 760, 163 Va. 407.

18. Tex.—Yarborough v. Downes, 1 Tex.App.Civ.Cas. § 675.

19. Ala.—Cullum v. Smith, 6 Ala. 625.
N.J.—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 558, affirmed Joyce v. Moran, 23 A.2d 396, 127 N.J.Law 562—Lubinsky v. Court of Common Pleas of Passaic County, 189 A. 635, 15 N.J.Misc. 183.

20. Va.—Moore v. Auditor, 3 Hen. & M. 232, 13 Va. 232.

21. La.—George Sliman & Co. v. Hemperly, App., 168 So. 718.
23 C.J. p 593 note 45.

22. Tex.—Cleveland v. Tufts, 7 S. W. 72, 69 Tex. 580.
23 C.J. p 593 note 48.

23. Tex.—Brown v. Young, 1 Tex. App.Civ.Cas. § 1240.

24. Miss.—Croom v. Williams, 70 So. 704, 110 Miss. 605.

25. Pa.—Van Winkle v. Young, 37 Pa. 214.
23 C.J. p 594 note 53.
Who may institute proceedings see supra § 170.

26. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.

27. Ill.—Citizens' State Bank of Manteno v. Senesac, 267 Ill.App. 288—Gaar v. Centralia First Nat. Bank, 20 Ill.App. 611.

prosecute the claim for the benefit of all,[28] except that where the property cannot be awarded to both or all claimants they are improperly joined.[29]

A trial of right of property may be presented in the name of an infant by a prochein ami.[30] Property belonging to a wife and children should not be subjected to the debts of the husband and father, because the proper party has not claimed it.[31] Where one person is substituted for another as the claimant with the consent of himself, plaintiff in execution, and the court, he cannot afterward object that the substitution was irregular.[32]

The judgment creditor should always be made a party to claim proceedings.[33] The fact that the levying officer answers that the fund in his hands is claimed by another execution creditor does not of itself make that creditor a party to the proceedings.[34]

Judgment debtor. In statutory claim cases, the execution debtor is not a party where the only issue made is the ordinary one between the execution creditor and claimant;[35] but the execution debtor's rights may be so involved, in a claim case, as to make him a necessary party.[36] He cannot be joined with the claimant as a coparty.[37]

The officer who levied an execution is a necessary party.[38]

Death of party. On the death of the execution creditor or claimant, the proceeding must be in the name of his personal representative.[39] In case of the death of one of several plaintiffs, the case should proceed in the name of the survivor.[40]

§ 181. Notice or Demand

Generally, timely and sufficient notice of claim proceedings must be given to all interested persons.

Generally, timely and sufficient notice of claim proceedings must be given to all interested persons.[41] Where the statutory requirement is complied with, no other notice or demand is necessary.[42] However, notice of trial is not required to be given to a claimant who has filed an affidavit of claim and bond.[43]

The failure of a claimant of personal property levied on to give notice under a statute requiring written notice to be given a landlord that household furniture or goods have been leased, hired, or conditionally sold to a tenant, in order to exempt the goods from levy, does not affect claimant's title where levy was made after the removal of such property from the leased premises.[44]

§ 182. Dismissal or Withdrawal by Claimant

Ordinarily a claimant may withdraw his claim at any time before verdict or decision. A withdrawal terminates the case, but claimant, unless prevented by statute, may interpose another claim or pursue any other available remedy. If he obtained possession of the property by giving bond, and dismissed his claim without restoring the property, the bond remains in effect.

28. Ala.—Hawkins v. May, 12 Ala. 673.

29. Ill.—Lips v. Cermak, 205 Ill. App. 246.

30. Ala.—Strode v. Clark, 12 Ala. 621.

31. Ga.—Bailey v. Brockett, 20 Ga. 148.

32. Ala.—Bettis v. Taylor, 8 Port. 564.

33. Ga.—King v. Castlen, 18 S.E. 313, 91 Ga. 488.
23 C.J. p 594 note 62.
Defendants in replevin see the C.J.S. title Replevin § 90, also 54 C.J. p 463 note 84–p 464 note 8.

Necessary party
N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.

34. Ga.—Jones v. Coney, 36 S.E. 321, 111 Ga. 843.

35. Ga.—Brooks v. Winkles, 78 S.E. 129, 139 Ga. 732—First Nat. Bank v. Roberson, 184 S.E. 887, 53 Ga. App. 142.

36. Ga.—Anderson v. Burson, 157 S.E. 632, 172 Ga. 448—Gibson v. Wilson, 60 S.E. 565, 130 Ga. 243.
N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S. 159, 172 Misc. 158.

37. Tex.—Anderson v. Anderson, 23 Tex. 639.

38. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.
Officer as:
Defendant in replevin see the C.J.S. title Replevin § 90, also 54 C.J. p 463 note 2–p 464 note 7.
Party to proceedings to enjoin sale of property see supra § 157.

39. Ga.—Ray v. Anderson, 41 S.E. 60, 114 Ga. 975.
23 C.J. p 594 note 74.

40. Ga.—Ray v. Anderson, supra.

41. Pa.—American Chemical Laboratories v. Wayne Junction Trust Co., 81 Pa.Super. 137—Mahoning Savings Loan Ass'n v. Cutler, 85 Pittsb.Leg.J. 653.
23 C.J. p 594 note 77.
Affidavit of claim see supra § 175.
Notice to officer as condition precedent to independent suit see supra § 168.

Notice to sheriff
The intervening plaintiff fulfills its duties to protect its goods by giving written notice to the sheriff and the sheriff thereafter proceeds at his own risk.—U. S. v. Kemmerer, 19 Leh.L.J., Pa., 301, 10 Som.Leg.J. 389.

Proof of service
A sheriff's affidavit that a rule was served compelling a claimant to interplead is insufficient proof of service, where there is no return or record of such service.—Erby v. Siegler, 9 Pa.Dist. 536.

42. Ill.—Van Zeis v. Cleaveland, 208 Ill.App. 387.

Conditional seller
Claimant selling automobile to wife of execution defendant under conditional sales contract, proving default in payments, demand and forfeiture, could maintain claim suit without further demand.—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala.App. 282, certiorari denied 115 So. 223, 217 Ala. 225.

43. Ala.—City Holding Co. v. Hosch, 124 So. 291, 220 Ala. 113.
Fla.—State v. Wright, 145 So. 598, 107 Fla. 178.

44. Pa.—Union of Hazleton, Inc. v. Klinger, 35 Luz.L.Reg. 139, 10 Som. Leg.J. 358.

Ordinarily, and subject to the provisions of governing statutes, a claimant may withdraw his claim,[45] unless he has stipulated not to do so.[46] A claimant who has given a bond and obtained possession of the property cannot dismiss his claim before restoring the property to the officer;[47] if he does so, the bond is still in effect,[48] and claimant is precluded from asserting as a defense in an action on the bond that the property was not subject to the levy.[49] Under a statute allowing the claimant to withdraw or discontinue his claim once without the consent of plaintiff in execution, it has been held that a second claim cannot be withdrawn after a withdrawal of a prior claim to the same levy,[50] unless the execution creditor moves for a dismissal of the claim or consents to its withdrawal.[51]

The only mode of dismissing a claim at claimant's instance is by voluntary withdrawal; a motion to dismiss made by claimant and based on his own default is properly denied.[52]

The withdrawal must be before verdict,[53] or before the decision, where a jury is waived,[54] and consequently cannot be made on appeal without the consent of the opposite party.[55]

The effect of a withdrawal is to terminate the case;[56] but, unless a statute otherwise provides, it will not prevent the claimant from interposing another claim,[57] or from pursuing any other available remedy with reference to the property.[58]

§ 183. Pleading

As a general rule, formal pleadings are unnecessary, although the jurisdictions are not in accord as to the necessity for written pleadings. Under some statutes the execution plaintiff merely alleges that the property claimed is that of the execution defendant and subject to the writ and claimant denies it; in others, where the claim is tried by an interpleader proceeding, claimant must file a concise statement of his source of title which the execution plaintiff answers. In some states affirmative defenses must be specially pleaded. Amendments may be allowed to the pleadings.

In some states, where a trial of the right of property is provided for, statutes provide for written pleadings as in civil actions,[59] and in others whether the pleadings shall be in writing or not is a question addressed to the discretion of the court;[60] but, as a general rule, formal pleadings are unnecessary,[61] and in some states the statutes expressly provide that there shall not be written pleadings.[62] The affidavit of claim which in the majority of jurisdictions claimant must make and file, considered supra § 175, is, in a number of jurisdictions, the only pleading necessary to be filed by claimant;[63] he need not file a complaint,[64] and no answer or other pleading is required or contemplated.[65] However, equitable rights cannot be asserted and enforced in a claim case without proper pleadings.[66] It has been held that plaintiff in execution must allege that the property claimed is the property of the execution defendant and is liable to satisfaction of the writ,[67] and that claimant simply

45. Ga.—Mercer v. Baldwin, 11 S.E. 846, 85 Ga. 651.
23 C.J. p 595 note 82.
Involuntary dismissal see infra §§ 187, 191.

46. Ga.—Royce v. Small, 20 S.E. 12, 94 Ga. 677.

47. Tex.—Mosely v. Gainer, 10 Tex. 578.

48. Ga.—Houser v. Williams, 11 S.E. 129, 84 Ga. 601.

49. Ga.—Anderson v. Banks, 18 S.E. 364, 92 Ga. 121—Aycock v. Austin, 13 S.E. 582, 87 Ga. 566.

50. Ga.—Brady v. Brady, 68 Ga. 831.
23 C.J. p 595 note 88.

51. Ga.—American Inv. Co. v. Cable Co., 60 S.E. 1037, 4 Ga.App. 106.

52. Ga.—Royce v. Small, 20 S.E. 12, 94 Ga. 677.

53. Ga.—Hiley v. Bridges, 60 Ga. 375.
23 C.J. p 595 note 91.

54. Ga.—Hiley v. Bridges, 60 Ga. 375—Houser v. Brown, 60 Ga. 366.

55. Ga.—Adams v. Carnes, 36 S.E. 597, 111 Ga. 505.
23 C.J. p 595 note 93.

56. Ga.—Melpass v. Georgia Loan & Trust Co., 33 S.E. 967, 108 Ga. 303.
Mo.—Brown v. Burrus, 8 Mo. 26.
Effect of involuntary dismissal see infra § 191.

57. Pa.—Laflin Co. v. Suplee, 17 Wkly.N.C. 157.

58. Or.—Vulcan Iron Works v. Edwards, 36 P. 22, 39 P. 403, 27 Or. 563.
23 C.J. p 595 note 96.

59. Mo.—Martin v. Fox, 40 Mo.App. 664.

60. Ky.—Borches v. Bellis, 62 S.W. 486, 110 Ky. 620, 23 Ky.L. 37.

61. Wash.—First Nat. Bank of Seattle v. Hagan, 47 P. 223, 16 Wash. 45.
23 C.J. p 595 note 98.
Joinder of issue see infra § 184.

Not permitted

These proceedings may not be embarrassed by formal pleadings.—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.

62. Ill.—Smeeth-Harwood Co. v. Hutchison, 175 Ill.App. 602.

63. Ala.—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535.
Ga.—Collier v. Bank of Tupelo, 10 S.E.2d 62, 190 Ga. 598—Harris v. Anderson, 99 S.E. 530, 149 Ga. 168.
Wash.—Christianson v. Shepherd, 255 P. 942, 143 Wash. 537—First Nat. Bank of Seattle v. Hagan, 47 P. 223, 16 Wash. 45—Chapin v. Bokee, 29 P. 936, 4 Wash. 1.

Dormancy of judgment

The failure of claim affidavit in usual form specifically to raise question of dormancy of judgment does not render judgment for claimant, based on such condition, erroneous.—Collier v. Bank of Tupelo, 10 S.E.2d 62, 190 Ga. 598.

64. Ala.—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535.
Wash.—First Nat. Bank of Seattle v. Hagan, 47 P. 223, 16 Wash. 45.

65. Ala.—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535.
Wash.—First Nat. Bank of Seattle v. Hagan, 47 P. 223, 16 Wash. 45.

66. Ga.—Carter v. Moody, 129 S.E. 163, 160 Ga. 649.

67. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535—The Branch Bank at

denies this allegation.[68]

It is held, where the claim is tried by an interpleader proceeding, that after the rule for interpleader has issued claimant must file a concise statement of his source of title, clearly setting out the basis of his claim, which must contain all the ingredients of a complete cause of action,[69] and the execution plaintiff must file an affidavit of defense or answer, averring the grounds on which he questions claimant's title.[70] Claimant's statement of title should be filed within the time fixed by statute therefor, but such limitation as to the time for filing is not absolute, and claimant may do so, of right, at any time before the execution plaintiff has acted by way of asking for an order that the sheriff proceed with his writ or that judgment of non pros. be entered in the issue;[71] and if neither party pleads in response to the sheriff's rule for interpleader they abandon their claim and consequently their right to have an issue framed.[72]

Affirmative defenses must be specially pleaded in some states.[73] In others, where a claim of title is filed to property levied on, an issue of fraud in the acquirement of title by claimant may be inquired into without being specially pleaded.[74] The plea or answer may set up prescription,[75] and in some states equitable matters may be set up;[76] but a defense available at law cannot be set up as an equitable plea.[77] A general demurrer raises the question of statutory limitation.[78]

Amendments. Amendments may be allowed to the pleadings within the discretion of the court,[79]

Montgomery v. Parker, 5 Ala. 731—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.

68. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535—Montgomery Branch Bank v. Parker, 5 Ala. 731—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.

No other allegation

Claimant is not permitted to make any other allegation.—Langdon v. Brumby, 7 Ala. 53.

69. Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.
23 C.J. p 595 note 2.

Sufficiency of pleading

Judgment will not be entered against claimant on pleading because of failure to allege actual physical possession of goods.—Edelman v. Stump, Pa., 26 North.Co. 128.

70. Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.

Effect of failure to answer

(1) Failure to file answer to rule for interpleader by execution plaintiff does not mean that claim has been abandoned or entitle claimant to default judgment, there being no time limit for filing such answer.—Mahoning Savings Loan Ass'n v. Cutler, 85 Pittsb.Leg.J. 649.

(2) If no answer is filed, the rule cannot be discharged except at the instance of the sheriff, as the proceedings are for his protection; and if the rule cannot be discharged, the converse is also true, and neither can it be made absolute.—L. B. Smith, Inc. v. Shellhammer, 5 Sch.Reg. 375.

Sufficiency of pleading

An affidavit of defense in a sheriff's interpleader proceeding, which pleads that a transfer to claimants was made at a time when the transferor was obligated under a court order to pay thirty-five dollars per week to defendant wife and with intent to hinder, delay, and defraud creditors, and that claimants were a party to the fraudulent intent, is sufficient.—Rosenthal v. Rosenthal, Pa., 19 Lehigh Co.L.J. 154.

71. Pa.—American Finance Co. v. Trachtman, 157 A. 692, 103 Pa. Super. 289.

Power and discretion of court

(1) Where, in a proceeding of sheriff's interpleader, the statements of title of claimants are not filed within the statutory time of two weeks after the sheriff's or claimant's rule for an issue has been made absolute, the court of common pleas has power in the exercise of its discretion to permit them to be filed nunc pro tunc.—Suburban Bldg. Ass'n v. Furman, 35 Pa.Dist. & Co. 509, 55 Montg.Co. 147.

(2) Notwithstanding the requirement of the law that claimant's statement in a proceeding must be filed within two weeks, a court would be disposed to permit the same to be filed within a reasonable period thereafter, provided plaintiff had not moved to take advantage of the default.—McEnery v. Nahlen, Pa., 21 Erie Co. 241.

(3) The court will not permit claimants' bonds and statements of title in sheriff's interpleader to be filed where, without extenuating circumstances, claimants have permitted more than a year to elapse after the issue has been made absolute.—Suburban Bldg. Ass'n v. Furman, supra—McEnery v. Nahlen, supra.

72. Pa.—L. B. Smith, Inc. v. Shellhammer, 5 Sch.Reg. 375.

73. Mo.—Martin v. Fox, 40 Mo.App. 664.
23 C.J. p 595 note 5.

74. Ga.—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653—Tippins v. Lane, 191 S.E. 134, 184 Ga. 331—Moore v. Loganville Mercantile Co., 191 S.E. 121, 184 Ga. 351—Simmons v. Realty Inv. Co., 127 S.E. 279, 160 Ga. 99—Fouts v. Gardner, 121 S.E. 330, 157 Ga. 362—Kelly v. Cates, 138 S.E. 280, 36 Ga.App. 763—Hancock v. Green-Miller Co., 132 S.E. 136, 35 Ga.App. 81.
Wash.—Christianson v. Shepherd, 255 P. 942, 143 Wash. 537.

75. La.—Maskell v. Pooley, 12 La. Ann. 661.

76. Ga.—Morrison v. Knight, 8 S. E. 211, 82 Ga. 96—Blandford v. McGehee, 67 Ga. 84.
Equitable nature of statutory proceedings see supra § 169.

77. Md.—Albert v. Freas, 64 A. 282, 103 Md. 583.
23 C.J. p 595 note 8.

78. Kan.—Gardner v. Quick, 54 P. 1034, 8 Kan.App. 559.

79. Pa.—Leedom v. Zierfuss, 3 Del. Co. 129.
23 C.J. p 596 note 15.

Amendment held proper

Where property was devised to D, and, if he died without children, to H for life, with remainder to her children, and was levied on as property of D, and claim interposed by H and her children, an amendment to the issue tendered by plaintiff, alleging D's belief in his absolute ownership, improvements in reliance on such belief, H's promise that she and her children would quitclaim their interests, further improvements in reliance on such agreement, and the execution by H of an instrument releasing her interest to plaintiff to the extent of a loan made by plaintiff to D on the land, was held not

provided they are germane to the issue,[80] are offered in due time,[81] and are verified, if so required by statute.[82] Under some statutes, either the execution creditor or claimant can amend by adding equitable matters germane to the issue;[83] but this rule cannot be so extended as to convert the issue in a claim case into a general action where either party may obtain a general judgment in personam.[84]

§ 184. Issues and Questions Considered

In general the issue to be tried is the liability of the property to the plaintiff's execution as against claimant's title or right, and only questions relevant thereto may be considered. Formal joinder of issue is required in some states but not in others. The proof should be limited to the issues, but is more liberally admitted than in suits where there are formal pleadings and issues. A variance in the proof is fatal.

The issue to be tried under the claim statutes is an issue of the liability of the property to plaintiff's execution as against claimant's title or right,[85] at the time of the filing of the claim,[86] or, in some jurisdictions, on the trial of the right of personal property, whether the execution creditor or claimant is entitled to possession at the time of the levy of execution.[87] The issue is whether claimant owns the property,[88] which includes the manner in which he obtained such title,[89] and not whether the execution debtor owns it.[90] The court is not authorized to determine any question of lien, fraud, or equities not involved in the determination of claimant's title,[91] nor to decide any issue that may arise between the executing officer and a third person.[92] In contests between plaintiff in execution and a donee or purchaser from the execution defendant, the issue of actual or constructive fraud

subject to demurrer.—Jukes v. Hull, 106 S.E. 96, 151 Ga. 156.

Dismissal of levy on part of property

On trial of claim to property on which execution had been levied, allowing sheriff to amend by dismissal of levy as to one of two tracts involved was not error, where claimant had moved to dismiss levy on ground that it was excessive and claimant was not injured by amendment.—Wright v. Pearson, 185 S.E. 336, 182 Ga. 366.

Party from whom property purchased

A motion to amend the statement of claim by substituting a different party from whom it is claimed the property was purchased should be allowed, since such an amendment does not change the nature of the claim nor introduce a new cause of action, but merely varies the proof. —Forman v. Fine, 89 Pa.Super. 329.

80. Pa.—Georgia Power Co. v. City of Decatur, 154 S.E. 268, 170 Ga. 699.
23 C.J. p 596 note 12.

81. Pa.—Grant v. Hancock, 5 Phila. 193.
23 C.J. p 596 note 13.

82. Ind.—Raymond v. Parisho, 70 Ind. 256.

83. Ga.—Georgia Power Co. v. City of Decatur, 154 S.E. 268, 170 Ga. 699—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30.
23 C.J. p 596 note 16.

To assert equitable rights

Proper pleadings to assert equitable rights can be effected by amendment in aid of levy, where plaintiff in execution seeks to subject property to his process on equitable grounds, or, by amendment to the claim, where claimant sets up equitable rights against plaintiff.—Carter v. Moody, 129 S.E. 163, 160 Ga. 849.

Required purpose for amendment

Such equitable amendments must be aimed at showing a legal or equitable title in claimant, or some interest in the nature of an equitable title, to support a claim.—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30.

84. Ga.—Georgia Power Co. v. City of Decatur, 154 S.E. 268, 170 Ga. 699—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30.

85. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Ga.—Georgia Power Co. v. City of Decatur, 154 S.E. 268, 170 Ga. 699—Pitts v. Cox, 145 S.E. 61, 167 Ga. 228—Williamson v. Harry L. Winter, Inc., 120 S.E. 602, 156 Ga. 779—Blackstock v. Blackman, 108 S.E. 775, 152 Ga. 179—Deloach v. Myrick, 6 Ga. 410—Jenkins v. Best Trading Co., 146 S.E. 512, 39 Ga. App. 214—Shaner Motor Co. v. Williams, 138 S.E. 274, 36 Ga.App. 766.
23 C.J. p 596 note 17.

No other issue

A claim case carries with it no question save that of title.—Farrar v. Joyce, 4 S.E.2d 708, 60 Ga.App. 675.

However, it has been stated that generally in a claim case claimant may attack execution on any ground maintainable by defendant in fieri facias, and may resist levy on ground that judgment on which fieri facias issued was void.—Becker v. Truitt, 146 S.E. 654, 39 Ga.App. 286.

Matters not in issue

(1) Claim of possession by claimant.—Pitts v. Cox, 145 S.E. 61, 167 Ga. 228.

(2) The nature of the indebtedness on which the judgment was based, and for which the fieri facias was issued, whether borrowed money or not.—Blackstock v. Blackman, 108 S.E. 775, 152 Ga. 179.

(3) The liability of claimant to pay the debt on which the execution was based.—Newsome Lumber Co. v. H. N. Ramsey Motor Co., 136 S. E. 166, 36 Ga.App. 194—23 C.J. p 596 note 17 [a] (4).

(4) Earlier cases see 23 C.J. p 596 note 17 [a].
Attack on judgment or execution see supra § 173.

86. Ga.—Dearlso v. Lawrence, 60 S. E. 330, 3 Ga.App. 580.

87. Tex.—Sanders v. Farrier, Civ. App., 271 S.W. 293.

88. Cal.—Fulton v. Webb, 103 P.2d 596, 39 Cal.App.2d 509.
Colo.—Schraeder v. Mitchell, 215 P. 147, 73 Colo. 320.
Tex.—Foster v. Spearman Equity Exchange, Civ.App., 266 S.W. 583.

89. Cal.—Fulton v. Webb, 103 P.2d 596, 39 Cal.App 2d 509.

90. Colo.—Schraeder v. Mitchell, 215 P. 147, 73 Colo. 320.

91. Cal.—Fulton v. Webb, 103 P.2d 596, 39 Cal.App.2d 509.

Unlawful acts of sheriff

Alleged unlawful acts, if any, of sheriff who levied execution but who was not party to the action could not be made the subject of inquiry. —Fulton v. Webb, supra.

92. Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

may be presented.[93] Where claimant is the wife of the execution debtor, the question of where she got the money used in the payment of the purchase price of the property is pertinent to the issue.[94] If the validity of the affidavit is challenged, an issue is presented which must of necessity be tried by the court before the right of property can be tried.[95] Where there is but one defendant in execution and a claim affidavit recognizes that the land is levied on as the property of such defendant, claimant cannot object to the levy on the ground that it fails to show the amount of defendant's interest in the property;[96] but the rule is otherwise in cases where there are two or more defendants in fieri facias.[97] In jurisdictions where pleadings are filed in the proceeding the issue is limited thereby.[98]

Claimant's issue is not triable unless the execution plaintiff establishes that, as against the execution defendant, the property seized is liable to the execution.[99]

Joinder of issue. In some states the making up of an issue within a prescribed time is required by statute or court rules,[1] while in other states a formal issue need not be joined.[2] Where a joinder of issue is required, the judgment creditor must take issue or be barred.[3] The tender of an immaterial issue does not affect the validity of a judgment based on a material issue.[4]

Proof. Evidence not material to the issues in the case is inadmissible.[5] Claimant is not bound in his proof to go beyond the issue raised by the pleadings.[6] In jurisdictions where the execution plaintiff has the burden of proof, see infra § 185 a, the execution plaintiff must prove, prima facie at least, that the property levied on is the property of the execution defendant.[7] Although the courts have refused to receive evidence offered by claimant or the execution creditor on the ground that it was not admissible under the affidavit of claim or under the pleadings,[8] as a general rule they are more liberal in this respect than in an ordinary suit

93. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.

Fraudulent nature of title

(1) Defendant in third opposition, involving title to personalty seized under fieri facias, may tender issue vel non of fraudulent nature of third opponent's title by answer.—Southland Inv. Co. v. Michel, La.App., 149 So. 177.

(2) The fact that fraud had not been pleaded did not preclude court from determining that there had been a fraudulent conveyance of bonds by judgment debtor to third-party claimant where both sides understood issues involved and no claim was made of surprise, continuance was not requested, and no objection was made to admission of evidence tending to establish fraud.—Fulton v. Webb, 103 P.2d 596, 39 Cal.App.2d 509.

Existence and date of debt

The existence and date of plaintiff's debt becomes material and decisive.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.

94. Ala.—Bradford v. Buttram, 88 So. 329, 205 Ala. 599—Daffron v. Crump, 69 Ala. 77.

95. Miss.—Farrand Co. v. Huston, 69 So. 997, 110 Miss. 40.

96. Ga.—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367—Scolly & Co. v. Butler, 59 Ga. 849.

97. Ga.—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367—Cooper v. Yearwood, 45 S.E. 716, 119 Ga. 44—Hudspeth v. Scarborough, 69 Ga. 777.

98. Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.

99. Miss.—Scruggs v. Electric Paint & Varnish Co., 105 So. 745, 747, 140 Miss. 615.

"If as between the plaintiff and the defendant in execution the property taken by the execution is not subject thereto, the court is without authority to adjudicate the conflicting claims thereto as between a third person and the defendant in execution."—Scruggs v. Electric Paint & Varnish Co., supra.

1. Miss.—Farrand Co. v. Huston, 69 So. 997, 110 Miss. 40.
23 C.J. p 597 note 20.

2. Fla.—Betton v. Willis, 1 Fla. 262.
23 C.J. p 597 note 21.

3. Miss.—Sears v. Gunter, 39 Miss. 338—Martin v. Lofland, 18 Miss. 317.
Judgment by default see infra § 187.

4. Tex.—Wright v. Henderson, 12 Tex. 43.

5. Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.
Tex.—Foster v. Spearman Equity Exch., Civ.App., 266 S.W. 583.

Petition and exhibits in original suit

Petition and exhibits thereto, in suit in which attachment and execution were levied, was inadmissible on trial of property right asserted by others, as not bearing on issue, and injecting issue, as to materialman's and laborer's lien, set up in affidavits attached to petition.—Foster v. Spearman Equity Exch., supra.

6. Pa.—Lettieri v. Mamaroneck Sand & Gravel Co., 186 A. 762, 123 Pa.Super. 13.

Title in claimant's vendor

In sheriff's interpleader proceeding where no issue was raised in pleading as to want of title in claimant's vendor, such evidence is inadmissible.—Lettieri v. Mamaroneck Sand & Gravel Co., supra.

7. Ga.—Jarrard v. Mobley, 154 S.E. 251, 170 Ga. 847.

Proof required

Unless the sheriff's entry discloses that the property levied on was in execution defendant's possession, or claimant admits a prima facie case in behalf of execution plaintiff or that execution defendant was in possession, execution plaintiff must prove, as a circumstance establishing the ownership of execution defendant, that execution defendant was in possession, or in a case of husband and wife, that he and his wife both lived on the property in dispute, from which circumstance the law presumes possession and ownership to be in the husband.—Jarrard v. Mobley, 154 S.E. 251, 170 Ga. 847.

8. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.
23 C.J. p 597 note 28.

Mortgage

(1) Failure of claim affidavit to state claim was based on mortgage as required by statute renders mortgage inadmissible as evidence over objection.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.

(2) Under Code 1923 § 10379, on trial of right of property on which execution was levied, claimant, who made no reference in affidavit to any mortgage or nature of right claimed, could not support his claim

where there are formal pleadings and issues.[9] Evidence with respect to questions raised by the pleadings,[10] such as fraud,[11] is admissible. Evidence tending to show that claimant had parted with his title to the property levied on is admissible.[12] Where claimant alleged ownership of the property levied on, evidence that he possessed a lien thereon is inadmissible.[13] In jurisdictions in which the execution plaintiff alleges that the property claimed is the property of the execution defendant and subject to execution and claimant simply denies it, see supra § 183, the only means by which claimant can sustain the negative after the execution plaintiff has made out a prima facie case, is to show that he is the owner of the property;[14] it is not allowable to prove that the property belongs to some third person.[15]

Admissions in pleadings. A party will not be heard to deny the existence of facts which he has alleged in his pleading.[16] However, fact allegations in an unanswered plea cannot be considered as evidence, and proof thereof should be made to establish them.[17] A replication that if there is any deed, it is not valid does not admit the execution of the deed.[18]

Variance. It is generally held that claimant must prove his title as claimed, or the variance will be fatal.[19] Thus if absolute ownership is alleged, a recovery is not allowed on proof of a limited interest,[20] or proof that the property is held as security,[21] or as agent for another;[22] nor can a claim of a qualified property in the subject matter of the execution be maintained by proof of absolute property.[23] It is not a fatal variance that the proof shows an ownership of only a part of the goods on a claim to all,[24] or a several instead of a joint ownership as claimed,[25] or, on a claim to absolute ownership, an ownership in trust under which the legal title to the whole of the property is in claimant.[26] Also, under a prayer for general relief, claimant asserting ownership of the property, who also alleged facts showing a privilege, should receive judgment allowing the privilege where the evidence introduced establishes it.[27] There is a fatal variance where the proof of ownership of plaintiff is of property other than that levied on.[28]

§ 185. Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

In some jurisdictions the court directs which party has the burden of proof; in others claimant has the burden; and in still others, the burden depends on the possession of the property at the time of levy. As a general rule, the execution plaintiff need not prove the judgment on which the execution is based, but the authorities are not in harmony as to the necessity of proving the execution.

In some jurisdictions, the court may direct which party shall be considered plaintiff and assume the burden of proof.[29]

by evidence of mortgage and note. —Drennen Co. Department Stores v. Brown, 103 So. 588, 212 Ala. 524.

9. Ala.—Lehman, Durr & Co. v. Warren & Burch, 53 Ala. 535.

Evidence held admissible

(1) Execution plaintiff may introduce evidence of every fact showing that the property is liable to the execution; and claimant may give evidence of every fact showing that there resides in him a superior right to the property.—Lehman, Durr & Co. v. Warren & Burch, supra.

(2) Where claimant relies on deed from execution defendant, evidence offered by execution plaintiff that the parties to the deed were husband and wife is admissible.—Moore v. Loganville Mercantile Co., 191 S.E. 121, 184 Ga. 351.

(3) Earlier cases see 23 C.J. p 597 note 29 [a].

10. La.—Home Finance Service v. Linam, App., 174 So. 389.

11. La.—First Nat. Bank v. Lagrone, 117 So. 741, 166 La. 626—Home Finance Service v. Linam, App., 174 So. 389.

12. Tex.—Foster v. Spearman Equity Exch., Civ.App., 266 S.W. 583.

13. Tex.—Noble v. Long, Civ.App., 298 S.W. 618.

14. Ala.—The Branch Bank at Montgomery v. Parker, 5 Ala. 731.

15. Ala.—The Branch Bank at Montgomery v. Parker, supra—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320. Ga.—Rucker v. Hunt, 163 S.E. 612, 44 Ga.App. 836.

16. Pa.—Blum v. Warner, 1 Leg. Rec. 113.

17. Ga.—Pendergrass v. Hardman, 121 S.E. 808, 157 Ga. 579.

18. Ala.—Desha v. Scales, 6 Ala. 356.

19. Ala.—Johnson v. Whitfield, 27 So. 406, 124 Ala. 508, 82 Am.S.R. 196.
23 C.J. p 597 note 30.

20. Pa.—Hoopes v. Ebel, 16 Pa. Dist. 271.

21. Ala.—Bank of Mobile v. Lewis, App., 80 So. 179.
23 C.J. p 597 note 32.

22. Pa.—Bloomingdale v. Victor, 10 Pa.Co. 177.

23. Pa.—Waverly Coal & Coke Co. v. McKennan, 1 A. 543, 110 Pa. 599.

24. Pa.—Rush v. Vought, 55 Pa. 437, 93 Am.D. 769.

Striking items not proved

Judgment creditor's motion to strike from property claim, based on constable's bill of sale, amount exceeding items therein, was properly granted.—Glaser v. B. V. D Sales Corporation, 170 A. 49, 112 N.J.Law 179.

25. Pa.—Van Winkle v. Young, 37 Pa. 214.

26. Pa.—Campbell v. Clevenstine, 24 A. 80, 149 Pa. 46.
23 C.J. p 597 note 35.

27. La.—Carnahan v. Rachal, 133 So. 803, 16 La.App. 269

28. Ga.—Peacock v. Savannah Woodenware Co., 88 S.E. 906, 18 Ga.App. 127.

29. Ark.—Norton v. Elk Horn Bank, 17 S.W. 362, 55 Ark. 59.

In other jurisdictions, the burden of proof in claim proceedings is on claimant,[30] who must show by clear and satisfactory evidence,[31] or, if claimant is the wife of the execution defendant, beyond a reasonable doubt,[32] that the property belongs to him and is not subject to sale on execution,[33] at least where the execution defendant had possession of the property levied on at the time of the levy.[34]

In still other jurisdictions, if the property levied on was taken from the possession of claimant or his agent, the burden of proof is on the execution plaintiff;[35] but if it is taken from the possession of the execution defendant or any other person than claimant, the burden of proof is on such claimant,[36] and the fact that the judgment creditor is permitted to open and close does not shift the burden;[37] and where it is uncertain whether claimant or the execution defendant was in possession, the court should direct which party shall assume the burden of proof.[38]

In still other jurisdictions, the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side,[39]

30. U.S.—Gross & P. Mfg. Co. v. Gerhard, C.C.Pa., 11 F.Cas.No.5,843, 8 Rep. 136, 7 Wkly.N.C. 51, 25 Int. Rev.Rec. 280, 27 Pittsb.Leg.J. 36.
Cal.—Kyne v. Kyne, 106 P.2d 620, 16 Cal.2d 436, prior opinion, App., 98 P.2d 738—Grant v. Segawa, 112 P. 2d 784, 44 Cal.App.2d Supp. 945.
Fla.—Sarasota County v. Weeks, 130 So. 599, 100 Fla. 1064—Cameron & Barkley Co. v. Law-Engle Co., 124 So. 814, 98 Fla. 920—Price v. Sanchez, 8 Fla. 136.
Ill.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403—Munson v. Commercial State Bank of Windsor, 246 Ill.App. 368.
La.—Picou v. Rousseau, App., 150 So. 67.
Mo.—Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543.
N.C.—Everett v. Carolina Mortg. Co., 1 S.E.2d 109, 214 N.C. 778.
Pa.—Gallagher v. Davis, 36 A. 319, 179 Pa. 504—Bloomingdale v. Vietor, 23 A. 547, 147 Pa. 371—Tremont Coal Co. v. Manly, 60 Pa. 384—Greene v. Keach, 164 A. 109, 107 Pa.Super. 546—Bricker v. Doyle, 64 Pa.Super. 474—Smith v. Axe, 14 Pa.Co. 532—Mitchell v. Jobes, 11 Pa.Co. 160—Northampton County National Bank v. Hay, 5 Pa.Co. 232—Blum v. Warner, 1 Leg.Rec. 113.
Philippine.—Amancio v. Pardo, 20 Philippine 313.
Burden of proof on third party claim in foreclosure of chattel mortgage by issuance of execution see Chattel Mortgages § 428 notes 63–71.

After issuance, and before levy, of execution

When a party purchases personal property of a judgment debtor after an execution has been issued and put into the hands of the sheriff against such property, but before levy, it would seem that the onus is on the purchaser to show himself to be a purchaser in good faith.—Williams v. Shelly, 37 N.Y. 375, 4 Transcr.A. 314.

31. Pa.—Greene v. Keach, 164 A. 109, 107 Pa.Super. 546.

32. Pa.—Jenkins v. Courtright, 39 Pa.Super. 232.

33. Ill.—Munson v. Commercial State Bank of Windsor, 246 Ill. App. 368.

Proof of possession insufficient

On the trial of a feigned issue under the sheriff's interpleader act, the burden is on claimant to prove title to the property and it is not sufficient to show mere possession of the property.—Bloomingdale v. Vietor, 23 A. 547, 147 Pa. 371—Petruzzi v. Black Diamond Wholesale Grocery Co., Pa., 34 Luz.L.Reg. 383.

34. Fla.—Charles Ringling Co. v. Muirheid, 133 So. 108, 101 Fla. 1215.
Md.—Guyer v. Snyder, 104 A. 116, 133 Md. 19.
Pa.—Hunter Const. Co. v. Lyons, 82 A. 761, 233 Pa. 561—Welch v. Kline, 57 Pa. 428.

Property in possession of husband and wife

(1) Wife who claims title to property which, when levied on by husband's execution creditors, was found in possession of both husband and wife, has the burden of proof.—Gillespie v. Miller, 37 Pa. 247.

(2) Earlier case see 23 C.J. p 598 note 45 [c] (3).

Delivery of possession

Where it appears that personal property which is the subject of a sheriff's interpleader had belonged to defendant in execution, and it is found by the sheriff in his apparently continuing and uninterrupted possession and use, the burden is on a person claiming through him to prove by sufficient evidence at least the constructive delivery of it.—Doll v. Crooks, 20 Pa.Dist. & Co. 168.

35. Tex.—Panhandle Nat. Bank v. Foster, 12 S.W. 223, 74 Tex. 514—King v. Sapp, 2 S.W. 573, 66 Tex. 519—Miller v. Sturm, 36 Tex. 291—Noble v. Long, Civ.App., 298 S. W. 618—Marrett v. Herrington, Civ. App., 145 S.W. 254—Courtney Shoe Co. v. Polley, Civ.App., 95 S.W. 7—Producers' Marble Co. v. Bergen, Civ.App., 31 S.W. 89.

Testimony of execution debtor

Where the execution debtor testifies that the property belongs to claimant, the burden of proof is on the execution plaintiff.—Steed v. Wren, Tex. Civ.App., 194 S.W. 963.

36. Tex.—Panhandle Nat. Bank v. Foster, 12 S.W. 223, 74 Tex. 514—Miller v. Sturm, 36 Tex. 291—Latham v. Selkirk, 11 Tex. 314—Moore-De Grazier Co. v. Hawley, Civ.App., 230 S.W. 1069—Horn v. Price, Civ. App., 200 S.W. 590—Love v. Hudson, 59 S.W. 1127, 24 Tex.Civ.App. 377—Cullers v. Gray, Civ.App., 57 S.W. 305.

In action by temporary administrator to try the right of property to goods levied on under an execution against him personally, while the goods were in his possession, and before his qualification as temporary administrator, the burden is on plaintiff to prove title in the estate.—Pinkard v. Willis, 57 S.W. 891, 24 Tex.Civ.App. 69.

37. Tex.—Horn v. Price, Civ.App., 200 S.W. 590.

38. Tex.—Miller v. Sturm, 36 Tex. 291.

Property in possession of husband and wife

Where property in the possession of husband and wife is levied on under an execution against the husband, and the wife claims title thereto, the decision of the court placing the burden of proof on the wife is proper.—McDuffie v. Greenway, 24 Tex. 625.

39. Ky.—Borches v. Bellis, 62 S.W. 486, 110 Ky. 620, 23 Ky.L. 37.

Where property prima facie subject to seizure

Where the officer seizes property as that of the execution defendant, which is prima facie subject to seizure, the burden of proof is on claimant.—Stone v. Hudson, 9 Ky.Op. 857.

Early case

In an early case it was held that, where the jury called on the motion of claimant of property seized under execution fail to render a verdict as to the right of the property, claimant necessarily fails to establish his right, and under the statute the officer must sell the property.—Mitchell v. Vance, 5 T.B.Mon., Ky., 528, 17 Am.D. 96.

which question the court must decide.[40] Where the execution plaintiff has the burden of proof and shows that the execution defendant had possession of the property at the time of the levy, he makes out a prima facie case and the burden of proof shifts to claimant.[41]

In still other jurisdictions the burden of proof, in the first instance, is on the execution plaintiff,[42] who must show that the property levied on is that of the execution defendant,[43] and is liable to the satisfaction of the writ or process,[44] provided, under the express provisions of some statutes, the property levied on is, at the time of such levy, not in the possession of defendant in execution.[45] Under such proviso the burden of proof is on the execution plaintiff where claimant or his agent was in possession at the time of the levy,[46] or where the entry of levy shows that the execution defendant was not in possession at that time,[47] or where the entry of levy,[48] or the evidence,[49] fails to show that, at the time of the levy, the property was in the possession of the execution defendant, or where it does not appear who was in possession;[50] but if it appears that the execution defendant was in possession of the property at the time of the levy,[51] as where the entry of levy recites that fact,[52] or where claimant admits it,[53] the burden of proof is on claimant and not on the execution plaintiff.

Where he has the burden of proof, the execution plaintiff may make out his case by proving title in the execution defendant,[54] or possession since the date of the judgment.[55] He need make only a prima facie case;[56] and where he does this,[57] as where the evidence shows title in the execution defendant prior to the judgment or execution,[58] after judgment,[59] before levy,[60] or at the time of levy,[61] or possession of the property by the execution defendant at the time of,[62] or after,[63] or according

40. Ky.—Borches v. Bellis, 62 S.W. 486, 110 Ky. 620, 23 Ky.L. 37.

41. Ky.—Borches v. Bellis, supra.

42. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Ga.—Sealy v. Beeland, 189 S.E. 524, 183 Ga. 709—Miller v. Clermont Banking Co., 179 S.E. 718, 180 Ga. 556—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367—Grant v. Sosebee, 159 S.E. 672, 173 Ga. 98—Jarrard v. Mobley, 154 S.E. 251, 170 Ga. 847—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750—Newsome Lumber Co. v. H. N. Ramsey Motor Co., 136 S.E. 166, 36 Ga. App. 194—Cain v. Robinson, 123 S. E. 914, 32 Ga.App. 476.
Miss.—Reid v. Halpin, 188 So. 310—Butler v. Lee, 54 Miss. 476—Atwood v. Meredith, 37 Miss. 635—Ross v. Garey, 8 Miss. 47.

Effect of rule

The burden of proof being on plaintiff in the execution, if no title is made to appear in defendant in the execution, plaintiff's case is defeated equally as well as if a paramount title were established in claimant.—Thornhill v. Gilmer, 12 Miss. 153.

43. Ala.—Cochran v. Garrard & Son, 43 So. 721, 150 Ala. 579.
23 C.J. p 597 note 42.

44. Ala.—Jackson v. Wilson, 78 So. 883, 201 Ala. 529.
23 C.J. p 597 note 43.

45. Ga.—Rountree & Co. v. Gaulden, 51 S.E. 346, 123 Ga. 449—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163—Deloach v. Myrick, 6 Ga. 410—Bull v. Johnson, 12 S.E.2d 96, 63 Ga.App. 750.

46. Ga.—Whitley v. Foster, 63 S.E. 698, 132 Ga. 32—Southern Min. Co. v. Brown, 33 S.E. 73, 107 Ga. 264.

47. Ga.—Whitley v. Foster, 63 S.E. 698, 132 Ga. 32.

48. Ga.—Woods v. Vann, 172 S.E. 686, 48 Ga.App. 393—Singer Sewing Mach. Co. v. Sloan, 132 S.E. 105, 35 Ga.App. 128—Watson v. Sudderth, 123 S.E. 143, 32 Ga.App. 383.

49. Ga.—Woods v. Vann, 172 S.E. 686, 48 Ga.App. 393.

50. Ga.—Singer Sewing Mach. Co. v. Crawford, 131 S.E. 103, 34 Ga. App. 719.

51. Ga.—Deloach v. Myrick, 6 Ga. 410—O'Neal v. First Nat. Bank, 71 S.E. 807, 9 Ga.App. 496.

52. Ga.—Veal v. Veal, 15 S.E.2d 725—Sealy v. Beeland, 189 S.E. 524, 183 Ga. 709—Thompson v. Vanderbilt, 142 S.E. 665, 166 Ga. 132—Head v. Holcombe, 123 S.E. 107, 158 Ga. 94—Nolley v. Elliott, 178 S.E. 309, 50 Ga.App. 382—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 45 Ga.App. 855.

53. Ga.—Sealy v. Beeland, 189 S.E. 524, 183 Ga. 709—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163—Securities Inv. Co. v. Johnson, 8 S.E.2d 794, 62 Ga.App. 695—Strickland v. Smith, 87 S.E. 718, 17 Ga.App. 505.
23 C.J. p 598 note 45 [b].

54. Ga.—Allen v. Clare, 71 S.E. 896, 136 Ga. 550—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163—Bull v. Johnson, 12 S.E. 2d 96, 63 Ga.App. 750.

55. Ga.—Allen v. Clare, 71 S.E. 896, 136 Ga. 550—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163—Bull v. Johnson, 12 S.E. 2d 96, 63 Ga.App. 750.

56. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559.
Ga.—Deloach v. Myrick, 6 Ga. 410.

57. Ala.—Brashear v. Williams, 10 Ala. 630.
Ga.—Tippins v. Lane, 191 S.E. 134, 184 Ga. 331—Grant v. Sosebee, 159 S.E. 672, 173 Ga. 98—Hirsch v. Beverly, 54 S.E. 678, 125 Ga. 657—Kimbrel v. Grow, 147 S.E. 915, 39 Ga.App. 594.
23 C.J. p 598 note 44.

58. Ga.—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653—Tippins v. Lane, 191 S.E. 134, 184 Ga. 331—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163.

Prima facie case shown

Plaintiff relying on judgment foreclosing loan deed carries burden of proof by showing affirmatively that defendant was vested with title at or before time plaintiff acquired his loan deed.—Moore v. Prudential Ins. Co. of America, 168 S.E. 48, 176 Ga. 489.

Conveyance subject to judgment and execution

Where it appears that claimant obtained title to the property levied on by conveyance subsequent to the judgment and recording of the execution, he has the burden of showing title superior to the lien of the execution, that is, that the property is not subject.—Goodwin v. Bowen, 191 S.E. 691, 184 Ga. 408.

59. Ga.—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653.

60. Ga.—State Banking Co. v. Miller, supra.

61. Ga.—State Banking Co. v. Miller, supra.

62. Ga.—Martin v. Cowan, 68 S.E. 69, 134 Ga. 477—Deloach v. Myrick, 6 Ga. 410—Kimbrel v. Grow, 147 S. E. 915, 39 Ga.App. 594.

63. Ga.—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367—Spraggins v. Brooks, 115 S.E. 495, 154 Ga.

to some authority before,[64] the rendition of the judgment, or at the time of the levy,[65] the burden shifts to claimant to show title in himself. However, where the evidence leaves it uncertain whether claimant or defendant was in possession, the burden of proof is not shifted but remains with plaintiff.[66]

Claimant has the burden of proving that he had title to the property claimed on the date of the filing of his claim;[67] and where he relies for title on an alleged purchase from the execution defendant the burden of proof is on such claimant.[68]

Necessity to prove judgment, execution, and levy. In some jurisdictions where claimant admits a prima facie case in the execution plaintiff and assumes the burden of proof, it is not necessary for the execution plaintiff to introduce in evidence the judgment, the fieri facias or the levy, or any evidence whatever, until such prima facie case is overcome by claimant's evidence.[69] In such case claimant must adduce evidence which so clearly overcomes the prima facie case as to require the court to set aside a verdict finding in favor of plaintiff.[70] In other jurisdictions the execution plaintiff must introduce the execution in evidence and has the burden of showing its validity;[71] but if it is not challenged the presumption is that it was valid.[72] He need not, however, except in some jurisdictions,[73] prove the judgment on which his execution is based.[74] In some jurisdictions the execution plaintiff must introduce in evidence, as a prerequisite to recovery, the officer's return;[75] in others the levy need not be proved, as that is admitted by the claim for the property.[76] Where the

822—Martin v. Cowan, 68 S.E. 69, 134 Ga. 477—Rountree & Co. v. Gaulden, 51 S.E. 346, 123 Ga. 449—S. T. Coleman & Burden Co. v. Rice, 31 S.E. 424, 105 Ga. 163—Deloach v. Myrick, 6 Ga. 410—Kimbrel v. Grow, 147 S.E. 915, 39 Ga. App. 594—Kelly v. Cates, 138 S. E. 280, 36 Ga.App. 763.

64. Ga.—Sealy v. Beeland, 189 S. E. 524, 183 Ga. 709.

Short time before

Evidence that defendant in execution was in possession of the property levied on down to a short time before the term of the court at which the judgment was obtained is sufficient to cast the onus on claimant to show his title.—Morgan v. Sims & Nance, 26 Ga. 283.

65. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559—City Holding Co. v. Hosch, 124 So. 291, 220 Ala. 113—Bennett v. McKee, 38 So. 129, 144 Ala. 601—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala. App. 320.

Ga.—Sealy v. Beeland, 189 S.E. 524, 183 Ga. 709—Thompson v. Vanderbilt, 142 S.E. 665, 166 Ga. 132—Spraggins v. Brooks, 115 S.E. 495, 154 Ga. 822—Stephens v. Southern Cotton Oil Co., 94 S.E. 245, 147 Ga. 410—Martin v. Cowan, 68 S.E. 69, 134 Ga. 477—N. Seligman & Co. v. Daniels, 7 S.E.2d 207, 61 Ga.App. 643—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 45 Ga.App. 855—Kimbrel v. Grow, 147 S.E. 915, 39 Ga.App. 594—Howell v. Booth, 145 S.E. 910, 39 Ga.App. 41—Jones Motor Co. v. W. R. Finch Motor Co., 129 S.E. 915, 34 Ga.App. 399—Greene v. Matthews, 120 S.E. 434, 31 Ga.App. 265—Andrews v. Sims, 108 S.E. 258, 27 Ga.App. 338—Lanier v. Holt, 89 S.E. 182, 18 Ga.App. 185.

23 C.J. p 598 note 45.

Evidence insufficient to shift burden of proof

Introduction in evidence by plaintiff in fieri facias of execution with entry of levy, which entry recites that defendant in fieri facias died in possession of property levied on, is not evidence of fact that defendant in fieri facias died in possession of the property and will not relieve plaintiff in fieri facias of the onus probandi, and the admission of the execution and entry will not cast the burden on claimant.—Page v. Jones, 198 S.E. 63, 186 Ga. 485.

66. Ga.—Dean v. American Harrow Co., 37 S.E. 176, 112 Ga. 155.

67. Ga.—Commercial Credit Co. of Georgia v. Jones Motor Co., 167 S.E. 768, 46 Ga.App. 464.

Burden of proof not sustained

Claimant's burden to prove he had title on date he filed claim was not sustained by proof of title on date of levy.—Commercial Credit Co. of Georgia v. Jones Motor Co., supra.

68. Ga.—Tompkins v. American Land Co., 103 S.E. 190, 25 Ga.App. 326.
Ky.—Borches v. Bellis, 62 S.W. 486, 110 Ky. 620, 23 Ky.L. 37.

Reason for rule

This defense necessarily admits title in execution defendant, and the presumption is in favor of the continuance of the title in him until the contrary is shown.—Borches v. Bellis, supra.

69. Ga.—Manley v. McKenzie, 57 S. E. 705, 128 Ga. 347—Strickland v. Smith, 87 S.E. 718, 17 Ga.App. 505.
Admissibility of execution see infra § 185 b.

Execution

(1) Where claimant admits that disputed property was in possession of defendant in fieri facias at time of levy, and assumes burden of proof, plaintiff need not put fieri facias in evidence.—Morehead v. Holland Bros., 165 S.E. 926, 45 Ga.App. 708.

(2) Plaintiff in execution need not introduce execution in evidence in claim case, execution, entry, and claim forming pleadings.—Bacon v. Hinesville Bank, 144 S.E. 125, 38 Ga.App. 422.

(3) In claim proceedings, execution with entry of levy is part of papers before court, even if not formally introduced.—Nelson v. J. L. Brannon & Co., 123 S.E. 735, 32 Ga.App. 455.

70. Ga.—Strickland v. Smith, 87 S. E. 718, 17 Ga.App. 505.
23 C.J. p 598 note 47.

71. Ala.—Brightman v. Meriwether, 25 So. 994, 121 Ala. 602.
Miss.—Beeson-Moore Motor Co. v. Catlett, 91 So. 564, 128 Miss. 865—Ross v. Garey, 8 Miss. 47.
Tex.—Latham v. Selkirk, 11 Tex. 314.
Right of claimant to attack judgment for execution see supra § 173.

72. Tex.—Latham v. Selkirk, supra.

73. Miss.—Beeson-Moore Motor Co. v. Catlett, 91 So. 564, 128 Miss. 865—Blalack v. Stevens, 33 So. 508, 81 Miss. 711.

74. Ala.—Huff v. Cox, 2 Ala. 310.
Ga.—Deloach v. Myrick, 6 Ga. 410.
Wash.—Schloss v. Stringer, 194 P. 577, 113 Wash. 529.
23 C.J. p 599 note 61.

In absence of attack

It is not necessary for the sheriff and the execution creditors affirmatively to establish the integrity of the judgment on which the execution was based, unless attacked by the adverse claimant.—Schloss v. Stringer, supra.

75. Miss.—Beeson-Moore Motor Co. v. Catlett, 91 So. 564, 128 Miss. 865.

76. Tex.—Latham v. Selkirk, 11 Tex. 314.

levy is sought to be asserted against a vendee or creditor of the execution defendant, the various acts essential to a valid levy must be proved with greater strictness than when the interests of the execution defendant are in question.[77]

Presumptions. Possession of the property levied on at the time of the levy by the execution defendant[78] or claimant[79] is prima facie evidence of ownership of the property by such person and raises a presumption of title in him. So a recital in the entry of the levying officer that the property levied on was in the possession of the execution defendant at the time of the levy or other evidence establishing that fact raises a presumption of the execution debtor's ownership of the property.[80]

b. Admissibility

In general, unless some other issue is involved, only competent evidence relevant to the issue of the ownership of the property at the time of the levy is admissible. Deeds or other instruments indicating ownership of the property involved, including tax papers and matters relating thereto, and evidence as to claimant's purchase of the property, the consideration paid and the source from which it was obtained, are admissible, as are also the execution and return and proof of the satisfaction of the debt due the execution defendant. Evidence as to the financial condition of the parties is sometimes admissible, and also evidence showing fraud or mala fides in the transfer of the property.

Where no other issue is involved, evidence is admissible only when it has a tendency to throw light on the ownership of the property at the time of the levy.[81] Such competent evidence as is relevant to this issue is admissible;[82] and evidence which is incompetent or irrelevant should be excluded.[83] A deed is admissible,[84] provided it is

77. Wash.—Monks & Miller v. Fein, 215 P. 525, 125 Wash. 230.

78. Ala.—Bennett v. McKee, 38 So. 129, 144 Ala. 601—Sandlin v. Anderson, 76 Ala. 403.
Fla.—Charles Ringling Co. v. Muirheid, 133 So. 108, 101 Fla. 1215.

79. Pa.—Kriele v. Pearson, 1 Pa.Co. 152.
Tex.—Moore-De Grazier Co. v. Hawley, Civ.App., 230 S.W. 1069.

Possession acquired by claimant's bond
Possession of claimant acquired only by filing claimant's bond and affidavit does not carry the presumption of right thereto in favor of claimant.—Moore-De Grazier Co. v. Hawley, supra.

80. Ga.—Sealy v. Beeland, 189 S.E. 524, 183 Ga. 709—Burt v. Rubley, 39 S.E. 409, 113 Ga. 1144—Holt v. Daniel, 170 S.E. 383, 47 Ga.App. 334.

Presumption not rebutted
Mere fact that corn crop found in husband's possession at time of levy was raised on wife's land was held insufficient to rebut presumption of husband's ownership.—Lane v. Happ Bros. Co., 162 S.E. 519, 44 Ga.App. 577.

Presumption held rebutted
(1) By uncontradicted evidence of claimant that the property levied on belonged to him.—Nolley v. Elliott, 178 S.E. 309, 50 Ga.App. 382.

(2) By uncontradicted evidence that property levied on belonged to claimant, defendant's wife, notwithstanding defendant returned such property for taxation in his own name.—Holt v. Daniel, 170 S.E. 383, 47 Ga.App. 334.

81. Pa.—Whitney v. Moore, 77 Pa. 479.
23 C.J. p 599 note 62.

82. Ga.—Home Mixture Guano Co. v. McKoone, 147 S.E. 711, 168 Ga. 317.
23 C.J. p 599 note 63.

Evidence held admissible
(1) Testimony as to agreement giving judgment debtor land as advancement in full of share of estate is not objectionable as irrelevant and immaterial in proceeding to subject estate to judgment.—Home Mixture Guano Co. v. McKoone, supra.

(2) In claim proceedings involving land, claimant's testimony that claimant's mother authorized judgment debtor, claimant's brother, to convey his expected share of mother's land to claimant, and that claimant gave consideration therefor was properly admitted.—J. C. & W. C. Holman Mule Co. v. Bullard, 166 S. E. 825, 175 Ga. 900.

(3) Admission of crop mortgage given by husband was not reversible error in proceedings had on wife's claim to farm property levied on under judgment against husband.—Lanier v. Bank of Portal, 160 S.E. 550, 43 Ga.App. 828.

(4) In trial of right to property levied in the hands of a warehouse association, evidence of the purchaser of cotton tickets that he had notified the warehouse company of his purchase was admissible.—Rodgers v. Murray, Tex.Civ.App., 247 S.W. 888.

On reconventional demand against intervener for damages
Evidence of intervener's ownership of property, seized to satisfy judgment for one filing reconventional demand against intervener for damages, was admissible, although intervener had dismissed suit to enjoin sale of property.—Hersh v. Steinau, La.App., 140 So. 163.

83. Ga.—Gill v. Willingham, 120 S. E. 108, 156 Ga. 728.
23 C.J. p 599 note 64.

Evidence held inadmissible
(1) Where the wife of the execution defendant claimed the merchandise levied on under a deed from him, evidence as to the amount of her stock of merchandise at the time of the trial is inadmissible, she having testified that she did not know how much stock she carried at the date of said deed, the evidence thus sought to be elicited being immaterial and irrelevant to the issue on trial.—Gill v. Willingham, supra.

(2) Where issue existed as to validity of levy on automobile, as against subsequent chattel mortgagee chargeable with notice of levy and that automobile had been left with execution defendant, evidence of previous mortgage held by mortgagee on another automobile of execution defendant was properly excluded.—Wallerbeck v. Haaven, 250 N.W. 565, 189 Minn. 604.

Former statement of execution defendant
Evidence, that defendant in fieri facias stated land belonged to him three years before crops grown on land were levied on, was irrelevant.—Jenkins v. Best Trading Co., 146 S.E. 512, 39 Ga.App. 214.

84. Ga.—Taylor v. Hartsfield, 68 S. E. 70, 134 Ga. 478.

Of minors
Where land was deeded long before plaintiff in fieri facias obtained judgment against grantors, and grantee deeded to P as trustee for E and her children, and subsequently P, E, and children executed deed to claimant, claimant's deed was admissible in evidence, it being sufficient to resist levy under fieri facias, even though it was not shown that children of E were not of age at time of its execution.—Wright v. Durden, 123 S.E. 701, 158 Ga. 244.

connected with the land in dispute[85] and the grantor had title,[86] but not as bearing on the question of the ownership of personalty.[87] Bills of sale,[88] or other written instruments showing the sale of the personalty involved,[89] a chattel mortgage thereon,[90] burglary and other insurance covering the goods,[91] and a lease of the premises containing the same,[92] or testimony as to the terms of an agreement under which the property was delivered to the execution defendant for a trial period,[93] are admissible. Where a wife claims property levied on under an execution issued against her husband, record evidence of a judgment in her favor against her husband and of the purchase of the property by the wife on an execution sale is admissible.[94] On the question whether property was originally purchased by the husband or wife, a mortgage given by the husband to secure the price is admissible.[95] Claimant who failed to take an assignment of a mortgage on the property claimed on payment of the debt secured thereby cannot introduce it in evidence.[96]

Claimant may show that he purchased and paid for the land in question.[97] He may show the consideration for the alleged sale to him,[98] and the source from which the money was obtained to pay for the property,[99] as well as the history of the transaction by which title was acquired,[1] and the motive in purchasing the property.[2] However, recitals of consideration in the deed from the execution defendant to claimant do not constitute competent evidence of the fact so recited as against the execution plaintiff who was not a party to the deed and did not claim any right under it.[3] Evidence that the execution creditor did not know, when furnishing the goods for which the judgment was rendered, that claimant was asserting any title to the property levied on, is not admissible,[4] nor is evidence that he extended credit on the faith of the possession and claim of ownership of the debtor,[5] unless claimant authorized or acquiesced in the possession and representations as to ownership.[6]

Evidence as to the ownership of property other than that levied on[7] or mentioned in the claim filed with the officer[8] is not admissible.

Judgment, execution, and return. The execution and return are admissible in evidence against claim-

Of remainder interest

Deed conveying remainder interest to claimant held properly admitted. —J. C. & W. C. Holman Mule Co. v. Bullard, 166 S.E. 825, 175 Ga. 900.

Quitclaim deed

(1) Quitclaim deed to defendant in fieri facias, recorded on same day as levy, was held properly admitted. —Deal v. Anderson, 141 S.E. 51, 165 Ga. 416.

(2) Quitclaim deed in execution proceedings was held not inadmissible because recorded more than ten years after sale to claimant, and claimant was held not party to proceedings.—Deal v. Anderson, supra.

Cancellation

Decree canceling quitclaim deed from defendant in fieri facias to original grantor was held not inadmissible because defendant was not party to cancellation proceedings.—Deal v. Anderson, supra.

85. Ga.—Wright v. Stafford, 58 S. E. 452, 128 Ga. 721.

Deed held sufficiently to identify property

Deed from defendant in fieri facias to his daughter sufficiently identified the property as land levied on as property of defendant, as regards question of fraudulent conveyance. —Glenn v. Tankersley, 200 S.E. 709, 187 Ga. 129.

86. Ga.—Taylor v. Hartsfield, 68 S. E. 70, 134 Ga. 478.

87. N.J.—Kaufhold v. Roth, 64 A. 1057, 74 N.J.Law 61.

88. Pa.—Newburger v. Central Trust & Savings Co., 66 Pa.Super. 507.

To secure loan

Bill of sale to property involved, given claimant by defendants in execution to secure loan, is admissible, notwithstanding claimant did not prove that loan was not paid.—Macon Shoe Co. v. Equitable Loan Co., 169 S.E. 377, 46 Ga.App. 841.

89. Ill.—Ewell v. Giamanco, 139 So. 515, 19 La.App. 672.

90. Ill.—Ewell v. Giamanco, supra.

91. Pa.—Newburger v. Central Trust & Savings Co., 66 Pa.Super. 507.

92. Pa.—Newburger v. Central Trust & Savings Co., supra.

93. La.—Ewell v. Giamanco, 139 So. 515, 19 La.App. 672.

94. Pa.—Henderson v. Barnes, 75 Pa.Super. 183.

Identical property

Where the property purchased was the stock of a going business, it was not necessary to show that the levy made under the second execution was on the identical property sold to the wife under the first execution. If the goods levied on were the result of her carrying on said business, or where manufactured or purchased with the proceeds of sale of the property sold to her by the sheriff, or from other funds furnished by her, they were her property and not subject to execution for her husband's debts, and the record evidence offered by her was the first step in the necessary proof and support of her title.—Henderson v. Barnes, supra.

95. Ga.—Long v. Putnam Oil & Fertilizer Works, 63 S.E. 700, 132 Ga. 66.

96. Ala.—Hammond v. White, 108 So. 347, 214 Ala. 431.

97. Ga.—Harris v. Anderson, 99 S. E. 530, 149 Ga. 168.

98. Ala.—Craddock v. Walden, 63 So. 534, 148 Ala. 58.

Ga.—Kelly v. William Sharp Saddlery Co., 27 S.E. 741, 99 Ga. 393.

99. Ala.—Jones v. Chenault, 27 So. 515, 124 Ala. 610, 82 Am.S.R. 211.

1. Ga.—Tuttle v. Cheeves, 16 S.E. 955, 90 Ga. 653.
23 C.J. p 600 note 82.

2. Ga.—Powell v. Watts, 72 Ga. 770.

3. Ga.—Beam v. Rome Hardware Co., 191 S.E. 126, 184 Ga. 272.

4. Ala.—Baker v. Drake, 41 So. 645, 148 Ala. 513.

5. Ga.—Mizell Live Stock Co. v. Smith, 81 S.E. 904, 14 Ga.App. 593.

6. Ga.—Taylor v. Brown, 77 S.E. 1062, 139 Ga. 797.
23 C.J. p 600 note 86.

7. Ga.—Brand v. Bagwell, 66 S.E. 935, 133 Ga. 750.
Pa.—Thomas v. Butler, 24 Pa.Super. 305.

8. N.J.—Kaufhold v. Roth, 64 A. 1057, 74 N.J.Law 61.

ant;[9] but an execution which fails to follow the judgment either as to the parties or in amount is properly excluded;[10] and if the execution introduced in evidence is for any reason void there can be no legal verdict in favor of plaintiff in execution.[11] Where an execution has been read in evidence, the sheriff may be permitted to testify that he levied on the property by virtue of the execution.[12] A prior execution issued against the property is admissible where the levy is accounted for and its dismissal explained,[13] and testimony explaining the levy under such prior execution, the dismissal thereof, and the relevy, is admissible.[14] Prior levies may be proved without introducing the executions.[15] In some jurisdictions the record of plaintiff's judgment against defendant in execution is irrelevant and inadmissible;[16] in others it is admissible.[17]

Payment of debt. In a claim case claimant may prove that the execution debtor has paid off and satisfied the debt due the execution creditor, where claimant purchased the property from the execution debtor while the judgment was a lien thereon.[18]

Indebtedness. Evidence is sometimes admissible to show the indebtedness of the execution defendant to claimant.[19] Some courts hold that evidence is admissible to show the indebtedness of defendant in execution to plaintiff in execution.[20] Other courts, however, hold inadmissible evidence as to the transactions by which the indebtedness merged in the judgment was created.[21] At any rate the indebtedness of defendant in execution to plaintiff in execution cannot be shown by papers made out and executed after claimant's purchase and after plaintiff had obtained judgment.[22]

Financial condition of party. The financial condition of the debtor is admissible in evidence, where it tends to show his relationship to the property as against claimant.[23] Also evidence tending to show the financial worth of claimant and her ability to advance money to the execution defendant is admissible.[24]

Title in third person. As appears supra § 172, claimant must recover on the strength of his own title, and he cannot show to support his claim a title paramount to that of defendant in execution in a third person, a stranger to the proceeding.

Value of property. As plaintiff in execution, if successful on the trial of the right of property, is entitled to a return of the specific thing which was delivered to claimant, or its assessed value, it is allowable for him to offer evidence to the jury to show its value at the time of trial.[25] However,

9. Ga.—Rice v. Warren, 17 S.E. 1032, 91 Ga. 759.
23 C.J. p 600 note 89.

10. Ga.—Bank of Tupelo v. Collier, 14 S.E.2d 59, 191 Ga. 852—Williams v. Atwood, 52 Ga. 585.

11. Ga.—Blackstock v. Blackman, 108 S.E. 775, 152 Ga. 179—Collins v. Hill, 41 S.E. 678, 115 Ga. 465—Autry, House & Co. v. Smith, 125 S.E. 384, 33 Ga.App. 47.
Necessity of proving execution on shifting of burden of proof see supra § 185 a.

Judgment void except as to execution defendant
In claim case, admitting fieri facias issued on judgment void except as to defendant in execution was error.—Penn Mut. Life Ins. Co. v. Troup, 170 S.E. 359, 177 Ga. 456.

12. Ill.—Johnson v. Sommers, 3 Ill. App. 55.

13. Ga.—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358.

14. Ga.—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358.

15. Ala.—Yarborough v. Moss, 9 Ala. 382.

16. Ala.—Snodgrass v. Decatur Branch Bank, 25 Ala. 161, 60 Am. D. 505.
23 C.J. p 600 note 94.

17. Pa.—Martin v. Rutt, 17 A. 993, 127 Pa. 380.

18. Tex.—England v. Brinson, 1 Tex.A.Civ.Cas. § 320.

19. Ala.—Floyd v. Morrow, 26 Ala. 353.

20. Ala.—Snodgrass v. Decatur Branch Bank, 25 Ala. 161, 60 Am. D. 505.
23 C.J. p 599 note 76.

21. Ga.—Denton Bros. v. Hannah, 77 S.E. 672, 12 Ga.App. 494.
Tex.—Stephens v. Johnson, Civ.App., 45 S.W. 328.
However, it has been held that notes on which plaintiff in execution's judgment was procured are admissible over objections that they contained irrelevant provisions relating to bankruptcy proceedings, and that assignment therein of defendant in execution's homestead and exemption could not convey any title to homestead because it was not shown that defendant in execution was then entitled to homestead and exemption, and that claim was based on bill of sale from defendant in execution, who was claimant's husband, and not on homestead.—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358.

22. Ga.—Barber v. Terrell, 54 Ga. 146.

23. N.Y.—Gates v. Bowers, 58 N.Y.S. 287.
23 C.J. p 600 note 97.

24. Ga.—Gill v. Willingham, 120 S.E. 108, 156 Ga. 728.

Checks
(1) Checks drawn by claimant payable to her husband, the execution defendant, and others are held admissible to show the financial worth of claimant and her ability to advance money to her husband.—Gill v. Willingham, supra.

(2) Checks in favor of claimant by her father, drawn and paid several years before, are admissible to show the ability of claimant to advance money to her husband, the execution defendant, and to pay for the premises in dispute.—Gill v. Willingham, supra.

25. Ala.—Thomas v. De Graffenreid, 27 Ala. 651.
23 C.J. p 600 note 1.

Appraisement
Where a third person claiming goods taken on execution has acquiesced in the valuation by the appraisers, and has given the bond required by the statute in double the amount of that valuation, he cannot subsequently object to the admission of the appraisement in evidence in proceedings to determine their ownership because of irregu-

evidence as to the value of the land levied on but not included in the claim is not admissible;[26] nor is evidence admissible as to the value of land not levied on and located in another county.[27]

Acts, declarations, and admissions in general. As plaintiff in execution succeeds only to the rights of defendant, any act, declaration, or admission of claimant, which would be admissible evidence for or against himself in a suit between him and the execution defendant, is also admissible on the trial of the claim suit;[28] and declarations or admissions made by the person from whom defendant in execution traces title, and which as a whole tend to show title to the property in him, are admissible in favor of plaintiff in execution.[29] Declarations and admissions by defendant in execution, made in the absence of claimant, as a general rule are inadmissible.[30] However, the declarations of defendant in execution, in whose possession the property levied on was found, when made before, or at the time of the levy, are competent evidence to show the nature and character of his possession.[31] Also, his declarations or admissions are admissible to show the character of the transfer by him to claimant, where the deed is attacked for fraud or want of consideration, if made before the pendency of the litigation, or the existence of the claim sought to be enforced against him.[32] Generally the declaration of the person in whose possession the property was found, made at the time of the levy, that he received it from defendant is admissible evidence against claimant.[33] However, declarations of defendant in execution while in possession of the property are admissible on the theory that they constitute a part of the res gestæ; where made at such a time that they do not constitute part of the res gestæ, they are not admissible.[34] A statement made by the officer after the levy, not shown to be part of the res gestæ, is hearsay and inadmissible.[35]

Tax papers and matters relating thereto. Tax receipts held by claimant have been held admissible,[36] together with evidence by the execution creditor attacking the receipts,[37] but tax bills showing an assessment for taxes are not admissible in favor of claimant where it does not appear that the property claimed is the property assessed.[38] Tax books have been held admissible against claimant to show that he gave in no property for taxation,[39] and to show that he had no means to purchase the property in dispute.[40] Tax fieri facias or an appraisement is not admissible against claimant where it is not shown that he had any connection therewith.[41] A return of property for taxes by claimant is admissible as a circumstance indicating ownership, but it raises no presumption of title.[42] An assessor's certificate that defendant in the execution was not assessed for any property in the township is not admissible.[43]

Possession. Testimony of the sheriff as to who was in possession when the land was levied on is admissible.[44] A recital in an entry of levy as to who was in possession at the date of the levy is admissible in evidence thereof,[45] as is also a forthcoming bond executed by the execution defendant and under which he retained the property in dispute.[46] The character of the possession of the execution debtor is admissible where he claims a prescriptive title.[47]

Fraud or mala fides. Where the transfer to claimant is attacked for fraud or mala fides, any material evidence tending to show or rebut the fraud or mala fides is admissible.[48] Thus evidence

larity therein.—Patterson v. Brett, 189 A. 756, 125 Pa.Super. 147—Lowry v. Letzelter, 45 Pa.Super. 143.

26. Ga.—Williamson v. Harry L. Winter, Inc., 120 S.E. 602, 156 Ga. 779.

27. Ga.—Sutton v. Blalock, 81 S.E. 854, 141 Ga. 622.

28. Ala.—Allen v. Smith, 22 Ala. 416.

29. Ga.—Elwell v. New England Mortg. Security Co., 28 S.E. 833, 101 Ga. 496.

30. Ala.—Craddock v. Walden, 63 So. 534, 184 Ala. 58.

31. Ala.—Gayle v. Bancroft, 22 Ala. 316.

32. Ga.—Hayes v. Hill, 31 S.E. 166, 105 Ga. 299—Pearson v. Forsyth, 61 Ga. 537.

33. Ala.—Derrett v. Alexander, 25 Ala. 265.

34. Ala.—Craddock v. Walden, 63 So. 534, 148 Ala. 58.
Ga.—Tillman v. Fontaine, 27 S.E. 149, 98 Ga. 672.

35. Tex.—Goldberg v. Bussey, Civ. App., 47 S.W. 49.

36. Pa.—Goldsmith v. Arch Bldg. & Loan Ass'n, 90 A. 543, 244 Pa. 149.

37. Pa.—Goldsmith v. Arch Bldg. & Loan Ass'n, supra.

38. N.J.—Kaufhold v. Roth, 64 A. 1057, 74 N.J.Law 61.

39. Ga.—Tillman v. Fontaine, 27 S. E. 149, 98 Ga. 672—McLendon v. Dunlap Hardware Co., 59 S.E. 718, 3 Ga.App. 206.

40. Ga.—Tillman v. Fontaine, 27 S. E. 149, 98 Ga. 672.

41. Ga.—White v. Interstate Bldg. & Loan Ass'n, 32 S.E. 26, 106 Ga. 146.

42. Ga.—McLendon v. Dunlap Hardware Co., 59 S.E. 718, 3 Ga.App. 206.

43. N.J.—Kaufhold v. Roth, 64 A. 1057, 74 N.J.Law 61.

44. Ga.—Jarrard v. Mobley, 154 S. E. 251, 170 Ga. 847.

45. Ga.—Burt v. Rubley, 39 S.E. 409, 113 Ga. 1144.

46. Ala.—Sandlin v. Anderson, 76 Ala. 403.

47. Ga.—Rountree v. Gaulden, 51 S. E. 346, 123 Ga. 449.
23 C.J. p 601 note 23.

48. Ga.—Strobel v. Gormley, 178 S. E. 192, 50 Ga.App. 358.
23 C.J. p 601 note 24.

as to the financial condition of the parties is admissible,[49] as is also evidence showing design of the judgment debtor and claimant to arrange the purchase of the property so as to defeat the judgment creditor.[50] However, the execution creditor must show a valid judgment and execution issued thereon before he can attack the transfer to claimant for fraud.[51] Evidence is sometimes admissible to show fraud or mala fides in the acquisition of the property by defendant in execution from claimant.[52]

c. Weight and Sufficiency

The general rules applicable as to the weight and sufficiency of evidence control.

Under the general rules as to the weight and sufficiency of evidence in civil actions generally, considered in Evidence §§ 1016-1050, the evidence has been held sufficient[53] or the evidence has been

Evidence held admissible

(1) Where plaintiff in execution sought to set aside as fraudulent deed from defendant in execution to his wife, testimony of defendant in execution identifying petition in bankruptcy as his own and other documents in connection with bankruptcy proceedings had more than nine years after execution of deed was admissible.—Miller v. Clermont Banking Co., 179 S.E. 718, 180 Ga 556.

(2) Where claim was interposed on ground that lien of judgment had been discharged by possession of property subject to lien for four years by a bona fide purchaser for value, claimant's application for a loan, made fifteen days after conveyance of property to her from her sister in which claimant stated that there were two outstanding judgments against her, was admissible as supporting contention of holder of execution that claimant was not a bona fide purchaser for value.—Calhoun v. Williamson, 5 S.E.2d 41, 189 Ga. 65.

(3) Evidence with respect to transfer of truck to corporation by debtor being in fraud of creditors is admissible where debtor had transferred other property with truck in exchange for capital stock and debt on truck which was assumed by corporation was insignificant when compared to value of all property transferred.—Home Finance Service v. Linam, La.App., 174 So. 389.

49. Ga.—Kirkman v. Ashford, 89 S. E. 411, 145 Ga. 452.
23 C.J. p 601 note 25.

50. Ala.—Bain v. Dalrymple, 114 So. 673, 22 Ala.App. 265.

51. Ill.—Calumet Paper Co. v. Knight & Leonard Co., 43 Ill.App. 566.

52. Ga.—Chisolm v. Chittenden, 45 Ga. 213.
23 C.J. p 599 note 73.

53. Ga.—Vann v. Youngblood, 191 S.E. 100, 184 Ga. 281—Betton v. Avery, 188 S.E. 901, 183 Ga. 559—Boone v. Rabun, 188 S.E. 524, 183 Ga. 318—Anderson v. Merchants' & Miners' State Bank, 129 S.E. 650, 161 Ga. 12—People's Bank v. Armour Fertilizer Works, 123 S.E. 864, 158 Ga. 568—Head v. Holcombe, 123 S.E. 107, 158 Ga. 94—Piedmont Realty Co. v. Bostwick, 16 S.E.2d 496, 65 Ga.App. 770—Nipper v. Minix, 176 S.E. 890, 50 Ga.App. 51—Alford v. Sharber, 154 S.E. 463, 41 Ga.App. 707—Watkins v. Jones, 146 S.E. 351, 39 Ga.App. 211—Johnson v. Citizens' First Nat. Bank, 142 S.E. 467, 38 Ga.App. 52—Jarriel v. Savannah Guano Co., 128 S.E. 237, 34 Ga.App. 72—Cain v. Robinson, 123 S.E. 914, 32 Ga. App. 476.
La.—People's Bank v. First Nat. Bank, 125 So. 763, 12 La.App. 273.
Mo.—Hull v. Whittenburg Canning Co., App., 36 S.W.2d 643.
N.J.—Glaser v. B. V. D. Sales Corporation, 170 A. 49, 112 N.J.Law 179.
Okl.—Phillips v. Mitchell, 207 P. 559, 86 Okl. 243.
Wash.—Rankin v. Graham, 216 P. 21, 125 Wash. 345.
23 C.J. p 602 note 27.

Particular cases

(1) Evidence of husband's purchasing mule levied on, operation of farm, and declaration of ownership, sustained verdict for plaintiff against claim of wife.—Bacon v. Hinesville Bank, 144 S.E. 125, 38 Ga.App. 422.

(2) Evidence that common grantor conveyed to plaintiff in fieri facias prior to claimant and that plaintiff's quitclaim deed to grantor was annulled before claimant paid purchase price authorized verdict finding property levied on subject.—Deal v. Anderson, 141 S.E. 51, 165 Ga. 416.

(3) Property claimed by father was properly found subject to execution against son, under evidence showing deed to father when son was insolvent, not recorded until judgment against son.—Johnson v. Tifton Buick Co., 149 S.E. 73, 40 Ga. App. 158.

(4) Evidence was held to authorize enforcement of execution against one to whom defendant in fieri facias had transferred property, reserving a life estate, notwithstanding property was left entirely in possession and control of transferee.—First Nat. Bank v. Geiger, 7 S.E.2d 756, 61 Ga.App. 865.

(5) Finding that restaurant business was owned by judgment debtor rather than third party claimant was held justified.—Longo v. Leo Feist, Inc., C.C.A.La., 58 F.2d 767.

(6) Where corporation organized by debtor claimed funds in bank levied on under execution, evidence showing that corporation was a family affair and that funds of debtor and corporation were intermingled and that debtor's personal obligations were paid by corporation and debtor's private funds deposited in corporation's bank account warranted conclusion that funds were property of judgment debtor and authorized judgment denying third-party claim.—Goldberg v. Engelberg, 92 P.2d 935, 34 Cal.App.2d 10.

(7) Evidence held insufficient to show that execution plaintiff, the divorced wife of the execution defendant, had notice of conditional sales contract under which the property involved was sold by claimant to her husband.—C. I. T. Corporation v. Stephens, 174 So. 493, 234 Ala. 303.

(8) Earlier cases see 23 C.J. p 602 note 27 [a].

Evidence sufficient for prima facie case

(1) Evidence showing that property levied on was in possession and control of judgment debtor.—Ballard v. Baker, 148 So. 835, 227 Ala. 143.

(2) Evidence of execution, with entry of levy showing that defendant in execution was in possession of property at date of levy.—Veal v. Veal, Ga., 15 S.E.2d 725—Nolley v. Elliott, 178 S.E. 309, 50 Ga.App. 382—Pritchett v. Bagby, 169 S.E. 211, 46 Ga.App. 772.

(3) Evidence of execution and levy.—Grant v. Sosebee, 159 S.E. 672, 173 Ga. 98.

(4) Evidence that crops were grown on land rented by defendant and produced by defendant's labor.—Kimbrel v. Grow, 147 S.E. 915, 39 Ga.App. 594.

(5) Evidence showing execution plaintiff's prior possession, sale to defendant, with retention of title, and execution on judgment for unpaid purchase money, claimant introducing no evidence of title.—Terrell v. Gould, 148 S.E. 515, 168 Ga. 607.

held or determined to be insufficient[54] to warrant a verdict for the execution plaintiff, or sufficient[55] or, according to the decisions on the ques-

(6) Claimant's introduction of evidence that his only claim of title was under testator of defendant in execution established prima facie case for plaintiff in execution.—Hardin v. Pie, 176 S.E. 14, 179 Ga. 446.

(7) Prima facie case for plaintiffs in fieri facias was held not rebutted by plaintiffs' inability to question tax sale at which claimant purchased property.—Thompson v. Vanderbilt, 142 S.E. 665, 166 Ga. 132.

Verdict for claimant not required

(1) Where claimant has the burden of proof and the only evidence tending to establish title to the property is the parol testimony of claimant that execution defendant is indebted to claimant and executed to him a bill of sale to the property.—Wilson v. Voche, 172 S.E. 672, 48 Ga.App. 173.

(2) Evidence of husband's possession of land levied on and conveyance to wife not paying for land did not demand verdict for wife claiming land.—James v. Hudson, 152 S.E. 829, 170 Ga. 321.

(3) Where claimant claimed as purchaser from defendant in execution's testator, evidence was held not to demand finding that all purchase money had been paid.—Hardin v. Pie, 176 S.E. 14, 179 Ga. 446.

(4) Inference of defendant's ownership of crops levied on was held not conclusively rebutted by wife's claim that husband acted as her agent and that she paid for raising crops.—Kimbrel v. Grow, 147 S.E. 915, 39 Ga.App. 594.

(5) That claimant bought property from defendant in fieri facias was held not conclusively to establish title superior to fieri facias lien, where claimant knew at time of purchase that there was a fieri facias against defendant, which evidence did not conclusively show was other than fieri facias levied on property.—Morehead v. Holland Bros., 165 S.E. 926, 45 Ga.App. 708.

(6) Where property was found in execution defendant's possession, mere showing that it was purchased by claimant more than five years before the levy does not require verdict for him.—Baxter v. Hinesville Bank, 167 S.E. 117, 46 Ga.App. 152.

Fraud

Registration of automobile furnished by employee's manager for use of defendant employee, in latter's name, was held not badge of fraud.—Cornelia Bank v. Taylor, 140 S.E. 901, 37 Ga.App. 538.

54. Ga.—Dixon v. Martin-Saunders Co., 117 S.E. 96, 30 Ga.App. 46.
23 C.J. p 602 note 28.

Particular cases

(1) Evidence that defendant in execution bought wagon for claimant with claimant's money was held insufficient to authorize finding wagon subject to execution.—Woods v. Vann, 172 S.E. 686, 48 Ga.App. 393.

(2) Earlier cases see 23 C.J. p 602 note 28 [a].

55. Ga.—Chattahoochee Fertilizer Co. v. Quinn, 151 S.E. 496, 169 Ga. 801—First Nat. Bank v. Roberson, 184 S.E. 887, 53 Ga.App. 142—Nolley v. Elliott, 178 S.E. 309, 50 Ga. App. 382—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 45 Ga.App. 855—Jenkins v. Best Trading Co., 146 S.E. 512, 39 Ga.App. 214—Citizens' Bank of Moultrie v. Moultrie Banking Co., 140 S.E. 895, 37 Ga. App. 548.
Ill.—Stadler v. Holmes, 19 N.E.2d 225, 298 Ill.App. 631.
La.—Hardee v. Beard, App., 152 So. 359.
Mo.—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.
Pa.—Becker v. Stern, 176 A. 771, 116 Pa.Super. 399—Greene v. Keach, 164 A. 109, 107 Pa.Super. 546.
23 C.J. p 602 note 29.

Need not prove absolute ownership

Claimant of property seized under execution need only prove ownership and right of possession superior to judgment debtor.—Kuhn v. Lewis, 279 P. 597, 153 Wash. 457.

Particular cases

(1) Evidence showing that wife of execution defendant purchased automobile from claimant rebutted evidence of defendant's possession, and authorized finding for claimant.—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala.App. 282, certiorari denied 115 So. 223, 217 Ala. 225.

(2) Evidence that interest of defendant in fieri facias was that of seller under contract retaining title to property levied on and other property as security for purchase money, but not disclosing what portion of debt had been paid or what portion of debt had reference to property levied on, authorized judgment for claimant, the conditional buyer.—D. A. Schulte, Inc., v. Varron, 184 S.E. 356, 52 Ga.App. 683, conforming to answers 182 S.E. 912, 181 Ga. 542.

(3) Claimants' uncontradicted testimony that defendant in execution had agreed that they could have part of property seized in consideration of their services entitled claimants to recovery.—Pritchett v. Bagby, 169 S.E. 211, 46 Ga.App. 772.

(4) Evidence that claimant of property was a minor, and had been given permission by his father to make for himself crops levied on, and had produced crop jointly with another on land owned by his mother, was held to establish claimant's title to at least fractional part of crops levied on.—H. B. Ehrlich & Co. v. King, 131 S.E. 524, 34 Ga.App. 737.

(5) Evidence that judgment debtor's sister rented farm to debtor's son, that she furnished money for purchase of stock and machinery, that debtor who later moved on farm had no personal property of any particular value, that son did practically all the farm work and bought the machinery used and the seed which was planted, was sufficient to show title in claimant, notwithstanding father for purpose of procuring a government loan had once represented that he was sole owner of grain and hay levied on and that debtor received the checks when grain was sold.—Farnham v. Swartwout, 16 N.E.2d 540, 296 Ill.App. 649.

(6) In proceeding on claim of property, comprising bank deposits, levied on under execution, evidence showing definitely that there were beneficial owners entitled to the deposits, which were held in name of judgment debtor as agent and as trustee, although indefinite as to their identity, was held to authorize recovery by debtor claiming deposits as trustee and agent.—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 558, affirmed Joyce v. Moran, 23 A.2d 396, 127 N.J.Law 562.

(7) Where, on the trial of a sheriff's interpleader to determine title to property, there is testimony that claimant bought the property at a sheriff's sale and the crier of the sale testifies to this effect, claimant's right to go to the jury is not defeated by the testimony of the prothonotary that there was no record of such a sale. There may have been a public sale, although the witnesses may have been mistaken in stating that it was a sheriff's sale.—Schweitzer v. Williams, 43 Pa.Super. 202.

(8) Conclusion that third party claimant owned lease and certain personalty, but was letting judgment debtor use them in restaurant business, result being that business income and property purchased therewith was judgment debtor's, was held justified.—Longo v. Leo Feist, Inc., C.C.A.La., 58 F.2d 767.

(9) Earlier cases see 23 C.J. p 602 note 29 [a].

Contradictory testimony

Where testimony of execution defendant, claimant's only witness, was contradictory as to the time when claimant bought the property, whether before or after the obtaining of the judgment by the execution plaintiff, the jury's finding that the sale

tion, insufficient[56] to warrant a verdict for claimant. Such general rules apply as well to the determination of who was in possession of the property levied on,[57] and its value.[58] Where the undisputed evidence shows the title to the property in question to be in claimant, he is entitled to judgment,[59] and a verdict in favor of the execution plaintiff is unauthorized,[60] and this, even though the witnesses who testified were closely related to claimant.[61] Also a verdict in favor of the execution plaintiff is unauthorized where the uncontradicted evidence conclusively rebuts the prima facie case made by claimant's admission that the execution defendant was in possession of the property levied on at the time of the levy.[62] If evidence that a portion of the property levied on was the property of claimant is undisputed, a verdict finding all the property subject to the fieri facias is unauthorized.[63] So the uncontradicted testimony of claimant that the property levied on had been

took place before the judgment was returned was authorized.—N. Seligman & Co. v. Daniels, 7 S.E.2d 207, 61 Ga.App. 643.

Delay in presenting claim

Third opponent's delay in suing out injunction until just before sale of property under execution was held not alone to establish that his claim of ownership was fraudulently interposed to defeat plaintiff's claim. —Iberville Land & Securities Co. v. Hurdle, La.App., 151 So. 254.

56. Cal.—Hayhurst v. Moorvartian, 60 P.2d 884, 16 Cal.App.2d 490.
Ga.—Durham v. Armstrong, 181 S.E. 665, 181 Ga. 137—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367.
Ill.—Fisher v. Bollman, 258 Ill.App. 461.
Iowa.—Borrusch v. Martin, 221 N.W. 789.
La.—Parsons v. Coxe, 96 So. 823, 153 La. 957.
Pa.—Petruzzi v. Black Diamond Wholesale Grocery Co., 34 Luz.Leg. Reg. 383.
Tex.—Noble v. Long, Civ.App., 298 S.W. 618—Foster v. Spearman Equity Exch., Civ.App., 266 S.W. 583.
23 C.J. p 602 note 30.

Clear evidence of transfer

Parol contract for sale of interest of heir to pay indebtedness to estate, to defeat lien of judgment against selling heir, must be clearly established.—Preston v. Porter Fertilizer Co., 150 S.E. 149, 169 Ga. 288.

Particular cases

(1) Evidence was held not to establish consummated sale of automobile as against judgment creditor seeking to appropriate automobile to satisfaction of judgment under execution.—Charles Ringling Co. v. Muirheid, 133 So. 108, 101 Fla. 1215.

(2) Where claim was interposed on ground that execution had become dormant because of expiration of seven years between entries on execution and their record on execution docket and between dates of any bona fide public effort to enforce execution, evidence was insufficient to establish dormancy of execution where evidence established a bona fide public effort to enforce execution within seven-year period, and execution and entries thereon were not in evidence.—Calhoun v. Williamson, 5 S.E.2d 41, 189 Ga. 65.

(3) Interest of heir orally contracting to sell interest to pay debt to estate was held properly found subject to execution against heir, where contract was not clearly established.—Preston v. Porter Fertilizer Co., 150 S.E. 149, 169 Ga. 288.

(4) Debtor's testimony that corn crop levied on in his possession belonged to wife, where based on other testimony that crop was raised on wife's land, was held insufficient to authorize finding for wife.—Lane v. Happ Bros. Co., 162 S.E. 519, 44 Ga. App. 577.

(5) Where joint claimants under a mortgage by the execution defendant to a partnership failed to show that the property was theirs jointly, by proof of the dissolution of the partnership, and that they were its surviving partners the evidence was insufficient.—Brantley v. Thomas, 70 So. 122, 194 Ala. 646.

Insurance policy

On application for injunction against sale, under writ of fieri facias of contents of building at 852 S. Street, insurance policy taken out in claimant's name and purporting to cover furniture in different building, with rider attached after the seizure stating correct location was 852 S. Street, was neither muniment of title, nor corroborative of title, and not binding on the judgment creditor.—Parsons v. Coxe, 96 So. 823, 153 La. 957.

Waiver of defects in levy

Finding that mortgagee of cattle did not waive right to attack levy thereon by recital, in agreement to place proceeds of cattle with stakeholder pending litigation, that execution had been legally executed was held sustained by evidence and, therefore, conclusive.—Western Nat. Bank of Hereford v. Steele, Tex.Civ. App., 36 S.W.2d 271, error dismissed.

57. Husband or wife

(1) Evidence did not demand finding that wife claiming land was in possession at time of levy against husband.—James v. Hudson, 152 S. E. 829, 170 Ga. 321.

(2) Husband's use of wife's property does not exclude wife, but possession will be referred to title.—Donald v. S. S. Howze Motor Co., 115 So. 221, 22 Ala.App. 282, certiorari denied 115 So. 223, 217 Ala. 225.

58. Pa.—Little v. Fearon, 49 Pa. Super. 634.

Values stated in bill of sale

Where a wife to whom her husband executed a bill of sale of furniture which was subsequently taken on execution on a judgment against her husband becomes claimant of the goods on a sheriff's interpleader, the trial court cannot consider the prices fixed in the bill of sale as sufficient evidence of the value of the goods.—Little v. Fearon, supra.

Effect of prior valuation

On a new trial of the title to property levied on under an execution, the fact that the value of the property as found was much less than that found on the previous trial, and less than that fixed by the sheriff in claimant's bond, is no ground for reversal, the amount found on the former trial being out of the case, and the value fixed by the sheriff in taking claimant's bond not being conclusive.—Ryan v. Teague, 110 S.W. 117, 50 Tex.Civ.App. 153.

59. La.—Cassiere v. Cuban Coffee Mills, App., 175 So. 491.

Prior failure to testify

Uncontradicted testimony that third opponent owned property seized should not be disbelieved merely because on prior provisional seizure third opponent and his witnesses failed to testify that third opponent owned such property, since only issue on provisional seizure was location of property at time of seizure. —Iberville Land & Securities Co. v. Hurdle, La.App., 151 So. 254.

60. Ga.—Vickers v. Calhoun Service Station, 4 S.E 2d 676, 60 Ga.App. 659 —Nolley v Elliott, 178 S.E. 309, 50 Ga.App. 382.

61. La.—Cassiere v. Cuban Coffee Mills, App., 175 So. 491.

62. Ga.—Vickers v. Calhoun Service Station, 4 S.E 2d 676, 60 Ga. App. 659.

63. Ga.—Smith v. Johnson, 80 S.E. 1051, 13 Ga App. 837.
Ill.—Smart v. Coke, 19 Ill.App. 655.

bought by him with his own means, and had never been owned since his purchase by anyone else, is sufficient to entitle him to recover;[64] as is the undisputed testimony of claimant and the execution defendant that the property had been bought for claimant with his money by defendant as his agent.[65] So, too, evidence that claimant was a bona fide purchaser for value from one to whom defendant in execution had, before the date of plaintiff's judgment, on a valuable and adequate consideration, in good faith, conveyed the property in dispute, requires a verdict for claimant.[66] A deraignment of title from a third party makes a prima facie case, but it does not conclude an execution creditor from showing that the title was in fact in the execution debtor at the time of the levy.[67] On the other hand, a judgment by default or confession is not evidence of the justness or existence of a debt in favor of claimant, as against plaintiff in execution;[68] nor can a recovery be had by claimant where the only title shown by him is one acquired after issue joined.[69] Claimant's title must be shown to have existed at the time of the levy.[70] The fact that claimant concealed the property in order to escape the levy is not of itself sufficient to authorize a finding that the property is subject to levy.[71]

Existence of debt. The debt due the execution plaintiff is sufficiently proved by the introduction in evidence of the writ of execution, from which a valid judgment is presumed.[72]

§ 186. Trial

a. In general
b. Province of court and jury
c. Instructions
d. Verdict and findings

a. In General

The conduct of the trial or hearing of a claim case rests largely in the court's discretion, which is to be exercised with a view to the application of the governing statutes to the particular facts. In general, the party having the burden of proof has the right to open and close.

The rule that the conduct of the trial or hearing of a claim case is a matter resting largely in the discretion of the court has been applied to the examination of witnesses,[73] the postponement of the trial,[74] and other matters.[75] The fact that a claim proceeding was not tried at the next succeeding term of court after the affidavit and bond were filed has been held not to preclude a subsequent trial.[76]

A rule on claimant to submit himself to cross-examination, taken before the time allowed for filing his bond, is premature.[77] It is error to render a personal judgment by default against claimant without a writ of inquiry as to the value of the property.[78] Where the statute governing the trial of the right to property provides that there shall be no written pleadings, but does not require defendant to state, at the beginning of the case, what his defense is, such requirement is error.[79] Particular circumstances connected with the award of

64. Ga.—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 251, 45 Ga.App. 855, citing **Corpus Juris.**
23 C.J. p 602 note 34.

65. Ala.—Jones v. Chenault, 27 So. 515, 124 Ala. 610, 82 Am.S.R. 211.
Pa.—Remaley v. Gregg, 64 Pa.Super. 73.

66. Ga.—Walker v. Hughes, 33 S.E. 417, 108 Ga. 768—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 45 Ga.App. 855.

67. Wash.—Lanham v. Longmire, 171 P. 237, 100 Wash. 413.

68. Ala.—Hooper v. Pair, 3 Port. 401, 29 Am.D. 258.
Ga.—Jones v. Empire Furniture Co., 150 S.E. 563, 40 Ga.App. 556.
23 C.J. p 603 note 39.

69. Ga.—Burt v. Rubley, 39 S.E. 409, 113 Ga. 1144.

70. Pa.—Newberger v. Central Trust & Savings Co., 66 Pa.Super. 507.
Time of title as affecting right to institute proceeding see supra § 170.

71. Ga.—Cronan v. Burt, 33 S.E. 56, 107 Ga. 295.

72. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.

73. Miss.—McCaughan v. Picard, 21 So. 796.
23 C.J. p 603 note 45.

74. Ga.—Smith v. Bell, 33 S.E. 684, 107 Ga. 800, 73 Am.S.R. 151.
Continuance to show service
Where claimant has shown, by an exemplification of the record of the suit in which the judgment was obtained under which the execution was levied, that defendant therein had not been served, the court should refuse a continuance to allow plaintiff to show the contrary, since the record can be perfected only in the court rendering the original judgment.—Aycock v. Turner, 52 Ga. 591.
Continuance without showing of good cause
Order continuing, without showing as to good cause, hearing on petition to have title to property determined violated statute but was not in excess of jurisdiction.—Duncan v. Superior Court, City and County of San Francisco, 285 P. 732, 104 Cal.App. 218.

75. **Proceeding with trial of interpleader** was held not abuse of discretion, notwithstanding claimant's objection that rule to open judgment was pending, where claimant was not party to judgment.—Kupres v. Citizens' Nat. Bank, 101 Pa.Super. 351.
In admitting tax returns as evidence in a claim case, it was not error for the court to read, or cause to be read, to the jury the oath prescribed for the taxpayer by statute, such oath being a part of the returns.—McLendon v. Dunlap Hardware Co., 59 S.E. 718, 3 Ga.App. 206.
After submitting his proof to the jury on an issue involving the precedence of an execution or of deeds, without a motion to dismiss or withdraw the levy, plaintiff in fieri facias cannot complain after verdict that the levy should have been dismissed.—Groves v. Williams, 69 Ga. 614.

76. Fla.—State v. Wright, 145 So. 598, 107 Fla. 178.

77. Pa.—Stokes v. McKinney, 34 Wkly.N.C. 128.

78. Miss.—Little v. King, 3 So. 258.

79. Ill.—Osborn v. Albers, 7 N.E.2d 447, 365 Ill. 631, reversing 4 N.E.2d 396, 286 Ill.App. 624.

a judgment for a claimant have been held to show an arbitrary disposal of the proceeding, rather than a trial or judicial determination thereof, so as to require reversal.[80]

In Maryland the claim must be heard on the merits by a jury if either party requires, but, if the parties agree, the court may hear and pass on the merits in a summary way, and neither party can thereafter complain.[81] In Pennsylvania an issue directed under the Interpleader Act is not subject to the provisions of the Compulsory Arbitration Act.[82] Such statute has been interpreted as intending that the value of the goods taken by claimant should be determined in the same proceeding in which the bond is filed by him, and the amount of the surety's liability thus definitely determined.[83]

Determining who has burden of proof; right to open and close. In a claim case, if the possession of the property is not admitted or shown, or is uncertain, the trial court should hear evidence and direct which party shall assume the burden of proof.[84] If defendant in execution was in possession of the property at the date of the levy, the burden in the claim case is on claimant, see supra § 185, and he is entitled to the opening and conclusion of the argument;[85] where the entry of the levy does not show that the execution defendant was in possession, the execution plaintiff, having the burden of proof, is entitled to open and close;[86] but if, where the execution defendant was in possession, claimant fails to assume the burden of proof, plaintiff, on being directed to assume the affirmative, is entitled to open and close;[87] and where, neither by the entry of levy nor the admission of claimant, the possession of the property is shown to be in the execution defendant, and plaintiff, taking the burden of proof, establishes the fact by evidence introduced on the trial, he and not claimant is entitled to the conclusion, unless claimant introduces no evidence.[88] After evidence by plaintiff showing the possession of the property levied on to be in defendant, claimant cannot open and close by admitting the possession of the property in defendant at the time of levy.[89]

b. Province of Court and Jury

All controverted questions of fact in a claim case are for the jury. In a proper case, a verdict may be directed for claimant or the execution creditor.

All controverted questions of fact in a claim case are as a rule to be submitted to the determination of the jury,[90] which determines the weight, credibility, and reasonableness of evidence.[91]

80. N.J.—Craddock-Terry Co. v. Scialabra, 141 A. 596, 7 N.J.Misc. 158.

81. Md.—Frantz v. Lane, 182 A. 337, 169 Md. 703.

82. Pa.—Van Auken v. Buxton, 1 Mon. 399.

83. Pa.—Barlly v. Danzig, 190 A. 188, 126 Pa.Super. 124—Com. to Use of George v. McPhilips, 66 Pa.Super. 223.

Entering nonsuit without trial of issue of amount of recovery on bond was held error, since verdict on such issue was essential to suit on bond, and proceedings were incomplete without trial of such issue—Barlly v. Danzig, 190 A. 188, 126 Pa. Super. 124.

84. Tex.—Continental Oil & Gas Production Co. v. Austin, Civ.App., 17 S.W.2d 1114.

85. Ga.—Lamkin v. Clary, 30 S.E. 596, 103 Ga. 631.
23 C.J. p 603 note 52.

86. Ga.—Miller v. Clermont Banking Co., 179 S.E. 718, 180 Ga. 556.

87. Ga.—James v. Kiser, 65 Ga. 515—Hall v. McLendon, 100 S.E. 726, 24 Ga.App. 292.

88. Ga.—New v. Driver, 15 S.E. 535, 89 Ga. 434—Smith v. Rothschild, 79 S.E. 88, 13 Ga.App. 293.

89. Ga.—Stinson v. Weaver, 97 S.E. 1171, 22 Ga.App. 702.

90. Ala.—Giddy v. Shotts, 108 So. 573, 214 Ala. 627.
Ga.—Butler v. La Grange Banking & Trust Co., 170 S.E. 918, 177 Ga. 714—Capps v. Toccoa Falls Light & Power Co., 167 S.E. 530, 46 Ga.App. 268.
23 C.J. p 603 note 57.
Discretion of court as to awarding issue in sheriff's interpleader see supra § 169.

Title to, and ownership of, property
Ala.—Kelley v. Lovett, 183 So. 855, 236 Ala. 538.
Ga.—Biggers v. Webb, 199 S.E. 756, 58 Ga.App. 684—Smallwood v. Warfield, 174 S.E. 185, 49 Ga.App. 93—Scruggs v. Blackshear Mfg. Co., 166 S.E. 249, 45 Ga.App. 855—Lanier v. Bank of Portal, 160 S.E. 550, 43 Ga.App. 828.
N.J.—Glaser v. B. V. D. Sales Corporation, 170 A. 49, 112 N.J.Law 179.
Pa.—County Nat. Bank of Clearfield v. Farmers Exchange, 98 Pa.Super. 277—Speer v. Zeuger, 83 Pa.Super. 288.
Wash.—Christianson v. Shepherd, 255 P. 942, 143 Wash. 537.
23 C.J. p 603 note 57 [a].

Good faith of transfer of property
Pa.—Becker v. Stern, 176 A. 771, 116 Pa.Super. 399—Sartor v. I.X.L. Permanent Wave Corporation to Use of Costello, 42 Lack.Jur. 131.
23 C.J. p 603 note 57 [b].

Excessiveness of levy
Ga.—Wright v. Pearson, 185 S.E. 336, 182 Ga. 366.

Whether claimant's evidence overcame prima facie case made by plaintiff in fieri facias was held for jury.—Deal v. Anderson, 141 S.E. 51, 165 Ga. 416.

Mixed question of law and fact
(1) Whether claim to property levied on under writ of execution is interposed to delay satisfaction of writ so as to entitle judgment plaintiff to damages, under a statute providing therefor, may be a question of fact or of law or a mixed question of law and fact.—Penney v. Stout, 168 So. 697, 232 Ala. 564.

(2) On the trial of a sheriff's interpleader to determine the ownership of property, where the evidence discloses circumstances out of the ordinary, and complicated, and the controlling question is a mixed one of law and of fact, the case must be resolved by a jury under proper instructions from the court.—Bleakley v. Feldman, 62 Pa.Super. 6.

91. Ga.—Butler v. La Grange Banking & Trust Co., 170 S.E. 918, 177 Ga. 714—Mobley v. Ocmulgee Guano Co., 151 S.E. 535, 40 Ga.App. 782.

The direction of a verdict is proper where there is no material fact in substantial dispute on the evidence,[92] but not where the evidence raises an issue of fact under the pleadings;[93] so in a proper case a verdict may be directed for the execution creditor[94] or claimant.[95] A verdict should be directed for claimant where the court refuses to admit the execution in evidence because it is void,[96] where the evidence in behalf of claimant shows title in him and is undisputed,[97] where he conclusively rebuts the prima facie case of plaintiff in fieri facias,[98] or where he introduces a valid bill of sale to the property levied on, given by defendant in fieri facias and antedating the execution.[99] It is error to direct a verdict for plaintiff in execution, or against claimant, or a verdict finding the property subject to execution, where the execution is not offered in evidence,[1] or where there is evidence showing or tending to show right or title in claimant,[2] or where the evidence leaves the question of possession or ownership in uncertainty,[3] or merely because a deed from defendant in execution to claimant bears a date subsequent to that of the execution.[4] It is error to direct a verdict for claimant where the evidence admits of a reasonable difference of opinion as to the superiority of his claim,[5] or where there is evidence tending to show ownership and possession in defendant in execution.[6]

Nonsuit. Where an action is brought, the court may award a nonsuit in a proper case.[7]

c. Instructions

The instructions in the trial of a claim case must conform to the rules governing instructions in civil cases generally.

On the trial of a claim case, it is error to refuse to give proper instructions submitting the issues raised by evidence to the jury.[8] The instructions must be predicated on some evidence,[9] and must correctly state the law thereon;[10] and an instruc-

92. Ga.—Callaway v. Life Ins. Co. of Virginia, 144 S.E. 381, 166 Ga. 818—Wright v. Durden, 123 S.E. 701, 158 Ga. 244—Reagin v. Adamson, 110 S.E. 232, 152 Ga. 271—Gunnin v. Carter, 131 S.E. 523, 34 Ga.App. 788.
N.J.—Glaser v. District Court of City of Perth Amboy, 170 A. 228, 112 N.J.Law 213—Central Pennsylvania Quarry Stripping & Construction Co. v. Court of Common Pleas of Hudson County, 169 A. 712, 112 N.J.Law 22.
Dismissal of claim or levy instead of direction of verdict see infra § 187.

93. Mo.—Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543.

94. Ga.—Batchelor v. Born, 171 S.E. 724, 177 Ga. 886—Callaway v. Life Ins. Co. of Virginia, 144 S.E. 381, 166 Ga. 818—Greenway v. People's Bank of Soperton, 164 S.E. 91, 45 Ga.App. 192—Gunnin v. Carter, 131 S.E. 523, 34 Ga.App. 788.
Pa.—Patterson v. Brett, 189 A. 756, 125 Pa.Super. 117.
23 C.J. p 604 note 58.

Prima facie case not rebutted, and directed verdict finding property subject was held proper, where there was no evidence explaining defendant's possession at time of levy.—Thompson v. Vanderbilt, 142 S.E. 665, 166 Ga. 132.

Title and possession by execution defendant clearly shown
Ga.—Blanchard, Humber & Co. v. Hagan Gas Engine & Mfg. Co., 106 S.E. 604, 26 Ga.App. 538.

Evidence of disclaimer by claimant
Ga.—Hodgson v. Hart, 142 S.E. 267, 165 Ga. 882.

Claimant asserting title under void tax sale
Ga.—Stowe v. Birmingham Trust & Savings Co., 131 S.E. 44, 161 Ga. 403.

95. Ga.—Lay-Hall Grocery Co. v. Johns, 161 S.E. 354, 173 Ga. 695—Reagin v. Adamson, 110 S.E. 232, 152 Ga. 271—Spencer v. Wright, 172 S.E. 91, 48 Ga.App. 126—Holt v. Daniel, 170 S.E. 383, 47 Ga.App. 334.
Pa.—General Motors Acceptance Corporation v. Hartman, 174 A. 795, 114 Pa.Super. 544.
23 C.J. p 604 note 59.

Failure to show personal possession of goods by judgment debtor at time of levy.—Crane Co. v. Royer, 144 A. 115, 7 N.J.Misc. 49.

96. Ala.—Marks v. Wood, 31 So. 978, 133 Ala. 533.
Dismissal of levy see infra § 187.

97. Ga.—Burt v. Kuhnen, 39 S.E. 414, 113 Ga. 1143—Holt v. Daniel, 170 S.E. 383, 47 Ga.App. 334.

98. Ga.—Cornelia Bank v. Taylor, 140 S.E. 901, 37 Ga.App. 538.

Prima facie case by sheriff's return
Where claimant's title to, and interest in, property levied on under fieri facias were shown without conflict, prima facie case made for plaintiff in fieri facias by sheriff's return, reciting possession by defendants in fieri facias did not create such conflict in evidence as required submitting issue of possession to jury.—Wright v. Durden, 123 S.E. 701, 158 Ga. 244.

99. Ga.—Macon Shoe Co. v. Equitable Loan Co., 169 S.E. 377, 46 Ga. App. 841.

1. Ga.—Collins v. Hill, 41 S.E. 678, 115 Ga. 485.
23 C.J. p 604 note 62.

2. Ga.—Butler v. La Grange Banking & Trust Co., 170 S.E. 918, 177 Ga. 714.
N.J.—Glaser v. District Court of City of Perth Amboy, 170 A. 228, 112 N.J.Law 213.
Pa.—Speer v. Zeuger, 83 Pa.Super. 288.
23 C.J. p 604 note 63.

3. Ga.—Callaway v. Life Ins. Co. of Virginia, 144 S.E. 381, 166 Ga. 818—Martin v. Cowan, 68 S.E. 69, 134 Ga. 477.

4. Ga.—Allen v. Clare, 71 S.E. 896, 136 Ga. 550.

5. Fla.—Cameron & Barkley Co. v. Law-Engle Co., 124 So. 814, 98 Fla. 920.

6. N.J.—Central Pennsylvania Quarry Stripping & Construction Co. v. Court of Common Pleas of Hudson County, 169 A. 712, 112 N.J.Law 22.
23 C.J. p 604 note 66.

Prima facie showing
Ga.—Shaner Motor Co. v. Williams, 138 S.E. 274, 36 Ga.App. 766.

7. N.Y.—Parker Mills v. Jacot, 21 N.Y.Super. 161.
23 C.J. p 604 note 69.

8. Pa.—Wickham v. Berwick Store Co., 47 Pa.Super. 176.
23 C.J. p 604 note 71.

9. Ga.—Spraggins v. Brooks, 115 S.E. 495, 154 Ga. 822—Johnson v. Tifton Buick Co., 149 S.E. 73, 40 Ga.App. 158.
23 C.J. p 605 note 73.

10. Ga.—Pitts v. Cox, 145 S.E. 61, 167 Ga. 228—Nesmith v. Nesmith, 142 S.E. 176, 37 Ga.App. 779.

tion which is misleading[11] or prejudicial to either party,[12] or which in any manner invades the province of the jury by withdrawing from their consideration any question of fact,[13] is erroneous, as is an instruction which incorrectly states the issues,[14] or is not pertinent thereto,[15] or which improperly restricts the jury in the determination of the issues.[16] It is proper for the court to instruct the jury as to the effect of proof of possession in the execution defendant.[17]

Where fraud is alleged, the instructions should be accompanied by a statement of the facts necessary to constitute fraud in law,[18] and it is proper to direct the jury's attention to peculiar circumstances which, if unexplained, tend to show fraud.[19]

d. Verdict and Findings

Verdict and findings in claim cases must conform to rules governing verdicts and findings in civil actions generally, such as the requirement of certainty, and to the special requirements of applicable statutes, such as those requiring assessment of the value of the property.

In order to support a judgment, the verdict in a claim case must be certain[20] and responsive to the issue or issues[21] and to the evidence;[22] the verdict is sufficient in point of certainty where it is as certain as the issue submitted to it for trial.[23]

A general verdict "for the plaintiffs" has been held sufficient,[24] and it is mere surplusage to state the amount for which claimant and his sureties are bound.[25] So, a verdict finding the property to belong to the execution creditor, although it should have stated the ownership to be that of the execution debtor, while informal, is sufficient.[26] Under statutes governing sheriff's interpleader, the only permissible verdicts have been said to be a verdict generally for claimant if he establishes his prop-

Pa.—Patterson v. Brett, 189 A. 756, 125 Pa.Super. 117.
23 C.J. p 605 note 74.

Prima facie case for plaintiff
Charge that evidence by execution plaintiff of execution and levy showing possession of property in execution defendant at time of levy made prima facie case for plaintiff was not error.—Hancock v. Green-Miller Co., 132 S.E. 136, 35 Ga.App. 81.

Charge as to court's favoring rights of creditors held "abstractly correct," as a direct quotation from a statute, as against the criticism that it "was prejudicial to the claimant."—Johnson v. Tifton Buick Co., 149 S.E. 73, 75, 40 Ga.App. 158.

Charge as to effect of stipulations in deed under which claimant claimed held not error.—Head v. Holcombe, 123 S.E. 107, 158 Ga. 94.

11. Ala.—Bickley v. Porter, 69 So. 565, 193 Ala. 607.
23 C.J. p 605 note 75.

Charge as to damages against claimant for interposing his claim for delay only held not confusing to the jury.—Nesmith v. Nesmith, 142 S.E. 176, 37 Ga.App. 779.

12. Ala.—Nelson v. Warren, 6 So. 413, 93 Ala. 408.
23 C.J. p 605 note 76.

Charging the law as to fraudulent conveyances held erroneous and prejudicial to claimant, where no issue as to any fraudulent conveyance was presented.—Thompson v. Swain, 139 S.E. 580, 37 Ga.App. 237.

Charge as to damages against claimant for interposing his claim for delay only held not prejudicial to claimant.—Nesmith v. Nesmith, 142 S.E. 176, 37 Ga.App. 779.

13. Miss.—Gilliam v. Moore, 21 Miss. 130.
Pa.—Saba v. McElwaine, 57 Pa.Super. 369.

14. Ga.—Pitts v. Cox, 145 S.E. 61, 167 Ga. 228.

Charge as to good faith of transfer held a fair statement of the issue involved.—Becker v. Stern, 176 A. 771, 116 Pa.Super. 399.

15. Ga.—Home Mixture Guano Co. v. McKoone, 147 S.E. 711, 168 Ga. 317—Thompson v. Swain, 139 S.E. 580, 37 Ga.App. 237.

Failure to charge on secret equities
Where claimant relied on deeds from her husband allegedly supported by consideration, failure to charge on secret equities of claimant in property conveyed by husband was held not error, the doctrine of secret equities not being involved in the case.—Stanton v. Adams, 178 S.E. 154, 180 Ga. 142.

16. Ga.—First State Bank v. Carver, 36 S.E. 960, 111 Ga. 876.
23 C.J. p 605 note 72.

17. Ala.—Ross v. Lawson, 16 So. 890, 105 Ala. 351.

Instruction held erroneous
Instruction that, if jury found that claimant, after making deed to defendant in fieri facias, put defendant in possession, it would be their duty to return verdict finding property subject to execution was error.—Pitts v. Cox, 145 S.E. 61, 167 Ga. 228.

18. Ga.—Smith v. Wellborn, 75 Ga. 799.
Ill.—Holly v. Augustine, 2 Ill.App. 108.

19. Ala.—Jones v. Stewart, 19 Ala. 701.

20. Pa.—Boginski v. Tobolski, 21 Pa.Co. 531.
23 C.J. p 605 note 81.

Verdict held not void for uncertainty
Ga.—Perkins v. Farmers' Bank of Doerun, 120 S.E. 528, 156 Ga. 841—Jones v. Empire Furniture Co., 150 S.E. 563, 40 Ga.App. 556.

21. Mo.—Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543.
23 C.J. p 606 note 82.

Issue as to whether property is subject; money verdict
"In the trial of a statutory claim case, the sole issue is whether the property is subject or not subject to the fi. fa. The verdict in such a case . . . cannot stand, unless it is so phrased as to determine this issue with definiteness. A verdict in favor of the plaintiff against the claimant for a given sum of money, without more, not only fails to determine the sole issue in the case, but deals with issues not involved therein. Such a verdict is a nullity on the face of the record."—Moseley v. Binford, 121 S.E. 127, 31 Ga.App. 513.

Theory of claim; plea on which verdict rendered
Statutory rule that, if several pleas are filed by defendant, verdict for defendant shall show on which of pleas verdict is rendered has no application to claim case, although claimant may introduce evidence to sustain claim on several theories.—Wells v. Blitch, 192 S.E. 209, 184 Ga. 616.

22. Ga.—McLaughlin v. Ham, 11 S.E. 889, 84 Ga. 786.
23 C.J. p 606 note 83.

23. Ga.—Jones v. Cleveland, 62 Ga. 237.

24. Tex.—Willer v. Kray, 11 S.W. 540, 73 Tex. 533.
23 C.J. p 606 note 85.

25. Tex.—Willer v. Kray, supra.

26. Mo.—Schroeder v. Clark, 18 Mo. 184.

erty claim, and a verdict for the execution creditor for a definite amount if he fails to establish it.[27]

By statute, the jury may bring in a verdict as to part of the property only, without mentioning the rest.[28] A verdict that part of the property is liable to the execution is equivalent to finding the residue not liable;[29] but, where the verdict contains findings that a part of the property is subject to the execution and that another part is not subject, its silence as to the remainder is simply a lack of finding and that part of the issue remains to be tried.[30]

No finding as to the amount due on the execution is necessary.[31] A finding in favor of claimant is sufficient without a further finding against the execution creditor;[32] and a verdict finding in favor of claimant the title to the property in question is to be construed as including a finding that the property is not subject to levy and sale under the fieri facias.[33] Findings may be in such conflict with one another as to preclude the rendition of any judgment in the case, in the absence of a motion for a judgment non obstante veredicto.[34]

Assessing value of property. Where the verdict is against claimant, it is necessary in some states for it to assess the value of the property,[35] although it has been held that the jury need not find the value of the property where its value was not expressly put in issue.[36] When so required, the verdict must, if practicable, assess the value of each article separately.[37] The statutes must be reasonably construed.[38]

In New York a sheriff's jury finding that the property belongs to claimant must determine its value and the damages above its value which he will sustain if the levy is not released.[39]

Setting aside verdict. The verdict of a jury impaneled by the sheriff to try the validity of a claim by a third person to property levied on is not such a judicial determination as may be reviewed, in the absence of an express statutory provision authorizing a review, since it is not conclusive of the ownership of the property, and therefore a motion will not lie to set aside such verdict.[40] A court's order entered on a verdict becomes final on the adjournment of the term and cannot be set aside at a subsequent term on a motion to set aside the verdict.[41]

§ 187. Judgment and Enforcement Thereof

The judgment in statutory proceedings to establish a claim by a third person must conform to the applicable statutory provisions. Such provisions have been applied to various matters of form and substance in judgments for and against claimants, including default judgments.

The judgment in a claim case should be in accordance with statutory provisions regulating its form,[42] although a mere clerical misprision may be amended on motion.[43] The judgment must conform to the pleadings,[44] and may determine equitable rights of the parties where supported by proper pleadings.[45] It need not determine the priorities of

27. Pa.—Patterson v. Brett, 189 A. 756, 125 Pa.Super. 117.

If claimant has suffered special damages by reason of the levy, a money verdict may be rendered against the execution creditor.—Babis v. New York Extract Co., 181 A. 846, 120 Pa.Super. 73.

Dismissal of interpleader as mistrial

Where claimant to goods levied on wherein sheriff entered a rule for an interpleader issue failed to establish his title to goods, direction of court that interpleader be dismissed was without legal warrant and constituted a mistrial.—Patterson v. Brett, 189 A. 756, 125 Pa.Super. 117.

28. Miss.—Gilliam v. Moore, 21 Miss. 130.

29. Ala.—Lewis v. Lewis, Minor 95.

30. Ga.—Pritchett v. Samuel Weichselbaum Co., 46 S.E. 99, 119 Ga. 293.

31. Ga.—Lamar v. Coleman, 14 S.E. 608, 88 Ga. 417.

32. Md.—Albert v. Freas, 64 A. 282, 103 Md. 583.

33. Ga.—F. S. Royster Guano Co. v. Odum, 146 S.E. 475, 167 Ga. 655.

34. Tex.—Head v. W. T. Rawleigh Co., Civ.App., 152 S.W.2d 463, error dismissed.

35. Ala.—Brightman v. Meriwether, 25 So. 994, 121 Ala. 602.
23 C.J. p 606 note 93.

36. Tex.—Latham v. Selkirk, 11 Tex. 314.
23 C.J. p 606 note 94.

37. Ala.—Tait v. Murphy, 2 So. 317, 80 Ala. 440.
23 C.J. p 606 note 95.

38. Miss.—Kibble v. Butler, 22 Miss. 207.

39. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.
Sheriff's jury generally see supra § 169.

40. N.Y.—Cohen v. Climax Cycle Co., 46 N.Y.S. 4, 19 App.Div. 158.
23 C.J. p 606 note 97.

41. Va.—Sauls v. Thomas Andrews & Co., 175 S.E. 760, 163 Va. 407.

42. N.Y.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.
Tex.—Hinzie v. Ward, 1 Tex.A.Civ. Cas. § 1314.

43. Ala.—Craddock v. Walden, 63 So. 534, 148 Ala. 58.
23 C.J. p 606 note 1.

44. Ga.—Austin v. Southern Home Bldg. & Loan Ass'n, 50 S.E. 382, 122 Ga. 439.

Alternative relief improper

Where petition of intervention in fieri facias proceeding was based solely on theory that intervener delivered merchandise seized under writ to plaintiff's judgment debtor on consignment and remained owner thereof, but evidence showed without contradiction that intervener sold and delivered merchandise to such debtor, and petition contained no alternative prayer for vendor's lien and privilege, judgment for intervener, maintaining such lien and privilege and ordering constable to pay proceeds of sale of merchandise to intervener, was erroneous.—Faber v. Gondrella, La.App., 4 So.2d 245.

45. Ga.—Bradwell v. Bainbridge Bank, 29 S.E. 756, 103 Ga. 242.
23 C.J. p 607 note 3.

liens, although it is stipulated that the court is to fix the legal rights of all the parties.[46]

Where want of jurisdiction appears on the face of the record, the proceedings should be dismissed.[47] Where the evidence introduced by claimant fails to rebut plaintiff's prima facie case, the dismissal of the claim, instead of letting the case proceed to verdict subjecting the property, is proper.[48] Where the statute so provides, if the execution creditor fails to make out a prima facie case, and claimant introduces no evidence, the court should either dismiss the levy or the case rather than direct a verdict for claimant,[49] and where there is no evidence to show possession or title of the execution debtor the court may dismiss the levy,[50] as it may where the fieri facias is refused in evidence for an irregularity therein;[51] and where no evidence is introduced by the parties, and the levy is dismissed on technical grounds, a judgment awarding the fund to claimant is error.[52]

A judgment entered on the verdict of a jury has been held to become final on adjournment of the term during which it was entered.[53]

A judgment in favor of the claimant should be so framed as to affect only his rights as against plaintiff in execution, so that it is error for the court to dismiss a levy where it appears that a part only of the property levied on is claimed; it should be dismissed only as to that part as to which the claimant establishes his claim.[54] Similarly on a claim by a mortgagee, it is error to discharge the property from all liens by reason of the levy, where the levy is good as to the judgment debtor, although inferior to the claimant's mortgage.[55] Where after a verdict for plaintiff, a new trial is granted unless he will dismiss his levy as to a portion of the property, which is done, and the parties agree that the residue shall be subject to the execution, judgment on the finding of the jury, as so modified, is proper.[56] In at least one jurisdiction, the only judgment for the claimant which is permitted by statute is one for the property and costs.[57]

Judgment against claimant generally. The judgment for plaintiff in execution in a claim case should, under some statutes, be that the property is subject to the execution,[58] and that plaintiff in execution recover from the claimant the damages assessed by the jury, together with his costs.[59] Under other statutes the judgment must be in the alternative, for the specific property or its assessed value;[60] but in at least one jurisdiction this form of judgment is improper.[61] In some,[62] but not in

Equitable relief in proceedings generally see supra §§ 169.

Necessity of pleading equitable matters see supra § 183.

46. Ga.—People's Nat. Bank v. Wheedon, 42 S.E. 91, 115 Ga. 782.

Proceedings for distribution of proceeds of sale among lienors see infra § 252.

47. Va.—Fields-Watkins Co. v. Hensley, 86 S.E. 113, 117 Va. 661.

Jurisdiction generally see supra § 179.

Abandonment after dismissal

Where, after dismissal for want of jurisdiction, claimant fails for two successive terms to file the papers in the proper court, the suit will be deemed abandoned.—Deware v. Wichita Valley Mill & Elevator Co., 43 S.W. 1047, 17 Tex.Civ.App. 394.

Property surrendered by sheriff

Court is without jurisdiction except to render judgment of dismissal in claim proceeding to recover property levied on under execution, where it appeared that sheriff had surrendered possession thereof to one whose right was superior to that of any party to the proceeding.—American Asphalt Roof Corporation v. Marler, Mo.App., 56 S.W.2d 844.

48. Ga.—Sexton v. Burruss, 86 S.E. 537, 144 Ga. 192.

49. Ga.—Preston v. Porter Fertilizer Co., 150 S.E. 149, 169 Ga. 288—Stewart v. Mundy, 62 S.E. 986, 131 Ga. 586—Decatur County Bank v Thomason, 120 S.E. 642, 31 Ga.App. 299.

50. Ga.—Freeman v. Sturgis Nat. Bank, 13 S.E. 22, 86 Ga. 622.

51. Ga.—Gunn v. McMichael, 68 Ga. 826.

23 C.J. p 607 note 16.

52. Ga.—E. Tris Napier Co. v. Dennard, 93 S.E. 513, 20 Ga.App. 801.

53. Va.—Sauls v Thomas Andrews & Co., 175 S.E. 760, 163 Va. 407.

54. Ga.—Hutchinson v. Jackson, 53 Ga. 56.

Amended claim

Where claimant, having executed affidavit and bond, was in possession of all of property levied on by execution, and on trial amended by striking from affidavit and bond certain property, judgment in favor of claimant on amended claim should also have ordered condemnation of property stricken to satisfaction of execution.—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala. App. 320.

55. Tex.—Lapowski v. Taylor, 35 S.W. 934, 13 Tex.Civ.App. 624.

56. Ga.—Blance v. Liddell, 77 Ga. 103.

57. Mo.—American Asphalt Roof Corporation v. Marler, App., 56 S.W.2d 844.

58. Ala.—Kelley v. Lovett, 183 So. 855, 236 Ala. 538.

23 C.J. p 607 note 22.

Protection of claimant

A judgment dismissing a life tenant's claim interposed in sale proceedings and decreeing a sale sufficiently protected his rights, where it made the sale subject to his right of occupancy, it appearing that another life tenant was not a party, and would not be affected.—Jones v. Brown, 119 S.E. 624, 156 Ga. 452.

59. Tex.—Kilgore v. Savage, Civ. App., 164 S.W. 1081.

23 C.J. p 607 note 23.

Costs see infra § 190.

Damages see infra § 189.

60. Miss.—Been v. Lindsey, 10 Miss. 581.

23 C.J. p 607 note 24.

61. Ala.—Kelley v. Lovett, 183 So. 855, 236 Ala. 538.

23 C.J. p 607 note 25.

62. Fla.—State v. Wright, 145 So. 598, 107 Fla. 178.

Pa.—Commonwealth v. U. S. Fidelity & Guaranty Co., 73 Pa.Super. 266.

23 C.J. p 607 note 26.

Liability on bond and enforcement thereof see infra §§ 192–194.

Automatic election

In Arizona, where one claiming property levied on, fails by own neg-

other,[63] jurisdictions, judgment may be rendered against the claimant and his sureties on the bond in the event of his failure to establish his right; judgment against the sureties alone is not authorized.[64] It has been held that judgment cannot be rendered against an unsuccessful claimant for the value of the property;[65] but under other authority judgment may be rendered in favor of plaintiff in execution for the amount of his claim up to, but not exceeding, the value of the goods,[66] the value being that at the time of the trial, with interest from that date.[67]

Default judgment; failure to appear or join issue. Where claimant fails to appear or join issue, plaintiff in execution is entitled to a judgment by default against him as in other cases;[68] but if the statute prescribes subsequent proceedings on the failure of either claimant or plaintiff in execution to join issue such proceedings must be taken.[69] Until after issue has been directed by the court, no judgment by default can be rendered against a claimant who by giving the statutory bond has obtained possession of the property.[70]

Under some statutes it has been held that where claimant fails to put in an appearance, the proper practice is either to dismiss the claim, or allow the execution creditor to make out his case and take a verdict finding the property subject to the execution;[71] but where there has been no return of the papers at the proper term, and claimant therefore takes it for granted that the levy has been abandoned, the execution creditor should not be allowed in the absence of claimant to tender issue and introduce evidence and obtain a verdict finding the property subject, but the court should dismiss the proceeding;[72] and where issue has not been joined, and neither the execution creditor nor his counsel appears, the levy should be dismissed instead of directing a verdict finding the property not subject.[73]

Judgment against execution defendant. It is error to render a new judgment against the execution debtor, thus making him liable for the costs and the penalty.[74]

Assessment of value of property. It has been required, under governing statutes, that a judgment against the claimant assess the value of property for which he may become liable on his bond;[75] but under other authority, where the bond does not state the separate value of the property and there is no issue on that point, the judgment need not ascertain it.[76] A statute requiring the assessment of the value of property levied on as of the time the claim is interposed and possession is obtained by the claimant has been held inapplicable where the issues were found for the claimant.[77]

Enforcement. A judgment of condemnation in a

lect to return it within ten days after adverse judgment, law automatically makes election that money judgment stands.—Gonzales v. Vargo, 273 P. 725, 34 Ariz. 556.

Value of property fixed by sheriff
That claim bond did not expressly state value of property and sheriff did not state such value in return on execution held not to show conclusively that value was not fixed by sheriff.—State v. Wright, 145 So. 598, 107 Fla. 178.

63. Ala.—Langworthy v. Goodall, 76 Ala. 325.
23 C.J. p 608 note 27.

Error harmless
Where complainant introduced sheriff's return showing that property levied on was worth more than penalty of bond, rendition of personal judgment against claimant and sureties was not harmful error, if error at all, in view of absence of evidence as to whereabouts of the property or its then value.—Miller v. McWhorter, 161 So. 672, 173 Miss. 16.

64. Fla.—Strobhar v. Jesse French Piano & Organ Co., 37 So. 177, 48 Fla. 158.

65. W.Va.—Bartlett v. Loundes, 12 S.E. 762, 34 W.Va. 493.
23 C.J. p 608 note 29.

66. Miss.—Johnston v. Standard Oil Co., 14 So. 533, 71 Miss. 397.
23 C.J. p 608 note 30.

67. Miss.—Johnston v. Standard Oil Co., supra.

68. Ala.—Harnischfeger Sales Co. v. Burge, 129 So. 37, 221 Ala. 387.
Miss.—Miller v. McWhorter, 161 So. 672, 173 Miss. 16.
Tex.—Betterton v. Buck, 2 Tex.A. Civ.Cas. § 198.
Joinder of issue see supra § 184.

Notice of proceedings
An order for the sale of property was improperly made, where the only proof of notice of a petition for interpleader is the deposition of the deputy sheriff that a notice "was sent by mail" and there is an express and uncontradicted denial that notice was received.—American Chemical Laboratories v. Wayne Junction Trust Co., 81 Pa.Super. 137.

69. Miss.—Bedford v. W. T. Adams Mach. Co., 47 So. 429, 93 Miss. 537.

70. Tex.—De Forest v. Miller, 42 Tex. 34.

71. Ga.—Bryant v. Bush, 140 S.E. 366, 165 Ga. 252.
23 C.J. p 607 note 10.

72. Ga.—Glisson v. Moore, 77 S.E. 108, 12 Ga.App. 291.

73. Ga.—W. J. Bell v. Martin, 82 S. E. 444, 142 Ga. 55.
Direction of verdict see supra § 186.

74. Tex.—Marx v. Lange, 61 Tex. 547.
23 C.J. p 608 note 32.

75. Ala.—Kelley v. Lovett, 183 So. 855, 236 Ala. 538—Drennen Co. Department Stores v. Elrod, 101 So. 805, 20 Ala.App. 320.
Statutes requiring jury to assess value see supra § 186.

Failure to assess held error to reversal
Ala.—Hendon v. McCoy, 133 So. 295, 222 Ala. 515.

76. Tex.—Chapman v. Allen, 15 Tex. 278.

77. Ala.—Brantley & Crawley v. Fort Deposit Bank, 142 So. 54, 225 Ala. 19.

Reason for decision
In such case the execution creditor had no equity in the property as of the time the claim was interposed. —Brantley & Crawley v. Fort Deposit Bank, 142 So. 54, 225 Ala. 19.

claim case may be enforced by execution;[78] and it has been held that, where the claimant has obtained a verdict for the property, he may on entering judgment issue execution for costs.[79] After reversal of the principal judgment, a judgment of condemnation cannot be enforced beyond the amount of the costs in the proceeding in which it was rendered.[80]

§ 188. Reinstatement, New Trial, and Review

Except as its powers may be limited by statute, the court may, on a proper showing, award a new trial in a claim case. The right of appeal, jurisdiction thereof, the sufficiency of the record, and the scope of review, in a claim case, are generally regulated by the ordinary rules governing review.

On a proper showing the court may award a new trial in a claim case, as in other civil cases,[81] except that where the statute provides a complete and exclusive method of procedure during and after the trial of the claim, the court has no inherent authority to grant a new trial not authorized by the statute.[82] Defendant in fieri facias is not such a party to the claim action that he may move for a new trial after a verdict for claimant therein.[83] An objection to the validity of the execution cannot be raised on a motion for a new trial;[84] nor can rulings made on the trial of the claim case be considered on a motion for a new trial on the question of damages only where that question is tried separately.[85]

When in a claim case the execution levy has been improperly dismissed, the court may correct the error at the same term by reinstating the case on motion.[86] The remedy for an erroneous reinstatement is by a motion to review the order.[87] Where the judgment is set aside and the case reopened, the issue of the value of the property is necessarily involved on the subsequent trial.[88] Where claimant[89] or his agent[90] was guilty of inexcusable neglect in allowing a default judgment to be taken against claimant, he cannot have the judgment set aside by a bill in equity.

Review. With respect to appellate procedure, the right of review,[91] the method of review,[92] the jurisdiction of the proceedings for review,[93] and

78. Ala.—Patton v. Hamner, 33 Ala. 307.
23 C.J. p 608 note 33.

79. Pa.—Craig v. Economy Bldg. Ass'n, 10 Wkly.N.C. 296.

80. Ala.—Clements v. Elliott, 11 Ala. 360.

81. Ga.—Howell v. Booth, 145 S.E. 910, 39 Ga.App. 41.
23 C.J. p 608 note 37.
Setting aside verdict of sheriff's jury see supra § 186.

Time for motion

(1) Where original defendant in fieri facias filed motion for new trial in claim case after verdict against claimant, claimant's motion to substitute itself as movant, filed more than thirty days after rendition of the verdict, was too late, and did not authorize granting new trial to claimant.—Arnoldsville Trading Co. v. Brotherton, 6 S.E.2d 210, 61 Ga.App. 370.

(2) Where trial court ordered new trial after it mistakenly directed that interpleader be dismissed, overruling objection to order granting new trial on ground that it was made after end of term was not error, since directing new trial merely recognized consequences of mistrial after dismissing interpleader without verdict for either claimant or defendant.—Patterson v. Brett, 189 A. 756, 125 Pa. Super. 117.

Grounds lacking

(1) In proceeding by executrix on claim to property levied on as property of devisee, failure to request submission of question to jury under statute until after evidence was closed was not ground for new trial where request was made before argument.—Walker v. Horton, 191 S.E. 462, 184 Ga. 429.

(2) On the trial of a claim case, the overruling of a motion to dismiss the levy under a fieri facias cannot be made a ground of a motion for new trial, but should be made the subject of direct exception.—Blackstock v. Blackman, 108 S.E. 775, 152 Ga. 179.

(3) Where claimant of legal title and claimant of equitable title filed claims, the latter filed a subsequent claim alleging that she had obtained the legal title in the intervening time, and the jury returned a verdict in favor of her second claim, the execution creditors were not entitled to a new trial on the ground that she asserted legal title too late.—McBride v. Ault, 88 Pittsb.Leg.J., Pa., 439.

82. Cal.—Jensen v. Hugh Evans & Co., 115 P.2d 471, prior opinion, App., 108 P.2d 93—Wilson v. Dunbar, 97 P.2d 262, 36 Cal.App.2d 144—Grant v. Segawa, 112 P.2d 784, 44 Cal.App.2d Supp. 945.

83. Ga.—Arnoldsville Trading Co. v. Brotherton, 6 S.E.2d 210, 61 Ga. App. 370.

84. Tex.—Latham v. Selkirk, 11 Tex. 314.

85. Ga.—Ray v. Atlanta Trust & Banking Co., 36 S.E. 769, 111 Ga. 853.

86. Ga.—Wilson v. Herrington, 13 S. E. 129, 86 Ga. 777.

87. Ga.—Widincamp v. James, 58 S.E. 836, 129 Ga. 279.

88. Tex.—Ryan v. Teague, 110 S.W. 117, 50 Tex.Civ.App. 153.

89. Ala.—Harnischfeger Sales Co. v. Burge, 129 So. 37, 221 Ala. 387.

90. Ala.—Harnischfeger Sales Co. v. Burge, supra.

91. U.S.—New Orleans v. Louisiana Constr. Co., La., 9 S.Ct. 223, 129 U.S. 45, 32 L.Ed. 607.
23 C.J. p 608 note 44.

Who may appeal

A surety in an execution levied on the property of the principal debtor has such an interest in the controversy over the ownership of the property to which he is a party as to entitle him to appeal from a judgment discharging it from the lien of the execution.—Hanna v. Charleston Nat. Bank, 46 S.E. 920, 55 W.Va. 185.

92. In New Jersey

(1) Certiorari is the only proper method of review of proceedings under a statutory claim of property levied on under execution.—Bayonne City Bank v. O'Mara, 97 A. 149, 88 N.J.Law 499—Reiman v. Wilkinson, 96 A. 52, 88 N.J.Law 383.

(2) An appeal is not the proper remedy to bring up proceedings under a statutory claim of property levied on under execution and may be dismissed by the court of its own motion.—Bayonne City Bank v. O'Mara, supra.

93. Ill.—Sellers v. Thomas, 57 N.E. 10, 185 Ill. 384.
23 C.J. p 609 note 46.

the sufficiency of the record[94] are generally governed by the rules relating to proceedings for review in ordinary cases. This is also true as to the scope and extent of the review; so that, matters which do not properly appear of record,[95] or are first urged on appeal,[96] or involve the discretion of the lower court,[97] will not ordinarily be considered. So, the judgment will not be reversed for immaterial or harmless errors.[98] On appeal of claimant from an adverse judgment, defendant in error cannot complain of the denial by the lower court of his motion for judgment for damages where he suffered from no manifest error or injustice.[99] The judgment will be reversed where the proceedings were not instituted in accordance with the provisions of the statute.[1] Since the sheriff is not a necessary party to the claim proceeding, his failure to appeal is not a ground for dismissal of a party's appeal.[2]

Where a judgment for claimant is set aside on appeal, plaintiff in execution is entitled to a judgment for the value of the property and legal interest thereon from the date of the bond, together with damages.[3]

Withdrawal of a claim on appeal is considered in § 182 supra.

§ 189. Damages and Penalties against Unsuccessful Claimant

Under statutes so providing, damages or a penalty may be recovered, on a proper showing, against an unsuccessful claimant, as for filing or continuing the claim for purposes of delay only.

Under statutes so providing, damages, or a penalty, may be awarded against an unsuccessful claimant,[4] as for filing or continuing the claim for purposes of delay only.[5] Before damages may be legally awarded, the case must be brought within the statute[6] by means of competent and relevant evidence,[7] and there must be a finding of the value of the property on which the execution was levied.[8] Where any part of the property levied on is found not to be subject to the execution, damages cannot be awarded.[9]

§ 190. Costs

The costs in a claim suit are largely in the court's discretion; authorities disagree as to the awarding of costs to or against a partially successful claimant. The propriety of allowing various items as costs, such as fees for the attorney for plaintiff in execution and for claimant's attorney, has been variously decided.

While the costs in a claim suit are largely in the discretion of the court, and do not necessarily follow the verdict or decision,[10] yet they have been awarded against the defeated party in a number of cases.[11] A claimant who is only partially successful may, in the discretion of the court, be taxed with full costs,[12] or he may be granted judgment without costs,[13] or, although there is some dis-

94. Ga.—Blackstock v. Blackman, 108 S.E. 775, 152 Ga. 179.
23 C.J. p 609 note 47.

95. Mo.—State v. Johnson, 1 Mo. App. 219.
23 C.J. p 609 note 49.

Inference as to burden of proof
However, in proceeding on levy of a fieri facias on land wherein a statutory claim was interposed by a third person, from fact that statutory claimant introduced evidence, first reviewing court would infer that claimant assumed burden of proof.—Calhoun v. Williamson, 5 S.E.2d 41, 189 Ga. 65.

96. Ga.—Betton v. Avery, 188 S.E. 901, 183 Ga. 559.
23 C.J. p 609 note 50.

97. Pa.—Strouse v. Bard, 8 Pa.Super. 48.

98. Ga.—Jordan v. Grogan, 13 S.E. 552, 87 Ga. 533.
23 C.J. p 609 note 53.

99. Tex.—Gillian v. Henderson, 12 Tex. 47.

1. Tex.—Paxton v. Boyce, 1 Tex. 317.

2. Ill.—Tipsword v. Doss, 272 Ill. App. 1.

3. Tex.—Willis v. Pinkard, 52 S.W. 626, 21 Tex.Civ.App. 423.

4. Pa.—Ebert v. Kaufmann, 34 Pa. Super. 487.

Specified percentage of value of property is basis of award.—Penney v. Stout, 168 So. 697, 232 Ala. 564—
23 C.J. p 609 note 63.

5. Ga.—Nesmith v. Nesmith, 142 S.E. 176, 37 Ga.App. 779.
23 C.J. p 609 note 58.

Constructive notice of priority
In claim suit where claimant had actual knowledge of execution and constructive notice of registration of judgment which made execution superior to claimant's claim and sole excuse for interposition of inferior claim was lack of actual knowledge of such registration, determination that claim was interposed for purposes of delay was not error and justified recovery of damages by judgment plaintiff.—Penney v. Stout, 168 So. 697, 232 Ala. 564.

6. Ga.—Ray v. Atlanta Trust & Banking Co., 36 S.E. 769, 111 Ga. 853.

Claim of mortgage lien
A reconventional demand for damages based on an allegation that the intervener wrongfully made an affidavit of ownership was without foundation in law or fact where the intervener merely claimed a mortgage lien.—Hersh v. Steinau, La.App., 140 So. 163.

7. Ga.—Ray v. Atlanta Trust & Banking Co., 36 S.E. 769, 111 Ga. 853.
23 C.J. p 609 note 60.

8. Ga.—Adams v. Carnes, 36 S.E. 597, 111 Ga. 505.

9. Ga.—Burt v. Lorentz, 29 S.E. 137, 102 Ga. 121.

10. Cal.—Noland v. Noland, 113 P. 2d 11, 44 Cal.App.2d 780.
Pa.—Waverly Coal & Coke Co. v. McKennan, 1 A. 543, 110 Pa. 599, 17 Wkly.N.C. 166—Haubert v. Beckhaus, 13 Wkly.N.C. 327.
23 C.J. p 609 note 69.

11. Pa.—Hipple v. Hoffman, 2 Watts 85.
23 C.J. p 609 note 70.

12. Mo.—Taylor v. Forman, 12 Mo. 547.
Pa.—Katzen v. Ehrhart, 20 Pa.Dist. 1090.

13. Pa.—Shellenberg v. Fleisher, 11 Pa.Co. 36—Peters v. Shaner, 1 Del. Co. 252.

sent,[14] the costs may be apportioned between the parties;[15] but a partially successful claimant has been held entitled to costs.[16]

The costs cannot be taxed against one not a party to the record;[17] thus, except under a statute having a different effect,[18] the costs cannot be awarded against the sureties on claimant's bond.[19]

Taxation and items allowable. A fee for the attorney for plaintiff in execution may be included in his costs.[20] The allowance of an attorney's fee to a successful claimant has been held proper by some authorities[21] and improper by another.[22] The amount to be allowed as the attorney's fee when such allowance is proper is in the discretion of the court.[23]

Where claimant has given a bond for the release of the property, plaintiff in execution cannot be charged by the sheriff with the expense of keeping it;[24] but where, after the claim has been tried and the property found subject to the execution, plaintiff in execution directs a second levy, the costs thereof and of keeping the property thereafter are assessable against him.[25] A successful claimant of crops levied on is not chargeable with the expense of gathering, harvesting, or threshing.[26]

Security for costs. It has been held that the statutory trial is not a "suit" within the meaning of a statute requiring security for costs.[27] A nonresident plaintiff in execution is not required to give security for the costs in a claim case,[28] at least where the burden of proof is not on him.[29] Under a statute providing for dismissal of an intervention when security for costs is not timely given, the court has discretion to allow a subsequent filing of security.[30]

Sale of property for costs. In case of a finding against claimant of property taken in execution, the property cannot be sold to pay the costs of the trial of the right of property.[31]

§ 191. Operation and Effect of Determination

The operation and effect of the determination in a claim proceeding depends on the terms of the finding and the statutory provisions; the judgment is commonly treated as conclusive on the parties to the proceeding, but not on strangers thereto. The dismissal of a claim not on the merits does not preclude another interposition of the claim. After a judgment against claimant, the property may be reseized and sold under the original judgment.

The operation and effect of a finding for or against claimant depends on the terms thereof and the statutory provisions in the particular jurisdiction.[32] In some jurisdictions the judgment is as conclusive as other judgments;[33] in others, the verdict or judgment is not conclusive on the par-

14. Pa.—Wagner v. Bertholf, 11 Pa. Dist. 367—Dunn v. Shaw, 11 Pa. Dist. 129.

15. Pa.—Dillich v. Union Bldg. & Loan Ass'n, 18 Pa.Dist. 518.
23 C.J. p 610 note 73.

16. La.—McCarthy v. Baze, 26 La. Ann. 382.

17. Ga.—Lewis v. Beck & Gregg Hardware Co., 73 S.E. 739, 137 Ga. 515.

18. Tex.—Wrought Iron Range Co. v. Brooker, 2 Tex.A.Civ.Cas. § 225.
Judgment against claimant and sureties jointly see supra § 187.

19. Ala.—Petree v. Wilson, 16 So. 143, 104 Ala. 157.
23 C.J. p 610 note 76.

20. Pa.—Couts v. Catanese, 27 Pa. Dist. & Co. 201, 8 Som.Leg.J. 159, 16 Wash.Co. 195, 50 York Leg.Rec. 126—Jenkins v. Courtright, 24 Pa. Dist. 978.

21. Pa.—Babis v. New York Extract Co., 181 A. 846, 120 Pa.Super. 73—Couts v. Catanese, 27 Pa.Dist. & Co. 201, 8 Som.Leg.J. 159, 16 Wash. Co. 195, 50 York Leg.Rec. 126—Fudge v. Scholl, 22 Pa.Dist. & Co. 42, 25 Del.Co. 39.

22. Ariz.—Farmers' Exch. v. Malody, 156 P. 78, 18 Ariz. 43.

23. Pa.—Couts v. Catanese, 27 Pa. Dist. & Co. 201, 8 Som.Leg.J. 159, 16 Wash.Co. 195, 50 York Leg.Rec. 126—Jenkins v. Courtright, 24 Pa. Dist. 978.

Attorney and client standard inapplicable
The standard of remuneration for professional services which governs the relation between the attorney and his client does not determine an allowance in the nature of costs.—Jenkins v. Courtright, supra.

Submission to jury
A statute requiring the fixing of the counsel fee by the court is satisfied where the question has been submitted to a jury and its verdict approved by the court.—Fudge v. Scholl, 22 Pa.Dist. & Co. 42, 25 Del. Co. 39.

24. Ga.—Houser v. Williams, 11 S.E. 129, 84 Ga. 601, 15 S.E. 821, 90 Ga. 21.

25. Ga.—Nessmith v. Hendry, 94 S. E. 256, 21 Ga.App. 257.

26. Ga.—Peugh v. Colley, 80 S.E. 633, 141 Ga. 135.
Kan.—Sims v. Mead, 29 Kan. 124.

27. D.C.—Bond v. Carter Hardware Co., 15 App.D.C. 72.
Nature of proceeding generally see supra § 169.
Requiring security for costs generally see Costs §§ 125–131.

28. Ala.—McAdams v. Beard, 34 Ala. 478.
23 C.J. p 610 note 88.

29. Pa.—Palmer v. Cole, 3 Kulp 55.
23 C.J. p 610 note 89.
Burden of proof see supra § 185.

30. La.—Hardee v. Beard, App., 152 So 359.

31. Ala.—Fryer v. Dennis, 2 Ala. 144.

32. Or.—Francisco v. Stringfield, 114 P.2d 1026.
Effect of determination of sheriff's jury see supra § 169.

Judgment not too vague for its effect to be readily determined.—Noland v. Noland, 113 P.2d 11, 44 Cal. App.2d 780.

Self-executed statute
Court cannot make order or decree or grant any affirmative relief, but can only make a determination that levy is valid or that ownership belongs to claimant, and such determination releases sheriff from any liability arising out of his official acts from following the compulsion of the statute, and the statute is self-executed upon such determination.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.

33. Ga.—Hightower v. Hodges, 63 S. E. 541, 5 Ga.App. 408.
23 C.J. p 610 note 96.

ties,[34] at least where the proceeding was instituted by the officer without the consent of claimant.[35]

A judgment for claimant does not operate as a bar to an action of trespass for the tort committed in taking the property under the execution.[36] A judgment against claimant will bar not only an action against the officer,[37] but also one against a purchaser at the execution sale.[38] A verdict against claimant does not vest the property in him, although he becomes liable to the amount of its value.[39] Where a judgment by default is rendered against claimant, a sale thereafter by the officer is valid, although the default is afterward set aside and a trial had.[40]

Where the levy is dismissed before trial, plaintiff in execution cannot proceed to the trial of the claim case without procuring a reversal of the judgment of dismissal.[41] If the claim is withdrawn before the jury retire, the verdict is of no effect.[42] The reversal of the judgment in the original action does not affect a verdict for the execution creditor previously rendered on claimant's issue.[43] An execution sale will not be enjoined on any ground which claimant might have urged in the claim case.[44]

Persons bound. The determination does not affect the title to the property as between claimant and execution defendant, or the rights of third persons not parties to the claim proceeding;[45] but as between execution plaintiff and claimant it is conclusive in some states as to the liability of the property to the execution,[46] and, where the judgment is against claimant, as to the validity and binding force of the judgment in the principal action.[47] The sureties on the claim bond are deemed parties to the proceeding.[48]

A defendant in execution who seeks the benefit of an interpleader bond will be bound as respects the valuation of the property in the interpleader proceeding.[49] Where several claimants have filed claims against a fund in the hands of the sheriff under a judgment, a verdict on an issue between two of the claimants will bind all.[50]

Dismissal; nonsuit. The dismissal of a claim case by a court of competent jurisdiction is in effect a judgment against the claim.[51] A dismissal of the claim for matters not affecting the merits does not preclude the right to again interpose the claim;[52] in such case the dismissal does not of itself amount to an adjudication of the title to the property;[53] but where claimant has disposed of the property taken possession of under a forthcoming bond, and hence is precluded from interposing another claim, the judgment dismissing the claim becomes conclusive as to the title,[54] and claimant, having elected his remedy, is precluded from thereafter contesting the title.[55]

A nonsuit in a sheriff's interpleader is a final determination of the issue against claimant,[56] although it will not prevent his contesting his claim in some other form.[57]

A claim by another after a claim by a third per-

34. Pa.—Commonwealth to Use of Shelly v. Walter, 46 A. 91, 195 Pa. 446.
23 C.J. p 610 note 97.

The only result of trial is to indemnify sheriff, acting in accordance with court's adjudication, from any liability.—Francisco v. Stringfield, Or., 114 P.2d 1026.

35. Neb.—Storms v. Eaton, 5 Neb. 453.

36. Ill.—Hibbard v. Thrasher, 65 Ill. 479.
23 C.J. p 611 note 4.

37. Neb.—Bray v. Saaman, 14 N.W. 474, 13 Neb. 518.
23 C.J. p 611 note 5.

38. Mo.—McGregor v. Hampton, 70 Mo.App. 98.
23 C.J. p 611 note 6.

39. Ala.—Fryer v. Dennis, 2 Ala. 144.

40. Iowa.—Hughes v. Miller, 2 Greene 9.

41. Ga.—Patterson v. Bagley, 53 Ga. 483.

42. Or.—Singer Mfg. Co. v. Driver, 67 P. 111, 40 Or. 333.
Effect of withdrawal generally see supra § 182.

43. Miss.—Willis v. Loeb, 59 Miss. 169.

44. Ga.—Hollinshead v. Woodard, 57 S.E. 79, 128 Ga. 7.

45. Ga.—Penn Mut. Life Ins. Co. v. Troup, 170 S.E. 359, 177 Ga. 456.
23 C.J. p 610 note 99, p 611 note 15.
Parties to proceedings generally see supra § 180.

A prior grantee of claimant, or a person holding under such grantee, is not affected.—Penn Mut. Life Ins. Co. v. Troup, 170 S.E. 359, 177 Ga. 456—Smith v. Coker, 36 S.E. 107, 110 Ga. 654.

United States marshal and his surety in subsequent suit against them by claimant for damages for seizure are not bound by the claim proceedings.—Snyder v. Charles Levine, Inc., 80 F.2d 382, 65 App.D.C. 81.

46. Ga.—Winship v. Phillips, 54 Ga. 237.
23 C.J. p 610 note 1.

47. Ga.—Henderson v. Hill, 64 Ga. 292—Pollard v. King, 63 Ga. 224.

48. Ala.—Elliott v. Gray, 4 Stew. & P. 168.
23 C.J. p 611 note 16.

49. Pa.—Commonwealth v. McPhillips, 66 Pa.Super. 223.

50. Ga.—Field v. Armstrong, 69 Ga. 170.

51. Ga.—Brannan v. Cheek, 29 S.E. 937, 103 Ga. 353.
Effect of voluntary withdrawal of claim see supra § 182.

52. Ga.—Lynch v. Bond, 19 Ga. 314—American Inv. Co. v. Cable Co., 60 S.E. 1037, 4 Ga.App. 106.

53. Ga.—Reynolds Banking Co. v. Beeland, 97 S.E. 861, 23 Ga.App. 228.

54. Ga.—Reynolds Banking Co. v. Beeland, supra.

55. Ga.—Reynolds Banking Co. v. Beeland, supra.

56. Pa.—O'Neill v. Wilt, 75 Pa. 266.
23 C.J. p 611 note 26.

57. Pa.—Bank v. Allen, 1 Del.Co. 277.
23 C.J. p 611 note 27.

son has resulted in a verdict finding the property subject to fieri facias, a forthcoming bond given has been violated, and it does not appear that plaintiff in fieri facias has elected to have a reseizure, should be dismissed on motion.[58]

Relevy and sale under original judgment. After a judgment adverse to claimant, the property may be reseized and sold under the original judgment,[59] and the execution plaintiff cannot be compelled to pursue his remedy on claimant's bond.[60] Such relevy is not per se a waiver of a money judgment recovered in the claim proceedings,[61] but after a judgment for the value of the property has been rendered against a claimant and satisfied out of his own property he should be credited with the proceeds of a subsequent sale of the property to which title was disputed.[62]

§ 192. Liabilities on Claimants' Bonds

A claimant's liability on his bond is fixed by a final judgment against him. The claimant is liable for breach of his bond if he fails to deliver the property described therein at the time and place fixed thereby, unless there is a valid excuse for the default or ratification by, or estoppel of, the execution creditor; and if the bond contains other conditions the mere return of the property does not discharge it.

The liability of claimant on his bond is fixed by a final judgment against him by a court having jurisdiction,[63] and this is so even though the bond is not good as a statutory bond, if it is good as a common-law obligation.[64] If the court has no jurisdiction and the case is therefore dismissed, there is no liability on the bond.[65] Under appropriate statutory provision, liability may accrue by failure to file a statement of title within the time prescribed by statute.[66] A discharge in bankruptcy of the judgment debtor after the levy does not affect the right to recover on the bond where by statute the giving of the bond does not discharge the levy.[67] The sheriff cannot discharge or waive any of the terms of the bond so as to affect the interest of the plaintiff in fieri facias without his consent.[68] Where the property in question was fraudulently transferred by the judgment debtor to a third person and by the latter to claimant, the failure of the assignee for creditors of the judgment debtor to attack the first fraudulent conveyance and cause it to be set aside does not defeat an action on the bond of claimant.[69]

What constitutes breach. The condition of a bond that the goods levied on shall be forthcoming to answer the writ, in case the issue shall be determined against claimant and in favor of the execution creditor, is broken by failure to deliver the property at the time and place fixed by the bond,[70] unless excused by a showing that performance was made impossible,[71] either by the act of the obligee in the bond,[72] by interference of the law,[73] or by an act of God.[74] Where a taking under other process is relied on, it must be shown that such process was legally adequate[75] and superior to the execution originally levied.[76] The sufficiency and manner of delivery depend on the nature of the property.[77] In order that the surrender may discharge

58. Ga.—Peacock Hardware Co. v. Allen, 127 S.E. 780, 33 Ga.App. 654.

59. Ga.—Seymour v. House, 30 S.E. 655, 103 Ga. 676.
23 C.J. p 611 note 28.

60. Miss.—Walker v. McDowell, 12 Miss. 118, 43 Am.D. 476.
Pa.—Bank v. Allen, 1 Del.Co. 277.

61. Ariz.—Gonzales v. Vargo, 273 P. 725, 34 Ariz. 556.

62. Ariz.—Gonzales v. Vargo, supra.

63. Pa.—Gain v. Steinberger, 36 Pa. Super. 303.
23 C.J. p 612 note 34.
Necessity and sufficiency of bond see supra § 176.

64. Ga.—Wall v. Mount, 49 S.E. 778, 121 Ga. 831.
W.Va.—Sayre v. Kunst, 98 S.E. 559, 83 W.Va. 456.

65. Ga.—Brannan v. Cheek, 29 S.E. 937, 103 Ga. 353.

66. Pa.—Commonwealth v. Beary, 9 Pa.Super. 246.
23 C.J. p 612 note 37.

67. Ky.—Bishop v. John H. Hibben Dry Goods Co., 99 S.W. 644, 30 Ky.L. 725.

68. Ga.—Coppage v. Martin, 146 S.E. 500, 39 Ga.App. 206—Boyd v. Crews, 122 S.E. 802, 32 Ga.App. 138.

69. Ky.—Bishop v. John H. Hibben Dry Goods Co., 99 S.W. 644, 30 Ky. L. 725.

70. W.Va.—Sayre v. Kunst, 98 S.E. 559, 83 W.Va. 456.
23 C.J. p 612 note 41.

71. Ga.—Rockmore v. Garner, 71 S. E. 506, 9 Ga.App. 369.

72. Ga.—Rockmore v. Garner, supra.

73. W.Va.—State ex rel. Hodges v. Hutchinson, 197 S.E. 359, 120 W. Va. 181.
23 C.J. p 612 note 44.
Sale under superior lien
Ga.—Floyd v. Cook, 45 S.E. 441, 118 Ga. 526, 63 L.R.A. 450.
W.Va.—State ex rel. Hodges v. Hutchinson, 197 S.E. 359, 120 W. Va. 181.

74. Ga.—Rockmore v. Garner, 71 S. E. 506, 9 Ga.App. 369.

75. Ga.—Rockmore v. Garner, supra.

76. Ga.—Rockmore v. Garner, supra.

77. Tex.—Edwards v. Connolly, 61 Tex. 30.
Sufficient delivery
A direction to the sheriff to retake goods in a store easily accessible to him constitutes a sufficient delivery; and, where the original levy was a range levy on horses and cattle, a direction to the sheriff to repossess himself of and retake the horses and cattle running at large on a range in the county is sufficient.—Willis v. Chowning, 46 S.W. 45, 18 Tex.Civ. App. 625.
Insufficient delivery
(1) The claimant's mere expression of a wish to deliver property which is a long distance away and in possession of the claimant's vendee is insufficient.—Garrity v. Thompson, 2 S.W. 750, 67 Tex. 1.
(2) A mere tender of a movable sorghum mill and evaporator which is ten or twelve miles away is insufficient.—Edwards v. Connolly, 61 Tex. 30.

the liability on the forthcoming bond, the property must be in as good condition as when it was received,[78] the delivery must be within the time fixed by the bond or statute,[79] and at the place fixed in the bond,[80] and the delivery must be in discharge of the particular bond.[81] Delivery of part of the property is not sufficient.[82]

Where the levying officer is the nominal obligee in the bond, his acceptance of the property in full satisfaction of the bond renders it functus officio and relieves the obligors from all liability thereunder,[83] but his acceptance of some other property does not so relieve the obligors[84] in the absence of ratification by, or estoppel of, the plaintiff in fieri facias.[85] Where the issue has been decided against claimant consumption of the property by him is a breach of the bond;[86] and it has been held that, where claimant has disposed of the property so that he could not produce it on demand, the bond is automatically breached,[87] notwithstanding no adjudication that the property is subject to the execution has been made.[88]

A notice to surrender the property is unnecessary.[89]

It is immaterial whether the judgment creditor consents to the return,[90] or whether a return made by a surety was with the consent of claimant.[91]

A return of the property does not of itself satisfy and discharge a bond containing other conditions.[92]

§ 193. —— Liabilities of Sureties

The surety's liability on a claimant's bond cannot be enforced until liability is fixed on the principal; whether the principal's confession of judgment fixes the surety's liability is in disagreement. A surety is not discharged by substitution of another bond without consent, by an extension or stay of execution, or by the fact that claimant is about to let his claim go by default.

Where, in a statutory proceeding to try rights of property, claimant's bond is filed, the court has been held to have jurisdiction over the person of a surety on such bond;[93] but the liability of the surety is dependent on that of his principal, and cannot be enforced until a liability is fixed on the principal.[94] Confession of judgment by the principal has been held to fix liability on the sureties,[95] but there is authority to the contrary.[96] A surety is liable even though the statute does not require sureties on the bond.[97] A surety on several bonds is liable to each creditor for a breach of the condition of the bond, although he may thereby be compelled to pay the value of the goods levied on several times.[98] Fraudulent representations inducing the sureties to sign the bond have been held to preclude liability.[99]

Release from liability. A surety cannot be dis-

78. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.
Tex.—Parlin v. Coffey, 61 S.W. 512, 25 Tex.Civ.App. 218.

79. Tex.—Bullard v. White, 2 Tex. A.Civ.Cas. § 286.

80. Ga.—King v. Castlen, 18 S.E. 313, 91 Ga. 488.

81. Ga.—Reese v. Worsham, 35 S. E. 680, 110 Ga. 449, 78 Am.S.R. 109, distinguishing and explaining King v. Castlen, 18 S.E. 313, 91 Ga. 488.
23 C.J. p 612 note 52.

82. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.
23 C.J. p 613 note 58.

83. Ga.—Webb v. Rehberg, 90 S.E. 100, 18 Ga.App. 537.

84. Ga.—Boyd v. Crews, 122 S.E. 802, 32 Ga.App. 138.

85. Ga.—Boyd v. Crews, supra.

Bidding at sale
That plaintiff in fieri facias bid for property was not a ratification of sheriff's act in receiving from claimant property other than that which was to be delivered under forthcoming bond, if plaintiff had notified sheriff on discovery thereof and declined further participation in sale, and he is not estopped from suing on bond because proceeds of sale remained in hands of levying officer.—Boyd v. Crews, supra.

Agent of execution creditor
The execution creditor is estopped to assert that the property returned was different from that seized under the levy, where the levying officer accepted the property, sold it under the execution, and paid the proceeds to an agent of the execution creditor who was directing the sale.—Anthony v. Bartholow, 69 Mo. 186.

86. Ga.—Bowen v. Penny, 76 Ga. 743.

87. Ga.—Hobbs v. Tindol, 124 S.E. 112, 32 Ga.App. 609.
23 C.J. p 612 note 55.

88. Ga.—Rice v. Lowry, 95 S.E. 330, 22 Ga.App. 36.
23 C.J. p 612 note 57.

89. Ga.—Hill v. George, 170 S.E. 326, 47 Ga.App. 272.
23 C.J. p 613 note 63.

90. Tex.—Willis v. Chowning, 40 S. W. 395, 90 Tex. 617, 59 Am.S.R. 842.

91. Tex.—Willis v. Chowning, supra.

92. Tex.—Kilgore v. Savage, Civ. App., 164 S.W. 1081.
23 C.J. p 613 note 66.

93. Tex.—Johnson v. Blum, 42 S.W. 791, 17 Tex.Civ.App. 260.
Enforcement of liability see infra § 194.

Who are sureties
"Defendant and his sureties," as referred to in Rev.St.1892, § 1200, providing that if the verdict in claim proceedings is for plaintiff the court shall enter judgment awarding a recovery by plaintiff from "defendant and his sureties," are the claimant in the claim proceedings and principal in the claim bond and the sureties who sign the claim bond.—Strobhar v. Jesse French Piano & Organ Co., 37 So. 177, 48 Fla. 158.

94. Pa.—Commonwealth v. U. S. Fidelity & Guaranty Co., 73 Pa.Super. 266.
23 C.J. p 613 note 68.

95. Pa.—Bradford v. Frederick, 101 Pa. 445.

96. Ala.—Gayle v. Bancroft, 17 Ala. 351.
Judgment as binding sureties generally see supra § 191.

97. Ala.—Jenkins v. Lockard, 66 Ala. 377.

98. Pa.—Collins v. Schlichter, 11 Phila. 349.

99. Tenn.—Bradley v. Kesee, 5 Coldw. 223, 94 Am.D. 246.
23 C.J. p 613 note 73.

charged by substituting another bond, with other surety, without the consent of the other party.[1] Since, after final judgment on the bond, sureties become principal debtors, they are not discharged by an extension or stay of execution,[2] or by the fact that claimant is about to leave the state and let his claim go by default,[3] or that plaintiff in a senior execution did not have the proceeds of the sale of the property under a junior execution applied to the senior execution.[4]

§ 194. —— Enforcement of Liability

Liability on claim bonds may, in a few jurisdictions, be enforced summarily in the proceedings for trial of the right of property, but is more commonly enforced by action. In proceedings for such enforcement, adjudications have been made, under the various governing statutes, with respect to parties, defenses, pleading, evidence, instructions, the amount of recovery, the judgment and its enforcement, stay of proceedings, and the application of the proceeds.

In a few jurisdictions the liability of claimant and his sureties on the claim bond may be enforced summarily in the proceedings for the trial of the right of property,[5] after the sheriff has returned the bond forfeited.[6] The liability of claimant and his sureties is most usually enforced by action on the bond.[7] In at least one state the execution plaintiff may maintain an action on a forthcoming bond in his own name,[8] or in the name of the levying officer.[9]

Defenses. Defendant can set up no defense which would permit him to prove the very issue which it was incumbent on him to prove in the claim case;[10] nor can he show that the jury found by their verdict that claimant was interested with defendant, and that the interest which the latter had on a settlement of accounts was nothing.[11] Claimant's engagement in his bond may preclude him from showing that the property really belonged to claimant or to others than the execution debtor,[12] or even to set up a right of exemption to the execution debtor.[13] Claimant taking possession of the property cannot, without equitable ground, deny receiving the property described in the bond[14] or dispute description in the bond concerning the amount of property under the pleadings.[15] Claimant cannot question the sufficiency of the description under which the property was readvertised for sale after dismissal of the claim case, where it corresponds with the description in the levy and forthcoming bond.[16] Payment by the execution defendant of the judgment against him after it was rendered is a defense to a proceeding for judgment on claimant's bond.[17] An amendable defect in the form of the judgment in the claim case is not always a good defense to an action on the forthcoming bond.[18] Mere interlineation is no defense,[19] unless it appears that it was made after the execution of the bond and that an advantage or detriment to the parties was accomplished thereby.[20]

1. Ala.—Fryer v. Dennis, 2 Ala. 144.
23 C.J. p 613 note 74.

2. U.S.—The Col. Howard v. Hayden, D.C.N.Y. 6 F.Cas.No.3,026.
Tex.—Geary v. Smith, 45 Tex 56.

3. Pa.—Armour v. Tabor, 21 Pa Co. 425.

4. Ga.—Reese v. Worsham, 35 S.E. 680, 110 Ga. 449, 78 Am.S.R. 109.
23 C.J. p 613 note 77.

5. Ky.—Southern Coal & Coke Co. v. Bracht, 101 S.W.2d 667, 267 Ky. 123.
23 C.J. p 613 note 78.
Rendition of judgment, in claim case, against claimant and sureties see supra § 187.

Notice of motion
Judgment on claimant's bond in execution proceedings must be reversed as to surety not before court on motion for judgment by notice or otherwise.—Butcher v. Corbin Hardware & Furniture Co., 51 S.W.2d 931, 244 Ky. 632.

6. Ala.—Catching v. Bowden, 8 So. 58, 89 Ala. 604.
23 C.J. p 614 note 79.

7. Ga.—O'Neill Mfg. Co. v. Harris, 47 S.E. 934, 120 Ga. 467.
23 C.J. p 614 note 81.
Liability on, and enforcement of forthcoming bond of debtor see supra §§ 118–119.

8. Ga.—Hart v. Thomas, 75 Ga. 529 —Hagedorn v. Powers, 95 S.E. 749, 22 Ga.App. 189.

9. Ga.—Boyd v. Crews, 122 S.E. 802, 32 Ga.App. 138.

Ex-officer
Suit may be brought in the name of an ex-officer to whom the bond was made payable during his term of office.—O'Neill Mfg. Co. v. Harris, 47 S.E 934, 120 Ga. 467.

Interest of officer
When suit is brought in name of the officer for use of plaintiff in fieri facias, officer is formal party only without interest in subject matter, plaintiff in fieri facias having right to bring action in either form without consent of levying officer.—Wynn v. Maddox, 125 S.E. 516, 33 Ga.App. 87.

10. Ga.—Oliver v. Warren, 53 S.E. 100, 124 Ga. 549, 110 Am.S.R. 188, 4 L.R.A.,N.S., 1020.

Ownership
Claimant will not be permitted to set up ownership in himself in mitigation of damages.—Waterman v. Frank, 21 Mo. 108.

Legality of levy; officer's authority
Neither the legality of the levy under execution nor the authority of the officer to make it is an issuable fact in an action on the bond.—Oliver v. Warren, 53 S.E. 100, 124 Ga. 549, 110 Am.S.R. 188, 4 L.R.A., N.S., 1020.

11. Pa.—Ward v. Zane, 4 Phila. 68.

12. Ga.—Jones v. Kendrick, 21 S.E. 831, 94 Ga. 645.
Mo.—Waterman v. Frank, 21 Mo. 108.
Pa.—Ingram v. Harris, 9 Pa.Super. 301, 43 Wkly.N.C. 550.

13. Ala.—Cauthen v. Norman, 140 So. 565, 224 Ala. 371.

14. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.

15. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.

16. Ga.—O'Neill Mfg. Co. v. Harris, 56 S.E. 739, 127 Ga. 640.

17. Ky.—Butcher v. Corbin Hardware & Furniture Co., 51 S.W.2d 931, 244 Ky. 632.

18. Ga.—Gray v. Riley, 170 S.E. 537, 47 Ga.App. 348.

19. Pa.—Commonwealth v. Beary, 9 Pa.Super. 246.

20. Pa.—Commonwealth v. Beary, supra.

Pleading. In a summary proceeding to enforce claimant's liability on his bond, ordinary pleadings are not required as in actions,[21] and matters may be proved even though not pleaded, so long as the statutory procedure is followed.[22] In an action on a claim bond, the complaint should clearly allege a failure to deliver.[23] It is only necessary to set out facts sufficient to show a breach of the conditions of the bond,[24] and to allege the value of the goods where the recovery is limited to such value.[25] It is not necessary to allege that the property was that of the execution debtor,[26] or that the execution is set out or attached as an exhibit.[27] Where the bond is void as a statutory bond, an amendment to show a cause of action on a common-law bond is proper.[28]

An affidavit of defense has been held not necessary,[29] but a special plea must allege all the facts necessary to sustain it.[30]

Evidence. Plaintiff must show that the property has been found subject to the execution, and either that a demand for it has been made and refused, or that it was not produced at the proper time and place.[31] Claimant has the burden of accounting for his failure to surrender the property,[32] and of explaining an apparent sale of it by him.[33] The bond itself is admissible in evidence.[34] The property described in claimant's forthcoming bond is prima facie what he received from the levying officer,[35] and in the absence of fraud, accident, mistake, or some other equitable ground claimant will not be allowed to prove that such property did not come into his possession.[36] Partial payments by defendant in execution are presumed to have been applied on the main indebtedness rather than on the liability of the obligor in the bond, in the absence of contrary evidence.[37] There is no presumption that the goods were worth as much as the amount due on the judgment.[38] Under a plea of payment defendant may introduce the return of the officer, showing a levy and sale, and money made thereby.[39] Where the obligor sold the property for his own benefit, evidence that the person conducting the sale was previously notified of the claim proceedings is admissible.[40]

In determining damages for failure to return goods, the jury may consider the officer's previous estimate of the value of the goods, under some authorities,[41] but it has also been held that such estimate furnishes no evidence of the true value of the property.[42]

The weight and sufficiency of the evidence is governed by the general rules relating to such matters in other actions.[43]

Instructions. An instruction on an issue whether an unsuccessful claimant had offered to return

21. Ky.—Southern Coal & Coke Co. v. Bracht, 101 S.W.2d 667, 267 Ky. 123.

22. Ky.—Southern Coal & Coke Co. v. Bracht, supra.

Evidence of defense

Exclusion of evidence, on hearing of motion for judgment on claimant's bond in execution proceedings, that judgment debtor paid judgment on which execution issued required reversal of judgment on bond.—Butcher v. Corbin Hardware & Furniture Co., 51 S.W.2d 931, 244 Ky. 632.

23. Ga.—O'Neill Mfg. Co. v. Harris, 47 S.E. 934, 120 Ga. 467.

24. Ga.—Bowen v. Penny, 76 Ga. 743.

25. Pa.—Byrne v. Hayden, 16 A. 750, 124 Pa. 170.

26. Ga.—O'Neill Mfg. Co. v. Harris, 47 S.E. 934, 120 Ga. 467.

27. Ga.—O'Neill Mfg. Co. v. Harris, supra.

28. Ga.—Wall v. Mount, 49 S.E. 778, 121 Ga. 831.

29. Pa.—Davis v. Wood, 39 Wkly. N.C. 328.

30. Ga.—Young v. Waldrip, 18 S.E. 23, 91 Ga. 765.

31. Ga.—Boyd v. Crews, 122 S.E. 802, 32 Ga.App. 138—Coursey v. Consolidated Naval Stores Co., 96 S.E. 397, 22 Ga.App. 538.

Judgment set aside

In suit on forthcoming bond given in claim case, judgment adjudicating the property subject will not authorize recovery, where, before filing of the suit, it has been set aside and contrary judgment rendered adjudicating the property not subject to the fieri facias.—Hicks v. Walker Bros. Co., 118 S.E. 452, 30 Ga.App. 548.

32. Ga.—Young v. Waldrip, 18 S.E. 23, 91 Ga. 765.

Abandonment of claim

The burden is on claimant to explain a long delay in prosecuting his claim; and where property seized on execution has been released on claimant's oath and bond, abandonment of his claim by claimant by failing to make return or have return made of the affidavit, oath, and bond to a district court having jurisdiction is not an issue of law, but of fact.—Josey v. Blieden, Tex.Civ.App., 236 S.W. 559.

33. Ga.—Hobbs v. Tindol, 124 S.E. 112, 32 Ga.App. 609.

34. Pa.—Ingram v. Harris, 9 Pa. Super. 301, 43 Wkly.N.C. 550.

35. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.

36. Ga.—Dickens v. Maxey, supra.

37. Ga.—McDaniel v. Wynn, 154 S.E. 720, 41 Ga.App. 788.

38. Pa.—Byrne v. Hayden, 16 A. 750, 124 Pa. 170.

39. Pa.—Hill v. Grant, 49 Pa. 200.

40. Ga.—Coursey v. Consolidated Naval Stores Co., 96 S.E. 397, 22 Ga.App. 538.

41. Ga.—Hobbs v. Tindol, 124 S.E. 112, 32 Ga.App. 609.

Prima facie evidence

Value of property fixed by levying officer and recited in forthcoming bond is prima facie evidence of value against claimant.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.

Certificate not conclusive

In action on forthcoming bond, plaintiff's testimony regarding value of property levied on, although contradicting levying officer's certificate, is admissible.—Bank of Warwick v. Ford, 165 S.E. 296, 45 Ga.App. 545.

42. Tex.—Kennedy v. Graybar Electric Co., Civ.App., 156 S.W.2d 562.

43. Ga.—Bank of Warwick v. Ford, 165 S.E. 296, 45 Ga.App. 545.
Tex.—Kennedy v. Graybar Electric Co., Civ.App., 156 S.W.2d 562—Josey v. Blieden, Civ.App., 236 S.W. 559.

23 C.J. p 614 note 8.

the property in as good condition as he had received it is not objectionable because it described the property slightly differently from what the pleadings and evidence showed it to be.[44]

Amount of recovery. The measure of recovery is fixed by the terms of the bond.[45] It has been held that, where claimant returns property in a damaged condition or returns only part of the property, the damage is the decrease in value since delivery to claimant, with interest,[46] even though the levying officer refuses the property as not complying with the bond and does not sell it.[47] If part of the property is returned and sold by the officer, the amount realized is a discharge pro tanto of the liability of the obligors,[48] regardless of its assessed value.[49] An execution plaintiff cannot sell a portion of the goods returned and recover on the bond for the portion which he refuses to sell.[50] If it appears that the property is owned jointly by claimant and the debtor, the recovery should be limited to the value of the debtor's interest.[51] Damages assessed for delay have been held not collectable against a surety,[52] but under other authority the surety is liable the same as for the value of the property.[53] Where plaintiff moves for judgment for the amount at which the property was appraised and a percentage thereof, it is error to render judgment for a greater sum.[54]

Judgment and enforcement. A judgment for plaintiff on the bond must be for an ascertained amount,[55] on which interest is to be allowed from the date of the judgment.[56] In at least one jurisdiction the form of judgment is for the amount of the penalty to be released on payment of the ascertained damages.[57] Plaintiff is entitled to a satisfaction of his original judgment, with the interest on such judgment from its date, and interest on the damages from the time of the judgment giving damages.[58] Where execution is issued on a forfeited claim bond after claimant has paid costs in the claim proceeding, the court may protect him from a second payment of the costs under the execution.[59]

Stay of proceedings. Where judgment has been rendered on an interpleader bond, the court will not stay proceedings until the determination of other feigned issues growing out of a levy on the same goods by other execution creditors, in order to relieve defendant from his liability on other interpleader bonds.[60]

Application of proceeds. The proceeds of a judgment on a forthcoming bond should be applied on the execution, whether or not the judgment on which the execution issued was a lien on the property seized; but defendant in execution has no claim to the proceeds.[61]

§ 195. False, Fraudulent, Vexatious, or Frivolous Claims

A fraudulent claimant to whom the officer surrenders property levied on is liable for damages only to the officer against whom the execution creditor has a remedy. Equitable relief against an allegedly dilatory claim depends on a showing of claimant's inability to respond in money damages.

If a third person wrongfully and fraudulently claims property levied on, and the officer surrenders the property to him because of such claim, the execution creditor cannot sue such third person for the resulting damage, since the latter is liable only

44. Tex.—Parlin v. Coffey, 61 S.W. 512, 25 Tex.Civ.App. 218.

45. Ala.—Robertson v. Patterson, 17 Ala. 407.
23 C.J. p 615 note 18.

Costs are recoverable where they are provided for in the bond.—Robertson v. Patterson, supra.

In Georgia

(1) Plaintiff in fieri facias can recover no more than the limited amount of a bond together with interest, even though the property is of greater value than such sum and of less value than the amount due on the fieri facias.—Green v. Taliaferro, 95 S.E. 312, 22 Ga.App. 27.

(2) Where the bond is in the form contemplated by statute, the measure of damages is said to be the value of property at time of delivery to claimant, with interest, not exceeding amount due on the execution. —Hobbs v. Tindol, 124 S.E. 112, 32 Ga.App. 609.

(3) But the amount of the judgment on which execution issued has also been mentioned as the limit of damages recoverable for breach of a statutory bond.—Hagedorn v. Powers, 95 S.E. 749, 22 Ga.App. 189.

In Mississippi where judgment debtor's wife claimed automobile levied on by judgment creditor, if judgment creditor should recover judgment against wife the measure of liability of wife on her claimant's bond would be value of automobile at time judgment became lien thereon less amount of unpaid purchase price due and to become due.—Reid v. Halpin, 188 So. 310.

46. Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783.

47. Ga.—Dickens v. Maxey, supra.

48. Ala.—Munter v. Leinkauff, 78 Ala. 546.

49. Ala.—Wilcox & Gibbs Guano Co. v. Piedmont Lumber Co., 11 So. 779, 97 Ala. 552, 98 Ala. 281.

50. Pa.—Whitesides v. Bardman, 15 Phila. 208.

51. Mo.—Ploss v. Thomas, 6 Mo. App. 157.

52. Ala.—Hughes v. Rhea, 1 Ala. 609.

53. Ga.—Shealy v. Toole, 62 Ga. 170.

54. Ky.—Combs v. Wallace, 3 Ky.L. 384, 11 Ky.Op. 338.

55. Ky.—Smith v. Wells, 4 Bush 92.

56. Pa.—Lowenstein v. Seff, 6 Pa. Dist. 533.

57. Pa.—Reger v. Manhattan Brass Co., 41 Wkly.N.C. 421.

58. Tex.—Lewis v. Taylor, 17 Tex. 57.

59. Ala.—Cauthen v. Norman, 140 So. 565, 224 Ala. 371.

60. Pa.—Collins v. Schlichter, 11 Phila. 349.

61. Ga.—Heard v. Duke, 26 S.E. 485, 98 Ga. 134.

to the officer, against whom the execution creditor has a remedy.[62] Equity will not enjoin the prosecution of an allegedly dilatory claim, or appoint a receiver of the property, where it is not alleged that claimant is insolvent or has not given a bond to pay damages as provided by law.[63]

VIII. SALE

A. NATURE, NECESSITY, AND REQUISITES

§ 196. Definition, Nature, and Distinctions

An execution sale is a sale of property by a sheriff as an officer holding process. It has been distinguished from judicial and forced sales.

An execution sale is a sale of property by a sheriff or his deputy, by virtue of his authority as an officer holding process.[64] Where the power to sell is derived from an agreement of the parties, the sale is not a sheriff's sale, as that term is used in the meaning of an execution sale.[65] The statutes in at least one state contemplate two kinds of execution sales, the sale absolute and the sale subject to redemption.[66]

The sale under an execution is to satisfy the lien created by the execution, and no other.[67]

Judicial sale distinguished. While an execution sale is the result of judicial proceedings in that it must be supported by a judgment or decree,[68] an execution sale is to be distinguished from a judicial sale in that in an execution sale the officer who sells gets his authority by virtue of the execution and is guided in the sale by the law rather than by the court, whereas in a judicial sale, the court controls, acting through the person appointed to make the sale as through an agent.[69] An execution sale requires no confirmation unless the statute so provides, whereas a judicial sale is not, as a rule, complete until confirmed by the court;[70] further, an execution sale is based on a judgment for a particular sum of money, a judicial sale on an order to sell specific property.[71] According to some authorities, however, the term "judicial sale," at least as used in particular statutes, embraces an execution sale;[72] and under the particular practice, a sale on execution may partake of the character of a judicial sale.[73]

Distinctions between execution and judicial sales in connection with the statute of frauds are con-

62. N.Y.—Cohen v. Sobel, 114 N.Y. S. 774, 62 Misc. 306.

63. Ga.—Robinson v. Walker, 171 S. E. 918, 178 Ga. 113.

64. Fla.—State v. Sloan, 184 So. 128, 130, quoting **Corpus Juris.**

Sale in foreclosure proceedings

A sale of realty under an order of sale issued in a mortgage foreclosure proceeding has been held to be a "sale on execution" within the meaning of certain statutes.—Goslen v. Waddell Inv. Co., 292 P. 362, 145 Okl. 269.

65. Vt.—Batchelder v. Carter, 2 Vt. 168, 19 Am.D. 707.

66. Iowa.—Mullaney v. Cutting, 154 N.W. 893, 175 Iowa 547.

Redemption see infra §§ 253–265.

67. Ky.—Pineville Steam Laundry v. Phillips, 71 S.W.2d 980, 254 Ky. 391.

68. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—Norton v. Reardon, 72 P. 861, 67 Kan. 302, 100 Am.S.R. 459.

69. Fla.—State v. Sloan, 184 So. 128, 130, quoting **Corpus Juris.**

Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—First Nat. Bank v. Barons, 200 P. 297, 109 Kan. 493—Brewer v. Warner, 182 P. 411, 105 Kan. 168, 5 A.L.R. 385, rehearing denied 185 P. 889, 105 Kan. 591.

23 C.J. p 616 note 45.

Sheriff or court as vendor

In an execution sale the sheriff is the real vendor; in a judicial sale, the court is.

U.S.—Coulter v. Blieden, C.C.A.Ark., 104 F.2d 29, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488.

Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—Norton v. Reardon, 72 P. 861, 67 Kan. 302, 100 Am.S.R. 459.

Court's power limited to setting aside

In execution sales, court gives no directions concerning property to be levied on and usually has no control over sale beyond power to set it aside for noncompliance with statutory provisions governing it.

Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—Norton v. Reardon, 72 P. 861, 67 Kan. 302, 100 Am.S.R. 459.

Use of words "levy" and "judgment" in a notice of sale does not necessarily characterize a sale as an execution sale.—Gray v. Eurich, 96 N.W. 343, 2 Neb., Unoff., 194.

70. U.S.—Coulter v. Blieden, C.C.A. Ark., 104 F.2d 29, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L. Ed. 488.

Hawaii.—Smith v. Pacific Heights R. Co., 17 Hawaii 96, affirmed Ballentyne v. Smith, 27 S.Ct. 527, 205 U.S. 285, 51 L.Ed. 803.

Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—First Nat. Bank v. Barons, 200 P. 297, 109 Kan. 493.

Neb.—Krug v. Hopkins, 273 N.W. 221, 223, 132 Neb. 768, citing **Corpus Juris.**

23 C.J. p 616 note 45.

Statutory confirmation of execution sale see infra § 226.

71. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

Kan.—First Nat. Bank v. Barons, 200 P. 297, 109 Kan. 493—Norton v. Reardon, 72 P. 861, 67 Kan. 302, 100 Am.S.R. 459.

72. Ga.—Seymour v. National Building & Loan Ass'n, 42 S.E. 518, 116 Ga. 285, 94 Am.S.R. 131.

Neb.—Neligh v. Keene, 20 N.W. 277, 16 Neb. 407.

S.D.—Danner v. Murnan, 178 N.W. 987, 43 S.D. 289.

"The use of the words 'judicial sales' [in a statute] was obviously intended to embrace execution sales, though it is not a correct use of the term."—Taylor v. Georgia State Savings Ass'n, 218 S.W. 180, 183, 141 Ark. 425.

73. Or.—Webster v. Rogers, 171 P. 197, 87 Or. 547.

sidered in the C.J.S. Title Frauds, Statute of § 123, also 27 C.J. p 225 notes 54–64.

Notwithstanding the foregoing distinctions, it is advisable, in considering the law relating to execution sales, to read in conjunction the law relating to judicial sales, since in most cases it cannot in principle or reason matter whether the sale is made by some officer, as the agent of the court, or by the sheriff, as the agent of the law to make the sale and enforce the payment of money due from defendant to plaintiff.[74]

Forced sale. A sale on execution is not synonymous with a forced sale.[75]

§ 197. Necessity for, Conditions Precedent, and Impediments to Sale

a. Necessity
b. Conditions precedent and impediments

a. Necessity

The sheriff must sell the property taken, except where the levy is on money, or, it has been held, on a cause of action; and he may withdraw the property from sale if a responsible offer to pay the debt is made by the debtor, or for his benefit.

After the sheriff has levied, it is his duty to sell the property taken;[76] he cannot, for instance, deliver it to plaintiff in satisfaction of his claim,[77] except in case of a levy on money.[78] In enforcing an execution against a cause of action, the sheriff has been held to have discretion either to sell it or to proceed to collect it; but this discretion can be controlled by the court.[79] If, during the progress of a sale, the debtor, or any other responsible person for his benefit, offers to pay the debt, the sheriff may accept the offer and withdraw the property from sale.[80]

A suit in equity is not the appropriate remedy to enforce an execution levy, since the power of the sheriff to enforce it by sale is ample.[81]

b. Conditions Precedent and Impediments

An execution sale is unauthorized unless all conditions precedent, such as a valid execution and levy, have been fulfilled. Satisfaction of the judgment, and appointment of a receiver and delivery of the property to him, bar an execution sale, as does a prior attachment of personalty, although not of realty.

To authorize a sale, there must be a valid execution,[82] and, as indicated supra § 91, a valid levy thereunder. A sale pending a statutory claim to the property by a third person is invalid;[83] but a forthcoming bond does not prevent a sale,[84] nor does a former void sale under a dormant execution prevent a sale on the same day under a valid execution.[85] The effect of a stay is considered supra § 141; the effect of an injunction, supra § 163.

It is not necessary to make a demand for payment of the judgment prior to the issuance of an order of sale,[86] nor is it necessary, as a condition precedent to an execution sale, to pay off a mortgage on the debtor's property.[87]

Satisfaction of judgment. If the judgment has been satisfied before any sale is made under the execution, the power to make the sale is lost,[88] and a sale thereafter is, under some authorities, void,[89] although in this connection should be observed the varying holdings as to the effect of satisfaction of

74. Ill.—Maulding v. Steele, 105 Ill. 644.
Judicial sales generally see the C.J.S. title Judicial Sales, also 35 C.J. p 7 note 1 et seq.

75. Cal.—Peterson v. Hornblower, 33 Cal. 266.
Fla.—Patterson v. Taylor, 15 Fla. 336.
S.D.—Karcher v. Gans, 83 N.W. 431, 13 S.D. 383, 79 Am.S.R. 893.

76. Cal.—La Societe Francaise v. McHenry, 49 Cal. 351, affirmed 95 U.S. 58, 24 L.Ed. 370.
23 C.J. p 616 note 51.

Duty to sell property previously attached
N.C.—Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 99 S.E. 104, 177 N.C. 404.

77. Ga.—Cargle v. Knox, 85 S.E. 764, 143 Ga. 597.
Md.—Jones v. Jones, 1 Bland 443, 18 Am.D. 327.

Judgment debtor's mortgaged property cannot be appraised and set off to judgment creditor at execution sale, but must be sold at auction.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H 234.

78. Mass.—Sheldon v. Root, 16 Pick. 567, 28 Am.D. 266.
23 C.J. p 616 note 53.

79. Mont.—Baker v. Tullock, 77 P. 2d 1035, 106 Mont. 375.

80. U.S.—U. S. v. Vestal, D.C.N.C., 12 F. 59, 4 Hughes 467.

81. Ky.—Low v. Skaggs, 105 S.W. 439, 31 Ky.L. 1292.

82. Ga.—Ray v. Atlanta Trust & Banking Co., 93 S.E. 418, 147 Ga. 265.
23 C.J. p 616 note 57.

Execution not warranted by terms of judgment
A judgment awarding attorney a lien on property, and providing that if client failed to pay lien property should be advertised and sold "as provided by law for the foreclosure of other liens," vested no authority in the clerk to issue an execution, or in the sheriff to sell the property under execution.—Crutchfield v. Foster, 200 S.E. 395, 396, 214 N.C. 551.

Writ held sufficient
Md.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Md. 190.

83. La.—In re Immanuel Presb. Church, 36 So. 408, 112 La. 348.
Effect of pendency of claim by third persons generally see supra § 177.

84. N.C.—Frost v. Rowland, 27 N.C. 385.

85. Ga.—Conley v. Redwine, 35 S.E. 92, 109 Ga. 640, 77 Am.S.R. 398.
23 C.J. p 616 note 62.

86. Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S.W.2d 1112.

87. Mich.—King v. Hubbell, 4 N.W. 440, 42 Mich. 597.

88. Ga.—Flemister Grocery Co. v. Burtz, 94 S.E. 229, 147 Ga. 416.
23 C.J. p 616 note 63.

89. Iowa.—Shaffer v. McCrackin, 58 N.W. 910, 90 Iowa 578, 48 Am.S.R. 465.
23 C.J. p 616 note 64.

the judgment on the title of bona fide purchasers, as set out infra § 285. The debtor is entitled to pay the judgment and costs and thereby stop further proceedings at any time before the sheriff has declared an unconditional sale.[90]

Where there is only a part payment of the judgment, a sale to realize the balance due is valid.[91] However, a sheriff has no right to sell for the purpose of collecting his fees after due notice of the settlement and discharge of the judgment.[92]

Prior attachment. An attachment of personal property in favor of one creditor has been held a bar to an execution sale in favor of another,[93] even though it is sought to make the execution sale subject to the prior lien of the attachment.[94] In the case of realty, it has been held proper for a creditor to proceed with his execution sale and take the risk that the earlier attachment will not be perfected by a judgment and levy.[95]

Appointment of receiver. After the appointment of a receiver and the delivery of the property to him, a sale of the property cannot be had under an execution, even though it was levied before the appointment.[96]

Leave of court. Under at least one statute, a sheriff's sale of rights and credits cannot be had without leave of the court.[97]

Waiver of certificates of lien. Where certificates of liens against the property, as provided for by statute, are waived by plaintiff and purchaser, it is not error for the sheriff to proceed with the sale without them.[98]

Death of party. The effect of the death of a party on the right to sell is considered supra § 65 and infra § 208.

§ 198. Statutory Provisions

The law in force at the time of the execution sale generally controls. Controlling statutes have variously been, or not been, given a retroactive effect.

As a general rule, the law in force at the time of the sale of property on execution will control the proceedings of the officer conducting the sale, and not the law in force at the time the judgment was rendered,[99] although there is authority to the effect that the sale on execution on a judgment in a suit on contract must be governed by the law in force when the contract was made.[1] There is no vested right to a particular form of remedy, and if a substituted remedy is given which does not abridge the usefulness of that existing at the time the right accrued, there is no cause for complaint.[2]

Retroactive effect. The provisions of a code as to sale have been held not to apply where the judgment was rendered prior to its taking effect;[3] and a statute requiring execution sales to be advertised in a newspaper has no application to sales made prior to its enactment;[4] but a statute relating to the sale of realty under execution has been held to govern such sale whether the execution was issued on a judgment rendered prior or subsequent to its enactment.[5]

§ 199. Authority of Officer to Sell

An execution sale must be made by an officer having the proper authority, and who is not a party to the execution. An officer who has properly levied during his term of office may generally sell thereafter; but there is authority to the contrary as to sales of realty.

An officer making a sale under execution acts solely by virtue of the statutory authority conferred, which must be strictly pursued; and where such power does not exist nothing passes by the sale.[6] It has been said that the judgment and execution prove the authority.[7]

A sale under an execution should be made by an officer of the county in which the property is situated.[8] A sale under an execution directed merely

90. R.I.—Niedwicki v. Belasco, 142 A. 228, 49 R.I. 417.
91. S.D.—La Penatiere v. Kellar, 137 N.W. 382, 29 S.D. 496.
23 C.J. p 617 note 67.
92. N.Y.—Jackson v. Anderson, 4 Wend. 474.
23 C.J. p 617 note 66.
93. Cal.—Holm v. Overholt, 6 P.2d 76, 214 Cal. 431.
Property in custody of law as subject to execution see supra § 55.
94. Cal.—Holm v. Overholt, supra.
95. Mass.—Trojanowski v. Maclachlan, 133 N.E. 350, 240 Mass. 225.
96. U.S.—Wiswall v. Sampson, Ala., 14 How. 52, 14 L.Ed. 322.
23 C.J. p 617 note 68.
Property in custody of law as subject to execution see supra § 55.
97. N.J.—Van Order v. Bailey, 146 A. 419, 104 N.J.Eq. 585.
98. Neb.—Moore v. Hornsby, 95 N.W. 858, 4 Neb., Unoff., 682.
99. Ohio.—Allen v. Parish, 3 Ohio 187.
23 C.J. p 620 note 33.
1. Ind.—Doe v. Collins, 1 Ind. 24.
23 C.J. p 621 note 34.
2. Me.—Poor v. Chapin, 54 A. 753, 97 Me. 295.
3. Iowa.—Holland v. Dickerson, 41 Iowa 367.
4. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
5. Wash.—Whitworth v. McKee, 72 P. 1046, 32 Wash. 83.
23 C.J. p 620 note 33 [b].
6. R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 617 note 76.
Authority to sell property previously attached
N.C.—Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 99 S.E. 104, 177 N.C. 404.
7. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
8. Tex.—Huff v. State, Civ.App., 93 S.W.2d 231.
23 C.J. p 617 note 71.
Place of sale see infra § 207.

to the sheriff as such, without naming him, may be made either by the sheriff himself or by his deputy;[9] but one officer has no power to sell under an execution directed to another officer.[10]

The officer must be in possession, or entitled to possession, of chattels to be sold,[11] but need not be in actual possession of real estate to be sold.[12] An officer has power to sell even though only one of several executions under which the sale is made is valid,[13] or at least the sale is voidable only, rather than void.[14] It has been held that where the officer dies before sale, the land may be sold by his executor or administrator;[15] but there is authority to the contrary.[16]

Officer as party. Under the principle of public policy which makes it unlawful for a sheriff to levy an execution issued in his favor, it is unlawful for an officer or his deputy to conduct a sale under an execution to which he is a party,[17] as where he has become the owner of the judgment.[18]

Expiration of term of office. Except where otherwise provided by statute, the general rule is that where a sufficient levy of execution is made on property during the life of a writ and prior to the expiration of the term of office of the officer to whom it is delivered, such officer is empowered to make a sale of the property so levied on after his term has expired.[19] In the case of personal property especially, the general rule is that the sale may and should be made by the officer who levied the writ, the reason given being that the officer, by virtue of his levy, has acquired an interest in the property;[20] but under a statute providing that process remaining with the officer unexecuted at the expiration of his term may be executed by his successor, where a sheriff has made a levy on personalty under an execution, his successor in office may complete the sale.[21]

Since the levy of an execution on real estate does not vest any special property in the officer making the levy, the rule has been laid down that the powers of his successor in office are concurrent with those of the officer making the levy with respect to the sale of such property, or, at least, that the successor may carry out the sale.[22] Further, according to some authorities, in the case of real property the new officer is the only proper party to make the sale and execute the conveyance, and a sale by the officer whose term has expired is a nullity,[23] unless he makes the sale under a venditioni exponas directed to him.[24] However, according to other authorities, only the outgoing officer has power to complete the execution by the sale and conveyance of the land levied on.[25]

It has been held that an ex-officer and the incumbent cannot advertise, sell, and make a deed jointly.[26]

§ 200. —— Venditioni Exponas

a. Definition and nature
b. Office of writ and right thereto
c. Necessity
d. Form

a. Definition and Nature

A venditioni exponas is a writ commanding the sheriff to sell property which he has taken in execution by virtue of a fieri facias and has not yet sold. It is considered by some authorities as in its nature an execution, but is more in the nature of an order requiring the sheriff to proceed to the execution of the former writ.

A venditioni exponas is a writ directed to an officer, such as the sheriff, commanding him to sell goods or chattels, and, in some states, lands, which he has taken in execution by virtue of a fieri facias, and which remain unsold.[27] It is a

9. Va.—Tyree v. Wilson, 9 Gratt. 59, 50 Va. 59.
23 C.J. p 617 note 72.

10. Ky.—Parsons v. Dills, 167 S.W. 415, 159 Ky. 471.
23 C.J. p 617 note 73.

11. U.S.—Zane v. Cowperthwaite, Pa., 1 Dall. 312, 1 L.Ed. 152.
23 C.J. p 617 note 74.

12. Ind.—Lahr v. Ulmer, 60 N.E. 1009, 27 Ind.App. 107.

13. Ky.—Shepherd v. Delph, 58 S.W. 991, 22 Ky.L. 977.
23 C.J. p 617 note 77.

14. Ala.—Francis v. Sheats, 45 So. 241, 153 Ala. 468, 127 Am.S.R. 61.

15. N.J.—Read v. Stevens, 1 N.J. Law 306.

16. N.Y.—Mason v. Sudam, 2 Johns. Ch. 172.
23 C.J. p 618 note 88.

17. N.C.—Bowen v. Jones, 35 N.C. 25, 55 Am.D. 426.
23 C.J. p 618 note 81.

18. Tenn.—Riner v. Stacy, 8 Humphr. 288.

19. Del.—Davis v. Napolski, 151 A. 721, 4 W.W.Harr. 237.
23 C.J. p 618 note 85.

20. R.I.—Doliver v. Collingwood, 8 A. 711, 15 R.I. 510.
23 C.J. p 618 note 86.

21. Cal.—Weldon v. Rogers, 108 P. 266, 157 Cal. 410.

22. Ga.—Gower v. New England Mortg. Sec. Co., 111 S.E. 422, 152 Ga. 822.
Ky.—Davis v. Hudson, 244 S.W. 68, 195 Ky. 766.
23 C.J. p 618 note 87.

Failure to pay sheriff who made original levy concerns that officer only, and does not affect the validity of a writ delivered to his successor.—Davis v. Hudson, supra.

23. Pa.—Leshey v. Gardner, 3 Watts & S. 314, 38 Am.D 764.
23 C.J. p 618 note 89.

24. N.C.—Tarkinton v. Alexander, 19 N.C. 87.
23 C.J. p 618 note 90.

25. Ark.—Byers v. Fowler, 12 Ark. 218, 54 Am.D. 271.
23 C.J. p 618 note 91.

26. N.J.—Maffett v. Tonkins, 6 N. J.Law 228.

27. U.S.—Yazoo & M. V. R. Co. v.

writ of compulsion, not of authorization, and gives the officer no authority not previously possessed by him.[28]

The writ is not separate from the fieri facias, but a part of it,[29] and derives its authority therefrom.[30] The execution and levy constitute the predicate of the venditioni exponas, and the latter rests on the judgment, as do the former.[31]

Although it has been held that the writ of venditioni exponas is in its nature an execution,[32] and that it may be a fieri facias for the residue of the debt when the goods taken are not sufficient to satisfy the whole,[33] it is more in the nature of a mandate or order requiring the sheriff to proceed to the execution of the former writ, which is still regarded as the foundation of his proceedings.[34]

Alias execution compared. As to the property on which a levy has been made, a venditioni exponas is in its nature and operation an alias execution.[35] Indeed, an alias execution performs the office of a writ of venditioni exponas in some jurisdictions,[36] although not in others.[37]

Distringas. Under the old practice when the sheriff had gone out of office, a distringas issued rather than a venditioni exponas.[38]

b. Office of Writ and Right Thereto

The office of a venditioni exponas is to compel the sale of property previously seized, and the judgment creditor is entitled to the writ whenever the officer who has the duty of selling neglects or refuses to do so.

The office of a venditioni exponas is to sell that which has been already seized, in order to satisfy the judgment and costs on which the execution issued,[39] and the same is the case with any subsequent venditioni exponas that may issue.[40] In other words, the office of the writ is to command the officer to proceed when he returns the execution showing that he has not made a sale of the property levied on as required by the writ.[41] Hence a

City of Clarksdale, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing, Miss., 81 So. 178.
Ala.—Dryer v. Graham, 58 Ala. 623.
Ill.—Hastings v. Mitchell, 3 N.E. 507, 115 Ill. 69.
Kan.—Ritchie v. Higginbotham, 26 Kan. 645.
Okl.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 567, 173 Okl. 285, quoting **Corpus Juris.**
23 C.J. p 619 note 95.

Corpus Juris cited for discussion of conditions which warrant issuance of writ.—U. S. v. Bailey, D.C. Ga., 52 F.2d 286, 287.

28. Del.—Smith v. Ford, 161 A. 214, 217, 5 W.W.Harr. 175, citing **Corpus Juris.**
Ill.—Hastings v. Mitchell, 3 N.E. 507, 115 Ill. 69.
Ky.—Fannin's Ex'r v. Haney, 140 S.W.2d 630, 283 Ky. 68.
23 C.J. p 619 note 12.

29. Tex.—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600, 604, quoting **Corpus Juris.**
23 C.J. p 619 note 97.

Branch of fieri facias
It is sometimes spoken of as a branch of the writ of fieri facias.
Del.—Smith v. Ford, 161 A. 214, 5 W.W.Harr. 175.
Mo.—Hicks v. Ellis, 65 Mo. 176.

The effect of a sale under the writ is the same as though the sale had been made under the original writ before the return day.—Hicks v. Ellis, 65 Mo. 176.

30. Del.—Smith v. Ford, 161 A. 214, 5 W.W.Harr. 175.

31. Tex.—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600, 604, quoting **Corpus Juris.**
23 C.J. p 619 note 3.

"The writ of venditioni exponas does not issue unless there has been a previous levy or the land otherwise brought within the custody of the court."—Sipes v. Sanders, 39 S.W.2d 739, 740, 162 Tenn. 593.

32. Mo.—Hicks v. Ellis, 65 Mo. 176.
Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265, affirmed, Com.App., 269 S.W. 1037.

33. Ala.—Quinn v. Wiswall, 7 Ala. 645.

34. Tex.—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600, 604, quoting **Corpus Juris.**
23 C.J. p 619 notes 98, 99.

35. U.S.—Beebe v. U. S., Ala., 16 S.Ct. 532, 161 U.S. 104, 40 L.Ed. 636.
Alias and pluries writs generally see supra § 85.

"It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. . . . If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ."—Dryer v. Graham, 58 Ala. 623, 626.

36. Kan.—Rain v. Young, 59 P. 1068, 61 Kan. 428, 78 Am.S.R. 325.

Death of debtor
A valid sale may be made under an alias execution issued after a levy under the original writ, the death of defendant, and the dissolution of an injunction which the judgment debtor has previously obtained against the sale.—Rain v. Young, 59 P. 1068, 61 Kan. 428, 78 Am.S.R. 325.

In Oklahoma, under a statute providing that if lands are not sold under one execution, "other executions" may be issued, the "other executions" referred to in the statute perform the office of a venditioni exponas at common law.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 173 Okl. 285.

37. Tenn.—Continental Gin Co. v. Banks, 39 S.W.2d 268, 269, 162 Tenn. 589.
"In some jurisdictions an alias fi. fa. is used as a substitute for the common-law writ of venditioni exponas, but quite generally, and certainly in Tennessee, the venditioni exponas is the proper process whenever a fieri facias has been returned unsatisfied."—Continental Gin Co. v. Banks, supra.

38. U.S.—Zane v. Cowperthwaite, Pa., 1 Dall. 312, 1 L.Ed. 152.

39. Tex.—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600, 604, quoting **Corpus Juris.**
23 C.J. p 619 note 3.
"The venditioni exponas continues the lien of the execution which has been levied, as to the property on which the levy has been made, whether the property be real or personal. . . . The writ is, indeed, merely for the continuation and completion of the original execution."—Dryer v. Graham, 58 Ala. 623, 626.

40. Tex.—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600, 604, quoting **Corpus Juris.**
23 C.J. p 619 note 3.

41. U.S.—U. S. v. Hogg, Ky., 112 F. 909, 50 C.C.A. 608.
Ky.—Low v. Skaggs, 105 S.W. 439, 31 Ky.L. 1292.

sale by an officer acting under a writ of venditioni exponas is null and void in a case where no fieri facias has been issued,[42] where the property sold has not been levied on,[43] where the levy is void,[44] or where the judgment has been satisfied or merged in another judgment.[45]

The writ of venditioni exponas is available for the sale of property where, because of the shortness of the time for return, sale cannot be made under the writ of fieri facias.[46]

Right of judgment creditor. Where an officer whose duty it is to sell property seized to satisfy an execution omits, neglects, or refuses to make sale thereof, according to law, the creditor whose debt or demand the property was seized to satisfy may have a writ of venditioni exponas to compel the officer to discharge his duty and sell the property;[47] if the clerk refuses to issue the writ, the party may without previous notice move the court to direct the clerk to issue it.[48] The right to the writ is not cut off by the failure of the officer to make his return on the first day of the term.[49]

Where the interest of the debtor in land has been sold under a venditioni exponas, an alias venditioni exponas will not be allowed to be issued against the same property while the first sale stands.[50]

c. Necessity

The writ of venditioni exponas is not ordinarily needed to justify a sale, and is superfluous if the officer is willing to proceed.

Since the writ of venditioni exponas is only a direction to perform a duty which already exists, and gives the sheriff no additional authority, the writ is not ordinarily needed to justify a sale,[51] at least where the return day has not gone by;[52] but the effect of some statutes has been to require the issuance of a venditioni exponas in order to warrant the sale of real property or of particular interests therein,[53] and it has also been held that, after a levy on personal property and discharge of a rule for an interpleader, the proper course is for plaintiff to take out a venditioni exponas.[54]

Issuance of the writ is superfluous if the officer is willing to proceed to sell.[55]

d. Form

The writ of venditioni exponas should make the proper recitals; but clerical errors are not fatal.

The writ of venditioni exponas should recite the former writ and return, and command the sheriff to make sale of the property seized and remaining unsold.[56] It must recite the issuance of an execution and the return;[57] but it need not designate by name the county or district in which the land to be sold lies.[58] It may contain a fieri facias clause so as to compel a sale of the property levied on and authorize a levy on other property sufficient to satisfy the judgment;[59] and if the writ omits a command to levy on additional property the sale thereunder of additional property not before levied on conveys no title.[60]

Where clerical errors appear in the writ, the

42. Pa.—Copeland v. Mehaffey, 6 Pa.Dist. 167.
Tenn.—Hurst v. Laford, 11 Heisk. 622.

43. Mo.—Wood v. Augustine, 61 Mo. 46.
23 C.J. p 619 note 6.

44. Pa.—McLanahan v. Goodman, 108 A. 206, 265 Pa. 43.
23 C.J .p 619 note 7.

45. Ark.—Wright v. Yell, 13 Ark. 503, 58 Am.D. 336.

46. Del.—Smith v. Ford, 161 A. 214, 5 W.W.Harr. 175.

47. Ind.—Doe v. Cunningham, 6 Blackf. 430.
23 C.J. p 620 note 23.

Implied authorization
The use of a writ of venditioni exponas is impliedly authorized where the form of execution provided by statute is identical in all material parts with the common-law fieri facias.—Ludtke v. Bankers' Trust Co., Tex.Civ.App., 251 S.W. 600.

48. Va.—Commonwealth v. Hewitt, 2 Hen. & M. 181, 12 Va. 181.

49. Tenn.—Continental Gin Co. v. Banks, 39 S.W.2d 268, 162 Tenn. 589.

50. Pa.—Copeland v. Mehaffey, 6 Pa.Dist. 167

51. U.S.—Yazoo & M. V. R. Co. v. City of Clarksdale, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing, Miss., 81 So. 178.
Ill.—Hastings v. Mitchell, 3 N.E. 507, 115 Ill. 69.
23 C.J. p 619 note 11.

Method not exclusive
(1) The writ of venditioni exponas is not the exclusive method of proceeding against land which has been levied on.—Fannin's Ex'r v. Haney, 140 S.W.2d 630, 283 Ky. 68.

(2) Thus, under the Delaware statutes, a sale of land may be had under proper circumstances on writ of fieri facias.—Smith v. Ford, 161 A. 214, 5 W.W.Harr., Del., 175.

52. U.S.—Yazoo & M. V. R. Co. v. City of Clarksdale, Miss., 42 S.Ct. 27, 257 U.S 10, 66 L.Ed. 104, reversing 81 So. 178.
Time of sale see infra § 208.

53. Pa.—Kunselman v. Stine, 38 A. 414, 183 Pa. 1.
23 C.J. p 619 note 14.

Life estate
Pa.—Lippard v. Spiegel, 88 Pittsb. Leg.J 596.
23 C.J. p 619 note 14 [a].

54. Pa.—Gray v. Krugerman, 4 Pa. Co. 290.

55. Ill.—Hastings v. Bryant, 3 N.E. 507, 115 Ill. 69, 75.

56. Mo.—Maupin v. Emmons, 47 Mo. 304.
23 C.J. p 619 note 16.

57. Ohio.—Sterling v. Emick, Tapp. 326.
23 C.J. p 620 note 17.

58. Ala.—McConnaughy v. Baxter, 55 Ala. 379—Weir v. Clayton, 19 Ala. 132.

59. Mo.—Hicks v. Ellis, 65 Mo. 176.
23 C.J. p 620 note 19.

60. Mo.—Maupin v. Emmons, 47 Mo. 304.

proper corrections should be made on the application of the purchasers at the sale.[61] Where the writ is issued under the seal of the court, the clerical omission of the signature of the clerk is not fatal.[62]

§ 201. Conduct and Mode of Sale Generally

a. General rules
b. Designation of property
c. Sale as realty or personalty
d. Encumbered property

a. General Rules

An execution sale should be conducted in conformity with statute and in a manner which will secure the best price. The officer who sells acts on behalf of the debtor as well as the creditor, and must exercise his discretion fairly for the benefit of all concerned.

An execution sale should be so conducted as to promote competition and secure the best price.[63] All statutory requirements relating to the sale must be observed,[64] the sale otherwise being void.[65] It has been held necessary,[66] although sufficient,[67] for the execution sale to be conducted substantially as prescribed by the notice of sale and in accordance with the decree.

Duties and powers of officer selling. Although the duties of the officer selling are ministerial in nature,[68] he nevertheless has some discretionary power.[69] Such discretion must be fairly and impartially exercised for the benefit of all concerned,[70] and an abuse thereof will be relieved against in equity, although there may have been a formal compliance with all statutory requirements.[71]

While the officer who sells should obey all reasonable directions of the execution plaintiff,[72] he is not a mere agent or servant of the judgment creditor;[73] he is, rather, the agent[74] or trustee[75] of, or at least under a duty to protect,[76] the debtor as well as the creditor.

The sheriff is not authorized to determine a judicial question as to the debtor's interest in the real estate offered for sale; his authority is only to offer the interest of the debtor, whatever such interest may be.[77]

Employment of auctioneer. As a general rule, the sheriff may employ an auctioneer and make him his agent to sell the property and collect the proceeds;[78] but it has been held that he cannot employ an auctioneer at the expense of the owner

61. Pa.—De Haas v. Bunn, 2 La. 335, 44 Am.D. 201.
Tenn.—Perkins v. Woodfolk, 8 Baxt. 480.

62. Pa.—McCormick v. Measin, 1 Serg. & R. 92.

63. R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 620 note 29.

64. Ala.—Sparry v. Woodliff, 117 So. 667, 218 Ala. 155.
Mich.—James v. Pontiac & G. Plank Road Co., 8 Mich. 91.
Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 620 note 31.

Compliance held shown
Ala.—Sparry v. Woodliff, 117 So. 667, 218 Ala. 155.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.

Agreement of parties
Where the parties agreed that the sheriff should sell property at public auction sooner than it could have been sold at law, it was held that the court had no power to treat the funds so raised as proceeds of an execution sale and distribute the same among the creditors.—Davis v. Collier, 13 Ga. 485.

65. Tex.—L. J. Tillery Oil Co. v. Snyder, Civ.App., 42 S.W.2d 282.
Contra Tuttle v. Gates, 24 Me. 395.

66. Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

67. Neb.—Holferty v. Wortman, 283 N.W. 855, 135 Neb. 732.

68. Ill.—Dorris v. Johnson, 2 N.E. 2d 74, 363 Ill. 236, 104 A.L.R. 629.
Iowa.—Prudential Ins. Co. of America v. Westfall, 260 N.W. 344, 219 Iowa 1119.

69. Iowa.—Prudential Ins. Co. of America v. Westfall, supra.
23 C.J. p 620 note 26.

70. Ohio.—Sparling v. Todd, 27 Ohio St. 521.
23 C.J. p 620 note 27.

71. N.J.—Cummins v. Little, 16 N. J.Eq. 48.

72. Del.—Adams v. Coates, 8 Del. 9.
23 C.J. p 620 note 30.

73. Iowa.—McCann v. McCann, 223 N.W. 393, 207 Iowa 610.

74. Ga.—Dupriest v. Bennett Bros., 7 S.E.2d 293, 61 Ga.App. 704.
Mo.—Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.
23 C.J. p 620 note 25.

75. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.

76. Iowa.—McCann v. McCann, 223 N.W. 393, 207 Iowa 610.
Mo.—Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.

Debtor guarded by courts
Courts guard with jealous care rights and interests of persons whose property is sold at execution sales.—Lowden v. Graham, 9 A.2d 659, 136 Me. 341.

Rights of both parties
Execution sales should be made in a manner which will not prevent the creditor from collecting his judgment but which will protect the debtor in his right to have as much realized as practicable.—Tice v. Tice, 224 N.W. 571, 208 Iowa 145.

77. Ill.—Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629.

78. Ga.—Giles v. Southwestern Georgia Bank, 29 S.E. 600, 102 Ga. 702.
23 C.J. p 623 note 81.
Public or private sale see infra § 204.

Announcement by auctioneer; property excepted from sale
Where an auctioneer at a sale of land under fieri facias made an oral announcement within the actual and apparent scope of his authority, all persons present were bound by it if they could have heard it had they been listening; so an auctioneer at a sale of a farm could publicly announce in the presence of bidders that a silo on the farm was excepted, and would not be sold, where the advertisement, although it referred to the various structures on the farm, contained no reference to the

of the property seized, in the absence of authority from such owner.[79]

b. Designation of Property

The property being sold under execution must be clearly designated.

It is a cardinal rule, in an execution sale of real property, that the property sold should be designated with reasonable certainty,[80] and therefore a sale of an undesignated part of a large tract of land, there being no means of distinguishing the portion sold from the residue, is void.[81] Personal property to be sold must be pointed out to the bidders and specifically designated, and it must not be left to any future act to ascertain what property was actually sold.[82]

c. Sale as Realty or Personalty

Personalty may not be sold, under execution, in the manner prescribed for the sale of realty, and vice versa. Realty and personalty should not be sold together indiscriminately.

An execution sale of personal property as real property, or vice versa, is invalid.[83] At common law, chattel interests in real leaseholds are always sold as personalty, and, in the absence of statutory provisions, a sale on execution of such interests in accordance with the statutory provisions for the sale of real estate is void;[84] by statute, however, chattels real may be required to be sold as real property.[85]

Lumping realty and personalty. It is irregular to sell real and personal estate together indiscriminately.[86]

d. Encumbered Property

Apart from statutory requirements, an execution sale need not be made expressly subject to prior encumbrances, and the sheriff need not search the records to ascertain whether any exist; but it is not improper for him to give notice of such encumbrances.

Except where otherwise provided by statute,[87] a sale under execution need not be made expressly subject to prior encumbrances,[88] although there is no impropriety in the sheriff's giving notice of such encumbrances.[89] He is not bound to search the public records to ascertain whether the property is encumbered by prior liens, nor is he bound to sell such property by virtue of any mortgage, but he may sell, subject to all encumbrances, under the execution.[90] It is no fraud on the part of the holder of several judgments to sell under a junior judgment, where he notifies bidders of the older liens.[91]

silo.—Lewis v. E F. Schlichter Co., 112 A. 282, 137 Md. 217.

79. U.S.—Wallis v. Shelly, C.C.N.Y., 30 F. 747.
23 C.J. p 623 note 82.

80. Ky.—Treadway v. Gray, 7 Ky. Op. 37.
23 C.J. p 621 note 38.
Description of property in notice of sale see infra § 241.

No presumption in aid of description

The presumption sometimes indulged, in voluntary sales, in aid of the description or identity of the property conveyed, based on the supposed intention of the grantor, has no application to an involuntary execution sale, "where the owner intends nothing with respect to the matter."—Millsap v. Peoples, 288 S. W. 181, 182, 116 Tex. 180.

81. Me.—Snell v. Libby, 15 A.2d 148, 150, 137 Me. 62, citing **Corpus Juris.**
23 C.J. p 621 note 39.

82. Cal.—Baar v. Smith, 275 P. 861, 862, 97 Cal.App. 398, quoting **Corpus Juris.**
23 C.J. p 621 note 40.
Presence of property at time and place of sale see infra § 207.

If a chose in action is to be sold, any paper evidence of it should be present to be exhibited, or it should at least be accurately described.—Crandell v. Blen, 13 Cal. 15—23 C.J. p 621 note 42.

If shares of stock are to be sold, the number of shares must be stated
Cal.—Baar v. Smith, 275 P. 861, 862, 97 Cal.App. 398, quoting **Corpus Juris.**
Tex.—Keating v. J. Stone & Sons, Livestock Co., 18 S.W. 797, 83 Tex. 467, 29 Am.S.R. 670.

Where goods are sold in large lots, adequate opportunity to inspect them should be allowed.—Wolf v. Hano, 11 Pa.Co. 204.

83. Nev.—Arnold v. Goldfield Third Chance Min. Co., 109 P. 718, 32 Nev. 447.
23 C.J. p 623 note 69.

84. Mich.—Buhl v. Kenyon, 11 Mich. 249, 83 Am.D. 738.
23 C.J. p 623 note 70.

Unexpired lease term of less than five years
N.Y.—Henderson v. Tomb, 8 N.Y.S. 2d 612, 169 Misc. 737—U. S. Oxygen Co. v. Bernard A. Buge, Inc., 136 N.Y.S. 297, affirmed 138 N.Y. S. 1146, 153 App.Div. 900.

Permit to occupy land on forest service reservation should be sold as personal property.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131.

85. U.S.—Hyatt v. Vincennes Nat. Bank, Ind., 5 S.Ct. 573, 113 U.S. 408, 28 L.Ed. 1009.
Wash.—Reilley v. Anderson, 73 P. 799, 33 Wash. 58.

Unexpired lease term of five years or more
N.Y.—Henderson v. Tomb, 8 N.Y.S. 2d 612, 169 Misc. 737

86. Or.—Roseburg Nat. Bank v. Camp, 173 P. 313, 89 Or. 67.
23 C.J. p 622 note 64.

87. Under the Louisiana statutes, the officer who sells is required to read a certificate showing the privileges and mortgages on the property offered for sale.—Liquid Carbonic Corporation v. Leger, La.App., 169 So. 170—Colfax Motor Co. v. O'Quinn, 2 La.App. 323—23 C.J. p 623 note 72.

88. Iowa.—Ramsdell v. Hana Water-Power Co., 51 N.W. 245, 84 Iowa 481.
23 C.J. p 623 note 73.

Quantity of land encumbered
However, it is the duty of the officer selling to disclose to the bidders how much of the land is encumbered, in order that bidders may fully understand the character of title they would acquire if they purchased.—Underwood v. Bowles, 2 Ky. Op. 321.

89. Pa.—Cake v. Cake, 26 A. 781, 156 Pa. 47.

90. S.C.—Treasury Comrs. v. Hart, 3 S.C.L. 492.

91. Mo.—Hardwick v. Jones, 65 Mo. 54.

All bidders must be on the same footing at an execution sale with respect to whether, as far as the record discloses, an unencumbered title will be acquired by the sale;[92] and if there is a real doubt as to the encumbrances which will be discharged by the sale the matter should, where reasonably possible, be determined preliminarily,[93] as, for example, by a declaratory judgment.[94]

§ 202. —— Sale of Less than Whole Interest, and Excessive Sale

The debtor's entire interest in the property should be sold, and no more than his interest; but a sale of a lesser interest than he owns has been held not void. No more of his property should be sold than is necessary to satisfy the demand, although a sale will not be avoided for an unappreciable excess. A sale of less property than was levied on is commonly held valid, but an estate larger than that embraced in the levy cannot be sold.

On an execution sale of property, the general rule is that the officer should sell the entire interest whereof defendant in execution is seized;[95] thus, if defendant owns the entire fee of land levied on, the officer cannot sell an undivided interest therein.[96] It has been held, however, that a sale is not void merely because the officer sells a smaller interest in the property than the execution defendant really owns.[97]

Sale of debtor's interest only. Where two or more individuals own undivided interests in property,[98] as where there are two tenants in common of a chattel,[99] and the property is seized under an execution against one of them, the officer who conducts the sale should sell only the share of the judgment debtor; the sale of all the property would, it has been held, constitute him a trespasser ab initio.[1]

On an execution against a partner under which partnership assets have been seized, the officer should sell only the interest of the partner.[2]

Where an execution against a mortgagor has been levied on mortgaged chattels, the officer should sell only the interest of the mortgagor.[3]

Sufficiency to satisfy demand. An officer should not sell more of the debtor's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided a part can be reasonably and conveniently detached from the residue of the property and be sold separately;[4] a sale of additional land[5] or personal property[6] after enough has been sold to satisfy the judgment is unauthorized. A sale of property so disproportioned in value to the amount to be raised as to create a presumption of fraud or reckless indifference has been held void[7] or voidable.[8] Where the amount of property sold in excess is not appreciable, the sale will not be avoided on that account.[9]

A sale of less property than was levied on is valid, under several authorities,[10] although it has been held that, where less land is sold than has been levied on and appraised, the sale is void.[11] Under a levy on a whole lot, the sheriff may lawfully sell an undivided interest in the lot.[12]

An estate larger than that embraced in the levy cannot be sold.[13]

92. Pa.—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1.

93. Pa.—Delaware County Nat. Bank v. Miller, supra.

94. Pa.—Delaware County Nat. Bank v. Miller, supra.

95. Pa.—McLaughlin v. Shields, 12 Pa. 283.
23 C.J. p 621 note 49.

Where a supposed equity of redemption is sold, and it is afterward ascertained that the debtor owns the entire estate, the sale is a nullity.—Pillsbury v. Smyth, 25 Me. 427.

96. Me.—Snell v. Libby, 15 A.2d 148, 150, 137 Me. 62, citing **Corpus Juris.**
23 C.J. p 621 note 50.

97. Ala.—O'Connor v. Youngblood, 16 Ala. 718.
23 C.J. p 621 note 51.

98. Ky.—Pinson v. Murphy, 295 S.W. 442, 220 Ky. 464.
23 C.J. p 621 note 53.

Partition unnecessary
"As a general rule, partition is not necessary to a sale under execution of an undivided interest in land owned by the judgment debtor."—Turner v. Miller, Tex.Civ.App., 255 S.W. 237, 238.

99. Vt.—Ladd v. Hill, 4 Vt. 164.
23 C.J. p 621 note 53.

1. Mass.—Melville v. Brown, 15 Mass. 82.

2. N.Y.—Ryder v. Gilbert, 16 Hun 163.
23 C.J. p 622 note 54.

3. Pa.—Brill v. West End Passenger R. Co., 4 Wkly.N.C. 139.
23 C.J. p 622 note 55.

4. Mo.—Mason v. Wilks, App., 288 S.W. 936, 938, quoting **Corpus Juris.**
23 C.J. p 622 note 57.

5. Ga.—Richards v. Edwardy, 76 S.E. 64, 138 Ga. 690.
23 C.J. p 622 note 59.

6. Mich.—Allen v. Kinyon, 1 N.W. 863, 41 Mich. 281.

7. Colo.—Fulton Inv. Co. v. Smith, 149 P. 444, 27 Colo.App. 279.
23 C.J. p 622 note 61.

8. S.D.—La Penotiere v. Kellar, 137 N.W. 382, 29 S.D. 496.

9. Iowa.—Humphry v. Beeson, 1 Greene 199, 48 Am.D. 370.
23 C.J. p 622 note 63.

10. La.—Lisso v. Williams, 71 So. 365, 139 La. 197.
23 C.J. p 621 note 45.

Levy on fee; sale reserving dower
Although a levy was on the whole fee, without reserving the right of a widow to her dower in the property, a conveyance may be made of the reversion, reserving the widow's dower right on the sale and in the sheriff's deed.—Parler v. Johnson, 7 S.E. 317, 81 Ga. 254.

11. Tex.—Howard v. North, 5 Tex. 290, 51 Am.D. 769.

12. Ga.—Perkerson v. Overby, 59 Ga. 414.
23 C.J. p 621 note 47.

13. Me.—Thompson v. Baker, 74 Me. 48.
23 C.J. p 622 note 58.

Judgment against particular property. Where the sale is made pursuant to a judgment directed against particular property, the officer cannot sell an additional tract.[14]

§ 203. —— Sale under Several Executions

Several executions against the same defendant, although not against different defendants, may ordinarily be satisfied by a single sale of realty.

One sale of real estate may be made to satisfy several executions against the same defendant,[15] except where the executions are governed by different laws as to the terms of sale;[16] but property cannot be sold at one time, under different writs, against different execution defendants.[17]

§ 204. —— Public or Private Sale

It is generally required, under statutes, that a sale under execution be at public auction.

Although at common law the sheriff may exercise his discretion as to the manner of sale and is not required to sell at auction,[18] it is generally held, under statutes, that a sheriff has no authority to make a private sale under execution, and that the sale must be at public auction,[19] unless all the parties consent to a private sale.[20]

§ 205. —— Order of Offering for Sale

In the absence of statute, or agreement of the parties, unencumbered property should be sold before encumbered, and personalty before realty. Under some statutes the execution debtor may direct the order of sale.

Unencumbered property of the judgment debtor which is subject to execution should generally be resorted to first.[21] Where lands subject to a judgment lien have been alienated at different times, they must be sold under execution to satisfy such judgment in the inverse order of the dates of the former alienations thereof.[22] Under some statutes, before any parcel of real estate can be sold, its rents and profits for a specified term of years must first be offered, and it must not be sold unless its rents and profits for such term will not bring sufficient to satisfy the writ.[23] A statute may give the judgment debtor the right to direct the order in which his property is to be sold;[24] and the parties may by agreement select which portion of property levied on shall be sold on the day of sale, and postpone the sale as to the remainder.[25]

Sale of personalty before realty. Under most statutes, where both personal and real property are seized under execution, the personal property should first be sold,[26] although a sale of realty where personalty exists has been held not void.[27] However, under statutes giving the judgment debtor the right to direct the order in which different parcels of property levied on shall be sold under execution, he may choose whether his realty or personalty shall be first offered for sale; and the officer has no authority to sell except in the order that the debtor directs.[28] Further, although personal property should be sold first, the execution debtor may

14. N.C.—Crutchfield v. Foster, 200 S.E 395, 214 N.C. 551.

Judgment awarding lien against land

A deed issued by sheriff pursuant to sale under execution on judgment awarding attorney lien against land recovered by attorney for client was a nullity where judgment described land as one lot and sheriff undertook to sell in addition thereto another tract.—Crutchfield v. Foster, supra.

15. Iowa.—Marker v. Quinlan, 203 N.W. 292, 199 Iowa 1036.

Tex.—Kenley v. Robb, Com.App., 245 S.W. 68, reversing, Civ.App., 193 S.W. 375.

23 C.J. p 622 note 66.

16. Ind.—Harrison v. Stipp, 8 Blackf. 455.

23 C.J. p 622 note 67.

17. Ga.—Bledsoe v. Winningham, 62 Ga. 550.

23 C.J. p 623 note 68.

18. Mass.—Caldwell v. Eaton, 5 Mass. 399, 402.

23 C.J. p 623 note 77.

Right to employ auctioneer see supra § 201 a.

19. Cal.—Sheehy v. Graves, 58 Cal. 449.

23 C.J. p 623 note 78.

20. N.C.—Jones v. Loftin, 9 N.C. 199.

23 C.J. p 623 note 79.

Defendant's attorney has no authority to agree with plaintiff that the property levied on shall be sold at private sale by a person other than the sheriff.—Kronschnable v. Knoblauch, 21 Minn. 56.

21. Ill.—Marshall v. Moore, 36 Ill. 321.

23 C.J. p 623 note 84.

Presumption of correct order of sale see infra § 229.

22. Ind.—Boos v. Morgan, 30 N.E. 141, 130 Ind. 305, 30 Am.S.R. 237.

23 C.J. p 623 note 85.

23. Ind.—Marmon v. White, 51 N. E. 930, 151 Ind. 445.

23 C.J. p 624 note 89.

24. Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.

Statute held inapplicable

A statute providing that sheriff should first levy on and sell that part of property which defendant in fieri facias desires sold has been held not applicable where a claimant points out certain property of defendant which claimant desires to be levied on and sold.—City of Leesburg v. Forrester, 1 S.E.2d 584, 59 Ga.App. 503.

25. Ky.—Hatfield v. Kentland Coal & Coke Co., 57 S.W.2d 1000, 247 Ky. 825.

26. Ohio.—Wheeling, L. E. & P. Coal Co. v. First Nat. Bank of Smithfield, 45 N.E. 630, 55 Ohio St. 233.

23 C.J. p 624 note 86.

Exhausting personalty before levying on land see supra § 100.

27. Ky.—Holcomb v. Hays, 62 S.W. 1028, 23 Ky.L. 352.

Setting aside sale see infra § 232.

Remedy of execution debtor against officer

N.Y.—Neilson v. Neilson, 5 Barb. 565.

28. Idaho.—Wooddy v. Jameson, 50 P. 1008, 5 Idaho 466.

23 C.J. p 624 note 87.

waive this order of sale and permit the real estate to be sold first.[29]

Homesteads. Under at least one statute, a homestead cannot be sold except to supply a deficiency remaining after exhausting the other property.[30]

§ 206. —— Terms and Conditions

A purchaser at an execution sale is bound by the terms and conditions of sale, unless they create liabilities not imposed by law.

Purchasers at an execution sale are bound, as to terms of payment, by the terms announced by the sheriff at the time of the sale;[31] but the execution debtor cannot object to a change in the terms which is more favorable to him.[32] The sheriff cannot impose on a purchaser any terms other than those imposed by the law; if he undertakes by any conditions of sale to vary the relative positions of the parties and to create liabilities which the law does not impose, the purchaser is not bound thereby.[33]

§ 207. Place of Sale

a. In general
b. Real property
c. Personal property

a. In General

Compliance with statutes relating to the sale of property is essential to the validity of such sale.

As a general rule, the sale should be made at the place stated in the notice of sale, and is invalid unless it is made at that place,[34] or so near by as to be in plain view of the place advertised.[35]

In most jurisdictions, the place of sale is regulated by statute, and compliance therewith is essential,[36] as these statutes are generally held to be mandatory,[37] although a sale by consent of the parties at a different place is valid where there is no intention to defraud and there are no other liens on the property at the time of the sale.[38] However, in some jurisdictions the place of sale is left to the discretion of the officer;[39] but this discretion should be so exercised as to secure the most advantageous sale,[40] and where it appears that an unusual place has been selected and the property sold for less than its value the sale may be set aside;[41] and in one early case it was held that the judgment should fix the place for the sale of real estate.[42]

Sale at different places. Where the character and situation of the property, and the interests of the parties require it, the officer may, in his sound discretion and in good faith, advertise and sell at different places.[43]

b. Real Property

Real property must be sold ordinarily at the door of the courthouse of the county in which the property is situated.

Under statutes in many jurisdictions, real property must be sold at the door of the courthouse of the county in which the property is situated,[44] and a sale at any other place is, as a general rule, invalid.[45] So a sale by a United States marshal must be made at the door of the county courthouse of the county where the land is situated, pursuant to the state law,[46] and cannot be made before the door of the federal courthouse.[47] If another building is

29. Ohio.—Wheeling, L. E. & P. Coal Co. v. First Nat. Bank of Smithfield, 45 N.E. 630, 55 Ohio St. 233.
23 C.J. p 624 note 88.

30. Iowa.—Burmeister v. Dewey, 27 Iowa 468.
23 C.J. p 624 note 91.
Exemption of homestead from execution sale see the C.J.S. title Homesteads §§ 203–205, also 29 C.J. p 967 note 86–p 968 note 15.

31. La.—Backen v. Hamilton, 18 La.App. 553.
Sale for cash or on credit see infra § 217.

32. La.—Nichols v. McCall, 13 La. Ann. 215.

33. N.J.—Merwin v. Smith, 2 N.J. Eq. 182.
23 C.J. p 624 note 94.

34. Vt.—Hall v. Ray, 40 Vt. 576, 94 Am.D. 440.
23 C.J. p 630 note 78.

35. Mich.—Perkins v. Spaulding, 2 Mich. 157.
23 C.J. p 630 note 79.

36. Vt.—Goss v. Cardell, 53 Vt. 447.
23 C.J. p 630 note 83.
Statute not applicable to execution sales
A statute providing that real estate sold under any order or decree of any United States court shall be sold at the courthouse of the county, parish, or city in which the premises are located or on the premises, and that personal property shall be so sold unless in the court's opinion a sale in some other manner would be best, applies only to judicial sales made under order or decree of the court and requiring confirmation by the court, and not to sales under common-law executions.—Yazoo & M. V. R. Co. v. City of Clarksdale, Miss., 42 S.Ct. 27, 257 U.S. 10, 66 L. Ed. 104, reversing 81 So. 178.

37. N.C.—Johnson County v. Smith, 165 S.E. 707, 203 N.C. 255.
23 C.J. p 630 note 84.

38. Ala.—Cawthorn v. McCraw, 9 Ala. 519.

39. Del.—Cowgill v. Cahoon, 3 Del. 23.
23 C.J. p 630 note 80.

40. N.J.—Cummins v. Little, 16 N. J.Eq. 48.

41. Del.—Cowgill v. Cahoon, 3 Del. 23.

42. Ky.—Stephenson v. Lishy, 4 Ky. Op. 538.

43. Vt.—Hall v. Ray, 40 Vt. 576, 94 Am.D. 440—Drake v. Mooney, 31 Vt. 617, 76 Am.D. 145.

44. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
23 C.J. p 630 note 90.

45. N.C.—Johnston County v. Smith, 165 S.E. 707, 203 N.C. 255.
23 C.J. p 630 note 91.

46. Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802.
23 C.J. p 630 note 92.

47. Tex.—Moody v. Moeller, 10 S. W. 727, 72 Tex. 635, 13 Am.S.R. 839—Sinclair v. Stanley, 64 Tex. 67.

temporarily used as a courthouse, a sale may be made at such place,[48] and it has been held that it should be sold at such place rather than at the location of the old courthouse,[49] but where the courthouse has been burned, and no other substituted, the sale may be made at the burnt courthouse or in full view thereof.[50] However, in the absence of a statute regulating the place of sale, land may be sold at such place as, in the sound discretion of the sheriff, he may judge best for the persons concerned,[51] and the sale need not be made on the premises,[52] or in a public place.[53]

Two courthouses. If there are two courthouses in a county, the sale may take place at the door of either.[54]

Sale in another county or judicial district. Except where otherwise provided by statute,[55] the sale of real property must be had in the county where it is situated,[56] and this applies to sales by a United States marshal.[57] It is well settled that a sale in one county or judicial district, of property located in another county or district, is at least voidable,[58] and in many cases it has been held to be absolutely void, and open to collateral attack.[59] In the absence of a statutory provision relating thereto, if land is located in two counties or districts, the sale is valid as to the part within the county or district where it is sold but is void as to the remainder.[60] Where a new county has been created but has not been organized, a sale of land in the new county may be made in the mother county.[61]

c. Personal Property

A sale of personal property should be in the district in which it was taken under the execution and it is generally required that such property be present at the time and place of sale so that it can be readily examined by the bidders.

A sale of personal property should be made in the county, town, or district in which the property was taken under the execution;[62] and it is generally required that personal property sold under execution shall be present at the time and place of sale so that it can be readily examined by the bidders;[63] and where the property is susceptible of being exhibited, the nature of the premises or the remoteness thereof is no excuse for not having it present at the sale.[64] It is not always necessary, however, that the property should be in the immediate view of the bidders, provided it is near by and an opportunity for inspection is given;[65] and it has been held, sometimes by virtue of statutory provisions, that under special circumstances a valid sale, if it is in other respects fairly conducted, may be made in the entire absence of the property,[66] as where the nature of the property prevents its being exhibited.[67] In some jurisdictions an exception has been made to the general rule when all the parties interested have consented to the sale taking place in the absence of the property.[68]

Sale as void or voidable. By the weight of authority a sale of personal property not within the view of the bidders is void[69] and confers no title on the purchaser, as shown infra § 300. There are, however, authorities which hold such sales merely

48. Ky.—Perry v. Lacy, 6 Ky.Op. 45.
Mo.—Kane v. McCown, 55 Mo. 181.

49. La.—Union Bank v. Smith, 3 La.Ann. 147.

50. Ga.—Longworthy v. Featherston, 65 Ga. 165.
23 C.J. p 630 note 96.

51. R.I.—Howland v. Pettey, 10 A. 650, 15 R.I. 603.
23 C.J. p 630 note 87.

52. Mass.—Woodward v. Sartwell, 129 Mass. 210.
23 C.J. p 630 note 88.

53. Mass.—Woodward v. Sartwell, supra.

54. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519—Anniston Pipe Works v. Williams, 18 So. 111, 106 Ala. 324, 54 Am.S.R. 51.

55. Pa.—McLanahan v. Goodman, 108 A. 206, 205 Pa. 43.
23 C.J. p 631 note 98.

56. Ind.—Thacker v. Devol, 50 Ind. 30.
Tex.—Huff v. State, Civ.App., 93 S.W.2d 231.

57. Ala.—Pollard v. Cocke, 19 Ala. 188.
Tex.—Casseday v. Norris, 49 Tex. 613.

58. Ala.—Street v. McClerkin, 77 Ala. 580.
23 C.J. p 631 note 2.

59. Tex.—Huff v. State, Civ.App., 93 S.W.2d 231.
23 C.J. p 631 note 3.

60 Nev.—Tonopah Banking Corp. v. McKane Min. Co., 103 P. 230, 31 Nev. 295.
23 C.J. p 631 note 4.

61. Tex.—Henson v. Sackville, 21 S.W. 187, 2 Tex.Civ.App. 16.

62. Vt.—Collins v. Perkins, 31 Vt. 624.
23 C.J. p 631 note 7.

63. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
N.Y.—Stoner v. Oneida Motor Car Co., 275 N.Y.S. 426, 154 Misc. 97.
Tex.—L. J. Tillery Oil Co. v. Snyder, Civ.App., 42 S.W.2d 282.
23 C.J. p 631 note 8.

64. Tex.—Hopping v. Hicks, Civ. App., 190 S.W. 1119.

65. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 329, 41 Ariz. 219, citing **Corpus Juris.**
La.—Mundy v. Phillips, 102 So. 519, 157 La. 445.
23 C.J. p 631 note 10.

66. Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
23 C.J. p 631 note 11.

Manual delivery impossible
Where property levied on consisted of claim against a corporation evidenced by nonnegotiable notes, the property was not required to be exposed to the view of the purchaser, since the levy was not made on personalty capable of manual delivery.—Pavlovich v. Watts, Cal.App., 115 P.2d 511.

67. Tex.—Hopping v. Hicks, Civ. App., 190 S.W. 1119.

68. Ill.—Cook v. Timmons, 67 Ill. 203.
23 C.J. p 632 note 13.

69. Tex.—L. J. Tillery Oil Co. v. Snyder, Civ.App., 42 S.W.2d 282.
23 C.J. p 632 note 15.

to be voidable.[70] Where part of the property is present and part absent, it has been held that the sale is valid at least as to the property present.[71]

§ 208. Time of Sale

a. In general
b. At time advertised; premature sale
c. On or after return day
d. After death of judgment debtor

a. In General

The time for selling property under execution is now generally regulated by statutes and compliance therewith is essential to a valid sale.

At common law the time for selling property under execution rested in the discretion of the officer,[72] but in many jurisdictions the time is now fixed by statutes which must be complied with,[73] as such statutes are usually held to be mandatory,[74] and a sale after the statutory time, or at a time other than the one fixed by the statute, is void,[75] unless made by the consent of the parties.[76] Where the statute provides that a sale of personal property shall be made within a certain number of days after seizure, the officer loses his claim to the property by a failure to sell within the time prescribed.[77] Under some statutes the sale may be made at any time during the statutory period of the lien of the judgment;[78] but where a statute provides that no execution can be issued or proceedings had on any judgment after a given number of years from the rendition thereof, an execution issued and levied within that time may be enforced by a sale thereafter.[79]

Under other statutory provisions, sales of land under execution are required to be made on certain designated days of the terms of court of the county in which the land is situate, and a sale made at any other time is invalid.[80] The rule has been laid down in some jurisdictions that within the statutory limitations the time of sale under an execution is a matter within the discretion of the officer, and the sale will not be vacated if ordinary prudence is shown in the exercise of the discretion.[81] It has been held, however, that due diligence should be used in making the sale within a reasonable time after seizure, and that a delay for an unreasonable time in making a sale, especially where it is caused by execution plaintiff, will impair the lien of the execution, as shown supra § 135.

Hour of sale. In some states the statute fixes the hour at which, or the hours between which, a sheriff's sale should take place, and such provisions must be complied with[82] or the sale will be void;[83] but a sale set for a certain hour may be made at any time before the expiration of the hour; for example, a sale fixed at eleven o'clock may be made at any time between eleven and twelve o'clock.[84]

Independent of statute a sale is not invalid, in the absence of fraud or unfair practice, because the

70. Mo.—Eads v. Stephens, 63 Mo. 90.
23 C.J. p 632 note 16.

71. N.Y.—Linnendoll v. Doe, 14 Johns. 222.

72. Del.—Lord v. Townsend, 5 Del. 457.
Mass.—Caldwell v. Eaton, 5 Mass. 399.
Pa.—Derr v. New York Joint Stock Land Bank, 6 A.2d 899, 335 Pa. 309.

Effect of delay
At common law, any delay in an execution sale deprived the execution of its force until restored by a countermand, and if a second execution were levied in the meantime, the former must be postponed, but the rigid rule of the common law has been departed from.—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F.Supp. 351.

73. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230.
23 C.J. p 624 note 99.

Control of creditor
Generally, execution creditor has absolute control of time of sale of goods levied on.—Petition of Hoopes, 5 A.2d 655, 1 Terry 126, sustaining 5 A.2d 653, 1 Terry 120.

Construction of statutes
(1) Date of "issuance of execution" within statute limiting time for sale of property on execution is date of delivery of execution to marshal.—Gutterman v. Auerbach, 274 N.Y.S. 605, 152 Misc. 640, affirmed 271 N.Y.S. 1067, 242 App.Div. 614, motion denied 195 N.E. 225, 266 N.Y. 612, affirmed 196 N.E. 559, 267 N.Y. 521.

(2) No specific time need elapse between date of levy on land and date of sale under writ of fieri facias.—Smith v. Ford, 161 A. 214, 5 W.W.Harr., Del., 175.

(3) Other statutes construed see 23 C.J. p 624 note 99 [a].

74. Conn.—Morey v. Hoyt, 33 A. 496, 65 Conn. 516.

75. N.C.—Johnston County v. Smith, 165 S.E. 707, 203 N.C. 255.
23 C.J. p 625 note 2.

76. Ala.—Cawthorn v. McCraw, 9 Ala. 519.
23 C.J. p 625 note 3.

77. Me.—Plaisted v. Hoar, 45 Me. 380.
Mass.—Caldwell v. Eaton, 5 Mass. 399.

78. Mo.—Riggs v. Goodrich, 74 Mo. 108.
23 C.J. p 625 note 5.

79. Mo.—Wayland v. Kansas City, 12 S.W.2d 438, 321 Mo. 654.
23 C.J. p 625 note 6.

80. N.C.—Loudermilk v. Corpening, 8 S.E. 117, 101 N.C. 649.
23 C.J. p 625 note 7.

81. Ala.—Powell v. Governor, 9 Ala. 36.
23 C.J. p 625 note 8.

82. Ga.—Gower v. New England Mortg. Sec. Co., 111 S.E. 422, 152 Ga. 822.
23 C.J. p 627 note 36.

83. Ga.—Gower v. New England Mortg. Sec. Co., supra.
23 C.J. p 627 note 37.

Slight irregularity
A sale was not invalidated in the absence of fraud, collusion, or surprise because begun shortly before ten o'clock and concluded after that hour.—Gower v. New England Mortg. Sec. Co., supra.

84. Ill.—McGovern v. Union Mut. Life Ins. Co., 109 Ill. 151.
Okl.—Wilmarth v. Helton, 77 P.2d 714, 715, 182 Okl. 351, quoting **Corpus Juris.**

hour of sale is fixed as between certain hours,[85] or at an unusual hour.[86]

Sunday or holiday. An execution sale cannot take place on Sunday,[87] but it may take place on a nonjudicial day, since such a sale is not a judicial act.[88]

Presumption. In the absence of proof to the contrary, it will be presumed that the sale was made at the proper time.[89]

b. At Time Advertised; Premature Sale

A sale by an officer prior to the time at which he is authorized by statute to make a sale is invalid; and a sale made at a time other than that advertised should ordinarily be set aside.

The sale should be made on the day and at the hour stated in the advertisement,[90] and it has been held that a sale made at a time other than that stated in the advertisement may or should be set aside,[91] especially where it is accompanied by circumstances of fraud.[92]

Premature sales. A sale of property under execution by an officer prior to the time at which he is authorized by statute to make a sale is invalid,[93] and this has been held to be true of a sale made before the time advertised,[94] especially where it is accompanied by circumstances of fraud.[95]

Perishable property. Under statutes requiring a designated number of days' notice to be given of the sale of property under execution, an exception is generally made in the case of perishable property.[96]

c. On or after Return Day

Property seized before the return day of the writ may ordinarily be sold after the return day, although in some jurisdictions a distinction is drawn between real and personal property in the application of this rule.

A sale made on the return day is valid.[97] So, also, as a general rule if property is seized under an execution on[98] or before[99] the return day of the writ, the officer may proceed to sell after the return day without new process, especially where the sheriff has been interrupted by an injunction issued at the instance of the judgment debtor,[1] but if the levy is not made during the life of the writ a sale after the return day is void.[2]

In some jurisdictions a distinction is made between sales of personal property and sales of land, it being held that a valid sale of land cannot be made after the return day of the writ, at least without a venditioni exponas,[3] on the ground that the seizure of personal property vests in the officer a qualified property in the thing seized which is only

85. N.J.—Coxe v. Halsted, 2 N.J. Eq. 311.
23 C.J. p 628 note 39.

86. Ill.—Rigney v. Small, 60 Ill. 416.
23 C.J. p 628 note 40.

87. Ind.—Shaw v. Williams, 87 Ind. 158, 44 Am.R. 756.
23 C.J. p 625 note 11.

88. N.Y.—King v. Platt, 37 N.Y. 155, 4 Transcr.A. 19, 3 Abb.Pr.,N.S., 434, 35 How.Pr. 23.
23 C.J. p 625 note 12.

89. Minn.—Bradley v. Sandilands, 68 N.W. 321, 66 Minn. 40, 61 Am.S.R. 386.
23 C.J. p 625 note 13.

90. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 625 note 14.

91. Ill.—Craddick v. Cotta Gear Co., supra.
23 C.J. p 625 note 15.

92. Ill.—McConnel v. Gibson, 12 Ill. 128.
Kan.—Pickett v. Pickett, 3 P. 549, 31 Kan. 727.

93. Ill.—Camp v. Ganley, 6 Ill.App. 499.
23 C.J. p 626 note 17.

94. Mich.—Wienskawski v. Wisner, 72 N.W. 177, 114 Mich. 271.
23 C.J. p 626 note 18.

95. Kan.—Pickett v. Pickett, 3 P. 549, 31 Kan. 727.
23 C.J. p 626 note 19.

96. Md.—Arnold v. Fowler, 51 A. 299, 94 Md. 497, 89 Am.S.R. 444.
23 C.J. p 626 note 20.

97. N.C.—Tayloe v. Gaskins, 12 N.C. 295.

98. U.S.—U. S. v. Hogg, Ky., 112 F. 909, 50 C.C.A. 608, affirming, D. C., 111 F. 292.
Ky.—Aloes v. Abbott, 9 Ky.Op. 822.

99. U.S.—In re Schwab Printing Co., C.C.A.Ill., 59 F.2d 726.
Del.—Denney v. Wilmington Ice & Coal Co., 128 A. 123, 14 Del.Ch. 352.
La.—Latham v. Glasscock, 108 So. 100, 160 La. 1089—State v. Treigle, App., 192 So. 152—A. Baldwin & Co. v. Le Long, App., 142 So. 879—Siess v. Couvillion, 5 La.App. 464.
23 C.J. p 626 note 23.

Moratorium

Where writ was issued on March 17, 1937, and a debt moratorium was granted to defendant expiring June June 5, 1937, and property was sold at public sale by sheriff on July 7, 1937, writ of fieri facias had not expired, where it was good for seventy days, as against contention that writ had expired and that sale thereunder was invalid.—Williams v. Bush, La. App., 184 So. 583.

In Pennsylvania, goods may be sold after the return day, the levy having been made prior thereto, provided the delay is reasonable, unavoidable, and not used as a mere method of establishing a continuing lien.—Miksch v. Sheedy, 18 Lehigh Co.L.J. 366.

1. Wash.—Hensen v. Peter, 164 P. 512, 95 Wash. 628, L.R.A.1918F 682.

2. La.—Latham v. Glasscock, 108 So. 100, 160 La. 1089.
23 C.J. p 626 note 25.

3. N.C.—Jeffreys v. Hocutt, 137 S.E. 177, 193 N.C. 332.
Tex.—Tanner v. Grisham, Com.App., 295 S.W. 590, reversing, Civ.App., 289 S.W. 146—Reynolds v. Farmers & Merchants Nat. Bank of Nocona, Civ.App., 135 S.W.2d 556—Ludtke v. Bankers' Trust Co., Civ. App., 251 S.W. 600.
23 C.J. p 626 note 26.

Term altered to later date

Where term of court to which writ of execution is returnable is afterward altered by law to a later date, writ remains in force until such later date, and sale of land made after original return day, but prior to altered date, is valid, and divests title out of judgment debtor.—Bass v. Albright, Tex.Civ.App., 59 S.W.2d 891, error refused.

divested by the sale, while in the case of real property he has only a right to sell which expires with the return day of the writ.[4] By the weight of authority, however, a sale of real property had after the return day is valid where the levy was made before the return day,[5] provided it is made before the life of the writ expires under the statute.[6]

d. After Death of Judgment Debtor

Where execution was issued and levied in the lifetime of defendant, a sale not made until after such defendant's death is ordinarily not void.

In most jurisdictions a sale under an execution issued and levied in the lifetime of defendant, which is not made until after such defendant's death, is valid,[7] or at least is not void,[8] provided, in some jurisdictions, notices of the time and place of sale are given in the debtor's lifetime,[9] but, in some jurisdictions, the sheriff cannot proceed further with the sale, in such a case, without a revivor.[10] Statutory authority to levy after the death of the debtor where the writ is delivered before his death includes the power to sell after his death.[11]

§ 209. Postponement

a. In general
b. Propriety
c. Notice
d. Effect of adjournment or irregularity

a. In General

The postponement of an execution sale is ordinarily within the discretion of the officer holding the sale, but it is a legal, and not an arbitrary, discretion.

Although there is authority to the effect that, in the absence of statutory authority, the officer cannot postpone or adjourn the sale,[12] as a general rule the officer holding an execution has power to postpone or adjourn a sale of the property levied on,[13] especially where he does so by the consent of the parties.[14] This power, except in so far as it is limited by statute,[15] rests in the discretion of the officer;[16] but it is a legal discretion, to be justified by the exigencies of the situation, and not an arbitrary preference,[17] and should be exercised with impartial regard as to the interests of all parties concerned.[18] An agreement by him to postpone the sale, which is inconsistent with his duties in the premises, is illegal and void.[19] The power vested in a selling officer to adjourn a sale cannot be delegated by him to the attorney of either party.[20]

4. N.C.—Doe v. McKinnie, 11 N.C. 279, 15 Am.D. 519.
23 C.J. p 627 note 27.

5. Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.
23 C.J. p 627 note 28.

Execution sent to another county
Under some statutes execution sale of land is not void because not made before end of second term of circuit court from which execution was issued, where it was sent to sheriff of another county.—Hamlin v. Hawkins, supra.

In Pennsylvania
(1) All sales of real estate by sheriffs must be made on or before the return day of the writs, or within six days thereafter.—Derr v. New York Joint Stock Land Bank, 6 A.2d 899, 335 Pa. 309—23 C.J. p 627 note 28 [a] (3).

(2) Where petition for stay of execution was granted by an order stating that "the execution is stayed and return day continued to November 20, 1933," the return day was continued until November 20, but the writ could be executed at a reasonable time before that day, so that sale on November 16 was at a reasonable time and debtors were not harmed by alleged prematurity of the sale.—Derr v. New York Joint Stock Land Bank, supra.

6. Mo.—Wack v. Stevenson, 54 Mo. 481.
23 C.J. p 627 note 29.

7. Me.—Coffin v. Freeman, 24 A. 986, 84 Me. 535.
23 C.J. p 627 note 31.

8. Mo.—Mundy v. Bryan, 18 Mo. 29.

9. Me.—Coffin v. Freeman, 24 A. 986, 84 Me. 535.

10. Tex.—Hooper v. Caruthers, 15 S.W. 98, 78 Tex. 432.
23 C.J. p 627 note 34.

11. Ala.—Hurt v. Nave, 49 Ala. 459.

12. Neb.—Fraaman v. Fraaman, 90 N.W. 245, 64 Neb. 472, 97 Am.S.R. 650.
23 C.J. p 628 note 42.

13. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.
Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 628 note 43.

Continuance by court
Where a sheriff's sale of real estate is objected to on the ground that the fair market value of real estate theretofore sold had not been determined under the Deficiency Judgment Act, 12 Pub.St. § 2621.1 et seq., the court will continue the sale to permit a compliance with that Act.—Federal Deposit Ins. Corporation v. King, 30 Del.Co., Pa., 534.

Rights of claimant
As between execution creditor and adverse claimant of property levied on, postponement of sheriff's sale was not fraudulent in itself.—C. I. T. Corporation v. Shakespeare, 95 Pa.Super. 491.

14. Tex.—Hillard v. Wilson, 13 S.W. 25, 76 Tex. 180.
23 C.J. p 628 note 44.

Sealed agreement not essential
Agreement for postponement of sheriff's sale of real property under fieri facias did not require seal, and seal affixed thereto was surplusage.—Dick v. McWilliams, 139 A. 745, 291 Pa. 165.

15. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 628 note 45.

16. Ill.—Craddick v. Cotta Gear Co., supra.
Iowa.—McCann v. McCann, 223 N.W. 393, 207 Iowa 610.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 628 note 46.

17. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 628 note 47.

18. Ill.—Craddick v. Cotta Gear Co., supra.
23 C.J. p 628 note 48.

19. N.Y.—Perkins v. Proud, 62 Barb. 420.
23 C.J. p 628 note 49.

20. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 628 note 50.

By direction of plaintiff in execution. In some jurisdictions the officer should adjourn the sale when so directed by plaintiff in execution.[21] If an unauthorized person orders the officer to postpone the sale, the creditor must acquiesce therein before the sale.[22]

Effect of injunction. Where an officer is enjoined from making a sale as at first advertised, he has no authority to adjourn the sale to a different date during the pendency of the injunction.[23]

Time and place. The sheriff, in making an adjournment, may, in his discretion, change not only the time but the place of sale,[24] provided he changes it to a place which he might have appointed in the first instance as the place of sale.[25]

b. Propriety

A postponement of an execution sale is generally proper whenever it cannot be completed on the day on which it is begun, or where for want of bidders or other cause, it appears that the property will be sold for an inadequate price, or for any other statutory reason.

A postponement or adjournment is proper whenever the sale cannot be completed on the day on which it is begun,[26] or where there have been irregularities in the proceedings prior to the sale,[27] or where, for want of bidders or other cause, it appears that the property will be sold for an inadequate price.[28] However, a statute authorizing a postponement on the ground of want of bidders does not authorize postponement merely because only one bidder is present where he is willing to bid a fair sum equal to the amount of the demand;[29] although it is otherwise where there are no bystanders and the only bidder is the execution creditor.[30]

It is not "good cause," as the term is used in a statute, for postponement, that the officer is unofficially advised of the claim of a third person,[31] particularly where the officer is notified of an application to the court for a postponement, and presumably knows of its refusal,[32] but where the adjournment may be made for "good cause" it seems that the direction of plaintiff's attorney may be a "good cause;"[33] and the fact that his attorney agrees with claimant to postpone the sale does not affect the validity of the sale, where neither the purchaser nor the officer knew thereof before the sale, although they are informed thereof before the purchase money is paid.[34] Where the purchaser refuses to comply with his bid, the sheriff may, under statutory authorization, treat the sale as a nullity and postpone the sale to another day, and this is true where plaintiff is himself the purchaser and refuses to pay the costs.[35]

The sale will not be postponed on the application of persons not parties to the record.[36]

c. Notice

Ordinarily a notice must be given on an adjournment of an execution sale, the sufficiency thereof depending on statutory provisions.

In some jurisdictions as full a notice must be given on an adjournment as was required for the sale at the time and place originally appointed;[37] and under some statutes this notice may be given in writing on the original notice or by posting a no-

21. U.S.—In re C. Lewis Lavine, Inc., D.C.N.J., 36 F.Supp. 351.
23 C.J. p 628 note 51.

Effect of refusal
Sheriff's sale under writ in executory proceeding is void, where seizing creditor prior to sale orally requested postponement and sheriff refused to defer sale.—Blomenstiel v. Tridico, La.App., 149 So. 912, rehearing refused 152 So. 79.

22. Va.—Fisher v. Vanmeter, 9 Leigh 18, 36 Va. 18, 33 Am.D. 221.

23. Minn.—Pettingill v. Moss, 3 Minn. 222, 74 Am.D. 747.

24. N.Y.—Tinkom v. Purdy, 5 Johns. 345.
23 C.J. p 628 note 54.

25. Vt.—Jewett v. Guyer, 38 Vt. 209.
23 C.J. p 628 note 55.

26. R.I.—Aldrich v. Grimes, 14 R.I. 219.

27. R.I.—Reynolds v. Hoxsie, 6 R. I. 463.

28. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.
Iowa.—McCann v. McCann, 223 N. W. 393, 207 Iowa 610.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142—Boiani v. Wilson, 132 A. 881, 47 R.I. 317.
23 C.J. p 628 note 58.

After offer in parcels
Where no bids were received when about one hundred forty-nine lots supposedly belonging to execution debtor were offered in separate tracts, fact that sheriff then sold property en masse without declaring adjournment as authorized by statute did not in, and of itself, constitute error.—Adams v. Morrison, 259 N.W. 582, 219 Iowa 852.

29. Ill.—Gilbert v. Watts-De Golyer Co., 48 N.E. 430, 169 Ill. 129, 61 Am.S.R. 154, affirming 66 Ill.App. 625.

30. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.
23 C.J. p 629 note 60.

31. Ill.—Gilbert v. Watts-De Golyer Co., 48 N.E. 430, 169 Ill. 129, 61 Am.S.R. 154, affirming 66 Ill.App. 625.

32. Ill.—Gilbert v. Watts-De Golyer Co., supra.

33. Mass.—Frazee v. Nelson, 61 N. E. 40, 179 Mass. 456, 88 Am.S.R 391.

34. Ga.—Knox v. Yow, 17 S.E. 654, 91 Ga. 367.

35. Iowa.—Reese v. Dobbins, 1 N. W. 540, 51 Iowa 282.

36. Pa.—In re Sheriff's Sale, 1 Pa. C.Pl. 13.

37. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 629 note 66.

Short postponement
Action of sheriff in postponing execution sale for thirty minutes was not such an adjournment as to require another advertisement of sale. Boiani v. Wilson, 132 A. 881, 47 R.I. 317.

38. Idaho.—Ollis v. Kirkpatrick, 28 P. 435, 3 Idaho, Hasb., 247.

tice of postponement under the original.[38] In other jurisdictions a public proclamation made in the presence and hearing of the persons assembled at the time first fixed for the sale, and with notice thereof to the parties in interest, is sufficient;[39] but under some statutes this should be followed, in some cases, by a publication of the fact of the adjournment.[40]

d. Effect of Adjournment or Irregularity

When a sale has been postponed, a sale thereafter on the day originally set is invalid; but mere irregularities will not ordinarily render the sale void.

Where under a statute prescribing certain days for making sales, a sale is regularly opened during such days, and thereafter postponed from day to day for want of bidders until a day beyond the time limited by statute, the sale is nevertheless valid, being in contemplation of law a sale on the day that the sale was first opened.[41] Where a bid is made at a sheriff's sale and the sale is adjourned, the bid is withdrawn by implication.[42] If postponement is made before the sale, a sale thereafter on the day originally set is invalid.[43] If the sale is postponed at the debtor's request, depreciation in the value of the property must be borne by him.[44]

Effect of irregularity. An irregularity in the postponement will not vitiate the sale, unless the officer is guilty of fraud with respect to it, and even then the sale would not be void as to a bona fide purchaser without notice of the fraud.[45] Thus, failure to give notice of an adjournment in the manner prescribed is a mere irregularity which does not render the sale void,[46] and irregularities in the postponement, where under an arrangement with the debtor and for his benefit, are waived by him.[47]

§ 210. Sale in Parcels

a. In general
b. Exceptions to rule
c. Waiver of right
d. Sale as void or voidable

a. In General

The general rule, adopted by statute in many jurisdictions, is that, where the property to be sold consists of distinct lots, tracts, or parcels, or is susceptible of division without injury, it should be offered for sale in parcels and not en masse.

The general rule, adopted by statute in many states, is that, where the property to be sold consists of distinct lots, tracts, or parcels,[48] or is susceptible of division without injury,[49] it should be offered for sale in parcels and not en masse, for the reason that a sale in that manner will generally realize the best price,[50] and will not result in taking from the debtor any more property than is necessary to satisfy the judgment,[51] and will enable defendant to redeem any one or more of the parcels without being compelled to redeem all the land sold.[52]

Ill.—Osgood v. Blackmore, 59 Ill. 261.

39. Pa.—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 534.
23 C.J. p 629 note 68.

40. N.J.—Weatherby v. Slape, 43 A. 898, 58 N.J.Eq. 550, 78 Am.S.R. 627.
23 C.J. p 629 note 69.

41. N.C.—Wade v. Saunders, 70 N. C. 270.

42. Pa.—Donaldson v. Kerr, 6 Pa. 486.

43. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
N.Y.—Frederick v. Wheelock, 3 Thomps. & C. 210.

44. Iowa.—Williams v. Gartrell, 4 Greene 287.

45. La.—Phœnix Building & Homestead Ass'n v. Meraux, 180 So. 648, 189 La. 819.
23 C.J. p 629 note 70.

46. Ill.—McGowan v. Goldberg, 117 N.E. 1045, 281 Ill. 547.
23 C.J. p 629 note 71.

47. Ind.—Egbert v. Mercer, 66 Ind. 305.

48. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
Del.—In re Roach, 130 A. 676, 3 W. W.Harr. 89.
Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.
Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702—Daniels v. Goff, 232 S.W. 66, 192 Ky. 15.
Mich.—Security Trust Co. v. Sloman, 233 N.W. 216, 252 Mich. 266.
N.D.—Michael v. Grady, 204 N.W. 182, 183, 52 N.D. 740, citing **Corpus Juris.**
Pa.—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1—First Nat. Bank v. Boes, 16 Pa.Dist. & Co. 327.
S.D.—Lockhart v. Ruden, 250 N.W. 349, 62 S.D. 1.
Tex.—Reed v. Gourley, Civ.App., 109 S.W.2d 242, error dismissed.
23 C.J. p 632 note 19.

49. U.S.—McLellan v. Penick, C.C.A. La., 289 F. 366.
Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702.
R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
23 C.J. p 632 note 20.

50. Ala.—Dean v. Lusk, 3 So.2d 310, 314, 241 Ala. 519, quoting **Corpus Juris.**
Del.—In re Roach, 130 A. 676, 3 W. W.Harr. 89.
N.D.—Michael v. Grady, 204 N.W. 182, 52 N.D. 740.
Pa.—First Nat. Bank v. Boes, 16 Pa. Dist. & Co. 327.
23 C.J. p 633 note 21.

51. Ala.—Dean v. Lusk, 3 So.2d 310, 314, 241 Ala. 519, quoting **Corpus Juris.**
Mich.—Security Trust Co. v. Sloman, 233 N.W. 216, 252 Mich. 266.
N.D.—Michael v. Grady, 204 N.W. 182, 52 N.D. 740.
R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
23 C.J. p 633 note 22.

Excluding one tract
Where sale of several tracts brought more than required amount at execution sale, lot or lots bringing less than excess should be excluded.
Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702.
Pa.—High v. High, 34 Berks Co.L.J. 23.

52. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.

It has been held, however, that the statutory provision for a division of the property is merely directory,[53] and that the propriety of a sale en masse is a matter within the discretion of the officer, having in view the object to make the property bring the best possible price,[54] as is also the question as to the divisibility of the property and the size and value of the parcels offered,[55] and the officer's determination of this question is, in the absence of fraud, conclusive.[56]

In any event the requirement of a sale in parcels does not authorize the sheriff to divide entire parcels of real or personal property in such a mode as to become oppressive or injurious to the parties,[57] nor bind him, unless required by defendant, to divide a single tract into parcels;[58] and if the property is not capable of subdivision, the sale of the entire property for the payment of a comparatively small judgment may be justified;[59] but where a part of the property, although not subdivided, may be conveniently sold, and the value of the whole is greatly in excess of the debt, such part should be so sold,[60] and in such a case the land should be offered in the smallest parcels compatible with a proper division of the land.[61] Although the officer should notify defendant to divide the land into lots before the sale, it is not necessary that such notice be given at the time of seizure.[62]

What constitutes separate tract, lot, or parcel. It has been held that it is the title of the debtor himself, as fixed by his deed, which determines whether the property shall be considered as one lot or several for the purpose of an execution sale;[63] but it cannot be said that because a deed describes the property conveyed as certain numbered lots that such lots do or do not constitute separate parcels.[64] An owner may convert two or more lots into one known parcel by his use of the land,[65] and a parcel may be single although divided by a street.[66]

Division by defendant. In some jurisdictions, in the absence of fraud or collusion, the owner of the property levied on has the right to direct whether it shall be sold in separate parcels or in bulk,[67] and the officer is required to sell in accordance with such directions.[68] A written direction to sell real estate instead of personal property confers no authority to sell the land as one tract.[69]

Demand for division. Under some statutes a demand on the officer for a division is not necessary,[70] although under other statutes a request to sell in parcels seems to be required.[71]

Presumption. In the absence of proof to the contrary it will be presumed that the sale was made in the proper manner.[72]

b. Exceptions to Rule

The general rule as to sale en masse is subject to exceptions, such as where the property would sell for a less sum if offered in parcels, or where no bids have been received thereon when offered in parcels, etc.

Under some circumstances a sale en masse may be necessary, proper, or more expedient in order to protect the interests of all the parties.[73] Thus, where the property is not susceptible of division

N.D.—Michael v. Grady, 204 N.W. 182, 52 N.D. 740.

Inclusion of property of others

Sale under execution in bulk of several tracts belonging to defendant and other tracts not belonging to defendant could not be upheld, since defendant was denied right to redeem.—Vaughan v. Screeton, 39 S.W.2d 299, 183 Ark. 816.

53. Tex.—Reed v. Gourley, Civ.App., 109 S.W.2d 242, error dismissed.
23 C.J. p 633 note 23.

54. R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
23 C.J. p 633 note 24.

55. Ind.—Nelson v. Bronnenburg, 81 Ind. 193.
Pa.—Furbush v. Greene, 108 Pa. 503—Evans v. Crone, 17 Pa.Co. 86.

56. Ind.—Nelson v. Bronnenburg, 81 Ind. 193.

57. Ind.—McLean County Bank v. Flagg, 21 Ill. 200, 83 Am.D. 224.

58. Ill.—Garrett v. Moss, 20 Ill. 549.

59. Iowa.—State Sav. Bank v. Shinn, 106 N.W. 921, 130 Iowa 365, 114 Am.S.R. 424.
23 C.J. p 633 note 29.

60. U.S.—McLellan v. Penick, C.C.A. La., 289 F. 366.
23 C.J. p 633 note 30.

61. Ill.—Van Gundy v. Hill, 104 N.E. 147, 262 Ill. 162.

62. La.—Howard v. Walsh, 28 La. Ann. 847.

63. Tenn.—Ament v. Brennan, 1 Tenn.Ch. 431.

64. Ga.—Palmour v. Roper, 45 S.E. 790, 119 Ga. 10.
23 C.J. p 633 note 34.

65. Del.—In re Roach, 130 A. 676, 3 W.W.Harr. 89.
Mich.—Security Trust Co. v. Sloman, 233 N.W. 216, 252 Mich. 266.

66. Mich.—Security Trust Co. v. Sloman, 233 N.W. 216, 252 Mich. 266.

67. Tex.—Gregg v. First Nat. Bank, Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ.App., 18 S.W.2d 772.

68. Tenn.—Doty v. Federal Land Bank of Louisville, 89 S.W.2d 337, 169 Tenn. 496, rehearing denied 90 S.W.2d 527, 169 Tenn. 496.
23 C.J. p 633 note 35.

69. Ky.—Graves v. Thompson, 5 Ky. Op. 678.

70. Ind.—State v. Leach, 10 Ind. 308—Reed v. Diven, 7 Ind. 189.
Ky.—Commonwealth v. Burnett, 44 S.W. 966, 19 Ky.L. 1836.

71. La.—Bauduc v. Conrey, 10 Rob. 466.
N.J.—Lennon v. Heindel, 37 A. 147, 56 N.J.Eq. 8.

72. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
23 C.J. p 634 note 39.

73. Del.—In re Roach, 130 A. 676, 3 W.W.Harr. 89.
Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.
Pa.—First Nat. Bank v. Boes, 16 Pa. Dist. & Co. 327.
R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
23 C.J. p 634 note 40.

without injury, or it appears that it would sell for a less sum if offered in parcels, a sale en masse is proper;[74] and under some statutes, where there is nothing to indicate that the land consists of more than one parcel, a sale in parcels is not required.[75]

Where no bids on separate parcels. Although there is authority to the contrary,[76] as a general rule where the property has been first offered for sale in separate parcels and no bids have been received thereon, the officer may proceed to sell en masse,[77] but this does not authorize him to sacrifice the property in order to make a sale.[78] Under some statutes, the property, after being offered in separate parcels, should be offered successively in lots of two, three, etc., before selling en masse.[79]

Offering by both methods. It has been held that the officer may offer the property for sale by both methods, reserving the bids, and if a larger amount is bid for the property en masse than the aggregate of the bids on the separate parcels, he may sell it en masse.[80]

Mortgaged property. Where the property to be sold is subject to a mortgage, the proper course is to sell en masse,[81] unless the mortgagor has conveyed his equity in the different parcels to different grantees.[82]

Several or undivided interests. Statutes or rules requiring sales in parcels have been held not applicable to the sale of undivided interests,[83] but there is authority to the contrary.[84] Where the writ is against two persons who are each entitled to an undivided interest, it has been held that the interest of both may be sold together on one bid,[85] but on the other hand it has been held that the interest of each should be sold separately.[86] On a joint execution against a husband and wife, their interests as tenants by entireties may be sold separately.[87]

Of course, the several interests of joint debtors in separate but contiguous lands cannot be sold as one for one price.[88]

c. Waiver of Right

Compliance with the rule requiring sale in parcels may be waived by the execution defendant.

As the rule requiring a sale in parcels is intended for the benefit of execution defendant, compliance with it may be waived by him,[89] and such waiver may be implied from his acquiescence in the sale,[90] or from his delay in objecting thereto.[91]

d. Sale as Void or Voidable

By the weight of authority, a sale en masse of property which should have been sold in parcels is not void, but voidable only.

The general rule is that a sale, on execution en masse, of property which should have been sold in separate parcels is not void, but voidable only,[92] and

74. Del.—In re Roach, 130 A. 676, 3 W.W.Harr. 89.
Pa.—First Nat. Bank v. Boes, 16 Pa. Dist. & Co. 327.
23 C.J. p 634 note 41.

75. Cal.—Rauer v. Hertweck, 165 P. 946, 175 Cal. 278.
23 C.J. p 634 note 42.

76. Mich.—Udell v. Kahn, 31 Mich. 195.
23 C.J. p 634 note 43.

77. Del.—In re Roach, 130 A. 676, 3 W.W.Harr. 89.
Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.
Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
Iowa.—McFerrin v. Nye & Jenks Grain Co., 264 N.W. 45, 220 Iowa 1086.
N.D.—Michael v. Grady, 204 N.W. 182, 183, 52 N.D. 740, citing **Corpus Juris.**
S.D.—Lockhart v. Ruden, 250 N.W. 349, 62 S.D. 1.
Utah.—Adams v. Pratt, 48 P.2d 444, 446, 87 Utah 80, citing **Corpus Juris.**
23 C.J. p 634 note 44.

Where offer idle ceremony
Execution sale in gross without first offering parcels separately was valid, where judgment creditor's representative, who had informed sheriff that he would not make a first bid on any separate parcel, was only bidder present at sale.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.

78. Ill.—Ballance v. Loomiss, 22 Ill. 82.

79. Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
23 C.J. p 634 note 46.

80. Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702.
23 C.J. p 635 note 49.

Sale according to separate bids
Sheriff was held justified in selling tracts according to separate bids at execution sale, where no one would advance aggregate bid when offered as whole, nor accept less acreage and pay debt.—Marcum v. Thompson, supra.

81. Neb.—Knutson v. Rosenberger, 116 N.W. 687, 81 Neb. 761.
23 C.J. p 634 note 47.

82. Mass.—North v. Dearborn, 15 N.E. 129, 146 Mass. 17.

83. La.—Borron v. Sollibellos, 28 La.Ann. 355.
23 C.J. p 635 note 50.

84. Ill.—Miller v. McAlister, 64 N.E. 254, 197 Ill. 72.
23 C.J. p 635 note 51.

85. N.C.—Jones v. Lewis, 30 N.C. 70, 47 Am.D. 338
23 C.J. p 635 note 52.

86. Tenn.—Ballard v. Scruggs, 18 S.W. 259, 90 Tenn. 585, 25 Am.S.R. 703.
23 C.J. p 635 note 53.

87. Ind.—Sharpe v. Baker, 99 N.E. 44, 96 N.E. 627, 51 Ind.App. 547.

88. Me.—Barnes v. Hechler, 125 A. 226, 124 Me. 30

89. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.
Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
23 C.J. p 635 note 55.

90. Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.
23 C.J. p 635 note 56.

91. N.Y.—Cunningham v. Cassidy, 17 N.Y. 276, 7 Abb.Pr. 183.
23 C.J. p 635 note 57.

92. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
Ariz.—Young Mines Co. v. Sevringhaus, 298 P. 628, 630, 38 Ariz. 160, citing **Corpus Juris.**

such a sale will not be set aside in the absence of a showing of prejudice as shown infra § 232. In some jurisdictions, however, such a sale is held to be void.[93]

§ 211. Notice of Sale

a. In general
b. How given
c. Contents
d. Time or duration of notice
e. Effect of failure to give proper notice
f. Objections and waiver
g. Presumptions

a. In General

It is generally required that notice be given of an execution sale and, under some statutes, notice must be served on the debtor.

In order that general publicity may be given to the sale, and the property disposed of to the best advantage of all who may be interested in the proceeds,[94] it is generally required by statute that a notice of the sale shall be given.[95] Unless required by statute, personal notice of the sale to the execution debtor is not necessary,[96] but the notices to be given, under some statutes, are two-fold, one for the public and the other for defendant,[97] and notice in writing must be served on the execution debtor if he resides in the state, county, or district,[98] or if he resides in a different county from that in which the land is situated.[99] The officer need not inform

Idaho.—Coghlan v. City of Boise, 212 P. 867, 36 Idaho 613.
Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
N.D.—Michael v. Grady, 204 N.W. 182, 183, 52 N.D. 740, citing **Corpus Juris.**
R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
Tex.—Gregg v. First Nat. Bank, Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ.App., 18 S.W.2d 772—Reed v. Gourley, Civ.App., 109 S.W.2d 242, error dismissed.
Utah—Adams v. Pratt, 48 P.2d 444, 446, 87 Utah 80, citing **Corpus Juris.**
23 C.J. p 635 note 58.

93. Ky.—Daniels v. Goff, 232 S.W. 66, 192 Ky. 15.
23 C.J. p 635 note 60.

94. Del.—Petition of Adair, 190 A. 105, 8 W.W.Harr. 175.
Pa.—First Nat. Bank v. Mount, 1 A.2d 517, 132 Pa.Super. 518.
23 C.J. p 636 note 65.

95. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
N.C.—Douglas v. Rhodes, 125 S.E. 261, 188 N.C. 580.
Tex.—Dodson v. Langford, Civ.App., 26 S.W.2d 924.
23 C.J. p 636 note 66.
Notice on postponement of sale see supra § 209 c.

Applicable to all sales on execution
Statute providing for public notice of sale of lands and tenements, taken on execution by sheriff, held applicable to all sales on execution or special execution.—John Hancock Mut. Life Ins. Co. v. Heinze, 41 P.2d 1046, 141 Kan. 540.

Mandatory
Statute providing for public notice of sale of lands and tenements taken on execution by sheriff held mandatory.—John Hancock Mut. Life Ins. Co. v. Heinze, supra.

Substantial compliance with statute providing for advertisement of sales of personalty by marshal of Atlanta municipal court is sufficient.—Continental Casualty Co. v. Bibb Chevrolet Co., 176 S.E. 418, 49 Ga. App. 523.

Notice of resale
The requirement of notice to judgment debtor whose real property is about to be sold under execution applies to resales of the property as well as to first sales, and where no notice of second sale was given to judgment debtor or to purchaser at first sale, and the property was bid off by judgment creditor, judgment debtor's motion for resale was properly granted.—Bank of Pinehurst v. Gardner, 11 S.E.2d 872, 218 N.C. 584.

96. Cal.—Thompson v. Cook, App., 120 P.2d 54.
23 C.J. p 636 note 68.

After default judgment
After entry of default judgment, debtor's property cannot be sold under execution until after he is notified by sheriff.—Thompson v. Cook, supra.

97. Pa.—McDonald v. Winton, 4 Lanc.L.Rev. 194.

98. Tenn.—Cooper v. Cooper, App., 124 S.W.2d 264.
Tex.—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct.
23 C.J. p 636 note 69.

Not mandatory
Statutory provisions for notice of sale to defendant or his attorney have been held not mandatory.
Cal.—Batini v. Ivancich, 287 P. 523, 105 Cal.App. 391.
Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S.W.2d 1112—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.

Posting notice in mail
(1) It is conclusively presumed that properly addressed statutory notice of sheriff's sale, when mailed, will be received by addressee.—Dodson v. Langford, Tex.Civ.App., 26 S.W.2d 924.

(2) If notice of sheriff's sale had been deposited in mail with correct address of execution defendant, it would have been sufficient, even though it was not actually received by the execution defendant.—Crow v. Thompson, Tex.Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct—23 C.J. p.636 note 69 [g].

(3) However, the mailing of statutory notice of sheriff's sale with wrong address does not raise presumption that such notice will be received by addressee.—Dodson v. Langford, supra.

(4) If a sheriff is not informed as to the correct address of an execution defendant, he has the duty to use at least ordinary diligence to ascertain it in order to give notice of sheriff's sale; and where sheriff made no effort to ascertain the correct post office address of execution defendant, and he sent notice to wrong address, the sale will be deemed irregular.—Crow v. Thompson, supra.

Where property fraudulently conveyed
Where mother made fraudulent conveyance of land to her son, who went into possession, written notice of levy and time and place of sale under such judgment need not be given to either mother or son.—Cooper v. Cooper, Tenn.App., 124 S.W.2d 264.

99. Mo.—City of St. Louis v. Koch, App., 156 S.W.2d 1.
23 C.J. p 636 note 70.

Purchaser of trust deed
A purchaser of trust deed covering property, which assignee of judg-

plaintiff or his attorney of the time and place of sale.[1]

Notice to other persons. The necessity of giving notice to persons other than the debtor is dependent on statutory provisions.[2]

Several executions. Where notice of sale under one execution is given, a sale cannot be made under such notice on an execution subsequently received;[3] but where proper notice is given under one of several executions, in which the parties are the same, a sale thereunder is valid, although notice is not given under the other executions.[4]

b. How Given

The method of giving notice of an execution sale depends on the provisions of the statutes in the different jurisdictions, posting in a public place and advertising in a newspaper being the usual methods prescribed.

It is usually provided that sales shall be advertised by posting notices at one or more public places in the county where the property to be sold is situated, one of which places usually being the courthouse door of the county.[5] Some statutes require the posting of notices only where there is no newspaper printed in the county,[6] and where notice of publication is made in a newspaper outside the county where the property is situated.[7] A "public place," as the term is used in the statutes, has been held to mean such a place that an advertisement posted in it would be likely to attract general attention so that its contents might reasonably be expected to become a matter of notoriety in the vicinity.[8] If posting in several public places is required, it is not sufficient to post notices on different parts of the same building.[9]

Publication in newspaper. With reference to the sale of land under execution the statutes generally require that the sheriff shall not only post advertisements of the sale, but shall publish notice thereof for a stated period in some newspaper.[10] Under some statutes, if no newspaper is published in the county, notice should be published in the nearest newspaper having the largest or a general circulation in the county;[11] and under other statutes the notice may be given either by posting or by publication in a newspaper in the county.[12] The general rule is that statutory provisions requiring publication must be strictly pursued, and even slight deviations therefrom will render the notice insufficient.[13]

ment sought to have sold at execution sale, was not entitled to notice of execution sale under statute requiring service of written notice on owner of property residing in county other than that in which realty is situated, since purchaser was not the owner, but applicable statute was one providing for notice by advertisement in a newspaper.—City of St. Louis v. Koch, supra.

1. Mo.—State v. Moore, 72 Mo. 285 —Meir v. Zelle, 31 Mo. 331.

Conditional seller

Judgment creditor levying on automobile was not required to serve thirty days' notice on conditional seller not filing third party claim.—Stanley v. Bedford, 265 P. 216.

Mortgagee

The statute providing that when the equity of redemption in personal property is sold under execution, notice of time and place of sale should be given mortgagee, was intended to require that notice of time and place of sale be given mortgagee to afford him an opportunity to protect his rights in property.—Habit v. Stephenson, 8 S.E.2d 245, 217 N.C. 447.

2. N.Y.—Van Camp v. Searle, 4 N.E. 427, 147 N.Y. 150, 2 N.Y.Ann.Cas. 351.

4. Tenn.—Luther v. McMichael, 6 Humphr. 298.
23 C.J. p 637 note 73.

5. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
Pa.—Macri v. Misiti, 20 Pa.Dist. & Co. 419, 39 Dauph.Co. 343—Barnes v. Barnes, 14 Pa.Dist. & Co. 563.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 637 note 75.

6. Kan.—Dewey v. Loomis, 216 P. 271, 113 Kan. 750.
23 C.J. p 637 note 76.

City considered as a county

The city of St. Louis is treated as a county within statute providing for notice to be given at time and place of execution sale.—City of St. Louis v. Koch, Mo.App., 156 S.W.2d 1.

Statute construed

If no newspaper is printed in the county, notice may be given by posting notices in five public places in the county, two of which shall be posted in the township where the sale is to be held.—Dewey v. Loomis, 216 P. 271, 113 Kan. 750.

7. N.M.—Pecos Valley Lumber Co. v. Freidenbloom, 168 P. 497, 23 N. M. 383.
23 C.J. p 637 note 77.

8. Cal.—Standley v. Knapp, 298 P. 109, 112, 113 Cal.App.2d 91, quoting **Corpus Juris.**
23 C.J. p 637 note 78.

Grocery store

Small grocery store near city hall, where it was practice to post sheriff's notices, was "public place" for posting notice of execution sale.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.

9. R.I.—Bowker v. Semple, supra.
23 C.J. p 637 note 79.

10. Ariz.—Colvin v. Weigold, 253 P. 633, 31 Ariz. 370.
Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.
R.I.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.
23 C.J. p 637 note 81.

Circulation

The statute does not require that the notice of sale be published in a newspaper of general circulation.—Saylors v. Wood, 140 S.W.2d 164, 135 Tex. 267, affirming, Civ.App., 120 S. W.2d 835—Eakin v. Glenn, Tex.Civ. App., 141 S.W.2d 420.

11. Ga.—Lamb v. Allen, 50 Ga. 207.

Sale by federal marshal

Under Georgia statute governing advertisements for sheriffs' sales, federal marshal held not bound, in publishing notice of execution sale, to use newspapers used by sheriffs.—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 340.

12. Idaho.—Ollis v. Kirkpatrick, 28 P. 435, 3 Idaho, Hasb., 247.

13. La.—Ernest Realty Co. v. Hunter Co., 179 So. 460, 189 La. 379.
23 C.J. p 638 note 84.

Relative nullity

The nullity of sheriff's sale because advertisement thereof in legal

Control of by officer. Where the statute makes it the duty of the officer to publish the notice of sale under execution, he alone has the power to determine and select the places and newspapers in which to publish the required notice.[14] Under some statutes, however, the execution creditor or his attorney may designate the paper for publication.[15]

Proof of publication. The affidavit of the publisher, or his authorized agent, is generally sufficient proof of the publication,[16] and the return of the officer need not establish such publication.[17] The affidavit must be subscribed by the affiant.[18]

c. Contents

The notice should contain a description of the property, the time and place of the sale thereof, and any other matters required by statute.

Since the object of a general notice is to secure the attendance of purchasers at the sale and thus obtain a fair price for the property,[19] such notice of sale should be designed to accomplish such object,[20] but a notice of sale is sufficient if it contains all that is required by the statute.[21] It has been held that the notice should set out the terms on which the property is to be sold;[22] but unless required by statute it need not state the amount due on the judgment,[23] nor specify whose interest in the property is to be sold, where there are several defendants.[24]

Although such a statement has been held too vague and indefinite in some cases,[25] if the full title is to be sold, it has been held sufficient to state that the officer will sell all the right, title, and interest of defendant in certain real estate "taken as the property of defendants,"[26] and if the sale will not be subject to the right of redemption that fact should be stated.[27] If the interest of a mortgagor is to be sold, the notice should show that the property is mortgaged and that what is to be sold is only the right and interest of the mortgagor therein;[28] but the contrary has been held where the property is in the possession of the mortgagor, and the mortgage is recorded.[29] Where the notice undertakes to mention the day as of which the interest of the judgment debtor will be sold, it must do so correctly.[30]

Surplusage in the notice has been held not to affect the sale.[31]

Description of property. A notice of sale should contain a description of the property to be sold.[32] The description should be as full and complete as in the exercise of ordinary diligence it is possible for the officer to give in view of the character, condition, and location of the property;[33] but it is sufficient if the property is described with reasonable

trade paper was defective was a mere "relative nullity" which could be cured by prescription of five years against informalities in public sales. —Ernest Realty Co. v. Hunter Co., supra.

14. R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 638 note 86.

Discretion
In selecting public places for posting notices of execution sale, sheriff has discretion which, if reasonably and fairly exercised, will not be interfered with.—Bowker v. Semple, supra.

15. Mo.—State v. Wilson, 139 S.W. 705, 158 Mo.App. 105.
23 C.J. p 638 note 87.

16. Ill.—Maass v. Hess, 29 N.E. 887, 140 Ill. 576.
23 C.J. p 638 note 88.

17. Mich.—Grand Rapids Nat. Bank v. Kritzer, 75 N.W. 90, 116 Mich. 688.
23 C.J. p 638 note 89.

18. Iowa.—Magney v. Roberts, 105 N.W. 430, 129 Iowa 218.

19. Del.—Petition of Adair, 190 A. 105, 8 W.W.Harr. 175.
23 C.J. p 638 note 92.

20. Pa.—West v. West, 6 Pa.Dist. & Co. 64.
23 C.J. p 638 note 93.

21. Ga.—Alsabrook v. Prudential Ins. Co. of America, 167 S.E. 735, 46 Ga.App. 400, transferred, see Alsabrook v. Prudential Ins. Co., 163 S.E. 706, 174 Ga. 637.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 639 note 94.

22. S.C.—Farr v. Sims, 9 S.C.Eq. 122, 24 Am.D. 396.

23. Tex.—Teague v. Burk, Civ.App., 3 S.W.2d 461.
23 C.J. p 639 note 96.

Excessive demand in citation and notice of sale in action for foreclosure of lien renders sale voidable.—McGlothlin v. Scott, Tex.Civ. App., 6 S.W.2d 129.

Statute not applicable to execution sales
A statute requiring the notice of sales under order of the court to specify the amount to be realized by such sale does not apply to a sale of land under execution.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.

24. Tex.—Citizens' Nat. Bank of Decatur, Ill. v. Interior Land & Immigration Co., 37 S.W. 447, 14 Tex.Civ.App. 301.

25. La.—Mulling v. Jones, 97 So. 202, 153 La. 1091.

Waiver
La.—Scott v. Gordon, 168 So. 134, 184 La. 1017.

26. Kan.—Treptow v. Buse, 10 Kan. 170.

27. Iowa.—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84.
23 C.J. p 639 note 99.

Redemption right of third person
Notices were not void because omitting statement that execution sale was without right of redemption as to debtor, where others had a right of redemption.—Ebinger v. Wahrer, supra.

28. Minn.—Johnson v. Gerber, 130 N.W. 995, 114 Minn. 174.

29. Tex.—Wilkerson v. Stasny, Civ. App., 183 S.W. 1191.

30. N.Y.—Taylor v. Bell, 106 N.Y.S. 273, 121 App.Div. 437.

31. N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.

32. Del.—Petition of Adair, 190 A. 105, 8 W.W.Harr. 175.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 639 note 5.

33. Cal.—Baar v. Smith, 275 P. 861, 97 Cal.App. 398.
Pa.—West v. West, 6 Pa.Dist. & Co. 64.
23 C.J. p 639 note 6.

certainty,[34] so as to enable prospective purchasers, in the exercise of ordinary diligence, to identify it.[35] The notice is not invalid because it includes more than the sheriff was authorized to, or did in fact, sell,[36] or because it fails to state that less than the full amount of the property will be sold if it will satisfy the judgment.[37] Under some statutes, the advertisement of the sale of real property under execution, in addition to a description of the property, must specify the principal improvements thereon.[38]

The time of the sale should be stated in the notice with such definiteness as will enable intending bidders to know when to be present.[39] It is not necessary, however, that the exact hour appointed for the sale should be stated if the time is fixed as between certain business hours of the day;[40] and where the hours between which property must be sold are fixed by statute it is not necessary to state in the notice the hour at which the sale is to take place.[41]

The place of sale should be set out in the notice, since "the designation of a place of sale is an essential requisite of the notice, without which it is in law no notice."[42]

Setting out names of parties. By the better practice, and under some statutes, the names of the parties to the execution, especially that of defendant, should be set out in the notice of sale,[43] but, in the absence of a statute requiring it, it is not necessary that the notice set out the names of the parties.[44]

Signature of officer. A notice of sale need not be signed by the officer in writing, a printed signature being sufficient.[45] Where a sale is made by a county sheriff acting as the deputy of a sheriff of the supreme court, the notice may be signed by him in his official capacity as county sheriff.[46]

d. Time or Duration of Notice

Ordinarily notice of an execution sale should be given for the prescribed length of time before the sale.

The notice of sale is no part of the levy but the levy must be complete before such notice can be given.[47] The statutes providing for notice of an execution sale usually prescribe the length of time before sale for which such notice must be given and such provisions must be complied with.[48] Unless required by statute, it is not necessary that the last publication of the notice shall be the prescribed number of days before the day of sale;[49] and in computing the time the law does not recognize fractions of a day.[50]

Where the statute requires the notice of sale to be published for a certain number of weeks, it has been held that this provision of the statute is not satisfied by a publication for less than seven days for each week, and that the full number of days contained in the number of weeks prescribed must elapse between the date of the first advertisement and the sale,[51] although a contrary rule is established in some states which hold that publication once during each week for the proper number of weeks prior to the sale is sufficient without regard to the number of days elapsed.[52] It has been held, however, under the latter construction, that a week

34. Cal.—Everts v. Will S. Fawcett Co., 74 P.2d 815, 24 Cal.App.2d 213.
Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 513, citing **Corpus Juris.**
23 C.J. p 639 note 7.

35. Idaho.—Rexburg Lumber Co. v. Purrington, supra, citing **Corpus Juris.**
Tex.—Gutierrez v. Rodriguez, Civ. App., 137 S.W.2d 220.
23 C.J. p 639 note 8.

36. Ky.—Siler v. Lawson, 173 S.W. 158, 163 Ky. 6.
Neb.—Northwestern Mut. L. Ins. Co. v. Marshall, 95 N.W. 357, 1 Neb. Unoff., 36.

37. Ky.—Siler v. Lawson, 173 S.W. 158, 163 Ky. 6.

38. Pa.—Houghtaling v. Megahey, 19 Pa.Dist. 371, 36 Pa.Co. 212.
23 C.J. p 640 note 13.

39. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
N.J.—Century Transit Co. v. Public Service Co-ordinated Transport, 176 A. 719, 117 N.J.Eq. 520.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 640 note 14.

40. N.J.—Coxe v. Halsted, 2 N.J. Eq. 311.
23 C.J. p 640 note 15.

41. Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
23 C.J. p 640 note 16.

42. Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 640 note 17.

43. Pa.—West v. West, 6 Pa.Dist. & Co. 64.
23 C.J. p 640 note 18.

Fieri facias owned by transferee
Advertisement naming original plaintiff and defendant held sufficient, although fieri facias was owned by transferee not mentioned in advertisement.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.

44. N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 640 note 19.

45. N.J.—Coxe v. Halsted, 2 N.J. Eq. 311.

46. Ind.—Ross v. Banta, 34 N.E. 865, 140 Ind. 120, 39 N.E. 732.

47. Minn.—Castner v. Symonds, 1 Minn. 427.

48. Tex.—McGlothlin v. Scott, Civ. App., 6 S.W.2d 129.
23 C.J. p 641 notes 23, 24.

49. Ind.—Rhoades v. Delaney, 50 Ind. 468.

50. Colo.—Leppel v. Kus, 88 P. 448, 38 Colo. 292.
23 C.J. p 641 note 27.

51. U.S.—Early v. Homans, D.C., 16 How. 610, 14 L.Ed. 1079.
23 C.J. p 641 note 28.

52. N.Y.—Wood v. Morehouse, 45 N. Y. 368.
23 C.J. p 641 note 29.

must be counted as a calendar week beginning on Sunday and ending with Saturday, and that the sale cannot be made on a day of the same week during which the last advertisement appears.[53]

It has been held that a notice of sale, defective by reason of failure to publish it for the time designated by the statute, cannot be cured by a postponement of the sale to a day sufficiently remote to answer the statutory requirements.[54] The advertisement of a sale in anticipation of the dissolution of a restraining order, although a violation of the order, was held not to render the sale void, in the absence of fraud, collusion, or surprise.[55]

Perishable property. Under some statutes, where the property levied on is of a perishable nature, the provision requiring a certain number of days' notice of sale does not apply, but the officer may obtain from the court authority for an immediate sale,[56] on his giving the required notice of his intention to make such application.[57]

e. Effect of Failure to Give Proper Notice

While defects in the notice have been variously held to render the sale void or voidable, in most jurisdictions it is now provided that an improper notice does not affect the validity of a sale to an innocent purchaser since the party aggrieved has his remedy against the officer for any injuries sustained by reason of the neglect.

Although it has been held under some statutes that the failure to give the required notice renders the sale void,[58] as, for example, where there is a failure to publish the notice for the required length of time,[59] ordinarily the failure of the officer to give the notice or notices required by law will render the sale voidable only.[60] Thus a failure to specify the principal improvements on the property will render the sale voidable,[61] and the sale is voidable where the description of the property in the notice is erroneous or insufficient,[62] but defects in a description of the property which do not mislead will not vitiate the sale;[63] and it has been held that, where defendant has actual notice of the sale, failure to give notice to him as required by statute will not be considered.[64]

It is expressly provided by statute in some states that the failure to give the required notice of sale shall not affect the validity of the sale,[65] and in most jurisdictions the neglect of the officer making a sale to give the notice required by law does not affect the validity of such sale to an innocent purchaser without notice of such omission, since the party aggrieved has his remedy against the officer for any injuries sustained by reason of the neglect.[66]

Opening, vacating, or collateral attack on execution sale because of irregularities or misconduct affecting the sale is discussed infra § *232*.

f. Objections and Waiver

Objections to the sufficiency of a notice can be made only by defendant in execution or by some person in privity with him, and such right may be waived.

53. Ga.—Conley v. Redwine, 35 S.E. 92, 109 Ga. 640, 77 Am.S.R. 398.
23 C.J. p 641 note 30.

54. Me.—Sawyer v. Wilson, 61 Me. 529.

55. Ga.—Gower v. New England Mortg. Sec. Co., 111 S.E. 422, 152 Ga. 822.

56. Md.—Arnold v. Fowler, 51 A. 299, 94 Md. 497, 89 Am.S.R. 444.

57. Ga.—Simmons v. Cooledge, 21 S.E. 1001, 95 Ga. 50.
23 C.J. p 642 note 33.

58. R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.
23 C.J. p 642 note 36.

59. Ind.—Keen v. Preston, 24 Ind. 395.
23 C.J. p 641 note 25.

60. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App. 2d 52—Batini v. Ivancich, 287 P. 523, 105 Cal.App. 391.
Ga.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.
Ind.—Willard v. Bringolf, 5 N.E.2d 315, 319, 103 Ind.App. 16, citing **Corpus Juris.**
Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
Okl.—Morgan v. Stevens, 223 P. 365, 101 Okl. 116.
Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S.W.2d 1112—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.
23 C.J. p 642 note 35.

In Pennsylvania

(1) It has been held that the provision for the posting of notice of execution sales is merely directory and that failure to comply with the requirement will not of itself invalidate a sale.—Barnes v. Barnes, 14 Pa.Dist. & Co. 563—McDonald v. Winton, 4 Lanc.L.Rev. 194.

(2) However, in an early case, where no notice of a sale was given and there was no bidder present but the plaintiff in execution, the sale was held fraudulent and void.—McMichael v. McDermott, 17 Pa. 353, 55 Am.D. 560.

(3) A sale of a life estate under a venditioni exponas issued without an order of the court entered after the required notice is void.—Kintz v. Long, 30 Pa. 501.

61. Pa.—Houghtaling v. Megahey, 19 Pa.Dist. 371, 36 Pa.Co. 212.

62. Cal.—Baar v. Smith, 275 P. 861, 97 Cal.App. 398.
23 C.J. p 639 note 9.

63. Tex.—Citizens' Nat. Bank of Decatur, Ill. v. Interior Land & Immigration Co., 37 S.W. 447, 14 Tex. Civ.App. 301.
23 C.J. p 640 note 10.

64. Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.
23 C.J. p 642 note 39.

65. Iowa.—Bowden v. Hadley, 116 N.W. 689, 138 Iowa 711.
23 C.J. p 638 note 85, p 642 note 38.

66. Cal.—Batini v. Ivancich, 287 P. 523, 105 Cal.App. 391.
Ga.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.
Mich.—Wernik v. Kolodzieiczak, 215 N.W. 360, 240 Mich. 468.
Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S.W.2d 1112—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.
23 C.J. p 642 note 37.

Objections to the sufficiency of a notice can be made only by defendant in execution or by some person in privity with him,[67] and must be made in apt time.[68]

Waiver. Since a statute requiring notice of a sale is intended for the benefit of the debtor, he may, either expressly or impliedly, waive its provisions;[69] but the waiver, to be upheld, must be made in good faith and not prejudicial to the rights of other creditors of defendant in execution.[70]

g. Presumptions

Unless the contrary appears, it will ordinarily be presumed that an officer making an execution sale gave the prescribed notices.

Unless the contrary appears, it will, as a general rule, be presumed that an officer making a sale under execution gave all the requisite statutory notices[71] in a proper manner;[72] and where a publication is shown it will be presumed that the newspaper was such a one as was required by the statute.[73] In some jurisdictions, however, where objection is made to the confirmation of a sale for the want of legal notice, the rule is laid down that the officer must prove that the proper notice was given;[74] and also that the burden of proof is on the party setting up title to land based on an execution sale, to show that proper notice of such sale was given.[75]

§ 212. Persons Who May Purchase

a. In general
b. Officer making sale
c. Execution creditor or his representatives
d. Execution debtor or person in fiduciary relation

a. In General

Generally any person may purchase at an execution sale provided he is competent to contract and does not occupy such a relationship to the execution defendant as would prevent him from making his interests antagonistic to defendant's interests.

As a general rule any person may become a purchaser at an execution sale, provided he is competent to contract and does not occupy such a relationship to execution defendant as would prevent him from making his interests antagonistic to defendant's interests,[76] but a person cannot become a purchaser where, by reason of his duties in connection with the sale or his relationship to defendant, his individual interest as purchaser would be inconsistent with his duties.[77] A tenant in common,[78] a tenant by the entirety,[79] or a partner[80] may purchase the interest of his cotenant or copartner at an execution sale.

Appraiser. Under some statutes an appraiser is prohibited from purchasing the property appraised by him;[81] but it has been held that in the absence of fraud a sale to such appraiser is not void, but merely voidable.[82]

Fraudulent grantee. A fraudulent grantee of property may become the purchaser thereof at a subsequent sale under execution having a paramount lien, and if the purchase is bona fide he acquires a valid title, since the fraud of the first conveyance does not taint or vitiate a subsequent purchase in good faith.[83]

A county,[84] *city,*[85] *or a school district*[86] may

67. Ill.—Cook v. Chicago, 57 Ill. 268.
23 C.J. p 642 note 40.

68. Ill.—McCormick v. Wheeler, 36 Ill. 114, 85 Am.D. 388.
Mo.—Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

69. La.—Scott v. Gordon, 168 So. 134, 184 La. 1017—United Shoe-Repairing Machine Co. v. Costa, 7 La.App. 147.
23 C.J. p 642 note 42.

70. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
N.Y.—Charles H. Dauchy Co. v. Wilkinson, 295 N.Y.S. 666, 251 App. Div. 53.
23 C.J. p 643 note 43.

71. Pa.—Derr v. New York Joint Stock Land Bank, 6 A.2d 899, 335 Pa. 309.
23 C.J. p 643 note 44.

72. Mass.—Holmes v. Jordan, 39 N. E. 1005, 163 Mass. 147.
23 C.J. p 643 note 45.

73. Mo.—Chandler v. Bailey, 1 S.W. 745, 89 Mo. 641.
23 C.J. p 643 note 46.

74. Kan.—Hazen v. Webb, 74 P. 1111, 68 Kan. 308.
23 C.J. p 643 note 47.

75. U.S.—Ransom v. Williams, Ill., 2 Wall. 313, 17 L.Ed. 803.

76. Tex.—Reitz v. Mitchell, Civ. App., 256 S.W. 697.
23 C.J. p 643 note 50.
The judge or justice who rendered the judgment may purchase property sold under execution issued on such judgment.—Reitz v. Mitchell, Tex. Civ.App., 256 S.W. 697—23 C.J. p 643 note 50 [a].

77. Miss.—White v. Trotter, 24 Miss. 30, 53 Am.D. 112.
23 C.J. p 643 note 51.

78. Cal.—Gunter v. Laffan, 7 Cal. 588.
23 C.J. p 643 note 52.

79. N.J.—Zubler v. Porter, 120 A. 194, 98 N.J.Law 444, 27 A.L.R. 822.

80. Cal.—Bradbury v. Barnes, 19 Cal. 120.
N.C.—Baird v. Baird, 21 N.C. 524, 31 Am.D. 399.

81. Neb.—McKeighan v. Hopkins, 19 Neb. 34.

82. Neb.—Best v. Zutavern, 74 N. W. 64, 53 Neb. 604.
Ohio.—Terrill v. Auchauer, 14 Ohio St. 80.

83. Ala.—Seals v. Pheiffer, 77 Ala. 278.

84. Idaho.—Evans v. Power County, 1 P.2d 614, 50 Idaho 690.

85. Idaho.—Evans v. Power County, supra.

86. Idaho.—Evans v. Power County, supra.

sometimes purchase property at an execution sale under a judgment in its favor.

b. Officer Making Sale

Ordinarily the officer making an execution sale cannot, either directly or indirectly, become the purchaser.

The rule of law that an agent cannot represent two principals whose interests are conflicting applies with peculiar force to execution sales, and the officer making the sale cannot, either directly or indirectly, become the purchaser,[87] even though a third person is jointly interested in the purchase;[88] at least he cannot do so without the consent of the creditor and the debtor;[89] nor can he bid for the property, either for himself or as the agent of another, as shown infra § 213. However, this rule does not prevent the officer from thereafter purchasing, as an individual, from the purchaser at the execution sale, where such purchase is not in pursuance of fraud, collusion, or prearrangement.[90]

A deputy who makes or assists in selling is under the same disability as the sheriff as to becoming a purchaser,[91] although it has been held that where the sale is made by the sheriff his deputy who is not concerned in the sale may become the purchaser.[92] An ex-sheriff may buy land sold subsequently under a levy made when he was in office.[93]

Generally a sale to the officer conducting the sale[94] or to his agent[95] is void; but it has been held that a sale by a sheriff to his own agent is not necessarily void at law but is voidable for fraud in fact;[96] and that, in the absence of statute to the contrary, a sale by the officer to a near relative[97] or to a corporation in which he is a stockholder[98] is not necessarily invalid.

c. Execution Creditor or His Representatives

The execution creditor or his representatives may purchase at the sale but it will be affected by slighter irregularities than if a stranger was the purchaser.

The execution creditor may, if he acts in good faith, become the purchaser,[99] especially where he has assigned his claim to another;[1] and such purchase may also be made by the creditor's attorney,[2] or by his assignee.[3] However, the courts are not in accord as to whether or not the creditor or his attorney is a bona fide purchaser without notice, as shown infra § 295, but he is held to greater strictness, and a sale to him will be affected by slighter irregularities than if a stranger was the purchaser.[4] Thus the party who has absolute control of the sale for his own benefit cannot be a purchaser unless there is a fair competition of bidders or a lawful opportunity given for such competition.[5]

A county judge, although a financial agent of the county, may purchase at a sale under a judgment in favor of the county, subject to an option in the county to claim the benefit of the purchase.[6]

d. Execution Debtor or Person in Fiduciary Relation

An execution debtor may become the purchaser at an execution sale, but a person standing in a fiduciary relation to him will not be permitted to derive an undue advantage at his expense.

Defendant in execution may become the purchaser;[7] and one of two codefendants may purchase the

87. Pa.—Trank v. Gysling, 30 Pa. Co. 386, 387.
23 C.J. p 644 note 58.

88. Ill.—Wickliff v. Robinson, 18 Ill. 145.
Tenn.—Johnson v. Pryor, 5 Hayw. 243.

89. Vt.—Woodbury v. Parker, 19 Vt. 353, 47 Am.D. 695.
23 C.J. p 644 note 60.

90. Miss.—Myers v. Drago Grain Co., 71 So. 874, 111 Miss. 614.

91. N.Y.—Jackson v. Anderson, 4 Wend. 474.
23 C.J. p 644 note 63.

92. N.C.—McKee v. Vail, 79 N.C. 194.
23 C.J. p 644 note 64.

93. S.C.—Leger v. Doyle, 48 S.C.L. 109, 70 Am.D. 240.

94. Ga.—Coleman v. Maclean, 28 S. E. 861, 101 Ga. 303.
23 C.J. p 644 note 66.

95. Vt.—Downing v. Lyford, 57 Vt. 507.

96. Md.—Isaac v. Clarke, 2 Gill 1.

97. Ala.—Dexter v. Strobach, 56 Ala. 233.
Tex.—Brackenridge v. Cobb, 21 S.W. 614, 2 Tex.Civ.App. 161.
23 C.J. p 644 note 69.

98. Mo.—Hardwick v. Jones, 65 Mo. 54.

99. Ark.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.
23 C.J. p 644 note 71.
Purchase at execution sale by executor or administrator see Executors and Administrators § 268.

Valid judgment and new equity of redemption
Execution sale, if made to party to litigation, to be valid must be had under valid judgment, and there must be a new equity of redemption. —First-Trust Joint Stock Land Bank of Chicago v. Meredith, 64 P.2d 977, 19 Cal.App.2d 103.

1. Tex.—Hudson v. Morriss, 55 Tex. 595.
23 C.J. p 644 note 72.

2. Cal.—Elam v. Arzaga, 10 P.2d 805, 122 Cal.App. 742.
23 C.J. p 644 note 73.

Sale invalid
Where defendant's grantor assigned claim for collection and attorney for assignee, through an intermediary, purchased property levied on at sale under execution and concealed facts from grantor, defendant receiving quitclaim deed from grantor obtained superior right over attorney subsequently obtaining deed from grantor.—Elam v. Arzaga, supra.

3. Mo.—Bradley v. Heffernan, 57 S. W. 763, 156 Mo. 653.
23 C.J. p 644 note 74.

4. Pa.—Leisenring v. Black, 5 Watts 303, 30 Am.D. 322.
23 C.J. p 644 note 76.

5. Pa.—McMichael v. McDermott, 17 Pa. 353, 55 Am.D. 560.
23 C.J. p 645 note 77.

6. Tex.—Felts v. Bell County, 132 S.W. 123, 103 Tex. 616, reversing, Civ.App., 120 S.W. 1065.

7. Ill.—Roberts v. Hughes, 81 Ill. 130, 25 Am.R. 270.

property of the other defendant, when sold to satisfy a joint execution against both.[8] A purchase by one acting for the debtor is not necessarily invalid;[9] and a purchaser may lawfully buy with the intent of afterward giving the whole of it, or any part thereof, to the insolvent debtor or his family.[10] It has been held, however, that a purchase at an execution sale, for the use of, or on behalf of, defendant in execution, is fraudulent, as creating a false impression on the other bidders,[11] or where the intention is to hold it for the benefit of the debtor and screen it from his creditors.[12]

Purchase of fiduciary for self. The doctrine that a person standing in a fiduciary relation to another will not be permitted to derive an undue advantage at the expense of the cestui que trust has been applied to execution sales,[13] but as against other creditors the attorney for the debtor may purchase,[14] and an attorney may always purchase where there is no fiduciary relation to the execution debtor.[15]

Debtor's wife. Unless a wife is incompetent to take title directly from her husband,[16] the mere existence of the marital relation does not prevent or disqualify the wife from buying the property of the husband at a sale under an execution, if she does so with her own funds and without collusion with him to hinder, delay, or defraud his creditors.[17]

§ 213. Bids

a. In general
b. Chilling and puffing the bidding

a. In General

A bid may be made in person or through an agent, or it may be made in writing or even by telephone, provided it is properly cried out; but the officer making the sale cannot bid for himself or as agent for another. A bid must be unconditional, and the amount for which the property is sold, must be within the statutory limits therefor. The sale usually should be made to the highest qualified bidder.

A bid may be made by the bidder in person or through an agent,[18] or it may be made in writing,[19] but the officer must regularly cry a written bid at the sale,[20] and a bid reduced to writing before the sale is concluded supersedes prior bids by the same person.[21] It has been held proper to receive a bid by telephone where the officer makes a public outcry of the bid before striking off the property to such a bidder.[22]

The officer making the sale cannot bid for the property, either for himself or as agent for another;[23] he cannot bid for the creditor under authority to bid off the property for him if it sells for less than the debt.[24] This, however, does not preclude his crying a bid of a third person who is absent and has telephoned or written to him a bid for a specific sum, as under such facts the bid is made by the third person and not by the officer;[25] although it has been held that written bids must be delivered to the officer at the sale, since the receipt of such bids by the officer at other times and places would constitute him the agent of such bidders and invalidate the sale.[26]

Conditional bids at execution sales are contrary to the policy of the law and should be disregarded by the officer conducting the sale,[27] such as a bid coupled with an unauthorized condition as to the

8. Iowa.—Atlee v. Bullard, 98 N.W. 889, 123 Iowa 274.
23 C.J. p 645 note 81.

9. Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.
23 C.J. p 645 note 82.

10. N.C.—Thorpe v. Beavans, 73 N. C. 241.

11. Ky.—Flowers v. Sproule, 2 A.K. Marsh. 54.

12. N.C.—Woodley v. Hassell, 94 N. C. 157—Morris v. Allen, 32 N.C. 203.

13. N.J.—Geyer v. Geyer, 78 A. 449, 75 N.J.Eq. 124.
23 C.J. p 645 note 86.

14. Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.
23 C.J. p 645 note 87.

15. Wash.—Johnson v. Johnson, 119 P. 22, 66 Wash. 113.
23 C.J. p 645 note 88.

16. Mass.—Stetson v. O'Sullivan, 8 Allen 321.

17. N.J.—Zubler v. Porter, 120 A. 194, 98 N.J.Law 444, 27 A.L.R. 822.
23 C.J. p 645 note 90.

Tenants by entirety

Where husband and wife are seized of an estate by the entirety, the wife may purchase her husband's interest at execution sale.—Zubler v. Porter, supra.

18. N.J.—Merwin v. Smith, 2 N.J. Eq. 182.

19. Ill.—Dickerman v. Burgess, 20 Ill. 266.
23 C.J. p 645 note 93.

20. Ill.—Dickerman v. Burgess, 20 Ill. 266.
Ky.—Mullins v. Buskirk, 5 Ky.L. 605, 12 Ky.Op. 413.

21. Pa.—Faunce v. Sedgwick, 8 Pa. 407.

22. Colo.—Victor Inv. Co. v. Roerig, 124 P. 349, 22 Colo.App. 257.

23. Ky.—Dixon v. Sharp, 1 A.K. Marsh. 211.
23 C.J. p 646 note 96.

24. Ga.—Coleman v. Maclean, 28 S. E. 861, 101 Ga. 303.
23 C.J. p 646 note 97.

25. Colo.—Victor Inv. Co. v. Roerig, 124 P. 349, 22 Colo.App. 257.
23 C.J. p 646 note 98.

26. Ohio.—Sparling v. Todd, 27 Ohio St. 521.

27. Ill.—Dorris v. Johnson, 2 N.E. 2d 74, 363 Ill. 236, 104 A.L.R. 629.
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S. W.2d 400.
23 C.J. p 646 note 1.

Bid should not be received which is conditioned on the debtors' owning all the property individually or having undivided one-half interests. —Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629.

"Upon confirmation of sale," not condition

Bid accepted on execution sale is an "unconditional bid," notwith-

Power of officer to purchase see supra § 212.

manner of payment.[28] If he accepts such a bid it is invalid, and the execution creditor, who has redeemed the premises from a foreclosure sale, is entitled, under a statutory provision that the amount of the redemption money so paid shall be regarded as a bid, to a sheriff's deed as having made the only valid bid.[29]

Sale to highest bidder. The sale should be made to the highest qualified bidder,[30] provided the debt is not paid or the judgment discharged before.[31] Except where the highest bid is not a proper one,[32] if the officer refuses to call the highest bid and strikes off the property to a lower bidder, equity will order the sale resumed at the point of the uncalled bid and have the property struck off to such bidder in case no higher bid is thereafter made;[33] or the person whose higher bid was wrongfully rejected by the officer may recover the property from the lower bidder to whom it was sold.[34]

On failure of the highest bidder to comply with his bid the sheriff, as a general rule, has no authority, without a resale, to convey the property to the next highest bidder,[35] although there are authorities to the effect that he may offer the property to the next highest bidder,[36] or make a return that the property was sold for so much, that the purchase money has not been paid, and that therefore the property remains unsold.[37]

Necessity for more than one bidder. Unless fraud is involved,[38] it is the rule that a sale is not invalid merely because there was only one bidder;[39] and this is so, although a statute requires the sale to be to the "highest" bidder.[40] If there are no bidders, the officer making the sale should return the execution, "No sale for want of bidders," and not sell to the judgment creditor for a mere fraction of the worth of the property.[41]

Amount of bid. The amount of a bid which may be accepted, or in other words the amount for which the property may be sold, is generally regulated by the statute. Under the different statutes, the bid on which the sale is predicated must be sufficient to discharge prior privileges and mortgages which have a preference over the judgment creditor;[42] or be a certain percentage of the appraised value of the property,[43] or of the debtor's equity or interest therein;[44] or, in case of the sale of a corporate franchise, must be for at least the amount of the debt.[45] If the bid, together with unpaid taxes, including penalty and costs, at the time of sale, amounts to the required amount or percentage, the sale is for the proper amount,[46] even though the purchaser, in the absence of fraud and collusion, later succeeds in procuring a reduction in the amount of the taxes.[47] Where a statute as to sale of encumbered property prevents the purchaser from acquiring anything more than a lien for his

standing that return of order of sale shows that premises were sold "upon confirmation of sale and possession," where record discloses that sale was conducted substantially as prescribed by notice and in accordance with decree.—Holferty v. Wortman, 283 N.W. 855, 135 Neb. 732.

28. Ind.—Swope v. Ardery, 5 Ind. 213.

29. Ill.—Dorris v. Johnson, 2 N.E. 2d 74, 363 Ill. 236, 104 A.L.R. 629.

30. La.—Ragusa v. Greco, 131 So. 849, 850, 171 La. 686, citing **Corpus Juris.**

Mo.—Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo.App. 746.

23 C.J. p 646 note 2.

31. U.S.—U. S. v. Vestal, D.C.N.C., 12 F. 59, 4 Hughes 467.

32. Ky.—Downing v. Brown, Hard. 181.

23 C.J. p 646 note 4.

33. Ga.—Duffey v. Rutherford, 21 Ga. 363, 68 Am.D. 459.

34. Tex.—Needham v. Cooney, Civ. App., 173 S.W. 979.

35. Ga.—Citizens Bank of Forsyth v. Lamar County, 200 S.E. 257, 258, 187 Ga. 123, citing **Corpus Juris.**

23 C.J. p 646 note 7.

Failure to comply with bid generally see infra §§ 218–222.

36. U.S.—Zantzinger v. Pole, Pa., 1 Dall. 419, 1 L.Ed. 204.

N.C.—Cummings v. McGill, 6 N.C. 357.

37. U.S.—Zantzinger v. Pole, Pa., 1 Dall. 419, 1 L.Ed. 204.

38. Pa.—Swires v. Brotherline, 41 Pa. 135, 80 Am.D. 601.

23 C.J. p 646 note 12 [a].

39. Kan.—Dewey v. Loomis, 216 P. 271, 113 Kan. 750.

N.D.—Power v. Larabee, 57 N.W. 789, 3 N.D. 502, 44 Am.S.R. 577.

Pa.—Swires v. Brotherline, 41 Pa. 135, 80 Am.D. 601.

23 C.J. p 646 note 12.

Only one bidder as circumstance in setting aside sale see infra § 233.

Scarcity of bidders as ground for postponement of sale see supra § 209.

40. N.D.—Power v. Larabee, 57 N. W. 789, 3 N.D. 502, 44 Am.S.R. 577.

41. Mo.—Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

42. La.—Markham v. Lacaze, 187 So. 669, 192 La. 285—Rice Mill Co. v. Benoit, 42 So. 480, 117 La. 999—Shaw v. Marceaux, 125 So. 460, 12 La.App. 401.

Chattel mortgages held within statute

La.—Giangrosso v. Straub, 122 So. 915, 11 La.App. 406.

Sale to judgment creditor is void where price paid by him is insufficient to discharge preëxisting special mortgage on property which has preference over judgment creditor's lien.—Keller v. Summers, La.App., 159 So. 198.

43. Ky.—Goff v. Moore, 290 S.W. 659, 217 Ky. 815.

Okl.—Alexander v. American Nat. Bank, 153 P. 130, 54 Okl. 345.

23 C.J. p 646 note 17.

Appraisement of property generally see supra § 106.

44. Okl.—Miller v. American Bank & Trust Co., 40 P.2d 1074, 171 Okl. 99—Hewitt v. Voils, 296 P. 447, 147 Okl. 270—Alexander v. American Nat. Bank, 153 P. 130, 54 Okl. 345.

45. N.C.—Taylor v. Jerkins, 51 N.C 316.

46. Okl.—Guaranty Bank of Oklahoma City v. Galbreath, 225 P. 971, 99 Okl. 9.

47. Okl.—Guaranty Bank of Oklahoma City v. Galbreath, 225 P. 971, 99 Okl. 9.

purchase price and interest, a bid cannot be received in excess of the debt, interest, and costs.[48] On a resale after the default of the purchaser at the first sale, no bid shall be received, under some statutes, except for a greater amount than the purchase price at the first sale,[49] but a default, within such a statute, is not constituted by the mere fact that plaintiff in execution, to whom the property was sold, refuses to receipt for the amount of his bid, or to credit his judgment.[50]

b. Chilling and Puffing the Bidding

Puffing or chilling the bidding is generally regarded as fraudulent and as being ground for setting aside the sale, as where an agreement or arrangement on the part of the bidders, or an act or representation by the purchaser, diminishes competition and stifles or chills the bidding.

Chilling or puffing of the bidding at a sheriff's sale is regarded as fraudulent, and it is well settled that on a timely application made by a motion to the court out of which the execution issued, or by a suit in equity, the sale will be set aside where such fraudulent practices have been resorted to.[51]

Agreement or combination. It is the policy of the courts to discountenance combinations or agreements on the part of bidders at execution sales, the object and effect of which are to stifle competition, and the courts will deny to any party to such agreement or combination any benefit from the sale and set it aside on proper motion,[52] unless all parties concerned know of the arrangement and assent thereto.[53] This rule, however, does not apply to an association or combination of bidders formed for honest and proper purposes,[54] as in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder would exceed the amount which individuals might wish to purchase on their own account;[55] or where several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property, and under this agreement it brings approximately its full value at the sale,[56] unless fraud was contemplated or committed.[57] It has been held that, even where the conduct of bidders was such as to deter other bidders desiring to purchase the property which was to be sold, the sale should not be set aside on such ground unless it is shown that there was at the sale a person or persons who would have, but for such conduct, become bidders for the property, and that by reason of this arrangement they were actually deterred from participating in the bidding.[58]

Employment of agent to make purchase. Where property is purchased by one person for another, even though both persons are present at the sale, such sale is not void on the ground that there was a chilling of the bidding.[59]

Representations or conduct. Since all execution sales should be open to free and full competition, the general rule is that, where the purchaser does any act or makes any false representation, the effect of which is to destroy such competition and stifle bids, by reason of which the property sells at an undervalue, the sale will be invalid;[60] and

48. Ky.—Cotton v. Cotton, 123 S. W. 331, 136 Ky. 54.
23 C.J. p 646 note 18.

49. Or.—Miller v. Achurch, 93 P. 332, 50 Or. 478.

50. Or.—Miller v. Achurch, supra.

51. N.J.—Vineland Nat. Bank v. Shinn, 36 A. 958, 55 N.J.Eq. 415, affirming 41 A. 1116, 55 N.J.Eq. 825—Metropolis Nat. Bank v. Sprague, 20 N.J.Eq. 159.
N.C.—Smith v. Greenlee, 13 N.C. 126, 18 Am.D. 564.
23 C.J. p 674 note 70.
Chilling bidding:
In general see Auctions and Auctioneers § 7 e (7).
At judicial sales generally see the C.J.S. title Judicial Sales § 22, also 35 C.J. p 40 note 41–p 41 note 60.
Puffing bidding:
In general see Auctions and Auctioneers § 7 e (8).
At judicial sales generally see the C.J.S. title Judicial Sales § 22, also 35 C.J. p 39 notes 36–39.
Irregularities or misconduct affecting sale as ground for setting aside sale generally see infra § 232.

52. La.—First Nat. Bank v. Hebert, 111 So. 66, 162 La. 703.
Pa.—Fenton v. Joki, 144 A. 136, 138, 294 Pa. 309, quoting **Corpus Juris.**
23 C.J. p 647 note 42.
Validity of contract to prevent competition see Contracts § 197.

53. Pa.—Maffet v. Ijams, 103 Pa. 266.

54. Ga.—Buckner v. Chambliss, 30 Ga. 652.
Pa.—Meskunas v. Puskunigis, 33 Pa. Dist. & Co. 124, 40 Lack.Jur. 77, 53 York Leg.Rec. 43.
Tex.—Snouffer v. Heisig, 130 S.W. 912, 62 Tex.Civ.App. 81.
23 C.J. p 648 note 44.
Where bidders have failed to comply with their bids at two sales, and certain parties interested in purchasing the property enter into an agreement with a third-lien creditor by which the latter is not to bid in return for the prospective purchaser's promise to see that his lien is paid, such an agreement does not constitute fraud such as will invalidate the sale in the absence of proof that other bidders were interested in the agreement or were in any way prevented from attending the sale.—Meskunas v. Puskunigis, 33 Pa.Dist. & Co. 124, 40 Lack.Jur. 77, 53 York Leg.Rec. 43.

55. N.C.—Smith v. Greenlee, 13 N. C. 126, 18 Am.D. 564.
23 C.J. p 648 note 45.

56. Pa.—Braden v. O'Neil, 38 A. 1023, 183 Pa. 462, 83 Am.S.R. 761
23 C.J. p 648 note 46.

57. Pa.—Oram v. Rothermel, 98 Pa. 300.

58. Ga.—Conley v. Redwine, 35 S.E. 92, 109 Ga. 640, 77 Am.S.R. 398.
Or.—Chandler Inv. Co. v. Matlock Inv. Co., 187 P. 1105, 95 Or. 394.
23 C.J. p 675 note 73.

59. Ga.—Conley v. Redwine, 35 S.E. 92, 109 Ga. 640, 77 Am.S.R. 398.
Tex.—Reynolds v. Dechaums, 24 Tex. 174, 76 Am.D. 101.
23 C.J. p 675 note 73 [a].

60. U.S.—Cocks v. Izard, La., 7 Wall. 559, 19 L.Ed. 275.

if the representation is untrue it is usually immaterial whether the person making the representation did or did not know of its falsity.[61] If, however, a party has an interest in property about to be sold under execution, or a valid claim against it, or one believed to be valid, it is not improper for him to announce such interest or claim before the sale takes place, and such statement is not improper chilling of bidding and will not estop him from becoming a purchaser of the property nor invalidate the sale;[62] and this also applies to a true representation of the purchaser that he intended to buy for the debtor.[63] No inference of impropriety can be drawn from the fact that the attorneys for the creditor informed one of the purchasers that a sale was to be had, and suggested that he bid,[64] or from representations made months before the judgment was rendered, without any apparent purpose of preventing competition at the sale.[65] Deterring bidders for the benefit of defendant, and with his consent, does not vitiate the sale as between him and the purchaser.[66] The debtor cannot complain that the sale was for an inadequate price where, at the time of the sale, he forbade it and impeached the validity of the judgment and execution, thus doing all in his power to prevent a sale at an adequate price.[67]

§ 214. —— Acceptance, Withdrawal, or Rejection

In accepting or rejecting a bid, the sheriff may consider the solvency or responsibility of the bidder, and the adequacy of the amount bid. An adjournment of the sale impliedly rejects bids made prior thereto. After acceptance a bid ordinarily cannot be withdrawn, unless made under a mistake of fact.

The sheriff has the right to judge of the solvency of bidders and the sufficiency of security offered by them, and may refuse to accept the bid of an insolvent or irresponsible person,[68] including the bid of a minor or one under disability,[69] or a bid beyond the amount that he believes the bidder able to make good;[70] and it has been held that he may, as a guaranty of the bidder's good faith, require a deposit to be made before accepting the bid.[71] He should reject a bid of an insolvent agent who bids in excess of his authority.[72]

Inadequate bid. The officer should not sell property levied on, for a grossly inadequate or a merely nominal price,[73] but should return the writ with a statement that the property was not sold for want of buyers,[74] or should postpone the sale, as stated supra § 209.

Where a sale is adjourned, bids made prior to such adjournment are impliedly rejected, and the bidder does not incur any liability on account of his bid,[75] or any right to demand a conveyance to him of the property.[76]

Withdrawal of or release from bid. The bidder has a right to withdraw his bid without incurring any liability at any time before the property is actually struck off to him,[77] and the sheriff has no authority to prescribe conditions which deprive the bidder of this right;[78] and, in the absence of evidence that a bid was consummated by deed or possession, it will be presumed, after the lapse of a

Ky.—Martin v. Blight, 4 J.J.Marsh. 491, 20 Am.D. 226.
Or.—Chandler Inv. Co. v. Matlock Inv. Co., 187 P. 1105, 95 Or. 394.
S.C.—Toole v. Johnson, 39 S.E. 254, 61 S.C. 34.
23 C.J. p 648 note 48, p 675 note 70 [a].

61. Ind.—Reed v. Diven, 7 Ind. 189.
Or.—Chandler Inv. Co. v. Matlock Inv. Co., 187 P. 1105, 95 Or. 394.

62. N.J.—Brady v. Carteret Realty Co., 60 A. 938, 67 N.J.Eq. 641, 110 Am.S.R. 502, 3 Ann.Cas. 421.
Or.—Chandler Inv. Co. v. Matlock Inv. Co., 187 P. 1105, 95 Or. 394.
Pa.—Miners Nat. Bank of Wilkes-Barre v. Bowman, 6 A.2d 286, 334 Pa. 524.
23 C.J. p 648 note 50, p 675 note 71.

Reading letter stating claim

Reading letter written by remainderman stating her claims, at sale by marshal, can not be considered as "chilling of bidding," invalidating sale of a life estate.—George v. Clary, 178 S.E. 920, 180 Ga. 279.

Reading notice concerning lien of a first mortgage at a sheriff's sale under an execution is not prejudicial to judgment debtor as discouraging bidding, especially in absence of a showing that any one was actually deterred from bidding because of such notice.—Miners Nat. Bank of Wilkes-Barre v. Bowman, 6 A.2d 286, 334 Pa. 524.

63. Pa.—Oram v. Rothermel, 98 Pa. 300.

64. Cal.—Rauer v. Hertweck, 165 P. 946, 175 Cal. 278.
23 C.J. p 648 note 51.

65. Neb.—Runge v. Brown, 45 N. W. 271, 29 Neb. 116.
23 C.J. p 674 note 70 [b].

66. Ga.—O'Kelley v. Gholston, 15 S. E. 123, 89 Ga. 1.

67. Wis.—Collins v. Smith, 44 N.W. 510, 75 Wis. 392.

68. N.J.—Merwin v. Smith, 2 N.J. Eq. 182.
23 C.J. p 647 note 27.

69. Pa.—Hotchkiss v. Homan, 25 Pa.Co. 314.

70. La.—Michel v. Kaiser, 25 La. Ann. 57.

71. N.J.—National Bank v. Sprague, 20 N.J.Eq. 159.
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S. W.2d 400.
23 C.J. p 647 note 30.

72. Ga.—Massey v. Bowles, 25 S. E. 270, 99 Ga. 216.

73. Mo.—Rogers & Baldwin, Hardware Co. v. Cleveland Bldg Co., 34 S.W. 57, 132 Mo. 442, 53 Am.S. R. 494, 31 L.R.A. 335.
23 C.J. p 647 note 34.

74. Ala.—Henderson v. Sublett, 21 Ala. 626.
23 C.J. p 647 note 35.

75. Pa.—Donaldson v. Kerr, 6 Pa. 486.

76. U.S.—Blossom v. Milwaukee & C. R. R. Co., Wis., 3 Wall. 196, 18 L.Ed. 43.

77. Cal.—Hibernia Savings & Loan Soc. v. Behnke, 53 P. 812, 121 Cal. 339.
23 C.J. p 647 note 20.

78. Pa.—Fisher v. Seltzer, 23 Pa. 308, 62 Am.D. 335.

number of years, that the bid was renounced.[79] If the bid is withdrawn, the bidder cannot afterward insist on the sale to him under such bid,[80] nor can he thereafter object to the propriety of the mode of bidding.[81] The acceptance of a higher bid releases prior bidders from liability;[82] and an order of court staying a sale on execution authorizes the sheriff to relieve from their bids persons to whom portions of the property had been struck off before notice of the stay reached the officer in actual charge of the sale.[83] A purchaser is also released if his failure to give a bond, as required by statute, is acquiesced in and no proceeding is had to enforce his bid in a reasonable time.[84]

After acceptance a bid is binding, in the absence of fraud, whether the judgment debtor has title or not.[85] The bidder cannot thereafter withdraw his bid without the consent of the parties,[86] except that where the bid is made under a mistake of fact and the bidder acts promptly, the sheriff may, in his discretion, allow the bid to be withdrawn and treat the sale as a nullity, without the consent of the judgment debtor.[87] An execution plaintiff should not be allowed to withdraw his bid merely because he has bid more than the property is worth;[88] but where such a bid is made by an agent, who, by mistake exceeds his instructions, he should, if he acts promptly and plaintiff pays the costs, be allowed to withdraw his bid.[89]

§ 215. —— Assignment of Bid

A purchaser at an execution sale may assign his contract to another.

A purchaser at an execution sale may assign his contract to another, and the sheriff's deed to such assignee will be valid,[90] and such an assignment may be made by an informal writing.[91] A conveyance to one who was not the purchaser at an execution sale is void, unless authorized by such an assignment.[92]

§ 216. Payment of Bid

An execution sale is effected only where the amount of the bid has been paid in accordance with the terms of the sale. If the sale is for cash, payment generally should be made on the day of sale, or when the certificate of sale is delivered, unless the parties consent to a delay.

A sale under execution is not effected until the successful bidder complies with his bid,[93] and, as stated infra § 289, no title is acquired until the money is paid in accordance with the terms of the sale. Where the terms of the sale are cash, unless a delay in payment is allowed by the act or consent of the parties,[94] the general rule is that the money to satisfy the bid should be paid to the officer immediately on the day of sale,[95] or when the certificate of sale is delivered.[96] In some states, however, the officer may give a reasonable time to the purchaser for the payment, at least in the absence of objection by the parties to the execution,[97] but in such cases he must secure the rights of the parties by making a proper memorandum of the sale.[98] The conditions of the sale may fix a certain sum or per cent to be paid at the time of the sale, and the balance to be paid a certain number of days thereafter,[99] and this rule has also been applied by statute.[1] A failure to pay the balance of the bid until

79. Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802—Cooper v. Granberry, 33 Miss. 117.
Presumption of validity of sale see infra § 229.

80. La.—Hills v. Jacobs, 7 Rob. 406.

81. Ind.—Barnes v. Zoercher, 26 N. E. 172, 126 Ind. 434.

82. Iowa.—Swortzell v. Martin, 16 Iowa 519.

83. N.Y.—Bernheim v. Daggett, 12 Abb.N.Cas. 316, affirmed 84 N.Y. 670.

84. Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

85. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.
N.D.—Burdick v. Farmers' Mercantile Co., 184 N.W. 4, 48 N.D. 227.

86. Iowa.—Downard v. Crenshaw, 49 Iowa 296.
23 C.J. p 647 note 25.

87. Iowa.—Van Rheenen v. Windell, 262 N.W. 120, 220 Iowa 211—Fuson v. Connecticut General Life Ins. Co., 6 N.W. 7, 53 Iowa 609.
23 C.J. p 647 note 26.

Where execution creditor makes bid under mistake of fact as to property included in sale and he promptly refuses to carry out his offer and withdraws his bid, and the sheriff consents to such withdrawal and treats sale as nullity, there is no binding sale, notwithstanding that judgment debtor does not consent to execution creditor's withdrawal of bid.—Van Rheenen v. Windell, 262 N.W. 120, 220 Iowa 211.

88. Iowa.—Fuson v. Connecticut General Life Ins. Co., 6 N.W. 7, 53 Iowa 609.

89. Iowa.—Fuson v. Connecticut General Life Ins. Co., supra.

90. N.C.—Carter v. Spencer, 29 N. C. 14.
23 C.J. p 657 note 2.
Assignment of certificate of sale see infra § 224.

91. Tenn.—Trotter v. Nelson, 1 Swann 7.

92. Tenn.—Morgan v. Hannah, 11 Humphr. 122.
23 C.J. p 657 note 3.

93. Tex.—Tanner v. Grisham, Com. App., 295 S.W. 590, reversing, Civ. App., 289 S.W. 146.

94. La.—Marx v. Sanders, 32 So. 331, 108 La. 140.
Wis.—Sauer v. Steinbauer, 14 Wis. 70.
23 C.J. p 650 note 84.

95. N.Y.—Rowe v. Granger, 103 N. Y.S. 439, 118 App.Div. 459.
23 C.J. p 650 note 85.

96. Cal.—Mehern v. Sanders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272.

97. Mass.—Pomeroy v. Winship, 12 Mass. 514, 7 Am.D. 91.
23 C.J. p 651 note 87.

98. Ind.—Ruckle v. Barbour, 48 Ind. 274.

99. Pa.—Hartman v. Pemberton, 24 Pa.Super. 222.

1. S.C.—Scott v. Wilson, 12 S.C.L. 194.
23 C.J. p 651 note 89 [a].

after the time fixed by the conditions of the sale precludes the rights of the purchaser, at least where it appears that both parties treated the sale as rescinded by consent.[2]

§ 217. —— Cash or Credit

a. In general
b. Bond for purchase money

a. In General

Except where authority to sell on credit is given by statute, the sale generally should be for cash, unless the parties agree otherwise. If the judgment creditor, or a prior lien creditor, becomes the purchaser, payment may be effected by crediting the amount of his debt on the execution, unless there are other liens on the property of equal dignity, in which case the purchase money may be required to be paid, to be deposited in court for distribution.

Except in so far as authority to sell on credit is given by statute,[3] which has been held constitutional,[4] an officer, as a general rule, must sell for cash and has no legal right to sell on credit,[5] and no power to execute a receipt for the money bid until he receives the same,[6] unless there is consent or an agreement of the parties to the contrary[7] or a direction by the execution creditor to receive something other than cash.[8] Cash within the meaning of this rule generally means current legal tender or money,[9] or that which substantially amounts to payment in cash,[10] and not a check, draft, or other form of negotiable instrument,[11] unless the parties consent or agree to receive it as cash.[12] The purchaser cannot set off against his bid a claim against the execution creditor.[13]

Judgment creditor as purchaser. Where the judgment creditor becomes a purchaser at the execution sale, although the sale was advertised as for cash in hand,[14] payment may be effected by crediting the amount of his debt on the execution,[15] and the officer should, at the direction of such judgment creditor, credit the amount of his debt on the execution, if the costs of the sale are paid;[16] but not where he refuses to make a payment at least sufficient to cover the costs,[17] although the sale is not rendered incomplete by the fact that the officer failed to pay over the costs to the clerk of the court.[18] It has been held that if the sheriff treats the sale as complete it will be presumed that such costs were

2. Pa.—Brennan v. Paxson, 76 A. 199, 227 Pa. 444.
23 C.J. p 651 note 90.

3. Neb.—De Moulin Loan & Investment Co. v. McLain, 187 N.W. 123, 107 Neb. 858.
23 C.J p 648 note 54.
On giving bond for purchase money see infra subdivision b of this section.

Statute relating to sales under order of court, does not apply to sales of land under execution, so as to invalidate a sale because made for cash, instead of on a credit of six or more months as provided by the statute.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.

4. Va.—Garland v. Brown, 23 Gratt. 173, 64 Va. 173.
23 C.J. p 648 note 54 [a].

5. Kan.—Metz v. Hicklin, 268 P. 823, 824, 126 Kan. 516, citing **Corpus Juris.**
Mo.—Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 247, 226 Mo.App. 746, citing **Corpus Juris.**
Neb.—De Moulin Loan & Investment Co. v. McLain, 187 N.W. 123, 107 Neb. 858—Hooper v. Castetter, 63 N.W. 135, 45 Neb. 67.
23 C.J. p 649 note 56.

Under statute providing that sale shall be for ready money, and that if the amount bid is not paid there may be a resale, neither the sheriff nor the successful bidder may determine how much of the bid shall be paid in.—Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo. App. 746.

6. Ind.—McCormick v. Walter A. Wood Mowing & Reaping Mach Co., 72 Ind. 518.

7. Ga.—Coker v. McConnell, 31 S. E. 411, 104 Ga. 482.
23 C.J. p 649 note 58.

8. Miss.—Doe v. Natchez Ins. Co., 16 Miss. 197.
23 C.J. p 649 note 59.

9. Neb.—De Moulin Loan & Investment Co. v. McLain, 187 N.W. 123, 107 Neb. 858—Hooper v. Castetter, 63 N.W 135, 45 Neb. 67.
23 C.J. p 649 note 60.

10. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.

11. Kan.—Metz v. Hicklin, 268 P. 823, 126 Kan. 516.
La.—Dunlap v. Whitmer, 62 So. 938, 133 La. 317, Ann.Cas.1915C 990.
Miss.—Tiffany v. Johnson, 27 Miss. 227.

12. Colo.—Cramer v. Oppenstein, 27 P. 716, 16 Colo. 504.
Ind.—Sutton v. Baldwin, 45 N.E. 518, 146 Ind. 346
Kan.—Metz v. Hicklin, 268 P. 823, 126 Kan. 516.
23 C.J. p 649 note 62.

13. Ill.—Perkins v. Webb, 67 Ill. App. 474.

14. Or.—Title & Trust Co. v. Security Buildings Corporation, 284 P. 177, 131 Or. 648.

15. Iowa.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856.
Or.—Title & Trust Co. v. Security Buildings Corporation, 284 P. 177, 131 Or. 648.
23 C.J. p 649 note 64.

16. Cal.—Moore v. Martin, 38 Cal. 428, overruled on other grounds Johnson v. Taylor, 88 P. 903, 150 Cal. 201, and Welsh v. Cross, 81 P. 229, 146 Cal. 621—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 446, 7 Cal.App.2d 52, quoting **Corpus Juris.**
Colo.—West v. Duncan, 210 P. 699, 700, 72 Colo. 253.
23 C.J. p 649 note 64.

Reasons for rule

"It would be a useless thing to require the creditor in execution to hand the money to the sheriff and then have the sheriff hand it back to him, where the judgment creditor is the purchaser and the expenses and costs of sale have been paid. The ends of justice are met if the sheriff credits the amount of the debt upon the execution."—West v. Duncan, supra—23 C.J. p 649 note 64 [a].

17. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
23 C.J. p 649 note 65.

Sheriff required by statute to collect costs

Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W. 2d 365, error dismissed.

18. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Tenn.—Strong v. Baird, 16 Lea 600.

paid.[19] If the judgment creditor's bid exceeds the amount due, he must pay the excess, as explained infra § 219. Where there are other liens on the property of equal dignity with the lien of the judgment creditor, the officer may require him to pay over the purchase money in order that he may deposit the same in court to await a judicial decision as to the distribution thereof;[20] or, under some statutes, the seizing creditor, as purchaser, must retain in his hands a sufficient sum to discharge prior mortgages and liens recorded against the property.[21]

Purchase by lien creditor. Where the purchaser is a prior judgment creditor,[22] or is a mortgagee whose mortgage has priority over the execution,[23] he may retain the amount of his debt. If the execution judgment is prior to the mortgage, the mortgagee purchaser may apply his mortgage on the amount of his bid in excess of the execution debt.[24] Under some statutes lien creditors may pay by giving a receipt;[25] but, although such statute does not apply to the real owner, who is forced to purchase the property, the sheriff may be required to accept his receipt for the balance of the purchase price over and above encumbrances, costs, and interest.[26]

b. Bond for Purchase Money

Under some statutes, the sale may be made on credit, on the giving of a bond for the purchase price; and on default in payment, it may be enforced by issuing execution on the bond, or, if it is void as a statutory bond, by an action on it as a common-law bond.

Under some statutes the sale may be made on credit, on the giving of a bond for the purchase price.[27] The sheriff is the proper judge of the sufficiency of the bond;[28] and if the bond has been taken and returned, and the return recorded, he cannot withdraw it and accept others in lieu thereof.[29] Such a bond cannot be quashed, at the instance of the obligors, without also quashing the sale;[30] but it may be canceled by agreement between the parties.[31] The purchaser's liability to the execution creditor on the bond is not affected by losses, with respect to the property, which occur without any fault or participation on the part of the creditor,[32] but it is otherwise where the creditor has directed the execution and sale.[33] If the purchaser, in order to retain the property, is forced to pay a mortgage existing on it at the time of the sale, he is entitled to credit for the amount so paid on that part of the bond payable to the execution debtor, who by accepting and receiving payment on the bond, has adopted the sale.[34] The purchaser, however, cannot avoid liability on the bond on the ground that he was the owner of the property at the time of sale,[35] or that the bond has been misplaced.[36] The sureties on such a bond are entitled to the protection of a lien on the property sold to secure the payment of the bond.[37]

Number of bonds. If the sale on credit is for an amount in excess of the demand, a separate bond should be taken for such excess, payable to defendant;[38] and if in such a case the bond is taken for the whole amount payable to the judgment creditor, he or the judgment debtor, but not the obligors in

19. Iowa.—Harpham v. Worthington, 69 N.W. 535, 100 Iowa 313.
Presumption of validity of sale generally see infra § 229.

20. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
La.—Terry v. Atlanta Wholesale Grocery Co., 127 So. 640, 13 La. App. 413.
23 C.J. p 649 note 66.

21. La.—Oden v. First Nat. Bank, 162 So. 189, 182 La. 591.

22. Pa.—Byers v. Byers, 14 A.2d 93, 339 Pa. 146.
Prior dower judgment
Where a dower charge on land created in deed, was subsequently evidenced by a judgment de terris against owner of land prior to his bankruptcy, and land was later sold under an order in bankruptcy clear of liens and encumbrances but subject to the dower charge, judgment was not divested by bankruptcy sale, and hence sheriff at sale of property on which the dower was charged was required to credit judgment on bid made by judgment creditors.—Byers v. Byers, supra.

23. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 446, 7 Cal.App.2d 52, quoting **Corpus Juris.**
23 C.J. p 650 note 69.

24. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Fla.—Harrison v. Roberts, 6 Fla. 711.

25. Pa.—Nolan v. Wittenmyer, 18 Pa.Dist. & Co. 734, 36 Dauph.Co. 369—Wheatland v. Light, 23 Pa. Co. 337.

26. Pa.—Houck v. Houck, 25 Pa. Dist. & Co. 701, 84 Pittsb.Leg.J. 497, 35 Sch.Leg.Rec. 305, 3 Sch. Reg. 68.

27. Ark.—Fullbright v. Morton, 199 S.W. 542, 131 Ark. 492.
Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.
Tex.—Clements v. Texas Co., Civ. App., 273 S.W. 992.
23 C.J. p 650 note 72.

28. La.—Michel v. Kaiser, 25 La. Ann. 57—Wells v. Moore, 3 Rob. 156.

29. Ky.—Spradlin v. Pieratt, 12 Bush 496.

30. Ky.—Cooper v. Hatter, 1 J.J. Marsh. 357.

31. Ky.—Robinson v. Whitney, 9 Ky.L. 327.

32. Ky.—Hanna v. Guy, 3 Bush 91.
23 C.J. p 650 note 77.

33. Ky.—Bartlett v. Loudon, 7 J.J. Marsh. 641.
23 C.J. p 650 note 78.

34. Ky.—Commodari v. Hart-Commodari Const. Co., 91 S.W.2d 8, 262 Ky. 774.

35. Ky.—Reed v. Taylor Motor Sales Co., 62 S.W.2d 788, 250 Ky. 259.

36. Ky.—Reed v. Taylor Motor Sales Co., supra.

37. Ky.—Schmaus v. Whittemore, 159 S.W. 947, 155 Ky. 338.
23 C.J. p 650 note 73 [b].

38. Ky.—Fant v. Wilson, 3 T.B.Mon. 342.

the bond, may have the bond quashed.[39] Where there are several judgment creditors, as many bonds should be taken as may be necessary to deliver to each party his proper portion after deducting the costs;[40] and in such a case, if all the liens of the different creditors are of equal dignity, a sale of the property under execution on the bond cannot be had until all the bonds are due.[41] However, a bond payable jointly to the several execution creditors, although irregular, is not void, and may be avoided only at the instance of the obligees.[42]

Enforcement. On default in payment, it may be enforced by issuing execution on the bond,[43] unless it is not good as a statutory bond,[44] in which case it may be good as a common-law bond and be enforced by an action thereon;[45] but where it is quashed, as a statutory bond, an action cannot be maintained on it while the quashing judgment stands.[46] It has been held that the sheriff may sue in his official capacity on a sale bond executed in favor of his predecessor.[47] Unless authorized by statute,[48] the sheriff is not entitled to recover interest on a bond taken for the purchase money.[49] A declaration on such a bond should allege the sale and a breach of the conditions thereof.[50]

§ 218. Failure to Comply with Bid

A purchaser who has failed to comply with his bid may, in some states, be proceeded against for the full amount of the bid; but the usual remedy, which in some states must be pursued, is to resell the property and proceed against the defaulting purchaser for any deficiency between the amount bid by him and the amount realized on the resale. Under some statutes, he may also be held liable for a penalty.

On the failure of the purchaser to comply with the terms of sale, the sheriff may, in some states, proceed against the purchaser for the full amount of his bid;[51] but his usual remedy, which in some states it is his duty to pursue, is to resell the property and proceed against the defaulting purchaser for any deficiency between the amount bid by him and the amount realized on the resale;[52] and if the officer has a right of election as to which course he will pursue, he must pursue the course he elects.[53] It has been held that where the officer has been in no default, such as by delivering the property without payment, it is his positive duty to resell, and not to sue for the purchase price;[54] and, under some statutes, it is the sheriff's duty to resell, where the execution plaintiff or his attorney does not proceed against the purchaser for the amount of his bid.[55] This right to resell exists where there has been a part payment of the bid and a default as to the balance,[56] but it has been held that there cannot be a resale under the execution, where a sufficient part of the purchase money has been paid to satisfy the execution, and the balance due is only as to the excess.[57]

Resale after unconditional delivery of property. Where the sheriff makes an unconditional delivery of personal property sold, the sale thereby becomes

39. Ky.—Fant v. Wilson, supra.

40. Ky.—Spradlin v. Pieratt, 12 Bush 496.
23 C.J. p 650 note 79.

41. Ky.—Campbell v. Opatich, 42 S.W.2d 525, 240 Ky. 442.

42. Ky.—Cooper v. Hatter, 2 J.J. Marsh. 357.
23 C.J. p 650 note 79 [a].

43. Ky.—Torian v. Caldwell, 181 S.W. 373, 167 Ky. 670.
23 C.J. p 650 note 73.
Enforcement of bid generally see infra §§ 218–222.

44. Ky.—W. T. Sistrunk & Co. v. Whitaker, 291 S.W. 781, 218 Ky. 566.

Surety could enjoin sale of his land in execution under a bond not good as a statutory bond.—W. T. Sistrunk & Co. v. Whitaker, supra.

45. Ky.—Brown v. Miller, 3 J.J. Marsh. 435.
23 C.J. p 650 notes 74, 82.

Bond payable to sheriff instead of to execution plaintiff, as required by statute, is enforceable against the surety as a common-law obligation in a suit by the sheriff setting out the amount of the executions in favor of the judgment creditors, and praying judgment in the name of the obligee for the benefit of the execution creditors named.—Holliday v. Whittaker, 1 S.W.2d 1062, 222 Ky. 596—W. T. Sistrunk & Co. v. Whitaker, 291 S.W. 781, 218 Ky. 566.

Action of debt may be maintained on the bond, notwithstanding execution cannot issue thereon, because of its invalidity as a statutory bond.—Brown v. Miller, 3 J.J.Marsh., Ky., 435.

46. Ky.—Brown v. Miller, supra.

47. La.—Bell v. Keefe, 12 La.Ann. 340.

48. Ark.—Fullbright v. Morton, 199 S.W. 542, 131 Ark. 492.
23 C.J. p 650 note 80.

49. Pa.—Gardner v. Klinefelter, 9 Watts & S. 59.
23 C.J. p 650 note 81.

50. Pa.—Friedly v. Scheetz, 9 Serg. & R. 156, 11 Am.D. 691.

51. Pa.—Acker v. Snyder, 95 A. 325, 250 Pa. 57.
23 C.J. p 651 note 93.
Liability for price bid generally see infra § 219.

52. Cal.—Bell v. Redwine, 277 P. 1050, 1051, 98 Cal.App. 784, quoting **Corpus Juris.**
N.J.—Gross v. Cades, 146 A. 40, 7 N.J.Misc. 365.
Pa.—Ransley v. Florkowski, 26 Pa. Dist. 945, 35 Lanc.L.Rev. 76.
23 C.J. p 651 note 94.

"May" construed as "must" in a statutory provision to the effect that the officer may resell and sue for the deficiency.—Bell v. Redwine, 277 P. 1050, 98 Cal.App. 784.

Failure of judgment creditor, as purchaser, to pay amount of bid, gives right to resell.—Smith v. Cook, Tex.Civ.App., 126 S.W.2d 1049—Warman v. Wurzbach, Tex.Civ.App., 51 S.W.2d 751.

53. Pa.—Acker v. Snyder, 95 A. 325, 250 Pa. 57.
23 C.J. p 651 note 94 [c].

54. Tenn.—Roberts v. Westbrook, 1 Coldw. 115.

55. Iowa.—State Bank v. Brown, 105 N.W. 49, 128 Iowa 665.

56. Cal.—People v. Hays, 5 Cal. 66.
23 C.J. p 651 note 96.

57. Ga.—Blalock v. Wells, 81 S.E. 853, 141 Ga. 623.
23 C.J. p 651 note 97.

complete and the sheriff thereafter cannot lawfully seize the property again and resell it for nonpayment of the purchase price, as such a delivery without payment, while it may render the sheriff liable, does not impair the title transferred to the purchaser.[58] If the sheriff thereafter receives the property and resells it at the purchaser's request, he does so as the agent of the purchaser and not in his official capacity; in such a case he may hold the first purchaser liable on the original sale, the only consequence of the second sale being that credit must be given to the first purchaser for the amount raised thereon.[59]

Penalty. Under some statutes a defaulting purchaser, in addition to his liability for the price bid or the deficiency on a resale, is also liable to pay a certain amount by way of damages or as a penalty.[60] Such a statute, giving a certain per cent of the value of the property sold, refers to its value as encumbered, and hence if the property is so encumbered that the sale passes a right of no value, the statutory penalty does not apply;[61] nor does it apply where nothing is really sold, as where the property has passed into the custody of a bankruptcy court, before the sheriff attempts to sell.[62]

§ 219. —— Liability for Price Bid

Where a bid is accepted, so as to form a contract, the bidder is liable to pay the bid, and on his default, an action or proceeding will lie against him for the amount due.

Where a bid at an execution sale is accepted, so as to form a binding contract, the bidder becomes liable to pay the bid, and on his default an action, or appropriate statutory proceeding, to recover the amount due will lie against him;[63] and this rule applies to sales on credit,[64] except where the statute requires that the sale be made for cash only.[65] This right to recover the amount of the bid exists, in some states, although the statute, or conditions of the sale, directs the sheriff to resell if the purchaser fails to comply with his bid,[66] and a return of the sale by the officer is not a condition precedent.[67] However, there is no liability where the bidder was of unsound mind so as to be incapable of making a contract.[68] The amount of the bid, not the value of the property, is the measure of recovery.[69] Where the judgment creditor is the purchaser, the officer can only hold him liable for the amount of his bid in excess of the amount due on his judgment.[70]

§ 220. —— Resale, and Liability for Loss Thereon

On a resale, the defaulting purchaser is liable, as on an implied contract, for any deficiency between the amount of his bid and the amount realized on the second sale, provided there are no alterations in the terms of the first sale, the property and title are the same, the second sale is under the same execution, and within the proper time therefor, and notice of the resale is properly given.

Where the sheriff rightfully resells property which the purchaser at the first sale has refused or neglected to pay for, there is an implied contract by the first purchaser to pay the difference which is thus ascertained between his bid and the price realized at the subsequent sale.[71] The defaulting purchaser is liable, although the property is sold for a larger sum at a second sale where the second purchaser also makes default, and the amount bid at the third sale is less than at the first sale.[72] However, it has been held that the deficiency cannot be recovered by the party injured, where the sheriff in his return on the execution, after the resale, makes no mention of the first or uncompleted sale.[73]

Terms of resale. Any alteration in the terms of the first sale on the resale of the property will release the first purchaser from all liabilities for the

58. S.C.—Cox v. Edwards, 8 S.C. 20—Cochran v. Roundtree, 34 S.C.L. 217.
23 C.J. p 652 note 1.

59. S.C.—Towles v. Turner, 21 S.C. L. 178.
23 C.J. p 652 note 1.

60. Ind.—Hunt v. Gregg, 8 Blackf. 105.
23 C.J. p 652 note 1.

61. Tex.—Borden v. Fahey, 120 S. W. 564, 56 Tex.Civ.App. 218—Towell v. Smith, Civ.App., 55 S.W. 186.

62. Tex.—Archenhold Co. v. Schaefer, Civ.App., 205 S.W. 139.

63. Kan.—Walker v. Braden, 9 P. 613, 34 Kan. 660.
Pa.—Mortgage Co. v. Born, 88 Pa.L. J. 253.
23 C.J. p 652 note 2.

64. S.C.—Kilgore v. Peden, 32 S.C. L. 18.

65. R.I.—Gerardi v. Caruolo, 61 A. 599, 27 R.I. 214.
23 C.J. p 652 note 4.

66. Ark.—Fullbright v. Morton, 199 S.W. 542, 131 Ark. 492.
23 C.J. p 652 note 5.

67. N.C.—McKee v. Lineberger, 69 N.C. 217.

68. R.I.—Cundall v. Haswell, 51 A. 426, 23 R.I. 508.

69. Ind.—Mazelin v. Martin, Wils. 423.
23 C.J. p 652 note 8.

70. Mich.—Munger v. Sanford, 107 N.W. 914, 144 Mich. 323.
23 C.J. p 652 note 9.

71. Ala.—Lamkin v. Crawford, 8 Ala. 153.
23 C.J. p 652 note 11.
In Louisiana the doctrine of sale à la folle enchère, wherein defaulting bidder at a first sale is liable for any deficiency in price fetched at second sale, is not applicable to sales made by sheriff under writs issued on final judgments, in view of Rev. Civ.Code art 2611, and Code Pract. art 689.—Roussell v. Hughes, 106 So. 332, 159 La. 864—Gallier v. Garcia, 2 Rob. 319—23 C.J. p 652 note 11 [e].

72. Pa.—Schoenig v. Leeds, 7 Wkly. N.C. 243.
23 C.J. p 653 note 12.

73. Ky.—Linn Boyd Tobacco Warehouse Co. v. Terrill, 13 Bush 463.

loss occasioned by the second sale,[74] as where the terms and conditions of the resale, with respect to payment, are materially different from those of the first sale, so as probably to result in lowering the price.[75]

Identity of property and title. In order to hold a defaulting purchaser liable for the difference between the price at which he bid off the property and the price at which it is subsequently sold, the same property must be resold, and resold as the property of the identical parties as whose property it had been bid off by him.[76] Likewise, the defaulting purchaser cannot be held liable for a deficiency on resale, if it appears that under the first sale he would have acquired a more valuable title than that which passed to the purchaser at the resale.[77]

Second sale under different execution. Where the second sale of the property is under a different execution from that under which the first sale was had, and in favor of a different plaintiff, this second sale is not a resale within the meaning of the general rule, but is an original sale;[78] and although the purchaser who has made default at the first sale purchases at the second, the sheriff cannot maintain an action against him to recover a deficiency.[79] Where the sheriff resells under a new process, after a return of the original execution stating the failure of the purchaser to pay, he cannot hold the first purchaser liable for the difference between his bid and a lesser sum realized at the resale.[80]

Time for and notice of resale. There is authority to the effect that the officer need not immediately reëxpose the property for sale,[81] especially where it has already been twice sold on the same day;[82] but may postpone the sale, giving notice thereof, and then make a new sale at a subsequent time,[83] particularly where, under the circumstances, there is not time in which to procure an earlier sale.[84] However, unless otherwise provided by statute,[85] the officer, as a general rule, may, and under some statutes should, immediately reoffer the property for sale where the purchaser repudiates his purchase,[86] unless plaintiff consents to a delay;[87] and it has been held that he may resell at once even though he has announced in his conditions of sale that he will adjourn the sale in case the property should be bid off by any person who should neglect or refuse to comply with the conditions.[88] The resale may be on the same day without advertising it,[89] but the officer cannot resell on the same day after the sale is closed and the bidders have departed.[90] Under some statutes, if the purchaser fails to give a purchase-money bond, when the property is knocked off to him, the officer may at once disregard the bid and resell to another,[91] or he may, in his discretion, readvertise the property and sell it on another day, entirely disregarding the purchaser who refused to give bond.[92] Where by statute the sale must be made between certain hours, and the purchaser has by consent until the last hour to pay the amount of his bid, it is irregular to make a resale a few moments before such hour.[93]

The statutory notice of sale need not be given a second time,[94] at least unless the sale is several days afterward and there is no adjournment of the sale.[95] Where the property sold is real estate, notice to the defaulting purchaser that a resale will be had and that he will be held liable for any loss is a prerequisite to charging him with liability for the deficiency,[96] and such notice must contain an offer by the sheriff to convey the property to the first purchaser before the second sale;[97] but such notice has been held not to apply where the prop-

74. Pa.—Hare v. Bedell, 98 Pa. 485.
23 C.J. p 653 note 13.

75. Pa.—Hare v. Bedell, 98 Pa. 485
—Freeman v. Husband, 77 Pa. 389.

76. Ga.—Hendrick v. Davis, 27 Ga. 167, 73 Am.D. 726.

77. Pa.—Hare v. Bedell, 98 Pa. 485.

78. Ga.—Barlow v. Toole, 5 S.E. 246, 80 Ga. 9.

79. Ga.—Barlow v. Toole, supra.

80. N.C.—Grier v. Yontz, 50 N.C. 371.
23 C.J. p 653 note 27.

81. Pa.—Hartman v. Pemberton, 24 Pa.Super. 222.
23 C.J. p 653 note 19.

82. Pa.—Hartman v. Pemberton, 24 Pa.Super. 222.
23 C.J. p 653 note 19 [b].

83. N.Y.—Robinson v. Brennan, 90 N.Y. 208.
Postponement of sale generally see supra § 209.

84. Pa.—Hartman v. Pemberton, 24 Pa Super. 222.
23 C.J. p 653 note 19 [a].

85. Ind.—Ruckle v. Barbour, 48 Ind. 274.
23 C.J. p 653 note 21.

86. La.—Dunlap v. Whitmer, 62 So. 938, 133 La. 317, Ann.Cas.1915C 990.
23 C.J. p 653 note 22.

87. La.—Dunlap v. Whitmer, 62 So. 938, 133 La. 317, Ann.Cas.1915C 990.

88. N.J.—Den v. Young, 12 N.J. Law 300.

89. Ga.—Humphrey v. McGill, 59 Ga. 649.
Corpus Juris statement applied to resale of property purchased at a trustee's sale.—Gray v. Sullivan, Miss., 139 So. 855, 856.

90. Neb.—Jones v. Null, 2 N.W. 350, 9 Neb. 254.

91. Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

92. Ky.—Hazard Lumber & Supply Co. v. Horn, supra.

93. Mo.—Conway v. Nolte, 11 Mo. 74.

94. Mo.—Illingworth v. Miltenberger, 11 Mo. 80.

95. Ind.—Givan v. Doe, 5 Blackf. 260.

96. Ill.—Maulding v. Steele, 105 Ill. 644.
23 C.J. p 653 note 30.

97. Ind.—Williams v. Lines, 7 Blackf. 46.

erty is personal estate.[98] However, the sheriff is not bound to give to the original purchaser notice of the time and place of the second sale; it is sufficient to notify him that unless he pays his bid the property will be resold;[99] and it has been held that if the property is regularly readvertised, further notice to the defaulting purchaser is not necessary.[1]

Measure of damages. In an action against the original purchaser to recover a deficiency in price after a resale, the measure of damages, in the absence of statutory regulations, is the difference between the amount of the bid at the first sale and the sum realized at the second sale, together with the costs and expenses attending the resale,[2] exclusive of attorney's fees.[3] Under some statutes, however, if it appears that the judgment debtor had no interest in the property, the recovery is limited to the difference between the amount received on the resale and the amount due the judgment creditor, plus costs.[4] Where the sale is of personal property which on the resale brings a lower price, any absolutely necessary and proper expense attendant on the keeping, storage, and preservation of the property pending the readvertisement and resale may be treated as increasing the deficiency for which the original purchaser is liable;[5] and where the proceeds of the resale exceed the bid at the first sale, but the surplus does not cover the costs of preserving the goods, the excess of costs can be recovered from the first purchaser.[6]

§ 221. —— Defenses by Purchasers

A purchaser at an execution sale ordinarily cannot set up, as against his liability for the purchase money or for a deficiency on a resale, any defense with respect to the title, quantity, value, or condition of the property purchased; or as to defects or irregularities in the sale or proceedings prior thereto. Fraud or mistake affecting his purchase generally is available as a defense.

The rule of caveat emptor applies to purchasers at execution sales,[7] and, as stated infra § 287, he acquires only such interest or title as the judgment debtor possessed. In accordance with this rule, the purchaser ordinarily cannot set up, as a defense to his liability for the purchase money or for a deficiency on a resale, defects in the debtor's title,[8] the existence of encumbrances,[9] a deficiency in quantity of the land,[10] or, in the absence of artifice or fraud, that the price bid is more than the property is worth.[11] Although there is authority to the contrary,[12] he ordinarily cannot set up as a defense the absence of any title in the debtor,[13] even though the title is in himself,[14] and this rule is particularly applicable where he has delayed asking for a confirmation of the sale until after tax liens against the property have ripened into tax deeds.[15] Where the property sold is personalty, the rule of caveat emptor precludes any defense based on the ground that the chattel was defective or unsound[16] or that the officer had delivered possession of the goods.[17] It

98. Ill.—Maulding v. Steele, 105 Ill. 644—Ullmann v. Kent, 60 Ill. 271.

99. Pa.—Gaskell v. Morris, 7 Watts & S. 32.

1. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.

2. N.J.—Townshend v. Simon, 38 N. J.Law 239.
Pa.—Tindle's Appeal, 77 Pa. 201.
23 C.J. p 654 note 34.
Penalty see supra § 218.

3. Ga.—Adams v. Aycock, 76 S.E. 161, 11 Ga.App. 793.

4. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.

5. Ga.—Barnes v. Bluthenthal, 28 S.E. 1017, 101 Ga. 598, 65 Am.S.R. 339.

6. Pa.—Coffman v. Hampton, 2 Watts & S. 377, 37 Am.D. 511.

7. Cal.—Anglo-California Trust Co. v. Oakland Rys., 225 P. 452, 193 Cal. 451.
Colo.—Bailey v. Hoffman, 96 P.2d 412, 105 Colo. 244—Cole v. Welch, 199 P. 487, 70 Colo. 203.
Fla.—Bradley v. Forbs, 156 So. 716, 116 Fla. 350.
Kan.—Metz v. Hicklin, 268 P. 823, 824, 126 Kan. 516, citing **Corpus Juris.**
Mont.—Sherlock v. Vinson, 1 P.2d 71, 90 Mont. 235.
Pa.—Ransley v. Florkowski, 26 Pa. Dist. 945, 35 Lanc.L.Rev. 76.
23 C.J. p 654 note 38.

8. U.S.—Brightwell v. First Nat. Bank, C.C.A.Fla., 109 F.2d 271.
Colo.—Bailey v. Hoffman, 96 P.2d 412, 105 Colo. 244—Cobbey v. Peterson, 3 P.2d 298, 89 Colo. 350.
Kan.—Metz v. Hicklin, 268 P. 823, 126 Kan. 516.
Okl.—Goldenstern v. Gavin, 102 P.2d 582, 187 Okl. 338.
23 C.J. p 654 note 39.
Relaxation of caveat emptor rule where sale is had pursuant to order of court of equity see the C.J.S. title Judicial Sales § 39, also 35 C.J. p 75 note 70–p 76 note 72.

9. Colo.—Kreps v. Webster, 277 P. 471, 85 Colo. 572, 68 A.L.R. 656.
Pa.—Ransley v. Florkowski, 26 Pa. Dist. 945, 35 Lanc.L.Rev. 76.
23 C.J. p 654 note 41.

10. Colo.—Kreps v. Webster, 277 P. 471, 85 Colo. 572, 68 A.L.R. 656.
S.C.—Long v. McKissick, 27 S.E. 636, 50 S.C. 218.

11. Colo.—Cobbey v. Peterson, 3 P. 2d 298, 89 Colo. 350—Kreps v. Webster, 277 P. 471, 85 Colo. 572, 68 A.L.R. 656.
N.J.—Delaware & L. R. Co. v. Blair, 28 N.J.Law 139.

12. Ind.—Julian v. Beal, 26 Ind. 220, 89 Am.D. 460.
23 C.J. p 654 note 40 [d].

13. Colo.—Kreps v. Webster, 277 P. 471, 472, 85 Colo. 572, 68 A.L.R. 656, quoting **Corpus Juris.**
Pa.—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131.
23 C.J. p 654 note 40.

No conveyable title

Where the holder of a security deed merely transfers the note secured, the transferee of the note has no title which he could reconvey for the purpose of levy, and, in the absence of a title to defendant in fieri facias prior to the levy and sale at which defendant bid for the land, the sale is void, and defendant cannot be compelled to comply with his bid.—Corley v. Jarrell, 150 S.E. 858, 40 Ga.App. 677.

14. N.C.—Islay v. Stewart, 20 N.C. 297.
23 C.J. p 654 note 40 [a], [b].

15. Kan.—Galbreath v. Drought, 29 Kan. 711.
23 C.J. p 654 note 40 [c].

16. Mo.—Hensley v. Baker, 10 Mo. 157.

17. La.—Terry v. Atlanta Whole-

is not a defense that after refusal of the purchaser to perfect the sale he was not immediately, or shortly thereafter, notified that he would be held to his bid;[18] that the sheriff had not tendered a certificate of sale to him, where the bidder stated that he would not have paid the bid in any event;[19] that the sale was illegal because the entire price was not required to be paid in cash;[20] that the execution debtor who is plaintiff does not show that he is able or willing to procure a sheriff's deed to the property,[21] or that his bid was induced by the agreement of another to finance the purchase, and that his failure to complete the transaction was due to such other's refusal to advance money therefor;[22] nor, in the case of a sale of property of a decedent, can the purchaser be excused from payment on the ground of subrogation to the rights of the widow, who is his debtor.[23]

On the other hand, it is a defense to an action for the balance of the bid that the property has been sold and conveyed to another person,[24] or that the officer has failed or refuses to make title.[25] In order to hold the purchaser liable for his bid, such title as the execution defendant actually had must have passed by the sale; and if the sale from any cause is inoperative to transfer the debtor's interest, such as it may be, the purchaser cannot be held liable for the amount of his bid.[26] It has been held that if the purchaser is disturbed in his possession or is justified in believing that he will be, he may retain the purchase money until he is relieved of his apprehension or protected by adequate security,[27] unless he was informed of the defect in title or the danger of eviction before the sale.[28] Payment of the bid to the officer, and a confirmation of the sale, is a good defense, although the creditor never received the money.[29]

Fraud. Notwithstanding the rule of caveat emptor, the purchaser will be protected from paying the purchase price where he was induced to purchase through the misrepresentations of the judgment creditor or debtor, even though he might have ascertained their falsity by the examination of the public records.[30] Fraud or misrepresentation by the execution debtor is a defense to an action to enforce the purchaser's bid where the action is brought by the execution debtor,[31] and the purchaser has not received title.[32] Where, however, the action is brought by the sheriff, and title to the property has passed by delivery, and the execution debtor is entitled to no part of the purchase money, the bid being less than the amount of the debt, the purchaser cannot set up the execution debtor's fraud in defense, but must bring a separate action against him, the principal reason being that in such a case the execution debtor is no party to the contract of sale.[33] Any statement of the sheriff as to the title the purchaser would receive furnishes no legal excuse for the nonpayment of the bid.[34]

Mistake. Where a plain mistake, not as to the title, but as to the property levied on and sold, has been made by the sheriff, execution defendant, and the purchaser, and the mistake materially affects the value of the property actually sold, and the purchaser applies to have the sale set aside before the money has been actually paid, he is entitled in equity to such relief.[35] However, in the absence of fraud or misrepresentation on the part of the officer, the execution creditor, or the debtor, a misapprehension of the facts on the part of the purchaser will not relieve him from liability on his bid.[36] The mis-

sale Grocery Co., 127 So. 640, 13 La.App. 413.

18. Pa.—Hartman v. Pemberton, 24 Pa.Super. 222.
23 C.J. p 655 note 45.

19. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.

20. Cal.—Meherin v. Saunders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272, reversing 56 P. 1110, 6 Cal.Unrep. Cas. 279.

21. Cal.—Meherin v. Saunders, supra.

22. N.J.—Gross v. Cades, 146 A. 40, 7 N.J.Misc. 365.

23. Pa.—Hughes v. Miller, 43 A. 976, 192 Pa. 365.
23 C.J. p 652 note 11 [d].

24. Ky.—Linn Boyd Tobacco Warehouse Co. v. Terrill, 13 Bush 463.
Pa.—Connell v. Shryock, 31 A. 731, 167 Pa. 483.
23 C.J. p 655 note 48.

25. S.C.—Moore v. Akin, 20 S.C.L. 403.

26. D.C.—Starr v. U. S., 8 App.D.C. 552, reversed on other grounds 17 S.Ct. 223, 164 U.S. 627, 41 L.Ed. 577.
Ga.—Corley v. Jarrell, 136 S.E. 177, 178, 36 Ga.App. 225, quoting **Corpus Juris.**

27. La.—Fortier v. Slidell, 7 Rob. 398.
23 C.J. p 654 note 39 [c] (1).
Retention of portion of purchase money
La.—Succession of Guillebert, 90 So. 508, 150 La. 49.

28. La.—Bonnecaze v. Grannery, 5 La.Ann. 166—Bemiss v. Dwight, 3 La.Ann. 337.

29. Ark.—Graham v. W. W. Dickinson Hardware Co., 63 S.W. 58, 69 Ark. 119.

30. Colo.—Bailey v. Hoffman, 96 P. 2d 412, 105 Colo. 244.
Mont.—Sherlock v. Vinson, 1 P.2d 71, 90 Mont. 235.
23 C.J. p 655 note 52.

31. S.C.—Minter v. Dent, 37 S.C.L. 205—Herbemont v. Sharp, 13 S.C. L. 264.

32. S.C.—Herbemont v. Sharp, supra.

33. S.C.—Towles v. Turner, 21 S.C. L. 178, disapproving Herbemont v. Sharp, 13 S.C.L. 264.

34. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.

35. Pa.—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518.
Tenn.—Reid v. House, 2 Humphr. 576.
23 C.J. p 655 note 56.
Mistake as ground for setting aside sale generally see infra § 230.

36. Pa.—Hartman v. Pemberton, 24 Pa.Super. 222—Ransley v. Flor-

taken inclusion of interest on a sale bond at a higher than the legal rate of interest is not a defense.[37] A unilateral mistake of law has been held to be no defense,[38] although there is authority to the contrary.[39]

Bidder acting as agent. Where the successful bidder is in fact purchasing for a third person, but does not disclose this fact to the sheriff until after the contract of sale is complete by the acceptance of the bid and its entry into the sheriff's sales book, the fact that the bidder afterward informs the sheriff that the purchase was for a third person does not relieve him from liability under his bid.[40] Where, however, the sheriff knows that the bidder is acting as agent for a third person, and in making the sale treats with him as acting in this representative capacity, the sheriff's right of action is not against the bidder, but against his principal.[41]

Defects prior to sale. In an action to recover the price bid or to recover the difference between the bid and the amount realized at a resale of the property, defects or irregularities in the proceedings, prior to the sale, such as in the writ,[42] or levy,[43] the notice of sale,[44] or in the judgment, where the judgment is not void,[45] are no defense.

§ 222. —— Proceedings to Enforce Bid

Recovery of the amount of the bid, or for a deficiency on a resale, may be had by an action, or, under some statutes, by a proceeding by motion. Under some statutes, the execution creditor or his attorney is the proper party so to proceed, but ordinarily the action may be brought by the officer conducting the sale or in his name. Usual rules apply as to the pleading and evidence.

An action lies against a defaulting purchaser to recover the amount bid,[46] or the difference on a resale;[47] but in such an action by the officer for the price of goods sold he cannot insist that he had no authority to stipulate, as a condition of sale, that he would actually deliver the goods sold.[48]

However, under some statutes a proceeding by motion on notice for judgment for the purchase money,[49] or for the difference on a resale,[50] may be had; but it has been held that such remedy may be had only against the actual purchaser at the sale.[51] This summary remedy is not available to the execution creditor who has received a check given by the purchaser, if he does not offer to rescind the contract or tender back the check when payment thereof is refused.[52]

Conditions precedent. The making of a return by the sheriff is not a prerequisite to an action by him to recover the amount of the bid,[53] especially where he is not bound to make the return until the bid has been paid.[54] Under some statutes, on the mere failure of the purchaser of land to pay the purchase money the sheriff may not hold him in default and institute proceedings to enforce the bid without first demanding payment and tendering a deed; and this applies whether the remedy sought is directly against the purchaser in the first instance or is by way of resale and action to recover the deficiency;[55] but, on the other hand, by other authorities, a tender of a deed is not necessary to hold the purchaser to his bid.[56] It has been held that it is essential to a recovery on a motion for the difference on a resale that the purchaser refuse to comply with his bid,[57] and that a loss results from the resale.[58]

Who may sue; parties. Under some statutes the only party who may proceed against a bidder who fails to comply with his bid is the execution credi-

kowski, 26 Pa.Dist. 945, 35 Lanc.L. Rev. 76.
23 C.J. p 655 note 57.

37. Ark.—Fullbright v. Morton, 199 S.W. 542, 131 Ark. 492.

38. N.Y.—Watson v. Hoboken Planing Mills Co., 140 N.Y.S. 822, 156 App.Div. 8.

39. Ga.—Collier v. Perkerson, 31 Ga. 117.
23 C.J. p 655 note 59.

40. Ga.—Adams v. Aycock, 76 S.E. 161, 11 Ga.App. 793.
Mo.—Gray v. Case, 51 Mo. 463.

41. Ga.—Cureton v. Wright, 73 Ga. 8.

42. Pa.—Emley v. Drum, 36 Pa. 123.

43. Mont.—Sherlock v. Vinson, 1 P. 2d 71, 90 Mont. 235.
Pa.—Cooper v. Borrall, 10 Pa. 491.

44. N.Y.—Francis v. Watkins, 76 N.Y.S. 106, 72 App.Div. 15, affirmed 64 N.E. 1120, 171 N.Y. 682.
23 C.J. p 655 note 56 [a].

45. Pa.—Hower v. Houpt, 1 Leg. Gaz. 101.

46. Ala.—Andrews v. Keith, 34 Ala. 722.
23 C.J. p 656 note 66.
Action or execution on sale bond see supra § 217.
Liability for price bid see supra § 219.

47. Miss.—Adams v. Griffin, 11 Miss. 556.
Liability for loss on resale see supra § 220.

48. Ala.—Andrews v. Keith, 34 Ala. 722.

49. Ind.—Sutton v. Baldwin, 45 N. E. 518, 146 Ind. 361.
23 C.J. p 656 note 68.

50. Mo.—Phillips v. Goldman, 75 Mo. 686.
23 C.J. p 656 note 69.

51. Mo.—Wimer v. Obear, 23 Mo. 242.
23 C.J. p 656 note 69 [a].

52. Ind.—Sutton v. Baldwin, 45 N. E. 518, 146 Ind. 361.

53. N.C.—McKee v. Lineberger, 69 N.C. 217.

54. Ill.—Perkins v. Webb, 48 N.E. 322, 169 Ill. 86.

55. Mo.—Phillips v. Goldman, 75 Mo. 686—Shaw v. Potter, 50 Mo. 281.
23 C.J. p 656 note 75.

56. Pa.—Dickson v. McCartney, 75 A. 735, 226 Pa. 552, 134 Am.S.R. 1078, 29 L.R.A.,N.S., 792, 18 Ann. Cas. 500.
23 C.J. p 656 note 75 [a].

57. Mo.—Phillips v. Goldman, 75 Mo. 686.

58. Mo.—Reed v. Shepperd, 38 Mo. 463.
23 C.J. p 656 note 71.

tor or his attorney.[59] Ordinarily, however, whether the action against the purchaser at an execution sale is for the whole purchase price, or only for the deficiency resulting from a resale, it may be brought by the officer conducting the sale or in his name;[60] or he may bring such action in the name of another as usee.[61] It has been held that the sheriff is the only person who can maintain such an action,[62] and that the execution creditor cannot maintain such action against the purchaser, since there is no privity between them.[63] On the other hand, it has been held that the right of action for the deficiency on a resale belongs to either party to the execution who has been injured by the bidder's default,[64] and not to the officer, unless he has rendered himself liable or suffered some damage by reason thereof,[65] or unless he proclaimed at the resale that he was selling at the risk of the first purchaser;[66] and that, even though the sheriff can maintain the action against the bidder, it does not exclude a right of action in those to whose benefit the recovery of the sheriff inures.[67] However, if the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor clearly is not entitled to bring an action to enforce the bid, and the action is properly brought by the sheriff.[68] Where a part payment of the bid has been deposited in court, to be distributed, the sheriff need not bring an action to recover a deficiency on a resale, but the party injured by the purchaser's default and for whose use the sheriff would recover is entitled to his damages in the distribution of the fund;[69] but, if the sheriff recovers a judgment for the deficiency, defendant will not be allowed to pay the amount into court, but the sheriff should collect the judgment and file his account of the proceeds.[70] Where the judgment debtor has been decreed to have no interest in property sold under execution, the actual owner cannot compel the purchaser at the execution sale to complete the purchase for his benefit.[71]

Where plaintiff's attorney, in his own name, bids off property at a sheriff's sale on execution and takes a certificate from the sheriff in his own name, the presumption is that the purchase was on his own account, and he may be made defendant in an action by the sheriff to recover the amount of the bid.[72]

Against execution creditor. The officer can recover from the execution creditor as purchaser only to the extent that money arising from the sale is applicable to the payment of his costs.[73]

Pleading. The declaration or complaint should aver the judgment and proceedings on which the execution issued;[74] but the judgment and execution need not be set forth at length.[75] The officer's return to the execution should also be stated in the declaration,[76] although it has been held that it is not necessary to do this, where the declaration sets forth the facts necessary to constitute the cause of action, with substantial certainty.[77] Defendant should be refused permission to amend his answer to deny that the bid was his bid and that the purchase was made without his authority, where the evidence discloses that he refused a deed when he found it impossible to finance the purchase.[78] In a proceeding by motion, it is sufficient for the motion to allege that the property was first sold for a specified sum, and that the property on a resale brought a smaller amount, stating it, without averring in

59. Iowa.—State Bank v. Brown, 105 N.W. 49, 128 Iowa 665.
23 C.J. p 656 note 76.

60. Cal.—Meherin v. Saunders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272, reversing 56 P. 1110, 6 Cal.Unrep. Cas. 279.
La.—Terry v. Atlanta Wholesale Grocery Co., 127 So. 640, 13 La. App. 413.
23 C.J. p 656 note 77.

61. Ga.—Adams v. Aycock, 76 S.E. 161, 11 Ga.App. 793.
23 C.J. p 656 note 78.

62. Ala.—Robinson v. Garth, 6 Ala. 204, 41 Am.D. 47.
23 C.J. p 657 note 79.

63. Ill.—Peo. v. Stelle, 103 Ill. 467.
23 C.J. p 657 note 80.

64. Miss.—Adams v. Griffin, 11 Miss. 556.
In Texas, under Vernon St.Annot. art 3821, and prior similar statutes, on a bidder's default the execution creditor is entitled to recover from the bidder twenty per cent of the value of the property bid off, besides costs, but he is not entitled to recover the deficiency between the amount of the bid and the amount realized on the resale, this going to the execution debtor.—Shanley v. York, 118 S.W. 146, 54 Tex.Civ.App. 214.

65. Miss.—Adams v. Griffin, 11 Miss. 556.
23 C.J. p 657 note 82.

66. S.C.—Yongue v. Cathcart, 33 S. C.L. 221.
23 C.J. p 657 note 83.

67. Cal.—Meherin v. Saunders, 63 P. 1084, 131 Cal. 81, 54 L.R.A. 272, reversing 56 P. 1110, 6 Cal.Unrep. Cas. 279.

68. S.C.—Towles v. Turner, 21 S. C.L. 178.

69. Pa.—Tindle's Appeal, 77 Pa. 201.
23 C.J. p 651 note 96 [a].

70. Pa.—Whitaker v. Peck, 3 Kulp 159.

71. Okl.—Streeter v. Anderson, 43 P.2d 53, 172 Okl. 113.

72. N.Y.—Chappell v. Dann, 21 Barb. 17.

73. S.C.—Cobb v. Pressly, 27 S.C. L. 416.

74. Ind.—Ennis v. Waller, 3 Blackf. 472.

75. Kan.—Walker v. Braden, 9 P. 613, 34 Kan. 660.
23 C.J. p 657 note 89.

76. Ind.—Ennis v. Waller, 3 Blackf. 472.

77. Mass.—Sanborn v. Chamberlin, 101 Mass. 409.
23 C.J. p 657 note 91.

78. N.J.—Gross v. Cades, 146 A. 40, 7 N.J.Misc. 365.

specific terms that "loss was occasioned thereby," in the language of the statute.[79]

Evidence. In some states in an action by a sheriff to recover the purchase price of property sold, the return of the officer is sufficient prima facie evidence to support the action,[80] and all that is necessary, in order to charge the purchaser, is to prove the sale and produce the writ under which it was made,[81] and the execution must be introduced in evidence, or its absence satisfactorily accounted for.[82] The sheriff's return is admissible in an action to recover the difference on a resale,[83] as is also the fieri facias, although an entry of sale does not appear thereon.[84] A deed exhibited by the sheriff at the time of the sale, but not then examined by the purchaser, is not evidence in behalf of the latter.[85] Matters of affirmative defense set up by the purchaser must be proved by him.[86]

§ 223. Entry and Record of Sale

Statutory provisions sometimes prescribe that the officer conducting the sale shall make an entry or record thereof, or file the certificate of sale or a duplicate thereof. The filing and recording give constructive notice of the sale, and the record and the original are evidence of the facts therein contained. The statutes are generally construed to be merely directory, so that a failure to comply therewith will not ordinarily affect the purchaser's title unless innocent third persons are injured thereby.

Under statutory provisions in force in various jurisdictions the officer conducting the sale is required to make an entry or record thereof, or to file the certificate of sale or a duplicate copy thereof in the office of the clerk or registrar of deeds within a reasonable time thereafter, in order that the parties whose interests are affected may have proper notice.[87] Although in some states a sale not recorded is void except as between the parties thereto,[88] it is generally held that these statutes are merely directory, in so far as the rights of the purchaser are concerned,[89] and hence that a failure to file or record,[90] or index,[91] does not ordinarily affect the title of the purchaser, unless the execution debtor or innocent third persons are injured thereby.[92]

The filing, or filing and recording, as the statute may require, import constructive notice to subsequent purchasers and encumbrancers;[93] and the record and the original are generally made evidence of the facts therein contained,[94] but other legal evidence is not excluded by the fact that this means of proof is made competent.[95]

§ 224. Certificate of Sale

a. In general
b. Form and contents
c. Assignment
d. Effect

a. In General

A certificate of sale is a statutory instrument which states the proceedings at the sale and conveys a certain interest to the purchaser subject to the debtor's right of redemption. In a proper case the certificate may be amended or canceled.

A certificate of sale is a statutory instrument, signed by the sheriff, stating what took place at the sale, conveying the equitable interest in the property to the purchaser or giving him a lien, subject to be defeated by redemption on the part of the judgment debtor, and it constitutes evidence of the purchaser's right to a deed.[96]

In states where by statute a certain time after the sale in which to redeem is given to the execution defendant the officer who makes the sale is usually required by statute to give a certificate of the sale to the purchaser.[97] It has been held that the sale is consummated, not on payment of the bid, but on

79. Cal.—Johns v. Trick, 22 Cal. 5.
80. Miss.—Hand v. Grant, 13 Miss. 508, 43 Am.D. 528.
23 C.J. p 657 note 94.
81. Ga.—Glenn v. Black, 31 Ga. 393.
Pa.—Davis v. Baxter, 5 Watts 515.
82. Ga.—Glenn v. Black, 31 Ga. 393.
83. Mo.—Hensley v. Baker, 10 Mo. 157.
84. Ga.—Adams v. Aycock, 76 S.E. 161, 11 Ga.App. 793.
85. Ga.—Hendrick v. Davis, 27 Ga. 167, 73 Am.D. 726.
86. Miss.—Hand v. Grant, 18 Miss. 514.
23 C.J. p 657 note 99.
87. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Philippine.—Joaquin v. Avellana, 11 Philippine 249.
23 C.J. p 660 note 42.
Sheriff's return as evidence of recording
Sheriff's return on the execution pursuant to which he sold the property, dated the date of the sale, stating that a duplicate of the certificate has been filed for record with the county recorder, is prima facie evidence that on the date of the sale a duplicate of the certificate of sale was duly recorded.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
88. La.—Raiford v. Wood, 14 La. Ann. 116.
89. N.Y.—Jackson v. Young, 5 Cow. 269, 15 Am.D. 473.
23 C.J. p 660 note 43.
90. N.Y.—Jackson v. Young, supra.
23 C.J. p 660 note 49.
91. Wis.—Phillips v. Hyland, 78 N. W. 431, 102 Wis. 263.
23 C.J. p 660 note 49 [a].
92. Mich.—Taylor v. Gladwin, 40 Mich. 232.
93. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
23 C.J. p 660 note 44.
94. S.C.—Long v. McKissick, 27 S. E. 636, 50 S.C. 218.
23 C.J. p 660 note 45.
95. Wis.—Knowlton v. Ray, 4 Wis. 283.
96. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.
23 C.J. p 658 note 5.
Filing and recording certificate see supra § 223.
97. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
Philippine.—Joaquin v. Avellana, 11 Philippine 249.
23 C.J. p 658 note 6.

the delivery to the purchaser of the certificate of sale.[98] However, statutes providing for the certificate are generally held to be merely directory,[99] and do not require the certificate as a prerequisite to a sheriff's deed;[1] nor will the failure to execute and deliver a certificate vitiate the sale.[2] The purchaser cannot require,[3] nor has the sheriff authority to execute,[4] a certificate before payment is made; but if it is issued before such payment it has been held that the sale is valid and the execution debtor can hold the sheriff responsible for the unpaid portion of the amount bid,[5] but there is other authority which holds that a certificate issued without payment is void.[6]

Amendment. An insufficient certificate may be amended by permission of the court,[7] even after the officer's term has expired.[8] A party aggrieved may compel a sheriff, by motion, to correct an omission in a certificate,[9] but such party may not resort to a court of equity for relief.[10]

Cancellation of certificate. A creditor who has bid in his debtor's interest in land at an execution sale and who has given a full or partial satisfaction as consideration therefor without having knowledge or reason to know that the premises were so encumbered as to leave nothing of value belonging to his debtor is entitled to a cancellation of the certificate, if he acts within a reasonable time and if the rights of third persons more deserving of protection have not intervened.[11] A proceeding to vacate a certificate of sale is governed by equitable rules, the ultimate question being whether it is inequitable or unconscionable for the debtor to avail himself of the satisfaction.[12]

Construction. The certificate will be construed in favor of a compliance with the law, where there are inconsistent statements, one of which is as to the performance of an official duty in accordance with the law and the other is as to its performance otherwise than as directed by the statute.[13]

b. Form and Contents

The certificate of sale should comply with the statutory requirements as to its form and contents, but slight mistakes and inaccuracies are immaterial. In some states it should be acknowledged, but it need not be attested or be under seal.

The certificate of sale should comply with the statutory regulations as to its form and contents, which in some jurisdictions require that it give the names of the parties to the suit and of the purchaser, the dates of the judgment and of the sale, a description of the property sold, the amounts of the judgment and of the bid, and the time when the purchaser will be entitled to a deed.[14] It should state facts and not conclusions of law;[15] it should describe, with certainty, the premises sold,[16] although it is sufficient if the premises are described with such accuracy that they may be identified.[17]

Under some statutes the issuance of the execution need not be stated in the certificate;[18] but, where the execution is required to be described, a description which identifies it beyond any reasonable doubt is sufficient, although incorrect as to the court rendering judgment.[19] The whole amount for which the property was sold must be stated.[20] A statement in the certificate that the proper notices of sale were given supplies any deficiency in the printer's affidavit.[21]

98. Wis.—Kissinger v. Zieger, 120 N.W. 249, 138 Wis. 368.

99. N.Y.—O'Brien v. Hashagan, 20 Hun 564.

1. Kan.—Armstead v. Jones, 80 P. 56, 71 Kan. 142.

2. Ind.—Rucker v. Steelman, 73 Ind. 396.
Minn.—Barnes v. Kerlinger, 7 Minn. 82.

3. Minn.—Carlson v. Headline, 111 N.W. 259, 100 Minn. 327.

4. Ind.—Ruckle v. Barbour, 48 Ind. 274.

5. Minn.—Carlson v. Headline, 111 N.W. 259, 100 Minn. 327.

6. Ind.—Ruckle v. Barbour, 48 Ind. 274.

Statute of frauds
A certificate issued without payment cannot have the effect of satisfying the statute of frauds so as to make the sale enforceable where the sheriff has not made some other sufficient memorandum thereof.—Ruckle v. Barbour, 48 Ind. 274.

7. N.Y.—Richards v. Varnum, 8 How.Pr. 79.
23 C.J. p 659 note 34.

8. Mich.—Bixby v. Rowe, 2 Mich. N.P. 152.

9. N.Y.—Smith v. Hudson, 1 Cow. 430.
23 C.J. p 659 note 36.

10. Ill.—Puterbaugh v. Elliott, 22 Ill. 157.

11. Wis.—Hermance v. Braun, 285 N.W. 733, 231 Wis. 357.

12. Wis.—Hermance v. Braun, supra.

13. Ill.—Clark v. Glos, 54 N.E. 631, 180 Ill. 556, 72 Am.S.R. 223.

14. Mo.—Evans v. Wilder, 5 Mo. 313, 7 Mo. 359.
23 C.J. p 658 note 15.

15. Minn.—Castner v. Symonds, 1 Minn. 427.

16. Minn.—Herrick v. Ammerman, 21 N.W. 836, 32 Minn. 544.
23 C.J. p 658 note 17.

17. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
23 C.J. p 658 note 18.

Description sufficient for voluntary conveyance
A description which would have been sufficient for a voluntary conveyance is adequate.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

18. N.Y.—Goldman v. Kennedy, 1 N.Y.S. 599, 49 Hun 157.

Recital as presumptive evidence
A recital with regard thereto is not presumptive evidence.—Goldman v. Kennedy, supra.

19. Minn.—Bartleson v. Thompson, 14 N.W. 795, 30 Minn. 161.

20. N.Y.—Mascraft v. Van Antwerp, 3 Cow. 334.
23 C.J. p 658 note 21.

21. Wis.—Sexton v. Rhames, 13 Wis. 99.

Slight mistakes or inaccuracies in the certificate, which produce no injury, are immaterial;[22] and mistakes in the certificate, which are corrected by the public records, and for which the purchaser is not responsible, cannot be taken advantage of by a third person who is a purchaser of the judgment debtor.[23] In jurisdictions where the law declares that property sold under execution is subject to redemption, the omission to state in the certificate that the property is subject to redemption will not affect the validity of the sale or deprive the document of effect as a certificate showing the sale on decree.[24]

Void deed as certificate. A sheriff's deed given before the expiration of the time for redemption is void as a deed, see infra § 270, but it may be given effect as a certificate of sale where it contains the necessary statutory requirements of such a certificate.[25]

Acknowledgment. It has been held that a certificate should be acknowledged in the same manner as a deed.[26] Under some statutes, however, acknowledgment is not necessary.[27]

Attestation and seal. The certificate need not be attested by witnesses or be under seal.[28]

c. Assignment

A certificate of sale is assignable, provided the statutory requirements are complied with.

A certificate of sale is assignable[29] and, as appears infra § 313, the assignee, in general, acquires all the rights and remedies of his assignor in the property, but no more. However, statutory requirements as to the assignment must be complied with,[30] unless they are such as may be waived, and such waiver is made.[31]

In some jurisdictions statutes require that an assignment of a certificate shall be witnessed and acknowledged[32] and recorded.[33]

d. Effect

In the absence of statute, a certificate of sale of land passes no title to the purchaser and does not disturb the possession of the execution defendant until the time for redemption has expired and the deed has been delivered, although the certificate is evidence of an equitable estate, constitutes the holder a purchaser for registration purposes, and confers seizin for purposes of escheats.

Under some statutes a certificate of sale of real property vests in the purchaser the legal title subject to the right of redemption only,[34] but in the absence of statute a certificate of purchase at a sale of land passes no title to the purchaser and will not disturb the possession of defendant in execution until after the time of redemption has expired and his title is transferred by the sheriff's deed.[35] However, the certificate constitutes evidence of an equitable estate or interest in the property, subject to be defeated by redemption within the time allowed,[36] although at most it is only evidence of an inchoate estate, which may or may not ripen into an absolute title.[37]

It has been held that a person holding a certifi-

22. Minn.—Herrick v. Morrill, 33 N.W. 849, 37 Minn. 250, 5 Am.S.R. 841.
23 C.J. p 658 note 23.

23. U.S.—White v. Crow, Colo., 4 S.Ct. 71, 110 U.S. 183, 28 L.Ed. 113, affirming 17 F. 98, 5 McCreary 310.

24. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.

25. Cal.—Anthony v. Janssen, supra.

26. Wis.—Knowlton v. Ray, 4 Wis. 288.
23 C.J. p 659 note 25.

27. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.

28. Minn.—Bidwell v. Coleman, 11 Minn. 78.

29. N.Y.—Stoddard v. Stoddard, 26 N.Y.S.2d 151, 261 App.Div. 315.
23 C.J. p 659 note 30.
Assignment of bid see supra § 215.

Alteration of assignment
Ill.—Reliance Elevator Co. v. Zimmer, 202 Ill.App. 315.

30. Iowa.—Howard v. Kelly, 114 N.W. 544, 137 Iowa 76, 126 Am.S.R 274.
23 C.J. p 659 note 32.

31. N.Y.—Wood v. Morehouse, 45 N.Y. 368.
23 C.J. p 659 note 33.

32. Validity as between parties
Assignment of sheriff's certificate of sale, which was not witnessed or acknowledged, as required by statute, may not be recorded, but it is binding as between the parties.—Bliss v. Miller, 250 P. 218, 119 Or. 573, rehearing denied 250 P. 763, 119 Or. 573.

33. Or.—Bliss v. Miller, supra.
23 C.J. p 659 note 33 [a].

34. Idaho.—Syster v. Hazzard, 229 P. 1110, 39 Idaho 580.

35. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
Ind.—First State Bank of Dunkirk v. Cunningham, 187 N.E. 60, 97 Ind.App. 379.
23 C.J. p 659 note 37.
Certificate as conferring color of title for adverse possession see Adverse Possession § 74 g (3).

Mere chose in action
N.Y.—Stoddard v. Stoddard, 26 N.Y.S.2d 151, 261 App.Div. 315.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400.

Certificate as provisional
Under statute providing that after the time for redemption has expired and there has been no redemption, the officer shall execute a deed to the property, the certificate is merely provisional. If the land is redeemed, the purchaser receives his money and the certificate becomes of no value; if the land is not redeemed, the purchaser secures a deed from the sheriff, which constitutes his muniment of title.—Joaquin v. Avellana, 11 Philippine 249.

36. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.
23 C.J. p 659 note 39.
Redemption generally see infra §§ 253–265.
Title and rights of purchaser generally see infra §§ 284–313.

37. Wash.—Bonded Adjustment Co. v. Helgerson, 61 P.2d 1267, 188 Wash. 176—Atwood v. McGrath,

cate of sale is seized of the premises within the meaning of the statutes of escheats,[38] and is a purchaser within the meaning of the registry laws.[39]

§ 225. Abandonment of Sale

In the absence of prejudice, the abandonment of a sale because of an error in the notice thereof does not invalidate a subsequent sale.

Abandonment of a sale because of an error in the notice thereof does not invalidate a subsequent sale where it does not appear that the execution debtor was prejudiced thereby.[40]

§ 226. Confirmation

a. In general
b. Procedure
c. Determination of motion
d. Effect of order
e. Vacation of order; collateral attack

a. In General

Confirmation of an execution sale is unnecessary, unless required by statute, as is the case in a number of jurisdictions, some of which make it essential to the passing of title. It is a purely statutory proceeding wherein inquiry is made as to whether the sale was in conformity with the law, and should be distinguished from confirmation of a judicial sale.

In the absence of statute requiring it, no order of confirmation of an execution sale is necessary,[41] although, where the notice of sale provides for confirmation, the purchaser cannot contend that confirmation was unnecessary.[42]

In some jurisdictions, by statutory enactment, the proceedings of the officer conducting an execution sale are required to be reported to the court from whence the writ under which the officer acted emanated, for the confirmation or disapproval of the sale, and under such statutes an execution sale is not complete until it has been confirmed by the court.[43] Although it is held in some of these jurisdictions that where the proceedings are regular in other respects a mere failure to have the sale confirmed as required by statute will not defeat the purchaser's title,[44] especially on a collateral attack by one who does not claim through or under the judgment debtor,[45] in other jurisdictions until the court has determined that the sale has been legally made and has confirmed the sale and ordered the sheriff to make a deed the title does not pass to the purchaser,[46] the judgment creditor is not entitled to the purchase money,[47] the sheriff has no authority to make a deed to the purchaser,[48] and the purchaser is not entitled to the possession of the land.[49]

Confirmation of an execution sale is a purely statutory proceeding[50] and is to be distinguished from confirmation of a judicial sale.[51] On confirmation of an execution sale the court inquires whether the sale has been made in conformity with law, from an inspection of the proceedings of the officer.[52]

A sheriff's deed duly executed and acknowledged, the recitals of which conform to the statutory re-

242 P. 648, 137 Wash. 400—Singly v. Warren, 51 P. 1066, 18 Wash. 434, 63 Am.S.R. 896.

38. N.Y.—Englishbe v. Helmuth, 3 N.Y. 294.
23 C.J. p 659 note 41.

39. Mich.—Atwood v. Bearss, 8 N. W. 55, 45 Mich. 469.
23 C.J. p 660 note 42.
Filing and recording certificate generally see supra § 223.

40. Mich.—Atwood v. Bearss, supra.
Effect of failure to give proper notice generally see supra § 211.

41. U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 92 F.2d 744.
Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.
23 C.J. p 661 note 65.
Confirmation of attachment sale see Attachment § 332.

42. Okl.—Goldenstern v. Gavin, 102 P.2d 582, 187 Okl. 338.

43. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L. Ed. 554—Schumacher v. Beeler, C.C.A Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
23 C.J. p 661 note 66.

44. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 66 Am.S.R. 702.
23 C.J. p 661 note 67.

45. S.D.—Baxter v. O'Leary, supra.

46. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

47. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

48. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

49. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

50. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.

51. Neb.—Bachle v. Webb, 9 N.W. 473, 11 Neb. 473.
23 C.J. p 662 note 69.
Confirmation of Judicial sale see the C.J.S. title Judicial Sales §§ 25–29, also 35 C.J. p 43 note 19–p 52 note 88.

52. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 65 Am.S.R. 702.
23 C.J. p 662 note 70.

Slight mistakes or inaccuracies in the certificate, which produce no injury, are immaterial;[22] and mistakes in the certificate, which are corrected by the public records, and for which the purchaser is not responsible, cannot be taken advantage of by a third person who is a purchaser of the judgment debtor.[23] In jurisdictions where the law declares that property sold under execution is subject to redemption, the omission to state in the certificate that the property is subject to redemption will not affect the validity of the sale or deprive the document of effect as a certificate showing the sale on decree.[24]

Void deed as certificate. A sheriff's deed given before the expiration of the time for redemption is void as a deed, see infra § 270, but it may be given effect as a certificate of sale where it contains the necessary statutory requirements of such a certificate.[25]

Acknowledgment. It has been held that a certificate should be acknowledged in the same manner as a deed.[26] Under some statutes, however, acknowledgment is not necessary.[27]

Attestation and seal. The certificate need not be attested by witnesses or be under seal.[28]

c. Assignment

A certificate of sale is assignable, provided the statutory requirements are complied with.

A certificate of sale is assignable[29] and, as appears infra § 313, the assignee, in general, acquires all the rights and remedies of his assignor in the property, but no more. However, statutory requirements as to the assignment must be complied with,[30] unless they are such as may be waived, and such waiver is made.[31]

In some jurisdictions statutes require that an assignment of a certificate shall be witnessed and acknowledged[32] and recorded.[33]

d. Effect

In the absence of statute, a certificate of sale of land passes no title to the purchaser and does not disturb the possession of the execution defendant until the time for redemption has expired and the deed has been delivered, although the certificate is evidence of an equitable estate, constitutes the holder a purchaser for registration purposes, and confers seizin for purposes of escheats.

Under some statutes a certificate of sale of real property vests in the purchaser the legal title subject to the right of redemption only,[34] but in the absence of statute a certificate of purchase at a sale of land passes no title to the purchaser and will not disturb the possession of defendant in execution until after the time of redemption has expired and his title is transferred by the sheriff's deed.[35] However, the certificate constitutes evidence of an equitable estate or interest in the property, subject to be defeated by redemption within the time allowed,[36] although at most it is only evidence of an inchoate estate, which may or may not ripen into an absolute title.[37]

It has been held that a person holding a certifi-

22. Minn.—Herrick v. Morrill, 33 N.W. 849, 37 Minn. 250, 5 Am.S.R. 841.
23 C.J. p 658 note 23.

23. U.S.—White v. Crow, Colo., 4 S.Ct. 71, 110 U.S. 183, 28 L.Ed. 113, affirming 17 F. 98, 5 McCreary 310.

24. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.

25. Cal.—Anthony v. Janssen, supra.

26. Wis.—Knowlton v. Ray, 4 Wis. 288.
23 C.J. p 659 note 25.

27. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.

28. Minn.—Bidwell v. Coleman, 11 Minn. 78.

29. N.Y.—Stoddard v. Stoddard, 26 N.Y.S.2d 151, 261 App.Div. 315.
23 C.J. p 659 note 30.
Assignment of bid see supra § 215.

Alteration of assignment
Ill.—Reliance Elevator Co. v. Zimmer, 202 Ill.App. 315.

30. Iowa.—Howard v. Kelly, 114 N.W. 544, 137 Iowa 76, 126 Am.S.R. 274.
23 C.J. p 659 note 32.

31. N.Y.—Wood v. Morehouse, 45 N.Y. 368.
23 C.J. p 659 note 33.

32. Validity as between parties
Assignment of sheriff's certificate of sale, which was not witnessed or acknowledged, as required by statute, may not be recorded, but it is binding as between the parties.—Bliss v. Miller, 250 P. 218, 119 Or. 573, rehearing denied 250 P. 763, 119 Or. 573.

33. Or.—Bliss v. Miller, supra.
23 C.J. p 659 note 33 [a].

34. Idaho.—Syster v. Hazzard, 229 P. 1110, 39 Idaho 580.

35. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
Ind.—First State Bank of Dunkirk v. Cunningham, 187 N.E. 60, 97 Ind.App. 379.
23 C.J. p 659 note 37.
Certificate as conferring color of title for adverse possession see Adverse Possession § 74 g (3).

Mere chose in action
N.Y.—Stoddard v. Stoddard, 26 N.Y.S.2d 151, 261 App.Div. 315.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400.

Certificate as provisional
Under statute providing that after the time for redemption has expired and there has been no redemption, the officer shall execute a deed to the property, the certificate is merely provisional. If the land is redeemed, the purchaser receives his money and the certificate becomes of no value; if the land is not redeemed, the purchaser secures a deed from the sheriff, which constitutes his muniment of title.—Joaquin v. Avellana, 11 Philippine 249.

36. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.
23 C.J. p 659 note 39.
Redemption generally see infra §§ 253–265.
Title and rights of purchaser generally see infra §§ 284–313.

37. Wash.—Bonded Adjustment Co. v. Helgerson, 61 P.2d 1267, 188 Wash. 176—Atwood v. McGrath,

cate of sale is seized of the premises within the meaning of the statutes of escheats,[38] and is a purchaser within the meaning of the registry laws.[39]

§ 225. Abandonment of Sale

In the absence of prejudice, the abandonment of a sale because of an error in the notice thereof does not invalidate a subsequent sale.

Abandonment of a sale because of an error in the notice thereof does not invalidate a subsequent sale where it does not appear that the execution debtor was prejudiced thereby.[40]

§ 226. Confirmation

a. In general
b. Procedure
c. Determination of motion
d. Effect of order
e. Vacation of order; collateral attack

a. In General

Confirmation of an execution sale is unnecessary, unless required by statute, as is the case in a number of jurisdictions, some of which make it essential to the passing of title. It is a purely statutory proceeding wherein inquiry is made as to whether the sale was in conformity with the law, and should be distinguished from confirmation of a judicial sale.

In the absence of statute requiring it, no order of confirmation of an execution sale is necessary,[41] although, where the notice of sale provides for confirmation, the purchaser cannot contend that confirmation was unnecessary.[42]

In some jurisdictions, by statutory enactment, the proceedings of the officer conducting an execution sale are required to be reported to the court from whence the writ under which the officer acted emanated, for the confirmation or disapproval of the sale, and under such statutes an execution sale is not complete until it has been confirmed by the court.[43] Although it is held in some of these jurisdictions that where the proceedings are regular in other respects a mere failure to have the sale confirmed as required by statute will not defeat the purchaser's title,[44] especially on a collateral attack by one who does not claim through or under the judgment debtor,[45] in other jurisdictions until the court has determined that the sale has been legally made and has confirmed the sale and ordered the sheriff to make a deed the title does not pass to the purchaser,[46] the judgment creditor is not entitled to the purchase money,[47] the sheriff has no authority to make a deed to the purchaser,[48] and the purchaser is not entitled to the possession of the land.[49]

Confirmation of an execution sale is a purely statutory proceeding[50] and is to be distinguished from confirmation of a judicial sale.[51] On confirmation of an execution sale the court inquires whether the sale has been made in conformity with law, from an inspection of the proceedings of the officer.[52]

A sheriff's deed duly executed and acknowledged, the recitals of which conform to the statutory re-

242 P. 648, 137 Wash. 400—Singly v. Warren, 51 P. 1066, 18 Wash. 434, 63 Am.S.R. 896.

38. N.Y.—Englishbe v. Helmuth, 3 N.Y. 294.
23 C.J. p 659 note 41.

39. Mich.—Atwood v. Bearss, 8 N. W. 55, 15 Mich. 469.
23 C.J. p 660 note 42.
Filing and recording certificate generally see supra § 223.

40. Mich.—Atwood v. Bearss, supra.
Effect of failure to give proper notice generally see supra § 211.

41. U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 92 F.2d 744.
Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.
23 C.J. p 661 note 65.
Confirmation of attachment sale see Attachment § 332.

42. Okl.—Goldenstern v. Gavin, 102 P.2d 582, 187 Okl. 338.

43. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L. Ed. 554—Schumacher v. Beeler, C. C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
23 C.J. p 661 note 66.

44. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 66 Am.S.R. 702.
23 C.J. p 661 note 67.

45. S.D.—Baxter v. O'Leary, supra.

46. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

47. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

48. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

49. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed 554—Schumacher v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
Ohio.—Bassett v. Daniels, 10 Ohio St. 617.

50. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.

51. Neb.—Bachle v. Webb, 9 N.W. 473, 11 Neb. 473.
23 C.J. p 662 note 69.
Confirmation of Judicial sale see the C.J.S. title Judicial Sales §§ 25–29, also 35 C.J. p 43 note 19–p 52 note 88.

52. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 65 Am.S.R. 702.
23 C.J. p 662 note 70.

quirements, sufficiently shows confirmation of an execution sale.[53]

b. Procedure

Confirmation is generally ex parte, and may be made at any time after the sheriff has made his return, on the application of plaintiff, defendant, the sheriff, or any other person interested therein. In some jurisdictions only the judgment debtor or his representative may object to confirmation, but in other jurisdictions either party or the purchaser may object, or the court may deny confirmation on its own motion.

When the sheriff's return of sale comes before the court for confirmation, the proceeding may be, and commonly is, ex parte.[54] Confirmation may take place without any notice thereof,[55] on the application of plaintiff, defendant, the sheriff, or any other person interested therein,[56] including the purchaser or assignee of the purchaser,[57] or on the court's own motion,[58] and with or without the consent of the sheriff.[59] If one of the judgment debtors dies after the sale, it is not necessary to revive the action before the confirmation of the sale.[60]

Objections to the sale should be presented to the court when the application for confirmation is heard.[61]

Persons entitled to object. It has been stated that no one can object to confirmation except the judgment debtor, or, in case of his death, his representative;[62] but there is authority which holds that either party to the execution sale or the purchaser thereat may object to its confirmation,[63] or the court may deny confirmation on its own motion where sufficient grounds appear on the face of the proceedings.[64] However, a mere creditor,[65] or judgment creditor,[66] or a purchaser, or the successor of a purchaser, at a prior and different execution sale,[67] who is not a party, cannot oppose the confirmation.

Time for confirming sale. No particular time is required for the confirmation of a sale, and it may be confirmed at any time after the sheriff has made his return.[68]

c. Determination of Motion

On proceedings to confirm an execution sale only matters appearing of record are considered, and if it appears therefrom that the sale proceedings were regular and in substantial compliance with the law the sale will be confirmed. As a general rule the court may not inquire into the regularity or merits of the judgment.

In some jurisdictions confirmation of execution sales is a matter within the sound discretion of the court,[69] which must be exercised on equitable principles and not arbitrarily.[70] In other jurisdictions confirmation constitutes a ministerial act only,[71] and the statute requiring confirmation is strictly construed in order that the confidence of bidders and the public in such sales be upheld.[72]

On proceedings to confirm an execution sale, only matters appearing of record may be considered.[73] The court cannot look beyond the return of the officer,[74] which, in order to justify confirmation, must affirmatively show that he complied with the law.[75]

53. Suit for partition
Ark.—Winfrey v. People's Sav. Bank, 5 S.W.2d 360, 176 Ark. 941.

54. Kan.—Brewer v. Warner, 182 P. 411, 105 Kan. 168.
N.D.—St. Paul Trust & Savings Bank v. Olson, 202 N.W. 472, 52 N.D. 315—Warren v. Stinson, 70 N.W. 279, 6 N.D. 293.
S.D.—Langeberg v. Perry, 252 N.W. 882, 62 S.D. 286—Baxter v. O'Leary, 72 N.W. 91, 10 S.D. 150, 66 Am. S.R. 702—Kirby v. Ramsey, 68 N. W. 328, 9 S.D. 197.

55. Wash.—Whitworth v. McKee, 72 P. 1046, 32 Wash. 83.
23 C.J. p 662 note 73.

56. Okl.—Payne v. Long-Bell Lumber Co., 60 P. 235, 9 Okl. 683.
23 C.J. p 662 note 72.

57. Kan.—Cowdin v. Cowdin, 3 P. 369, 31 Kan. 528.
23 C.J. p 662 note 74.

58. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 65 Am.S.R. 702.
23 C.J. p 662 note 72.

59. Okl.—Payne v. Long-Bell Lumber Co., 60 P. 235, 9 Okl. 683.
S.D.—Baxter v. O'Leary, 72 N.W. 91, 10 S.D. 150, 65 Am.S.R. 702.

60. Kan.—Johnson Loan & Trust Co. v. Ball, 53 P. 878, 7 Kan.App. 667.

61. Wash.—Betz v. Tower Sav. Bank, 55 P.2d 338, 185 Wash. 314.

62. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.

63. Or.—Miller v. Achurch, 93 P. 332, 50 Or. 478.
23 C.J. p 662 note 78.

64. Okl.—Skinner v. First Nat. Bank, 273 P. 893, 135 Okl. 61.

65. Okl.—Skinner v. First Nat. Bank, supra.

66. Or.—Miller v. Oregon City Paper Mfg. Co., 3 Or. 24.

67. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.

68. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 65 Am.S.R. 702.
23 C.J. p 662 note 80.

69. Kan.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.
Ohio.—Ohio Life Insurance and Trust Co. v. Goodin, 10 Ohio St. 557.
Okl.—Wyant v. Davidson & Case Lumber Co., 49 P.2d 151, 173 Okl. 467—Sandridge v. Home Building & Loan Ass'n, 44 P.2d 944, 172 Okl. 298—Burton v. Mee, 4 P.2d 33, 152 Okl. 220—Drummond v. James, 300 P. 658, 150 Okl. 105—Kline v. Evans, 229 P. 427, 103 Okl. 44.
23 C.J. p 662 note 81.

70. Kan.—Robinson v. Kennedy, 144 P. 1002, 93 Kan. 514.
Okl.—Drummond v. James, 300 P. 658, 150 Okl. 105.

71. S.D.—Langeberg v. Perry, 252 N.W. 882, 62 S.D. 286.

72. Neb.—Bachle v. Webb, 9 N.W. 473, 11 Neb. 473.
23 C.J. p 662 note 83.

73. Okl.—Severson v. Bemore, 278 P. 327, 137 Okl. 50.

74. N.D.—St. Paul Trust & Savings Bank v. Olson, 202 N.W. 472, 52 N.D. 315.
Okl.—Osborn v. Home Federal Savings & Loan Ass'n of Tulsa, 95 P. 2d 604, 185 Okl. 629.
23 C.J. p 662 note 85.

75. Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

Although it has been held that the validity of the judgment may be inquired into,[76] as a general rule the court should confine itself to a consideration of questions relating to the regularity of the sale proceedings,[77] and may not properly inquire into the regularity[78] or merits[79] of the judgment on which the execution is based. The subjects for determination are the regularity of the levy, appraisement, advertising, sale and return of the sheriff;[80] antecedent proceedings are not disturbed.[81] However, the court may refuse to confirm a sale on equitable grounds under certain exceptional conditions of fact, which are limited to equitable considerations which affect or interfere with the procedural machinery of the sale, or which tend to impeach its adequacy to establish the value of the subject matter.[82]

The court is authorized to confirm the sale only after it has carefully examined the proceedings of the officer and is satisfied that such sale was in all respects made in conformity with the law.[83] Confirmation may be had of an execution sale of realty which was conducted substantially in the manner prescribed by the notice and in accordance with the decree.[84] If the officer's return on its face shows that the proceedings were regular, and no equitable grounds for setting aside the sale are shown, it is the duty of the court to confirm the sale;[85] and a failure to comply literally with all the provisions of the law relating to the sale does not justify a refusal to confirm, where such failure is not prejudicial.[86] Confirmation should not be refused because the execution debtor had no title,[87] or because the appraisement was irregular, where it was not fraudulent,[88] or, although there is authority to the contrary,[89] because the property sold was exempt.[90]

76. Wash.—Stark Bros. v. Royce, 87 P. 340, 44 Wash. 287.
23 C.J. p 663 note 96.

77. Okl.—Aycock v. Harriman, 113 P.2d 380—Cesar v. Oklahoma Farm Mortg. Co., 112 P.2d 800—Thrush v. Winslow, 98 P.2d 905, 186 Okl. 499—Osborn v. Home Federal Savings & Loan Ass'n of Tulsa, 95 P. 2d 604, 185 Okl. 629—Essley v. Langley, 90 P.2d 396, 185 Okl. 106—Wright v. Craig, 87 P.2d 317, 184 Okl. 371—MacKenchnie v. Voight, 86 P.2d 991, 184 Okl. 291—Turner v. Clark, 83 P.2d 178, 183 Okl. 458—Funk v. Payne, 82 P.2d 976, 183 Okl. 332—Kirkpatrick v. Jefferson Standard Life Ins. Co. of Greensboro, N. C., 70 P.2d 59, 180 Okl. 402—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86—Wyant v. Davidson & Case Lumber Co., 49 P.2d 151, 173 Okl. 467—Sandridge v. Home Building & Loan Ass'n, 44 P.2d 944, 172 Okl. 298—State ex rel. Com'rs of Land Office v. Harrower, 29 P.2d 123, 167 Okl. 269—Burton v. Mee, 4 P.2d 33, 152 Okl. 220—Millard v. Nelson, 281 P. 238, 139 Okl. 56—Griggs v. Brandon, 269 P. 1052, 132 Okl. 180—Kline v. Evans, 229 P. 427, 103 Okl. 44—Brazell v. Brockins, 217 P. 847, 95 Okl. 38.
S.D.—Langeberg v. Perry, 252 N.W. 882, 62 S.D. 286.

78. Okl.—Cesar v. Oklahoma Farm Mortg. Co., 112 P.2d 800—Thrush v. Winslow, 98 P.2d 905, 186 Okl. 499—Essley v. Langley, 90 P.2d 396, 185 Okl. 106—Wright v. Craig, 87 P.2d 317, 184 Okl. 371—MacKenchnie v. Voight, 86 P.2d 991, 184 Okl. 291—Funk v. Payne, 82 P. 2d 976, 183 Okl. 332—Wyant v. Davidson & Case Lumber Co., 49 P.2d 151, 173 Okl. 467—Burton v. Mee, 4 P.2d 33, 152 Okl. 220—Griggs v. Brandon, 269 P. 1052, 132 Okl. 180—Kline v. Evans, 229 P. 427, 103 Okl. 44.

Mode of attacking regularity of judgment

Questions pertaining to the regularity of the judgment or jurisdictional questions must be raised by motion to quash the sale or to set aside the sale.—Kirkpatrick v. Jefferson Standard Life Ins. Co. of Greensboro, N. C., 70 P.2d 59, 180 Okl. 402.

Matters not considered

(1) Error in not granting party a jury trial.—Funk v. Payne, 82 P. 2d 976, 183 Okl. 332.

(2) Whether judgment was outside the issue.—Funk v. Payne, supra.

(3) Whether defendant was served with summons.—Millard v. Nelson, 281 P. 238, 139 Okl. 56—Brazell v. Brockins, 217 P. 847, 95 Okl. 38.

(4) Whether or not recitation in judgment that defendant had appeared by his attorneys was true.—Brazell v. Brockins, supra.

(5) The regularity of revivor of judgment—Turner v. Clark, 83 P.2d 178, 183 Okl. 458.

79. Neb.—Security Bank of Maywood v. Wood, 271 N.W. 349, 351, 132 Neb. 175, citing **Corpus Juris.**
Okl.—Aycock v. Harriman, 113 P.2d 380.
23 C.J. p 663 note 95.

80. Neb.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39—Best v. Zutavern, 74 N.W. 81, 53 Neb. 619.

81. Neb.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39.

82. Okl.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86—State ex rel. Com'rs of Land Office v. Harrower, 29 P.2d 123, 167 Okl. 269.

83. Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

84. Neb.—Holferty v. Wortman, 283 N.W. 855, 135 Neb. 732—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

85. N.D.—St. Paul Trust & Savings Bank v. Olson, 202 N.W. 472, 52 N.D. 315.
Okl.—Osborn v. Home Federal Savings & Loan Ass'n of Tulsa, 95 P. 2d 604, 185 Okl. 629—Severson v. Bemore, 278 P. 327, 137 Okl. 50.
23 C.J. p 662 note 85.

86. Neb.—Stull v. Seymour, 88 N.W. 174, 63 Neb. 87.

87. Neb.—Bachle v. Webb, 9 N.W. 473, 11 Neb. 423.

Inquiry into title

(1) The court, on confirmation, does not inquire into and certify the title to the property sold.—Lexington Land Co. v. Ambrister, 64 P.2d 703, 179 Okl. 86.

(2) The claim of a stranger to property offered at the sale as the property of the judgment debtor cannot be tried or determined on objection by such stranger to confirmation of the sale.—Lexington Land Co. v. Ambrister, supra.

88. Neb.—Best v. Zutavern, 74 N. W. 81, 53 Neb. 619.
23 C.J. p 662 note 88.

89. Wash.—Mowbray Pearson Co. v. Pershall, 159 P. 682, 92 Wash. 516—Waldron v. Kineth, 84 P 16, 41 Wash. 459, 111 Am.S.R. 1022.

90. Neb.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39—Wollmer v. Wood, 228 N.W. 541, 119 Neb. 248.
23 C.J. p 662 note 89.

Homestead right

The homestead right of exemption of real property is not a proper sub-

On the other hand, confirmation may be denied where the sale was not conducted in accordance with the decree;[91] or substantially in the manner prescribed by the notice,[92] as where it was not held at the time fixed by the notice of sale;[93] or where the execution under which the sale was made was void;[94] or where the property was not sold subject to prior liens;[95] or where the sales proceedings included items not found in the judgment;[96] or where it appears on the face of the proceedings that the judgment is dormant;[97] or where the judgment on which the execution was based had been satisfied at the time of the sale;[98] or where the debtor pays the judgment in full after the sale;[99] or where the judgment creditor, after consulting with the bidder, makes other arrangements to secure the payment of his judgment and the debtor in reliance thereon expends money on the property.[1]

In a jurisdiction where the judgment debtor may redeem realty sold on execution but cannot redeem personalty, it is error to confirm a sale on execution of realty and personalty in one unsegregated bid and for a lump sum.[2]

Inadequacy of price. Mere inadequacy of price is not a ground for refusing to confirm the sale,[3] but confirmation may be denied where the price is so inadequate as to shock the conscience of the court or to amount to evidence of fraud,[4] or where the purchase price is grossly inadequate and the sale was not conducted in a prudent and just manner and an announcement chilled the bidding.[5]

Modification of terms of sale. On the hearing of the motion by the court, it should either confirm or set aside the sale, but should not modify its terms.[6]

Confirmation of resale. It is proper for the court to confirm a second sale of land at a price much less than that bid at the first sale but which is not less than the value of the realty where the bidder refused to make his bid on the first sale good, it appearing that at the first sale the conduct of the attorney for the execution creditor caused confusion and misunderstanding which resulted in the bidder exceeding his authority by bidding an amount greater than that authorized by his principal and in excess of the value of the land.[7]

d. Effect of Order

(1) In general
(2) Cure of irregularities

(1) In General

An order confirming an execution sale is res judicata as to all matters presented by and pertaining to the order of sale or execution and the steps taken thereunder, at least as to parties who had notice thereof, but it is not res judicata as to matters not apparent on the record. The order relates back to the date of the sale.

An order confirming an execution sale is res judicata as to all matters presented by and pertaining to the order of sale or execution and the steps tak-

ject for consideration.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39.

91. Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.

92. Neb.—Farmers Security Bank of Maywood v. Wood, supra.

93. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

94. Okl.—Williams v. Ross, 223 P. 137, 97 Okl. 119.

95. Neb.—Barry v. Horton, 238 N. W. 763, 122 Neb. 20.

96. Okl.—White v. Oklahoma Savings & Loan Ass'n, 253 P. 977, 124 Okl. 24.

97. Okl.—Skinner v. First Nat. Bank, 273 P. 893, 135 Okl. 61.

98. Neb.—Linton v. Cathers, 95 N. W. 1040, 69 Neb. 450, 111 Am.S.R. 556—Moore v. Boyer, 72 N.W. 586, 52 Neb. 446.

99. Ohio.—Reed v. Radigan, 42 Ohio St. 292.

1. Okl.—Drummond v. James, 300 P. 658, 150 Okl. 105.

2. Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.

Reason for rule

The amount to be paid in redemption of the realty cannot be ascertained.—Dixie Meadows Independence Mines Co. v. Kight, supra.

3. Neb.—Department of Banking v. Modrow, 278 N.W. 559, 134 Neb. 336—Wolcott v. Wiles, 257 N.W. 533, 128 Neb. 65.

Okl.—Magic City Amusement Co. v. Hastings, 116 P.2d 709—Osborn v. Home Federal Savings & Loan Ass'n of Tulsa, 95 P.2d 604, 185 Okl. 629—Essley v. Langley, 90 P. 2d 396, 185 Okl. 106.

S.D.—Langeberg v. Perry, 252 N.W. 882, 62 S.D. 286.

Inadequacy of price as ground for setting aside sale see infra §§ 233–234.

4. Neb.—Department of Banking v. Modrow, 278 N.W. 559, 134 Neb. 336—Wolcott v. Wiles, 257 N.W. 533, 128 Neb. 65.

Okl.—Cesar v. Oklahoma Farm Mortg. Co., 112 P.2d 800—State ex rel. Com'rs of Land Office v. Harrower, 29 P.2d 123, 167 Okl. 269.

Admissibility of evidence to show value

In hearing objection to confirmation of execution sale of realty, excluding testimony showing actual value was error where objecting party shows fraud or other circumstances which prevented property from bringing reasonable value.—Miller v. Gray Eagle Oil & Gas Co., 23 P.2d 657, 164 Okl. 259.

Inadequacy not sufficient

Testimony valuing realty sold for six thousand dollars at from six thousand five hundred dollars to seven thousand eight hundred dollars, with no assurance of a higher bid in case of another sale, does not show inadequacy of price sufficient to shock the conscience of the court or constitute evidence of fraud.—Wolcott v. Wiles, 257 N.W. 533, 128 Neb. 65.

5. N.C.—Federated Textiles v. Mooresville Shirt Corporation, 174 S.E. 290, 206 N.C. 471.

6. Ohio.—Ohio Life Insurance and Trust Co. v. Goodin, 10 Ohio St. 557.

23 C.J. p 662 note 84.

7. Pa.—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518.

en thereunder.[8] It is an adjudication that the proceedings of the officer as they appear of record are regular,[9] and constitutes a direction to the sheriff to complete the sale;[10] and unless reversed or set aside in a direct proceeding the order is conclusive as to everything found by the court that is essential to its legality,[11] except as to matters not apparent on the record.[12]

The only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him, in the levy, appraisement, advertising, making and returning of the sale.[13] The statutory order of confirmation of an execution sale has an entirely different effect from a common-law confirmation of a judicial sale, so far as being res judicata is concerned.[14] It is not res judicata as to any contention that the execution is void or fraudulent,[15] nor is it an adjudication that the property sold was lawfully subject to sale.[16] Further, it is not res judicata in an action to recover the land founded on such sale so as to preclude the introduction of evidence to show fraud in the conduct of the sale, or that it was based on a void judgment.[17] Where, by statute, the adjudication is ex parte, it is not binding on any one as res judicata,[18] and where the scope of the inquiry is merely to ascertain whether the report of the sheriff shows on its face that the sale has been in conformity to the statutes, the confirmation can, in no event, be res judicata as to matters not disclosed by such report.[19] If the purchaser procures a confirmation of the sale, in fraud of the debtor, the purchaser's deed is invalid.[20]

Relation back. The order in the confirmation proceedings relates back to the date of the execution sale.[21]

(2) Cure of Irregularities

Defects and irregularities in the proceedings up to and including the sale are cured by the confirmation, but matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, are not cured.

The rule has been laid down in some jurisdictions that the confirmation cures all defects and irregularities in the proceedings up to and including the sale, where the court making the order is one of competent jurisdiction;[22] but matters which are not mere irregularities, but which are fatal defects, or which form no part of the proceedings connected with the sale, are not cured by the confirmation,[23] and hence a sale under a judgment paid prior to the sale is not validated by confirmation.[24] Fraud in the sale, unknown to the debtor, is not cured.[25]

e. Vacation of Order; Collateral Attack

In a proper case the order confirming an execution sale may be set aside on timely motion. After the time for such motion has expired relief can be obtained only through an original suit based on some equitable ground.

8. Okl.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586—Christy v. Springs, 69 P. 864, 11 Okl. 710.

9. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.
Okl.—Osborn v. Home Federal Savings & Loan Ass'n of Tulsa, 95 P. 2d 604, 185 Okl. 629—Kirkpatrick v. Jefferson Standard Life Ins. Co. of Greensboro, N. C., 70 P.2d 59, 180 Okl. 402—Severson v. Bemore, 278 P. 327, 137 Okl. 50.
Or.—Bobell v. Wagenaar, 210 P. 711, 106 Or. 232.
S.D.—Langeberg v. Perry, 252 N.W. 882, 62 S.D. 286.
23 C.J. p 663 note 97.

10. Okl.—Kirkpatrick v. Jefferson Standard Life Ins. Co. of Greensboro, N. C., 70 P.2d 59, 180 Okl. 402—Severson v. Bemore, 278 P. 327, 137 Okl. 50.

11. S.D.—Schroeder v. Pehling, 108 N.W. 252, 20 S.D. 642, 129 Am.S.R. 952.
23 C.J. p 663 note 98.

12. S.D.—Crouch v. Dakota, W. & M. R. Co., 101 N.W. 722, 18 S.D. 540, appeal dismissed 27 S.Ct. 780, 203 U.S. 582, 51 L.Ed. 327.
23 C.J. p 663 note 99.

13. Neb.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39—Wollmer v. Wood, 228 N.W. 541, 119 Neb. 248—Best v. Zutavern, 74 N.W. 81, 53 Neb. 619—Schribar v. Platt, 28 N. W. 289, 19 Neb. 625, in effect overruling Berkley v. Lamb, 8 Neb. 392.

14. N.D.—Warren v. Stinson, 70 N. W. 279, 6 N.D. 293.

15. Alaska.—Pecaravich v. Gilmore, 6 Alaska 108.
23 C.J. p 663 note 4.

16. Kan.—Brewer v. Warner, 182 P. 411, 105 Kan. 168.

17. Kan.—Benz v. Hines, 3 Kan. 390, 89 Am.D. 594.
23 C.J. p 663 note 4.

18. N.D.—Warren v. Stinson, 70 N. W. 279, 6 N.D. 293.
23 C.J. p 663 note 2.

19. N.D.—Warren v. Stinson, supra.

20. Wash.—Knowles v. Rogers, 67 P. 572, 27 Wash. 211.

21. Okl.—Christy v. Springs, 69 P. 864, 11 Okl. 710.
23 C.J. p 663 note 5.

22. Okl.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586.
23 C.J. p 663 note 8.
Irregularities held cured
(1) Failure of sheriff's return of sale on execution to show levy on the property.—Armstrong v. Travis, 192 P. 649, 97 Or. 587.

(2) Failure to levy on debtor's property.—Crim v. Thompson, 229 P. 916, 112 Or. 399.

(3) Irregularities in attachment proceedings.—Bobell v. Wagenaar, 210 P. 711, 106 Or. 232.

(4) Erroneous description of property in notice of levy and sale, the certificate of sale, and in the record of the return of execution in the sale book.—Cooley v. Wilson, 42 Iowa 425.

(5) Other cases see 23 C.J. p 663 note 8 [a].

23. Kan.—Capital Bank of Topeka v. Huntoon, 11 P. 369, 35 Kan. 577.
23 C.J. p 664 note 9.

24. Wash.—McLiesh v. Ball, 109 P. 209, 58 Wash. 690, 137 Am.S.R. 1087.

25. U.S.—Arnold v. Ness, D.C.Or., 212 F. 290.
23 C.J. p 664 note 11.

If the court has jurisdiction the order cannot be collaterally attacked.

The order confirming an execution sale may be set aside on motion in a proper case.[26] Irregularities by the sheriff usually do not constitute sufficient ground to set aside an order of confirmation,[27] unless prejudice is shown;[28] it is only steps omitted or defectively performed which are deemed material to the jurisdiction of the court to proceed, and which render the proceeding void, that justify the vacation of the order.[29] An order confirming a sale made under a void execution should be set aside,[30] as may also an order confirming a sale made by a sheriff after the order of sale and special execution has been recalled and withdrawn,[31] or after the judgment has been satisfied.[32]

A motion to vacate an order of confirmation may be made within the term during which the sale was confirmed,[33] and must be made at or within the time fixed by statute,[34] except that if the order of confirmation is void a motion to set it aside may be made at any time thereafter.[35] Exceptions to the confirmations of sheriff's sales are in due course if presented prior to delivery of the sheriff's deed even though after acknowledgment thereof.[36] After the time for such motion has expired, the order can be set aside only through an original suit based upon some equitable ground for relief.[37]

After a person's exceptions to the confirmation have been overruled, he cannot move to have the confirmation set aside on other grounds, without alleging that he had no information as to such grounds when he filed his exceptions, and without showing that his substantial rights are affected by the confirmation.[38]

Collateral attack. Where the court had jurisdiction of the parties and of the subject matter in the confirmation proceeding, its order cannot be attacked collaterally.[39]

§ 227. Who May Question Validity of Sale

a. In general
b. Execution debtor; purchaser from debtor
c. Execution creditor
d. Execution purchaser
e. Other lien creditors

a. In General

As a general rule an execution sale may be avoided by any interested person who is injured thereby.

As a general rule an execution sale may be avoided by any interested person who is injured thereby,[40] and, vice versa, one who is not interested and is not injured thereby cannot question the validity of the sale.[41] Where land has been sold on exe-

26. Okl.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586—Miller v. Gray Eagle Oil & Gas Co., 23 P.2d 657, 164 Okl. 259.
23 C.J. p 664 note 13.
Setting aside sale generally see infra §§ 230–241.

Application by petition
Jurisdiction of court to entertain request to vacate confirmation of a sheriff's sale is properly invoked by application in form of petition.—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

Admissibility and examination of entire record
On motion to set aside an order of confirmation of execution sale on the ground that the execution was not legally issued and returned, it is competent and proper to examine the entire record for the purpose of determining the validity of the execution and to permit the introduction of the record for that purpose is not error. Williams v. Ross, 223 P. 137, 97 Okl. 119.

27. Okl.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586.

28. Okl.—Johnson v. Bearden Plumbing & Heating Co., supra.

29. Okl.—Johnson v. Bearden Plumbing & Heating Co., supra.

Appraisal by persons not designated
The fact that levying sheriff, in making reappraisement of real estate, selected three appraisers other than those who originally appraised the realty in contravention of court order that a reappraisement be made by the same persons as originally appraised it, did not constitute an "irregularity" warranting setting aside order of confirmation and sale of the real estate.—Toohey v. Simmons, 35 N.E.2d 858, 67 Ohio App. 418, appeal dismissed 35 N.E.2d 152, 138 Ohio St. 400.

30. Okl.—Williams v. Ross, 223 P. 137, 97 Okl. 119.

31. Okl.—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

32. Neb.—Linton v. Cathers, 95 N. W. 1044, 4 Neb. Unoff. 641.

33. Okl.—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

34. Kan.—Livingston v. Lamb, 1 Kan. 221.
23 C.J. p 664 note 14.

35. Lapse of year not fatal
Wash.—Brooks v. Lewis, 60 P. 121, 22 Wash. 192.

36. Pa.—Home Owners Loan Corporation v. Edwards, 198 A. 123, 329 Pa. 529.

37. Or.—Churchill v. Meade, 182 P. 368, 92 Or. 626.
23 C.J. p 664 note 16.

38. Ky.—Fishback v. Columbia Bldg. Assoc., 47 S.W. 575, 20 Ky.L. 795.
Okl.—Walton v. Kennamer, 136 P. 584, 39 Okl. 629.

39. Or.—Bobell v. Wagenaar, 210 P. 711, 106 Or. 232.
23 C.J. p 663 note 6.

40. Iowa.—Dorsey v. Bentzinger, 226 N.W. 552, 209 Iowa 883.
23 C.J. p 664 note 18.

41. Ill.—Hruby v. Steinman, 30 N. E.2d 7, 374 Ill. 465, affirming 24 N. E.2d 175, 302 Ill.App. 480—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
La.—Testard v. Williams, 2 La.App. 121.
N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J. Eq. 319.
Pa.—O'Hare v. Marateck, 13 Pa.Dist. & Co. 516, 27 Sch.L.R. 329.
23 C.J. p 664 note 20.

Objection by injured party only
Objection to sale of property on ground of inadequacy of price may be made only by injured party.—

cution, another person claiming to be the owner thereof, and interested in defeating the sale, may, although he may not be a party to the execution, move the court to set aside such sale,[42] whether his title is legal or equitable,[43] although it has been held that a person who has a good and valid title to the property sufficient to enable him to defend successfully an action of ejectment brought for its recovery cannot move to set aside the sale.[44] As a general rule a person not a party to the record has no standing in court on a motion to vacate an execution sale on the ground of mere irregularities, which can be urged only by the execution debtor.[45]

Highest bidder. If an officer fraudulently refuses to accept the highest bid of a responsible person and accepts a lower bid, the highest bidder can, by an application to the court from which the execution issued, have such sale set aside and a resale ordered, to commence at the amount of his bid.[46]

Trustee in bankruptcy. A trustee for creditors of a bankrupt can attack an execution sale on a judgment recovered against the bankrupt prior to bankruptcy.[47]

b. Execution Debtor; Purchaser from Debtor

The execution debtor, and his purchaser or assignee, are entitled to move or sue to set aside the execution sale for irregularities therein, provided they were prejudiced.

As a general rule the execution defendant may avail himself of irregularities in the conduct of the sale or in the levy of the execution and is entitled to move or sue to set the sale aside.[48] He cannot, however, so move where he is not prejudiced,[49] as where the error complained of operates only as an injury to the creditor;[50] or where he has assigned his interest,[51] unless the conveyance was with a general warranty by which he is compelled to make good the title of the assignee or purchaser;[52] or where he has become a bankrupt;[53] or where the property sold belongs to a codefendant.[54]

Where the sale is under an execution against two or more, all of them should be made parties to the motion, and a motion by one only is erroneous.[55]

Purchaser or assignee of debtor. A purchaser from the execution debtor of property later sold at execution sale under a judgment which was a lien on the property at the time he purchased it is not precluded from attacking the execution sale.[56] Further, a purchaser from the execution debtor, who purchases after the execution sale, may bring an action to avoid such sale where there was no adverse possession by the purchaser at the sheriff's sale at the time of the subsequent conveyance.[57] However, as is true in the case of the execution debtor, see supra this subdivision, a purchaser or assignee of the property from the execution debtor cannot move to set aside the execution sale where he was not prejudiced by the irregularity complained of.[58] In some jurisdictions, under the rule that one who is not injured by the execution sale cannot move for its vacation, see supra subdivision a of this section a purchaser from the execution debtor of property later sold at execution sale is not entitled to move for the vacation of the execution sale where his title as against the execution purchaser

Downs v. Wagnon, Tex.Civ.App., 66 S.W.2d 777, error dismissed.

Owners of other properties of estate

Even though an executrix, who was also life tenant, had no right in her individual capacity to purchase a remainder interest sold under execution, the owners of other remainder interests in other properties of the estate could not complain.—Gibbs v. Gibbs, 108 S.E. 214, 151 Ga. 745.

42. Okl.—Cuberly Bros. Mercantile Co. v. Boggess, 294 P. 186, 147 Okl. 39—Citizens' State Bank of Vici v. Boggess, 294 P. 185, 147 Okl. 37—Producers' State Bank of Wilson v. Clark, 228 P. 986, 102 Okl. 181.
23 C.J. p 664 note 21.

43. Ala.—Henderson v. Sublett, 21 Ala. 626.
23 C.J. p 664 note 22.

44. Ala.—Sheffey v. Davis, 60 Ala. 548.

45. Ind.—Jones v. Carnahan, 63 Ind. 229.
La.—Childers v. Adair, 5 La.App. 212.
23 C.J. p 665 note 26.

46. Tex.—Rugely v. Moore, 54 S.W. 379, 23 Tex.Civ.App. 10.

47. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

48. Ill.—Craddick v. Cotta Gear Co., supra.
Or.—Geanakapulas v. Zographos, 208 P. 585, 104 Or. 430.
Pa.—Wagener v. Yetter, 124 A. 487, 280 Pa. 229.
23 C.J. p 665 note 35.

Bailee

A bailee whose interest has been sold on execution against him is entitled to be heard on his petition to set aside the sale.—Wagener v. Yetter, supra.

49. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
23 C.J. p 665 note 36.

50. Vt.—Slocum v. Catlin, 22 Vt. 137.

51. Mo.—State v. Yancy, 61 Mo. 397.
Tex.—Flanagan v. Pearson, 50 Tex. 383.

52. Ala.—Abercrombie v. Conner, 10 Ala. 293.
23 C.J. p 665 note 39.

53. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.
Pa.—Cutler Lumber Co. v. Adsit, 33 Pa.Co. 225.

54. Mo.—Hicks v. Perry, 7 Mo. 346.

55. Ky.—Stark v. Mitchel, 2 A.K. Marsh. 15.

56. Tex.—Driscoll v. Morris, 21 S. W. 629, 2 Tex.Civ.App. 603.

57. Ind.—Stumph v. Reger, 92 Ind. 286.

58. Idaho.—Evans v. Power County, 1 P.2d 614, 50 Idaho 690.

Want of authority in purchaser

Want of authority of trustee of municipal corporations, who purchased at execution sale with money belonging to such corporations, is not cause for complaint by the debtor's assignee, since the law raises a resulting trust in favor of the municipal corporations and the sale

is such that he may successfully defend an action brought for its recovery,[59] as where he purchased the property prior to the rendition of the judgment under which the execution issued,[60] or after it had ceased to be a lien thereon.[61] In other jurisdictions under a statute authorizing any person interested in the real estate to move to set aside an execution sale thereof, a purchaser from the execution debtor of property subsequently sold at execution sale and which was exempt from the lien of the judgment may move to set aside the sale.[62] A purchaser from the execution debtor of land subject to the lien of the judgment, which land was afterward sold under such judgment, cannot set aside the execution sale on the ground that the execution defendant had, at the time, other lands and personalty sufficient to satisfy the execution.[63]

An assignee of the rights of the debtor, interested in the surplus obtained on the sale, may move to set it aside.[64]

c. Execution Creditor

The execution creditor may move to vacate the sale for some irregularity, misconduct, or mistake prejudicial to his interests.

Under some circumstances an execution creditor may have the sale vacated on account of some irregularity, misconduct, or mistake resulting in a sale for an inadequate price, or in a sale of property not belonging to the debtor, thus leaving his judgment wholly or partially unsatisfied.[65] However, the creditor is not in a position to deny the validity of the writ, as a ground for setting aside the sale,[66] nor can he attack the sale on the ground that the property sold in reality belonged to him.[67]

d. Execution Purchaser

The purchaser at an execution sale may move to vacate the sale on account of irregularities which cause a failure in his title, or for any other reason rendering it unconscionable to enforce his bid.

The purchaser at an execution sale may move to vacate the sale on account of such irregularities in the proceedings as to fail to give him a title, or for any other reason rendering it unconscionable to enforce his bid.[68] However, the purchaser cannot have the sale set aside because of want of title of the debtor, where he knew of the defect in the title at the time of his purchase.[69] If the property is resold on failure to pay the bid, the first purchaser can avail himself of any irregularity in the second sale.[70]

e. Other Lien Creditors

Judgment and execution creditors of the execution debtor may question the validity of an execution sale, provided they suffer injury as a result of the sale.

Judgment and execution creditors undoubtedly have such an interest in the property of their debtor as will entitle them, on sufficient grounds, to question the validity of an execution sale thereof.[71] However, where the ground of objection is merely that the execution was irregular, or that there were irregularities in the conduct of the officer, a motion to vacate the sale cannot be made by plaintiff in another execution,[72] or by another judgment creditor,[73] the rule, as appears in subdivision a of this section supra, being that mere irregularities can ordinarily be attacked only by the execution debtor. If the sale is valid as against the debtor, it is also valid as against his creditors.[74]

In any event, a creditor cannot move to set aside the sale unless he has been injured or lost some advantage thereby;[75] and hence subsequent judgment creditors cannot ordinarily attack the sale.[76] However, junior lien creditors may attack the sale where, by reason of irregularities, the property has brought less than it would have brought at a fair sale.[77]

Mortgagee. A senior mortgagee may not have an execution sale vacated, since his lien is prior to the

is not invalid.—Evans v. Power County, supra.

59. Ala.—Sheffey v. Davis, 60 Ala. 548—Nuckols v. Mahone, 15 Ala. 212.

60. Ala.—McLaughlin v. Bradford, 2 So. 515, 82 Ala. 431.

61. Ala.—Shaw v. Lindsay, 46 Ala. 290.

62. Iowa.—Dorsey v. Bentzinger, 226 N.W. 52, 209 Iowa 883.

63. S.C.—Longworth v. Screven, 20 S.C.L. 293, 27 Am.D. 381.

64. Tex.—Flanagan v. Pearson, 50 Tex. 383.

65. Ky.—Bent v. Maupin, 5 S.W. 425, 86 Ky. 271, 9 Ky.L. 469.
23 C.J. p 666 note 43.

66. Pa.—Smith v. Waynesburg Exch. Bank, 1 A. 760, 110 Pa. 508.

67. La.—McIlhenny v. Barbin, 15 La.Ann. 548.

68. Ky.—Budnick v. Hogg, 294 S. W. 482, 219 Ky. 775.
Or.—Miller v. Achurch, 93 P. 332, 50 Or. 478.
23 C.J. p 666 note 46.

69. Ala.—Nearen v. Farrow, 41 So. 421, 146 Ala. 623.
Caveat emptor see supra § 221.

70. La.—Drouet v. Rice, 2 Rob. 374.

71. Pa.—Tigue v. Banta, 35 A. 131, 176 Pa. 414, reversing 8 Kulp 65.
23 C.J. p 666 note 49.

72. Ind.—Johnson v. Murray, 13 N. E. 273, 112 Ind. 154, 2 Am.S.R. 174.
23 C.J. p 666 note 50.

73. Ind.—Hollcraft v. Douglass, 17 N.E. 275, 115 Ind. 139.

74. Vt.—Wood v. Doane, 20 Vt. 612.

75. La.—Wederstrandt v. Marsh, 11 Rob. 533.

76. S.C.—State v. Yongue, 40 S.C.L. 323.
23 C.J. p 666 note 55.

77. Tex.—Cravens v. Wilson, 48 Tex. 324.

rights of the persons claiming under the sale.[78] It has also been held that the court will not interfere on the application of a junior mortgagee,[79] although there is authority to the contrary.[80]

A pledgee of corporate stock may attack a sheriff's sale of the property of the corporation.[81]

§ 228. —— Waiver and Estoppel

a. In general
b. Execution debtor
c. Execution creditor
d. Purchaser
e. Third persons

a. In General

A person may waive formalities required in the conduct of an execution sale or be estopped by his conduct from attacking its validity.

The rule is well recognized that the formalities required to be observed in the conduct of execution sales are designed for the protection and benefit of those interested in the property and its proceeds, and may be waived by their common consent.[82] A person may, by his acquiescence in a sheriff's sale, his participation in or ratification of acts of irregularity, or by the acceptance of the benefits of such sale with knowledge that it was not properly conducted, be estopped from afterward asking to have it vacated either by motion or by a suit in equity;[83] and parties acquiescing in the setting aside of the sale and ordering a resale are bound thereby.[84]

There is no waiver or estoppel, however, unless all the elements necessary to create a waiver or an estoppel in pais are present.[85] Thus a motion to set aside the sale will not be denied on the ground that the moving party is estopped from questioning the validity of the sale, where it is not shown that he knew his rights at the time when he did the acts relied on to constitute a waiver or estoppel.[86]

b. Execution Debtor

The execution debtor may be estopped by his conduct from attacking the validity of the sale, as where he participates therein, or assents thereto, or fails to object when he should.

The execution debtor may be estopped by his conduct from attacking the sale,[87] as where he participates in, or has knowledge of and assents to, irreg-

78. Ind.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

79. Pa.—Soloman v. Parnell, 2 Miles 264.

80. Ind.—Stotsenburg v. Stotsenburg, 75 Ind. 538.

On tendering amount of judgment

A mortgagee whose mortgage is junior to the judgment on which the execution issued may, on tendering the amount of the judgment, have the sale set aside by a court of equity on the ground that it was made for an inadequate consideration.—James v. Markham, 58 S.E. 917, 128 N.C. 380.

81. Pa.—Chester Pipe & Tube Co. v. Saltsburg Gas Co., 8 Pa.Dist. 427.

82. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.

23 C.J. p 666 note 61.

Estoppel to attack judicial sale generally see Estoppel § 92.

83. La.—Jones v. Scott, App., 167 So. 117.

Philippine.—Muyco v. Montilla, 7 Philippine 498.

23 C.J. p 666 note 62.

84. Or.—Miller v. Achurch, 93 P. 332, 50 Or. 478.

85. Ala.—White v. Hogland, 96 So. 625, 209 Ala. 537.

23 C.J. p 667 note 64.

Failure to notify accommodation maker of principal's default

Woman, inexperienced in business and without knowledge of her legal duty, is entitled to expect that one, whose note she signed as accommodation maker, and payee bank or its agents, knowing such fact, would advise her of principal's default and necessity of her paying note, before levying attachment on her property and selling it in execution of judgment of foreclosure.—Citizens' State Bank v. McRoberts, 239 P. 1028, 29 Ariz. 173.

86. La.—Jones v. Alford, App., 172 So. 213.

23 C.J. p 667 note 65.

87. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.

Okl.—Yeldell v. Bank of Elmer, 221 P. 422, 96 Okl. 184.

Pa.—Goodyear Service v. Moore, 184 A. 116, 321 Pa. 320.

23 C.J. p 667 note 66.

Facts constituting waiver or estoppel

(1) Stipulation by defendant with plaintiff that court might overrule his motion to set aside judgment and recall execution, and that, if he failed to pay judgment within time stipulated, plaintiff might proceed as advised waived objections to validity of sale made after defendant failed to pay as agreed.—McClelland v. Leahy, 227 P. 549, 75 Colo. 542.

(2) Where sheriff sold more land than necessary, and the debtor, not using ordinary diligence for more than a year to discover this fact, induced defendant to purchase the land so sold from the assignee of the execution purchaser, he is estopped from asserting a claim with or against such purchaser.—Burford v. Burford, 4 Ky.Op. 463.

(3) Judgment debtor negotiating sale of portion of judgment remaining unpaid after sheriff's sale for creditor, in order to release judgment lien on debtors' other land, is estopped from setting aside sheriff's sale.—McGlothlin v. Scott, Tex.Com. App., 48 S.W.2d 610, affirming Scott v. McGlothlin, Civ.App., 30 S.W.2d 511.

(4) Other cases see 23 C.J. p 667 note 66 [a].

Facts not constituting waiver or estoppel

(1) Judgment defendant's delay of four years after the sale in suing to set it aside did not create estoppel as against subsequent purchaser, where it was disputed that she waited any considerable time after knowing of sale.—Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

(2) Partners not served and not appearing, in action brought against partnership as corporation, is not estopped from suing in trover against purchaser at execution sale. —McGeorge v. Danforth, Mo.App., 39 S.W.2d 565.

(3) Where, in an action to set aside a sheriff's deed as a cloud on plaintiff's title, on the ground that judgment on which execution was issued had been paid, and there was no showing that plaintiff by any

ularities in the conduct of the sale,[88] or bids on[89] or purchases[90] the property at the sale. Provisions for the benefit of the debtor, relating to the writ, levy, or sale, may ordinarily be waived by him,[91] unless he is in failing circumstances,[92] as by failure to object to a sale en masse.[93] A change in the terms of the sale more favorable to the debtor will be presumed to have been made at his instance, and he is estopped from contesting it.[94] Objections may be waived by failure to move to quash the writ,[95] or, in some states, by failure to object to the confirmation of the sale.[96]

Surrender of possession by the debtor does not estop him to attack a void sale.[97] There is no estoppel to deny the validity of the execution merely because of a prior motion before the sale to stay the levy and sale on other grounds;[98] but it has been held that successive applications to stay execution on grounds not impeaching the judgment preclude setting aside the sale for defects in the judgment.[99] An attempt to redeem the property has been held not to estop the execution defendant from attacking the validity of the sale where it does not appear that the purchaser has taken a position or done anything he would not have done had the debtor not attempted to redeem,[1] or where it did not prejudice the execution creditor,[2] or where the proceedings are void for want of jurisdiction.[3] The fact that the execution debtor pays the balance of the judgment after crediting the amount realized from the execution sale does not estop him from attacking the sale.[4]

Inducing party to purchase. Where the judgment debtor has induced a party to become a purchaser at a sale of his property under execution, he is estopped to set up the invalidity of the judgment on which such execution issued,[5] or a mistake in the notice of sale,[6] or irregularity because of failure

act intended that defendant should act on his conduct or representations, plaintiff, although not present at execution sale, was not estopped to claim that it was void.—Geanakapulas v. Zographos, 208 P. 585, 104 Or. 430.

(4) Other cases.—Highland Trust Co. v. Hamilton, 181 A. 825, 134 Me. 64—23 C.J. p 667 note 66 [b].

Inaction

(1) Owner of realty who did not know that realty was being sold at execution sale was not estopped to attack validity of execution sale by failure to take steps to prevent sale at time thereof.—Jones v. Alford, La.App., 172 So. 213.

(2) Where judgment debtors given only twenty-four hours' notice to appoint appraiser before sheriff's sale made no appointment, they did not waive their right to two days' notice.—Mulling v. Jones, 97 So. 202, 153 La. 1091.

88. Ga.—Alley v. Gormley, 133 S.E. 787, 161 Ga. 650.
La.—Jones v. Scott, App., 167 So. 117.
23 C.J. p 667 note 67.

Act constituting waiver or estoppel

Formality of service of notice of seizure on judgment debtor prior to sale is waived by his acceptance of the property from the sheriff as "custodian" thereof.—Jones v. Scott, La.App., 167 So. 117.

89. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.

90. Tex.—Clements v. Texas Co., Civ.App., 273 S.W. 993.

Right of heirs to object

When debtor, whose land was up for execution sale, bought it on twelve-month bond, thus waiving irregularities prior to execution, and others have acted on his decision, his heirs and privies could not raise against execution questions ancestor had waived.—Clements v. Texas Co., supra.

91. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.
23 C.J. p 668 note 68.

Provision that property be in view at sale

(1) To effect waiver of statute requiring that, at time of sale under execution, personalty must be present and in view of people attending sale, waiver must be given by judgment debtor for whose benefit statute was enacted and not by the judgment creditor.—Stoner v. Oneida Motor Car Co., 275 N.Y.S. 426, 154 Misc. 97.

(2) Judgment debtor who, shortly before execution sale of furniture in apartment house, removed some of attached property and ordered all tenants of house to keep their doors locked, waived right to object that property was not within view of those attending sale as required by statute, especially where his attorney stated to officer making sale that there was no way of getting to property, and that it might be sold just as it was.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.

92. La.—Hilligsberg's Succ., 1 La. Ann. 340.

93. Ark.—Reynolds v. Tenant, 9 S.W. 857, 51 Ark. 84.
23 C.J. p 668 note 70.

94. La.—Nicholls v. Mercier, 15 La. Ann. 370.

95. Or.—Leinenweber v. Brown, 34 P. 475, 38 P. 4, 24 Or. 548.

96. Or.—Crim v. Thompson, 229 P. 916, 112 Or. 399.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400.
23 C.J. p 668 note 72.

97. Iowa.—O'Brien v. Harrison, 12 N.W. 256, 13 N.W. 764, 59 Iowa 686.
23 C.J. p 668 note 77.

98. Ill.—Weaver v. Peasley, 45 N.E. 119, 163 Ill. 251, 54 Am.S.R. 469.

99. Pa.—Lehman v. Tammany, 7 Kulp 235.

1. La.—Jones v. Alford, App., 172 So. 213.

Without knowledge of sale

Property owner who attempted to repurchase property from judgment creditor without knowledge that property had been sold at public sale and purchased by judgment creditor, but in belief that property had been taken by judgment creditor for payment of debt, is not estopped to attack the validity of the sale.—Jones v. Alford, supra.

2. Iowa.—Manion v. Brady, 138 N.W. 558, 158 Iowa 306.

However, it has been held that the vendee of the execution defendant by attempting to redeem from the sale admits that the sale was valid, and that the land was subject to the judgment.—Thayer v. Coldren, 10 N.W. 390, 57 Iowa 110.

3. Kan.—Duncan v. Benton & Hopkins Inv. Co., 172 P. 523, 102 Kan. 725.

4. Wash.—Daniel v. Gold Hill Min. Co., 68 P. 884, 28 Wash. 411.

5. Ill.—Hill v. Blackwelder, 113 Ill. 283.

6. Ind.—McClure v. McCormick, 5 Blackf. 129.

to sell in parcels,[7] or otherwise question the validity of the sale.[8]

Acceptance of surplus. A judgment debtor who accepts the surplus realized from the sale of his property on execution and retains it with knowledge of defects which would render the sale voidable is estopped to attack the sale.[9]

Where judgment is dormant or void. An execution debtor whose property is sold under a dormant or void judgment is not estopped from asserting title to the property, as against the holder of a sheriff's deed, merely because he failed to take steps to arrest the sale under such dormant or void judgment.[10] His presence at the sale, without objection, is no estoppel where he did not know that the judgment was dormant.[11]

c. Execution Creditor

The execution creditor cannot ratify a void sale, but he may be estopped to attack the validity of the sale.

The execution creditor cannot ratify a void sale;[12] but he may be estopped to attack the validity of the sale.[13] When not transcending the mandate of his writ, the sheriff may be considered in some degree as the judgment creditor's agent, and the latter is as a rule estopped from assailing the validity of a sale made by virtue of such writ.[14] Where the execution creditor receives from the sheriff the proceeds of an execution sale, with full knowledge of the manner of its conduct, and without making any objection to the sale, he is thereafter estopped from attacking its validity.[15] However, the silence of an agent of the creditor is no waiver of objection to the goods being sold in too large parcels.[16]

The creditor is not estopped to set up the purchaser's want of capacity to take the title,[17] or a fraudulent purchase by one in reality his agent;[18] nor is the creditor, where he first protested against the sale, estopped from contesting its validity by subsequently bidding thereat.[19] A waiver by defendant will not prevent his creditors who were prejudiced by an irregularity from avoiding or vacating the sale by appropriate method.[20]

d. Purchaser

A purchaser at an execution sale may be estopped to deny the validity of the sale.

A purchaser at an execution sale may be thereafter estopped from denying the validity of the sale,[21] as where he executes a sale bond,[22] or obtains a deed, takes possession, and conveys by warranty deed.[23] He cannot have the sale set aside on the ground that the title to the property sold was in himself or in a third person.[24]

A defaulting bidder at a first sale is not estopped to contest the validity of a resale for defects in the notice of sale which existed at the first sale at which he bid.[25] A chattel mortgagee, who bids in the equity of redemption at an execution sale, is not estopped to deny the validity of such sale, especially where the sale is void.[26]

7. Ky.—Williamson v. Logan, 1 B. Mon. 237.

8. Mo.—Carter v. Shotwell, 42 Mo. App. 663.
23 C.J. p 668 note 83.

9. Ga.—Gibbs v. Gibbs, 108 S.E. 214, 151 Ga. 745.
Mont.—Bury v. Bury, 223 P. 502, 69 Mont. 570.
23 C.J. p 668 note 84.

Purchase bond
Execution debtor which accepted and collected major portion of bond executed by purchaser at execution sale adopted sale which was of no effect because of encumbrance existing on property sold.—Commodari v. Hart-Commodari Const. Co., 91 S.W.2d 8, 262 Ky. 774.

10. N.C.—McCauley v. Williams, 80 S.E. 345, 122 N.C. 293.
23 C.J. p 668 note 85.

Agreed order as judgment for costs
An agreed order entered in an election contest stating that by agreement contestant dismissed action at his cost was not a "judgment for costs" on which an execution could issue, and contestant was not "estopped" to question the proceedings and to assert the invalidity of a sheriff's sale to collect an execution levied on his property.—Deskins v. Coleman, 151 S.W.2d 751, 286 Ky. 624.

11. Ala.—Herzberg v. Hollis, 24 So. 842, 119 Ala. 496.

12. Pa.—Diese v. Yerger, 6 Phila. 207.
23 C.J. p 668 note 87.

13. Mo.—Mahen v. Ruhr, 240 S.W. 164, 293 Mo. 500.
23 C.J. p 668 note 88.

14. Ga.—Lynn v. New England Mortg. Sec. Co., 26 S.E. 750, 98 Ga. 442.
23 C.J. p 669 note 89.

15. Mo.—Clelland v. Clelland, 235 S. W. 816, 291 Mo. 312.
23 C.J. p 669 note 91.

Receipt by attorney
A judgment creditor, whose attorney caused execution to be levied and defendant's land sold and received and retained the sheriff's check for the net proceeds, is estopped to question the validity of the sale.—Clelland v. Clelland, supra.

16. N.Y.—Wyman v. Hart, 12 How. Pr. 122.

17. U.S.—Russell v. Topping, C.C. Ill., 21 F.Cas.No.12,163, 5 McLean 194.

18. Mo.—Mahen v. Ruhr, 240 S.W. 164, 293 Mo. 500.

19. La.—Blomenstiel v. Tridico, App., 149 So. 912, rehearing refused 152 So. 79.

20. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

21. Ga.—Wall Lumber Co. v. Lott-Lewis Co., 63 S.E. 637, 5 Ga.App. 604.
23 C.J. p 669 note 93.

22. La.—Coons v. Graham, 12 Rob. 206—Jones v. Frellsen, 9 Rob. 186.

23. Neb.—Storz Brewing Co. v. Hansen, 132 N.W. 122, 89 Neb. 685.

24. N.C.—Islay v. Stewart, 20 N.C. 160.

25. Pa.—Connell v. Hughes, 1 Phila. 225.

26. N.C.—Rowland Hardware & Supply Co. v. Lewis, 92 S.E. 13, 173 N.C. 290.

e. Third Persons

A lienor or claimant to property sold under execution may be estopped from attacking the validity of the sale, as where he accepts the proceeds of the sale or a part thereof, or stands by without objection and sees the property sold.

A lienor or claimant to property sold under execution may by his acts or his acquiescence in the sale be estopped from attacking its validity,[27] as where he accepts the proceeds of the sale or a part thereof.[28] However, one who is in no sense a party to the record or execution sale is not estopped from attacking its validity, merely because he has derived some collateral and incidental benefit therefrom.[29]

Although there is authority to the contrary,[30] it has been held that a person cannot stand by without objection and see his property sold at execution sale as that of another without being estopped thereafter to assert his title.[31] However, to create such an estoppel it is essential that the purchaser shall have been misled by the owner's silence, and that he shall have been induced thereby to make the purchase.[32] The fact that the owner bid at a protested sale will not estop him from asserting title to the property;[33] nor will the failure to object estop one who seeks recovery from the sheriff to whom he had made a specific claim of title before the sale;[34] nor will the giving to the sheriff of an indemnifying bond by the purchaser estop the true owner who claimed the property at the time of the sale from later claiming it.[35] Knowledge by the owner that his property has been levied on as the property of another cannot, without more, authorize a finding that he consented to the sale at which he was not present, and he is therefore not estopped from thereafter asserting title against the purchaser.[36] The failure to file a claim,[37] or the withdrawal of a claim to land levied on,[38] and permitting the sale to take place, does not estop the claimant from afterwards asserting his title to the property levied on and sold, where the claimant does nothing else to induce the purchaser to buy or to entrap him.

The failure of remaindermen to object within a reasonable time to the purchase of the property on execution sale by the life tenant and executor of the estate in his individual capacity will prevent their claiming an interest therein.[39]

A surety on a stay of execution is not estopped to show that the judgment recited is a nullity;[40] and a surety on a delivery bond which merely binds the obligor to have the property or its value forthcoming for the satisfaction of the judgment is not estopped to assert a right in himself to the property and show that it should not be used to satisfy the judgment.[41]

§ 229. Presumption of Validity

In the absence of proof to the contrary, which must be clear and satisfactory, it will be presumed, except as to those things which the law requires to be recorded, that the requirements of the law were complied with in respect of an execution sale and the proceedings in connection therewith.

It is necessary for a purchaser relying on a sheriff's deed to show those things which the law requires to be recorded.[42] All other matters will be presumed.[43] In the absence of proof to the contrary, which must be clear and satisfactory,[44] the

27. S.D.—McDowell v. Jameson, 184 N.W. 251, 44 S.D. 480.
23 C.J. p 669 note 99.

Estoppel by laches

In an action by the assignee of a mortgagee of certain mining claims to foreclose the mortgage thereon and determine adverse claims of title to the property, defendant basing its claim of title on execution sale under judgments, plaintiff assignee and the successor in interest of the former owner of the property held estopped by their laches from maintaining the action, having stood by while extensive permanent improvements were made on the property.—McDowell v. Jameson, supra.

Acts not constituting estoppel

(1) Where property sold under conditional sales contract was removed without owner's consent to another state, attached and sold under execution sale before expiration of ten days after notice to seller of removal, fact that owner allowed it to remain in county to which it had been removed for thirty days after knowledge of its removal did not validate such attachment.—Bradshaw v. Kleiber Motor Truck Co., 241 P. 305, 29 Ariz. 293.

(2) Other cases see 23 C.J. p 669 note 99 [b].

28. Pa.—Bowman v. Hoke, 30 Pa. Super. 633.
23 C.J. p 669 note 1.

29. Mo.—Shotwell v. Munroe, 42 Mo.App. 669.

30. N.J.—Brady v. Carteret Realty Co., 60 A. 938, 67 N.J.Eq. 641, 110 Am.S.R. 502, affirming 57 A. 814, 66 N.J.Eq. 243.

31. Ala.—White v. Hogland, 96 So. 625, 209 Ala. 537.
23 C.J. p 670 note 3.

32. Ala.—White v. Hogland, supra.

33. Kan.—Kemmerle v. Wilson, 203 P. 297, 110 Kan. 247.

34. Mich.—Turner v. Rosema, 268 N.W. 757, 276 Mich. 620.

35. Mo.—Rookery Realty, Loan, Inv. & Bldg. Co. v. Johnson, 243 S.W. 123, 294 Mo. 461.

36. Ga.—Singer Sewing Mach. Co. v. Wardlaw, 116 S.E. 207, 29 Ga. App. 626.

37. Ga.—Lawless v. Orr, 50 S.E. 85, 122 Ga. 276.

38. Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
23 C.J. p 669 note 99 [b] (2).

39. Ga.—Fowler v. Blackstock, 112 S.E. 893, 153 Ga. 706.

40. N.C.—Hamilton v. Parrish, 12 N.C. 415.

41. Ark.—Applewhite v. Harrell Mill Co., 5 S.W. 292, 49 Ark. 279.
23 C.J. p 670 note 6.

42. Tenn.—Siler v. Siler, 277 S.W. 896, 152 Tenn. 379.

43. Tenn.—Siler v. Siler, supra.

44. Iowa.—Iowa Loan Co. v. O'Connell, 116 N.W. 137, 138 Iowa 361.
23 C.J. p 661 note 63.

courts will as a general rule indulge all presumptions in favor of the regularity of the judgment, execution, and levy on which an execution sale was founded, and of all proceedings in connection with the sale;[45] and the execution purchaser is not affected by matters subsequent to the sale arising between parties to the judgment to which he is a stranger.[46] Thus, in the absence of contrary evidence, it will be presumed that the law was complied with in respect of the order of offering the property for sale,[47] the levy,[48] the interest sold,[49] the time of the issuance of the writ,[50] notice,[51] the time of the levy, see supra § 93, and the time of the sale, see supra § 208.

On the other hand, it has been held that it will not be presumed that leave of court to issue the execution, as required by statute, was granted,[52] although there is authority to the contrary.[53] The validity of the sale will not be presumed where the fact that the sale was in violation of a statute is apparent on the face of the record through which the title is claimed.[54] There is no presumption in favor of the regularity of the sale of property of a third person.[55] It has been held that one asserting the existence of a judgment lien to support an execution sale under a judgment, the lien of which lapses at the expiration of a certain time from the date the judgment is docketed, has the burden of proving as against a purchaser of the property for value that the execution was issued within the time required after the docketing of the judgment.[56]

Second execution for same amount. In attacking the validity of a sheriff's deed, the circumstance that a second execution issued years after the registration of the sheriff's deed for the same amount as the first, if it is any evidence, is not conclusive that there was no previous sale or avails under it.[57]

B. OPENING OR VACATING, AND COLLATERAL ATTACK

§ 230. Grounds for Opening or Vacating in General

The usual grounds for setting aside an execution sale, where there is resulting injury or prejudice, are fraud, mistake, and irregularity.

The general policy of the law is to sustain execution sales,[58] and such a sale cannot be set aside except for some good and sufficient reason,[59] which

45. N.J.—Scott v. Wuest, 122 A. 241, 98 N.J.Law 572.
Philippine.—Muyco v. Montilla, 7 Philippine 498.
23 C.J. p 660 note 52.

Legal appraisement

Legal appraisement of property seized under execution will be presumed if sheriff's return shows that property was sold after appraisal.—Jones v. Alford, La.App., 172 So. 213.

Evidence of procedure followed under other executions

In trespass to try title, evidence justified a finding that the sheriff in making the levy and sale pursued the same method as the records disclosed was followed by him in making levy and sale under other executions issued at the same time, and that before the expiration of the writ of execution a venditioni exponas was obtained, notwithstanding the execution docket failed to show such fact, and all the files in the case were lost.—Ludtke v. Bankers' Trust Co., Tex.Civ.App., 251 S.W. 600.

46. Mo.—McClintock v. Kansas City Cent. Bank, 24 S.W. 1052, 120 Mo. 127.
N.Y.—Jackson v. Bartlett, 8 Johns. 361.

47. N.C.—Corey v. Fowle, 76 S.E. 734, 161 N.C. 187.
23 C.J. p 661 note 54.
Order of offering property for sale see supra § 205.

48. Ky.—White v. Laurel Land Co., 82 S.W. 571, 26 Ky.L. 775, 83 S.W. 628, 26 Ky.L. 1235.
Levy generally see supra §§ 88–122.
Presumption of levy upon land because no chattels found see supra § 100.

49. Ind.—Currier v. Elliott, 39 N.E. 554, 141 Ind. 394.
23 C.J. p 661 note 56.

50. Iowa.—Iowa Loan Co. v. O'Connell, 116 N.W. 137, 138 Iowa 361.
23 C.J. p 661 note 57.
Time of issuance generally see supra § 66.

51. Tenn.—Siler v. Siler, 277 S.W. 886, 152 Tenn. 379.

52. Mo.—Rollins v. McIntire, 87 Mo. 496.
Leave of court to issue execution generally see supra § 59.

53. S.D.—Schroeder v. Pehling, 108 N.W. 252, 20 S.D. 642, 129 Am.S.R. 952.

54. Ind.—Piel v. Brayer, 30 Ind. 332, 95 Am.D. 699.

55. Ky.—Spears v. Weddington, 142 S.W. 679, 146 Ky. 434.

56. Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093.

57. Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.

58. Ariz.—Young Mines Co. v. Sevringhaus, 298 P. 628, 38 Ariz. 160.
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.
Presumption of validity of sale see supra § 229.

59. Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.
Minn.—Ridgway v. Mirkovich, 260 N.W. 303, 194 Minn. 216.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 672, 74 Mont. 355, quoting **Corpus Juris.**
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
23 C.J. p 670 note 8.

Insufficient reasons

(1) Lack of confirmation of the sale.—Finch, Van Slyck & McConville v. Jackson, supra—Warren v. Stinson, 70 N.W. 279, 6 N.D. 293.

(2) Misappropriation or misapplication of the proceeds of the sale.
Mich.—Flynn v. Kalamazoo Cir. Judge, 98 N.W. 740, 136 Mich. 23.
N.C.—Statesville Bank v. Graham, 82 N.C. 489.
23 C.J. p 670 note 13.

exists in fact,[60] but may be set aside for about the same reasons that judicial sales, in the strict meaning of the term, may be set aside.[61] Comprehensively stated, the grounds on which an execution sale may be set aside, where there is resulting injury or prejudice, are fraud, mistake, and irregularity;[62] but, as appears hereinafter in this section and in §§ 231, 232, an irregularity preceding the sale is accorded less favor as a ground for setting aside the sale than one in, or directly connected with, the sale itself, and, in either case, an irregularity, to be ground for setting aside the sale, must be prejudicial and not merely technical.

As dependent on who is purchaser. A sale may be set aside where the purchaser is one chargeable with notice of the objection relied on, even though it would not be set aside if the purchaser were one in good faith and without notice.[63]

Matters connected with judgment. A motion to set aside the sale does not permit of an inquiry into supposed errors or irregularities involved in the rendition, entry, or amendment of the judgment.[64] The fact that a judgment is liable to reversal or error does not invalidate an execution sale thereunder made while the judgment is still in force,[65] and the filing of a bill to set aside such judgment is no ground for a motion to set the sale aside.[66] However, if the judgment is set aside, the sale should be set aside where the deed has not been delivered.[67] A sale under a void judgment will be set aside,[68] as will also a sale under a judgment which has been satisfied.[69]

It has been held that the reversal, after the sale, of the judgment on which the execution issued gives to defendant in execution the right to have the sale set aside if within a reasonable time he so elects, and if no equitable considerations interfere with the exercise of such right;[70] and that, where the judgment creditor is the purchaser, the sale will be set aside on reversal of a judgment in his favor.[71] On the other hand, it has been held that the fact that the execution plaintiff and the purchaser knew that defendant intended to appeal is not sufficient, on reversal of the judgment, to set aside the sale, where the supersedeas bond was filed before the price was paid, but was not accepted until thereafter;[72] and that, where plaintiff recovers a second time on a new trial after reversal, the sale will be set aside only on condition that the judgment rendered on the second trial be paid.[73]

A reduction of the amount of the judgment on appeal is not ground on behalf of the execution creditor who became the purchaser;[74] and treating a remittitur as a credit on the judgment, instead of entering a new judgment, is not ground for setting aside the sale.[75]

Mistake or surprise. Mistake or surprise in connection with the sale, which results in injury, may be ground for setting aside the sale;[76] but the mistake must be of the kind which would warrant judicial relief[77] and not be the result of the negligence of the moving party.[78] It has been held proper to set aside a sale where there has been a mistake as to the title to the property sold,[79] or as to its identity,[80] or as to prior encumbrances on the property,[81]

(3) Other reasons see Federal Deposit Ins. Corporation v. King, 30 Del.Co., Pa., 541.

60. U.S.—Norton v. Walton, C.C.A. La., 288 F. 359.
La.—Scott v. Gordon, 168 So. 134, 184 La. 1017.
Minn.—Ridgway v. Mirkovich, 260 N.W. 303, 194 Minn. 216.

61. Mo.—State v. Innes, 118 S.W. 1168, 137 Mo.App. 420.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 672, 74 Mont. 355, quoting **Corpus Juris.**

62. Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, supra, quoting **Corpus Juris.**
23 C.J. p 670 note 10.

Voluntary cancellation on same grounds
Parties to illegal execution sale may voluntarily cancel sale under circumstances under which a court of equity would decree a cancellation.—Holbrook v. Stewart, 191 S.E. 165, 55 Ga.App. 720.

63. Ind.—Richey v. Merritt, 9 N.E. 368, 108 Ind. 347.
23 C.J. p 670 note 17.

64. Ariz.—Smith v. Arizona Engineering Co., 193 P. 303, 21 Ariz. 624.
23 C.J. p 671 note 18.

65. Pa.—Jermon v. Lyon, 81 Pa. 107.

66. Ill.—Grundy County Nat. Bank v. Rullson, 61 Ill.App. 388.

67. Pa.—Stephens v. Stephens, 1 Phila. 108.

68. Ind.—Ferrier v. Deutchman, 12 N.E. 497, 111 Ind. 330.

69. Or.—Gobbi v. Refrano, 52 P. 761, 33 Or. 26.
23 C.J. p 670 note 12.

70. Ill.—Puterbaugh v. Moss, 11 N. E. 197.

71. Ky.—Ferguson v. Cabell, 133 S. W. 539, 141 Ky. 499.

72. Ala.—Anderson v. Whitaker, 15 So. 910, 103 Ala. 658.

73. N.Y.—Winterson v. Hitchings, 34 N.Y.S. 188, 13 Misc. 201, 25 N. Y.Civ.Proc. 1.

74. Ky.—Hegan v. Louisville Bldg. Assoc., 58 S.W. 804, 22 Ky.L. 884.

75. Ill.—Mayne v. Drury, 129 N.E. 77, 295 Ill. 533.

76. Ohio.—Wheeler v. Lorenz, 153 N.E. 195, 21 Ohio App. 218.
23 C.J. p 671 note 31.

77. Minn.—Ridgway v. Mirkevich, 260 N.W. 303, 194 Minn. 216.

78. Or.—Churchill v. Meade, 182 P. 368, 92 Or. 626.
23 C.J. p 671 note 32.

79. Ind.—Weaver v. Guyer, 59 Ind. 195.
23 C.J. p 671 note 33.

Mistake as to rights of parties in and to property
Pa.—Gaumer v. Mahanoy Mfg. Co., 7 Sch.Reg. 300.

80. Iowa.—Parks v. Davis, 16 Iowa 20.
23 C.J. p 671 note 34.

81. Pa.—Cumming's Appeal, 23 Pa. 509.
23 C.J. p 671 note 35.

or as to the application of the proceeds.[82]

§ 231. Defects or Irregularities in Writ or Levy

An execution sale will not be set aside for defects or irregularities in the execution or levy, unless they are of such a character as to render the writ or levy void.

The courts as a rule will refuse a motion to set aside an execution sale for mere irregularities, as shown by the record, in the execution or levy where the proceedings were not fraudulent or void, and the court rendering the judgment had jurisdiction over the parties and the subject matter, particularly where no injury appears as to any of the parties interested[83] or where the sale has been validated or legalized by statute.[84]

On the other hand, the sale may be set aside where the writ under which the levy is made is so defective as to render it void,[85] as where the description of the land levied on is so indefinite that it cannot be located,[86] or where the execution was not authorized by the judgment on which it purported to be issued,[87] or where the writ was prematurely returned,[88] or where the levy was in violation of law.[89]

If one or more, but not all, of the writs under which the sale is made are void, the sale cannot be set aside,[90] although it has held that, in such case, the sale, although not invalid, is voidable on seasonable application.[91]

Absence of a seal on the writ under which the sale was made is or is not ground for holding the sale void and setting it aside accordingly as the lack of the seal does[92] or does not[93] render the writ void.

Excessive execution or levy. An execution sale is not necessarily invalid because the execution was issued for an amount in excess of what was due on the judgment, or because of failure to make a credit on the judgment, where there has been no fraud or want of good faith; and the court will not set aside the sale because of such irregularity.[94]

Irregular or incorrect appraisement. The sale may be set aside where the appraisement was not according to law;[95] but an incorrect appraisement is ground for setting aside the sale only where it is the product of fraud, or unfairness, or mistake other than one arising merely from an erroneous opinion as to value.[96]

Lack of notice. Failure to serve the execution on the execution debtor or to give him notice of the execution or levy is not ground for setting aside the sale,[97] except where the land levied on is situated in a county other than the one in which defendant resides and the judgment was rendered, and a statute requires written notice in such case.[98] Where the judgment creditor, who was the purchaser at the execution sale, had neither actual nor constructive notice of the prior transfer of the stock levied on, his failure to give notice of the levy to the transferee does not warrant the setting aside of the sale.[99]

82. Iowa.—Bay v. Harnett, 12 N.W. 336, 58 Iowa 344.

83. Ind.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Ind. 190.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 672, 74 Mont. 355, citing **Corpus Juris.**
Or.—Armstrong v. Travis, 192 P. 649, 97 Or. 587.
23 C.J. p 672 note 37.

Premature issuance of writ
La.—Alfano v. Franek, 105 So. 598, 159 La. 498.

84. Iowa.—Francis v. Todd & Kraft Co., 259 N.W. 249, 219 Iowa 672.

85. Ark.—Meeks v. Black, 104 S.W. 147, 83 Ark. 419.
23 C.J. p 672 note 39.

Execution without itemized bill of costs attached thereto
Miss.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358.

86. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.
23 C.J. p 672 note 40.

87. Tex.—Cleveland v. Simpson, 13 S.W. 851, 77 Tex. 96.

88. Mo.—Rogers v. Wilson, 119 S.W. 369, 220 Mo. 213.

89. Ariz.—Haigler v. Burson, 298 P. 404, 38 Ariz. 192.
23 C.J. p 672 note 43.

90. Ky.—Shepherd v. Delph, 58 S.W. 991, 22 Ky.L. 977.

91. Ala.—Francis v. Sheats, 45 So. 241, 153 Ala. 468, 127 Am.S.R. 61.

92. U.S.—Ætna Ins. Co. v. Hallock, Ind., 6 Wall. 556, 19 L.Ed. 948.
23 C.J. p 418 note 4.

93. Neb.—Taylor v. Courtnay, 16 N.W. 842, 15 Neb. 190.
Wis.—Corwith v. Illinois State Bank, 18 Wis. 560, 86 Am.D. 793.

94. Pa.—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 541.
Tex.—Scott v. McGlothlin, Civ.App., 30 S.W.2d 511, affirmed McGlothlin v. Scott, Com.App., 48 S.W.2d 610.
23 C.J. p 673 note 46.

Levying officer without discretion
Sheriff's deed of property, sold in execution of judgment foreclosing attachment, which was directly before court, on all attached property, cannot be canceled because of excessive levy, officer having no discretion as in case of open execution.—Citizens' State Bank v. McRoberts, 239 P. 1028, 29 Ariz. 173.

95. Del.—Cavender v. Cavender, 39 A. 776, 17 Del. 86.
23 C.J. p 672 note 44.

Insufficient notice to appoint appraiser
That judgment debtors were given only twenty-four hours' notice to appoint appraiser before sheriff's sale, instead of two days' notice required by statute, was ground for setting aside adjudication.—Mulling v. Jones, 97 So. 202, 153 La. 1091.

96. Ky.—Hunley v. Perryman, 267 S.W. 206, 206 Ky. 243
23 C.J. p 672 note 45.

97. Colo.—Victor Inv. Co. v. Roerig, 124 P. 349, 22 Colo.App. 257.
N.D.—Past v. Rennier, 151 N.W. 763, 30 N.D. 1.

98. Mo.—Mahen v. Tavern Rock, 87 S.W.2d 562, 327 Mo. 391.

99. Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323.

§ 232. Irregularities or Misconduct Affecting Sale

Fraud in connection with an execution sale is ground for setting the sale aside; the sale may be set aside for an irregularity in the sale or in the notice thereof, unless it is merely a technical, and not a prejudicial, irregularity.

A court of law is competent to control the acts of its officers in the execution of its process, and may, when satisfied that the officer, in the conduct of an execution sale, has been guilty of irregularities, to the injury of any party having an interest in the action, set such sale aside.[1] Under some statutes, a sale may and should be set aside where it was not made in conformity with equity.[2] However, technical irregularities in a sale which are not shown to have been prejudicial to any of the parties in interest will not furnish sufficient ground for setting it aside,[3] especially after confirmation of the sale[4] which, as noted above in § 226, cures all irregularities in the preliminary proceedings; and the position has been taken that the sale will not be set aside for mere irregularities appearing on the face of the record unless they clearly render the sale void.[5] When regularly made, an execution sale is not to be set aside except for some trick, artifice, fraud, oppression, or undue advantage.[6]

The sale may be set aside where the officer refused to accept from the debtor the amount due on the judgment with costs;[7] where the sale was made to a person not authorized to purchase,[8] or to one other than the highest bidder;[9] or where the sale was made at an improper time, as where it was made at a time other than that fixed by the notice of sale,[10] or it was made after the time allowed therefor,[11] or on a day not authorized by law,[12] or it was made in violation of an agreement for delay or compromise,[13] or the officer failed to adjourn the sale under circumstances which required it.[14] However, the failure of the sheriff to reopen the sale, after formally closing it, in order to permit further bidding, solely on account of a misapprehension on the part of plaintiff's attorney, is not such an irregularity as authorizes the setting aside of the sale.[15]

The sale may be set aside where it was for an amount materially in excess of the amount due,[16] but not where the sum for which the property sold exceeded the actual amount due by several dollars.[17]

Fraud of the officer or a party in connection with the sale is ground for setting the sale aside on the motion of, or in a suit by, one prejudiced thereby;[18] and this rule applies, even though no actual fraud was intended, if there was that which in law amounts to fraud.[19]

Order in which property sold. A violation of directions as to the order in which the property shall be sold may be ground for setting aside the sale.[20] However, where the creditor is not bound to exhaust the property of the debtor in the county where the judgment was rendered before resorting to property in another county, his failure to do so does not warrant the setting aside of the sale;[21] and a sale of real property before exhausting personal property, in violation of a statute, is not ground for setting aside the sale where the statute is regarded as

1. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
La.—Ragusa v. Greco, 131 So. 849, 171 La. 686.
23 C.J. p 673 note 47.

2. Kan.—Kaw Valley State Bank v. Chumos, 27 P.2d 244, 138 Kan. 714, modified on other grounds 28 P.2d 744, 138 Kan. 921.

3. Ill.—State Bank of Jerseyville v. Reardon, 22 N.E.2d 716, 301 Ill. App. 248.
Okl.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586.
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400.
23 C.J. p 673 note 48.

4. U.S.—Heid v. Ebner, Alaska, 133 F. 156, 66 C.C.A. 222.
Ky.—Daniels v. Land, 115 S.W.2d 293, 272 Ky. 730.

5. Tex.—Reitz v. Mitchell, Civ.App., 256 S.W. 697.

6. N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
Fraud as ground see infra this section.

7. Ariz.—McCoy v. Brooks, 80 P. 365, 9 Ariz. 157.

8. Ind.—Martin v. Wyncoop, 12 Ind. 266, 74 Am.D. 209.
23 C.J. p 673 note 54.

9. Tex.—Rugely v. Moore, 54 S.W. 379, 23 Tex.Civ.App. 10.

10. Ill.—Craddick v. Cotta Gear Co., 28 N.E.2d 734, 306 Ill.App. 459.

11. Kan.—Shultz v. Smith, 17 Kan. 306.
Tex.—Towns v. Harris, 13 Tex. 507.
23 C.J. p 674 note 56.

12. Ky.—Chambers v. Hays, 6 B. Mon. 115.
Pa.—Kauffeld v. Tinstman, 54 Pa. Super. 158.
23 C.J. p 674 note 57.

13. Mont.—Bernard v. Herzog, 31 P. 74, 12 Mont. 519.
Tex.—Marshall v. Marshall, Civ.App., 150 S.W. 755.

14. Iowa.—Drake v. Brickner, 163 N.W. 597, 180 Iowa 1196—Copper v. Iowa Trust & Savings Bank, 128 N.W. 373, 149 Iowa 336.

15. Tex.—Beavers v. Looney, 85 S.W.2d 1046, 126 Tex. 125, reversing Looney v. Elliott, Civ.App., 52 S.W.2d 949.

16. Ark.—Downs v. Dennis, 102 S.W. 699, 83 Ark. 71, 119 Am.S.R. 119.
23 C.J. p 673 note 51.

17. Ky.—Southard v. Pope, 9 B. Mon. 261.

18. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Pa.—Meskunas v. Puskunigis, 33 Pa. Dist. & Co. 124, 40 Lack.Jur. 77, 53 York Leg.Rec. 43.
23 C.J. p 674 note 68.

19. Ga.—Johnson v. Dooly, 72 Ga. 297.
23 C.J. p 674 note 69.

20. Idaho.—Wooddy v. Jameson, 50 P. 1008, 5 Idaho 466.
23 C.J. p 674 note 67.

21. Pa.—Taylor v. Bailey, 185 A. 699, 323 Pa. 278.

merely directory,[22] the purchaser is without notice of the irregularity,[23] or the motion to set aside is made by the execution plaintiff.[24]

Property not subject to sale. Where the property sold was not subject to sale, the sale should be set aside,[25] as where the officer improperly sold property exempt from execution, or the homestead of defendant in execution.[26] Where the execution debtor did not own the property sold, the sale may be set aside on the application of the purchaser;[27] but an attack on the sale by either the execution debtor[28] or creditor[29] will not be sustained on the ground that the interest of the debtor in the property sold was an equitable one or less than sole ownership; and it has been held that the fact that the property sold belongs to the execution creditor, or that he claims an interest therein, does not render the sale void[30] or subject to attack by the execution creditor, as only the execution debtor's interest in the property is affected by the sale.[31]

Sale in gross. A sale en masse of separate tracts or parcels, or in some states of property susceptible of natural division, in violation of the statutory or other duty imposed on the sheriff, will be set aside on motion of the person interested, or by bill in equity, where a substantial injury is shown to have been sustained by such party,[32] as where the right of redemption is prejudiced;[33] and especially will the court set aside the sale where part of the property sold in bulk was not owned by the debtor or was not legally levied on, so that it is impossible to determine for what the property owned by the debtor and legally levied on sold.[34]

Some courts require satisfactory evidence that the land could have been advantageously divided and that the sale en masse resulted in injury or prejudice, before setting the sale aside,[35] and where it appears that no benefit would have resulted from a division of the property, a sale en masse will not per se be ground for vacating the sale.[36] Further, the sale will not be set aside as void for failure to sell the parcels separately where the controlling statute is merely directory.[37]

Want or inadequacy of notice of sale. Except where an adequate remedy is provided against the officer by a penalty,[38] failure by the officer to give the proper notice of sale is sufficient ground for setting it aside where the motion is made at the proper time by an interested party.[39] The insufficiency of the notice, such as inadequate or erroneous description of the property or failure to advertise for the statutory period, has been held sufficient to warrant the vacation of the sale,[40] at least before its confirmation;[41] but mere irregularities in the notice which result in no prejudice to any of the parties are not ground for setting aside the sale.[42]

22. Wash.—Whitworth v. McKee, 72 P. 1046, 32 Wash. 83.
23 C.J. p 674 note 65.

23. N.J.—Simmons v. Vandegrift, 1 N.J.Eq. 55.

24. Ky.—McMillen v. Bailey, 112 S.W.2d 1009, 271 Ky. 628.

25. Kan.—White-Crow v. White-Wing, 3 Kan. 276.

26. Ky.—Pinson v. Murphy, 295 S.W. 442, 220 Ky. 464.
23 C.J. p 674 note 61.

27. Ky.—Holbrook v. Combs, 12 S.W.2d 281, 227 Ky. 174.

28. U.S.—Norton v. Walton, C.C.A. La., 288 F. 359.

29. Ky.—McMillen v. Bailey, 112 S.W.2d 1009, 271 Ky. 628.

30. La.—McIlhenny v. Barbin, 15 La.Ann. 548.

31. Ky.—McMillen v. Bailey, 112 S.W.2d 1009, 271 Ky. 628.

32. Ky.—White v. Roberts, 66 S.W. 758, 112 Ky. 788, 23 Ky.L. 2187.
23 C.J. p 676 note 81.

Inadequate price
Where land is sold en masse in violation of a statute and for an inadequate price, defendant in execution may have the sale set aside, notwithstanding a statute which allows him to redeem, because the exercise of the right of redemption will afford to him no adequate protection.
Iowa.—Love v. Cherry, 24 Iowa 204.
N.D.—Power v. Larabee, 57 N.W. 789, 3 N.D. 502, 44 Am.S.R. 577.
23 C.J. p 676 note 84.

33. Iowa.—Adams v. Morrison, 259 N.W. 582, 219 Iowa 852.
N.D.—Michael v. Grady, 204 N.W. 182, 52 N.D. 740.
23 C.J. p 676 note 81 [c].

34. Ark.—Brown v. Vaughan, 42 S.W.2d 558, 184 Ark. 364.
Iowa.—Adams v. Morrison, 259 N.W. 582, 219 Iowa 852.

35. Cal.—Batini v. Ivancich, 287 P. 523, 105 Cal.App. 391—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.
Ga.—Fowler v. Blackstock, 112 S.E. 893, 153 Ga. 706.
N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
23 C.J. p 676 note 82.

36. Pa.—First Nat. Bank v. Boes, 16 Pa.Dist. & Co. 327.
23 C.J. p 676 note 83.

37. Tex.—Reed v. Gourley, Civ.App., 109 S.W.2d 242, error dismissed.

38. Cal.—Frink v. Roe, 11 P. 820, 70 Cal. 296—Smith v. Randall, 6 Cal. 47, 65 Am.D. 475.

39. Pa.—West v. West, 6 Pa.Dist. & Co. 64.
23 C.J. p 675 note 75.

Failure to give notice of resale
Dissolution of order restraining judgment creditor from interfering with the real property of judgment debtor did not preclude debtor from seeking second resale because of lack of notice to him of first resale procured by judgment creditor.—Bank of Pinehurst v. Gardner, 11 S.E.2d 872, 218 N.C. 584.

40. Pa.—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1—Barton, for Use of, v. Moser, 36 Pa.Dist. & Co. 133, 87 Pittsb. Leg.J. 226—West v. West, 6 Pa. Dist. & Co. 64.
23 C.J. p 639 note 9, p 675 note 76.

41. Kan.—Watkins v. Williams, 5 P. 771, 33 Kan. 149.
Neb.—Fisher v. Kellogg, 258 N.W. 404, 128 Neb. 248.

42. Ill.—State Bank of Jerseyville v. Reardon, 22 N.E.2d 716, 301 Ill. App. 248.
Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
Tex.—Hodges v. Commonwealth

§ 233. Inadequacy of Price

Mere inadequacy, or gross inadequacy, of price is not, of itself, a ground for setting aside an execution sale.

Mere inadequacy of price is not, of itself, sufficient ground to set aside an execution sale; inadequacy of price is not ground for setting aside the sale where the sale is regular, proper, and legal in other respects, the parties stand on an equal footing, there are no confidential relations between them, there is no element of fraud, unfairness, or oppression, and there is no misconduct, accident, mistake, or surprise connected with, and tending to cause, the inadequacy.[43] This rule is especially applicable where defendant has the right of redemption and has knowledge of the sale and an opportunity to exercise the right, since this affords him ample protection against a sacrifice of his property through a sale for an inadequate price, and if inadequacy of price is the only ground for attacking the sale, relief should be denied and he should be left to resort to his right to redeem.[44] Mere inadequacy of price is insufficient even though there was only one bidder.[45] An execution sale will not be set aside for gross inadequacy of price,[46] unless the inadequacy is so gross as to shock the understanding or the conscience,[47] or as to amount to fraud, unfairness, or oppression, or satisfactory or conclusive evidence thereof,[48] or unless defendant makes a timely offer to pay the indebtedness, costs, and interest.[49]

Bank & Trust Co., Civ.App., 44 S W.2d 400.
23 C.J. p 675 note 78.

Overstatement of acreage
Pa.—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 541.

Sale for full value
Del.—Petition of Seaford Hardware Co., 132 A. 737, 3 W.W.Harr. 146.

43. Cal.—Everts v. Will S. Fawcett Co., 74 P.2d 815, 24 Cal.App.2d 213—Eccleston v. Gale, 10 P.2d 1032, 122 Cal.App. 688—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.
Ga.—Woodward v. La Porte, 184 S. E. 280, 181 Ga. 731.
Idaho.—Elliott & Healy v. Wirth, 198 P. 757, 34 Idaho 797.
Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341—Dietz v. Hagler, 141 N.E. 194, 309 Ill. 381.
Iowa.—Adams v. Morrison, 259 N. W. 582, 219 Iowa 552.
Kan.—Dewey v. Loomis, 216 P. 271, 113 Kan. 750.
Ky.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62—Casebolt v. Collinsworth, 294 S.W. 181, 219 Ky. 656.
Mo.—Ellis v. Powell, 117 S.W.2d 225.
Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
N.J.—Giordano v. Asbury Park & Ocean Grove Bank, 156 A. 779, 9 N.J.Misc. 1008.
N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
Okl.—Whitchurch v. Doughty, 271 P. 1033, 133 Okl. 283.
Pa.—Taylor v. Bailey, 185 A. 699, 323 Pa. 278—O'Hare v. Marateck, 13 Pa.Dist. & Co. 516, 27 Sch.Leg. Rec. 329.
R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142—Boiani v. Wilson, 132 A. 881, 47 R.I. 317.
S.D.—Lockhart v. Ruden, 250 N.W. 349, 62 S.D. 1.
Tex.—Mergenthaler Linotype Co. v. McClure, Com.App., 16 S.W.2d 280, affirming, Civ.App., 9 S.W.2d 198—Graves v. Griffin, Com.App., 228 S. W. 913—Holt v. Holt, Civ.App., 59 S.W.2d 324, error refused.
23 C.J. p 676 note 85.

Sale to bona fide purchaser
U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 92 F.2d 744.

Mere inadequacy of price is seldom a ground for setting a sale aside.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.

In absence of exceptional circumstances, mere inadequacy of price will not warrant the setting aside of an execution sale.—St. Paul Trust & Savings Bank v. Olson, 202 N.W. 472, 52 N.D. 315.

44. Ill.—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.
23 C.J. p 677 note 91.

45. Mass.—Learned v. Geer, 29 N. E. 215, 139 Mass. 31.
Pa.—Swires v. Brotherline, 41 Pa. 135, 80 Am.D. 601.

46. Cal.—Pavlovich v. Watts, App., 115 P.2d 511.
Ga.—Gower v. New England Mortg. Sec. Co., 111 S.E. 422, 152 Ga. 822.
Tex.—Gregg v. First Nat. Bank, Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ.App., 18 S.W.2d 772—Brinkman v. Tinkler, Civ.App., 117 S.W. 2d 139, error refused.
23 C.J. p 677 note 90.

47. U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 92 F.2d 744.
Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Ariz.—Smith v. Arizona Engineering Co., 193 P. 303, 21 Ariz. 624.
D.C.—Van Senden v. O'Brien, 58 F. 2d 689, 61 App.D.C. 137, certiorari denied 53 S.Ct. 11, 287 U.S. 608, 77 L.Ed. 528.
Miss.—Bratton v. Graham, 111 So. 353, 146 Miss. 246.
Pa.—Hettler v. Shephard, 191 A. 581, 326 Pa. 165—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1—Wagener v. Yetter, 124 A. 487, 280 Pa. 229.
Tex.—Scott v. McGlothlin, Civ.App., 30 S.W.2d 511, affirmed McGlothlin v. Scott, Com.App., 48 S.W.2d 610.
23 C.J. p 678 note 93.
Gross inadequacy of price coupled with other objections see infra § 234.

Sale for mere nominal consideration, such as one for less than a cent an acre, is unconscionable and invalid, and the court is warranted, without more, in setting it aside.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.

Inequitable sale
Under a statute construed to require the court to grant a motion to set aside a sale which was not made in conformity with equity, inadequacy of price alone, without addition of extraneous factors of equitable cognizance, may make a sale inequitable.—Kaw Valley State Bank v. Chumos, 27 P.2d 244, 138 Kan. 714, modified on other grounds 28 P.2d 744, 138 Kan. 921.

48. Cal.—Haisch v. Hall, 265 P. 1030, 90 Cal.App. 547.
Iowa.—Buter v. Slattery, 237 N.W. 232, 212 Iowa 677.
Mo.—Ellis v. Powell, 117 S.W.2d 225.

Inadequacy as evidential feature of fraud
In a suit to set aside execution sale, inadequacy of price is always an evidential feature of fraud, particularly where the absolute and shameless inadequacy is patent and amounts to the use of legal process to take property from the owner without compensation.—Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

Presumption of fraud
The inadequacy of price must be so gross as to create a presumption of fraud.—O'Bryan v. Davis, 15 So. 860, 103 Ala. 429.

49. Okl.—Miller v. Gray Eagle Oil

The debtor cannot have the sale set aside on the ground of inadequacy or gross inadequacy of price where such inadequacy was caused by his acts or acts of those for whom he is responsible,[50] or where his conduct contributed thereto.[51] A fraudulent grantee of the debtor cannot have the sale set aside for inadequacy,[52] especially where the inadequacy was caused by the recording of the fraudulent deed.[53]

While inadequacy of price, unconnected with other matters, is not ground for setting aside the sale, see supra this section, and does not prevent the passing of title[54] or render the sale subject to collateral attack, see infra § 242, nevertheless, it is not the purpose of the law to protect one who seeks to procure valuable property for little outlay,[55] and relief to a purchaser under such circumstances will be refused when he goes into equity to enforce the sale.[56]

What constitutes adequate or inadequate price. Where it is sought to set aside an execution sale on the ground of inadequacy of price, and the question is not controlled by statute, the test of inadequacy is not what the property is worth, but what it will bring at a fair sheriff's sale, which, of course, is a forced sale.[57] It would seem that, where a motion is made to set aside the sale on this ground, a safe rule to follow is to determine whether the sheriff has or has not abused his discretion.[58] An execution sale will not be set aside on the ground of inadequacy, or gross inadequacy, of price where no facts appear in support of such ground,[59] or the sale price of the property in question cannot be ascertained because the property was sold with other property as a whole.[60] The price may not be inadequate or grossly inadequate in view of the encumbrances on the property,[61] it being proper and necessary, in passing on the question of adequacy, to consider such encumbrances,[62] even though the purchaser was without knowledge thereof and thought that he was purchasing property which was unencumbered and therefore of greater value.[63]

Where the price is less than that required by statute, as where it is less than a designated proportion of the appraised value of the property,[64] or is insufficient to discharge existing mortgages having preference over the execution,[65] it is inadequate and the sale is invalid and subject to vacation in proper proceedings. On the other hand, the price is not inadequate where it equals or exceeds the proportion of the appraised value designated by statute,[66] and fraud or mistake on the part of the appraisers is not alleged.[67] The sale is not void where, be-

& Gas Co., 23 P.2d 657, 164 Okl. 259.
Tex.—Saylors v. Wood, Civ.App., 120 S.W.2d 835, affirmed 140 S.W.2d 164, 135 Tex. 267.

50. Iowa.—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84—Coburn v. Davis, 221 N.W. 186, 206 Iowa 649. 23 C.J. p 678 note 94.

Corpus Juris cited in support of the point that an effort to thwart the sale made by the attorney for the execution defendant is an insecure ground for setting it aside, but, rather, weighs heavily in favor of the sale's validity.—Taylor v. Bailey, 185 A. 699, 703, 323 Pa. 278.

Announcement of bankruptcy

Judgment debtor, hindering execution sale by public announcement that he had previously filed petition in bankruptcy, could not complain of inadequacy of price.—Wilkinson v. Goree, C.C.A.Tex., 18 F.2d 455, reversing, D.C., 15 F.2d 399, and certiorari denied Goree v. Wilkinson, 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1339.

Warning of litigation

A party could not claim land was sold under execution for grossly inadequate price, where his attorney notified persons present at sale that they would buy lawsuit.—Teague v. Burk, Tex.Civ.App., 18 S.W.2d 690, error dismissed.

51. Tex.—Bean v. Brownwood, Civ. App., 43 S.W. 1036.

52. N.J.—Laurence v. Lippencott, 6 N.J.Law 473.
Tex.—Clark v. Bell, 89 S.W. 38, 40 Tex.Civ.App. 39.

53. Tex.—Miller v. Koertge, 7 S.W. 691, 70 Tex. 162, 8 Am.S.R. 587.

54. Ala.—Howard v. Corey, 28 So. 682, 126 Ala. 283.

55. Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.

56. Miss.—Huntington v. Allen, 44 Miss. 654—Clement v. Reid, 17 Miss. 535.

Shocking disproportion between value and price

Equity will not enforce execution sale where disproportion between value of property and sum paid for it is so great as to shock conscience.—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.

57. Pa.—Cary for Use of v. Tychonicavice, 51 York Leg.Rec. 98.
Tex.—Atcheson v. Hutchison, 51 Tex. 223.

58. Ala.—Henderson v. Sublett, 21 Ala. 626.
N.J.—Seaman v. Riggins, 2 N.J.Eq. 214, 34 Am.D. 200.

59. Ill.—State Bank of Jerseyville v. Reardon, 22 N.E.2d 716, 301 Ill. App. 218.

60. Del.—In re Roach, 130 A. 676, 3 W.W.Harr. 89.

61. Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323—Batini v. Ivancich, 287 P. 523, 105 Cal.App. 391.
Mich.—Wernik v. Kolodziejczak, 215 N.W. 360, 240 Mich. 468.
Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.
Pa.—Miners Nat. Bank of Wilkes-Barre v. Bowman, 6 A.2d 286, 334 Pa. 534.
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400—Teague v. Burk, Civ. App., 18 S.W.2d 690, error dismissed.

62. Miss.—Wilkinson v. Wilson, 123 So. 847, 154 Miss. 726.

63. Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323.

64. Ind.—Bollman v. Gemmill, 57 N.E. 542, 155 Ind. 33.
23 C.J. p 678 note 2.

65. La.—Rosenthal Sloan Millinery Co. v. Picone, App., 141 So. 494.

66. Iowa.—McFerrin v. Nye & Jenks Grain Co., 264 N.W. 45, 220 Iowa 1086.

67. Ky.—Runyon v. Bevins, 291 S.W. 1033, 218 Ky. 589.

cause of a mistake of the appraisers in undervaluing the property, it brings the designated proportion of its estimated, but not that much of its real, value,[68] or where the property does not bring its full appraised value.[69]

§ 234. —— Inadequacy Coupled with Other Objections

Gross inadequacy of price, in connection with other circumstances which tend to bring it about, may be ground for setting aside an execution sale.

Where there is gross inadequacy of price and it is connected with fraud, mistake, misapprehension, surprise, or other circumstances which, although not sufficient in themselves to authorize the execution sale to be set aside, tend to bring about such inadequacy, to the injury of the parties interested, the sale may be set aside,[70] even though actual fraud does not appear.[71] In any event, gross inadequacy of price may be considered in connection with other circumstances in determining the validity and fairness of the sale;[72] and, when so considered for this purpose, it is important[73] and may be controlling.[74] Each case must depend largely on its own peculiar facts,[75] and what additional circumstances, in connection with the inadequacy of price, are sufficient to justify setting aside the sale, is largely in the discretion of the court.[76] As a general rule, the court will seize on slight irregularities or additional circumstances to set aside the sale where the price is grossly inadequate.[77] Thus, only slight circumstances of unfairness in the conduct of the party benefited by the sale are considered necessary to raise a presumption of fraud,[78] at least where no question of an innocent purchaser is involved.[79] It has been held that to avoid an execution sale as against a person claiming to be an innocent purchaser, even where the price paid is inadequate, knowledge of the vice in the sale or some misconduct traceable to him must be shown, and while the courts will often seize upon a slight circumstance to add to the weight of inadequacy of price to turn the scale, yet it must be shown that the purchaser is in some measure responsible for it;[80] but, on the other hand, it has been held that it is not necessary that the purchaser should have known of the additional circumstances;[81] and it has also been held that, although the purchaser is not guilty of fraud, gross inadequacy of price in connection with other circumstances may avoid the sale.[82]

In some cases, the irregularities complained of may not be sufficient to warrant the setting aside of the sale even though there was inadequacy of price.[83] Inadequacy of price, coupled with accident or mistake, is not ground for setting aside a sale where the predicament of the party seeking relief was caused by his own negligence.[84] Mere irregu-

68. Ky.—Vallandingham v. Worthington, 2 S.W. 772, 85 Ky. 83, 8 Ky. L. 707.

69. Tex.—Sydnor v. Roberts, 13 Tex. 598, 65 Am.D. 84.

70. U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 92 F.2d 744.
Ariz.—Citizens' State Bank v. McRoberts, 239 P. 1028, 29 Ariz. 173.
Cal.—Eccleston v. Gale, 10 P.2d 1032, 122 Cal.App. 688—Baar v. Smith, 275 P. 861, 97 Cal.App. 398—Hyman v. Stern, 215 P. 911, 61 Cal. App. 656.
Ill.—Magnes v. Tobias, 169 N.E. 741, 337 Ill. 605.
Mich.—Greenberg v. Kaplan, 268 N. W. 788, 277 Mich. 1.
Mo.—City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.
N.J.—Van Order v. Bailey, 146 A. 419, 104 N.J.Eq. 585.
N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
Pa.—Warren Pearl Works v. Rappaport, 154 A. 587, 303 Pa. 235—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1—Gamble v. Clift Coal Co., 17 Pa.Dist. & Co. 242.
R.I.—Boiani v. Wilson, 132 A. 881, 47 R.I. 317.
Tex.—Campbell v. Richards, Civ. App., 233 S.W. 532.
Wash.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297—Lovejoy v. Americus, 191 P. 790, 111 Wash. 571.
23 C.J. p 678 note 6.

Corpus Juris cited in a case dealing with the exercise of a power of sale contained in a mortgage.—Guels v. Mississippi Valley Trust Co., 49 S.W.2d 60, 63, 329 Mo. 1154.

71. N.J.—Sapinsky v. Stout, 138 A. 899, 101 N.J.Eq. 813.
Tex.—Chamblee v. Tarbox, 27 Tex. 139, 84 Am.D. 614.

72. R.I.—Boiani v. Wilson, 132 A. 881, 47 R.I. 317.

73. R.I.—Bowker v. Semple, 152 A. 604, 51 R.I. 142.

74. Ga.—Howland v. Donehoo, 82 S. E. 32, 141 Ga. 687.
Ind.—Benton v. Shreeve, 6 Ind. 66.

75. S.D.—Kirby v. Ramsey, 68 N.W. 328, 9 S.D. 197.

76. Pa.—Light v. Zeller, 45 A. 1055, 195 Pa. 315.

77. Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.
Kan.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.
23 C.J. p 679 note 10.

78. U.S.—Graffam v. Burgess, Mass., 6 S.Ct. 686, 117 U.S. 180, 29 L.Ed. 839.
23 C.J. p 680 note 11.

Where there was any unconscionable conduct by judgment creditor who purchased at grossly inadequate price, and kept judgment debtor ignorant of sale, the sale will be set aside.—West Ridgelawn Cemetery v. Jacobs, 155 A. 673, 108 N.J.Eq. 513.

79. N.D.—Warren v. Stinson, 70 N. W. 279, 6 N.D. 293.

80. Ark.—Carden v. Lane, 2 S.W. 709, 48 Ark. 216, 3 Am.S.R. 228.
23 C.J. p 680 note 13.

81. Tex.—Chamblee v. Tarbox, 27 Tex. 139, 84 Am.D. 614.

82. Tex.—Gillette v. Davis, Civ. App., 15 S.W.2d 1085.

83. Pa.—Taylor v. Bailey, 185 A. 699, 323 Pa. 278.

84. N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319.
23 C.J. p 680 note 20 [a].

larities which are cured by the delivery of the sheriff's deed are not thereafter a ground in connection with inadequacy of price;[85] and, although it is not necessary to show affirmatively that the ground relied on in connection with the inadequacy of price occasioned the inadequacy, as such natural connection may be presumed,[86] yet where the irregularity, or alleged irregularity, did not conduce to the inadequacy in price, the sale will not be set aside.[87]

Particular circumstances. Gross inadequacy of price may furnish sufficient grounds for setting aside the sale where it is connected with some irregularity on the part of the officer conducting the sale;[88] a mistake,[89] including a mistake or misapprehension which prevents the parties from attending the sale whereby the property was sacrificed;[90] the sudden illness of an attorney for a party which prevented him from attending the sale and bidding;[91] fraud;[92] the absence of, or error in, the notice of sale;[93] inadequacy of, or errors in, description of the property to be sold;[94] a sale in gross of property which should be sold in parcels;[95] irregularity as to the time of sale;[96] a defective return;[97] the lack of a basis for, or defects in, the writ under which the sale was made;[98] irregularities in the issuance of the execution;[99] or failure to serve a copy of the execution on the judgment debtor.[1]

§ 235. Advance on Bid

Some authorities are opposed to the opening of an execution sale merely because of an offer of a higher bid, although it has been held that the matter is within the court's discretion.

According to some authorities, an execution sale should not be opened merely because of an offer of a higher bid,[2] although it has been held that, where a sale by the sheriff is in all respects fairly and legally made, and an offer of an increased bid is made in case a resale is ordered, it is a matter of discretion with the court to which the offer is made whether to accept it.[3]

§ 236. Defenses by Purchaser

As a general rule, only matters which go to negative the grounds urged as invalidating the sale may be asserted in defense to setting it aside.

There is authority for the proposition that an execution purchaser in defending an action to set the sale aside has only to show the judgment of a competent court and an execution authorizing the sale.[4] It is no bar to such action that the purchaser, being the execution plaintiff and chargeable with notice of irregularities, offered to reconvey on payment of the debt,[5] or that there has been no offer to return the amount of the purchase money.[6] It is no defense that the person seeking to set aside the sale has sued the officer for trespass and has recovered a judgment against him.[7] Lack of title in plaintiff

85. Pa.—Media Title & Trust Co. v. Kelly, 39 A. 832, 185 Pa. 131, 64 Am.S.R. 618.

86. Tex.—McLean v. Smith, 112 S. W. 355, 50 Tex.Civ.App. 323.

87. Tex.—Gregg v. First Nat. Bank, Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ.App., 18 S.W.2d 772.
23 C.J. p 680 note 15.

88. Ariz.—Blasingame v. Wallace, 261 P. 42, 32 Ariz. 580.
Pa.—Wagener v. Yetter, 124 A. 487, 280 Pa. 229.
23 C.J. p 680 note 18.

89. N.J.—Sapinsky v. Stout, 138 A. 899, 101 N.J.Eq. 813.
23 C.J. p 680 note 19.

90. N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319—Sapinsky v. Stout, 138 A. 899, 101 N.J.Eq. 813.
Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085.
23 C.J. p 680 note 20.

91. Pa.—Hepburn v. Stein, 17 Pa. Dist. & Co. 101.

92. Tex.—Marshall v. Marshall, Civ. App., 150 S.W. 755.
23 C.J. p 680 note 21.

Duty of court
Where property is attempted to be confiscated by legal process, courts should inquire with some care whether transaction constitutes an honest attempt to collect a debt, or results from a desire to use wrongfully and oppressively the process of the court to obtain another's property without adequate consideration. —Van Graafeland v. Wright, 228 S. W. 465, 286 Mo. 414.

93. Ill.—Misener v. Glasbrenner, 77 N.E. 467, 221 Ill. 384.
23 C.J. p 681 note 22.

Lack of notice to judgment debtor
Ark.—Wade v. Deniston, 21 S.W.2d 424, 180 Ark. 326.
N.J.—West Ridgelawn Cemetery v. Jacobs, 155 A. 673, 108 N.J.Eq. 513 —Van Order v. Bailey, 146 A. 419, 104 N.J.Eq. 585.
Pa.—Wagener v. Yetter, 124 A. 487, 280 Pa. 229.

94. Pa.—Gamble v. Clift Coal Co., 17 Pa.Dist. & Co. 242.
23 C.J. p 681 note 23.

95. Iowa.—McCann v. McCann, 223 N.W. 393, 207 Iowa 610.
23 C.J. p 681 note 24.

96. Pa.—Wagener v. Yetter, 124 A. 487, 280 Pa. 229.
23 C.J. p 681 note 25.

97. Pa.—Ilgenfritz v. Wantz, 16 Pa. Dist. 63.

98. Kan.—Weir v. Travellers' Ins. Co., 4 P. 267, 32 Kan. 325.
23 C.J. p 681 note 27.

99. Tex.—Selkirk v. Selkirk, Civ. App., 297 S.W. 578.

1. Ill.—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73.

2. N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
23 C.J. p 671 note 28.

3. Neb.—State Bank v. Green, 9 N. W. 36, 11 Neb. 303.

4. Ind.—Frakes v. Brown, 2 Blackf. 295.
23 C.J. p 681 note 28.

5. Ind.—Hamilton v. Burch, 28 Ind. 233.
23 C.J. p 681 note 29.

6. La.—Gallagher v. Abadie, 26 La. Ann. 343.
Tex.—Needham v. Cooney, Civ.App., 173 S.W. 979.
23 C.J. p 681 note 30.

7. Ala.—Staunton v. Simmons, 20 Ala. 243.

is no defense;[8] it is no defense that complainant's right of homestead had been terminated where no right of homestead was involved;[9] and the purchaser cannot set up an outstanding title where the holder thereof, on being made a party, disclaims any title except that of a mere naked trustee.[10]

Where land alleged to have been fraudulently conveyed by the debtor is levied on and sold, and afterward the grantee sues to set aside the execution sale, the execution creditor may set up as a defense whatever he might have urged in a direct action to set aside the first sale as fraudulent.[11]

§ 237. Proceedings to Open or Vacate

An execution sale may be set aside on motion in the court which issued the process or in an independent action in a court possessing equitable jurisdiction.

The procedure to set aside an execution sale is either by motion or by an independent action,[12] there being a remedy either in the court which issued the process, or, in a proper case, by a bill in equity;[13] but whether the one remedy or the other is available in a given case is a subject of some controversy,[14] as appears more fully infra §§ 238, 239. Procedure which is not authorized by the law of the particular jurisdiction may not be resorted to for the purpose of attacking an execution sale.[15]

It has been held that matters which were, or could have been, urged as objections to the confirmation of the sale cannot, after the sale is confirmed, be made the ground of a motion or action to set aside the sale, where the order of confirmation is not vacated and there is no charge of fraud or lack of jurisdiction.[16]

The right to set the sale aside may be sold and conveyed by the execution debtor.[17]

§ 238. —— By Motion

a. In general
b. Time for motion
c. Parties to motion
d. Notice of motion

a. In General

A motion or other equivalent application in the original cause is the usual procedure followed to obtain the vacation of an execution sale.

A proceeding to set aside a sale under execution may be, and generally should be, by motion, or other equivalent application,[18] unless the character of the controversy is such that it cannot, in justice to all concerned, be determined on such an informal presentation,[19] or some special facts are alleged which create jurisdiction in a court of equity[20] and render resort to equity necessary to give additional and complete relief.[21] However, according to some authorities, objections which might have been urged by contesting the confirmation of the sale, see supra § 237, or by a motion to quash the writ,[22] cannot be urged by motion to set aside the sale.

The power of a court to vacate a sale made under its process is well settled;[23] and, except to the extent that it is otherwise provided by statute,[24] a motion to set aside an execution sale may and should be made in the court from which the execution is-

8. Ind.—Fechheimer v. Washington, 77 Ind. 366.
23 C.J. p 682 note 35.

9. Ill.—Karle v. Schlick, 99 N.E. 615, 255 Ill. 373.

10. Tex.—Strickland v. Hardwicke, 22 S.W. 541, 3 Tex.Civ.App. 326.

11. La.—Fischer v. Moore, 12 Rob. 95.

12. Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 670, 74 Mont. 355, citing **Corpus Juris.**

13. Ala.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171.

14. Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.

15. Ga.—McNair v. Maxwell Bros., 11 S.E.2d 715, 63 Ga.App. 539.

16. Neb.—Selleck v. Miller, 264 N. W. 754, 130 Neb. 306.
23 C.J. p 682 notes 39, 43.

17. Tex.—Strickland v. Hardwicke, 13 S.W. 973, 77 Tex. 195.

18. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52—Colver v. W. B. Scarborough Co., 238 P. 1104, 1105, 73 Cal.App. 441, citing **Corpus Juris.**
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 672, 74 Mont. 355, citing **Corpus Juris.**
N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S. E. 340, 213 N.C. 369—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.
Pa.—Hettler v. Shephard, 191 A. 581, 326 Pa. 165—Meskunas v. Puskunigis, 33 Pa.Dist. & Co. 124, 40 Lack.Jur. 77, 53 York 43—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 534.
23 C.J. p 682 note 41.

Where no equities of third persons have intervened
Cal.—Haisch v. Hall, 265 P. 1030, 90 Cal.App. 547.

Consolidation
Several motions to set aside a sale for different causes may be consolidated.—Harris v. Vanarsdall, 3 Ky. Op. 156.

19. Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 672, 74 Mont. 355, citing **Corpus Juris.**
23 C.J. p 682 note 42.

20. Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal. App. 441.
Bill in equity to set aside sale see infra § 239.

21. Fla.—Strong v. Tedder, 196 So. 829, 143 Fla. 473.

22. Or.—Leinenweber v. Brown, 34 P. 475, 38 P. 4, 24 Or. 548.

23. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.
23 C.J. p 682 note 47.

24. Pa.—Sylvester v. Dewitt, 31 Pa. Co. 225.
23 C.J. p 683 note 49 [b].

sued[25] and in the original cause.[26]

Application and proof. In the absence of a statute or a rule of court requiring it, no formal application in writing is necessary,[27] nor must there be the technical precision required in more formal proceedings.[28] However, an affidavit setting forth the grounds for setting aside the sale, without any application or motion, is ordinarily not sufficient.[29]

The motion or other application must state clearly and fully the grounds on which the application is made,[30] and it must be supported by affidavits or other proof as to matters outside the record;[31] but fraud need not be alleged where the motion is based on other distinct grounds.[32]

A failure to prove immaterial or unnecessary allegations as alleged is not fatal;[33] and it is not necessary for the moving party to offer evidence on the question of ownership.[34]

b. Time for Motion

Generally a motion or other similar application to set aside an execution sale must be made promptly and without unreasonable delay, but there is no universal rule fixing the period of time within which the application may and must be made.

25. Fla.—Strong v. Tedder, 196 So. 829, 143 Fla. 473.
Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
Mo.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
23 C.J. p 682 note 48.

Return of execution
The fact that the execution under which the sale was made has not been returned to the court from where it was issued is no objection to the entertainment of a motion to set aside the sale.—Lee v. Davis, 16 Ala. 516.

Sale under executions from two courts
Although a statute provides that a motion to set aside an execution sale must be made in the court whence the execution issues, yet where a sale was made under an execution from a circuit court, and also an execution from the court of appeals, the circuit court has jurisdiction of a motion to set aside the sale.—Bach v. Whittaker, 60 S.W. 410, 109 Ky. 612, 22 Ky.L. 1226.

26. Cal.—Colver v. W. B. Scarborough, 238 P. 1104, 73 Cal.App. 441.
Mo.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369—Weir v Fowler, 145 S.E. 283, 196 N.C. 270.
Title of original action should be retained in the motion.—Williams v. Dunn, 79 S.E. 512, 163 N.C. 206—23 C.J. p 685 note 86.

27. Kan.—White-Crow v. White-Wing, 3 Kan. 276.

Verification
Motion to set aside execution sale need not be verified.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

28. Ala.—Danforth v. Burchfield, 78 So. 904, 201 Ala. 550.

29. Del.—Penn Mut. L. Ins. Co. v. Walton, 40 A. 1124, 15 Del. 328.
23 C.J. p 685 note 81.

30. Minn.—Cunningham v. Water-Power Sandstone Co., 77 N.W. 137, 74 Minn. 282.
23 C.J. p 685 note 82.

Facts must be averred
Pa.—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 534.

Statement of mere conclusions is not sufficient.—Morton Gas Engine Co. v. California Seeded Raisin Co., 141 P. 392, 24 Cal.App. 362—23 C.J. p 685 note 83.

Where irregularity is relied on, the nature of the irregularity must be stated.—Lane v. White, 14 Wis. 585.

Amendment of the motion may be permitted in the discretion of the court.—Mowbray Pearson Co. v. Pershall, 159 P. 682, 92 Wash. 516.

31. Pa.—Armstrong County Trust Co. v. Boozer, 65 A. 669, 216 Pa. 242.

Ex parte affidavits may be used in support of the motion.—Danforth v. Burchfield, 78 So. 904, 201 Ala. 550.

Mere making of tender of payment of the original judgment and costs cannot take the place of proof to sustain the allegations of a motion attacking a sheriff's sale.—Mentzer v. Miller, 54 P.2d 1038, 176 Okl. 1

Burden of proof
Where officer's return shows publication of notice of execution sale of realty in newspaper in county where lands are situated, burden is on attacking party to show irregularity of sale in matter of publication.—Burton v. Mee, 4 P.2d 33, 152 Okl. 220.

Proof required to overcome presumption
The presumption that the sale was made in good faith stands unless overthrown by clear and satisfactory evidence of fraud or unfair means.—Cary for Use of v. Tychonicavice, 51 York Leg.Rec., Pa., 98.

Oral testimony is competent to prove the manner and character of the levy.—Brown v. Vaughan, 42 S.W.2d 558, 184 Ark. 364.

Materiality of evidence
Evidence as to value of oil and gas rights sold under execution was immaterial on motion to set aside execution sale, where judgment debtor did not own gas rights.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.

Sufficiency of evidence
(1) Affidavit filed by plaintiff stating that defendant, against whom plaintiff recovered second judgment in action on note secured by mortgage, had quitclaimed her interest in mortgaged realty to her counsel and others did not justify order denying defendant's motion to set aside execution and sale under prior judgment on ground that defendant was no longer a party aggrieved, where quitclaim was made after plaintiff had forced sale under execution, and sale was made to defendant's own counsel, so that the circumstances themselves indicated equity in realty in defendant.—First-Trust Joint Stock Land Bank of Chicago v. Meredith, 64 P.2d 977, 19 Cal.App.2d 103.

(2) Evidence held to sustain finding as to fair market value of property.—Miners Nat. Bank of Wilkes-Barre v. Bowman, 6 A.2d 286, 334 Pa. 534.

(3) Evidence by six disinterested witnesses that mining stock had only nominal value at the time of execution sale, and that the price bid was reasonable, warranted refusal to set aside the sale on motion.—Smith v. Arizona Engineering Co., 193 P. 303, 21 Ariz. 624.

(4) Even though there is no direct evidence of an agreement to prevent competitive bidding, there may be facts from which an inference that such agreement was made can fairly be drawn.—Fenton v. Joki, 144 A. 136, 294 Pa. 309.

(5) Evidence held insufficient to support a charge of conspiracy.—Cary for Use of v. Tychonicavice, 51 York Leg.Rec., Pa., 98.

32. Iowa.—Ritter v. Henshaw, 7 Iowa 97.

33. Ala.—Danforth v. Burchfield, 78 So. 904, 201 Ala. 550.

34. Ala.—Danforth v. Burchfield, supra.
23 C.J. p 685 note 89.

Except to the extent that the time is fixed by statute,[35] the time within which a motion or other similar application to set aside an execution sale must be made is governed by the general rule that there must be promptness of action and no delay which is unnecessary or unreasonable, or which is not clearly and satisfactorily explained.[36] Tardy applications for relief are not looked on with favor,[37] especially where the rights of innocent persons have intervened.[38] However, where the sale is void, there is no limit to the time to move.[39]

During or before return term of writ. In some states the rule obtains that the motion may and must be made during or before the return term of the writ under which the sale was made.[40]

Before or after delivery of deed. In some jurisdictions the motion may be made after the sheriff's deed is delivered,[41] at least if it is delivered before the return of the writ or the expiration of the return term,[42] or where the purchaser's misconduct is the cause for setting aside the sale.[43] In other jurisdictions, however, a motion or other application in the original action to set aside the sale is in time when made before the sheriff's deed is delivered for the purpose of recording, even though after the acknowledgment of the deed,[44] but, in the absence of fraud[45] or want of authority to make the sale,[46] is too late when made after the delivery of the deed for recording,[47] it being a rule in such jurisdictions, as stated infra § 239 a, that, after a sheriff's deed to land has been executed and delivered, the sale can be impeached, if at all, only in a court of equity, unless there was no judgment or execution, or the court had no jurisdiction to render the judgment.

Before redemption or expiration of time for redemption. According to some authorities, a motion or similar application to set aside an execution sale may[48] and must[49] be made before the time for redemption from the sale has expired. The sale cannot be vacated after a redemption therefrom has been made by the debtor.[50]

Terms imposed. The view has been taken that the sale may be vacated on the motion of defendant in execution, even though he has been guilty of great laches, where such terms are imposed as to punish him for his laches and afford full indemnity to the purchaser.[51]

c. Parties to Motion

The proper and necessary parties to a motion to set aside an execution sale include all interested persons.

35. Pa.—O'Hare v. Marateck, 13 Pa. Dist. & Co. 516, 27 Sch.L.R. 329.
23 C.J. p 683 note 51 [a].

36. Ala.—Jones v. Spear, 85 So. 472, 204 Ala. 402.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
Pa.—Hettler v. Shephard, 191 A. 581, 326 Pa. 165—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518.
23 C.J. p 683 note 52.
Motions held timely
Okl.—Miller v. Gray Eagle Oil & Gas Co., 23 P.2d 657, 164 Okl. 259.
23 C.J. p 683 note 52 [a].
Applications held too late
Ala.—Jones v. Spear, 85 So. 472, 204 Ala. 402.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
Pa.—Penn State Building & Loan Ass'n v. Buchwald, 48 Dauph.Co. 77.
23 C.J. p 683 note 52 [b].

37. Mo.—Sheppard v. Enright, 188 S.W. 186.

38. Mo.—Sheppard v. Enright, supra.

39. Wash.—Brooks v. Lewis, 60 P. 121, 22 Wash. 192.

40. Mo.—City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S. Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
23 C.J. p 683 note 56.

41. Kan.—Duncan v. Benton & Hopkins Inv. Co., 172 P. 522, 102 Kan. 725.
N.J.—Campbell v. Gardner, 11 N.J. Eq. 423, 69 Am.D. 598.

42. Mo.—City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.
23 C.J. p 684 note 59.

43. Ohio.—Hurst v. Fisher, 60 N.E 626, 64 Ohio St. 530.

44. Pa.—Home Owners' Loan Corporation v. Edwards, 198 A. 123, 329 Pa. 529—Knox v. Noggle, 196 A. 18, 328 Pa. 302—Warren Pearl Works v. Rappaport, 154 A. 587, 303 Pa. 235.

45. Pa.—Knox v. Noggle, 196 A. 18, 328 Pa. 302—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 1.

46. Pa.—Knox v. Noggle, 196 A. 18, 328 Pa. 302—Macri v. Misiti, 20 Pa.Dist. & Co. 419, 20 Dauph.Co. 343—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 1.

47. Pa.—Home Owners' Loan Corporation v. Edwards, 198 A. 123, 329 Pa. 529—Knox v. Noggle, 196 A. 18, 328 Pa. 302—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131—Meskunas v. Puskunigis, 33 Pa.Dist. & Co. 124, 40 Lack.Jur. 77, 53 York Leg.Rec. 43—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 148—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 1—Penn State Building & Loan Ass'n v. Buchwald, 48 Dauph.Co. 77—Meskunas v. Puskunigis, 40 Lack.Jur. 29—Soult v. May, 23 West.Co.L.J. 1.

48. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230.

49. Ill.—Dietz v. Hagler, 141 N.E. 194, 309 Ill. 381.
23 C.J. p 684 note 62.

50. Or.—Brand v. Baker, 71 P. 320, 42 Or. 426.
23 C.J. p 684 note 63.

51. N.Y.—Chapman v. Boetcher, 27 Hun 606, appeal dismissed 90 N. Y. 692.
Imposing conditions generally see infra § 240.

A motion to set aside an execution sale may be made by,[52] and only by,[53] a person who, according to the rules stated supra §§ 227, 228, is entitled to question the validity of the sale.

All persons who have an interest in the sale or who will be prejudiced by setting it aside should be made defendants to the motion.[54] If the creditor moves, the debtor is a necessary party.[55] The purchaser is generally a necessary party,[56] unless he has transferred all his interest,[57] in which case the assignee is a necessary party.[58] The joinder of the execution debtor with his assignee, where he has assigned his entire interest to a stranger, is not fatal.[59]

d. Notice of Motion

Notice of a motion to set aside an execution sale must be given to all known interested persons unless it is waived.

The court cannot entertain a motion to set aside a sale under execution if notice is not given to all the parties interested,[60] unless such notice is waived by appearance[61] or by failure to object at the proper time.[62] Thus notice should be given to plaintiff in execution, since the vacation of the sale will deprive him of his right to the proceeds thereof;[63] to defendant in execution, since the vacation of the sale deprives him of the benefit of the satisfaction of the judgment entered as a result of the sale;[64] and to the purchaser at the sale, since a vacation of the sale would deprive him of the benefits of his purchase.[65] An unknown transferee or assignee of corporate stock is not entitled to notice;[66] and a party who appears and resists the motion cannot complain that notice was not given to other parties.[67]

Where no particular form of notice is prescribed by statute, a notice may be timely and sufficient although it fails to fix the day of the hearing of the motion.[68]

§ 239. —— By Action

a. In general
b. Conditions precedent
c. Time to sue, limitations, and laches
d. Parties
e. Pleading
f. Evidence

a. In General

A bill in equity to set aside an execution sale may be maintained where a proper ground for equity jurisdiction exists and the remedy at law is inadequate.

As a general rule a bill in equity to set aside an execution sale does not lie where the remedy at law by motion is adequate,[69] as where the only grounds are irregularities in the writ or in the proceedings of the officer in executing the writ.[70]

52. Executors of deceased judgment creditor
N.C.—Weir v. Weir, 145 S.E. 281, 196 N.C. 268.

Purchaser at foreclosure sale
Mo.—City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.

53. Party interested in action or otherwise affected thereby
Okl.—Mideke Supply Co. v. Ryan Cotton Oil Co., 271 P. 1022, 133 Okl. 220.

54. Mo.—City of St. Louis v. Miller, 82 S.W.2d 579, 581, 336 Mo. 1122, quoting **Corpus Juris**, and certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.
23 C.J. p 684 note 66.

55. Ky.—Chambers v. Hays, 6 B. Mon. 115.

56. La.—Mulling v. Jones, 97 So. 202, 153 La. 1091.
23 C.J. p 684 note 68.

57. Wash.—Bank v. Doherty, 79 P. 486, 37 Wash. 32.
23 C.J. p 684 note 69.

58. N.Y.—Ceburre v. Pearson, 50 N.Y.S. 112, 27 App.Div. 621.
23 C.J p 684 note 70.

59. Mo.—State v. Yancy, 61 Mo. 397.

60. Fla.—Strong v. Tedder, 196 So. 829, 143 Fla. 473.
Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
Ohio.—Sullins v. Burry, 177 N.E. 378, 379, 39 Ohio App. 556, quoting **Corpus Juris.**
23 C.J. p 684 note 72.

61. Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
Ohio.—Sullins v. Burry, 177 N.E. 378, 379, 39 Ohio App. 556, quoting **Corpus Juris.**
23 C.J. p 684 note 73.

62. Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
Ohio.—Sullins v. Burry, 177 N.E. 378, 379, 39 Ohio App. 556, quoting **Corpus Juris.**
23 C.J. p 685 note 74.

63. Tex.—Good v. Coombs, 28 Tex. 34.
23 C.J. p 685 note 75.

64. Ill.—McCormick v. Wheeler, 36 Ill. 114, 85 Am.D. 388.
23 C.J. p 685 note 76.

65. Ohio.—Sullins v. Burry, 177 N.E. 378, 379, 39 Ohio App. 556, quoting **Corpus Juris.**
23 C.J. p 685 note 77.

66. Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

67. Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 27, 324 Mo. 1142, citing **Corpus Juris**—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 25, 324 Mo. 1130, citing **Corpus Juris.**
23 C.J. p 685 note 78.

68. Tex.—Campbell v. Richards, Civ. App., 233 S.W. 532.

69. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.
23 C.J. p 685 note 92.

70. N.C.—Perkins v. Bullinger, 2 N.C. 367.
23 C.J. p 685 note 93.

A bill in equity, however, may be maintained for this purpose where proper grounds for equity jurisdiction exist,[71] and where the remedy at law by motion to vacate the sale,[72] or by ejectment or defense thereto,[73] is inadequate. Thus a bill in equity is the proper remedy where the questions involved are such that they cannot be as satisfactorily investigated on the hearing of the motion as on the trial of a suit in equity, as in cases where it may be necessary to excuse long delay in attacking the sale, or where there may be one who may possibly claim to be an innocent purchaser;[74] or where the purchaser has rightfully paid out considerable sums which should be refunded or secured to him if the sale is vacated;[75] or where the property has been conveyed by the purchaser at the sale to a third person;[76] or where the purchaser is not a party to the action;[77] or after the time for a motion has expired.[78]

Before or after execution of deed. While, as shown supra § 238 b, there are decisions authorizing a motion to set aside the sale after the execution of a sheriff's deed; it is generally held that equity has exclusive[79] jurisdiction of a bill to set aside a sale where the sale has been followed by a deed from the sheriff, since a court of law is incompetent to decree the cancellation of such deed and thus remove the cloud it casts on the title,[80] unless there was no judgment or execution, or the court had no jurisdiction to render the judgment.[81] It has been held that a suit in equity does not lie unless a sheriff's deed has been executed,[82] although under the facts of the particular case the interposition of equity may be warranted before the deed has been delivered.[83]

Fraud, accident, or mistake. Equity has jurisdiction of a bill to set aside a sheriff's sale in case of fraud, accident, or mistake resulting to the prejudice of complainant.[84] However, the jurisdiction of equity in this class of cases is not exclusive, but is concurrent with that of courts of law.[85]

Cross complaint. The sale may be set aside on a cross complaint in a suit for the land.[86]

Venue. A suit to vacate an execution sale of land is properly brought in the county wherein the purchaser resides and the land is situated.[87]

b. Conditions Precedent

Ordinarily a tender of the amount necessary to reimburse the purchaser is a condition precedent to the setting aside of an execution sale.

Although there is authority to the effect that a tender of the purchase price is not necessary as a condition precedent to having the sale set aside,[88] as a general rule, since he who asks equity must do equity, a debtor seeking to set aside a sale for irregularities, where fraud is not charged, can only have such sale vacated, according to the decisions, on tendering the purchase money[89] or tendering the

71. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Ariz.—Dragoon Marble & Mining Co. v. McNeish, 235 P. 401, 405, 28 Ariz. 96, citing **Corpus Juris.**
Fla.—Strong v. Tedder, 196 So. 829, 143 Fla. 473.
Ill.—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73.
23 C.J. p 686 note 94.

72. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
23 C.J. p 686 note 95.

73. Ala.—Dunn v. Ponceler, supra.
Mo.—Pocoke v. Peterson, 165 S.W. 1017, 256 Mo. 501.

74. N.D.—Warren v. Stinson, 70 N. W. 279, 6 N.D. 293.
23 C.J. p 686 note 97.

75. Ala.—Anniston Pipe Works v. Williams, 14 So. 111, 106 Ala. 324, 54 Am.S.R. 51.
Fla.—Strong v. Tedder, 196 So. 829, 143 Fla. 473.

76. Ill.—Jenkins v. Merriweather, 109 Ill. 647.
23 C.J. p 686 note 99.

77. Ill.—Day v. Graham, 6 Ill. 435.
S.D.—McCarthy v. Speed, 94 N.W. 411, 16 S.D. 584.

78. Mo.—Force v. Van Patton, 50 S. W. 906, 149 Mo. 446.
23 C.J. p 686 note 2.

79. Fla.—Strong v. Tedder, 196 So. 829, 831, 143 Fla. 473, quoting **Corpus Juris.**
23 C.J. p 686 note 5.
In Missouri the rule of the text does not obtain.—City of St. Louis v. Miller, 82 S.W.2d 579, 580, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.

80. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Pa.—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 148.
23 C.J. p 686 note 5.
Cancellation of sheriff's deed see infra § 279.

81. Fla.—Strong v. Tedder, 196 So. 829, 831, 143 Fla. 473, quoting **Corpus Juris.**
Ill.—Jenkins v. McMillan, 8 N.E. 192.

82. N.J.—Ludlam v. Pennsylvania Realty Co., 89 A. 998, 83 N.J.Eq. 130.
23 C.J. p 687 note 7.

83. Ariz.—Dragoon Marble & Mining Co. v. McNeish, 235 P. 401, 28 Ariz. 96.

84. U.S.—Foote v. Kansas City Life Ins. Co., C.C.A.Tex., 93 F.2d 744.
Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Ariz.—Dragoon Marble & Mining Co. v. McNeish, 235 P. 401, 405, 28 Ariz. 96, citing **Corpus Juris.**
Pa.—Meskunas v. Puskunigis, 40 Lack Jur. 29.
23 C.J. p 687 note 8.

85. Ala.—Cowan v. Sapp, 74 Ala. 44.
23 C.J. p 687 note 10.

86. Ind.—Gilpin v. Wilson, 53 Ind. 443.
23 C.J. p 687 note 11.

87. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.

88. Ind.—Seller v. Lingerman, 24 Ind. 264—Banks v. Bales, 16 Ind. 423.

89. Ill.—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.
23 C.J. p 687 note 15.
Where sale is set aside only as to certain interest, the owner of such interest should tender that portion of the purchase price which corresponds to his proportionate inter-

amount of the debt,[90] or making an offer of reimbursement for at least the amount of the judgment with interest, the amount of taxes paid with interest, and improvements.[91]

A tender of the purchase price is not necessary to a setting aside of the sale on the ground of fraud, of which the purchaser had knowledge, and where he was not misled by any act or conduct on the part of the judgment debtor, to whom the sale results in no benefit;[92] nor is such tender necessary where the debtor notified the purchaser before the sale that the judgment had been settled,[93] or where the property is sold under a void judgment or execution.[94] A tender of the amount of the debt is not necessary where the holder of a security deed caused the land to be sold under execution without previously reconveying the property to the debtor by a quitclaim deed duly filed and recorded.[95]

Conditions imposed by the court when granting relief are considered infra § 240.

c. Time to Sue, Limitations, and Laches

A suit in equity to set aside an execution may be barred by limitations or laches. Strong equitable grounds are necessary to warrant relief after the expiration of the period for redemption.

A suit in equity to set aside an execution sale may[96] or may not[97] be barred by limitations.

Although the suit is not barred by limitations, it may[98] or may not[99] be barred by laches. The suit must be brought within a reasonable time,[1] but it will not be barred if the delay, through lack of knowledge or otherwise, is excusable.[2] Where a party unnecessarily delays in seeking relief or allows the rights of third parties to intervene, the court will not grant him equitable relief after the time for his legal remedies has expired, except in the case of strong injustice as well as irregularities.[3]

Before or after expiration of redemption period. Ordinarily a suit to vacate and set aside a sale under execution is timely if it is brought within the redemption period;[4] and under some circumstances a court of equity may set aside a sale, even after the time for redemption has expired,[5] but it will not do so except on strong equitable grounds.[6]

d. Parties

General rules as to parties ordinarily apply in a suit to set aside an execution sale.

General rules as to parties ordinarily are applicable in suits to set aside an execution sale.[7] All persons having a legal or beneficial interest in property sold under execution, or whose interests are prejudicially affected by its sale, should be made parties to a bill to set aside the sale,[8] as should all parties of record in the original action,[9] and in some jurisdictions it has been held that all persons holding under such parties should likewise be made parties.[10] However, where only the purchaser complains of a failure to make parties transferees from him of a portion of the land purchased, a decree

est.—Moore v. Snowball, 82 S.W. 330, 36 Tex.Civ.App. 495.

90. Ga.—Woodward v. La Porte, 184 S.E. 280, 181 Ga. 731.

91. Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.

92. Mo.—Guinan v. Donnell, 98 S.W. 478, 201 Mo. 173.
23 C.J. p 688 note 17.

93. Tex.—Marshall v. Marshall, Civ. App., 150 S.W. 755.

94. Ill.—Cox v. Spurgin, 71 N.E. 456, 210 Ill. 398.

95. Ga.—Coates v. Jones, 82 S.E. 649, 142 Ga. 237.
23 C.J. p 687 note 14.

96. La.—Morris v. Foster, 189 So. 601, 192 La. 996—Murray v. Hardee, App., 189 So. 376.
23 C.J. p 688 note 23 [d].

97. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.
La.—Keller v. Summers, App., 159 So. 198.

98. Md.—Roberto v. Catino, 116 A. 873, 140 Md. 38.
Mich.—Brown v. Harrison, 219 N.W. 606, 242 Mich. 603.
N.J.—Giordano v. Asbury Park & Ocean Grove Bank, 156 A. 779, 9 N.J.Misc. 1008.
23 C.J. p 688 note 23 [a].

99. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
Mo.—Mahen v. Tavern Rock, 37 S.W. 2d 562, 327 Mo. 391.
23 C.J. p 688 note 23 [b].

1. Ala.—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
23 C.J. p 688 note 23.
However, the position has been taken that where there is an applicable statute of limitation a party has the entire statutory period in which to sue.
Ky.—Myers v. Sanders, 7 Dana 506.
S.C.—Bradley v. McBride, 9 S.C.Eq. 202.

2. Tex.—Moore v. Miller, Civ.App., 155 S.W. 573.
23 C.J. p 688 note 24.

3. Ill.—Noyes v. True, 23 Ill. 503.
Tenn.—York v. Byars, 173 S.W. 435, 131 Tenn. 38.

4. N.D.—Michael v. Grady, 204 N.W. 182, 52 N.D. 740.

5. Utah.—Young v. Schroeder, 37 P. 252, 10 Utah 155, affirmed 16 S.Ct. 512, 161 U.S. 334, 40 L.Ed. 721.
Corpus Juris cited in a case where the sale sought to be set aside was made in a mortgage foreclosure proceeding.—Security Savings and Loan Ass'n v. Morgan, 20 N.E.2d 707, 709, 106 Ind.App. 437.

6. Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230.
23 C.J. p 686 note 3.

7. Ill.—Burnham v. Roth, 91 N.E. 472, 244 Ill. 344.

8. Ind.—Stotsenburg v. Stotsenburg, 75 Ind. 538.
Ky.—Cassiday v. McDaniel, 8 B.Mon. 519.

9. Tex.—Cook v. Smith, Civ.App., 96 S.W.2d 318, error dismissed.
23 C.J. p 689 note 29.

10. N.Y.—Pardee v. Leitch, 6 Lans. 303—Ceburre v. Pearson, 50 N.Y.S. 112.

vacating the sale may be valid as to him and without prejudice to the transferees.[11] Persons having no interest in the controversy are not necessary parties.[12]

The execution creditor has been held not to be a necessary defendant,[13] but there is authority to the contrary.[14]

The execution debtor is a proper, but not a necessary, party to a proceeding to set aside the sale on the ground that the property belongs to a third person,[15] or to a suit to set aside the sale and determine the rights of the various judgment creditors, where he has no right of redemption in the premises and no legal interest to be protected or foreclosed.[16]

The sheriff has been held not a proper defendant;[17] but a contrary view has also been taken.[18]

e. Pleading

In a suit to set aside an execution sale the bill must state facts and circumstances disclosing an equitable cause of action.

General rules of pleading usually apply in suits to set aside an execution sale.[19] The bill, petition, or complaint must state facts and circumstances disclosing an equitable cause of action.[20] It must show the right of plaintiff to bring the suit,[21] state specifically the irregularity or fraud relied on as a ground for setting aside the sale,[22] and show injury or prejudice therefrom.[23] Thus a bill to set aside a sale on the ground that several parcels of land were sold en masse should allege what the land sold for and its value,[24] and that it was susceptible of division, or that it might have been more advantageously sold in separate parcels,[25] or that the proceeds of the sale were less than they would have been if the land had been sold in separate parcels;[26] but it need not aver that the petitioner did not desire or direct that the property be sold en masse, since such direction, if given, is a matter of defense which must be pleaded by the officer or purchaser;[27] and the view has been taken that, where the bill complains of the sale of disconnected tracts of real estate en masse, the burden of pleading is on respondent to show that there was not an offensive use of the right of execution.[28] The property purchased need not be specifically described where its identity is fixed.[29]

If there has been long delay in bringing the action, a sufficient reason therefor must be alleged in the bill.[30] If it is claimed that the purchaser had notice of the facts relied on, it should be so alleged;[31] and if plaintiff claims by deed delivered before the recovery of judgment on which the execution is based it must be alleged that the deed was duly recorded or that the execution purchaser had notice before the purchase.[32] Alleging that the purchaser had obtained a deed imports that he paid the amount of his bid, and does not raise an issue as to whether the purchase was for a valuable consideration.[33]

The bill may be framed with a double aspect;[34] and the allowance of an amendment is discretionary.[35]

11. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.

12. Ill.—Burnham v. Roth, 91 N.E. 472, 244 Ill. 344.
23 C.J. p 689 note 31.

13. Ga.—White-Diamond v. Hightower, 53 S.E. 1024, 125 Ga. 191, 5 Ann.Cas. 260.

14. Tex.—Good v. Coombs, 28 Tex. 34.
23 C.J. p 689 note 33.

15. Ill.—Farmers' Nat. Bank v. Sperling, 113 Ill. 273.
23 C.J. p 689 note 34.

16. Ill.—Burnham v. Roth, 91 N.E. 472, 244 Ill. 344.

17. Ind.—Draper v. Vanhorn, 15 Ind. 155.

18. Ga.—Giddens v. Alexander, 56 S.E. 1014, 127 Ga. 734.

19. Ga.—Woodward v. La Porte, 184 S.E. 280, 181 Ga. 731.

20. Colo.—Michell v. San Juan Mining Co., 83 P.2d 149, 103 Colo. 16.
Ga.—Woodward v. La Porte, 184 S.E. 280, 181 Ga. 731.
La.—Markham v. Lacaze, 187 So. 669, 192 La. 285.

Allegations held sufficient
Tex.—Selkirk v. Selkirk, Civ.App., 297 S.W. 578.

21. Idaho.—Ryan v. Woodin, 75 P. 261, 9 Idaho 525.
23 C.J. p 689 note 38.

22. Ala.—Harris v. Stephenson, 41 So. 1008, 147 Ala. 537.
23 C.J. p 689 note 39.

Fraud in selection of appraisers
To authorize the court to set aside an execution sale on the ground of fraud in the selection of the appraisers the bill must allege that the incorrect valuation was procured by fraud.—Lawrence v. Edelen, 6 Bush, Ky., 55.

Allegations held sufficient
N.J.—Sapinsky v. Stout, 138 A. 899, 101 N.J.Eq. 813.

23. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
23 C.J. p 689 note 40.

24. Ill.—Ross v. Mead, 10 Ill. 171.

25. Ill.—Greenup v. Stoker, 12 Ill. 24, 52 Am.D. 474.
23 C.J. p 689 note 42.

26. Cal.—Hudepohl v. Liberty Hill Consolidated Min. & Water Co., 29 P. 1025, 94 Cal. 588, 28 Am.S.R. 149.
Ill.—Prather v. Hill, 36 Ill. 402.

27. Mo.—Kelly v. Hurt, 61 Mo. 463.

28. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.

29. La.—Viguerie v. Hall, 31 So. 1019, 107 La. 767.

30. Idaho.—Ryan v. Woodin, 75 P. 261, 9 Idaho 525.

31. Cal.—Reeve v. Kennedy, 43 Cal. 643.

32. Ind.—Union Cent. L. Ins. Co. v. Doods, 58 N.E. 258, 155 Ind. 365.

33. Iowa.—May v. Sturdivant, 39 N.W. 221, 75 Iowa 116, 9 Am.S.R. 463.

34. Ill.—Henderson v. Harness, 56 N.E. 786, 184 Ill. 520.
23 C.J. p 689 note 45.

35. Cal.—Stockwell v. McAlvay, 74 P.2d 504, 10 Cal.2d 368, certiorari

Counterclaim. In an action for the recovery of the possession of real estate, a counterclaim which seeks to have the sale set aside may be sustained, although the facts alleged as grounds therefor might have been given in evidence under the general denial, which is also pleaded.[36]

f. Evidence

General rules of evidence ordinarily apply in a suit to set aside an execution sale.

The burden of proof is on the party filing the bill to vacate an execution sale to show the irregularities or fraud relied on.[37] However, the burden of evidence may be shifted to defendant.[38] Where one who was agent for both the debtor and the creditor in effecting an execution sale himself became the purchaser at such sale, the burden is on him, in an action to set aside the sale, to show that the sale was not fraudulent.[39]

The admissibility[40] and the weight and sufficiency[41] of evidence in a suit to set aside an execution

denied McAlvay v. Stockwell, 58 S. Ct. 1047, 304 U.S. 547, 82 L.Ed. 1520.

36. Ind.—Gilpin v. Wilson, 53 Ind. 443.
23 C.J. p 690 note 52.

37. Wash.—Cook v. Reuter, 197 P. 53, 115 Wash. 384.
23 C.J. p 690 note 54.

Sale in gross

Person complaining of sale has the burden of showing that land sold on execution without subdivision was sold for an inadequate price because not offered in separate tracts.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.

38. Tex.—Snouffer v. Heisig, Civ. App., 130 S.W. 912.
23 C.J. p 690 note 55.

Where gross inadequacy of price is coupled with circumstances indicating fraud or unfairness, purchaser can retain advantage only by showing that title was acquired by proceedings free from fraud or irregularity.—Barnes v. Freed, 173 N. E. 795, 342 Ill. 73.

39. Miss.—White v. Trotter, 22 Miss. 30, 53 Am.D. 112.

40. Tex.—Moore v. Miller, Civ.App., 155 S.W. 573.
23 C.J. p 690 note 57.

Representations by the officer, or by the purchaser before, and at the time of, the sale, are admissible in evidence in connection with the inadequacy of price, on the issue whether the sale was fair and valid. —Seller v. Lingerman, 24 Ind. 264—23 C.J. p 691 note 58.

The execution, advertisement, and appraisement of the property are admissible in evidence for the party seeking to vacate a sale, in order to prove the material facts averred therein.—Barkley v. Mahon, 95 Ind. 101.

Evidence to impeach the return is admissible where the allegations in the petition constitute a direct attack on the return.—Moore v. Snowball, 82 S.W. 330, 36 Tex.Civ.App. 495—23 C.J. p 691 note 61.

41. Me.—Gilman v. Haviland, 56 A. 139, 114 Me. 303.
23 C.J. p 691 note 62.

Estoppel or waiver

For property owner to be estopped from attacking validity of execution sale, facts creating waiver or estoppel must be clearly shown and established.—Jones v. Alford, La.App., 172 So. 213.

Fraud

Where statements that the purchaser is buying for the benefit of the debtor and his family are relied on to show fraud, it is necessary to show by some evidence that persons were influenced by such statements, although slight evidence may be sufficient —Stewart v. Severance, 43 Mo. 322, 97 Am.D. 392.

Prima facie evidence

(1) The recitals in the execution, the return thereon, and the sheriff's deed are prima facie evidence of the facts stated therein.—Massey v. Young, 73 Mo. 260.

(2) In a suit by a wife to set aside an execution sale of property, title to which was in her name, on a judgment against her husband, testimony that the land was purchased by the wife, or for her out of proceeds arising from the sale of her homestead interest in other land, and that the amount settled on her was not unreasonable in proportion to the whole consideration for the sale, makes a prima facie case for her.—Davis v. Yonge, 85 S.W. 90, 74 Ark. 161.

Undisputed or uncontradicted evidence

(1) Sheriff's uncontradicted testimony that he posted notices of execution sale shows that they were posted.—Runyon v. Bevins, 291 S.W. 1033, 218 Ky. 589.

(2) Undisputed evidence that full purchase price of realty sold on execution was paid within fifteen minutes time consumed by sheriff and purchaser in walking two blocks from place of sale to bank where purchaser had his money sustains trial justice's finding that sale was for cash.—Coulters v. Meiggs, 191 A. 115, 58 R.I. 30.

Evidence held sufficient

(1) To justify judgment nullifying sale on ground that writ of fieri facias was not issued.—Jones v. Alford, La.App., 172 So. 213.

(2) To render judgment upholding sale proper as against claim of inadequacy in price.—Buter v. Slattery, 237 N.W. 232, 212 Iowa 677.

(3) To sustain finding that levy was regular and valid.
Cal.—Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441.
Mo.—Spring v. Giefing, 289 S.W. 825, 315 Mo. 525.

(4) To show fraud, misrepresentations, or that execution debtor was misled.
Mo.—Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.
R.I.—Boiani v. Wilson, 132 A. 881, 47 R.I. 317.

(5) To show that all the capital stock of a certain corporation was owned by the husband, although some of the stock was held in the name of the wife and children, and that the purchaser at the sale under execution against the wife knew and recognized such ownership.—Rookery Realty, Loan, Inv. & Bldg. Co. v. Johnson, 243 S.W. 123, 294 Mo. 461—23 C.J. p 691 note 62 [a] (2), (3).

(6) To show other matters see 23 C.J. p 691 note 62 [a] (1), (4).

Evidence held insufficient

(1) To prove contention that the land was not in the county.—Cook v. Reuter, 197 P. 53, 115 Wash. 384.

(2) To sustain attack on advertisement.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62.

(3) To sustain claim that appraisers were incompetent because of lack of experience and knowledge concerning values of property like that appraised.—Francis v. Todd & Kraft Co., 259 N.W. 249, 219 Iowa 672.

(4) To show fraud.
Ky.—Kitchen, Whitt & Co. v. Fannin, supra.
Md.—Roberto v. Catino, 116 A. 873, 140 Md. 38.
Pa.—Young v. National Bank of Lansdowne, 27 Del.Co. 160.
23 C.J. p 691 note 62 [b] (3).

(5) To show such gross inadequacy of price as to indicate fraud or warrant the setting aside of the sale.

sale are usually governed by rules obtaining in civil actions generally.

§ 240. —— Hearing, Determination, and Judgment

An application for relief against an execution sale is addressed largely to the discretion of the court.

An application for relief against an execution sale, whether it is presented to a court of equity or to the court out of which the execution issued, is to a large extent addressed to the discretion of the court, and in each case the court has considerable latitude in determining whether or not a proper case is made for the exercise of its jurisdiction.[42] Unless the right to have evidence taken and witnesses examined is given by statute, and has not been waived,[43] on a motion to set aside an execution sale the court may exercise its discretion in allowing or disallowing evidence to be introduced,[44] and may go beyond the face of the papers and examine questions outside of those affecting the mere regularity of the proceedings;[45] but the court's exercise of its discretion is not uncontrollable, and where there has been an abuse of discretion a reversal may be obtained on appeal.[46] After reversal, it may be necessary, under the mandate and in order to carry out the intention of the appellate court, that the motion be fully heard and all competent evidence thereon be received.[47]

The granting of an order nisi to set aside an execution sale operates, as soon as the parties have notice of it, to stay any further action pending a hearing on the motion.[48] There is neither necessity nor justification for the appointment of a receiver where the motion affords all parties a plenary hearing and no facts showing immediate peril to the rights of the parties are pleaded.[49]

Material issues must be determined[50] and the judgment must correspond to the issues.[51] Plaintiff cannot obtain a decree on other grounds disclosed by the proof, without amendment, where the evidence disproves the case made by the bill.[52] Where plaintiff has homestead rights but sues to set aside the sale on the ground of fraud, it is proper to set aside the sale instead of merely setting off the homestead in the land.[53] The rights of a person who is not a party cannot properly be adjudicated.[54] Equity will not grant relief merely because of a technicality,[55] nor where to do so would work injustice;[56] and where the purchaser is the judgment creditor, it may be proper, in order to do equity, to allow the sale to stand and declare that defendant holds the property in trust to sell and apply the proceeds in reduction or payment of the amount due on his judgment, rendering any surplus to complainant.[57] Where the denial of relief to plaintiff in a suit to set aside the sale renders un-

Ill.—Dietz v. Hagler, 141 N.E. 194, 309 Ill. 381.
Iowa.—Francis v. Todd & Kraft Co., supra.
Md.—Roberto v. Catino, supra.
Mo.—Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.

(6) To show a conspiracy.—Sidwell v. Kaster, supra.

(7) To show that officer at execution sale made statements preventing free competitive bidding.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 9 F.2d 599.

(8) To show other matters see 23 C.J. p 691 note 62 [b] (1), (2).

42. Del.—Petition of Seaford Hardware Co., 132 A. 737, 3 W.W.Harr. 146.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.
N.D.—St. Paul Trust & Savings Bank v. Olson, 202 N.W. 472, 52 N.D. 315.
Okl.—Dascomb-Daniels Lumber Co. v. Whitley, 15 P.2d 31, 159 Okl. 222.
Pa.—First Nat. Bank v. Mount, 1 A.2d 547, 132 Pa.Super. 518—Barton, for Use of, v. Moser, 36 Pa.Dist. & Co. 133, 87 Pittsb.Leg.J. 226—New Tripoli Nat. Bank v. Greenawalt, 33 Berks Co.L.J. 1.
23 C.J. p 691 note 67.

43. Wis.—Kissinger v. Zieger, 120 N.W. 249, 138 Wis. 368.
23 C.J. p 691 note 69 [a].

44. Kan.—Aultman v. Humphrey, 53 P. 789, 8 Kan.App. 2.
23 C.J. p 691 note 70.

Assumption of injury or damage

While there may be some exceptions to the rule, in most cases court will assume that injury or damage has resulted where provisions of statute with respect to giving of notice of sale of property under execution process are not complied with. —Petition of Adair, 190 A. 105, 8 W.W.Harr., Del., 175.

45. Pa.—Brennan v. Paxson, 76 A. 199, 227 Pa. 444. See Federal Deposit Ins. Corporation v. King, 30 Del.Co. 534.
23 C.J. p 691 note 71.

Consideration of attendant circumstances

Every motion for quashing sale is to be determined with reference to all attendant circumstances under which writ was executed.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.

46. Pa.—Stroup v. Raymond, 38 A. 626, 183 Pa. 279, 63 Am.S.R. 758.

47. Okl.—Miller v. Bird, 54 P.2d 1041, 176 Okl. 4—Mentzer v. Miller, 54 P.2d 1038, 176 Okl. 1.

48. N.C.—Weir v. Fowler, 145 S.E. 283, 196 N.C. 270.

49. Mo.—State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

50. Tex.—Treadaway v. Hodges, Civ. App., 125 S.W.2d 385.

51. Ind.—Mugge v. Helgemeier, 81 Ind. 120.
23 C.J. p 692 note 79.

52. Ill.—Schmitt v. Weber, 88 N.E 268, 239 Ill. 377.

53. Ill.—Karle v. Schlick, 99 N.E. 615, 255 Ill. 373.

54. Cal.—Stockwell v. McAlvay, 74 P.2d 504, 10 Cal.2d 368, certiorari denied McAlvay v. Stockwell, 58 S. Ct. 1047, 304 U.S. 547, 82 L.Ed. 1520.

55. D.C.—Bride v. Baker, 37 App.D. C. 231.

56. D.C.—Bride v. Baker, supra.
23 C.J. p 692 note 77.

57. N.J.—Combee v. Hoffman, 99 A. 607, 87 N.J.Eq. 148.

necessary affirmative equitable relief prayed for by defendant in a cross bill, relief on the cross bill should not be granted.[58]

Jury trial and instructions. It has been held that a jury trial may be demanded.[59] Where there is a jury trial, all questions of fact, such as the question of fraud, are for the jury, under appropriate instructions from the court.[60]

Nonsuit. A nonsuit is improper where there is evidence to support plaintiff's case.[61]

Imposing conditions. The setting aside of the sale may be conditioned on making certain payments, giving security, or doing other appropriate acts.[62] Reimbursement of sums paid out by the purchaser to protect the property[63] and of the amount of the bid which he has paid,[64] less the rents and profits chargeable against him,[65] is generally required. However, repayment of the bid or so much as paid by the purchaser need not be ordered where the purchaser is one with notice.[66] Payment of the debt,[67] or of the judgment, interest, and costs,[68] is sometimes made a condition precedent where the attacking party is the execution debtor or his grantee.

Effect of decision. The court's decision on a motion is not conclusive of the ultimate rights of the parties claiming the property;[69] and the denial of a motion made by a stranger to the action does not deprive the court of jurisdiction of a similar motion subsequently presented by defendant.[70]

Costs and security therefor. The purchaser at an execution sale is not chargeable with the costs of an equitable suit to set aside the sale brought by the judgment debtor without a tender of the amount of the judgment.[71] Security for costs need not be given before consideration of a rule nisi to set aside a sheriff's sale where the ground for setting aside is not inadequacy of price.[72]

§ 241. Effect of Setting Aside Sale

On the setting aside of an execution sale, the parties are, or should be, restored, as far as possible, to the positions they occupied before the sale.

On setting aside an execution sale, all parties are or should be placed in statu quo as far as possible.[73] Thus, where the sale is vacated for an irregularity or fraud in the conduct thereof, as a general rule the judgment creditor should be restored to his full judgment rights,[74] the purchaser should be refunded the purchase money,[75] and the execution debtor restored to his title and to possession of the property,[76] or its proceeds,[77] although he cannot have both the property and its proceeds or an application of the proceeds to the payment of the debt.[78] After the sale has been

58. Ga.—Tanner v. Wilson, 17 S.E. 2d 581.

59. Miss.—Hopton v. Swan, 50 Miss. 545.

60. N.C.—Thorpe v. Beavans, 73 N. C. 241.
23 C.J. p 692 note 74.
Instructions
(1) The instructions must be supported by the proofs.
Ga.—Keith v. Brewster, 39 S.E. 850, 114 Ga. 176.
Tex.—Driscoll v. Morris, 21 S.W. 629, 2 Tex.Civ.App. 603.
(2) They must clearly and correctly state the law applicable to the facts of the case.—Weaver v. Nugent, 10 S.W. 458, 72 Tex. 272, 13 Am.S.R. 792.
23 C.J. p 691 note 66.

61. Ga.—Suttles v. Sewell, 35 S.E. 224, 109 Ga. 707.

62. Ga.—Reeves v. Lancaster, 126 S.E. 480, 159 Ga. 540.
Ill.—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.
Pa.—Kline v. Kline, 188 A. 119, 324 Pa. 145—Federal Deposit Ins. Corporation v. King, 30 Del.Co. 534.
23 C.J. p 692 note 82.
Payment of amount of tender
Mich.—Roubaje v. Graszuk, 221 N.W. 289, 244 Mich. 179.

63. Ill.—Flemming v. Tallerday, 124 N.E. 613, 289 Ill. 508.
23 C.J. p 692 note 83.
Taxes
(1) A rule contrary to that of the text has been laid down as to taxes, and assessments paid.—Stanley v. Westover, 269 P. 468, 93 Cal.App. 97.
(2) On the other hand, it has been held that the court is authorized to award judgment creditor, paying taxes on lots, sale of which under execution was set aside as inequitable, supplemental lien for amount thereof on application.—Kaw Valley State Bank v. Chumos, 28 P.2d 744, 138 Kan. 921, modifying 27 P.2d 244, 138 Kan. 714.

64. Cal.—Stanley v. Westover, 269 P. 468, 93 Cal.App. 97.
Ill.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.
23 C.J. p 692 note 84.

65. Ga.—O'Kelley v. Gholston, 15 S.E. 123, 89 Ga. 1.
Ill.—Kinney v. Knoebel, 51 Ill. 112.

66. Mo.—Siling v. Hendrickson, 92 S.W. 105, 193 Mo. 365.

67. Ky.—Black v. Stefle, 6 S.W. 23, 9 Ky.L. 610.

68. Ariz.—Blasingame v. Wallace, 261 P. 42, 32 Ariz. 580.
Mich.—Roubaje v. Graszuk, 221 N.W. 179, 244 Mich. 179.

69. Kan.—Harrison v. Andrews, 18 Kan. 535—Aultman v. Humphrey, 53 P. 789, 8 Kan.App. 2.

70. Cal.—Sorensen v. Coddington, 249 P. 37, 79 Cal.App. 199.

71. Ill.—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.

72. Pa.—Macri v. Misiti, 20 Pa.Dist. & Co. 419, 20 Dauph.Co. 343.

73. La.—Mulling v. Jones, 114 So. 725, 164 La. 894, affirming 7 La. App. 184.
Neb.—State Bank v. Green, 4 N.W. 942, 10 Neb. 130.

74. N.Y.—Wambaugh v. Gates, 11 Paige 505, affirmed How.A.Cas. 247.
23 C.J. p 692 note 89.

75. Ky.—George Hogg & Son v. Budnick, 13 S.W.2d 756, 227 Ky. 602.
23 C.J. p 692 note 91.

76. Okl.—Goldenstern v. Gavin, 102 P.2d 582, 584, 187 Okl. 338, citing **Corpus Juris.**
23 C.J. p 692 note 92.

77. Ky.—Trueman v. Berry, 6 B. Mon. 536.
Pa.—Williams v. Steenrod, 11 Pa. Dist. 22, 7 Lack.Leg.N. 377.

78. Ga.—Holbrook v. Stewart, 191 S.E. 165, 55 Ga.App. 720.

set aside, the purchaser has no title to the property[79] and cannot convey any title.[80]

Where an execution sale is objected to on two grounds, a general order setting it aside, although res judicata as to the validity of the sale, is not res judicata as to either of the grounds urged.[81] An action on a claim is not barred by the fact that an execution sale was had under a former judgment which was reversed, where the sale was set aside before it became absolute.[82]

Effect on levy. While it has been held that the levy on which the sale was made is not restored,[83] it has also been held otherwise under statute,[84] or where the sale is set aside on grounds pertaining to steps taken subsequent to, and not involving the validity of, the seizure.[85]

Resale. In some cases a resale may be ordered under the original writ to make the debt and costs, inclusive of the costs of the prior sale;[86] and where a resale is ordered and the sale unconditionally set aside, on the purchaser failing to comply with his bid, he thereafter has no interest in the proceedings.[87]

§ 242. Collateral Attack on Sale

An execution sale may be collaterally attacked only when the sale is void.

If the defect or irregularity relied on makes the execution sale void rather than voidable, it may be urged by way of collateral attack,[88] as in ejectment[89] or in some other action to recover possession or establish title;[90] but it has been held that in order to be received with favor the collateral attack should come from some creditor or purchaser claiming an intervening right or lien.[91]

On the other hand, if the defect or irregularity relied on,[92] whether occurring before the sale,[93] or in the conduct of the sale,[94] makes the sale merely voidable and not void, it cannot be urged by way of a collateral attack, but only on a motion to set it aside or in a direct action instituted for that purpose; and this is particularly true after the sale has been confirmed.[95] For instance, the want of proper notice of sale is not ground for a collateral attack on the sale,[96] especially after confirma-

79. Tex.—Moore v. Miller, Civ.App., 155 S.W. 573.
23 C.J. p 692 note 94.

80. U.S.—Deputron v. Young, Neb., 10 S.Ct. 539, 134 U.S. 241, 33 L.Ed. 923, affirming 37 F. 46.
23 C.J. p 692 note 95.

81. Okl.—Ashur v. McCreery, 300 P. 767, 150 Okl. 111.

82. Mich.—Millikin v. Ferguson, 22 N.W. 278, 56 Mich. 189.

83. Tenn.—Mays v. Wherry, 3 Tenn. Ch. 80.

Property not belonging to debtor
The setting aside of the sale, on the ground that the property did not belong to the debtor, bars any claim of the creditor to the property or possession acquired by the levy and sale.—Bacon v. Kimmel, 14 Mich. 201.

84. Ky.—Hirsch v. Bourne, 4 Ky.Op. 529.
23 C.J. p 692 note 90 [a].

85. La.—Mulling v. Jones, 114 So. 725, 164 La. 894, affirming 7 La. App. 184.

86. N.J.—J. E. Linde Paper Co. v. Gebert, 105 A. 447, 92 N.J.Law 280.
23 C.J. p 692 note 96.

87. N.C.—Hines v. Moye, 34 S.E 103, 125 N.C. 8.

88. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
Tex.—Kellogg v. Southwestern Lumber Co. of New Jersey, Civ.App., 44 S.W.2d 742, error refused.
23 C.J. p 693 note 4.

89. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
Ky.—Spears v. Weddington, 142 S. W. 679, 146 Ky. 434.

90. La.—Long v. Challan, 175 So. 42, 187 La. 507.

91. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
Mo.—Mayes v. Cunningham, App., 204 S.W. 404.

92. Ala.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171—Jones v. Spear, 85 So. 471, 204 Ala. 110.
Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
Tex.—Houston Oil Co. of Texas v. Randolph, Com.App., 251 S.W. 794, 28 A.L.R. 926, reversing Southwestern Settlement & Development Co. v. Randolph, Civ.App., 240 S.W. 655—Graves v. Griffin, Com.App., 228 S.W. 913—Hendron v. Yount-Lee Oil Co., Civ.App., 119 S.W.2d 171, error refused.
Wash.—In re Stoops' Estate, 203 P. 22, 118 Wash. 153.
23 C.J. p 693 note 7.

Where nullity is relative and not absolute, it may be judicially declared only where there is a direct issue of nullity and all the parties in interest are before the court, and not in a collateral proceeding.—Shaw v. Marceaux, 125 So. 460, 12 La.App. 401—Colfax Motor Co. v. O'Quinn, 2 La.App. 323.

93. Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
Tex.—Houston Oil Co. of Texas v. Randolph, Com.App., 251 S.W. 794, 28 A.L.R. 926, reversing Southwestern Settlement & Development Co. v. Randolph, Civ.App., 240 S.W. 655—Collins v. Jones, Civ.App., 79 S.W.2d 175, error refused—Smith v. Bittick, Civ.App., 237 S.W. 331, error refused.
23 C.J. p 693 note 8.

94. Ala.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171.
Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 182, 339 Ill. 230, quoting **Corpus Juris.**
23 C.J. p 694 note 9.

Acknowledgment of sheriff's deed is a judicial act, and concludes all mere irregularities, however gross, in the process and sale. After acknowledgment the validity of the title acquired by the purchaser cannot be questioned in a collateral action involving the title, except for the absence of authority, or the presence of fraud in the sale.—Podol v. Shevlin, 130 A. 264, 284 Pa. 32—23 C.J. p 694 note 9 [b].

95. Kan.—Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.
Okl.—Dixon v. Peacock, 141 P. 429, 43 Okl. 87.

96. Ala.—Dean v. Lusk, 3 So.2d 310, 241 Ala. 519.
Neb.—Nipp v. Puritan Mfg. & Supply Co., 259 N.W. 53, 126 Neb. 459.
Okl.—Morgan v. Stevens, 223 P. 365, 101 Okl. 116.

tion and a finding that due notice of the sale was given.[97] It cannot be urged collaterally that the sale was en masse instead of in parcels,[98] or that the price for which the property was sold was inadequate.[99]

Collateral attack on judgment. Where the judgment on which the execution issued is erroneous, or irregularities were committed in the action in which such judgment was recovered, the remedy is by appeal or writ of error, and if the party foregoes these methods of correcting errors and irregularities in the judgment, he cannot afterward set them up in a collateral action or proceeding involving the title to the property sold;[1] but the judgment may be attacked collaterally where it is void,[2] as where it was rendered by a court which had no jurisdiction.[3]

What constitutes direct or collateral attack. A motion or other proceeding to set aside an execution sale is a direct, and not a collateral, attack.[4] Where an action is brought on the sheriff's deed,[5] such as ejectment,[6] or where an action of trespass to try title is brought,[7] and defendant seeks by appropriate pleadings to set aside the sale, the attack is a direct and not a collateral one, although it is otherwise, as to an attack by defendant in an action of trespass to try title, where he does not make the judgment creditor a party and does not tender to the purchaser the price he paid at the sale.[8] On the other hand, in an action of trespass to try title against the holder of a sheriff's deed, an attack by plaintiff on the sale or proceedings relating thereto is collateral rather than direct;[9] but evidence which merely explains the date of the delivery of the deed is not a collateral attack.[10]

C. PROCEEDS

§ 243. Definition

The "proceeds" of an execution sale may be defined as all that which is received therefrom.

"Proceeds" means all that is received from an execution sale.[11]

§ 244. Disposition in General

Generally the plaintiff of record or his assignee is the person legally entitled to the proceeds of an execution sale and, in the absence of superior claims or contrary provisions of statute, payment may be made directly to him, although technically it is more proper that the money should be paid into the court from which the execution issued.

Except in so far as there are preferred claims as of the time of sale payable therefrom,[12] the general rule is that plaintiff of record, or his assignee, is the party legally entitled to the proceeds of an execution sale, and the sheriff should pay over to such party the money so collected, less the amount of his fees and charges, so far as required to satisfy the execution,[13] but where an order of court authoriz-

Or.—Mt. Vernon Nat. Bank v. Morse, 264 P. 439, 128 Or. 64.
23 C.J. p 694 note 12.

97. Neb.—Bresee v. Snyder, 143 N. W. 219, 94 Neb. 384.
S.D.—Schroeder v. Pehling, 108 N. W. 252, 20 S.D. 642, 129 Am.S.R. 952.

In absence of fraud
Neb.—Fisher v. Kellogg, 258 N.W. 404, 128 Neb. 248.

98. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Ill.—Morey v. Brown, 137 N.E. 210, 305 Ill. 284.
23 C.J. p 694 note 14.

99. Ala.—Howard v. Carey, 28 So. 682, 126 Ala. 283.
Ill.—Morey v. Brown, 137 N.E. 210, 305 Ill. 284.
Iowa.—Coburn v. Davis, 221 N.W. 186, 206 Iowa 649.
Tex.—Gutierrez v. Rodriguez, Civ. App., 137 S.W.2d 220—Smith v. Bittick, Civ.App., 237 S.W. 331, error refused.
23 C.J. p 694 note 15.

1. Kan.—Pritchard v. Madren, 2 P. 691, 31 Kan. 38.
23 C.J. p 694 note 16.

Title of purchaser cannot be collaterally attacked
La.—Jonesboro State Bank v. National Cash Register Co., App., 157 So. 553.

2. Mo.—Davis v. Montgomery, 103 S.W. 979, 205 Mo. 271.
Tex.—Bailey v. Block, 134 S.W. 323, 104 Tex. 101, reversing 125 S.W. 955.

3. Mo.—Caffery v. Choctaw Coal & Min. Co., 68 S.W. 1049, 95 Mo.App. 174.

4. Ark.—Brown v. Vaughan, 42 S. W.2d 558, 184 Ark. 364.
Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.

5. Ark.—Russell v. Williamson, 53 S.W. 561, 67 Ark. 80.

6. **Cross complaint**
Ind.—Branch v. Foust, 30 N.E. 631, 130 Ind. 538.

7. Tex.—Stone v. Day, 5 S.W. 642, 69 Tex. 13, 5 Am.S.R. 17.
23 C.J. p 694 note 21.

8. Tex.—Lange v. Brauner, Civ. App., 118 S.W.2d 971.

9. Tex.—Gutierrez v. Rodriguez, Civ App., 137 S.W.2d 220—Collins v. Jones, Civ.App., 79 S.W.2d 175, error refused.

10. Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed.

11. Idaho.—Dittemore v. Cable Milling Co., 101 P. 593, 16 Idaho 298, 133 Am.S.R. 98.

12. Pa.—Pennsylvania Trust Co. of Pittsburgh, for use of Colonial Trust Co. v. Earnest, 194 A. 520, 128 Pa.Super. 331.

13. Ga.—Jones Motor Co. v. Macon Sav. Bank, 142 S.E. 199, 37 Ga. App. 767, affirmed Macon Sav. Bank v. Jones Motor Co., 149 S.E. 217, 168 Ga. 805.
Ill.—Hallford v. Bairstow, 27 N.E.2d 851, 305 Ill.App. 661.
La.—Caldwell v. Laurel Grove Co., 153 So. 17, 179 La. 53—Holzer v. Whistle Bottling Co. of New Orleans, 3 La.App. 12.
Pa.—Reynolds v. Reynolds Lumber Co., 32 A. 537, 169 Pa. 626, 47 Am. S.R. 935.
Tex.—McKenzie v. Mayer, Civ.App., 20 S.W.2d 238.
23 C.J. p 695 note 27.

es the proceeds to be paid over to the creditor only on his complying with certain conditions which he fails to do, the debtor is entitled to the proceeds.[14] The sheriff has no right to appropriate the proceeds to other claims or purposes leaving plaintiff's debt unsatisfied.[15] It is usual for the officer to pay the money directly to plaintiff in execution, but in strictness he should bring it into the court issuing the execution, since such is the command of the writ.[16] Where the sheriff is directed by defendant not to pay out, he may either retain the money until he is sued, or apply for leave to pay it into court.[17]

Statutory provisions. Of course, in the distribution of proceeds arising from a sheriff's sale, it is necessary to have regard to whatever statutes there may be which fix the priorities of creditors and prescribe how distributions shall be made.[18]

In case of wrongful sale. Where the execution debtor stands passively by and allows his property to be sold, and makes no opposition to the sale, and subsequently surrenders possession, he cannot claim the proceeds of the sale on the ground that the judgment had been satisfied by payment prior to the sale,[19] or on the ground that the consideration of the debt, to pay which the property was sold, was illegal,[20] or on the ground of irregularity in the proceedings.[21] However, where there is proper ground for setting a sale aside on account of irregularities in the proceedings, but the property has passed into the hands of innocent purchasers, then the execution debtor can have recourse to the proceeds of the sale in lieu of the recovery of the property.[22] A grantee who claims the land under a conveyance from defendant in the execution prior to the judgments against him is not entitled to the proceeds of sale in preference to the judgment creditors, since if his title is valid it may be set up against the claim of the purchaser at the sheriff's sale.[23] Where property of a third person is sold as that of the debtor, the right of the former to the proceeds of the sale is the same as his previous right to the property.[24]

Who may make objections. A person having no claim to the proceeds cannot object to an order for payment to certain other persons.[25]

Agreements. Where lien creditors enter into an agreement for the distribution of the proceeds of an execution sale in a certain manner, such agreement will bind the parties thereto, and the distribution by the sheriff in accordance therewith will be upheld.[26]

Costs, expenses, and attorney's fees. The sheriff has a lien on the funds in his hand realized from an execution sale for his lawful fees, and the expense incurred in making the levy and sale, and he may retain such amount on settlement with the execution creditor;[27] and where such creditor is insolvent the court may order the costs to be paid out of money in the sheriff's hands due to such creditor.[28] However, unless there is a statutory provision to the contrary,[29] where liens on the property

Proceedings for distribution see infra § 252.

Prior to expiration of time for redemption

Where stranger to suit became the purchaser at an execution sale of realty, the sheriff should have delivered the purchase money to the execution creditor when it was received, and could not wait until the time for redemption of the judgment debtor should expire.—Fort Smith Seed Co. v. Jones, 132 S.W.2d 364, 198 Ark. 1012.

Rights of judgment debtor

Judgment debtor has right to require, from purchaser of land at execution sale, benefit of bid, at least up to value of land.—White v. Smith, 231 N.W. 309, 210 Iowa 787.

14. Ga.—Tift v. Goode, 47 Ga. 507.
23 C.J. p 695 note 28.

15. Ky.—Champion v. Dunn, 16 S.W.2d 791, 229 Ky. 148.
23 C.J. p 695 note 29.

16. Pa.—Franklin Tp. v. Osler, 91 Pa. 160.
23 C.J. p 695 note 30.

17. Pa.—O'Donnell v. Rorer, 4 Pa. Dist. 146.

18. Pa.—Pennsylvania Trust Co. of Pittsburgh, for use of Colonial Trust Co. v. Earnest, 194 A. 520, 128 Pa.Super. 331.
23 C.J. p 695 note 33.

Retroactive legislation

The rights of persons including governmental subdivisions to proceeds realized by sheriff's sale of real estate on a writ of fieri facias could not be affected by legislation subsequent to the sale.—Pennsylvania Trust Co. of Pittsburgh, for use of Colonial Trust Co. v. Earnest, 194 A. 520, 128 Pa.Super. 331.

19. La.—Parson v. Henry, 8 So. 918, 43 La.Ann. 307.

20. La.—Wailes v. Citizens' Bank, 23 La.Ann. 524.

21. Mo.—Slagel v. Murdock, 65 Mo. 522—Hendrix v. Wright, 50 Mo. 311.

22. Ill.—Murphy v. Loos, 104 Ill. 514.
N.Y.—Holloway v. Stevens, 2 Hun 384, 4 Thomps. & C. 674, 48 How. Pr. 129, appeal dismissed 58 N.Y. 670.

23. Pa.—Helfrich's Appeal, 15 Pa. 382.

24. N.H.—Sartwell v. Moses, 62 N. H. 355.

25. La.—Payne v. Buford, 30 So. 263, 106 La. 83.
N.J.—Kirkpatrick v. Cason, 30 N.J. Law 331.
23 C.J. p 696 note 40.

26. Ga.—Baker v. Wimpee, 22 Ga. 69.
23 C.J. p 696 note 41.

27. Iowa.—Shaw v. Roberts, 122 N. W. 932, 144 Iowa 215.
23 C.J. p 696 note 42.

Claimant for storage charges

In the absence of an express or implied contract with the sheriff, a person who claims for storage of the goods between the dates of levy and sale may not be paid from the proceeds of the sale.—Crawford v. McMahon, 69 Pa.Super. 19.

28. N.C.—Clerk's Office v. Cape Fear Bank, 66 N.C. 214, 8 Am.R. 506—Clerk's Office v. Allen, 52 N.C. 156.

29. R.I.—McKenna v. Brown, 71 A. 450, 29 R.I. 339.
23 C.J. p 696 note 44.

having priority to the judgment and execution under which the land was sold exhaust the fund realized by the sale, the costs of the execution and sale thereunder should be deducted before distribution of the fund to the prior lienors,[30] not including costs incurred prior to the issuance of the execution.[31] The fees on one execution cannot be retained out of the surplus proceeds arising from another execution.[32] Where the proceeds are less than the amount which, by statute, the debtor is entitled to as exempt, he is entitled to the entire fund without any deduction of costs.[33] Where the amount levied is insufficient to discharge plaintiff's judgment, the costs of defendant's witnesses cannot be paid out of the amount levied.[34]

Attorneys fees or commissions cannot be paid out of the proceeds of sale,[35] unless they constitute a prior lien on the property,[36] or unless such fees are expressly included in the judgment.[37]

§ 245. Duty and Right of Purchaser as to Application

Generally the purchaser at an execution sale has no duty or right regarding the officer's application of the proceeds.

The purchaser at the execution sale is under no duty to see that the officer makes a proper application of the purchase money;[38] nor can he demand that the money paid by him be applied in a particular manner.[39]

§ 246. Mortgages and Other Liens

Where a lien still attaches to the property notwithstanding its sale on execution, it is not payable from the proceeds of the sale; but liens of which property is freed by the sale are ordinarily transferred to the proceeds and are payable therefrom in the order of their priority as of the time of sale.

Liens, which are not discharged by the execution sale, but continue as liens on the property, are not payable out of the proceeds of the sale.[40] Thus, where there is a valid recorded mortgage on property at the time of the rendition of the judgment, only the equity of redemption is subject to levy and sale, and therefore the judgment creditor is entitled to the proceeds of sale, and not the mortgagee, whose lien still attaches to the property,[41] and this rule applies even where the mortgagee is the purchaser.[42] This rule likewise applies to vendors'[43] and mechanics'[44] liens. If land is only partially paid for by the judgment debtor, who has possession but no deed, the proceeds go to the judgment creditor rather than the vendor.[45] If the proceeds have been attached as the property of the judgment creditor, the lien comes into existence when the proceeds come into the hands of the officer.[46]

Where sale is free from liens. Where, by statute or otherwise, the sale on execution is free from preëxisting liens, such liens are ordinarily transferred from the property to the proceeds of the sale.[47] In such case the proceeds should be ap-

30. Del.—Associated Realty Corporation v. Caldwell, 172 A. 842, 843, 6 W.W.Harr. 196, quoting **Corpus Juris.**
La.—Viau v. Semprevivo, 118 So. 831, 9 La.App. 355.
23 C.J. p 696 note 45.

Bankruptcy of debtor
When a trustee in bankruptcy becomes entitled to the proceeds of an execution sale, the sheriff may deduct the costs due him and the prothonotary.—Berkovitz v. Jacobson, 28 Pa.Dist. & Co. 347, 17 Wash. Co. 60.

Claim to property sold
When claimants to property levied on did not file a bond, the property was therefore sold, and the claim proceeding was determined in their favor, the sheriff could deduct the legal costs incident to the entry of judgment, the sheriff's levy, and the costs of sale from the proceeds of sale payable to claimants.—Lancaster Bone Fertilizer Co. v. Weaver, 17 Pa.Dist. & Co. 356.

31. Del.—Associated Realty Corporation v. Caldwell, 172 A. 842, 843, 6 W.W.Harr. 196, quoting **Corpus Juris.**
23 C.J. p 696 note 46.

32. N.Y.—Whitehall Bank v. Weed, 8 How.Pr. 104, overruling Knickerbacker v. Shipherd, 3 Cow. 383.

33. Pa.—Hain v. Rhoads, 7 Pa.Co. 568—McFarland v. Short, 1 Chest. Co. 410.

34. N.C.—Pearson v. Haden, 5 N.C. 140.

35. Ga.—Burgin & Sons Glass Co. v. McIntire, 68 S.E. 490, 7 Ga.App. 755.
23 C.J. p 697 note 50.

36. Pa.—Eisenhower v. Shank, 31 Pa.Super. 23.
53 C.J. p 607 note 51.

37. Pa.—Berkovitz v. Jacobson, 28 Pa.Dist. & Co. 347, 17 Wash.Co. 60.
23 C.J. p 697 note 52.

38. Mo.—Childers v. Schantz, 25 S.W. 209, 120 Mo. 305.
S.C.—Farrington v. Duval, 10 S.E. 944, 32 S.C. 590.
23 C.J. p 695 note 23.

39. N.C.—Fox v. Kline, 85 N.C. 173.

40. Ga.—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga. App. 278.
Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
23 C.J. p 697 note 62.

41. Ga.—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga.App. 278.
23 C.J. p 697 note 54.

42. S.C.—Ex parte City Sheriff, 12 S.C.L. 399.

43. Ga.—Estes v. Ivey, 53 Ga. 52—Wilkerson v. Burr, 10 Ga. 117.
23 C.J. p 697 note 56.

44. N.Y.—In re West Side Electric Light & Power Co., 12 N.Y.S. 478.

45. Ga.—Wilkerson v. Burr, 10 Ga. 117.

46. Tex.—Needham v. Cooney, Civ. App., 173 S.W. 979.

47. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Ga.—Chambers v. Planters' Bank, 131 S.E. 280, 161 Ga. 535, answer to certified questions conformed to 132 S.E. 233, 35 Ga.App. 13.
R.I.—Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204.
23 C.J. p 767 note 65.

Consent presumed
In sale under judgment inferior to mortgage, consent of mortgagor, mortgagee, and plaintiff in fieri facias to sale of entire interest in property will be presumed, where en-

plied to the liens according to their priority,[48] as determined at the time of the sale, since an after-acquired lien cannot attach to such proceeds.[49] Only judgment or lien creditors of defendant in execution are within the rule, and it has no application to his contract creditors.[50] Where a sale takes place under a judgment and execution having priority over a mortgage, the proceeds go first to the satisfaction of such execution.[51] If the holder of a lien becomes the purchaser at a low price on announcing at the sale that it would be subject to his lien, his lien is not entitled to participate in the distribution of the proceeds.[52]

§ 247. Preferred Claims

a. In general
b. Wages
c. Rent
d. Debts due government

a. In General

An equitable preference may arise from the fact that the particular creditor has discovered property of the judgment debtor and brought it into court. Other preferences may arise from statutes.

A creditor who has instituted supplementary proceedings, discovered property of the judgment debtor, and brought it into court, may be given an equitable preference to the proceeds of an execution sale of the property.[53]

As considered infra this section, statutes in some states give preferences to certain claims against the debtor, such as laborer's claims, rent claims, and debts due the government. Such statutes have no extraterritorial force.[54]

b. Wages

Where priority is given by statute to wage claims in certain instances, the statutory proceeding for effectuating such priority must be followed.

In some jurisdictions, by statute, money due for wages to certain persons in certain specified businesses, for a designated period preceding an execution sale of property connected with such business, is made a preferred claim, and is first to be paid out of the proceeds of such sale,[55] if, when the statute so prescribes, the judgment debtor is insolvent.[56] A person is not entitled to a preference in the distribution of the proceeds, unless he is one of a class of persons specifically designated by the statute,[57] and the services were rendered during

tire interest was levied on, sold, and conveyed, mortgagor was insolvent, and mortgagee, in obtaining his judgment under which property was sold, had set up and established a preferred lien on property mortgaged, and awarding funds to holder of superior mortgage lien under money rule was not error.—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga.App. 278.

Effect of prothonotary's certificate

On execution and sale of realty, the fact that certificate of prothonotary showed that lien creditor which purchased at the sale held the first lien and omitted a lien in favor of exceptor, which was imposed by an equity decree which was binding on the lien creditor, because it was a party, did not entitle sheriff to distribute proceeds of the sale without regard to the exceptor's lien, since a proper case for correction of the record was presented.—Duquesne Trust Co. v. Benovitz, 2 A.2d 756, 332 Pa. 243.

Partly satisfied mortgage

Purchaser's payments on mortgage extinguished mortgage in amount thereof, and therefore distribution of full amount of mortgage to such purchaser after execution sale was improper.—Marshall v. Klein, 96 Pa. Super. 580.

48. Ga.—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga.App. 278.
La.—Crichton Co. v. Turner, 111 So. 261, 162 La. 864.
23 C.J. p 697 note 60.

Erroneous payment to a junior lienor may be followed by a court of equity which will compel restoration to the prior lienor to whom it justly belongs.—Ridenour v. Shideler, 5 Ill.App. 180.

49. Pa.—Douglass' Appeal, 48 Pa. 223—Dentler's Appeal, 23 Pa. 505.
23 C.J. p 697 note 61.

50. Ga.—Lathan v. Stringer, 88 S. E. 941, 145 Ga. 224.
23 C.J. p 697 note 63.

Void chattel mortgage does not improve the position of mortgagee over that of an ordinary creditor.—Elston, Prince & McDade v. Lyon Drug Co., 140 So. 249, 19 La.App. 321.

51. Pa.—Barnitz v. Smith, 1 Watts & S. 142.
23 C.J. p 697 note 65.

52. Pa.—Birney's Appeal, 7 A. 150, 114 Pa. 519.

53. S.C.—Ex parte Roddey, 172 S.E. 866, 171 S.C. 489, 92 A.L.R. 1430.
Liens acquired by supplementary proceedings see infra §§ 394–396.

54. Pa.—In re Modes, 76 Pa. 502—Baker v. U. S. Foreign & Domestic Fruit Co., 7 Pa.Co. 309.

55. Pa.—Bogdan v. St. Michael's Russian Orthodox Church, 173 A. 878, 114 Pa.Super. 77.
23 C.J. p 698 note 69.

56. Ill.—Western Stone Co. v. Carver, 93 Ill.App. 150.
23 C.J. p 697 note 66.

57. La.—McRae v. His Creditors, 16 La.Ann. 305.
Pa.—Bogdan v. St. Michael's Russian Orthodox Church, 173 A. 878, 114 Pa.Super. 77.
23 C.J. p 698 note 70.

Clergyman has no priority of lien for wages out of proceeds of church property sold under execution issued at instance of judgment creditor of church.—Bogdan v. St. Michael's Russian Orthodox Church, supra.

Employees of contractor

Where a statute provides that those employed by a contractor in any work on an oil well shall be entitled to a lien for their services, it was held that the word "contractor" meant only persons employed by the owner or lessees of the well, and did not embrace those who undertake to perform some special service in the construction of the well or opening of the same.—Gibbs & Sterrett Mfg. Co's, Appeal, 100 Pa. 528.

Laborer

One who performs a contract to deliver lumber, by hiring teams and drivers, but who does no hauling himself, is not a "laborer" within the meaning of the statute, and is not entitled to the preference provided by statute in distributing the

the time limited by the statute.[58] The preference is due only from proceeds of property which has been used in and about, or in connection with, the business in the course of which the services were rendered, and such other property as may be sold with it.[59] The claim can only be allowed to the one performing the work,[60] or his assignee.[61] Although it has been held that the preference does not apply to wages earned after a particular property has been seized by the sheriff on execution, since property so levied on is in the custody of the law, and that when sold the proceeds are preserved against creditors whose liens attach subsequent to the levy,[62] the day of sale must be regarded as the true limit from which to reckon the preference for wages of labor in all cases where the possession of the owner is not disturbed or transferred to the sheriff.[63] Such claims are not a lien on the property, but only on its proceeds in the custody of the law, and hence until there has been a conversion of the property into money the rights of a labor claimant do not vest;[64] and he has no control of a writ of execution issued by a judgment creditor against the employer.[65] The rights of claimant are not affected by the fact that his claim has been reduced to judgment.[66]

Notice of claim. In order to have a claim for wages accruing against a judgment debtor allowed, it is necessary for claimant to file with the sheriff a written notice of his claim prior to the execution sale;[67] and under some statutes it is also necessary that notice of the claim be given to the judgment creditor,[68] and to the judgment debtor,[69] unless such notice is waived.[70] While such notice need not be in any particular form so long as the matters essential to give claimant a lien are recited, yet it should set forth facts sufficient to make a case within the statute, so that the officer and persons interested may know that the labor was performed within the time limited in a business defined by the act, the sum due, and that property, the proceeds of which is subject to the lien, is embraced in the levy.[71] A failure to file or give the notice required constitutes a waiver of the right to a preference in the distribution of the proceeds.[72] Any number of claims may be included in one notice, especially those of husband and wife, provided all the requirements of the statute, relative to each, are complied with.[73] It is not necessary that the notice should recite all the executions under and by virtue of which the levy was made; it is sufficient if the first execution is recited.[74]

c. Rent

Claims for rent, to be entitled to preference in a distribution of the proceeds of an execution sale, must be perfected as required by the statute conferring the preference, and must be within its provisions.

Under some statutes, where the personal property of a lessee or tenant, which would be liable to distress, is sold on execution, the lessor or landlord is entitled to a preference in the distribution of the proceeds for rent of the premises on which such property is situated,[75] even though sufficient person-

proceeds of an execution sale.—Wentroth's Appeal, 82 Pa. 469.

58. Pa.—Myanza Color & Chemical Co. v. Fertex Dyeing & Finishing Co., 12 Pa.Dist. & Co. 666.

59. Pa.—Mellott v. Ott, 10 Pa.Dist. & Co. 19.
23 C.J. p 698 note 71.

Ownership of property
Petition for preference for wages was properly refused where claim was against partnership, in absence of evidence that property was partnership property.—Rothwell v. Kremer & Hoffman, 95 Pa.Super. 36.

60. Pa.—Henry v. Sheaffer, 8 Pa.Dist. 347, 14 Pa.Co. 237.
23 C.J. p 699 note 72.

61. Pa.—Wolfe's Appeal, 1 Walk. 451.
23 C.J. p 699 note 73.

62. Pa.—Central Newspaper Union v. Gracie, 7 Pa.Co. 188.
23 C.J. p 699 note 74.

63. Pa.—Dixon v. Bellefonte Glass Co., 7 Pa.Co. 235.
23 C.J. p 699 note 75.

64. Pa.—Donnan v. Shaw, 7 Pa.Dist. 605, 21 Pa.Co. 39—Keystone Lumber Co. v. Spellman, 44 Pa.Co. 653.

65. Pa.—Bell v. Faust, 20 Pa.Co. 394.
23 C.J. p 699 note 77.

66. Ill.—Western Stone Co. v. Carver, 93 Ill.App. 150.
23 C.J. p 699 note 78.

67. Pa.—Bogdan v. St. Michael's Russian Orthodox Church, 173 A. 878, 114 Pa.Super. 77.
23 C.J. p 699 note 79.

68. Cal.—Taylor v. Hill, 44 P. 336, 46 P. 922, 115 Cal. 143.

69. Cal.—Taylor v. Hill, supra.

70. Cal.—Taylor v. Hill, supra.
23 C.J. p 699 note 82.

71. Pa.—Bogdan v. St. Michael's Russian Orthodox Church, 173 A. 878, 114 Pa.Super. 77.
23 C.J. p 699 note 83.

Inference as to business
The nature of the employer's business may be inferred from a notice of claim describing the labor performed as "hand and farm labor."—Torpy v. Webster, 20 Pa.Co. 475.

72. Pa.—Stichler v. Malley, 94 Pa. 82.

73. Pa.—Wiand v. Himmelwright, 8 Pa.Co. 663.

74. Pa.—Wilson v. Gibson, 10 Pa. Co. 191.

75. Del.—Petition of Hoopes, 5 A.2d 655, 1 Terry 126, sustaining 5 A.2d 653, 1 Terry 120
Pa.—Rifkin's Furniture House v. Harry, 35 Luz.Leg.Reg. 137.
23 C.J. p 700 note 89—36 C.J. p 506 notes 14, 15, p 566 notes 3–7.

The purpose of such a statute is to benefit landlords, not execution creditors, although the view is not without support that it tends to promote the interests of both tenants and their creditors by removing the inducement to landlords to require onerous conditions for their security.—Petition of Hoopes, 5 A.2d 655, 1 Terry, Del., 126, sustaining 5 A.2d 653, 1 Terry 120.

Distraint is not necessary prior to the levy in order that a landlord's claim be entitled to priority.—In re Goldstein, D.C.Pa., 34 F.Supp. 876.

The preference is coextensive with the right of distress and only the sum due for rent which can be col-

al property is left on the premises, after the sale, to satisfy the rent,[76] unless he has waived or otherwise lost his right to such preference,[77] or unless the sale does not discharge his lien, as in the case of a sale of property under a judgment obtained after a transfer by the judgment debtor which was fraudulent as to creditors.[78] Such a preference has been held to extend to the usual conveyance in fee on ground rent, with right of reëntry, so that the landlord is entitled to be paid the arrears out of the proceeds of an execution sale, although without interest.[79]

Time and basis of accrual of rent. Under some statutes the lessor or landlord is entitled to a preference only for the rent which has accrued or is due at the time of the levy of the execution and not for rent to the date of sale, or for the time after levy during which the goods remain on the premises in the possession of the officer.[80] Rent payable in advance, if due, may be claimed out of the proceeds of sale.[81] Under other statutes the preference extends to subsequent rent, such as rent growing due but not accrued at the time of seizure,[82] rent accrued up to the day of removal of the goods,[83] or rent due up to the time of sale.[84]

Under the statutes the landlord is usually limited as to the time, such as one year, for which he may claim rent.[85] In a case of rent accrued at the time of seizure if the prescribed length of time is not exceeded, it is immaterial that the rent claimed is not all for the current year, the last year, or the year immediately preceding the levy.[86] Likewise rent may be preferred although it has accrued under successive leases.[87] In a case of rent growing due

lected by distress can be demanded under the preference.—In re Myers, D.C.Pa., 102 F. 869—36 C.J. p 565 note 97.

Failure of the sheriff to apply the proceeds on a landlord's claim for rent does not invalidate the sale or cause the purchaser's title to be encumbered by the landlord's lien.—Craddock v. Riddlesbarger, 2 Dana, Ky., 205.

Renting on shares

The preference has been extended to the value of shares of crops payable as rent.—Zug v. Watson, 19 Pa. Dist. & Co. 571, 47 York Leg.Rec. 174.

After termination of tenancy

The preference exists only where the tenancy was in existence at the time of the seizure under execution and the landlord cannot claim it where the goods were seized after the termination of the tenancy by agreement of the parties, although rent was still unpaid.—In re Ellegood, 116 A. 127, 1 W.W.Harr., Del., 529.

The unexpired term of the lease is not goods and chattels on the leased premises within the meaning of a statute granting a preference from the proceeds of a sale of such goods and chattels.—Schwartzman v. Gould, 160 A. 207, 5 W.W.Harr., Del., 150.

The preference given wage claims may be inferior to the preference given rent claims.—Mangos v. Cronis, 10 Pa.Dist. & Co. 812, 76 Pittsb. Leg.J. 855.

76. Pa.—Allen v. Lewis, 1 Ashm. 184.

77. Pa.—Greider's Appeal, 5 Pa. 422—Hampton v. Henderson, 4 Pa. L.J. 438—Lewin v. Acheson, 30 Pittsb.Leg.J. 215.
23 C.J. p 700 note 91.

78. Pa.—Fisher's Appeal, 33 Pa. 294.
23 C.J. p 700 note 92.

79. Pa.—Ter-Hoven v. Kerns, 2 Pa. 96.
23 C.J. p 700 note 93.

80. N.Y.—Theriat v. Hart, 2 Hill 380.
23 C.J. p 701 note 98—36 C.J. p 566 note 98.

Levies under several executions

Where levies are made under a number of executions, and the proceeds of the sale are not sufficient to satisfy all of them, the landlord's claim for rent due is to be reckoned up to the date of the levy made on that execution which is the last to participate in the fund.—Wadas v. Sharp, 27 Pa.Super. 233—Worley v. Meekley, 1 Phila., Pa., 398—23 C.J. p 701 note 98 [a]—36 C.J. p 566 note 2.

81. Pa.—Collins' Appeal, 35 Pa. 83—Purdy's Appeal, 23 Pa. 97—Platt v. Johnson, 15 Pa.Co. 587.
23 C.J. p 701 note 96—36 C.J. p 566 notes 8–11.

Acceleration clauses

(1) A provision in a lease that if the goods on the premises shall be sold under execution against the lessee the rent for the balance of the then term shall become due as though by the terms of the lease it were payable in advance and shall first be paid out of the proceeds of such sale is binding on the execution creditor.—Weiss v. Levey, 69 Pa.Super. 359.

(2) A provision in a lease that if default is made in any of its conditions, if execution is issued against the lessee or if an assignment is made for the benefit of creditors, the rent for the entire balance of the term shall at once become due and payable will be sustained to the extent of giving the landlord priority for one year's rent out of the proceeds from an execution sale.—Rosenblum v. Uber, Pa., 256 F. 584, 167 C.C.A. 614—36 C.J. p 507 notes 20, 22.

82. Del.—Petition of Hoopes, 5 A.2d 655, 1 Terry 126, sustaining 5 A. 2d 653, 1 Terry 120.

Landlord as purchaser

Landlord buying in tenant's unexpired lease at sheriff's sale of tenant's chattels, and immediately taking possession, is entitled to priority for year's rent growing due.—Schwartzman v. Gould, 160 A. 207, 5 W.W.Harr., Del., 150.

83. N.J.—Newell v. Clark, 46 N.J. Law 363—Woodside v. Adams, 40 N.J.Law 417.

84. D.C.—Gibson v. Gautier, 12 D.C. 35.

A fieri facias received by the sheriff before an attachment for rent not due is entitled to preference and must first be satisfied.—Stieber v. Hoye, D.C., 23 F.Cas.No.13,441, 1 Cranch C.C. 40.

85. Del.—Petition of Hoopes, 5 A.2d 655, 1 Terry 126, sustaining 5 A. 2d 653, 1 Terry 120.
23 C.J. p 700 note 94—36 C.J. p 566 notes 9, 13, 14, 18.

Date of seizure material

In determining landlord's preference for one year's rent in arrear or growing due at the time of seizure, date of seizure under execution process and not date of issuance of writ is the material date.—Petition of Hoopes, 5 A.2d 653, 5 Terry, Del., 120, sustained 5 A.2d 655, 1 Terry 126.

86. Pa.—Weltner's Appeal, 63 Pa. 302.
23 C.J. p 701 note 95—36 C.J. p 566 note 16.

87. Pa.—Parker's Appeal, 5 Pa. 390.
23 C.J. p 701 note 95—36 C.J. p 566 note 17.

but not accrued at the time of seizure, a preference for one year's rent is not limited to the year immediately following the seizure.[88]

Notice of claim. In order to avail himself of this preference, it is ordinarily necessary for the lessor or landlord to give notice to the officer of his claim prior to the sale of the property levied on,[89] even though the statute does not, in words, require notice.[90] Under some statutes actual knowledge on the part of the officer does not supply the place of notice,[91] while under other statutes a contrary rule prevails.[92]

Under the statutes the time for giving notice is variously limited, as, for example, to the time preceding the distribution of the proceeds of the execution sale[93] or to the time preceding removal of the goods.[94] Under a statute requiring notice prior to the sale it has been held that the landlord must strictly pursue the statute or he cannot acquire rights under it.[95]

Unless required by statute, such notice need not be in writing, and it is sufficient if the sheriff is in any way apprised of the claim and of the amount due.[96] Under some statutes the notice is in the nature of legal process and the landlord should state the facts required by the statutes to show that he is entitled to a preference.[97] Thus the notice must be from the landlord[98] or his agent,[99] and must show that the claimant was landlord,[1] that defendant in execution was his tenant and that the money is due from him as such[2] for the rent of the demised premises.[3] Where the preference is restricted to rent payable before the levy, the notice of claim must show that the claim is within the restriction.[4] Where the statute so requires, the notice should be accompanied by an affidavit showing the amount of rent claimed to be due,[5] although in the absence of a statute so requiring the landlord is not required to state the amount due with absolute precision.[6]

d. Debts Due Government

Statutory priority is frequently awarded to debts due to the national government, the states, or municipalities.

Lease not commenced

If goods are sold under execution within the term of one lease the landlord has no preferred claim for rent agreed to be paid in advance on another lease not yet commenced. —Martin's Appeal, 5 Watts & S., Pa., 220.

88. Del.—Petition of Hoopes, 5 A.2d 655, 1 Terry 126, sustaining 5 A.2d 653, 1 Terry 120.

Reason for rule has its origin in lease and is perfected by seizure, but does not depend on seizure.—Petition of Hoopes, 5 A.2d 655, 1 Terry, Del., 126, sustaining 5 A.2d 653, 1 Terry 120.

Liberal construction

Under statute providing that tenant's goods located on leased premises and seized on execution process are liable in preference to process for one year's rent "growing due at the time of said seizure," the quoted words must be construed liberally in favor of landlord.—Petition of Hoopes, 5 A.2d 653, 1 Terry, Del., 120, sustained 5 A.2d 655, 1 Terry 126.

89. Md.—Washington v. Williamson, 23 Md. 244.

23 C.J. p 701 note 99—36 C.J. p 507 note 23, p 565 note 84.

Several executions

A landlord who gave a notice of claim for the same year's rent to two officers who levied under different executions could not be preferred to the extent of a separate year's rent under each levy.—Van Rensselaer v. Quackenboss, 17 Wend., N.Y., 34.

Question for jury

Whether or not the officer has received notice is a question of fact for the jury.—Burket v. Boude, 3 Dana, Ky., 209.

90. Ky.—Burket v. Boude, supra.

91. Ky.—Craddock v. Riddlesbarger, 2 Dana 205.

Miss.—Stamps v. Gilman, 43 Miss. 456.

Delivery of a distress warrant to the sheriff is insufficient notice as the statute requires something more than mere knowledge by the officer that rent is in arrear.—Bussing v. Bushnell, 6 Hill, N.Y., 382.

92. S.C.—In re Connor, 46 S.C.L. 319

36 C.J. p 565 note 85.

93. Pa.—Borlin v. Commonwealth, 1 A. 404, 110 Pa. 454.

23 C.J. p 701 note 99—36 C.J. p 565 note 91.

Partial distribution

Where part of the proceeds of the sale have been distributed notice is too late, although it is given prior to the return day of the writ of execution.—Herr v. Landis, 25 Pa.Dist. 975—36 C.J. p 507 note 24.

94. N.J.—Ayres v. Johnson, 7 N.J. Law 119.

95. N.Y.—Bussing v. Bushnell, 6 Hill 382.

23 C.J. p 701 note 99.

Under a prior statute which did not in terms require any notice it was held that notice after the sale was sufficient.—Beekman v. Lansing, 3 Wend., N.Y., 446, 20 Am.D. 707.

96. Ga.—Cochran v. Waits, 56 S.E. 241, 127 Ga. 93.

Ky.—Burket v. Boude, 3 Dana 209.

97. N.Y.—Olcott v. Frazier, 5 Hill 562—Millard v. Robinson, 4 Hill 604.

Contra Miller v. Johnson, 12 Wend. 197—23 C.J. p 701 note 2.

98. N.Y.—Camp v. McCormick, 1 Den. 641—Bussing v. Bushnell, 6 Hill 382.

99. N.Y.—Bussing v. Bushnell, supra.

An attorney employed to take measures for distress was not authorized to give such notice since he knew nothing about the facts beyond mere hearsay.—Bussing v. Bushnell, supra.

1. N.Y.—Camp v. McCormick, 1 Den. 641—Olcott v. Frazier, 5 Hill 562.

2. N.Y.—Camp v. McCormick, 1 Den. 641—Millard v. Robinson, 4 Hill 604.

Notice insufficient

A notice alleging a certain amount to be due the landlord and that it is claimed as rent, accompanied by a general affidavit of the truth of the notice, does not sufficiently impart that rent is in fact due.—Olcott v. Frazier, 5 Hill, N.Y., 562.

3. N.Y.—Camp v. McCormick, 1 Den. 641—Olcott v. Frazier, 5 Hill 562.

4. N.Y.—Camp v. McCormick, 1 Den. 641.

5. Md.—Washington v. Williamson, 23 Md. 244.

6. Pa.—Timmes v. Metz, 27 A. 248, 156 Pa. 384.

In the absence of statute, debts due to the national government, a state, or a municipality, such as debts for taxes, are not entitled to priority over subsisting liens on the property sold on execution in the distribution of the proceeds realized therefrom.[7] However, in some jurisdictions, by express statutory enactment, such debts are made a first lien on the property and have a preference over all other claims in the distribution of the proceeds of the sale.[8] Statutory provisions for recording tax liens must be conformed to in order that a preference be obtained.[9] Where an undivided interest in land has been sold only a proportionate share of taxes against the land need be paid from the proceeds of the sale in preference to the execution.[10]

§ 248. Distribution among Different Judgments or Executions

In general the right of a judgment or execution creditor to share in the proceeds of a sale on execution on another judgment depends on whether or not the lien of his judgment or execution on the property itself has been destroyed. As between different judgments and executions entitled to share in the proceeds in general they should take in accordance with the priorities of their liens, and in the absence of statute to the contrary where liens are equal they should share pro rata.

The proceeds of an execution sale are not applicable to the satisfaction of judgments which were not liens on the property and under which no execution was levied thereon.[11]

The right of judgment and execution lienors to share in the proceeds of sale depends on whether or not the sale extinguishes their liens on the property.[12] The general rule in the case of a sale of land under a junior execution is that the title passes subject to the lien of a prior judgment or execution, and the money realized from such sale cannot be applied to the payment of a senior judgment lien;[13]

7. Ala.—Holding v. Thomas, 62 Ala. 4.
23 C.J. p 701 note 3.

8. Pa.—Keystone State Building & Loan Ass'n v. Sabo, 14 A.2d 831, 140 Pa.Super. 599—Mortgage Co. v. Born, 88 Pittsb.Leg.J. 253—National-Dime Bank v. Eltringham, 13 Northumb.Leg.J. 264, 29 Mun. L.R. 198.
23 C.J. p 701 note 4.
Payment of taxes from property in custody of law generally see the C.J.S. title Taxation § 615, also 61 C.J. p 957 notes 20–22.
Priorities among tax liens and other liens generally see the C.J.S. title Taxation §§ 599–606, also 61 C.J. p 925 note 55–p 936 note 98.

Occupation tax or a per capita tax against an owner of land is not a tax on the land within a statute making taxes of the latter class a first lien on the property.—Lesher v. Martin, 17 Pa.Dist. & Co. 379, 46 York Leg.Rec. 166.

Capital stock and corporate loans taxes are made preferred claims.—Myanza Color & Chemical Co. v. Fertex Dyeing & Finishing Co., 12 Pa.Dist. & Co. 666.

Liquid fuel tax lien is entitled to priority.—Young v. Young, 18 Pa. Dist. & Co. 353.

Real estate taxes are given a preference.—First Nat. Bank, for Use of Hunter, v. Mount, 7 A.2d 528, 136 Pa.Super. 549.

Interest and penalties
If an amount is bid at a sheriff's sale sufficient to pay taxes in full, including interest and penalties, the right of the taxing authority to payment of tax in full attaches as of date of sheriff's sale, and cannot be affected by a subsequent tender by bidder of less than such amount.—Keystone State Building & Loan Ass'n v. Sabo, 14 A.2d 831, 140 Pa. Super. 599—Exchange Nat. Bank v. Welch, 26 Pa.Dist. & Co. 303, 17 Erie Co. 125.

9. Pa.—Semanczyk v. Moran, 25 Pa. Dist. & Co. 697.

10. Ohio.—Ohio Savings & Trust Co. v. Schumacher, 172 N.E. 682, 36 Ohio App. 65, affirmed Schumacher v. Ohio Savings & Trust Co., 169 N.E. 442, 121 Ohio St. 446.

11. Minn.—Reaume v. Winkelman, 255 N.W. 81, 192 Minn. 1, 93 A.L.R. 313.

Fraudulent conveyance
If a conveyance of real estate was fraudulent as to a junior judgment creditor but not as to a senior judgment creditor, so that the latter could not issue execution against the property, he is not entitled to priority in the distribution of the proceeds of an execution sale under the junior judgment.—Zook v. Shirk, 12 Pa.Dist. & Co. 322, 41 Lanc.L.Rev. 385.

12. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.

13. Ala.—Caldwell v. Houser, 19 So. 796, 108 Ala. 125.
23 C.J. p 503 note 98, p 702 note 12.

In New Jersey
(1) Under statute an execution sale under a junior judgment dissevers the lien of a prior judgment when there has been no execution and levy under the latter.—Lambertville Nat. Bank v. Boss, Ch., 13 A. 18.

(2) Under earlier decisions the proceeds of sale under a junior execution were not applied to the prior lien because the latter continued to be enforceable against the land.—Den v. Young, 12 N.J.Law 300—Williamson v. Johnston, 12 N.J.Law 86.

In North Carolina
(1) The rule has been applied with the qualification that if executions on senior judgments are in the sheriff's hands at the time of sale under an execution on a junior judgment, the lien of those senior judgments is transferred to the proceeds of sale.—Bernhardt v. Brown, 24 S.E. 527, 118 N.C. 700—Burton v. Spiers, 92 N. C. 503—23 C.J. p 702 note 12.

(2) In a case involving such qualification the sheriff should apply the proceeds to the execution in his hands which was issued on the oldest docketed judgment and the proceeds should next be applied in satisfaction of the next oldest judgment lien, whether execution has issued thereon or not.—G. A. Gambrill Mfg. Co. v. Wilcox, 15 S.E. 885, 111 N.C. 42, 44.

(3) As another qualification, if the amount bid by holder of second judgment at execution sale under the second judgment was more than the amount of that judgment, the judgment debtors were entitled to have the excess over and above the amount necessary to pay the second judgment applied to the satisfaction of first judgment.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

(4) It is legal duty of trust company, purchasing judgment prior to judgments secured by it as administrator of decedent's estate against same parties, to apply proceeds of sale of lands under execution on latter judgments to satisfaction of prior judgment so far as adequate and available for such purpose, whether in pursuance of purchase contract

but it has been held that, whether the sale is had under the junior or any other of the executions in the sheriff's hands, the proceeds must be applied to the satisfaction of the existing judgment liens.[14] When a sale of real property is made under a prior execution, the junior judgment and execution liens on the land are ordinarily extinguished and therefore the lienholders may share in the proceeds.[15] Where the sale is made under all the executions and judgments, or under a junior judgment but free and clear from all judgment liens, the latter liens may share in the proceeds.[16]

So far as personal property is concerned, however, it is generally held that the proceeds of its sale, under an execution, must be applied to the satisfaction of other executions, even though the latter were prior liens on the property, because the sale discharges the liens;[17] but in some jurisdictions the proceeds of such a sale should be applied to the junior execution, under which the sale was made, where there has been no levy under the senior execution.[18]

Priorities. When different judgments or executions are entitled to participate in the proceeds of a sheriff's sale, distribution as between them should generally be according to the priorities of their liens,[19] especially where there is an agreement between the parties to this effect.[20] This rule of distribution has been applied where priorities among execution liens depend on the order of delivery of the writs to the officer,[21] although the several executions are levied at the same time,[22] or although,

or not.—Abernethy Land & Finance Co. v. First Security Trust Co., 199 S.E. 733, 214 N.C. 478.

14. Ind.—Carnahan v. Yerkes, 87 Ind. 62.
23 C.J. p 769 note 99, p 702 note 13.

15. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.

16. N.C.—Cannon v. Parker, 81 N.C. 20.
23 C.J. p 503 note 97, p 769 note 5.

Lack of authority to sell

An officer who attempts to sell real estate under two executions and who has authority to sell under the junior execution, but not under the senior one, must apply the proceeds of the sale to the junior execution and not to the senior one.—Mushback v. Ryerson, 11 N.J.Law 346.

17. Ala.—Caldwell v. Houser, 19 So. 796, 108 Ala. 125.
23 C.J. p 702 note 14, p 769 note 99.

In Mississippi

(1) The text rule of distribution is especially applicable where the sale is made in violation of an agreement between the parties.—Kohlman v. Meridian First Nat. Bank, 15 So. 131, 71 Miss. 843.

(2) Under statutes making judgments liens on personal property without the issuance of execution, the holders of prior judgment liens who comply with statutory requirements may be paid from the proceeds of a sale under a junior execution.—Mobile & O. R. Co. v. Trotter, 36 Miss. 416.

(3) However, under earlier statutes it was held that if there was a prior judgment lien on personal property sold under a junior execution the proceeds of the sale belonged to the junior lienor and the prior lienor could not share therein but was left to recourse against the property.—Reynolds v. Ingersoll, 19 Miss. 249, 49 Am.D. 57—Goode v. Mayson, 7 Miss. 543.

(4) When the operative energy of a prior execution had been suspended by an injunction, a sale under a junior execution did not discharge the prior lien and it was not payable from the proceeds.—Lynn v. Gridley, 1 Miss. 548, 12 Am.D. 591.

18. Fla.—Love v. Williams, 4 Fla. 126.
Pa.—Sweet v. Williams, 29 A. 350, 162 Pa. 94.
23 C.J. p 703 note 19.

19. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Pa.—Bogdan v. St. Michael's Russian Orthodox Church, 173 A. 878, 114 Pa.Super. 77.
23 C.J. p 503 note 97, p 701 note 7, p 702 notes 13, 14, p 769 note 5.
Preferred claims see supra § 247.
Priorities between executions see supra § 127.
Priority of judgment liens generally see the C.J.S. title Judgments §§ 483–485, also 34 C.J. p 601 note 55–p 614 note 86.

Deposit of lien with sheriff

Where two executions are held by different parties, and property is sold under the junior execution, the sheriff may pay the proceeds to the plaintiff by whose process it was raised, unless the holder of the senior execution deposits his lien with the sheriff, and, where the senior lienholder fails to do so, he cannot recover the fund from the junior lienholder.—McDuffie Oil & Fertilizer Co. v. Sims, 120 S.E. 549, 31 Ga. App. 261, transferred, see 117 S.E. 318, 155 Ga. 521.

Execution suspended

If a prior judgment creditor suspends his execution he loses his priority of lien so that an execution sale under a junior judgment will accrue to its benefit.—Michie v. Planters' Bank, 5 Miss. 130, 34 Am. D. 112.

Other property of debtor

(1) Where execution creditor failed to prove judgment debtor had other property to satisfy claim of intervening prior judgment creditor, latter was entitled to priority in proceeds of execution sale.—Penn Liberty Oil Co. v. Crescent Magnolia Planting & Mfg. Co., 132 So. 254, 15 La.App. 670.

(2) On exceptions to distribution of proceeds of the sale of realty, it appeared that a holder of a judgment had issued execution and levied on the personal property of the debtor, which was claimed by a third person, and that it had secured a verdict on the sheriff's interpleader. Subsequently it compromised the verdict for a lesser amount. On the levy on the real estate and the distribution of the proceeds thereof it was error to disregard the senior lien. The holder thereof by its diligence acquired a levy on the debtor's personal property and reduced the lien by the amount recovered; but it was not to be penalized for making a compromise, and was under no duty to consult the junior creditor before so doing, and at the time of the sale of the real estate there were not two funds to which the senior creditor had recourse, the personal fund having been eliminated nearly a year before.—Zacharias v. Wagner, 84 Pa.Super. 527.

20. Del.—Trimble v. Hurst, 30 A. 670, 12 Del. 14.

21. Ill.—Leach v. Pine, 41 Ill. 65, 89 Am.D. 375.
23 C.J. p 499 note 49.

22. Del.—Stuarts v. Reynolds, 4 Del. 112.
Pa.—Shafner v. Gilmore, 3 Watts & S. 438.
23 C.J. p 702 note 16.

where the several executions are in the hands of the same officer, the junior execution is levied first;[23] and has also been held to apply although no levy is made on the senior execution.[24] Under this rule the proceeds of a sale should be applied to a judgment having priority of lien before application to a junior judgment even though execution on the latter was first levied.[25] At common-law where the proceeds of a sale of property under two or more executions, the liens of which are equal, are not sufficient to pay the debts that have been levied, the proceeds must be applied equally to the several debts, irrespective of their several amounts, unless a surplus remains after the full payment of one or more of the claims, in which case the surplus must be applied equally to the balance of the unpaid debts.[26]

Exceptions to the general rule of distribution according to the priority of liens occur where the prior lienor waives his rights, as considered infra § 249, and under particular statutory provisions which are intended to aid a diligent junior lienor.[27] Also in many jurisdictions, by statutory enactment, where several judgments are rendered at the same term of court against one defendant in favor of different creditors, and real estate of the judgment debtor is sold under an execution issued on one of the judgments, executions on the other judgments being all in the sheriff's hands at the time of sale, the holders of such judgments are entitled to share pro rata in the proceeds of the sale, without regard to the execution under which the land was sold.[28] Such a statute ordinarily relates only to sales of real estate, and not to sales of personal property on which executions become liens in the order of priority of delivery to the sheriff.[29]

Judgments of federal and state courts. The above rules are not changed by the fact that some of the judgments were rendered in state courts and some of them were rendered in federal courts;[30] but the marshal cannot apply proceeds to the satisfaction of a judgment in the state courts, in the hands of the sheriff.[31]

Where one judgment or execution fraudulent or satisfied. Where property is sold under several executions, one of the creditors is not entitled to share in the proceeds of the sale if it appears that his judgment or execution is fraudulent,[32] or has previously been satisfied,[33] unless such satisfaction has been vacated.[34] A judgment lien which has been partly satisfied can share in the proceeds of a sale only on the basis of the remainder of the claim, not on the basis of the entire original amount.[35] Where a first judgment is held valid as against a second judgment, but invalid as against a third judgment, the first judgment creditor is nevertheless entitled to so much of the proceeds of a sale as between the second and third judgment creditors would have gone to the second.[36]

Set-off against execution creditor. Money collected by an officer on an execution sale is in custodia legis, and in some jurisdictions it cannot be applied by the officer to the satisfaction of a contemporaneous execution against the execution creditor, at least not before the return of the first execution.[37] In other jurisdictions, however, the sheriff may apply the proceeds of an execution sale to the payment of an execution held by him against the execution creditor,[38] or on motion the court may order him to do so,[39] unless the legal or equitable right to it has passed to some other person.[40]

§ 249. —— Waiver of Rights

The rights of a prior creditor to the proceeds of an execution sale may be waived by him.

23. Ky.—Kennon v. Ficklin, 6 B. Mon. 414, 44 Am.D. 776.
23 C.J. p 498 note 36, p 702 note 17.

24. N.Y.—Pach v. Gilbert, 27 N.E. 391, 124 N.Y. 612, 20 N.Y.Civ.Proc. 307.

25. Ga.—Piedmont Sav. Co. v. Chapman, 156 S.E. 638, 42 Ga.App. 555.

26. Mass.—Sigourney v. Eaton, 14 Pick. 414, 25 Am.D. 414.
23 C.J. p 703 note 28.

Execution liens created by levy
Execution lienors whose executions were levied on personal property on the same day are entitled to a pro rata distribution of the proceeds of the execution sale in a jurisdiction where the lien is created by the levy.—Lawrence v. Wofford, 17 S.C. 586.

27. N.J.—Lippincott v. Smith, 64 A. 141, 69 N.J.Eq. 787, reversing 60 A. 330, 69 N.J.Eq. 243.

28. Neb.—Moores v. Peycke, 62 N. W. 1072, 44 Neb. 405.
23 C.J. p 703 note 29.

29. Ill.—Lawrence v. McIntire, 83 Ill. 399.

30. U.S.—Leopold v. Godfrey, C.C. Ill., 50 F. 145.
23 C.J. p 703 note 21.

31. U.S.—Hagan v. Lucas, Ala., 10 Pet. 400, 9 L.Ed. 470.

32. Pa.—Boyd v. Roberts, 2 Pa.Co. 535.
23 C.J. p 703 note 23.

33. Ga.—Parrott v. Nesbitt, 6 S.E. 840, 81 Ga. 306.
23 C.J. p 703 note 24.

34. N.Y.—People v. Lansing, 3 Abb. Dec. 533, 5 Transcr.A. 96.

35. Pa.—Chambersburg Trust Co. v. Alexander, 156 A 615, 102 Pa.Super. 158—Gold Standard National Bank v. Shannon, 77 Pa.Super. 256.

36. Pa.—Tomb's Appeal, 9 Pa. 61.
23 C.J. p 703 note 26.

37. Fla.—Hooker v. Wiggins, 139 So. 803, 104 Fla. 355.
23 C.J. p 703 note 33.
Levy under execution on property in custody of law see supra § 55.
Set-off of executions generally see infra § 335.

38. S.C.—Maddox v. Kennedy, 31 S.C.L. 102.
23 C.J. p 704 note 34.

39. Mo.—Ex parte Fearle, 13 Mo. 467, 53 Am.D. 155.
23 C.J. p 704 note 35.

40. Mo.—Ex parte Fearle, 13 Mo. 467, 53 Am.D. 155.
S.C.—Reid v. Ramey, 31 S.C.L. 4.

The rights of a prior creditor to the proceeds may be waived by him.[41] Where an execution creditor having a prior lien allows the proceeds of a sale to be applied in satisfaction of a junior lien to the prejudice of third persons, it will be considered an extinguishment pro tanto of such creditor's lien,[42] and it is immaterial under which execution the money was raised and brought into court.[43]

§ 250. —— Liability to Refund

Where the proceeds of an execution sale are paid to a party not entitled thereto they are in general recoverable back.

Where the proceeds of an execution sale are paid over to a party not entitled thereto, they are generally recoverable back.[44] Especially is this so where the payment was on an agreement to refund under certain conditions.[45] When however an officer erroneously levied on and sold property under a writ other than the one first delivered to him and paid the proceeds to a bona fide junior lienor, it has been held that the only remedy of the senior lienor was against the officer for breach of duty.[46] Where property is sold under a judgment which is subsequently reversed, recovery may be had only from the party who obtained the erroneous judgment, and not from creditors who merely filed their claims after the judgment was entered and received only what was justly due them.[47]

§ 251. Surplus

After payment of the executions in the hands of the officer, the remaining proceeds of an execution sale are payable to the execution debtor or his representative in the absence of other liens or claims. Adverse claims to surplus proceeds may be asserted by motion or, in case the right is not clear, the claimant may be remitted to his action.

Where a sheriff has satisfied all executions placed in his hands, and there are no liens on the property which were transferred to the proceeds by virtue of the sale, the execution debtor or his representative is entitled to any surplus remaining in the sheriff's hands,[48] unless he is estopped from claiming it,[49] as where the right to the surplus is shown to be in some third person who was the real owner of the property[50] or who held an equitable title thereto.[51] This right to the surplus exists even where the property is subject to a prior lien if the lien is not displaced by the sale,[52] and passes to a receiver appointed in proceedings supplementary to an execution against the debtor.[53] The sheriff cannot retain such surplus for a debt due to himself[54] or for expenses which he incurred without legal authority.[55] If the sheriff states in his deed that he has received the price, although he has not, he will be responsible for any balance due the debtor,[56] unless the latter, with knowledge of the facts, accepts a reconveyance from the purchaser on conditions stipulated between themselves.[57] Where the debt-

41. S.D.—Banton v. Dakota Lodge No. 1, I.O.O.F., 292 N.W. 874.
23 C.J. p 704 note 37.
Loss or suspension of execution lien generally see supra §§ 132–137.
Waiver of judgment lien generally see the C.J.S. title Judgments § 507, also 34 C.J. p 631 note 4–p 632 note 14.

Consent to pro rata distribution
When an execution creditor consented to a provision in the judgment calling for pro rata distribution of the proceeds of the execution he lost the right to demand priority.—Banton v. Dakota Lodge No. 1, I.O.O.F., S.D., 292 N.W. 874.

A direction not to levy a senior writ operates as a waiver of priority and makes it the duty of the officer to levy and satisfy junior writs in his hands.—Moore v. Fitz, 15 Ind. 43—23 C.J. p 505 note 33.

42. Ga.—Rushin v. Shields, 11 Ga. 636, 56 Am.D. 436.
S.C.—Lawrence v. Grambling, 19 S.C. 461.
23 C.J. p 704 note 38.

43. Ga.—Rushin v. Shields, 11 Ga. 636, 56 Am.D. 436.

44. Minn.—Auerbach v. Gieseke, 41 N.W. 946, 40 Minn. 258.
23 C.J. p 704 note 40.

In Pennsylvania
(1) Where a party, by false representations that his judgment is the first lien, procures the improper payment to himself of the proceeds of an execution sale, they may be recovered back.—McDonald v. Todd, 1 Grant 17

(2) However, a creditor who receives payment in good faith without fraud or unfairness, out of funds belonging to another creditor, is not liable to refund.—Diechman v. Northampton Bank, 1 Rawle 54.

45. U.S.—U. S. v. Mechanics' Bank, D.C.Pa., 26 F.Cas.No.15,756, Gilp. 51.

46. N.C.—Motz v. Stowe, 83 N.C. 434
23 C.J. p 505 notes 28, 32.

In New York
(1) The text rule has been approved.—Marsh v. Lawrence, 4 Cow. 461—Sandford v. Roosa, 12 Johns. 162.

(2) Nevertheless the rule is subject to the exception that money paid to an officer of the court under a mistake of law is recoverable.—Gillig v. Grant, 49 N.Y.S. 79, 23 App. Div. 596.

47. Ky.—Hays v. Griffith, 8 S.W. 431, 85 Ky. 375, 11 S.W. 306, 9 Ky. L. 65.

48. La.—Hunter v. Rayville State Bank, 125 So. 477, 12 La.App. 143.
Tex.—McKenzie v. Mayer, Civ.App., 20 S.W.2d 238.
23 C.J. p 704 note 45.

49. Pa.—Onwake v. Harbaugh, 23 A. 985, 148 Pa. 278.
23 C.J. p 705 note 46.

50. N.J.—Siccardi v. Caruso, 198 A. 370, 120 N.J.Law 111.
N.Y.—Henderson v. Tomb, 8 N.Y.S. 2d 612, 169 Misc. 737.
23 C.J. p 705 note 47.

51. Colo.—Ross v. Brown, 212 P. 835, 72 Colo. 560.

52. Mich.—Munger v. Sanford, 107 N.W. 914, 144 Mich. 323.

53. N.Y.—Davenport v. McChesney, 86 N.Y. 242.
Supplementary proceedings generally see infra §§ 345–402.

54. Pa.—Hopkins v. Forsyth, 14 Pa. 34, 53 Am.D. 513—Fitch's Appeal, 10 Pa. 461, 51 Am.D. 495.

55. Ind.—Martin v. Reissner, 54 Ind. 217.

56. La.—Winter v. Zacherie, 4 Rob., La., 35.

57. La.—Winter v. Zacharie, supra.

or bids in the land for a sum greater than the amount of the execution and costs, the so-called surplus coming back to himself cannot be impounded as an asset.[58]

As between the execution debtor and his grantee the rule is well settled that a grantee of property which has been sold under a judgment against the grantor, which was a prior lien upon the property, is entitled to any surplus remaining after the satisfaction of such judgment.[59] This is equally true where the grantee himself becomes the purchaser at the execution sale.[60]

Other creditors. If there are other executions against the same debtor in the hands of the sheriff,[61] or in the hands of another officer,[62] the surplus should be applied thereon, even though there has been no levy under the other executions, where a levy is not necessary to create a lien.[63] Likewise, if other liens are displaced by the sale, such lienors are entitled to the surplus in the order of priority of their liens.[64] This rule applies to a mortgagee where the lien is displaced by the sale and the mortgage is a junior lien;[65] but generally, where land is sold subject to a prior mortgage, the surplus proceeds, in the absence of other liens thereon, must be returned to the judgment debtor, and not paid to the mortgagee who must look to the land for the satisfaction of the mortgage.[66] Where the mortgagee of personal property bids it in on an execution sale against the mortgagor, thereby waiving the priority of his mortgage lien over the execution lien, the mortgagee is entitled to the surplus as against the execution debtor.[67] In some states the proceeds of an execution sale of land are considered realty, so that the surplus should be treated as land and paid over to the judgment creditors having liens on the land according to the priority of their judgment liens.[68]

Recovery. The court has control over the surplus money, and if at the time of the sale the property was subject to, or bound by, subsequent judgments and executions, it may require such surplus to be brought into court to be distributed.[69] In some jurisdictions the sheriff may file a bill in interpleader after several claims have been made to surplus money in his hands.[70] The person entitled to the surplus may sue the sheriff or purchaser therefor,[71] or may make application for the payment of such surplus by motion in the action in which the execution was issued.[72] Where, however, claimant's right to such surplus is not clear, his remedy is an action against the sheriff or the party who has received the surplus and not by summary proceedings.[73] Where the surplus is paid into court in a proceeding to which the then owner of the property is not a party, an order of the court disposing of it, without notice to and without the knowledge or consent of such owner, is without jurisdiction and void.[74]

§ 252. Proceedings for Distribution

a. In general
b. Power of court
c. Remedies of claimant
d. Order or decree
e. Costs
f. Appeal

58. Tenn.—Carter v. Wyrick, Ch., 42 S.W. 159.

59. Ga.—Crawford v. Williams, 76 Ga. 792.
23 C.J. p 705 note 55.

60. Ala.—Wheeler v. Kennedy, 1 Ala. 292.
Pa.—Bitting's Appeal, 17 Pa. 211.
23 C.J. p 705 note 56.

61. N.J.—Millville Nat. Bank v. Shaw, 42 N.J.Law 550.
23 C.J. p 705 note 57.

Death of creditor
Sheriff was under no duty to apply any excess in proceeds of sale of property on execution on another execution issued in name of third person after death of such judgment creditor.—Downs v. Wagnon, Tex. Civ.App., 66 S.W.2d 777, error dismissed.

62. Mass.—Denny v. Hamilton, 16 Mass. 402.

63. Tenn.—Simpson v. Sparkman, 12 Lea 360.

64. N.Y.—Kittle v. Gordon, 263 N.Y.S. 647, 146 Misc. 726.
23 C.J. p 705 note 60, p 697 note 65.

Attachment rendered void
An attachment which is rendered void rather than merely displaced by a seizure under execution does not become payable from the proceeds of the execution sale.—Watson v. Todd, 5 Mass. 271—23 C.J. p 705 note 58.

65. Neb.—Storz Brewing Co. v. Hansen, 152 N.W. 370, 98 Neb. 282.
23 C.J. p 705 note 61, p 697 note 65.

66. Ga.—De Vaughn v. Byrom, 36 S.E. 267, 110 Ga. 904.
23 C.J. p 706 note 62.

In an equity proceeding the surplus has been held applicable to the mortgage debt where the purchaser by mistake had bid the full unencumbered value of the property.—Norman v. Norman, 11 S.E. 1096, 26 S.C. 41.

67. Kan.—Walker v. Braden, 25 P. 195, 44 Kan. 707.

68. Wash.—Mayer v. Morgan, 66 P. 128, 26 Wash. 71.
23 C.J. p 706 note 63.

69. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
23 C.J. p 706 note 65.

70. Mo.—Endres v. Hadeler, App., 220 S.W. 1002.

71. Cal.—Mehein v. Saunders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272, reversing 56 P. 1110, 6 Cal.Unrep. Cas. 279.
23 C.J. p 706 note 66.

72. Iowa.—Polk County v. Sypher, 17 Iowa 358, 85 Am.D. 568.
23 C.J. p 706 note 67.

73. N.Y.—Frankel v. Elias, 60 How. Pr. 74.
Ohio.—Creps v. Baird, 3 Ohio St. 277.

74. Kan.—Poole v. French, 111 P. 488, 83 Kan. 281.

a. In General

Generally the sheriff may distribute the proceeds of an execution sale to the parties entitled thereto in the absence of conflicting claims, but at his own risk. Under some circumstances he should hold the proceeds subject to the court's order and apply to the court for directions on notice to all claimants, or pay the money into court and thereby free himself from responsibility. Under some statutes the officer may compel contesting claimants to interplead.

The general rule is that a sheriff may distribute the proceeds of an execution sale to the parties entitled thereto, in the absence of conflicting claims, although he does so at his own risk and is liable to the party injured for any mistake;[75] but where the proceeds of an execution sale are the subject of conflicting claims of which the sheriff has due notice he cannot proceed to the distribution thereof, but should hold the money until the claims are settled, unless otherwise directed by the court.[76] If the sheriff is in doubt, he may pay the proceeds into the court, and thereby exonerate himself from responsibility,[77] otherwise he should apply to the court for instructions as to the proper disposition of the fund.[78] It is the practice in some states, where there are conflicting claims to the proceeds of a sale, for the officer to make a return setting forth the various claims and to ask the court to make an order regulating the distribution of such proceeds;[79] but where the sheriff takes an indemnifying bond from one of the creditors, and sells in consequence of that indemnity, he cannot afterward apply to the court for its advice as to the distribution of the fund raised by the sale.[80] On a distribution, neither the sheriff, auditor, nor the court can inquire into the judgment under which the sale was made, the proper practice being to move to open the judgment.[81]

Notice. On an application by the officer for an order of distribution, all claimants of the proceeds should be notified that they may come in, make themselves parties, and submit their claims for decision;[82] but where the proceeds are in court in compliance with an order therefor, and the parties in interest are before it, an order for distribution may be made without giving notice of a hearing thereon.[83] By statute in some jurisdictions the sheriff may compel the contesting claimants of the fund to interplead;[84] but it is doubtful whether he can do this without statutory authority.[85] If, however, the sheriff seizes property claimed by a person against whom there is no execution, he is a wrongdoer if the claim be just and he cannot compel the claimant and the execution debtor to interplead.[86]

b. Power of Court

The court out of which execution issues may control the disposition of the proceeds of a sale where the money is in court or in the sheriff's hands subject to the court's order. It may also compel the sheriff to bring such money into court in a proper case.

The power of the court in a summary way to adjust priorities among contending executions and to dispose of moneys arising from sales has been exercised in many instances and is well settled.[87] The court out of which the execution issued has power to distribute the proceeds,[88] but it will not interfere unless the money is paid into court,[89] or is in the

75. Del.—Ableman v. Conoway, 199 A. 278, 9 W.W.Harr. 324.
Pa.—First Nat. Bank, for Use of Hunter, v. Mount, 7 A.2d 528, 136 Pa.Super. 549.
23 C.J. p 706 note 72.

76. Ill.—John Spry Lumber Co. v. Chappell, 56 N.E. 794, 84 Ill. 539, affirming 85 Ill.App. 223.
23 C.J. p 706 note 73.

Recommendation of auditor
The distribution made by a sheriff is proper when made in accordance with the recommendation of an auditor appointed by the court, after exceptions had been filed to the sheriff's special return.—First Nat. Bank of Elizabethville v. Fetterolf, 8 Sch.Reg., Pa., 54.

77. Del.—Ableman v. Conoway, 199 A. 278, 9 W.W.Harr. 324.
23 C.J. p 708 note 93.

78. Tenn.—Wiley v. Bridgman, 1 Head 68.
23 C.J. p 706 note 74.

79. Ala.—Turner v. Lawrence, 11 Ala. 427.
23 C.J. p 707 note 75.

80. N.C.—Ramsour v. Young, 26 N. C. 133.

81. Pa.—Gerhart v. Gerhart, 18 Montg.Co. 78.

82. Wis.—McDonald v. Allen, 37 Wis. 108.
23 C.J. p 707 note 78.

83. N.J.—Sitley v. Morris, 67 A. 789, 73 N.J.Eq. 197.

84. Ark.—Lawson v. Jordan, 19 Ark. 297, 70 Am.D. 596.
N.C.—Bates v. Lilly, 65 N.C. 232.

Wrongful death statute
Under a statute authorizing an action for wrongful death in the name of the widow for the equal benefit of herself and decedent's children, a sheriff, holding proceeds of an execution in favor of the widow, can maintain interpleader to settle conflicting claims by the widow, the children, an assignee of one of the children, and the widow's attorneys. —Kelly v. Howard, 54 So 10, 98 Miss. 543, Ann.Cas.1913B 229, followed in Howard v. Kelly, 54 So. 12.

85. Mass.—Boston Third Nat. Bank v. Skillings, Whitneys & Barnes Lumber Co., 132 Mass. 410.
N.H.—Parker v. Barker, 42 N.H. 78, 77 Am.D. 789.
N.Y.—Shaw v. Coster, 8 Paige 339, 35 Am.D. 690, affirming Shaw v. Chester, 2 Edw. 405.
N.C.—Quinn v. Patton, 37 N.C. 48—Quinn v. Green, 36 N.C. 229, 36 Am. D. 46.
Wis.—McDonald v. Allen, 37 Wis. 108, 19 Am.R. 754.

86. N.H.—Parker v. Barker, 42 N.H. 78, 77 Am.D. 789.
N.Y.—Shaw v. Coster, 8 Paige 339, 35 Am.D. 690, affirming Shaw v. Chester, 2 Edw. 405.
N.C.—Dewey v. White, 65 N.C. 225.

87. Ohio—Shuee v. Ferguson, 8 Ohio 136.
23 C.J. p 707 note 82.

88. N.J.—Woodruff v. Chapin, 23 N. J.Law 566, 57 Am.D. 416.
Tenn.—Atkinson v. Cooper, 2 Humphr. 361.

89. U.S.—Wortman v. Conyngham,

sheriff's hands subject to the court's order.[90] Where executions issue out of different courts, that court alone under whose execution the money was raised and into which the sheriff was commanded by the writ to pay it,[91] or into which he has paid it voluntarily or by consent of the parties,[92] has jurisdiction of such summary application, even where all the writs are directed to the same officer.[93] The court out of which a junior execution has issued has no jurisdiction over the proceeds of a sale, made by the same officer, of goods on which he had made a prior levy, by virtue of an older execution out of another court.[94]

Payment into court. The court from which the execution issued has the power, in a proper case and on application, to compel the sheriff to bring the money into court,[95] but the sheriff is entitled to be heard before the order is made.[96] The court will not order the proceeds paid into court on the application of one who would not be benefited thereby, and where it would prejudice the rights of the creditor entitled to the proceeds.[97] In the absence of statutory authorization a court has no jurisdiction to compel an officer to bring into that court for distribution under its order moneys raised by virtue of the process of another court.[98]

c. Remedies of Claimant

(1) In general

(2) Bill in equity

(3) Third opposition

(4) Pennsylvania practice

(1) In General

A claim to the proceeds of an execution sale may be asserted in various modes, as, for example, by action, by motion, by rule against the sheriff, or by an agreed case on the application of all the interested parties. The procedure and proof are subject to the practice in the particular jurisdiction.

The proper procedure of one claiming part or all of the proceeds is either by action,[99] or by motion,[1] or by rule against the sheriff to compel him to pay the proceeds into court or to distribute them in a certain way,[2] or by an agreed case on the application of all the interested parties, although the sheriff is not made a party.[3] Where there is a doubt as to who is entitled to the proceeds, it is held in some jurisdictions that claimant will be left to his action instead of a motion or rule.[4] Where the sheriff holds a fund which was raised on several executions in favor of different creditors, and adverse claims are asserted to it, the proper mode of procedure in some jurisdictions is for each of the claimants to take his rule against the sheriff to distribute the fund, and, since they may all be tried together, the allowance of one will be the refusal of the others.[5] On a rule to show cause, the court may or-

C.C.Pa., 30 F.Cas.No.18,056, Pet.C.C. 241.
23 C.J. p 707 note 84.

90. N.Y.—Marsh v. Lawrence, 4 Cow. 461.
23 C.J. p 707 note 85.

91. Mo.—Field v. Milburn, 9 Mo. 492.
N.Y.—Marsh v. Lawrence, 4 Cow. 461.
23 C.J. p 707 note 86.

In New Jersey

(1) The rule of the text has been followed.—Woodruff v. Chapin, 23 N.J.Law 566, 57 Am.D. 416.

(2) In an earlier case where a lienor under an execution out of one court by virtue of which property was sold sought a decision by another court as to the priority between executions of the two courts, jurisdiction was assumed by the second court which said that the application could be made to either court and that the decision first made by either would bind the other.—Matthews v. Warne, 11 N.J.Law 295.

92. N.J.—Woodruff v. Chapin, 23 N.J.Law 566, 57 Am.D. 416.

93. N.J.—Woodruff v. Chapin, supra.

94. N.J.—Heinselt v. Smith, 34 N.J.Law 215—Woodruff v. Chapin, 23 N.J.Law 566, 57 Am.D. 416.

95. Del.—Taggart v. Phillips, 5 Del. Ch. 237.
23 C.J. p 708 note 94.

96. Pa.—McCanna & Fraser Co. v. Continental Hotel Co., 97 A. 700, 252 Pa. 482.

97. Pa.—Jones v. English, 32 A. 39, 168 Pa. 438.

98. N.Y.—Marsh v. Lawrence, 4 Cow. 461.

In New Jersey

(1) Under express statutory provisions where a controversy arises between execution creditors as to the application of proceeds of sale under executions issued out of different courts, a justice of the supreme court may order into which court such proceeds shall be paid, which court would then have jurisdiction to decide the entire controversy.—Walton v. Hillier, 20 A.2d 420, 129 N.J.Eq. 330.

(2) The rule of the text applied prior to enactment of the statute.—Woodruff v. Chapin, 23 N.J.Law 566, 57 Am.D. 416.

99. Cal.—Taylor v. Hill, 44 P. 336, 46 P. 922, 115 Cal. 142.
23 C.J. p 708 note 98.

1. Va.—Wilson v. Stokes, 4 Munf. 455, 18 Va. 455.
23 C.J. p 708 note 99.

2. Ga.—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga App. 278
23 C.J. p 708 note 1.

Rule to show cause

Where proceeds of sale by sheriff under writ of fieri facias had been distributed by sheriff or by purchaser who retained a part of purchase price and used it to satisfy judgment and mortgage which mortgage certificate furnished sheriff at time of sale disclosed were encumbrances against property, and writ had been returned satisfied and the whole matter was closed as far as sheriff was concerned, redistribution by proceeds of sale was not an "incidental matter" arising during pendency of suit so as to permit judgment debtor to obtain redistribution by a rule to show cause filed eight months following the distribution.—Southern Coal Co. v. Thibodaux & Chauvin, La.App., 181 So. 79.

3. Ala.—Turner v. Lawrence, 11 Ala. 427.

4. N.Y.—Mills v. Davis, 53 N.Y. 349. S.C.—Oliver v. Sale, 19 S.C. 17.

5. Fla.—Willis v. Shepard, 2 Fla. 397.

der an issue to try the rights of the parties.[6] If it is discovered that, by mistake, there is no issue of fact on the record, the court should allow one to be tendered and filed.[7] Of course, if the money is in the custody of the court, any mode of procedure agreed on by all the interested persons cannot thereafter be attacked by any of them.[8] In some states there are pleadings in a proceeding for a rule against the sheriff.[9] A general verdict for the movant means that the fund should be applied to the payment of the executions held by the movant after payment of costs.[10]

Notice of rule. Filing an intervening petition makes one a party to the rule as effectually as a written notice of the rule given by the officer or the movant.[11]

Parties. It has been held that it is not essential, in the first instance, that an applicant for a rule against a sheriff for a fund in his hands should make other claimants of the fund parties to the proceeding;[12] but the court will not determine priority between two executions with only one of the parties before it.[13]

Burden of proof. As in other civil proceedings, the burden of proof, as a general rule, is on the party who has the affirmative of the issue.[14] One claiming under a prior unrecorded deed has the burden of proving that the execution creditor had notice of the deed.[15] When a claim is based on a fieri facias the writ must be introduced in evidence or accounted for.[16]

(2) Bill in Equity

In some jurisdictions a bill in equity will lie to determine rival claims to the proceeds of an execution sale. Relief by injunction may be available in a proper case.

In some jurisdictions a bill in equity will lie to determine the rights of rival claimants to the proceeds of an execution sale;[17] but in other jurisdictions the rule has been laid down that in a contest as to priority between several executions, or as to the relative priority between an execution and other liens, adequate relief can be obtained by rule or an application to the court out of which the executions issued, and a bill in equity will not lie.[18]

A claimant may maintain a bill to enjoin the sheriff from paying the proceeds to another, if there is no adequate remedy at law.[19]

(3) Third Opposition

Where the statute so provides, a person claiming a privilege on property sold under execution may make timely claim to the proceeds of the sale before the court which granted the order of sale or rendered the judgment by which the seizure was effected, and when the claim is properly prosecuted the court may determine its rank with other claims in a summary manner.

Under the statutes in Louisiana, where property on which a party claims a privilege is sold under execution, he should proceed by way of a third opposition to claim a priority of privilege on the proceeds of the sale.[20] The opponent is not required to make oath to the facts on which he bases his demand, in order to arrest the proceeds in the hands of the sheriff pending the inquiry.[21] Such opposition should be made before the court which has granted the order of sale or rendered the judgment by virtue of which the seizure has been effected;[22] and all suits and claims should be transferred to the court by whose mandate the property was seized, and such court should class them according to their rank, in a summary manner after notifying all parties in interest.[23] It is too late to make such opposi-

6. N.J.—Tradesmen's Bank v. Fairchild, 31 N.J.Law 371.
23 C.J. p 708 note 5.

7. Ga.—Valentino v. Stafford, 21 S. E. 154, 93 Ga. 735.

8. Mo.—Williamson v. Wylie, 69 Mo. App. 368.

9. Ga.—Stewart v. Blalock-McCollum-Roberts Co., 76 S.E. 573, 139 Ga. 44.
23 C.J. p 709 note 8.

10. Ga.—Stewart v. Blalock-McCollum-Roberts Co., 76 S.E. 573, 139 Ga. 44.

11. Ga.—Paris v. Citizens' Banking Co., 32 S.E. 141, 106 Ga. 206.
23 C.J. p 709 note 10.

12. Ga.—Berrie v. Smith, 25 S.E. 757, 97 Ga. 782—Foster v. Rutherford, 20 Ga. 668.
23 C.J. p 709 note 11.

13. N.J.—McDonald v. Lawry, 6 N. J.Law 414.

14. Mo.—Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo. App. 746.
Tex.—Rickards v. Bemis, Civ.App., 78 S.W. 239.
23 C.J. p 709 note 14.

15. Mich.—Lachelt v. McInerney, 152 N.W. 86, 185 Mich. 413.
Tex.—Whitaker v. Farris, 101 S.W. 456, 45 Tex.Civ.App. 378.

16. Ga.—Texas Co. v. Hall, 9 S.E.2d 859, 62 Ga.App. 731.

17. W.Va.—Childs v. Hurd, 9 S.E 362, 32 W.Va. 66.
23 C.J. p 709 note 17.

18. Ga.—Rucker v. Tabor, 66 S.E. 917, 133 Ga. 720.
23 C.J. p 709 note 18.

19. R.I.—Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204.
The lien of a mortgage on personal property which attached to the proceeds of an execution sale was sufficient to justify an injunction.—Zimmerman v. Andrews, supra.

20. La.—Caldwell v. Laurel Grove Co., 153 So. 17, 179 La. 53.
23 C.J. p 711 note 46.
Seizure in globo
The holder of a privileged debt must request a separate appraisement and sale of property subject to his right of preference if it is seized in globo with other property of the debtor.—Liquid Carbonic Corporation v. Leger, La.App., 169 So. 170.

21. La.—Rains v. Chaffe, 23 La.Ann. 657.

22. La.—West Feliciana Bank v. Clack, 54 So. 145, 127 La. 909.
23 C.J. p 711 note 48.

23. La.—West Feliciana Bank v. Clack, supra.
23 C.J. p 711 note 49.

tion after the property has been seized, sold, and the proceeds distributed;[24] and, by statutory provision, an opposition will be considered as having been abandoned, where the opponent allows five years to elapse without taking any steps in the prosecution thereof; and in such case the defunct opposition cannot serve as a basis of another concursus at the suit of the original execution defendant.[25]

(4) Pennsylvania Practice

In Pennsylvania a claimant to the proceeds of an execution sale is given specific statutory remedies by which, generally, the court from which execution issued may determine conflicting claims, direct an issue to try a disputed fact, or appoint an auditor to make distribution.

In Pennsylvania, it is provided by statute that when there are disputes concerning the distribution of the proceeds, the court from which the execution issued has power, after notice, and on the assent of all parties, to hear and determine such disputes, without ordering the payment of the money into court.[26] If any fact connected with such distribution is in dispute, the court may, on request of any person interested, direct an issue to try such dispute,[27] provided the applicant makes an affidavit as to the existence of the dispute setting forth the nature and character thereof;[28] but to entitle one to an issue the disputed fact must be material and relevant,[29] the question must be one of fact and not of law,[30] and the facts must not have already been decided by the court.[31] The issue must be demanded within a proper time.[32] Where the creditor applies for and procures the appointment of an auditor, he cannot afterward have an issue awarded.[33] The applicant is entitled to a hearing,[34] but the granting of the application for an issue is not a matter of right,[35] and the court may refuse to grant the issue where it must necessarily prove unavailing,[36] or where loss will be thrown on an innocent party by granting it.[37]

As to the proceeds of a sale of real estate the proper procedure for a claimant is to file exceptions to the sheriff's schedule of distribution.[38]

Lienor as purchaser. When a lien creditor has become purchaser at a sheriff's sale and has given a receipt for payment of his claim in discharge of his bid, a prior lienor who is aggrieved may except to the sheriff's return,[39] and the court may thereupon appoint an auditor or direct an issue to determine

24. La.—Lyons v. McRae, 14 La. Ann. 423.

25. La.—Morvant v. Henderson, 66 So. 960, 136 La. 245.

26. Pa.—Duquesne Trust Co. v. Benovitz, 2 A.2d 756, 332 Pa. 243—Libel v. Butler, 19 Erie Co. 476—Potter Title & Trust Co. v. Tudick, 88 Pittsb.L.J. 623.
23 C.J. p 707 note 84 [a].

Relief under statute denied
The court was without jurisdiction to order distribution of proceeds of personalty sold under execution, where defendant was not served with rule and did not appear, and no return was made by sheriff fixing proceeds in his hands for distribution.—Cynkar v. Kaczynski, 161 A. 761, 105 Pa.Super. 434.

Money deposited as security
Where money had been paid to a sheriff to prevent a sale under execution, and the sheriff had deposited it in court, it was proper for the court, on motion of plaintiffs in the writs, to compel claimants to interplead with reference thereto.—Pennypacker's Appeal, 57 Pa. 114.

27. Pa.—Corfield v. Klein, 34 A. 435, 173 Pa. 363.
23 C.J. p 709 note 22.

Dispute of fact not raised
Pa.—Potter Title & Trust Co. v. Tudick, 88 Pittsb.L.J. 623.

28. Pa.—Lœffler v. Schmertz, 25 A. 636, 152 Pa. 615.
23 C.J. p 710 note 23.

29. Pa.—Martin's Appeal, 97 Pa. 85—Souder's Appeal, 57 Pa. 498—Irvin's Appeal, 11 A. 430, 7 Pa. Cas. 350—O'Donnell v. Polke, 2 Pa.Dist. 790.
23 C.J. p 710 note 24.

30. Pa.—Wolfe v. Oxnard, 25 A. 806, 152 Pa. 623.
23 C.J. p 710 note 25.

31. Pa.—Robinson v. Vandiver, 2 Pearson 95.

32. Pa.—Mahler's Appeal, 38 Pa. 220—In re Brown, 2 Pa. 463.

After argument concluded
The demand may be made after all the evidence has been submitted, the argument concluded, and the court prepared to render its decision.—Trimble's Appeal, 6 Watts, Pa., 133—Salsburg v. Franik, 4 Kulp, Pa., 502—Reigle's Appeal, 13 Lanc.Bar, Pa., 22.

After hearing before auditor
(1) It has been held that after a full hearing before an auditor, participated in by the applicant for an issue, a demand made after the auditor has passed on facts comes too late.—People's Sav. Bank v. Mosier, 49 A. 132, 199 Pa. 375—23 C.J. p 710 note 30.

(2) On the other hand, it has been held that the demand for an issue is in time if made on the return of the auditor's report even though the question of fact involved has been litigated before the auditor.—Souder's Appeal, 57 Pa. 498—23 C.J. p 710 note 29.

33. Pa.—People's Sav Bank v. Mosier, 49 A. 132, 199 Pa. 375, following Second Nat. Bank v. Pennsylvania Anthracite Coal Co., 21 A. 412, 140 Pa. 628.
23 C.J. p 710 note 31.

34. Pa.—Atherholt v. Atherholt, 42 Wkly.N.C. 70.

35. Pa.—People's Sav. Bank v. Mosier, 49 A. 132, 199 Pa. 375.
23 C.J. p 710 note 33.

36. Pa.—Benson's Appeal, 48 Pa. 159.

37. Pa.—McLaughlin v. Graybill, 15 Pa.Dist. 528.

38. Pa.—Citizens Bank of Barnsboro v. Variali, 18 Pa.Dist. & Co. 315.

Distribution by auditor
The proceeds can be paid into court for distribution by an auditor only on the application of the sheriff when the court is satisfied that by reason of peculiar circumstances the sheriff cannot safely distribute.—Citizens Bank of Barnsboro v. Variali, *supra*.

39. Pa.—Duquesne Trust Co. v. Benovitz, 2 A.2d 756, 332 Pa. 243—Nolan v. Wittenmyer, 18 Pa.Dist. & Co. 734, 36 Dauph.Co. 369—Alma Building & Loan Ass'n to Use v. Kramer, 17 Pa.Dist. & Co. 59—Mortgage Co. v. Born, 88 Pittsb. L.J. 253.

conflicting claims.[40] If it be determined that the purchaser is not entitled to the proceeds the court must set aside the sale unless the money be paid to the sheriff.[41] In such a case the court cannot require payment of the proceeds to the sheriff.[42]

Auditors. The court may, when expedient, appoint auditors to make distribution[43] without compelling the payment of the money into court;[44] but an auditor cannot be appointed to distribute a fund where the money is not in court or within its grasp,[45] as where the sheriff has paid the money over to prior lien holders and taken their receipts;[46] and, where it appears that only one party is entitled to the fund, the sheriff will be directed to pay it to him without subjecting him to the cost of an audit.[47] The auditor has no authority to inquire into the validity of a judgment in due form rendered by a court of record,[48] but he may disregard a judgment which is void on its face[49] and for that purpose ascertain the facts which go to show that it is void.[50] It is within his jurisdiction to determine the ownership of the judgment.[51] His report to the court should recite the facts proved and not the evidence; this part of his report should be in effect a case stated or special verdict.[52]

d. Order or Decree

General rules apply with reference to the order or decree in proceedings as to distribution.

No change in the mode of appropriating the proceeds of a sale specifically disposed of by a decree can be made except by opening and correcting the decree.[53] If a pro rata distribution has been agreed on by the parties, an order of court omitting the specific amounts to be paid is not for that reason insufficient.[54] An ex parte order to the sheriff to pay the proceeds to another does not bind a party to the suit or protect the sheriff.[55]

e. Costs

Costs are usually charged against the fund when the unsuccessful claimant shows probable cause for his objection; but otherwise the costs may be charged against him.

In the distribution by an auditor or by the court of the proceeds of an execution sale, costs do not necessarily fall upon the unsuccessful claimant; where he shows probable cause for his objection or litigation, the costs are usually charged against the fund.[56] Where, however, the ground of the contest was merely the suspicion of fraud, collusion, or lack of consideration, unsupported by the evidence, the costs of the proceedings will not be allowed out of the fund, but will be charged to the unsuccessful claimant.[57]

f. Appeal

A party who complies with the requirements of statutes conferring the right may appeal from an order distributing the proceeds of an execution sale.

Unless a party claiming an interest in the proceeds of an execution sale has not complied with the statute with regard to the allowance of his claim,[58] he has a right of appeal from an order or decree of court distributing the fund.[59] It has been held in one jurisdiction that the appellate court will appropriate the money to the creditor entitled to it whether he excepts or not to the order of the court below,[60] while in another jurisdiction it has been held that a creditor who neglects to appeal cannot be relieved by the appellate court although it clearly appears that he is entitled to the money in contest.[61] A decision of the appellate court on the re-

40. Pa.—Nolan v. Wittenmyer, 18 Pa.Dist. & Co. 734, 36 Dauph.Co. 369.

41. Pa.—Alma Building & Loan Ass'n to Use v. Kramer, 17 Pa. Dist. & Co. 59.

42. Pa.—Duquesne Trust Co. v. Benovitz, 2 A.2d 756, 332 Pa. 243.

43. Pa.—Semple v. Semple, 44 A. 1077, 193 Pa. 630.
23 C.J. p 710 note 36.

Appointment denied
The court has declined to appoint an auditor in the absence of exceptional circumstances when a case is governed by the statute requiring the sheriff to make distribution of the proceeds of a sale of real estate.—Citizens Bank of Barnsboro v. Variali, 18 Pa.Dist. & Co. 315.

44. Pa.—Leith v. Bauder, 25 Pa. Dist. 699, 44 Pa.Co. 441.

45. Pa.—Semple v. Semple, 44 A. 1077, 193 Pa. 630—Hoch's Appeal, 72 Pa. 53.

46. Pa.—Semple v. Semple, 44 A. 1077, 193 Pa. 630.

47. Pa.—Cohen v. Green, 5 L.T.N.S. 11—Commonwealth v. Steacy, 1 Lanc.L.Rev. 86.

48. Pa.—Ford's Appeal, 25 A. 884, 152 Pa. 641.
23 C.J. p 711 note 41.

49. Pa.—In re Harris, 6 Kulp 409.

50. Pa.—Osterhout v. Germon, 5 L. T.N.S. 31.

51. Pa.—Souder's Appeal, 57 Pa. 498.

52. Pa.—Field v. Oberteuffer, 2 Phila. 271.
23 C.J. p 711 note 45.

53. Ill.—Gregory v. Gover, 19 Ill. 608.

N.J.—Lithauer v. Royle, 17 N.J.Eq. 40.

54. N.J.—Linford v. Linford, 28 N. J.Law 113.

55. La.—Delassize v. Cenas, 4 Mart., N.S., 508.

56. Ga.—Buena Vista Loan & Savings Bank v. Grier, 40 S.E. 284, 114 Ga. 398.
23 C.J. p 711 note 57.

57. Pa.—Kræmer v. Mullin, 12 Pa. Co. 190.
23 C.J. p 711 note 58.

58. Pa.—Reamer's Appeal, 18 Pa. 510.

59. Miss.—Heizer v. Fisher, 23 Miss. 672.
23 C.J. p 712 note 61.

60. Miss.—Heizer v. Fisher, supra.

61. Pa.—Cash's Appeal, 1 Pa. 166.

spective rights of creditors to the proceeds of sale under their executions is conclusive of their rights to the proceeds of other subsequent sales made on executions issued on the same judgment.[62]

IX. REDEMPTION

§ 253. Right to Redeem Generally

a. General considerations
b. Redemption of part
c. Agreements as to redemption

a. General Considerations

The right to redeem from an execution sale is purely statutory in the absence of an agreement between the interested parties.

The right to redeem property from sale under execution is purely statutory,[63] except where based on an agreement of the parties, considered infra subdivision c of this section.

The right to redeem is not one which may be enforced in a court of equity as of course,[64] although under certain circumstances, where the statutory right of redemption has been denied or defeated, a court of equity has jurisdiction, as shown infra § 261.

62. Miss.—Martin v. Lofland, 18 Miss. 317.

63. Colo.—Marty v. Paul, 226 P. 150, 152, 75 Colo. 446, citing **Corpus Juris.**
Ill.—Dausch v. Barker, 255 Ill.App. 161.
Iowa.—Pierce v. White, 216 N.W. 764, 204 Iowa 1116—Paulsen v. Hanson, 216 N.W. 762.
Mont.—Dipple v. Neville, 267 P. 214, 82 Mont. 280—Reynolds v. Davis, 252 P. 386, 78 Mont. 56—Leonard v. Western, 241 P. 523, 74 Mont. 513.
N.Y.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.
23 C.J. p 712 note 66.
Equity of redemption as subject to execution see supra § 45.
Redemption of property set off under statutes of extents or elegits see infra § 404.
Possession of purchaser during period for redemption see infra § 303.
Right to redeem from execution or judicial sale as subject of execution see supra § 40.

Effect of absence of right

(1) Owner of property sold under execution loses power to regain property after confirmation, if property is not subject to redemption.—Messer v. American Eagle Fire Ins. Co., 12 S.W.2d 358, 227 Ky. 3.

(2) Sale of leasehold within two years before term expires, under execution issued at either secured or unsecured creditor's request, confers absolute title.—Crystal Petroleum Products Corporation v. Abbott, 264 P. 810, 89 Cal.App. 421.

Law of redemption

(1) Law of redemption is a statute which confers on the party where land is sold for debt by executions, etc., the right to redeem or repurchase the land within a limited time after the sale.—Reynolds v. Baker, 6 Coldw., Tenn., 221.

(2) The view has been expressed that the law of redemption is a law of property.—Reynolds v. Baker, supra.

Nature of right and distinctions

(1) "Right of redemption" arises only after the sale of property and exists only for the period prescribed by law.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.

(2) The right of the debtor to redeem is not an "equity of redemption" in the sense of the law of mortgages.—Reynolds v. Baker, 6 Coldw., Tenn., 221.

(3) "Equity of redemption" and "legal right to redeem" have, however, been used synonymously, and it has been stated that "an equity of redemption, or legal right to redeem is that right which the owner of property has to regain the complete title to his property by the payment to the purchaser of the amount for which the property was sold, with interest and penalties, in accordance with the provisions of the statute."—Messer v. American Eagle Fire Ins. Co., 12 S.W.2d 358, 360, 227 Ky. 3.

(4) The right of the debtor to redeem is not an estate or interest in the land.—Reynolds v. Baker, supra.

(5) The right to redeem is not a property right but is a mere privilege of statutory origin.—Brown v. Timmons, supra—Leonard v. Western, 241 P. 523, 74 Mont. 513.

(6) The distinction between "sale" and "redemption" referred to in statutes governing execution sales and redemption therefrom is fundamental.—Corporation of America v. Eustace, 17 P.2d 723, 217 Cal. 102.

(7) "Redeem" means repurchase, and as used in Rev.Codes 1921 §§ 9441-9448, as applied to redemptioner, signifies right to purchase interest acquired by purchaser, whether purchaser is willing or not.—Leonard v. Western, supra.

Public policy

It is the public policy of some states that a debtor who has lost his land under execution sale shall have the right to regain it by complying with the conditions imposed.—Dipple v. Neville, 267 P. 214, 82 Mont. 280—Hamilton v. Hamilton, 154 P. 717, 51 Mont. 509.

Right in law to redeem from sale exists only when given by statute.—Lopez v. McQuade, 273 N.Y.S. 34, 151 Misc. 390.

Specific execution

(1) Whether execution was specific was immaterial as respects right of judgment debtors' grantees to redeem from sale thereunder.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.

(2) That court ordered clerk to issue and deliver to sheriff a "specific execution" and also ordered latter to levy such execution on all real estate of debtors in county when judgment was rendered and any real estate acquired by them thereafter prior to four months before the date of their adjudication in bankruptcy did not change the writ as an execution so far as the right of redemption thereunder was concerned.—Arkansas Nat. Bank v. Price, supra.

Effect of bill to annul judgment

Where a sale of land under execution was made pending a suit by the judgment creditor to vacate and annul the judgment, it was proper for the court, in such suit, to assure plaintiff a right to redeem.—King v. Dent, 93 So. 823, 208 Ala. 78.

Repeal of statute and saving clause

The saving clause of L.1921 p 500, which repealed in certain respects the act of July 1, 1917, governing judgments and decrees, applied to the redemption of lands from certificates of levy.—Reardon v. Taft, 235 Ill.App. 75.

64. Colo.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.

The general rule in equity is that the right to redeem from a sale exists only when given by statute.—

To enable one to redeem he must conform to the requirements of the statute.[65] He must take the privilege burdened with all its restrictions,[66] or, as sometimes stated, the privilege may be exercised only on the conditions prescribed.[67]

Construction and constitutionality of statutes. While a liberal construction is to be given to statutes allowing redemption, to the end that the property of the debtor may pay as many debts as possible,[68] or, as sometimes stated, to accomplish the beneficent purpose of the statute,[69] the right or privilege conferred is a statutory one that is not to be enlarged by judicial construction,[70] and may be exercised only in the instances provided in the statute.[71]

Where statutes give the right of redemption on execution sales or change the mode of procedure or the redemption period or other matters relating thereto, it is usually held that such statutes have no retroactive effect.[72] As to the constitutionality of such statutes in respect of violation of vested rights see the C.J.S. title Constitutional Law § 235; in respect of impairment of obligations of contracts see § 391 of such title.

Property subject to redemption. The question as to what type of property is subject to redemption depends on the terms of the applicable statute duly construed.[73] If land may properly be levied on and sold under execution, redemption from such sale is permissible under the terms of some statutes.[74]

Lopez v. McQuade, 273 N.Y.S. 34, 151 Misc. 390.

65. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
N.Y.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.
23 C.J. p 712 note 69.

Surrender of possession

Under some statutes the execution debtor forfeits his right to redeem by failure to comply with a written demand for possession of the land sold, made by the purchaser at the execution sale in accordance with the applicable statute.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171.

66. N.M.—Union Esperanza Min. Co. v. Shandon Min. Co., 135 P. 78, 18 N.M. 153.
N.D.—State v. O'Connor, 69 N.W. 692, 6 N.D. 285.

67. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.

Waiver of conditions

No condition attached by the statute may be waived.—Union Esperanza Min. Co. v. Shandon Min. Co., 135 P. 78, 18 N.M. 153.

68. Colo.—Rossi v. Colorado Pulp & Paper Co., 299 P. 19, 39, 88 Colo. 461, quoting **Corpus Juris**—Walker v. Wallace, 246 P. 553, 79 Colo. 380, citing **Corpus Juris.**
Ill.—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990.
23 C.J. p 712 note 72.

69. Ark.—Rose v. Loughborough, 32 S.W.2d 1066, 182 Ark. 782.

70. Colo.—Rossi v. Colorado Pulp & Paper Co., 299 P. 19, 39, 88 Colo. 461, citing **Corpus Juris**—Walker v. Wallace, 246 P. 553, 79 Colo. 380, citing **Corpus Juris.**
Iowa.—Paulsen v. Hanson, 216 N.W. 762.
N.M.—Union Esperanza Min. Co. v. Shandon Min. Co., 135 P. 78, 18 N.M. 153.

71. Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.

Sale to enforce lien

Where the execution purchaser of land subject to a lien again purchases the property on the sale to enforce the lien, the execution debtor had the right to redeem under statute only as to the purchase at the execution sale, and not as to the lien foreclosure.—Jones v. Hopper, 5 Ky.Op. 379.

72. Cal.—Welsh v. Cross, 81 P. 229, 146 Cal 621, 106 Am.S.R. 63, 2 Ann. Cas. 796.
23 C.J. p 712 note 74.
Retroactive operation of statutes generally see C.J.S. title Statutes §§ 412-440, also 59 C.J. p 1158 note 13-p 1196 note 61.

In Arkansas

(1) It was held that statute authorizing redemption applied notwithstanding the debt on which the judgment and execution sale were based was contracted before the enactment of such statute.—Turner v. Watkins, 31 Ark. 429—23 C.J. p 713 note 75.

(2) It was also held, however, that, in view of the provision of the applicable statute that no proceedings in pursuance of its provisions before a specified subsequent date shall be rendered invalid by the statute, there was no right to redeem from a sale made during the period intermediate the date of enactment and such subsequent date, under an execution levied during such period, where the judgment was recovered prior to the enactment of the statute.—Dennis v. Tomlinson, 6 S.W. 11, 49 Ark. 568.

73. In Arkansas

(1) The terms "real property," "real estate," "land," and "premises," as used in the statutes, Crawford & M.Dig. c 59 §§ 4323–4333, concerning the sale of real property under execution and redemption from such sale, are used, interchangeably and mean the same thing.—Munson v. Wade, 298 S.W. 25, 174 Ark. 880.

(2) Lease of lands for a term for the purpose of growing crops is regarded as personal property and, therefore, not redeemable as real estate under § 4329 of such Digest; nor may it be regarded as an interest in real estate redeemable under such section.—Munson v. Wade, supra.

(3) Leasehold interest is not to be regarded as real estate redeemable under such section merely because of the provision of § 4271 of the above Digest that every unexpired lease of land shall be subject to execution and sale as real estate.—Munson v. Wade, supra.

In Kansas

Statute relating to redemption of real property from a sale on execution does not apply to the incorporeal hereditament created by license to mine for oil and gas, and, if mineral be discovered, to produce and take care of the product.—National Supply Co. v. McLeod, 227 P. 350, 116 Kan. 477.

In Oregon, under Lord L. §§ 240, 244, Code 1930 3-408, 3-501, a judgment debtor can redeem realty, but he cannot redeem personalty when sold on execution.—Roseburg Nat. Bank v. Camp, 173 P. 313, 89 Or. 67.

74. Tenn.—Shea v. Rucker, 72 S.W. 2d 551, 167 Tenn. 550.

Land subject to homestead

Where debtor received homestead's value on execution sale, his wife, purchasing from execution creditor, who purchased at such sale, acquired property subject to statutory rights, as regards redemption, of husband's

b. Redemption of Part

Usually different parcels of land which have been sold en masse must be redeemed en masse; separate redemption is permitted when and only when there have been separate sales.

Under the redemption statutes the general rule is that, where different parcels of land are sold en masse, they must be redeemed en masse and cannot be redeemed in separate parcels,[75] unless the purchaser consents thereto.[76] It is otherwise, however, where several parcels of land are sold separately.[77]

If the debtor has no title to part of the property sold, he may be allowed to redeem the rest on payment of the full amount due.[78]

Under the terms of some statutes the right of a judgment creditor of one of two owners of undivided fractional interests in the same real property, which have been sold at execution sale to redeem, depends on payment of the full amount of the sales price,[79] but under other statutes, where lands held in common are sold under execution, the judgment creditor of one of the owners may redeem the interest of his debtor without redeeming the whole tract of land sold.[80] Independent of statute, one joint debtor or his creditor cannot redeem his moiety.[81]

c. Agreements as to Redemption

An agreement for redemption between the execution purchaser and the execution debtor is valid and enforceable where the elements of a binding contract are present.

An agreement between the execution purchaser and the execution debtor, to allow redemption or to extend the term therefor, is valid and enforceable by the debtor,[82] provided it is based on a sufficient consideration,[83] and provided the debtor complies with the terms of the agreement within the time stipulated or contemplated.[84]

It has been held in some jurisdictions that such agreements are valid even when made by parol;[85] but there is authority to the contrary.[86] An instrument which constitutes an attempt to reduce to writing the prior parol agreement may be looked to in determining the conditions of, and limitations on, the debtor's right to redeem.[87] The view has been expressed that it is not necessary to the validity of the agreement that a time for such redemption be fixed,[88] and the consent of junior judgment creditors is not necessary.[89] An agreement by one

creditors.—Crawford v. First Nat. Bank, 137 So. 777, 223 Ala. 621.

75. Ala.—Dean v. Lusk, 3 So.2d 310, 313, citing **Corpus Juris.**
Colo.—Chain O'Mines v. Williamson, 72 P.2d 265, 101 Colo. 231—Walker v. Wallace, 246 P. 553, 79 Colo. 380.
N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 286, 86 N.H. 234, quoting **Corpus Juris.**
23 C.J. p 713 note 78.

76. Ala.—Tribble v. Wood, 65 So. 73, 186 Ala. 329.

77. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 286, 86 N.H. 234, citing **Corpus Juris.**
23 C.J. p 713 note 80.

Particular property
Cemetery sold at auction under execution, distinct from other church property, and for a separate price, could be redeemed by judgment debtor's assignee on basis of that price without redeeming all property.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

78. Ala.—Richardson v. Dunn, 79 Ala. 167.

Other property improperly included in sale
In a case in which a sale in bulk included property of the execution debtor and also property which he did not own, it was stated, in holding that such a sale was not permissible, that in order to redeem his own property the execution debtor would have been required to tender the whole amount bid at the sale, as there was no way to determine the amount bid for his property.—Vaughan v. Screeton, 39 S.W.2d 299, 183 Ark. 816.

79. Ill.—Durley v. Davis, 69 Ill. 133.

80. Ill.—Harper v. Sallee, 34 N.E.2d 860, 376 Ill. 540, 135 A.L.R. 189, affirming 26 N.E.2d 987, 305 Ill. App. 85, transferred, see 23 N.E. 2d 27, 372 Ill. 199.
23 C.J. p 713 note 82.

81. Ind.—Sharpe v. Baker, 96 N.E. 627, 99 N.E. 44, 51 Ind.App. 547.

82. Ark.—Trapnall v. Brown, 19 Ark. 39.
23 C.J. p 713 notes 84, 85.

Proof of agreement
There must be clear proof of such an agreement for redemption.—Abernathy v. Hoke, 37 N.C. 157—23 C.J. p 713 note 84 [a].

Effect of subsequent contract
Where execution creditor bid off property under agreement to hold for debtor's benefit and permit him to redeem, and afterward so-called contract of tenancy was made, providing for tenancy at will, such contract may establish debtor's right to redeem as existing so long as tenancy exists, and debtor remains in possession, paying the "rent" or interest contracted for.—Broadwell v. Maxwell, 119 S.E. 344, 30 Ga.App. 738.

Enforceable in equity
N.J.—Marlatt v. Warwick, 18 N.J.Eq 108—Combs v. Little, 4 N.J.Eq 310, 40 Am.D. 207.
22 C.J. p 713 note 84 [b].

83. Ill.—Lucas v. Nichols, 66 Ill. 41.
Ky.—Herring v. Johnston, 72 S.W. 793, 24 Ky.L. 1940.
23 C.J. p 713 note 85.

84. Iowa.—Alston v. Wilson, 44 Iowa 130.
23 C.J. p 713 note 86.

85. Ga.—Broadwell v. Maxwell, 119 S.E. 344, 30 Ga.App. 738.
23 C.J. p 713 note 87.

86. Ill.—Lucas v. Nichols, 66 Ill. 41.
23 C.J. p 714 note 88.

87. **So-called contract of tenancy**
Where creditor bid off property for debtor's benefit under agreement to hold for debtor's benefit and permit him to redeem, so-called contract of tenancy subsequently made, and constituting effort to reduce to writing certain terms of the agreement, may be looked to in determining conditions and limitations on debtor's right to redeem.—Broadwell v. Maxwell, 119 S.E. 344, 30 Ga.App. 738.

88. N.J.—Throckmorton v. O'Reilly, Ch., 55 A. 56.

89. N.Y.—Miller v. Lewis, 4 N.Y. 554.

of the joint owners of a sheriff's certificate of sale has been regarded as binding on all the joint owners.[90]

While a different view has been taken in regard to some agreements of the general type here under consideration,[91] according to some cases, the purchaser only acquires a mortgage interest in the property under such an agreement, and another creditor may maintain a bill to redeem or require a sale and distribution of the proceeds,[92] and one who agrees to purchase property at an execution sale, and hold title as a mortgagee subject to redemption, acquires no other title, and the debtor may redeem at any time, the transaction amounting to a trust.[93]

A purchaser at a subsequent execution sale of a judgment debtor's rights under an agreement to redeem has been held to be in the same position as that of an assignee of the agreement.[94] Where the purchaser of a lot under execution, for much less than its value, has agreed with defendant in execution to release him whenever he reimburses the amount paid, if defendant afterward sells the lot, his purchaser is entitled, by subrogation, to redeem.[95]

Against whom enforced. A contract by which the parties stipulate that defendant in execution shall have the right to redeem is enforceable against the wife of plaintiff in execution, where he purchases and procures the deed to be made to the wife for the purpose of defeating such contract.[96] An agreement to extend the time is binding on a purchaser with notice;[97] but the agreement should not be enforced against an innocent purchaser from the execution purchaser.[98] If the purchaser sells to an innocent person before the time agreed on expires, the sale need not be set aside, but the purchaser may be charged with the full value of the property without regard to the amount for which he sold it.[99]

§ 254. Persons Entitled to Redeem

a. General considerations
b. Judgment debtor or his successor in interest
c. Execution creditor
d. Other creditors of execution debtor
e. Purchaser at execution, foreclosure, or tax sale

a. General Considerations

Only such persons as are designated in the applicable statute have the right to redeem.

Only the persons designated in the statute may redeem.[1] Of course, as between the parties, anyone may redeem if the purchaser consents thereto.[2]

Under some statutes one who owns a separate part of the land sold or has some interest therein may redeem the whole tract,[3] but the right of a tenant in common of the execution debtor to redeem has been denied in the absence of statutory authorization.[4]

In general the statutory right to redeem is assignable, and the assignee succeeds to all the right and interest of his assignor.[5]

Under some statutes a second redemption or a series of redemptions is permissible under certain circumstances.[6]

b. Judgment Debtor or His Successor in Interest

Usually the redemption statutes authorize redemption by the judgment or execution debtor and his assignee or grantee.

Generally, by statute, a judgment or execution debtor may redeem property sold on execution against him, by compliance with the statutory provisions within the time designated therein,[7] and

90. N.D.—Murphy v. Leutsch, 132 N.W. 435, 22 N.D. 102, 25 L.R.A., N.S., 1139, Ann.Cas.1913E 1185.
91. Iowa.—Alston v. Wilson, 44 Iowa 130.
92. Ky.—Yoder v. Standiford, 7 T.B.Mon. 478.
93. U.S.—Leggat v. McLure, Mont., 234 F. 620, 148 C.C.A. 386.
94. La.—Kelso v. Beaman, 10 La. 450.
95. Ky.—Dupuy v. McMillan, 2 Duv. 555.
96. Ky.—Ferguson v. Mason, 60 S.W. 847, 22 Ky.L. 1571.
97. Ill.—Dimmitt v. Flinn, 82 N.E. 249, 229 Ill. 111.
98. Ill.—Stevens v. Irwin, 76 Ill. 604.
99. S.C.—Keith v. Purvis, 4 S.C.Eq. 114.
1. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
Iowa.—Pierce v. White, 216 N.W. 764, 204 Iowa 1116—Paulsen v. Hanson, 216 N.W. 762.
Mich.—Gilson v. Putnam, 201 N.W. 462, 229 Mich. 415.
Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.
23 C.J. p 714 note 1.
2. Ala.—Tribble v. Wood, 65 So. 73, 186 Ala. 329.
3. Minn.—Powers v. Sherry, 132 N.W. 210, 15 Minn. 290.
4. Mich.—Gilson v. Putnam, 201 N.W. 462, 229 Mich. 415.
5. Ala.—Gay v. Taylor, 108 So. 853, 214 Ala. 659.
23 C.J. p 717 note 62.
6. Tenn.—Holmes v. Jarrett, 7 Heisk. 506.
7. U.S.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.
Ark.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 398, 179 Ark. 259, citing **Corpus Juris.**
Ky.—Messer v. American Eagle Fire Ins. Co., 12 S.W.2d 358, 227 Ky. 3—R. T. Elswick & Co. v. Scott, 8 S.W.2d 398, 225 Ky. 309.
Tenn.—Shea v. Rucker, 72 S.W.2d 551, 167 Tenn. 550.
23 C.J. p 714 note 6.

this right extends to his assignee[8] or grantee,[9] and under some statutes to his devisees, heirs, and personal representatives.[10] By the express terms of some statutes the right to redeem is given to the successor in interest of the judgment debtor.[11] While the view has been taken that the grantee of the judgment debtor under a deed absolute in form, but intended only as security, may redeem as grantee,[12] under some statutes such grantee may redeem only as a creditor.[13]

A subsequent levy of execution on, or sale of, the property under another execution does not defeat the right under some statutes.[14] So under some statutes another creditor who is in a position to redeem cannot reach and subject to sale this statutory right, and the filing of a bill in equity for that purpose is no obstacle to a redemption by the debtor or an assignment by him of his right to redeem.[15] It has been held that the legality of a redemption which complies with the statute in all respects is not affected by the fact that defendant before making such redemption had previously obtained an order of court restraining the sheriff from issuing any deed or from paying over any redemption money pending an appeal from an order denying a motion to set aside the sale and certificate of sale.[16]

Under some statutes defendant's right to redeem within the statutory period is lost in case he appeals or causes the execution to be stayed.[17] Such a statute should be strictly construed,[18] and it has been held that the right of the judgment debtor to redeem is not defeated by virtue of such statute by reason of an appeal taken in an auxiliary suit

Inconsistent attitude

The right of redemption is purely statutory, and one who redeems from an execution sale as owner cannot insist on a subsequent execution sale that he redeemed as a judgment creditor.—Marty v. Paul, 226 P. 150, 152, 75 Colo. 446, citing **Corpus Juris.**

8. Ky.—Hibbitt v. Spurrier, 8 B. Mon. 469.
Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.
N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.
Tenn.—Shea v. Rucker, 72 S.W.2d 551, 167 Tenn. 550—Reaves v. Bank of Hartsville, Ch., 64 S.W. 307.
23 C.J. p 715 note 7, p 717 note 62.

Assignment of right independent of interest in property

The right of redemption from an execution sale of real property given by California Code Civ.Proc. § 701, to the judgment debtor or his successor in interest in the whole or any part of the property, is a property right which is assignable by a judgment debtor independently of any transfer of an interest in the property.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.

Assignment to purchaser at prior sale

Where conveyance under federal court sale was not recorded, and property was subsequently sold under execution in state court, judgment debtor could assign right of redemption to heirs of purchaser under federal court sale, who could redeem as assignees of right of redemption.—Shea v. Rucker, 72 S.W. 2d 551, 167 Tenn. 550.

9. Ark.—Rose v. Loughborough, 32 S.W.2d 1066, 182 Ark. 782—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 398, 179 Ark. 259, citing **Corpus Juris.**
Ill.—Easter v. Holcomb, 221 Ill.App. 485.
23 C.J. p 715 note 7, p 717 note 62.

Method of transfer

(1) A conveyance of land by the judgment debtors after the execution sale transfers the right to redeem, even in the absence therefrom of a reference to the right to redeem.—Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181.

(2) It was pointed out, however, that the deed involved in express terms conveyed the right to redeem, and that, in addition, there was a written assignment of the right to redeem so that there was no question as to the transferee's right to redeem, provided there was due compliance with the applicable statute.—Gray v. C. A. Harris & Son, supra.

Agreement to permit redemption

Where the purchaser at execution sale made an agreement with the owner to release the real property involved to the owner on payment by the latter to the purchaser of the full amount for which the property was sold, a vendee of such owner acquired the right to redeem.—Dupuy v. McMillan, 2 Duv., Ky., 555.

Grantee under fraudulent conveyance

The right to redeem of a grantee under a fraudulent conveyance from the judgment debtor has been denied.—R. T. Elswick & Co. v. Scott, 8 S.W.2d 398, 225 Ky. 309—Warden v. Troutman, 74 S.W. 1085, 25 Ky.L. 247.

Sole right in grantee

Absolute conveyance of lands before judgment recovered against debtor vested right to redeem from subsequent execution sale solely in grantee, under St.1929 § 272.40.—Wiedner v. Smith, 240 N.W. 367, 206 Wis. 438.

10. Mich.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 165 N. W. 724, 198 Mich. 648.

11. Mont.—Hamilton v. Hamilton, 154 P. 717, 51 Mont. 509.
S.D.—State v. Tuttle, 216 N.W. 194, 51 S.D. 596.

12. Ark.—Rose v. Loughborough, 32 S.W.2d 1066, 182 Ark. 782.

13. Iowa.—Robertson v. Moline, Milburn & Stoddard Wagon Co., 55 N.W. 495, 88 Iowa 463.

14. Mont.—Hamilton v. Hamilton, 154 P. 717, 51 Mont. 509.
23 C.J. p 715 note 10.

Redemption from both sales

It was held that, where land was sold under two different judgments, at different times, a redemption from both sales could be made at one time by the judgment debtor, within a year from the first sale, by paying the two amounts for which the property was sold.—Harrison v. Wilmering, 32 N.W. 279, 72 Iowa 727.

15. Tenn.—Ewing v. Cook, 3 S.W. 507, 85 Tenn. 382, 4 Am.S.R. 765.

16. Ill.—Wenham v. Schmitt, 76 N. E. 375, 219 Ill. 195.

17. Iowa.—Brown v. Markley, 12 N. W. 721, 58 Iowa 689.
22 C.J. p 715 note 12.

18. Iowa.—Anthony v. Heiny, 244 N.W. 902, 215 Iowa 1347.

Limited operation of statute

The view has been taken that the prohibition applies only to a party who is the debtor.—Quinn v. First Nat. Bank, 206 N.W. 271, 200 Iowa 1384—Sieben v. Becker, 3 N.W. 804, 53 Iowa 24.

in equity brought by the judgment creditor in aid of execution under his judgment.[19] So, also, it has been held that the statute does not apply where an appeal is taken after the execution sale.[20]

Right as affected by ownership or extent or nature of interest. While it has been stated that only the owner has the right to redeem,[21] under some statutes the execution debtor's right to redeem real estate cannot be defeated by showing title in a third person, and he may redeem whatever interest he may have.[22] So some statutes do not make actual ownership at the time of sale or redemption a condition precedent, the right following the person and not the land and continuing for the period prescribed by the statute, although the debtor meanwhile may have parted with his title,[23] particularly where the family of the debtor retains a homestead interest in the property with resultant right of possession in him, as head of the family, jointly with his wife.[24] It has been held that a debtor whose equity of redemption has been subsequently foreclosed cannot redeem.[25]

Under some statutes a judgment debtor who has held as tenant for a term under a lease of land for the purpose of growing crops does not have such an interest as will permit him to redeem from a sale of the lease under execution.[26]

c. Execution Creditor

Under some, but not under all, statutes the creditor under whose judgment the sale is made may redeem.

Under some statutes a creditor by virtue of whose judgment the property of the debtor is sold has a statutory right to redeem the same from the purchaser,[27] as, for example, an execution creditor who himself purchases for less than the amount of his judgment.[28] Other statutes have been differently construed, and the right of redemption is not accorded to such creditor,[29] even though the purchase money was wholly applied to prior executions.[30] As to any other judgments which he holds, however, such creditor has the same rights as any other creditor,[31] and, under some statutes, the execution creditor may redeem as holder of the legal title where he holds under a deed in the chain of title based on a tax sale of the same property.[32]

d. Other Creditors of Execution Debtor

Judgment creditors of the execution debtor, other than the creditor under whose judgment the sale is made, are frequently accorded the statutory right to redeem, as are persons who hold mortgages on the property sold.

Usually provision is made according to a subsequent judgment creditor of the same debtor the right to redeem the property,[33] and, unless there

19. Iowa.—Anthony v. Heiny, 244 N.W. 902, 215 Iowa 1347.

Suit to set aside conveyances

The text rule applies where the equity suit was one to set aside conveyance of real estate by the judgment debtor.—Anthony v. Heiny, supra.

20. Iowa.—Quinn v. First Nat. Bank, 206 N.W. 271, 200 Iowa 1384—Fitzgerald v. Kelso, 29 N.W. 943, 71 Iowa 731.

21. Ky.—McMillan v. Bagby, 83 S. W. 610, 26 Ky.L. 1265.

22. Me.—Ross v. Richards, 140 A. 378, 127 Me. 5.

23. U.S.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.
Wyo.—Altman v. Schuneman, 273 P. 173, 39 Wyo. 414.
23 C.J. p 715 note 14.

Ownership at time of sale

(1) Actual ownership of land at time of sale is not condition precedent to execution debtor's right to redeem land, under Code 1932 § 7736, which right follows person and is predicated on sale of judgment debtor's interest in land and not on character or extent of title.—Shea v. Rucker, 72 S.W.2d 551, 167 Tenn. 550.

(2) Where conveyance under federal court sale was not recorded, and property was subsequently sold under execution in state court, judgment debtor could redeem property, and debtor's resumption of title would inure to benefit of heirs of purchaser under federal court sale since as between such purchaser and debtor title was in purchaser.—Shea v. Rucker, supra.

24. Wyo.—Altman v. Schuneman, 273 P. 173, 39 Wyo. 414.

25. N.Y.—Husted v. Dakin, 17 Abb. Pr. 137.

26. Ark.—Munson v. Wade, 298 S. W. 25, 174 Ark. 880.

27. Ill.—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990.
23 C.J. p 715 note 16.

28. Ill.—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990.

Priority

Under some statutes the judgment of the execution creditor who purchases remains senior to a subsequent judgment and he has a prior right to redeem within the time limited and to purchase at, and obtain title under, a second sale, notwithstanding the holder of the junior judgment attempts to redeem and to acquire title at another sale.—Crowder v. Scott State Bank of Bethany, supra.

29. Ind.—Horn v. Indianapolis Nat. Bank, 25 N.E. 558, 125 Ind. 381, 21 Am.S.R. 231, 9 L.R.A. 676.
23 C.J. p 715 note 17.

Deficiency on sale

A judgment lien holder, after he has once sold land on execution, cannot redeem from his own sale in case it produces less than the whole amount of his judgment, and thereby restore the lien of his judgment and subject the property to resale as if no previous sale had been made.—Hervey v. Krost, 19 N.E. 125, 116 Ind. 268—23 C.J. p 729 note 99.

30. N.Y.—Ex parte Paddock, 4 Hill 544.

31. N.Y.—People v. Fleming, 4 Den. 137, affirmed 2 N.Y. 484.

32. Ind.—Murray v. Holland, App., 27 N.E.2d 126.

33. Colo.—Leach v. Torbert, 204 P. 334, 71 Colo. 85—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.
Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.
23 C.J. p 715 note 20.

Creditors of person whose land is sold

Only judgment creditors of the person or persons whose land is sold under execution and creditors who have judgments or decrees which may be enforced by a sale of land as to which redemption is sought are in-

is statutory provision to the contrary,[34] this includes judgments confessed,[35] provided they are confessed or entered in good faith.[36]

Under some statutes a senior judgment creditor may redeem from a sale under a junior judgment,[37] or any judgment creditor either senior or junior may redeem.[38] Some statutes permit a junior judgment creditor who purchases at an execution sale under a senior judgment to redeem, although such redemption is in effect a redemption from himself.[39]

Under some statutes a surety who pays a judgment against his principal is entitled to redeem,[40] while under others he is not.[41]

The creditor may redeem, although he has other security for his debt.[42] A judgment creditor is entitled to redeem land sold under an execution against the judgment debtor, although the note on which his judgment was obtained included an amount for which there was no indebtedness, if any part of the note represented a bona fide indebtedness.[43] One who is a judgment creditor of, and administrator on, an estate may redeem land belonging to the estate, which has been sold for the payment of debts, and hold the same as any redeeming creditor, notwithstanding his status as fiduciary.[44] Where land is sold under an execution levied before the recording of a deed previously executed, the grantee is not entitled to redeem as a creditor under the statute.[45]

The reversal, for irregularity or error, of the judgment which is the authority to redeem, after redemption, does not necessarily invalidate the title of the redemptioner, see infra § 263 b; but, under some statutes, a judgment creditor is not entitled to redeem where his judgment is reversed after his offer to redeem, and a new judgment recovered on the same cause of action is not rendered until after the expiration of the time to redeem.[46]

It has been held or recognized that, where an entire tract of land has been sold at a foreclosure or execution sale, a creditor having a lien on a part only of the tract may redeem the whole thereof,[47] although the rule is otherwise under some statutes.[48] Under some statutes, where two lots of ground have been sold together, under an execution, a judgment creditor who seeks to redeem from such sale must cause the lots to be sold together, under his judgment, as they were sold under the original judgment, in order to consummate his redemption,[49] and, if, after paying the redemption money, he causes the lots to be sold separately, and bids them in for a less sum, he will be regarded as having abandoned his redemption, and as having made his sale wholly independently of it.[50] A judgment creditor may redeem the balance where part of the property sold has been redeemed by other creditors.[51]

Judgment creditors need not sue to set aside a

cluded and a judgment creditor of one who has no interest in, or title to, such land is not entitled to redeem.—Leach v. Torbert, 204 P. 334, 71 Colo. 85.

Judgment on order dismissing appeal

Party entering judgment for amount of costs on order dismissing with costs appeal of adverse party was regarded as a judgment creditor entitled to redeem, notwithstanding the judgment was for a small amount.—Foley v. Carter, 212 N.Y.S. 381, 214 App.Div. 292.

Judgment for foreclosure of mechanic's lien

The fact that one's judgment was for foreclosure of a mechanic's lien did not affect his right to redeem, under statute providing that any judgment creditor of one whose land is sold under execution has such right.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.

Naked right to redeem

Naked right to redeem is the only right which creditors under junior judgments have after execution sale under senior judgment.—Paddack v. Staley, supra.

Duty of court officer

The bailiff of the municipal court was not under a duty to determine whether there was consideration for a note on which the judgment of a judgment creditor who sought to redeem was recovered or whether the note was given collusively in order to permit such redemption.—Hooper v. Snow, 155 N.E. 765, 325 Ill. 53.

34. Ala.—Mobile Mut. Ins. Co. v. Steele, 61 Ala. 253.

35. Ill.—Phillips v. Demoss, 14 Ill. 410.
23 C.J. p 715 note 21, p 720 note 10 [a] (2).

36. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.
Ill.—Martin v. Judd, 60 Ill. 78.

37. N.Y.—People v. Fleming, 2 N. Y. 484, affirming, 4 Den. 137—Ex parte Peru Iron Co., 7 Cow. 540.

38. Colo.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.
N.Y.—Ex parte Ives, 1 Hill 639.
23 C.J. p 716 note 26.

39. Iowa.—Citizens' Sav. Bank v. Percival, 16 N.W. 76, 61 Iowa 183.

40. Ind.—Nesbit v. Hanway, 87 Ind. 400.
23 C.J. p 716 note 28.

41. Philippine.—Urrutia v. Moreno, 28 Philippine 260.

42. Ind.—Warford v. Sullivan, 46 N. E. 27, 147 Ind. 14.
N.Y.—Muir v. Leitch, 7 Barb. 341.

43. Ill.—Kerr v. Miller, 102 N.E. 1050, 259 Ill. 516.

44. Tenn.—Harris v. Harris, 8 Baxt. 474.

45. Mich.—Spring v. Raymond, 95 N.W. 1003, 134 Mich. 84.

46. Ala.—Barringer v. Burke, 21 Ala. 765.

47. Minn.—Powers v. Sherry, 132 N. W. 210, 115 Minn. 290.
23 C.J. p 714 note 3.

48. N.Y.—Huntington v. Forkson, 6 Hill 149—Erwin v. Schriver, 19 Johns. 379.

49. Ill.—Oliver v. Croswell, 42 Ill. 41.

50. Ill.—Oliver v. Croswell, supra.

51. Ill.—Schuck v. Gerlach, 101 Ill. 338.

mortgage, although fraudulent as to creditors, before redeeming from an execution sale.[52]

Under some statutes there may be successive redemptions by judgment creditors under certain circumstances,[53] but some statutes do not permit a creditor to redeem after the debtor or his assignee has redeemed.[54]

Restrictions imposed by some statutes on the right of redemption in case of appeal or stay of execution have no application to creditors holding liens,[55] particularly where an appeal is taken after the execution sale.[56] It has been held that the fact that plaintiff has appealed from a judgment in his favor on the ground that the amount recovered is inadequate does not prevent him from redeeming, as a judgment creditor, from a prior execution sale of property of the judgment debtor.[57]

Under some statutes a judgment creditor, otherwise entitled to redeem, may redeem from a person who has purchased the land from the purchaser at the execution sale.[58]

Necessity for judgment. Subject to certain qualifications hereinafter noted usually only such creditors as have reduced their claims to judgment may redeem.[59]

Necessity for lien. A judgment creditor, to be entitled to redeem, need not have a lien on the property involved,[60] unless by the terms of the statute itself only lien creditors may exercise the right,[61] in which latter case, if the judgment has ceased to be a lien, the creditor's right to redeem ceases.[62] An estate for years cannot be redeemed where the judgment lien does not extend thereto.[63]

Time when judgment recovered. The words "any judgment creditor," as used in redemption statutes, have been construed in some states as meaning any creditor having a judgment on which execution may issue at the time he seeks to redeem, without regard to the time when the judgment may have been recovered;[64] and it is immaterial whether the judgment was obtained, or the cause of action accrued, before or after the debtor's period of redemption has expired.[65] Where the statute does not so provide, the right is not limited to judgment creditors at the time of sale, but extends to those becoming such creditors after the sale but within the time allowed for redemption.[66]

Under some statutes there is a priority among judgment creditors with regard to the right to redeem, dependent on seniority of the judgment held,[67] but under other statutes there is no such priority.[68]

Assignee of judgment. Some statutes authorize the assignee of a judgment creditor to redeem.[69] So it has been held that the assignee of a judg-

52. Iowa.—Kingman Plow Co. v. Knowlton, 119 N.W. 754, 143 Iowa 25.

53. N.Y.—Foley v. Carter, 212 N.Y. S. 381, 214 App.Div. 292.
Tenn.—Holmes v. Jarrett, 7 Heisk. 506.

54. Tenn.—Reaves v. Bank of Hartsville, Ch., 64 S.W. 307.

55. Iowa.—Quinn v. First Nat. Bank, 206 N.W. 271, 200 Iowa 1384—Sieben v. Becker, 3 N.W. 804, 53 Iowa 24.

56. Iowa.—Quinn v. First Nat. Bank, 206 N.W. 271, 200 Iowa 1384.

57. **In California**
Where plaintiff obtained a money judgment, and appealed, without executing undertaking, deeming judgment inadequate in amount, and pending the appeal filed a transcript of the judgment in another county, under Code Civ.Proc. § 674, he was entitled to exercise the rights of a redemptioner accorded under § 701, as regarded land of judgment debtor sold under execution in another suit.—Stetson v. Sheehan, 200 P. 387, 52 Cal.App. 353, hearing denied 200 P. 392, 186 Cal. 334.

58. Ala.—Crawford v. First Nat. Bank, 137 So. 777, 223 Ala. 621.

59. U.S.—Hardin v. Kelley, S.D., 144 F. 353, 75 C.C.A. 355.
23 C.J. p 716 note 42.

A creditor by judgment in a justice's court of another state was not within the meaning of an act allowing a bona fide judgment creditor to redeem.—Freeman v. Jordan, 17 Ala 500.

60. Ill.—Dausch v. Barker, 255 Ill. App. 161.
23 C.J. p 716 note 43.

61. Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.
23 C.J. p 716 note 44.

62. Mont.—Leonard v. Western, supra.
23 C.J. p 716 note 45.

Acceptance of payment
(1) Right of judgment creditor to redeem property sold under execution on prior judgment may be lost by satisfaction of judgment with resultant loss of lien.—Leonard v. Western, supra.

(2) Under Rev.Codes 1921 §§ 9410, 9442, holder of judgments, who, while seeking to compel accounting from purchaser under prior execution, accepted full satisfaction of judgments, lost right to redeem, since judgment liens were thereby destroyed.—Leonard v. Western, supra.

63. N.Y.—Ex parte Wilson, 7 Hill 150—People v. Westervelt, 17 Wend. 674—Merry v. Hallet, 2 Cow. 497.

64. Colo.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.
Ill.—Meier v. Hilton, 100 N.E. 520, 257 Ill. 174.

65. Ill.—Kerr v. Miller, 102 N.E. 1050, 259 Ill. 516.

66. Wis.—Falbe v. Caves, 138 N.W. 87, 151 Wis. 54.

In Alabama
Under the applicable statute, a creditor obtaining judgment within two years after execution sale of debtor's land may redeem land from a purchaser from the execution creditor who purchased at the execution sale.—Crawford v. First Nat. Bank, 137 So. 777, 223 Ala. 621.

67. Ariz.—Hughes v. Young, 120 P. 2d 396, 138 A.L.R. 943.
Ill.—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990.

68. Colo.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.

69. N.Y.—Ex parte Ives, 1 Hill 639.
23 C.J. p 716 note 40.

ment is a judgment creditor within the contemplation of some statutes, and as such is entitled to redeem property sold under execution if otherwise within the statute;[70] but there is authority to the contrary.[71]

Mortgagee and his transferee. Under most of the redemption statutes, a mortgagee whose mortgage has been properly recorded is entitled to redeem from such sale,[72] provided, under some statutes, the mortgage is given by the judgment debtor and covers a mortgageable interest of the debtor in the land.[73] However, under some statutes, a mortgagee cannot redeem from a sale under an execution on a judgment junior to the mortgage.[74]

Under some statutes the conveyance by a mortgagee, who has a right to redeem, of his interest in the land involved to the judgment debtor constitutes the latter an assignee with right to redeem.[75]

Attachment creditors. Attachment creditors are entitled to redeem under the express provisions of some statutes,[76] but under other statutes attaching creditors are not entitled to redeem as lien holders,[77] before the claim is reduced to judgment.[78]

e. Purchaser at Execution, Foreclosure, or Tax Sale

Under some statutes the purchaser at a sale under process or forced sale may be entitled to redeem from another sale of the same property under execution.

Under some statutes the purchaser at an execution sale may redeem from another sale as the successor in interest of the judgment debtor,[79] although it has been held that a purchaser at execution sale who has not yet obtained a sheriff's deed cannot redeem from another sale as the grantee of the execution debtor.[80]

It has been held that a purchaser of real estate at execution sale subject to a prior judgment lien, who has obtained a valid sheriff's deed, may redeem as owner from a subsequent sale under the prior judgment.[81] Under a statute which limits the right to redeem to holders of liens junior to that of the judgment under which the sale is made, the view has been taken that the holder of a certificate of sale under a junior judgment may redeem from a sale under a prior judgment, as a judgment creditor,[82] but that the holder of a certificate of sale under a decree of foreclosure of a mortgage may not redeem from a sale under a judgment which is junior to such mortgage.[83]

The holder of a deed based on a tax sale has legal title which entitles him to redeem from an execution sale of the same real property, under a statute authorizing the holder of the legal title to redeem.[84]

The right of a creditor, who purchased at the execution sale but who did not advance his bid within the time fixed by statute, to redeem from another creditor who had exercised his right to redeem has been recognized under some statutes.[85]

70. Ill.—Sweezey v. Chandler, 11 Ill. 445.
23 C.J. p 716 note 40.

71. Ala.—Sloss v. Steiner, 40 So. 511, 146 Ala. 692—Chambers v. Pollak, 39 So. 316, 143 Ala. 438.

72. Iowa.—Manning v. Markel, 19 Iowa 103.
23 C.J. p 717 note 50.

Time when mortgage interest acquired
Under some statutes the right of mortgage creditors to redeem is not limited to those who were mortgage creditors when the sale was made, but extends to those becoming such creditors after the sale but within the time allowed for redemption.—Falbe v. Caves, 138 N.W. 87, 151 Wis. 54.

Assignment of mortgage claim
Mortgagee who had assigned his mortgage to secure a debt owing by him was entitled to redeem for the purpose of protecting the mortgage claim.—Manning v. Markel, 19 Iowa 103.

Unrecorded mortgage
Under a statute making an unrecorded mortgage void, as against the judgment creditor without notice, the holder of an unrecorded mortgage cannot redeem from an execution sale where the judgment creditor was the purchaser.—Condit v. Wilson, 36 N.J.Eq. 370.

73. Wis.—Wiedner v. Smith, 240 N. W. 367, 206 Wis. 438.

74. Iowa.—Lysinger v. Hayer, 54 N. W. 145, 87 Iowa 335.

75. Ala.—Gay v. Taylor, 108 So. 853, 214 Ala. 659.

76. U.S.—King v. Bender, Mont., 116 F. 813, 54 C.C.A. 317, affirming, C. C., 111 F. 60, and certiorari denied 23 S.Ct. 843, 187 U.S. 643, 47 L.Ed. 346.
23 C.J. p 717 note 52.

77. U.S.—Hardin v. Kelley, S.D., 144 F. 353, 75 C.C.A. 355.
Iowa.—Byers v. McEniry, 91 N.W. 797, 117 Iowa 499.
23 C.J. p 717 note 53.

78. U.S.—Hardin v. Kelley, S.D., 144 F. 353, 75 C.C.A. 355.

79. **"Successor in interest" and not "redemptioner"**
Within the meaning of some statutes a purchaser at execution sale is regarded as a "successor in interest" of the judgment debtor and not as a "redemptioner" and may redeem from another sale as a successor in interest.
Cal.—Pollard v. Harlow, 71 P. 454, 648, 138 Cal. 390.
S.D.—State v. Tuttle, 216 N.W. 194, 51 S.D. 596.
Redemption by purchaser at execution sale, from chattel mortgage see Chattel Mortgages § 433; from sale of real property on foreclosure see the C.J.S. title Mortgages § 828, also 42 C.J. p 361 notes 96–9.

80. N.Y.—Lathrop v. Ferguson, 22 Wend. 116.

81. Kan.—Porter v. Watson, 76 P. 841, 69 Kan. 349.

82. Ind.—Jarrell v. Brubaker, 49 N. E. 1050, 150 Ind. 260.
23 C.J. p 717 note 56.

83. Ind.—Jarrell v. Brubaker, supra.

84. Ind.—Murray v. Holland, App., 27 N.E.2d 126.

85. Tenn.—Holmes v. Jarrett, 7 Heisk. 506.

§ 255. Waiver, Estoppel, and Laches

A person who has a statutory right to redeem may waive such right or may by his acts or conduct be estopped to claim it.

A party entitled to redeem under the statute may waive such right, or by his language or conduct be estopped from asserting it.[86] The fact, however, that a mortgagor directed a levy on his mortgaged property and was present at the sale and made no mention of any encumbrance does not estop him to redeem.[87] So an agreement between the owner of land and a stranger whereby the latter was to bid off the land and allow the owner to redeem within a year is not a waiver of the statutory right of redemption.[88]

Joinder of the execution defendant with the purchaser at an execution sale in a conveyance, with covenants of warranty, of a part of the property, to a third person, is not a waiver of the right to redeem the rest of the property; it is nothing more than a waiver of the right of such purchaser to deal with the redemption on the basis of a redemption in toto only.[89]

§ 256. Amount Required to Redeem

The applicable statute controls in determining the amount which must be paid by the person who seeks to redeem.

Some statutes require, as a condition to the exercise of the right to redeem, the payment of the amount of the bid or of the purchase price on the execution sale, together with a certain percentage of such amount.[90] Under such a statute the full amount of the judgment need not be paid.[91] Some statutes of this general type apply to a redemption by the judgment debtor,[92] but do not apply so as to require payment of the additional percentage where judgment creditors or subsequent lienholders exercise their right to redeem.[93] Included in the amount required to redeem may be such items as taxes paid by the purchaser,[94] the value of improvements[95] and repairs,[96] interest on the amount of the bid or purchase price[97] and on proper expenditures,[98] compensation for the care of the property and the collection of rents,[99] moneys properly paid in discharge of liens or encumbrances,[1] interest paid by the purchaser on a prior mortgage where the execution sale was made subject to the mortgage,[2] the amount due on a debt for which the

86. Mont.—Leonard v. Western, 241 P. 523, 525, 74 Mont. 513, citing **Corpus Juris.**
23 C.J. p 717 note 64.

Conduct not constituting estoppel
(1) Holder of a deed in a chain of title based on a tax sale, who had taken the necessary steps to redeem from an execution sale of the same real property which was made under a judgment held by him as assignee, was not estopped to have his title quieted on the theory that he, in effect, sought to redeem from his own sale.—Murray v. Holland, Ind. App., 27 N.E.2d 126.

(2) For other illustrations see 23 C.J. p 717 note 64.

Waiver or estoppel with regard to defects and objections affecting redemption see infra § 260.

87. Ky.—Sanford v. Farmers' Bank, 1 Bush 335.

88. Miss.—Wallis v. Wilson, 34 Miss. 357.

89. Ala.—Francis v. White, 52 So. 349, 166 Ala. 409.

90. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
Ark.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.
23 C.J. p 718 note 70.

91. Ark.—Arkansas Nat. Bank v. Price, supra.
Iowa.—Hays v. Thode, 18 Iowa 51.

Sale to execution creditor on bid for nominal amount
Judgment creditor bidding only nominal amount at execution sale was not entitled to injunction against issuance of redemption deeds to debtors' grantees paying sale price, together with additional percentage and charges and costs, in accordance with statutory requirements.—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.

92. Ariz.—Circle A Cattle Co. v. R. J. Lewis Hardware Co., 230 P. 1102, 27 Ariz. 106.

93. Ariz.—Circle A Cattle Co. v. R. J. Lewis Hardware Co., supra.

94. Ill.—Garden City Sand Co. v. Christley, 124 N.E. 729, 289 Ill. 617.
23 C.J. p 718 note 72, p 718 note 70 [b].

Taxes paid or assessed
Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

95. Ala.—Snow v. Montesano Land Co., supra.
Mass.—Norton v. Babcock, 2 Metc. 510.
23 C.J. p 718 note 73.

Failure to furnish proof of claim for improvements
Purchaser at execution sale, by failing to furnish itemized statement of debt and lawful charges on demand made pursuant to the applicable statute, forfeited right to claim compensation for improvements.—Gay v. Taylor, 108 So. 853, 214 Ala. 659.

96. Mass.—Norton v. Babcock, 2 Metc. 510.
23 C.J. p 718 note 74.

97. Mass.—O'Brien v. McGeough, 110 N.E. 289, 222 Mass. 303—Norton v. Babcock, 2 Metc. 510.
23 C.J. p 718 note 75.

Interest period
Where there was an unlawful refusal to permit redemption notwithstanding due tender was made on the last day on which the right to redeem could be exercised, payment of interest beyond that day could not be required.—Martinez v. Campbell, 10 Philippine 626, 6 Off.Gaz. 933.

98. Mass.—Young v. Reynolds, 105 N.E. 864, 218 Mass. 129.
N.J.—Natter v. Turner, Ch., 55 A. 650.

99. Mass.—O'Brien v. McGeough, 110 N.E. 289, 222 Mass. 303.

1. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

Mortgage
Moneys rightfully paid by the purchaser to discharge a mortgage debt for the purpose of removing the mortgage encumbrance are included under some statutes.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171.

2. Failure to file receipts for mortgage interest paid
Land sold under execution, subject to a mortgage, could not be redeemed by the judgment debtor's grantee who had purchased subject to existing liens of record, without

sale was made where redemption is made from the person owning such debt,[3] attorney's fees,[4] costs of the clerk connected with the act of redemption,[5] and sheriff's fees paid by the purchaser.[6] The phrase "lawful charges" in a statute has been held not to include insurance paid by the purchaser or the amount of a justice's judgment held by him which was not a lien on the land.[7]

Under some statutes a bona fide creditor, who purchases or redeems, may, subject to certain limitations, make an advance on, or increase in, his bid, within a specified time, and then hold the property subject to redemption at the price bid, plus such advance, just as though he had bid the whole sum at the time of the sale or redemption;[8] but such advance or increase must be made within the time prescribed by the statute in order to be effective.[9]

If the redemptioner owns only a part of the property sold as one tract, he cannot redeem except on payment of the whole amount of the purchase price.[10]

A judgment defendant who redeems is not entitled to credit for a surplus after satisfaction of the execution, which has been applied on another execution on a judgment in favor of a firm in which the purchaser of the property was a partner, although such application was illegal.[11]

The amount which must be paid depends on the method of redemption which is adopted by the redemptioner, where the statutes provide alternative methods which contemplate substantially different ways to determine the amount.[12]

Sale under several judgments. Under some statutes, where lands are sold at the same time under several judgments, a creditor cannot redeem by tendering the amount of the judgment older than his judgment, but must pay the amount bid at the sale.[13] However, where land was sold on a junior judgment and thereafter under a senior judgment, the holder of the junior judgment may redeem from the sale under the senior judgment without redeeming from the sale under the junior judgment;[14] and a junior lienholder may redeem from the first sale, where his time to redeem from the second sale has not arrived, without paying the amount for which the second sale was made.[15]

Amount fixed by agreement. As between the parties, the amount may be fixed by agreement.[16] If the redemption is by agreement made at the time of the sale, it has been held that a fair allowance should be paid for the purchaser's time, trouble, and expenses, in addition to the price agreed on.[17]

Accounting for rents and profits. While in the absence of provision therefor in the statute, the court has declined to require an accounting for rents received by the purchaser,[18] under some statutes, where the purchaser is given the right of possession and the rents and profits from the day of sale until redemption, such purchaser must account to the redemptioner for the rents and profits thus received by him during the interim between the sale and the redemption.[19]

paying to the purchaser at execution sale interest on the mortgage, paid by the latter after his purchase, notwithstanding such purchaser, at the expiration of the period of redemption, had not filed with the clerk of the district court receipts showing payment of such interest, in accordance with the applicable statute, since equity required the payment of the amount of such interest by the person who sought to redeem. —Blurton v. First Nat. Bank, 273 P. 401, 127 Kan. 304.

3. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

4. Tex.—Valdez v. Cohen, 56 S.W. 375, 23 Tex.Civ.App. 475.

5. Ark.—Fuller v. Evatt, 42 Ark. 230.

6. Nev.—Roberts v. Ingalls, 135 P. 927, 36 Nev. 325, 48 L.R.A.,N.S., 542, Ann.Cas.1915C 1119.

7. Ala.—Richardson v. Dunn, 79 Ala. 167.

8. Tenn.—Rogers v. Tindall, 42 S. W. 86, 99 Tenn. 356.
23 C.J. p 718 note 82.

9. Tenn.—Rogers v. Tindall, supra.

10. Ill.—Hawkins v. Vineyard, 14 Ill. 26, 56 Am.D. 487.

11. Ark.—Simpson v. Biffle, 38 S.W. 345, 63 Ark. 289.

12. Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

13. N.Y.—Barker v. Gates, 1 How. Pr. 77—Silliman v. Wing, 7 Hill 159.

14. Ill.—Sweezey v. Chandler, 11 Ill. 445.

15. Minn.—Abraham v. Holloway, 42 N.W. 867, 41 Minn. 156.

16. Ind.—Pfaffenberger v. Platter, 16 N.E. 835, 114 Ind. 473.
Pa.—Pierce v. Schoonover, 24 A. 164, 149 Pa. 115.
23 C.J. p 719 note 88.

Agreement not proved
Iowa.—Wilson v. Eddy, 98 N.W. 150, 122 Iowa 415.

17. N.J.—Combs v. Little, 4 N.J. Eq. 310, 40 Am.D. 207.

18. **In Pennsylvania,** where proceedings to redeem were brought under the act of May 23, 1899, P.L. p 277, it was held that no question of accounting for rents and profits or other collateral issues not covered by its provisions would be considered.—Hicks v. Griswold, 2 Lack.Leg. N. 129.

19. Mass.—O'Brien v. McGeough, 110 N.E. 289, 222 Mass. 303—Young v. Reynolds, 105 N.E. 864, 218 Mass. 129—Norton v. Babcock, 2 Metc. 510.
Or.—Fields v. Crowley, 142 P. 360, 70 Or. 141.
23 C.J. p 719 note 90.

Sufficiency of demand for accounting
A written demand for an accounting of rents and profits made on purchaser of real property at execution sale on behalf of a corporation judgment defendant entitled to redeem, and signed by its attorney, who had previously acted for such corporation and had been recognised as such

Where a creditor, holding land by levy of an execution, subject to the debtor's right of redemption, has leased the same, the debtor, after redeeming, cannot recover of the lessee for the use and occupation prior to redemption;[20] nor, after redeeming, can the debtor claiming to be, by operation of law, the assignee of the rents and earnings under the lease recover of the lessee for any of the rents and earnings which accrued prior to the redemption.[21]

Where an equity of redemption of land mortgaged has been attached and sold on execution, and the purchaser has entered, and received the rents and profits, and the land has been subsequently redeemed by an assignee of the mortgage, the mortgagor cannot maintain an action against the purchaser for the same mesne profits received by him, and such right of recovery, if it exists at all, vests in the assignee.[22]

If the execution debtor remains in possession, without paying rent to the purchaser, the latter is not chargeable therewith.[23] On the other hand, under some statutes a judgment debtor who is allowed to retain the property cannot be compelled, on redeeming the same, to account to the purchaser for the rents and profits.[24] Where a sheriff's deed for land sold under execution is invalid, and the judgment debtor remains in possession by tenant, the value of a crop seized by the purchaser from the tenant is properly credited to the judgment debtor when the deed is set aside and the debtor allowed to redeem.[25]

Under some statutes the liability of the purchaser to account for the rents and profits, except by way of offset to improvements made, does not arise until he is put in default by a proper tender of the amount necessary to redeem.[26]

Payment of prior liens. Under some statutes, the execution debtor or his assignee or grantee need not, on redeeming, pay any other liens upon the property held by the purchaser.[27] Where, however, a subsequent judgment creditor or other lienor having the statutory right to redeem seeks to redeem the property, he is sometimes required to pay certain liens of the owner of the certificate of sale paramount to the lien under which redemption is sought,[28] provided, under some statutes, the owner of such certificate has taken the steps necessary to put himself in the line of redemptioners in respect of such paramount liens.[29] It has been held or recognized, however, that under applicable statutes, a judgment creditor, on redeeming, is not required to pay off junior liens.[30]

§ 257. Time for Redemption

A person who seeks to redeem must exercise the right within the time fixed by the statute, in the absence of a binding agreement fixing a different time, or of the elements of an estoppel or waiver, or of grounds for equitable relief.

Redemption must be made within the time fixed by the statutes,[31] unless the time has been extend-

by the purchaser in other transactions, was legal and sufficient under Cal.Code Civ.Proc. § 707.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.

20. Me.—Dakin v. Goddard, 32 Me. 138.

21. Me.—Dakin v. Goddard, supra.

22. N.H.—Mason v. Davis, 11 N.H. 383.

23. Me.—Cushing v. Thomson, 34 Me. 496.

24. N.Y.—Hall v. Fisher, 1 Barb.Ch. 53.

25. Ill.—Keen v. Bump, 121 N.E. 251, 286 Ill. 11.

26. Ala.—Gardner v. Lanford, 5 So. 879, 86 Ala. 508—Weathers v. Spears, 27 Ala. 455—Spoor v. Phillips, 27 Ala. 193.

27. Minn.—Warren v. Fish, 7 Minn. 432.
Mont.—Hamilton v. Hamilton, 154 P. 717, 51 Mont. 509.
23 C.J. p 719 note 98.

28. U.S.—King v. Bender, Mont., 116 F. 813, 54 C.C.A. 317, affirming C.C., 111 F. 60, and certiorari denied 23 S.Ct. 843, 187 U.S. 643, 47 L.Ed. 346.
Minn.—Warren v. Fish, 7 Minn. 432.
23 C.J. p 719 note 99.

29. Minn.—Ritchie v. Ege, 59 N.W. 1020, 58 Minn. 291.

30. N.Y.—Jackson v. Budd, 7 Cow. 658—Rosekrans v. Hughson, 1 Cow. 428.
23 C.J. p 719 note 1.

31. Ala.—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453—Paulsen v. Hanson, 216 N.W. 762.
Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.
23 C.J. p 719 note 3.

In Kentucky

(1) In view of St. § 1709, since purchaser at execution sale of land subject to a mortgage acquires only a lien and is entitled to enforcement of the lien, the execution debtor may redeem at any time until such lien is enforced and the property is sold under it, and he is not limited to one year in that regard.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

(2) Where realty sold to satisfy judgment does not bring two thirds of its appraised value, judgment debtor has right to redeem within one year from date of sale, and where the equity of redemption is sold, the debtor has right to redeem against the purchaser of the equity until the end of the year from the first sale.—Pinson v. Williams, 155 S.W.2d 869, 288 Ky. 314.

(3) Accordingly, where the equity of redemption was sold under execution about eleven months after the sale of the land to satisfy the judgment, the judgment debtor could not successfully contend that the delay in selling the equity of redemption did not improperly limit his right to redeem.—Pinson v. Williams, supra.

Levy of attachment after expiration of redemption period

Attaching creditor was not entitled to redemption from execution sale where property was not levied

ed by agreement of the parties, under rules considered supra § 253. Equity may, however, under certain circumstances give relief by allowing a redemption after the statutory time has elapsed, as shown infra § 261.

The time for redemption sometimes depends on whether the person seeking to redeem is the judgment debtor or his assignee,[32] or a judgment or mortgage creditor of the debtor,[33] or a person seeking to redeem from one who has already redeemed.[34] The time of redemption under some statutes is affected by the receipt of rents or profits by the person from whom redemption is sought, demand by the person seeking redemption for a statement of rents or profits so received, and compliance or noncompliance with such demand.[35] Some statutes make the length of the period of redemption by the defendant owner depend on whether the real property sold has been abandoned or is not occupied in good faith,[36] but do not make such period depend on his ability or intention to redeem.[37]

Some statutes give a subsequent judgment creditor or mortgagee a limited period after the expiration of the limitation on the judgment debtor's right to redeem, where the latter has not exercised such right, in which to redeem the property from the execution sale.[38]

Method of computation. The period of redemption fixed by some statutes must be reckoned from the time when the property is stricken off by the officer.[39] Where land and, subsequently, the right or the equity of redemption are sold, the right to redeem is reckoned from the date of selling the land and not the equity, under some statutes.[40]

As to exclusion of day of sale from computation of statutory period see the C.J.S. title Time § 13, also 62 C.J. p 1000 note 81; as to meaning of term "months" as used in statute see the C.J.S. title Time § 10, also 23 C.J. p 720 note 14, 62 C.J. p 96 note 69–p 970 note 76; and as to effect of last day of redemption period falling on a holiday see the C.J.S. title Time § 14, also 62 C.J. p 1002 note 17.

Statute authorizing extension of redemption period. Statutes authorizing the court to extend, within certain limitations, the period of redemption from certain sales on execution, which are enacted to meet an existing public emergency and which are limited as to time, relate to the public peace, health, and safety, and may be supported as an exercise of the police power of the state.[41]

on under attachment until after nine months from date of sale, in view of Code § 11776.—Pierce v. White, 216 N.W. 764, 204 Iowa 1116.

Redemption before confirmation of sale

Under some statutes right to redeem from the lien of a levy of execution on real estate may be exercised at any time before confirmation of the sale by a court having jurisdiction, and unless the right is exercised within that time it is lost. —Gosmunt v. Gloe, 76 N.W. 424, 55 Neb. 709.

Power of court or clerk to extend time

Neither the court nor the clerk may grant an extension of time, under some statutes.—Paulsen v. Hanson, Iowa, 216 N.W. 762—23 C.J. p 719 note 3 [e].

Extension of time on giving security

Under some statutes an extension of time may be allowed on the giving of security.—Thompson v. E. I. Dupont Co., 111 N.W. 302, 100 Minn. 367.

Time dependent on method adopted

(1) Where redemptioner proceeds under Rev.Codes 1921 § 9443, amount to be paid is merely matter of calculation, and must be tendered within one year, but, under § 9448, amount to be paid requires accounting, and tender is not necessary until amount is determined and period within which redemption may be made is extended, although demand for accounting must be made within one year.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

(2) Under § 9448, the redemption is not completed until an accounting is had and the amount determined and paid or tendered within the time fixed.—Leonard v. Western, supra.

Redemption not premature

A judgment creditor's redemption of his debtor's property from execution sale, made by his delivering his execution and paying the redemption money to the sheriff at 12:15 A. M. of the first day on which he can redeem, is valid.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.

32. Colo.—Roose v. Gove, 77 P. 246, 32 Colo. 522.
23 C.J. p 720 note 7.

33. Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.
Mich.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 165 N.W. 724, 198 Mich. 648.
23 C.J. p 720 note 8.

34. S.D.—Stocker v. Puckett, 96 N. W. 91, 17 S.D. 267.
23 C.J. p 720 note 9.

35. Mont.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56—Leonard v. Western, 241 P. 523, 74 Mont. 513.

36. **In Kansas**

(1) Period of redemption is reduced, if the real property is abandoned or not occupied in good faith. —Docking v. Holley, 243 P. 286, 120 Kan. 344—Rosenfield v. Cunningham, 118 P. 878, 85 Kan. 835.

(2) In determining the question, court may consider failure of the owner to pay taxes or to keep the property insured, but failure to do either or both does not compel a finding of abandonment or lack of good faith which is necessary before court has power to shorten the period of redemption.—Rosenfield v. Cunningham, supra.

(3) Land may be occupied in good faith notwithstanding it is in possession of owner's tenant.—Docking v. Holley, supra.

37. Kan.—Docking v. Holley, supra.

38. Colo.—Paddack v. Staley, 58 P. 363, 13 Colo.App. 363.
Ill.—Moore v. Hopkins, 93 Ill. 505.
23 C.J. p 720 note 10.

39. Kan.—Platt v. Flaherty, 149 P. 734, 96 Kan. 42.

40. Ky.—Bethel v. Smith, 7 Ky.L. 14.

41. S.D.—Culhane v. Equitable Life Assur. Soc. of U. S., 274 N.W. 315, 65 S.D. 337, followed in Culhane v. Mutual Benefit Life Ins. Co. of Newark, N. J., 274 N.W. 319, 65 S.D. 344.

§ 258. Tender and Payment

a. General considerations
b. To whom payment to be made

a. General Considerations

There must be due compliance with provisions of the statutes as to tender, deposit of money, or payment.

The terms of the statutes as to the tender, deposit, or payment of money must be complied with in order successfully to assert the right to redeem.[42] General rules as to the sufficiency of tender, as discussed in the C.J.S. title Tender §§ 6–44, also 62 C.J. p 660 note 77–p 680 note 15, apply.[43] Where the redemptioner has made due tender to the person authorized to receive the statutory amount, the latter's refusal to receive it for any reason does not invalidate the tender;[44] nor is the right to redeem forfeited by failure to make seasonable tender, when such tender is prevented by inability, after diligent effort, to find the purchaser or any person authorized to act in his behalf.[45] A fortiori is this true where the purchaser designedly prevents tender by leaving the state and remaining away until the redemption period has expired.[46] A delay in tendering the amount due to the alienee of the purchaser at execution sale is sufficiently accounted for by a showing that there was an attempt to redeem from the execution purchaser without notice of his prior alienation, and that such purchaser accepted the tender.[47]

Payment to the officer is not necessarily impaired by giving notice to him not to pay over a portion of the money.[48]

Amount. The party attempting to redeem must tender or pay the amount required by statute,[49] and the payment of a smaller sum than that fixed by the statute is fatal to the redemption proceedings,[50] except where the failure to pay the correct amount is caused by the mistake of the officer in computing the amount due,[51] the debtor having acted in good faith and paid the additional sum due on demand.[52] The right of a person who pays to the proper officer the amount required by statute is not defeated by the mistake of the officer in distributing the fund and in returning part to such person, where the latter does not ratify the mistake of the officer but immediately tenders payment of sufficient to restore the required amount.[53]

A mistake as to this matter on the part of the person who seeks to redeem, which is one of law, does not afford ground for equitable relief, on the tender of an amount sufficient to cover the deficit.[54]

Partial payments. An execution creditor is not required to accept partial payments, but he may

42. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
23 C.J. p 721 note 17.
Tender as condition precedent to suit see infra § 261.

43. Tenn.—Simpson v. Sparkman, 12 Lea 360.
23 C.J. p 721 note 18.

44. Ala.—Steele v. Hanna, 9 So. 174, 91 Ala. 190.
Minn.—Abraham v. Holloway, 42 N. W. 867, 41 Minn. 156.
23 C.J. p 721 note 20.

45. Ala.—Francis v. White, 39 So. 174, 142 Ala. 590.
23 C.J. p 721 note 21.

46. Me.—Stevens Mills Paper Co. v. Myers, 100 A. 11, 116 Me. 73.

47. Ala.—Thompson v. Brown, 76 So. 298, 200 Ala. 382.

48. N.Y.—Spraker v. Cook, 16 N.Y. 567.

49. Tex.—Valdez v. Cohen, 56 S.W. 375, 23 Tex.Civ.App. 475.
23 C.J. p 721 note 25.

Claim of credit for rents or profits

(1) Under some statutes the person who seeks to redeem and who has received from the person from whom redemption is sought a statement of rents or profits received by the latter which are to be credited on the redemption money, may determine for himself the amount which is to be paid and tender the same, at his peril, or may tender or pay an amount governed or determined by such statement, with the right to accompany such tender or payment with a protest as to the amount thereof deemed excessive.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.

(2) Such protest does not nullify the effect of the tender.—Reynolds v. Davis, supra.

(3) While such protest does not take from the tender its voluntary character, it has the effect of notice to the officer receiving payment that the excess payment is not intended as a gift and constitutes such officer a bailee for the redemptioner of such excess payment.—Reynolds v. Davis, supra.

Amount required in general see supra § 256.

50. N.Y.—Ex parte Peru Iron Co., 7 Cow. 540—Dickenson v. Gilliland, 1 Cow. 481.
23 C.J. p 721 note 26.

51. U.S.—Walsh v. Erwin, C.C.Cal., 115 F. 531.
Wis.—Williams v. Thrall, 167 N.W. 825, 167 Wis. 410.

In New York

(1) In an early case, the fact that an insufficient payment was due to a mistake in which the officer participated was not regarded as an excuse, where the mistake was one of law.—Dickenson v. Gilliland, 1 Cow. 481.

(2) In a later case in which the short payment was due to a mistake of the officer, Dickenson v. Gilliland, supra, was followed, the court making no reference to the distinction between a mistake of law and a mistake of fact.—Ex parte Peru Iron Co., 7 Cow. 540.

(3) In a still later case payment of a sum less than that required by the statute was not regarded as fatal where such payment was induced by a mistake of fact on the part of the officer—Hall v. Fisher, 9 Barb. 17.

(4) In respect of a miscalculation by the officer which misleads the person who seeks to redeem, it has been said that there may be good reason for holding the redemption valid and effective.—Hall v. Fisher, 1 Barb.Ch. 53.

52. U.S.—Walsh v. Erwin, C.C.Cal., 115 F. 531.

53. Colo.—Brown v. Bell, 103 P. 380, 46 Colo. 163, 133 Am.S.R. 54, 23 L.R.A.,N.S., 1096.

54. Iowa.—Case v. Fry, 59 N.W. 333, 91 Iowa 132.
N.Y.—Dickenson v. Gilliland, 1 Cow. 481.

do so unless the statute forbids.[55] If partial payments are made but not completed before the expiration of the period for redemption, it has been held that the payor may recover back the amount paid,[56] although there is authority to the contrary.[57]

Medium of payment. The tender or payment should be made in legal tender funds.[58] A payment by check may be refused.[59] Where, however, the purchaser agrees, a redemption may be made by the transfer of property or securities other than money.[60] On the theory that the officer authorized by statute to receive redemption money is either regarded as the agent of the purchaser or prior redemptioner or is required to account in money, it has been held or recognized that a payment by check or draft[61] or bank bills[62] or currency which is not legal tender[63] is effective if the officer accepts such payment. The redemption of land sold on execution by delivery of a check to the officer is not, however, necessarily conclusive under all circumstances; if dishonesty is shown, or the check dishonored, equitable remedies are available for the protection either of the officer or of the certificate holder.[64]

A tender in currency not legal tender is sufficient where the tender is not refused on that ground.[65]

b. To Whom Payment to Be Made

The officer who makes the sale, or the clerk of court, is a proper party to whom payment may be made under some statutes, as is the person from whom redemption is sought.

Under some statutes the officer conducting the sale, or his agent or personal representative, is a proper person to receive payment.[66] Under some of such statutes tender or payment may also be made to the execution purchaser or other person entitled to the redemption money.[67]

Under various provisions the clerk of the court of the county in which the sale was made,[68] or in which the land lies,[69] or the clerk of the court from which execution issued,[70] or in which the judgment was rendered, if the purchaser does not reside in the county,[71] has been regarded as one to whom payment may or must be made; but in the absence of any statutory provision authorizing such payment, payment to the clerk of the court is of no effect.[72]

Under some statutes an officer who is authorized to receive payment is in a qualified sense the agent of the person from whom redemption is sought,[73]

55. S.D.—Way v. Hill, 171 N.W. 206, 41 S.D. 437.

56. Tenn.—Rambo v. Donnelly, 9 Baxt. 418.

57. Me.—Morton v. Chandler, 6 Me. 142.

58. Cal.—Peo. v. Hays, 4 Cal. 127.
Tenn.—Lytle v. Etherly, 10 Yerg. 389—Lowry v. McGhee, 8 Yerg. 242.
Form and medium of payment generally see the C.J.S. title Payment §§ 13–37, also 48 C.J. p 595 note 65–p 630 note 72.

59. Cal.—Peo. v. Hays, 4 Cal. 127.
Iowa.—Dougherty v. Hughes, 3 Greene 92.
Tenn.—Lytle v. Etherly, 10 Yerg. 389.

60. N.Y.—Stone v. Smith, 2 How. Pr. 117.

61. Ind.—Bowen v. Van Gundy, 33 N.E. 687, 133 Ind. 670.
23 C.J. p 721 note 39.

In Iowa

(1) Payment to the officer by check drawn by the attorney for the person seeking to redeem has been upheld.—Martin v. Dilley, 159 N.W. 594, 178 Iowa 41.

(2) If in good faith the redemptioner pays, and the officer receives, before the expiration of the time of redemption, an ordinary banker's check, and especially of a banker resident of the place where the business is transacted, upon which the money is realized when demanded, although after the expiration of the time, the same being ready for payment to the holder of the certificate promptly and without trouble to him, the payment has been regarded as sufficient.—Webb v. Watson, 18 Iowa 537.

Necessity for receipt of money on check

The view has been taken, however, that payment to the officer by check is not effective if money is not received for the check, but that such payment is sufficient if money is received for the check before the expiration of the time for redemption. —Hatcher v. Hackney, 20 Wend., N. Y., 602.

62. N.Y.—Hall v. Fisher, 9 Barb. 17—Ex p. Board, 4 Cow. 420.

63. Cal.—Peo. v. Mayhew, 26 Cal. 655.

64. Iowa.—Martin v. Dilley, 159 N. W. 594, 178 Iowa 41.

65. Minn.—Ritchie v. Ege, 59 N.W. 1020, 58 Minn. 291.

66. Ark.—Edgewood Distilling Co. v. Rugg, 136 S.W. 977, 98 Ark. 589.
23 C.J. p 721 note 46.

Expiration of term of office

(1) The propriety or necessity of making payment to the officer who made the sale has been recognized, notwithstanding his term of office has expired.
Ill.—Elkin v. Peo., 4 Ill. 207, 36 Am. R. 541.
N.Y.—Peo. v. Lynch, 68 N.Y. 473—Peo. v. Baker, 20 Wend. 602.
23 C.J. p 721 note 46.

(2) The propriety of payment to the successor in office of the person who sold the land has been asserted, —Robertson v. Dennis, 20 Ill. 313.

67. Ill.—Stone v. Gardner, 20 Ill. 304, 71 Am.D. 268.
N.Y.—Ex p. Board, 4 Cow. 420.
23 C.J. p 722 note 47.

68. Tenn.—Rothwell v. Gettys, 11 Humphr. 135.
23 C.J. p 722 note 50.

69. Tenn.—Maupin v. Blanton, 25 S. W. 99, 93 Tenn. 422.
23 C.J. p 722 note 50.

70. Ind.—Jessup v. Carey, 61 Ind. 584.

71. Ky.—Hatcher v. Hackney, 110 S. W. 888, 33 Ky.L. 661.

72. Ill.—Stone v. Gardner, 20 Ill. 304, 71 Am.D. 268.
N.Y.—Peo. v. Rathbun, 15 N.Y. 528—Griffin v. Chase, 23 Barb. 278.

73. Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513—Hamilton v. Hamilton, 154 P. 717, 51 Mont. 509.

but he is not an agent in the sense that his receipt of the money necessarily constitutes an acceptance of it by such person,[74] and under some statutes the officer is regarded as an officer of the law with whom the redemption money may be deposited and not as an agent of the person entitled to receive the money.[75]

Under some statutes, where the purchaser has parted with the certificate of purchase, payment should be made to his grantee or purchaser, if known to the redemptioner.[76] Where the redemption is from one who has already redeemed, he has been regarded as the purchaser to whom the payment should be made.[77]

§ 259. Proceedings to Effect Redemption

a. General considerations
b. Notice
c. Production of papers
d. Receipt or certificate

a. General Considerations

The method or mode of redemption prescribed by statute must be pursued in order to effectuate a valid redemption.

The mode prescribed by statute must be pursued to make a valid redemption.[78] Even a court of equity has no power to prescribe a different mode.[79] This rule does not, however, deprive such a court of power to control the legal rights of creditor and redemptioner in cases of excusable mistake in bona fide attempts to exercise legal rights, or where the acts of the parties give rise to estoppel,[80] and, if compliance with the statute is prevented by the person from whom redemption is sought, equity will interfere to protect the rights of the person entitled to redeem.[81]

Due compliance with statutory requirements for redemption by one entitled to redeem usually will be treated as a completed redemption, and the right in this regard of the one so complying may not be defeated.[82]

According to some authorities the taking of an assignment of a certificate of sale, although by a party entitled to redeem, is not a redemption of the property under the statute,[83] but according to others an assignment of the certificate of sale to one entitled to redeem operates as a redemption.[84] A purchase at execution sale does not amount to a statutory redemption.[85] Although the statute provides for a credit on the amount required to redeem from a purchaser in possession of the excess of the rents and profits over and above the expenses of operation, care, and insurance and for an accounting of such rents and profits on demand by the redemptioner for a sworn statement of the rents, profits, and expenditures, the right to redeem on paying the amount prescribed by statute does not depend on such demand.[86]

b. Notice

Formal notice to the purchaser of an intention to exercise the right to redeem is not necessary in the absence of a statutory requirement.

Except where otherwise provided by statute,[87]

74. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.
Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

75. Minn.—Davis v. Seymour, 16 Minn. 210.

76. Ala.—Thompson v. Brown, 76 So. 298, 200 Ala. 382.
23 C.J. p 722 note 48.

77. N.Y.—Peo. v. Baker, 20 Wend. 602.

78. Iowa.—Pierce v. White, 216 N.W. 764, 204 Iowa 1116—Paulsen v. Hanson, 216 N.W. 762.
Mont.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56—Leonard v. Western, 241 P. 523, 74 Mont. 513.
N.Y.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.
23 C.J. p 722 note 53, p 714 note 1 [c].

Alternative methods

(1) If the statutes provide two methods by which the right to redeem may be exercised and the methods are substantially different, it has been held that the redemptioner may not pursue both methods at the same time.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

(2) An attempt to redeem, under Rev.Codes 1921 § 9443, by making a deposit of the amount necessary to redeem under that section was nullified by making a demand for an accounting which may be done only under § 9448.—Leonard v. Western, supra.

Definite form

Purpose of redemption statute is to reduce method of redemption from execution to definite form.—Paulsen v. Hanson, Iowa, 216 N.W. 762.

79. S.D.—Way v. Hill, 171 N.W. 206, 41 S.D. 437.

80. S.D.—Way v. Hill, supra.

81. Mont.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.

82. Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

83. Ill.—Moore v. Hopkins, 93 Ill. 505.
23 C.J. p 727 note 70.

Right of judgment debtor to effect purchase of certificate

Instead of paying, and thus rendering the certificate of sale null and void and extinguishing the power of the officer to convey, the judgment debtor, having still the title, may, if he chooses, advance the money to a third person to enable the latter to purchase and take an assignment of the certificate and thus keep it in force.—Rankin v. Arndt, 44 Barb., N.Y., 251.

84. Ind.—Harvey v. Lowry, 183 N.E. 309, 204 Ind. 93.
23 C.J p 727 note 71.

85. Cal.—Corporation of America v. Eustace, 17 P.2d 723, 217 Cal. 102.

86. Wash.—Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181.

87. In Washington, the provision of Remington Code § 599, for five days' written notice to the sheriff of intention to redeem, and for notification by the sheriff to the purchaser or redemptioner of the sheriff's receipt of such notice, has been given a liberal construction in favor of

if the statute directs that the payment of the redemption money be made to the officer conducting the sale, no formal notice need be given to the purchaser, and the payment of the money and the filing of the papers required by statute are sufficient.[88]

The receipt of a redeeming creditor filed with the clerk, without notice to the debtor, must contain on its face sufficient to operate as notice in law that the credit is given to the debtor, and to enable him to redeem; otherwise the redemption will be void.[89]

c. Production of Papers

There must be due compliance with statutory provisions requiring the production of written proof or showing as to designated matters, in the absence of an effective waiver.

There must be due compliance by the person who seeks to redeem with provisions of statutes requiring the production and tender by such person of specified proofs of certain requisite facts.[90] Some statutes of this general type are not applicable where the redemption is by the execution debtor.[91]

Where the statutes so require a judgment creditor who seeks to redeem shall present a copy of the docket of the judgment under which he seeks to redeem,[92] and the statutes sometimes require him to deliver a satisfaction of his judgment in whole or for a specified amount.[93] An affidavit of the amount due on the judgment[94] or mortgage[95] under which a redemption is sought is required by some statutes. An affidavit of assignment of the judgment or mortgage which is relied on as a basis for redemption is sometimes required.[96]

Waiver. The production of the statutory proofs,[97] or the insufficiency thereof,[98] may be waived by the purchaser or one claiming under him; but they cannot be waived by the officer conducting the sale.[99] By statute in some states there can be no waiver of these requirements as against a person entitled subsequently to redeem.[1]

d. Receipt or Certificate

The certificate of redemption provided for by some statutes may properly be claimed only where there has been due performance of statutory conditions precedent.

In order to entitle a person who seeks to redeem to the certificate of redemption provided for by some statutes, there must be due compliance by him with conditions precedent to the right to re-

the person who seeks to redeem.—State v. Shattuck, 163 P. 414, 95 Wash. 119—23 C.J. p 722 note 56 [a].

88. Minn.—Warren v. Fish, 7 Minn. 432.

89. Tenn.—Hurt v. Brien, 1 Tenn. Ch. 443.

90. Ill.—Stone v. Gardner, 20 Ill. 304, 71 Am.D. 268.
N.Y.—People v. Ransom, 2 N.Y. 490, affirming 4 Den. 145.
23 C.J. p 722 note 60.

91. Ind.—Mitchell v. Hodges, 87 Ind. 491.
Philippine.—Brusas v. Infante, 13 Philippine 217.
23 C.J. p 722 note 61.

92. N.Y.—Nehrboss v. Bliss, 88 N.Y. 600, 2 N.Y.Civ.Proc. 39—People v. Ransom, 2 N.Y. 490, affirming 4 Den. 145.
23 C.J. p 722 note 62.

In Minnesota

(1) It has been held that the holder of a subsequent judgment could redeem the premises from an execution sale by paying the proper amount to the proper officer, without producing certified copies of the judgment docket, files, and records; it was sufficient if the clerk had knowledge thereof, and the originals were called to his attention.—Hunter v. Mauseau, 97 N.W. 651, 91 Minn. 124.

(2) It was also held that, in view of the effect given by statute to the sheriff's certificate of execution sale, it was sufficient for a judgment creditor who sought to redeem to produce the sheriff's certificate of sale under such creditor's judgment, without producing certified copies of the judgment, docket thereof, and execution on which such sale was made.—Ritchie v. Ege, 59 N.W. 1020, 58 Minn. 291.

93. In New York

(1) Provisions of Civ.Prac.Act §§ 728, 741, requiring judgment creditor who seeks to redeem to deliver certificate of satisfaction of his judgment, in whole or for a specified amount, must be strictly followed.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.

(2) Where senior judgment creditor, attempting to redeem property sold pursuant to judgment of junior judgment creditor, failed to deliver to sheriff such certificate, senior judgment creditor was not entitled to redeem.—Application of Burdikoff, supra.

(3) Failure to deliver the required certificate of satisfaction at time the creditor attempts to exercise right to redeem is fatal defect which renders redemption ineffective and cannot be cured by delivering satisfaction after another creditor has exercised right of redemption.—Application of Burdikoff, supra.

94. N.Y.—Smith v. Miller, 25 N.Y. 619.
23 C.J. p 723 note 63.

Statute not applicable

Some statutory provisions of this type are not applicable where the right to redeem is exercised by a "successor in interest" of the judgment debtor and not by a "redemptioner."—State v. Tuttle, 216 N.W. 194, 51 S.D. 596.

95. Cal.—Schumacher v. Langford, 127 P. 1057, 20 Cal.App. 61.
23 C.J. p 723 notes 63, 64.

96. Minn.—Williams v. Lash, 8 Minn. 496.
N.Y.—People v. Fleming, 2 N.Y. 484.
23 C.J. p 723 note 66.

97. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.
N.Y.—Wood v. Morehouse, 45 N.Y. 368, affirming 1 Lans. 405.
23 C.J. p 723 note 67.

98. Ind.—Warford v. Sullivan, 46 N.E. 27, 147 Ind. 14.
Wis.—Falbe v. Caves, 138 N.W. 87, 151 Wis. 54.
23 C.J. p 723 note 68.

99. N.Y.—Vergennes Bank v. Warren, 7 Hill 91.
23 C.J. p 723 note 69.

1. N.Y.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.

Right to waive denied

The right of the purchaser to waive the requirements as against a person entitled subsequently to redeem was denied in a case in which the court did not refer to any statutory prohibition.—People v. Ransom, 2 N.Y. 490, affirming 4 Den. 145.

deem imposed by statute.[2] The receipt of certificate of the officer conducting the sale is sufficient evidence of the payment of the redemption money, and establishes a complete redemption of the property from the sale under the execution.[3] A redemption made by payment to the person from whom redemption is made is not invalidated by the fact that the certificate is made by the sheriff.[4]

Failure of one in actual and open possession of the property, who has redeemed as remote grantee of the debtor, to have executed and recorded a certificate of redemption, as required by statute, does not render the redemption ineffective so as to permit a judgment creditor of the debtor subsequently to redeem, since such possession is notice to such creditor of the rights and claims of the redemptioner.[5] Such a certificate need not be made and recorded in order to protect the rights of the redemptioner, in the absence of statutory requirement in that regard.[6]

§ 260. Defects, Objections, and Waiver or Estoppel

As a general rule only defects in substance affect the validity of a redemption; the right to question the validity of a redemption may be lost by waiver or estoppel and objections may be made only by persons whose rights are affected.

As a general rule the validity of the redemption is not affected by defects unless they are defects in substance,[7] and cannot be collaterally attacked in a proceeding in which neither the execution debtor nor the owner of the land is a party.[8]

As between the immediate parties to the redemption, the statutory requirements for a redemption may be dispensed with by agreement under rules set forth supra § 253, or may be waived by the acts or conduct of the purchaser.[9] In the absence of any rights acquired by third persons,[10] an execution creditor may waive the time of redemption.[11] So, it seems, an interested party by his conduct may estop himself from objecting to a reasonable extension of time in which to redeem,[12] and the purchaser may waive, or be estopped to rely on, the provision of an agreement fixing the period for redemption, so as to permit redemption after the expiration of such period.[13]

The execution purchaser may be estopped by the conduct of his attorney from asserting that the payment by the redeeming judgment creditor was to the wrong officer so as to make the redemption ineffectual.[14]

The purchaser may by his conduct waive defects in an attempted tender made by the execution debtor looking to the right to redeem and estop himself to claim that no tender was made.[15] The person from whom redemption is sought, by denying the right of another to redeem and by refusing to furnish to such other a statement of indebtedness, is estopped from relying on such other's failure

2. Redemption by judgment creditor

A judgment creditor is not entitled to a certificate of redemption where he has not delivered a certificate of satisfaction of his judgment in whole or for a specified amount, as required by statute.—Application of Burdikoff, 296 N.Y.S. 609, 251 App. Div. 826.

Receipt as certificate

A sheriff's receipt stating all the facts necessary to show a redemption, although not formally stated to be a certificate, was in substance a certificate within a statute directing the officer making a sale of lands under execution to execute to the person making a redemption a certificate stating all facts transpiring before him sufficient to show the fact of such redemption, and as such it was evidence of the facts stated in it under the statute.—Livingston v. Arnoux, 56 N.Y. 507, affirming 15 Abb.Pr.,N.S., 158.

3. N.Y.—Elsworth v. Muldoon, 15 Abb.Pr.,N.S., 440—Livingstone v. Arnoux, 15 Abb.Pr.,N.S., 158, affirmed 56 N.Y. 507.

4. Minn.—Sprandel v. Houde, 56 N. W. 34, 54 Minn. 308.

5. Ill.—Mauvaisterre Drainage & Levee Dist. v. Frank, 145 N.E. 131, 313 Ill. 431.

6. Ill.—Ralph v. Lefler, 23 Ill. 52.

7. U.S.—King v. Bender, Mont., 116 F. 813, 54 C.C.A. 317, affirming, C. C., 111 F. 60, and certiorari denied 23 S.Ct. 843, 187 U.S. 643, 47 L.Ed. 346.

8. Ill.—Off v. Finkelstein, 100 Ill. App. 14, affirmed 65 N.E. 439, 200 Ill. 40.

9. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.
N.Y.—In re Eleventh Ave., 81 N.Y. 436, affirming 49 How.Pr. 208.
S.D.—Way v. Hill, 171 N.W. 206, 41 S.D. 437.
Waiver as to medium of payment see supra § 258.
Waiver of proofs of right to redeem see supra § 259.
Waiver of right to redeem see supra § 255.

10. Mich.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 165 N.W. 724, 198 Mich. 648.

11. Mich.—Pellston Planing Mill & Lumber Co. v. Van Wormer, supra.
S.D.—Way v. Hill, 171 N.W. 206, 41 S.D. 206.
23 C.J. p. 723 note 78.

12. Kan.—Piatt v. Flaherty, 149 P. 734, 96 Kan. 42.

13. Ga.—Broadwell v. Maxwell, 119 S.E. 344, 30 Ga.App. 738.

Matters constituting waiver or estoppel

Where execution creditor bid off property under agreement to hold for debtor's benefit and permit him to redeem before a certain date, it was held that right was not automatically forfeited by failure to redeem within that time, that creditor waived right to terminate debtor's equitable estate by accepting rent or interest paid thereafter under belief that right still existed, and that creditor was estopped by acceptance of so-called rent, which was in reality interest.—Broadwell v. Maxwell, supra.

14. Ark.—Edgewood Distilling Co. v. Rugg, 136 S.W. 977, 98 Ark. 589.

15. Cal.—Peterson v. Gilbert, 257 P. 140, 83 Cal.App. 542.

Facts constituting waiver and estoppel

Cal.—Peterson v. Gilbert, supra.

to tender the amount due.[16] Demand by the person from whom redemption is sought of an amount in excess of that to which he is entitled constitutes a waiver in a court of equity of requirements as to tender.[17]

Some statutes render void and ineffective, as against a subsequent redeeming creditor, an attempted waiver of statutory requirements for redemption.[18]

Acceptance of money. The legality of a redemption cannot ordinarily be questioned by the purchaser or other interested person where he has accepted the redemption money,[19] either on the ground that the party redeeming had no authority to redeem,[20] or that the redemption was after the statutory period therefor[21] or was premature,[22] or that the amount paid was too small.[23]

Acceptance of money by the officer is not necessarily such an acceptance by the purchaser as will estop him to refuse to accept it.[24] So the acceptance of the money by the purchaser is not an estoppel against the debtor.[25]

It has been held that the acceptance of a partial payment by the purchaser at an execution sale prior to the expiration of the statutory period of redemption, operates as a waiver of the right to the sheriff's deed,[26] particularly where accompanied by an agreement to give further time for the payment of the residue,[27] and that the execution debtor will be allowed to redeem after the expiration of the statutory period.[28]

Who may object. Third persons cannot urge objections,[29] nor can a defect or irregularity in redemption proceedings be urged by the debtor or one claiming under him, where neither of them sought to redeem during the statutory period.[30]

Under some statutes, the purchaser of real property at execution sale is entitled, as owner, to protect his interest by contesting the claimed right of another to redeem,[31] and whether the assignee of a junior judgment is entitled to redeem is a question which concerns only such assignee and the purchaser.[32] A purchaser at an execution sale is entitled to question the right of one attempting to redeem and to ask that an attempted redemption be set aside as a cloud on his title where those entitled to redeem have failed to do so.[33]

Grantee of the purchaser at execution sale of real property may not defeat the right of the as-

16. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

17. Ala.—Hopson v. Eller, 114 So. 52, 216 Ala. 556.

18. N.Y.—Application of Burdikoff, 296 N.Y.S. 609, 251 App.Div. 826.

19. Ill.—Pearson v. Pearson, 23 N. E. 418, 131 Ill. 464.
Ind.—Hervey v. Krost, 19 N.E. 125, 116 Ind. 268.
23 C.J. p 723 note 80.

Distribution pursuant to consent decree

Persons who held an interest in the judgment on which the execution was issued could not successfully assert a claim to the real property involved as against one who had redeemed from the sale, where such persons had accepted the redemption money from the sheriff pursuant to a consent decree making provision for distribution of such money in a suit in which the validity of the redemption was involved.—Robinson v. Bailey, 198 N.E. 217, 361 Ill. 458.

20. Ark.—Allen v. McGaughey, 31 Ark. 252.
Colo.—Casserleigh v. Spar Consol. Mining Co., 128 P. 863, 23 Colo. App. 239.
23 C.J. p 724 note 81.

21. U.S.—White v. Crow, Colo., 4 S. Ct. 71, 110 U.S. 103, 28 L.Ed. 113, affirming, C.C., 17 F. 98, 2 McCrary 310.
Mich.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 165 N.W. 724, 198 Mich. 648.

Acceptance of purchase money under debtor's contract of sale

Where a person who held an option from the execution debtor to purchase the property sold under execution exercised option during redemption period, such person's deposit with clerk of court of balance due under option during redemption period, when purchaser at execution sale had mere certificate of purchase, and acceptance of such deposit by purchaser at execution sale after expiration of redemption period, did not change character of his title, effect a waiver of his right to enforce forfeiture of equity of redemption, convert purchase into mere lien, or give execution debtor and his judgment creditors right to redeem by paying balance of purchase money.—Chain O'Mines v. Williamson, 72 P. 2d 265, 101 Colo. 231.

22. Colo.—Paul v. Marty, 211 P. 667, 72 Colo. 399.
Ill.—Massey v. Westcott, 40 Ill. 160.

23. Ill.—Karnes v. Lloyd, 52 Ill. 113.
Tenn.—Smith v. Kincaid, 10 Humphr. 73.

24. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.

25. Ind.—Jarrell v. Brubaker, 49 N. E. 1050, 150 Ind. 260.

26. N.D.—Murphy v. Teutsch, 132 N.W. 435, 22 N.D. 102, 35 L.R.A., N.S., 1139, Ann.Cas.1913E 1185.

27. Ill.—Kaufman v. Smallwood, 36 Ill. 504, 87 Am.D. 230.
Ind.—Felton v. Smith, 84 Ind. 485.

28. N.D.—Murphy v. Teutsch, 132 N.W. 435, 22 N.D. 102, 35 L.R.A., N.S., 1139, Ann.Cas.1913E 1185.

29. N.Y.—People v. Bunn, Lalor, 265.

Prematurity of redemption

It has been stated that a premature redemption by a judgment creditor may be objected to only by the owner and by the holder of the certificate of purchase.—Paul v. Marty, 211 P. 667, 72 Colo. 399.

30. Colo.—Paul v. Marty, supra—Roose v. Gove, 77 P. 246, 32 Colo. 522.
Ill.—Massey v. Westcott, 40 Ill. 160.

Prematurity of redemption by judgment creditor

Colo.—Paul v. Marty, 211 P. 667, 72 Colo. 399.

31. Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

Contesting right of particular claimant

(1) Judgment debtor.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.

(2) Assignee of subsequent judgment.—Leonard v. Western, 241 P. 523, 74 Mont. 513.

32. Mont.—Leonard v. Western, supra.

33. Iowa.—Robertson v. Moline, Milburn & Stoddard Wagon Co., 55 N.W. 495, 88 Iowa 463.

signee of the judgment debtor to redeem, on the ground that the original judgment creditors would be entitled to levy on and resell the property for the purpose of collecting a balance due, where the rights of such grantee are fully protected and such judgment creditors are not parties to the proceeding to redeem.[34]

A prior redemptioner who has effected a valid redemption has such an estate as entitles him to protection against an assumed junior redemption under a void mortgage. He may maintain an action to determine the invalidity of the judgment and judgment lien claimed to support a junior redemption, and to determine that the holder thereof is not a redemptioner.[35]

§ 261. Actions to Redeem and for Accounting

a. General considerations
b. Tender and payment into court
c. Time to sue and laches
d. Parties
e. Pleading and proof
f. Evidence
g. Relief and decree
h. Costs and allowances

a. General Considerations

Courts of equity will enforce a statutory right to redeem in a proper case, even, under some circumstances, after the statutory time to redeem has elapsed.

A statutory right of redemption may be enforced through a bill in equity, seasonably brought, in instances where the exercise of the right in conformity with the statutory requirements is wrongfully denied, obstructed, or prevented, or where, before the right can be properly exercised, it is necessary to determine by judicial proceedings in whom the right rests, from whom the redemption must be made, or the amount requisite to effect it.[36] It has been held, however, that a bill does not lie to keep a question of redemption open until a judgment of the court can be had removing all embarrassments and clouds from the title of property held for redemption.[37] A bill which is so framed as to call for redemption, and the setting aside of interfering obstructions on equitable grounds, even though it contains allegations appropriate to a statutory proceeding to quiet title, presents a case which falls under the inherent jurisdiction of a court of equity, and needs no statutory aid.[38]

Where a tender of the amount required to redeem is refused, a suit in equity may be brought to compel the allowance of a redemption,[39] except, it seems, where a statutory proceeding is provided for this purpose, which the person who seeks to redeem has neglected, without sufficient cause, to pursue,[40] and even then such statutory remedy may not preclude the right to proceed in equity.[41] Relief may be obtained in equity by the holder of a mere equitable title, where a tender by him is refused, although he is not in possession.[42]

A purchaser at execution sale does not acquire title adverse to defendant in execution who offers to redeem on compliance with a statute giving the right, so as to defeat the jurisdiction of a court of equity to determine such defendant's right to redeem under the statute.[43]

A suit does not lie until there has been either a full performance by plaintiff of all the statutory requirements, or a valid and sufficient excuse for nonperformance without any fault or neglect on the part of such plaintiff.[44]

Some statutes provide a remedy for the recovery of possession by the person entitled to redeem where the purchaser in possession of the property improperly refuses to permit redemption.[45]

After lapse of statutory time. Courts of equity may, on a proper showing of fraud, mistake, or other circumstances appealing to the discretion of the court, relieve debtors from a failure to redeem within the statutory period and permit a redemption thereafter.[46] For instance, equity may permit redemption after the statutory period where the

34. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

35. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.

36. U.S.—Lynch v. Burt, N.D., 132 F. 417, 67 C.C.A. 305.

37. Tenn.—Alexander v. Colcock, 2 Baxt. 282.

38. Mich.—Geney v. Maynard, 7 N. W. 173, 44 Mich. 578.

39. Ala.—Vick v. Beverly, 21 So. 325, 112 Ala. 458.
23 C.J. p 724 note 98.

40. U.S.—Parker v. Dacres, 9 S.Ct. 433, 130 U.S. 43, 32 L.Ed. 848, affirming 7 P. 893, 2 Wash.T. 439.

41. Ala.—Moore v. Gore, 35 Ala. 701.
Iowa—Kendig v. McCall, 110 N.W. 458, 133 Iowa 180, 119 Am.S.R. 594.

42. Me.—Morrill v. Everett, 22 A. 172, 83 Me. 290.

43. Ala.—Vick v. Beverly, 21 So. 325, 112 Ala. 458.
Jurisdiction of equity to determine title to real property as affected by existence of remedy at law generally see Equity § 30.

44. Ala.—Spoor v. Phillips, 27 Ala. 193.
Ill.—Stone v. Gardner, 20 Ill. 304, 71 Am.D. 268.
23 C.J. p 724 note 6.

45. Ala.—Posey v. Pressley, 60 Ala. 243—Jonsen v. Nabring, 50 Ala. 392.

46. Ky.—Daniel v. Daniel, 226 S.W. 1070, 190 Ky. 210—Sayres v. Green, 9 Ky.Op. 897.
Mont.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.
23 C.J. p 724 note 7.

land was sold at a grossly inadequate price and the transaction is also affected by other facts showing or indicating unfairness,[47] even though the rights of third persons have intervened, where they are chargeable with notice of the circumstances of the sale.[48] Likewise, it is a ground for relief that the execution debtor was mentally infirm, so as to be incapable of looking after his interests, in connection with gross inadequacy of price.[49]

Equity will not interfere, however, merely to relieve the debtor from hardship,[50] nor unless there is some good ground therefor,[51] especially where complainant has not acted in good faith.[52] Mere inadequacy of price is not of itself sufficient ground for relief,[53] nor is the sickness of the debtor and his inability to attend to business during the redemption period.[54] A party is not entitled to redemption after the expiration of the statutory period, merely on the ground that he had no actual notice of the sale or that he was mistaken as to the time when the right of redemption expired.[55]

While generally the statutory right to redeem within the prescribed period cannot be extended by any act of the party claiming that right, such as a suit to redeem or the like, without a showing of additional facts,[56] in a proceeding in a court of equity it has been stated that it is the duty of courts to see that parties are not deprived of the right to redeem given by statute because of delays which are the result of proceedings in court to determine questions affecting such right.[57] So it has been held that, where the validity of the judgment and sale is questioned, a court of equity may extend the time for redemption until the determination of the questions thus raised.[58] Where the setting aside of an execution sale was reversed on appeal after the statutory period for redemption had elapsed, it was held that the lower court has authority to give the debtor a reasonable time to redeem.[59]

b. Tender and Payment into Court

Usually where suit to redeem is brought, tender is necessary in the absence of an excuse.

When a suit to redeem is brought, a tender is necessary,[60] unless there are facts excusing the failure to make tender.[61]

If the bill fails to show that payment or tender

Policy in state

In a proceeding in equity it has been stated that, where the rights of innocent third persons are not involved, the policy in Illinois is to permit judgment debtor to redeem on equitable terms, even though the period of redemption has expired, where provisions of the law have not been complied with and judgment creditor would otherwise gain a benefit to which he is not entitled.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.

Proof of fraud must be clear

Iowa.—Bradford v. Bradford, 14 N.W. 254, 60 Iowa 201.

47. Ill.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182—Flemming v. Tallerday, 124 N.E. 613, 289 Ill. 508.

Inducing delay in making redemption

Equity will permit redemption after the statutory period where the land was sold at a grossly inadequate price and the debtor was unfairly induced by the purchaser to delay making redemption.

U.S.—Graffam v. Burgess, Mass., 6 S.Ct. 686, 117 U.S. 180, 29 L.Ed. 839, affirming, C.C., 10 F. 216.

Ill.—Henderson v. Harness, 56 N.E. 786, 184 Ill. 520.

Invalid execution

Where execution based on joint judgment was issued against only one party defendant, and land was sold for a grossly inadequate price to purchaser who probably knew of processes of law with relation to execution sales, but who kept still until period of redemption had expired, redemption was allowed in equity after expiration of period therefor.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182.

Irregularities

Where land has sold for an inadequate price, irregularities will be seized on to permit the judgment debtor to redeem.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.

48. Ill.—Henderson v. Harness, 56 N.E. 786, 184 Ill. 520.

49. U.S.—Barstow v. Beckett, C.C. Ga., 122 F. 140, reversed on other grounds 148 F. 562, 78 C.C.A. 248.
Ky.—Humpich v. Drake, 44 S.W. 632, 19 Ky.L. 1782.

50. Iowa.—Tharp v. Kerr, 119 N.W. 267, 141 Iowa 26.
23 C.J. p 725 note 13.

51. Cal.—Summers v. Hammell, 120 P. 63, 17 Cal.App. 493.
23 C.J. p 725 note 13.

52. U.S.—Lynch v. Burt, N.D., 132 F. 417, 67 C.C.A. 305.

53. Ill.—Flemming v. Tallerday, 124 N.E. 613, 289 Ill. 508.
Iowa.—Tharp v. Kerr, 119 N.W. 267, 141 Iowa 26.
Wis.—Phillips v. Hyland, 78 N.W. 431, 102 Wis. 253.

54. Ill.—Wallace v. Monroe, 22 Ill. App. 602.
Mich.—Sielaff v. Woodruff, 137 N.W. 91, 171 Mich. 5.

55. Iowa.—Ayres v. Campbell, 9 Iowa 213, 74 Am.D. 346.
Ky.—Casey v. Gregory, 13 B.Mon. 505, 56 Am.D. 581.

56. Iowa.—Hughes v. Feeter, 23 Iowa 547.
23 C.J. p 725 note 18.

57. N.H.—Dzialtik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

58. N.H.—Carroll v. McCullough, 63 N.H. 95.

59. Kan.—Quinton v. Adams, 123 P. 740, 87 Kan. 112.

60. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310—Francis v. White, 39 So. 174, 142 Ala. 590.
Iowa.—Tharp v. Kerr, 119 N.W. 267, 141 Iowa 26.
23 C.J. p 725 note 21.
Tender and payment generally see supra § 258.

61. Ala.—Hopson v. Eller, 114 So. 52, 216 Ala. 556—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.
23 C.J. p 725 note 22.

Facts constituting excuse

(1) Where one against whom redemption is sought, without suit, claims more than allowed, person entitled to redeem may proceed in equity to effectuate accounting and redemption under law without tender.—Hopson v. Eller, 114 So. 52, 216 Ala. 556.

(2) Where purchaser at execution sale failed to furnish itemized statement of debt and lawful charges on demand, person entitled to redeem could enforce right of redemption

was made before such pleading was filed, according to some cases a tender made therein is not sufficient to authorize a judgment or decree for redemption, unless, in connection with such offer, the pleading show a valid and sufficient excuse for the omission to make such tender before the action was brought.[62] The view has been taken, however, that it is not in all cases necessary to bring the redemption money into court,[63] and a tender in the bill of such an amount as may be due in redemption has been regarded as the equivalent of the bid of the amount paid by a prior redemptioner, where the bill is filed within the period for redemption prescribed by statute.[64] It has been held, however, that, where tender has been made and refused, plaintiff should tender the redemption money in the bill and, at least, should always be ready to pay the money into court when ordered so to do.[65]

Payment into court is not necessary, where a tender has been refused, if plaintiff is ready and willing to do so when ordered.[66]

Tender is not required before suit for an account to determine the amount necessary to redeem, where the amount is in dispute and defendant had refused to furnish a statement of indebtedness on demand by plaintiff.[67]

c. Time to Sue and Laches

A suit to redeem will be barred by laches in the absence of a sufficient excuse for the delay, or by failure to bring the suit within the time prescribed by statute.

Laches will bar the right to enforce redemption by suit or action,[68] in the absence of a sufficient excuse for the delay.[69] Failure to bring the suit within the time prescribed by statute will operate as a bar.[70]

d. Parties

Whether or not a particular person has a present interest in the property involved or in the litigation is usually to be considered in determining whether he is a proper or necessary party.

Where a judgment creditor assigns his judgment, he cannot sue to redeem.[71] Where the execution debtor has tendered the redemption money to the purchaser within the redemption period, a purchaser from such debtor may maintain a bill to redeem without making such debtor a party;[72] and, where property has been redeemed from the execution purchaser, such purchaser is not a necessary party to a suit by his redemptioner to enforce the right of redemption against a subsequent redemptioner.[73] A purchaser of land under an execution sale, who has received from the debtor his redemption money, and released to him his right in the land, is not a necessary party to a bill to set aside a fraudulent conveyance of the same property, to a judgment creditor, by the sheriff.[74]

An assignee of a judgment is a necessary party in a suit by the assignor.[75] The heirs of the purchaser are necessary defendants, where he died intestate,[76] and so are subsequent purchasers from the execution purchaser.[77]

e. Pleading and Proof

The complaint or bill in an action to enforce a statutory right to redeem should contain allegations showing an attempt to exercise the right in the manner prescribed by the statute, and the existence of all other facts which constitute essentials of such right.

The complaint or bill should allege an attempt to exercise the right of redemption in the usual statutory mode.[78] A bill to redeem which does not

without tender.—Gay v. Taylor, 108 So. 853, 214 Ala. 659.

(3) That a purchaser at execution sale conveyed portions of the land by several conveyances has been held a sufficient excuse for the failure of the redemptioner from the sale to pay or tender the purchaser or his vendee the amount required to effectuate redemption, the purchaser having put it beyond redemptioner's power to redeem out of court as provided by statute.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

(4) For other illustrations see 23 C.J. p 725 note 22 [a], [b].

62. Ala.—Spoor v. Phillips, 27 Ala. 193.
23 C.J. p 725 note 23.
Pleading tender or excuse for failure to make tender see infra subdivision e of this section.

63. La.—Boone v. Pelichet, 13 La. Ann. 203.
Pa.—Hicks v. Griswold, 2 Lack.Leg. N. 129.
Tenn.—Guinn v. Locke, 1 Head 110.

64. Miss.—Watson v. Hannum, 10 Sm. & M. 521.

65. Tenn.—Simmons v. Marable, 11 Humphr. 436.

66. Minn.—Ritchie v. Ege, 59 N.W. 1020, 58 Minn. 291.

67. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

68. Iowa.—Hensen's Empire Fur Factory v. Teabout, 73 N.W. 875, 104 Iowa 360.
N.D.—Past v. Rennier, 151 N.W. 763, 30 N.D. 1.
23 C.J. p 726 note 26.
Facts not constituting laches
Me.—Ross v. Richards, 140 A. 378, 127 Me. 5.

69. Ill.—Henderson v. Harness, 56 N.E. 786, 184 Ill. 520.

70. Mass.—Houghton v. Field, 2 Cush. 141.
Neb.—Parker v. Kuhn, 32 N.W. 74, 21 Neb. 413, 59 Am.R. 838.

71. Ala.—Sloss v. Steiner, 40 So. 511, 146 Ala. 692.

72. Tenn.—Jones v. Planters' Bank, 5 Humphr. 619, 42 Am.D. 471.

73. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.

74. Ill.—Greenup v. Porter, 4 Ill. 63.

75. Ala.—Sloss v. Steiner, 40 So. 511, 146 Ala. 692.

76. Ala.—Bondurant v. Sibley, 37 Ala. 565.

77. Ga.—Brown v. Cheatham, 66 Ga. 14.

78. Mont.—Reynolds v. Davis, 352 P. 386, 78 Mont. 56.
23 C.J. p 726 note 39.

allege either performance on the part of complainant of all that the statute requires of him or excuse for nonperformance, and which does not couple such excuse with an offer in the bill to perform all that the statute requires, contains no equity.[79] Thus, under a statute giving the judgment debtor the right to redeem only on condition that possession of the land was delivered to the purchaser within a stipulated period after the sale without suit, a bill to enforce the right of redemption which fails to allege the fulfillment of such condition precedent is fatally defective,[80] unless the bill alleges facts constituting an excuse for noncompliance with such condition.[81] The production of the papers required by statute on applying to redeem must be alleged.[82] The bill is subject to demurrer if it fails to show that the person who seeks to redeem is one of a class to which the statute gives the right.[83]

A bill to enforce a right to redeem conferred by some statutes should allege tender prior to the bringing of suit or a sufficient excuse for failure to make such tender;[84] and, according to some cases, the bill should usually contain an averment of readiness, or an offer, to pay.[85] In pleading tender it must be alleged that the amount tendered included all lawful charges of which plaintiff had notice.[86] In some jurisdictions an averment of tender must state that the money is paid into court.[87]

A complaint to establish a right of redemption over another redemptioner by showing that the judgment under which the latter redeemed is void need not allege that there was a defense to such judgment on the merits.[88] In a suit to set aside a prior redemption by a judgment creditor on the ground that his debtor had no title, estate, right, or interest in the property and to permit the present plaintiff to redeem, an allegation in the complaint that such debtor has no title in the property whatsoever is sufficient to negative record title in him notwithstanding there is no specific mention of record title.[89]

A bill for redemption may be framed with a double aspect with a prayer in the alternative.[90]

Complaint in an action brought pursuant to statute by the execution debtor to compel the purchaser in possession to account for rents as a preliminary to redemption is not subject to demurrer merely because it appears on the face of the complaint that defendant purchaser claims the right to withhold information demanded by plaintiff, in accordance with the statute, prior to suit.[91]

Answer. A denial of a tender by an administrator is not sufficient where there is no denial of a

79. Ala.—Spoor v. Phillips, 27 Ala. 193—Paulling v. Meade, 23 Ala. 505.

80. Ala.—Sandford v. Ochtalomi, 23 Ala. 669—Paulling v. Meade, 23 Ala. 505.
23 C.J. p 726 note 41.

81. Ala.—Richardson v. Dunn, 79 Ala. 167.
23 C.J. p 726 note 41.

82. Minn.—Dunn v. Dewey, 77 N.W. 793, 75 Minn. 153.

83. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

84. Ala.—Snow v. Montesano Land Co., supra.
23 C.J. p 725 note 23.

Bill subject to demurrer

A bill which does not contain such allegation is subject to demurrer.—Etheredge v. Etheredge, 148 So. 114, 226 Ala. 618, followed in Etheredge v. Wood, 148 So. 115, 226 Ala. 619, and Etheredge v. Etheredge, 148 So. 912, 227 Ala. 694—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

Excuse for failure to make tender not shown

(1) In an action by the judgment debtor to compel the purchaser in possession to account for rents and profits, in which plaintiff also demanded that the sheriff be compelled to accept the amount which should be found due and necessary to redeem the property, there was no basis for requiring such acceptance where the complaint contained no allegation as to tender, it appeared that the purchaser had, prior to suit, actually furnished the judgment debtor with a statement of rents and profits, pursuant to demand made by the latter under the statute, and there were no allegations in the complaint showing that compliance with the redemption statute was prevented by defendant purchaser.—Reynolds v. Davis, 252 P. 386, 78 Mont. 56.

(2) A bill to redeem which merely alleged a written demand by complainant for a statement in writing of the amount of the debt and lawful charges claimed for redemption and that the same was not furnished within ten days as per Code § 10144, did not show an excuse for failure to make tender, averment solely of the facts set out in the statute not being sufficient; the bill should show that an occasion for the demand existed, that the amount required to redeem is unknown to complainant, and that it is not reasonably ascertainable without the aid of a court of equity.—Etheredge v. Etheredge, 148 So. 114, 226 Ala. 618, followed in Etheredge v. Wood, 148 So. 115, 226 Ala. 619, and Etheredge v. Etheredge, 148 So. 912, 227 Ala. 694.

Tender in bill as substitute for tender before suit see supra subdivision b of this section.

85. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234—Perry v. Carr, 41 N.H. 371.

Tender alleged

It has been held, in a case in which tender before suit was alleged, that an offer to pay the money tendered should have been made in the bill.—Perry v. Carr, supra.

Allegation sufficient

Allegation in bill that complainant is ready and willing to pay the purchase price and lawful charges when the same can be ascertained by the court is sufficient under Code § 10147.—Gay v. Taylor, 108 So. 853, 214 Ala. 659.

86. Ala.—Thompson v. Brown, 76 So. 298, 200 Ala. 382.

87. Ala.—Francis v. White, 39 So. 174, 142 Ala. 590.

88. Cal.—Bennett v. Wilson, 55 P. 390, 122 Cal. 509, 68 Am.S.R. 61.

89. Colo.—Leach v. Torbert, 204 P. 334, 71 Colo. 85.

90. Ill.—Henderson v. Harness, 56 N.E. 786, 184 Ill. 520.

91. Cal.—Salveter v. Salveter, 15 P. 2d 862, 127 Cal.App. 401.

tender by decedent or his heirs.[92] An answer denying that plaintiff is a junior lienholder as alleged and also the payment of the redemption money as alleged is not demurrable.[93]

Proof. In a suit to enforce a statutory right to redeem, there must be due proof of the matters alleged in the bill, on which such right depends.[94]

f. Evidence

Rules of evidence applicable in civil actions generally apply in an action to enforce a right to redeem.

In accordance with general rules, see Evidence § 104, the burden of proof is on complainant to establish the material allegations made by him.[95]

The rules as to the weight and sufficiency of evidence which obtain in civil actions generally, see Evidence §§ 1016–1025, apply.[96] A record entry of redemption, although made at the proper time and by the proper officer, is not conclusive evidence of such redemption.[97] It may be shown that the entry is a forgery or otherwise fraudulent.[98]

g. Relief and Decree

In a suit in equity to enforce or establish a right to redeem the court may, in the exercise of a sound discretion, impose proper conditions on the grant of relief, and determine and enforce the rights of the various parties.

In a suit in equity to enforce the right to redeem, the court, in the exercise of a sound discretion, may impose on its grant of relief such conditions as the justice of the case requires.[99] The decree may award restitution on making the payments fixed by it,[1] and, where this cannot be done, may order the return of the money paid in attempting to redeem, with interest;[2] but plaintiff who has paid part of the redemption money, on being allowed to recover back the amount paid, cannot recover interest thereon, where he had been in possession since the execution sale.[3]

Under a statute authorizing a judgment debtor to redeem the interest in his land which may have been sold under execution, a decree that the purchaser shall convey the land by a quitclaim deed is erroneous, since he may have acquired some other interest than that which passed at the sale.[4] Under a bill, based on such a statute, the court is not authorized to determine conflicting titles, and put the judgment debtor in a better condition than he occupied when his land was sold under execution.[5]

The decree should fix the time within which the redemption is to take place.[6] In a suit for an accounting and for determination of the amount necessary for plaintiff to pay in order to redeem real property, it is proper for the court to make provision for an extension of the statutory period of redemption for a reasonable time after the conclusion of the litigation.[7]

Where equity has acquired jurisdiction, it will

92. Iowa.—Tharp v. Kerr, 119 N.W. 267, 141 Iowa 26.

93. Iowa.—Bolton v. Owen, 26 N.W. 89, 68 Iowa 230.

94. Ala.—Snow v. Montesano Land Co., 89 So. 719, 206 Ala. 310.

95. Ala.—Farley v. Nagle, 24 So. 567, 119 Ala. 622.

96. Ky.—Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy, 102 S.W. 303, 31 Ky.L. 305.

Evidence held sufficient

(1) To show release of redemption right.—Nichols v. Woodruff, 8 Blackf., Ind., 493.

(2) To show tender of amount due within period of redemption.—Ross v. Richards, 140 A. 378, 127 Me. 5.

(3) To show that wife of execution debtor redeemed her husband's one-half interest in land from purchaser at execution sale.—Hudson v. Hudson, 70 S.W.2d 935, 253 Ky. 814.

Evidence held insufficient

(1) To show redemption.—Nichols v. Woodruff, 8 Blackf., Ind., 493.

(2) To show redemption agreement.—Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy, 102 S.W. 303, 31 Ky.L. 305.

97. Ind.—Nichols v. Woodruff, 8 Blackf. 493.

98. Ind.—Nichols v. Woodruff, supra.

99. Ill.—Shrontz v. Thyfault, 231 Ill. App. 228.

Reimbursement of defendant for expenditures

Ill.—Shrontz v. Thyfault, supra.

1. Ala.—May v. Eastin, 2 Port. 414. Mass.—Sewall v. Sewall, 130 Mass. 201.

Decree for conveyance to judgment debtor not authorized

In a suit in which the judgment debtor sought a conveyance from the alleged purchaser, in which the bill alleged a tender of costs, fees, and expenses of the judgment creditor and offered to pay into court such items and the amount of execution, plaintiff was not entitled to a decree requiring conveyance by the alleged purchaser, where no valid execution sale had been made before the suit was brought, but the proper relief was a decree declaring the alleged sale void and enjoining the judgment creditor from enforcing his execution if plaintiff should pay the judgment creditor's judgment, costs, and expenses, and, in the event of noncompliance with such conditions, permitting the judgment creditor to enforce his execution.—Niedwicki v. Belasco, 142 A. 228, 49 R.I. 417.

Necessity of reimbursing adversary

(1) It has been held that one who seeks redemption in equity must reimburse the adverse party at least for the amount of the judgment with interest, for the amount of taxes paid with interest, and for improvements made by such party.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.

(2) Plaintiff in a suit to obtain redemption after the expiration of the statutory period may lose the benefit of judgment in his favor by failing to make the payments provided for by the decree.—Bunting v. Haskell, 93 P. 110, 152 Cal. 426.

2. Ky.—Graves v. Dugan, 6 Dana 331.

3. Ky.—Hale v. Powell, 7 Ky.L. 672.

4. Ala.—Weathers v. Spears, 32 Ala. 481, reversing 27 Ala. 455.

5. Ala.—Weathers v. Spears, supra.

6. N.Y.—Waller v. Harris, 7 Paige 167, affirmed 20 Wend. 35, 32 Am.D. 590.

7. N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.

determine the rights of the parties and enforce them by partition when necessary.[8]

h. Costs and Allowances

The award of costs is generally a matter within the discretion of the court.

Costs are generally in the discretion of the court,[9] and the amount, if any, should, it has been said, be stated in the decree.[10]

It is not only proper for the decree to provide that the costs to which defendant is entitled must be deposited with the clerk for the use of defendant,[11] but it should also provide that, if the amount specified is not deposited within the time specified, the bill should be dismissed with costs.[12]

In a suit in equity to redeem the court may, in the exercise of a sound discretion, impose as a condition of relief to plaintiff the requirement that he shall pay to defendant a reasonable solicitor's fee incurred by defendant.[13]

§ 262. Operation and Effect

Generally redemption by the debtor, his successor in interest, or the owner vacates or destroys the effect of the execution sale, although the rule is otherwise where another than the foregoing redeems; redemption terminates the purchaser's title or interest in the property.

As a general rule redemption by the judgment or execution debtor or his successor in interest vacates, annuls, or destroys the effect of, the sale as such,[14] and a like rule applies in some jurisdictions where a person who owns a part of an entire tract of land, or has some interest therein, redeems the entire tract.[15] On the other hand, redemption by other persons does not generally vacate, or interfere with the ultimate effect of, the sale as such,[16] and, as a general rule, such redemptioner succeeds to the rights and interests of the purchaser at the execution sale, as shown infra § 263 b. Generally the redemption terminates the estate, title, or interest of the purchaser as such in the property sold,[17] where the redemption is either

8. Ala.—Vick v. Beverly, 21 So. 325, 112 Ala. 458.

9. Mass.—O'Brien v. McGeough, 110 N.E. 289, 222 Mass. 303—Young v. Reynolds, 105 N.E. 864, 218 Mass. 129.

Award of costs to prevailing or losing party in equity suit generally see Equity § 10.

10. Mass.—Young v. Reynolds, supra.

11. Mass.—Young v. Reynolds, supra.

12. Mass.—Young v. Reynolds, supra.

13. Ill.—Shrontz v. Thyfault, 231 Ill. App. 228.

Fee not taxed

A provision in the decree for reimbursement for certain expenditures and for payment of a reasonable solicitor's fee to defendant, otherwise the bill to be dismissed, did not amount to taxation of the solicitor's fee as costs, since plaintiff was not required to pay such fee.—Shrontz v. Thyfault, supra.

Evidence held sufficient to support the determination of the chancellor fixing solicitor's fee at two hundred dollars.—Shrontz v. Thyfault, supra.

14. Ill.—Davenport v. Karnes, 70 Ill. 465.

Ind.—Harvey v. Lowrey, 183 N.E. 309, 204 Ind. 93.

N.Y.—Bodine v. Moore, 18 N.Y. 347—People ex rel. Hunter v. Seery, 200 N.Y.S. 531, 206 App.Div. 19.

Or.—Flanders v. Aumack, 51 P. 447, 32 Or. 19, 67 Am.S.R. 504.

23 C.J. p 727 note 66, p. 728 notes 77, 78.

In California

(1) Under Code Civ.Proc. § 703, if the judgment debtor redeems, the effect of the sale is terminated, and, "judgment debtor," as used in such statute, has been construed to include "successor in interest" of the judgment debtor.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

(2) In an earlier case in the supreme court, however, in which redemption from a mortgage foreclosure sale was involved, but in which §§ 702, 703 of such Code were construed, the court did not regard a grantee of the judgment debtor as within the term "judgment debtor."—Simpson v. Castle, 52 Cal. 644.

15. Minn.—Powers v. Sherry, 132 N. W. 210, 115 Minn. 290.

16. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

Or.—Flanders v. Aumack, 51 P. 447, 32 Or. 19, 16 Am.S.R. 504.

Redemption by judgment creditor

(1) A redemption from an execution sale by a judgment creditor does not vacate the sale.—Roose v. Gove, 77 P. 246, 32 Colo. 522.

(2) Redemption from execution sale of church property by an assignee of a judgment creditor and receipt of a sheriff's deed by such assignee did not make execution sale void and cause revival of lien of present plaintiff's judgment to extent of amount unpaid thereon, where such judgment was against trustees of church and not the church, and litigation between present plaintiff and trustees was terminated in favor of trustees after stipulation was entered into to the effect that decree of court would resolve all matters between trustees and lienholder.—Zawojski v. Mederer, 21 N.Y.S.2d 466, affirmed 21 N.Y.S.2d 399, 259 App. Div. 1035.

Holder of lien on part of land sold

Redemption of the whole tract sold on execution by a creditor who has a lien on part only of such tract does not annul the sale.—Powers v. Sherry, 132 N.W. 210, 115 Minn. 290.

17. Ala.—Morris v. Beebe, 54 Ala. 300.

23 C.J. p 727 note 66, p 728 note 77.

Absolute title in purchaser

The rule applies even where the title of the purchaser is absolute until redemption.—Morris v. Beebe, supra.

Purchase by execution creditor

Where real property sold under execution had been purchased by the execution creditor, the purchase price being an amount equal to the balance due on the judgment debt, and there had been a redemption from such sale by one who had received a deed of the property in a foreclosure procedure, it was held, in an action by the execution creditor to recover possession from one in possession under the grantee in such deed, that the execution creditor was not entitled to possession, nor could he recover rents and profits for the period intermediate the issuance of the certificate of sale to him and the redemption, in view of the fact that such creditor had recovered the full amount due on his judgment.—Ziller v. Brower, 6 Alaska 134.

by the execution or judgment debtor,[18] or by a creditor of such debtor.[19]

Where the officer making the sale has accepted payment, he has no further legal or equitable interest in the property sold.[20] A deed made by such officer to the execution purchaser, or one claiming under him, after the statutory redemption thereof, passes no rights.[21]

If the statute which authorizes the sale and gives the redemption right likewise declares the effect of the sale and allowance of the right, that effect, and it alone, may be allowed.[22]

Returning the redemption money, after once accepting it, does not affect the redemption.[23]

Right to, and control over, redemption money. A judgment creditor who has redeemed property from an execution sale, generally speaking, has no further interest in, or control over, the redemption money.[24] The holder of the certificate of sale and not the assignee of the judgment on which the execution sale is based is entitled to the redemption money.[25]

It has been held that, where the execution creditor has redeemed from the sale at which he himself had purchased, the execution debtor is entitled to the benefit of the amount bid by the execution creditor at a subsequent sale pursuant to such creditor's redemption.[26]

§ 263. —— Interest Acquired

a. Redemption by debtor, his successor in interest, or owner

b. Redemption by one other than debtor, his successor in interest, or owner

a. Redemption by Debtor, His Successor in Interest, or Owner

As a general rule redemption by the debtor or his successor in interest releases the title of the debtor or successor in interest from the consequences of the execution sale but restores the original liens; under some statutes redemption by the debtor's successor in interest does not restore the original liens.

The general rule is that a redemption by the execution debtor or his successor in interest destroys the effect of the sale as such, extinguishing the rights of the purchaser, as stated supra § 262, and that such redemption releases the title of the execution debtor,[27] or of his successor in interest,[28] from the consequences of the sale, but that, by such redemption, the original liens are restored,[29] and the

18. Ala.—Morris v. Beebe, 54 Ala. 300.
Ill.—Off v. Finkelstein, 100 Ill.App. 14, affirmed 65 N.E. 439, 200 Ill. 49.
N.Y.—Bodine v. Moore, 18 N.Y. 347.
23 C.J. p 727 note 66, p 728 note 77.

19. Ala.—Morris v. Beebe, 54 Ala. 300.
23 C.J. p 727 note 66.

20. N.Y.—Boyd v. Boyd, 56 N.Y.S. 760, 26 Misc. 679, affirmed 65 N.Y.S. 859, 53 App.Div. 152.

21. Colo.—Colorado Mfg. Co. v. McDonald, 25 P. 712, 15 Colo. 516.
Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.
23 C.J. p 727 note 68.

22. Kan.—Case v. Cherokee Lanyon Spelter Co., 61 P. 406, 62 Kan. 69.
23 C.J. p 727 note 74.

23. Colo.—Hartsock v. John Wright Hardware Co., 64 P. 245, 16 Colo. App. 48.
Philippine.—Benedicto v. Yulo, 26 Philippine 160.

24. Ill.—Brooks v. Sanders, 110 Ill. 453.
23 C.J. p 730 note 15.

25. Ind.—Brown v. Harrison, 93 Ind. 142.

26. **Increased amount bid on subsequent sale**
Where execution creditor purchased debtor's realty on sale under execution on its two judgments, redeemed from execution sale, and purchased at sale pursuant to its own redemption, it was held that the execution debtor was entitled to benefit of amount bid by execution creditor at sale following redemption, in satisfaction of his debts, where sale by subsequent judgment creditor, who had also redeemed from execution sale, resulted in bid only of redemption money, and debtor obtained no credit thereby on any debt.—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990.

27. Ky.—Botts v. Botts, 74 S.W. 1093, 25 Ky.L. 300.
Or.—Flanders v. Aumack, 51 P. 447, 32 Or. 19, 67 Am.S.R. 504.
22 C.J. p 728 note 77.

Absolute title in purchaser
Where, under the applicable statute or practice, the purchaser holds absolute title until redemption, under some statutes redemption by the judgment debtor reinvests the latter with the title, and he is in the estate as of his original estate, as was a grantor entering at common law for breach of condition, and as though there had been no execution sale and conveyance to the purchaser.—Morris v. Beebe, 54 Ala. 300.

Payment accruing to benefit of debtor
Under some statutes payment of the redemption money by another than the execution debtor has been regarded as a payment for the execution debtor as owner, and revests title in him so that it cannot be divested by any action of the execution purchaser and the person making the payment, done without the knowledge or consent of the debtor.—McMillan v. Bagby, 83 S.W. 610, 26 Ky.L. 1265.

28. Ind.—Harvey v. Lowrey, 183 N.E. 309, 204 Ind. 93.
Minn.—Rutherford v. Newman, 8 Minn. 47, 82 Am.D. 122.
Or.—Flanders v. Aumack, 51 P. 447, 32 Or. 19, 67 Am.S.R. 504.
23 C.J. p 728 note 77.

29. Or.—Flanders v. Aumack, supra.
23 C.J. p 728 notes 77, 78.

Judgment under which sale made
In a case in which a grantee of the judgment debtor redeemed, it was stated that during the period for redemption the rights of the judgment creditor were suspended and that, on redemption, the judgment was restored as a lien, subject to the amount received from the sale, and with all its former force.—People ex rel. Hunter v. Seery, 200 N.Y.S. 531, 206 App.Div. 19.

Junior lien
(1) Where a sale is made under several executions issued under different judgments and no benefit is received from such sale by the holder of a junior of such judgments, redemption by the judgment creditor restores the holder of such junior judgment to the same position he would have been in if the sale were

property may be sold again for any balance remaining unpaid on the judgment under which the sale was made[30] or may be applied to the satisfaction of other liens on the property existing prior to such sale.[31] Under the construction given some statutes, however, a different rule applies where the grantee or assignee of the judgment debtor redeems, and such grantee or assignee takes the property free and clear of the judgment under which the execution sale was made, notwithstanding there was a deficiency on such sale,[32] and also free and clear of a lien junior to that of the judgment under which the sale was made, where the holder of the junior lien failed to exercise his right to redeem within the prescribed time.[33] Under some statutes which have so been construed, however, a different rule

not made under such holder's execution.—Bodine v. Moore, 18 N.Y. 347.

(2) In a case in which an assignee of the judgment debtor redeemed and in which the right to sell under a junior judgment was denied in view of the construction given to the applicable statute, it was said that, in the case of a statute which merely authorizes the sale of real estate and gives a right of redemption from the sale, without prescribing the effect of the sale and allowance of the right, it is altogether likely that the consequence of the exercise of the right would only be to free the land from the prior judgment or other lien on which it was sold, and thus give place to subsequent liens.—Case v. Cherokee Lanyon Spelter Co., 61 P. 406, 62 Kan. 69.

Redemption by widow of judgment debtor

In a case in which the widow of the owner of property sold on execution redeemed, it was held that she was not entitled to protection as an innocent purchaser without notice, and that she took title with infirmities resulting from prior acts of herself and her husband.—Lamar v. Lincoln Reserve Life Ins. Co., 131 So. 223, 222 Ala. 60.

In Idaho the view has been taken that redemption by the assignee or successor in interest of the judgment debtor did not give a new title but merely restored to the judgment debtor or to his successor in interest the title of the judgment debtor, freed of the encumbrance of the liens foreclosed but subject to all other liens, including the liens of judgments inferior to the lien of the judgment under which the execution sale was made.—Evans v. Power County, 1 P.2d 614, 50 Idaho 690.

30. Ind.—Harvey v. Lowrey, 183 N. E. 309, 204 Ind. 93.
N.Y.—Bodine v. Moore, 18 N.Y. 347—People ex rel. Hunter v. Seery, 200 N.Y.S. 531, 206 App.Div. 19.
Or.—Flanders v. Aumack, 51 P. 447, 32 Or. 19, 67 Am.S.R. 504.
Wash.—Bonded Adjustment Co. v. Helgerson, 61 P.2d 1267, 188 Wash. 176—Ford v. Nokomis State Bank, 237 P. 314, 135 Wash. 37.
23 C.J. p 728 note 78.

Redemption by "owner"

Word "owner," as used in a statute providing that lands sold under a judgment when redeemed by the "owner" shall be subject to resale to pay an amount remaining unpaid on such judgment, means any owner of the real estate whose interest is subject to payment of the judgment, without regard to whether or not he is the judgment debtor, or claims under him.—Lemmon v. Osborn, 54 N.E. 1058, 153 Ind. 172.

31. Minn.—Rutherford v. Newman, 8 Minn. 47, 82 Am.D. 122.
23 C.J. p 728 note 78.

Agreement for redemption and no change of possession

Where an execution purchaser takes title under an agreement with the judgment debtor that the latter may redeem, and there is no change of possession, and afterward another judgment for another debt is rendered against the judgment debtor, and while that judgment is outstanding the contract of redemption is partly executed and the purchaser, at the instance of the judgment debtor, conveys a portion of the property to a third person by absolute deed, and there is still no change of possession, the property embraced in such deed is prima facie subject to levy and sale under the junior judgment.—Christie v. Whaley, 3 S.E. 896, 79 Ga. 188.

32. Ark.—Rose v. Loughborough, 32 S.W.2d 1066, 182 Ark. 782—Arkansas Nat. Bank v. Price, 15 S.W.2d 396, 179 Ark. 259.

In Alaska, under Alaska statute, execution sale of property of lessor to satisfy specific liens against it exhausted such liens, and after redemption of property by lessee of the owner it was not subject to resale to satisfy same demands.—Dikeman v. Jewel Gold Mining Co., C.C.A. Alaska, 13 F.2d 118.

In California

(1) In a case which actually involved redemption from a mortgage foreclosure sale, but which involved the construction of Code Civ.Proc. §§ 702, 703, the view was taken that a grantee who redeems takes the title free from a lien for a deficiency.—Simpson v. Castle, 52 Cal. 644—23 C. J. p 728 note 78 [a].

(2) In a comparatively recent case, however, the view has been expressed that "judgment debtor" as used in § 703 of such Code is to be construed to include "successor in interest" of the judgment debtor.—Bateman v. Kellogg, 211 P. 46, 59 Cal. 464.

In Illinois

(1) In a comparatively early case it was held that, where a person recovered two judgments against the same defendant at the same term of court and executions on the judgments were issued the same day but execution was levied, and the property was sold to the judgment creditor under the smaller judgment, it was permissible for such creditor to have execution levied, and the property sold, under the larger judgment after the grantee of the execution debtor under a deed given after the first sale had redeemed from such sale.—Davenport v. Karnes, 70 Ill. 465.

(2) In a case arising under Hurd Rev.St.1919 c 77 § 18, it was held that, where the holder of the judgment under which an execution sale was made purchased at the sale for less than the amount of the judgment, the grantee of the execution debtor, on redeeming, took the property free and clear of the lien of such judgment and that the judgment creditor was not entitled to have the property levied on and sold under an alias execution for the amount of the deficiency.—Easter v. Holcomb, 221 Ill.App. 485.

In Iowa the rule stated in the text applies.—Paulsen v. Jensen, 228 N. W. 357, 360, 209 Iowa 453, quoting **Corpus Juris**—Danforth v. Linsey, 160 N.W. 318, 178 Iowa 834—23 C.J. p 728 note 78 [c] (2).

In Montana it has been held, under applicable statutes, that, where real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, the judgment debtor may transfer the interest remaining in him, during the period of redemption, to a third person, who, on redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered.—McQueeney v. Toomey, 92 P. 561, 36 Mont. 282, 122 Am. S.R. 358, 13 Ann.Cas. 316.

33. **In Iowa**

(1) The rule stated in the text applies, and the grantee, on redeeming, takes property free of junior judgment lien, where junior judgment lienholder failed to redeem.—

obtains where the judgment debtor redeems, and, after redemption by him, the property is subject to a lien for the deficiency on the sale,[34] and also to the lien of a judgment junior to the one under which the sale was made.[35]

It has been held that the rule that, after redemption by the judgment debtor, the property may be sold again to satisfy a deficiency on the first sale does not apply in case of a judgment against a nonresident based on substituted process and attachment, that is, a judgment quasi in rem, since the lien of the attachment terminates on the first sale and there is no lien by virtue of the judgment alone,[36] but the rule permitting a resale for the deficiency has been applied where the judgment was based on such process and attachment in a case in which a remote grantee of the judgment debtor redeemed.[37]

It has been held that redemption of the whole tract by a person who owns only a part of such tract, or who has an interest therein, gives him a lien in the nature of an equitable mortgage on the part not owned by him for the amount necessarily paid to redeem, if the original lien was, as to him, equitably chargeable on that part of the tract,[38] but that the rule is otherwise as to an equitable pro rata share of the amount, which he was compelled to pay to protect his own share.[39] Under some statutes redemption by the grantee of the judgment debtor extends only to the undivided fractional interest in the property involved which was owned by the judgment debtor at the time of the execution sale and which was acquired by the purchaser at such sale, notwithstanding the whole of such property is subsequently allotted to such debtor in a partition proceeding and is included in the conveyance to the grantee.[40]

If the execution debtor sold the land before the execution sale but after the judgment lien attached, a redemption by him will inure to the benefit of his purchaser,[41] and, where a purchaser at a prior execution sale acquired title as against the execution debtor but not against the latter's creditors because of such purchaser's failure to record his deed under such sale, redemption by such debtor from a subsequent execution sale of the same property inures to the benefit of the successors in interest of such purchaser.[42] Where there is an execution sale of lands and thereafter of the equity of redemption, a redemption from the first sale by the execution debtor inures to the benefit of the purchasers at the second sale.[43]

It has been held that a legal tender within the time prescribed by law, of the amount for which an equity of redemption is sold under execution, is sufficient to revest the equity of redemption in the execution debtor without a deed of conveyance from the purchaser,[44] but, under some statutes, mere tender or payment does not revest the execution debtor with legal title to the land.[45]

Where property has been sold by an execution purchaser to a bona fide purchaser, after the same has been redeemed by the owner, but before the redemption has been recorded, the owner may reach

Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453, overruling People's Savings Bank v. McCarthy, 93 N.W. 583, 119 Iowa 586.

(2) Provision in deed by judgment debtor that it was subject to liens of record did not have the effect of reattaching junior judgment lien after grantee redeemed from execution sale to satisfy senior judgment.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.

(3) In some earlier cases effect was given to a junior lien notwithstanding the grantee of the judgment debtor redeemed.—Byers v. McEniry, 91 N.W. 797, 117 Iowa 499—Curtis v. Millard, 14 Iowa 128, 81 Am.D. 460—23 C.J. p 728 note 78 [c] (3), (4).

In Kansas, in a case in which the assignee of the judgment debtor redeemed, it was held that, under the applicable statute, land once sold and redeemed cannot again be sold in satisfaction of any inferior judgment or lien under which the holder was allowed a right of redemption, contingent on the non-exercise of the same right by the preferred classes of persons therein mentioned.—Case v. Cherokee Lanyon Spelter Co., 61 P. 406, 62 Kan. 69—23 C.J. p 727 note 74 [b].

34. Iowa.—Cadd v. Snell, 259 N.W. 590, 219 Iowa 728—Paulsen v. Jensen, 228 N.W. 357, 360, 209 Iowa 453, quoting **Corpus Juris.**
Mont.—McQueeney v. Toomey, 92 P. 561, 36 Mont. 282, 122 Am.S.R. 358, 13 Ann.Cas. 316.
23 C.J. p 728 note 78 [c] (1).

35. Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.
23 C.J. p 728 note 78 [c] (4).

36. S.D.—Herron v. Allen, 143 N.W. 283, 22 S.D. 301, 47 L.R.A.,N.S., 1048.

37. N.Y.—People ex rel. Hunter v. Seery, 200 N.Y.S. 531, 206 App.Div. 19.

38. Minn.—Powers v. Sherry, 132 N.W. 210, 115 Minn. 290.

39. Minn.—Powers v. Sherry, supra.

40. **In California** the rule stated in the text was applied where the judgment creditor purchased at the execution sale and acquired only the judgment debtor's one-third interest in the land; and it was held that the grantee of such debtor redeemed only such one-third interest and that he took the other two-thirds interest subject to the lien of the judgment under which the execution sale was made, the lien of such judgment having been extended to such two-thirds interest by reason of the allotment of such interest to the judgment debtor in the partition proceeding which involved two separate tracts.—Noble v. Beach, Cal.App., 120 P.2d 110.

41. Tenn.—Jones v. Planters' Bank, 5 Humphr. 619, 42 Am.D. 471.

42. Tenn.—Shea v. Rucker, 72 S.W. 2d 551, 167 Tenn. 550.

43. Ky.—Cavanaugh v. Willson, 35 S.W. 918, 18 Ky.L. 175—Marshall v. Green, 1 S.W. 602, 8 Ky.L. 346.

44. Me.—Legro v. Lord, 10 Me. 161.

45. Tenn.—Paris v. Burger, 4 Humphr. 325.

the proceeds of the sale in the hands of the execution purchaser.[46]

b. Redemption by One Other than Debtor, His Successor in Interest, or Owner

As a general rule a redemptioner other than the debtor, his successor in interest, or the owner steps into the shoes of the purchaser at execution sale and succeeds to the right, title, or interest acquired by such purchaser at the sale.

Usually a redemptioner, other than the execution debtor, his successor in interest, or the owner, merely steps into the shoes of the execution purchaser,[47] and succeeds to whatever right, title, or interest the purchaser acquired at the sale,[48] as fully, it has been said, as if the redemptioner had purchased the certificate of sale.[49] A sheriff's deed passes the same title as it would pass to the purchaser, if executed to him without redemption.[50]

If the execution creditor was the purchaser, the redemptioner does not acquire any interest in the judgment debt or security therefor.[51]

If a creditor who has two judgments proceeds to sell on one, and within the same year sells the same property on the other, under some statutes a judgment creditor who redeems from the first sale will hold the property as against the second sale.[52]

It has been held that a redemption by a mortgagee whose mortgage is junior to the judgment under which the execution sale was made inures to the benefit of one to whom the mortgagee has assigned the mortgage as security for a debt.[53]

A redemption by a judgment creditor which restores the property to the judgment debtor does not cause any title which thus came back to the debtor to pass under a prior intermediate second sale.[54]

Revival, discharge, or satisfaction of liens, judgments, or claims. Under some statutes redemption by a judgment creditor from a sale on execution on a prior judgment effects a revival of such creditor's judgment lien.[55] It has been held, however, that redemption by a judgment creditor or other lienholder may, under some circumstances, effect a satisfaction or payment of his judgment or lien.[56] It has been held that a literal or absolute compliance by the holder of a junior judgment, who redeems, with a statutory provision that his lien and claim will be extinguished, unless within a specified time he enters in the sale book the amount he is willing to credit on his claim, is not required in order to prevent the complete discharge of his judgment.[57]

46. Ky.—McMillan v. Bagby, 83 S. W. 610, 26 Ky.L. 1265.

47. Colo.—Roose v. Gove, 77 P. 246, 32 Colo. 522.
Ind.—Reed v. Ward, 51 Ind. 215.
Iowa.—Hays v. Thode, 18 Iowa 51.
N.Y.—Benton v. Hatch, 25 N.E. 486, 122 N.Y. 322, affirming 43 Hun 142 —Emmet v. Bradstreet, 20 Wend. 50.
23 C.J. p 728 note 84.

48. Iowa.—Craig v. Alcorn, 46 Iowa 560.
Mont.—Leonard v. Western, 241 P. 523, 74 Mont. 513.
23 C.J. p 727 note 66, p 728 note 84.
Lienors
(1) Lienors, whether by judgment or mortgage, who redeem as "redemptioners" under Code Civ.Proc. § 701 subd. 2, succeed to all the rights which the purchaser at the execution sale would have possessed had no redemption been made.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

(2) Where the redemptioner is a lienholder but his lien extends to only a part of the land sold, it has been held that, where he redeems the whole thereof, he is subrogated to the rights of the purchaser at such sale.—Powers v. Sherry, 132 N.W. 210, 115 Minn. 290.

49. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

50. Cal.—Bagley v. Ward, 37 Cal. 121, 99 Am.D. 256.

51. Cal.—Abadie v. Lobero, 36 Cal. 390.

52. Ill.—Merry v. Bostwick, 13 Ill. 399, 54 Am.D. 434.

53. Iowa.—Manning v. Markel, 19 Iowa 103.

54. Ill.—Hill v. Blackwelder, 113 Ill. 283.

55. Colo.—Floyd v. Sellers, 44 P. 373, 7 Colo.App. 498, affirmed 52 P. 674, 24 Colo. 484.

56. In Arizona where judgment creditor redeemed property of judgment debtor which had been sold at execution sale and property was worth more than the cost of redemption plus the judgment of the redemptioner, redemptioner's judgment was satisfied and was not a lien against any other property of the judgment debtor.—Hughes v. Young, 120 P.2d 396, 138 A.L.R. 943.

In Minnesota redemption by a mortgagee extinguished and paid his mortgage debt to the amount of the value of the land less the amount which he paid to redeem.—White v. Leeds Importing Co., 75 N.W. 595, 761, 72 Minn. 352, 71 Am.S.R. 488.

In New York
(1) In a case in which the rights of the parties were governed by the statutes in force before the enactment of the code of civil procedure, it was held that, where land redeemed by a senior judgment creditor was of greater value than the amount paid to redeem and the amount due on such senior judgment, the judgment of such judgment creditor must be considered satisfied.—Benton v. Hatch, 25 N.E. 486, 122 N.Y. 322, affirming 43 Hun 142.

(2) In an earlier case, however, it was held that redemption by a senior judgment creditor from sale under execution on a junior judgment did not constitute a satisfaction of the senior judgment creditor's judgment where he acquired only a nominal title by virtue of his redemption, and that he might redeem again under the same judgment from a sale of the property under a judgment senior to his own and the one from which he first redeemed.—Ex p. Peru Iron Co., 7 Cow. 540.

(3) It was also held that redemption by a junior judgment creditor from a sale under a senior judgment did not constitute a satisfaction of the junior judgment.—Van Horne v. McLaren, 8 Paige 285, 35 Am.D. 685.

(4) The view was also taken that such redemption by a junior judgment creditor was no bar to an action at law to enforce the payment of his judgment.—Emmet v. Bradstreet, 20 Wend. 50—Van Horne v. McLaren, 8 Paige 285, 35 Am.D. 685.

57. Construction of statute and sufficiency of compliance
(1) A statement filed by the redeeming creditor which indicated

Under some statutes the right or title acquired by redemption by a judgment creditor from a sale under execution on a judgment senior to his judgment is subject to liens which are prior to that of such senior judgment.[58] On the other hand, since the sale of property on execution destroys all liens subsequent to the one under which it is sold, a judgment creditor redeeming property from an execution sale takes title discharged from all liens prior to his but subsequent to the one under which the sale was made, whether such liens are by judgment or otherwise.[59]

Redemption by virtue of voidable or void judgment. A judgment creditor who redeems from a prior sale acquires a valid title to the premises redeemed, even though the judgment, by virtue of which he acquired the right to redeem, may be subsequently reversed for irregularity or error,[60] but, if the judgment under which redemption is attempted is void, the attempt amounts to nothing and confers no right or interest on the person attempting redemption.[61] It has been held, however, that if a judgment creditor whose judgment is unauthorized and void redeems land of the judgment debtor from sale under a prior valid judgment, with the consent of the purchaser, and receives a deed therefore, he obtains a good title thereto,[62] and a like rule has been recognized where the purchaser at execution sale receives the amount of the claim from the holder of the void judgment and transfers to such holder all rights acquired under such sale.[63]

Voidable or void execution sale or judgment under which sale made. A lienholder who redeems is generally entitled to the rights of a purchaser and the mere fact that the judgment under which the same was made, or the sale itself, was voidable does not impair his rights in this regard.[64] Where, however, the judgment on which the execution issues is void, an attempted redemption from a sale thereunder is a nullity and confers no title on the person who seeks to redeem.[65]

§ 264. —— Right to Deed

A person who has complied with statutory requirements for redemption may be entitled to a deed of the property either from the proper officer or from the purchaser at execution sale if the latter has himself received a deed.

Where the redemptioner has fulfilled all the statutory requirements necessary to effect a redemption, he may be entitled to a deed to the property from the proper officer;[66] or, in case the purchaser has already received a conveyance from the sheriff, then the redemptioner is entitled to a conveyance from the purchaser, and may proceed by a bill in equity to enforce his rights,[67] notwithstanding the statute gives him a summary remedy to recover the possession after he has acquired the legal title.[68]

§ 265. —— Recovery Back of Money Paid

The general rule is that voluntary payments made

with sufficient certainty the amount for which he was willing to give credit on his judgment was sufficient under the statute described in the text, the statute not prescribing the form.—Craig v. Alcorn, 46 Iowa 560.

(2) It was held that there was sufficient compliance with the statute where, within the time prescribed, the judgment creditor filed with the clerk of court who issued the execution a statement of the amount he proposed to allow as the value of the land, the balance, after deducting the amount of the sale from which he redeemed, to be credited on his own judgment, and the judgment debtor had knowledge, within the prescribed time, of the existence of such statement in the files of the clerk, notwithstanding the statement was not actually entered in the sale book until after the prescribed time.—Craig v. Alcorn, supra.

(3) The duty of actually entering the statement in the sale book was that of the clerk, and his failure to perform such duty did not deprive the redeeming creditor of his rights, in the absence of prejudice to the other person.—Craig v. Alcorn, supra.

(4) Immaterial alteration of the statement after entry in the sale book and of the record did not vitiate the proceeding.—Craig v. Alcorn, supra.

58. Colo.—Sellers v. Floyd, 52 P. 674, 24 Colo. 484, affirming 44 P. 373, 7 Colo.App. 494.

59. Colo.—Floyd v. Sellers, 44 P. 373, 7 Colo.App. 498, affirming 52 P. 674, 24 Colo. 484.
23 C.J. p 729 note 86.
Effect on title of purchaser at execution sale of liens junior to lien under which sale made see infra § 291.

60. Ill.—McLagan v. Brown, 11 Ill. 519.

61. Ill.—Borders v. Murphy, 78 Ill. 81.
Tenn.—Hughes v. Helms, Ch., 52 S. W. 460.

62. Ark.—Hare v. Hall, 41 Ark. 372.

63. Tenn.—Hughes v. Helm, Ch., 52 S.W. 460.

64. U.S.—Ryan v. Staples, Colo., 78 F. 563, 23 C.C.A. 551.
23 C.J. p 729 note 96.
Rights of person who has lost right to redeem
A mortgagee who has duly redeemed from an execution sale has been regarded as a bona fide purchaser for value, notwithstanding he is charged with notice of a defect in the notice of sale and with notice of the inadequacy of the sales price, and one who has lost his prior right of redemption cannot have the sale set aside, although he offers to refund the money paid to redeem which was much less than the value of the property.—White v. Leeds Importing Co., 75 N.W. 595, 72 Minn. 352, 71 Am.S.R. 488.

65. Ill.—Mulvey v. Carpenter, 78 Ill. 580.

66. Iowa.—Kilbride v. Munn, 8 N.W. 305, 55 Iowa 445.
23 C.J. p 729 note 5.

67. Ala.—Moore v. Gore, 35 Ala. 701.
Tenn.—Mitchell v. Brown, 6 Coldw. 505—Hawkins v. Jamison, Mart. & Y. 83.

68. Ala.—Moore v. Gore, 35 Ala. 701.

for the purpose of redemption may not be recovered back.

As a general rule, payment of the amount necessary to redeem by a party so entitled is regarded as purely voluntary, so that such money is not recoverable back.[69] Such payment waives all defects in the proceedings and is not recoverable back on account of them.[70] So, where an attempted redemption for the purported purpose of protecting the redemptioner's interest is wholly unnecessary, the right to recover back the money paid has been denied because of the voluntary character of the payment.[71] The view has been taken, however, that money paid into court on an attempted redemption by a person who sought to redeem as grantee of the debtor should be returned to such person if the deed to him is void as to creditors and he, therefore, has no interest in the property or power to redeem.[72]

Where one who knows that the title of the judgment debtor is defective redeems, he cannot recover the money paid by him on the ground of mistake of fact on its subsequently appearing that the debtor's title was invalid.[73] Where, however, an execution sale is made under a void judgment, and the property is redeemed by one ignorant of the facts, he may recover back the money.[74]

X. CONVEYANCE TO PURCHASER

§ 266. Necessity of Deed or Bill of Sale

The general rule is that a conveyance from the sheriff is necessary to perfect the legal title of the purchaser of real estate at an execution sale; but a bill of sale is not needed to vest title in personalty.

While there is authority that the purchaser of realty at an execution sale acquires legal title by operation of law,[75] it has been held that, in the absence of a deed from the sheriff, the purchaser has only an equitable title;[76] and a conveyance from the sheriff is commonly regarded as necessary in order to perfect the title of the purchaser of real estate,[77] after the termination of the statutory period within which the land could have been redeemed;[78] the sheriff's certificate of sale is not sufficient for that purpose.[79] A sale not consummated by a transfer of the property is, however, valid until set aside in proceedings therefor;[80] and when the sheriff has made, at the same time, several sales to one purchaser on several executions in favor of the same creditor and against the same debtor, but one deed is necessary to complete the proceedings.[81] If the deed is lost before registration, the officer should execute a new deed.[82] The lapse of many years without a deed having been taken by the purchaser authorizes the conclusion that he and those claiming under him abandoned all claim to the premises.[83]

In the case of personal property, the general rule is that the title vests in the purchaser by virtue of the levy and sale without any bill of sale.[84]

§ 267. —— Presumption of Execution

After the lapse of many years from the date of an execution sale, it will be presumed that the sheriff made a deed to the purchaser, at least where it is shown that the purchaser went into possession under the sale and continued in possession.

69. U.S.—In re St. Albans First Nat. Bank, C.C.Vt., 49 F. 120.
Ariz.—Copper Belle Min. Co. v. Gleeson, 134 P. 285, 14 Ariz. 548, 45 L.R.A.,N.S., 481.
23 C.J. p 729 note 11.
Directing return of redemption money paid where judgment or decree for redemption not granted see supra § 261 g.
Recovery back of part payments see supra § 258.
Recovery back of payments generally see C.J.S. title Payments §§ 132–160, also 48 C.J. p 734 note 5–p 774 note 36.

70. U.S.—In re St. Albans First Nat. Bank, C.C.Vt., 49 F. 120.

71. Iowa.—Weaver v. Stacy, 75 N. W. 640, 105 Iowa 657—Weaver v. Stacy, 62 N.W. 22, 93 Iowa 683.

72. Ky.—R. T. Elswick & Co. v. Scott, 8 S.W.2d 398, 225 Ky. 309.

73. Ariz.—Copper Belle Min. Co. v. Gleason, 134 P. 285, 14 Ariz. 548, 45 L.R.A.,N.S., 481.

74. Colo.—Brown v. Hunter, 31 P. 506, 2 Colo.App. 527.
Tenn.—Neal v. Read, 7 Baxt. 333.

75. La.—Shreveport Long Leaf Lumber Co. v. Hughes, 1 La.App. 706.
23 C.J. p 730 note 20.

76. U.S.—Glenn v. Hollums, C.C.A. Tex., 80 F.2d 555, reversing, D.C., Eaves v. Glenn, 9 F.Supp. 647.
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085.

77. N.J.—Joslin v. Ervien, 12 A. 136, 50 N.J.Law 39.
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
Wash.—Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181—Ford v. Nokomis State Bank, 237 P. 314, 135 Wash. 37.
23 C.J. p 730 note 21.
Relation back see infra § 283.
"A judgment debtor is not divested of title until after the expiration of the time for redemption and not until title is vested in the purchaser by sheriff's deed."—Clark v. Strohbeen, 181 N.W. 430, 433, 190 Iowa 989, 13 A.L.R. 1419.

78. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.

79. Wash.—Ford v. Nokomis State Bank, 237 P. 314, 135 Wash. 37.
23 C.J. p 730 note 22.

80. Iowa.—Harpham v. Worthington, 69 N.W. 535, 100 Iowa 313.

81. Me.—People's Nat. Bank v. Nickerson, 80 A. 849, 108 Me. 341—Hill v. Reynolds, 44 A. 135, 93 Me. 25, 74 Am.S.R. 329.

82. N.C.—McMillan v. Edwards, 75 N.C. 81.
23 C.J. p 731 note 24.

83. Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802.
23 C.J. p 731 note 28.

84. Ark.—Kennedy v. Clayton, 23 Ark. 270.
23 C.J. p 730 note 19.

It has been held that after many years have elapsed since the date of a sale under execution, it will be presumed that the sheriff made a deed in the performance of his duty, and did all else necessary to effect a lawful sale;[85] but there is authority that a deed to the purchaser at execution sale will not be presumed in the absence of a showing that he went into possession under the sale and continued in possession.[86]

§ 268. Constitutional and Statutory Provisions

Constitutional and statutory provisions relating to the conveyance to the purchaser of property sold at an execution sale are discussed in connection with their specific subject matter infra §§ 269–283.

Examine Pocket Parts for later cases.

§ 269. Authority to Make

a. In general
b. After expiration of term of office
c. Successor in office

a. In General

The officer conducting an execution sale, or his deputy, is generally the proper person to execute the conveyance of the property.

The general rule is that the officer conducting an execution sale is the proper person to execute the conveyance of the property,[87] provided he is not interested in the judgment under which the sale was had,[88] and provided there is a subsisting power in him at the time of the conveyance.[89] There is no presumption, however, of the official right of a sheriff to make a valid deed of real estate; but such right must be shown in each instance by the record of the proceedings which resulted in the deed.[90] A sheriff cannot execute a deed to land outside of his county.[91]

A deed may be executed by a deputy,[92] whether he conducted the sale or not.[93] If the sale is made by a deputy, the deed may be made by the sheriff.[94]

b. After Expiration of Term of Office

Even after the expiration of his term of office, the officer who conducted the sale, or his deputy, may execute a conveyance of the property, in the absence of statute to the contrary.

In the absence of statute to the contrary,[95] the officer conducting the sale may execute a conveyance even after the expiration of his term of office;[96] and the fact that the sheriff is not in possession of, and has no control over, his official books, papers, documents, and records, and has no present recollection of the sale made by him, is no excuse for his refusal to execute a deed.[97] In case of the death of such officer prior to the execution of a deed, the proper remedy for the purchaser is to apply to the court for the appointment of a commissioner or master to execute a conveyance,[98] or to sue to obtain a decree divesting the title of the execution debtor.[99]

A deputy may execute a deed after the expiration of the term of office of his principal,[1] provided his authority is made to appear.[2]

c. Successor in Office

Under some statutes the deed to property sold under execution may be made by the successor in office of the sheriff who made the sale.

In many jurisdictions, by statutory provision, the deed may be executed by the successor in office of the sheriff who made the sale,[3] even though he is not the immediate successor.[4] Under some statutes

85. S.C.—Bullard v. Cox, 101 S.E. 111, 112 S.C. 392.
86. Ala.—Normant v. Eureka Co., 12 So. 454, 98 Ala. 181, 39 Am.S.R. 45.
Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802.
87. Minn.—Messerschmidt v. Baker, 22 Minn. 81.
23 C.J. p 731 note 30.
88. Ga.—Morrison v. Knight, 6 S.E. 211, 82 Ga. 96.
23 C.J. p 731 note 31.
89. N.Y.—Stafford v. Williams, 12 Barb. 240.
90. N.Y.—Rumble v. Smith, 121 N.Y.S. 501, 66 Misc. 298.
91. Ga.—Hanby v. Tucker, 23 Ga. 132, 68 Am.D. 514.
92. Tex.—Davis v. Rankin, 50 Tex. 279.
23 C.J. p 731 note 34.
Execution by deputy in sheriff's name see infra § 275 a.
93. Ohio.—Haines v. Lindsey, 4 Ohio 88, 19 Am.D. 586.
94. Kan.—Ogden v. Walters, 12 Kan. 282.
Ky.—Young v. Smith, 10 B.Mon. 293.
95. Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
23 C.J. p 731 note 41.
96. Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.
Tex.—Bendy v. W. T. Carter & Bros., Com.App., 269 S.W. 1037, affirming W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
23 C.J. p 731 note 42.
97. N.Y.—People v. Grant, 70 N.Y.S. 504, 61 App.Div. 238, 32 N.Y.Civ.Proc. 73.
98. Cal.—People v. Boring, 8 Cal. 406, 68 Am.D. 331.
23 C.J. p 731 note 44.
99. Ala.—Stewart v. Stokes, 33 Ala. 494, 73 Am.D. 429.
1. N.Y.—People v. Lynch, 68 N.Y. 473.
23 C.J. p 731 note 38.
2. Cal.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am.D. 526.
3. Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
23 C.J. p 732 note 46.
4. Ky.—Hudson v. Hudson, 70 S.W. 2d 935, 253 Ky. 814.

it may be executed by either the officer making the sale or his successor in office;[5] or by the successor only when the officer who conducted the sale is unavailable or disqualified.[6]

Such statutory power is special and limited,[7] and must be exercised under the restrictions imposed.[8] An order of court has frequently been required in such a case.[9]

§ 270. Time for Making

In the absence of statute providing otherwise, a sheriff's deed cannot be executed and delivered before the redemption period has elapsed or, in some jurisdictions, after the termination of a reasonable or prescribed time following the expiration of such period.

Unless otherwise provided by statute,[10] the deed cannot be executed and delivered until after the expiration of the time limited by statute for redemption;[11] if executed prior thereto, even on the last day of the redemption period,[12] it is void[13] unless the error is corrected.[14] After the right to a deed has accrued, however, it may, in the absence of a statute to the contrary, be executed at any time,[15] on demand.[16] In some jurisdictions, however, it is held that a motion to require the sheriff to execute a conveyance should be made within a reasonable time after the expiration of the redemption period, and that laches on the part of the party entitled will bar his right to a deed;[17] and, under some statutes, the deed cannot be executed after the expiration of a prescribed period of time from the date on which the priod of redemption terminates.[18]

§ 271. Right to Conveyance

The purchaser of realty at an execution sale is the person primarily entitled to the deed, but may ordinarily demand it only after paying or tendering the purchase price. In proper circumstances, the deed may be executed to the purchaser's heirs, assigns, or legal representatives, or to third persons designated by him.

The purchaser of realty at an execution sale is not entitled to a deed until he has paid,[19] or tendered,[20] the purchase price, unless the creditor grants the purchaser time within which to pay his bid, and so informs the sheriff;[21] and where the execution is satisfied before the bid is paid the purchaser is not in a position to insist on a deed.[22] Where all requirements have been complied with, the purchaser is entitled to demand that the sheriff make a deed to him for the property,[23] notwithstanding he has a perfect title through other conveyances,[24] provided the sale was a valid one,[25] and provided there has been no waiver of the right.[26]

The purchaser of realty at an execution sale is the person primarily entitled to the deed,[27] and the deed cannot be made to one of several purchasers with-

5. S.C.—McElmurray v. Ardis, 34 S.C.L. 212.
Wis.—Prescott v. Everts, 4 Wis. 314.

6. Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.

7. Mass.—Thornton v. Boyd, 3 Cush. 598.
23 C.J. p 732 note 48.

8. Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.
23 C.J. p 732 note 49.

9. N.C.—Edwards v. Tipton, 77 N. C. 222.
23 C.J. p 732 note 50.

10. U.S.—Reeve v. North Carolina Land & Timber Co., Tenn., 141 F. 821, 72 C.C.A. 287, certiorari denied 27 S.Ct. 776, 203 U.S. 588, 51 L. Ed. 329.
23 C.J. p 732 note 51.

11. Cal.—Anthony v. Janssen, 191 P. 538, 183 Cal. 329.
23 C.J. p 732 note 52.
Time for redemption see supra § 257.

12. Cal.—Perham v. Kuper, 61 Cal. 331.

13. Cal.—Hall v. Yoell, 45 Cal. 584.
23 C.J. p 732 note 54.

14. Kan.—Porter v. Watson, 76 P. 841, 69 Kan. 349.
23 C.J. p 732 note 55.

15. Or.—Webster v. Rogers, 171 P. 197, 87 Or. 549.
23 C.J. p 732 notes 57, 59–61, p 733 note 62.

16. N.Y.—People v. Grant, 70 N.Y. S. 504, 61 App.Div. 238.

17. N.Y.—Dixon v. Dixon, 85 N.Y. S. 609, 89 App.Div. 603, reversing 78 N.Y.S. 255, 38 Misc. 652.
23 C.J. p 733 note 63.

18. Ill.—Parker v. Shannon, 27 N. E. 525, 137 Ill. 376.
23 C.J. p 732 note 56.

19. Cal.—People v. Hays, 5 Cal. 66.
23 C.J. p 733 note 67.

20. Ind.—Benton v. Shreeve, 4 Ind. 66.
23 C.J. p 733 note 68.

21. La.—Gallier v. Garcia, 2 Rob. 319.

22. Iowa.—Long v. Valleau, 66 N. W. 195, 97 Iowa 328.

23. N.Y.—In re Eleventh Ave., 81 N.Y. 436, affirming 49 How.Pr. 208.
23 C.J. p 733 note 72.

Foreclosure redemptioner
Execution debtors' judgment creditor who had redeemed premises from foreclosure sale was not estopped to demand sheriff's deeds forthwith under statute making such redemption a bid at execution sale and allowing no other redemption where there is no greater bid, notwithstanding premises were struck off to creditor under conditional bids at execution sale, where those bids were made to protect creditor's interest after sheriff accepted another's conditional bids without authority and over creditor's objection.—Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629.

Where judgment creditor purchases at execution sale, and amount of bid is less than amount of judgment, creditor is entitled to sheriff's deed on payment of cost.—Ziegler v. Baker, 142 So. 241, 104 Fla. 499.

24. Cal.—People v. Irwin, 14 Cal. 428.

25. Ga.—State v. Byrd, 42 Ga. 629.
23 C.J. p 733 note 74.

Although the property is misdescribed in the judgment, in the writ of execution, and in the advertisement, the sheriff should be required to complete the sale and execute a deed to the property as so described, where the purchaser is the only person affected by such defect.—Mack v. Eli, La.App., 169 So. 265.

26. Ky.—Fitzpatrick v. Apperson, 2 Ky.L. 249.
23 C.J. p 733 note 75.

27. Ill.—Johnson v. Adleman, 35 Ill. 265.
23 C.J. p 733 note 65.

The clerk of court is, under the Louisiana statute, the person to whom the deed must be delivered, and the purchaser is not entitled to its possession and control.—McCall v. Irion, 6 So. 345, 41 La.Ann. 1126.

out authority from the others.[28] By due assignment of the certificate of purchase, or proper directions by the purchaser, the sheriff is authorized, and may be compelled, to execute the deed to a designated third person.[29] Whether the conveyance should be made to the purchaser or to his assignee concerns only those parties.[30] A deed made to an entire stranger to the record, without authority, is a nullity.[31] Where a sheriff's deed was made to the parties who furnished the money, and not to the purchaser named in the return to an execution sale, and was acquiesced in for nearly fifty years, the presumption is that it was so done by the appointment of the purchaser.[32]

After death of party entitled. A deed made to the party entitled after his death is of no force,[33] although the fact that it is void does not affect the title of those claiming under him.[34] In such a case the deed should, at the instance of the executor or administrator, be made to the heirs or devisees of the party so entitled,[35] or to his legal representatives.[36]

After death of judgment debtor. Where a sale is had and approved, and a deed ordered, and before its execution the judgment debtor dies, it is not necessary to revive proceedings in the name of the heirs or legal representatives of the deceased before the deed is executed.[37]

A purchaser of personal property at an execution sale is, under at least one statute, entitled to a certificate of sale transferring to him all of the interest of the debtor in the property as of the date of the levy of the execution.[38]

§ 272. —— Proceedings to Compel

The purchaser at an execution sale, in order to compel the officer to execute a deed, may resort to mandamus or an application in the original action by motion, or may seek the assistance of a court of equity.

If the officer neglects or refuses without good cause to execute an execution deed at the proper time, the purchaser has a remedy by mandamus to compel its execution, as is shown in the C.J.S. title Mandamus § 97, also 38 C.J. p 639 note 30–p 640 note 32. The purchaser may also seek the assistance of a court of equity,[39] or he may proceed by an application in the original action by motion;[40] and it has been held that the only proper remedy is by a motion in the cause and not by distinct action.[41]

In a proceeding to compel a sheriff to deliver a deed, questions of fact are for the determination of the trial court.[42]

§ 273. Restraining Making or Delivery

Where sufficient ground exists, a court of equity has discretion to grant an injunction restraining the sheriff from executing an execution deed.

Where sufficient ground exists to prevent the completion of a sale by the execution of a deed by the sheriff, it is within the discretion of a court of equity to grant an injunction restraining the sheriff from executing it;[43] thus the delivery may be enjoined where the sale was made contrary to the explicit directions of the execution plaintiff.[44] In order to warrant such relief it must be made to appear that the judgment and decree are void, or that the proceedings of the sheriff thereunder are so defective as to render the alleged sale invalid,[45] and the party seeking such relief must show such right, title, or interest as entitles him to do it.[46] Where part of the premises are alleged to be exempt as a

28. N.H.—Rice v. Smith, 18 N.H. 369.
23 C.J. p 733 note 66.

29. Ga.—Parler v. Johnson, 7 S.E. 317, 81 Ga. 254.
23 C.J. p 733 note 76.

30. Ill.—Shelton v. Blake, 6 N.E. 409, 115 Ill. 275.

31. Ill.—Johnson v. Adleman, 35 Ill. 265—Davis v. McVickers, 11 Ill. 327.

32. Pa.—Jackson v. Gunton, 67 A. 467, 218 Pa. 275.

33. U.S.—Reeve v. North Carolina Land & Timber Co., Tenn., 141 F. 821, 72 C.C.A. 287, certiorari denied 27 S.Ct. 776, 203 U.S. 588, 51 L.Ed. 329.
Wash.—Diamond v. Turner, 39 P. 379, 11 Wash. 189.

34. Wash.—Diamond v. Turner, supra.
23 C.J. p 734 note 82.

35. Ky.—Jones v. Webb, 59 S.W. 858, 22 Ky.L. 1100.
23 C.J. p 734 note 83.

36. N.Y.—Dixon v. Dixon, 85 N.Y.S. 609, 89 App.Div. 603, reversing 78 N.Y.S. 255, 38 Misc. 652.
23 C.J. p 734 note 84.

37. U.S.—Insley v. U. S., Kan., 14 S.Ct. 158, 150 U.S. 512, 37 L.Ed. 1163, affirming 54 F. 221, 4 C.C.A. 296.
Ky.—Thomas v. Thomas, 10 S.W. 282, 87 Ky. 343, 10 Ky.L. 223.

38. Cal.—Holm v. Overholt, 6 P.2d 76, 214 Cal. 431.

39. Ala.—Stewart v. Stokes, 33 Ala. 494, 73 Am.D. 429.
23 C.J. p 734 note 86.

40. Mo.—Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.S.R. 307.
23 C.J. p 734 note 87.

41. N.C.—Patrick v. Kerr, 60 N.C. 633, 86 Am.D. 454.
23 C.J. p 734 note 88.

42. Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.
Evidence held sufficient to sustain finding that execution was not fatally defective.—Swabey v. Boyers, supra.

43. Ark.—Maynard v. Henderson, 173 S.W. 831, 117 Ark. 24, Ann. Cas.1917A 1157.
Iowa.—Paulsen v. Hanson, 216 N.W. 762.
23 C.J. p 734 note 90.

44. N.J.—Shinn v. Vineland Nat. Bank, 36 A. 953, 55 N.J.Eq. 415, 41 A. 1116, 55 N.J.Eq. 825.

45. Ind.—Costigan v. Schalk, 145 N.E. 510, 82 Ind.App. 180.

46. Okl.—Jacobs v. American Bank & Trust Co., 68 P.2d 801, 180 Okl. 225.

homestead, the execution of a deed for the balance will not be enjoined.[47]

A judge has no power to order the sheriff not to execute a deed unless the property brings a price fixed.[48]

Pleading. A plaintiff seeking to enjoin the execution of a deed must allege facts showing that in an action of ejectment founded on the deed he would be required to offer evidence to overcome the effect of the deed.[49]

§ 274. Who May Object to Issuance

After the expiration of the redemption period, the judgment debtor is not entitled to raise objections to the execution of a deed.

After the sale and the expiration of the redemption period, the judgment debtor has no such interest in the land as will entitle him to raise objections to the completion of the execution sale by the execution of the deed, he then occupying the position of a mere stranger.[50] A junior purchaser who has not redeemed cannot insist, as against the execution debtor and the purchaser at a prior sale, that the right of such prior purchaser to a deed from the sheriff had been lost.[51] It has been held, however, that the execution debtor may show the deed to be void, because executed to one who was not the purchaser or his representative and who had no right.[52]

§ 275. Execution and Delivery

a. Execution generally
b. Acknowledgment
c. Delivery

a. Execution Generally

Statutes governing the execution of deeds to property sold under execution must be complied with. The deed should be executed by the sheriff or by a deputy in his name, and must purport to be his official act.

Statutes governing the execution of deeds to property sold under execution must be complied with.[53] The deed must purport to be the official act of the sheriff[54] and, where so required by statute, must be signed by attesting witnesses.[55] Some statutes require as a condition precedent to the execution of the deed that the proceedings be examined and approved by the court and an order obtained directing the deed to be made;[56] but the failure to indorse the approval on the deed does not render the deed ineffective.[57]

The deed should be executed by the sheriff, or, where executed by a deputy, it must be in the name of the sheriff;[58] but a bill of sale of property sold by a judge acting as sheriff is good, although he refers to himself therein as sheriff instead of judge.[59]

Seal. The deed has been required to be sealed,[60] but the mere absence of a seal, without proof that it was omitted at the time of execution, is no ground for the exclusion of the deed as evidence.[61] The circumstances may be such as to give rise to a presumption that a seal was attached;[62] but such a presumption is not justified in the face of an express admission that the deed was not sealed.[63]

b. Acknowledgment

(1) In general
(2) Before and by whom
(3) Sufficiency and effect
(4) Time

(1) In General

In some jurisdictions, the sheriff's deed does not pass title unless acknowledged in the manner prescribed by statute; in others, acknowledgment is not essential where execution is otherwise proved.

In some jurisdictions the sheriff's deed is inoperative to pass the title unless acknowledged in the manner prescribed by statute;[64] while in others it is held that acknowledgment is not essential to the validity of the deed where its execution is otherwise duly proved,[65] on the theory that the purpose of the acknowledgment is to render unnecessary the

47. Wis.—Bennett v. Child, 19 Wis. 362, 88 Am.D. 692.

48. La.—Hickman v. Thompson, 26 La.Ann. 260.

49. Cal.—Schuyler v. Broughton, 3 P. 870, 65 Cal. 252.
23 C.J. p 734 note 94.

50. Minn.—Messerschmidt v. Baker, 22 Minn. 81.
23 C.J. p 734 note 95.

51. Mich.—Whiting v. Butler, 29 Mich. 122.

52. S.C.—Landrum v. Hatcher, 45 S.C.L. 54, 70 Am.D. 237.

53. Ariz.—Colvin v. Weigold, 253 P. 633, 31 Ariz. 370.
Formal acceptance held unnecessary to complete deed of sheriff.—Carroll v. Scheen, 34 La.Ann. 423.

54. Tex.—Benson v. Cahill, Civ.App., 37 S.W. 1088.
23 C.J. p 734 note 98.

55. Mass.—Cuffee v. Milk, 10 Metc. 366.

56. Ohio.—Curtis v. Norton, 1 Ohio 278.
Or.—Wright v. Young, 6 Or. 87.
Confirmation of sale see supra § 226.

57. Or.—Wright v. Young, supra.

58. Kan.—Robinson v. Hall, 5 P. 763, 33 Kan. 139.
23 C.J. p 735 note 7.

59. La.—Bayon v. Mollere, 4 Mart. 66.

60. Mo.—Moreau v. Branham, 27 Mo. 351.
Pa.—Robins v. Bellas, 2 Watts 359.

61. Cal.—Clark v. Sawyer, 48 Cal. 133.

62. Mo.—Hammond v. Gordon, 6 S. W. 93, 93 Mo. 233.
23 C.J. p 735 note 3.

63. Mo.—Moreau v. Branham, 27 Mo. 351.

64. Mo.—Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.
23 C.J. p 735 note 10.

65. Ala.—White v. Farley, 8 So. 215, 81 Ala. 563.
23 C.J. p 735 note 11.

introduction of other evidence to show the execution of the deed.[66] The statute may require that after the deed is acknowledged the clerk shall make an entry of the acknowledgment on the records of the court.[67]

A deed properly acknowledged is good evidence without the production of the record entry,[68] and a defective entry will not invalidate the acknowledgment.[69] A defective certificate of acknowledgment cannot be aided by reference to the record entry,[70] nor can the absence of a certificate be so cured.[71] Reference may, however, be properly made to the language of the conveyance itself.[72]

(2) Before and by Whom

A sheriff's deed may be required to be acknowledged in open court, before the clerk of the court from which execution issued, or in the county where the land lies. The deed must be acknowledged by the officer signing it.

Some statutes require sheriffs' deeds to be acknowledged in open court,[73] or before the clerk of the court from which the execution issued,[74] or in the county where the land lies.[75] The deed must be acknowledged by the officer signing it,[76] although his term of office may have expired between the execution and the acknowledgment.[77]

Where a deputy has executed the deed in the name of his principal, he should also acknowledge it;[78] but he must do this in the name of his principal,[79] and not in his own name.[80] An acknowledgment made by a deputy after the death of his principal is void.[81]

(3) Sufficiency and Effect

Substantial compliance with the statute as to the certificate of acknowledgment is sufficient. The acknowledgment has been held to cure all irregularities not rendering the sale and proceedings prior thereto void ab initio.

A substantial compliance with the statute as to the certificate of acknowledgment is sufficient.[82] The acknowledgment has been held to cure all irregularities[83] which do not render the sale and proceedings prior thereto void ab initio,[84] so that nothing but fraud in the sale or a want of authority to sell can defeat the title.[85]

In a jurisdiction where acknowledgment is necessary to the validity of a deed, even a defectively acknowledged deed, evidence to show that a party holding under it is not a mere intruder, but holds under color of title.[86]

(4) Time

Where the statute does not designate the time for acknowledging a sheriff's deed, it may be acknowledged after suit brought, whether the sale was before, or after his term of office has expired, but it cannot be acknowledged before the return day of the writ.

Where the statute does not designate the time within which a sheriff's deed must be acknowledged, it may be acknowledged after the suit in which it is offered in evidence has been brought, if the sale was before,[87] or after a subsequent sale to another person and acknowledgment of the deed,[88] or after the sheriff's term of office has expired.[89] The acknowledgment cannot, however, be made before the return day of the writ.[90]

c. Delivery

Delivery is essential to the validity of a sheriff's deed; but delay in delivery does not affect its validity. Delivery may be made anywhere, as the parties find convenient.

Compliance must be had with statutes governing the delivery of a deed executed by a sheriff to property sold under execution.[91]

66. Ill.—Stephenson v. Thompson, 13 Ill. 186.
Nev.—In re Smith, 4 Nev. 254, 97 Am.D. 531.

67. Mo.—Lincoln v. Thompson, 75 Mo. 613.

68. Mo.—Chandler v. Bailey, 1 S.W. 745, 89 Mo. 641.

69. Mo.—Lincoln v. Thompson, 75 Mo. 613—Scruggs v. Scruggs, 41 Mo. 242.

70. Mo.—Lincoln v. Thompson, 75 Mo. 613.
23 C.J. p 735 note 16.

71. Mo.—Adams v. Buchanan, 49 Mo. 64.

72. Mo.—Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.S.R. 618.

73. Mo.—Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.
23 C.J. p 735 note 19.

74. Pa.—Brownlee v. Fox, 23 Pa. Dist. 952.
23 C.J. p 735 note 20.

75. Ill.—Fail v. Goodtitle, 1 Ill. 201.

76. Mo.—Lincoln v. Thompson, 75 Mo. 613.
23 C.J p 735 note 22.

77. Pa.—Woods v. Lane, 2 Serg. & R. 53—Adams v. Thomas, 6 Binn. 254.

78. Tex.—Terrell v. Martin, 64 Tex. 121.

79. Tex.—Terrell v. Martin, supra.

80. Mo.—Samuels v. Shelton, 48 Mo. 444.

81. Ohio.—Anderson v. Brown, 9 Ohio 151.

82. Mo.—Bray v. Marshall, 75 Mo. 327.
23 C.J. p 735 note 28.

83. Pa.—Media Title & Trust Co. v. Kelly, 39 A. 832, 185 Pa. 131.
23 C.J. p 735 note 29.

84. Mo.—Carson v. Hughes, 2 S.W. 127, 90 Mo. 173.
23 C.J. p 735 note 30.

85. Pa.—Colvin v. Crown Coal & Coke Co., 90 Pa.Super. 560.
23 C.J. p 735 note 31.

86. Pa.—Wilson v. Howser, 12 Pa. 109.

87. Pa.—Smith v. Grim, 26 Pa. 95, 67 Am.D. 400.

88. Pa.—Hoyt v. Koons, 19 Pa. 277.

89. Pa.—Woods v. Lane, 2 Serg. & R. 53.

90. Pa.—Glancey v. Jones, 4 Yeates 213.

91. Ariz.—Colvin v. Weigold, 253 P. 633, 31 Ariz. 370.

It is essential to the validity of a sheriff's deed that there be a delivery thereof,[92] and it is immaterial that the deed was executed prematurely if not delivered prematurely.[93] Delay in delivering the deed does not affect its validity.[94]

The delivery of the deed is a mere ministerial act, which may be done anywhere, as may suit the convenience of the parties.[95] It has been held that delivery should not be made pending a motion to set aside the sale.[96]

If the deed is put in escrow, no title passes until the conditions are performed.[97]

Presumption of delivery. Where a deed has been executed, acknowledged, and recorded, no formal delivery is necessary; the law presumes a delivery under such circumstances.[98]

The delivery of a bill of sale is a delivery of the thing sold.[99]

§ 276. Form and Contents

a. In general
b. Effect of omission or misrecital

a. In General

Statutes prescribing the facts to be recited in a sheriff's deed must be complied with; in the absence of statutory requirements, an intention to pass title must appear. Recitals as to the judgment, execution, and sale are frequently required.

Compliance must be had with statutes prescribing what facts are to be recited in a sheriff's deed.[1] In the absence of statute, while no particular form of words is required in a sheriff's deed to pass the title, it must appear from the language employed that such was the intention, and it must contain apt and proper words of grant, release, or conveyance.[2] There is authority that the deed must conform to the judgment in every essential particular.[3]

It has been held that a deed is valid if it recites facts sufficient to show that the officer had authority to sell;[4] and, although there is authority that it need not state the judgment on which it is predicated,[5] it appears that it would be well for a sheriff to recite in his deed both the judgment and execution under which he acted.[6] The deed is frequently required to recite the judgment, its date, the names of the parties, the amount thereof, and the court rendering it;[7] the execution, levy, and date thereof;[8] the time and place of sale;[9] notice of sale;[10] and the name of the purchaser.[11] Matters required to be recited in the return to the execution are not therefore necessary recitals in the sheriff's deed.[12]

b. Effect of Omission or Misrecital

The validity of a sheriff's deed is not affected by the omission or misrecital of matters which are not necessary to show his authority to sell; but the omission of essential recitals is fatal.

The omission or misrecital of facts not required by statute to be stated does not render a sheriff's deed invalid.[13] On the other hand, the omission of essential recitals required by statute is fatal;[14] but,

92. Pa.—Robins v. Bellas, 2 Watts 359.
33 C.J. p 736 note 38.
93. Kan.—Cain v. Robinson, 20 Kan. 456.
33 C.J. p 736 note 39.
94. Me.—Hobbs v. Walker, 60 Me. 184.
33 C.J. p 736 note 40.
95. N.J.—Walker v. Hill, 22 N.J.Eq. 513.
33 C.J. p 736 note 41.
96. Pa.—German v. Myers, 22 Pa. Dist. 663.
33 C.J. p 736 note 44.
97. Pa.—Robins v. Bellas, 2 Watts 359.
33 C.J. p 736 note 42.
98. Pa.—Meskunas v. Puskunigis, 40 Lack.Jur. 29.
33 C.J. p 736 note 46.
99. N.C.—Cummings v. MacGill, 6 N. C. 357.
Me.—Caldwell v. Blake, 69 Me. 458.
33 C.J. p 736 note 51.
Mo.—Howell v. Sherwood, 147 S. W. 810, 242 Mo. 513.
33 C.J. p 736 note 48.

1. Ill.—Block v. Hooper, 149 N.E. 21, 318 Ill. 182.
4. Tenn.—Sipes v. Sanders, 39 S.W. 2d 739, 162 Tenn. 593.
33 C.J. p 736 note 49.
5. Tex.—McGlothlin v. Scott, Civ. App., 6 S.W.2d 129.
6. Fla.—Johnson v. McKinnon, 45 So. 23, 54 Fla. 221, 127 Am.S.R. 135, 13 L.R.A.,N.S., 874, 14 Ann.Cas. 180.
7. Mo.—Hall v. Klepzig, 12 S.W. 372, 99 Mo. 83.
33 C.J. p 736 note 52.
Recital held sufficient
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
8. Miss.—Woodward v. Sartwell, 129 Mass. 210.
33 C.J. p 736 note 53.
Recitals held sufficient
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
9. Mo.—Tanner v. Stine, 18 Mo. 580, 59 Am.D. 320.
33 C.J. p 736 note 54.
10. Ark.—Russell v. Williamson, 53 S.W. 561, 67 Ark. 80.
33 C.J. p 737 note 55.
Sufficiency
A sheriff's deed, which was executed after an execution sale of land, could not be attacked on ground that deed showed that land was not properly advertised for sale and that sale was made to highest and best bidder, where deed recited that land was sold at public auction at the courthouse door after advertising according to law, and that, after giving tenants in possession thirty days' written notice of time and place of sale, the land was offered for sale at public outcry and sold to a certain buyer.—Williams v. Williams, Tenn. App., 156 S.W.2d 363.

11. Tenn.—Morgan v. Hannah, 11 Humphr. 122.
33 C.J. p 737 note 56.

12. Mo.—Kessner v. Phillips, 88 S.W. 66, 189 Mo. 515, 107 Am.S.R. 368, 3 Ann.Cas. 1005.
33 C.J. p 737 note 57.

13. Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 128 Me. 96, 64 A.L.R. 790.
Tex.—McGlothlin v. Scott, Civ.App., 6 S.W.2d 129.
33 C.J. p 737 note 58.

14. N.C.—Weston v. John L. Roper

in so far as statutes require recitals beyond those necessary to show the authority of the officer to sell, they are merely directory, and an omission or misrecital of such matters will not affect the validity of the deed.[15]

The deed is not fatally defective because of a misrecital of, or an omission to recite, the levy,[16] the date of the levy,[17] the sale, and proceedings had thereunder,[18] the issuance and return of a justice's court execution where the property was sold under an execution issued on a transcript of the judgment,[19] the parties to the execution, where the parties to the judgment are named,[20] the name of the execution creditor[21] or debtor,[22] the exact day when judgment was rendered,[23] the date of the execution,[24] the amount of the judgment,[25] the court which issued execution,[26] the reasons why the sale was not made at the first term of court,[27] or the fact that the executions recited were issued on the judgments recited.[28] If necessary, the deed may be aided as to such omissions by the return.[29] Even a misrecital of, or an omission to recite, the judgment or execution is not fatal unless identification thereof is impossible.[30]

If a fatal defect appears from the sheriff's deed, and is not explained, the deed is void and confers no title.[31] After possession thereunder for a number of years, a deed will not be held defective if, from a reasonable construction of the language of the recitals, it can be inferred that the sheriff performed the requisite acts.[32]

When the deed varies from the return, the former must prevail.[33]

§ 277. —— Description of Property

Realty conveyed by a sheriff's deed must be so described that it may be accurately identified; but the description may be aided by reference to other instruments or by evidence aliunde. A deed purporting to convey property other than that ordered sold by the writ is void; but, where the identity of the land is certain, a variance between the description in the deed and that in the levy, return, or certificate of sale is immaterial.

Where a sheriff's deed is necessary to pass the title to real property, the premises must be properly described therein,[34] although it has been held that the purchaser takes an equitable title where the description is incorrect.[35] A description is sufficient if the property conveyed is capable of being accurately identified therefrom;[36] but a deed not describing the property with such precision that it can be reduced to a certainty is insufficient.[37] What would be a certain description in a voluntary conveyance is necessarily certain in a sheriff's deed.[38]

It is not necessary that the description of land be contained in the body of the deed;[39] it may be sufficient if it refers, for identification, to some other instrument or document.[40] Where, however, the

Lumber Co., 86 S.E. 363, 169 N. C. 398.
23 C.J. p 737 note 59.

15. Mo.—Evans v. Robberson, 4 S. W. 941, 92 Mo. 192, 1 Am.S.R. 701.
23 C.J. p 737 note 60.

16. Mo.—Butler v. Imhoff, 142 S.W. 287, 288, 238 Mo. 584.
23 C.J. p 737 note 61.

17. Me.—Crockett v. Borgerson, 152 A. 407, 129 Me. 395.

18. Mo.—Matney v. Graham, 50 Mo. 559.
23 C.J. p 737 note 72.

19. Mo.—Perkins v. Quigley, 62 Mo. 498.

20. Mo.—Gaines v. Fender, 82 Mo. 497.

21. Ga.—Glover v. Cox, 73 S.E. 1068, 137 Ga. 684, Ann.Cas.1913B 191.
23 C.J. p 738 note 74.

22. Me.—Hill v. Reynolds, 44 A. 135, 93 Me. 25, 74 Am.S.R. 329.
23 C.J. p 738 note 75.

23. Me.—People's Nat. Bank v. Nickerson, 80 A. 849, 108 Me. 341.
23 C.J. p 737 note 64.

24. Ala.—Davidson v. Kahn, 24 So. 583, 119 Ala. 364.
23 C.J. p 737 note 65.

25. Ill.—Pyatt v. Riley, 96 N.E. 570 252 Ill. 36.
23 C.J. p 737 note 66.

26. La.—Stackhouse v. Zuntz, 6 So 666, 41 La.Ann. 415.
23 C.J. p 737 note 67.

27. Mo.—Groner v. Smith, 49 Mo 318.

28. Mo.—Wack v. Stevenson, 54 Mo 481.

29. Me.—People's Nat. Bank v Nickerson, 80 A. 849, 108 Me. 341.
23 C.J. p 737 note 70.

30. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
23 C.J. p 737 note 73.

31. Ark.—Russell v. Williamson, 53 S.W. 561, 67 Ark. 80.
23 C.J. p 738 note 79.

32. Mo.—Bush v. White, 85 Mo. 339.

33. La.—Hughes v. Edson, 57 So. 154, 129 La. 866.
23 C.J. p 738 note 80.

34. Me.—Highland Trust Co. v. Hamilton, 181 A. 825, 134 Me. 64.
Tex.—Continental Supply Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 268 S.W. 444, affirming, Civ.App., 250 S.W. 1095, and rehearing denied, Com.App., 269 S.W. 1040.
23 C.J. p 738 note 84.

35. Mo.—Manning v. Kansas & T. Coal Co., 81 S.W. 140, 181 Mo. 359.

36. Tex.—Downs v. Wagnon, Civ. App., 66 S.W.2d 777, error dismissed —Bass v. Albright, Civ.App., 59 S. W.2d 891, error refused.
23 C.J. p 738 note 86.

Description held sufficient

Ark.—Mosby-Dennison & Co. v. Maxwell, 225 S.W. 646, 146 Ark. 482.
Ga.—Floyd v. Braswell, 166 S.E. 65, 45 Ga.App. 726.
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
Tex.—Clements v. Texas Co., Civ. App., 273 S.W. 993.

37. Fla.—Armour Fertilizer Works v. Burney, 143 So. 250, 106 Fla. 294.
23 C.J. p 739 note 94.

38. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Tex.—Herman v. Likens, 39 S.W. 282, 90 Tex. 448.

39. Mo.—Nelson v. Bradhack, 44 Mo. 596, 100 Am.D. 328.

40. N.C.—Dill-Cramer-Truitt Corporation v. Jacksonville Lumber Co., 112 S.E. 740, 183 N.C. 660.
23 C.J. p 739 note 89.

property cannot be identified by reference to the papers or records, the deed is void for uncertainty.[41]

Even where vague and uncertain, the description may be aided by evidence aliunde identifying the premises,[42] or showing that, in the community where the sale took place, the land was known by the description given.[43] An inherently insufficient description, however, cannot be helped out by evidence of facts tending to show what property the officer probably intended to sell.[44] If the description of the property in the deed is equally applicable to two or more tracts of land, and there is nothing in the officer's return under the writ from which the particular tract to which the description refers can be ascertained, the deed is void for uncertainty.[45] Failure to state that the land sold was situated in the county is not a fatal defect,[46] where the deed recites that the levy was made by the sheriff of a certain county, and the sale was made therein.[47]

Variance. A sheriff's deed purporting to convey property other than that ordered to be sold by the writ is void and conveys no title.[48] The sheriff cannot cure defects in the description of the land in the prior proceedings by accurately describing it in his deed.[49] Where the identity of the land is certain, a variance between the description in the deed and that in the levy or return is immaterial[50] and may be explained by parol.[51]

A variance between the deed and certificate of sale does not affect the title,[52] and the fact that a deed purports to convey more than was sold does not invalidate it as to the actual interest sold.[53]

In the case of personal property, a defective description thereof in the bill of sale is immaterial,[54] since, as shown supra § 266, title vests in the purchaser by virtue of the levy and sale.

§ 278. Recording and Registration

Unless a sheriff's deed is recorded or registered in the time and manner prescribed by statute, it is void as to subsequent bona fide purchasers or encumbrancers; but, except where statutes make recording necessary to pass legal title, an unrecorded deed is operative as against the execution defendant, his heirs or devisees, and purchasers with notice.

Purchasers at execution sales are entitled, to the same extent as purchasers at private sales, to the benefit of registry and recording acts;[55] and where such deeds are not recorded or registered within the time required by the statute,[56] or are defectively recorded,[57] they are void as to subsequent bona fide purchasers or encumbrancers. Where there are no intermediate conveyances, however, the failure of the execution purchaser to record his deed within the time required by statute will not invalidate his title;[58] and as against the execution defendant, his heirs or devisees, and purchasers with notice, the sheriff's deed is operative even where it is not recorded,[59] or where it is defectively recorded,[60] except that in some jurisdictions, by statute, an unrecorded deed passes merely the equitable title,

Reference to decree

Tex.—Gutierrez v. Rodriguez, Civ. App., 137 S.W.2d 220.

41. Tex.—Chambers v. Brown, 2 S. W. 518—Brown v. Chambers, 63 Tex. 131.

42. Tex.—Smith v. Bittick, Civ.App., 237 S.W. 331, error refused.
23 C.J. p 739 note 91.

43. N.C.—Dill-Cramer-Truitt Corporation v. Jacksonville Lumber Co., 112 S.E. 740, 183 N.C. 660.
23 C.J. p 739 note 92.

44. Minn.—Herrick v. Morrill, 33 N. W. 849, 37 Minn. 250, 5 Am.S.R. 841.

45. Tex.—Edrington v. Hermann, 77 S.W. 408.
23 C.J. p 739 note 95.

46. Tex.—Reeder v. Eidson, Civ.App., 102 S.W. 750, reversed on other grounds 105 S.W. 1113, 101 Tex. 202.

47. Tex.—Turner v. Crane, 47 S.W. 822, 19 Tex.Civ.App. 369.

48. Tex.—Pfeiffer v. Lindsay, 1 S.W. 264, 66 Tex. 123.
23 C.J. p 739 note 98.

49. Tex.—Pfeiffer v. Lindsay, supra.
23 C.J. p 739 note 99.

50. Ga.—Burson v. Shields, 129 S. E. 22, 160 Ga. 723.
23 C.J. p 739 note 1.

51. Ohio.—Matthews v. Thompson, 3 Ohio 272.
23 C.J. p 740 note 2.

52. N.Y.—Jackson v. Page, 4 Wend. 585.

53. Colo.—Finch v. Turner, 40 P. 565, 21 Colo. 287.
Ky.—Reid v. Heasley, 9 Dana 324.

Failure to mention life estate

That levy and levying officer's deed described debtor's property as "one-fifth undivided interest," without mentioning outstanding life estate, did not prevent officer from selling, or purchaser from acquiring, whatever lesser interest debtor had therein.—Floyd v. Braswell, 166 S.E. 65, 45 Ga.App. 726.

54. Miss.—Robertson v. Haun, Freem. p 265.

55. N.Y.—Hetzel v. Barber, 69 N. Y. 1.
23 C.J. p 741 note 28.

56. Ky.—Conley v. Mayo, 163 S.W. 243, 157 Ky. 445.
23 C.J. p 741 note 29.

57. La.—Colomer v. Morgan, 13 La. Ann. 202.
23 C.J. p 741 note 30.

Date of deed

Subsequent purchasers were not deprived of due notice because of the recording of a sheriff's deed which bore an erroneous date, where the deed was simply evidence that the title acquired by the purchaser at the sale had become absolute, and where the recording of the certificate of sale to such purchaser was alone sufficient, under statute, to charge all subsequent purchasers with notice of title.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

58. Tex.—Brackenridge v. Cobb, 21 S.W. 1034, 85 Tex. 448.
23 C.J. p 741 note 31.

59. Mo.—Bailey v. Winn, 12 S.W. 1048, 101 Mo. 649.
23 C.J. p 741 note 32.

60. Mo.—Mason v. Perkins, 79 S.W. 683, 180 Mo. 702, 103 Am.S.R. 591.
23 C.J. p 741 note 33.

recording being necessary to pass the legal title,[61] which thereupon relates back to the time the deed was made.[62]

The deed may be recorded in the county where the land is situated, although the judgment was rendered in another county.[63]

§ 279. Amendment, Reformation, or Cancellation

a. Amendment; reformation
b. Cancellation

a. Amendment; Reformation

Where a sheriff's deed is defective, the sheriff, or his successor in office, may make another deed, and may be compelled to do so.

Where a sheriff's deed is defective, he has the right to make another deed,[64] and he may be compelled to do so;[65] or the court, in a proper proceeding, may grant relief.[66] An obvious and palpable mistake, which a court would correct of course on motion, needs no correction and may be disregarded.[67]

The sheriff may exercise this power after the expiration of his term of office,[68] but not after the expiration of the prescribed time within which a deed must be made.[69] The sheriff's successor may also, in a proper case, execute a new deed.[70]

The new or amended deed may not, however, convey to the purchaser property not actually sold, although intended to have been sold.[71] An intervening purchaser from the judgment debtor acquires no title, since the deed, so far as the purchaser is concerned, relates back to the execution sale.[72]

The power of a court of equity to reform a sheriff's deed is considered in the C.J.S. title Reformation of Instruments § 12, also 53 C.J. p 916 note 32–p 917 note 40.

b. Cancellation

Equity may cancel a sheriff's deed where it was made under fraudulent or other unconscionable circumstances.

In the absence of statute, a sheriff's deed cannot be set aside on motion, unless there was no judgment or execution, or the court had no jurisdiction to render the judgment;[73] but equity may, on proper and sufficient grounds, cancel such a deed.[74] While mere inadequacy of consideration is not, of itself, ground for setting aside a sheriff's deed,[75] cancellation may be had where the deed was made under circumstances which were inequitable or unconscionable,[76] as, for example, where the price paid at the execution sale was shockingly low,[77] or where there was fraud[78] or other irregularity[79] in the proceedings, in which irregularity the party seeking relief did not participate.[80]

The deed may be canceled as to part and maintained as to the balance.[81]

Parties. In a suit for cancellation of a sheriff's deed, all the necessary parties must be joined;[82]

61. N.C.—McMillan v. Edwards, 75 N.C. 81.
Tenn.—Rogers v. Cawood, 1 Swan 142, 55 Am.D. 729.

62. U.S.—Wallace v. Lawrence, Pa., 29 F.Cas.No.17,101, 1 Wash.C.C. 503.
23 C.J. p 741 note 35.

63. Iowa.—Foreman v. Higham, 35 Iowa 382.

64. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 340, 80 Cal.App. 393, citing **Corpus Juris.**
23 C.J. p 740 note 5—53 C.J. p 917 note 39.

65. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
23 C.J. p 740 note 6.

66. Tex.—Andrews v. Palmer, 9 Tex. 491.
23 C.J. p 740 note 7.

67. N.C.—Millsaps v. McCormick, 71 N.C. 531.

68. Mo.—Ozark Land & Lumber Co. v. Franks, 57 S.W. 540, 156 Mo. 673.
23 C.J. p 740 note 10.
Authority to convey after expiration of term see supra § 269.

69. Ill.—Parker v. Shannon, 27 N.E. 525, 137 Ill. 376—Ryhiner v. Frank, 105 Ill. 326.

70. Mo.—Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.
23 C.J. p 740 note 12.

71. N.Y.—Jackson v. Striker, 1 Johns.Cas. 284.

72. Ill.—Kruse v. Wilson, 79 Ill. 233.
Mo.—Ozark Land Lumber Co. v. Franks, 57 S.W. 540, 156 Mo. 673.
53 C.J. p 917 note 39.
Relation back of sheriff's deed generally see infra § 283.

73. Ill.—Jenkins v. Merriweather, 109 Ill. 647.

74. Ga.—Rollins v. Cox, 138 S.E. 76, 164 Ga. 231.
23 C.J. p 740 note 22.
Cancellation held properly refused
Ga.—Sikes v. Beavers, 157 S.E. 467, 172 Ga. 180—Haynes v. Arnold, 114 S.E. 360, 154 Ga. 377.
Neb.—Selleck v. Miller, 264 N.W. 754, 130 Neb. 306.
23 C.J. p 740 note 22 [a], [b] (1).
Liability of grantee of debtor
Where judgment creditor redeemed from prior judgment, but debtor paid prior creditor and received certificate of sale, for which he got redemption money from bailiff and then quitclaimed to wife, wife was liable on equitable principles for amount with interest in suit to set aside bailiff's deed to judgment creditor.—Erlinger v. Freed, 180 N.E. 400, 347 Ill. 588.

75. Fla.—City of Sanford v. Ashton, 179 So. 765, 131 Fla. 759.
Mich.—Solomon v. Neubrecht, 1 N.W.2d 501, 300 Mich. 177.

76. Wis.—Hermance v. Braun, 285 N.W. 733, 231 Wis. 357.

77. Ala.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.

78. Fla.—City of Sanford v. Ashton, 179 So. 765, 131 Fla. 759.
23 C.J. p 741 note 24.

79. Fla.—City of Sanford v. Ashton, supra.

80. Ga.—Guthrie v. Gaskins, 192 S.E. 36, 184 Ga. 537.
23 C.J. p 741 note 25.

81. Miss.—Semmes v. Wheatley, 7 So. 430.

82. Ga.—Cain v. Bacon County, 195 S.E. 753, 185 Ga. 459.

but a decree of cancellation may be binding as to parties joined in the suit, although it is without prejudice to the rights of interested parties who were not joined therein.[83]

Pleading. The grounds on which cancellation is sought must be properly and sufficiently set out in the pleadings.[84]

Question for jury. Whether a sheriff's deed was void because the levy was excessive has been held a question for the jury.[85]

§ 280. Construction and Operation

a. Operation and effect in general
b. Construction

a. Operation and Effect in General

A sheriff's deed is generally admissible in evidence to prove title to the property described therein, and is prima facie evidence of a valid execution sale. Holdings conflict as to whether such a deed is subject to collateral attack.

Compliance must be had with statutes governing the operation and effect of sheriff's deeds.[86] It has been held that, after the acknowledgment and delivery of such a deed, the title of the vendee can be defeated only by a showing of fraud in the sale or want of authority to sell;[87] but where the bid and payment of the purchase money at an execution sale is regarded as constituting the purchaser's right, the deed is merely evidence of that right.[88]

The deed is ordinarily admissible in evidence, where the title to the property is in issue;[89] it is prima facie evidence of a valid execution sale,[90] and it is also prima facie evidence of the title of the purchaser,[91] at least as to the judgment debtor,[92] and if supported by proof of the judgment and execution.[93] If the deed is defective, it is nevertheless admissible, even in a collateral proceeding, as tending to show that the purchaser at the sale had acquired the equitable title to the land;[94] and this is true where the deed does not correctly describe the land.[95]

A third person cannot treat possession under a sheriff's deed as a nullity.[96] Where one has two sheriff's deeds to the same property, under different judgments and executions, his title is good, although one of the deeds is defective.[97] In some jurisdictions the deed is presumed valid after the lapse of a long period of years.[98]

Collateral attack. While a statute prohibiting collateral attack on sales made by public or municipal authorities has been held inapplicable to sheriff's deeds,[99] other authority regards such deeds as presumptively valid and not subject to attack in a collateral proceeding.[1]

b. Construction

A sheriff's deed is to be construed as a whole and according to the parties' intentions; as to the description of the premises conveyed, it must be construed liberally.

A sheriff's deed is to be construed according to the intentions of the parties,[2] and in ascertaining

Sheriff

In suit to cancel sheriff's deed on the ground that the judgment was illegal and void for want of service, the sheriff should have been made a party, as one having an interest and not merely as a nominal party.—Haynes v. Arnold, 114 S.E. 380, 154 Ga. 377.

Grantees of purchaser at execution sale were chargeable with knowledge of any defects in title, and therefore the heirs of such grantee should have been parties to a suit brought, after his death, to cancel the sheriff's deed.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.

83. Ala.—Dunn v. Ponceler, supra.

84. Ga.—Haynes v. Arnold, 114 S. E. 380, 154 Ga. 377.

85. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284.

86. Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.
Pa.—Media Title & Trust Co. v. Kelly, 39 A. 332, 185 Pa. 131, 64 Am. S.R. 613.
Estate or interest acquired see infra § 287.

87. Pa.—Derr v. New York Joint Stock Land Bank, 6 A.2d 899, 335 Pa. 309.

88. Mich.—Cook v. Knowles, 38 Mich. 316.
Tex.—Miller v. Alexander, 8 Tex. 36.
Necessity of deed see supra § 266.

89. N.C.—Maynard v. Moore, 70 N.C. 546.
23 C.J. p 741 note 41.

90. Ark.—McCullough v. East Arkansas Lumber Co., 20 S.W.2d 305, 180 Ark. 57.
Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.

91. N.D.—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.

Sale and sheriff's deed are sufficient evidence of title, if sheriff had authority to sell.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.

92. Cal.—Hansen v. d'Artenay, 57 P. 2d 202, 13 Cal.App.2d 293.

93. Idaho.—Jorgensen v. McAllister, 202 P. 1059, 34 Idaho 182.

94. Ky.—Jones v. Webb, 59 S.W. 858, 22 Ky.L. 1100.
23 C.J. p 741 note 42.

95. Mo.—Spence v. Spence, 141 S.W. 898, 238 Mo. 71.
23 C.J. p 742 note 43.

96. La.—Brown v. Kendall, 12 La. Ann. 347.

97. Miss.—Pickett v. Doe, 13 Miss. 470, 43 Am.D. 523.

98. La.—Brosnaham v. Turner, 13 La. 433.
Tex.—Ruby v. Von Valkenberg, 10 S.W. 514, 72 Tex. 459.

99. N.J.—McMahon v. Amoroso, 154 A. 840, 108 N.J.Eq. 263, affirming 150 A. 847, 106 N.J.Eq. 363, and certiorari denied Diamond v. McMahon, 52 S.Ct. 31, 284 U.S. 652, 76 L.Ed. 553.
Collateral impeachment of recitals see infra § 281.

1. Iowa.—Frum v. Kueny, 207 N.W. 372, 201 Iowa 327.

2. Okl.—Schuman v. Campbell, 33 P.2d 549, 183 Okl. 553.
23 C.J. p 742 note 50.

Time of levy

Where a sheriff's deed recites that he levied execution and sold the property levied on under and by authority of the execution, the presumption is that he made the levy

its intendment the whole instrument must be construed together.[3] Punctuation, or the want of it, is not decisive, if the meaning is clear.[4] It has been held that the deed is not entitled by inference to as liberal a presumption of intendment as is a direct conveyance by the grantor,[5] although it is entitled to the effect that its face imports.[6]

Construction as to property or interest conveyed. The deed, as to the description of the premises conveyed, must be construed liberally,[7] the intention of the parties being controlling.[8] A sheriff's deed conveys only the estate which it purports to convey,[9] although defendant in execution had a greater interest subject to levy and sale;[10] but a deed of all the "right, title, and interest" of the debtor passes all his interest,[11] although otherwise limited in the deed.[12] Of course, land expressly excepted in the deed does not pass.[13]

§ 281. —— Recitals as Prima Facie Evidence

a. In general
b. Judgment and execution
c. Deed of former sheriff or successor

a. In General

Recitals, in a sheriff's deed, of compliance with the requirements of statutes relating to the conduct of the execution sale are prima facie evidence of such compliance.

Recitals, in a sheriff's deed, of compliance with the various requirements of statutes relating to the conduct of the execution sale are prima facie evidence of such compliance,[14] and cannot be impeached collaterally,[15] unless the deed is void on its face.[16] In other words, where a sheriff's deed is supported by the introduction of a judgment and an execution thereunder, which would have authorized the deed if the provisions of the law relating to the sale of the judgment debtor's property were complied with, such deed is prima facie proof of compliance with all provisions of the law necessary to make it a valid transfer of the title to the sheriff's purchaser.[17] Recitals of extraneous matters, which the sheriff is not required to make,[18] or recitals which he had no authority to make,[19] are not evidence of their existence.

Recitals as curing defects. While recitals in a sheriff's deed will not validate a sale which is void on account of failure to observe some statutory requirement,[20] yet an irregularity which renders the sale voidable and not void, such as a misdescription of the property, is cured by a correct recital in the deed.[21]

before the writ expired, nothing to the contrary appearing.—Ludtke v. Bankers' Trust Co., Tex.Civ.App., 251 S.W. 600.

3. Okl.—Schuman v. Campbell, 83 P.2d 549, 551, 183 Okl. 553, quoting **Corpus Juris.**
23 C.J. p 742 note 51.

4. Me.—People's Nat. Bank v. Nickerson, 80 A. 849, 108 Me. 341.
23 C.J. p 742 note 52.

5. Mo.—Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513—Nelson v. Brodhack, 44 Mo. 596, 100 Am.D. 328.

6. Mo.—Bush v. White, 85 Mo. 339.
23 C.J. p 742 note 54.

7. Ind.—Lewis v. Owen, 64 Ind. 446.
23 C.J. p 742 note 55.
Estate or interest acquired see infra § 287.

8. N.Y.—Ocean Causeway v. Gilbert, 66 N.Y.S. 401, 54 App.Div. 118.

9. Me.—Highland Trust Co. v. Hamilton, 181 A. 825, 134 Me. 64.
23 C.J. p 742 note 57.

10. Ala.—Carrington v. Richardson, 79 Ala. 101.
23 C.J. p 742 note 57.

11. La.—Durell v. New Orleans, 13 La.Ann. 335.
Mo.—Parks v. Watson, 29 Mo. 108.

Setting aside deed as to other persons claiming interest

A sheriff's deed conveying "all the right, title, and interest" of the judgment debtor in land will not be set aside as to parties claiming a two-thirds interest therein, since, whatever the judgment debtor's interest actually is, the deed conveys no more than that, so that claimants are not injured by the deed and cannot complain of it.—Mitchell v. Indian Head State Bank, 164 A. 230, 164 Md. 193.

Use of word "heirs" is not required in order to pass the fee by a deed of "all the estate, title, and interest" which the judgment debtor has in the land.—Penienskice v. Short, 194 A. 409, 8 W.W.Harr., Del., 526.

12. S.C.—Carolina Sav. Bank v. McMahon, 16 S.E. 31, 37 S.C. 309.
23 C.J. p 742 note 59.

13. N.Y.—Bartlett v. Judd, 21 N.Y. 200, 78 Am.D. 131, overruling Mason v. White, 11 Barb. 173.
23 C.J. p 742 note 60.

14. Colo.—McCracken v. Citizens' Nat. Bank of Akron, 249 P. 652, 80 Colo. 164.
Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230—Morey v. Brown, 137 N.E. 210, 305 Ill. 284—Mayne v. Drury, 129 N.E. 77, 295 Ill. 533.
Ky.—Hopkins v. Slusher, 98 S.W.2d 932, 266 Ky. 300, 108 A.L.R. 662.
Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 128 Me. 96, 64 A.L.R. 790.
Mo.—Thorp v. Daniel, 99 S.W.2d 42, 339 Mo. 763.
Tenn.—Siler v. Siler, 277 S.W. 886, 152 Tenn. 379—Williams v. Williams, App., 156 S.W.2d 363—Cooper v. Cooper, App., 124 S.W.2d 264.
23 C.J. p 742 note 61.

15. Mo.—Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.S.R. 618.
23 C.J. p 743 note 62.
Collateral attack generally see supra § 280.

16. Ky.—Smith v. Commonwealth Land & Lumber Co., 189 S.W. 912, 172 Ky. 607.

17. Ill.—Kimmel v. Meier, 106 Ill. App. 251 (by statute).
N.M.—Springer v. Wasson, 183 P. 398.
23 C.J. p 743 note 64.

18. Ky.—Engle v. Bond-Foley Lumber Co., 189 S.W. 1146, 173 Ky. 35.

19. Ga.—Summerlin v. Hesterly, 20 Ga. 689, 65 Am.D. 639.

20. Iowa.—Cassidy v. Woodward, 42 N.W. 319, 77 Iowa 354.
23 C.J. p 744 note 85.

21. N.C.—Farrior v. Houston, 6 S.E. 72, 100 N.C. 369, 6 Am.S.R. 597.
23 C.J. p 744 note 86.

b. Judgment and Execution

In the absence of statute having a contrary effect, the entry of judgment and the issuance of execution cannot be proved by recitals thereof in the sheriff's deed, except where there is privity between the parties or where the execution or record is lost.

In the absence of statute to the contrary, the recitals of the sheriff's deed,[22] or of the bill of sale,[23] are not sufficient evidence of the entry of judgment and issuance of execution, except where there is privity between the parties,[24] or where the execution or record is lost.[25] Under some statutes, however, a party claiming under a sheriff's deed which recites the judgment, execution, and sale is relieved of the necessity of producing the judgment and writ of execution, and the party contesting the deed has the onus of establishing the invalidity of the sale or of the judgment by virtue of which it was made.[26] A deed not containing the recitals mentioned in the statute, or not showing a compliance with the law on its face, is inadmissible as evidence,[27] unless the judgment and execution are proved aliunde.[28]

In some jurisdictions a presumption as to the truth of the facts recited in the deed arises after the expiration of a prescribed period.[29]

c. Deed of Former Sheriff or Successor

The recitals in an ex-sheriff's deed are entitled to the same weight as those in a deed made while in office; but, in the absence of contrary statute, recitals in a sheriff's deed of his predecessor's acts are not evidence of the facts recited, at least where he had no personal knowledge of the facts.

The recitals in a deed made by an ex-sheriff are entitled to the same weight as those in a deed made while he was in office.[30] However, recitals in a deed by a sheriff of the acts of his predecessor in office are not evidence of the facts recited[31] in the absence of a statute making them such evidence.[32] A fortiori is this true where it appears that the sheriff had no knowledge of the facts;[33] but it has been held that recitals as to facts within the personal knowledge of the officer executing the deed are prima facie evidence.[34]

§ 282. —— Conclusiveness of Recitals

a. In general
b. Persons concluded

a. In General

The recitals of a sheriff's deed may be overcome by a showing that they are false or erroneous.

A sheriff's deed has only prima facie effect,[35] and the recitals therein being, if evidence, only prima facie evidence, see supra § 281, they may be overcome by a showing that they are false or erroneous,[36] or by a showing, from the record, that the judgment or execution, recited therein, is invalid.[37]

b. Persons Concluded

Recitals in a sheriff's deed are conclusive only as to the parties to the deed and those claiming under them.

The general rule is that the recitals in a sheriff's deed are conclusive as to all parties to the deed and

22. Ala.—Thompson v. Heiter, 192 So. 282, 238 Ala. 549.
Ky.—Hopkins v. Slusher, 98 S.W.2d 932, 935, 266 Ky. 300, 108 A.L.R. 662, quoting **Corpus Juris**—Lowther Oil & Gas Co. v. McGuire, 225 S.W. 718, 189 Ky. 681.
Or.—Oliver v. Burg, 58 P.2d 245, 154 Or. 1.
Tex.—Barrett v. Craft, Civ.App., 57 S.W.2d 387.
23 C.J. p 743 note 67.
Inferential recital in deed that judgment was rendered held insufficient.—Hopkins v. Slusher, 98 S.W 2d 932, 266 Ky. 300, 108 A.L.R. 662.

23. Tex.—Barrett v. Craft, Civ.App., 57 S.W.2d 387.
23 C.J. p 743 note 67 [d].

24. S.C.—Kennedy v. Kennedy, 68 S.E. 664, 86 S.C. 483.

25. U.S.—Thompkins v. Creighton-McShane Oil Co., Tex., 160 F. 303, 87 C.C.A. 427.
23 C.J. p 743 note 69.

26. Ala.—Thompson v. Heiter, 192 So. 282, 238 Ala. 549—Bonner v. Lockhart, 181 So. 767, 236 Ala. 171.
Mo.—Thorp v. Daniel, 99 S.W.2d 42, 339 Mo. 763—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.
Okl.—Lindeberg v. Messman, 218 P. 844, 95 Okl. 64.
Tenn.—Williams v. Williams, App., 156 S.W.2d 363—Cooper v. Cooper, 124 S.W.2d 264, 22 Tenn.App. 473.
23 C.J. p 743 note 70.

27. Mo.—McCormick v. Fitzmorris, 39 Mo. 24.
Deed held ineffective
A sheriff's deed which fails to recite the existence of a judgment should not be given effect, in the absence of legal proof that there was a judgment.—Thompson v. Heiter, 192 So. 282, 238 Ala. 549.

28. Cal.—Montgomery v. Robinson, 49 Cal. 258.
23 C.J. p 743 note 72.

29. Tex.—Giddings v. Day, 19 S.W. 682, 84 Tex. 605.
23 C.J. p 744 note 73.

30. N.C.—Curlee v. Smith, 91 N.C. 172, 178.
23 C.J. p 744 note 74.

31. N.C.—Edwards v. Tipton, 77 N. C. 222.
23 C.J. p 744 note 75.

32. Tenn.—York v. Byars, 173 S.W. 435, 131 Tenn. 38—Williams v. Williams, App., 156 S.W.2d 363.

33. N.C.—McPherson v. Hussey, 17 N.C. 323.

34. Ky.—Phillips v. Jamison, 14 B. Mon. 579.

35. Colo.—Bailey v. Wilkinson, 66 P.2d 603, 103 Colo. 405.
Deed as prima facie evidence of sale and title see supra § 280.

36. Mass.—Wade v. Merwin, 28 Mass. 280.
Tenn.—Williams v. Williams, App., 156 S.W.2d 363.
23 C.J. p 744 note 79.
Recital in certified copy of sheriff's deed that land was sold on a day not authorized by law held to be clerical error of recorder.—Ludtke v. Bankers' Trust Co., Tex.Civ. App., 251 S.W. 600.

37. Or.—Willamette Real Estate Co. v. Hendrix, 42 P. 514, 28 Or. 485, 52 Am.S.R. 800.
23 C.J. p 744 note 80.

those claiming under them,[38] but not as against the judgment debtor[39] or against strangers,[40] particularly parties claiming adversely thereto.[41]

§ 283. —— Relation Back

The general rule is that the sheriff's deed relates back to, and conveys, whatever title or interest the execution defendant had at the time of the sale, the deed being treated as if executed at the time of the creation of the lien under which such sale was made; but this rule is not allowed to operate so as to cut off the intervening rights of strangers without notice.

Although there is contrary authority,[42] the general rule is that the sheriff's deed relates back to, and conveys, whatever title or interest the execution defendant had at the time of the sale,[43] so as to cut off the claims of encumbrancers and purchasers whose interest attached subsequent to the sale of the property,[44] even where the deed is given after expiration of the period of redemption,[45] or where a long period has elapsed between the sale and the delivery of the deed.[46] This rule is not allowed to operate, however, so as to cut off the intervening rights of strangers without notice.[47]

In order to preserve and make effectual the lien under which the execution sale was made, it has been frequently held that the deed must be treated as if executed on the date when such lien was created,[48] so as to cut off intermediate transfers[49] or liens,[50] whether that day is the day of the rendition or docketing of the judgment,[51] or the day of the levy of the execution,[52] or the day of the levy of the attachment where the execution was issued in an attachment suit,[53] provided the attachment proceedings are regular.[54] The title relates back to the inception of the lien notwithstanding the sheriff's deed purports to convey the debtor's interest at a specified later date.[55] This rule as to relation back has been held inapplicable, however, where a long period of years has intervened between the giving of the certificate of sale and the deed, and the judgment lien has ceased in the meantime because of the legal presumption of payment of the judgment.[56]

XI. TITLE, RIGHTS, AND LIABILITIES OF PURCHASER

§ 284. In General

So far as the rights of a purchaser at an execution sale are concerned, such sale has the same force and effect as a voluntary conveyance by the debtor. A judgment creditor purchasing at an execution sale acquires the same rights as a stranger would acquire.

In so far as the rights of a purchaser at an execution sale are concerned, a sale on an execution against a judgment debtor has the same force and effect as a voluntary conveyance by the debtor;[57] and the purchaser bears the same relationship to the debtor that he would bear if he were the purchaser under a voluntary conveyance.[58] It has

38. U.S.—French v. Edwards, Cal., 13 Wall. 506, 20 L.Ed. 702.
23 C.J. p 744 note 81.

39. Ky.—Spragins v. Russell, 4 Ky. L. 255, 11 Ky.Op. 717.
N.Y.—Hasbrouck v. Burhans, 42 Hun 376.

40. Ky.—Engle v. Bond Foley Lumber Co., 189 S.W. 1146, 173 Ky. 35
23 C.J. p 744 note 83.

41. Cal.—Donahue v. McNulty, 24 Cal. 411, 85 Am.D. 78.

42. S.C.—Leger v. Doyle, 45 S.C.L. 109, 70 Am.D. 240—Holmes v. McMaster, 18 S.C.Eq. 340.

43. Idaho.—Syster v. Hazzard, 229 P. 1110, 39 Idaho 580.
La.—Shreveport Long Leaf Lumber Co. v. Hughes, 1 La.App. 706.
23 C.J. p 744 note 88.

Action to recover land

(1) In several jurisdictions a sheriff's deed made pending an action for the recovery of land may be admitted in evidence, on the theory of relation back, to prove that grantee had title at the commencement of the suit.—Farlin v. Sook, 1 P. 123, 30 Kan. 401, 46 Am.R. 100—23 C.J. p 745 note 4.

(2) There is, however, contrary authority.—Richardson v. Thornton, 52 N.C. 458—Davis v. Evans, 27 N.C. 525.

44. Ky.—Greer v. Wintersmith, 4 S.W. 232, 85 Ky. 516, 9 Ky.L. 96, 7 Am.S.R 613.
23 C.J. p 745 note 89.

45. Vt.—Wilson v. Spear, 34 A. 429, 68 Vt. 145.
23 C.J. p 745 note 90.

46. N.Y.—Jackson v. Ramsay, 3 Cow. 75, 15 Am.D. 242.

47. Mo.—Merchants' Bank v. Evans, 51 Mo. 335.
23 C.J. p 745 note 92.

48. Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418.
23 C.J. p 745 note 93.

Title to personalty

When levy and sale are made under execution, title to personalty relates back to inception of lien and takes precedence over all subsequent transfers and encumbrances.—Birmingham News Co. v. Barron G. Collier, Inc., 103 So. 839, 212 Ala. 655.

49. Ala.—Crawford Mercantile Co. v. Anderton, 60 So. 874, 179 Ala. 573.

50. Ky.—Greer v. Wintersmith, 4 S.W. 232, 85 Ky. 516, 9 Ky.L. 96, 7 Am.S.R 613.

51. N.Y.—Maroney v. Boyle, 36 N.E 511, 141 N.Y. 462, 38 Am.S.R. 821, affirming 17 N.Y.S. 275.
23 C.J. p 745 note 96.

52. Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418.
23 C.J. p 745 note 98.

53. Mont.—MacGinniss Realty Co. v. Hinderager, 206 P. 436, 63 Mont. 172.
23 C.J. p 745 note 99.

54. Cal.—San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co., 102 P. 548, 10 Cal.App. 415.

55. Mo.—Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.S.R. 618.

56. N.Y.—Dixon v. Dixon, 85 N.Y.S. 609, 89 App.Div. 603, reversing 78 N.Y.S. 255, 38 Misc. 652.

57. Cal.—In re Pierce's Estate, 81 P.2d 1037, 28 Cal.App.2d 8.
Ga.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.
Tenn.—Pritchett-Thomas Co. v. Pennebaker, 10 Tenn.App. 425.

58. Iowa.—Frum v. Kueny, 207 N.W. 372, 201 Iowa 327.

been held that the purchaser does not stand in the right of the sheriff, but is the privy of the party under whose execution the sale was made,[59] although it has also been held that the purchaser stands in no sort of legal privity of contract with the judgment creditor.[60] Where there is a statute fixing the rights of execution purchasers, the rights of a purchaser are those fixed by the statute rather than those fixed by the decree.[61]

In order that a purchaser may make out his title to the property purchased, he must show a valid judgment, or its equivalent, and an execution issued thereon;[62] but that is all he must do, and he is not required to search for defects or irregularities.[63]

A judgment creditor who purchases property at a valid execution sale acquires the same rights which a stranger to the record would acquire by being a successful bidder and purchaser.[64] If execution creditors purchase under an agreement that their respective interests shall be in proportion to the relative amount of their claims at the time of the sale, their interest is a joint one and each is bound by the acts of the others.[65]

§ 285. Effect of Satisfaction of Judgment

It is commonly held that the satisfaction of a judgment prior to the execution sale renders the sale void, and that the purchaser takes no title although acting in good faith and without notice.

While in some jurisdictions, especially in the earlier decisions, the rule is laid down that a bona fide purchaser without notice will acquire a good title, even though the execution is paid off or the judgment satisfied before sale, where the satisfaction does not appear of record at the time of or before the sale,[66] the doctrine of the more numerous and more recent decisions is that the satisfaction of the judgment prior to an execution sale will render such sale void, and the purchaser will take no title thereunder, even though he bought in good faith and without notice.[67] In any event, no title passes if the purchaser had actual or constructive notice.[68]

Satisfaction of the judgment after the sale does not affect the title of a bona fide purchaser.[69]

§ 286. Property Passing by Sale

What property passes by execution sale depends, in so far as determined by the description in the proceedings, on the particular circumstances, subject to the rule that the levy controls the subsequent proceedings. In general, land purchased at execution sale includes interests in immature and unsevered crops, fixtures, minerals, and timber situated thereon.

What property passes by execution sale, as determined by the description in the levy or the notice of sale or officer's statement made at the sale, depends on the particular circumstances and description of each sale,[70] subject to the rule that the levy of an execution controls the subsequent proceedings in determining what property passes by the sale.[71] Particular property does not pass where it was sold, but not levied on,[72] or where it was levied on but was not included in the notice of sale or actually sold,[73] or where it was neither levied on, advertised, nor sold.[74] A sale of a particular tract as containing a certain number of acres will vest the whole tract in the purchaser,

59. Mich.—McKay v. Kilburn, 4 N. W. 539, 42 Mich. 614.

60. Ind.—Currier v. Elliott, 39 N. E. 554, 141 Ind. 394.

61. Ariz.—Western Land & Cattle Co. v. National Bank of Arizona at Phœnix, 239 P. 299, 29 Ariz. 51, denying motion 236 P. 725, 28 Ariz. 270.

62. Ky.—Fortney v. Moore, 8 Ky.Op. 288.

63. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
Effect of defects or irregularities see infra §§ 298–300.

64. Fla.—City of Sanford v. Ashton, 179 So. 765, 131 Fla. 759.

65. N.D.—Murphy v. Teutsch, 132 N.W. 435, 22 N.D. 102, 25 L.R.A., N.S., 1139, Ann.Cas.1913E 1185.

66. Del.—Jones v. Short, Super. 77 A. 968.
23 C.J. p 750 note 58.
Effect of reversal of judgment see infra § 301.

67. Ga.—Mayor and Council of City of Millen v. Clark, 17 S.E.2d 742, 743, citing **Corpus Juris.**
Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.
23 C.J. p 322 note 30, p 750 note 59.
Partial satisfaction
Purchaser at a sheriff's sale is bound to take notice of how much of the judgment has been paid, and he cannot obtain title if the property was sold to satisfy a substantial sum which has already been paid on the judgment.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

68. Mo.—Baird v. Given, 70 S.W. 697, 170 Mo. 302.
23 C.J. p 750 note 60.

69. Pa.—Gibson v. Winslow, 38 Pa. 49.
23 C.J. p 750 note 61.

70. Pa.—Hoffman v. Danner, 14 Pa. 25.
23 C.J. p 750 note 63.
Construction of deed as to property or interest conveyed see supra § 280.

71. Ky.—Taylor & Crate v. Asher, 4 S.W.2d 385, 223 Ky. 574.
23 C.J. p 750 note 64.

72. N.Y.—Craftsman v. Whinston, 198 N.E. 611, 269 N.Y. 7, reversing 277 N.Y.S. 517, 243 App.Div. 731, and answering certified questions 278 N.Y.S. 913, 243 App.Div. 801.
Pa.—Samule v. Knight, 9 Pa.Super. 352, 43 Wkly.N.C. 392.

73. Okl.—Glenn v. Robertson, 177 P. 372, 74 Okl. 157.

74. La.—Nouvet v. Bollinger, 15 La. Ann. 293.
The sale of a leasehold interest in a fishpond will not pass title to the fish therein, where they are not mentioned in the levy and notice of sale. —Murphy v. Hitchcock, 22 Hawaii 665, Ann.Cas.1917B 976.

although it in fact contains a much greater number;[75] a fortiori, where a tract of land is levied on and sold as such and described as containing a designated quantity of land "more or less," the purchaser takes the whole tract without reference to the computed quantity which it is said to contain.[76]

Crops. While there is a contrary view,[77] growing crops belonging to the owner of the land, before severance, are commonly held to pass with a sale of the land on execution,[78] unless there be an express reservation in the deed,[79] although it has also been held that the sheriff cannot reserve growing crops which would otherwise vest in the purchaser.[80] An attempted execution sale of immature crops as personalty passes no title to the purchaser,[81] at least as against another execution purchaser of the land on which the crops are being grown.[82] A purchaser of land at a sale under execution against the owner thereof acquires no interest in the growing crops beyond that of the judgment debtor.[83] Where the judgment debtor has leased the land to a third person, and the tenant is entitled to the crop, as where he pays a cash rent, the execution purchaser does not acquire title thereto;[84] but the right of the purchaser to growing crops exists against a lessee who after the sale, sows a crop which will not mature before the time when the execution purchaser will be entitled to possession.[85]

Crops which have been severed before the execution sale do not pass as a part of the realty;[86] and in some states a crop fully matured is not considered a part of the realty and does not pass on an execution sale of the realty.[87] Where the legal title to property sold on execution does not pass until the sale is confirmed, the title to a crop harvested after sale but before confirmation does not pass to the purchaser,[88] but crops planted after confirmation pass to the purchaser.[89] The purchaser of land cannot maintain trespass for the crops where he does not obtain possession by ejectment;[90] and, where the purchaser does not take possession of the land and allows the judgment debtor to remain in possession and to sow and grow a crop, neither the purchaser nor his grantee is entitled to enter and remove a portion of the crops as owner thereof.[91]

Fixtures and improvements. The general rule is that a levy on, and sale of, realty will pass to the purchaser all fixtures and improvements thereon,[92] including those erected or made by the debtor after the sale and before the sheriff's deed.[93] However, if a fixture is detached and converted into personalty by the agreement of the owners and the lien creditors, it does not pass.[94]

Minerals. The purchaser of land at an execution sale acquires whatever interest the debtor may have had in the minerals under the land.[95]

75. Pa.—Zeigler v. Houtz, 1 Watts & S. 533.

76. Del.—Doe v. Roe, 8 Del. 326.

77. Ohio.—Herron v. Herron, 25 N. E. 420, 47 Ohio St. 544, 21 Am.S.R. 854, 9 L.R.A. 667.
23 C.J. p 751 note 78.

78. N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.
Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297.
23 C.J. p 751 note 79.

79. N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.

80. Ga.—Frost v. Render, 65 Ga. 15.

81. Iowa.—Ellithorpe v. Reisdesil, 32 N.W. 238, 71 Iowa 315.

82. Pa.—Long v. Seavers, 103 Pa. 517—Loose v. Scharff, 6 Pa.Super. 153.

83. Ga.—Blitch v. Lee, 41 S.E. 275, 115 Ga. 112.
23 C.J. p 751 note 81.

84. Mo.—Johnson v. Cook, 70 S.W. 526, 96 Mo.App. 442.
23 C.J. p 751 note 82.

85. Iowa.—Frum v. Kueny, 207 N. W. 372, 201 Iowa 327—Wheeler v. Kirkendall, 25 N.W. 829, 67 Iowa 612.

86. Miss.—Reily v. Carter, 23 So. 435, 75 Miss. 798, 65 Am.S.R. 621.
23 C.J. p 751 note 85.

87. Kan.—Myers v. Steele, 158 P. 660, 98 Kan. 577, L.R.A.1917C 4.
23 C.J. p 751 note 83.

88. Neb.—Yeazel v. White, 58 N.W. 1020, 40 Neb. 432, 24 L.R.A. 449.

89. Neb.—Jaques v. Dawes, 92 N.W. 570, 3 Neb., Unoff., 752.

90. Ohio.—Beggs v. Thompson, 2 Ohio 95, 15 Am.D. 539.

91. Pa.—Potter v. Lambie, 21 A. 888, 142 Pa. 535.

92. Pa.—Wright v. Chestnut Hill Iron Ore Co., 45 Pa. 475.
23 C.J. p 750 note 72.

93. Colo.—Hayes v. New York Gold Min. Co., 2 Colo. 273.

94. Neb.—Dewey v. Walton, 48 N.W. 960, 31 Neb. 819.
Pa.—Harlan v. Harlan, 20 Pa. 303.

95. Pa.—Burke v. Kerr, 19 A.2d 382, 341 Pa. 304, affirming 15 A.2d 685, 142 Pa.Super. 37.

Interest under mining lease

(1) An agreement by which landowners "granted, bargained, sold, let and leased" limestone under land, with right of ingress to mine and remove limestone, in consideration of royalty for limestone mined, was a "sale of limestone in place as land", and landowners retained interest in limestone to which lien of judgment against landowners attached, and such interest passed to purchasers of land at sheriff's sale pursuant to fieri facias issued on judgment.—Burke v. Kerr, supra.

(2) Where fee owner of seven eighths mineral estate leased interest retaining one eighth royalty in seven eighths of minerals and judgment creditor thereafter levied on lessor's interest, elements of lessor's interest, consisting of royalty rights, right to demand and receive payment of rentals in lieu of drilling operations, and inchoate right to reversion of the working interest held by the lessee, were merged together in one ownership to form under statute "all the right, title, interest and claim which the defendant in execution had in and to the property," and deed to purchaser at execution sale conveyed such interest, which included lessor's "possibility of reverter."—Jensen v. Wilkinson, Tex.Civ.App., 133 S.W.2d

Timber and trees. Standing timber on land subject to a judgment lien passes to the purchaser of the land at the execution sale;[96] and the same is true of timber which has been cut at the time of the sale but which is still on the property and has not been converted into lumber or articles and which has not been withdrawn or excepted from the sale.[97] The purchaser at an execution sale, as against the judgment debtor, takes title to nursery trees sold on the execution and growing on the land, and has the right to remove them;[98] but one who purchased merely the standing timber and not the land has no right to operate a turpentine orchard in connection with such timber, and therefore cannot convey such right.[99]

§ 287. Estate or Interest Acquired

a. In general
b. Particular interests

a. In General

The doctrine of caveat emptor applies to execution sales, and, subject to certain exceptions, the purchaser takes whatever title the execution debtor has, no more and no less.

Except where fraud intervenes,[1] the rule is well settled that the doctrine of caveat emptor applies to execution sales, and that purchasers thereat must take notice of the title for which they bid;[2] thus there is no implied warranty of title.[3] However, where there is an express warranty as to the quantity of property on sale, the doctrine of caveat emptor does not apply as to quantity.[4]

Subject to the exceptions considered later in this subdivision, the purchaser under a valid execution sale takes just what title or interest defendant in the execution has, no more and no less;[5] and, except in so far as he may have the right to redeem,

982, error dismissed, judgment correct.

96. Ga.—Shirling v. Security Loan & Abstract Co., 145 S.E. 840, 167 Ga. 489.
Pa.—Havens v. Pearson, 6 A.2d 84, 334 Pa. 570.
Purported sale by debtor held ineffective as against sheriff's sale.—Havens v. Pearson, supra.

97. La.—Frank v. Magee, 22 So. 739, 49 La.Ann. 1250.
23 C.J. p 751 note 91.

98. N.Y.—Batterman v. Albright, 25 N.E. 856, 122 N.Y. 484, 19 Am.S.R. 510, 11 L.R.A. 800, affirming 6 N.Y.St. 334.

99. Ala.—Dixie Grain Co. v. Quinn, 61 So. 886, 181 Ala. 208.

1. Idaho.—Quirk v. Bedal, 248 P. 447, 42 Idaho 567.
23 C.J. p 746 note 10.
If the purchaser takes title to any interest in land sold under execution, the sale is valid as to him, in the absence of fraud.—Williams v. Williams, Tenn.App., 156 S.W.2d 363.

2. U.S.—Hunn v. Lewis, C.C.A.Iowa, 25 F.2d 271, 275, citing **Corpus Juris**, and certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549.
Ark.—Roetzel v. Beal, 116 S.W.2d 591, 196 Ark. 5.
Cal.—Puccetti v. Girola, App., 119 P. 2d 200.
Ga.—Brady v. Smotherman, 180 S.E. 862, 51 Ga.App. 480.
Ill.—Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629.
Ind.—First State Bank of Dunkirk v. Cunningham, 7 N.E.2d 537, 103 Ind.App. 310.
Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.
Mont.—Stauffacher v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324—Fox v. Curry, 29 P. 2d 663, 96 Mont. 212—Short v. Karnop, 275 P. 278, 84 Mont. 276—MacGinniss Realty Co. v. Hinderager, 206 P. 436, 63 Mont. 172.
Okl.—Goldenstern v. Gavin, 102 P. 2d 582, 187 Okl. 338.
Pa.—Miners Nat. Bank of Wilkes-Barre v. Bowman, 6 A.2d 286, 334 Pa. 524—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131.
Tenn.—Estes v. Doty, 90 S.W.2d 754, 169 Tenn. 683.
23 C.J. p 746 note 11.
Purchasers with notice
Rule of caveat emptor applies in its utmost vigor and strictness, to purchasers of lands at execution sale with notice of lease and of possession and operation thereunder.—Cedrom Coal Co. v. Moss, 159 So. 225, 230 Ala. 32.

3. Ill.—Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629.
Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
Tenn.—Estes v. Doty, 90 S.W.2d 754, 755, 169 Tenn. 683, citing **Corpus Juris.**
23 C.J. p 746 note 12.

4. Idaho.—Works v. Byrom, 128 P. 551, 22 Idaho 794.
23 C.J. p 746 note 13.

5. Ariz.—Steinfeld v. Copper State Mining Co., 290 P. 155, 37 Ariz. 151—City of Phœnix v. Hughes, 286 P. 191, 36 Ariz. 399—Colvin v. Weigold, 253 P. 633, 31 Ariz. 370.
Ark.—Roetzel v. Beal, 116 S.W.2d 591, 196 Ark. 5.
Cal.—Rabbit v. Atkinson, 113 P.2d 14, 44 Cal.App.2d 752—Cook v. Huntley, 112 P.2d 889, 44 Cal.App. 2d 635—Porter v. Nelson, 109 P. 2d 996, 42 Cal.App.2d 750—Schwartz v. Mead, 3 P.2d 48, 116 Cal.App. 606—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383—Loescher v. Whipple, 286 P. 741, 104 Cal.App. 782.
Colo.—Reagan v. Dick, 293 P. 333, 88 Colo. 122.
Del.—Stidham v. Brooks, 5 A.2d 522, 1 Terry 110.
Fla.—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 98 Fla. 186.
Ga.—Brady v. Smotherman, 180 S.E. 862, 864, 51 Ga.App. 480, citing **Corpus Juris.**
Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 514, citing **Corpus Juris**—State v. Wood, 271 P. 5, 46 Idaho 724.
Ill.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622—Dorris v. Johnson, 2 N.E.2d 74, 363 Ill. 236, 104 A.L.R. 629—Klein v. Mangan, 22 N.E.2d 269, 301 Ill.App. 203, transferred, see 17 N.E.2d 958, 369 Ill. 645.
Iowa.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304—Zimmerman v. Horner, 272 N.W. 148, 223 Iowa 149—First Trust Joint-Stock Land Bank of Chicago, Ill. v. Ogle, 221 N.W. 537, 208 Iowa 15.
Ky.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62.
Md.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217—Griffin v. Wilmer, 111 A. 114, 136 Md. 623.
Mo.—Thorp v. Daniel, 99 S.W.2d 42, 339 Mo. 763.
Mont.—Hillsdale College v. Thompson, 44 P.2d 753, 99 Mont. 400—Stauffacher v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324—Fox v. Curry, 29 P.2d 663, 96 Mont. 212—Short v. Karnop, 275 P. 278, 84 Mont. 276—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122—MacGinniss Realty Co. v. Hinderager, 206 P. 436, 63 Mont. 172.

see § 253 supra, the defendant loses all the title and interest he had in the property.[6] Thus the purchaser at an execution sale, even though in good faith, acquires no title where the judgment debtor had none,[7] as where he transferred it before the lien of the judgment attached to it.[8]

The contention that a sheriff's sale is analogous to a sale in market overt, and that for that reason a purchaser takes title to property sold thereat, although the debtor had none, has been explicitly repudiated.[9] The sheriff's deed passes the same title which a deed of bargain and sale executed by the debtor would pass.[10] In other words, the sale operates as a conveyance of the title which the debtor was capable of conveying.[11]

It is held that a purchaser at a sheriff's sale on execution acquires no better title than the judgment creditor would have received had he purchased,[12]

N.J.—Zubler v. Porter, 120 A. 194, 98 N.J.Law 444, 27 A.L.R. 822—Fox v. Cardone, 136 A. 923, 5 N.J.Misc. 395.
N.C.—Miller v. Little, 194 S.E. 92, 93, 212 N.C. 612, citing **Corpus Juris.**
Okl.—Goldenstern v. Gavin, 102 P.2d 582, 187 Okl. 338—Streeter v. Anderson, 43 P.2d 53, 172 Okl. 113.
Pa.—Taylor v. Bailey, 185 A. 699, 323 Pa. 278—Broadway Nat. Bank of Scottdale v. Diskin, 161 A. 470, 105 Pa.Super. 279—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131—Bishop & Babcock Sales Co. v. Seltzer, 29 Pa.Dist. & Co. 325, 26 North. Co. 29—Universal Credit Co. v. McNair, 17 Pa.Dist. & Co. 377.
Tenn.—Estes v. Doty, 90 S.W.2d 754, 169 Tenn. 683.
Tex.—Peurifoy v. Wiebusch, 117 S.W. 2d 773, 132 Tex. 36, reversing Thomason v. Wiebusch, Civ.App., 89 S. W.2d 452—Kerr v. Clark, Civ.App., 148 S.W.2d 880.
Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297—State, by and through State Land Board, v. Blake, 20 P.2d 871, 88 Utah 584, modified on other grounds 56 P.2d 1347, 88 Utah 600—Pincock v. Kimball, 228 P. 221, 64 Utah 4.
Vt.—Lowe v. Green Mountain Power Corporation, 11 A.2d 219, 111 Vt. 112.
23 C.J. p 746 note 15.
Construction of deed as to property or interest conveyed see supra § 280.

Possession claimed under sheriff's deed held limited to property therein described belonging to judgment debtor.—Reagan v. Dick, 293 P. 333, 88 Colo. 122.

Sales by United States marshals are governed by the same rules as govern sheriff's sales in the state, and the purchaser acquires only defendant's interest.—Green v. Rountree, 116 S.E. 116, 155 Ga. 1.

Rights of parties other than judgment debtor in the property are not affected by the execution sale.
Ky.—McMillen v. Bailey, 112 S.W.2d 1009, 271 Ky. 628.
Or.—Endicott v. Digerness, 205 P. 975, 103 Or. 555.

Execution for costs
Title of purchaser at execution sale to satisfy decrees fixing liens against lots, awarded nonresident minor defendants in partition suit, for court costs, was held superior to title of one claiming under subsequent deeds from one of such defendants.—Salinas v. Jones, D.C.Tex., 60 F.2d 1049.

Stock in defunct corporation
Rights acquired by purchaser of stock in defunct corporation at execution sale are merely choses in action.—Hollingsworth v. Multa Trina Ditch Co., C.C.A.Colo., 51 F.2d 649.

6. La.—Washington v. Page, 119 So. 888, 9 La.App. 282.

Debtor as mortgagee
Judgment debtor loses all title as mortgagee on sale of note and mortgage under execution, and the fact that mortgagor furnished money for purchase, below face value, of note and mortgage at execution sale, did not give mortgagee right to collect balance from mortgagor.—Buter v. Slattery, 237 N.W. 232, 212 Iowa 677.

7. Colo.—Salisbury v. La Fitte, 121 P. 952, 21 Colo.App. 13, affirmed 141 P. 484, 57 Colo. 358.
Ga.—Garmon v. Davis, 12 S.E.2d 209, 63 Ga.App. 815—Commercial Credit Co. v. Britt, 186 S.E. 449, 53 Ga.App. 430.
Ill.—Binz v. Michels, 220 Ill.App. 83.
Ky.—Inter-Mountain Coal & Lumber Co. v. Boggs, 56 S.W.2d 705, 247 Ky. 123.
La.—Perkins v. Louisiana Land & Exploration Co., 132 So. 499, 171 La. 913—Creston Lumber Co. v. Cockerham's Estate, 2 La.App. 29.
Mont.—Bowen v. First State Bank, 221 P. 527, 69 Mont. 223.
Pa.—National Cash Register Co. v. Sorto, 161 A. 766, 106 Pa.Super. 106—Broadway Nat. Bank of Scottdale v. Diskin, 161 A. 470, 105 Pa Super. 279.
S.D.—Smith v. Blackford, 228 N.W. 466, 56 S.D. 360.
Wis.—United Shoe-Repairing Mach. Co. v. Asoumanakis, 178 N.W. 312, 172 Wis. 102.
23 C.J. p 747 note 16.

Void sale
If sheriff attempts to sell property other than that of judgment debtor, sale is void, and purchaser acquires no title to property sold.—Steinfeld v. Copper State Mining Co., 290 P. 155, 37 Ariz. 151.

Prior sale under trust deed
Purchaser at execution sale acquires no interest in property which debtor had conveyed in trust to secure debt and which trustee under trust deed had sold prior to entry of judgment.—Cook v. Huntley, 112 P.2d 889, 44 Cal.App.2d 635.

Prior execution sale; effect of lien
A judgment creditor, who purchased at attempted execution sale, acquired no title where property had been sold to another at prior valid execution sale, even if purchaser at subsequent sale had lien on property, where owner of property was not made a party to judgment under which subsequent sale was made or action in which such judgment was rendered.—Arizona Power Corporation v. Smith, C.C.A.Ariz., 119 F.2d 888.

8. Iowa.—Zimmerman v. Horner. 272 N.W. 148, 223 Iowa 149.
23 C.J. p 748 note 17.

9. Vt.—Sanborn v. Kittredge, 20 Vt. 632, 50 Am.D. 58.
23 C.J. p 748 note 18.

10. Colo.—McCracken v. Citizens' Nat. Bank of Akron, 249 P. 652, 80 Colo. 164.
Iowa.—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.
N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.
23 C.J. p 748 note 19.

Quitclaim deed
The legal effect of a sheriff's deed is at least equal to that of a quitclaim deed executed by the debtor.—Frink v. Roe, 11 P. 820, 70 Cal. 296.

Sheriff's deed as evidence
A sheriff's deed has been held to be prima facie evidence that the grantee holds all title and interest in the land conveyed that was held by the judgment debtor
Okl.—Lindeberg v. Messman, 218 P. 844, 95 Okl. 64.
Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.

11. Mass.—Cressey v. Cressey, 102 N.E. 314, 215 Mass. 65.
23 C.J. p 748 note 20.

12. N.Y.—Frost v. Yonkers Sav Bank, 70 N.Y. 553, 26 Am.R. 627, modifying 8 Hun 26, and followed

or than the judgment creditor could give if he were allowed to seize the property and sell it by virtue of his judgment without an execution.[13] Where the judgment creditor purchases the property, the general rule applies, and he acquires only the actual interest of the debtor;[14] and if the debtor is the purchaser, he acquires no new title.[15]

Exceptions to rule. The rule that the whole title of the debtor, and that only, passes is subject to a number of exceptions, as where the interest sold is not subject to execution, in which case no title passes;[16] where a lesser interest in levied on than that which the debtor owns;[17] where the sale does not purport to be of all the debtor's interest;[18] where a third person who owns the property or has some interest therein has by his acts, words, or conduct estopped himself from asserting his title or interest;[19] where the sale is expressly subject to liens or conditions, in which case it is generally held that the purchaser cannot attack the lien or disregard the conditions, see infra § 291; where the sale is on execution of a vendor's judgment for purchase money, see infra § 291; or where the doctrine of bona fide purchaser is applied, see infra §§ 293-297.

Agreement to buy or hold for execution debtor. A parol agreement to purchase land sold on execution and reconvey to the debtor on the payment by him to the purchaser of the amount paid out by the latter will be enforced where, by reason of such an agreement, others refrain from bidding at the sale, or the purchaser procures the land on terms more favorable than he otherwise would have obtained, even though the statute of frauds be pleaded.[20] However, a mere naked verbal agreement by a purchaser at a sheriff's sale, who purchases with his own money, that he will hold the premises in trust for the debtor does not vest any equitable estate in the debtor.[21]

b. Particular Interests

The rule, with its exceptions, that an execution purchaser acquires only the interest which the debtor had has been applied to various types of interest in property, including equity of redemption, life estate, estate for years, leasehold, remainder or reversion, rights under a contract of purchase, and part interest in property.

The rule stated in subdivision a of this section, to the effect that, subject to certain exceptions, the purchaser acquires only the interest which the debtor had, has been applied to various particular interests, such as the interest of a trustee in property,[22] the interest of a beneficiary of a trust,[23] the interest of a devisee under a will,[24] and other

in Clute v. Emmerich, 2 N.E. 6, 99 N.Y. 350.

Corpus Juris cited as authority in analogous situation of sale of property subject to first mortgage by second mortgagee under power of sale contained in second mortgage.—Turner v. Binninger, Wyo., 112 P.2d 568, 570.

13. Ga.—Coates v. Jones, 82 S.E. 649, 142 Ga. 237.
N.Y.—Frost v. Yonkers Sav. Bank, 70 N.Y. 553, 26 Am.R. 627, modifying 8 Hun 26.

14. Okl.—Harris v. Southwest Nat. Bank of Dallas, Tex., 271 P. 683, 133 Okl. 152.
Judgment creditor as bona fide purchaser see infra § 295.

15. La.—Scott v. Leonard, 30 So. 841, 106 La. 317.

16. Mo.—Gentemann v. Dyer, App., 140 S.W.2d 75, transferred, see, Sup., 132 S.W.2d 1022.
Tex.—Broussard Trust v. Perryman, Civ.App., 134 S.W.2d 308, error refused.
23 C.J. p 748 note 24.

17. Ga.—Clarke v. Mayor and Council of Millen, 200 S.E. 698, 187 Ga. 185.
23 C.J. p 748 note 25.

18. Ga.—Oglesby v. Hynds Mfg. Co., 22 S.E. 328, 96 Ga. 748.
23 C.J. p 748 note 26.

19. Ky.—Spears v. Weddington, 142 S.W. 679, 146 Ky. 434.
23 C.J. p 748 note 30.
Estoppel to assert lien against execution purchaser see infra § 291.

Facts insufficient for estoppel
Of course, this rule does not apply where the matters relied on are not sufficient to constitute an estoppel.
Ill.—Standard Computing Scale Co. v. Dombrowski, 257 Ill.App. 409.
Ky.—Spears v. Weddington, 142 S. W. 679, 146 Ky. 434.

The burden of proving the facts working an estoppel rests on the execution purchaser.—Hughes v. Williams, 105 N.E. 1056, 218 Mass. 448

20. N.C.—Mulholland v. York, 82 N. C. 510, disapproving McKee v. Vail, 79 N.C. 194.
23 C.J. p 749 note 54.

Specific performance
A bill in equity will lie to compel specific performance of such an agreement.
U.S.—Leggat v. McLure, Mont., 234 F. 620, 148 C.C.A. 386.
Mo.—Griffith v. Judge, 49 Mo. 536.

21. Pa.—Dollar Sav. Bank v. Bennett, 76 Pa. 402.
23 C.J. p 749 note 56.

22. **Naked legal title subject to trust**
One purchasing at execution sale realty to which judgment debtors held only naked legal title, subject to trust imposed in them for equitable owners thereof, acquired no interest therein, except possible naked legal title subject to such trust, with duty to convey title to beneficiaries.—Rabbit v. Atkinson, 113 P.2d 14, 44 Cal.App.2d 752—Goldberg, Bowen & Co. v. Demick, 247 P. 261, 77 Cal.App. 535—23 C.J. p 747 note 16 [b].

23. **Right to enforce trust**
A sale on execution of personal property of which the judgment defendant is the beneficial owner, but title to which is in a trustee, does not convey to the purchaser the legal title, but only the right to enforce the trust.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.

As to corpus of trust
Sale of trust property under execution which would destroy trust would be ineffectual during existence of trust, but not void, especially when trust was in respect to income from land bequeathed, and there was no express restraint in matter of principal of fund or corpus of estate.—Estes v. Estes, Tex.Com.App., 267 S.W. 709, affirming, Civ.App., 255 S.W. 649.

24. **As dependent on executrix**
Execution purchaser of devisee's interest in estate in hands of executrix would acquire title only to whatever property executrix might set aside as judgment debtor's inter-

interests.[25]

Equity of redemption. Where the execution sale is of all the right, title, and interest of the judgment debtor in property which has been mortgaged by him, it passes to the purchaser all the interest that the judgment debtor has in the property, including the equity of redemption;[26] but where the sale is merely of the equity of redemption, it does not pass an interest or estate in the land not covered by the mortgage.[27] Where the levy is restricted to the equity of redemption, the purchaser acquires no greater interest;[28] and in such case a sale of the property, rather than of the equity, to the judgment creditor passes nothing.[29] The sale and conveyance of an equity of redemption conveys no interest at all where the property is unencumbered,[30] as where prior to the sale the mortgage is paid.[31] In a jurisdiction where a deed absolute in form but given as security is deemed to leave the legal title in the grantor, an execution purchaser of all the interest of the mortgagor acquires the legal title subject to the mortgage.[32]

Life estate; estate for years; leasehold interest. Where a sale under execution is of property in which the judgment debtor has only a life estate,[33] or an estate for years,[34] the sale passes the limited estate, but not the fee, even though the sheriff's deed purports to convey the fee.[35]

Thus if a leasehold interest is sold the purchaser takes only the interest of the lessee,[36] and acquires the same rights that the lessee had, but no greater ones.[37] He stands in the position of an assignee of the estate;[38] he takes subject to all the covenants and conditions contained in the lease,[39] and cannot dispute the title of the lessor.[40] If the interest of the lessee has terminated, the purchaser cannot hold the property as against the lessor.[41]

Remainder or reversion. If the sale is of a remainder or reversion, the sheriff's deed is as effectual to pass the title thereto as is the deed of the remainderman or reversioner;[42] the sale is subject to the terms of the instrument creating the estate[43] and to the right of the life tenant to possess and control the property during life.[44]

As a contingent remainder,[45] as well as an heir's possibility of reverter on breach of a condition sub-

est in estate under will.—Gregg v. First Nat. Bank, Tex.Com.App., 26 S.W.2d 179, reversing First Nat. Bank v. Browne, Civ.App., 18 S.W. 2d 772.

Estate subject to control by others

Where testatrix devised all her estate to her children, including judgment debtor, share and share alike, but provided that the estate should be kept intact under complete management of independent executors for five years from date of testatrix' death, purchaser of judgment debtor's interest at execution sale would succeed only to title of judgment debtor, and could not interrupt control of executors.—Lozano v. Guerra, Tex.Civ.App., 140 S.W. 2d 587.

25. **Decedent's estate**

A sheriff's sale under a judgment in favor of a creditor of decedent divested all title or interest of the estate, of the widow as life tenant, and of the remaindermen or heirs.—Fowler v. Blackstock, 112 S.E. 893, 153 Ga. 706.

Interest subject to easement

Purchaser at sale under execution, levied after village accepted dedication of land for street, took only dedicator's interest therein, subject to village's easement.—Hooper v. Haas, 164 N.E. 23, 332 Ill. 561, 63 A. L.R. 658.

Interest subject to homestead rights

Sale, pursuant to default judgment, of debtor's interest in lot occupied by his mother as homestead passed his interest subject to homestead.—Winfrey v. People's Sav. Bank, 5 S.W.2d 360, 176 Ark. 941.

Execution sale of property subject to dower see Dower § 63.

26. Me.—Highland Trust Co. v. Hamilton, 181 A. 825, 134 Me. 64.
23 C.J. p 749 note 34.

27. Mass.—Laflin v. Crosby, 99 Mass. 446.
23 C.J. p 749 note 35.

28. Ala.—Gassenheimer v. Molton, 2 So. 652, 80 Ala. 521.

29. Me.—Williams v. Libby, 105 A. 855, 118 Me. 80.

30. Me.—Highland Trust Co. v. Hamilton, 181 A. 825, 134 Me. 64.

31. Me.—Brown v. Snell, 46 Me. 490.
23 C.J. p 749 note 38.

32. Mich.—Flynn v. Holmes, 108 N. W. 685, 145 Mich. 606, 11 L.R.A.,N. S., 209.

33. Ill.—Dunlavy v. Lowrie, 25 N. E.2d 67, 372 Ill. 622.
Iowa.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304.
Mo.—Donaldson v. Donaldson, 278 S. W. 686, 311 Mo. 208.
23 C.J. p 749 note 41—21 C.J. p 962 note 78.

Use after death of life tenant

An execution purchaser of a life estate in personal property must account to the remainderman for the use of such property from the death of the life tenant until the property is delivered to the remainderman.—Clifford v. Read, 24 S.C.Eq. 218.

34. Pa.—Simons v. Van Ingen, 86 Pa. 330.
23 C.J. p 749 note 42.

35. Ill.—Dunlavy v. Lowrie, 25 N. E.2d 67, 372 Ill. 622.

36. Pa.—Groves v. Lewis, 53 Pa Super. 511—Lefever v. Armstrong, 15 Pa.Super. 565.

37. Cal.—Summerville v. Kelliher, 77 P. 889, 144 Cal. 155.
Mass.—McNeil v. Ames, 120 Mass. 481.

38. Cal.—Summerville v. Kelliher, 77 P. 889, 144 Cal. 155.
Mass.—McNeil v. Ames, 120 Mass. 481.

39. Cal.—Summerville v. Kelliher, 77 P. 889, 144 Cal. 155.
23 C.J. p 749 note 46.

40. Kan.—Hentig v. Pipher, 51 P. 229, 58 Kan. 788, affirming 48 P. 868, 5 Kan.App. 879.

41. Pa.—Cobb v. Deiches, 7 Pa.Super. 252, 42 Wkly.N.C. 228.
23 C.J. p 749 note 48

42. Ill.—Barco v. Harkleroad, 158 N. E. 570, 327 Ill. 291.
23 C.J. p 749 note 49.

43. Ala.—Williams v. Spears, 180 So. 266, 235 Ala. 611.

Power to sell given to life tenant

Ala.—Williams v. Spears, supra.

44. Mich.—Storrs v. Storrs, 24 N. W. 654, 53 Mich. 55.
Tex.—Estes v. Estes, Civ.App., 255 S.W. 649, affirmed, Com.App., 267 S.W. 709.

45. Ill.—Barco v. Harkleroad, 158 N.

sequent,[46] is not subject to, or extinguished by, a sale on execution, an attempted sale thereof does not pass title.

Rights under contract of purchase. One who purchases, at execution sale, land which the debtor had previously contracted to convey, and who has notice of such agreement, takes the legal title subject to the right of the vendee to compel a conveyance thereof to him on compliance with the terms of the contract.[47] While it has been held that the purchaser becomes entitled to all sums still to be paid by the vendee,[48] it has also been held that the purchaser is not so entitled without some proceeding to charge the vendee with the payment thereof to him, and that in the absence of such a proceeding the vendee will be protected in payments made to the debtor.[49] After an execution sale against the vendor, his deed to his vendee is of no effect as against the execution purchaser.[50]

Where property in the possession of an execution debtor, as the vendee under a contract of purchase, is sold on execution, the execution purchaser acquires only such title or interest as the debtor had under the terms of the contract,[51] and acquires no title where a performance, or a tender of performance, of the terms of the contract cannot be shown.[52] Only the equitable title passes to the purchaser,[53] regardless of whether the contract was recorded or not.[54] The debtor cannot affect the rights of the purchaser by a subsequent voluntary surrender of the bond for title to his vendor.[55] Even where the interest of a conditional vendee is held not subject to execution, the rights of a purchaser are those of the debtor and cannot be questioned except by the conditional vendor or a chattel mortgagee having superior right.[56]

Part interest in property. Where property owned by two or more persons is sold on execution against one of them only, the purchaser at the execution sale takes such, and only such, interest as the judgment debtor had in such property, and becomes a tenant in common with the other owners thereof,[57] even though the sheriff purports to sell the entire property;[58] but if the property cannot be identified by the description in the sheriff's deed no title passes.[59] Where one tenant by the entirety purchases at execution sale the interest of his cotenant, he acquires title to the property for the joint lives of both tenants.[60]

A sale of land as the property of one defendant passes no title to the interest of his codefendant;[61] but a sale of the undivided interest of a codefendant passes a good title to such interest even though the interest of the other defendant was not sold.[62]

§ 288. —— Time as of Which Title Vests in Purchaser

The purchaser acquires the title which the debtor had at the time the execution lien was created, or, if the judgment was a lien on the property, at the date of the judgment on which the execution was issued. Title or interests acquired by the debtor after the sale do not pass; but interests acquired after the levy but before the sale do pass.

The title which passes on an execution sale in which the whole title is sold is ordinarily that which the debtor had at the time the execution lien was created,[63] so as to cut off transfers, liens, or equities made or acquired in the interim and before

E. 570, 327 Ill. 291—Ætna L. Ins. Co. v. Hoppin, 94 N.E. 669, 249 Ill. 406.

46. R.I.—Brown v. Tilley, 57 A. 380, 25 R.I. 579.

47. Minn.—Steele v. Taylor, 1 Minn. 274.
23 C.J. p 751 note 94.

48. Colo.—Chain O'Mines v. Williamson, 72 P.2d 265, 101 Colo. 231.

49. Ky.—Chinn v. Butts, 3 Dana 547.
N.C.—Blackmer v. Phillips, 67 N.C. 340.

50. Ala.—Doe v. Haskins, 75 Ala. 619, 50 Am.D. 154.

51. Ill.—Standard Computing Scale Co. v. Dombrowski, 257 Ill.App. 409.

52. Colo.—Salisbury v. La Fitte, 141 P. 484, 57 Colo. 358.
23 C.J. p 751 note 97.

Repossession by conditional vendor
Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.

53. Pa.—Morrison v. Funk, 23 Pa. 421.

54. Ill.—Hayes v. Carey, 122 N.E. 524, 287 Ill. 274.

55. Me.—Jameson v. Head, 14 Me. 34.

56. N.Y.—Meisel Tire Co. v. Fishman, 296 N.Y.S. 882, 163 Misc. 883.

57. Minn.—Greiger v. Pye, 297 N. W. 173.
Tex.—Boyd v. Jancik, Civ.App., 245 S.W. 770.
23 C.J. p 752 note 3.
Title of purchaser of partnership property on execution against partner see the C.J.S. title Partnership § 240, also 47 C.J. p 1019 notes 34–40.

58. Tex.—Broussard Trust v. Perryman, Civ.App., 134 S.W.2d 308, error refused.

59. Tex.—Boyce v. Hornberger, 68 S.W. 701, 29 Tex.Civ.App. 337.
23 C.J. p 752 note 4.

60. N.J.—Zubler v. Porter, 120 A. 194, 98 N.J.Law 444, 27 A.L.R. 822

61. Mo.—Frederick v. Missouri River, Ft. S. & G. R. Co., 82 Mo. 402.

62. Pa.—Sheetz v. Wynkoop, 74 Pa. 198.

63. Iowa.—Keefe v. Cropper, 194 N. W. 305, 196 Iowa 1179.
Okl.—Streeter v. Anderson, 43 P.2d 53, 172 Okl. 113—Harris v. Southwest Nat. Bank of Dallas, Tex., 271 P. 683, 133 Okl. 152.
Tex.—Brinkman v. Tinkler, Civ.App., 117 S.W.2d 139, error refused.
23 C.J. p 754 note 45.
Time when lien attaches see supra § 124.

Time of attachment
Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.
Mont.—Bowen v. First State Bank, 221 P. 527, 69 Mont. 223.
23 C.J. p 754 note 51.

Time of levy
U.S.—Wilkinson v. Goree, C.C.A.Tex.,

the sale,[64] at least where not known to the purchaser.[65] No subsequent act of the lessee, or of an assignee or mortgagee of the leasehold claiming under the lessee, can enlarge or diminish the title as it stood at the time the lien attached.[66]

If the purchase is of property on which the judgment was a lien, the purchaser acquires such interest as the debtor had at the date of the judgment on which the execution was issued,[67] or, under other authority, at the date of the docketing of the judgment;[68] and a deed of the debtor after the judgment lien has attached does not give a title superior to that of the execution purchaser.[69] However, where the lien of the judgment has expired before execution is issued, the purchaser at the sale acquires only the interest the debtor has at the time of the issuance of the execution.[70]

Title acquired by the debtor after the levy but before the sale passes to the purchaser,[71] even though the sheriff's deed by its terms conveys only the title at the time of the judgment,[72] but not where the title at the time of the levy was equitable and not subject to execution.[73]

Title acquired after sale. It is a general rule that title or interests acquired by the debtor after the sale do not pass to the purchaser.[74] Thus the legal title subsequently acquired by the judgment debtor does not inure to the benefit of the purchaser of the equitable title at the execution sale.[75] However, the rule has been laid down in some jurisdictions that where a judgment debtor holding, under a land office certificate, land which is sold under execution against him, thereafter acquires a patent for such land, the perfected title will inure to the benefit of the execution purchaser and cannot be set up adversely to him.[76]

§ 289. Time When Title Passes

Some authorities hold that title passes at the time of the execution sale, others that it does not pass until delivery of the sheriff's deed after the redemption period, and still others that it does not pass until the sale is confirmed by the court; but no title passes until payment of the purchase price. Before the delivery of the deed the purchaser acquires an equitable estate in the realty sold.

In some jurisdictions title is held to pass at the time of the execution sale, subject to the right of the debtor to defeat such transfer by redemption within the statutory period;[77] and the effect of the sheriff's subsequent deed is merely to show that the title of the purchaser has become absolute.[78] In other jurisdictions, the legal title to real property sold does not pass until delivery of the sheriff's deed, see supra § 266, after the expiration of

18 F.2d 455, reversing, D.C., 15 F. 2d 399, and certiorari denied Goree v. Wilkinson, 47 S.Ct. 770, 274 U. S. 761, 71 L.Ed. 1339.
23 C.J. p 754 note 45 [b].

64. Cal.—Selby v. Allen, 6 P.2d 285, 119 Cal.App. 257.
Ky.—Bailey v. Bailey, 151 S.W.2d 374, 286 Ky. 582.
Tex.—Bankers' Home Building & Loan Ass'n v. Wyatt, Civ.App., 153 S.W.2d 216, error granted.

65. Ga.—Keaton v. Farkas, 70 S.E. 1110, 136 Ga. 188.
23 C.J. p 754 note 46.

66. Pa.—Lefever v. Armstrong, 15 Pa.Super. 565.

67. Mo.—Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.S.R. 618.
23 C.J. p 754 note 48.

68. N.Y.—Hetzel v. Barber, 69 N. Y. 1, modifying 6 Hun 534—McNamara v. McNamara, 135 N.Y.S. 215.

69. Ark.—Stotts v. Brookfield, 18 S.W. 179, 55 Ark. 307.
Ga.—Keaton v. Farkas, 70 S.E. 1110, 136 Ga. 188.

Title under gift divested by sheriff's sale

Title under parol gift of land was divested by sheriff's sale in execution on judgment, against donor, existing at time of gift.—Brewton v. Brewton, 146 S.E. 444, 167 Ga. 633.

70. Mo.—Crittenden v. Leitensdorfer, 35 Mo. 239.
23 C.J. p 377 note 80.

71. Pa.—King v. King, 93 A. 20, 247 Pa. 89.
Tex.—Willis v. Pounds, 25 S.W. 715, 6 Tex.Civ.App. 512.

Where severance of joint tenancy was accomplished after lien attached but before sale, purchaser took the interest of the debtor as it was after severance.—Greiger v. Pye, Minn., 297 N.W. 173.

72. Pa.—King v. King, 93 A. 20, 247 Pa. 89.

73. Tenn.—Pratt v. Phillips, 1 Sneed 543, 60 Am.D. 162.

74. Mich.—McArthur v. Oliver, 27 N.W. 689, 60 Mich. 605.
23 C.J. p 754 note 52.

75. Cal.—Kenyon v. Quinn, 41 Cal. 325.
Tenn.—Pratt v. Phillips, 1 Sneed 543, 60 Am.D. 162.

76. U.S.—Kingman v. Holthaus, C. C.Mo., 59 F. 305.
23 C.J. p 754 note 54.

77. Ariz.—Colvin v. Weigold, 253 P. 633, 31 Ariz. 370.
Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Idaho.—Evans v. Power County, 1 P. 2d 614, 50 Idaho 690.
La.—New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 176 La. 946.
Mont.—Brown v. Timmons, 256 P. 176, 79 Mont. 246, 57 A.L.R. 1122.
Philippine.—U. S. v. Painaga, 27 Philippine 18.

"Title passes at once"

U.S.—Coulter v. Blieden, C.C.A.Ark., 104 F.2d 29, 33, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488.

Effect of subsequent litigation

(1) The rights of a purchaser at an execution sale which become vested at the time it is made cannot be divested nor impaired by subsequent litigation between plaintiff and defendant.—Johns v. Woodson, 5 Ky. Op. 536.

(2) Effect of reversal, vacation, or modification of judgment see infra § 301.

Cattle at large

Under statute to that effect, range levy and sale of portion of cattle herd does not pass title until buyer has gathered and selected specific animals claimed under certificate of sale; but range levy and sale of entire class described in certificate of sale passes title on delivery of certificate, without need of gathering and selecting cattle.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.

78. Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.

the time for redemption.[79] Where a statute requires that the sale shall be confirmed by the court, title does not vest in the purchaser until after such confirmation and the delivery of a deed.[80]

In any event, the highest bidder acquires no title to the thing purchased until payment of the purchase price;[81] and, if the statute authorizes a sale to be made only for cash, a conveyance of land to the purchaser without payment of the bid in cash passes no title.[82]

Rights prior to delivery of deed. Even under the rule requiring the delivery of the sheriff's deed to pass title, the purchaser acquires an equitable estate the moment the real property is sold,[83] which continues until the time for redemption has expired.[84] While this interest has been called a lien,[85] it has more frequently been regarded as more than a mere lien.[86] After the expiration of the period allowed for redemption, without a redemption having been made by any of the persons entitled to it, the equitable estate of the purchaser becomes absolute and the debtor is merely the holder of the legal title,[87] with authority in the sheriff to divest it by executing a deed to the purchaser.[88]

After the expiration of the time for redemption, but before the execution of a sheriff's deed, the purchaser has a title subject to execution against him,[89] an interest which, although assignable, and capable of being inherited, is inchoate in character;[90] he has an equitable estate which is not terminated by the expiration of the time during which the judgment is a lien.[91]

§ 290. Rights Passing as Incidents

Rights incidental to the property sold under execution generally pass to the purchaser; but various particular rights or interests have been held not to pass.

Rights incidental to the property sold under execution generally pass to the purchaser,[92] including all easements appurtenant to the land sold, although not referred to in the proceedings for sale.[93] Thus the purchaser of cattle is the owner of their increase from the time of the attachment.[94]

On the other hand, particular rights or interests have been held not to pass as incidental to the particular property sold.[95] Thus it has been held that the purchaser of lands or equipment of a debtor does not acquire his franchise or license;[96] that a sale of the property of a corporation under a statute authorizing a levy and sale on "any personal, mixed or real property, franchises and rights of such corporation" does not pass title to a claim for damages existing in favor of the corporation,[97] or any chose in action;[98] that water rights do not pass as appurtenances to land sold, unless so intend-

79. U.S.—Provident Mut. Life Ins. Co. of Philadelphia v. University Evangelical Lutheran Church of Seattle, C.C.A.Wash., 90 F.2d 992.
Iowa.—Clark v. Strohbeen, 181 N.W. 430, 190 Iowa 989, 13 A.L.R. 1419.
Ky.—Messer v. American Eagle Fire Ins. Co., 12 S.W.2d 358, 227 Ky. 3 —R. T. Elswick & Co. v. Scott, 8 S.W.2d 398, 225 Ky. 309.
Wash.—Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181.
23 C.J. p 753 note 31.
Time for making sheriff's deed see supra § 270.

80. Iowa.—Hendryx v. Evans, 94 N. W. 853, 120 Iowa 310.
23 C.J. p 753 note 42.
Confirmation of sale see supra § 226.

81. Mo.—Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 247, 226 Mo.App. 746, citing Corpus Juris.
Tex.—Tanner v. Grisham, Com.App., 295 S.W. 590, reversing, Civ.App., 289 S.W. 146—Smith v. Cook, Civ. App., 126 S.W.2d 1049, error dismissed, judgment correct.
23 C.J. p 753 note 28.

82. Ind.—Chapman v. Harwood, 8 Blackf. 82, 44 Am.D. 736.

83. Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297.
23 C.J. p 753 note 32.

84. Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297.
23 C.J. p 753 note 33.

85. N.Y.—People ex rel. Hunter v. Scery, 200 N.Y.S. 531, 206 App.Div. 19.

86. Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297.
23 C.J. p 753 note 34.

87. Utah.—Local Realty Co. v. Lindquist, supra.
23 C.J. p 753 note 35.

88. Cal.—Page v. Rogers, 31 Cal. 293.
23 C.J. p 753 note 36.

89. Or.—Pogue v. Simon, 81 P. 556, 47 Or. 6, 114 Am.S.R. 903, 8 Ann. Cas. 474.

90. Mich.—Pike v. Halpin, 154 N.W. 148, 188 Mich. 447.

91. Ind.—Hubble v. Berry, 103 N.E. 328, 180 Ind. 513.

92. Pa.—McArthur v. Sherwood, 35 A. 812, 177 Pa. 513.
23 C.J. p 752 note 7.
Covenants running with land see Covenants § 83.
Right to attack previous fraudulent conveyance of property see the C. J.S. title Fraudulent Conveyances § 291, also 27 C.J. p 692 notes 82, 83.
Right to attack voidable tax deed
Kan.—Clark v. Tandy, 167 P. 1039, 101 Kan. 328.

93. Ky.—Damron v. Damron, 84 S. W. 747, 119 Ky. 806, 27 Ky.L. 272.
23 C.J. p 752 note 8.

94. Ariz.—Hagan v. Cosper, 292 P. 1020, 37 Ariz. 209.

95. Stock
Collateral agreements made between the owner of stock sold and the company issuing it do not pass as incidents of the execution sale.—Pittsburg & C. R. Co. v. Allegheny County, 63 Pa. 126.
A sale of cattle passes no interest in a pasturage contract.—Abadie v. Lobero, 36 Cal. 390.

96. Tex.—Palestine v. Barnes, 50 Tex. 538.
Ferryboat
Wash.—Anderson v. Glenn, 191 P. 792, 112 Wash. 31.

97. U.S.—International Coal Min. Co. v. Pennsylvania R. Co., C.C. Pa., 152 F. 551.

98. U.S.—International Coal Min. Co. v. Pennsylvania R. Co., supra.
Pa.—International Coal Min. Co. v. Pennsylvania R. Co., 16 Pa.Dist. 529.

ed by the judgment debtor;[99] and that money paid in proceedings by which part of the property was condemned does not belong to the purchaser as against a mortgagee, where the mortgagor who was the execution debtor had no right thereto as against the mortgagee.[1]

Mortgages or mortgaged property. The purchaser of a note and mortgage has the election to surrender the mortgage or to enforce it.[2] It has been held that on a sale of mortgaged property the purchaser does not acquire the mortgage notes[3] or the mortgagor's equitable right to insist on other land covered by the mortgage being sold first;[4] nor does a purchaser of a mortgagor's equity of redemption acquire any interest in a money deposit made to secure the mortgages against prior liens and to be applied only after the exhaustion of the mortgaged property, where the deposit was assigned to a third person prior to the judgment and execution sale.[5] A sale of all the right and interest of a mortgagor of chattels, under a chattel mortgage which had not been filed as required by statute, is not a sale subject to the mortgage, and the purchaser acquires not only the interest of the mortgagor, but also the right of the execution creditor to treat the mortgage as void.[6]

Patented or copyrighted matter. The sale under execution against a patentee of a patented machine, made by the patentee for his own use, by implication invests the purchaser with a license to use that particular machine even though the patentee does not manufacture for sale.[7] However, the purchaser of the plates of a copyrighted book acquires no right to use such plates to reproduce copies of such book.[8]

The purchaser of land leased to a tenant acquires all the rights of the debtor with respect to such lease.[9] It has been held that a purchaser has the right to affirm or disaffirm a lease of the property,[10] but that, where the tenant has notice of the sale, no notice of an intention to affirm the lease is necessary.[11]

§ 291. Liens or Incumbrances on Property

a. In general
b. Particular liens

a. In General

Subject to certain exceptions, a purchaser at execution sale of property on which there is a prior lien takes the property subject to such lien; and the removal of liens or encumbrances from the property inures to his benefit. The purchaser may, in a proper case, be estopped to attack the validity of a prior lien; and the lienor may, similarly, be estopped to assert his lien.

In most jurisdictions prior liens are not affected by the execution sale of the property, and the purchaser takes the property subject to such liens,[12] except in so far as the rule may be affected by his being a bona fide purchaser, see infra §§ 293–297. However, in a few jurisdictions it has been held that the execution purchaser takes free from prior liens;[13] that existing liens are not affected by a foreclosure sale under special execution unless the lien holders are made parties to the proceeding;[14] and, under statute to that effect, that the purchaser acquires not title to encumbered property, but merely a lien thereon to the amount of the purchase price,[15] which lien is junior to the prior encum-

99. Colo.—Cooper v. Shannon, 85 P. 175, 36 Colo. 98, 118 Am.S.R. 95.
23 C.J. p 752 note 19.

1. Wash.—Commercial Nat. Bank v. Johnson, 48 P. 267, 16 Wash. 536.

2. Iowa.—Buter v. Slattery, 237 N. W. 232, 212 Iowa 677.

3. Ill.—King v. Cushman, 41 Ill. 31, 89 Am.D. 366.

4. N.Y.—McNamara v. McNamara, 135 N.Y.S. 215.

5. Ala.—Moses v. Philadelphia Mortg. & Trust Co., 32 So. 612, 131 Ala. 554.

6. N.Y.—Porter v. Parmley, 14 Abb. Pr.,N.S., 16.

7. U.S.—Wilder v. Kent, C.C.Pa., 15 F. 217.
23 C.J. p 333 note 8.

8. U.S.—Stevens v. Gladding, R.I., 17 How. 447, 15 L.Ed. 155.
13 C.J. p 1100 note 93.

9. Iowa.—Clark v. Strohbeen, 181 N. W. 430, 190 Iowa 989, 13 A.L.R. 1419.

10. Pa.—Farmers' & Mechanics' Bank v. Ege, 9 Watts 436, 36 Am. D. 130—Market Co. v. Lutz, 4 Phila. 332.

11. Pa.—Israel v. Clough, 5 Pa.Dist. 325.

12. Cal.—Penziner v. West American Finance Co., 74 P.2d 252, 10 Cal.2d 160—Withington v. Shay, App., 117 P.2d 415, hearing denied, Sup., 119 P.2d 1—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Mo.—Hunter v. Hunter, 39 S.W.2d 359, 327 Mo. 817.
Neb.—Barry v. Horton, 238 N.W. 763, 122 Neb. 20.
Tex.—Bell v. Lebo, Civ.App., 74 S. W.2d 187.
23 C.J. p 763 note 4, p 767 note 59.

Lien for delinquent taxes
Fla.—Ziegler v. Baker, 142 So. 241, 104 Fla. 499.
Ga.—Brown v. Roach, 120 S.E. 813, 31 Ga.App. 476—La Grange Grocery Co. v. City of La Grange, 119 S.E. 536, 31 Ga.App. 97.
Iowa.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304.

13. Del.—Reading v. State, 1 Del. 190.
23 C.J. p 767 notes 62–63.

14. Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.

15. Ky.—Commodari v. Hart-Commodari Const. Co., 91 S.W.2d 8, 262 Ky. 774—Hall v. Commonwealth, 60 S.W.2d 625, 249 Ky. 290—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 288 Ky. 554—Sullivan Machinery Co. v. Leckieville Land Co., 14 S.W.2d 761, 228 Ky. 216—Marcum v. Thompson, 2 S.W. 2d 392, 222 Ky. 702—Deaver-Kennedy Co. v. Cooper, 224 S.W. 1053, 189 Ky. 366.

Effect of deed
Under this rule, the purchaser is not entitled to a deed, but the giving of a deed will not render the sale

brances.[16] Under statute to that effect, an execution sale of personal property of a perishable nature divests prior liens thereon.[17] A purchaser having a prior lien has been allowed to retain the amount of his bid up to the amount of his lien.[18]

In Pennsylvania it is generally held that liens on realty sold under execution are divested or discharged by the sale, even though they are prior and superior to the lien being enforced by the sale;[19] under this rule, the prior lienor is entitled to satisfaction from the proceeds of the sale, and the purchaser takes title free therefrom.[20] The rule does not apply, however, where the sale is expressly made subject to the lien, or it is agreed or clearly understood between the parties that the sale shall be subject to liens;[21] where the existing lien is one specifically made by law an exception to the rule;[22] where the property subject to the lien is sold on execution after it has been fraudulently conveyed by the debtor;[23] where the lien is incapable of being made definite and certain;[24] or where the lien is expressly created to run with the land.[25] So, also, where the title of an heir or devisee is sold on execution before the sale to pay the decedent's debts, the lien of the ancestor's debts is not divested;[26] and an execution sale will not divest a lien or charge on land where, in order to effectuate the trust created by the charge, it will be necessary for the court to reinvest the fund arising from the execution sale, thus substituting a plan other than that contemplated by the person creating the charge.[27] Arrears of ground rent are not discharged, because they constitute an estate in the land and not a mere lien,[28] and for the same reason a widow's right of dower is not divested.[29] Similarly, dues of the commonwealth depend not on a lien, but a paramount title, which no sheriff's sale can affect.[30]

Junior liens. A purchaser of property at an execution sale does not take subject to liens junior to the one under which the execution sale was made,[31] except, it has been held, in the case of a tax lien.[32]

Effect of removal of liens. The removal of encumbrances or liens from the property sold by payment or the expiration thereof inures to the benefit of the purchaser at the execution sale, and to that extent confirms his title to the property.[33]

Estoppel to contest or set up lien. In the absence of facts constituting an estoppel, the execution purchaser may contest the validity of prior liens or encumbrances,[34] as where the sale is of all the right, title, and interest of defendant in execution.[35] However, the purchaser may be estopped to attack the validity of the lien where the sale

void.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

Requirement of bond

The purchaser of encumbered personal property is required to execute a bond that he will not remove the property from the county and will preserve it to answer the encumbrance.—Durret v. Bouche, 5 Ky.Op. 667.

16. Ky.—West v. Criscillis, 46 S.W. 2d 1082, 242 Ky. 549—Blankenship v. Bartleston & Co., 6 Ky.Op. 158.

17. Ga.—Chambers v. Planters' Bank, 131 S.E. 280, 161 Ga. 535, answer to certified questions conformed to 132 S.E. 233, 35 Ga.App. 13.
23 C.J. p 767 note 61.

18. La.—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.

19. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568—White v. Ehrens, 14 Pa.Dist. & Co. 151, 22 Berks Co.L.J. 269.
23 C.J. p 767 note 64.

Time of divestment

Liens are divested on completion of the sale and as of the date of sale, that is, the date on which property is knocked down to a bidding purchaser, who completes his bid, and not the date when sheriff's deed is acknowledged; and liens against purchaser attach as of such date.—Keystone State Building & Loan Ass'n v. Sabo, 14 A.2d 831, 140 Pa. Super. 599.

20. Pa.—Beekman's Appeal, 38 Pa. 385.
23 C.J. p 767 note 65.

21. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
23 C.J. p 768 note 67.

22. Pa.—Silverman v. Keal, supra.

Whether tax liens are divested by sale depends on the wording of the governing statutes.—Duffy v. Philadelphia, 42 Pa. 192—23 C.J. p 768 note 75.

23. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
23 C.J. p 768 note 71.

24. Pa.—In re McKenzey, 3 Pa. 156.
23 C.J. p 768 note 66.

25. Pa.—Cella's Est., 17 Pa.Super. 428.
23 C.J. p 768 note 68.

26. Pa.—Smith v. Seaton, 11 A. 661, 117 Pa. 382, 2 Am.S.R. 668, followed in Homer v. Hasbrouck, 41 Pa. 169.
23 C.J. p 768 note 70.

27. Pa.—Wertz's App., 65 Pa. 306.
23 C.J. p 768 note 69.

28. Pa.—Devine's App., 30 Pa. 348.
23 C.J. p 768 note 72.

29. Pa.—Fisher v. Kean, 1 Watts 259.
23 C.J. p 768 note 73.

30. Pa.—Connelly v. Withers, 9 Lanc.Bar 117.

31. Wis.—C. Hennecke Co. v. Columbia Lodge, No. 11, K. P., 287 N.W. 742, 233 Wis. 24.
23 C.J. p 767 note 58.
Priorities between executions and other liens see supra § 128.

32. Wis.—C. Hennecke Co. v. Columbia Lodge, No. 11, K. P., supra.

33. Ga.—Glover v. Patton, 30 S.E. 414, 104 Ga. 17.
23 C.J. p 770 note 8.

34. N.Y.—Wagner v. Jones, 7 Daly 375, affirmed 77 N.Y. 590.
23 C.J. p 770 note 12.

Enforcement of invalid lien

The rights of a purchaser at an execution sale were not affected by the seizure and sale of the property to enforce an alleged laborer's lien if there was no valid lien.—Ruddell v. Reves, 225 S.W. 316, 146 Ark. 259.

35. Mo.—Huffman v. Nixon, 53 S.W. 1078, 152 Mo. 303, 75 Am.S.R. 454.
23 C.J. p 770 note 13.

is made expressly subject to a subsisting lien, or where the purchaser has notice, and recognizes the existence, of such lien,[36] although there is also authority to the contrary.[37] The execution purchaser may be estopped to deny the validity of a lien or an encumbrance where the amount thereof was deducted for purposes of appraisal and the purchase was for less than two thirds of the appraised value of the property.[38] Where there are two or more encumbrances on the property, the purchaser may be estopped as to one but entitled to contest the others.[39]

The holder of a lien may be estopped by his conduct and declarations to set up his lien against the execution purchaser.[40]

b. Particular Liens

Execution purchasers of property, encumbered by judgment or execution liens, mortgages, pledges, and vendor's liens, have frequently been held to take the property subject to such encumbrances; but in various situations a different rule has been followed, or a different result reached.

In a number of jurisdictions the effect of an execution sale under a junior judgment is to pass the debtor's estate in the property encumbered with the lien of an older judgment;[41] and it is even held that where both the elder and younger judgments are owned by the same person, he may sell under the junior lien, without disturbing the lien of the senior judgment or prejudicing his right to enforce it, provided there is no deceit or unfairness toward the purchaser.[42] However, in some jurisdictions, liens of judgments or executions on property sold under execution are divested thereby, even though they are prior and superior to the lien being enforced by the sale,[43] or, in the absence of fraud, even though the prior judgment was obtained against a former owner and the execution is against a subsequent owner,[44] and the lien is transferred from the property to the proceeds of the sale in the hands of the sheriff.[45] An exception to the latter rule exists where the property is sold expressly subject to the prior judgment[46] or execution[47] lien. Where statutes require that executions issue on judgments within a designated period after their rendition, a sale on execution on a junior judgment, after the failure to issue execution on the senior judgment within the statutory period, will pass the property free of the lien of the senior judgment.[48]

A sale under a senior judgment cancels the lien of a junior judgment, which is thereafter transferred to the surplus proceeds of the sale;[49] but

36. Vt.—People's Trust Co. of St. Albans v. Finn, 181 A. 102, 107 Vt. 433.
23 C.J. p 770 note 15.

Reasons for rule

(1) The purchaser in such circumstances acquires the property at a lower price than he would otherwise have to pay, since the mortgagee is not required to bid to protect his interests.
N.J.—F. R. Patch Mfg. Co. v. William A. Gahagan Co., 114 A. 321, 93 N.J.Eq. 73, affirmed 115 A. 926, 93 N.J.Eq. 223.
Vt.—People's Trust Co. of St. Albans v. Finn, 175 A. 4, 106 Vt. 345.

(2) Moreover, terms of sale, although not creating direct liability to pay mortgage debt, create condition which purchaser is required to perform to perfect title to property. —People's Trust Co. of St. Albans v. Finn, supra.

Purchase subject to two mortgages

Purchaser on execution sale which bought subject to two mortgages and thereafter paid off prior mortgage and took assignment thereof was estopped to deny validity of second mortgage, since it would not be permitted to acquire property at price lower than it bid at sale.—People's Trust Co. of St. Albans v. Finn, supra.

37. Mo.—Huffman v. Nixon, 53 S.W. 1078, 152 Mo. 303, 75 Am.S.R. 454.
23 C.J. p 770 note 16.

38. Neb.—Equitable Trust Co. v. Omaha, 95 N.W. 650, 69 Neb. 342.
23 C.J. p 770 note 17.

39. Mass.—Stebbins v. Miller, 12 Allen 591.
23 C.J. p 770 note 18.

40. S.C.—Moore v. Trimmier, 11 S. E. 548, 32 S.C. 511, rehearing denied 11 S.E. 552, first case, 32 S. C. 511.
23 C.J. p 770 note 10.

Claiming proceeds

Where intervener who claimed part of seized property under prior attachment consented to sale under later attachment by claiming proceeds thereof, property did not pass to purchaser burdened with privilege of prior attachment.—Caldwell v. Laurel Grove Co., 153 So. 17, 179 La. 53.

Facts preventing estoppel

The lienholder is not estopped if he was not present at the sale and had no reason to believe that the execution purchaser did not know of the claim.—Brotherton v. Anderson, 66 S.W. 682, 27 Tex.Civ.App. 587.

41. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Mo.—Hunter v. Hunter, 39 S.W.2d 359, 327 Mo. 817.
23 C.J. p 769 note 3

42. Iowa.—Matless v. Sundin, 62 N. W. 662, 94 Iowa 111.
N.Y.—Shotwell v. Murray, 1 Johns. Ch. 512.

43. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
S.D.—Security Nat. Bank of Sioux Falls v. Lowrie, 238 N.W. 304, 59 S.D. 102.
23 C.J. p 505 note 25, p 769 note 99.

Divestment only as to interest sold

Under this rule, the lien of the senior judgment is divested only as to the interest or estate in the property which is sold.—Tarver v. Ellison, 57 Ga. 54.

44. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.

45. S.C.—Mathews v. Nance, 27 S. E. 408, 49 S.C. 389.
23 C.J. p 769 note 99.

46. Pa.—Tospon v. Sipe, 11 A. 873, 116 Pa. 588—Commonwealth v. Alexander, 14 Serg. & R. 257.

47. Ala.—Harrison v. Marshall, 6 Port. 65.

48. Ill.—Dobbins v. Peoria First Nat. Bank, 112 Ill. 553.
23 C.J. p 770 note 7.

49. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.
Iowa.—Wood v. Rankin, 93 N.W. 387, 119 Iowa 448.
Pa.—Commonwealth, on Suggestion

if there be no surplus, the junior judgment creditor must save his debt by redeeming from the sale.[50]

The effect of a sale under both senior and junior judgments is to vest the title in the purchaser and transfer the liens in the same order of priority to the proceeds of the sale.[51]

Mortgages. In most jurisdictions a purchaser of mortgaged property at an execution sale under judgment against the mortgagor takes the property subject to the paramount lien of the mortgage,[52] although it has also been held that the lien of the mortgage is divested and attaches only to the proceeds of the execution sale.[53] However, where the execution is based on the mortgage debt, the purchaser takes free from the mortgage lien and all subsequent liens and assignments.[54] In Pennsylvania, under an early statute, the lien of a prior mortgage was divested,[55] but the rule has been changed by a statute which is applicable where there are no liens prior to the mortgage,[56] although not where there are.[57]

Where the majority rule prevails, the execution purchaser stands in the same position as the mortgagor.[58] He has no equities as against the mortgage,[59] and cannot defend against it on a ground which was not open to the mortgagor.[60] A payment and satisfaction of the mortgage inures to his benefit,[61] conferring on him full title[62] with protection against intermediate purchasers with notice.[63] It requires the consent of the mortgagor, mortgagee, and the execution creditor to sell the entire interest in the property free from the lien of the mortgage;[64] but after an execution sale of

of Meconkey v. Rogers, 4 Pa.L.J.R. 252, Brightly N.P. 450.
W.Va.—Davis v. Landcraft, 10 W.Va. 718.

50. Iowa.—First Nat. Bank of Newton v. Campbell, 98 N.W. 470, 123 Iowa 37—Wood v. Rankin, 93 N.W. 387, 119 Iowa 448.

51. N.C.—Cannon v. Parker, 81 N.C. 320.
23 C.J. p 769 note 5.

52. Cal.—Isaacs v. Jones, 54 P.2d 1123, 12 Cal.App.2d 98—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464—Givens v. German Savings & Loan Soc., 86 P. 993, 3 Cal.App. xiii—Youd v. German Savings & Loan Soc., 86 P. 991, 3 Cal.App. 706.
Ga.—Glover v. Patton, 30 S.E. 414, 104 Ga. 17—Coweta Fertilizer Co. v. M. C. Kiser Co., 125 S.E. 793, 33 Ga.App. 278.
Ind.—Julian v. Beal, 26 Ind. 220, 89 Am.D. 460.
Md.—Godfrey v. Johnson, 139 A. 283, 153 Md. 582—Griffin v. Wilmer, 111 A. 114, 136 Md. 623.
Mo.—Hunter v. Hunter, 39 S.W.2d 359, 327 Mo. 817.
Mont.—Hillsdale College v. Thompson, 44 P.2d 753, 99 Mont. 400.
N.C.—Miller v. Little, 194 S.E. 92, 212 N.C. 612.
Or.—Niedermeyer, Inc., v. Fehl, 57 P.2d 1086.
23 C.J. p 768 note 82—41 C.J. p 521 note 53.

Chattel mortgage
N.Y.—Meisel Tire Co. v. Fishman, 296 N.Y.S. 882, 163 Misc. 883.
Ohio.—City Loan & Savings Co. v. Sheban, 29 N.E.2d 171, 65 Ohio App. 7.

Creditor as purchaser
Position of judgment creditor with respect to judgment debtor's mortgaged property became that of a purchaser on creditor's purchasing property at execution sale.—Hillsdale College v. Thompson, 44 P.2d 753, 99 Mont. 400.

Mortgage subsequent to first levy
Where mortgage was given after levy of execution, but another execution was subsequently issued in chancery suit in aid of original execution, second execution was held abandonment of first one, and purchaser at execution sale took subject to mortgage.—Pratt v. Mapes, 259 N.W. 142, 270 Mich. 501.

Corporate mortgage as affecting stockholder
A purchaser at execution sale of property, the record title of which was in corporation but which belonged after dissolution of corporation to judgment debtor owning stock of corporation, became owner of property subject to mortgage executed by corporation.—Peurifoy v. Wiebusch, 117 S.W.2d 773, 132 Tex. 36, reversing Thomason v. Wiebusch, Civ. App., 89 S.W.2d 452.

Statement as to balance due
Mortgagee's statement of amount of balance due on chattel mortgage to purchaser of mortgaged personalty at execution sale was held not false where mortgagor owed amount stated which, as between parties, was covered by mortgage, and was entitled to construction that it was made for an honest purpose and not to mislead purchaser, in absence of allegation that it was intended to mislead purchaser, since fraud will not be presumed.—People's Trust Co. of St. Albans v. Finn, 181 A. 102, 107 Vt. 433.

Right of purchaser to redeem is restricted to those properties to which he acquired legal title.—Houston v. Shear, Tex.Civ.App., 210 S.W. 976, error granted.

53. Del.—Isaacs v. Messick, 40 A. 1109, 15 Del. 259.
R.I.—Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204.

54. Pa.—Moore v. Schell, 99 Pa.Super. 81.
23 C.J. p 769 note 98.

55. Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
23 C.J. p 769 note 84.

56. U.S.—Febeiger's Lessee v. Craighead, 4 Dall. 151, 1 L.Ed. 778.
Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568—Petition of Case, 27 Pa.Dist. & Co. 391—White v. Ehrens, 14 Pa.Dist. & Co. 151, 22 Berks Co.,L.J. 269.
23 C.J. p 769 note 85.

Prior estates and charges, although "liens" in a general and popular sense, are not prior liens within such statute.—Helfrich v. Weaver, 61 Pa. 385—23 C.J. p 769 note 86.

57. Pa.—Fisher v. Connard, 100 Pa. 63, 11 Wkly.N.C. 519, 39 Leg.Int. 328, 14 Lanc.Bar 201.

58. N.Y.—Hamill v. Gillespie, 48 N.Y. 556.
Pa.—Steele v. Walter, 53 A. 1097, 204 Pa. 257.

59. Mich.—Youmans v. Lox, 22 N.W. 282, 56 Mich. 197.

60. U.S.—Wright v. Phipps, C.C.N.Y., 90 F. 556, affirmed 98 F. 1007, 38 C.C.A. 702.

61. Ga.—Glover v. Patton, 30 S.E. 414, 104 Ga. 17.

62. Miss.—House v. Fultz, 21 Miss. 39.

63. S.C.—Seymour v. Preston, 17 S.C. Eq. 481.

64. Ga.—Miller v. Pitts, 45 S.E. 67, 117 Ga. 794—De Vaughn v. Byrom, 36 S.E. 267, 110 Ga. 904.

Presumption of consent
In sale under judgment inferior to mortgage, consent of mortgagor, mortgagee, and plaintiff in fieri facias to sale of entire interest in property

mortgaged land, the mortgagor cannot, by joining in a consent with the mortgagee, cause the entire estate in the land to be sold and conveyed under another judgment against him in favor of the mortgagee.[65]

A sale under an execution senior to a mortgage will of course divest the lien of the mortgage,[66] although the mortgagee will have a right in equity to have the liens marshaled so that the execution may be satisfied out of personalty.[67]

Under some statutes, the execution purchaser of mortgaged chattels acquires no title as against the mortgagee without paying the amount due or performing the condition of the mortgage.[68] The officer must hold the property after the execution sale thereof until the terms of the mortgage have been complied with by the purchaser;[69] but the purchaser has a lien on the chattels for the excess remaining after satisfaction of the mortgage.[70]

Pledgees. A purchaser at an execution sale takes the property subject to the prior lien of a pledge.[71]

Vendor's lien. A purchaser under an execution sale of land encumbered with a vendor's lien acquires the title of the execution defendant subject to such lien,[72] except as the rule may be affected by his being a bona fide purchaser, see §§ 293–297 infra, and at least where the judgment creditor is one other than the vendor,[73] for where the vendor is the judgment creditor and the judgment is for the balance of the purchase money, the title of the vendor as well as that of the purchaser passes.[74]

Under statute to that effect a sheriff's sale of property encumbered by vendor's lien does not pass title, but merely creates a lien in the purchaser.[75]

§ 292. Equities against Debtor

The general rule is that an execution purchaser takes subject to rights and equities outstanding against the execution debtor, except as the rule may be affected by the purchaser's being a bona fide purchaser.

The purchaser at an execution sale takes subject to outstanding rights and equities against the execution debtor,[76] at least those which are superior to

will be presumed, where entire interest was levied on, sold, and conveyed, mortgagor was insolvent, and mortgagee, in obtaining his judgment under which property was sold, had set up and established a preferred lien on property mortgaged.—Coweta Fertilizer Co. v. J. C. Kiser Co., 125 S.E. 793, 33 Ga.App. 278.

65. Ga.—Hitch v. Bailey, 42 S.E. 252, 115 Ga. 891.

66. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495.
Kan.—Jonas v. Jones, 109 P.2d 211, 153 Kan. 108.
Ky.—Greer v. Howard, 4 Ky.L. 350, 11 Ky.Op. 755.

67. S.C.—Gadberry v. McClure, 23 S.C.Eq. 175.

68. Mich.—Worthington v. Hanna, 23 Mich. 530.

69. Ind.—Collins v. State, 30 N.E. 12, 3 Ind.App. 542, 50 Am.S.R. 298.

70. Ind.—McFadden v. Ross, 41 N.E. 607, 14 Ind.App. 312.

71. Mo.—McClintock v. Kansas City Cent. Bank, 24 S.W. 1052, 120 Mo. 127.

Pledge of bank stock
Under Florida law possession of national bank stock certificate by pledgee of the stock protects pledgee in case of sale by sheriff on execution against pledgor, although pledge is not entered on bank's books, and the sale, if valid, passes title of pledgor subject to the pledge.—Brightwell v. First Nat. Bank, C.C.A.Fla., 109 F.2d 271.

Pledgee without valid lien
The fact that the pledgee of property who has no valid lien thereon gives notice of his claim to prospective purchasers and to the pledgor's judgment creditor prior to the execution sale, but after the property has been levied on, does not render the execution creditor liable for his claim where he purchases the car at the sale.—Ewing v. Meehan, 41 Pa. Dist. & Co. 689.

72. Mo.—Hunter v. Hunter, 39 S.W. 2d 359, 327 Mo. 817.
Tex.—Bidwell v. Taylor, Civ.App., 224 S.W. 941.
23 C.J. p 768 note 76—66 C.J. p 1248 notes 93–96, p 1249 note 97.

Implied liens
(1) Where vendor's implied liens are recognized, a purchaser takes subject to such lien.—Lissa v. Posey, 1 So. 500, 64 Miss. 352—66 C.J. p 1248 note 96.

(2) Where such liens are not recognized, the purchaser does not take subject to a vendor's implied lien.—Harper v. Williams, 21 N.C. 379—Johnson v. Cawthorn, 21 N.C. 32, 27 Am.D. 250.

(3) Extent of recognition of implied lien see the C.J.S. title Vendor and Purchaser § 377, also 66 C.J. p 1212 note 80–p 1215 note 89.

73. Pa.—Canon v. Campbell, 34 Pa. 309.
23 C.J. p 768 note 79.

74. Ky.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702.
Pa.—McCay v. Forwood, 15 Phila. 137.

75. Ky.—Sullivan Machinery Co. v. Leckieville Land Co., 14 S.W.2d 761, 228 Ky. 216.

Execution for vendor
This statute has been held inapplicable where sale was held to satisfy vendor's lien.—Marcum v. Thompson, 2 S.W.2d 392, 222 Ky. 702.

76. Cal.—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71.
Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511.
Iowa.—Frum v. Kueny, 207 N.W. 372, 201 Iowa 327—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.
Mont.—Stauffacher v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324—Short v. Karnop, 275 P. 278, 84 Mont. 276—MacGinniss Realty Co. v. Hinderager, 206 P. 436, 63 Mont. 172.
Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085.
23 C.J. p 770 note 20.

Rights of real owner
Where judgment debtor did not own land sold under execution but had in good faith conveyed it to his daughter, to whom it had in fact at all times belonged, purchasers at execution sale took subject to rights of daughter, notwithstanding record title was in judgment debtor when judgment was recovered.—Cain v. Lane, 263 S.W. 399, 165 Ark. 205.

Rights of lessee
The lien of a judgment recovered against a lessor subsequent to the giving of a lease by him was inferior to the leasehold interest of the lessee, and the purchaser at a sale under a fieri facias thereon would take the property subject to the lease.—Western Union Telegraph Co. v. Brown & Randolph Co., 114 S.E. 36, 154 Ga. 229.

the lien of the judgment,[77] except in so far as the rule may be affected by the purchaser's being a bona fide purchaser, see §§ 293–297 infra.

The execution purchaser has been held not to be liable on certain contracts of the debtor not attaching to the property.[78]

§ 293. Bona Fide Purchasers

a. In general
b. Scope of inquiry
c. Effect of being bona fide purchaser

a. In General

To be a bona fide purchaser at an execution sale one must purchase for a valuable consideration and without notice, actual or constructive.

As stated generally, the rule is that, in order to constitute a purchaser at an execution sale a bona fide purchaser, he must purchase for a valuable consideration and without notice, actual or constructive, of any equities outstanding against the property, or of any irregularities in the proceedings which would vitiate the sale.[79] More specifically, a bona fide purchaser is one who has the legal title to property,[80] and has paid therefor a valuable consideration, discussed infra this subdivision, in good faith,[81] without notice, actual or constructive, of defects or vices in the title, considered infra § 294. A purchaser at an execution sale will be deemed an innocent purchaser where he would have been deemed such at a voluntary sale.[82]

Payment of valuable consideration. A purchaser at an execution sale who has not paid the amount of his bid is not considered a bona fide purchaser.[83]

Some courts take the view that gross inadequacy of consideration precludes the purchaser from being considered a bona fide purchaser.[84] Other courts, however, hold that inadequacy of consideration alone is not sufficient to support a claim that the purchaser is not a purchaser in good faith.[85] At any rate, the inadequacy of the price paid will be considered on the question of the good faith of the purchaser,[86] and may be sufficient to put him on inquiry.[87]

Execution sale under void judgment. A purchaser at an execution sale under a void judgment is not an innocent purchaser.[88]

b. Scope of Inquiry

An execution purchaser is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court has jurisdiction to render judgment and whether there is a valid execution and sale; but he is not bound to make further inquiry into the regularity of the proceedings.

In order to determine whether the officer is duly authorized to make the sale,[89] the execution purchaser is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court has jurisdiction to render judgment[90] and whether there is a valid execution,[91] and sale.[92] In other words, the purchaser is bound to inquire into the power and means by which the property is subjected to the sale.[93] However, he is not bound to make further inquiry into the regularity of the proceedings,[94] except, in some jurisdictions, where

Bar against claim of laches
Where execution debtor was barred from claiming laches concerning fraudulent acquisition of seized property, purchaser at execution sale was likewise barred.—Rubinsky v. Kosh, 151 A. 676, 301 Pa. 35.

77. Ga.—Equitable Loan & Security Co. v. Lewman, 52 S.E. 599, 124 Ga. 190, 3 L.R.A.,N.S., 879.
Tex.—Senter v. Lambeth, 59 Tex. 259.

78. Particular contracts
(1) Assignee corporation which acquired on execution sale contractual interest of another corporation in timber on land was not bound to perform promises of assignor to landowner.—Coquille Mill & Tug Co. v. Robert Dollar Co., 285 P. 244, 132 Or. 453.

(2) An execution purchaser of land does not take subject to the claim of a third person under a contract for personal services which confers no interest in the land which a court of equity would recognize.—Manning v. Ayers, Ill., 77 F. 690, 23 C.C.A. 405.
23 C.J. p 771 note 26.

79. Cal.—Koch v. Wilcoxon, 158 P. 1048, 30 Cal.App. 517.
23 C.J. p 759 note 19.

80. Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085.
23 C.J. p 761 note 78.

If purchase is of equity instead of legal title, the purchase is subject to prior equities, although unknown to the purchaser.—Wallace v. Bartle, 21 Iowa 346, 89 Am.D. 584.

Conveyance of legal title before notice of prior claim is necessary.—Cline v. Osborne, 68 S.W. 1083, 24 Ky.L. 511.

81. Neb.—Taylor v. Courtnay, 16 N. W. 842, 15 Neb. 190.
23 C.J. p 759 note 22.

82. Tex.—Love v. R. S. Allday Supply Co., Civ.App., 106 S.W.2d 830, error dismissed.

83. N.J.—McArdle Real Estate Co. v. McGowan, 163 A. 24, 25, 109 N.J. Law 595, citing **Corpus Juris.**
23 C.J. p 759 note 24.

84. Tex.—Chestnut v. Specht, Civ. App., 272 S.W. 830.
23 C.J. p 759 note 26.

85. Iowa.—Koch v. West, 92 N.W. 663, 118 Iowa 468, 96 Am.S.R. 394.

86. Or.—Geanakapulas v. Zographos, 208 P. 585, 104 Or. 430.

87. Tex.—Hicks v. Sias, Civ.App., 102 S.W.2d 460, error refused.

88. Tex.—Linn Bros. Motor Co. v. Williams, Civ.App., 293 S.W. 658.

89. Cal.—Bock v. Losekamp, 179 P. 516, 179 Cal. 674.
Ind.—State v. Prime, 54 Ind. 450.

90. Cal.—Bock v. Losekamp, 179 P. 516, 179 Cal. 674.
23 C.J. p 761 note 98.

91. Pa.—Everett Bank v. Hall, 10 A. 2d 115, 138 Pa.Super. 79.
23 C.J. p 761 note 79.

92. N.Y.—Charles H. Dauchy Co. v. Wilkinson, 295 N.Y.S. 666, 251 App.Div. 53.

93. Ill.—Bybe v. Ashby, 43 Am.D. 47.

94. Ga.—Clark v. C. T. H. Corporation, 184 S.E. 592, 181 Ga. 710.
23 C.J. p 761 note 80.

the purchaser is the judgment creditor or his attorney, see infra § 295.

Where the judgment on which the execution was issued appears on its face to be barred by lapse of time, it is sufficient to put the purchaser on inquiry as to whether it has been discharged.[95] So far as title is concerned, the execution purchaser is bound to look to the possession when the sale is made and to the records, and if neither of these furnish any evidence that defendant has parted with his interest, he is not required to look further.[96] The purchaser is not required to look beyond the records, to determine whether apparent liens or encumbrances have or have not been discharged,[97] or to determine whether the sale is subject to liens.[98]

c. Effect of Being Bona Fide Purchaser

Generally, a bona fide execution purchaser takes free of equities, secret liens, unrecorded conveyances and infirmities in the judgment or subsequent proceedings.

Although there is authority to the contrary,[99] a bona fide purchaser at an execution sale generally does not take subject to equities.[1] He takes free from secret liens,[2] and from unrecorded conveyances where the instrument is one which the statutes require to be recorded.[3] He is not affected by infirmities in the judgment or proceedings subsequent thereto which do not appear on the face of the record, such as secret vices, frauds, defects, or other secret infirmities.[4]

In order that the statutory rule that an execution purchaser takes free from an unrecorded mortgage or conveyance may apply, the execution purchaser must acquire some real or apparent interest in the property to be protected; the rule does not apply where, prior to the execution sale, the judgment debtor has been divested of all legal and equitable interest in the property.[5] An equitable estate cannot be converted into a legal estate by the application of the rule.[6] The statutes do not apply so as to require a recording of a receipt for an advancement, in order that an execution purchaser may take subject to the advancement.[7]

Claim of heirs to community property. Where real estate which was community property of husband and wife is sold after the death of the wife on an execution issued on a judgment against the husband, a purchaser for value without notice of the death of the wife or of the claims of her heirs acquires a valid title as against the heirs.[8]

§ 294. —— Notice

a. In general
b. Matters of record
c. Possession by third person
d. Time of notice
e. Effect of notice

a. In General

A purchaser at an execution sale stands on the same basis respecting notice as a purchaser at a voluntary sale, and knowledge sufficient to put a reasonably prudent man on inquiry is constructive notice.

A purchaser at an execution sale stands on the same basis respecting notice as a purchaser at a voluntary sale.[9] Knowledge sufficient to put a rea-

95. Tex.—Hart v. McDade, 61 Tex. 208.

96. Pa.—Lefever v. Armstrong, 15 Pa.Super. 565.

97. Iowa.—Barber v. Tryon, 41 Iowa 349.
Pa.—Meigs v. Bunting, 21 A. 588, 141 Pa. 233, 23 Am.S.R. 273.
Case where there is double security for same debt, such as a mortgage and a judgment furnishes no exception to the rule.—Meigs v. Bunting, 21 A. 588, 141 Pa. 233, 23 Am. S.R. 273.

98. Pa.—Everett Bank v. Hall, 10 A.2d 115, 138 Pa.Super. 79.

99. Ark.—Beidler v. Beidler, 74 S. W. 13, 71 Ark. 318.
23 C.J. p 771 note 22.

1. U.S.—Hunn v. Lewis, C.C.A.Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549.
Cal.—Withington v. Shay, App., 117 P.2d 415, hearing denied Sup., 119 P.2d 1—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71.
Iowa.—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.
Tex.—Parker v. Holstead, Com.App., 255 S.W. 724, reversing Holstead v. Parker, Civ.App., 238 S.W. 287.
23 C.J. p 771 note 23.

2. Cal.—Withington v. Shay, App., 117 P.2d 415, hearing denied Sup., 119 P.2d 1—Richman v. Bank of Perris, 282 P. 801, 102 Cal.App. 71.
23 C.J. p 766 note 50.
Vendor's lien
(1) The rule of the text has been applied to a vendor's lien.—Maroney v. Boyle, 36 N.E. 511, 141 N.Y. 452, 38 Am.S.R. 821, affirming 17 N.Y.S. 275, 173 Misc. 173—66 C.J. p 1249 note 98.
(2) However, it has also been held that an execution purchaser without notice takes subject to a vendor's lien.—Holloway v. Ellis, 25 Miss. 103.

3. Ga.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.
Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418.
N.C.—Mills v. Tabor, 109 S.E. 850, 182 N.C. 722.
23 C.J. p 766 note 51.
Prior deed of gift, whether recorded or not, yields to subsequent sheriff's deed, unless purchaser at sheriff's sale had actual notice of deed of gift at time of purchase.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.

4. Ark.—Carden v. Lane, 2 S.W. 709, 48 Ark. 216, 3 Am.S.R. 228.
23 C.J. p 766 note 52.

5. Iowa.—Witmer v. Shreves, 120 N.W. 86, 141 Iowa 496.

6. Pa.—Morrison v. Funk, 23 Pa. 421.

7. Iowa.—Pinckney v. Pinckney, 87 N.W. 406, 114 Iowa 441.

8. Tex.—Love v. R. S. Allday Supply Co., Civ.App., 106 S.W.2d 830, error dismissed—Smith v. Olson, 56 S.W. 568, 23 Tex.Civ.App. 458.

9. Tex.—Lissner v. State Mortg. Corporation, Civ.App., 29 S.W.2d 849, error dismissed.

sonably prudent man on inquiry is constructive notice,[10] and an execution purchaser is affected with notice of all that is patent on an examination of the premises he is about to buy.[11] Where the levy is excessive, the purchaser must be held chargeable with notice of the value of the property, and of the legal rules bearing on the transaction.[12] He, of course, has notice where he is privy to the arrangement for the selling of a vast amount of property under an execution for a small sum.[13]

Notice does not generally arise from one circumstance alone, but from a collection of facts which, taken together, may be held sufficient to put a person on inquiry.[14] The notice should come from the person claiming an interest in the lands,[15] and it should be direct and full as to the fact that he then owns and claims the lands.[16] A mere general statement of the judgment debtor, without giving details, that he owns no property or has sold all of his property, is not notice;[17] nor is the purchaser put on inquiry by a mere general notice at the time of sale that the judgment debtor does not own the property,[18] or that a third person has title and possession.[19]

Knowledge that both husband and wife join in a deed is not notice that the wife holds title to the property as her separate property under an unrecorded deed.[20]

Knowledge of agent or attorney. An execution purchaser is chargeable with the knowledge of his agent,[21] such as an attorney who acts for him in bidding for the property,[22] and he is also chargeable with notice of information conveyed to him by his counsel.[23]

Notice to creditor or sheriff. Notice to the execution creditor[24] or to the sheriff[25] is not notice to the purchaser.

b. Matters of Record

An execution purchaser is bound to take notice of facts exhibited in a public record, and the record of an instrument, entitled to record and properly recorded, is constructive notice of its contents to an execution purchaser.

An execution purchaser is bound to take notice of facts exhibited in a public record,[26] and the record of an instrument is constructive notice of its contents to an execution purchaser,[27] provided the instrument is entitled to record,[28] properly record-

10. Nev.—Lang Syne Gold Min. Co. v. Ross, 18 P. 358, 20 Nev. 127, 19 Am.S.R. 337.
23 C.J. p 759 note 31.

11. Ill.—Hatch v. Bigelow, 39 Ill. 546.
23 C.J. p 760 note 39.

12. Ill.—Morris v. Robey, 73 Ill. 462.

13. Ill.—Kinney v. Knoebel, 51 Ill. 112.

14. Ill.—Hatch v. Bigelow, 39 Ill. 546.

Loose talk among bystanders at sale to the effect that the sale is subject to a mortgage, which is in opposition to the record and to the acts and declarations of the sheriff at the sale, does not affect the title of the purchaser, in the absence of fraud.—Fickes v. Ersick, 2 Rawle, Pa., 166.

Notice of matters decided adversely to person giving it does not affect the purchaser.—Forest Oil Co.'s App., 12 A. 442, 118 Pa. 138, 4 Am.S.R. 584.

Payment of taxes by third person on an undivided interest in the land is not constructive notice, to the execution purchaser, of an unrecorded deed.—Cetti v. Wilson, Tex.Civ.App., 168 S.W. 996.

15. Pa.—Moyer v. Schnick, 3 Pa. 242.

16. Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340—Moyer v. Schnick, 3 Pa. 242.

17. U.S.—Meek v. Skeen, Tex., 60 F. 322, 8 C.C.A. 641.

18. Pa.—Commonwealth v. Calhoun, 39 A. 563, 184 Pa. 629.
23 C.J. p 759 note 35.

19. Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340.

20. Cal.—Vassault v. Austin, 36 Cal. 691.

21. Cal.—Jackins v. Queen Oil Co., 195 P. 51, 184 Cal. 645.

22. Mo.—Baird v. Given, 70 S.W. 697, 170 Mo. 302.

23. Mass.—Hughes v. Williams, 105 N.E. 1056, 218 Mass. 448.

24. S.C.—Miles v. King, 5 S.C. 146.

25. Mich.—Luton v. Sharp, 53 N.W. 1054, 94 Mich. 202.
Pa.—Stahle v. Spohn, 8 Serg. & R. 317.

26. Ariz.—Barth v. A. & B. Schuster Co., 220 P. 391, 25 Ariz. 546.
Cal.—Puccetti v. Girola, App., 119 P. 2d 200.
Ill.—Hooper v. Haas, 164 N.E. 23, 332 Ill. 561, 63 A.L.R. 658.
Mo.—Troost Ave. Cemetery Co. v. Kansas City, 154 S.W.2d 90.
23 C.J. p 760 note 50.

Charged with knowledge of law
N.Y.—Charles H. Dauchy Co. v. Wilkinson, 295 N.Y.S. 666, 251 App. Div. 53.
Tex.—Peurifoy v. Wiebusch, 117 S.W.2d 773, 132 Tex. 36, reversing Thomason v. Wiebusch, Civ.App., 89 S.W.2d 452.

Copy of attachment writ not deposited in registry
A purchaser at an execution sale was not charged with notice of an attachment prior to that in the action in which the sale was made, and her rights were not affected thereby, where no certified copy of the writ was deposited in the registry of deeds, as required by statute, and the writ was not entered in the court to which returnable, although entered in the court for the county in which the land was situated, where it was pending.—Trojanowski v. Maclachlan, 133 N.E. 350, 240 Mass. 225.

27. Conn.—Myers v. Burke, 179 A. 88, 120 Conn. 69.
Fla.—Laganke v. Sutter, 187 So. 586—Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness, 123 So. 699, 98 Fla. 186.
Iowa.—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.
Tex.—Lasater v. Hinson, Civ.App., 84 S.W.2d 874.
23 C.J. p 760 note 51.

Deed not fixing amount or locality of land
The recording of a deed of land which does not fix the locality of the land, its amount, or contain any description except by referring to certain natural objects, cannot be considered as notice to the purchaser of an outstanding title.—Banks v. Ammon, 27 Pa. 172.

28. Pa.—Heister v. Fortner, 2 Binn. 40, 4 Am.D. 417.

ed[29] and not outside of the chain of title.[30]

The notice of title which a record gives is only of the title as shown thereby; it is not notice of a secret trust,[31] or of extraneous facts qualifying or contradicting the recorded instrument;[32] but where a recorded instrument indicates or declares a trust, it is constructive notice of the rights and title of the persons interested therein.[33] An execution purchaser can be held to no further knowledge of the action taken by the court in a suit or proceeding to which he is not a party than that furnished by the record;[34] he is not bound to take notice of the information contained in the minutes or memoranda made by the judge on his own docket,[35] or of dockets or memoranda of the sheriff which do not possesss the characteristics of a record.[36] A record of the suit, regular on its face, does not charge the execution purchaser with knowledge of fraud in procuring the judgment.[37]

c. Possession by Third Person

Generally, where a third person is in possession, either personally or by tenant, of the land at the time of the execution sale and is claiming it as his own, the purchaser is charged with notice of his claim.

Where a third person is in possession, either personally or by tenant, of the land at the time of the execution sale and is claiming it as his own, the purchaser is charged with notice of the claim.[38]

To be sufficient to impart notice, the possession must be actual,[39] exclusive,[40] open,[41] notorious,[42] visible,[43] and continuous.[44] The change of possession from the execution debtor must be actual rather than constructive.[45] Where two or more persons are in possession of the property as a family, and the record title is in the name of one of such persons, the possession of another member of the family is not notice of his or her claim under an unrecorded deed.[46]

Notice which possession imparts is limited where the person in possession places on record a title consistent with his possession; it may be assumed that he holds under the recorded title.[47]

Possession by tenant. A continuance in possession by a tenant constitutes constructive notice to the execution purchaser where the tenant attorns

29. N.Y.—Harnischfeger Sales Corporation v. Spellman, 9 N.Y.S.2d 241, 256 App.Div. 879.

30. Tex.—Stanford v. Dumas, Civ. App., 137 S.W.2d 1071, error dismissed, judgment correct.
23 C.J. p 760 note 57.

31. Ill.—Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 69 N.E. 17, 206 Ill. 9, 99 Am. S.R. 132.
Pa.—Derwaters v. Kuhule, 49 A. 264, 199 Pa. 439.

32. Ill.—Curtis v. Root, 28 Ill. 367.
Iowa.—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.

Sale made prior to time indicated by record

Where information that the judgment debtor had sold the land was communicated to the execution purchaser long after the judgment in question had become a lien, and the record of the deed shows that it was made after the lien of the judgment attached, something more than mere general notice of the sale is necessary to put the execution purchaser on inquiry as to whether or not the sale had in fact been made before the time indicated by the record of the deed.—Brown v. Wade, 42 Iowa 647.

33. Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed.
23 C.J. p 760 note 56.

34. Ill.—McCormick v. Wheeler, 36 Ill. 114, 85 Am.D. 388.

35. Ill.—McCormick v. Wheeler, supra.

36. Pa.—Kelly v. Green, 63 Pa. 299.

37. Mo.—Heffernan v. Ragsdale, 97 S.W. 890, 199 Mo. 375.

38. Cal.—Fowler v. Lane Mortg. Co., 207 P. 919, 58 Cal.App. 66.
Ga.—Sikes v. Seckinger, 137 S.E. 833, 164 Ga. 96.
Miss.—Kalmia Realty & Insurance Co. v. Hardy, 145 So. 506, 164 Miss. 313.
Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.
Mont.—Prosper v. Smith, 215 P. 649, 67 Mont. 308.
N.D.—Earnest v. First Nat. Bank, 217 N.W. 169, 56 N.D. 309.
Pa.—Rubinsky v. Kosh, 151 A. 676, 301 Pa. 35—Smith v. Miller, 145 A. 901, 296 Pa. 340—Smith v. Miller, 137 A. 254, 289 Pa. 184.
Tex.—Kerr v. Clark, Civ.App., 148 S.W.2d 880—Stanford v. Dumas, Civ. App., 137 S.W.2d 1071, error dismissed, judgment correct—Hardin v. Palm, Civ.App., 253 S.W. 948.
23 C.J. p 761 note 63.

Residence in another state by execution purchaser does not change the rule.—Sulzbacher v. Campbell, 121 So. 706, 219 Ala. 191.

Possession by judgment debtor charges purchaser from execution purchaser with notice of the rights of the judgment debtor.—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.

Purchasers from execution purchasers see infra § 296.

Possession as notice of selection of homestead

That surviving wife and children lived on land at time of execution levy and sale was notice of her selection thereof as homestead.—Roubaje v. Graszuk, 221 N.W. 289, 244 Mich. 179.

39. N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.

40. N.J.—Eckman v. Beihl, supra.

41. Utah.—National Realty Sales Co. v. Ewing, 186 P. 1103, 55 Utah 438.

42. Utah.—National Realty Sales Co. v. Ewing, supra.

43. Utah.—National Realty Sales Co. v. Ewing, supra.

44. Utah.—National Realty Sales Co. v. Ewing, supra.

45. Ala.—Brown v. International Harvester Co., 60 So. 841, 179 Ala. 563.

46. Pa.—Miners Sav. Bank of Pittston v. Tracy, 192 A. 246, 326 Pa. 367, appeal dismissed Toole v. Miners Sav. Bank of Pittson, 58 S. Ct. 272, 302 U.S. 651, 82 L.Ed. 504—Smith v. Miller, 145 A. 901, 296 Pa. 340.
23 C.J. p 761 note 70.

47. Iowa.—Rogers v. Hussey, 36 Iowa 664.
23 C.J. p 761 note 73.

to the grantee under an unrecorded deed;[48] but the continuance of the tenant in possession is not notice of the rights of the grantee where the tenant does not attorn to the grantee, or pay rent to him, or recognize his title.[49]

Possession by tenant in common. A taking or continuance of possession by a tenant in common who has purchased the interests of his cotenants and taken an unrecorded deed is not sufficient to constitute notice.[50]

d. Time of Notice

Notice to be effective, must be given before the execution sale or before payment is made. Under some statutes the recording of an instrument after judgment but before the sale is ineffective, but under other statutes instruments recorded after judgment but before the sale constitute notice to the execution purchaser.

Notice to the execution purchaser may be given at any time before payment is made,[51] but notice given after the sale and after payment has been made is generally ineffective.[52]

Under statutes giving priority to instruments which shall be first recorded, the title of a grantee of a deed which is recorded after the execution sale but before the recording of the evidence of title based on such sale is superior to that of the execution purchaser.[53] However, the sheriff's certificate of sale is an instrument within the meaning of such statutes, and when it is recorded the sheriff's deed subsequently delivered and recorded relates back thereto; hence where a deed to a third person is recorded after the recording of the certificate of sale but before the recording of the sheriff's deed, the title of the execution purchaser is superior.[54] The latter principle has been applied so as to make a purchaser who has paid the purchase price and received a certificate of sale a bona fide purchaser with full protection against claims of which he subsequently receives notice, regardless of whether he receives such notice before or after the execution of the sheriff's deed.[55] In jurisdictions where the object of recording is to impart notice to subsequent purchasers and mortgagees and not to creditors merely, and where an unrecorded deed or mortgage is superior to a judgment lien, the recording of a deed or mortgage subsequent to judgment and before the execution sale constitutes notice to the execution purchaser and prevents him from acquiring title superior to, or unaffected by, the recorded instrument.[56]

Statutes giving judgment lien priority. Under some of the registry statutes giving a judgment lien priority as against any unrecorded instrument of which the judgment creditor had no knowledge at the time the judgment lien attached, an execution purchaser acquires a title superior to, and unaffected by, a deed or mortgage which is unrecorded at the time the judgment lien attached and of which the judgment creditor then had no notice, even though the execution purchaser before or at the sale acquires actual notice of the instrument,[57] or constructive notice by virtue of its recording before sale.[58] This is on the principle that, where the creditor's right has vested and he is entitled to priority over the unrecorded conveyance, the purchaser at the sale will be similarly entitled, since otherwise the creditor would be deprived of the ad-

48. Tex.—Duncan v. Matula, Civ. App., 26 S.W. 638, followed in Mainwarring v. Templeman, 51 Tex. 205.

Possession as notice of mortgagee's claim to rents

Purchaser at execution sale claiming rents from tenant was not chargeable with constructive notice of mortgagee's unrecorded claim under oral assignment of rents and subsequent collection thereof by mortgagee.—Pacific Fruit Exchange v. Schropfer, 279 P. 170, 99 Cal. App. 692.

49. Iowa.—McCormick v. McCormick Harvesting Mach. Co., 95 N W. 181, 120 Iowa 593.
23 C.J. p 761 note 72.

50. Iowa.—May v. Sturdivant, 39 N.W. 221, 75 Iowa 116, 9 Am.S.R. 463.
Tex.—Sanger v. Collum, Civ.App., 78 S.W. 401.

51. Utah.—National Realty Sales Co. v. Ewing, 186 P. 1103, 55 Utah 438.
23 C.J. p 762 note 88.

52. N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.

After payment but before sheriff's deed

Notice after the payment of the sum bid at the sale, but before delivery of the sheriff's deed, is of no effect.—Reed v. Munn, Colo., 148 F. 737, 80 C.C.A. 215, certiorari denied 28 S.Ct. 255, 207 U.S. 588, 52 L.Ed. 353.

Deed recorded after execution sale

does not give execution purchaser notice.
Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340.
Tex.—Stanford v. Dumas, Civ.App., 137 S.W.2d 1071, error dismissed, judgment correct.

53. Neb.—Sheasley v. Keens, 66 N. W. 1010, 48 Neb. 57.
23 C.J. p 762 note 90.

54. Cal.—Foorman v. Wallace, 17 P. 680, 75 Cal. 552.
Colo.—McMurtrie v. Riddell, 13 P. 181, 9 Colo. 497.
Certificate of sale generally see supra § 224.
Relation back of sheriff's deed see supra § 283.

55. Cal.—Duff v. Randall, 48 P. 66, 116 Cal. 226, 58 Am.S.R. 158.

56. Mo.—Houston v. Sparks, 230 S. W. 70.
23 C.J. p 762 note 94.

57. Fla.—Lusk v. Reel, 18 So. 582, 36 Fla. 418, 51 Am.S.R. 32.
23 C.J. p 762 note 96.
Application of rule where judgment creditor is purchaser see infra § 295.

Notice to sheriff before sale ineffective

Tex.—Bova v. Wyatt, Civ.App., 140 S.W.2d 601, error refused.

58. Tex.—Bova v. Wyatt, supra.
23 C.J. p 762 note 97.

vantage acquired.[59] The rule has been applied to equities of which the judgment creditor had no notice at the time his lien attached and of which the purchaser had notice at the time of sale, so as to protect the latter as a bona fide purchaser;[60] but the rule is not applicable to equities, liens, or resulting trusts which are not required to be recorded and hence are not within the application of the recording statute.[61]

e. Effect of Notice

An execution purchaser with notice is not a bona fide purchaser and he takes subject to all claims, legal or equitable, of which he has timely notice.

The effect of notice, actual or constructive, is to prevent the purchaser at the execution sale from being considered a bona fide purchaser with the rights, title, and protection belonging to and afforded a person holding that status.[62] He takes subject to all claims, legal or equitable, which third persons may have on the property and of which he has timely notice,[63] such as liens or encumbrances,[64] equities,[65] resulting trusts,[66] prior sales, transfers, or contracts to sell,[67] and unrecorded instruments.[68]

An execution purchaser who has notice of a mistake in a deed from the judgment debtor to a third person whereby certain land or an interest therein was omitted from the description by mistake, cannot recover, or assert a clear title to, the property so omitted.[69] Likewise, where a mortgage from the judgment debtor is insufficient in its description of the land, an execution purchaser who knows what land was intended to be mortgaged, takes subject to the mortgage.[70] A person who purchases at an execution sale with knowledge of the invalidity of the execution,[71] or of the invalidity of, or irregularities in, the judgment[72] is not an innocent purchaser. However, it has been held that notice of irregularities making the sale voidable does not affect the title where no fraud is shown.[73]

§ 295. —— Judgment Creditor or Attorney as Purchaser

A judgment creditor who purchases at the execution sale with notice is not a bona fide purchaser. The authorities have expressed contrary views regarding the status of a judgment creditor who purchases without actual notice.

A judgment creditor who purchases at the execution sale with actual timely notice of matters affecting the title,[74] or with notice of facts putting him on inquiry,[75] is not a bona fide purchaser.

The courts are divided on the question as to whether the judgment creditor who purchases at his own sale is affected by irregularities, liens, and equities of which he had no actual notice.[76] According to the doctrine prevailing in some jurisdictions he is not an innocent purchaser, but is chargeable with notice of all irregularities in the judgment, execution, and sale, and of all liens on, and equities subsisting against, the property in the hands of the judgment debtor.[77] At least this is so where

59. N.J.—Capital Circle B. of U. v. Schmitt, 92 A. 596, 84 N.J.Eq. 95.
23 C.J. p 762 note 98.

60. Fla.—Mansfield v. Johnson, 40 So. 196, 51 Fla. 239, 240, 120 Am. S.R. 159.
23 C.J. p 762 note 99.

61. Tex.—Seuter v. Lambeth, 59 Tex. 259.
23 C.J. p 763 note 1.

62. Okl.—Whittington Park Amusement Co. v. Gardner, 223 P. 684, 98 Okl. 51.
Or.—Geanakapulas v. Zographos, 208 P. 585, 104 Or. 430.
Pa.—Smith v. Miller, 137 A. 254, 289 Pa. 184.
23 C.J. p 763 note 2.

63. Ind.—Heck v. Fink, 85 Ind. 6.
23 C.J. p 763 note 3.

64. Pa.—Delaware County Nat. Bank v. Miller, 154 A. 19, 303 Pa. 1.
Tex.—Lasater v. Hinson, Civ.App., 84 S.W.2d 874—Lane v. Kempner, Civ.App., 184 S.W. 1090.
23 C.J. p 763 note 4.

65. Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed.
23 C.J. p 770 note 20.
Equities against the debtor generally see supra § 292.

66. Tex.—Caldwell v. Bryan, 49 S.W. 240, 20 Tex.Civ.App. 168.

67. Fla.—Laganke v. Sutter, 187 So. 586, 137 Fla. 71.
Mont.—Prosper v. Smith, 215 P. 649, 67 Mont. 308.
23 C.J. p 763 note 7.

68. Cal.—Fowler v. Lane Mortg. Co., 207 P. 919, 58 Cal.App. 66.
N.D.—Earnest v. First Nat. Bank, 217 N.W. 169, 56 N.D. 309.
Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340.
23 C.J. p 763 note 8.

69. Ark.—Williams v. McIlroy, 34 Ark. 85.
Tex.—McCrory v. Lutz, 64 S.W. 780, 94 Tex. 650, affirming Civ.App., 62 S.W. 1094.

70. Ind.—Betson v. State, 47 Ind. 54.

71. N.C.—Phillips v. Hyatt, 83 S.E. 804, 167 N.C. 570.

72. Tex.—Snow v. Hawpe, 22 Tex. 168.
23 C.J. p 763 note 12.

73. Ind.—Woodburn Sarven Wheel Co. v. McKernan, 1 Wils. 48.

74. Ky.—Perry v. Trimble, 76 S.W. 343, 25 Ky.L. 725.
23 C.J. p 764 note 15—66 C.J. p 1249 note 2.

75. Cal.—Rabbit v. Atkinson, 113 P.2d 14, 44 Cal.App.2d 752.

Statement of debtor that he owns no property

A statement of the judgment debtor that he owns no property made to the judgment creditor at the time of the contracting of the debt, which forms the basis of the judgment, is sufficient to put the judgment creditor on inquiry so that neither he nor his attorney on becoming a purchaser at the execution sale can properly claim to be a bona fide purchaser without notice.—Kinealy v. Macklin, 14 S.W. 507, 89 Mo. 433.

76. Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 513, citing **Corpus Juris.**

77. Kan.—Simmons v. Clark, 99 P. 2d 739, 151 Kan. 431—Hazelwood v. Jenkins, 205 P. 1038, 1040, 111 Kan. 10, quoting **Corpus Juris.**
Tex.—Kuehn v. Kuehn, Civ.App., 259 S.W. 290.
Wash.—Anderson Buick Co. v. Cook,

he merely credits the amount of his bid on the judgment.[78] The doctrine prevailing in other jurisdictions is that a judgment creditor purchasing at the execution sale stands in the same position as if he were a third person making the purchase; where he has no actual notice of prior irregularities or equities, or such constructive notice as would affect a third person purchasing, he is to be accorded the protection afforded a bona fide purchaser.[79] In these jurisdictions the courts apply the rule, unless there are equities of so strong and persuasive a nature as to prevent its application.[80]

Under registry acts. Under the various registry acts providing that all deeds and title papers shall be in force and take effect from and after the time of filing the same for record and not before, as to all creditors and subsequent bona fide purchasers without notice, it is usually held that the judgment creditor purchasing the property at the execution sale will be protected against an unrecorded deed or mortgage of which he had no actual notice.[81] Some courts reach the same conclusion where the statute does not extend protection to creditors as such but only to bona fide purchasers.[82] It has been held that an execution creditor is a "purchaser in good faith" within the meaning of the statute without regard to whether he is a bona fide purchaser for a valuable consideration.[83] Some courts hold that a judgment creditor who purchases at the execution sale is not an innocent or bona fide purchaser within the meaning of the recording acts, and is not entitled to the protection afforded by such acts against unrecorded instruments.[84]

The rule obtaining in some states that, where the judgment creditor has no actual notice, at the time his lien attaches, of an unrecorded instrument, subsequent notice to the execution purchaser is immaterial, discussed supra § 294, is applied by some courts in cases where the judgment creditor is the purchaser.[85] Of course, if he has notice before his lien attached he will not be protected.[86] Other courts decline to apply the rule where the execution creditor is the purchaser,[87] and hold that in such case he may be compelled in equity to relinquish the advantage which he secured.[88]

Where attorney for judgment creditor purchases at the execution sale, he is not regarded as a bona fide purchaser.[89] He takes with notice of all ir-

110 P.2d 857, 7 Wash.2d 632—Tallyn v. Cowden, 290 P. 1005, 158 Wash. 335—Vandin v. Henry McCleary Timber Co., 289 P. 1016, 157 Wash. 635—Waddell v. Roberts, 246 P. 755, 139 Wash. 273.
Wis.—Bradt v. Beloit Dairy Co., 230 N.W. 135, 201 Wis. 319.
23 C.J. p 764 note 16.

Execution creditor must make inquiry as to the title of the execution debtor.—Dunn v. Ponceler, 193 So. 723, 239 Ala. 53.

78. Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511.
Tex.—Carlisle v. Holland, Civ.App., 289 S.W. 116.
23 C.J. p 764 note 17.

79. Cal.—Pepin v. Stricklin, 299 P. 557, 114 Cal.App. 32—Pacific Fruit Exchange v. Schropfer, 279 P. 170, 99 Cal.App. 692.
Colo.—Zuckerman v. Guthner, 96 P.2d 4, 105 Colo. 176—Etchison v. Strain, 262 P. 919, 83 Colo. 78.
Iowa.—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.
23 C.J. p 765 note 19.

Prior sale of property by debtor
(1) Where the debtor sold the property to a third person before judgment, the judgment creditor purchasing the property at his execution sale did not occupy the position of a bona fide purchaser.—Hartsock v. John Wright Hardware Co., 64 P. 245, 16 Colo.App. 48.

(2) Estate or interest acquired by execution purchaser generally see supra § 287.

80. Iowa.—Butterfield v. Walsh, 21 Iowa 97, 89 Am.D. 557—Evans v. McGlasson, 18 Iowa 150.

81. Miss.—Hart v. Gardner, 33 So. 442, 497, 81 Miss. 650.
23 C.J. p 765 note 21.

Statute protecting subsequent holders of judgment duly recorded as against holder of unrecorded deed is not limited to one who acquires rights as a creditor after the execution of the unrecorded deed.—Miners Sav. Bank of Pittston v. Tracy, 192 A. 246, 326 Pa. 367, appeal dismissed Toole v. Miners Sav. Bank of Pittson, 58 S.Ct. 272, 302 U.S. 651, 82 L.Ed. 504.

82. Colo.—Younge v. Sutton, 61 P.2d 1370, 99 Colo. 254.
23 C.J. p 765 note 22.

83. N.Y.—Wood v. Morehouse, 45 N. Y. 368, 369, affirming 1 Lans. 405—Creegan v. Robertson, 26 N.Y.S. 326, 74 Hun 22.

84. Wash.—Vandin v. Henry McCleary Timber Co., 289 P. 1016, 157 Wash. 635.
23 C.J. p 765 note 24.

Lis pendens notice
Holder of junior attachment lien purchasing land involved at own execution sale could not, by lis pendens notice or by making him party to action on indebtedness, bar interest in land of holder of senior mortgage lien whose mortgage, although delivered prior to attachment, was recorded long after filing of lis pendens.—Tallyn v. Cowden, 290 P. 1005, 158 Wash. 335.

85. Fla.—Mansfield v. Johnson, 40 So. 196, 51 Fla. 239, 120 Am.S.R. 159.
23 C.J. p 765 note 26.

In Pennsylvania
(1) The rule of the text has been applied.—Miners Sav. Bank of Pittston v. Tracy, 192 A. 246, 326 Pa. 367, appeal dismissed Toole v. Miners Sav. Bank of Pittson, 58 S.Ct. 272, 302 U.S. 651, 82 L.Ed. 504.

(2) However, in an earlier case it was held that notice of an unrecorded conveyance given at any time before the purchase is in time where the judgment creditor is the purchaser.—Moyer v. Schick, 3 Pa. 242.

86. Ala.—May v. Chiles, 80 So. 46, 202 Ala. 224—Dickerson v. Carroll, 76 Ala. 377.

87. Ky.—Low v. Blinco, 10 Bush 331.

88. Ky.—Low v. Blinco, supra.

89. Ark.—Woods v. Hayes, 107 S.W. 387, 85 Ark. 163.
23 C.J. p 765 note 31.

Attorney as surety of purchaser
An attorney who admits that he recovered the judgment for the satisfaction of which the land was sold, and was present at the sale, was the surety of the purchaser in the sale bond, and must have known all about the manner of making the sale, is not an innocent purchaser without notice of the imperfection of

regularities.[90] Some courts hold that he is chargeable only with notice of irregularities.[91]

§ 296. —— Purchasers from Execution Purchasers

A purchaser with notice from a bona fide execution purchaser is protected as a bona fide purchaser, and such a bona fide purchaser is not affected by equities which might be set up against the property in the hands of the execution purchaser; but a purchaser with notice from one not a bona fide purchaser is not protected as a bona fide purchaser.

A purchaser with notice from a bona fide execution purchaser without notice is entitled to protection as a bona fide purchaser.[92] However, a purchaser with notice from one not a bona fide purchaser is not protected as a bona fide purchaser.[93]

A bona fide purchaser from the purchaser at the execution sale is not affected by equities which might be set up against the property in the hands of such purchaser.[94] He acquires a good title where the execution sale is merely voidable,[95] as where the execution purchaser is one having no right to purchase because he is an officer or the like.[96] Even where the execution sale is voidable as against the purchaser of the execution purchaser on account of his knowledge of irregularities attending the sale, a person who purchases from him bona fide for value and without notice acquires a good title.[97] However, where there was no power to sell under the execution, as where the judgment was satisfied before the sale, a purchaser without notice from a purchaser with notice acquires no title.[98] He cannot claim the property as an innocent purchaser where he purchased with knowledge of fatal irregularities in the execution sale,[99] and that the sale had been set aside by the court because of such irregularities.[1]

As in the case of the original execution purchaser, a purchaser from him must be deemed to have notice of facts shown by the public records.[2] The inadequacy of the bid at the execution sale cannot be invoked to destroy the title of a remote purchaser on the ground that it per se put him on notice.[3]

Purchasers from judgment creditor. If a judgment creditor purchasing at an execution sale is not regarded as a bona fide purchaser, see supra § 295, a party claiming under such judgment creditor is not an innocent purchaser, and acquires no better title than that of the judgment creditor,[4] at least where he has notice of facts placing him on inquiry.[5] However, where a judgment creditor was an innocent purchaser for value at his own execution sale, his transferee succeeds to his rights as innocent purchaser for value without notice,[6] although such transferee himself had notice before or at the time of the purchase.[7]

§ 297. —— Determination of Question of Bona Fides

The question as to whether an execution purchaser took with notice is one of fact for the jury, and a person claiming an interest in the property ordinarily has the burden of showing that the purchaser took with notice.

The question of whether the facts in evidence constitute notice to the purchaser is one of fact for the jury.[8] A person claiming an interest in property sold on execution, such as a person claiming under a prior unrecorded deed or mortgage, has the burden of showing that the execution purchaser took with notice;[9] but in the absence of an af-

his vendor's title.—Underwood v. Bowles, 2 Ky.Op. 321.

90. N.Y.—Simonds v. Cadman, 2 Cai. 61.

91. Ill.—Day v. Graham, 6 Ill. 435.

92. Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340.
23 C.J. p 765 note 35.
Purchaser without notice from execution purchaser without notice is a bona fide purchaser.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.

93. Ill.—Dimmitt v. Flinn, 82 N.E. 249, 229 Ill. 111.
23 C.J. p 765 note 36.

94. Ga.—Keaton v. Farkus, 70 S.E. 1110, 136 Ga. 188.
Pa.—Jones v. Harlukowicz, 33 Luz. Leg.Reg. 385.
23 C.J. p 766 note 37.

95. Pa.—Atkinson v. Tomlinson, 91 Pa. 284.
23 C.J. p 766 note 38.

96. N.C.—Cowles v. Hardin, 7 S.E. 896, 101 N.C. 388, 9 Am.S.R. 36.
23 C.J. p 766 note 39.

97. Ga.—Borders v. Vance, 67 S.E. 543, 134 Ga. 85.

98. N.Y.—Wood v. Colvin, 2 Hill 566, 38 Am.D. 598.

99. Tex.—Day v. Johnson, 72 S.W. 426, 32 Tex.Civ.App. 107.

1. Tex.—Day v. Johnson, supra.

2. Ill.—Barnes v. Freed, 173 N.E. 795, 342 Ill. 73.
23 C.J. p 766 note 45.

3. Miss.—Hart v. Gardner, 33 So. 442, 497, 81 Miss. 650.
Mo.—Elliott v. McCormick, 19 S.W. 2d 654, 661, 323 Mo. 263, quoting **Corpus Juris.**

4. Ill.—Culver v. Phelps, 22 N.E. 809, 130 Ill. 217.
23 C.J. p 766 note 48.

5. Cal.—Rabbit v. Atkinson, 113 P. 2d 14, 44 Cal.App.2d 752.

6. Ala.—John Silvey & Co. v. Cook, 68 So. 37, 191 Ala. 228.
Innocent purchaser at fair price
Judgment debtor's bill alleging fraudulent execution sale of his property to creditor authorized no relief against innocent purchasers at fair price from creditor.—Giordano v. Asbury Park & Ocean Grove Bank, 156 A. 779, 9 N.J.Misc. 1008.

7. Ala.—John Silvey & Co. v. Cook, 68 So. 37, 191 Ala. 228.

8. Pa.—Rhines v. Baird, 41 Pa. 256.
23 C.J. p 761 note 74.

9. Ala.—Sulzbacher v. Campbell, 121 So. 706, 219 Ala. 191.
Pa.—Smith v. Miller, 145 A. 901, 296 Pa. 340.
Tex.—W. C. Belcher Land Mortgage Co. v. Barfield, Civ.App., 244 S.W. 395, reversed on other grounds Barfield v. W. C. Belcher Land Mortgage Co., Com.App., 257 S.W. 1095.
23 C.J. p 761 note 75.

firmative showing that the execution purchaser bought without notice and for value, all that the grantee under a recorded deed need show is that the deed was sufficient to pass title.[10]

Evidence has been held sufficient[11] or insufficient[12] to show that the execution purchaser or his successor had notice.

§ 298. Effect of Defects or Irregularities

No title passes to the purchaser where the proceedings under an execution are wholly void.

If the proceedings under an execution are wholly void, no title passes to the purchaser.[13] However, where an execution is regular on its face, the purchaser at the sale cannot be injuriously affected by any irregularities in the proceedings which resulted in the sale, or in the sale, where not of such character as to render the proceedings wholly void.[14]

§ 299. —— Relating to Judgment, Writ, or Levy

a. Relating to judgment
b. Relating to writ
c. Relating to levy
d. Relating to appraisement

a. Relating to Judgment

That the judgment is voidable does not in general affect the title of an execution purchaser, but such a purchaser acquires no title under a void judgment.

The fact that the judgment is voidable, or may be set aside or reversed for errors prior to its rendition, does not affect the title of an execution purchaser[15] in the absence of statute to that effect.[16] On the other hand, if there are jurisdictional or other defects rendering the judgment void ab initio,[17] or if there is no judgment as a basis for the execution,[18] or if the lien of the judgment has expired where the sale is of real property,[19] the purchaser acquires no title. Failure to register the judgment is not fatal in some jurisdictions.[20]

b. Relating to Writ

The title of a bona fide execution purchaser is unaffected by mere defects or irregularities in the writ of execution, but such a purchaser acquires no title under a void writ.

Presumption of good faith

In action by heirs to recover portion of wife's interest in land which had allegedly belonged to matrimonial community and which had been sold by sheriff to satisfy judgment obtained against husband for debt incurred after wife's death, where neither husband's nor wife's succession was ever opened, and fact that husband was married when he bought the land did not appear in deed or record, evidence would not overcome presumption that sheriff's sale purchaser and subsequent purchasers acted in good faith, notwithstanding statement attributed to sheriff's sale purchaser that he bought the land to help husband out of a tight place. —Long v. Chailan, 199 So. 222, 196 La. 380.

In California

(1) The rule of the text has been followed.—Pepin v. Stricklin, 299 P. 557, 114 Cal.App. 32—Pacific Fruit Exchange v. Schropfer, 279 P. 170, 99 Cal.App. 692.

(2) However, in a case where the purchaser from the execution purchaser failed to testify that he purchased without notice and for a valuable consideration, it was held that he failed to sustain the burden of proving that the conveyance to him was taken in good faith.—Rabbit v. Atkinson, 113 P.2d 14, 44 Cal. App.2d 752.

10. Tex.—Watts v. Bruce, 72 S.W. 258, 31 Tex.Civ.App. 347.

11. Cal.—Rabbit v. Atkinson, 113 P. 2d 14, 44 Cal.App.2d 752.
Tex.—Richardson v. Hughes, Civ. App., 146 S.W.2d 255, error dismissed, judgment correct.

12. Ala.—King v. City Nat. Bank of Paducah, Ky., 144 So. 31, 225 Ala. 558.
N.J.—Eckman v. Beihl, 184 A. 430, 116 N.J.Law 308.

13. Cal.—Sellers v. Neil, App., 117 P.2d 390.
Mo.—Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.
Okl.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 788, 182 Okl. 542, citing **Corpus Juris.**
23 C.J. p 754 note 61.
Defects or irregularities as ground for setting sale aside see supra §§ 230–235.
Remedies against purchaser see infra § 312.
Rights of purchaser on failure of title see infra §§ 306–308.

14. Mo.—Wamsley v. Snow, 53 S.W 2d 258, 331 Mo. 261.
Pa.—Russell v. Randolph, 22 Wash. Co. 52.
23 C.J. p 755 note 62.

15. Mo.—Sidwell v. Kaster, 232 S. W. 1005, 289 Mo. 174.
Tex.—Scott v. McGlothlin, Civ.App., 80 S.W.2d 511, affirmed McGlothlin v. Scott, Com.App., 48 S.W.2d 610 —Taylor v. Doom, 95 S.W. 4, 43 Tex.Civ.App. 59.
23 C.J. p 755 note 64.

Claim of fraud and nonindebtedness

Where a default judgment of a domestic court of superior jurisdiction is immune to collateral attack by a party for fraud, the judgment debtor may not show fraud or that he did not owe the debt and a purchaser of property sold on execution under the judgment acquires a good title as against a claim of fraud and nonindebtedness.—Geo. Benz & Sons v. Hassle, 293 N.W. 133, 208 Minn. 118.

16. Ind.—Hutchins v. Doe, 3 Ind. 528.
23 C.J. p 755 note 65.

17. Fla.—Brauer v. Paddock, 139 So. 146, 103 Fla. 1175.
Ill.—Ledford v. Weber, 7 Ill.App. 87.
Mich.—Beier v. Pacholka, 285 N.W. 811, 283 Mich. 673.
Okl.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 182 Okl. 542—Empire Supply Co. v. McCann, 260 P. 44, 127 Okl. 195.
Tex.—Reitz v. Mitchell, Civ.App., 256 S.W. 697.
23 C.J. p 755 note 66.

18. U.S.—Salinas v. Jones, D.C.Tex., 60 F.2d 1049.
Idaho.—Evans v. City of American Falls, 11 P.2d 363, 368, 52 Idaho 7, citing **Corpus Juris.**
23 C.J. p 756 note 67.

19. N.C.—Cowen v. Withrow, 19 S. E. 645, 114 N.C. 558.
23 C.J. p 756 note 68.

Dormant judgment

Ga.—Odum v. Peterson, 153 S.E. 757, 170 Ga. 666.
23 C.J. p 756 note 68 [a].

20. Ala.—Howard v. Corey, 28 So. 682, 126 Ala. 283.

It is a general rule that the title of a bona fide purchaser is not affected by defects and irregularities in, or pertaining to, the writ of execution, such as defects in its contents or irregularities in its issuance or in the proceedings after judgment to obtain its issuance.[21] Thus no mere irregularity in the indorsement of the writ, or clerical error in its recitals, which render it voidable only, will invalidate the title of a bona fide purchaser at a sale thereunder.[22]

On the other hand, if the writ is void,[23] or the clerk had no right to issue it,[24] or the officer to whom the writ is directed or delivered has no authority to levy,[25] as where the writ does not direct or command him to levy,[26] the purchaser acquires no title. It has also been held that a purchaser acquires no title to property sold under a writ which is defective on its face because not in compliance with statutory requirements.[27]

Delay in issuing writ. Where it is required that execution shall issue within a designated period after the rendition of judgment, its issuance after the expiration of such period without a revival by scire facias renders it voidable merely, and a sale thereunder will give a valid title to the purchaser;[28] but if the writ is dormant the sale is void and the judgment debtor may assert title.[29]

Sale under several executions. Where property is sold under several executions, it is generally held that the title of the purchaser will be good if one of the executions is valid, although the others under which the property is sold are void.[30] Some authority, however, is to the contrary.[31]

c. Relating to Levy

As a general rule, mere irregularities in the levy of execution do not affect the title of an execution purchaser.

In some jurisdictions the rule is that there must be a valid levy as prescribed by statute in order to support the sheriff's deed, and that where such statutory levy is wanting the execution purchaser acquires no title.[32] In other jurisdictions, however, while it is recognized that the levy must comply with the substantial requisites of the law in order that title may pass,[33] and that there may be some defects in the levy which will render the sale void and prevent the title from passing,[34] the general rule is that the title of the purchaser is not affected by irregularities in the levy with which he was not connected, such as failure of the officer to make a seizure of the property in the mode or by the steps prescribed by statute,[35] to attach a levy and inventory to the execution,[36] to make a demand of payment before levying the execution,[37] to abide by the debtor's selection of property to be levied on,[38] or to make demand on the debtor for property before selling.[39] Formal defects in the copy of the writ served on the debtor are not fatal;[40] and failure to record the levy, as provided by statute, is not fatal if no rights of third persons intervene.[41]

Excessive levy. It has been held that a levy

21. Ala.—Williams v. Oates, 102 So 712, 212 Ala. 396.
Tex.—Smith v. Bittick, Civ.App., 237 S.W. 331, error refused.
23 C.J. p 756 note 70.
Effect of return or defects therein on title of purchaser see infra § 330.

22. Minn.—Swaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
23 C.J. p 756 note 71.

23. Ala.—Williams v. Oates, 102 So. 712, 212 Ala. 396.
Mo.—Mahon v. Tavern Rock, 37 S.W. 2d 562, 327 Mo. 391.
23 C.J. p 757 note 72.

24. Mo.—Wolz v. Venard, 161 S.W. 760, 253 Mo. 67.
23 C.J. p 757 note 73.

25. Ga.—Torbert v. Collier, 81 S.E. 1103, 141 Ga. 700.
Ill.—Bybee v. Ashby, 7 Ill. 151, 43 Am.D. 47.

26. Mo.—Keeline v. Sealy, 164 S.W. 556, 255 Mo. 692—Maupin v. Emmons, 47 Mo. 304.

27. Ill.—Sidall v. Schumacher, 99 Ill. 426.
23 C.J. p 757 note 76.

28. Ala.—Prince v. Carter, 65 So. 326, 186 Ala. 535.
23 C.J. p 757 note 77, p 380 note 13.

Writ issued without statutory notice The text rule holds true where an execution is issued without the statutory notice required where issued after a certain length of time.—McKeithen v. Blue, 62 S.E. 769, 149 N. C. 95, 128 Am.S.R. 654.

29. Ga.—Davis v. Comer, 33 S.E. 852, 108 Ga. 117, 75 Am.S.R. 33—Shaw v. Walker, 104 S.E. 23, 25 Ga.App. 642.

30. Kan.—Catlin v. Deering, 170 P. 396, 102 Kan. 256.
23 C.J. p 758 note 94.

31. Ind.—Ferrier v. Deutchman, 12 N.E. 497, 111 Ind. 330.
23 C.J. p 758 note 95.

32. Ark.—Hughes v. Watt, 26 Ark. 228.
23 C.J. p 757 note 80.

33. Mass.—Williams v. Amory, 14 Mass. 20.

34. Ariz.—Hill v. Favour, 84 P.2d 575, 52 Ariz. 561.
Tex.—Held Bros. v. Dawson, Civ. App., 117 S.W.2d 481.
23 C.J p 757 note 82.

35. Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 240 P. 667, 74 Mont. 355.
23 C.J. p 757 note 83.

Failure of realty attachment to create lien did not prevent purchaser at execution sale from acquiring title, where there were no intervening rights.—Crockett v. Borgerson, 152 A. 407, 129 Me. 395.

36. N.J.—Black v. Mullins, 92 A. 281, 86 N.J.Law 463.

37. Ill.—Rock v. Haas, 110 Ill. 528.
23 C.J. p 757 note 85.

38. Ind.—Tillotson v. Doe, 5 Blackf. 590.

39. Ind.—Lahr v. Ulmer, 60 N.E. 1009, 27 Ind.App. 107.

40. Minn.—Carlson v. Smith, 149 N. W. 199, 127 Minn. 203.

41. Me.—Crockett v. Borgerson, 152 A. 407, 129 Me. 395—Swift v. Guild, 47 A. 912, 94 Me. 436, 80 Am.S.R. 406.

which is excessive, see supra § 107, will not invalidate a sale thereunder;[42] but according to some authorities if the levy is entirely out of proportion to the debt the purchaser acquires no title,[43] although this is so only in extreme cases.[44]

Exhausting personalty before levy on land. According to some authorities the failure to exhaust personalty before levying on land, as required by statute, see supra § 100, will not invalidate the title of an innocent purchaser who has not been instrumental in causing the officer to violate the law,[45] although it has also been held that a sheriff's deed based on a return which fails to show that the personalty was insufficient to satisfy the judgment is void and conveys no title.[46]

d. Relating to Appraisement

Irregularities in the appraisement do not affect the title of an execution purchaser, but, according to some authorities, a sale made without any appraisement passes no title.

Defects and irregularities in the appraisement do not affect the title of the execution purchaser.[47] However, it has been held that title does not pass under a sale made without any appraisement,[48] at least, under some circumstances,[49] although it has been held that title passes where there was a prior appraisement under other proceedings and the property sold for more than two thirds of its value under such appraisement.[50]

§ 300. —— Relating to Sale or Acts after Sale

Mere defects or irregularities relating to the sale or to acts after the sale do not ordinarily affect the title of the execution purchaser, but no title passes under a void sale.

Mere irregularities in the sale, or connected therewith, do not ordinarily affect the title of the execution purchaser,[51] where not caused or induced by the purchaser.[52] Failure of the officer to keep the property in his possession for the required length of time before sale is not fatal.[53] The fact that property was improperly sold en masse does not affect the title of the purchaser;[54] nor does failure to notify the judgment debtor of his right to select exempt property avoid the sale and the deed given thereunder.[55]

On the other hand, the sale is void and vests no title in the purchaser where, contrary to statutory provisions, the sale is made at the first offering for less than the proper proportion of the appraised value of the property;[56] where a sale under process issued out of the court in question is prohibited by statute;[57] or where the officer making the sale is without authority to do so,[58] as where he has been restrained by injunction,[59] or where he sells under

42. Wash.—McConnell v. Kaufman, 32 P. 782, 5 Wash. 686.
23 C.J. p 467 note 67.

43. Ga.—Wood v. Sommerfield, 195 S.E. 428, 185 Ga. 441.
23 C.J. p 467 note 68, p 759 note 13.

44. Ga.—Landrum v. Broadwell, 35 S.E. 638, 110 Ga. 538.
23 C.J. p 759 note 14.

45. Ohio.—Wheeling, L. E. & P. Coal Co. v. First Nat. Bank, 45 N. E. 630, 55 Ohio St. 233.
23 C.J. p 446 note 88, p 758 note 2.

46. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284—Robinson v. Burge, 71 Ga. 526.

47. Ky.—Guelot v. Pearce, 38 S.W. 892.
23 C.J. p 757 note 90.

48. Ind.—Doe v. Collins, Smith p 58.

49. Ky.—Smith v. Mason, 25 S.W. 493, 15 Ky.L. 719.
23 C.J. p 757 note 92 [a].

50. Kan.—Shaffer v. Knox, 53 P. 785, 7 Kan.App. 182.

51. Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
Pa.—Colvin v. Crown Coal & Coke Co., 90 Pa.Super. 560.
Tex.—Stone v. King, Civ.App., 154 S.W.2d 521, error refused.
23 C.J. p 758 note 96.

Error in advertisement

(1) Misdescription of district in advertisement of execution sale of land does not affect title of purchaser, who took without notice.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.

(2) Error in advertisement, with reference to court from which execution issued, does not render void sale of automobiles to purchaser, without notice of such irregularity. —Washington Loan & Banking Co. v. Butler, 126 S.E. 289, 159 Ga. 520.

Land in excess of homestead

Execution sale of homestead and additional land would not be invalid as to land in excess of homestead.—Conley v. Abrams, Tex.Civ.App., 7 S.W.2d 674, error refused.

52. Tex.—Stone v. King, Civ.App., 154 S.W.2d 521, error refused—Hendron v. Yount-Lee Oil Co., Civ. App., 119 S.W.2d 171, error refused.
23 C.J. p 758 note 97.

53. Me.—Richardson v. Kimball, 28 Me. 463—Tuttle v. Gates, 24 Me. 395.

54. Mo.—Hays v. Perkins, 18 S.W. 1127, 109 Mo. 102.
23 C.J. p 758 note 3.

In absence of request that land be sold separately or evidence of timely objection to tracts being sold together, no advantage could be had from fact that three tracts were offered for sale and sold together.—Downs v. Wagnon, Tex.Civ.App., 66 S.W.2d 777, error dismissed.

55. Mo.—Hudson v. Wright, 103 S. W. 8, 204 Mo. 412.

56. La.—Monroe v. Jones, 66 So. 759, 136 La. 143.

57. Okl.—Robertson v. Eldridge, 87 P. 659, 15 Okl. 599.

58. N.Y.—Harris v. Murray, 28 N.Y. 574, 86 Am.D. 268.
Tex.—Stone v. King, Civ.App., 154 S.W.2d 521, error refused.

Recall of execution

Sheriff's sale had under order of sale and special execution previously recalled by execution creditor was void for want of authority, and conferred no right on purchaser at sale. —Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

Sale after return day

A sale of real estate made under an execution after the return day on the writ is void, and the purchaser acquires no title thereby.—Reynolds v. Farmers & Merchants Nat. Bank of Nocona, Tex.Civ.App., 135 S.W.2d 556.

59. N.C.—Stern v. Austern, 27 S.E. 31, 120 N.C. 107.
23 C.J. p 759 note 11.

an execution directed to an officer of another jurisdiction.[60]

A sale of personal property not in the possession of the officer or within the view of the bidders generally is void and confers no title on the purchaser;[61] but there is authority holding that such sales are merely voidable.[62]

Notice of sale. In most jurisdictions a mistake or defect in, or even failure to give, notice of sale does not render the sale void so as to invalidate the title of a bona fide purchaser,[63] but in other jurisdictions failure to give the statutory notice renders the sale void.[64]

Stifling of bidding. If the purchaser stifles bidding, it has been held that the sale is voidable but not void;[65] but some courts have held that the purchaser will not be permitted to hold property so purchased.[66]

Acts or omissions after sale. The title of the purchaser cannot be affected by delinquencies of the sheriff committed subsequent to the sale;[67] and failure to have the sale confirmed, even where required by statute, does not invalidate the purchaser's title.[68]

§ 301. Effect of Reversal, Vacation, or Modification of Judgment

a. Reversal or vacation
b. Modification

a. Reversal or Vacation

(1) In general

The title of an execution purchaser who purchases before an appeal is taken or before the judgment is superseded or suspended is not impaired by the subsequent reversal or vacation of the judgment.

The title of an execution purchaser, and particularly of a bona fide purchaser who is a stranger to the suit, who purchases before an appeal is taken and before the judgment is superseded or suspended by giving a bond, is not impaired by the subsequent reversal of the judgment on appeal or its being set aside by the trial court on grounds which do not render the judgment absolutely void,[69] or for frauds, vices, or infirmities which do not appear on the face of the record, as appears supra § 293; and this rule has been applied where the judgment contained recitals of personal service of process, although in fact there was no service.[70] The rule has been affirmed by statute in some jurisdictions,[71] but in other jurisdictions, under statutes relating to new trials, a new trial granted within a specified period of time for a particular cause is deemed a continuation of the original suit and defeats the title of the purchaser.[72] If the judgment was reversed before levy and sale, no title passes to the purchaser,[73] and, where the judgment stands reversed at the time of sale, a subsequent affirmance does not aid the purchaser.[74]

Where the judgment in another action is levied on and sold while the right of appeal therefrom still exists, the execution purchaser takes subject to

(2) Where purchaser is judgment creditor or his attorney, assignee, or vendee

60. Pa.—Gordon v. Camp, 3 Pa. 349, 45 Am.D. 647.

61. N.C.—Alston v. Morphew, 18 S. E. 335, 113 N.C. 460.
23 C.J. p 632 note 15.

62. Del.—Hazzard v. Burton, 4 Del. 62.
23 C.J. p 632 note 16.

63. Minn.—Sivaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
N.Y.—Rotkowitz v. Sohn, 239 N.Y.S. 639, 136 Misc. 265.
23 C.J. p 758 note 98.

64. U.S.—U. S. v. Sinclair, Tex., 209 F. 612, 126 C.C.A. 606.
23 C.J. p 758 note 99.

65. U.S.—Froneberger v. Charlotte First Nat. Bank, N.C., 203 F. 429, 121 C.C.A. 539.

66. Ind.—Arnold v. Cord, 16 Ind. 177.

67. Ky.—Galot v. Pearce, 38 S.W. 892, 18 Ky.L. 1004.
23 C.J. p 759 note 16.
Effect of return or defects therein on title of purchaser see infra § 330.

68. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 156, 66 Am.S.R. 702.

69. La.—Wetherbee v. Lodwick Lumber Co., 193 So. 671, 194 La. 352—United Railway Men's Oil Ass'n v. Dupuy, 151 So. 71, 178 La. 179—Bank of La Fourche v. Barrios, 118 So. 893, 167 La. 215—Dyer v. Mountz, 102 So. 413, 157 La. 316—Citizens' Bank of Columbia v. Bellamy Lumber Co., 73 So. 308, 140 La. 497—Blappert v. Pagluighi, App., 192 So. 135.
Mo.—Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.
Or.—Niedermeyer, Inc. v. Fehl, 57 P. 2d 1086, 1092, 153 Or. 656, quoting **Corpus Juris.**
23 C.J. p 771 note 27.
Distinction between void and voidable judgments as affecting purchaser see supra § 299.

Purchaser with notice
Where the purchase is made by a stranger and the circumstances of the case show that he is chargeable with notice of the facts and proceedings leading up to the judgment, his title will not be protected as against the execution debtor or his grantee.—Cottle v. Simon, 47 N.E. 815, 153 N.Y. 403, reversing 92 Hun 607.

Only right or remedy of execution debtor is to claim the proceeds of the sale.—Continental Securities Corporation v. Wetherbee, 175 So. 571, 187 La. 773—Jefferson v. Gamm, 90 So. 682, 150 La. 372.

70. Tex.—Carpenter v. Anderson, 77 S.W. 291, 33 Tex.Civ.App. 484, overruling Scanlan v. Campbell, 55 S. W. 501, 22 Tex.Civ.App. 505.

71. Iowa.—English v. Otis, 101 N.W. 293, 125 Iowa 555.
23 C.J. p 772 note 31.

72. Tex.—Glaze v. Johnson, 65 S.W. 662, 27 Tex.Civ.App. 116.
23 C.J. p 772 note 32.

73. Tex.—Flanary v. Wade, 113 S. W. 8, 102 Tex. 63, reversing, Civ. App., 108 S.W. 506.

74. Tex.—Flanary v. Wade, supra.

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45. Ohio.—Wheeling, L. E. & P. Coal Co. v. First Nat. Bank, 45 N. E. 630, 55 Ohio St. 233.
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46. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284—Robinson v. Burge, 71 Ga. 526.

47. Ky.—Guelot v. Pearce, 38 S.W. 892.
23 C.J. p 757 note 90.

48. Ind.—Doe v. Collins, Smith p 58.

49. Ky.—Smith v. Mason, 25 S.W. 493, 15 Ky.L. 719.
23 C.J. p 757 note 92 [a].

50. Kan.—Shaffer v. Knox, 53 P. 785, 7 Kan.App. 182.

51. Mont.—Fox v. Curry, 29 P.2d 663, 96 Mont. 212.
Pa.—Colvin v. Crown Coal & Coke Co., 90 Pa.Super. 560.
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23 C.J. p 758 note 97.

53. Me.—Richardson v. Kimball, 28 Me. 463—Tuttle v. Gates, 24 Me. 396.

54. Mo.—Hays v. Perkins, 18 S.W. 1127, 109 Mo. 102.
23 C.J. p 758 note 3.

In absence of request that land be sold separately or evidence of timely objection to tracts being sold together, no advantage could be had from fact that three tracts were offered for sale and sold together.—Downs v. Wagnon, Tex.Civ.App., 66 S.W.2d 777, error dismissed.

55. Mo.—Hudson v. Wright, 103 S. W. 8, 204 Mo. 412.

56. La.—Monroe v. Jones, 66 So. 759, 136 La. 143.

57. Okl.—Robertson v. Eldridge, 87 P. 659, 15 Okl. 599.

58. N.Y.—Harris v. Murray, 28 N.Y. 574, 86 Am.D. 268.
Tex.—Stone v. King, Civ.App., 154 S.W.2d 521, error refused.

Recall of execution

Sheriff's sale had under order of sale and special execution previously recalled by execution creditor was void for want of authority, and conferred no right on purchaser at sale. —Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

Sale after return day

A sale of real estate made under an execution after the return day on the writ is void, and the purchaser acquires no title thereby.—Reynolds v. Farmers & Merchants Nat. Bank of Nocona, Tex.Civ.App., 135 S.W.2d 556.

59. N.C.—Stern v. Austern, 27 S.E. 31, 120 N.C. 107.
23 C.J. p 759 note 11.

an execution directed to an officer of another jurisdiction.[60]

A sale of personal property not in the possession of the officer or within the view of the bidders generally is void and confers no title on the purchaser;[61] but there is authority holding that such sales are merely voidable.[62]

Notice of sale. In most jurisdictions a mistake or defect in, or even failure to give, notice of sale does not render the sale void so as to invalidate the title of a bona fide purchaser,[63] but in other jurisdictions failure to give the statutory notice renders the sale void.[64]

Stifling of bidding. If the purchaser stifles bidding, it has been held that the sale is voidable but not void;[65] but some courts have held that the purchaser will not be permitted to hold property so purchased.[66]

Acts or omissions after sale. The title of the purchaser cannot be affected by delinquencies of the sheriff committed subsequent to the sale;[67] and failure to have the sale confirmed, even where required by statute, does not invalidate the purchaser's title.[68]

§ 301. Effect of Reversal, Vacation, or Modification of Judgment

a. Reversal or vacation
b. Modification

a. Reversal or Vacation

(1) In general

(2) Where purchaser is judgment creditor or his attorney, assignee, or vendee

(1) In General

The title of an execution purchaser who purchases before an appeal is taken or before the judgment is superseded or suspended is not impaired by the subsequent reversal or vacation of the judgment.

The title of an execution purchaser, and particularly of a bona fide purchaser who is a stranger to the suit, who purchases before an appeal is taken and before the judgment is superseded or suspended by giving a bond, is not impaired by the subsequent reversal of the judgment on appeal or its being set aside by the trial court on grounds which do not render the judgment absolutely void,[69] or for frauds, vices, or infirmities which do not appear on the face of the record, as appears supra § 293; and this rule has been applied where the judgment contained recitals of personal service of process, although in fact there was no service.[70] The rule has been affirmed by statute in some jurisdictions,[71] but in other jurisdictions, under statutes relating to new trials, a new trial granted within a specified period of time for a particular cause is deemed a continuation of the original suit and defeats the title of the purchaser.[72] If the judgment was reversed before levy and sale, no title passes to the purchaser,[73] and, where the judgment stands reversed at the time of sale, a subsequent affirmance does not aid the purchaser.[74]

Where the judgment in another action is levied on and sold while the right of appeal therefrom still exists, the execution purchaser takes subject to

60. Pa.—Gordon v. Camp, 3 Pa. 349, 45 Am.D. 647.

61. N.C.—Alston v. Morphew, 18 S. E. 335, 113 N.C. 460.
23 C.J. p 632 note 15.

62. Del.—Hazzard v. Burton, 4 Del. 62.
23 C.J. p 632 note 16.

63. Minn.—Sivaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
N.Y.—Rotkowitz v. Sohn, 239 N.Y.S. 639, 136 Misc. 265.
23 C.J. p 758 note 98.

64. U.S.—U. S. v. Sinclair, Tex., 209 F. 612, 126 C.C.A. 606.
23 C.J. p 758 note 99.

65. U.S.—Froneberger v. Charlotte First Nat. Bank, N.C., 203 F. 429, 121 C.C.A. 539.

66. Ind.—Arnold v. Cord, 16 Ind. 177.

67. Ky.—Galot v. Pearce, 38 S.W. 892, 18 Ky.L. 1004.
23 C.J. p 759 note 16.
Effect of return or defects therein on title of purchaser see infra § 330.

68. S.D.—Baxter v. O'Leary, 72 N. W. 91, 10 S.D. 150, 66 Am.S.R. 702.

69. La.—Wetherbee v. Lodwick Lumber Co., 193 So. 671, 194 La. 352—United Railway Men's Oil Ass'n v. Dupuy, 151 So. 71, 178 La. 179—Bank of La Fourche v. Barrios, 118 So. 893, 167 La. 215—Dyer v. Mountz, 102 So. 413, 157 La. 316—Citizens' Bank of Columbia v. Bellamy Lumber Co., 73 So. 308, 140 La. 497—Blappert v. Pagluighi, App., 192 So. 135.
Mo.—Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.
Or.—Niedermeyer, Inc. v. Fehl, 57 P. 2d 1086, 1092, 153 Or. 656, quoting **Corpus Juris.**
23 C.J. p 771 note 27.
Distinction between void and voidable judgments as affecting purchaser see supra § 299.

Purchaser with notice
Where the purchase is made by a stranger and the circumstances of the case show that he is chargeable with notice of the facts and proceedings leading up to the judgment, his title will not be protected as against the execution debtor or his grantee.—Cottle v. Simon, 47 N.E. 815, 153 N.Y. 403, reversing 92 Hun 607.

Only right or remedy of execution debtor is to claim the proceeds of the sale.—Continental Securities Corporation v. Wetherbee, 175 So. 571, 187 La. 773—Jefferson v. Gamm, 90 So. 682, 150 La. 372.

70. Tex.—Carpenter v. Anderson, 77 S.W. 291, 33 Tex.Civ.App. 484, overruling Scanlan v. Campbell, 55 S. W. 501, 22 Tex.Civ.App. 505.

71. Iowa.—English v. Otis, 101 N.W. 293, 125 Iowa 555.
23 C.J. p 772 note 31.

72. Tex.—Glaze v. Johnson, 65 S.W. 662, 27 Tex.Civ.App. 116.
23 C.J. p 772 note 32.

73. Tex.—Flanary v. Wade, 113 S. W. 8, 102 Tex. 63, reversing, Civ. App., 108 S.W. 506.

74. Tex.—Flanary v. Wade, supra.

such action as defendant in the judgment may legally take to appeal and obtain a reversal.[75]

Sale pending appeal. Except in some jurisdictions,[76] a reversal defeats the title of the purchaser where the sale was made pending the appeal,[77] especially where the judgment was suspended or superseded by the giving of a bond,[78] or where the purchaser had actual knowledge of the pending appeal.[79]

(2) Where Purchaser Is Judgment Creditor or His Attorney, Assignee, or Vendee

The title acquired at an execution sale, where the purchaser is the execution creditor or one standing in his position, generally is not protected by a subsequent reversal or vacation of the judgment.

The policy of law which protects the title which a stranger acquires at an execution sale under a voidable judgment does not apply where the purchase is made by the execution creditor or one occupying his position, so that where an execution creditor bids in property at a sale under his own execution and the judgment is afterward set aside in the lower court or reversed on appeal, the former owner of the property or the execution debtor becomes entitled to restitution of the property and can recover it in an appropriate proceeding, since in such case the execution creditor has none of the equities of a bona fide purchaser.[80] It has been held, however, that restitution of the property itself, whether lands or goods, cannot be had; that the right is limited to the proceeds.[81] Statutes providing that on reversal there shall be a restitution of the price for which the land was sold but that the land shall not be restored have been held applicable where the purchaser was the judgment creditor.[82] Where the sale is based on two judgments, the fact that the judgment on the inferior claim is afterward reversed does not affect the validity of the sale even where the judgment creditor is the purchaser;[83] and where the judgment creditor purchases before notice of the appeal, and when the cause is remanded recovers again for the whole amount of the first judgment, he will be protected in his purchase, for in such case the recovery of the second judgment in effect declares that he is under no obligation to make restitution.[84]

Under the practice in some jurisdictions by which the debtor's property or any interest or estate therein is set off or delivered to the creditor under a writ of elegit or an extent, the title to the property does not pass absolutely to the creditor, but depends on the continuance of the judgment;[85] and hence, where the judgment is subsequently reversed, the debtor thereupon becomes entitled to have the specific property or interest restored to him, and he may recover it not only where it remains in the hands of the creditor,[86] but where it has been sold to a third person, even though the third person is an innocent purchaser.[87]

Purchase by execution creditor's attorney. Where the purchase at the sale was made by the execution creditor's attorney who conducted the proceedings culminating in the judgment and sale, the execution debtor may enforce restitution from the attorney, although the attorney purchased for his own benefit; in such a case the attorney is chargeable with notice and occupies no more favorable a position than the execution creditor.[88] A fortiori the attorney is not protected where the circumstances of the case show that in reality he purchased for the benefit of the execution creditor,[89] or was himself the beneficial plaintiff in the judgment.[90]

Purchase by assignee of judgment. Where the judgment creditor assigns the judgment and the assignee procures an execution to be issued thereon and purchases the property at the sale, he is not protected as a bona fide purchaser on a subsequent reversal of the judgment, but must make restitution

75. Iowa.—Markley v. Western Union Tel. Co., 141 N.W. 443, 159 Iowa 557.

76. Pa.—Kramer v. Wellendorff, 10 A. 892, 8 Pa.Cas. 1.

77. Iowa.—English v. Otis, 101 N.W. 293, 125 Iowa 555.
23 C.J. p 772 note 36.

78. N.J.—Thompson v. Thompson, 1 N.J.Law 184.

79. Iowa.—Twogood v. Franklin, 27 Iowa 239.

80. Neb.—Baxter v. National Mortg. Loan Co., 264 N.W. 675, 130 Neb. 256.
Okl.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 182 Okl. 542.
23 C.J. p 772 note 41.

81. N.C.—Den v. Dellinger, 5 N.C. 272.

82. Pa.—Lengert v. Chaninel, 57 A. 561, 208 Pa. 229, 101 Am.S.R. 931.
When sale completed
"Sale," within statute providing that reversal of judgment in satisfaction of which land is sold shall not defeat title of purchaser, but restitution shall be made of moneys received with lawful interest from day of sale, does not exist until order of confirmation is entered and time for superseding order has elapsed.—Baxter v. National Mortg. Loan Co., 264 N.W. 675, 130 Neb. 256.

83. Kan.—Falk v. Ferd Heim Brewing Co., 72 P. 531, 67 Kan. 131.

84. Iowa.—Frazier v. Crafts, 40 Iowa 110.

85. Me.—Bryant v. Fairfield, 51 Me. 149.
Extending executions, and proceedings by elegit see infra § 403.

86. Me.—Bryant v. Fairfield, supra.
23 C.J. p 773 note 52.

87. Me.—Bryant v. Fairfield, supra.

88. Ky.—Cavanaugh v. Willson, 57 S.W. 620, 108 Ky. 759, 22 Ky.L. 474.
23 C.J. p 773 note 45.

89. Ill.—Hays v. Cassel, 70 Ill. 669.
Iowa.—English v. Otis, 101 N.W. 293, 125 Iowa 755.

90. Ill.—McLean County Bank v. Flagg, 31 Ill. 290, 83 Am.D. 224.

to the execution debtor,[91] although there is some authority to the contrary.[92]

Purchaser from execution creditor. Where the execution creditor, after purchasing at his own sale, the judgment not having been superseded by bond, sells the property to a third person who purchases for value and without notice, and the judgment is afterward reversed on appeal, it is held in some jurisdictions that the title of the purchaser is not affected by the reversal;[93] but the contrary is held in other jurisdictions.[94] Especially does the purchaser from the execution creditor lose his title on reversal where he purchases pending an appeal, although there is no supersedeas, since he is chargeable with notice.[95] At any event, a stranger thus purchasing from the execution creditor is not protected from the effects of the subsequent reversal of the judgment unless he occupies the position of a purchaser for value and without notice;[96] and in order to occupy this position he must acquire the legal title and pay the purchase money.[97]

Where the execution creditor purchases at the sale and takes only a sheriff's certificate which he assigns, the assignee, on a subsequent reversal of the judgment, cannot hold the property as against the execution debtor;[98] but where the assignee of the certificate obtains the sheriff's deed before reversal of the judgment his title may be protected.[99]

Remedies. Where the purchase at the execution sale was made by the execution creditor, his attorney, or assignee, it has been held that the former owner of the property or the execution debtor, on a reversal of the judgment, may compel restitution of the particular property, or may sue for damages[1] if the property cannot be restored to him.[2]

b. Modification

A modification of the judgment generally does not affect the title acquired by the purchaser at an execution sale.

Generally a modification of a judgment does not affect the purchaser's title at the execution sale,[3] even though the execution creditor is the purchaser,[4] unless, in the latter case, such modification or partial reversal is on so material a point or is so great in extent as to destroy the grounds for the sale or make it inequitable for the sale to stand.[5] Thus, where the partial reversal or modification relates only to the amount, and the bid at which the property was purchased is less than the amount of the amended judgment, the sale will be permitted to stand, in the absence of other reasons for setting it aside, and the execution creditor's title will not be affected by the amendment, since not all ground for the sale has been destroyed.[6]

Amount of amended judgment less than amount bid. Where the modification of the judgment reduces the amount thereof below the amount for which the execution creditor has bid in the property, it has been held that the title which the execution creditor has acquired cannot be divested, but that he must pay to the execution debtor the difference between the reduced amount of the judgment and the amount of the bid,[7] although it has also been declared that the execution creditor is

91. Ill.—McJilton v. Love, 13 Ill. 486, 54 Am.D. 449.
23 C.J. p 773 note 48.

92. La.—Farrar v. Stacy, 2 La.Ann. 210.

93. Ill.—Hallorn v. Trum, 17 N.E. 823, 125 Ill. 247.
23 C.J. p 773 note 54.

94. Okl.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 182 Okl. 542.
23 C.J. p 773 note 55.

Pledgee of property sold on execution issued on default judgment, later set aside, was liable for its value as of date of demand therefor.—Wichita Motors Co. v. United Warehouse Co., 255 P. 30, 123 Kan. 235.

95. Ala.—Marks v. Cowles, 61 Ala. 299.
Cal.—Di Nola v. Allison, 76 P. 976, 143 Cal. 106, 101 Am.S.R. 84, 65 L.R.A. 419.

96. Cal.—Reynolds v. Harris, 14 Cal. 667, 76 Am.D. 459.
23 C.J. p 773 note 57.

97. Cal.—Reynolds v. Harris, supra.
Wash.—Singly v. Warren, 51 P. 1066, 18 Wash. 434, 63 Am.S.R. 896.

98. Cal.—Reynolds v. Harris, 14 Cal. 667, 76 Am.D. 459.
Wash.—Singly v. Warren, 51 P. 1066, 18 Wash. 434, 63 Am.S.R. 896.

99. Ill.—Guiteau v. Wisely, 47 Ill. 433.

1. Cal.—Reynolds v. Hosmer, 45 Cal. 616.
23 C.J. p 774 note 62.

Measure of damages

(1) The measure of damages is the fair market value of the property when taken, and the owner is not confined to the amount of the proceeds of the execution sale.—Hess v. Cedar Rapids State Bank, 182 N.W. 813, 191 Iowa 685.

(2) Other cases see 23 C.J. p 774 note 62 [a].

2. Iowa.—Hess v. Cedar Rapids State Bank, 182 N.W. 813, 191 Iowa 685.

3. Cal.—Bonney v. Tilley, 55 P. 801, 123 Cal. 126.
23 C.J. p 774 note 63.

Where court did not stay operation of former decree, sale under execution under former decree should not be set aside on modification of decree.—Wagner v. Wagner, 216 N.W. 433, 237 Mich. 371, modifying 211 N.W. 738, 237 Mich. 371.

If there is no order for restitution, where such order is provided for by statute, the purchaser's title is not affected by the modification of the judgment.—Purser v. Cady, 49 P. 180, 5 Cal.Unrep.Cas. 707.

4. **Reduction of amount**
La.—Pasley v. McConnell, 38 La. Ann. 470.

5. Nev.—Martin v. Victor Mill & Min. Co., 9 P. 336, 19 Nev. 197.
23 C.J. p 774 note 65.

6. Tex.—Sage v. Clopper, 48 S.W. 36, 19 Tex.Civ.App. 502.
23 C.J. p 774 note 66.

7. La.—McWaters v. Smith, 25 La. Ann. 515.
23 C.J. p 774 note 68.

not bound to pay to the execution debtor the difference between the amount of the bid and the amount of the judgment as reduced, but that the execution debtor is entitled to a vacation of the sale and a restitution of all the property purchased unless it appears that he would be prejudiced by pursuing this course instead of having payment of the excess.[8]

§ 302. Right to Possession

a. In general
b. Property subject to mortgage
c. Taking possession by force

a. In General

An execution purchaser acquires only such right to possession of the property as the debtor had; he is entitled to possession of personal property when he has complied with the terms of sale and has made payment; on perfection of his title he has a right to possession of real property where the debtor was entitled to possession.

A purchaser at an execution sale acquires only such right to possession of the property as the execution debtor had.[9]

Personal property. The general rule is that the purchaser of personal property at an execution sale who has complied with the terms of the sale and has paid the amount of his bid is entitled to immediate possession of the property purchased.[10] An exception to the rule exists where a rule to set aside the sale is pending.[11] Where the property is pledged, redemption from the pledge is necessary to entitle the purchaser to possession.[12] A change of possession is not necessary to the validity of the sale[13] or to the passing of title.[14]

The purchaser has a reasonable time to remove the property,[15] a reasonable time being deemed to be the time required to move the property with diligence in the ordinary manner of moving property of the same class.[16] The act of the sheriff in delivering to the purchaser a key to the building or room where the property is kept, together with the acts of the purchaser in assuming control of and removing the property, constitute a delivery.[17]

An execution purchaser of fixtures as personal property who places a custodian in possession of them cannot thereby be deemed to be in possession of the real estate.[18]

Real property. Where the judgment debtor was entitled to possession, the execution purchaser of real property is entitled to possession immediately on the perfection of his title.[19] The purchaser will not be put in possession where the execution debtor's title was in dispute and he was out of possession at the time of the sale;[20] nor is a purchaser entitled to possession of land which was not included in the execution sale.[21] The purchaser of an estate in remainder is not entitled to possession until after the death of the tenant for life.[22] Where only an undivided interest in the land is sold, the execution purchaser is only entitled to the right of possession to which the execution debtor was entitled, and his possession must therefore be that of a tenant in common or joint tenant.[23]

The purchaser is not entitled to the possession of real property until the execution and delivery of the sheriff's deed, and his title will not support an action for such possession until then.[24] The mere purchase and certificate of sale alone either before or after the expiration of the redemption period

8. Iowa.—Munson v. Plummer, 13 N. W. 71, 58 Iowa 736.

9. Tex.—Lozano v. Guerra, Civ.App., 140 S.W.2d 587.

Purchaser of undivided interest in estate, required by terms of will to be kept intact for a specified period, could not abridge the executors' right to possession and control.—Lozano v. Guerra, supra.

10. Cal.—Holm v. Overholt, 6 P.2d 76, 214 Cal. 431.
23 C.J. p 774 note 70.

Until purchase price is paid, officer may refuse delivery of goods sold under execution.—Terry v. Atlanta Wholesale Grocery Co., 127 So. 640, 13 La.App. 413.

11. La.—Bayon v. Breedlow, 3 Rob. 383.

12. N.Y.—Stief v. Hart, 1 N.Y. 20.
Tex.—Kimbrough v. Bevering, Civ. App., 182 S.W. 403, 405.

13. Cal.—Matteucci v. Whelan, 55 P. 99, 123 Cal. 312, 66 Am.S.R. 60.
Pa.—Bisbing v. Third Nat. Bank, 93 Pa. 79, 39 Am.R. 726.

14. Vt.—Caswell v. Jones, 26 A. 529, 65 Vt. 457, 36 Am.S.R. 879, 20 L.R. A. 503.

15. Ind.—Geisendorff v. Eagles, 5 N. E. 743, 106 Ind. 38.
23 C.J. p 774 note 75.

16. Pa.—Stern v. Stanton, 39 A. 404, 184 Pa. 468.

17. Pa.—Brechtel v. Cortright, 13 Pa. Super. 384.

18. Ill.—Seiberling v. Miller, 69 N.E. 800, 207 Ill. 443, affirming 106 Ill. App. 190.

19. Ala.—Teaford v. Moss, 179 So. 917, 235 Ala. 490.
Del.—Stidham v. Brooks, 5 A.2d 522, 1 Terry 110.
Ill.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622.
Philippine.—Muyco v. Montilla, 7 Philippine 498.
23 C.J. p 774 note 79.

Duty of debtor to vacate is correlative to purchaser's right to possession.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.

Neglect or failure to secure possession does not defeat transfer of title by the officer's deed.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.

20. Del.—Wright v. Rodney, 10 Del. 573.

21. Ga.—Griner v. Culpepper, 139 S. E. 666, 164 Ga. 858.

22. Ky.—Gibbs v. Davis, 20 S.W. 385, 93 Ky. 466, 14 Ky.L. 500.
27 C.J. p 775 note 81.

23. Ky.—Stevenson v. Riddell, 68 S. W. 649, 24 Ky.L. 404.
23 C.J. p 775 note 82.

24. U.S.—Fish v. East, C.C.A.Colo., 114 F.2d 177.
23 C.J. p 775 note 89.

do not confer any right to possession or beneficial use of the premises.[25] It has been held, however, that forcible entry and detainer lies before execution of the sheriff's deed.[26]

b. Property Subject to Mortgage

Where the property sold under execution is subject to a mortgage, the purchaser generally is entitled to possession only when the mortgagor had a right thereto.

Except as otherwise provided by statute,[27] where property sold under execution is subject to a mortgage, and the mortgagor has the right of possession until default, the execution purchaser of such property may recover possession thereof from the mortgagor or any one claiming under him before default.[28] Unless he is the mortgagee,[29] or except where the mortgagor is himself entitled to possession,[30] an execution purchaser of a mortgagor's equity of redemption only is not entitled to possession,[31] and he has no such title to the property as will support an action of ejectment.[32] Where land is conveyed and a mortgage taken back to secure support for life, and the interest of the mortgagor is afterward sold on execution, the purchaser's right of possession must be postponed until the mortgagee's rights are extinguished.[33]

Where the mortgagee is in possession of the property, or has a right to the possession by reason of default in the mortgage, the execution purchaser cannot maintain ejectment, or any other action for the recovery of the property, until he has complied with the terms of the mortgage.[34]

c. Taking Possession by Force

An execution purchaser entitled to possession may not take possession by force.

An execution purchaser who is entitled to possession and who cannot obtain possession peaceably is not justified in taking possession by force, but must bring ejectment or other appropriate action to recover possession.[35]

The officer conducting the sale is sometimes authorized by statute to evict defendant, his heirs, or their tenants or assignees after the judgment, when they are in possession of the property,[36] although he is not authorized by virtue of such a statute to evict persons other than those falling within the class named therein.[37] On the other hand, a petitioner who does not show either title or possession in himself,[38] or who does not otherwise present a proper case,[39] is not entitled to have the officer restrained from proceeding under the statute.

§ 303. —— During Period for Redemption

Under most, but not all, redemption statutes the purchaser is not entitled to possession during the redemption period; a tenant in possession under an unexpired lease is entitled to continue in possession during such period.

Under most of the statutes which give the execution debtor a designated period during which he is permitted to redeem his property from the sale, the purchaser is not entitled to the immediate possession of the property,[40] the right to such possession being in the judgment debtor, his assigns, or the person in possession at time of sale;[41] but in some jurisdictions the purchaser has the right of possession during the time for redemption.[42]

25. Mich.—Pike v. Halpin, 154 N.W. 148, 188 Mich. 447.

26. Ohio.—Barto v. Abbe, 16 Ohio 408.

27. Ind.—Adams v. Hessian, 39 N.E. 530, 11 Ind.App. 598.
23 C.J. p 775 note 92.

28. Pa.—See County Capital Building & Loan Ass'n v. Cummings, 55 York Leg.Rec. 20.
Tex.—Gammage v. Silliman, 2 Tex. A.Civ.Cas. § 14.
23 C.J. p 775 note 93.

29. Me.—Dyer v. Chick, 52 Me. 350.

30. Ky.—Swigert v. Thomas, 7 Dana 220.

31. Ala.—Horton v. Hovater, 66 So. 939, 11 Ala.App. 413.

32. Mass.—Forster v. Mellen, 10 Mass. 421.
23 C.J. p 776 note 96.
Title to support ejectment see Ejectment §§ 7-23.

33. Me.—Greenleaf v. Grounder, 21 A. 1082, 86 Me. 298.

34. Tex.—Gammage v. Silliman, 2 Tex.A.Civ.Cas. § 14.
23 C.J. p 776 note 98.
Prima facie case for possession
Plaintiff, producing sheriff's deed to mortgaged property, made out prima facie case for possession against everybody except those claiming under mortgage.—W. H. Glover Co. v. Smith, 138 A. 770, 126 Me. 397.

35. Del.—Stidham v. Brooks, 5 A.2d 522, 1 Terry 110.
23 C.J. p 776 note 99.

36. Ga.—Smith v. Coker, 36 S.E. 107, 110 Ga. 654.
23 C.J. p 776 note 1.

37. Ga.—Smith v. Coker, supra—Smith v. Equitable Mortg. Co., 25 S.E. 423, 98 Ga. 240.

38. Ga.—Cox v. Heidt, 76 S.E. 859, 139 Ga. 145.

39. Ga.—O'Brien v. O'Keefe, 57 S.E. 682, 128 Ga. 346.
23 C.J. p 776 note 4.

40. Utah.—Local Realty Co. v. Lindquist, 85 P.2d 770, 96 Utah 297.
23 C.J. p 775 note 83.

41. Utah.—Local Realty Co. v. Lindquist, supra.

42. Ala.—Ensley Mortgage & Realty Co. v. Lewis, 68 So. 1012, 193 Ala. 226.
23 C.J. p 775 note 84.
In Montana
(1) When the officer issues a certificate of sale the execution purchaser is substituted for and acquires all of the right, title, and interest of the judgment debtor to the property, subject to the right of redemption, and during the period of time allowed for redemption the possession of an assignee of the judgment debtor is that of a tenant at sufferance of the execution purchas-

Tenant in possession. Under statutes so providing, a tenant in possession holding under an unexpired lease is entitled to continue in possession as against either the purchaser[43] or the judgment debtor[44] during the period of redemption. Manifestly the tenancy must be a lawful and valid one in order to come within the statute.[45]

§ 304. Right to Rents and Profits

In the absence of statute, an execution purchaser is entitled to the rents and profits from the land from the time he would be entitled to possession of the premises if they were in possession of the debtor.

The common-law rule that a purchaser of land buys all that is growing on or issuing out of it, belonging to the vendor, unless specially exempted, including rent in money or in kind, accruing out of an unexpired term, applies to land sold at an execution sale; and, independent of statute, he is entitled to the rents from the time when he would be entitled to possession of the premises if they were in the possession of the debtor.[46] He does not, however, acquire any right to rent earned prior to such time, although by the terms of the lease payable afterward.[47] Unless otherwise provided by statute, where the purchaser becomes entitled to possession only on receiving a sheriff's deed, the right to rents and profits dates from that time.[48]

Where the purchaser is not entitled to possession during the period allowed for redemption, see supra § 303, he is not entitled to rent during such period in the absence of a statute so providing;[49] but under some statutory provisions the purchaser is entitled to the rents and profits accruing from the date of sale.[50] A statute authorizing a recovery of rent, from the time of the sale, from "the tenant in possession" has been held not applicable where the judgment debtor remains in possession,[51] but there is authority to the contrary.[52] In some jurisdictions a purchaser may recover the rents and profits from the party in possession accruing between the sale and the expiration of the redemption period, even where the property is redeemed at the expiration of that period,[53] while in others the execution purchaser is given a right of action for the rents and profits during the redemption period against the judgment debtor only, and then only in case he fails to redeem at the expiration of the redemption period.[54] Where an agreement

er.—Libby Lumber Co. v. Pacific States Fire Ins. Co., 255 P. 340, 79 Mont. 166, 60 A.L.R. 1.

(2) However, under a statute so providing, the execution debtor has the right of possession during the redemption period while personally occupying the land as a home for himself and family.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

43. Or.—British Columbia Bank v. Harlow, 9 Or. 338—Cartwright v. Savage, 5 Or. 397.

44. Philippine.—Riosa v. Verzosa, 26 Philippine 86.

45. Wash.—Briggs v. Murray, 69 P. 765, 29 Wash. 245.

46. Ariz.—First Nat. Bank v. Maxey, 272 P. 641, 34 Ariz. 438.
Cal.—Fahrenbraker v. E. Clemens Horst Co., 284 P. 905, 209 Cal. 7.
Iowa.—First Trust Joint-Stock Land Bank of Chicago, Ill., v. Ogle, 221 N.W. 537, 208 Iowa 15.
Pa.—Burke v. Kerr, 19 A.2d 382, 341 Pa. 304, affirming 15 A.2d 685, 142 Pa.Super. 37.
23 C.J. p 776 note 6.
Right to crops see supra § 286.

47. Pa.—Borrell v. Dewart, 37 Pa. 134.

48. Ill.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622.
23 C.J. p 776 notes 8, 9.

49. N.Y.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954, 198 App.Div. 1022.
23 C.J. p 777 note 12.

50. Ala.—Moss v. Cedrom Coal Co., 153 So. 195, 228 Ala. 267.
23 C.J. p 777 note 13.

"Rent" is not synonymous with value of "use and occupation," to which holder of sheriff's certificate of sale is entitled.—Kuiper v. Miller, 207 N.W. 489, 53 N.D. 711.

Written demand to lessee in possession is not essential to right of purchaser to rentals.—Moss v. Cedrom Coal Co., 153 So. 195, 228 Ala. 267.

Effect of possession by mortgagee

Where mortgaged property subject to judgment lien was conveyed to beneficiary under trust deed in consideration of release from liability for payment of any deficiency remaining on note after exhaustion of security, judgment creditor who purchased the property at sheriff's execution sale was entitled to rents until sale of property under trust deed, since beneficiary under trust deed had possession of property, not by virtue of trust deed, but by virtue of transfer of property in consideration of release.—Carpenter v. Pacific States Savings & Loan Co., 45 P.2d 1033, 7 Cal.App.2d 309.

In Washington

(1) Under a statute providing that the execution purchaser until redemption is entitled to receive the rents from the tenant in possession and that any rents so received shall be a credit on the redemption money to be paid, the only rights acquired by the purchaser are to protect, care for, and, in a proper case, to operate the property during the period of redemption, and if he has received any rents or profits from the property during such period and there is a redemption, he must, in an appropriate action, account to redemptioner for such rents and profits, over and above the cost of operating, caring for and protecting the property. —Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181.

(2) As the actual date of redemption and consequently the period for which purchaser is entitled to recover rent cannot be known in advance, the purchaser is not entitled to recover rent in advance even though by the terms of lease it is so payable.—Byers v. Rothschild, 39 P. 688, 11 Wash. 296.

(3) Other cases see 23 C.J. p 777 note 13 [a].

51. Philippine.—De La Rosa v. Revita Santos, 10 Philippine 148.
23 C.J. p 777 note 15.

52. Cal.—Harris v. Reynolds, 13 Cal. 514, 73 Am.D. 600.
23 C.J. p 777 note 16.

53. Cal.—Webster v. Cook, 38 Cal. 423.
23 C.J. p 777 note 17.

54. Ind.—Davis v. Newcomb, 72 Ind. 413.
23 C.J. p 777 note 18.

between the execution purchaser and the judgment debtor confers on the debtor the right to redeem, he is chargeable with rent for the period of time he has possession and use of the property after the sale.[55] Under some provisions the right to rent dates from the confirmation of the sale;[56] under other provisions the adjudication carries to the purchaser of land at sheriff's sale the immovable and all its appurtenances, including its fruits pending the seizure, in the control or possession of the sheriff at the date of the adjudication.[57]

Procedure. Where the purchaser is entitled to the rent, he may recover it in a direct action therefor,[58] or by summary proceedings where provided for by statute.[59] Since the right to rents during the redemption period is based on statute and not on title or right of possession, rent for that period cannot be recovered as mesne profits in ejectment.[60]

If the purchaser of standing timber has entered into possession he may sue for profits lost by the interference of the landowner, without first establishing title at law.[61]

§ 305. Rights as to Waste

An execution purchaser generally may prevent waste during the redemption period or recover damages therefor after the expiration of such period.

Except in some jurisdictions,[62] an execution purchaser has such an interest in the land purchased as will authorize the maintenance of an action to prevent waste during the period allowed by law for redemption.[63] After the expiration of the period of redemption, in case no redemption was made, he may maintain an action to recover damages;[64] but in some jurisdictions he cannot recover damages for waste before confirmation of the sale and delivery of the sheriff's deed.[65] To bring a case within these rules there must, of course, be waste[66] and it must be properly alleged and proved.[67]

The purchaser cannot recover for waste committed prior to the purchase;[68] and, where the life estate of the debtor is set off to the execution creditor, he can recover damages only for such acts as impair his enjoyment of the life estate.[69]

§ 306. Rights of Purchaser on Avoidance of Sale or Failure of Title

An execution creditor purchasing at his own sale may obtain cancellation of the satisfaction thereof and the issuance of a new execution if no title is acquired by the purchase; but such relief may not be obtained where there is only a partial failure of title or where he had notice of the defect.

An execution creditor purchasing at his own sale may obtain a cancellation of the satisfaction thereof and the issuance of a new execution if no title is acquired by the purchase.[70] In some jurisdictions such right is conferred by express statutory enactments,[71] and is not limited to the execution creditor purchasing at his own sale.[72] However, the satisfaction will not be set aside, in the absence of fraud, where there is a failure of title as to only part of the parcels of land purchased.[73] If the execution creditor purchases with notice of the defect of title, he cannot be remitted to his judgment lien.[74] The satisfaction may be set aside on motion instead of resorting to an action.[75]

The fact that the purchaser acquired no title, because the debtor had no title, does not estop the judgment creditor from asserting a valid title subsequently acquired from the true owner,[76] at least

55. Ky.—Hale v. Powell, 13 Ky.Op. 1006.

56. Neb.—Westerfield v. South Omaha Loan & Bldg. Assoc., 105 N.W. 1087, 107 N.W. 1010, 75 Neb. 53.
Ohio.—Heidelbach v. Slader, 1 Handy 456, 12 Ohio Dec., Reprint, 234.

57. La.—Frank v. Magee, 23 So. 939, 50 La.Ann. 1066.
Rents constitute "fruits of the immovable" within statute and inure to benefit of seizing creditor.—New Orleans Compress Co. v. Katz, 170 So. 244, 185 La. 723.

58. Wash.—Griffith v. Burlingame, 51 P. 1059, 18 Wash. 429.
23 C.J. p 777 note 22.

59. Ky.—Cooper v. Baker, 2 Bush 244.

60. Cal.—Henry v. Evarts, 30 Cal. 425.

61. N.C.—Williams v. Parsons, 83 S.E. 914, 167 N.C. 529.

62. U.S.—Law v. Wilgees, C.C.Wis., 15 F.Cas.No.8,132, 5 Biss. 13.
23 C.J. p 778 note 30.

63. Ind.—Connelly v. Dickson, 76 Ind. 440.
23 C.J. p 778 note 31.

64. Minn.—Whitney v. Huntington, 26 N.W. 631, 34 Minn. 458, 57 Am.R. 68.
23 C.J. p 778 note 32.

65. Del.—Baker v. Johnson, 42 A. 449, 16 Del. 219.

66. Mich.—Ward v. Carp River Iron Co., 10 N.W. 109, 47 Mich. 65.
23 C.J. p 778 note 34.

67. Mich.—Ward v. Carp River Iron Co., supra.

68. Del.—Hughlett v. Harris, 1 Del. Ch. 349, 12 Am.D. 104.
23 C.J. p 752 note 12.

69. Me.—McKeen v. Gammon, 33 Me. 187.

70. Ill.—Bressler v. Martin, 24 N.E. 518, 133 Ill. 278.
23 C.J. p 780 note 87.

71. Idaho.—Cantwell v. McPherson, 34 P. 1095, 3 Idaho 721.
23 C.J. p 781 note 88.

72. Mont.—Tetrault v. Ingraham, 171 P. 1148, 54 Mont. 524.
23 C.J. p 781 note 89.

73. Ind.—Weaver v. Guyer, 59 Ind. 195.

74. Ala.—McCartney v. King, 25 Ala. 681.

75. U.S.—McWilliams v. Withington, C.C.Nev., 7 F. 326, 7 Sawy. 205.
Vacation of satisfaction see infra § 344.

76. Tenn.—Henderson v. Overton, 2 Yerg. 394, 24 Am.D. 492.
Tex.—Rosenthal v. Mounts, Civ.App., 130 S.W. 192.

in the absence of special circumstances making it inequitable to permit him to thus defeat the purchaser's title.[77]

§ 307. —— Reimbursement or Other Relief in General

a. In general
b. Amount of reimbursement

a. In General

As a general rule an execution purchaser is entitled to reimbursement in case of total failure of title, or as a condition to recovery of the property by the execution debtor.

While the doctrine of caveat emptor has its legitimate force and effect in precluding any idea of a warranty by defendant in execution, or by the sheriff who sells the property under an execution in his hands, as appears supra § 287, yet, except in some jurisdictions,[78] it has no application where a purchaser acquires no title to the property sold, and the purchaser is entitled to relief in appropriate proceedings therefor.[79] This is true even where the judgment creditor is the purchaser,[80] unless he purchases with notice of lack of title[81] or unless the sale is void by reason of irregularities in the judgment or proceedings and the jurisdiction is one in which he is charged by law with notice of such irregularities.[82] However, no relief is obtainable by the purchaser where there is only a partial failure of title.[83]

A purchaser praying relief on the ground that the property belongs to a stranger must make out a clear case; doubt and uncertainty as to the interest of the execution defendant will not entitle him to relief.[84] Where a sale is set aside or a resale is had, the purchaser is entitled to reimbursement of the money paid by him.[85] If land has been irregularly sold under an execution and the debtor has the sale set aside on the ground of irregularity and has paid off the judgment against him, the court may, on motion of the purchaser, set aside the credit on the judgment to the extent of his bid and order a resale of the land for the purpose of indemnifying him unless the debtor himself reimburses the purchaser.[86] A bond for the purchase price may be annulled or quashed on the setting aside of the sale[87] or on the eviction of the purchaser.[88] To entitle the purchaser to a rescission he must tender back the property within a reasonable time, or offer a good and sufficient reason for not making the tender.[89]

Reimbursement as condition to recovery of property. The purchaser is entitled to be reimbursed as a condition to recovery of the property by the execution debtor.[90] Exceptions to the rule exist where the judgment is void;[91] where the purchaser was guilty of fraud or collusion in the purchase;[92] where the purchaser's claim for reimbursement is barred by limitations;[93] and where the purchase price was paid by a person other than the purchaser.[94] However, even though the case falls within one of the exceptions so that the purchaser is not entitled to be reimbursed for the purchase price paid by him, where the action is an equitable one and it appears that the judgment against the execution debtor has been paid and satisfied, he should refund to the purchaser the amount of the judgment with interest.[95] It has been held that ejectment may be maintained against the purchaser without tendering the amount paid by the purchaser while in possession to the commonwealth to obtain a patent for the land, whatever remedy the purchaser may have for recovery in some other form

77. Tex.—Rosenthal v. Mounts, supra.

78. Ga.—Methvin v. Bexly, 18 Ga. 551—Brady v. Smotherman, 180 S.E. 862, 864, 51 Ga.App. 480, citing Corpus Juris.

79. Ky.—Hawkins v. Hennig & Speed, 5 Ky.Op. 533.
23 C.J. p 778 note 41.

80. N.Y.—Utica Bank v. Mersereau, 3 Barb.Ch. 528, 49 Am.D. 189.
23 C.J. p 778 note 42.

81. Ala.—McCartney v. King, 25 Ala. 681.

82. Pa.—Caldwell v. Walters, 18 Pa. 79, 55 Am.D. 592.

83. Ind.—Parker v. Rodman, 84 Ind. 256.
23 C.J. p 778 note 45.

84. Ky.—Thompson v. Harlan, 1 Dana 190.

Purchase of equity of redemption Judgment creditors of the owner of land subjected to lien foreclosure, who, on levying execution on the owner's equity of redemption, acquired all they thought or understood they were purchasing, that is, the owner's equity, and lost the benefit of their purchase by their own failure to redeem the land from the foreclosure, have no equitable ground for relief.—Noble v. People's Stock & Poultry Feed Co., 225 S.W. 491, 189 Ky. 549.

85. Ky.—Davis v. Hudson, 244 S.W. 68, 195 Ky. 766.
23 C.J. p 778 note 47.

86. Iowa.—Fleming v. Maddox, 32 Iowa 493.

87. Ky.—Wilson v. Percival, 1 Dana 419.

88. La.—McRae v. Chapman, 10 Rob. 65.

89. Ky.—Daniel v. Bank, 1 Ky.Op. 402.

90. La.—Childress v. Allen, 3 La. 477.
Mo.—Cravens v. Moore, 61 Mo. 178.
23 C.J. p 779 note 53.

91. Ky.—Grigsby v. Barr, 14 Bush 330.
Tex.—Stegall v. Huff, 54 Tex. 193.

92. Pa.—Seylar v. Carson, 69 Pa. 81.
23 C.J. p 779 note 55.

93. Ky.—Cheny v. Smith, 7 Ky.L. 293.

94. S.C.—Toole v. Johnson, 39 S.E. 254, 61 S.C. 34.

95. N.Y.—McIntyre v. Sanford, 89 N.Y. 634.

of action.[96]

If the real owner of property sold as belonging to the execution debtor sues to recover it, it is not a condition precedent to the right of recovery that the purchaser be repaid his bid.[97] Where recovery is had by part owners of the land for their respective interests only, they are bound to return to the purchaser only that portion of the price paid by him which corresponds to their proportionate interests in the land.[98]

b. Amount of Reimbursement

An execution purchaser entitled to reimbursement on failure of title generally may recover the purchase price paid, plus interest and certain expenditures, such as those for taxes and repairs, less rents and profits received. Ordinarily he may also recover compensation for improvements made.

On failure of title in the execution purchaser the measure of recovery is not the value of the property[99] but the amount of the purchase price paid[1] together with interest,[2] reimbursement for services performed in connection with the property,[3] sums paid for necessary repairs,[4] taxes[5] and insurance,[6] or to satisfy other claims against the property,[7] less the rents and profits that the purchaser received or might have received in the exercise of ordinary diligence.[8]

Where the judgment creditor, prior to the sale, paid off an encumbrance on the property, and it afterward appears that the property was not subject to sale, the execution purchaser cannot have the encumbrance enforced against the property.[9]

Compensation for improvements. Where the owner of property seeks aid in a court of equity against a bona fide holder of an invalid title under a void execution sale, equitable relief will not be granted except upon the terms of compensation for improvements made on the premises in ignorance or mistake as to the title.[10] However, the purchaser cannot recover for improvements where the rents of which he was in receipt largely exceeded the value of such improvements;[11] nor is he entitled to compensation for improvements made by his tenant,[12] but only for those which he has paid or is liable to pay.[13]

§ 308. —— Recourse to Officer or Parties

On failure of title an execution purchaser generally may recover the purchase price from the officer if the funds are still in his hands; he may recover from the execution debtor or creditor in some jurisdictions, but not in others.

In case of failure of title, or where the sale is set aside on account of irregularities in the proceedings which render it void, a bona fide purchaser is entitled to recover the purchase price from the officer,[14] if the funds are still in his hands,[15] but not otherwise.[16] However, it has been held that there is no implied promise by the sheriff at an execution

96. Pa.—Caldwell v. Walters, 18 Pa. 79, 59 Am.D. 592.

97. Ill.—Conwell v. Watkins, 71 Ill. 488.
23 C.J. p 779 note 59.

98. Tex.—Moore v. Snowball, 82 S.W. 330, 36 Tex.Civ.App. 495.

99. N.H.—Gay v. Smith, 38 N.H. 171.
23 C.J. p 781 note 93.

1. Ky.—McLaughlin's Adm'rs v. Daniel, 8 Dana 182.
23 C.J. p 781 note 94.

2. Neb.—State Bank v. Green, 4 N.W. 942, 10 Neb. 130.
23 C.J. p 781 note 95.

3. Ky.—Cavenaugh v. Willson, 71 S.W. 870, 24 Ky.L. 1507.

4. Ky.—Cavenaugh v. Willson, supra.

5. N.D.—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.
Tex.—Mitchell v. Reitz, Civ.App., 269 S.W. 279, error dismissed, Com. App., 281 S.W. 1044.
23 C.J. p 781 note 98.

6. Ky.—Cavenaugh v. Willson, 71 S.W. 870, 24 Ky.L. 1507.

7. R.I.—Cosgrove v. Merz, 37 A. 704.
Tex.—Mitchell v. Reitz, Civ.App., 269 S.W. 279, error dismissed, Com. App., 281 S.W. 1044.

8. Ky.—Cavenaugh v. Willson, 71 S.W. 870, 24 Ky.L. 1507—Cavanaugh v. Willson, 57 S.W. 620, 108 Ky. 759, 22 Ky.L. 474.

9. Mo.—Beckmann v. Meyer, 75 Mo. 333.

10. Ill.—Kilmer v. Garlick, 56 N.E. 1103, 185 Ill. 406.
23 C.J. p 781 note 5.

In Louisiana, where the third opponent obtains a money judgment for improvements against the purchaser, the purchaser has his recourse for reimbursement against defendant in execution.—In re Immanuel Presb. Church, 36 So. 408, 112 La. 348.

11. Iowa.—Thompson v. Thompson, 90 N.W. 493, 117 Iowa 65.

12. Ill.—Stout v. Cook, 57 Ill. 386.

13. Ill.—Stout v. Cook, supra.

14. Ga.—Shaw v. Walker, 104 S.E. 23, 25 Ga.App. 642.

15. Ga.—Brady v. Smotherman, 180 S.E. 862, 864, 51 Ga.App. 480, quoting **Corpus Juris.**
Tenn.—Estes v. Doty, 90 S.W.2d 754, 755, 169 Tenn. 683, quoting **Corpus Juris.**
23 C.J. p 779 note 62.

Purchaser with knowledge of defective title cannot recover back purchase money.—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131.

Retention of amount for expenses of sale

In case a recovery is permitted the officer will not be allowed to retain an amount necessary to cover the expenses of the sale.—Bowne v. O'Brien, 5 Daly, N.Y., 474.

16. **Absence of fraud or misrepresentation**

Purchaser at sale under execution was bound by doctrine of caveat emptor and could not recover from officer purchase money paid him and turned over to plaintiff in execution, on ground that levy was excessive, in absence of actual fraud or misrepresentation by officer, although sale was declared void and officer's deed canceled, in action in which purchaser was party.—Brady v. Smotherman, 180 S.E. 862, 51 Ga. App. 480.

sale to refund the purchase money on the purchaser being evicted.[17]

Recovery from debtor. In some jurisdictions it is held that, where a third person purchases at an execution sale property to which the debtor has no title, or where the title otherwise fails, the purchaser, if he has paid his bid and the transaction has been completed, may recover from the debtor the amount in which the debtor's indebtedness has been discharged.[18] The rule is applicable, although no fraud is imputed to the debtor.[19] In other jurisdictions it is held that in the absence of fraud or misrepresentation the purchaser is not entitled, either at law or in equity, to any relief as against the debtor.[20] In any event the execution debtor is not liable in an action of deceit for failure to disclose defects in the property sold.[21] The purchaser cannot sue the execution debtor for money had and received on the ground that the debtor concealed from the purchaser the true condition of the property.[22]

In some states, where the execution creditor is the purchaser, it is held that a court of equity may decree that the debtor pay to the creditor the amount credited on the execution.[23] In other jurisdictions the right to relief; either at law or in equity, is denied.[24] Where plaintiff in execution purchases the property and the title proves bad, the law raises no assumpsit in the debtor to make good the sum lost by the purchaser;[25] but where the execution creditor is the purchaser, and the title fails because of a fraudulent transfer by the debtor, and the sale satisfies the judgment, the creditor may recover from the debtor the price bid.[26]

Recovery from creditor. In a number of jurisdictions it is the rule that a purchaser at a sale under a valid judgment cannot recover the amount paid by him in satisfaction of the bid from the execution creditor, on failure of title,[27] especially where the purchaser had knowledge at the time of sale of the defect in title.[28] Some courts apply this rule where the creditor merely pursued his legal remedy without directing in any way the acts of the officer,[29] but not where he directed and controlled the levy and the acts of the officer.[30] In other jurisdictions a recovery is allowed,[31] sometimes by force of express statutory provisions.[32] These statutes contain various limitations, some being applicable only on a sale of real estate,[33] and others being applicable only where the fact that the judgment was not a lien on the property purchased was unknown to the purchaser.[34]

If a sale is void for the reason that it is founded on a void judgment, one who purchased at the sale without knowledge of such invalidity can recover from the judgment creditor, if he has received it,

17. Va.—Stone v. Pointer, 5 Munf. 287, 19 Va. 287.

18. Ky.—Lucas' Adm'r v. Stanley, 300 S.W. 889, 890, 222 Ky. 374, citing **Corpus Juris.**
23 C.J. p 779 note 65.

Officer is not a necessary or proper party in an action against the debtor to recover the purchase price.—Coan v. Grimes, 63 Ind. 21.

Previous demand is not necessary to recovery.—Pennington v. Clifton, 10 Ind. 172.

19. Ind.—Preston v. Harrison, 9 Ind. 1.
Ky.—Lucas' Adm'r v. Stanley, 300 S. W. 889, 890, 222 Ky. 374, citing **Corpus Juris.**

20. Ga.—McWhorter v. Beavers, 8 Ga. 300.
23 C.J. p 779 note 68.

21. Ky.—Hart v. Hampton, 7 T.B. Mon. 381, 18 Am.D. 186.

22. S.C.—Davis v. Murray, 9 S.C.L. 143, 12 Am.D. 661.

23. Ky.—Lucas' Adm'r. v. Stanley, 300 S.W. 889, 222 Ky. 374.
23 C.J. p 780 note 71.

24. Ala.—McCartney v. King, 25 Ala. 681.
23 C.J. p 780 note 72.

25. N.C.—Atkinson v. Farmer, 6 N. C. 291.

26. N.C.—Wall v. Fairley, 77 N.C. 105.

27. Ariz.—Barth v. A. & B. Schuster Co., 220 P. 391, 25 Ariz. 546.
Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 495, 228 Ky. 554, citing **Corpus Juris.**
23 C.J. p 780 note 76.

28. Ariz.—Barth v. A. & B. Schuster Co., 220 P. 391, 25 Ariz. 546.

29. Ariz.—West Virginia Copper Belle Min. Co. v. Gleeson, 134 P. 285, 14 Ariz. 548, 48 L.R.A.,N.S., 481.
Ky.—McGhee v. Ellis, 4 Litt. 244, 14 Am.D. 124.

30. Ky.—Hackley v. Swigert, 5 B. Mon. 86, 41 Am.D. 256.
23 C.J. p 780 note 78.

31. N.Y.—Schwinger v. Hickok, 53 N.Y. 280.
S.D.—Danner v. Murnan, 178 N.W. 987, 43 S.D. 289.
23 C.J. p 780 note 79.

Purchaser having acquired good title, had no cause of action against judgment creditor.—Williams v. Standard Oil Co. of New York, 219 N.Y.S. 541, 219 App.Div. 193.

32. Iowa.—Rosenberger v. Hawker, 103 N.W. 781, 127 Iowa 521.
23 C.J. p 780 note 80.

In Louisiana
(1) Under statutes so providing, the purchaser evicted from property purchased under execution has recourse for reimbursement against both the debtor and the creditor.—Louisiana Citizens' Bank v. **Freitag,** 37 La.Ann. 271—23 C.J. p 780 note 83.

(2) However, on judgment obtained jointly for that purpose, the purchaser must first take execution against the debtor, and, on the return of no property found, he is then at liberty to take out execution against the seizing creditor.—Haynes v. Courtney, 15 La.Ann. 630—23 C. J. p 780 note 84.

(3) The statutory obligation of plaintiff to refund to the purchaser on his eviction the money received by the former cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from defendant in the execution the whole sum paid by him.—Cleary v. New Orleans, 5 Rob. 247.

33. Mont.—Tetrault v. Ingraham, 171 P. 1148, 54 Mont. 524.

34. Iowa.—Rosenberger v. Hawker, 103 N.W. 781, 127 Iowa 521.
23 C.J. p 780 note 82.

the amount paid by him and for which he received nothing.[35]

§ 309. Remedies of Purchasers

a. In general
b. Proof of title

a. In General

Purchasers at execution sales are entitled to recover the property by due process of law, unless the property is peaceably relinquished.

Purchasers of realty at execution sales must recover possession of the property by due process of law, unless the property be peaceably relinquished.[36] The actions or proceedings available or necessary for the purchaser to adopt to obtain possession are discussed infra § 310. A purchaser of a debtor's undivided interest in land may maintain a bill for the partition of the land.[37]

b. Proof of Title

As against the execution defendant it is generally sufficient for the purchaser to show a valid judgment, execution, sale, and sheriff's deed. Where the action is against one other than the execution debtor it is necessary to show that the execution defendant had title.

It is sufficient for the purchaser or a party claiming under him to show a valid judgment, execution, sale, and sheriff's deed.[38] If such facts are shown, a prima facie case is made.[39] These rules obtain where the action is against the execution defendant;[40] but, as stated infra this section, where the action is against a person other than the execution debtor it must also be shown that the execution defendant had title. A sale must be shown,[41] but it may be proved either by the sheriff's deed or a return of the fieri facias.[42] To permit a writ of assistance, ownership or right to possession must have been fully determined.[43] Except in some jurisdictions[44] a return by the officer need not be shown.[45] A deed must be shown.[46] It is not sufficient merely to introduce the sheriff's deed in evidence;[47] it is necessary to show a judgment[48] and execution.[49] In other words, the judgment and execution must be proved independently of the recitals in the sheriff's deed.[50] Under some circumstances, however, it is not necessary to prove the judgment.[51] It is held in some cases that a levy must also be shown,[52] but there is authority expressly to the contrary.[53] At any rate, after the lapse of thirty years, a valid levy of a lost execution on land is sufficiently shown by the execution docket, showing issuance of the execution, and the sheriff's deed, reciting the levy and sale.[54] If the execution is

35. U.S.—Favour v. Hill, C.C.A. Ariz., 123 F.2d 77.
23 C.J. p 780 note 85.

36. Del.—Stidham v. Brooks, 5 A.2d 522, 1 Terry 110.

37. Tenn.—Simpson v. Sparkman, 12 Lea 360.

38. Cal.—Colton Land & Water Co. v. Swartz, 33 P. 878, 99 Cal. 278.
23 C.J. p 781 note 17.

39. Mont.—Aronow v. Hill, 286 P. 140, 87 Mont. 153.
23 C.J. p 782 note 18.

40. Ind.—Shipley v. Shook, 72 Ind. 511.
N.C.—Sinclair v. Worthy, 60 N.C. 114, 84 Am.D. 357.

41. Ind.—Leary v. New, 90 Ind. 502.

42. Md.—Fenwick v. Floyd, 1 Harr. & G. 172.
23 C.J. p 782 note 22.

43. Ariz.—Burney v. Lee, 110 P.2d 554.

A judgment for money due, which ordered judgment lien on land foreclosed and ordered the land sold to satisfy the judgment, did not determine ownership of the land which then stood in the name of judgment debtor's stepdaughter who was not a party to the action, and the purchaser at the sheriff's sale acquired only the interest of the judgment debtors and was not, as a result of the judgment, entitled to a writ of assistance to gain possession of the land from third party who had contracted to purchase it from the stepdaughter. —Burney v. Lee, supra.

44. La.—Hyman v. Bailey, 13 La. Ann. 450—Martinez v. Fouche, 2 McG. 130.

45. Cal.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am.D. 526.
Del.—Williams v. Hickman, 2 Del. 463.

46. Ind.—Wilhite v. Hannick, 92 Ind. 594—Vandalia R. Co. v. Topping, 113 N.E. 421, 62 Ind.App. 657.
23 C.J. p 782 note 25.

47. Tex.—Snowden v. Glaspy, Civ. App., 127 S.W.2d 508.
23 C.J. p 782 note 26.

48. Ill.—Mayne v. Drury, 129 N.E. 77, 295 Ill. 533.
Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418.
Tex.—Snowden v. Glaspy, Civ.App., 127 S.W.2d 508.
23 C.J. p 782 note 27.

In suit to quiet title, wherein plaintiff relied on sheriff's deed, validity of execution issued as foundation for sheriff's sale would have to be established by proof of the judgment in such case, or proof of inability to establish judgment because of loss of records, or for any other reason and by proof that alleged defendant in execution proceedings, whose land was sold, was summoned in case in which judgment was rendered.—Hopkins v. Slusher, 98 S.W. 2d 932, 266 Ky. 300, 108 A.L.R. 662.

49. Tex.—Snowden v. Glaspy, Civ. App., 127 S.W.2d 508.
23 C.J. p 782 note 28.

Mode of proof
Setting out the return is sufficient to show that the execution has issued.—Russell v. Stinson, 3 Hayw., Tenn., 56—23 C.J. p 782 note 31 [a].

Intermediate executions need not be produced, but only the one under which the sale was made.
Miss.—Kane v. Mackin, 17 Miss. 387.
S.C.—Barkley v. Screven, 10 S.C.L. 408.

50. Ala.—Warren v. Jones, 121 So. 519, 219 Ala. 213.
23 C.J. p 782 note 29.

Recorded certificate insufficient
Purchaser at execution sale could not recover in unlawful detainer without introduction of judgment, although recorded certificate was introduced.—Warren v. Jones, 121 So. 519, 219 Ala. 213.

51. Ky.—Kentucky River Coal Corporation v. Culton, 124 S.W.2d 82, 276 Ky. 418.
23 C.J. p 782 note 30.

52. Cal.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am.D. 526.

53. N.C.—McEntire v. Durham, 29 N.C. 151, 45 Am.D. 512.

54. Tex.—West v. Loeb, 42 S.W. 612, 16 Tex.Civ.App. 399.

based on the transcript of a judgment of a justice of the peace, the preliminary facts necessary to warrant the filing of the transcript must appear.[55] Some courts hold that, where a transcript is filed, the judgment of the justice and the execution thereon need not be shown,[56] but other courts hold that it must be proved that an execution was issued by the justice and a proper return made thereon.[57] The recitals in the deed are not conclusive but may be attacked by defendant.[58] The proof must be clear and satisfactory.[59] It has been held that the purchaser must show that all the statutory requirements have been strictly complied with.[60]

Proof of title of debtor. The purchaser must show that defendant in execution had some interest or estate in the land sold on which the judgment could operate,[61] or at least possession since the rendition of the judgment.[62] The rule applies where the opposing party is a person other than the judgment debtor,[63] but there is no necessity for proving title in defendant where the action is against the judgment debtor.[64] Proof of title need not be made where it is not put in issue by the pleadings.[65] It is not necessary for the purchaser to deduce a regular chain of title subsisting in the execution debtor, since it is sufficient if he shows a legal title in defendant at the time of the rendition of the judgment.[66]

§ 310. —— Actions or Proceedings to Obtain Possession

a. Form of remedy
b. Defenses
c. Limitations and laches
d. Conditions precedent
e. Parties
f. Pleading
g. Evidence
h. Trial and judgment

a. Form of Remedy

The purchaser may have various remedies, such as ejectment, forcible entry and detainer, replevin, or such other statutory remedies as may have been provided. In a proper case his remedy is by bill in equity.

A proper remedy of a purchaser of property sold under execution to secure possession thereof is ejectment,[67] or forcible entry and detainer,[68] or replevin.[69] In several jurisdictions there are statutes providing for the recovery of the possession of property purchased at an execution sale by summary proceedings.[70] A statutory remedy for obtaining possession may be merely cumulative of the common-law remedies, so that resort may be had to either at the election of the purchaser.[71] A writ of entry is, as shown in the title Entry, Writ of, § 6, sometimes an appropriate remedy, as is a writ of assistance.[72] The purchaser is ordinarily entitled to immediate possession which he may obtain by a writ of possession.[73] A writ of possession is properly refused a purchaser of property at an execution sale where the execution of such writ would require the sheriff to dispossess one holding under a valid independent title.[74] Unlawful detainer is not the proper remedy of a plaintiff, relying solely

55. Mich.—Monaghan v. McKinnie, 32 Mich. 40.

56. N.C.—Davis v. Baker, 67 N.C. 388.

57. Mo.—Coonce v. Munday, 3 Mo. 373.

58. N.J.—Meyers v. Conover, 46 A. 709, 65 N.J.Law 187.

59. Tenn.—Hamilton v. Bradley, 5 Hayw. 127.

60. Conn.—Hobart v. Frisbie, 5 Conn. 592.

61. Cal.—Pekin Min., etc., Co. v. Kennedy, 22 P. 679, 81 Cal. 356.
23 C.J. p 783 note 42.

62. Ga.—Whatley v. Doe, 10 Ga. 74.
23 C.J. p 783 note 43.

63. Or.—Oliver v. Burg, 58 P.2d 245, 154 Or. 1.
23 C.J. p 783 note 44.

64. Miss.—Robinson v. Parker, 11 Miss. 114, 41 Am.D. 614.

65. Ky.—Randall v. Ewell, 55 S.W. 552, 21 Ky.L. 1425.
23 C.J. p 783 note 48.

66. Ala.—Elliott v. Dycke, 78 Ala. 150.
23 C.J. p 783 note 49.

67. Del.—Stidham v. Brooks, 5 A.2d 522, 524, 1 Terry 110, citing **Corpus Juris.**
Pa.—See Flowers v. Curry, 86 Pittsb. Leg.J. 248.
23 C.J. p 783 note 50.

Effect of void judgment
Where judgment in attachment proceeding was void for lack of jurisdiction over defendant, plaintiff in ejectment action holding under sheriff's deed based on that judgment could not prevail.—Johnson v. Clark, 198 So. 842, 145 Fla. 258.

68. Miss.—Glenn v. Caldwell, 20 So. 152, 74 Miss. 49.
23 C.J. p 783 note 51.

69. N.J.—Grimbilas v. Linfair, Inc., 18 A.2d 412, 126 N.J.Law 82.
23 C.J. p 783 note 52.

70. La.—Washington v. Page, 119 So. 888, 9 La.App. 282.
Pa.—Second Nat. Bank v. Hustead, 6 A.2d 63, 334 Pa. 421—Buckley v. Buckley, 120 A. 926, 277 Pa. 215—Singer Sewing Machine Co. v. Baird, 11 Pa.Dist. & Co. 251—Hendrickson v. Frutchey, 41 Lack. Jur. 70, 10 Som.Leg.J. 42—Konnick v. Epstein, 32 Luz.L.Reg. 47—First Nat. Bank & Trust Co. of Easton v. Sulkin, 27 North.Co. 111.
23 C.J. p 783 note 53.

71. Ark.—Austin v. Huie, 26 S.W.2d 87, 181 Ark. 412.
Pa.—Second Nat. Bank v. Hustead, 6 A.2d 63, 334 Pa. 421.
23 C.J. p 784 note 54.

72. Wis.—Schultz v. Schultz, 113 N. W. 445, 133 Wis. 125.
5 C.J. p 1319 note 42.

73. Ga.—Hill v. Kitchens, 148 S.E. 754, 39 Ga.App. 789.

Duty to issue
Order of sale being sufficient authority for sheriff to put purchasers in possession of premises, which he failed to do within thirty days, court clerk had duty to issue writ of possession.—Darlington v. Allison, Tex. Civ.App., 12 S.W.2d 839, error dismissed.

74. Ga.—Edwards v. Hall, 168 S.E. 254, 176 Ga. 632.

on title acquired as purchaser at an execution sale, against one in possession under claim of title.[75] Action of warranty against debtor, where purchaser is evicted by a better title in a third person, arises only on a sale legally made.[76]

Where a purchaser has secured only an equitable title at the execution sale, his proper remedy is a bill in equity and not an action at law.[77] He cannot recover in ejectment,[78] except in those jurisdictions where, as considered in Ejectment § 20, an equitable title will support ejectment. However, under the statutes of some states, the summary remedy provided thereby is available to an execution purchaser of an equitable title,[79] carrying with it the right to possession.[80] A court of equity has power to appoint a receiver until possession can be obtained by legal proceedings.[81] A bill in equity is not an appropriate remedy to test the validity of a deed made by the judgment debtor, since the purchaser has an adequate remedy at law.[82]

b. Defenses

Various matters of defense may be interposed. In general, the original defendant may not set up title in a third person where he is in possession of the property, but title not obtained from the execution debtor is a good defense where a third person is defendant.

Where the purchaser sues to recover possession, the defenses which may be set up depend, at least in part, on whether defendant is the execution debtor or a third person. A statutory defense is not available where the facts take the case out of the statute.[83] An option given the debtor to repurchase is no defense where the option has expired without being acted upon.[84] It is no defense that the purchase money was not paid where the officer indorsed payment on the writ, the judgment creditor does not claim that he was not paid, and the judgment debtor received credit for the purchase money.[85] A mere claim falls short of being an equitable defense.[86] Matters of defense may be waived.[87]

Want of title. The general rule is that, in an action by the execution purchaser against the original defendant in possession of the property, the latter cannot set up title in a third person;[88] nor can he dispute the purchaser's title to the property.[89] Likewise a party claiming under the execution defendant who was in actual possession of the property at the time of the rendition of the judgment is estopped from denying the title of the purchaser;[90] but tenants in possession of the land may show in defense that they hold as tenants under a prior purchaser by a bona fide conveyance.[91] The debtor is not estopped to set up a title subsequently acquired,[92] but the debtor cannot set up title under

75. Ala.—Warren v. Jones, 121 So. 519, 219 Ala. 213.

76. La.—Childress v. Allen, 3 La. 477.

77. Ala.—Goodbar v. Daniel, 7 So. 254, 88 Ala. 583, 16 Am.S.R. 76.
23 C.J. p 784 note 57.

78. Ill.—First Nat. Bank of Assumption v. Gordon, 29 N.E.2d 246, 374 Ill. 242.
23 C.J. p 784 note 58.

79. Pa.—Lesher v. Leiser, 4 Walk. 378.

In Kentucky

(1) Where judgment creditor purchased, at execution sale, realty which was purportedly encumbered so that creditor could obtain only a lien which would not entitle creditor to possession, creditor was nevertheless entitled to maintain suit for writ of possession, under statutory provision that, if judgment debtor sold encumbered realty under equitable title, court shall subject it to payment of judgment debt as though there had been a return of no property found, and providing for proceedings to determine equitable rights of the parties.—McCormack v. Moore, 117 S.W.2d 952, 273 Ky. 724.

(2) A party holding a mortgage on land is not entitled to its possession under writ of habere facias possessionem, since, under the statute, the purchaser at an execution sale of encumbered property obtains only a lien thereon subject to prior liens which he must enforce by action by making prior lienholders parties.—Whitaker v. Holcomb, 276 S.W. 973, 210 Ky. 836.

80. Md.—Deakins v. Rex, 60 Md. 593—McMeehen v. Marman, 8 Gill & J. 57.

81. Pa.—McFadden v. Nolan, 15 Phila. 187.

82. Ala.—Altman v. Barrett, 174 So. 293, 234 Ala. 234.

83. Mass.—Owen v. Neveau, 128 Mass. 427.
23 C.J. p 784 note 64.

84. Pa.—Young v. McCamant, 88 A. 481, 241 Pa. 232.

85. Ky.—Randall v. Ewell, 55 S.W. 552, 21 Ky.L. 1425.

86. Mo.—Johnson v. Bowlware, 51 S.W. 109, 149 Mo. 451.
23 C.J. p 784 note 67.

87. Pa.—Wilford v. White, 16 Pa. Dist. & Co. 469, 23 Berks Co.L.J. 231, 45 York Leg.Rec. 86.

88. Mo.—Littlefield v. Ramsey, 80 S.W. 949, 181 Mo. 613.
23 C.J. p 784 note 68.

Undivided interest as tenant in common is no defense.—McMahon v. Taylor, 27 Pa.Dist. & Co. 174.

89. Ill.—Keith v. Keith, 104 Ill. 397.
23 C.J. p 784 note 69.

Deraignment to common source

In ejectment suit by purchaser at execution sale on judgment against mother, against mother and son to whom mother executed fraudulent conveyance, deraignment of title back to mother as a common source was sufficient.—Cooper v. Cooper, Tenn.App., 124 S.W.2d 264.

Purchaser acquires right to defendant's possession

When the sheriff sells the land of a defendant in a judgment, who is in possession, he cannot make any defense against the purchaser, as the latter acquires a right to the defendant's possession at least which will support ejectment against him.—Sallada v. Mock, 114 A. 652, 271 Pa. 212.

90. Pa.—Feigenspan v. Driesigacker, 45 A. 481, 195 Pa. 17, 78 Am.S.R. 799.
23 C.J. p 784 note 70.

91. Ala.—Strickland v. Nance, 19 Ala. 233.
23 C.J. p 785 note 71.

92. R.I.—Simmons v. Brown, 7 R.I 427, 84 Am.D. 569.
23 C.J. p 785 note 72.

a lease taken by him from a third person after levy of execution.[93] Where defendant is one who had conveyed the property to the judgment debtor prior to the sale, by warranty deed, he is estopped to assert any title.[94] Title not obtained from the execution debtor is a defense, where a third person is defendant,[95] but not where it was the result of a fraudulent collusion between him and the former owner to defeat the effect of the sheriff's sale.[96]

Property not subject to execution. The judgment debtor, or a person claiming under him, may successfully defend an action by the purchaser for the possession of property by showing that defendant's interest or estate in the property was not subject to, or was exempt from, execution, unless the right of exemption has been expressly or impliedly waived.[97] Where only part of the property is exempt, the execution purchaser may recover the residue.[98]

Irregularities in proceedings. The general rule is that the execution debtor, or a third person in possession of the property, cannot set up as a defense in an action for the recovery thereof irregularities in the judgment, execution, or sale,[99] unless the purchaser is chargeable with notice of the irregularity.[1] The sale cannot be attacked except for reasons rendering it absolutely void.[2] The judgment debtor or those claiming under him may defend by showing that the judgment,[3] execution,[4] or levy[5] is void. Where the judgment is valid, the judgment debtor may be estopped by his conduct and that of his counsel at the time of the sale from contesting the validity of the execution on the ground that it was not actually signed by the proper officer.[6]

c. Limitations and Laches

A purchaser may lose his rights by laches or be barred from enforcing them by limitations.

Where the purchaser at an execution sale sleeps on his rights for a long period of time and fails to take the statutory steps necessary to obtain possession of the property, he will be presumed to have abandoned any right he might have acquired by virtue of the sale,[7] and the courts will refuse aid to the purchaser as against bona fide purchasers in the interim.[8] The statutes in some of the states require the action for possession to be brought within a designated period after the delivery of the sheriff's deed, under penalty of forfeiture of all rights under the sale.[9] Limitations do not begin to run against the purchaser until the delivery of the sheriff's deed.[10]

d. Conditions Precedent

Conditions precedent must be complied with. Demand for possession must be made where required.

Plaintiff may be precluded from suing before performance of certain conditions.[11] In some jurisdictions or under some statutes the purchaser at

93. Pa.—Dunlap v. Cook, 18 Pa. 454.

94. Cal.—Dodge v. Walley, 22 Cal. 224, 83 Am.D. 61.

95. Pa.—Walker v. Bush, 30 Pa. 352.
Real owner of property sold under execution to satisfy another's judgment debt could protect her interest in ejectment brought by sheriff's vendee against her.—Broadway Nat. Bank of Scottdale v. Diskin, 161 A. 470, 105 Pa.Super. 279.

96. Pa.—Walker v. Bush, 30 Pa. 352.

97. N.Y.—Bates v. Ledgerwood Mfg. Co., 29 N.E. 102, 130 N.Y. 200.
23 C.J. p 785 notes 77, 78.

98. Kan.—Benz v. Hines, 3 Kan. 390, 89 Am.D. 594.

99. N.C.—Benners v. Rhinehart, 12 S.E. 456, 107 N.C. 705, 22 Am.S.R. 909.
23 C.J. p 785 note 80.

1. Ind.—Meredith v. Chancey, 59 Ind. 466.
23 C.J. p 785 note 81.

2. Ind.—Lovely v. Speisshoffer, 85 Ind. 454.
Pa.—See Soult v. May, 23 West.Co.L.J. 1.

3. Kan.—Lundstrum v. Branson, 139 P. 1172, 72 Kan. 78, 52 L.R.A., N.S., 697.
23 C.J. p 785 note 83.

4. N.C.—Peebles v. Pate, 90 N.C. 348.
In New York, in summary proceedings under Code Civ.Proc. § 2232 subd 1, before a county judge, to remove defendant from property sold on execution against him, he may show that before the issuance of the execution the judgment had been assigned to a brother of the judgment creditor; and that question may be tried by the county judge, and the validity of the sale under such execution determined, under Code Civ. Proc. §§ 2242, 2244, providing that defendant in such proceeding may set forth as new matter constituting a legal or equitable defense.—Mawson v. Wermuth, 74 N.E. 829, 182 N.Y. 234.

5. Vt.—Perry v. Whipple, 38 Vt. 278.
23 C.J. p 785 note 85.

6. Ga.—Warwick v. Maddox, 73 S.E. 738, 137 Ga. 496.

7. Iowa.—Gray v. Bloom, 132 N.W. 42, 151 Iowa 566.
23 C.J. p 785 note 87.

8. Ky.—Partin v. American Assoc., 160 S.W. 1057, 156 Ky. 323.
23 C.J. p 785 note 88.

9. Mass.—Cunniff v. Parker, 21 N.E. 241, 149 Mass. 152.
Pa.—See Russell v. Randolph, 22 Wash.Co. 52.
23 C.J. p 785 note 89.

10. Cal.—Leonard v. Flynn, 26 P. 1097, 89 Cal. 535, 23 Am.S.R. 500.

11. Ind.—Jenkins v. Newman, 23 N.E. 683, 122 Ind. 99.
23 C.J. p 786 note 91.
Habere facias possessionem
The county court, on a sale of lands under an execution, ought not to issue a writ of habere facias possessionem, under Act 1825 c 103, where, after the return of the execution, it does not appear from the record that notice was given to the tenant in possession to show cause why the writ of habere should not issue; and the fact that an injunction has been granted in favor of the tenant against the issuance of the writ is no bar to a motion to vacate the same after the injunction has been dissolved.—Waters v. Duvall, 6 Gill & J., Md., 76.

an execution sale may sue without making a previous demand for possession, or giving a previous notice to quit to the party in possession,[12] while in others a demand is necessary.[13] The demand for possession may be made by the execution purchaser in person or by his authorized agent.[14] In some jurisdictions the statutes giving a summary remedy to the execution purchaser for the recovery of the property require that a notice of the proceeding must be served personally upon defendant, or the person or persons in possession under him by titles derived from him subsequently to the judgment.[15] Apart from statutory provisions, notice in such proceedings is sometimes required by the courts.[16] The notice should be in writing[17] and be served personally on the parties entitled thereto a designated period of time prior to the institution of proceedings.[18] Where the notice takes the place of a petition, it should state facts sufficient to entitle plaintiff to the relief demanded.[19] The contents are sufficient if they follow the statutory form,[20] but a notice which fails to show everything required by the statute is insufficient.[21] It is not necessary to allege in so many words that petitioner is the owner of the property,[22] or to follow the form in an action of ejectment.[23] The sufficiency of the notice cannot be complained of by persons who come into the case by petition, claiming an interest in the land, and who, on issues formed on their petition, are defeated.[24] Lack of notice may be waived by appearance.[25] Regardless of whether or not notice is necessary, where it is given and defendant is thus brought into court, he has a right to resist a recovery by plaintiff.[26]

Tender. In general, as stated supra § 287, an execution purchaser of the interest of a vendee under a contract of purchase does not acquire title unless he can show performance, or tender of performance, of the terms of the contract. However, tender of the unpaid purchase money is not a condition precedent to an action of ejectment by him under some circumstances, as where defendant sets up an absolute title against him, rather than a claim for the unpaid purchase money,[27] or where possession has been obtained by the holder of the legal title under circumstances which constitute a fraud on the other creditors of the execution debtor.[28]

e. Parties

In general actions may be maintained by the purchaser or any one claiming under him, against the judgment debtor or such others as may be necessary parties to the proceeding which is brought for the recovery of the property.

The general rule is that under statutes allowing summary proceedings for the recovery of the possession of property sold under execution, or in real action therefor, such proceedings or action may be maintained by the purchaser or any person claiming under him,[29] and may be maintained against the judgment debtor in possession, his representatives, and parties in possession under him, who took possession subsequent to the lien of the judgment.[30] Summary proceedings cannot be maintained against a person holding adversely.[31] The grantee of the execution purchaser may present a petition for a statutory writ of possession,[32] but it is held that he cannot maintain a writ of entry in his own name.[33] Forcible entry and detainer may be maintained by an execution purchaser of the interests of a lessor against the assignees of the lessee.[34]

12. Mich.—Lieblien v. Hansen, 144 N.W. 496, 178 Mich. 11.
Pa.—See Citizens Trust Co. v. Kolosky, 19 Wash.Co. 65.
23 C.J. p 786 note 92.

13. Ala.—Francis v. White, 39 So. 174, 142 Ala. 590.
23 C.J. p 786 note 93.

14. Ala.—Farley v. Nagle, 24 So. 567, 119 Ala. 622.

15. Ark.—Fitzgerald v. Beebe, 7 Ark. 305, 46 Am.D. 285.
23 C.J. p 786 note 95.

16. Ga.—Smith v. Equitable Mortg. Co., 25 S.E. 423, 98 Ga. 240.

17. Pa.—Langowski v. Strupinski, 2 Leg.Rec. 348—Courtney v. Detzner, 2 Leg.Rec. 347.

18. Pa.—Langowski v. Strupinski, 2 Leg.Rec. 348—Courtney v. Detzner, 2 Leg.Rec. 347.
Grantee under fraudulent conveyance
Notice of motion for writ of possession of land sold under execution is properly directed to grantees under alleged fraudulent conveyance from judgment debtor.—Gilbert v. Watts, Ritter & Co., 60 S.W.2d 142, 249 Ky. 27.

19. Ky.—Sharpe v. Roe, 13 Bush 461—Bunnell v. Thompson, 12 Bush 116.
23 C.J. p 786 note 99.

20. Ky.—Combs v. Miller, 149 S.W. 906, 149 Ky. 546.
Notice held sufficient
Ky.—Smith v. Smith, 75 S.W.2d 351, 255 Ky. 703.

21. Ky.—Whitaker v. Holcomb, 276 S.W. 973, 210 Ky. 836.

22. Ky.—Mooar v. Covington City Nat. Bank, 80 Ky. 305.

23. Ky.—Mooar v. Covington City Nat. Bank, supra.

24. Ky.—Read v. Cochran, 71 S.W. 487, 24 Ky.L. 1412.

25. Ark.—Ferguson v. Blakeney, 6 Ark. 296.

26. Ky.—Smith v. Lewis, 5 Ky.L. 427.

27. Pa.—Stewart v. Freeman, 22 Pa. 120.

28. Pa.—Forrester v. Hanaway, 82 Pa. 218.

29. Del.—Kent v. Pyle, 45 A. 716, 18 Del. 242.
23 C.J. p 786 note 11.

30. Ala.—Teaford v. Moss, 179 So. 817, 818, 235 Ala. 490, citing **Corpus Juris.**
23 C.J. p 786 note 12.

31. Pa.—Moseby v. Fleck, 88 A. 940, 242 Pa. 154.
23 C.J. p 787 note 13.

32. Del.—Kent v. Pyle, 45 A. 716, 18 Del. 242.

33. Mass.—Hunt v. Mann, 132 Mass. 53.

34. Ill.—Taylor v. Marshall, 153 Ill. App. 409.

The remedy, as given by some statutes, is not available to a grantee of the execution purchaser against a person holding under a title derived from the same person under whom the judgment debtor claimed title.[35] Summary proceedings may be had against a tenant in common before partition.[36] If the action is against the execution debtor, his landlord may be admitted to defend with him.[37] Where the wife of the debtor has an interest in the property, she is a proper defendant.[38] Where a writ of habere facias possessionem is sought, a petition of infants, claiming the land through inheritance, to be made parties, should not be rejected since their rights should be determined in the proceedings.[39]

f. Pleading

Plaintiff must allege everything necessary to entitle him to the relief sought; and defendant must plead properly such matters as he may wish to rely on in defense of the action.

Plaintiff must allege facts sufficient to entitle him to the relief demanded.[40] He must allege that the land was subject to execution.[41] Some courts hold that in summary proceedings against a third person it must be alleged that he took possession under title derived from the judgment debtor,[42] but other courts hold that an express allegation to this effect is unnecessary, it being sufficient to allege that defendant came into possession under the execution debtor.[43] Under some statutes providing for the issuance of citation on petition of the purchaser, the petition must be verified by the petitioner, and not by his attorney.[44] Where defendant in proceedings for possession seeks to rely on an antecedent lease his answer must comply with the statutory provisions if it is to be sufficient.[45] Where defendant was an unsuccessful claimant, it is proper to strike from the answer matter which should have been put in issue in the claim case.[46] Under some statutes the defense to a summary proceeding need not be pleaded in writing;[47] and the issue is sufficiently joined by a statement of defense without further pleading.[48] If, however, the parties choose to proceed by pleadings the case should be treated as though written pleadings were required.[49] Where plaintiff alleges title and ownership generally, and defendant denies such title and ownership, the existence of a judgment on which execution issued as a foundation for the sheriff's sale at which plaintiff claiming the land became the purchaser is put in issue.[50]

g. Evidence

The general rules of evidence require plaintiff to prove by proper and sufficient evidence matters essential to his recovery, and defendant has the burden of establishing any affirmative defense which he sets up.

The burden of proof is on plaintiff,[51] but, where defendant sets up affirmative defenses, the burden is on him.[52] To obtain a writ of habere facias possessionem plaintiff must show a conveyance to him of the property sold on execution by the sheriff.[53] The evidence must be within the pleadings and issues.[54] For a judgment and execution to be admissible, they must appear to have some bearing on the question of the title or of the right of possession as between the parties.[55] The judgment

35. Mich.—Royce v. Bradburn, 2 Dougl.-377.

36. N.Y.—Brown v. Betts, 13 Wend. 29.

37. Ala.—Doe v. McKinney, 5 Ala. 719.

38. N.C.—Cecil v. Smith, 81 N.C. 285.

39. Ky.—Whitaker v. Holcomb, 276 S.W. 973, 210 Ky. 836.

40. Del.—Stidham v. Brooks, 5 A.2d 522, 1 Terry 110.
Pa.—First Nat. Bank & Trust Co. of Easton v. Sulkin, 27 North.Co. 111—Home Owners' Loan Corporation v. Samuels, 4 Sch.Reg. 396—Soult v. May, 23 West.Co.L.J. 1.

41. Tex.—Ballad v. Anderson, 18 Tex. 377.

42. N.Y.—Hallenbeck v. Garner, 20 Wend. 22.

43. Pa.—Moore v. Moore, 23 Pa. Super. 73.

44. Pa.—Home Owners' Loan Corporation v. Samuels, 29 Pa.Dist. & Co. 137, 4 Sch.Reg. 345.

45. Pa.—East Penn Realty Co. v. Van Osten, 164 A. 807, 108 Pa. Super. 468—Merchant's Nat. Bank v. Itzkovitz, 5 Sch.Reg. 121.

46. Ga.—Garlington v. Fletcher, 36 S.E. 920, 111 Ga. 861.

47. Ky.—Kennedy v. Weber, 64 S. W. 514, 23 Ky.L. 879.

48. Pa.—Minier v. Saltmarsh, 5 Watts 293.

49. Ky.—Ashcraft v. Bowling, 234 S.W. 945, 193 Ky. 31.
Response construed
A response to a motion for judgment for possession by a purchaser at execution sale, which alleged that the creditor had fully repaid the purchaser by delivering to him timber from the premises, and that the purchaser obtained the deed by fraud, does not attempt to allege merely a statutory redemption.—Ashcraft v. Bowling, supra.

50. Ky.—Hopkins v. Slusher, 98 S. W.2d 932, 266 Ky. 300, 108 A.L.R. 662.

51. Me.—Ames v. Young, 119 A. 863, 122 Me. 331, 36 A.L.R. 984.
23 C.J. p 787 note 42.
Evidence held insufficient to meet the burden imposed on a purchaser of land at a sheriff's sale to show that the proceedings leading up to and including the sale were in accordance with statute.—Ames v. Young, supra.

52. Ky.—Salyers v. Sword, 64 S.W. 2d 182, 251 Ky. 59.
Pa.—See Citizens Trust Co. v. Kolosky, 19 Wash.Co. 65.
23 C.J. p 787 note 43.

53. Ky.—Whitaker v. Holcomb, 276 S.W. 973, 210 Ky. 836.

54. Mo.—Kessner v. Phillips, 88 S. W. 66, 189 Mo. 515, 107 Am.S.R. 368, 3 Ann.Cas. 1005.
23 C.J. p 787 note 30.
Evidence held inadmissible
Ark.—Johnson v. Berg, 227 S.W. 413, 147 Ark. 323.

55. Ala.—Bynum v. Hewlett, 34 So. 391, 137 Ala. 333.

roll in the original action is admissible,[56] as are also the original execution[57] and the return of the officer.[58] It has been held that copies of the writ and return are admissible.[59] At any rate, on a showing of the loss or destruction of original records, secondary evidence of their contents is admissible.[60] Where the sheriff's deed is accompanied by an exemplification of a valid judgment and proof of the loss of the execution, the deed is admissible as evidence of title.[61] Plaintiff, being a purchaser at the execution sale, may show that the execution debtor was in actual possession of the property at the time of the levy and sale, from which possession title will be presumed.[62] Plaintiff may introduce deeds to the execution debtor, to show the title of the debtor.[63] In an action to recover possession of property sold on execution which had previously been conveyed by the judgment debtor, evidence that such conveyance was fraudulent and void is admissible.[64] Receipts of payments are admissible on behalf of defendant who claims the property as her separate estate,[65] and a receipt for the amount bid at the sale is admissible.[66]

h. Trial and Judgment

The general rules as to trial and judgment apply to actions or proceedings by purchasers to obtain possession of the property.

In summary proceedings, adverse titles cannot be tried.[67] On a trial before a jury, questions of fact may and should be referred to the jury for determination[68] under proper instructions by the court.[69] Questions of law are, of course, for the court.[70] A statutory summary proceeding may[71] and should[72] be decided by the court without the intervention of a jury; but the court substantially complies with the law by giving a peremptory instruction to the jury.[73]

A judgment on a motion for a writ of habere facias possessionem must be supported by the pleadings.[74] The purchaser should not be awarded possession of more land than he purchased at the execution sale.[75] The relief granted may be based on conditions.[76] Where allowed by statute, damages for the wrongful detention of the property are properly included in the verdict of the jury,[77] but may not be assessed by the court.[78] It is not error for the jury to find, and the court to render judgment for, a gross sum as costs.[79] So long as the judgment remains in force it is conclusive as to the right of possession of the property involved.[80] The court may in its discretion direct the judgment to be opened and defendant allowed to plead a defense of which he was unaware before the judgment.[81] A judgment dispossessing defendant in execution is not invalidated because the rule nisi was issued in a county other than the one wherein the land lay, where the petition and rule were duly filed in the proper court and the judgment was had in the proper court.[82] A judgment awarding the purchaser a writ of possession where land is encumbered by a mortgage is not void where the ex-

Execution and judgment held admissible

Tex.—Tanner v. Grisham, Civ.App., 289 S.W. 146, reversed on other grounds, Com.App., 295 S.W. 590.

56. Cal.—Robinson v. Thornton, 61 P. 946, 129 Cal. 12.

57. Ind.—Woodburn Sarven Wheel Co. v. McKernan, 1 Wils. 48.
Vt.—Perry v. Whipple, 38 Vt. 278.

58. Wis.—Knowlton v. Ray, 4 Wis. 288.

59. Mass.—Frazee v. Nelson, 61 N. E. 40, 179 Mass. 456, 88 Am.S.R. 391.

60. La.—Fontelieu v. Fontelieu, 41 So. 866, 116 La. 866.

61. Ga.—Sweeney v. Sweeney, 46 S. E. 76, 119 Ga. 76, 100 Am.S.R. 159.

62. Tenn.—Cooper v. Cooper, App., 124 S.W.2d 264.

63. Pa.—Marks v. Baker, 2 Pa.Super. 167, 39 Wkly.N.C. 12.

64. Conn.—Staples v. Bradley, 23 Conn. 167, 60 Am.D. 630.

Evidence held sufficient

Ky.—Ashcraft v. Bowling, 234 S.W. 945, 193 Ky. 31.

Pa.—Singer v. Bugis, 87 Pa.Super. 426.

65. Tex.—Morris v. Hastings, 7 S. W. 649, 70 Tex. 26, 8 Am.S.R. 570.

66. Ind.—Turner v. Madison First Nat. Bank, 78 Ind. 19.

67. Mich.—Riggs v. Sterling, 16 N. W. 320, 51 Mich. 157.

68. N.C.—Braddy v. Pfaff, 186 S.E. 340, 210 N.C. 248.
Pa.—Konnick v. Epstein, 32 Luz.L. Reg. 47—Commonwealth ex rel. v. Gregory, 5 Sch.Reg. 59.
23 C.J. p 787 note 45.

Questions for jury

In ejectment suit instituted by the purchaser of realty on which fieri facias for state and county taxes had been levied, questions of the reasonable divisibility of the property, and whether levy was excessive were for the jury under the evidence.—Crump v. McEntire, 10 S.E. 2d 186, 190 Ga. 684.

69. Ky.—Ashcraft v. Bowling, 234 S.W. 945, 193 Ky. 31.
23 C.J. p 787 note 46.

70. Ky.—Ashcraft v. Bowling, 234 S.W. 945, 193 Ky. 31.
Pa.—Stauffer v. Witherspoon, 23 West.Co.L.J. 5—Soult v. May, 23 West.Co.L.J. 1.

71. Ky.—Mooar v. Covington City Nat. Bank, 3 Ky.L. 674.

72. Ky.—Ireland v. Pugh, 4 Ky.L. 252.

73. Ky.—Ireland v. Pugh, supra.

74. Ky.—Hale v. Fair, 268 S.W. 815, 207 Ky. 157.

75. Ky.—Stevenson v. Riddell, 68 S.W. 649, 24 Ky.L. 404—Cooper v. Griffin, 5 Ky.Op. 3.

76. Cal.—Woods v. Kellerman, 89 P. 358, 3 Cal.App. 422.
23 C.J. p 787 note 51.

77. Pa.—Walker v. Bush, 30 Pa. 352—Eberly v. Billingfelt, 21 Lanc.L. Rev. 346.

78. Pa.—Hull v. Russell, 4 Pa.L.J. R. 453.

79. Pa.—Brown v. Gray, 5 Watts 17.

80. Ky.—Combs v. Johnson, 80 S.W. 506, 26 Ky.L. 12.

81. N.J.—Meyers v. Conover, 46 A. 709, 65 N.J.Law 187.

82. Ga.—Creswell v. Bryant Hardware Co., 142 S.E. 885, 166 Ga. 228.

ecution defendant had proper notice of the motion and filed no response, although erroneous in that under the statute the court should have adjudged to the purchaser a lien on the land.[83]

§ 311. —— Actions to Quiet or Try Title

a. Quieting title
b. Trespass to try title

a. Quieting Title

The execution purchaser may, in a proper case, maintain an action to quiet title.

An execution purchaser may maintain an action to quiet title,[84] unless the case falls within a statute providing another remedy which is deemed exclusive.[85] Such action may be maintained even though the interest acquired by the purchaser is subject to a right of redemption.[86] Where the statute so provides, the purchaser may quiet title by suit after the expiration of time for redemption, although no deed has been issued.[87] Where actual possession is required in order to maintain a bill to quiet title, plaintiff's allegations must disclose actual possession at the time when the action was instituted.[88] Plaintiff has the burden of defeating defendant's title, where his own is not of record,[89] and the execution purchaser must show, as against a stranger to the judgment, that the judgment debtor had title or possession on the date of the execution sale.[90] Matters immaterial to the issue cannot be tried.[91] The usual rules of evidence apply.[92] Relief will be refused where plaintiff is guilty of laches,[93] or where defendant is a bona fide purchaser from the debtor,[94] or where there is an adequate remedy at law.[95] In a suit to quiet title, where the judgment creditor was not a bona fide purchaser, equity will do complete justice and protect the rights of one who had advanced most of the purchase price paid for the land involved.[96]

b. Trespass to Try Title

The purchaser at an execution sale may, under statutory authorization, maintain an action of trespass to try title.

The purchaser may, in Texas, maintain an action of trespass to try title, unless the execution sale was absolutely void and vested no title.[97] Where defendant had title at the time of the execution sale, he cannot set up as a defense a title afterward acquired.[98] Where plaintiff is a purchaser

83. Ky.—Matney v. Ratliff, 251 S.W. 634, 199 Ky. 508.

84. Ariz.—Oliver v. Dougherty, 68 P. 553, 8 Ariz 65.
23 C.J. p 788 note 57.

85. In Michigan, where an equitable interest is levied on and sold, a statute requires the judgment creditor, where he has not done so before the sale, to institute proceedings within one year after the sale to settle the rights of the parties in interest. This remedy is exclusive.—Kunze v. Solomon, 85 N.W. 739, 126 Mich. 290—23 C.J. p 788 note 59 [a].

86. Cal.—Porter v. Nelson, 109 P.2d 996, 42 Cal.App.2d 750.

87. Cal.—Leaver v. Smith, 190 P. 1050, 47 Cal.App. 474.

88. Ill.—First Nat. Bank of Assumption v. Gordon, 29 N.E.2d 246, 374 Ill. 242.

89. Mont.—MacGinniss Realty Co. v. Hinderager, 206 P. 436, 63 Mont. 172.

90. Cal.—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.

Findings as to ownership
In execution purchaser's suit to quiet title to corporate stock, express finding should have been made on question whether original transfer of title to third party was made for benefit of judgment debtor.—McAlvay v. Consumers' Salt Co., supra.

91. Colo.—Cooper v. Shannon, 85 P. 175, 36 Colo. 98, 118 Am.S.R. 95.

92. Evidence held admissible
In execution purchaser's action against judgment debtor's wife to quiet title to corporate stock, evidence of connected transactions and surrounding circumstances was admissible.—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.

Evidence held sufficient
(1) To establish that corporate stock sold at execution sale was previously purchased in name of third person and held for benefit of judgment debtor.—McAlvay v. Consumers' Salt Co., supra.

(2) To support finding that judgment debtor was owner of corporate stock at time execution was levied.—McAlvay v. Consumers' Salt Co., supra.

(3) Evidence relating to ownership of oil well equipment which plaintiff had purchased at execution sale justified judgment for plaintiff in suit to quiet title against defendants who claimed that purchase of equipment by judgment debtor had been made by him as their agent with funds furnished by them.—Fesler v. Rawlins, 111 P.2d 380, 43 Cal. App.2d 541.

(4) In action to determine title to lots as between purchaser of sheriff's deed under execution and son of execution debtor, evidence warranted finding that execution debtor used five hundred dollars of son's money, at time when son was minor, in paying for or improving property, but required finding that no other definite substantial amount was furnished by son for making improvements or paying therefor; and judgment was rendered declaring purchaser of sheriff's deed to be owner of lots subject to lien in favor of execution debtor's son for five hundred dollars.—Lifiander v. Bobbitt, Mo., 111 S.W.2d 72.

Evidence held insufficient to require finding that price of fifty dollars execution sale of judgment debtor's interest in two hundred and twenty-five thousand shares of corporate stock was so inadequate as to render transaction unconscionable.—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383.

93. Ill.—Strauss v. Tuckhorn, 65 N. E. 683, 200 Ill. 75.

Delay in disclosing claim to property sold at execution sale may be considered in determining the equities.—Rexburg Lumber Co. v. Purrington, Idaho, 113 P.2d 511.

94. Mo.—Hamilton v. McClelland, 45 Mo. 424.

95. Ala.—Teague v. Martin, 6 So. 362, 87 Ala. 500, 13 Am.S.R. 63.
23 C.J. p 788 note 62.

96. Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511.

97. Tex.—Snodgrass v. Rutherford, Civ.App., 54 S.W. 1054.

98. Tex.—Bonner v. Ogilvie, 58 S. W. 1027, 24 Tex.Civ.App. 237.

under a judgment holding realty subject to the lien of a former judgment, defendant cannot, in the absence of an attack on such former judgment in the pleadings, rely on defects therein rendering it voidable.[99] Testimony that defendant furnished the money with which the judgment debtor acquired the property is admissible irrespective of the fact that plaintiff had no notice or knowledge of the transaction.[1] In trespass to try title by a purchaser at a sale on execution issued on a judgment against an officer of a corporation, whether equitable title to the property was in the corporation is a question for the jury, where the officer had purchased it in his own name and conveyed it to the corporation a short time before execution issued, and the corporation had paid the purchase price and all expenses from the date of the purchase by the officer.[2] Where it is contended that the sale was void because the officer making the sale did not give defendants personal notice as required by statute, the question is one for the jury on conflicting evidence as to mailing of notices to incorrect addresses;[3] but where the uncontradicted evidence is sufficient as a matter of law to establish the issuance of the execution, the court should not submit the question to the jury as a controverted issue of fact.[4] A finding that a sale was not for a grossly inadequate consideration will not be disturbed where the evidence supports it.[5] Sustaining exceptions to defendant's answer alleging that the judgment was void is of no consequence where the judgment, execution, return and sheriff's deed were introduced in evidence without objection.[6]

§ 312. Liabilities of, and Remedies against, Purchasers

a. In general
b. Liens and encumbrances
c. Rents, profits, and improvements
d. Waste
e. Remedies against purchasers

a. In General

The owner of property may maintain appropriate actions or proceedings against the purchaser at the execution sale where the sale is void, the property is not included in the writ, or does not belong to the execution debtor.

Where the sale is for any reason void,[7] or where property not included in the writ[8] or not belonging to the execution debtor[9] is sold, the execution purchaser by assuming and retaining possession becomes liable in an appropriate action to the owner of the property.[10] He is also liable for his wrongful acts in connection with the sale[11] or with relation to the property of third persons after the sale.[12] He is not liable for pursuing a right to enter on premises to remove the property purchased.[13] Where property belonging to two or more persons is sold on execution against one, possession by the execution purchaser does not render him liable to the other owners.[14] The purchaser is not bound to look to the application of the purchase money, and is not liable in an action by parties entitled to a portion of the price;[15] nor is he responsible for any irregularity of the officer by which the purchaser from the execution debtor was deprived of notice of the levy and lien.[16]

Nudum pactum. Promises made by the execution purchaser, where without consideration, cannot be enforced.[17]

b. Liens and Encumbrances

The purchaser is not liable personally for liens on the property subject to which, and not for the payment of which, the property is sold.

A purchaser at an execution sale is not personal-

99. Tex.—Brinkman v. Tinkler, Civ. App., 117 S.W.2d 139, error refused.

1. Tex.—Matador Land & Cattle Co. v. Cooper, 87 S.W. 235, 39 Tex.Civ. App. 99.

2. Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed.

3. Tex.—Saylors v. Wood, 140 S.W. 2d 164, 135 Tex. 267, affirming, Civ. App., 120 S.W.2d 835.

4. Tex.—Gillean v. Witherspoon, Civ.App., 121 S.W. 909.

5. Tex.—Saylors v. Wood, Civ.App., 120 S.W.2d 835, affirmed 140 S.W. 2d 164, 135 Tex. 267.

6. Tex.—Lange v. Brauner, Civ.App., 118 S.W.2d 971.

7. Okl.—Empire Supply Co. v McCann, 260 P. 44, 127 Okl. 195.
23 C.J. p 788 note 70.

8. Pa.—Heiser v. Withers, 15 Pa. Dist. 871.

9. Utah.—Pincock v. Kimball, 228 P. 221, 64 Utah 4.
23 C.J. p 788 note 72.

10. Ala.—White v. Hogland, 96 So. 625, 209 Ala. 537.

11. Pa.—Morrison v. Nipple, 39 Pa. Super. 184.

12. Ga.—Blitch v. Lee, 41 S.E. 275, 115 Ga. 112.
23 C.J. p 788 note 75.

13. Ky.—Thompson v. Craigmyle, 4 B.Mon. 391, 41 Am.D. 240.
Mass.—Doty v. Gorham, 5 Pick. 487, 16 Am.D. 417.

14. N.Y.—Fiero v. Betts, 2 Barb. 633.
Utah.—Spalding v. Allred, 64 P. 1100, 23 Utah 354.

15. Ark.—Graham v. W. W. Dickinson Hardware Co., 63 S.W. 58, 69 Ark. 119.
23 C.J. p 788 note 78.
Attorney for judgment creditor, not having in fact been adjudicated purchaser at sheriff's sale, held not liable to holder of special mortgage having preference.—Shaw v. Marceaux, 125 So. 460, 12 La.App. 401.

16. Ky.—Greer v. Howard, 4 Ky.L. 350.

17. N.C.—Heathman v. Hall, 38 N.C. 414.

ly liable for a mortgage or other subsisting lien on the property, subject to which, and not for the payment of which, the property is sold,[18] unless he is permitted to retain the amount thereof out of his bid.[19] In other respects, where the lien or encumbrance attaches to the property sold, the purchaser is liable the same as the debtor was.[20]

c. Rents, Profits, and Improvements

Where the execution sale is set aside, the purchaser is liable in a proper case for rents and profits, and should receive credit for necessary expenditures and improvements.

Where for any reason an execution sale is subsequently set aside, the general rule is that the execution purchaser is liable in an action by the judgment debtor, or the owner of the property, for the rents and profits accruing while the property was in his possession.[21] The purchaser is not liable for rents which, without his fault, he did not receive,[22] nor is he liable to account for rents and profits to a mortgagee where the mortgage debt is fraudulent and void.[23] He should be credited with the amount paid out for necessary expenditures,[24] and as stated supra § 307, with the cost of improvements made by him tending to enhance the value of the property. Where the purchaser has paid the purchase price, the interest thereon should be set off against the rent.[25] The purchaser is liable for insurance money received less his expense in obtaining the insurance and collecting the money.[26] Where a purchaser has no right to the possession or profits until the sheriff's deed, he is not personally liable for ground rent accruing between the day of the sale and the date of the deed.[27]

d. Waste

It has been variously held that the purchaser is, and is not, liable for waste.

It has been held that the purchaser, being subject only to the right of statutory redemption outstanding in the judgment debtor and other parties designated in the statute as entitled to redeem, is not liable to the redemptioner for waste committed in the management of the property.[28] On the other hand, it has been held that during the period of redemption a purchaser at an execution sale has no right to denude land of its merchantable timber,[29] and that one making redemption may bring an action against him for the reasonable value of timber cut and removed.[30] Where the purchaser of real estate on sale under execution, intermediate the sale and the giving of a sheriff's deed, severs anything from the realty, he is liable for its value to the person who eventually receives the sheriff's deed.[31] If a cotenant whose interest is sold has committed waste, the purchaser will take subject to the right of the other cotenant to an equitable adjustment of their rights in partition proceedings.[32]

e. Remedies against Purchasers

The owner may resort to any appropriate remedy, such as ejectment, or replevin, or trover, if the property is personal. Any statutory remedy may be pursued. Conditions precedent must be complied with, and the general rules as to parties, pleading, evidence, trial, and judgment apply.

Where the sale is void the proper remedy of the owner, out of possession, is ejectment in the case of real property,[33] or such statutory action as may be provided;[34] and in the case of personal property, replevin or trover, at the election of the owner.[35] It is sometimes held that, on a rule to show cause, the purchaser may be summarily required to return the property to the custody of the officer.[36] In some jurisdictions a writ of recordari has been

18. N.Y.—Hamill v. Gillespie, 48 N. Y. 556.
23 C.J. p 788 note 81.

19. La.—Yeatman v. Erwin, 14 La. Ann. 149.
23 C.J. p 788 note 82.

20. N.C.—State v. Pool, 27 N.C. 105.

21. U.S.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.
Alaska.—Ziller v. Brower, 6 Alaska 134.
23 C.J. p 788 note 84.

22. S.C.—Bath South Carolina Paper Co. v. Langley, 23 S.C. 129.

23. Ky.—Zimmerman v. McMaster, 76 S.W. 5, 25 Ky.L. 456.

24. Wash.—Dart v. McDonald, 195 P. 253, 114 Wash. 448.
23 C.J. p 789 note 87.

25. Ky.—Stephens v. Jones, 9 Ky. Op. 654.

26. S.C.—Bath South Carolina Paper Co. v. Langley, 23 S.C. 129.

27. Pa.—Thomas v. Connell, 5 Pa. 13, affirming 1 Pa.L.J. 319, 3 Pa. L.J. 299, and overruling by implication Walton v. West, 4 Whart. 221.

28. Ala.—O'Connor v. Attalla Bank, 22 So. 902, 116 Ala. 585, 67 Am. S.R. 146.
23 C.J. p 789 note 92.

29. Wash.—Gray v. C. A. Harris & Son, 93 P.2d 385, 200 Wash. 181.

30. Wash.—Gray v. C. A. Harris & Son, supra.

Time for bringing suit

Grantees who redeemed land from execution sale without having made a demand for an accounting from execution sale purchaser for timber cut and removed during period of redemption were not bound by statutory provision relative to the time within which an action may be brought after a demand for an accounting has been made and refused. —Gray v. C. A. Harris & Son, supra.

31. N.Y.—Potter v. Cromwell, 40 N. Y. 297, 100 Am.D. 485.

32. N.J.—Polhemus v. Empson, 27 N. J.Eq. 190, reversed on other grounds 28 N.J.Eq. 439.

33. Mo.—McGeorge v. Danforth, 39 S.W.2d 565, 566, quoting **Corpus Juris.**
23 C.J. p 789 note 95.

34. La.—Long v. Chailan, 175 So. 42, 187 La. 507.

35. Mo.—McGeorge v. Danforth, 39 S.W.2d 565, 566, quoting **Corpus Juris.**
23 C.J. p 789 note 96.

36. W.Va.—August v. Gilmer, 44 S. E. 143, 53 W.Va. 65.

held the proper remedy in case of real property,[37] and, of course, an action lies to quiet title,[38] unless the execution debtor has an adequate remedy at law.[39] Sometimes trespass may be brought against the purchaser.[40] A grantee of realty under an unrecorded deed from a judgment debtor is furnished with an adequate remedy at law by a statute providing for and defining the rights, duties, and liabilities of purchasers of realty at judicial sales, and of the persons then in possession thereof, the statute providing that the latter may demand a jury trial where the purchaser seeks possession by petition under the statute.[41] Where defendant in fieri facias had tendered to the attorney of plaintiff on the day of sale and prior thereto the full amount due on the process, an injunction restraining the execution purchaser from taking possession of the land is proper.[42]

Conditions precedent. In actions relating to personal property, a demand is a condition precedent.[43] Where a suit to quiet title is brought against the execution purchaser, on the ground that his claim as judgment creditor was fictitious, an offer to redeem is not necessary.[44]

Time to sue. The suit must be brought within the time specified in the applicable[45] statute of limitation.[46] The title will not be disturbed after many years of acquiescence and the death of the judgment creditor who was the purchaser.[47]

Defenses. In an action against the execution purchaser to recover the property he is estopped to deny the title of the judgment debtor.[48] Title in another person is no defense.[49] Laches is available as a defense in a proper case.[50]

Parties. In actions or proceedings against purchasers, only necessary parties must be joined.[51]

Pleading. Where, in an action to quiet title brought against the execution purchaser, plaintiff does not in the petition or complaint directly attack the execution sale on equitable grounds but merely demands that defendant set forth the nature of his title, an answer containing general averments of the judgment, execution sale thereon, confirmation thereof, and the execution and recording of the sheriff's or marshal's deed under which he claims title, is sufficient without setting out in detail the issuance and levy of execution and sale thereunder and the steps necessary to the validity of the sale.[52] A petition to declare payment of a lien out of the proceeds of sale void states a cause of action where it alleges an execution sale subject to the lien, purchase by the lienor, and that the amount of the lien was deducted from the proceeds of sale credited on the judgment against plaintiff, and prays that the amount deducted be credited on

37. N.C.—Heath v. Bishop, 72 N.C. 456.

38. Cal.—First Nat. Bank v. Kinslow, 65 P.2d 796, 8 Cal.2d 339—Yokohama Specie Bank v. Kitasaki, App., 117 P.2d 398.
23 C.J. p 789 note 99.

Where action for benefit of judgment debtor

Corporation which sold property and was controlled by transferee could not complain of mode of transfer, in action against purchaser at execution sale, and the fact that transfer of corporation's property was not formally assented to is not available to plaintiff.—Lost Burros Gold Mining Co. v. Inyo County Bank, 257 P. 209, 83 Cal.App. 679.

Trespass to try title

(1) Plaintiffs were entitled to judgment, unless precluded by some statute of limitations pleaded by defendants, where deed under which defendants were claiming had been executed by a sheriff in connection with sale of land made under an execution on a judgment against one of the plaintiffs after return day on the writ.—Reynolds v. Farmers & Merchants Nat. Bank of Nocona, Tex. Civ.App., 135 S.W.2d 556.

(2) Where sole issue was sufficiency of a description, contained in a sheriff's levy, notice of sale, and sheriff's deed to defendant, which description referred to lands awarded to plaintiff by a partition decree, description taken with description in partition decree and extrinsic evidence established identity of the realty conveyed by sheriff's deed and sustained judgment for defendant.—Gutierrez v. Rodriguez, Tex.Civ.App., 137 S.W.2d 220.

39. Or.—Anderson v. Guenther, 22 P. 2d 339, 144 Or. 446, rehearing denied 25 P.2d 146, 144 Or. 446.

40. Pa.—Morrison v. Nipple, 39 Pa. Super. 184.
23 C.J. p 789 note 1.

41. Pa.—Miners Sav. Bank of Pittston v. Tracy, 192 A. 246, 326 Pa. 367, appeal dismissed Toole v. Miners Sav. Bank of Pittson, 58 S.Ct. 272, 302 U.S. 651, 82 L.Ed. 504.

42. Ga.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683.

43. Conn.—Carter v. Clark, 28 Conn. 512.
N.Y.—Storm v. Livingston, 6 Johns. 44.

44. Ala.—Worthington v. Miller, 32 So. 748, 134 Ala. 420.

45. Mich.—Millar v. Babcock, 29 Mich. 526.
23 C.J. p 789 note 5.

46. Ind.—Marley v. State, 46 N.E. 466, 147 Ind. 145—Moore v. Ross, 38 N.E. 817, 139 Ind. 200.

47. S.C.—Hogan v. Hall, 20 S.C.Eq. 323.

48. Ala.—Rust v. Mobile Electric Lighting Co., 27 So. 263, 124 Ala. 202.
23 C.J. p 789 note 8.

49. N.Y.—Jackson v. Graham, 3 Cai. 188.

50. Tex.—Reynolds v. Farmers & Merchants Nat. Bank of Nocona, Civ.App., 135 S.W.2d 556.

51. Iowa.—Graham v. Williams, 293 N.W. 562, 228 Iowa 1261.
La.—Long v. Chailan, 175 So. 42, 187 La. 507.

Sheriff

It is within the discretion of the trial court to order the sheriff who made an execution sale, and executed the deed to the purchaser, to be made a party to an action by the execution defendant against the purchaser for the cancellation of the deed.—Colorado Mfg. Co. v. McDonald, 25 P. 712, 15 Colo. 516.

52. U.S.—Heid v. Ebner, Alaska, 133 F. 156, 66 C.C.A. 222.

the judgment.[53] Where a petition correctly describes a constable's deed, but in a subsequent paragraph erroneously states the volume in which the deed is recorded, admission of a certified copy of the deed is not a variance.[54]

Evidence. In an action to recover personal property, the burden of showing the illegality of the sale rests on plaintiff.[55] In an action of trespass, defendant is not required to prove that the officer making the sale was a de facto officer.[56] Where plaintiff is pursuing the proper remedy, evidence of prior attempts on his part to establish his right by wrong remedies is not admissible against him.[57] In a suit to quiet title, where defendant purchaser introduces the judgment, execution, and proceedings of the sheriff under it, and the judgment is not denied by plaintiff, defendant's title is sufficiently established.[58] As against a contention in a suit to try title that a sheriff's deed was inadmissible on the ground that it was not shown that execution had in fact been issued, the record showing rendition of the judgment, issuance of original execution, return nulla bona, and issuance of alias execution establishes a prima facie case, notwithstanding no return on the alias execution is shown.[59]

Trial and judgment. In proceedings or actions against purchasers at execution sales questions of fact are for the jury.[60] In actions to quiet title, findings as to ownership of property must be sustained by the evidence.[61] In an action to recover the value of property sold at a sheriff's sale, where the evidence without conflict supports plaintiff's allegations as to ownership of the property, a finding that plaintiff was not the owner cannot be sustained.[62] In an action to establish title to realty as against a purchaser the question of the identity of land cannot be decided on an exception of no cause of action, but must be determined on the merits.[63] A direction of a verdict in plaintiff's favor for the entire title of the property in controversy is improper where it appears that defendant has at least some interest or title therein.[64] Where it appears that the owner was in possession of the property at the time of the levy and sale under execution on a judgment against a third person, the purchaser at the sale acquired no title to the land and the court should cancel the deed and quiet title in the owner.[65] In a suit in equity to recover goods of plaintiff sold to defendant on execution, such goods not belonging to the execution debtor, a refusal of the court, in awarding plaintiff recovery, to include additional goods in the award of damages, defendant having disposed of some of the goods, or to admit evidence of the value of the goods as part of a going business conducted by someone other than plaintiff is not improper.[66]

§ 313. Title, Rights, and Liabilities of Assignees of, or Purchasers from, Execution Purchasers

The vendee of a purchaser at an execution sale stands in the shoes of his vendor, and may exercise the same rights and pursue the same remedies, as a general rule. The same is true of the assignee of the certificate of sale, to whom, after the assignment the deed should be made.

The vendee of a purchaser at an execution sale stands in the shoes of his vendor.[67] He takes all the right and title acquired by his vendor at such sale,[68] free from such claims as the property was free from in the hands of the vendor.[69] Ordinarily the purchaser's vendee acquires no better title than such purchaser, and a claimant of the property may set up the same defenses or equities against such vendee as he might against the purchaser;[70]

53. Ga.—Crowley v. Calhoun, 130 S.E. 563, 161 Ga. 354.
54. Tex.—Kerr v. Clark, Civ.App., 148 S.W.2d 880.
55. Ala.—Brandon v. Snows, 2 Stew. 255.
56. Mass.—Doty v. Gorham, 5 Pick. 487, 16 Am.D. 417.
57. Pa.—Hinderman v. Fisher, 42 Pa.Super. 128.
58. Ky.—Moore v. Marcum, 106 S.W. 2d 117, 269 Ky. 101.
59. Tex.—Bunn v. Mackin, Civ.App., 25 S.W.2d 942, error refused.
60. N.Y.—American Lumber & Mfg. Co. v. Wyoming County Nat. Bank & Trust Co. of Wyoming County, 8 N.Y.S.2d 761, 255 App.Div. 924.
61. Cal.—Lost Burros Gold Mining Co. v. Inyo County Bank, 257 P. 209, 83 Cal.App. 679.
62. Cal.—Henry Cowell Lime & Cement Co. v. Mitchell, 278 P. 241, 99 Cal.App. 87.
63. La.—Long v. Chailan, 175 So. 42, 187 La. 507.
64. Tex.—Uglow v. Southern, Civ. App., 250 S.W. 738.
65. Tex.—Kerr v. Clark, Civ.App., 148 S.W.2d 880.
66. Mass.—Long v. George, 7 N.E.2d 149, 296 Mass. 574.
67. Wash.—Singly v. Warren, 51 P. 1066, 18 Wash. 434, 63 Am.S.R. 896.
23 C.J. p 789 note 15.
68. Cal.—Hansen v. d'Artenay, 57 P. 2d 202, 13 Cal.App.2d 293.
23 C.J. p 790 note 16.
69. Ark.—Fort Smith Building & Loan Ass'n v. Hight, 86 S.W.2d 923, 191 Ark. 415.
Cal.—Farris v. Pacific States Auxiliary Corporation, 48 P.2d 11, 4 Cal. 2d 103.
Ill.—Olsen v. Kern, 10 Ill.App. 578.
Ky.—Waller v. Tate, 4 B.Mon. 529.
Pa.—Silverman v. Keal, 7 A.2d 57, 135 Pa.Super. 568.
70. Okl.—Todd v. Webb, 272 P. 380, 134 Okl. 107.
23 C.J. p 790 note 18.
In action to quiet title to realty conveyed to plaintiff by judgment creditor of certain defendants after purchasing it at execution sale, it was trial court's exclusive province to determine witnesses' credibility and weight and effect of their evidence, consider inferences reasonably deducible therefrom, and determine disputed fact as to whether one of such defendants was trustee for other defendants as equitable owners of

but where he is an innocent purchaser he may take a better title than the execution purchaser had,[71] by reason as stated supra § 296, of his taking free of equities and irregularities of which the vendor had notice. An oral agreement made by the execution purchaser is not binding on his vendee who had no knowledge thereof.[72] The fact that the execution purchaser is an administrator and may be refused credit in his account for the amount expended does not prevent a subsequent purchaser from him from acquiring a good title.[73] On failure of title, the remedy of the vendee, if any, is against the vendor only, and not against the execution debtor.[74] The vendee of a purchaser at a sheriff's sale which is void because of irregularity in the sale has no remedy as against his vendor where the deed contains no other covenant than special warranty.[75] A voluntary substituted purchaser at an execution sale has no cause of action against the original vendee for the amount of the purchase money paid over to him under a mutual mistake as to the identity of the estate sold.[76] The vendor is not entitled to relief from the vendee under the doctrine that the person who acquires a legal estate with notice of an earlier equity holds subject to such equity, where there is no preëxisting equity in the vendor.[77] The mere assignment of the interest of the execution plaintiff in a judgment under which land was sold to him on execution does not operate to convey his interest in the land purchased.[78]

Assignee of certificate of sale. The certificate of sale is as stated supra § 224, assignable, and the sheriff's deed may and should be made to the assignee,[79] who thereby acquires all the rights and remedies of his assignor in the property.[80] The sheriff's deed executed and delivered to the assignee of the certificate of sale conveys to him the legal title, and, in connection with the equity acquired by the assignment, gives him a perfect title.[81] The sheriff cannot be compelled to execute a deed to the assignee prior to the filing of the assignment according to statute;[82] but even where the assignment is so defective that the officer cannot be compelled to execute a deed to the assignee, if he voluntarily does so the deed is valid and passes title.[83] A conveyance by the execution purchaser before he has received the sheriff's deed operates, or has the same effect, as an assignment of the certificate of sale.[84] The assignee of a certificate of sale does not acquire any greater rights than his assignor, and the same defenses and equities subsist against the certificate in his hands as in the hands of his assignor.[85] The assignee does not acquire any interest in the judgment debt or security therefor.[86] Upon failure of title the assignee is not liable for the amount of the agreed consideration[87] and, if the same has been paid, is entitled to recover it back.[88] On redemption the assignee may recover the money paid from the sheriff.[89] Where the assignee takes the certificate only as security, he has merely a lien on the land, which is satisfied by payment of the debt secured, and neither he nor his assignee with notice can subsequently acquire any title to the land by obtaining a sheriff's deed.[90] If the assignment was to secure a loan, and the assignee obtained a sheriff's deed and sold the property, the assignor may compel him to account for the surplus in excess of

property from conflicting evidence as to terms of claimed trust.—Rabbit v. Atkinson, 113 P.2d 14, 44 Cal.App. 2d 752.

71. Ind.—Hasselman v. Lowe, 70 Ind. 414.
Ky.—Craig v. Hawes, 2 Ky.Op. 625.

72. Pa.—Roberts v. Williams, 5 Whart. 170, 34 Am.D. 549.

73. Cal.—San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co., 102 P. 548, 10 Cal.App. 415.

74. Ky.—McLaughlin v. Daniel, 8 Dana 182.

75. Tenn.—Prigmore v. Shelton, 9 Lea 563.

76. Mo.—Cravens v. Gordon, 53 Mo. 287.

77. Minn.—Thompson v. E. I. Dupont Co., 111 N.W. 302, 100 Minn. 367.

78. Ill.—Meacham v. Sunderland, 10 Ill.App. 123.

79. Iowa.—Rush v. Mitchell, 32 N.W. 367, 71 Iowa 333.
23 C.J. p 790 note 29.

80. Ill.—Palmer v. Riddle, 54 N.E. 227, 180 Ill. 461.
23 C.J. p 790 note 30.

81. Cal.—Leonard v. Flynn, 26 P. 1097, 89 Cal. 535, 23 Am.S.R. 500.

82. N.Y.—People v. Ransom, 4 Den. 145.

83. Ill.—McClure v. Engelhardt, 17 Ill. 47.
23 C.J. p 790 note 34.

84. Cal.—Leonard v. Flynn, 26 P. 1097, 89 Cal. 535, 23 Am.S.R. 500.
Ill.—Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333.

85. U.S.—Reed v. Munn, Colo., 148 F. 737, 80 C.C.A. 215, certiorari denied 28 S.Ct. 255, 207 U.S. 588, 52 L.Ed. 353.
23 C.J. p 790 note 36.

The doctrine of caveat emptor applies to the assignee of a purchaser at an execution sale.—Burdick v. Farmers' Mercantile Co., 184 N.W. 4, 48 N.D. 227.

As between assignor and assignee
In the absence of an express warranty or fraud the assignor of a sheriff's certificate on execution sale of real property is not liable for the failure or partial failure of title thereafter resulting.—Burdick v. Farmers' Mercantile Co., supra.

86. Cal.—Abadie v. Lobero, 36 Cal. 390.

87. Wash.—Vanasse Land Co. v. Hewitt, 164 P. 196, 95 Wash. 643.

88. Mich.—McGoren v. Avery, 37 Mich. 120.

89. N.Y.—Colvin v. Holbrook, 2 N.Y. 126, affirming 3 Barb. 475.

90. Cal.—Baber v. McLellan, 30 Cal. 135.

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A return on a writ of execution is the short official statement of the officer, indorsed thereon or attached thereto, of what he has done in obedience to the mandate of the writ or of the reason why he has done nothing.[93] It consists of the two acts of writing out the statement on the writ or on an attached paper and the filing.[94] The mere writing out of the statement is not sufficient without filing it,[95] and vice versa the mere filing of the writ with no statement is not a return.[96] When the process is brought into court with the official indorsement on it as required by law, whether true or false, it is a return.[97]

The office of the return is to inform the court and the parties of what was done, and to make the recitals contained in the return of record.[98]

Where the execution is satisfied, it is a necessary part of the return that the sum realized, unless paid to the judgment creditor or his attorney, be brought into court.[99]

§ 315. Necessity

It is the duty of the officer to whom an execution is directed to make a proper return thereof, but as a general rule a writ of execution, when duly executed, is good, although never returned by the officer.

It is the duty of the officer to whom an execution is directed to make a return thereto on or before the time fixed by law, to the proper court or officer, in all cases, whether or not it has been executed;[1] and, as discussed in the C.J.S. title Sheriffs and Constables § 168, also 57 C.J. p 983 notes 51, 52, if the officer fails to make due return, he may be compelled to do so by the court out of which the execution issued. Under some statutes, however, the sheriff is not required to return the writ to the clerk's office unless it is desired to renew the same or unless it is satisfied.[2] Of course, a void writ need not be returned.[3]

At common law, all writs of execution which were to be executed by the sole authority of the sheriff, such as a writ of fieri facias, when duly executed, were good, although never returned by the sheriff.[4] Likewise, a lack of return of execution is not conclusive against a finding that the execution was placed in the sheriff's hands.[5] The failure of an officer levying an execution to make return of facts showing the satisfaction thereof does not prevent the judgment from being treated as discharged.[6] The effect of a return or defects therein on the title of a purchaser at execution sale is hereinafter discussed infra § 330.

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91. Ind.—Wagner v. Winter, 23 N.E. 754, 122 Ind. 57.

92. Ariz.—Oliver v. Dougherty, 68 P. 553, 8 Ariz. 65.

93. Ark.—Jones v. Goodbar, 29 S. W. 462, 60 Ark. 182.
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(1) "The return of an execution is the statement by the officer, certified to the court under the sanction of his official oath and responsibility, of what he has done touching the execution of the writ according to its commands and the requirements of the law."—Farmers' Bank v. Wyatt, 40 S.W.2d 402, 163 Tenn. 31—Hutton v. Campbell, 10 Lea, Tenn., 170, 173.

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A sheriff is not required to make a return of levy and seizure and return of the execution on which the levy was made, or either of them, in response to an affidavit by an adverse claimant to property, where not required to do so by statute.—Schloss v. Stringer, 194 P. 577, 113 Wash. 529.

2. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.

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4. Del.—Ableman v. Conoway, 199 A. 278, 9 W.W.Harr. 324.

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fails to return an execution, it will be presumed against him that he has collected the money.[7]

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The officer to whom the writ is directed should make the return.

The return should be made by the officer to whom the writ is directed,[8] even though his term of office has expired,[9] provided he commenced to execute it while in office.[10] If the writ has been executed by an undersheriff or deputy, it has been held that he should return it in the name of his principal by himself as deputy;[11] but it has also been held that a return by a deputy in his own name is sufficient,[12] at least if ratified by the sheriff.[13] If a deputy dies before completing his return, it may be completed by the sheriff.[14]

No duty rests on the seizing creditor with respect to the return on a writ of fieri facias.[15]

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In the absence of a statute to the contrary, an execution should be returned to the court from which it issued.

An execution should be returned to the court from which it issued,[16] in the absence of statute providing otherwise.[17]

§ 318. Time for Making and Effect of Delay

The time for returning executions is largely a matter of statutory regulation. An officer generally may return an execution before the return day, and a return may usually be made after the return day.

The time for returning executions is generally regulated by statute.[18] It has been held that the time for a return is to be computed from the date when the writ was delivered to, and received by, the officer for service, rather than from the time of its preparation by the clerk.[19] If the writ is to be returned in a certain number of days from its issuance, the day of its issuance is to be excluded in computing the time for its return,[20] or else the day of return is to be excluded.[21] The return may be made on the return day, although the statute allows the officer to make the return within a prescribed time thereafter, without subjecting himself to liability.[22] If the writ is returnable in a specified number of days, return may be made at any time on the last day.[23] When an execution is not returnable to a court but to the clerk's office, it is returnable at any reasonable and convenient time on the return day.[24] If the return is required to be made to a court to be held at a certain day and place, return may be made at any time on that day before adjournment of the court but not thereafter.[25] It has been held that a return on Sunday, although that is the return day, is void.[26] Where the return day falls on Sunday, it has been held the return may be made on the following Monday;[27] but, on the contrary, it has also been held that the return must be made on the preceding Saturday.[28] If an execution is returnable to a certain term of

7. Pa.—Commonwealth v. McCoy, 8 Watts 153, 34 Am.D. 445.

8. La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.
23 C.J. p 792 note 68.

Notation by clerk
Filing of execution in office of clerk of court, with notation thereon by clerk that it was returned not satisfied, was insufficient as return.—Richardson v. Rusk, 245 N.W. 770, 215 Iowa 470.

9. Tenn.—Campbell v. Cobb, 2 Sneed 18.

10. N.C.—McLin v. Hardie, 25 N.C. 407.
Tenn.—State v. Parchmen, 3 Head 609.

11. Ill.—Ryan v. Eads, 1 Ill. 217.
23 C.J. p 792 note 71.

12. S.C.—Ford v. De Villers, 13 S. C.L. 144.
23 C.J. p 792 note 72.

13. N.C.—Lanier v. Stone, 8 N.C. 329.

14. Mass.—Firth v. Haskell, 20 N. E. 164, 148 Mass. 501.
23 C.J. p 792 note 74.

15. La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.

16. Pa.—Fleisher v. Friedman, 7 Pa. Dist. 421.

Statute construed
Statute providing that sheriff levying execution shall record execution in his county, and return same to office of court whence it issued, was construed to mean that sheriff shall return process to office whence it issued after he has performed duties in respect thereof.—Brownsville Auto Co. v. Peaslee Gaulbert Co., 46 S.W. 2d 1088, 242 Ky. 519.

17. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308.
23 C.J. p 792 note 76.

18. Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.
Mo.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074.
23 C.J. p 792 note 79.

In Michigan it has been held that the sheriff must retain the writ until the lien created by it has been discharged by satisfaction, payment, or order of the court.—Raymond v. Bigley, 197 N.W. 532, 226 Mich. 182.

19. S.D.—Schroeder v. Pehling, 108 N.W. 252, 20 S.D. 642, 129 Am.S.R. 952.

20. Mo.—Huhn v. Lang, 27 S.W. 345, 122 Mo. 600.
23 C.J. p 793 note 81.

21. Ky.—Ogden v. Redman, 3 A.K. Marsh. 234.

22. Mich.—Peck v. Cavell, 16 Mich. 9.

23. Mass.—Prescott v. Wright, 6 Mass. 20.

24. Mass.—Bull v. Clarke, 2 Metc. 587.
23 C.J. p 793 note 85.

25. Mass.—Prescott v. Wright, 6 Mass. 20.

26. Mich.—Peck v. Cavell, 16 Mich. 9.

27. Ind.—Williams v. State, 5 Ind. 235.

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23 C.J. p 792 note 68.

Notation by clerk
Filing of execution in office of clerk of court, with notation thereon by clerk that it was returned not satisfied, was insufficient as return.—Richardson v. Rusk, 245 N.W. 770, 215 Iowa 470.

9. Tenn.—Campbell v. Cobb, 2 Sneed 18.

10. N.C.—McLin v. Hardie, 25 N.C. 407.
Tenn.—State v. Parchmen, 3 Head 609.

11. Ill.—Ryan v. Eads, 1 Ill. 217.
23 C.J. p 792 note 71.

12. S.C.—Ford v. De Villers, 13 S. C.L. 144.
23 C.J. p 792 note 72.

13. N.C.—Lanier v. Stone, 8 N.C. 329.

14. Mass.—Firth v. Haskell, 20 N. E. 164, 148 Mass. 501.
23 C.J. p 792 note 74.

15. La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.

16. Pa.—Fleisher v. Friedman, 7 Pa. Dist. 421.

Statute construed
Statute providing that sheriff levying execution shall record execution in his county, and return same to office of court whence it issued, was construed to mean that sheriff shall return process to office whence it issued after he has performed duties in respect thereof.—Brownsville Auto Co. v. Peaslee Gaulbert Co., 46 S.W. 2d 1088, 242 Ky. 519.

17. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308.
23 C.J. p 792 note 76.

18. Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.
Mo.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.
Mont.—Merchants Credit Service v. Chouteau' County Bank, 114 P.2d 1074.
23 C.J. p 792 note 79.

In Michigan it has been held that the sheriff must retain the writ until the lien created by it has been discharged by satisfaction, payment, or order of the court.—Raymond v. Bigley, 197 N.W. 532, 226 Mich. 182.

19. S.D.—Schroeder v. Pehling, 108 N.W. 252, 20 S.D. 642, 129 Am.S.R. 952.

20. Mo.—Huhn v. Lang, 27 S.W. 345, 122 Mo. 600.
23 C.J. p 793 note 81.

21. Ky.—Ogden v. Redman, 3 A.K. Marsh. 234.

22. Mich.—Peck v. Cavell, 16 Mich. 9.

23. Mass.—Prescott v. Wright, 6 Mass. 20.

24. Mass.—Bull v. Clarke, 2 Metc. 587.
23 C.J. p 793 note 85.

25. Mass.—Prescott v. Wright, 6 Mass. 20.

26. Mich.—Peck v. Cavell, 16 Mich. 9.

27. Ind.—Williams v. State, 5 Ind. 235.

28. Ark.—Hawkins v. Taylor, 19 S. W. 105, 56 Ark. 45, 35 Am.S.R. 82.

court, and no particular day is specified when it is to be returned, the officer has all the days of the term to return it,[29] unless he is required by statute[30] or unless he is ruled, on motion and cause shown,[31] to return it on some particular day. An execution returned on the first day of the term is not returned prematurely.[32] If the writ is returnable at the next term of court, it means the next regular term as distinguished from a special term.[33] If the term of court to which the writ is returnable is afterward altered by statute to a later date, the writ remains in full force until such later day.[34] A return may be made even while an action is pending against the officer for neglecting to levy the writ.[35]

It is not necessary that the return should be written out and signed when the levy is made.[36]

After return day. While it is the duty of the officer in all cases to return the writ by the return day,[37] yet it is not necessary that the return should be so made,[38] but it may be made at any time thereafter, and when so made it is of equal effect and of equal verity as if it had been made by the return day.[39] Neither of the parties can be deprived of the return by the officer's neglect or failure so to return the writ at the prescribed time;[40] nor will a levy made thereunder be invalidated by such neglect or failure.[41] If an officer has commenced the service of an execution at any time before the day on which it is returnable, he may complete the service after the return day, and retain the execution to indorse such service thereon, and the whole proceedings will relate back to the time when the service commenced.[42] Under special circumstances and for good cause shown the court may extend the time within which the return is to be made.[43]

Before return day. In many jurisdictions the officer may return the execution before the return day, even unsatisfied, where he has been unable after diligent search to find property subject to the writ.[44] In other jurisdictions, however, where the statute fixes a definite return day, or a day a prescribed number of days after the issuance of the execution, a return of nulla bona made before that time is premature and irregular.[45] A return of nulla bona may be made, under the instructions of the judgment creditor, immediately after it has become evident that the debtor has no property which can be seized.[46] Where the officer makes a return of nulla bona before the return day, at the request of the judgment creditor or his attorney, such return has been regarded as the act of the party, and not the official act of the officer, and supplementary proceedings founded on such return will be set aside on application of the judgment debtor;[47] but the fact that the attorney for the judgment creditor gave the sheriff an indemnifying agreement waiving any damages which might accrue to plaintiff by return of the writ before the return day has been held not to invalidate the return where the evidence shows that the writ was returned in his discretion and not on the order of the attorney.[48] Where the ends of justice will be furthered thereby, and there is no evidence that the sheriff can derive any advantage from holding the execution until the return day, it has been held to be within the power of the court to compel an earlier return;[49] but it has also been held that the time allowed by law for the return of an execution cannot be abridged by an order of any court.[50] In determining whether a return has been made before the return day, the return speaks from the

29. N.C.—Person v. Newsom, 87 N. C. 142.
Tenn.—Valentine v. Cooley, 1 Humphr. 38.

30. Tenn.—Browning v. Jones, 4 Humphr. 69.
23 C.J. p 793 note 91.

31. N.C.—Person v. Newsom, 87 N. C. 142.

32. R.I.—Rowley v. Nichols, 14 R.I. 14.

33. Tex.—Masterson Irr. Co. v. Foote, Civ.App., 163 S.W. 642.

34. N.H.—Brown v. Roberts, 24 N. H. 131.

35. Me.—Clark v. Foxcroft, 6 Me. 296, 20 Am.D. 309.

36. Ky.—Demint v. Ringo, 5 Ky.L. 320.

37. Va.—Rowe v. Hardy, 34 S.E. 625, 97 Va. 674, 75 Am.S.R. 811.
23 C.J. p 793 note 5.

38. D.C.—Rich v. Henry, 15 D.C. 155.

39. Mass.—Ellis v. Lyford, 169 N. E. 800, 270 Mass. 96.
23 C.J. p 793 notes 7, 8.
However, it has been held that after the expiration of the time for the return of the writ the sheriff is helpless to make a proper return without the issuance of an alias writ.—Poust v. Bull, 22 Pa.Dist. & Co. 301, 12 Northumb.Leg.J. 9.

40. Va.—Rowe v. Hardy, 34 S.E. 625, 97 Va. 674.
23 C.J. p 794 note 9.

41. Conn.—Pratt v. Pond, 45 Conn. 386.

42. Mass.—Prescott v. Wright, 6 Mass. 20.

43. Md.—Jessop v. Brown, 2 Gill & J. 404.
23 C.J. p 794 note 12.

44. Ky.—Rowan County Lumber Co. v. Kautz, 56 S.W.2d 1, 246 Ky. 732.
23 C.J. p 793 note 97.

45. Mo.—Huhn v. Lang, 27 S.W. 345, 122 Mo. 600.
23 C.J. p 793 note 98.

46. Ky.—Rowan County Lumber Co. v. Kautz, 56 S.W.2d 1, 3, 246 Ky. 732, quoting **Corpus Juris.**
La.—Wheeling Pottery Co. v. Levi, 19 So. 752, 48 La.Ann. 777.

47. N.Y.—Spencer v. Cuyler, 9 Abb. Pr. 382, 7 How.Pr. 157.

48. Ill.—Zimek v. Illinois Nat. Casualty Co., 19 N.E.2d 620, 370 Ill. 572.

49. N.Y.—National Exch. Bank v. Burkhalter, 20 N.Y.S. 593, 22 N.Y. Civ.Proc. 414.

50. N.Y.—Ansonia Brass & Copper Co. v. Conner, 8 N.Y.Civ.Proc. 88.

date it is filed in the clerk's office, rather than from the date indorsed on the writ by the sheriff.[51]

Dormant judgment. A return of nulla bona cannot be made on an execution after the judgment under which it was issued has become dormant.[52]

Excuses for delay. Failure to make return within the statutory time may be excused by the circumstances.[53] A stay, granted by a court of competent jurisdiction, which restrains a sheriff from enforcing an execution has been held to suspend the running of the time in which he is required to return the writ.[54] Neither the authorization of plaintiff to return the writ to be renewed,[55] nor the oral direction by plaintiff's attorney, where under the statute a request for delay must be in writing,[56] nor the fact that the execution came to the officer's hands but a few days before the return day,[57] nor the fact that the sale was not made until after the return term,[58] will excuse the failure to return an execution at the prescribed time. Stay laws enacted at the time of the Civil War did not operate retroactively.[59]

The effect of delay in making the return on the title of a purchaser at an execution sale is discussed infra § 330.

§ 319. Form and Requisites in General

The return must be in writing on the writ itself or on a paper attached thereto and signed by the officer executing it.

The return to an execution must be in writing, on the writ itself or on a paper attached thereto.[60] It must be authenticated by the signature of the officer,[61] but, unless required by statute, it need not be under seal[62] or be sworn to.[63] If the officer cannot write, the return may be written in his presence and signed with his mark.[64] It will not vitiate a return that it is signed by the deputy for the sheriff, and not in the name of the sheriff, by the deputy.[65] Likewise, it has been held that a return on a sale made by the sheriff may be signed by his deputy.[66]

§ 320. Making Return by Mail

Where a statute so provides, return may be made by mail.

Where authorized by statute, a return may be made by mail;[67] and, ordinarily, if a sheriff of another county to whom an execution is issued deposits it in the mail properly directed, or sends it by some safe conveyance, in time to reach the court from which it issued by the return day, it is sufficient.[68] Mailing of a return, however, is not a sufficient compliance with a statute expressly providing that the officer shall file it.[69]

§ 321. Contents

a. In general
b. Where writ not satisfied in whole or in part
c. Where writ satisfied in whole or in part

a. In General

A return must show what the officer has done and that it has been done according to law.

A return of an execution must in some intelligible words show what the officer has done and that it has been done according to law.[70] It must

51. N.Y.—Greene v. Burnham, 3 Sandf.Ch. 110.

52. Ga.—Groves v. Williams, 68 Ga. 598.

53. Ky.—Farmers' Bank v. White, 1 Ky.L. 120, 10 Ky.Op. 654.
23 C.J. p 794 note 14.

54. N.Y.—Ansonia Brass & Copper Co. v. Conner, 9 N.E. 238, 103 N.Y. 502, affirming 11 Daly 326, 6 N.Y. Civ.Proc. 173, 67 How.Pr. 157.

55. Tenn.—Bershears v. Warner, 5 Sneed 676.

56. Ky.—Carmical v. Broughton's Adm'x, 61 S.W.2d 612, 249 Ky. 749.

57. Tenn.—Chaffin v. Stuart, 1 Baxt. 296.

58. Ala.—Neale v. Caldwell, 3 Stew. 134.

59. Va.—Hamilton v. McConkey, 2 S.E. 724, 83 Va. 533.

60. S.D.—Black Hills Brewing Co. v. Middle West Fire Ins. Co., 141 N.W. 358, 31 S.D. 318.
23 C.J. p 794 notes 24, 25.

61. Ind.—Stott v. Harrison, 73 Ind. 17.
23 C.J. p 794 note 26.

Indorsement
Under a statute providing that, if no personal property is found, an indorsement to that effect must be made on the writ before levy is made on real property, it is not necessary for the sheriff to sign his name to such indorsement.—Battersby v. Gillespie, 222 N.W. 480, 57 N.D. 426.

62. Vt.—Eastman v. Curtis, 4 Vt. 616.

63. Pa.—Eberly v. Billingsfelt, 20 Lanc.L.Rev. 111.
S.C.—Belser v. Graves, 10 S.C.L. 125.

64. Ga.—Cox v. Montford, 66 Ga. 62.

65. Ky.—Guelot v. Pearce, 38 S.W. 892—Humphrey v. Wade, 1 S.W. 648, 84 Ky. 391, 8 Ky.L. 384.

66. La.—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.

67. N.Y.—Smith v. Greaty, 109 N.Y. S. 738, 58 Misc. 556.

68. Ark.—Bledsoe v. Pierce-Williams Co., 226 S.W. 532, 147 Ark. 51.
23 C.J. p 792 notes 66, 67.

69. N.Y.—Smith v. Greaty, 109 N.Y. S. 738, 58 Misc. 556.

70. Pa.—Fox v. Meyer, 1 Woodw. 50.

Return held sufficient
When the sheriff properly indorses thereon the date and hour he receives an execution, signs his name thereto, and indorses on the back thereof, "No personal property found," and there is appended to such execution a return containing in detail all the information the statute requires on a completed execution, there is a substantial compliance

show on its face either that the mandate of the writ has been fully complied with, or, if not, the existence of such a state of facts as, without fault or negligence on the part of the officer, prevented a compliance.[71] It should consist of a concise statement of facts, showing what the officer has done in pursuance of his authority, and not of any conclusions of law.[72] A return may be sufficient, although not strictly formal in its language,[73] and, if it is in substantial compliance with the requirements of the statute, it is sufficient.[74] While a reasonable degree of certainty is all that is required,[75] the return must answer the whole writ,[76] and set out all the necessary facts[77] with sufficient precision to show whether they have or have not been legal and regular.[78] Of course, facts imported by necessary intendment need not be set out.[79] The date of delivery of an execution to a sheriff need not be noted by him on his return.[80] Under some statutes where money is levied on, it should be returned by the officer making such levy as so much money collected without sale.[81]

b. Where Writ Not Satisfied in Whole or in Part

A return nulla bona is usually sufficient where the writ is unsatisfied.

In the absence of a statute to the contrary, it is usually held that a return nulla bona of a writ of execution is sufficient,[82] although it has been held, adhering to the strict meaning of these words, that such a return is not of sufficiently extensive meaning to respond to the mandate of a writ of execution, both real and personal property being subject to execution.[83] A return of nulla bona has been held to be proper where the creditor postpones the sale, and another then proceeds to sell and exhausts the property,[84] but a return of nulla bona is improper because of a prior lien unless the executions creating such lien were actually levied.[85] A return of nulla bona may be made, although property was levied on, where the officer became convinced after the levy that the property did not belong to defendant;[86] but a return nulla bona after levying on some property of the debtor is improper, notwithstanding the officer's belief that it was not of sufficient value to make the money on the writ in the event defendant claimed his statutory exemption.[87]

A return of an execution against several persons that no goods of such persons could be found is sufficient without stating that neither of them had any goods;[88] but it is not sufficient merely to state that no property of one of the several execution debtors can be found.[89] Sometimes, by statute, the return must show a demand in addition to inability to find property.[90] It is sometimes required by statute that, if no goods or chattels of the debtor shall be found, the officer shall indorse on the execution "no goods," and forthwith levy the execu-

with the statute.—Battersby v. Gillespie, 222 N.W. 480, 57 N.D. 426.

71. Tenn.—McCrory v. Chaffin, 1 Swan 307—Union Bank v. Barnes, 10 Humphr. 244—Raines v. Childress, 2 Humphr. 449.
23 C.J. p 795 note 41.

Return insufficient

A return, "Executed 10/11/30, Execution set aside by T. J. Wills, lawyer in the case this the 3rd day of November, 1930," is bad, as the duty imposed by statute on the sheriff is to levy the execution on defendant's property, or, in default thereof, to return it nulla bona.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.

72. Cal.—Hooper v. McDade, 82 P. 1116, 1 Cal.App. 733.
Iowa.—Cramer v. McDonald, 239 N. W. 101, 102, 213 Iowa 454, citing Corpus Juris.
23 C.J. p 794 notes 34, 35.

73. Ala.—Casky v. Haviland, 13 Ala. 314.
Mo.—State v. Steel, 11 Mo. 553.

74. Iowa.—McFerrin v. Nye & Jenks Grain Co., 264 N.W. 45, 220 Iowa 1086.

75. Va.—Rucker v. Harrison, 6 Munf. 181, 20 Va. 181.
23 C.J. p 794 note 36.

76. N.C.—Buckley v. Hampton, 23 N. C. 322.
23 C.J. p 795 note 37.

77. Ark.—Faulkner v. Cook, 103 S. W. 384, 83 Ark. 205.
Minn.—Johnson v. Gerber, 130 N.W. 995, 114 Minn. 174.
23 C.J. p 795 note 38.

78. Mass.—Frazee v. Nelson, 61 N. E. 40, 179 Mass. 456, 88 Am.S.R. 391.
23 C.J. p 795 note 39.

79. Me.—Brackett v. McKenney, 55 Me. 504.
Mass.—Sanborn v. Chamberlin, 101 Mass. 409.

80. N.C.—Person v. Newsom, 87 N.C. 142.

81. Colo.—McMillen v. Yost, 194 P. 938, 69 Colo. 462.

82. N.Y.—Wheeler v. Millar, 90 N.Y. 353, affirming 24 Hun 541—Card v. Groesbeck, 124 N.Y.S. 372, 140 App. Div. 30.
Pa.—See Wayne Title & Trust Co. v. Mellett, 29 Pa.Dist. & Co. 117, 38 Lack.Jur. 47, 8 Som.Leg.J. 364.

"Nulla bona"

(1) A return of nulla bona means, strictly speaking, that there are no goods applicable to the writ.—Woodward v. Harbin, 1 Ala. 104—23 C.J. p 795 note 43.

(2) It has also been held that this form of return, as generally understood, means that the execution is uncollectable.—Card v. Groesbeck, 124 N.Y.S. 372, 140 App.Div. 30, modified on other grounds 97 N.E. 728, 204 N.Y. 301.

83. Ala.—Woodward v. Harbin, 1 Ala. 104.

84. N.C.—Newbern Bank v. Pallen, 15 N.C. 297.

85. Ala.—Bell v. King, 8 Port. 147.

86. N.J.—Waterman v. Merrill, 33 N. J.Law 378.

87. Pa.—Lehmann v. Steffey, 18 Pa. Dist. & Co. 574.

88. N.Y.—Winchester v. Crandall, Clarke 371.

89. Tenn.—Hassell v. Southern Bank, 2 Head 381.

90. La.—Gayoso v. Hickey, 4 La. 301.

tion on the lands and tenements of the debtor.[91]

The sufficiency of particular returns has been considered in a number of cases.[92] A return of "stopped by order of plaintiff" is a good return,[93] as is a return "enjoined,"[94] or a return that no levy has been made "by reason of the stay law."[95] An indorsement of the words "in bankruptcy" has been held to be a sufficient return, in that it is equivalent to an indorsement that defendant has no property subject to execution.[96] A return that the judgment has been satisfied by defendant in execution is bad.[97]

c. Where Writ Satisfied in Whole or in Part

(1) In general
(2) Levy
(3) Sale

(1) In General

A return of an execution which is satisfied only in part should state that defendant has no other property from which the residue of the execution can be satisfied.

Where a return shows that the property levied on is not sufficient to satisfy the execution, and fails to show why a further levy was not made, it is insufficient.[98] It should state that defendant had no other property from which the residue of the execution can be satisfied.[99] Where corporate shares are levied on, a certificate of the number of shares held by the debtor in the corporation, which the statute requires to be delivered to the officer, need not be returned.[1] A return of "bond taken and forfeited" is a sufficient return of forfeiture of a forthcoming bond.[2] A memorandum indorsed on the writ in the words "case arranged in bank as per instructions" is not equivalent to a return of satisfied.[3]

(2) Levy

A return of the ultimate facts as to a levy, which includes a description of the property seized, is sufficient.

The officer is required to return only the ultimate facts as to a levy,[4] and a return in general terms that he "levied" is sufficient, without stating the acts done in making the levy, since the necessary proceedings will be implied.[5] Where such a demand is required by statute, the return should allege a demand on the debtor or plaintiff in execution to point out property to be taken,[6] or state a sufficient excuse therefor.[7] It need not be stated that the levy was made subject to prior encumbrances.[8] It is not necessary for the return to specify the sum for which each article seized sold, or the time of seizure.[9] If the return states that the officer sold and delivered the possession of the property, it sufficiently shows an actual seizure, although it does not state in terms that he made a levy.[10]

Appraisement. Where land is sold on execution, the appraisement thereof, if such is required by statute, is no part of the return.[11] It is sometimes required by statute, however, that, where a levy is made on personalty, the return must show not only the levy but also the inventory and appraisement.[12] The nature of the estate appraised need not be described in the return,[13] and the return need not state that notice of the appraisement

91. Kan.—Koehler v. Ball, 2 Kan. 160, 83 Am.D. 451.
23 C.J. p 795 note 55.

92. Kan.—Hoyt v. Bunker, 32 P. 126, 50 Kan. 574.
23 C.J. p 795 note 56.

Nulla bona

(1) Return held sufficient to constitute a return nulla bona.—Scharff v. McGaugh, 103 S.W. 550, 205 Mo. 344.

(2) The words "not satisfied," on the return of an execution, are not synonymous with "nulla bona."—Merrick v. Carter, 68 N.E. 750, 205 Ill. 73.

Returns held sufficient

(1) "Search made and nothing to be found in county to make this execution."—Farmers' Bank v. Wyatt, 40 S.W.2d 402, 163 Tenn. 31.

(2) Other returns see Person v. Newsom, 37 N.C. 142.
23 C.J. p 795 note 56 [a].

93. Tenn.—State v. McDonald, 9 Humphr. 806.

94. N.C.—Patton v. Marr, 44 N.C. 377.

95. Va.—Hamilton v. McConkey, 2 S. E 724, 83 Va. 533.
23 C.J. p 795 note 59.

96. Tenn.—McCoy v. Lippner Auto Co., 265 S.W. 988, 150 Tenn. 482.

Officer's diligence not involved

Whether words "in bankruptcy" are an adequate return by an officer on an execution involves alone the sufficiency of the return on its face, and not the question of the officer's diligence in performance of his duty otherwise thereunder.—McCoy v. Lippner Auto Co., supra.

97. Ala.—Abercrombie v. Chandler, 9 Ala. 625.

98. Tenn.—Bank v. Sevier County, 1 Tenn.Cas. 24, Thomps.Cas. 40.

99. Ala.—Casky v. Haviland, 13 Ala. 314.

1. Ill.—Thompson v. Wells, 57 Ill. App. 436.

2. Miss.—Wanzer v. Barker, 5 Miss. 363.

3. Ala.—Gilchrist v. Branch Bank, 11 Ala. 408.

4. Minn.—Hossfeldt v. Dill, 10 N.W. 781, 28 Minn. 469.

5. Tex.—Jones v. Meyer Bros. Drug Co., 61 S.W. 553, 25 Tex.Civ.App. 234.
23 C.J. p 796 note 69.

6. La.—Hill v. Labarre, 12 La.Ann. 419—Conway v. Jones, 17 La. 413.

7. La.—Conway v. Jones, supra.

8. Ky.—Boyer v. Lincoln, 3 Ky.L. 537.

9. Pa.—Fitler v. Patton, 8 Watts & S. 455.

10. Mo.—Howard v. Baum, 73 Mo. App. 235.
23 C.J. p 796 note 75.

11. Ind.—Coan v. Elliott, 101 Ind. 275.

12. Ky.—Bedford v. Kesler, 15 Ky. L. 31.

13. Me.—French v. Allen, 50 Me. 437—Roop v. Johnson, 23 Me. 335.

was given to defendant.[14] It is not a valid objection to a title acquired by levy of an execution that it does not appear from the return that the land was shown to the appraisers, or that they made the appraisal in view of the premises, or what means they took to ascertain the value.[15] As a general rule a recital in the return of the officer that the appraisers were duly sworn or were sworn according to law is sufficient,[16] although some statutes require a certificate of the oath to be attached to the return or indorsed on the execution.[17]

Description of property. The return to a levy on personal property should specially designate the particular property seized,[18] but there is authority to the contrary.[19] Where the description is in too general terms, evidence is admissible to apply it to the subject matter.[20] Where personalty is already under seizure by another officer, the return need not specify or describe the property, it being sufficient to refer to it as all the property which is in the custody of the officer in possession.[21] If an officer does not specify in his return what he has levied on, but makes a return of levied on all defendant's goods, this is to be considered as a return of levied to the value of the debt, so far, at least, as to cast on him the burden of proof, what the goods were, and the value.[22] The term "appurtenances" as used in a return is too general and indefinite to comprehend in its meaning any personal property as the subject of levy.[23]

Where realty is levied on under an execution, it must be described in the return with such precision that the property can be clearly identified.[24] It is not required, however, that the description be such that the land may be identified by a mere inspection of the return. Certainty of description in the indorsement of the levy is essential only where the matter of description constitutes the only evidence to identify the property,[25] and a return will not be declared void, if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended.[26] If the description is general, but sufficiently accurate to enable one to identify the land by reference to records and other means usually resorted to for that purpose, it is sufficient.[27] The return may refer to deeds or records in describing the land and thereby remove all doubt as to identification.[28] A return is insufficient where it fails to show the county or state in which the lands are situated, and does not show anything from which this can be determined.[29] If the levy is on part of a tract, the return must show what part was levied on.[30]

(3) Sale

The officer's return should show that he has complied with all essential statutory requirements in making an execution sale.

When a debtor's land is taken on execution, the general rule is that the officer's return shall state in substance that every act which is required by statute to constitute a valid levy or sale was performed.[31] It is not necessary that the performance of such acts shall be stated in direct terms, it

14. Pa.—Huddy v. Jones, 5 Wkly. N.C. 491.

15. Vt.—Eastman v. Curtis, 4 Vt. 616.

16. Kan.—Paine v. Spratley, 5 Kan. 525.
Mass.—Leonard v. Bryant, 2 Cush. 32.
23 C.J. p 463 note 7, p 796 note 83.

17. Me.—Hall v. Staples, 74 Me. 178.
23 C.J. p 463 note 8.

18. U.S.—Barnes v. Billington, Pa., 2 F.Cas.No.1,015, 1 Wash.C.C. 29.
23 C.J. p 796 note 84.

19. Pa.—Fitler v. Patton, 8 Watts & S. 455.
23 C.J. p 796 note 85.

20. Ala.—Broaddus v. Smith, 26 So. 34, 121 Ala. 335, 77 Am.S.R. 61.
Colo.—Laughlin v. Hawley, 11 P. 45, 9 Colo. 170.

21. Mo.—State v. Curran, 45 Mo.App. 142.

22. Pa.—Beale v. Commonwealth, 11 Serg. & R. 299.

23. Cal.—Munroe v. Thomas, 5 Cal. 470.

24. Ind.—Peck v. Sims, 22 N.E. 313, 120 Ind. 345.
23 C.J. p 796 note 91.
Description held not void
Tex.—Downs v. Wagnon, Civ.App., 66 S.W.2d 777, error dismissed.

25. Tex.—Downs v. Wagnon, supra.

26. Tex.—Buckner v. Vancleave, 78 S.W. 541, 34 Tex.Civ.App. 312.
53 C.J. p 797 note 93.

27. Ky.—Taylor & Crate v. Asher, 4 S.W.2d 385, 223 Ky. 574.
23 C.J. p 797 note 92.

28. Ky.—Taylor & Crate v. Asher, supra.
23 C.J. p 797 note 94.
Mortgage record
If the realty is subject to a mortgage, it is sufficient to refer to the book and page where the mortgage is recorded, to identify the mortgage.—Coffin v. Freeman, 24 A. 986, 84 Me. 535.

29. Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802.
23 C.J. p 797 note 96.

30. Tex.—Focke v. Garcia, Civ.App., 41 S.W. 187.
23 C.J. p 797 note 97.

31. Neb.—Farmers Security Bank of Maywood v. Wood, 271 N.W. 349, 132 Neb. 175.
23 C.J. p 797 note 98.
Adjourned sale
A statement in a return as to an adjournment of a sale, which contains so much of the language of the statute as to show that the adjournment was taken in compliance therewith, is sufficient, although all the statutory language is not incorporated therein.—Ela v. Yeaw, 33 N.E. 511, 158 Mass. 190—Sanborn v. Chamberlin, 101 Mass. 409.
Giving of deed
In making a sale of such interest on execution, it is not necessary for the officer to return that he has given a deed to the purchaser under his sale.—Whittier v. Vaughan, 27 Me. 301.

being sufficient if it appears from the language used, or can be reasonably and fairly inferred from it, that the act was done.[32] The return should give some general description of the land sold,[33] although it has been held that it is no part of the office of a return to show what land is sold on the execution.[34] The return should also show to whom the sale was made, the price realized, and all the steps taken in the sale.[35] The return need not specify the day or hour or the particular place of the sale,[36] nor need it set out the circumstances which authorized a sale at a place other than the ordinary place of sale.[37] Where the officer has been prevented from selling property levied on, the return should state the cause by which he was prevented.[38] Under some statutes if the sheriff is unable to realize two thirds of the valuation of the property, he must so return the fact.[39] If the property is not paid for after the sale, the return may be that the property was knocked down to a certain person for a specified price, and that he has not paid the purchase money and that therefore the premises remain unsold.[40] The return after a sale of real estate need not set forth the levy and sale where a deed has been executed setting forth such facts.[41] A return need not state that the judgment creditor elected to have the levy made by sale instead of extent.[42]

Notice of sale. It is generally held the return should show that the required notice of sale, whether by advertisement or notice to the debtor, or by both, has been given;[43] but there is authority to the contrary.[44] Likewise, a return on an order of sale which fails to name defendant's attorney of record to whom a written notice of sale was mailed, as required by statute, is defective.[45]

Disposition of proceeds. Where money, arising from an execution sale, is retained by the officer for costs, his return must show the particular items of costs for which such money was appropriated.[46] It is not a sufficient return on an execution, nor such as will protect the officer from a motion for the money collected, that he has retained the amount of damages which he supposes himself entitled to recover against the execution creditor on an indemnifying bond the latter had executed to him in another case.[47] Under some statutes the return of the sheriff, containing a schedule of distribution of the proceeds of an execution sale of realty, was required to be read in open court.[48]

§ 322. Amendments

Courts have power to allow amendments to officers' returns on executions, to make records conform to the truth.

Until an execution with the return thereon is

32. Me.—Millet v. Blake, 18 A. 293, 81 Me. 531, 10 Am.S.R. 275.

33. Ky.—Reid v. Heasley, 9 Dana 324.
23 C.J. p 797 note 1.

Interest sold

Where the interest which a party has under a contract for a conveyance of realty on conditions to be performed by him is sold, the interest must be truly described and it is not sufficient to return that such interest was sold as an equity of redemption.—Stevens v. Legrow, 19 Me. 95.

34. Ill.—Gardner v. Eberhardt, 82 Ill. 316.
23 C.J. p 797 note 2.

35. Ky.—Reid v. Heasley, 9 Dana 324.
23 C.J. p 797 note 5.

Details of sale

Under a statute requiring a return to state the name of the purchaser and the price obtained, the details of the sale need not be set forth. —Tulane v. Dean, 4 N.J.L.J. 23.

Sale of entire tract

(1) Under a statute requiring real estate when taken in execution to be sold in separate tracts, and requiring the officer to offer each tract separately, then, if no bid is made, two tracts together, then more in suitable combinations until all the tracts have thus been offered, and then, if no bids are made, or the execution is still unsatisfied, to offer all together, his return should show the manner of offering the different tracts and the facts authorizing the sale en masse.—Diets v. Hagler, 141 N.E. 194, 309 Ill. 381.

(2) The return need not show that lots of land were sold separately where there is no claim that the property was sacrificed.—Wilson v. Swasey, Tex., 20 S.W. 48.

36. Me.—Townsend v. Meader, 58 Me. 288.
Vt.—Beattie v. Robin, 2 Vt. 181.

37. Conn.—Backus v. Stamford, 10 Conn. 297.

38. Ind.—State v. Nelson, 1 Ind. 522.

Claim by third person

If part of the goods levied on is claimed by a third person, and for that reason is not sold, a return of a sale of the balance of the goods and that the remainder has been claimed by a third person is sufficient.—Hunt v. Hunt, 1 Pa.L.J.R. 315, 2 Pa.L.J. 297.

Return "not sold for want of time," if a true return, is sufficient.—Stone v. Mahon, 4 Pa.C.Pl. 165.

39. Pa.—Dolan v. Ward, 1 Leg.Rec. 83.

40. U.S.—Zantizinger v. Pole, Pa., 1 Dall. 419, 1 L.Ed. 204.
Md.—Scott v. Bruce, 2 Harr. & G. 262.

41. Ark.—Bettison v. Budd, 17 Ark. 546, 65 Am.D. 442.

42. Mass.—Sanborn v. Chamberlin, 101 Mass. 409.

43. Mass.—Cunningham v. Bright, 117 N.E. 909, 228 Mass. 385.
23 C.J. p 798 note 24.

Misnomer of paper, in officer's return, by insertion of word "Evening" in name of paper in which notice was published, does not affect the validity of the notice or sale.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.

44. Pa.—Tupper v. Taylor, 6 Serg. & R. 173.
23 C.J. p 798 note 25.

45. Tex.—Turner v. Maury, Civ.App., 224 S.W. 255, reversed on other grounds, Com.App., 244 S.W. 809.

46. Ga.—Harrison v. Thompson, 9 Ga. 310.

47. Tenn.—Hinkle v. Blake, 2 Humphr. 574.

48. Pa.—Brownlee v. Fox, 23 Pa. Dist. 952.

deposited in the clerk's office, the return is not matter of record, and it may be amended by the officer without permission of the court;[49] but after a return has been filed and become a matter of record, the officer can no longer amend it of his own motion.[50] The court, however, has the power to allow amendments[51] or the filing of a substituted return.[52] Applications for this purpose are not granted as a matter of right,[53] but the granting of them rests in the sound discretion of the court,[54] Great liberality, however, will be allowed in making amendments,[55] and leave to amend will be granted where the amendment is in the furtherance of justice,[56] provided the rights of innocent third parties will not be impaired thereby.[57] The rule prohibiting collateral attack on the officer's return does not preclude an amendment of the return in a proper case to make it speak the truth.[58] Alterations made in the levy after return, without the authority of the officer or the execution creditor, are void.[59]

An amendment relates back to the original return, and dates from it,[60] and the officer is freed from any responsibility on the original.[61] An amendment of a return having been allowed by the court, the copy thereof duly filed has the same effect as if incorporated in the original return.[62] Where a return stated the original attachment of the land sold thereunder to have been two years after the true date, the amendment of the return according to the fact does not affect the title of one taking a mortgage after the true date.[63] If the amendment is withdrawn the original return is reinstated.[64]

Scope and purpose. Amendments of mistaken returns and of omissions therein are allowed to promote justice and equity,[65] by making the record agree with the true state of the facts.[66] Courts

49. Mass.—Welsh v. Joy, 13 Pick. 477.
23 C.J. p 799 note 34.

50. Va.—Hammen v. Minnick, 32 Gratt. 249, 73 Va. 249.
23 C.J. p 799 note 35.

51. Kan.—Trinkle v. Garden City Land & Immigration Co., 198 P. 847, 109 Kan. 290.
Mass.—Marble v. Bloom, 150 N.E. 831, 255 Mass. 22.
N.Y.—Clark v. John L. Dugan, Inc., 295 N.Y.S. 151, 250 App.Div. 871, citing **Corpus Juris.**
Or.—Croisant v. Croisant, 107 P.2d 115, 165 Or. 474, 132 A.L.R. 895.
Pa.—Lieberman v. Harrigan, 28 Del. Co. 481, 53 York Leg.Rec. 87.
R.I.—MacDonald v. Barr, 154 A. 564, 51 R.I. 337.
23 C.J. p 799 note 36.

Inherent power

Even in the absence of a statute authorizing the amendment of a return by an officer, the court has power to permit such an amendment, as such power is inherent in courts.—Equitable Life Ins. Co. of Iowa v. Ryan, 239 N.W. 695, 213 Iowa 603.

52. Colo.—Salsbury v. La Fitte, 123 P. 124, 22 Colo.App. 90.
23 C.J. p 799 note 37.

53. Mo.—Scruggs v. Scruggs, 46 Mo. 271.

54. R.I.—MacDonald v. Barr, 154 A. 564, 51 R.I. 337.
Tex.—Citizens State Bank of Clarinda, Iowa, v. Del-Tex Inv. Co., Civ. App., 123 S.W.2d 450, error dismissed, judgment correct.
23 C.J. p 799 note 39.

55. Ind.—Willard v. Bringolf, 5 N.E. 2d 315, 103 Ind.App. 16.

56. Me.—Jackson v. Esten, 21 A. 830, 83 Me. 162, 23 Am.S.R. 756.
23 C.J. p 799 note 40.

57. Iowa.—Luke v. First Nat. Bank, 278 N.W. 230, 224 Iowa 847—Equitable Life Ins. Co. of Iowa v. Ryan, 239 N.W. 695, 213 Iowa 603.
23 C.J. p 799 note 41.

Defendant in scire facias proceedings against estate of bail could not object to amendment of erroneous return on execution, since he had no right which had intervened since original return.—MacDonald v. Barr, 154 A. 564, 51 R.I. 337.

58. Ala.—Fowler v. Nash, 144 So. 831, 225 Ala. 613.

59. N.J.—Wills v. McKinney, 41 N. J.Law 120.

60. Ind.—Willard v. Bringolf, 5 N.E. 2d 315, 103 Ind.App. 16.
23 C.J. p 801 note 5.

61. N.C.—Cody v. Quinn, 28 N.C. 191, 44 Am.D. 75.

62. Mass.—Hunneman v. Lowell Sav. Inst., 95 N.E. 886, 209 Mass. 368.

63. Me.—Milliken v. Bailey, 61 Me. 316.

64. Me.—Hanly v. Sidelinger, 52 Me. 138.

65. N.H.—Baker v. Davis, 22 N.H. 27.
N.Y.—Clark v. John L. Dugan, Inc., 295 N.Y.S. 151, 250 App.Div. 871.

66. Cal.—Blenkiron v. Birkhauser, 282 P. 984, 102 Cal.App. 172.
Iowa.—Equitable Life Ins. Co. of Iowa v. Ryan, 239 N.W. 695, 697, 213 Iowa 603, citing **Corpus Juris.**
La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.
Or.—Croisant v. Croisant, 107 P.2d 115, 165 Or. 474, 132 A.L.R. 895.
R.I.—MacDonald v. Barr, 154 A. 564, 51 R.I. 337.
Wash.—Hansen v. Smart Apartments, 56 P.2d 670, 185 Wash. 657.
23 C.J. p 799 note 44.

Particular amendments allowed

(1) Adding that the officer left a copy of the writ with an officer of the corporation where shares of stock were levied on.—Chase v. Merrimack Bank, 19 Pick., Mass., 564, 31 Am.D. 163.

(2) Adding the officer's signature to the return.—Singluff v. Collins, 64 S.E. 1055, 109 Va. 717, 17 Ann.Cas. 456—23 C.J. p 799 note 58.

(3) To correct immaterial irregularities.—Phillips v. Evans, 64 Mo. 17.

(4) To make the return correspond with the sheriff's deed as to the locality of the land sold.—Spear v. Sturdivant, 14 Me. 263.

(5) To make the return more clearly understood by intervening parties.—Whittier v. Vaughan, 27 Me. 301.

(6) To show a fact necessary to the validity of the sale.—Hopkins v. Burch, 3 Ga. 222—23 C.J. p 799 notes 52–57.

(7) To show cancellation of levy under first execution to establish validity of second writ.—Luke v. First Nat. Bank, 278 N.W. 230, 224 Iowa 847.

(8) To show extent of the levy.—Mathes v. Dover Nat. Bank, 62 N.H. 491.

(9) To show that the debtor had no property in his county other than that sold where such fact was omitted through inadvertence.—Broughton v. Allen, 6 Humphr., Tenn., 96.

(10) To show that the officer first offered nonexempt land of debtor for sale before he sold homestead.—

exercise this power to prevent innocent parties from suffering by the error or neglect of a ministerial officer, such as the sheriff.[67] Immaterial amendments, adding unimportant facts, are properly refused.[68] Facts occurring subsequent to a return cannot be incorporated into it by amendment;[69] nor will an amendment be allowed which only partially corrects a return, where, if the whole return was to be corrected so as to conform to the truth, an invalid levy would be shown.[70] A court has no power to allow an amendment by which the provisions of a statute would be defeated or evaded.[71] An officer cannot, by amending his return, remedy his neglect to perform an act necessary to give efficacy to the execution.[72] An amendment will not be allowed after a decree against the sheriff and his surety, so as to explain away his liability and enable his surety to escape liability.[73] A return of satisfaction made out of defendant who was principal in a forthcoming bond cannot be amended so as to show that the execution is still unsatisfied, without notice to the surety on the bond.[74] It has been held that the court, on a trial, cannot allow an amendment of the return for the purpose of rendering the execution admissible in evidence.[75] It is no objection to an amended return that it contradicts the original.[76]

Power to compel. It is a general rule that a court will not compel an officer to amend his return,[77] but the officer may be compelled to perfect an incomplete return.[78] Accordingly, if a court may compel an officer to amend his return for the purpose of supplying obvious omissions, the power to compel amendment is limited to enforcing a return sufficient on its face, and the court cannot decide that a particular act was done or omitted and then require the officer to conform to such decision.[79]

Persons entitled. A stranger to the proceedings cannot move to amend the return.[80] A party to the proceeding whether plaintiff or defendant, creditor or debtor,[81] a purchaser[82] or the officer making the return,[83] is entitled to ask leave to amend. The officer, however, has no standing to ask leave to amend, unless he has an interest in having the amendment allowed.[84] A sheriff out of office cannot amend his return so as to defeat an action brought against him for damages.[85]

Time of. There is no fixed time within which an application to amend must be made, and, if the facts are clear and the rights of third persons will not be injuriously affected thereby, an amendment may be allowed by the court at any time subsequent to the return of the execution which may seem proper;[86] but, where there has been a considerable

Equitable Life Ins. Co. of Iowa v. Ryan, 239 N.W. 695, 213 Iowa 603.

(11) To show the name of the purchaser.—Trinkle v. Garden City Land & Immigration Co., 198 P. 947, 109 Kan. 290.

(12) To show that the signature was of the sheriff by the deputy, where a return is signed by a deputy with the letters "D. S." after his signature.—Humphrey v. Wade, 1 S.W. 648, 84 Ky. 391, 8 Ky.L. 384.

Nulla bona returns

(1) An amendment striking out a return of a levy and sale may be made so as to show a return nulla bona.—Dickinson v. Lippitt, 27 N.C. 560.

(2) Where the return is nulla bona, an amendment may be allowed to show that the property levied on was wrongfully converted by a third person.—Barker v. Binninger, 14 N.Y. 270.

Person preparing amendment

That officer testified he did not know who drew amended return did not prevent finding that it conformed to truth.—Marble v. Bloom, 150 N.E. 831, 255 Mass. 22.

Untruth

Return cannot be amended so as to state facts which are untrue.—Tanner v. Grisham, Tex.Com.App., 295 S.W. 590, reversing, Civ.App., 289 S.W. 146.

Where second sale is made on failure of the first purchaser to pay all the sum bid, a return of the land unsold may be amended to state the sum received on the first sale.—Wright's Appeal, 25 Pa. 373.

67. N.H.—Baker v. Davis, 22 N.H. 27.

68. Me.—Cota v. Ross, 66 Me. 161.

69. Ala.—Bibb v. Collins, 51 Ala. 450.
N.Y.—Hicks v. Ross, 11 Barb. 481.
23 C.J. p 800 note 66.

70. Mass.—Wolcott v. Ely, 2 Allen 338.

71. N.C.—Phillipse v. Higdon, 44 N. C. 380.

72. Me.—Miller v. Miller, 25 Me. 110.

73. Va.—Carr v. Meade, 77 Va. 142.

74. Miss.—Coopwood v. Morgan, 34 Miss. 368.

75. Vt.—Paul v. Slason, 22 Vt. 231, 54 Am.D. 75.

76. La.—Rochelle v. Cox, 5 La. 283.

77. Or.—Croisant v. Croisant, 107 P.2d 115, 118, 165 Or. 474, 132 A. L.R. 895, citing **Corpus Juris.**
23 C.J. p 800 note 74.

78. U.S.—Ex parte Worley, D.C.N.C., 19 F. 586.
Md.—Berry v. Griffity, 2 Harr. & G. 337, 18 Am.D. 309.
N.Y.—Davis v. Weyburn, 1 How.Pr. 153.

79. Or.—Croisant v. Croisant, 107 P.2d 115, 165 Or. 474, 132 A.L.R. 895.

80. Ala.—Cawthorne v. Knight, 11 Ala. 268.

81. N.H.—Baker v. Davis, 22 N.H. 27.

82. Mo.—Sibole v. McKinnies, App., 217 S.W. 577.
Pa.—Lowenstein v. Krell, 29 A. 878, 162 Pa. 267.

83. Va.—Stone v. Wilson, 10 Gratt. 529, 51 Va. 529.
23 C.J. p 800 note 79.

84. Pa.—Lowenstein v. Krell, 29 A. 878, 162 Pa. 267.

85. Pa.—Peck v. Whitaker, 103 Pa. 297.

86. Ind.—Willard v. Bringolf, 5 N. E.2d 315, 103 Ind.App. 16.
La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376.
23 C.J. p 800 note 82.

After return date

Sheriff may correct date of return on execution after return date.—

lapse of time, amendments should be allowed with caution and only where they are in furtherance of justice.[87] The return may be allowed to be amended after the lapse of many years by correcting a mistake as to who was the purchaser at the execution sale, where all the parties consent thereto.[88] A return may be amended even after a contest in which its validity is attacked.[89] It is usually held that an amendment may be allowed after the expiration of the term of office of the officer making the return;[90] but there is authority to the contrary.[91] An amendment may be allowed after the death of the officer on the application of his administrator.[92] However, an amendment should not be allowed after the death of the officer making the levy where neither a surviving officer nor any other disinterested person was reliably cognizant of the facts.[93] An amendment may be allowed pending a motion against the officer for failing to pay over the money collected on the writ.[94] It has been held, however, that an amendment will not be allowed after a motion, actually made, against the officer for an insufficient return,[95] but that an amendment may be allowed after notice of such motion but before it has been made.[96] Under a statute providing that the levying officer shall give notice of the filing of his return containing a schedule of the proceeds of the sale and that, if the distribution is not questioned or disputed within such time as fixed by court rule, it shall be final and conclusive, in the absence of allegation of mistake or fraud, after the return has become conclusive, it has been held that the officer has no standing to ask that it be amended.[97]

Procedure. The proper method of obtaining amendment of a return is by motion in the original cause and not by formal civil action.[98] The motion is not a civil action and the forming of issues of law and fact and the trial thereof as in a civil action are irregular.[99] In a proceeding brought by the execution creditor against the sheriff and execution debtor to compel the sheriff to amend his return, it has been held that formal pleadings are not required and that the sheriff's answer setting up his version of the facts may be treated as a motion for leave to amend.[1] A motion for leave to amend is determinable by the court without a jury.[2] When such motion is made by some one other than the officer, he should be made a party to the proceeding,[3] but neither the judgment debtor nor the judgment creditor need be notified when the motion is made by a purchaser.[4] Oral evidence may be introduced on the hearing of the motion.[5] If a mistake is relied on, the party moving for an amendment should show the mistake beyond any reasonable doubt,[6] and if a new and material fact is sought to be added,

Tanner v. Grisham, Tex.Civ.App., 289 S.W. 146, reversed on other grounds, Com.App., 295 S.W. 590.

Sale of corporate stock

Under a statute providing that, where a shareholder's interest in a corporation is levied on, an attested copy of the execution and of the return thereon shall within fourteen days from the day of sale be left with the officer of the corporation whose duty it is to record transfers of shares, where it was shown that within the fourteen days the sheriff delivered to the proper officer a copy of the execution and return which was not attested and which failed to show the name of the purchaser, as between the corporation and the purchaser the court had authority to permit the sheriff to amend his return by setting forth the name of the purchaser, and thereupon to deliver to the corporation's officer a duly attested copy of the execution and return as amended, notwithstanding the passage of more than fourteen days since the sale.—Trinkle v. Garden City Land & Immigration Co., 198 P. 947, 109 Kan. 290.

87. R.I.—MacDonald v. Barr, 154 A. 564, 51 R.I. 337.
23 C.J. p 800 note 88.

88. Del.—Diamond State Loan Ass'n v. Collins, 60 A. 861, 20 Del. 77.

89. La.—Elmore v. Bell, 2 Rob. 484—Aubert v. Buhler, 3 Mart.,N.S., 489.

90. Ind.—Willard v. Bringolf, 5 N.E.2d 315, 103 Ind.App. 16.
Okl.—Chapman v. Norris, 42 P.2d 487, 488, 171 Okl. 154, citing **Corpus Juris.**
Tex.—Tanner v. Grisham, Civ.App., 289 S.W. 146, reversed on other grounds, Com.App., 295 S.W. 590.
Wash.—Hansen v. Smart Apartments, 56 P.2d 670, 185 Wash. 657.
23 C.J. p 801 note 86.

91. Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.
23 C.J. p 801 note 87.

92. Mo.—Scruggs v. Scruggs, 46 Mo. 271.

93. Md.—Jarboe v. Hall, 37 Md. 345.

94. Ala.—Wilson v. Strobach, 59 Ala. 488.
23 C.J. p 801 note 90.

95. Tenn.—Howard v. Union Bank, 7 Humphr. 26.

96. Tenn.—Broughton v. Allen, 6 Humphr. 96.

97. Pa.—Hoffman v. Pocono Syndicate, 27 Pa.Dist. & Co. 592.

98. Wash.—Hansen v. Smart Apartments, 56 P.2d 670, 185 Wash. 657—Toner v. Page, 157 P. 866, 91 Wash. 314.

No formal proceedings are necessary
Ind.—Willard v. Bringolf, 5 N.E.2d 315, 103 Ind.App. 16.

99. Ind.—Wilcox v. Moudy, 89 Ind. 232.

1. Or.—Croisant v. Croisant, 107 P. 2d 115, 165 Or. 474, 132 A.L.R. 895.

2. Tex.—Morrill v. Fitzgerald, 36 Tex. 275.

3. Ind.—Walter v. Palmer, 18 Ind. 279.

4. Mo.—Sibole v. McKinnies, App., 217 S.W. 577.

5. Ind.—Wilcox v. Moudy, 89 Ind. 232.

Original return not binding

Trial judge, on motion to amend return, could decide question whether sheriff's return conformed to truth on evidence before him, and was not bound by original return, and request that, unless means of correcting it could be found in the return itself, it was not amendable was properly refused.—Marble v. Bloom, 150 N.E. 831, 255 Mass. 22.

6. Mo.—Scruggs v. Scruggs, 46 Mo. 271.

proof of its truth is necessary.[7] The motion can be made only in the court where the judgment was rendered and in connection with the action in which the judgment was rendered.[8] The amendment must conform to the moving papers and order allowing it.[9] It has been held that no one but the execution defendant can complain of irregularities in the proceedings for the amendment of a return, and that even he cannot do it in a collateral manner.[10]

§ 323. Record

Where a statute so requires, the return of an execution should be filed for record.

Under some statutes, it is the duty of the officer, unless relieved thereof by the execution creditor, to cause the return on his levy, particularly where the levy is on real estate, to be recorded.[11] In order to become matter of record, a return must be actually filed in the proper office[12] and is generally required to be recorded in a book kept for that purpose.[13] Under some of the statutes, a copy of the execution with the return need not be filed for record where the real estate levied on has been attached in the suit in which the execution issued.[14] Under some statutes filing for record is essential to the passage of title by levy on real estate[15] or by sale thereof;[16] but under other statutes it is only necessary as against creditors and bona fide purchasers without notice.[17] If the return is not dated, an entry on the execution book on the day of return is sufficient evidence of the date of the return.[18] If there is a variance between the date of the return as made by the officer, and the date as made by the clerk on filing, the former will control.[19] The record may be corrected on motion.[20]

§ 324. Defects, Objections, and Waiver

Objections to a return of an execution ordinarily cannot be made by defendant's creditors, and objections to such return may be waived.

As a general rule, irregularities in, and objections to, the return of an execution are available only to defendant, and not to his creditors,[21] although under a statute providing that any person interested may except to a return, the holder of a lien superior to the execution lien may object to a return which impairs his rights.[22] Objections may be waived,[23] as by a failure to object in due time.[24] Objections to the acts of the prothonotary cannot be raised as exceptions to the sheriff's account.[25]

§ 325. Quashing or Setting Aside

A court has power, where there are sufficient grounds, to set aside or quash the return of an execution.

There is no question as to the power of courts to set aside or quash the return,[26] but there must be sufficient grounds to warrant the court in acting.[27] That the return is false in fact is usually ground for quashing it.[28] It has been held, however, that the court cannot quash or annul a return on mo-

7. Mass.—Ex parte Bayley, 132 Mass. 457.

8. S.D.—Black Hills Brewing Co. v. Middle West Fire Ins. Co., 140 N.W. 687, 31 S.D. 318.

9. Pa.—Lowry v. Coulter, 9 Pa. 349.

10. Ind.—Willard v. Bringolf, 5 N.E. 2d 315, 103 Ind.App. 16.

11. Me.—Thompson v. Goding, 63 Me. 425.

12. Ky.—Harland v. Arthur, 3 S.W. 151, 8 Ky.L. 697.
23 C.J. p 803 note 64.

13. Ga.—Dunlap Hardware Co. v. Tharp, 58 S.E. 398, 2 Ga.App. 63.
23 C.J. p 803 note 65.

14. Mass.—Hunneman v. Lowell Sav. Inst., 95 N.E. 886, 209 Mass. 368.

15. Me.—Berry v. Spear, 13 Me. 187.
N.H.—Morse v. Child, 7 N.H. 531.
Vt.—Morton v. Edwin, 19 Vt. 77.
23 C.J. p 803 note 66.

16. N.H.—Riddle v. Fellows, 42 N.H. 309.
23 C.J. p 803 note 67.

17. Ill.—McClure v. Engelhardt, 17 Ill. 47.
N.Y.—Jackson v. Terry, 13 Johns. 471.
23 C.J. p 803 note 68.

18. Ky.—Maury v. Cooper, 3 J.J. Marsh. 224.

19. Vt.—Gilson v. Parkhurst, 53 Vt. 384.

20. Ind.—Newhouse v. Martin, 68 Ind. 224.

21. N.Y.—Crouse v. Schoolcraft, 64 N.Y.S. 640, 51 App.Div. 160.
23 C.J. p 802 note 23.

22. Pa.—Duquesne Trust Co. v. Benovitz, 2 A.2d 756, 332 Pa. 243.

23. Mich.—Starks Co. v. Eppink, 151 N.W. 676, 185 Mich. 233.

24. U.S.—Buckhannan v. Tinnin, Miss., 2 How. 258, 11 L.Ed. 259.
23 C.J. p 802 note 26.

25. Pa.—First Nat. Bank of Elizabethville v. Fetterolf, 8 Sch.Reg. 54.

26. N.Y.—Lopez v. Campbell, 57 N.E. 501, 163 N.Y. 340, reversed on other grounds 46 N.Y.S. 91, 18 App. Div. 427.
23 C.J. p 802 note 27.

27. Ky.—Payne v. Cowan, 1 J.J. Marsh. 12.

28. Mich.—William Wright Co. v. Frazer, 66 N.W. 954, 109 Mich. 139.
23 C.J. p 802 note 30.

Return of satisfaction

(1) Where execution is returned satisfied, or credited by a sum made by the sale of property not the execution defendants', and the execution creditor has had to refund the money to the purchaser, he may have the levy and return quashed.—Sanders v. Hamilton, 3 Dana, Ky., 550.

(2) Where an officer, without collecting the full amount required by the mandate of an execution, returns the same satisfied, and an entry to that effect is made on the docket, the judgment creditor may move to vacate the return and have the entry modified or may bring an action for compensation.—Todd v. Botchford, 86 N.Y. 517, affirming 24 Hun 495.

(3) The execution creditor may have the return of execution satisfied set aside as prejudicial to his rights where the officer takes a promissory note for the amount from a third person, by the direction of the execution debtor, but the officer himself is bound by his return, and can nei-

tion on evidence aliunde of irregularity, falsehood, or illegality in the conduct of the officer, the only remedy being by action against the officer for a false return and damages resulting therefrom.[29] As a general proposition, it is a good ground for quashing a return that it is not made in accordance with the requirements of the law, that the officer who made it was disqualified, that the levy was made prematurely, or that in making the levy there has been a violation of the debtor's right to select the property to be levied on.[30] Where facts are stated which show that there was no levy in fact, the return may be set aside.[31] Various other matters have been held to be,[32] or not to be,[33] grounds for quashing a return. Refusal to quash is sometimes held to be justified because of acquiescence of the moving party.[34] In defense of the motion it may be shown by defendant in execution that the money had been tendered and refused.[35]

The application may be made by a motion or rule to show cause.[36] The execution creditor cannot move to quash a return on grounds of irregularities in the levy and sale which concern the execution debtor only,[37] although a subsequent mortgagee of the land taken on execution may move to set aside the return.[38] The court may hear the application and determine it without the intervention of a jury.[39]

Notice. All parties interested must be notified of a motion to quash or set aside a return.[40] Thus, if he would be injured thereby, notice must be given to the officer,[41] execution creditor,[42] execution debtor,[43] and the purchaser at the execution sale.[44] Persons having no legal interest in the matter are not entitled to notice.[45]

Effect. The vacation of a false return of satisfaction leaves the lien still in force against the property;[46] but the quashing of the return of an execution sale, where the purchaser has given a sale bond, does not revive the lien of the levy, but gives the judgment creditor a right to have another execution issued.[47] Quashing such a return does not, however, per se set aside the sale or quash the bond. An order to that effect is necessary.[48] The setting aside of a return does not conclude or estop the officer as against parties who do not act on the faith of it.[49]

ther amend it nor have it set aside.—Holt v. Robinson, 21 Ala. 106, 56 Am.D. 240.

29. Mont.—McGregor v. Wells, 1 Mont. 142, error dismissed 13 Wall. 188, 20 L.Ed. 538.

30. Okl.—Osborne v. Hughey, 76 P. 146, 14 Okl. 29.

31. Tex.—Bryan v. Bridge, 6 Tex. 137.

Invalid levy

Where separate judgments were recovered against each of two brothers, and a third judgment was recovered against two brothers jointly, and executions were issued on the judgments and were levied on purported equities of redemption of the brothers in a tract of land, although the tract was not owned jointly by them, and one brother owned part of the tract and the other brother owned the remaining part, returns on the executions were required to be quashed, since neither brother had an equity of redemption in the entire tract on which the sheriff could levy, and in reality the executions were not levied on anything.—Pinson v. Williams, 155 S.W.2d 869, 288 Ky. 314.

32. **Illegal exemption**

A return, setting off the homestead as exempt, may be set aside where the exemption is illegal.—Creath v. Dale, 69 Mo. 41.

Payments after return day

Where the return shows that the officer received some of the payments thereon after the return day, that portion of the return will be quashed.—Rudd v. Johnson, 5 Litt., Ky., 19.

Where levy and sale have been quashed, the officer's return should also be quashed.—Bogie v. Moore, 6 Ky.Op. 4.

33. **Dishonor of check**

The fact that a check, drawn by the officer to the execution creditor, on a fund, arising from the transfer of the amount of a check, given by the execution debtor, to the credit of the officer on the books of the bank on which the check is drawn, is dishonored is not a ground for quashing a return of satisfied.—Bailey v. Robinson, 14 Ky.L. 670.

Interest levied on

It seems that it is no ground for quashing a return that the interest levied on was not subject to execution.—Warfield v. Wirt, D.C., 29 F. Cas.No.17,174, 2 Cranch C.C. 102—23 C.J. p 803 note 46.

Wrong clerk's office

A return will not be set aside for irregularity merely because it is made to the wrong clerk's office, this seemingly being a mere error of form.—Clark v. Dakin, 2 Barb.Ch., N.Y., 36.

34. U.S.—Buckhannan v. Tinnin, Miss., 2 How. 258, 11 L.Ed. 259.

Consent to sale

It is proper to refuse to set aside the return on the ground that the purchase at the execution in behalf of the execution creditor was made without his authority, where he was present and afterward recognized the sale and purchase.—Bell v. Delew, 4 Ky.L. 828.

35. Ala.—Minter v. Mobile Branch Bank, 23 Ala. 762, 58 Am.D. 315.

36. Del.—Voshell v. Cavender, 39 A. 989, 17 Del. 167.
23 C.J. p 803 note 51.

37. Ky.—McMillen v. Bailey, 112 S. W.2d 1009, 271 Ky. 628.

38. Mass.—In re Sawyer, 136 Mass. 339.

39. Miss.—Anderson v. Carlisle, 8 Miss. 408—Morton v. Walker, 8 Miss. 554.

40. Ark.—State Bank v. Marsh, 7 Ark. 390.

41. Miss.—Mann v. Nichols, 9 Miss. 257.
23 C.J. p 803 note 55.

42. Tex.—McKenney v. Jones, 7 Tex. 598, 58 Am.D. 83.

43. Miss.—Mann v. Nichols, 9 Miss. 257—Parks v. Person, Sm. & M.Ch. 76.

44. Tex.—Toler v. Ayres, 1 Tex. 398.

45. N.Y.—Barker v. Binninger, 14 N. Y. 270.

46. Miss.—Parks v. Person, Sm. & M.Ch. 76.

47. Ky.—Ettlinger v. Tansey, 17 B. Mon. 364.

48. Ky.—Schobee v. Dedman, 2 Litt. 116.

49. N.Y.—Barker v. Binninger, 14 N. Y. 270.

§ 326. Construction

The return of an execution should be construed so as to make it consistent with the proper discharge of his duties by the officer making it, if it can reasonably be made to bear such interpretation.

The well settled rule is that the return of an officer when ambiguous is to be so construed as to make it consistent with the proper discharge of the duty imposed on him by law, if the return by reasonable intendment and construction can be made to bear this interpretation.[50] In construing a return every presumption will be made in favor of its truth and validity, and that the officer has in all things acted legally and properly.[51] There is no presumption, however, contrary to the facts recited in the return.[52] Although mere surplusage in the writ may be disregarded,[53] all the language of the return must be construed together and effect given to every clause and word, if possible, in order to ascertain the intended meaning.[54] A return that a named person, plaintiff's attorney, was the purchaser at a certain sum and had paid the costs is to be construed to mean that he purchased as attorney and for plaintiff.[55] A return of a levy on certain property by virtue of the writ is an affirmation that it is the property of defendant.[56] The return of a levy is not contradicted by the fact that thereafter the officer surrendered the property levied on to the judgment debtor.[57] A return "not satisfied for want of buyers" does not show a levy.[58] Where the writ is against two or more, a return that they have no property is equivalent to a return that neither of them has property,[59] and a return that no property of "defendant" was found is to be construed to mean "defendants" where there are several defendants.[60]

By signing a complete return, the sheriff not only certifies to the facts therein stated which were done by him personally, but he also certifies as to things therein stated which were done by his deputy under his direction and in his behalf.[61]

Returns of sales. Since it is the policy of the law to uphold execution sales, the return under an execution sale will receive a liberal construction.[62] The fact that a return does not show that notice in writing of an execution sale was given is not conclusive that proper notice was not given.[63]

§ 327. Operation and Effect

After a return has been made, the execution becomes functus officio. The officer, as agent, binds all parties by his return.

After a return has been made, the execution becomes functus officio.[64] A return terminates the lien of the levy,[65] but a return satisfied will not discharge the levy where the sale is set aside by other creditors on the ground of want of authority in the sheriff to make the sale.[66] Where all the facts are to the contrary, a return of an execution does not extinguish the debt.[67] The status of property seized by execution, as to third persons,

50. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284.
23 C.J. p 801 note 10.

51. Ga.—Burden v. Gates, supra.
23 C.J. p 801 note 11.

52. Ky.—Garr v. Reesor, 91 S.W. 717, 28 Ky.L. 1308.
23 C.J. p 802 note 12.

53. **Writ of venditioni exponas**
Since a writ of venditioni exponas gives the officer no authority not previously possessed, and is unnecessary to enable the officer to proceed with a sale under a fieri facias unless the return day of the writ has gone by, although neither ground nor time enough for the issue and return of such writ was shown, a reference thereto in the return may be treated as surplusage, not affecting the validity of the proceedings, if regular in other respects.—Yazoo & M. V. R. Co. v. City of Clarksdale, Miss., 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing 81 So. 178.

54. Me.—Franklin Bank v. Blossom, 23 Me. 546.

55. Cal.—Moore v. Martin, 38 Cal. 428.

56. Ala.—Thornton v. Winter, 9 Ala. 613.

57. Minn.—Hastings First Nat. Bank v. Rogers, 15 Minn. 381.

58. Ind.—Bowman v. Mallory, 14 Ind. 424.

59. N.Y.—Austin v. Figueira, 7 Paige 56—Conant v. Sparks, 3 Edw. 104.

60. Tenn.—Heffly v. Hall, 5 Humphr. 581.

Personal property
Where a judgment and execution were against two defendants, a sheriff's deed to land based on a constable's return which stated that no personalty of "the defendant" was found in county was not void under statute requiring entry of execution against land to show the absence of personalty sufficient to satisfy debt, since language of entry would be construed to refer to both defendants in view of fact that all other parts of return referred to both.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284.

61. Iowa.—Nelson v. Hayes, 269 N. W. 861, 222 Iowa 701.

62. Tex.—Jones v. Meyer Bros. Drug Co., 61 S.W. 553, 25 Tex.Civ.App. 234.
23 C.J. p 802 note 21.

63. Tex.—Paschall v. Brown, Civ. App., 133 S.W. 509.

64. Ill.—Phillips v. Dana, 4 Ill. 551.
23 C.J. p 804 note 75.

In Florida
(1) A premature return by way of indorsement "nulla bona" on the execution is not necessarily such a final return of the execution as works its dissolution.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

(2) Other particulars of Florida rule see 23 C.J. p 804 note 75 [a].

65. Mich.—Studley v. Ann Arbor Sav. Bank, 70 N.W. 426, 112 Mich. 181.
23 C.J. p 804 note 76.

However, it has been held that a sheriff's return of execution pursuant to order of receiver after taking possession of property levied on did not release levy.—Chicago Trust Co. v. Daniel Boone Coal Corporation, D. C.Ky., 58 F.2d 302.

66. Mich.—Campau v. Detroit Driving Club, 98 N.W. 267, 135 Mich. 575.

67. Ky.—Manning v. Manning, 283 S.W. 384, 214 Ky. 381.

is fixed by the return thereon, and the status of that property can be changed only by an order of court.[68] The return of a sale does not transfer title, but merely gives a right to demand a deed conveying the title.[69] Where the property has not been levied on by the execution, or where it is of such a nature that it never could have been levied on, or reached by an execution at law, the return of the execution unsatisfied will not, of itself, give the creditor a specific lien on the trust property, or choses in action of the debtor.[70] After the lapse of time when the execution is returnable, the execution creditor is chargeable with notice of the return thereof and of the matters stated in such return.[71]

Binding parties. The officer is the legal agent and representative of plaintiff and defendant in the judgment, and also of the accepted bidder, and has the right to bind all the parties by his return of the execution.[72]

§ 328. —— As Evidence

The recitals in the return as to matters which are part of the officer's duty are admissible as evidence of the facts therein stated and are prima facie proof thereof.

The return is admissible as evidence of the facts therein stated[73] so far as the statement of such facts is a part of the officer's official duty, but no further.[74] As against the purchaser at an execution sale, it has been held that the officer's return is inadmissible,[75] but where the title to property is claimed through a sheriff's sale, the return to the execution is admissible in evidence in favor of the purchaser or of one holding under him.[76] A return satisfied is admissible to show payment.[77] Recitals in a return as to matters which are part of the officer's duty are prima facie evidence of the truth of the facts recited therein,[78] even against third persons,[79] and will be taken as true unless disproved.[80] This is not true, however, of recitals in the return as to matters which are not part of the officer's duty.[81] A return has been held to be prima facie evidence of a proper levy.[82] A return nulla bona is admissible to show insolvency,[83] and is prima facie evidence that the debtor has no property subject to levy.[84] A return nulla bona, however, is not evidence of the nonexistence of property situated beyond the jurisdiction of the court.[85] Such a return is no evidence that the writ was returned on the same day,[86] or before the return day.[87] In an action involving the question of whether the ownership of property at the time of the wife's death was in the husband or wife, evidence of the sheriff's return of "no property found" on an execution against the husband shortly before the wife's death is of little value on the question of ownership, in the absence of proof that the husband had denied ownership to the sheriff.[88] Where one claims under a sheriff's deed, the execution

68. Fla.—Adams v. Burns, 172 So. 75, 126 Fla. 685.

69. Miss.—Jones v. Rogers, 38 So. 742, 85 Miss. 802.

70. N.Y.—Weed v. Pierce, 9 Cow. 722.

71. Tex.—Betterton v. Buck, 2 Tex. A.Civ.Cas. § 198.

72. Ky.—Linn Boyd Tobacco Warehouse Co. v. Terrill, 13 Bush 463.

73. Mo.—O'Byrne v. McCormick, 92 S.W.2d 1005, 1007, 230 Mo.App. 520, citing **Corpus Juris.**
23 C.J. p 804 note 80.

An erasure in a sheriff's return does not render the return inadmissible, where it is shown that the erasure is in the sheriff's handwriting and was made before the return was filed.—Crossen v. Oliver, 61 P. 885, 37 Or. 514.

74. Ohio.—Root v. Columbus R. Co., 12 N.E. 812, 45 Ohio St. 222.
23 C.J. p 804 note 81.

75. Tenn.—Mitchell v. Lipe, 8 Yerg. 179, 29 Am.D. 116.

76. Ind.—Camp v. Smith, 98 Ind. 409.

77. Ky.—Pryor v. Commonwealth, 4 Ky.Op. 180.

Mo.—Manufacturers' Union Co. v. Todd, 4 Mo.App. 591.

78. Iowa.—Nelson v. Hayes, 269 N. W. 861, 222 Iowa 701.

Mo.—O'Byrne v. McCormick, 92 S. W.2d 1005, 1007, 230 Mo.App. 520, citing **Corpus Juris.**
23 C.J. p 804 note 84.

79. N.J.—Browning v. Flanagin, 22 N.J.Law 567.

80. La.—Baldwin v. Gordon, 12 Mart.,N.S., 378.

N.C.—Jackson v. Jackson, 35 N.C. 159.

81. Va.—Shannon v. McMullin, 25 Gratt. 211, 66 Va. 211.
23 C.J. p 804 note 87.

Possession

While the return of the levying officer is sufficient prima facie to establish the fact as to who was in possession at the time of the levy, such an entry is not sufficient to show that claimant had never been in possession of the property under a previous conveyance.—Glenn v. Tankersley, 200 S.E. 709, 187 Ga. 129.

82. N.C.—Bank of Duplin, Rose Hill Branch, v. Hall, 166 S.E. 526, 203 N.C. 570.

83. Mich.—Riggs v. Whitaker, 89 N. W. 954, 130 Mich. 327.
23 C.J. p 804 note 89.

Prima facie evidence

(1) Return of nulla bona on execution makes out a prima facie case of insolvency of debtor in action to set aside his conveyances as fraudulent.—Tidwell v. J. H. Askew & Co., 262 S.W. 988, 165 Ark. 57.

(2) Effect as prima facie evidence in other cases see 23 C.J. p 804 note 89[a].

84. Ga.—Steinberg v. Freedman, 198 S.E. 224, 225, 186 Ga. 361, citing **Corpus Juris.**

Ill.—Zimek v. Illinois Nat. Casualty Co., 19 N.E.2d 620, 370 Ill. 572—Crane v. Illinois Merchants' Trust Co., 238 Ill.App. 257.
23 C.J. p 804 note 90.

85. Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

86. Ga.—Thornton v. Lane, 11 Ga. 459.

87. Miss.—Izod v. Addison, 6 Miss. 432.

88. Ky.—Groves v. Bryant, 216 S.W. 364, 186 Ky. 104.

with the amended return making it conformable to the truth is admissible to prove the recitals in the deed.[89] The fact that his return appears on an execution sufficiently shows that he was the officer holding the same, and that he held it for the purpose of its legal enforcement.[90] A return is admissible to contradict the deed of a succeeding sheriff.[91]

Aider by extrinsic evidence. Extrinsic evidence is admissible to explain,[92] corroborate,[93] or supply defects in a return.[94] Evidence of extrinsic facts not required to be stated therein is admissible in aid of a return.[95] Where a claim is interposed by a third person to the land levied on, a failure to enter material facts by the officer cannot be corrected by proving such facts by parol, unless in exceptional cases where equity would afford relief on the ground of accident or mistake.[96]

Sufficiency of evidence to overcome return. As an official record made by the officer in the discharge of his official duties, greater weight will as a rule be attached to a return than to evidence generally.[97] The evidence to overcome the return must be clear and decisive,[98] and the burden of proving the falsity of the return is on the person who seeks to show such fact.[99] In questions appertaining to the title to real property, the sheriff's deed furnishes proof of the adjudication, and its recitals control those of his return.[1] When an officer's return and the clerk's certificate of the filing thereof disagree as to the time when an execution was returned, the return prevails,[2] but, where there is a disagreement as to the time when a levy of execution was recorded in the clerk's office, the certificate of the clerk will prevail.[3] The prima facie case of a proper levy arising from the return may be overcome by the recitals of the return itself, such as where it excludes the conclusion that the property was either actually or constructively seized.[4]

§ 329. —— Conclusiveness and Collateral Attack

a. In general
b. As to third persons
c. As evidence for or against officer

a. In General

As between the parties and their privies, a return is generally held to be conclusive as to matters required to be stated therein.

As a general rule, subject to some exceptions,[5] a return is conclusive on the parties and their privies, as to matters required to be stated therein,[6] and cannot be collaterally attacked.[7] In some jurisdictions, however, a return is only prima facie evidence of the facts stated in it between the parties,[8] and is subject, like other presumptive evi-

89. Mass.—Blake v. Rogers, 97 N.E. 68, 210 Mass. 588.

90. Me.—Came v. Brigham, 39 Me. 35.

91. N.C.—Edwards v. Tipton, 77 N. C. 222.

92. Mont.—McCarthy v. O'Marr, 47 P. 953, 19 Mont. 215, 61 Am.S.R. 502.
23 C.J. p 809 note 81.

93. N.C.—Grandy v. McPherson, 52 N.C. 347.
23 C.J. p 809 note 82.

94. Ala.—Governor v. Gibson, 14 Ala. 326.

95. N.C.—Mulholland v. York, 82 N. C. 510.
Ohio.—Darling v. Peck, 15 Ohio 65.
Pa.—Flick v. Troxsell, 7 Watts & S. 65.

96. Ga.—Collins v. Hudson, 69 Ga. 684.

97. Ky.—Commonwealth v. Jackson, 10 Bush 424.
23 C.J. p 805 note 97.

98. Ga.—Parler v. Johnson, 7 S.E. 317, 81 Ga. 254.
23 C.J. p 805 note 98.

Counter-affidavit insufficient
Where the officer returns that he could find no goods and chattels, it will not be overthrown by an affidavit of one defendant that the other defendants had personal property subject to execution, without showing what or where it is.—Treptow v. Buse, 10 Kan. 170.

99. La.—Gibson v. Foster, 2 La.Ann. 503.

1. La.—McCall v. Irion, 6 So. 845, 41 La.Ann. 1126.
Tex.—Tanner v. Grisham, Civ.App., 289 S.W. 146, reversed on other grounds, Com.App., 295 S.W. 590.

2. Vt.—Gilson v. Parkhurst, 53 Vt. 384.

3. Vt.—Ellison v. Wilson, 36 Vt. 60.

4. N.C.—Bank of Duplin, Rose Hill Branch, v. Hall, 166 S.E. 526, 203 N.C. 570.

5. Cal.—Meherin v. Sanders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272.

6. Ark.—Commercial Standard Ins. Co. v. Waller, 80 S.W.2d 78, 190 Ark. 636.
Pa.—Garland v. Seaton, 86 Pa.Super. 508—Lieberman v. Harrigan, 28 Del.Co. 481, 53 York.Leg.Rec. 87.
Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42—First Nat. Bank of South Pittsburg, Tenn. v. Tate, 15 Tenn.App. 462.
Tex.—Citizens State Bank of Clarinda, Iowa v. Del-Tex Inv. Co., Civ. App., 123 S.W.2d 450, error dismissed, judgment correct.
23 C.J. p 805 note 9.

7. Ind.—Willard v. Bringolf, 5 N.E. 2d 315, 103 Ind.App. 16.
Ky.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62.
Minn.—Swaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
Ohio.—Fidelity & Casualty Co. v. Thumm, 172 N.E. 631, 35 Ohio App. 499.
Pa.—Lieberman v. Harrigan, 28 Del. Co. 481, 53 York.Leg Rec. 87.
Tenn.—First Nat. Bank of South Pittsburg, Tenn. v. Tate, 15 Tenn. App. 462.
23 C.J. p 805 note 10.

8. La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 180 La. 376—Bolton v. Byrd, App., 154 So. 657.
Mont.—Silfvast v. Asplund, 42 P.2d 452, 99 Mont. 152.
23 C.J. p 805 notes 5, 6.

Value of land
In absence of any showing concerning value of judgment debtor's land, sheriff's declaration, in return on writ of fieri facias, that property was not worth amount for which it was mortgaged, must be accepted as

dence, to be rebutted by contrary proof.[9] It has also been held that a recital in a return may be shown to have been the result of mistake or inadvertence, or fraud or collusion.[10] Likewise, in a court of equity the truth of the sheriff's return may be impeached by parol evidence, and facts shown to be otherwise, if the acts of the officer, constituting the returns, were mala fide, or in violation of law, or beyond the scope of his official duty.[11]

The return is conclusive only as to such facts as it is the legal duty of the officer to state,[12] and other statements may be collaterally attacked.[13] A return may be impeached as to a matter which is not a material or proper part of it.[14]

A return to be conclusive must be a regular legal return,[15] signed by the officer.[16] A return amended after the officer's term of office has expired is not conclusive.[17] A return is not conclusive where some other portion of the record in the same case contradicts the return.[18] The return may be contradicted when the question of jurisdiction of the party arises, and it may be shown that jurisdiction was never in fact obtained, notwithstanding recitals to that effect in the return;[19] and the same is true where the question arises as to whether or not a given person is in fact a privy.[20]

The legal effect of the return may be inquired into and determined.[21] Evidence which does not contradict a return[22] is not inadmissible as attacking its conclusiveness.[23]

Date. It seems that the date of a return is not such a part of it that it cannot be contradicted.[24] Parol evidence is admissible to show that a date appearing in his return was no part thereof, but was inserted by the sheriff without authority after the return was made.[25]

Nulla bona. A return of nulla bona is conclusive between the parties unless procured by the fraud of one of them, and its verity cannot even then be inquired into without making the officer a party.[26] Such a return cannot be questioned in a judgment creditor's suit,[27] nor in an action of ejectment brought by a bona fide purchaser at an execution sale against a prior grantee of the execution debtor, whose deed was not recorded until after the sale.[28] It has been held, however, that such a return is not conclusive evidence of a devastavit.[29] It has also been held that, although ordinarily a return wholly unsatisfied is regarded as conclusive that no property belonging to the judgment debtor can be found, where the person who has a right to

true.—Winsey v. Bourgeois, La.App., 157 So. 824.

9. La.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 426, 180 La. 376.
23 C.J. p 805 note 7.

"The purely ministerial acts of the sheriff are in nowise under the control or direction of the judgment creditor, and he cannot be prejudiced by the manner in which the sheriff performs those acts. The appellee received nothing from the sale of appellant's property under the first execution, and he is entitled to collect his judgment in full irrespective of the sheriff's erroneous return."—Louisiana Western Lumber Co. v. Stanford, supra.

10. Ky.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62.
23 C.J. p 806 notes 11, 12.

In direct proceedings, based on fraud, to set aside a decree based on the return, the return is not conclusive.—Fowler v. Nash, 144 So. 831, 225 Ala. 613.

11. Tenn.—Wood v. Chilcoat, 1 Coldw. 423.

12. Ind.—U. S. Gypsum Co. v. Moore, App., 36 N.E.2d 951, rehearing denied 37 N.E.2d 682.
Tex.—Holden v. Ryan, Civ.App., 268 S.W. 1022.
23 C.J. p 806 note 14.

13. Ohio.—Creditors v. Search, 2 Ohio Dec., Reprint, 495, 3 West.L. Month. 319.
Va.—Shannon v. McMullen, 25 Gratt. 211, 65 Va. 211.

Conclusions

Mere statements of conclusions in the return do not make them conclusive.—U. S. Gypsum Co. v. Moore, Ind.App., 37 N.E.2d 682, denying rehearing 36 N.E.2d 951.

14. Ind.—Goodtitle v. Cummins, 8 Blackf. 179.
Tex.—Holden v. Ryan, Civ.App., 268 S.W. 1022, 1024, citing **Corpus Juris.**

15. Pa.—Williams v. Carr, 1 Rawle 420—Weidman v. Weitzel, 13 Serg. & R. 96.
23 C.J. p 806 note 17.

16. U.S.—Watson v. Bondurand, La., 21 Wall. 123, 22 L.Ed. 509.

17. Ky.—Armstrong v. Easton, 1 B. Mon. 66.

18. Mich.—Macomber v. Wright, 65 N.W. 610, 108 Mich. 109.
23 C.J. p 806 note 20.

19. Wis.—St. Lure v. Lindsfelt, 52 N.W. 308, 82 Wis. 346, 33 Am.S.R. 50, 19 L.R.A. 515.
23 C.J. p 806 note 21.

20. Wis.—Toepfer v. Lampert, 78 N.W. 779, 102 Wis. 465.

21. Miss.—Reynolds v. Ingersoll, 19 Miss. 249, 49 Am.D. 57.

22. Pa.—Lieberman v. Harrigan, 28 Del.Co. 481, 53 York Leg.Rec. 87.
23 C.J. p 806 note 24.

23. Ind.—Gilpin v. Wilson, 53 Ind. 443.

24. Mich.—Macomber v. Wright, 65 N.W. 610, 108 Mich. 109.
23 C.J. p 806 note 26.

25. Pa.—Henderson v. Henderson, 19 A. 424, 133 Pa. 399, 19 Am.S.R. 650.

26. Ky.—Durret v. Bouche, 5 Ky.Op. 667.

Traverse

Even where an entry nulla bona may be traversed by defendant, it must be done at the first term after notice to him, and before pleading to the merits.—Steinberg v. Freedman, 190 S.E. 187, 55 Ga.App. 298, affirmed 198 S.E. 224, 186 Ga. 361.

27. Ark.—Hunt v. Weiner, 39 Ark. 70.
Mich.—William Wright Co. v. Fraser, 66 N.W. 954, 109 Mich. 139.

28. Mich.—Luton v. Sharp, 53 N.W. 1054, 94 Mich. 202.

29. S.C.—Young v. Kennedy, 27 S.C.L. 80.

rely on that fact sets up other independent facts which utterly repudiate the fact that the judgment debtor has no property subject to execution, it would be but a travesty to permit a conclusion arising from the sheriff's return of the writ to prevail.[30]

As to levy. While statements made in an officer's return on an execution as to the levy made thereunder are as a rule conclusive,[31] nevertheless mere statements of opinion or statements of reasons are not conclusive.[32] Thus it has been held that facts stated as a reason for not making a levy are not conclusive, on the theory that the statement of such facts is not an official act or within the duty of the officer.[33] If there is no duty to schedule the personal property levied on, it seems that a return enumerating the articles levied on does not preclude evidence that the chattels in dispute were a part of the property levied on, where the return was ambiguous.[34]

As to delivery bond. The statements in a sheriff's return as to the taking and forfeiture of a delivery bond may be impeached.[35]

As to sale. As a general rule, and in the absence of fraud or mistake, the official return of a sheriff concerning the sale of the property levied on is conclusive,[36] except where directly attacked as in an action to set aside the sale.[37] Under some statutes, however, the return of the officer as to the advertisement of sale may be contradicted on a motion to set aside the sale.[38] The return has been held not conclusive as to who was the purchaser at the sale;[39] but there is authority to the contrary.[40] The recital of a levy and sale of defendant's interest does not estop him from showing that the title to the land was not in him, but in his co-defendants.[41] It has been held that, where the return makes no mention of the land having been offered in parcels before being sold as a whole, such fact cannot be shown by the testimony of witnesses.[42]

b. As to Third Persons

A return of an execution is not conclusive as to third persons.

The return is not conclusive against third persons,[43] that is, against persons other than parties to the action in which the execution was issued and those claiming under them as privies.[44] As to such persons the return of an officer is prima facie evidence only of the matter stated in the return,[45] and the presumption of regularity is rebuttable.[46] A claimant of the property[47] or a purchaser at the execution sale who was not a party to the action[48] is within the rule. A purchaser is not precluded by a return stating the execution of a deed

30. Cal.—McCutcheon v. Superior Court in and for Los Angeles County, 24 P.2d 911, 134 Cal.App. 5.

31. Ohio.—Fidelity & Casualty Co. v. Thumm, 172 N.E. 631, 35 Ohio App. 499.
S.C.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.
23 C.J. p 806 note 34.

Mere indorsement by sheriff on execution is not conclusive of valid levy.—In re Phipps, 163 S.E. 801, 202 N.C. 642.

32. Tex.—Holden v. Ryan, Civ.App., 268 S.W. 1022.
23 C.J. p 806 note 35.

Release of property

Statement in sheriff's certificate that he had released property levied on by instructions from plaintiff's attorney was not binding on court, in action by trustee in bankruptcy of judgment debtor to recover property levied on, since rights of attaching creditor are dependent on what sheriff has actually done, not on return he may have made.—Gilbank v. Benton, 50 P.2d 815, 9 Cal. App.2d 517.

33. Ind.—Hessong v. Pressley, 86 Ind. 555.
Tex.—Holden v. Ryan, Civ.App., 268 S.W. 1022, 1024, citing **Corpus Juris.**

34. Pa.—Weidensaul v. Reynolds, 49 Pa. 73.

35. Ala.—Anderson v. Rhea, 7 Ala. 104.
23 C.J. p 807 note 38.

36. Minn.—Swaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
23 C.J. p 807 note 39.

In Louisiana, it has been held, however, that a return that the property was sold after legal advertisement is not conclusive.—Delogny v. Smith, 3 La. 418—Bolton v. Byrd, App., 154 So. 657.

37. Tex.—Moore v. Snowball, 82 S.W. 330, 36 Tex.Civ.App. 495.

38. Kan.—White-Crow v. White-Wing, 3 Kan. 276.
23 C.J. p 807 note 43.

39. Ala.—Wyatt v. Stewart, 34 Ala. 716.
Del.—McIntire v. Barkley, 11 Del. 145.

40. Ky.—Trigg v. Lewis, 8 Litt. 129.
23 C.J. p 807 note 46.

41. Pa.—Gibson v. Winslow, 38 Pa. 49.

42. Ill.—Flemming v. Tallerday, 124 N.E. 613, 289 Ill. 508—Van Gundy v. Hill, 104 N.E. 147, 262 Ill. 162.

43. Tex.—Citizens State Bank of Clarinda, Iowa v. Del-Tex Inv. Co., Civ.App., 123 S.W.2d 450, error dismissed, judgment correct—Held Bros. v. Dawson, Civ.App., 117 S.W.2d 481—Holden v. Ryan, Civ. App., 268 S.W. 1022.
23 C.J. p 807 note 49.

44. Tex.—Held Bros. v. Dawson, Civ.App., 117 S.W.2d 481.
23 C.J. p 807 notes 50, 51.

Assignee

It has been held, however, that whatever may be the consequence and effect of a return of satisfaction of an execution as between the sheriff and plaintiff in execution, the assignee of the judgment, if notice of the assignment is given, is neither bound nor affected thereby.—Holden v. Ryan, Tex.Civ.App., 268 S.W. 1022.

45. Minn.—Stewart v. Duncan, 50 N.W. 227, 47 Minn. 285, 28 Am.S.R. 367.
23 C.J. p 807 note 52.

46. Ohio.—Home Owners' Loan Corporation v. Wadsworth, 19 N.E.2d 518, 60 Ohio App. 60.

47. Ga.—Gray v. Cole, 20 Ga. 203.
23 C.J. p 807 note 53.

48. Ohio.—Home Owners' Loan Corporation v. Wadsworth, 19 N.E.2d 518, 60 Ohio App. 60.
23 C.J. p 807 note 54.

from showing that he had received no deed.[49] It has been held, however, that after an official return has become the foundation of a title acquired under a levy and sale, it is not competent to admit parol proof of the officer to contradict his return, either to impeach or sustain the validity of a purchaser's title.[50] One not a party to the action is not protected by the return,[51] and so whether a purchaser paid his bid may be decided on evidence aliunde.[52]

c. As Evidence for or against Officer

As to matters embraced therein which are within his official duty, an officer's return will, as a general rule, conclude him and his sureties.

An officer's return on an execution will as a general rule conclude him and his sureties as to facts or matters embraced in his return which are within his official duty.[53] If the return shows a levy, he cannot attack the validity of such levy.[54] While an officer cannot contradict his return he may fully explain the facts set forth in the return, where an action is brought against him, and he may sustain any part of the return by evidence aliunde.[55] He is not estopped by his return from proving facts not contained therein,[56] or from showing that the goods levied on did not belong to the judgment debtor.[57] As against a person who fraudulently procured him to make it, a sheriff may deny the truth of his return,[58] and the officer may show that an insufficient return was caused by the act of the judgment creditor.[59] The rule that the sheriff cannot contradict his return is subject to an exception where the officer brings a suit against a tort-feasor who is alleged to have taken the goods levied on and wrongfully converted them to his own use.[60] A return of nulla bona to an execution on a judgment against a surety in a replevin bond is not conclusive against the officer as to the insufficiency of the surety.[61] A sheriff may prove, in an action of replevin in which he is defendant, that at the time he seized the property replevied he had an execution in his hands, notwithstanding the return on the fieri facias shows that at the time the seizure was made the execution had not in fact come into his hands.[62] Of course, the return, after the court has allowed it to be canceled, is not conclusive against the officer in favor of parties who did not act on the faith of it.[63]

The return is prima facie evidence in favor of the officer making it but is subject to be rebutted and overturned by proof aliunde.[64] It is prima facie evidence in his favor only as to facts returned which are within his official duty.[65] In applying this rule it is generally held that the officer cannot incorporate the statement of an excuse or apology for the nonperformance of his duty into his return, so as thereby to make the same evidence in his own favor,[66] but exceptions to this rule have been made by some authorities.[67] An officer's return,

49. Ind.—Gregg v. Strange, 3 Ind. 366.

50. Tenn.—Pratt v. Phillips, 1 Sneed 543, 60 Am.D. 162.

51. Cal.—Meherin v. Saunders, 63 P. 1084, 131 Cal. 681, 54 L.R.A. 272.

52. Cal.—Meherin v. Saunders, supra.

53. N.D.—Smith v. Hanson, 293 N. W. 551, 555, 70 N.D. 241, 129 A.L.R. 1356, citing **Corpus Juris.**
23 C.J. p 807 note 59, p 808 note 60.

Levy under subsequent writ
Where two writs are delivered to the sheriff on different days, and in his return he states that he levied under the second writ, in an action against him he cannot avoid the effect of his return by showing by parol that the levy was made on the writ first delivered to him.—McClelland v. Slingluff, Pa., 7 Watts & S. 134, 42 Am.D. 224.

54. Tex.—Cox v. Patten, Civ.App., 66 S.W. 64.

55. N.D.—Smith v. Hanson, 293 N. W. 551, 555, 70 N.D. 241, 129 A.L.R. 1356, quoting **Corpus Juris.**
23 C.J. p 808 notes 62, 63.

56. Mass.—Hovey v. Lovell, 9 Pick. 68.
23 C.J. p 808 note 64.

The statute providing that, if writ is not executed by officer or is executed in part only, the reason must be stated by the officer in the return, did not render inadmissible, in action against sheriff and his surety to recover damages allegedly sustained by reason of sheriff's failure to sell certain personalty levied on under an execution, testimony of sheriff as to reason for returning execution unsatisfied, although such reason was not mentioned in the return.—Smith v. Hanson, 293 N.W. 551, 555, 70 N. D. 241, 129 A.L.R. 1356, quoting **Corpus Juris.**

57. Mo.—State v. Springate, 51 Mo. App. 619.
N.D.—Smith v. Hanson, 293 N.W. 551, 555, 70 N.D. 241, 129 A.L.R. 1356, quoting **Corpus Juris.**
23 C.J. p 808 note 65.

58. Pa.—Evans v. Matson, 51 Pa. 366, 88 Am.D. 584.

59. Tenn.—Granberry v. Crosby, 7 Heisk. 579.

60. Del.—Hargadine v. Ford, 10 Del. 380.

61. Pa.—Myers v. Clark, 3 Watts & S. 535.

62. Tenn.—Mankin v. Fletcher, 7 Coldw. 162.

63. N.Y.—Barker v. Binninger, 14 N. Y. 270.

64. Ind.—Waymire v. State, 80 Ind. 67.
23 C.J. p 808 note 72.

65. Ind.—Hessong v. Pressley, 86 Ind. 555.
23 C.J. p 808 note 73.

An amended return entered on the execution in virtue of leave granted by an order of the court, and perfected before any proceedings are commenced against the officer, has the same effect as evidence of the correctness of the facts returned, as if it had been entered in due time as required by law, and, in a proceeding against the officer making it, it is prima facie evidence in his favor.—Leavitt v. Smith, 14 Ala. 279.

66. N.Y.—Browning v. Hanford, 5 Den. 586, reversing 7 Hill 120.
23 C.J. p 808 note 74.

67. Ohio.—Langdon v. Summers, 10 Ohio St. 77.
23 C.J. p 808 note 75.

being always under his own control, and always evidence for him, should be construed most strongly against him.[68]

§ 330. Effect of Return or Defects Therein on Title of Purchaser

As a general rule, a failure to make a return, delay in making return, or defects in the return as made do not invalidate the title of a purchaser at execution sale.

The validity of title to property conveyed by an officer's deed at execution sale is not, as a general rule, dependent on the officer's return.[69] Indeed, the general rule is that the failure of the officer to make a return of the writ will not invalidate the title of a purchaser at the execution sale,[70] but in some jurisdictions the rule is otherwise.[71] It has been held that the title of the execution purchaser is invalidated by the absence of a return evidencing the sale, unless the fact that the execution is lost is made to appear, and the loss is supplied in a proper manner.[72]

Likewise, the fact that the officer has not made a return to an execution within the proper time does not affect the validity of a sale made under it,[73] and, even in jurisdictions where a return is held necessary to the validity of a sale, a sale is not invalidated by a delay, but the return when made relates back to the time named in the writ.[74]

As a general rule, the title of a purchaser at an execution sale cannot be affected by defects or informalities in the return,[75] if there is a sufficient description of the property sold whereby it can be identified.[76]

XIII. PAYMENT, SATISFACTION, AND DISCHARGE

§ 331. What Constitutes

An execution is satisfied by a payment of money or by a conversion of the debtor's property into money. A lawful tender of the amount of the writ operates as a satisfaction; but a mere contract does not satisfy an execution until it is performed.

An execution is satisfied by a payment of money or by a conversion of the debtor's property into money.[77] A lawful tender of the amount of the writ operates as a satisfaction;[78] but a mere contract does not satisfy an execution until it is performed.[79] An inquisition finding that land levied on under execution would be sufficient to pay in seven years is not equivalent to a satisfaction of the execution.[80]

The fact that an execution debtor does not offer certain property as payment of the execution is immaterial where it is taken and accepted by the

68. Pa.—Smith v. Emerson, 43 Pa. 456.

69. Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.

70. Tex.—Bunn v. Mackin, Civ.App., 25 S.W.2d 942, error refused—Griggs v. Montgomery, Civ.App., 22 S.W.2d 688.
23 C.J. p 791 note 59.

71. Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96.
23 C.J. p 792 note 60.

Sale after return day
It has been held that title of the judgment debtor is not divested by a sale made after the return day of the writ unless the constable returned the writ and retained a copy thereof, as required by statute.—Jacobshagen v. Maylan, 26 La.Ann. 735.

72. Ky.—Spragin v. Russell, 4 Ky.L. 255, 11 Ky.Op. 717.

73. La.—Nichols v. Bell & Rachal, 2 La.App. 16.
23 C.J. p 794 note 21.

74. Mass.—Ellis v. Lyford, 169 N.E. 800, 270 Mass. 96—Firth v. Haskell, 20 N.E. 164, 148 Mass. 501.

75. Ind.—Willard v. Bringolf, 5 N.E. 2d 315, 103 Ind.App. 16.
Mass.—Blake v. Rogers, 97 N.E. 68, 210 Mass. 588.
Minn.—Swaney v. Hasara, 205 N.W. 274, 164 Minn. 416.
Mont.—Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 835, 85 Mont. 375, 65 A.L.R. 968, citing **Corpus Juris.**
Tex.—Hodges v. Commonwealth Bank & Trust Co., Civ.App., 44 S.W.2d 400—Griggs v. Montgomery, Civ.App., 22 S.W.2d 688.
23 C.J. p 798 note 32.

Date
Where the sheriff was authorized to make sale on execution issuing July 18, 1910, and made sale thereunder, it was not invalid, although the return erroneously showed that the sale was made on execution issuing Oct. 13, 1910.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.

Notice
(1) The omission of the officer to state in his return that notice had been served on the execution defendant, as required by statute, cannot prejudice the rights of a bona fide purchaser or invalidate his deed as evidence.—Humphry v. Beeson, 1 Greene, Iowa, 199, 48 Am.D. 370.

(2) A sale of real estate will not be set aside on the ground that the return does not show that the notice required by law has been given or give any reason why it was not done.—Drake v. Hale, 38 Mo. 346.

76. Ark.—Tatum v. Croom, 30 S.W. 885, 60 Ark. 487.
23 C.J. p 798 note 33.

Where all other proceedings dispelled claimed uncertainty, uncertainty in return, regarding which tract was struck off for certain sum, did not impair validity of execution sale.—Hodges v. Commonwealth Bank & Trust Co., Tex.Civ.App., 44 S.W.2d 400.

77. La.—Baham v. Langfield, 16 La. Ann. 156.
S.C.—Richardson v. Inglesby, 34 S.C. Eq. 59.
Forthcoming bond as satisfaction of execution see supra § 116.

78. N.Y.—Tiffany v. St. John, 65 N.Y. 314, 22 Am.R. 612, affirming 5 Lans. 153.

Tender on condition that the execution be transferred to another does not operate as a payment and discharge of the execution.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683.

79. N.C.—Williams v. Bradley, 3 N.C. 363.
23 C.J. p 812 note 57.

80. Pa.—Lyons v. Ott, 6 Whart. 163.

creditor from the officer as such payment and the debtor subsequently acquiesces therein.[81]

§ 332. Payment

Payment of the judgment under which an execution has been issued and levied terminates the right of the judgment creditor to proceed further under the levy.

Payment of the judgment under which an execution has been issued and levied terminates the right of the judgment creditor to proceed further under the levy.[82]

The nature and requisites of a payment which will operate as satisfaction of an execution are treated infra §§ 333, 334.

§ 333. —— By and to Whom Made, and Amount

a. By whom made
b. To whom made
c. Amount

a. By Whom Made

(1) Codefendant
(2) Third person
(3) Officer

(1) Codefendant

Unless otherwise provided by statute, satisfaction of an execution by one of several codefendants who were all principals on the cause of action extinguishes the judgment, and such codefendant cannot subsequently issue execution against the other codefendants for his benefit.

Except where it is otherwise provided by statute,[83] payment by one of several codefendants who were all principals on the cause of action, extinguishes the judgment debt, and execution cannot be subsequently issued against any of the other codefendants for the benefit of the one who made the payment;[84] nor is it in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment.[85] If, therefore, in such a case, the defendant paying the judgment takes an assignment to himself or, unless under special circumstances, even to a third person for his own benefit, the assignment is void and the judgment satisfied.[86] However, a transfer of property to the creditor by one of the codefendants expressly in satisfaction of but a portion of the judgment does not relieve the codebtors of liability for the balance.[87]

(2) Third Person

Unless authorized by statute, payment of an execution by a third person may be refused.

In the absence of statute, payment of an execution by a third person may be refused.[88] If payment by such a person is accepted, the judgment is or is not extinguished, according to the intention of

81. Account
Or.—Barr v. Rader, 54 P. 210, 33 Or. 375.

82. Ill.—Dausch v. Barker, 255 Ill. App. 161.

83. Cal.—Tucker v. Nicholson, 84 P. 2d 1045, 12 Cal.2d 427.
23 C.J. p 812 note 64 [b].

In Georgia
(1) Where a codefendant in a judgment on an obligation on which all are liable as principals pays the judgment, he may, by having such payment entered on the execution, control and enforce the execution against his codefendants to compel them to contribute their share of the payment.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86—23 C.J. p 812 note 64 [a] (1), (3).

(2) A transferee of such a codefendant may control and enforce the execution in like manner.—Register v. Southern States Phosphate & Fertilizer Co., supra.

(3) The failure of the codefendant to establish that he is a surety does not defeat his right to enforce the execution.—Johnson v. Washington, 110 S.E. 889, 152 Ga. 635.

(4) A codefendant cannot enforce the execution, however, without complying with the provisions of the statute. A member of a partnership against whom an execution issued is a codefendant within the meaning of this requirement.—Easterling v. Adamson, 110 S.E. 757, 28 Ga.App. 257.

(5) The transfer of an execution to one of the defendants "for value received" without the entry thereon of any amount paid by the transferee is a settlement of the execution precluding enforcement of the execution against the other defendants. —Easterling v. Adamson, supra—23 C.J. p 812 note 64 [a] (4).

(6) If one of several codefendants in a judgment on an obligation on which they were liable as principals pays off the judgment with funds of all the codefendants, this is a payment of the judgment by all, and an execution issued thereon becomes functus officio.—Register v. Southern States Phosphate & Fertilizer Co., supra.

(7) A statement in the entry that the clerk is authorized to cancel the execution on his records as to the defendant who paid the judgment does not constitute a settlement of the execution so as to preclude the defendant from enforcing the execution for his benefit against his codefendants.—Register v. Southern States Phosphate & Fertilizer Co., supra.

(8) An entry of payment signed only by the clerk of the court is not a sufficient basis for a subsequent levy against codefendants at the instance of a defendant asserted to have made the payment.—Wilcher v. Williams, 127 S.E. 795, 33 Ga.App. 797.

(9) Entry held to comply with statutory requirement.—Johnson v. Washington, supra—23 C.J. p 812 note 64 [a] (2).

84. Ark.—Walker v. Bradley, 2 Ark. 578.
23 C.J. p 812 note 65.

85. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.

86. N.Y.—Harbeck v. Vanderbilt, supra.

87. Ky.—Manning v. Manning, 283 S.W. 384, 214 Ky. 381.

88. Mass.—Porter v. Ingraham, 10 Mass. 88.

the party paying.[89] A person not a party to an execution may advance money on it, and by agreement have it assigned to himself, and thus keep it in force.[90] However, if such person pay an execution in whole or in part, without an agreement that it is not to operate as a discharge, or without taking an assignment, the execution will be pro tanto satisfied, and cannot be afterward enforced.[91]

Persons indebted to judgment debtor. By statute in a number of states, after the issuance of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt will be a sufficient discharge for the amount so paid.[92] Such statutes are to be strictly construed.[93] The conditions which justify a payment by a debtor are that an execution has been issued, and not returned;[94] it is not essential to the validity of such payment that there should have been any levy.[95] The statutes do not authorize the sheriff to apply the proceeds of one execution in his hands to the satisfaction of another.[96]

(3) Officer

A voluntary, unconditional payment of an execution by the sheriff or other officer ordinarily operates as a satisfaction thereof, and the officer cannot thereafter use the execution for his own reimbursement; but as a general rule the sheriff may have execution for his reimbursement where the payment is compulsory, or he takes an assignment, or it is expressly agreed that payment shall not operate as a discharge.

A voluntary and unconditional payment of an execution by the sheriff or other officer operates as a satisfaction thereof, and thereafter the officer is not entitled to use the execution for his own reimbursement,[97] except under peculiar circumstances and by express leave of court,[98] or unless defendant in execution waives the benefit of the rule.[99]

The foregoing rule has been applied although the payment was compulsory,[1] and notwithstanding an agreement that the execution shall continue in force for the benefit of the sheriff.[2] As a general rule, however, where the payment is a compulsory and not a voluntary one,[3] or where the sheriff takes an assignment at the time he makes the payment,[4] or where it is expressly agreed that the payment shall not operate as a discharge,[5] the sheriff may have execution for his reimbursement. In some jurisdictions there appears to be no question of the right of the sheriff to enforce his execution in any case where he is not using his office for the purpose of oppression.[6]

b. To Whom Made

In order to constitute satisfaction of an execution, payment must be made to the proper party, person, or officer. Payment may be made to the execution creditor or to the officer holding the writ while the writ is operative.

In order to satisfy an execution by payment, the payment must be made to the proper party, person, or officer.[7] Payment may be made to the execution creditor,[8] or to one of several execution creditors.[9]

Clerk of court. In the absence of statutory au-

89. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.
23 C.J. p 813 note 73.

90. W.Va.—Beard v. Arbuckle, 19 W.Va. 135.
23 C.J. p 813 note 74.

91. Miss.—Morris v. Lake, 17 Miss. 521, 48 Am.D. 724.

92. S.D.—Bostwick v. Benedict, 57 N.W. 78, 4 S.D. 414.
23 C.J. p 813 note 78.

Purpose of statutes is to facilitate the collection of executions by authorizing sheriffs to receive from debtors to defendant in an execution in his hands the debts due to him.—Smith v. McMillan, 84 N.C. 593.

In New York

(1) This was the rule under the old code of procedure.—Mallory v. Norton, 21 Barb. 424.

(2) Decisions construing a later provision which is in somewhat different form see 23 C.J. p 813–note 79 [a].

93. N.C.—Howey v. Miller, 67 N.C. 459.
23 C.J. p 813 note 81.

94. Cal.—Butler v. San Francisco Gas & Electric Co., 141 P. 818, 168 Cal. 32—Skelly v. Winchester School Dist., 37 P. 643, 103 Cal. 652.

95. Cal.—Butler v. San Francisco Gas & Electric Co., 141 P. 818, 168 Cal. 32.

96. N.C.—Smith v. McMillan, 84 N. C. 593.
Ohio.—Burke v. Renner, 1 Ohio S. & C.P. 93, 2 Ohio N.P. 306.

97. N.Y.—Carpenter v. Stilwell, 11 N.Y. 61.
23 C.J. p 813 note 86.

98. N.Y.—Albany City Nat. Bank v. Kearney, 9 Hun 535.
23 C.J. p 813 note 87.

99. Ala.—Mooney v. Parker, 18 Ala. 708.
23 C.J. p 813 note 88.

1. N.Y.—Carpenter v. Stilwell, 11 N. Y. 61, 66, reversing 12 Barb. 128.
23 C.J. p 813 note 89.

2. N.Y.—Sherman v. Boyce, 15 Johns. 443.

3. Tenn.—Lintz v. Thompson, 1 Head 456, 73 Am.D. 182.
23 C.J. p 814 note 93.

4. Va.—Clevinger v. Miller, 27 Gratt. 740, 68 Va. 740.
23 C.J. p 814 note 91.

5. Miss.—Morris v. Lake, 17 Miss. 521, 48 Am D. 724.
23 C.J. p 814 note 92.

6. Vt.—State Treasurer v. Holmes, 4 Vt. 110.
23 C.J. p 814 note 94.

7. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.

8. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486—Caldwell v. Dean, Litt.Sel.Cas. 239.
23 C.J. p 814 note 97.
Payment to attorney for execution creditor see Attorney and Client § 97.

9. Pa.—Lazarus v. Follmer, 4 Watts & S. 9.
Tenn.—Erwin v. Rutherford, 1 Yerg. 169.

thority,[10] payment cannot be made to a clerk of the court from which the execution issued.[11]

Officer holding writ. Payment may be made to the officer holding the writ,[12] and such payment is good although the execution was irregularly issued,[13] or notwithstanding the creditor never received the money.[14] A sheriff, as sheriff, has no authority, however, to receive money without an operative execution in his hands,[15] and hence a payment to him as sheriff, prior to his having the execution in his hands, does not satisfy the debt.[16] A sheriff has no authority to receive money on an execution which has not been levied, after the return day thereof;[17] and the creditor will not be prevented from enforcing his judgment, unless he is proved to have received the money.[18] The creditor may affirm the act, however, and by proper action compel the officer, as an individual, to pay over the money.[19]

If the execution has been levied, payment may properly be made to the sheriff after the return day;[20] and the sheriff not only has authority then to receive money when tendered in payment of the debt, but it is his duty to receive it, instead of satisfying the debt out of defendant's property.[21]

After the expiration of his term as sheriff, a person has no authority to receive payment of money on an execution, and payments made to him do not discharge the judgment unless actually paid over by him to plaintiff.[22]

c. Amount

A payment of the amount of the writ satisfies it and a payment of a portion is a satisfaction pro tanto. An amount which the creditor could, but did not, include in the execution will be considered satisfied when the money has been made on the execution.

A payment of the amount of the writ satisfies it.[23] A payment of a portion of the debt is a satisfaction pro tanto which plaintiff must credit.[24]

Interest and charges. Inasmuch as the payment of a portion of the debt is a satisfaction pro tanto, interest cannot afterward be collected on the amount thus recovered, for a delay which was not caused by defendant.[25] Where a bond is given for the purchase money, payable on condition, interest is recoverable only from the time of the fulfillment of the condition.[26] The debtor need not pay the charges for publishing an inaccurate notice of sale.[27]

Amounts omitted from execution. The law contemplates but one final execution; to prevent a defendant from being harassed by successive executions, where the money has been made upon an execution, the law will consider the execution satisfied with respect to amounts which the creditor could, but did not, include,[28] such as costs[29] or interest on the judgment.[30] Where the sheriff is paid the amount of the judgment under an agreement with the debtor to return the execution as satisfied on receipt of such amount, he cannot refuse to make such a return on the ground that he inadvertently failed to include his fees.[31]

§ 334. —— Medium

a. In general
b. Kind of money
c. Property

a. In General

A sheriff may not, without the sanction of the creditor, accept anything but money as satisfaction of an execution.

A sheriff is not permitted, without the sanction of the creditor, to accept anything but money as satisfaction of an execution in his hands.[32] The

10. Ala.—Murray v. Charles, 5 Ala. 678.
11. Ga.—Georgiatown Bank v. Ault, 31 Ga. 359.
12. N.Y.—Sorge v. Honigsbaum, 245 N.Y.S. 34, 137 Misc. 824.
23 C.J. p 814 note 99.
13. Conn.—Worthington v. Hosmer, 1 Root 192.
14. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
23 C.J. p 814 note 5.
15. N.Y.—Corlies v. Waddell, 1 Barb. 355.
23 C.J. p 814 note 6.
16. Ga.—Irwin v. McKee, 25 Ga. 646.
23 C.J. p 814 note 7.
17. Miss.—Edwards v. Ingraham, 31 Miss. 272.
23 C.J. p 815 note 8.
18. La.—Rothschild v. Ramsay, 2 La. 277.
Miss.—Edwards v. Ingraham, 31 Miss. 272.
19. Ky.—Stephens v. Boswell, 2 J. J.Marsh. 29.
20. Va.—Grandstaff v. Ridgely, 30 Gratt. 1, 71 Va. 1.
23 C.J. p 815 note 11.
21. Ill.—Phillips v. Dana, 4 Ill. 551, 558.
22. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
23 C.J. p 815 note 13.
23. Ga.—Hoard v. Jordan, 99 S.E. 144, 23 Ga.App. 656.
23 C.J. p 812 note 54.
24. Ill.—Sandburg v. Papineau, 81 Ill. 446.
23 C.J. p 812 note 58.
25. N.Y.—Gray v. Griswold, 7 How. Pr. 44.
26. Pa.—Beetim v. Buchanan, 4 Watts 59.
27. N.Y.—Taylor v. Bell, 106 N.Y.S. 273, 121 App.Div. 437.
28. N.Y.—People v. Onondaga Ct.C. Pl., 3 Wend. 331.
29. Ala.—Slater v. Alston, 15 So. 944, 103 Ala. 605, 49 Am.S.R. 55.
Pa.—Bradley v. Clearfield & M. R. Co., 8 Pa.Dist. 493.
30. N.Y.—Todd v. Botchford, 86 N. Y. 517, 1 N.Y.Civ.Proc. 402, affirming 24 Hun 495.
31. N.Y.—Sorge v. Honigsbaum, 245 N.Y.S. 34, 137 Misc. 824.
32. Ill.—Hood v. Moore, 9 Ill. 99.
23 C.J. p 815 note 15.

exigency of his writ requires him to make the money, and he can receive only money in satisfaction.[33]

b. Kind of Money

An officer may not receive anything but lawful money of the United States in satisfaction of an execution, except with plaintiff's consent, express or implied.

Payment of an execution must be in lawful money of the United States, and the sheriff or other officer may not receive anything else in satisfaction of an execution except with the consent of plaintiff.[34] This consent may be implied, however, as well as express,[35] and may be inferred from long acquiescence.[36]

Lawful money of the United States was at one time considered to be gold and silver only;[37] but this is no longer the case, since the decision of the legal tender cases.[38] A judgment creditor has, unless restrained by statute, a right, however, to require payment in specie;[39] but this, like all other legal rights, must be exercised in good faith, and not with a view of sacrificing his debtor's property, and obtaining an unconscionable advantage.[40] Payment in bank bills which are not legal tender[41] or in Confederate currency[42] without the consent of plaintiff is unauthorized, particularly if the bank bill or currency is depreciated.[43] However, it has been held in some cases that, where a certain kind of money is current in the community and passes as currency, it may be accepted as payment,[44] unless the creditor has instructed to the contrary,[45] and this rule has been applied to Confederate currency.[46] If the sheriff or marshal receive bank notes or other nonlegal tender currency, and plaintiff sanctions the transaction either expressly or impliedly, the execution is discharged.[47]

c. Property

An officer has no authority to receive specific property in satisfaction of an execution except with the creditor's consent. Choses in action are not an exception to the rule.

An officer has no authority to receive specific property in satisfaction of an execution directed to him,[48] unless the execution creditor consents, in which case the debtor is entitled to a credit pro tanto.[49]

Choses in action such as mortgages, promissory notes, etc., are not an exception to the rule that money alone can be received by the sheriff in satisfaction of the writ.[50] The acceptance of a note is not a satisfaction, although the maker of the note pays it to a third person to whom it has been transferred.[51] However, a chose in action may be taken in payment of an execution with the consent of plaintiff,[52] although where it is accepted by the creditor as conditional payment there is no satisfaction if the condition fails.[53] Thus, where notes are taken, payment of the notes may be expressly made a condition precedent to the discharge of the execution.[54]

Whether a chose in action has been received in satisfaction of the execution is a question of fact.[55]

§ 335. Set-Off of Executions

Where the right is not conferred by statute the authorities disagree as to whether an officer may set off executions in his hands.

In the absence of statute it has been held that

33. Ill.—Thorpe v. Wheeler, 23 Ill. 495, 497.

34. U.S.—McFarland v. Gwin, Miss., 3 How. 717, 7 L.Ed. 799.
23 C.J. p 815 note 18.

35. Miss.—Prewett v. Standifer, 16 Miss. 493.

36. Miss.—Prewett v. Standifer, supra.

37. U.S.—McFarland v. Gwin, Miss., 3 How. 717, 7 L.Ed. 799.
23 C.J. p 815 note 21.

38. U.S.—Knox v. Lee, Tex., 12 Wall. 457, 20 L.Ed. 287.
Cal.—People v. Mayhew, 26 Cal. 655.
23 C.J. p 815 note 22.

39. U.S.—Gwinn v. Buchanan, Hagan & Co., Miss., 4 How. 1, 11 L. Ed. 849.
23 C.J. p 815 note 23.

40. S.C.—Farr v. Sims, 9 S.C.Eq. 122, 24 Am.D. 396.
23 C.J. p 815 note 24.

41. U.S.—McFarland v. Gwin, Miss., 3 How. 717, 11 L.Ed. 799.
N.H.—Moody v. Mahurin, 4 N.H. 296.
23 C.J. p 815 note 25.

42. Tex.—Morrill v. Fitzgerald, 36 Tex. 275.
23 C.J. p 815 note 26.

43. Ill.—Trumbull v. Nicholson, 27 Ill. 149.
23 C.J. p 815 note 27.

44. Tenn.—Haynes v. Bridge, 1 Coldw. 32.
23 C.J. p 815 note 28.

45. N.C.—McKay v. Smitherman, 64 N.C. 47.
23 C.J. p 815 note 29.

46. N.C.—Utley v. Young, 68 N.C. 387.
23 C.J. p 816 note 30.

47. Miss.—Bright v. Ross, 19 Miss. 289.
23 C.J. p 816 note 31.

48. Ill.—Thorpe v. Wheeler, 23 Ill. 544.
23 C.J. p 816 note 32.

49. Ky.—Banta v. Snapp, 2 Duv. 98.
23 C.J. p 816 note 33.

50. Mass.—Langdon v. Potter, 13 Mass. 319.
23 C.J. p 816 note 34.

Presumption of settlement
The giving of a promissory note does not of itself raise any presumption of settlement of the account between the parties.—White v. Jones, 38 Ill. 159.

51. N.Y.—Orange County Bank v. Wakeman, 1 Cow. 46.

52. Ky.—Ettlinger v. Tansey, 17 B. Mon. 364.
23 C.J. p 816 note 36.

53. Ill.—Jones v. Smith, 17 Ill. 263.
23 C.J. p 816 note 37.

54. Mass.—Richardson v. Boston Chemical Laboratory, 9 Metc. 42—Hart v. Waterhouse, 1 Mass. 433.

55. Ill.—White v. Jones, 38 Ill. 159.

an officer cannot set off executions in his hands;[56] but there is authority to the contrary.[57]

Statutory provisions. By statute in a number of jurisdictions, an officer who has in his possession two executions of different parties for mutual claims may set them off one against the other.[58] This is an equitable right which the law protects and will enforce.[59]

In order that such a set off may be made, the parties to the judgments on which the writs are issued must be the same,[60] and the judgments must in fact belong to, and be the property of, the respective parties thereto.[61] A general execution issued on a personal judgment and a special execution against property cannot be set off against each other.[62] It is immaterial, however, what may be the nature of the causes of action on which the judgments have been rendered, as where one is in tort and the other is in contract.[63] It has been held that neither the sheriff, the coroner, nor the constable can set off executions unless they are in his possession as an officer authorized and obliged to obey them and unless the writs are directed to him.[64]

If necessary for the protection of the officer against the consequences of making a set-off, reasonable security may be required.[65]

§ 336. Levy as Satisfaction

a. Personal property

b. Real property

c. In favor of third persons

a. Personal Property

(1) In general

(2) Conclusiveness of presumption of satisfaction

(1) In General

A levy on sufficient personal property to satisfy the debt is, until disposition of the levy is accounted for, a prima facie satisfaction of the debt, and operates, as long as the property remains in legal custody, as a suspension of further remedies on the part of the creditor to obtain satisfaction.

Although in a number of cases it has been said that a levy upon sufficient personal property is a satisfaction of the execution,[66] this doctrine has long since been exploded.[67] The settled rule is that a levy on sufficient personal property is, until the disposition of the levy is accounted for, a prima facie satisfaction of the debt,[68] and operates, as long as the property remains in legal custody, as a suspension of further remedies on the part of the creditor to obtain satisfaction.[69] A levy and sale under a subsequent execution on the same judgment and against the same defendant, while the former levy remains, are void and no title passes.[70]

Where an execution is levied on land and personal property at the same time, however, and the land alone is sold, the execution is not prima facie satisfied by the levy on personal property, and the purchaser of the land gets a good title.[71] The rule that the writ is satisfied by a levy applies only as to the debtor whose property is levied on and not as to codebtors.[72]

Value of property. To give rise to the presumption of satisfaction, the levy must have been made

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56. Ala.—Brazeal v. Smith, 5 Ala. 206.
23 C.J. p 816 note 47.
Application of:
Money collected to satisfaction of writs against execution creditor see supra § 55.
Proceeds of sale to execution against execution creditor see supra § 248.

After payment
If the debtor voluntarily pays a judgment on which execution issued, he cannot subsequently set off an execution against his creditor.—Morris v. Scott, 127 S.E. 823, 33 Ga.App. 787.

57. Vt.—Culver v. Pearl, 1 Tyler 12.
23 C.J. p 816 note 48.

58. Ill.—Silverman v. City Engineering Const. Co., 170 N.E. 250, 338 Ill. 154, affirming 252 Ill.App. 275.
Mich.—Cross v. Hickey, 236 N.W. 800, 254 Mich. 330.
23 C.J. p 817 note 49.

59. Me.—Leathers v. Carr, 24 Me. 351.

60. Mich.—Carpenter v. Hood, 138 N.W. 241, 172 Mich. 533.
23 C.J. p 817 note 52.

61. Mo.—Primm v. Ransom, 10 Mo. 444.
23 C.J. p 817 note 53.

62. Mo.—Haseltine v. Thrasher, 65 Mo.App. 334.

63. N.H.—Shapley v. Bellows, 4 N.H. 347, 350.
23 C.J. p 817 note 55.

64. Mass.—Goodenow v. Buttrick, 7 Mass. 140.

65. Me.—Leathers v. Carr, 24 Me. 351.
23 C.J. p 817 note 51.

66. Mass.—Ladd v. Blunt, 4 Mass. 402.
23 C.J. p 817 note 59.

67. N.Y.—Peck v. Tiffany, 2 N.Y. 451.
23 C.J. p 817 note 60.

68. Miss.—Brown v. Kidd, 34 Miss. 291.
23 C.J. p 817 note 61.

Prima facie satisfaction under statute
Ga.—Rawson v. Davis, 36 Ga. 511—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358—Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.

69. Ark.—Ford v. Bigger, 97 S.W. 65, 80 Ark. 300.
23 C.J. p 818 note 62.

70. Miss.—Bingaman v. Hyatt, Sm. & M.Ch. 437.
23 C.J. p 818 note 63.

71. Ga.—Dowdell v. Neal, 10 Ga. 148.

72. Ark.—Walker v. Bradley, 2 Ark. 578, 595.
Ky.—McGinnis v. Lillard, 4 Bibb 490.

on property of sufficient value to satisfy the debt.[73] Some courts have held that this must be shown affirmatively before satisfaction will be presumed;[74] others, however, have held that when it appears that a levy has been made, and there is no showing as to the value of the property, the presumption is that it was of sufficient value to satisfy the execution.[75]

(2) Conclusiveness of Presumption of Satisfaction

The prima facie satisfaction resulting from a levy becomes absolute if the property is wasted, destroyed, or otherwise lost through misconduct or negligence of the plaintiff or the officer. The presumption of satisfaction is rebutted whenever it is shown that the plaintiff has been prevented by act of the defendant or operation of law from reaping the fruits of his levy.

The prima facie satisfaction resulting from a levy becomes absolute if the property is wasted, destroyed, or otherwise lost through the misconduct or negligence of plaintiff or the officer,[76] and plaintiff must seek his remedy against the sheriff.[77] There is no satisfaction, however, if the property is destroyed or lost without any fault on their part, but the loss in such a case falls on defendant.[78] The presumption also becomes conclusive if, after a great lapse of time, a disposition of the levy is unaccounted for.[79]

Rebuttal of presumption. The presumption of satisfaction by levy may be rebutted.[80]

The presumption is rebutted whenever it is shown that plaintiff has been prevented, either by the act of defendant or the operation of law, from reaping the fruits of his levy.[81] Thus it is rebutted where defendant is left in possession of the property and permitted to use it as his own, and no further steps are taken under the writ,[82] or where the property has been restored to defendant,[83] on the execution of a delivery bond,[84] or to the possession of a claimant, on the execution of a bond for the trial of the right of property,[85] or has been disposed of to the satisfaction of defendant otherwise than in payment of the execution.[86] Likewise the presumption is rebutted where the property has been fraudulently withdrawn by defendant from the possession of the officer;[87] and it is rebutted where the levy has been removed or nullified by process of law.[88]

The presumption is rebutted by showing that the property levied on was exempt,[89] or not subject to execution,[90] or exhausted by satisfying prior claims or executions;[91] or that the property did not sell for enough to satisfy the execution;[92] or that property formerly levied on is the identical property levied on and sold in the present proceeding.[93] Proof of inability to sell for want of bidders rebuts any presumption of satisfaction,[94] as does inability to sell for want of time to advertise.[95]

Where there are several executions in the sheriff's hands, a levy of one of them on sufficient personal property to satisfy all does not create a presumption of satisfaction of those executions not levied.[96]

73. Ill.—Montgomery v. Wayne, 14 Ill 373.
23 C.J. p 818 note 67.

74. N.Y.—Taylor v. Ranney, 4 Hill 619.
Tenn.—Fuller v. Watkins, 11 Heisk. 489.

75. Ark.—Anderson v. Fowler, 8 Ark. 388.
W.Va.—North Western Bank v. Hays, 16 S.E. 561, 37 W.Va. 475.

76. Ill.—Harris v. Evans, 81 Ill. 419.
23 C.J. p 818 note 70.

77. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
N.Y.—Peck v. Tiffany, 2 N.Y. 451.

78. U.S.—Starr v. Moore, C.C.Ind., 22 F.Cas.No.13,315, 3 McLean 354.
23 C.J. p 818 note 72.

79. Va.—Paine v. Tutwiler, 27 Gratt. 440, 68 Va. 440.
23 C.J. p 818 note 73.

80. Ga.—Rawson v. Davis, 36 Ga. 511—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358—Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.
23 C.J. p 819 note 74.

81. Wash.—Adams v. National Bank of Commerce, 70 P. 105, 30 Wash. 20.
23 C.J. p 819 note 75.

82. Miss.—Wade v. Watt, 41 Miss. 248.
23 C.J. p 819 note 76.

83. Minn.—Willis v. Jelineck, 6 N. W. 373, 27 Minn. 18.
23 C.J. p 819 note 77.

Dismissal and return of property

A showing that the levy was dismissed at the instance of the plaintiff in the execution, that the property was returned to the debtor, and that the execution had not been paid sufficiently accounts for the levy to rebut a presumption of satisfaction. —Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.

84. Ill.—Martin v. Charter, 27 Ill. 294.
23 C.J. p 819 note 78.

85. Ala.—Rapier v. Gulf City Paper Co., 69 Ala. 476.
Miss.—Walker v. McDowell, 12 Miss. 118, 43 Am.D. 476.

86. Tex.—Cornelius v. Burford, 28 Tex. 202, 91 Am.D. 309.

87. N.Y.—Mickles v. Haskin, 11 Wend. 125.

88. Cal.—Mulford v. Estudillo, 32 Cal. 131.
23 C.J. p 819 note 81.

89. N.Y.—Piper v. Elwood, 4 Den. 165.

90. Mo.—Groschke v. Bardenheimer, 15 Mo.App. 353.
23 C.J. p 820 note 83.

91. Mo.—Young v. Schofield, 34 S.W. 497, 132 Mo. 650.
23 C.J. p 820 note 84.

92. Ga.—Jenkins v. Swicord, 104 S. E. 18, 25 Ga.App. 640.
23 C.J. p 820 note 85.

93. S.C.—Lawrence v. Wofford, 17 S.C. 586.

94. U.S.—Morton v. Smith, C.C.Neb., 17 F.Cas.No.9,867, 2 Dill. 316.
Pa.—Peddler v. Hollinshead, 9 Serg. & R. 277.

95. U.S.—Beebe v. U. S., Ala., 16 S. Ct. 532, 161 U.S. 104, 40 L.Ed. 636.

96. Miss.—Banks v. Evans, 18 Miss. 35, 48 Am.D. 734.

b. Real Property

In some jurisdictions the levy of an execution on land of sufficient value to satisfy the execution raises a presumption of satisfaction, but as a general rule such a levy does not operate even prima facie as a satisfaction.

In some jurisdictions it has been held that the levy of an execution on land of sufficient value to satisfy the execution raises a presumption of satisfaction, as in the case of a levy on personal property,[97] but is not an absolute satisfaction.[98] As a general rule, however, a levy on land does not operate even prima facie as a satisfaction;[99] there can be no satisfaction of an execution levied on real estate until the purchaser gets a good title at the sale.[1]

Elegit, extent, and liberari facias. Except as otherwise provided by statute,[2] where there is a levy by extent[3] or liberari facias,[4] a delivery of seizin, and a return of the writ, the execution is satisfied. A return of "lands delivered" on an elegit, is a legal satisfaction.[5]

c. In Favor of Third Persons

A levy of an execution operates as a satisfaction in favor of third persons whenever it operates as a satisfaction in favor of defendant, and in some circumstances may operate as a satisfaction in favor of third persons, such as junior lienholders or subsequent bona fide purchasers, although not amounting to a satisfaction in favor of defendant.

The levy of an execution on sufficient property to satisfy the same operates as a satisfaction in favor of third persons who may be interested in having the execution satisfied, whenever it operates as a satisfaction in favor of defendant;[6] and even when the circumstances are such that there is no satisfaction in favor of defendant there may be a satisfaction in favor of third persons.[7]

Junior lienholders and purchasers. A levy not amounting to a satisfaction of the execution in favor of defendant may, nevertheless, operate as a satisfaction in favor of third persons holding liens, by subsequently issued execution or otherwise, junior to the lien of the execution plaintiff, or of subsequent bona fide purchasers.[8] The rights of junior lienholders and subsequent purchasers cannot be prejudiced by a release or surrender of the property levied on without their consent,[9] or by unreasonable delay in proceeding to a sale under the execution.[10]

§ 337. Execution Sale

An execution is satisfied to the extent of the proceeds of the sale, even where the sheriff makes no return or a false return or misapplies the money. An execution sale does not operate as a satisfaction if by reason of substantial defects in the proceedings no title passes to the purchaser.

When property is levied on and sold under an execution, it is a satisfaction of the execution to the extent of the proceeds of the sale.[11] If a sum is realized equal to the amount due, the execution is thenceforth functus officio,[12] and a subsequent sale of other property under another execution is void.[13] It is immaterial that the purchaser is the judgment creditor.[14] If the officer chooses to give credit to the purchaser, it is still a satisfaction of the execution to the amount of the sale, especially when done with the concurrence of the execution plaintiff.[15]

On the other hand, if not enough is realized on the sale to pay the debt, the execution is not satisfied as to the balance.[16]

Irregular or defective proceedings. An execution sale is a satisfaction of the execution to the

97. Ind.—Neff v. Hagaman, 78 Ind. 57.
23 C.J. p 820 note 91.

98. Ark.—Black v. Nettles, 25 Ark. 606—Trapnall v. Richardson, 13 Ark. 543, 58 Am.D. 338.

99. U.S.—U. S. v. Dashiel, Tex., 3 Wall. 688, 18 L.Ed. 268.
23 C.J. p 820 note 93.

Reason for rule is that the sheriff gets no qualified property in lands levied on, as is the case in a levy on personalty, but the debtor still holds title and possession.—Shepard v. Rowe, 14 Wend., N.Y., 260—23 C.J. p 820 note 94.

1. R.I.—East Greenwich Sav. Inst. v. Allen, 47 A. 885, 22 R.I. 337.
23 C.J. p 820 note 95.

2. Conn.—Cowles v. Bacon, 21 Conn. 451, 56 Am.D. 371.
23 C.J. p 820 note 96.

3. Mass.—Wareham Sav. Bank v. Vaughan, 133 Mass. 534—Ladd v. Blunt, 4 Mass. 402.

4. Pa.—Barnet v. Washebaugh, 16 Serg. & R. 410.

5. Del.—Hinesly v. Hunn, 5 Del. 236.
23 C.J. p 821 note 97 [c].

6. Ga.—Newsom v. McLendon, 6 Ga. 302.
Miss.—Brown v. Kidd, 34 Miss. 291.

7. Ga.—Newsom v. McLendon, 6 Ga. 392.
S.D.—Tolerton & Stetson Co. v. Petrie, 82 N.W. 199, 12 S.D. 595.

8. Ga.—Chisolm v. Chittenden, 45 Ga. 213—Newsom v. McLendon, 6 Ga. 392.

9. N.J.—Johnson v. Tuttle, 9 N.J. Eq. 365.
23 C.J. p 821 note 10.

10. N.Y.—Hayden v. State Prison, 1 Sandf.Ch. 195.

11. Nev.—Tonopah Banking Corp. v. McKane Min. Co., 103 P. 230, 31 Nev. 295.
23 C.J. p 821 note 12.

12. Ga.—Jinks v. American Mortg. Co., 28 S.E. 609, 102 Ga. 694.

13. Nev.—Tonopah Banking Corp. v. McKane Min. Co., 103 P. 230, 31 Nev. 295—Tonopah Banking Corp. v. Red Rock Cons. Min. Co., 103 P. 232, 31 Nev. 301.

14. Nev.—Tonopah Banking Corp. v. McKane Min. Co., supra.
23 C.J. p 821 note 17.

15. Ill.—McCluskey v. McNeely, 8 Ill. 578.

16. Ill.—Chandler v. Higgins, 109 Ill. 602.

extent of the proceeds whether or not the sheriff makes return to the execution,[17] or even though he makes a false return,[18] or misapplies the money.[19]

A sale does not operate as a satisfaction of the execution, however, where, by reason of any substantial defects in the execution or proceedings thereon, no title passes to the purchaser.[20] Thus a sale does not operate as a satisfaction where there has been no conveyance or binding contract to convey, and the bidder has not paid his bid.[21] Likewise, if the purchaser does not make good his bid, and the resale is not made in time to fix liability on the bidder at the prior sale, the writ has been held not satisfied to the extent of the first bid.[22] However, where the amount bid is not paid, and the sale is not set aside, but a deed is executed to the purchaser, it has been held that the writ must be considered satisfied to the extent of the sum bid.[23]

Misconduct on the part of the creditor in stifling competition at the sale has been held not to render the sale a satisfaction.[24]

§ 338. Arrest of Debtor under Execution against the Person

A taking of the debtor's body in execution prima facie discharges the debt and completely suspends further action to satisfy the judgment during the debtor's imprisonment. Unless otherwise provided by statute, a debtor's discharge from imprisonment with the consent or by order of plaintiff constitutes a satisfaction of the judgment debt and execution.

A taking of the body of the debtor in execution operates as a prima facie discharge of the debt and as a complete suspension of further action on the part of the judgment creditor against the imprisoned debtor to satisfy his judgment during the imprisonment of the debtor.[25] If there are several defendants, however, a capias against one does not bar plaintiff from taking out execution against the others liable on the same judgment.[26]

Release or escape of debtor. Unless it is otherwise provided by statute,[27] a discharge of a debtor from imprisonment with the consent or by order of plaintiff constitutes a satisfaction of the judgment debt, and of the execution therefor;[28] and this rule applies notwithstanding any agreement to the contrary by the parties.[29] Where there is only a conditional liberation, however, under a promise to return if the terms are not complied with, and an actual return into custody in pursuance of the agreement, there is no satisfaction.[30]

There is no satisfaction if the imprisonment is terminated without the consent of the execution creditor,[31] as by an escape,[32] or by reason of the creditor's refusal to pay jail fees,[33] or if the debtor obtains his discharge by force or fraud.[34] Subsequent assent by the creditor to the escape of the debtor, and an agreement that he may remain at large, does not satisfy the judgment.[35]

§ 339. Release or Discharge without Satisfaction

A sheriff cannot discharge an execution if the judgment is not satisfied, and he cannot accept part in full satisfaction unless the creditor authorizes or ratifies such a compromise. The plaintiff in an execution which has been levied may for a valuable consideration release the property from the levy and from future levies. By some statutes, a release by the plaintiff for a valuable consideration is a satisfaction of the execution to the extent

17. Ind.—State v. Salyers, 19 Ind. 432.

18. Ind.—State v. Salyers, supra.

19. Miss.—Reynolds v. Ingersoll, 19 Miss. 249, 49 Am.D. 57—Planters' Bank v. Spencer, 11 Miss. 305.

20. Tex.—Townsend v. Smith, 20 Tex. 466, 70 Am.D. 400.
23 C.J. p 822 note 19.
However, it has been held that the fact that defendant was not the owner of the property sold, and that the real owner has recovered from the officer and the execution creditor the proceeds of the sale, is immaterial. —Jones v. Burr, 36 S.C.L. 147, 53 Am. D. 699—Perry v. Williams, 23 S.C.L. 44.

21. Ind.—Chapman v. Harwood, 8 Blackf. 82, 44 Am.D. 736.
23 C.J. p 822 note 21.
Where title not in debtor
A fortiori, where the execution debtor did not have title and the bidder for this reason refuses to pay his bid, the execution is not satisfied.—Scott v. Aultman Co., 71 N.E. 1112, 211 Ill. 612, 103 Am.S.R. 215, affirming 113 Ill.App. 581.

22. S.C.—Lewis v. Richardson, 40 S. C.L. 382.

23. Ala.—Moore v. Barclay, 18 Ala. 672.

24. Conn.—Spencer v. Champion, 13 Conn. 11.
23 C.J. p 812 note 60.

25. Ohio.—Bowrell v. Zigler, 19 Ohio 362.
23 C.J. p 822 notes 26, 28.
Bill in equity to reach defendant's equitable estate cannot be filed while he is in custody.
N.H.—Tappan v. Evans, 11 N.H. 311.
N.Y.—Stilwell v. Van Epps, 1 Paige 615.

26. Mass.—Porter v. Ingraham, 10 Mass. 88.
23 C.J. p 822 note 29.

27. N.H.—Abbott v. Osgood, 38 N. H. 280.
23 C.J. p 822 note 30.

28. Ala.—State v. Richardson, 18 Ala. 109.
23 C.J. p 822 note 31.

29. N.Y.—Bonesteel v. Garlinghouse, 60 Barb. 338.
23 C.J. p 822 note 32.

30. Mass.—Little v. Newburyport Bank, 14 Mass. 443.

31. Mich.—Baehr v. Decker, 274 N. W. 339, 340, 280 Mich. 590, quoting **Corpus Juris.**
23 C.J. p 823 notes 33, 34.

32. Ill.—Wiltshire v. Lambert, 44 Ill.App. 473, affirmed 33 N.E. 538, 144 Ill. 517.
23 C.J. p 823 note 34 [a].

33. Mich.—Baehr v. Decker, 274 N. W. 339, 340, 280 Mich. 590, quoting **Corpus Juris.**
23 C.J. p 823 note 35.

34. N.H.—Abbott v. Osgood, 38 N. H. 280.
23 C.J. p 823 note 36.

35. N.Y.—Sweet v. Palmer, 16 Johns. 181.
23 C.J. p 823 note 37.

of the property released, in so far as purchasers and creditors are concerned.

A sheriff cannot discharge an execution if the judgment has not been satisfied;[36] nor is he authorized to accept part in full satisfaction,[37] unless the creditor authorizes such a compromise, or subsequently ratifies it.[38]

Where an assignment to the execution creditor for the benefit of creditors is made by the execution debtor after a levy, and the assignment is void, the payment by the creditor on a junior writ discharges the lien of the older writ which he held on property of the judgment debtor in the hands of a bona fide purchaser for value without notice.[39]

Release for valuable consideration. The plaintiff in an execution which has been levied may for a valuable consideration release the levy and bind himself and subsequent transferees of the execution not to make a subsequent levy of the execution on the property.[40] By statute in some jurisdictions, a release by a plaintiff in execution, for a valuable consideration, of property subject to the execution is a satisfaction of the execution to the extent of the property so released, in so far as purchasers and creditors are concerned.[41] The consideration contemplated by the statute is money or something convertible to money or having a money value, except marriage,[42] and must flow to the plaintiff in execution.[43] A mere incidental benefit received by a third person is not sufficient.[44]

The acceptance of a sum from one of several joint defendants and an agreement to release him from further liability also releases the other defendants and discharges the execution,[45] and a payment of money in consideration of a release of several executions will support the release in respect of all although credited on only one of them.[46]

An unexplained dismissal of a levy creates, under some statutes, a presumption that the execution has been satisfied,[47] but the presumption may be rebutted.[48]

§ 340. Applying or Indorsing Payments

Payment of an execution satisfies it without regard to whether the officer pays the money over to the creditor or misapplies it, although defendant is estopped to claim satisfaction if he consents to a misapplication. Payment is satisfaction although not indorsed on the writ.

Payment of an execution satisfies it without regard to whether the officer pays it over to the creditor or misapplies it,[49] and the debtor cannot reclaim the money before it is paid over.[50] If defendant consents to the sheriff's misapplication of the money, however, defendant is estopped to claim that the debt is satisfied.[51]

If a payment to the officer is conditional, he has no right to apply it in satisfaction of the writ where the condition is not performed.[52] A direction to an officer by the execution creditor to pay over the money collected for his benefit, on an execution against him, has been held not to be a payment where the creditor in the latter execution is not a party, and has not agreed, to any such arrangement.[53]

Where several executions have issued against a judgment debtor, he may, on making a payment to the officer, direct its application, and it must be applied as he directs.[54] The rule that a creditor hav-

36. Pa.—Miles v. Richwine, 2 Rawle 199, 19 Am.D. 638.
23 C.J. p 823 note 40.

37. Ohio.—Runyan v. Vandyke, 6 Ohio Dec., Reprint, 601, 7 Am.L. Rec. 8.

38. Ohio.—Runyan v. Vandyke, supra.
23 C.J. p 823 note 43.

39. Ga.—Connell v. Culpepper, 30 Ga. 107.

40. Ga.—Manley v. Ayers, 68 Ga. 507.

41. Ga.—Saunders v. Citizens' First Nat. Bank of Albany, 142 S.E. 127, 165 Ga. 558, answers to certified questions conformed to 142 S.E. 744, 38 Ga.App. 141—Williams v. Brown, 57 Ga. 304.

42. Ga.—Bradley v. De Loach, 167 S.E. 301, 176 Ga. 142—Saunders v. Citizens' First Nat. Bank of Albany, 142 S.E. 127, 165 Ga. 558, answers to certified questions conformed to 142 S.E. 744, 38 Ga.App. 141.

43. Ga.—Bradley v. De Loach, 167 S. E. 301, 176 Ga. 142—Saunders v. Citizens' First Nat. Bank of Albany, 142 S.E. 127, 165 Ga. 558, answers to certified questions conformed to 142 S.E. 744, 38 Ga.App. 141.

44. Ga.—Bradley v. De Loach, 167 S. E. 301, 176 Ga. 142—Saunders v. Citizens' First Nat. Bank of Albany, 142 S.E. 127, 165 Ga. 558, answers to certified questions conformed to 142 S.E. 744, 38 Ga.App. 141.

45. Ga.—Warthen v. Melton, 63 S.E. 832, 132 Ga. 113, 131 Am.S.R. 184—Swicord v. Waxelbaum, 97 S.E. 891, 23 Ga.App. 297.

46. Ga.—Bradley v. De Loach, 167 S.E. 301, 176 Ga. 142.

47. Ga.—Rawson v. Davis, 36 Ga. 511—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358—Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.

48. Ga.—Rawson v. Davis, 36 Ga. 511—Strobel v. Gormley, 178 S.E. 192, 50 Ga.App. 358—Hope v. Underwood, 139 S.E. 110, 37 Ga.App. 139.

49. N.C.—Elliott v. Higgins, 83 N.C. 459.
23 C.J. p 823 notes 50, 51.

50. Ga.—Cloud v. Kendrick, 9 S.E. 1084, 82 Ga. 730.

51. N.C.—Heptinstall v. Medlin, 83 N.C. 16.

52. U.S.—In re Bruce, D.C.N.Y., 158 F. 123.
Or.—Richards v. Nye, 5 Or. 382.
23 C.J. p 823 note 54.

53. Ky.—Cosby v. Worland, 6 B.Mon. 195.

54. S.C.—Adams v. Crimager, 26 S.C. L. 309.

Statute governing application of sale proceeds

A statute fixing the application, as between senior and junior liens, of the proceeds of execution sales does not apply to a voluntary payment to

ing several demands against the debtor may appropriate a payment to the demand which is least secure, unless the debtor at the time of the payment elects to have it appropriated to a different demand, does not apply to an involuntary payment under an execution.[55]

Indorsing payments. Payment of an execution satisfies it although not indorsed on the writ.[56]

§ 341. Entry of Satisfaction

Where the debt has been extinguished and satisfaction has not been entered, the debtor should move to have the entry made. Notice must be given plaintiff. The evidence in a proceeding for the entry of satisfaction must be confined to the issues, and, to warrant an order for entry, evidence of payment must be conclusive.

Where the debt has been extinguished and satisfaction has not been entered, the debtor should move to have the entry made;[57] his remedy is not in equity.[58]

A creditor who has purchased at an execution sale of land may show, before he has received the conveyance, on a rule to show cause why satisfaction should not be entered, that the title was not in defendant, and that defendant was guilty of fraud in representing the title in himself.[59]

Notice. Before a motion to enter satisfaction of, or a credit on, an execution can be made, notice must be given plaintiff.[60]

Evidence. The evidence in a proceeding for entry of satisfaction must be confined to the issues;[61] and entry of satisfaction should not be ordered by the court unless the evidence of payment is conclusive.[62]

Irregular entry. The validity of a satisfaction which has not been entered in a manner prescribed by statute cannot be questioned, it has been held, by a person who was not a party to the cause at the time of the satisfaction.[63]

§ 342. Evidence of Payment or Satisfaction

A sheriff's indorsement of payment on the writ, although not signed and not stating the date, is evidence of payment. A fieri facias which has not been returned is not evidence of satisfaction, but satisfaction may be proved although a return has not been made. A receipt in full or satisfaction indorsed on the writ raises a presumption that the whole amount due was paid before the return day and that the proper person received the money.

A sheriff's indorsement of payment on the writ, although not signed and not stating the date, is evidence of payment.[64] The word "paid," indorsed on an execution without any evidence that it was done by plaintiff or some one acting for him is not sufficient evidence, however, of such payment.[65] An entry of satisfaction by sale to the creditor, made by him, is no evidence of title in his favor;[66] and an indorsement of satisfaction on the writ by the attorney for the execution creditor has been held not evidence against anyone other than the execution creditor.[67]

A fieri facias which has not been returned is not evidence that the debt has been satisfied;[68] but a party may prove an execution satisfied, although it has not been returned.[69]

Evidence of payment and satisfaction of a judgment on which execution had issued has been held admissible on an issue as to the validity of a sale under a subsequent execution on the same judgment.[70]

An admission of payment may sometimes be implied.[71]

Receipt of note or security. Since a sheriff is not permitted, without the consent of the judgment creditor, to receive anything but money in payment of an execution, see supra § 334 a, where he takes a note, indorses it on the execution and then returns it satisfied, the return is not conclu-

the officer by the debtor.—Mississippi Cent. R. Co. v. Harkness, 32 Miss. 203.

55. Mass.—Blackstone Bank v. Hill, 10 Pick. 129.

56. Ga.—Jinks v. American Mortg. Co., 28 S.E. 609, 102 Ga. 694.
N.H.—Stanley v. Nutter, 16 N.H. 22.

57. Miss.—Planters' Bank v. Spencer, 11 Miss. 305.

58. Va.—Morrison v. Speer, 10 Gratt. 228, 57 Va. 228.

59. S.C.—Herbemont v. Sharp, 13 S. C.L. 264.

60. Miss.—Haley v. Williams, 16 Miss. 487.
23 C.J. p 824 note 65.

61. Ala.—Edwards v. Lewis, 16 Ala. 813.
Ga.—Boyd v. McFarlin, 58 Ga. 208.
Evidence of payment or satisfaction see infra § 342.

62. S.C.—Herbemont v. Sharp, 13 S. C.L. 264.

63. Mo.—Bovard v. Bovard, App., 128 S.W.2d 274.

64. Ga.—Perdue v. Fraley, 19 S.E. 40, 92 Ga. 780.
Pa.—Slusher v. Washington County, 27 Pa. 205.
23 C.J. p 824 note 68.

65. Me.—Bartlett v. Sawyer, 46 Me. 317.

66. Ga.—Dickinson v. Solomons, 26 Ga. 684.

67. Va.—Barksdale v. Fitzgerald, 76 Va. 892.

68. Pa.—Borne v. Krumpp, 4 Leg. Gaz. 230.

69. Pa.—Johnson v. Ramsey, 16 Serg. & R. 115.

70. Minn.—Shelley v. Lash, 14 Minn. 498.

71. Tex.—Beardsley v. Hall, 9 Tex. 119.

sive,[72] and, perhaps, not even prima facie,[73] evidence of satisfaction, unless it shows some authority for receiving the note, although as to the latter proposition the contrary has been held.[74] A return showing that the judgment had been satisfied by the judgment debtor is not evidence of such fact where the statement on the return was that security had been taken in satisfaction.[75]

Presumptions. A receipt "in full" by the sheriff,[76] or the single word "satisfied,"[77] indorsed on the execution raises a presumption, in the absence of any proof to the contrary, that the whole amount due has been paid, although by actual calculation the aggregate of all the credits indorsed is less than the sum due.[78] The indorsement of satisfaction on an execution is an equivocal act, however, and is open to explanation by evidence as to the amount actually received.[79]

The return of "satisfied" on an execution raises the presumption that the money due on it was paid before the return day,[80] and that the proper person received the money.[81]

Where receipts for part payments were given by the officer to the debtor, and later there was indorsed on the writ credits for a sum in excess of such receipts, it will be presumed that the sums for which the receipts were given were included in the credits afterward indorsed.[82]

A previous payment and satisfaction of the execution will not be readily presumed as against a purchaser thereunder.[83]

§ 343. Revival after Satisfaction

After an execution has been partly satisfied, the parties cannot, by canceling the receipt, revive it as to the sum paid, to the prejudice of subsequent execution creditors.

After an execution has been partly satisfied, the parties cannot, by canceling the receipt, revive it as to the sum paid, to the prejudice of subsequent execution creditors.[84]

§ 344. Vacating Satisfaction

a. In general
b. Proceedings to obtain

a. In General

If an execution is returned as satisfied when for any reason there has been no satisfaction, and the plaintiff is entitled to another writ, the court may vacate the satisfaction and direct another writ to issue. After entry of satisfaction after a sale, no further execution can be issued on the judgment until the levy, sale, and entry of satisfaction are set aside and a new execution is awarded by order of the court.

If an execution is returned as satisfied, when for any reason there has been no satisfaction, and plaintiff is entitled to another writ, the court may vacate the satisfaction and direct another writ to issue.[85] Thus the indorsement or entry of satisfaction will be vacated where it was made by mistake when in fact there was no satisfaction,[86] where it was made wrongfully by the officer or by any other person without authority,[87] where the money was paid after the return day of the execution,[88] or where the judgment under which the sale took place was reversed.[89] Satisfaction entered on a void execution may be vacated,[90] and if the sale on which the satisfaction has been entered has proved void on account of an informality of the sheriff the entry of satisfaction may be vacated.[91] An entry of satisfaction will not be vacated, however, by reason of the fact that defendant in execution recovered judgment against the sheriff for a wrongful sale of the property and plaintiff paid the judgment, he not being legally obliged to do so.[92]

Where property is sold to satisfy an execution and the execution is returned satisfied although it appears that the title to the property sold was not in defendant, some courts allow a vacation of the

72. Cal.—Mitchell v. Hackett, 14 Cal. 661.

73. Cal.—Mitchell v. Hackett, supra.

74. Mass.—Day v. Stickney, 14 Allen 255.
23 C.J. p 824 note 86.

75. Iowa.—Aultman, Miller & Co. v. McGrady, 12 N.W. 233, 58 Iowa 118.

76. S.C.—Steel v. Atkinson, 14 S.C. 154, 37 Am.R. 728.

77. Iowa.—Aultman, Miller & Co. v. McGrady, 12 N.W. 233, 58 Iowa 118.

78. S.C.—Steel v. Atkinson, 14 S.C. 154, 37 Am.R. 728.

79. Mass.—Lait v. Sears, 115 N.E. 247, 226 Mass. 119.

80. Ala.—Barton v. Lockhart, 2 Stew. & P. 109.
23 C.J. p 824 note 81.

81. Ga.—Gilmore v. Johnson, 29 Ga. 67.

82. S.C.—Boulware v. Witherspoon, 28 S.C.Eq. 450.

83. Ga.—Webb v. Camp, 26 Ga. 354.

84. Ga.—Satterfield v. Boyd, 6 S.E. 583, 81 Ga. 316.
N.J.—Caldwell v. Fifield, 24 N.J.Law 150.

85. Mo.—Laughlin v. Fairbanks, 8 Mo. 367.
23 C.J. p 824 note 91.
Alias, pluries, and renewed writs see supra § 85.

86. Ill.—Sandburg v. Papineau, 81 Ill. 446.
Ky.—Frankfort Bank v. Markley, 1 Dana 373.

87. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.
23 C.J. p 825 note 93.

88. Miss.—Haralson v. Holcombe, 18 Miss. 581.

89. N.Y.—Wallace v. Burdell, 11 N. E. 274, 105 N.Y. 7, affirming 41 Hun 444.

90. Conn.—Stoyel v. Cady, 4 Day 222.
23 C.J. p 825 note 96.

91. Tenn.—Henry v. Keyes, 5 Sneed 488.

92. S.D.—Allen v. Peterson, 111 N.W. 538, 21 S.D. 203.

satisfaction.[93] Other courts, however, deny such relief[94] in the absence of fraud on the part of defendant in his representation of title.[95] At any rate, a right to vacation of satisfaction does not extend to cases where defendant really has an interest in the property and the judgment creditor who purchases gets, without any fraud on the part of defendant,[96] a smaller estate than he contemplated.[97]

Necessity for vacating. After entry of satisfaction of an execution after a sale of property levied on, no further execution can be issued on the judgment until the levy, sale, and entry of satisfaction are set aside and a new execution is awarded by order of the court.[98]

Finality of adjudication. An adjudication that a return of satisfaction should be quashed and that a new execution should issue makes all questions in issue on the hearing of the motion, of which defendant had notice, res judicata.[99] However, failure to obtain relief under a statute does not preclude a resort to equity.[1]

b. Proceedings to Obtain

The usual methods of obtaining a vacation of satisfaction and the issuance of a new execution are by writ of scire facias, bill in equity, or motion or order to show cause. A proceeding to set aside an entry of satisfaction must be brought with due diligence.

The usual methods of obtaining a vacation of satisfaction and the issuance of a new execution are by writ of scire facias,[2] bill in equity,[3] or motion or order to show cause.[4]

A motion to set aside the entry of satisfaction must be served on defendant;[5] and, where property of a third person is sold, the credit on the execution will not be canceled in a proceeding to which the purchaser is not a party, where it does not appear that the money had ever been refunded.[6]

Diligence. A proceeding to set aside the entry of satisfaction must be brought with due diligence.[7]

XIV. SUPPLEMENTARY PROCEEDINGS

§ 345. Nature and Purpose

Supplementary proceedings are statutory proceedings designed to aid judgment creditors in the discovery of the debtor's property and its application in satisfaction of the judgment.

Supplementary proceedings are purely statutory proceedings[8] in which the court where the action is pending is called on to exercise its jurisdiction in aid of the judgment in the action.[9] Such proceedings are said to be an extraordinary remedy,[10] largely equitable in their nature,[11] intended to reach dishonest debtors,[12] and generally are only to be

93. Minn.—Osborne v. Wilson, 32 N. W. 786, 37 Minn. 8.
23 C.J. p 825 note 99.

94. Ohio.—Vattier v. Lytle, 6 Ohio 477.
23 C.J. p 825 note 1.

95. Or.—Poppleton v. Bryan, 58 P. 767, 36 Or. 69.
23 C.J. p 825 note 2.

96. Or.—Poppleton v. Bryan, supra.

97. Iowa.—Holtzinger v. Edwards, 1 N.W. 600, 51 Iowa 383.
Tenn.—Gonce v. McCoy, 49 S.W. 754, 101 Tenn. 587, 70 Am.S.R. 714.

98. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.
23 C.J. p 825 note 5.

Corpus Juris cited in connection with a holding that the rule of the text is not applicable to a case in which the only relief sought is an amendment of an erroneous return to make it conform to the truth.—Louisiana Western Lumber Co. v. Stanford, 156 So. 423, 425, 180 La. 376.

99. Ala.—Saint v. Ledyard, 14 Ala. 244.

1. Tenn.—Swaggerty v. Neilson, 8 Baxt. 32.

2. Mass.—Perkins v. Bangs, 92 N. E. 623, 206 Mass. 408.
23 C.J. p 825 note 6.

3. Tenn.—Swaggerty v. Neilson, 8 Baxt 32.
23 C.J. p 825 note 7.

4. Miss.—Mandeville v. Bracy, 31 Miss. 460.
Tex.—De Witt v. Monroe, 20 Tex. 289.
23 C.J. p 825 note 8.

5. Tex.—De Witt v. Monroe, supra.

6. Ky.—Baker v. Dovyns, 4 Dana 220.

7. Miss.—Haralson v. Holcombe, 18 Miss. 581.
23 C.J. p 825 note 10.

8. Cal.—Bryant v. Bank of California, 7 P. 128, 2 Cal.Unrep.Cas. 475.
La.—Continental Supply Co. v. International Gas Products, 145 So. 119, 176 La. 1.
23 C.J. p 828 note 62.

9. Cal.—Bryant v. Bank of California, 7 P. 128, 2 Cal.Unrep.Cas. 475.
1 C.J. p 944 notes 12, 13.
Supplementary proceedings to collect taxes see the C.J.S. title Taxation § 691, also 61 C.J. p 1064 notes 50–62.

10. S.C.—Ex parte Roddey, 172 S.E. 866, 868, 171 S.C. 489, 92 A.L.R. 1430, quoting **Corpus Juris.**
23 C.J. p 826 note 21.

11. N.Y.—Liberty Storage & Warehouse Co. v. Van Wyck, 1 N.Y.S. 2d 149, 165 Misc. 890.
S.C.—Ex parte Roddey, 172 S.E. 866, 868, 171 S.C. 489, 92 A.L.R. 1430, quoting **Corpus Juris.**
23 C.J. p 826 note 22.

Additional or equitable executions
Supplementary proceedings are in the nature of additional or equitable executions.—Ex parte Roddey, supra, quoting **Corpus Juris**—23 C.J. p 826 note 32.

Quasi-equitable
Under code provisions which abolish the distinction between law and equity, supplementary proceedings are quasi-equitable in character.—The Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, D.C.S.C., 278 F. 816, modified on other grounds, C. C.A., 282 F. 811, certiorari denied Marlboro Cotton Mills v. The Firestone Tire & Rubber Co., 43 S.Ct. 248, 260 U.S. 749, 67 L.Ed. 494.

12. N.J.—Willson v. Salmon, 17 A. 815, 45 N.J.Eq. 257.
23 C.J. p 826 note 23.

resorted to when the ordinary processes of the law are not adequate.[13]

The purpose of supplementary proceedings is to aid judgment creditors in the collection of their judgments.[14] They furnish a method whereby a judgment creditor may obtain a discovery of property of the judgment debtor,[15] either in his possession or control or in the possession or control of another,[16] and have it applied to the satisfaction of the judgment.[17] The purpose, so far as an examination of the judgment debtor is concerned, is to discover property rather than the application of that which is already known.[18] Supplementary proceedings are in part a summary method of purging the debtor's conscience and compelling the disclosure of any property he may have which is not exempt from execution.[19] Such proceedings are not a substitute for an execution but are merely intended to supplement it by reaching assets which could not be obtained thereby.[20]

Supplementary proceedings should not be perverted to other purposes;[21] they are not to be used as a club to enforce settlements of claims which the debtor is without property to pay,[22] or to obtain evidence for use on the trial of another action.[23]

Civil proceedings; proceedings in personam. Supplementary proceedings are civil as distinguished from criminal proceedings.[24] They are proceedings in personam and not in rem;[25] but it has been said that they operate in rem.[26]

Independent proceeding. In some states supplementary proceedings are regarded as a proceeding in the original action, auxiliary and supplementary thereto;[27] in other states they are independent actions or proceedings,[28] particularly where a third

13. Iowa.—Reardon v. Henry, 47 N. W. 1022, 82 Iowa 134.
N.C.—Hinsdale v. Sinclair, 83 N.C. 338.

14. Colo.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.
Fla.—Virginia-Carolina Chemical Corporation v. Smith, 164 So. 717, 121 Fla. 720.
N.Y.—White v. Saphire, 23 N.Y.S.2d 354, 260 App.Div. 638—Bruen v. Goodman, 16 N.Y.S.2d 210, 172 Misc. 775—Cobbe v. Stowe, 13 N.Y.S.2d 651, 171 Misc. 687.

Liquidation of debtor's affairs

The court in supplementary proceedings does not undertake to wind up the debtor's affairs and the procedure is in no sense a fair liquidation, and although it portions out the debtor's assets among those creditors who are parties to action, it does not do so on any basis of equality.—Nick v. Holtz, 297 N.W. 387, 237 Wis. 407.

15. U.S.—Robbins v. Festetics, D.C. N.Y., 299 F. 816.
Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191.
Colo.—Walker v. Staley, 1 P.2d 924, 89 Colo. 292.
Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109—South Florida Trust Co. v. Miami Coliseum Corporation, 133 So. 334, 101 Fla. 1351.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
N.Y.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.
23 C.J. p 826 note 27.

Information as to contents of safe deposit box

Where the sheriff levies execution on the contents of a safe deposit box rented by defendant, necessary information as to the contents of the box may be obtained by bill of discovery.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.

16. Ind.—Earl v. Skiles, 93 Ind. 178.
23 C.J. p 826 note 28.

17. Colo.—Walker v. Staley, 1 P.2d 924, 89 Colo. 292.
Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
N.Y.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.
23 C.J. p 826 note 27.

Distribution to just creditors

Purpose of proceeding supplementary to execution is to aid equity court in reaching tangible and intangible assets of debtor, and to distribute proceeds to just creditors.—Hyman v. Spector, 268 N.Y.S. 342, 150 Misc. 145.

18. Iowa.—Reardon v. Henry, 47 N. W. 1022, 82 Iowa 134.

19. Utah.—Cleverly v. District Court of Second Judicial Dist. in and for Davis County, 39 P.2d 748, 85 Utah 440.
23 C.J. p 826 note 30.

Ability to pay

Design of statute as to supplementary procedure is to provide inquiry into judgment debtor's ability to pay his legal obligation, to relieve him from harassment if found unable to pay, but to compel him to do what an honest man ought to be willing to do if found able to pay in whole or in part.—Goldman v. Adlman, 197 N.E. 632, 291 Mass. 492.

20. S.C.—Ex parte Roddey, 172 S.E. 866, 868, 171 S.C. 489, 92 A.L.R. 1430, quoting **Corpus Juris**—McManus v. Bank of Greenwood, 171 S.E. 473, 171 S.C. 84.
23 C.J. p 826 note 31.

21. N.Y.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.
Va.—Thompson v. Commonwealth, 159 S.E. 98, 156 Va. 1032.

Discovery

Statute authorizing interrogation of judgment debtor cannot be used as substitute for bill of discovery.—Thompson v. Commonwealth, 159 S. E. 98, 156 Va. 1032.

Interrogatories

Statute authorizing interrogation of judgment debtor cannot be used as substitute for interrogatories under different code section.—Thompson v. Commonwealth, supra.

22. N.Y.—Smith v. Cowles, 99 N.Y. S. 747, 114 App.Div. 295.

23. N.Y.—Jones v. Ramsdell, 159 N. Y.S. 209, 174 App.Div. 13—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.
Va.—Thompson v. Commonwealth, 159 S.E. 98, 156 Va. 1032.

24. N.Y.—Feinberg v. Kutcosky, 132 N.Y.S. 9, 147 App.Div. 393.

25. N.Y.—Maltbie v. Lobsitz Mills Co., 119 N.E. 389, 223 N.Y. 227.

26. Ind.—Beavans v. Groff, 5 N.E.2d 514, 211 Ind. 85, 108 A.L.R. 694.

27. Colo.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.
Wash.—Junkin v. Anderson, 120 P. 2d 548—Bank of America Nat. Trust & Savings Ass'n v. Stotsky, 78 P.2d 595, 194 Wash. 513—State v. Superior Court for King County, 277 P. 850, 152 Wash. 323—State v. Hall, 207 P. 685, 120 Wash. 449.
23 C.J. p 826 note 41—1 C.J. p 944 note 13 [b] (2).

28. Fla.—Orange Belt Packing Co. v. International Agr. Corporation, 150 So. 264, 112 Fla. 99.

In New York

(1) Supplementary proceedings are not proceedings in an action or part

person is joined,[29] and the rules of procedure governing civil actions generally are applied.[30] It has been said that a supplementary proceeding is part of the original action in the sense that it proceeds out of and takes the same number on the docket as the original cause, but that it is essentially a new and independent action involving different issues.[31]

Special proceeding. Technically a supplementary proceeding is not a special proceeding where not expressly so designated by statute.[32]

Substitute for creditors' bill. It is generally held that supplementary proceedings are a substitute for, or perform the same functions as, a creditors' bill.[33] In most states all the relief that can be obtained by a creditor's bill may be had in these proceedings,[34] and the general principles prevailing in suits of the nature of creditors' bills are properly applicable to these proceedings so far as they have not been changed by statute or are not obviously inconsistent with the new remedy;[35] but, unlike creditors bills, supplementary proceedings operate only for the benefit of the creditors who institute the proceedings.[36]

Substitute for capias or garnishment. In some jurisdictions supplementary proceedings are deemed a substitute for the capias ad satisfaciendum which formerly existed.[37] They are sometimes deemed analogous to, and in most aspects a substitute for, the process of garnishment.[38]

§ 346. Constitutional and Statutory Provisions

Statutes as to supplementary proceedings are generally held to be valid and to apply to the enforcement of judgments rendered prior to the effective date of the statute.

According to some authorities statutes providing for supplementary proceedings are in derogation of the common law[39] and must be strictly construed;[40] the remedy cannot be enlarged by construction nor be made available or valid except by

of the original action.—Dunn v. Seidenschwarz, 18 N.Y.S.2d 264, 173 Misc. 495—23 C.J. p 827 note 51.

(2) Orders therein are not orders in the action.—Harris v. Weiss, 105 N.Y.S. 8.

(3) However, an order requiring the judgment debtor to appear for examination is an order in an action so far as to authorize its service in any part of the state.—Deane v. Sire, 95 N.Y.S. 556, 48 Misc. 606.

(4) Under the former code they were proceedings in the action in which the judgment was recovered, and were held to be in the nature of new remedies or equitable rights, arising by force of the statute, in the action in which the judgment had been recovered.—Wright v. Nostrand, 94 N.Y. 31—23 C.J. p 827 notes 46, 47.

29. Ind.—Hobbs v. Eaton, 78 N.E. 333, 38 Ind.App. 628.
23 C.J. p 827 note 43.
Third persons as parties to proceedings see infra § 348.

30. Ind.—Abell v. Riddle, 75 Ind. 345.
23 C.J. p 827 note 44.

31. Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191.
N.M.—Hammond v. District Court of Eighth Judicial Dist. of New Mexico, 228 P. 758, 30 N.M. 130, 39 A.L.R. 1490.

32. S.C.—Dauntless Mfg. Co. v. Davis, 24 S.C. 536—Kennesaw Mills Co. v. Walker, 19 S.C. 104.
"Special proceeding" defined see Actions § 1 b (7).
Special proceedings and actions distinguished see Actions § 42.

In New York

(1) Under the present code supplementary proceedings are designated as special proceedings.—Dunn v. Seidenschwarz, 18 N.Y.S.2d 264, 173 Misc. 495—Kommel v. Karron, 283 N.Y.S. 953, 157 Misc. 557—Los Angeles Inv. Securities Corporation v. Joslyn, 12 N.Y.S.2d 370—23 C.J. p 827 note 49.

(2) As such they bear some analogy to an ordinary action.—Sinnott v. Hempstead First Nat. Bank, 54 N.Y.S. 417, 34 App.Div. 161—Jones v. Sherman, 11 N.Y.Civ.Proc. 416, 18 Abb.N.Cas. 461.

(3) Formerly supplementary proceedings were held not to be special proceedings.—Dresser v. Van Pelt, 15 How.Pr. 19.

33. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F.2d 762.
Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 151 Ariz. 191.
Cal.—Booge v. First Trust & Savings Bank of Pasadena, Super., 116 P.2d 503—McCutcheon v. Superior Court in and for Los Angeles County, 24 P.2d 911, 134 Cal.App. 5.
Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109—George E. Sebring Co. v. O'Rourke, 134 So. 556, 101 Fla. 885.
N.Y.—Smith v. Meader Pen Corporation, 8 N.Y.S.2d 39, 255 App.Div. 397, reversing 6 N.Y.S.2d 919, 169 Misc. 238, affirmed 20 N.E.2d 13, 280 N.Y. 554.
N.C.—Dillard v. Walker, 167 S.E. 632, 204 N.C. 67.
Utah.—Cleverly v. District Court of Second Judicial Dist. in and for Davis County, 39 P.2d 748, 750, 85 Utah 440, citing **Corpus Juris.**
23 C.J. p 827 note 55—1 C.J. p 944 note 13 [b] (1), (3).
Supplementary proceedings as superseding or abolishing creditors' suits see Creditors Suits § 5.

Equity proceeding as supplementary proceeding

Where supplementary proceedings supersede the remedy by suit in equity, an action, although formally a suit in equity, to seize judgment debtor's interest in trust property, is substantially a statutory proceeding supplemental to execution.—Knettle v. Knettle, 3 P.2d 133, 164 Wash. 468.

In nature of creditor's bill

Supplementary proceedings are of equitable cognizance in nature of creditor's bill.—Washington Trust Co. v. Blalock, 285 P. 449, 155 Wash. 510.

34. Cal.—McCutcheon v. Superior Court in and for Los Angeles County, 24 P.2d 911, 134 Cal.App. 5.
23 C.J. p 827 note 56—15 C.J. p 1386 note 37 [b] (2).

35. N.C.—Dillard v. Walker, 167 S.E. 632, 204 N.C. 67.
23 C.J. p 827 note 57.

36. N.C.—Dillard v. Walker, supra.

37. W.Va.—Lewis v. Rosier, 19 W.Va. 61.

38. N.C.—La Fountain v. Southern Underwriters' Assoc., 79 N.C. 514.

39. Ind.—West v. State, 79 N.E. 361, 168 Ind. 77.
23 C.J. p 828 note 63.

40. R.I.—Morris Plan Co. of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.
23 C.J. p 828 note 65.

strictly following the directions of the statute;[41] and any step taken therein must be authorized by the statute.[42] However, it has also been stated that such statutes are remedial and should be liberally construed.[43]

Statutes relating to supplementary proceedings will be construed so as to give effect to every one of them;[44] where they conflict, the statute most recently enacted will prevail.[45]

Although the statutes in the several states are by no means uniform in all particulars, the most comprehensive statutory provision for supplementary proceedings, that existing in New York, has been copied to a considerable extent in several other states.[46]

Validity of statutes. Statutes providing for or governing supplementary proceedings have generally been held valid.[47] A federal statute authorizing supplementary proceedings in accordance with the state practice for the collection of judgments recovered in common-law actions in the United States courts does not conflict with the provisions of the federal constitution recognizing the distinctions between law and equity;[48] nor is a statute authorizing a probate judge, when not sitting in court, to entertain supplementary proceedings in aid of an action pending in another court a violation of a constitutional provision prescribing and limiting the jurisdiction of the probate court.[49]

An act which makes no provision that no answer which the debtor may be required to make shall be used against him in any criminal prosecution is in violation of a constitutional provision that no person shall be compelled to give testimony which may incriminate him.[50] Conversely, where such a provision is made, the statute is constitutional.[51] A statute authorizing the court to permit the judgment creditor to sue a third person who is a debtor of the judgment debtor is void where it fails to provide for notice to the judgment debtor before such permission is given.[52]

Retrospective effect. Statutes governing supplementary proceedings are generally held to be retrospective and to apply to proceedings for the collection of judgments rendered before the statute became effective,[53] unless they give a remedy where none existed before.[54]

§ 347. Persons Entitled to Maintain Proceedings

Supplementary proceedings may be maintained by such persons as the judgment creditor, his agent, assignee, or representative.

Supplementary proceedings may be maintained by the judgment creditor,[55] and, where such proceedings are authorized by statute, the judgment creditor is entitled as of right to pursue such remedy.[56] The

41. N.Y.—Maltbie v. Lobsitz Mills Co., 119 N.E. 389, 223 N.Y. 227.

42. Mont.—Johnson v. Lundeen, 200 P. 451, 61 Mont. 145.
N.Y.—Heyl v. Taylor, 117 N.Y.S. 916, 64 Misc. 31.

43. U.S.—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F. 2d 762.
Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733.
N.Y.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.

44. N.Y.—Hecht v. Sanger, 215 N.Y.S. 409, 126 Misc. 785, reversed on other grounds 218 N.Y.S. 675, 128 Misc. 380.

45. Wash.—Junkin v. Anderson, 120 P.2d 548.

46. Wis.—Enders v. Smith, 100 N.W. 1061, 122 Wis. 640.
23 C.J. p 828 note 60.

47. Fla.—Reese v. Baker, 123 So. 3, 98 Fla. 52.
Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

Statutes held valid

(1) Statute providing that an order may be granted without notice to the judgment debtor requiring him to submit to an examination as to his property.—South Florida Trust Co. v. Miami Coliseum Corporation, 133 So. 334, 101 Fla. 1351.

(2) Statute providing for the commitment of the judgment debtor for failure to disclose property.
Fla.—Reese v. Baker, 123 So. 3, 98 Fla. 52.
La.—Fithian v. Centanni, 106 So. 321, 159 La. 831.

(3) Statute providing that a third party served with a subpœna shall thereby be enjoined from disposing of any property of the judgment debtor.—Capital Co. v. Fox, C.C.A.N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming order, D.C., 15 F.Supp. 677.

(4) Statute authorizing the court to order the judgment debtor to make installment payments in satisfaction of the judgment out of his income, and providing that the debtor may be punished for contempt of court if he disobeys such order.—Reeves v. Crownshield, 8 N.E.2d 283, 274 N.Y. 74, 111 A.L.R. 889, affirming 292 N.Y.S. 756, 162 Misc. 118—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App.Div. 545.

Trustee for distribution of nonexempt wages

Statute providing for the appointment of a trustee on application of the debtor for distribution pro rata among creditors and authorizing prohibition of proceedings by way of attachment or otherwise in aid of execution is valid.—McWhorter v. Curran, 13 N.E.2d 362, 57 Ohio App. 233.

48. U.S.—Ex parte Boyd, N.Y., 105 U.S. 647, 26 L.Ed. 1200.

49. Kan.—Young v. Ledrick, 14 Kan. 92.

50. Pa.—Horstman v. Kaufman, 97 Pa. 147, 39 Am.R. 802.

51. Pa.—Pennock v. West, 23 Pa. Dist. 1062, 43 Pa.Co. 16, distinguishing Horstman v. Kaufman, 97 Pa. 147, 39 Am.R. 802.

52. Cal.—Bryant v. State Bank, 8 P. 644, 2 Cal.Unrep.Cas. 567.

53. N.Y.—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App. Div. 545—Kommel v. Karron, 283 N.Y.S. 953, 157 Misc. 557—Scheuer v. Eisenstein, 8 N.Y.S.2d 247.
23 C.J. p 828 note 71.

54. N.Y.—Braun v. Korostoff, 296 N.Y.S. 839, 163 Misc. 882—Gotham Nat. Bank of New York v. Strunsky, 293 N.Y.S. 961, 162 Misc. 673.

55. N.Y.—Clark v. Shaw, 154 N.Y.S. 1101, 91 Misc. 245.
23 C.J. p 829 note 3.

56. Ohio.—Sam Savin, Inc., v. Burd-

judgment creditor is the only one who can institute the proceedings.[57] That is, the proceedings may be maintained only by a judgment creditor as distinguished from a simple contract creditor,[58] and as distinguished from a person who is neither a judgment creditor nor a person authorized to act for him.[59] The term "judgment creditor" as used in this connection is broad enough to signify a person who is authorized or entitled to collect or otherwise enforce a money judgment.[60] One subrogated to the judgment creditor's rights may maintain such proceedings.[61]

Supplementary proceedings cannot be instituted by a person in his individual capacity against himself in his representative capacity.[62]

Agent, attorney, or representative of creditor. The duly authorized agents of the judgment creditor,[63] such as his attorney,[64] may institute supplementary proceedings, as may the personal representatives of a deceased judgment creditor,[65] and it is not necessary that the latter should have the judgment revived or continued before proceeding to enforce it.[66]

If the authority of an attorney has ended with the death of plaintiff, proceedings thereafter must be taken in the name of the personal representatives or successors in interest of deceased plaintiff.[67] Where the attorney has a lien on the judgment for his own costs and fees, which his client refuses to pay, he may enforce the judgment through these proceedings to collect the sum due to him.[68]

Assignee of judgment. Supplementary proceedings may be maintained by an assignee of the judgment,[69] either in his own name, or in the name of his assignor, the original judgment creditor.[70] He may maintain the proceedings even where the assignment was made after the return of execution unsatisfied,[71] and notwithstanding the death of the original judgment creditor.[72]

Receiver. Where the judgment creditor is a corporation in the hands of a receiver, the receiver may institute supplementary proceedings in the name of the corporation.[73] After the title to the judgment has passed from the client to a receiver, an attorney must procure leave of the court to institute the proceedings.[74]

A receiver appointed in supplementary proceedings is not entitled to seek an examination of a third person in the supplementary proceedings.[75]

Stockholders. A minority stockholder who recovers a judgment in favor of the corporation against its directors may bring supplementary proceedings on behalf of the corporation to collect the judgment.[76]

§ 348. Persons against Whom Proceedings May Be Maintained

Supplementary proceedings ordinarily may be maintained against any judgment debtor, but whether such proceedings are available against a corporate judgment debtor depends on the statutes in the particular jurisdiction.

If the requisite jurisdictional facts exist, ordinarily supplementary proceedings may be maintained against any judgment debtor,[77] including infants,[78] a lunatic,[79] or trustees against whom judgment has been recovered as such,[80] and, it seems, a sheriff against whom execution has is-

sal, 22 N.E.2d 914, 61 Ohio App. 539.

57. N.Y.—Title Guarantee & Trust Co. v. Brown, 121 N.Y.S. 891, 136 App.Div. 843—Kemp v. Gartenberg, 156 N.Y.S. 883.

58. N.C.—Righton v. Pruden, 73 N. C. 61, followed in La Fountain v. Southern Underwriters' Assoc., 79 N.C. 514.

59. N.Y.—Title Guarantee & Trust Co. v. Brown, 121 N.Y.S. 891, 136 App.Div. 843.

60. N.Y.—Kemp v. Gartenberg, 156 N.Y.S. 883.

61. N.Y.—Munch Brewery v. Grief, 11 N.Y.S.2d 126, reversing 6 N.Y.S. 2d 989, 169 Misc. 382.

62. N.Y.—In re Livingston, 27 Hun 607.

63. N.Y.—Hawes v. Barr, 30 N.Y. Super. 452.

64. Ind.—Eden v. Everson, 65 Ind. 113.

N.Y.—Ward v. Roy, 69 N.Y. 96.
23 C.J. p 830 note 14.

65. N.Y.—Collier v. De Revere, 7 Hun 61.
23 C.J. p 830 note 15.

66. N.Y.—Pardee v. Tilton, 20 Hun 76, 58 How.Pr. 476—Walker v. Donovan, 6 Daly 552, 53 How.Pr. 3.

67. N.Y.—Amoré v. La Mothe, 5 Abb. N.Cas. 146.

68. N.Y.—Russell v. Somerville, 10 Abb.N.Cas. 395.
23 C.J. p 830 note 18.

69. N.Y.—In re National Bank of Oxford, 16 N.Y.S.2d 429.
23 C.J. p 829 note 8.

70. N.Y.—Kemp v. Gartenberg, 156 N.Y.S. 883.

71. N.Y.—Ross v. Clussman, 5 N.Y. Super. 676, Code Rep.,N.S., 91.
23 C.J. p 829 note 11.

72. N.Y.—Crill v. Kornmeyer, 56 How.Pr. 276, following Ross v. Clussman, 1 Code Rep.,N.S., 91.

73. N.Y.—Wright v. Nostrand, 94 N. Y. 31.

74. N.Y.—Moore v. Taylor, 2 How. Pr.,N.S., 343.

75. N.Y.—Rosenblum v. Marmur, 245 N.Y.S. 283, 230 App.Div. 468.

76. N.Y.—Earl v. Brewer, 289 N.Y. S. 150, 248 App.Div. 314, reversing 282 N.Y.S. 922, 156 Misc. 881, affirmed 8 N.E.2d 339, 273 N.Y. 669.

77. N.Y.—Logan v. McCall Pub. Co., 35 N.E. 655, 140 N.Y. 447, 23 N.Y. Civ.Proc. 250.
Judgment against estate as basis for supplementary proceedings see infra § 360.

78. N.Y.—Lederer v. Ehrenfeld, 49 How.Pr. 403.

79. N.J.—Wilkinson v. Markert, 47 A. 488, 65 N.J.Law 518, 521.
23 C.J. p 830 note 25.

80. N.Y.—Matter of Gough, 52 N. Y.S. 627, 31 App.Div. 307.

sued.[81] The proceedings may be maintained against a married woman.[82] The proceedings may be maintained against joint debtors,[83] or against one or more of several debtors;[84] but a discharged bankrupt[85] or a foreign consul[86] will not be compelled to submit to an examination in supplementary proceedings.

After a judgment against a corporation, where the judgment creditor is permitted to issue execution against stockholders, the stockholders are not judgment debtors as against whom supplementary proceedings may be maintained.[87]

Corporations. Whether supplementary proceedings may be maintained against a corporation which is the judgment debtor depends on the statutes and practice of the jurisdiction in which the remedy is sought; in some jurisdictions the remedy has been allowed,[88] while in others it has been denied.[89]

Municipal corporations are not subject to examination as a judgment debtor, where it is not expressly so provided by statute.[90]

Third persons. Where the statute so provides, the court has the power to bring in and implead third persons when relief against them seems warranted.[91] The examination of third persons in supplementary proceedings is treated infra § 362.

§ 349. Property or Rights Which May Be Reached

As a general rule any property owned by the judgment debtor can be reached by supplementary proceedings.

The general rule is that supplementary proceedings are broad enough to reach any property of the judgment debtor,[92] real or personal.[93] In some

81. N.Y.—Potts v. Davidson, 1 How. Pr.,N.S., 216.

82. N.Y.—Thompson v. Sargent, 15 Abb.Pr. 452.
S.C.—Clinkscales v. Hall, 15 S.C. 602.

83. N.C.—Weiller v. Lawrence, 81 N.C. 65.

84. W.Va.—Lewis v. Rosen, 19 W. Va. 61.
23 C.J. p 830 note 32.

85. N.Y.—Leo v. Joseph, 9 N.Y.S. 612.
23 C.J. p 830 note 33.

86. N.Y.—Griffin v. Dominguez, 9 N.Y.Super. 656, 11 N.Y.Leg.Obs. 285.

87. Kan.—Hentig v. James, 22 Kan. 326.

88. S.D.—South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co., 56 N.W. 98, 4 S.D. 173.
23 C.J. p 830 note 37.

89. Mass.—B. F. Huntley Furniture Co. v. Parker, 196 N.E. 925, 291 Mass. 339.
Pa.—Commercial Nat. Bank & Trust Co. v. American Kid Co., 16 Pa. Dist. & Co. 799—Kohn, Adler & Co. v. I. Hyman & Co., 9 Pa.Dist. & Co. 3.
23 C.J. p 830 note 38.

In New York

(1) Supplementary proceedings may be maintained against corporations.—Boucker Contracting Co. v. Callahan Contracting Co., 113 N.E. 257, 258, 218 N.Y. 321—23 C.J. p 831 note 43.

(2) The provisions of the old code relating to supplementary proceedings applied to natural persons only. —Sherwood v. Buffalo, etc., R. Co., 12 How.Pr. 136—23 C.J. p 830 note 39.

(3) In a subsequent revision, one section expressly provided for proceedings against a "judgment debtor," without making any distinction between a natural person and a corporation.—Logan v. McCall Pub. Co., 35 N.E. 655, 140 N.Y. 447, 449, reversing 25 N.Y.S. 1142, 6 Misc. 635.

(4) In another section, however it expressly declared that the provisions relating to supplementary provisions do not apply where the judgment debtor is a corporation created by or under the laws of the state, or a foreign corporation or joint-stock association which does business within the state or has within the state a business or fiscal agency or agency for the transfer of stock, except in those actions or special proceedings brought by or against the people of the state.—Logan v. McCall Pub. Co., supra—23 C.J. p 831 note 41.

(5) These provisions by implication authorized supplementary proceedings against a foreign corporation doing no business in and having no agent in the state.—Logan v. McCall Pub. Co., supra—23 C.J. p 831 note 42.

90. S.D.—South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co., 56 N.W. 98, 4 S.D. 173, 183.
23 C.J. p 831 note 45.

91. Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

Nonresident

A nonresident adverse claimant to judgment debtor's property may be made a party to proceeding supplemental to execution.—Junkin v. Anderson, Wash., 120 P.2d 548.

92. U.S.—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F.2d 762.
23 C.J. p 831 note 60, p 832 note 73.
Property:
Acquired by receiver see infra § 392.
Subject to turnover order see infra § 383.

All property or property rights

Statute providing for proceedings supplementary to execution was intended to give circuit courts broad discretionary powers to accomplish purpose of statute, which was to confer on circuit courts right to subject all property, or property rights of defendant in execution, however fraudulently conveyed or concealed, or whether in name or possession of third parties, to satisfaction of execution outstanding against defendant.—State ex rel. Phœnix Tax Title Corporation v. Viney, 163 So. 57, 120 Fla. 657—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

Doubtful or obstructed title

A creditor will not be confined to property of a doubtful or obstructed title in the enforcement of his judgment.—Beck v. Dennis, 15 A.2d 457, 128 N.J.Eq. 128.

Property "in hands of" debtor

Words "in the hands of," judgment debtor, as used in Florida statute relating to proceedings supplementary to execution, mean, in effect, "in the possession of."—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F.2d 762.

Stock of merged corporation

In proceedings supplemental to execution, that corporation which was judgment debtor had merged illegally with another corporation did not give judgment creditor right to stock issued by merged corporation to stockholders of debtor corporation. —Trounce v. Whittier Sav. Bank, 29 P.2d 789, 136 Cal.App. 761.

93. U.S.—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F.2d 762.
Utah.—Cleverly v. District Court of Second Judicial Dist. in and for

states it has been held that whatever can be reached by a creditor's bill can be reached by these proceedings.[94] In some states only property that the debtor could sue for can be reached, where in the hands of, or owing by, a third person.[95]

It has been held that property which can be reached by supplementary proceedings includes money fraudulently withheld by the debtor,[96] an interest in a partnership,[97] patents and copyrights,[98] property held by a municipality,[99] property retained by the debtor after a general assignment for the benefit of creditors,[1] dower after the death of the husband but not admeasured,[2] proceeds of a mortgage taken as security for a legacy and assigned without consideration,[3] and property in another state.[4] The interest of a chattel mortgagor, although the mortgage is past due, may be reached, where the mortgage provides for turning over to the mortgagor any surplus arising from the sale.[5] Money received from the federal government for goods sold to it may be reached.[6]

On the other hand, it has been held that contingent fees of an attorney in an undetermined case,[7] the interest of a mortgagee in personal property,[8] money transferred by the judgment debtor to its fiscal agent under an indenture irrevocably authorizing the agent to pay interest on the debtor's bonds with such money,[9] money deposited by a third person as bail,[10] or public moneys or moneys in the hands of a public officer[11] cannot be reached in supplementary proceedings. In some states a vested interest in real estate cannot be sold in supplementary proceedings since it may be sold under execution.[12]

After-acquired property. The proceedings affect only property which the debtor has at the time the order for his examination is served, and not property thereafter acquired,[13] although according to some authorities property acquired by the debtor after the issuance of the order for examination but before the time of hearing may be reached.[14]

Rents accruing under an existing lease are not after-acquired property.[15]

Alimony. Alimony awarded to the debtor cannot ordinarily be reached in supplementary proceedings where the claim antedates the allowance of alimony,[16] but it may be reached in such proceedings on a claim arising after alimony has been allowed, particularly where the claim is for necessaries.[17]

Choses in action. A chose in action owned by the judgment debtor may be reached in supplementary proceedings,[18] unless the claim is one that is nonassignable.[19] The liability of a third person to the judgment debtor may be reached where it is a present, fixed liability;[20] a contingent or uncertain liability cannot be reached.[21] A judgment recov-

Davis County, 39 P.2d 748, 85 Utah 440.

94. N.Y.—Barnes v. Morgan, 3 Hun 703, 6 Thomps. & C. 105.

95. Va.—Freitas v. Griffith, 71 S.E. 531, 112 Va. 343.
W.Va.—Swann v. Summers, 19 W.Va. 115.

96. Ind.—Baker v. State, 9 N.E. 711, 109 Ind. 47.

97. N.Y.—Lovins v. Laub, 147 N.Y.S. 304, 85 Misc. 336.

98. Cal.—Pacific Bank v. Robinson, 57 Cal. 520, 40 Am.R. 120.

99. Minn.—Knight v. Nash, 22 Minn. 452.

1. N.Y.—Eastern Nat. Bank v. Hulshizer, 2 N.Y.St. 115.

2. N.Y.—Payne v. Becker, 87 N.Y. 153, reversing 22 Hun 28.

3. N.Y.—Muller v. Hall, 49 How. Pr. 374.

4. N.J.—Peck v. Low, 7 N.J.L.J. 350.
N.Y.—Fenner v. Sanborn, 37 Barb. 610.

5. N.Y.—Moss v. Lightfine, 111 N.Y.S. 675, 60 Misc. 62.

6. S.C.—Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 97 S.E. 833, 111 S.C. 299.

7. Colo.—Walker v. Staley, 1 P.2d 924, 925, 89 Colo. 292, citing **Corpus Juris.**
N.Y.—Gibney v. Reilly, 56 N.Y.S. 1055, 26 Misc. 275.

8. Or.—Knowles v. Herbert, 4 P. 126, 11 Or. 54, 240.

9. N.Y.—Peskowitz v. United Steel Works Corporation, 9 N.Y.S.2d 891.

10. N.Y.—McShane v. Pinkham, 19 N.Y.S. 969, 22 N.Y.Civ.Proc. 173.

11. N.Y.—Lowber v. New York, 7 Abb.Pr. 248.
23 C.J. p 832 note 94.

12. N.Y.—Monolithic Drain & Conduit Co. v. Dewsnap, 41 N.Y.S. 224, 25 N.Y.Civ.Proc. 380.

13. Minn.—Christensen v. Tostevin, 53 N.W. 461, 51 Minn. 230.
23 C.J. p 833 note 7.

14. Cal.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.

15. N.Y.—Lertora v. Reimann, 53 N.Y.S. 921, 5 N.Y.Ann.Cas. 19.

16. N.Y.—Romaine v. Chauncey, 29 N.E. 826, 129 N.Y. 566, 26 Am.S.R. 544, 14 L.R.A. 712, affirming 15 N.Y.S. 198, 60 Hun 477, 21 N.Y.Civ.Proc. 76—Anna Tappe, Inc., v. Battelle, 249 N.Y.S. 589, 140 Misc. 49.

17. N.Y.—Anna Tappe, Inc., v. Battelle, supra.

18. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571.
Ky.—Wittenauer v. Kaelin, 15 S.W. 2d 461, 228 Ky. 679.
N.Y.—Bank of Richmondville v. Hicks, 197 N.Y.S. 369.
N.C.—McIntosh Grocery Co. v. Newman, 114 S.E. 535, 184 N.C. 370.
23 C.J. p 831 note 60, p 832 note 70.
Insurance policies and proceeds see infra § 350.

19. Ky.—Wittenauer v. Kaelin, 15 S.W.2d 461, 228 Ky. 679.

20. Ohio.—Kuhn v. Wolf, 16 N.E. 2d 1017, 59 Ohio App. 15—Pettitt Bros Hardware Co. v. City of Akron, 155 N.E. 396, 23 Ohio App. 233.

21. Ohio.—Kuhn v. Wolf, 16 N.E.2d 1017, 59 Ohio App. 15—Pettitt Bros. Hardware Co. v. City of Akron, 155 N.E. 396, 23 Ohio App. 233.

Deposit for gas and electricity

Deposit by consumer with company as security for payment of gas and electricity did not give company "property" of consumer or

ered by the judgment debtor,[22] shares of corporate stock belonging to the debtor and deemed to be in the possession of the corporation,[23] an annuity,[24] a right of action on contract,[25] a cause of action for trespass to realty which will survive,[26] or a vested interest in the funds of an organization evidenced by a certificate of membership[27] may be reached. United States bonds may be reached in a state court by supplementary proceedings the same as any other property.[28]

On the other hand, it has been held that a check not yet delivered to or accepted by the debtor,[29] corporate bonds which are still in the hands of the corporation, its agents, or trustees, and which have not yet become property by negotiation or passing into the hands of holders for value,[30] may not be reached in supplementary proceedings.

Equitable interests. In some jurisdictions equitable interests not subject to execution cannot be reached in supplementary proceedings,[31] but in other states equitable interests may be reached.[32]

Membership in exchange. A transferable seat or membership in an exchange may be reached in supplementary proceedings,[33] provided the court has the power to compel an involuntary transfer of the membership.[34]

Property in custody of law. Property in the custody of the law cannot be reached without an order of the court in whose custody the property is.[35]

Ownership or possession of property. If the judgment debtor is not the owner of the property or the title thereto is in dispute, it cannot except as the statute may provide for the determination of title ordinarily be reached in supplementary proceedings,[36] or at least, where the title is in dispute, it can be reached only by an action by the receiver or judgment creditor, as discussed infra §§ 383, 384, 393. Where the judgment debtor is in possession of the property and there is no real or serious dispute as to his ownership of it, it may be reached.[37]

Property assigned prior to the commencement of supplementary proceedings cannot be reached,[38] except by an action to set the assignment aside where it is fraudulent or otherwise invalid, as discussed infra § 393. Under the statutes in some jurisdictions a judgment creditor who serves a third party order or subpœna on a third party debtor takes precedence over a subsequent assignee of the judgment debtor.[39]

cause company to become "indebted" to consumer within statute, so as to entitle judgment creditor of consumer to attach deposit prior to closing account of consumer, notwithstanding there was no outstanding charge against consumer at time of service of third party's subpœna. —Parke, Davis & Co. v. Levine, 11 N.Y.S.2d 773, 171 Misc. 185.

Refund on license

As respects whether state comptroller had any property of liquor licensee as to which judgment creditor of licensee could institute third-party supplementary proceeding, possibility that licensee might surrender its license in future and so become entitled to refund did not create "property" or "indebtedness" within meaning of statute.—Heilman v. St. Cloud Restaurant, 297 N.Y.S. 111, 164 Misc. 15.

22. S.C.—Rhodes v. Casey, 20 S.C. 491.
20 C.J. p 832 note 71.

23. Ohio.—Ball v. Towle Mfg. Co., 65 N.E. 1015, 67 Ohio St. 306, 93 Am.S.R. 682.

24. N.Y.—Ten Broeck v. Sloo, 2 Abb.Pr. 234, 13 How.Pr. 28.

25. N.Y.—Ten Broeck v. Sloo, supra —Swartout v. Schwester, 5 Redf. Surr. 497.

26. N.Y.—Bennett v. Wolfolk, 30 N.Y.S. 328, 80 Hun 390.

27. N.Y.—Dease v. Reese, 60 N.Y.S. 590, 39 Misc. 657.
23 C.J. p 832 note 80.

28. Ind.—Kelley v. Bell, 88 N.E. 58, 172 Ind. 590, affirming, App., 83 N.E. 773.

29. N.Y.—Cooman v. Board of Education, 37 Hun 96.

30. N.Y.—Cunningham v. Pennsylvania, S. & N. E. R. Co., 11 N.Y.St. 663.

31. N.C.—McCaskill v. Lancashire, 83 N.C. 393.
23 C.J. p 831 note 66.

Title of chattel mortgagee, where it is a mere equity, may not be reached.—Knowles v. Herbert, 4 P. 126, 11 Or. 54, 240.

32. Ind.—Figg v. Snook, 9 Ind. 202.
23 C.J. p 832 note 68.

33. N.Y.—Powell v. Waldron, 89 N.Y. 328, 42 Am.R. 301—Leggett v. Waller, 80 N.Y.S. 13, 39 Misc. 408.
23 C.J. p 833 note 13.

34. N.Y.—Ulmann v. Thomas, 175 N.E. 192, 255 N.Y. 506, affirming 243 N.Y.S. 771, 229 App.Div. 855, and reargument denied 177 N.E. 156, 256 N.Y. 598.

35. Cal.—McCracken v. Lott, 44 P. 2d 355, 3 Cal.2d 164.
23 C.J. p 832 note 74.

36. Cal.—Bond v. Bulgheroni, 8 P. 2d 130, 215 Cal. 7.
23 C.J. p 832 note 2.

Duty to afford hearing to claimants see infra § 358.

Determination of disputed ownership or indebtedness on examination see infra § 378 c.

Property not in debtor's possession

In proceeding supplementary to execution, court erred in summarily adjudicating the rights of property not in the possession or control of the judgment debtor at time receiver was appointed to satisfy the demands of the judgment creditor.—Northern Nat. Bank of Duluth v. McLaughlin, 280 N.W. 852, 203 Minn. 253.

Procedure to be followed

The statute regarding proceedings supplemental to execution and setting out the procedure to be followed where the title or the right to possession of real or personal property is disclaimed by the judgment debtor, or is substantially disputed by another person, provides the exclusive procedure to be followed in such circumstances.—Junkin v. Anderson, Wash., 120 P.2d 548.

37. N.Y.—Matter of Weld, 54 N.Y.S. 253, 34 App.Div. 471.

38. N.Y.—Watrous v. Lathrop, 6 N.Y.Super. 700.

39. N.Y.—Weinberg v. Schwartz, 14 N.Y.S.2d 554.

Formerly

(1) A valid assignment, made after the service of a third party order

§ 350. —— Exempt Property

Property which is exempt from execution cannot be reached for the benefit of a judgment creditor in supplementary proceedings.

Property exempt from levy and sale on execution, or its proceeds, cannot be appropriated in supplementary proceedings.[40] For instance, on this ground it has been held that a pension,[41] a watch used by the debtor in his occupation[42] rather than worn merely as an ornament,[43] a share in a law library held by a lawyer as a working tool,[44] and a judgment for the conversion of exempt property or the proceeds of such judgment[45] may not be reached in supplementary proceedings. Property without the state, belonging to a nonresident debtor, which would be exempt if within the state, cannot be reached.[46] It is doubtful where an exemption is claimed whether the question of its validity can be determined in these proceedings.[47]

Insurance policies and proceeds thereof. It has been held that a life policy as to which insured has a property right and a surrender value may be reached by insured's judgment creditors in supplementary proceedings.[48] However, an insurance policy validly assigned to a third person before judgment may not be reached.[49]

Under a statute providing that a policy payable to a third person as beneficiary shall not be subject to the claims of insured's creditors, a judgment creditor of the insured cannot reach such policy even though the judgment creditor is the beneficiary and has the power to change the beneficiary,[50] or although insured retains the right to change the beneficiary.[51] Where the beneficiary dies and the policy thereby becomes payable to insured's estate, judgment creditors of insured can reach it.[52]

Industrial policies, payable to insured's estate or to his blood relatives where they are equitably entitled to the proceeds as reimbursement for expenditures made in connection with insured's illness or death have been held to be[53] and not to be[54] subject in supplementary proceedings to the claim of a judgment creditor of insured. It has been held that the court may, in its discretion, refuse to compel a judgment debtor to turn over an industrial policy which has no present surrender value and the premiums on which have been paid with pension money.[55]

Money due the judgment debtor as exclusive beneficiary of a health and accident policy may be reached in supplementary proceedings,[56] and the same is true as to disability benefits due to insured under a life insurance policy although the surrender value and the proceeds payable on death are exempt.[57]

Although the interest of a wife as beneficiary of a policy on the life of her husband cannot be reached by her judgment creditors during his life,[58] the proceeds of the policy may be reached on the husband's death.[59]

Even where the policy is exempt, the exemption may not attach to money borrowed on the policy.[60]

or subpœna on a third party debtor, took precedence over the rights of the judgment creditor.—Prospect Coal Co., Inc. v. Commercial Credit Corporation, 293 N.Y.S. 231, 161 Misc. 780—Weinberg v. Schwartz, 14 N.Y.S.2d 554.

(2) The same rule applied to an assignment which did not become effective until after the service of the third party order or subpœna.—Weinberg v. Schwartz, supra.

(3) However, even before the statutory change, there was authority that the transfer of a debt by the judgment debtor to a third party after the service of a stay order on the third party debtor did not take the debt beyond the judgment creditor's reach in supplementary proceedings.—Lebowitz v. Bowery Sav. Bank, 281 N.Y.S. 176, 155 Misc. 567.

40. N.Y.—Ford v. Bailey, 20 N.Y.S. 2d 113, 259 App.Div. 505.
23 C.J. p 833 note 9.

41. N.Y.—Ford v. Bailey, supra—Ley Realty Corporation v. Foley, 293 N.Y.S. 795, 161 Misc. 666.
23 C.J. p 833 note 10.

42. N.Y.—In re Edlunds, 35 Hun 367—Merriam v. Hill, 1 N.Y.Wkly. Dig. 260.

43. N.Y.—Peck v. Mulvihill, 2 N.Y. City Ct. 424.

44. N.Y.—Kelher v. Shipherd, 4 N.Y.Civ.Proc. 274.

45. N.Y.—Tillotson v. Wolcott, 48 N.Y. 188—Andrews v. Rowan, 28 How.Pr. 126.

46. N.Y.—Bunn v. Fonda, 2 Code Rep. 70.

47. N.Y.—Dickinson v. Onderdonk, 18 Hun 479.

48. N.Y.—Beigel v. Windschauer, 274 N.Y.S. 850, 153 Misc. 389.
23 C.J. p 832 note 97.

Policy payable to estate

(1) Endowment policy.—Rockwood & Co v. Trop, 207 N.Y.S. 507, 211 App.Div. 421, reversed on other grounds 208 N.Y.S. 459, 212 App. Div. 883.

(2) Life policy.—Beigel v. Windschauer, 274 N.Y.S. 850, 153 Misc. 389.

49. Ind.—Rodwell v. Johnston, 52 N.E. 798, 152 Ind. 525.

50. N.Y.—Abraham v. Abraham, 278 N.Y.S. 863, 155 Misc. 574.

51. N.Y.—40 West 57th Street Realty Corporation v. Starr, 267 N.Y.S. 740, 149 Misc. 470.

52. N.Y.—Bender v. Kolber, 13 N.Y.S.2d 1013, 172 Misc. 23.

53. N.Y.—Billings v. Lynch, 292 N.Y.S. 344, 161 Misc. 496.

54. N.Y.—Sullivan v. Bock, 284 N.Y.S. 297, 157 Misc. 327.

55. N.Y.—Billings v. Lynch, 292 N.Y.S. 344, 161 Misc. 496.

56. N.Y.—Oriole Textile Co. v. Robert Silk & Woolen Co., 265 N.Y.S. 447, 147 Misc. 524.

57. N.Y.—Herbach v. Herbach, 265 N.Y.S. 144, 148 Misc. 33.

58. N.Y.—Baron v. Brummer, 3 N.E. 474, 100 N.Y. 372—Masten v. Amerman, 4 N.Y.S. 681, 51 Hun 244, reversing 20 Abb.N.Cas. 443.

59. N.Y.—Crosby v. Stephan, 32 Hun 478, appeal dismissed 97 N.Y. 606—Millington v. Fox, 13 N.Y.S. 334.

60. Ohio.—Kuhn v. Wolf, 16 N.E.2d 1017, 59 Ohio App. 15.

§ 351. —— Trust Property

Property held in trust for the judgment debtor, unless exempt by statute, can be reached in supplementary proceedings.

Property held in trust for the judgment debtor can be reached in supplementary proceedings unless by statute such property is exempt.[61] In some jurisdictions, by statute, money or other property held in trust for the debtor cannot be reached by these proceedings where the trust was created by, or the trust fund proceeded from, a person other than the debtor,[62] unless the trust has been so far performed that the fund is payable directly to the debtor.[63] A legacy in the hands of an executor, on no trust except to pay it over to the legatee, is not a trust created by some person other than the debtor himself.[64] Death benefits paid by a fraternal order to the beneficiary of a deceased member, and thereafter deposited in trust for the benefit of such beneficiary, is a trust created by a person for her own benefit within the statute.[65]

The income of personalty originally belonging to the debtor and held under an invalid trust for his support may be reached,[66] as may a fund created by the debtor himself from the sale of his own property;[67] and where money is apparently held in trust for the debtor, but in reality it is so held to protect him, it may be reached.[68]

§ 352. —— Earnings in General

Unless exempted by statute, the earnings of the judgment debtor may be reached in supplementary proceedings.

Earnings of the judgment debtor may be reached in supplementary proceedings in the absence of a statute to the contrary.[69]

However, in some jurisdictions the statute expressly provides that earnings of the debtor for his personal services, rendered within a specified time next before the institution of the proceedings or the order, are exempt when necessary for the use of a family wholly or partly supported by his labor.[70] There is considerable confusion in construing such statutes, as to what are "earnings" for "personal" services, within the meaning of that phrase as used therein.[71] The terms are sufficiently broad to include not only wages but also a pecuniary benefit indirectly accruing.[72] It has been held that the proceeds of a saloon business,[73] or a retail ice business where two carts and several men are employed,[74] or moneys earned but turned into the business of the employer,[75] or income from boarders,[76] or advances against royalties that may accrue on books not yet sold[77] are not exempt. On the other hand, it has been held that personal earnings include earnings of one in charge of others who himself performs some part of the labor,[78] earnings for services rendered by a husband to his wife in her separate business,[79] earnings in a business carried on independently where the debtor's services are the chief factor,[80] and tuition fees.[81] If the debtor is running a business or the like, his personal earnings have been held in some cases to be the net profits realized from it.[82] Necessity for use of a family will not ordinarily be presumed where the salary is quite large, but must be shown.[83] A salary is not exempt as necessary for the support of the debtor's family where its intended use is for the support of persons as to whom there is no legal liability.[84] The judgment creditor cannot compel the debtor to exact compensation for services rendered under the understanding that they were gratuitous.[85]

61. Wis.—Williams v. Smith, 93 N. W. 464, 117 Wis. 142.
Proceedings to subject beneficiary's interest to claims of creditors see the C.J.S. title Trusts § 200, also 65 C.J. p 561 note 80–p 565 note 32.

62. Wash.—Knettle v. Knettle, 3 P. 2d 133, 164 Wash. 468.
23 C.J. p 833 note 21.

63. N.Y.—Lawrence v. Pease, 21 N. Y.S. 223.
23 C.J. p 833 note 22.

64. N.J.—Bacon v. Bonham, 27 N.J. Eq. 209, affirmed 33 N.J.Eq. 614.

65. **Royal Arcanum death benefit** N.J.—Schuhardt v. Wittke, 76 A. 570, 76 N.J.Eq. 119.

66. N.Y.—Sloan v. Birdsall, 11 N.Y. S. 814, 58 Hun 317.

67. Colo.—Hexter v. Clifford, 5 Colo. 168.

68. N.Y.—Harvey v. Arnold, 82 N. Y.S. 155, 84 App.Div. 132.

69. N.J.—White v. Koehler, 57 A. 124, 70 N.J.Law 526.

70. N.Y.—Murray Hill Co. v. Kuhnle, 109 N.Y.S. 669, 58 Misc. 313.
23 C.J. p 834 note 35.

71. N.Y.—Matter of Wyman, 78 N. Y.S. 546, 76 App.Div. 292.

72. **Right to live in house rent free** N.Y.—William F. Kasting Co. v. Whittle, 159 N.Y.S. 909, 174 App. Div. 224.

73. N.Y.—Prince v. Brett, 47 N.Y. S. 402, 21 App.Div. 190.

74. N.Y.—Mulford v. Gibbs, 41 N. Y.S. 273, 9 App.Div. 490.

75. N.Y.—Clark v. Andrews, 19 N. Y.S. 211.

76. N.Y.—Van Vechten v. Hall, 14 How.Pr. 436—Whalen v. Tennison, 1 N.Y.Month.L.Bul. 22.
23 C.J. p 834 note 41.

77. N.Y.—St. Luke's Hospital v. Hall, 20 N.Y.S.2d 602.

78. N.Y.—Moran v. Darcy, 31 N.Y. S. 1130, 10 Misc. 789.

79. N.Y.—Kingman v. Frank, 5 N. Y.Month.L.Bul. 34.

80. N.Y.—McSkiman v. Knowlton, 14 N.Y.S. 283, 20 N.Y.Civ.Proc. 274—Sandford v. Goodwin, 20 N.Y. Civ.Proc. 276 note.

81. N.Y.—Miller v. Hooper, 19 Hun 394.

82. N.Y.—Murray Hill Co. v. Kuhnle, 109 N.Y.S. 669, 58 Misc. 313.

83. N.Y.—Twelfth Ward Bank v. Hamilton, 109 N.Y.S. 21, 58 Misc. 173.

84. N.Y.—Blake v. Bolte, 30 N.Y. S. 209, 9 Misc. 714, modified on other grounds 31 N.Y.S. 124, 10 Misc. 333—Van Vechten v. Hall, 14 How.Pr. 436.

85. N.C.—Osborne v. Wilkes, 13 S.E. 285, 108 N.C. 651.

Future earnings. In the absence of a special statute permitting such income to be reached, see infra §§ 383, 406, future earnings, wages, or salaries to become due, or which become due after service of the order for examination, cannot be reached by supplementary proceedings.[86] If there is no showing as to when money was earned, it will be presumed to have been earned before the service of the order for examination.[87] Where a doubt exists as to whether the sum in controversy was earned prior or subsequent to the order, the debtor is entitled to the benefit of the doubt.[88]

§ 353. —— Salaries of Public Officers or Employees

Except as statutes may otherwise provide, the compensation of a public employee cannot be reached in supplementary proceedings until it is in the employee's possession.

Unless otherwise provided by statute, it is generally held that for reasons of public policy the wages, fees, or salary of a public official, due or to become due from the public authorities, cannot be subjected in their hands to the payment of his debts under proceedings supplementary to execution instituted for that purpose;[89] but salary or earnings of such an official which he has reduced to possession may be subjected to payment of the judgment.[90]

§ 354. Time for Proceedings

Supplementary proceedings must be instituted within the time fixed by statute, although objections may be waived by appearance and submission to examination.

The time within which proceedings must be instituted depends on the terms of the statute under which the remedy is sought.[91] Generally the proceedings cannot be commenced[92] or prosecuted[93] after the judgment has become dormant. Even though no time is limited, the proceedings must nevertheless be commenced within a reasonable time after the right accrues.[94] If the commencement of the proceedings is not limited to any time after entry of judgment, they may be instituted at any time during the life of the judgment,[95] especially where an execution has been issued during that time.[96] Supplementary proceedings are not "an action on a judgment" within a provision requiring such actions to be commenced within six years.[97]

Waiver of delay. The fact that proceedings are commenced after the statutory time provided therefor, or after the judgment has ceased to be a lien, is an objection which may be waived by appearing and submitting to an examination,[98] and cannot be

86. Cal.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.
23 C.J. p 834 note 50.

Prospective earnings of professional person are entirely hypothetical and cannot be reached.—Hill v Central Trust Co., 168 N.E. 768, 33 Ohio App. 204.

87. N.Y.—Matter of Van Ness, 47 N.Y.S. 702, 21 Misc. 249.

88. N.Y.—Potter v. Low, 16 How. Pr. 549.

89. Cal.—Medical Finance Ass'n v. Short, 92 P.2d 961, 36 Cal.App.2d Supp. 745.
23 C.J. p 834 note 55.
Special execution against wages of government employees see § 406.

90. Cal.—Medical Finance Ass'n v. Short, supra.
N.Y.—Blake v. Bolte, 31 N.Y.S. 124, 10 Misc. 333, 24 N.Y.Civ.Proc. 166, 1 N.Y.Ann.Cas. 78.
Order to make payments out of wages as received see infra § 383.

91. N.C.—International Harvester Co. of America v. Brockwell, 164 S.E. 322, 202 N.C. 805.
23 C.J. p 835 note 60.

In New York

(1) Under Civ.Pract.Act § 773, which authorizes the maintenance of proceedings supplementary to judgment until the "judgment is satisfied, vacated or barred by the statute of limitations," the applicable statute of limitations is twenty years.—Bank of U. S. v. Rosengarten, 24 N.Y.S. 2d 647, 175 Misc. 677—Meinhard v. Millstein, 293 N.Y.S. 966, 162 Misc. 22.

(2) The same limitation applies to an order to examine a third party.—Gotham Nat. Bank of New York v. Strunsky, 293 N.Y.S. 961, 162 Misc. 673.

(3) Prior to the amendments of 1935, the ten-year statute was held applicable where the proceeding was under the provision of the code governing applications after return of execution.—Importers' & Traders' Nat. Bank v. Quackenbush, 38 N.E. 728, 143 N.Y. 567, reversing 30 N.Y. S. 35, 80 Hun 111—23 C.J. p 835 notes 64–68.

(4) Where the judgment creditor revived his right in a suit on the original judgment, prosecuted with the permission of the court, and obtained a new judgment, he was in the same position that he occupied before the ten years began to run.—Importers' & Traders' Nat. Bank v. Quackenbush, supra.

(5) The ten year statute was inapplicable to an order issued in aid of execution and before its return.—R. F. Stevens Co. v. Maus, 139 N Y.S. 1059, 155 App.Div. 249—Press Pub. Co. v. McGill, 136 N.Y.S. 177.

(6) An order in aid of a levy, made within sixty days from the receipt of the execution by the sheriff, could be granted after the sixty-day period had elapsed.—Bank of Richmondville v. Hicks, 197 N.Y.S. 369.

92. Ohio.—Simpson v. Hook, 6 Ohio Cir.Ct. 27, 3 Ohio Cir.Dec. 333.

93. N.D.—Merchants' Nat. Bank v. Braithwaite, 75 N.W. 244, 7 N.D. 358, 66 Am.S.R. 653.
23 C.J. p 835 note 62.

94. Wis.—Woodward v. Hall, 44 N. W. 114, 75 Wis. 406.

95. N.Y.—Miller v. Rossman, 15 How.Pr. 10.
23 C.J. p 836 note 71.

96. N.Y.—Miller v. Rossman, supra.

97. N.Y.—Green v. Hauser, 9 N.Y. S. 660, 18 N.Y.Civ.Proc. 354.

98. N.Y.—Glover v. Gargan, 42 N. Y.S 74, 10 App.Div. 527.
23 C.J. p 836 note 74.

Delay of about sixteen months between time of service of order for examination in proceedings supplementary to execution and the time when examination was actually had, where no objection was raised by judgment debtor when he was examined, was not fatal to the proceedings.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599.

reserved for a motion to vacate a final order in which the proceedings result.[99]

§ 355. Simultaneous and Successive Proceedings

a. Simultaneous proceedings
b. Successive proceedings

a. Simultaneous Proceedings

Proceedings by separate judgment creditors may be maintained at the same time in the absence of statutory restrictions.

The right of a judgment creditor to maintain supplementary proceedings is not precluded by reason of the fact that other supplementary proceedings by other creditors are pending against the same debtor.[1] The only restrictions are that the creditors prosecuting the prior proceedings shall be notified of the present proceeding; that an examination shall first be had in the prior proceeding, especially if it is being diligently prosecuted; and that only one receiver shall be appointed.[2] The right to an examination of a third party after appointment of a receiver is discussed infra § 362. The effect of an assignment for the benefit of creditors on proceedings supplementary to execution is discussed in Assignments for Benefit of Creditors § 162 a (1).

b. Successive Proceedings

Successive examinations may be permitted where not instituted merely to harass the judgment debtor.

While the creditor is not restricted to one examination,[3] he will not be permitted to institute successive proceedings for examination merely in order to harass the judgment debtor.[4] Ordinarily a judgment creditor is entitled to examine his debtor only once,[5] even though he has two or more judgments;[6] and two orders on the same judgment cannot be enforced at the same time,[7] so that a second order is improper where the original order is still in force or outstanding.[8] An exception exists where the second order is obtained for the purpose of examining the debtor concerning property of which he has come into possession since the first examination, and concerning which he cannot be examined under the first order. In such case the second order does not of itself supersede the first,[9] nor is it necessary to have the first order vacated before obtaining the second; the proceedings under the first order, if not already closed or abandoned, may be consolidated with the proceedings under the new order.[10] Where it is provided by statute that the proceedings can be discontinued or dismissed only by order of the judge, failure to enter orders on decisions dismissing former orders for examination precludes a new order for examination;[11] but, if an order of dismissal is made, the debtor cannot object that it was not entered, to defeat a second order for his examination, since if the entry thereof is required it is the duty of the successful party to make it.[12] A dismissal or discontinuance without an examination does not preclude a second order based on the same facts,[13] nor does the termination of prior proceedings by consent,[14] or by failure to proceed thereunder,[15] without the entry of an order of discontinuance. Where the first examination was not concluded, otherwise than by a vacation of the order therefor, a further examination founded on another judgment and order will not be considered a second examination or as harassing.[16] The vacation of a third party order before termination of the proceeding does not prohibit the service of another such order, where the prior order was vacated under the mistaken belief that the proceeding had been closed.[17]

Third party proceedings

In proceeding to compel former husband of judgment debtor to pay alimony to judgment creditor, irregularity of not issuing third party subpœna within two years from recovery of judgment, as required by statute, was waived, where husband did not in stipulation for adjournment nor in affidavit in lieu of examination state any reservation as to his rights because of irregularity.—Conlew, Inc., v. Thompson, 289 N.Y.S. 862, 160 Misc. 551.

99. N.Y.—Bolt v. Hauser, 10 N.Y. S. 397, 19 N.Y.Civ.Proc. 7.

1. Wis.—Kellogg v. Coller, 3 N.W. 433, 47 Wis. 649.
23 C.J. p 836 note 78.

2. Wis.—Kellogg v. Coller, supra.

3. N.Y.—Weiss v. Ashman, 32 N.Y. S. 161, 11 Misc. 377, 24 N.Y.Civ. Proc. 268.

4. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
N.Y.—Davidson v. Sokiran, 280 N.Y. S. 117, 155 Misc. 229.
23 C.J. p 836 note 87.

5. N.J.—Clarke v. Londrigan, 40 N. J.Law 310.
23 C.J. p 836 note 88.

6. N.Y.—Canavan v. McAndrew, 20 Hun 46.

7. N.Y.—Gaylord v. Jones, 7 Hun 480.
23 C.J. p 836 note 90.

8. N.Y.—Roscoe Lumber Co. v. Payne, 149 N.Y.S. 331.
23 C.J. p 836 note 91.

9. N.Y.—Walter v. Pecare, 11 N.Y. S. 146, 57 Hun 587.

10. N.Y.—Benedick v. Meyer, 129 N. Y.S. 772, 72 Misc. 158.

11. N.Y.—German Exch. Bank v. Schlang, 155 N.Y.S. 924, 92 Misc. 351.
23 C.J. p 836 note 95.

12. N.Y.—Consolidated Agency Co. v. Townsley, 129 N.Y.S. 773, 72 Misc. 155.
23 C.J. p 837 note 96.

13. N.Y.—Weiss v. Ashman, 32 N.Y. S. 161, 11 Misc. 377, 24 N.Y.Civ. Proc. 268, 1 N.Y.Ann.Cas. 314.

14. N.Y.—Carter v. Clarke, 30 N.Y. Super. 43.

15. N.Y.—Dorfman v. Jacobs, 166 N. Y.S. 403, 100 Misc. 592.
23 C.J. p 837 note 99.

16. N.Y.—Methodist Book Concern v. Hudson, 1 How.Pr.,N.S., 517.

17. N.Y.—Oriole Textile Co. v. Rob-

Examination by one judgment creditor does not affect the right of every other judgment creditor to at least one examination of the debtor.[18]

Grounds. To warrant an order for a second examination after one examination has been had, facts arising or ascertained after such examination and warranting a further examination must be shown,[19] such as that subsequent to the examination the judgment debtor has acquired property[20] and that an alias execution has been issued and returned nulla bona.[21] As is pointed out infra § 366, the granting of a second order rests in the sound discretion of the judge.

§ 356. Existence of Other Remedy

The creditor may be compelled to elect between supplementary proceedings and other remedies which are not made concurrent by statute.

The institution of a creditor's suit does not preclude the institution[22] or maintenance[23] of supplementary proceedings; the remedies are concurrent and may be pursued simultaneously.[24] Neither are pending proceedings affected by the issuance of a second execution[25] or the levy thereof, unless it is clear that such levy will be sufficient to satisfy the judgment,[26] in which latter case the creditor may be compelled to elect which remedy he will pursue.[27] While it has been held that the institution by the creditor of a suit to set aside a transfer or assignment by the judgment debtor does not preclude the institution and maintenance of supplementary proceedings,[28] the contrary position was later taken in the same jurisdiction on the ground that an order for examination would be useless, the court being without power in supplementary proceedings to try the validity of the transfer and to order a retransfer and application of the property in question to the payment of the judgment.[29]

Attachment and garnishee process. The levy of an attachment does not affect the right of a judgment creditor to institute and maintain supplementary proceedings.[30] Under a statute authorizing both garnishee executions and supplementary proceedings, however, it has been held that a creditor who elects to take advantage of one remedy is debarred from taking advantage of the other while the first is being pursued.[31] Equity will not entertain a bill for the purpose of summarily compelling a garnishee to satisfy a levy on rights and credits of a judgment debtor unless the remedy at law is inadequate.[32]

Existence of other property. Where the statute merely requires a showing that execution has been returned unsatisfied in whole or in part, the judgment debtor cannot avoid the proceeding by showing that there was property on which the sheriff might have levied.[33]

§ 357. Stay of Proceedings

Supplementary proceedings may, in the discretion of the judge, be stayed if there is sound reason therefor.

A stay of the proceedings can be granted on application therefor by the judge before whom they are pending.[34] While it is within the discretion

ert Silk & Woolen Co., 265 N.Y.S. 447, 147 Misc. 524.

18. N.Y.—Murphy v. Cram, 142 N.Y.S. 972, 157 App.Div. 609.

19. N.Y.—Rosenblum v. Marmur, 245 N.Y.S. 283, 230 App.Div. 468—Davidson v. Sokiran, 280 N.Y.S. 117, 115 Misc. 229.
23 C.J. p 837 note 2.
"A second order of examination . . . should not be made unless new facts are disclosed to the court which were not known to the judgment creditor at the time of the former hearing."—Corcoran v. Harris, 270 P. 391, 392, 94 Cal.App. 19.

20. N.J.—Clarke v. Londrigan, 40 N.J.Law 310.
23 C.J. p 837 note 3.

21. N.Y.—Losee v. Allen, 40 N.Y.S. 349, 17 Misc. 275—Weiss v. Ashman, 32 N.Y.S. 161, 11 Misc. 377, 24 N.Y.Civ.Proc. 268, 1 N.Y.Ann.Cas. 314.

22. N.Y.—In re Bachiller De Ponce De Leon, 69 N.Y.S. 242.
23 C.J. p 837 note 9.

23. N.Y.—Matter of Allbright, 105 N.Y.S. 486, 55 Misc. 324.

24. N.Y.—Matter of Allbright, supra—In re Bachiller De Ponce De Leon, 69 N.Y.S. 242.

25. N.Y.—Lilliendahl v. Fellerman, 2 Abb.Pr. 155, 11 How.Pr. 528.
N.C.—Vegelahn v. Smith, 95 N.C. 254.
23 C.J. p 837 note 13.

26. N.Y.—Smith v. Davis, 17 N.Y.S. 614, 63 Hun 100.
23 C.J. p 837 note 14.

27. N.Y.—Smith v. Davis, supra.
23 C.J. p 837 note 15.

28. N.Y.—Matter of Sickle, 5 N.Y.S. 703, 52 Hun 527—In re Bachiller De Ponce De Leon, 69 N.Y.S. 242.

29. N.Y.—Lowther v. Lowther, 97 N.Y.S. 5, 110 App.Div. 122.

30. N.Y.—Hanson v. Tripler, 5 N.Y.Super. 733, Code Rep.,N.S., 154.

31. **Remedies not concurrent**
"We find no intention on the part of the Legislature to give a creditor two concurrent cumulative remedies to collect the same judgment out of income."—McDonnell v. McDonnell, 24 N.E.2d 134, 135, 281 N.Y. 480, reversing 12 N.Y.S.2d 585, 257 App Div. 810.

Necessity of first resort to garnishee process
The view has been expressed that a judgment creditor should first resort to garnishee process where it will afford a reasonable chance of satisfying his judgment.—Dibner v. Cousminer, 283 N.Y.S. 369, 157 Misc. 229.

32. N.J.—Future Building & Loan Ass'n v. Mazzocchi, 156 A. 463, 109 N.J.Eq. 58.

33. Ohio.—Stern v. Columbus Mut. Life Ins. Co., 177 N.E. 923, 39 Ohio App. 498.

34. N.Y.—Genesee Bank v. Spencer, 15 How.Pr. 14.
23 C.J. p 838 note 18.
Adjournments see infra § 371.

Direction as effecting stay
Where, after service of third-party subpoena directed to a corporation allegedly indebted to judgment debtor, a motion was made in mu-

of the judge to grant or refuse the application,[35] the right to proceedings after judgment in aid of execution cannot even be temporarily withheld from a judgment creditor without sound reason.[36] It is a good reason for staying or suspending the proceedings that the debtor has been discharged as an insolvent[37] or bankrupt.[38] The proceedings will not be stayed because the creditor has availed himself of concurrent remedies, such as a creditor's suit,[39] or because an appeal has been taken from the judgment,[40] unless security is given and a stay procured.[41] A stay of proceedings on an execution does not preclude the creditor from examining a third party.[42] A stay pending the decision of a motion does not affect an existing injunction restraining the disposition of property.[43]

§ 358. Jurisdiction and Authority of Court or Judge

a. In general
b. Judge or court

a. In General

Supplementary proceedings being purely statutory, the courts have no inherent jurisdiction respecting them.

The jurisdiction of supplementary proceedings[44] and the place in which they must be brought[45] are based on, and regulated by, statute. The remedy being purely statutory, jurisdiction to act and to make orders in the proceedings exists and may be exercised when, and only when, it is conferred by statute.[46] Jurisdiction cannot be conferred by the mere appearance of the debtor and his submission to examination without objection,[47] and even by consent of all the parties interested, greater juris-

nicipal court to vacate judgment on ground of nonservice of summons, but justice sustained the service and allowed defendant to interpose an answer, further direction that judgment stand as security had effect of holding in statu quo all proceedings in aid of or for enforcement of the judgment until determinative disposition of cause in the municipal court.—Met. Roofing Supplies Co. v. Stern, 18 N.Y.S.2d 694.

35. Ind.—McCray v. Whitney, 104 N.E. 979, 56 Ind.App. 94.
23 C.J. p 838 note 19.

36. Ohio.—Sam Savin, Inc., v. Burdsal, 22 N.E.2d 914, 61 Ohio App. 539.

37. N.Y.—Coursen v. Dearborn, 30 N.Y.Super. 143.

38. N.Y.—World Co. v. Brooks, 7 Abb.Pr.,N.S., 212.

39. N.Y.—Gates v. Young, 17 N.Y. Wkly.Dig. 551.

40. N.Y.—Sluyter v. Smith, 15 N.Y. Super. 673—Arnoux v. Homans, 32 How.Pr. 382.

41. N.Y.—Cowdrey v. Carpenter, 25 N.Y.Super. 601, 17 Abb.Pr. 107—Arnoux v. Homans, 32 How.Pr. 382.
23 C.J. p 838 note 25.

42. N.Y.—Lowber v. New York, 5 Abb.Pr. 268.

43. N.Y.—Woolf v. Jacobs, 36 N.Y. Super. 408.

44. **In California,** under Code Civ. Proc. § 714, an order for the examination of a judgment debtor should issue from the superior court sitting in the county in which the judgment is entered.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.

In Louisiana, under Acts 1924 No. 198, as amended by Acts 1928 No. 268, proceedings for the examination of a judgment debtor are properly brought before the judge of the court where the judgment was rendered and in the parish where the debtor has its domicile.—Continental Supply Co. v. International Gas Products, 145 So. 119, 176 La. 1.

In New Jersey, under Comp.St. Suppl. § 71-9a, a petition summarily to compel a garnishee to satisfy an execution levy must be addressed to the court out of which execution issued.—Future Building & Loan Ass'n v. Mazzocchi, 156 A. 463, 109 N.J.Eq. 58.

In New York

(1) Where judgment is recovered in the municipal court of New York City, the proceedings must, subject to provisions of Civ.Pract.Act § 777, be instituted in the city court of New York City.—Perel v. Brozen, 29 N.Y.S.2d 286, 176 Misc. 754.

(2) Under prior statutory provisions in New York there was some contrariety of opinion as to the proper court in which to commence proceedings supplementary to execution on a municipal court judgment where execution had issued to the city marshal.—Solomon v. Suffin, 209 N.Y.S. 671, 124 Misc. 748—Rosen v. Polansky, 201 N.Y.S. 93, 121 Misc. 395—Huber v. Moran-Greenberg Corporation, 198 N.Y.S. 434, 120 Misc. 104.

(3) Under some decisions it was held that such proceedings could properly be instituted before one of the county judges or before a justice of a supreme court.—Thomas v. Gifford, 216 N.Y.S. 463, 217 App.Div. 756—Solomon v. Suffin, supra—Rosen v. Polansky, supra—Regina Cloak & Suit Corporation v. Zalmovitz, 198 N.Y.S. 845, 120 Misc. 321—Baker v. Slotkin, 198 N.Y.S. 876.

(4) Under other decisions such proceedings were held not within the jurisdiction of the county or supreme court, but properly brought before a justice of the municipal court.—Corn Exch. Bank v. Hirschberg, 205 N.Y.S. 651, 123 Misc. 436—R. M. Hollingshead Co. v. Santillo, 201 N.Y.S. 91, 121 Misc. 200—Huber v. Moran-Greenberg Corporation, 198 N.Y.S. 434, 120 Misc. 104.

(5) Decisions as to jurisdiction of other particular judges see 23 C.J. p 839 notes 42–49.

Jurisdiction:
To appoint receiver see infra § 387.
To conduct examination see infra § 372.
To enjoin disposition of property see infra § 370.
To entertain proceedings and punish for contempt see infra § 400.
To require payment of money or delivery of property see infra § 383.
To vacate or set aside proceedings see infra § 368.

45. **In North Carolina**
Supplementary proceedings should be instituted in the county where the judgment was rendered rather than in another county where it is docketed.—Hutchison v. Symons, 67 N.C. 156, followed in Hasty v. Simpson, 77 N.C. 69.

46. Cal—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
N.Y.—Hutchinson v. Weston, 290 N.Y.S. 334, 160 Misc. 890—In re James' Will, 236 N.Y.S. 363, 134 Misc. 645—Connolly v. Hoth, 208 N.Y.S. 412, 124 Misc. 446.
23 C.J. p 838 notes 29, 31, p 839 notes 42–50.

47. N.Y.—Bingham v. Disbrow, 5 Transcr.A. 198, reversing 37 Barb. 24, 14 Abb.Pr. 251.
23 C.J. p 838 note 33.

diction cannot be conferred on the court or judge than is conferred by statute.[48] The denial to certain courts of jurisdiction in equity cases will not preclude them from entertaining supplementary proceedings.[49] Ordinarily jurisdiction once acquired continues until the termination of the proceeding.[50] While as a matter of propriety all proceedings based on the same judgment should be had before the same officer,[51] this rule will not preclude another judge from entertaining proceedings based on the same judgment against other parties.[52] The jurisdiction may be concurrent or so conferred as to permit the judges of one court, on the observance of certain formalities, to entertain proceedings on judgments rendered in another court or jurisdiction,[53] and ordinarily the entertaining of the proceedings in one court in accordance with the statutory authority will not operate to oust the other court of jurisdiction.[54] The fact that an executor is acting under the direction of a court of one county does not prevent a court of another county from requiring him to answer in supplementary proceedings.[55]

Scope and extent. The scope and extent of the court's jurisdiction in supplementary proceedings is dependent on the terms of the statute under which it is exercised.[56] In general, the court has power to make all lawful orders necessary to make the remedy effective,[57] although it may not decide issues arising between the executing officer and third persons[58] or make a contract between the judgment debtor and third persons.[59] Where there is no adverse claim to property involved by strangers to the action, the court may make such order with respect to it as the evident justice of the case requires.[60] If the procedure with reference to determining rights is not fixed by statute, but the judge is given a broad power to prescribe what, in his discretion, may be the proper proceeding, such procedure must be provided as will give all claimants in interest a hearing,[61] and the court has the power, and it is its duty, to summon all adverse claimants into court and require them to set up their rights.[62] The court may inquire into existing defenses, such as the applicability of a discharge in bankruptcy to the judgment.[63] The court, having jurisdiction over the debtor's person, may order the application to the judgment of the debtor's property held by a nonresident.[64]

48. N.Y.—Maas v. McEntegart, 46 N.Y.S. 534, 20 Misc. 676.

49. Wis.—Second Ward Bank v. Upmanu, 12 Wis. 199.

50. Kan.—Teats v. Herington Bank, 51 P. 219, 58 Kan. 721.
23 C.J. p 838 note 36.

51. N.Y.—Rome First Nat. Bank v. Dering, 8 N.Y Wkly.Dig. 261.

52. N.Y.—Rome First Nat. Bank v. Dering, supra.

53. Wis.—Gould v. Dodge, 30 Wis. 621.
23 C.J. p 838 note 39.

54. N Y.—Baldwin v. Perry, 25 Hun 72, 1 N.Y.Civ.Proc. 118, 61 How. Pr. 289.
Wis.—Gould v. Dodge, 30 Wis. 621.

55. Ind.—Murphy v. Busick, 53 N. E. 475, 22 Ind.App. 247, 72 Am.S.R. 304.

56. Mass.—Goldman v. Adlman, 197 N.E. 632, 291 Mass. 492.
23 C.J. p 838 note 32.

Determining rights to realty outside county

Circuit court had jurisdiction in proceedings supplementary to execution to determine, as between parties to proceedings, rights of judgment debtor to realty lying within another county in state.—Virginia-Carolina Chemical Corporation v. Smith, 164 So. 717, 121 Fla. 720.

57. Fla.—Richard v. McNair, 164 So. 836, 121 Fla. 733.

58. Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

59. Fixing reasonable salary of debtor

Court order summarily fixing reasonable salary of judgment debtor was not binding on employer in action to recover amount of judgment. —Diamond v. Schulte Bakers, 240 N.Y.S. 663, 136 Misc. 195.

60. Wash.—Washington Trust Co. v. Blalock, 285 P. 449, 155 Wash. 510.

Applicability of general statute

The act of 1901, P.L. p 372, entitled a "further supplement to an act entitled 'An act respecting any execution,'" and authorizing proceedings supplemental to execution, is applicable to the district courts, although the district court act itself makes provision for supplemental proceedings.—Hershenstein v. Hahn, 71 A. 105, 77 N.J.Law 39.

61. U.S.—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F. 2d 762.
Fla.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

Adjudication of rights of third persons

In proceeding supplementary to execution, rights of third persons holding assets claimed by them adversely to plaintiff and defendant should not be adjudicated, unless such persons are made parties by voluntary intervention or by service of appropriate rule nisi, and are given opportunity to present their claims as parties fully and fairly after making up of definite issues to be tried. —State ex rel. Phœnix Tax Title Corporation v. Viney, 163 So. 57, 120 Fla. 657—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109

Determination of disputed ownership or possession on examination see infra § 378 c.

Property claimed by third persons as subject to proceedings see supra § 349.

62. U.S.—Florida Guaranteed Securities v. McAllister, C.C.A.Fla., 47 F.2d 762.
Fla.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

Rule nisi

In proceeding supplementary to execution to reach property but concealed or held under color of title in third person, but in trust for, or derived from, defendant, where third person claims such property adversely to defendant and plaintiff, third party claimant should be made party by rule nisi and should be given statutory opportunity to file claim affidavit and claim bond for property ordered to be levied on if third party wishes to acquire immediate repossession prior to hearing and trial on the rule nisi.—Ryan's Furniture Exchange v. McNair, supra.

63. Mass.—Goldman v. Adlman, 197 N E. 632, 291 Mass. 492.

64. Ohio.—Wilson v. Columbia Cas-

b. Judge or Court

Under some statutes orders in supplementary proceedings may be made either by a judge or by the court, but under others the power belongs to the judge alone.

Under some statutes the power to grant orders in supplementary proceedings belongs to the judge alone and not to any court;[65] and orders made are judge's orders and not court orders.[66] The judge has sole and exclusive jurisdiction over the proceedings until they are finally disposed of, and no other judge or officer at chambers has any power to come in and stay such proceedings by a general order.[67] It is immaterial that an order purports to have been made by the court, when in fact it was made by the sole judge thereof.[68] Under other statutes the orders may be made either by a judge or by the court,[69] and in some instances by court commissioners.[70] If a judge makes the order to appear for examination returnable before himself on a certain day, but he is no longer a judge at such time, the debtor must appear before his successor at the time and place designated in the order.[71]

§ 359. Grounds and Conditions Precedent in General

The grounds for and conditions precedent to the maintenance of supplementary proceedings depend on the particular statute involved.

The grounds for, and conditions precedent to, the maintenance of supplementary proceedings are regulated by statute.[72] Where a compliance with the terms of the statute is shown, a judgment creditor is entitled to maintain the proceedings,[73] but he should not be permitted to harass the judgment debtor to no purpose.[74]

§ 360. —— Judgment or Order

a. Necessity
b. Requisites and sufficiency

a. Necessity

The recovery and entry of a valid judgment or order for the payment of money is a condition precedent to the institution of supplementary proceedings.

The recovery and entry of a valid judgment,[75] or of an order for the payment of money,[76] is a condition precedent to the institution of supplementary proceedings.

b. Requisites and Sufficiency

(1) In general
(2) Appearance or personal service
(3) Amount

(1) In General

Supplementary proceedings may generally be instituted on any valid money judgment by which the person of the judgment debtor is bound and which remains wholly or partially unsatisfied.

In order to constitute the basis for supplementary proceedings, a judgment must remain wholly or partially unsatisfied,[77] when once it is ascertained that for any reason since there is no longer any judgment the proceedings to enforce it must fall to the ground.[78] Thus, if the judgment is

uality Co., 160 N.E. 906, 118 Ohio St. 319.

65. N.Y.—Kostor v. Kliss, 244 N.Y.S. 671, 137 Misc. 754.
23 C.J. p 839 note 51.

66. N.Y.—Feinberg v. Kutcosky, 132 N.Y.S. 9, 147 App.Div. 393.

67. N.Y.—McAlpin v. Stoddard, 105 N.Y.S. 9, 54 Misc. 647—Genesee Bank v. Spencer, 15 How.Pr. 14.
Vacation or modification of order see infra § 368.

68. Kan.—White Sewing Mach. Co. v. Wait, 24 Kan. 136.

69. Mich.—Humber v. Wayne Circuit Judge, 228 N.W. 689, 249 Mich. 246.
23 C.J. p 840 note 55.

70. Mich.—Berles v. Comstock, 62 N.W. 148, 104 Mich. 129.
23 C.J. p 840 note 56.

Limits of jurisdiction

A court commissioner's jurisdiction in supplementary proceedngs is limited to exercise of powers conferred by statute.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 283 Wis. 234.

71. N.Y.—Dodge v. Albers, 104 N.Y.S. 497, 54 Misc. 37.

72. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
N.Y.—Everight Utilities Corporation v. Lonshein, 264 N.Y.S. 681, 147 Misc. 833.

73. Cal.—Travis Glass Co. v. Ibbetson, 200 P. 595, 186 Cal. 724.
N.Y.—Bank of Richmondville v. Hicks, 197 N.Y.S. 369.
Okl.—U. S. Fidelity & Guaranty Co. v. Cherry, 105 P.2d 544, 187 Okl. 666.
Pa.—Telep v. Golden, 6 Pa.Dist. & Co. 483, 2 Lack.Jur. 336, 2 Som. Leg.J. 368.

74. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.

75. Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191.
N.Y.—Donohue v. Stein, 293 N.Y.S. 755, 250 App.Div. 126—Devonia Discount Corporation v. Bianchi, 274 N.Y.S. 880, 153 Misc. 384—Amerangio Corporation v. Krellberg, 254 N.Y.S. 772, 142 Misc. 478.
23 C.J. p 840 note 58.

76. Mont.—Sperling v. Calfee, 19 P. 204, 7 Mont. 514.
N.Y.—Lydecker v. Smith, 44 Hun 454.
23 C.J. p 840 note 59.

Order directing attornment insufficient

Order directing tenant of mortgaged premises to attorn and pay rent to receiver appointed in foreclosure suit was not judgment decree, or order awarding payment of money within statute authorizing issuance of subpœna for examination of judgment debtor in supplementary proceedings, there being no showing that receiver was judgment creditor nor docket of any judgment.—Donohue v. Stein, 293 N.Y.S. 755, 250 App. Div. 126.

77. N.Y.—Everight Utilities Corporation v. Lonshein, 264 N.Y.S. 681, 147 Misc. 833.

78. N.D.—Merchants Nat. Bank v. Braithwaite, 75 N.W. 244, 7 N.D. 358, 66 Am.S.R. 653.

extinguished by payment[79] or a release,[80] or a discharge in bankruptcy,[81] it cannot be the basis of supplementary proceedings. However, partial payment of the judgment does not preclude proceedings to recover the balance,[82] and this is true where the principal but not the interest is paid.[83]

As a general rule supplementary proceedings can be instituted on any money judgment which remains unsatisfied in whole or in part.[84] It is usually required, however, that the judgment be one by which the person of the judgment debtor is bound;[85] and under the terms of some statutes the judgment must be one which is a lien on real property.[86] Under other statutes the remedy seems to be confined to judgments for necessaries.[87] Proceedings supplementary to execution cannot be sustained on a judgment in rem[88] or on a foreign judgment.[89] They may be based on a federal judgment, or on an order of a federal judge, where authorized by a statute of the state in which judgment was rendered,[90] but docketing a federal judgment with the county clerk does not authorize supplementary proceedings in a state court.[91] A judgment against an executor or an administrator in his representative,[92] as distinguished from his individual,[93] capacity is not enforceable by supplementary proceedings; neither is a judgment against a person as a representative of unincorporated associates so enforceable.[94] On compliance with statutes making a judgment of a municipal court a judgment of a higher court on its being docketed, or a transcript thereof filed, in the office of the county clerk, it may be enforced by supplementary proceedings as a judgment of the higher court.[95]

Void and voidable judgments. If the judgment on which the proceedings are based is void, the proceedings are themselves void,[96] but, as is pointed out infra § 378 b, in proceedings of this character it is erroneous to review the regularity of the judgment or the merits of the action in which it was recovered. Mere clerical errors in the judgment do not invalidate supplementary proceedings based thereon.[97]

Judgment against defendant in fictitious name. The proceedings may be instituted against a judgment debtor on a judgment against him under a fictitious name, where his real name is unknown,[98] provided he is sufficiently described to enable execution to be issued and levied against him.[99] Where his true name is subsequently discovered the supplementary proceedings must be amended so as

79. N.J.—Gibson v. Gorman, 44 N. J.Law 325.

80. N.J.—Gibson v. Gorman, supra.

81. N.Y.—Smith v. Paul, 20 How. Pr. 97.
23 C.J. p 840 note 63.

82. N.Y.—Austin v. Byrnes, 54 N.Y. Super. 552, 12 N.Y.Civ.Proc. 332.
23 C.J. p 840 note 64.

83. N.Y.—Johnson v. Tuttle, 17 Abb.Pr. 315.

84. N.Y.—Edelstein v. Oxman, 13 N. Y.S.2d 95, 171 Misc. 552.
Wash.—State v. Superior Court for King County, 238 P. 639, 135 Wash. 640.
23 C.J. p 840 note 66.

Chancery money decree
Chancery has jurisdiction to order discovery by a defendant in aid of the collection of a chancery money decree.—Whitfield v. Kern, 6 A.2d 411, 125 N.J.Eq. 515.

Judgment or order for costs
(1) In a proper case supplementary proceedings may be based on a judgment or order for costs.—Brush v. Lee, 1 Abb.Dec., N.Y., 238, 2 Transcr.A. 95, 6 Abb.Pr.,N.S., 50—23 C.J. p 840 note 68.

(2) However, statutes authorizing supplementary proceedings on an award of costs in a special proceeding do not include costs given by an interlocutory order in an 'action.'—Matter of Stoddard, 113 N.Y.S. 157, 128 App.Div. 759.

Judgments of justices' courts
(1) Supplementary proceedings may be based on the judgment of a justice of the peace where a transcript thereof has been filed in the county clerk's office.—Honce v. Schram, 85 P. 535, 73 Kan. 868—23 C. J. p 840 note 72.

(2) In New York it has been held that proceedings may be based on a judgment reversing a judgment of a county court affirming a justice's judgment, when filed in the office of the proper county clerk.—Short v. Scutt, 57 N.Y.S. 393.

85. N.Y.—Maltbie v. Lobsitz Mills Co., 119 N.E. 389, 223 N.Y. 227.
23 C.J. p 840 note 67.

86. N.Y.—Meinhard v. Millstein, 289 N.Y.S. 206, 159 Misc. 889, reversed on other grounds 293 N.Y.S. 966, 162 Miss. 22—Connolly v. Hoth, 208 N.Y.S. 412, 124 Misc. 446.

87. Mass.—Darrigan v. Williams, 84 N.E. 797, 198 Mass. 457.
23 C.J. p 841 note 81.

88. N.Y.—Hoferd v. Oster, 268 N.Y. S. 227, 149 Misc. 395.
23 C.J. p 840 note 67.

89. N.Y.—Maltbie v. Lobsitz Mills Co., 119 N.E. 389, 223 N.Y. 227.

90. U.S.—Ex parte Body, N.Y., 105 U.S. 647, 26 L.Ed. 1200.
23 C.J. p 841 note 79.

91. N.Y.—Tompkins v. Purcell, 12 Hun 662.

92. N.Y.—Villaume v. Nelson, 285 N.Y.S. 861, 247 App.Div. 761—Ward La France Truck Corporation v. Totonelly, 298 N.Y.S. 156, 164 Misc. 291.
23 C.J. p 841 note 75.

93. S.C.—Rhodes v. Casey, 20 S.C. 491.
23 C.J. p 841 note 76.

94. N.Y.—Kriegman v. Dumphy, 122 N.Y.S. 1116, 66 Misc. 221.

95. N.Y.—Matter of Streep, 168 N. Y.S. 1026, 181 App.Div. 869—Owens v. Ford, 124 N.Y.S. 839, 68 Misc. 522.

96. N.Y.—Williams v. Carroll, 2 Hilt. 438.
23 C.J. p 841 note 82.

97. S.C.—Henlein v. Graham, 10 S. E. 1012, 32 S.C. 303.
23 C.J. p 841 note 84.

Judgment not signed or indexed
A judgment creditor was authorized to institute supplementary proceeding on a judgment although the judgment was neither signed by the clerk nor indexed.—Edelstein v. Oxman, 13 N.Y.S.2d 95, 171 Misc. 552.

98. N.Y.—Smith v. Josephson, 107 N.Y.S. 221, 56 Misc. 120—Mintry v. Stransky, 107 N.Y.S. 220.

99. N.Y.—Simon v. Underwood, 115 N.Y.S. 65, 61 Misc. 369.

to set forth his true name.[1]

(2) Appearance or Personal Service

Under some statutes supplementary proceedings may be maintained only where the judgment was rendered on the judgment debtor's appearance or on personal or substituted service of the summons on him.

To entitle a judgment creditor to maintain a proceeding supplementary to execution under some statutes the judgment on which execution has been issued must have been rendered on the judgment debtor's appearance or personal service of the summons on him,[2] or substituted service of the summons on him in accordance with a particular section of the statute.[3] The substituted service referred to is permitted only in certain cases on "a domestic corporation, other than a municipal corporation, a joint-stock or other unincorporated association or a natural person, residing within the state."[4] These requirements are jurisdictional and submission to examination does not waive the right to urge the objection.[5] The requirement of service is, of course, inapplicable where the judgment on which the proceedings are founded is against plaintiff in the original action.[6]

Service on one of joint debtors. Under some statutory provisions, a judgment against joint debtors, rendered on personal service on one, will authorize the proceedings as to the joint property.[7]

(3) Amount

The judgment must be for a sum not less than the jurisdictional amount fixed by the statute.

To authorize supplementary proceedings the judgment must in all cases be for a sum not less than the jurisdictional amount fixed by the statute;[8] but where there is no statutory provision to the contrary, and the amount of the judgment is sufficient to constitute it a lien on real estate,[9] the costs are properly added to the amount of the judgment in determining the amount thereof.[10]

§ 361. —— Execution and Return

a. Execution
b. Return

a. Execution

Generally, unless the statute has dispensed with the requirement, or unless the judgment debtor is insolvent, the issuance of a legal and valid execution is a condition precedent to a resort to supplementary proceedings.

Generally, unless the statute has dispensed with the requirement,[11] or unless the judgment debtor is insolvent,[12] the issuance of an execution is a condition precedent to a resort to supplementary proceedings,[13] and it is necessary that the execution be issued in a bona fide attempt to find and levy on property which can be reached,[14] since the remedy is given only where the debtor has no known property liable to execution,[15] and it clearly appears that the creditor cannot collect his judgment by means of ordinary process.[16]

Sufficiency. The execution must have issued out of a court of record, and one capable of enforcing its own judgments.[17] It must be a legal and valid execution[18] executed in accordance with the mandate of the court,[19] and effective to reach all the property of the judgment debtor, real as well as personal.[20] In some jurisdictions, however, an execution against personal property alone is suffi-

1. N.Y.—Simon v. Underwood, supra.

2. N.Y.—Doctors' Service Corps v. Robbins, 214 N.Y.S. 199, 126 Misc. 587.
23 C.J. p 841 note 88.

3. N.Y.—Maltbie v. Lobsitz Mills Co., 119 N.E. 389, 223 N.Y. 227.
23 C.J. p 841 note 89.

4. N.Y.—Maltbie v. Lobsitz Mills Co., supra.

5. N.Y.—Hildreth v. Seeback, 41 N.Y.S. 653, 18 Misc. 387.

6. N.Y.—Davis v. Jones, 8 N.Y.Civ. Proc. 43—Davis v. Herrig, 65 How. Pr. 290.

7. N.Y.—Jones v. Lawlin, 3 N.Y. Super. 722, 1 Code Rep. 94—Perkins v. Kendall, 3 N.Y.Civ.Proc. 240—Emery v. Emery, 9 How.Pr. 130.
23 C.J. p 841 note 93.

8. N.Y.—Mason v. Hackett, 35 Hun 238.
23 C.J. p 841 note 94, p 842 note 98 [a].

9. N.Y.—Mason v. Hackett, 35 Hun 238—Mede v. Meyer, 105 N.Y.S. 957, 55 Misc. 621.

10. N.Y.—Mede v. Meyer, supra.
23 C.J. p 842 notes 97, 98.

11. N.Y.—Gotham Nat. Bank of New York v. Strunsky, 293 N.Y.S. 961, 162 Misc. 673—Meinhard v. Millstein, 289 N.Y.S. 206, 159 Misc. 889, reversed on other grounds 293 N.Y.S. 966, 162 Misc. 22—Everight Utilities Corp. v. Lonshein, 264 N.Y.S. 681, 147 Misc. 833—Zwerdling v. Hamman Bldg. Corporation, 259 N.Y.S. 593, 145 Misc. 471.

12. Neb.—Application of Laflin, 239 N.W. 836, 122 Neb. 210.

13. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors, Inc., 186 So. 421, 136 Fla. 207.
23 C.J. p 842 note 99.

14. N.Y.—Pudney v. Griffiths, 6 Abb.Pr. 211, 15 How.Pr. 411.
Pa.—Fidelity-Philadelphia Trust Co. v. Miller, 29 Pa.Dist. & Co. 282, 284, citing **Corpus Juris.**

15. N.Y.—Canandaigua First Nat. Bank v. Martin, 2 N.Y.S. 315, 49 Hun 571, 15 N.Y.Civ.Proc. 324.
23 C.J. p 842 note 2.

16. Wis.—Woodward v. Hall, 44 N.W. 114, 75 Wis. 406.

17. N.Y.—Burke v. Burke, 58 N.Y.S. 676, 27 Misc. 684.
23 C.J. p 842 note 4.

18. Ind.—Dandistel v. Kronenberger, 39 Ind. 405.
N.Y.—Shannon v. Steger, 78 N.Y.S. 163, 75 App.Div. 279.
23 C.J. p 842 note 5.

19. R.I.—Morris Plan Co. of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.

20. N.Y.—Importers' & Traders' Nat. Bank v. Quackenbush, 38 N.

cient.[21] Supplementary proceedings cannot be based on an execution which is utterly void,[22] but if the execution is merely defective for informality or irregularity, such as can be amended on motion, the defects will be disregarded and the proceedings will not be affected.[23]

The execution must be issued to the proper county.[24] Generally it is provided by statute that the execution must have issued either to the county where the debtor has a place for the regular transaction of business,[25] or to a county where he resides,[26] or, if a nonresident, to the county where the judgment roll or a transcript of the judgment is filed.[27] However, under some statutes an execution is sufficient where it is issued to the sheriff of the county in which the court rendering the judgment has residence, it not being required that execution should also issue in the county of defendant's residence.[28]

b. Return

A bona fide return of execution unsatisfied in whole or in part is a prerequisite to the maintenance of supplementary proceedings under some, although not other, statutes. Unless false on its face, a return is conclusive in supplementary proceedings.

In determining whether a return of execution is a condition precedent to the maintenance of supplementary proceedings, regard must first be had for the terms of the governing statute.[29] Under some statutes, which are applicable where the judgment creditor has knowledge of property belonging to the defendant, but which he has been unable to locate or have levied on under the execution, an order for examination may be obtained after the issuance of execution and before its return.[30] Under other statutes, which apply generally where the judgment creditor has no knowledge of the existence of any property of the defendant subject to levy under execution, an order for examination may be secured only after execution is returned.[31] Where the statute requires a return of the execution, or where the proceeding is based on a particular provision of the statute which requires a return as a condition precedent, a return unsatisfied in whole or in part is necessary,[32] and the objection that there was no such return is jurisdictional and not waived by appearance and submission to examination.[33] The omissions or mistakes of the clerk in filing the return of the execution do not vitiate the supplementary proceedings.[34]

Sufficiency. The return on the execution must be sufficient to show that the creditor has exhausted his legal remedy,[35] and that the officer making

E. 728, 143 N.Y. 567, 1 Ann.Cas. 20, reversing 30 N.Y.S. 35, 80 Hun 111.
23 C.J. p 842 note 6.
Lien on realty as affecting amount of judgment requisite to jurisdiction see supra § 360.

21. N.J.—Westfall v. Dunning, 14 A. 486, 50 N.J.Law 459.

22. N.Y.—Baumler v. Ackerman, 63 Hun 40.
23 C.J. p 842 note 8.

23. Okl.—Gulager v. Bickford, 293 P. 209, 146 Okl. 49.
23 C.J. p 842 note 9.

24. Ind.—Fowler v. Griffin, 83 Ind. 297.
N.Y.—People v. Norton, 6 N.Y.Super. 640.

25. N.Y.—Groshut v. Kinetophote Corp., 157 N.Y.S. 312, 93 Misc. 558.
23 C.J. p 842 note 11.

26. U.S.—Bates v. International Co., C.C.Cal., 84 F. 518.
23 C.J. p 843 note 12.

27. N.Y.—Logan v. McCall Pub. Co., 35 N.E. 655, 140 N.Y. 447.
23 C.J. p 843 note 13.

28. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors, Inc., 186 So. 421, 136 Fla. 207.

29. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors Inc., 186 So. 421, 136 Fla. 207.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
N.Y.—Gotham Nat. Bank of New York v. Strunsky, 293 N.Y.S. 961, 162 Misc. 673.
Pa.—Brunozzi v. Stackhouse, 35 Luz. L.Reg. 200.
23 C.J. p 843 notes 14–19.

30. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.
23 C.J. p 843 note 14.

Property in open and notorious possession

(1) Under some statutory provisions proceedings before return of the execution cannot be maintained against the judgment debtor if he has in his open and notorious possession, and within reach of execution, property which he shows no design to remove or fraudulently dispose of.
N.Y.—Sackett v. Newton, 10 How.Pr. 560.
Wis.—Smith v. Weeks, 18 N.W. 778, 60 Wis. 94.

(2) Under other differently worded statutes, however, the contrary is held.
Or.—State v. Downing, 66 P. 917, 40 Or. 309.
Wis.—Enders v. Smith, 100 N.W. 1061, 122 Wis. 640.

Nature of proceedings

It has been held that, where proceedings are instituted before the return of the execution, the same proceedings for the application of the debtor's property may be had as on the return of the execution.
N.Y.—Union Bank v. Sargeant, 35 How.Pr. 87.
S.C.—Green v. Bookhart, 19 S.C. 466.

31. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors Inc., 186 So. 421, 136 Fla. 207.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
R.I.—Morris Plan Co. of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.
23 C.J. p 843 note 19.

32. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors Inc., 186 So. 421, 136 Fla. 207.
Ohio.—Southern Ohio Finance Corporation v. Wahl, 171 N.E. 369, 34 Ohio App. 518.
Philippine.—Manotoc v. McMicking, 10 Philippine 119, 6 Off.Gaz 625.
R.I.—Morris Plan Co of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.
23 C.J. p 843 note 19.

33. N.Y.—Jennings v. Lancaster, 37 N.Y.S. 196, 15 Misc. 444.

34. N.Y.—Jones v. Porter, 6 How. Pr. 286.
Wis.—Barker v. Dayton, 28 Wis. 367.

35. Wash.—Klepsch v. Donald, 51 P. 352, 18 Wash. 150.
23 C.J. p 843 note 22.

such return was authorized by law to make it.[36] Under some statutes a return nulla bona is sufficient;[37] but under other statutes the return must show an exhaustion of the remedy by execution against all the property of the judgment debtor, real as well as personal.[38] Ordinarily a return of execution unsatisfied is sufficient,[39] although another outstanding execution has not been returned.[40] If the action is against persons jointly liable on contract, but summons is served on only a part, an execution issued against the joint property of all the defendants and returned unsatisfied is a sufficient exhaustion of the remedy at law.[41] However, a return of execution issued against persons jointly liable is insufficient as a basis for supplementary proceedings where it shows on its face that it was served on one person only.[42] A defect in the return which is not prejudicial cannot be relied on after examination.[43]

Time and good faith. The creditor is not bound to wait until the expiration of the time allowed by law for the execution to run, but may institute proceedings immediately on the return of the execution unsatisfied.[44] The creditor's remedy by execution must be really exhausted by permitting the officer to take the usual course. If there is collusion, or the return is made prematurely, pursuant to the creditor's instructions and without any real attempt to effect a levy, the proceedings cannot be sustained.[45] In other words, there must be a bona fide attempt to find leviable property,[46] but if there is such an attempt, although unsuccessful, the mere fact that the premature return was made at the request of the creditor will not invalidate the proceedings.[47] The debtor may in good faith facilitate proceedings against himself.[48]

Conclusiveness. The return unsatisfied in whole or in part is conclusive until set aside by a direct motion in the action;' it cannot be attacked or impeached in supplementary proceedings,[49] unless it is shown to be false on its face.[50]

§ 362. Right to, and Grounds for, Examination of Third Persons

In most states where supplementary proceedings are authorized, persons indebted to, or having property of, the judgment debtor may be compelled to submit to examination in respect thereof.

In some states the statute authorizing examination is by its terms limited to an examination of the judgment debtor;[51] and the only way, if any, of proceeding against third parties, is by an action, where such remedy is appropriate.[52] However, in most states where supplementary proceedings are authorized, the right exists to compel persons indebted to, or having property of, the judgment debtor to submit to an examination in respect thereof,[53] where the proper procedure for procuring

36. N.Y.—Muldowney v. Corney, 3 Daly 170—Silverman v. Henant, 40 How.Pr. 88.

37. Ohio.—Stern v. Columbus Mut. Life Ins. Co., 177 N.E. 923, 39 Ohio App. 498.
Pa.—Wayne Title & Trust Co. v. Mellett, 29 Pa.Dist. & Co. 117, 38 Lack.Jur. 47, 8 Som.Leg.J. 364—Commercial Nat. Bank & Trust Co. v. American Kid Co., 16 Pa.Dist. & Co. 799.
23 C.J. p 844 note 24.

Return nulla bona at plaintiff's request is insufficient, however, where it does not appear that any bona fide effort was made to ascertain whether defendant had property subject to execution.—Fidelity-Philadelphia Trust Co. v. Miller, 29 Pa.Dist. & Co. 282.

38. N.Y.—Marx v. Spaulding, 35 Hun 478, 16 Abb.N.Cas. 309, affirmed 99 N.Y. 675.
23 C.J. p 844 note 25.

39. N.J.—Belmont Lumber Co. v. Friedman, 147 A. 583, 105 N.J.Eq. 284.
Okl.—U. S. Fidelity & Guaranty Co. v. Cherry, 105 P.2d 544, 187 Okl. 666.

Return of city marshal's execution unsatisfied is sufficient basis for supplementary proceedings under some statutes.—Hecht v. Sanger, 218 N.Y.S. 675, 128 Misc. 380, reversing 215 N.Y.S. 409, 126 Misc. 735.

40. N.Y.—Owen v. Dupignac, 9 Abb. Pr. 180, 17 How.Pr. 512.
Pa.—Commercial Nat. Bank & Trust Co. v. American Kid Co., 16 Pa. Dist. & Co. 799.

Alias execution outstanding
Order of citation issued before return of alias execution, prior execution having been returned unsatisfied, is not void because prematurely issued.—Gulager v. Bickford, 293 P. 209, 146 Okl. 49.

41. N.Y.—Perkins v. Kendall, 3 N. Y.Civ.Proc. 240.

42. R.I.—Morris Plan Co. of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.

43. N.Y.—Baker v. Herkimer, 43 Hun 86.

44. N.Y.—Forbes v. Walter, 25 N.Y. 430, 25 How.Pr. 166.
23 C.J. p 844 note 29.

45. N.Y.—Eleventh Ward Bank v. Heather, 48 N.Y.S. 44, 22 Misc. 87, reversing 47 N.Y.S. 718, 21 Misc. 539.
23 C.J. p 844 note 30.

46. Pa.—Fidelity-Philadelphia Trust Co. v. Miller, 29 Pa.Dist. & Co. 282.
23 C.J. p 844 note 31.

47. Wis.—Second Ward Bank v. Upmann, 12 Wis. 499.
23 C.J. p 844 note 32.

48. N.Y.—Lindsley v. Van Cortlandt, 22 N.Y.S. 222, 67 Hun 145, affirmed 37 N.E. 825, 142 N.Y. 682.

49. Minn.—Flint v. Webb, 25 Minn. 263.
23 C.J. p 844 note 34.
Conclusiveness of return generally see supra § 329.

50. R.I.—Morris Plan Co. of Rhode Island v. Katz, 190 A. 455, 57 R.I. 495.
23 C.J. p 844 note 35.

51. Mo.—Ex parte Koehler, 156 S. W. 982, 174 Mo.App. 297.
Okl.—U. S. Fidelity & Guaranty Co. v. Cherry, 105 P.2d 544, 187 Okl. 666.

52. La.—Copley v. Dosson, 3 La. Ann. 651.
23 C.J. p 828 note 82.
Actions in aid of execution see infra § 384.

53. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.

such an examination, considered infra §§ 363–365, is followed. The right may be exercised either before or after the return of execution.[54] It is not affected by a provision that no action can be maintained to obtain a discovery in aid of another action,[55] or by a claim by the third person of ownership of the property in question,[56] or by a denial of possession of property of the debtor or the existence of an indebtedness,[57] or by the fact that the debt of the third person is not yet payable,[58] nor will the right be precluded by an attachment of the debtor's property.[59] While, as appears supra § 349, a third party order does not ordinarily reach moneys or property not owned by, or due to, the judgment debtor at the time of the commencement of the proceedings, it has nevertheless been held that a statute providing for supplementary proceedings against third parties, since it is remedial, should not be so narrowly construed as to prevent the examination of a third party who is about to receive moneys belonging to a judgment debtor.[60] There is no right to the examination unless the case is within the terms of the statute authorizing it;[61] and, even where it is, the granting or refusal of the application has been held to rest in the sound discretion of the trial judge.[62] The third party's objection that the judgment on which the proceeding is based is absolutely void is a valid objection which, if true, prevents the examination.[63]

Dependency on proceedings against judgment debtor or other third persons. In some jurisdictions the proceedings against a third party must be in connection with the proceedings against the judgment debtor who must be made a party.[64] In other jurisdictions proceedings for the examination of third persons are distinct proceedings from those authorizing the debtor's examination and are not dependent on the institution of proceedings against the latter or his examination.[65] The right to the examination exists even after the conclusion of the examination of the judgment debtor;[66] but it is held in these jurisdictions that an order cannot be issued for the examination of a third party while he is under subpœna as a witness in proceedings against the judgment debtor,[67] or after he has been examined fully as a witness in such a proceeding against the judgment debtor,[68] or after the judg-

Neb.—Orchard & Wilhelm Co. v. North, 251 N.W. 895, 125 Neb. 723

N.C.—Boseman v. McGill, 114 S.E. 10, 184 N.C. 215.

W.Va.—Hatfield ex rel. Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742.

23 C.J. p 828 note 83.

Validity of statute

New York statute providing for examination of third parties believed to have property belonging to judgment debtor on proof by affidavit or subpœna in proceedings supplementary to execution was held not unconstitutional as allowing uncontrolled examination into affairs of any one whom judgment creditor might select, since examination is conducted before judge or referee, who is to keep examination within bounds and exclude prying into irrelevant matters.—Capital Co. v. Fox, C.C.A.N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F.Supp. 677.

Liberal construction

The statute providing for examination of third party who has property of, or is indebted to, judgment debtor should be construed in favor of a policy of aiding a judgment creditor in the discovery of assets of a judgment debtor.—Draco Realty Corporation v. Krapp, 24 N.Y.S.2d 173, 175 Misc. 589.

"Property or other means"

(1) Knowledge of a judgment debtor's address is not knowledge of "property" or "other means" of the judgment debtor, so as to subject a corporation having such knowledge to a third party examination directed solely to the disclosure of such address.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.

(2) A deposit made pursuant to statute by a judgment debtor with a public utility corporation to secure payment of bills for utility service was not "property" of the debtor within the statute, such as would authorize examining the corporation as a witness in supplementary proceedings.—Schwartz' Estate v. Dunishtock, supra.

54. N.Y.—Seeley v. Garrison, 10 Abb. Pr. 460.

Prior to sale on execution of property of defendant shown to be insufficient to pay the judgment, right may be exercised.—Boseman v. McGill, 114 S.E. 10, 184 N.C. 215.

55. N.Y.—Matter of Sickle, 5 N.Y.S. 703, 52 Hun 527, 17 N.Y.Civ.Proc. 138.

56. N.Y.—New York First Nat. Bank v. Gow, 124 N.Y.S. 449, 139 App. Div. 576.

23 C.J. p 829 note 87.

57. N.Y.—New York First Nat. Bank v. Gow, supra.

58. N.Y.—Davis v. Herrig, 65 How. Pr. 290.

Indebtedness to be incurred

Issuance of a third party order on proof that third party may become indebted or incur an obligation to judgment debtor at some future time is not authorized by statute relating to such orders.—Kaufung v. Doric Shop, 11 N.Y.S.2d 67, 170 Misc. 683.

59. N.Y.—Hanson v. Tripler, 5 N.Y. Super. 733, Code Rep.,N.S., 154.

60. N.Y.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.

61. N.Y.—New York First Nat. Bank v. Gow, 124 N.Y.S. 449, 139 App. Div. 576.

23 C.J. p 829 note 91.

62. S.C.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.

63. N.Y.—Nankivel v. Omsk All Russian Government, 142 N.E. 569, 237 N.Y. 150, reversing 197 N.Y.S. 467, 203 App.Div. 740.

64. Ind.—Earl v. Skiles, 93 Ind. 178.

65. N.Y.—Gibson v. Haggerty, 37 N.Y. 555, 97 Am.D. 752, reversing 15 Abb.Pr. 406, 23 How.Pr. 260.

23 C.J. p 829 note 95.

Subpœna on third party

Under the New York statute permitting the judgment creditor's attorney to procure the attendance and examination of a third party by issuing and having served on him a subpœna, such proceeding may be instituted separately from proceedings to examine the judgment debtor. —Daniels v Becker, 290 N.Y.S. 487, 160 Misc. 649.

66. N.Y.—Lockwood v. Worstill, 15 Abb.Pr. 430 note—Morrell v. Hey, 15 Abb.Pr. 430 note.

67. N.Y.—Steinmann v. Hosier, 139 N.Y.S. 863, 3 N.Y.Civ.Proc.,N.S., 22.

68. N.Y.—New York First Nat. Bank v. Gow, 124 N.Y.S. 449, 139 App.Div. 576.

ment creditor has brought an action to set aside the transfer of property by a judgment debtor to a third person.[69] If sufficient property has been discovered by the examination of third persons an order directing the examination of another person will be vacated as unnecessary.[70]

Prior appointment of receiver. After the appointment of a receiver, it has been held in New York that a third party order cannot be granted, on the theory that title to the debtor's personalty vests in the receiver, including that possessed by third persons,[71] although there is authority to the contrary.[72]

Dependency on information sought. A third party order will not be granted merely to aid a fishing expedition.[73]

What third parties. Where an examination of a third party is sought, the proceeding may be instituted against the wife of the judgment debtor,[74] his assignee,[75] a corporation,[76] the treasurer of a joint stock company,[77] the representative of an estate in which the judgment debtor is believed to have an interest,[78] an executor holding a legacy belonging to the debtor,[79] the custodian of property attached in the action,[80] or persons holding assets of a corporate debtor or indebted thereto.[81] Under one statute it has been held that a municipal body cannot be proceeded against as to its indebtedness to the execution debtor;[82] but under another it has been held that a municipal corporation is subject to a third party order directing its examination respecting its indebtedness to the judgment debtor for salary or wages.[83] An instrumentality of the United States government has been held not subject to supplementary proceedings as a third party, in the absence of an intent to make it so in the statute creating it.[84] While it has been held that a municipal officer having funds belonging to the municipality may be examined at the instance of a creditor of the corporation,[85] this has been denied as to money which he holds for the corporation in its public or municipal, as distinguished from its private, capacity.[86] A receiver of the debtor cannot be examined,[87] nor can a receiver of a foreign corporation claimed to owe money to the judgment debtor.[88] An examination of a third person as to property in custodia legis is not authorized.[89]

§ 363. Proceedings to Procure Order for Examination

Irregularities in the proceedings on which an order for examination is based may be waived by submitting to examination.

Where, under the rules stated supra §§ 359-362, the grounds and conditions precedent to supplementary proceedings are present, certain steps hereinafter considered must be taken in order to ef-

69. N.Y.—Lowther v. Lowther, 97 N.Y.S. 5, 110 App.Div. 122—Mutual Film Corp. v. Davis, 176 N.Y.S. 320.

70. N.Y.—Crane v. Beecher, 6 N.Y.S. 225.
23 C.J. p 829 note 1.

71. N.Y.—Steinmann v. Conlon, 135 N.Y.S. 740, 150 App.Div. 708.
23 C.J. p 829 note 92.

72. N.Y.—Denison v. Jackson Bros. Realty Co., 143 N.Y.S. 586, 158 App. Div. 475.
23 C.J. p 829 note 93.

73. S.C.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.
"An intrusion into the records of the witness on the mere chance that something useful to the judgment creditor will turn up is unwarranted and is, therefore, an invasion of the rights of the witness."—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 746, 175 Misc. 860.

Examination to discover address
The examination of a public utility corporation as a witness in supplementary proceedings was not within purview of statute respecting examination of witnesses in connection with proceedings supplementary to judgment where sole purpose of proposed examination of corporation was to discover judgment debtor's address.—Schwartz' Estate v. Dunishtock, supra.

74. N.Y.—Lockwood v. Woerstell, 15 Abb.Pr. 430 note.
Wash.—Frankenthal v. Solomonson, 55 P. 754, 20 Wash. 460, 72 Am.S.R. 116, 44 L.R.A. 311.
Wis.—O'Brien's Petition, 24 Wis. 547.
23 C.J. p 831 note 46.

75. N.C.—Bruce v. Crabtree, 21 S.E. 194, 116 N.C. 528.

76. S.C.—Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 97 S.E. 833, 111 S.C. 299.
23 C.J. p 831 note 48.

77. N.Y.—Courtois v. Harrison, 1 Hilt. 109, 3 Abb.Pr. 96, 12 How.Pr. 359.

78. N.Y.—Ward La France Truck Corporation v. Totonelly, 298 N.Y.S. 156, 164 Misc. 291.

Where judgment debtor is representative
A judgment creditor was entitled to examine judgment debtor in her representative capacity as administratrix of husband's estate.—Ward La France Truck Corporation v. Totonelly, 298 N.Y.S. 156, 164 Misc. 291.

79. R.I.—Spencer v. Greene, 17 R.I. 727.
23 C.J. p 831 note 50.

80. N.Y.—Chandler v. Fon du Lac, 56 How.Pr. 449.

81. Ind.—Tompkins v. Floyd County Agricultural & Mechanical Ass'n, 19 Ind. 197.
N.Y.—McBride v. Farmers' Bank, 28 Barb. 476, 7 Abb.Pr. 347.

82. Ind.—Wallace v. Lawyer, 54 Ind. 501, 23 Am.R. 661.
23 C.J. p 831 note 53.

83. N.Y.—Draco Realty Corporation v. Krapp, 24 N.Y.S.2d 173, 175 Misc. 589.

84. N.Y.—Manufacturers Trust Co. v. Ross, 299 N.Y.S. 398, 252 App. Div. 292.

85. N.Y.—Lowber v. New York, 5 Abb.Pr. 268.

86. N.Y.—Lowber v. New York, supra.

87. N.Y.—Fitchburgh Nat. Bank v. Bushwick Chemical Works, 13 N.Y.Civ.Proc. 155.

88. N.Y.—Smith v. McNamara, 15 Hun 447.

89. N.Y.—Havens v. National City Bank, 4 Hun 131, 6 Thomps. & C. 346—Anonymous, Code Rep.,N.S., 211.
Wis.—Williams v. Smith, 93 N.W. 464, 117 Wis. 142.

fectuate the right to examine the judgment debtor or third persons.[90] Requirements of notice of the institution of proceedings to procure an examination are considered infra § 364, and affidavits or other papers by which the proceedings are instituted, as well as subsequent pleadings, are considered infra § 365. Irregularities in the proceedings on which an order for examination is based may be waived by submitting to examination.[91]

§ 364. —— Notice

In the absence of a statutory requirement, it is generally unnecessary to give notice to a judgment debtor of an application for an order for his or a third party's examination, although it has been considered to be the better practice to do so.

As a general rule, in the absence of a statutory requirement, notice need not be given to a judgment debtor of an application for an order for his examination[92] or for the examination of a third person;[93] but, as appears infra § 366 c (1), it is sometimes provided by statute that, where an order for the examination of a third person is granted, the judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor. An order requiring a judgment debtor to submit to a second examination may be granted ex parte;[94] but a creditor who has permitted the proceedings to drop after examining the debtor, and who has not adjourned or extended the proceedings, cannot thereafter take the testimony of a witness, without notice to the debtor.[95] It would seem to be the better practice in all cases that notice should be given,[96] and that an opportunity to show that the judgment has been paid, or to establish any other satisfaction or defense arising since the judgment was perfected, be thus afforded to the debtor.[97] Where, under the practice discussed infra § 366, an order is dispensed with by the issuance of a subpoena pursuant to statute, there is obviously no occasion to give the person served any notice of an application for an order.[98] A statute requiring as a condition precedent to the commencement of proceedings in aid of execution the sending of a demand to the judgment debtor is complied with by sending such a demand by registered mail, and it is not necessary that the debtor receive it.[99]

§ 365. —— Affidavits and Pleadings

a. Affidavit or other application
b. Subsequent pleadings

a. Affidavit or Other Application

(1) Necessity
(2) Who may make
(3) Sufficiency
(4) Objections and waiver
(5) Filing

(1) Necessity

The necessity of showing the requisite facts by affidavit or its equivalent depends on local statute, and in some instances is made to turn on whether the execution has or has not been returned.

As a condition to the issuance of an order of examination some statutes expressly require proof of the requisite facts by affidavit or other competent evidence, not only where the proceedings are instituted before the return of the execution, but also where they are instituted after the return.[1] In other states the statutes, while requiring an affidavit as a condition precedent to the institution of supplementary proceedings before the return of the execution,[2] are silent as to its necessity where the proceedings are instituted after the return, and

90. Cal.—Trounce v. Whittier Sav. Bank, 29 P.2d 789, 136 Cal.App. 761.

91. U.S.—In re Loftus, D.C.N.Y., 16 F.Supp. 711.
Objections to affidavit and waiver see infra § 365.
Jurisdiction
In proceeding supplementary to execution where third party submitted itself to examination and was represented by its attorney on all but the first two examinations and on motion to punish it for contempt and filed opposing affidavits, and at no time questioned the jurisdiction of the court, third party could not thereafter question the jurisdiction of the court.—Scheuer v. Eisenstein, 8 N.Y.S.2d 247.

92. U.S.—Bair v. Bank of America Nat. Trust & Savings Ass'n, C.C.A. Mont., 112 F.2d 247, citing **Corpus Juris**, and certiorari denied 61 S.Ct. 61, 311 U.S. 684, 85 L.Ed. 441.
Colo.—Sweeney v. Cregan, 299 P. 1058, 1059, 89 Colo. 94, citing **Corpus Juris.**
Iowa.—Lehigh Sewer Pipe & Tile Co. v. Gjellefald, 218 N.W. 475, 205 Iowa 778.
N.J.—Whitfield v. Kern, 6 A.2d 411, 125 N.J.Eq. 515—Commercial Nat. Trust & Savings Bank of Los Angeles v. Hamilton, 137 A. 403, 101 N.J.Eq. 249, affirming 133 A. 703, 99 N.J.Eq. 492.
23 C.J. p 845 note 38.

93. U.S.—Bair v. Bank of America Nat. Trust & Savings Ass'n, C.C.A. Mont., 112 F.2d 247, 249, citing **Corpus Juris**, and certiorari denied 61 S.Ct. 61, 311 U.S. 684, 85 L.Ed. 441.
Iowa.—Lehigh Sewer Pipe & Tile Co. v. Gjellefald, 218 N.W. 475, 205 Iowa 778.
23 C.J. p 845 note 39.

94. N.Y.—Goodall v. Demarest, 2 Hilt. 534.

95. N.Y.—Thomas v. Kircher, 15 Abb.Pr.,N.S., 342.

96. N.Y.—Gibson v. Haggerty, 15 Abb.Pr. 406, 23 How.Pr. 260.

97. N.Y.—Ward v. Beebe, 15 Abb.Pr. 372.

98. N.Y.—Zwerdling v. Hamman Bldg. Corporation, 259 N.Y.S. 593, 145 Misc. 471.

99. Ohio.—Askin Stores v. Bender, 29 N.E.2d 815, 65 Ohio App. 307.

1. N.Y.—Bridges v. Koppelman, 117 N.Y.S. 306, 63 Misc. 27.

2. Neb.—Clarke v Nebraska Nat. Bank, 77 N.W. 805, 57 Neb. 314, 73 Am.S.R. 507.

the decisions are in conflict as to the necessity of an affidavit where the proceedings are so instituted, some holding that no affidavit is necessary,[3] while others hold that proof of the requisite facts by affidavit or otherwise is required by implication.[4] Where the statute requires proof by affidavit or other competent evidence, it is not essential that all the jurisdictional facts required to be shown be contained in the affidavit, it being sufficient if some of such facts are established by other competent evidence.[5] In a few states the proceedings are instituted by a complaint[6] or verified petition,[7] which, however, in its nature, purpose, and contents corresponds with the affidavit required in other states; and it has been held that a verified petition will take the place of an affidavit required by the statute.[8] Under a statute allowing, as a substitute for the procuring of an order, the issuance by the judgment creditor's attorney of a subpœna to a third party believed to have property of the judgment debtor, no supporting affidavit is required, although the subpœna is supported by a declaration of the attorney's belief.[9]

For supplemental order. Where a proper order is not obeyed and the proceedings are continued and defendant is brought into court, a supplemental order again directing discovery may be made without the filing of a new petition.[10]

(2) Who May Make

Unless the statute otherwise provides, the affidavit may be made by the judgment creditor, his attorney, or agent.

Generally the affidavit may be made by the owner of the judgment, his attorney, or agent for collection of the judgment;[11] but where the statute expressly requires the affidavit to be made by the judgment creditor it cannot be made by his agent.[12]

(3) Sufficiency
- (a) In general
- (b) Showing authority to institute
- (c) Reference to judgment
- (d) Reference to execution
- (e) Reference to property of debtor
- (f) For third-party order
- (g) For second order or examination

(a) In General

The affidavit must comply with statutory requirements, and generally should state facts and not conclusions, should state the sources of information and belief on which allegations are based, and should not state the grounds in the alternative.

As will hereinafter appear, the necessary contents of the affidavit are governed to some extent, at least in most of the states, by the question whether the examination sought is that of the judgment debtor or of a third party, and also whether the application is after or before the return of the execution. There are certain rules, however, generally applicable to all such affidavits, such as that the affidavit should not state in the alternative the grounds on which it is based,[13] and that allegations on information and belief are not sufficient unless the sources of affiant's information and belief are stated, in order that the court may judge of their sufficiency.[14] Statements in affidavits will be presumed to have been made on personal knowledge

S.C.—Robinson v. McMaster, 95 S.E. 110, 109 S.C. 20.

3. S.C.—Robinson v. McMaster, supra.
23 C.J. p 845 note 49.

4. Wis.—Smith v. Weeks, 18 N.W. 778, 60 Wis. 94.
23 C.J. p 845 note 50.

5. U.S.—Wood v. Noyes, C.C.A.Alaska, 279 F. 321, certiorari denied 43 S.Ct. 94, 260 U.S. 732, 67 L.Ed. 486.
S.C.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.

6. Ind.—Vordermark v. Wilkinson, 46 N.E. 336, 147 Ind. 56.
23 C.J. p 845 note 51.
Complaint in plenary action in aid of execution see infra § 384.

7. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 428.

8. S.C.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.

9. U.S.—Capital Co. v. Fox, C.C.A.N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F.Supp. 677.
N.Y.—New York Credit Men's Ass'n v. Schneider, 286 N.Y.S. 978, 247 App.Div. 896, appeal dismissed 7 N.E.2d 726, 273 N.Y. 625, motion denied 10 N.E.2d 590, 274 N.Y. 637.

10. N.J.—Whitfield v. Kern, 6 A.2d 411, 125 N.J.Eq. 515.

11. N.Y.—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390—Conway v. Hitchins, 9 Barb. 378.

Distinguished from showing of authority to institute

(1) Where the papers for an order in supplementary proceedings for the examination of a judgment debtor are indorsed by attorney for judgment creditor, authority to institute the proceedings is presumed, and supporting affidavit may be made by managing clerk in office of attorney for judgment creditor, for under such circumstances, as long as the required facts appear, it is immaterial who makes the supporting affidavit. —In re Weil, 197 N.Y.S. 884, 119 Misc. 627.

(2) Showing authority to institute proceeding see infra subdivision a (3) (b) of this section.

12. N.J.—Westfall v. Dunning, 14 A. 486, 50 N.J.Law 459.

13. N.Y.—Lowther v. Lowther, 97 N.Y.S. 5, 110 App.Div. 122.
23 C.J. p 845 note 59.

14. Mo.—Ackerman v. Green, 81 S.W. 509, 107 Mo.App. 341.
23 C.J. p 845 note 60.

Defect not jurisdictional

An order for supplementary proceedings, to which the statute declares a judgment creditor entitled, on proof by affidavit, or other competent written evidence of certain facts, is not void because the affidavit on information and belief does not state the sources of information and belief, the defect not being jurisdictional, but one which could be cured or waived.—Boyd v. Hildebrandt, 185 N.Y.S. 235.

Verification on belief held to authorize order for discovery, but not

unless stated to have been made on information and belief, or unless it appears affirmatively and by fair inference that they could not have been made on personal knowledge.[15] The affidavits must comply with the statutory requirements,[16] and if two or more are filed as separate applications each must be sufficient in itself.[17] The affidavit must state facts and not mere conclusions,[18] and it is not always sufficient to follow the language of the statute.[19] The nature of the relief sought need not be stated,[20] and if the affidavit is presented in a court of inferior jurisdiction it need not state that it is a court of record.[21] Surplusage may be disregarded.[22] In some states it is held that defective statements in the affidavit may be cured by reference to the record on the theory that the court takes judicial notice thereof.[23]

Entitling. The affidavit should be entitled in the court in which the proceedings are instituted,[24] but, if it sufficiently refers to the proceeding, it will not be invalidated by a defective title.[25]

Indorsement. Noncompliance with a rule requiring the indorsement with the name and address of plaintiff's attorney of all papers required to be filed is a mere irregularity which may be disregarded.[26]

Reference to prior applications. While it is the usual practice for the affidavit to state that no previous application has been made for the order,[27] such an allegation is not essential,[28] except where required by a statute or rule of court,[29] and in any event its omission is a mere irregularity not entitling a party to a dismissal of the proceedings.[30]

(b) Showing Authority to Institute

Where the moving affidavit is made by one other than the judgment creditor, it must show the authority of the affiant to institute the proceeding.

If the affidavit is made by one other than the judgment creditor, it must show authority to act for him, so that the application will show on its face that the proceeding was authorized by the owner of the judgment,[31] except, it has been held, where the affidavit is made by the attorney for the judgment creditor.[32] Thus an assignee of the judgment must show his right to institute the proceeding,[33] as must an attorney who claims a lien on the judgment.[34] Where the judgment creditor is dead, his personal representatives seeking to enforce the judgment through these proceedings must show their right to do so.[35] If the affidavit does not show the authority of the affiant to make it, and it is made by one other than the judgment creditor or his attorney, the subsequent approval or adoption thereof by the judgment creditor is ineffective, since the question, on motion to vacate the order, is as to the authority of the judge making the order when the papers first came before him.[36]

order forbidding transfer or payment. —Barr v. Voorhees, 37 A. 134, 55 N. J.Eq. 134.

15. N.Y.—Bruen v. Nickels, 51 N.Y. S. 352, 30 App.Div. 396, 5 N.Y.Ann. Cas. 381.

16. Ind.—D. L. Adams Co. v. Federal Glass Co., 103 N.E. 414, 180 Ind. 576.
23 C.J. p 846 note 62.

Forms of affidavits
Mo.—Ackerman v. Green, 100 S.W. 30, 201 Mo. 231.
23 C.J. p 846 note 45.

17. Ind.—Abell v. Riddle, 75 Ind. 345.

18. N.Y.—Schwartz' Estate v. Dunishtock, 25 N.Y.S.2d 742, 175 Misc. 860.
23 C.J. p 846 note 64.

19. N.Y.—Rome First Nat. Bank v. Wilson, 13 Hun 232—Carbonating Apparatus Co. v. Bennett, 105 N.Y. S. 1052, 56 Misc. 47.

20. Minn.—Knight v. Nash, 22 Minn. 452.

21. N.Y.—Sayer v. McDonald, 2 How. Pr..N.S., 119.

22. Ind.—Hobbs v. Eaton, 78 N.E. 333, 38 Ind.App. 628.

23. Wash.—Flood v. Libby, 80 P. 533, 38 Wash. 366, 107 Am.S.R. 851.

24. N.Y.—People v. Oliver, 66 Barb. 370.
23 C.J. p 846 note 70.

25. N.Y.—Lynch v. Riley, 22 N.Y. Wkly.Dig. 357.
23 C.J. p 846 note 71.

26. N.Y.—Dorsey v. Cummings, 48 Hun 76.

27. N.Y.—Ludlow v. Mead, 21 N.Y. St. 435.

28. N.Y.—Sayer v. McDonald, 2 How. Pr.,N.S., 119—Schanck v. Conover, 56 How.Pr. 437.

Prior invalid order
It is not necessary to refer to a previous order which was a nullity. —Sudlow v. Mead, 3 N.Y.S. 321.

29. N.Y.—Bean v. Tonnelle, 1 N.Y. Civ.Proc. 33, 24 Hun 353.

30. N.Y.—Bean v. Tonnelle, supra.

31. N.Y.—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390.
23 C.J. p 846 note 73.

32. N.Y.—Ruf v. B. B. & F. Realty Corporation, supra.
23 C.J p 846 note 74.

Moving or supporting affidavit
(1) A moving affidavit made by the managing clerk of the attorney for the judgment creditor is insufficient where his authority is not shown and the reason why the affidavit was not made by the judgment creditor or his attorney is not set forth.—Eyre v. Stubbert, 128 N.Y.S. 4, 71 Misc. 147.

(2) But where the moving papers are indorsed by the attorney for the judgment creditor, authority to institute the proceedings is presumed, and in such case an affidavit made by the attorney's managing clerk, or anyone else, is sufficient.—In re Weil, 197 N.Y.S. 884, 119 Misc. 627.

Right to require proof of authority
Where the officer to whom application is made doubts the right of the attorney who applies to act for the judgment creditor, he may require evidence on that point.—Kress v. Morehead, 8 N.Y.St. 858.

33. N.Y.—Seeley v. Connors, 95 N.Y. S. 1109, 109 App Div. 279.
23 C.J. p 846 note 75.

34. N.Y.—Merchant v. Sessions, 5 N. Y.Civ.Proc. 24—Russell v. Sumerville, 4 N.Y.Month.L.Bul. 3.

35. N.Y.—Walker v. Donovan, 6 Daly 552, 53 How.Pr. 3.
23 C.J. p 846 note 77.

36. N.Y.—Beardsley v. Stone Valley Distilling Co., 122 N.Y.S. 686.

(c) Reference to Judgment

Ordinarily the affidavit should show the recovery of a valid judgment capable of supporting supplementary proceedings, and that the judgment remains unpaid in whole or in part.

The affidavit should affirmatively show the recovery of a judgment,[37] except where the record in the action is a part of the proceedings so that the court will take judicial notice thereof,[38] and should contain a sufficient description of the judgment to show that it is capable of being made the basis of supplementary proceedings.[39] The affidavit should describe the judgment with substantial accuracy,[40] show the court in which it was recovered,[41] and the party in whose favor it was rendered.[42] Where the docketing or filing of a transcript of the judgment is necessary, as where the judgment is that of a justice of the peace, the docketing or filing must be alleged;[43] but such an allegation need not be made where a docketing or the filing of a transcript is not necessary, as where a judgment of a court of record is sought to be enforced in the county where rendered.[44] Allegations of this kind may be aided by the presumption of proper and regular performance of official duty.[45] Under a statute in effect so providing, it must be stated that the judgment was rendered on defendant's appearance or personal or substituted service of summons on him,[46] unless such facts appear by the judgment roll referred to in the affidavit.[47] The amount of the judgment should be stated,[48] and the affidavit should show that it was for an amount authorizing the examination;[49] but the affidavit need not show that the court rendering the judgment had jurisdiction,[50] unless the court was one of limited or inferior jurisdiction.[51] The affidavit must allege that the judgment is unpaid in whole or in part;[52] and if the execution has been returned partly unsatisfied the affidavit must contain a statement showing the amount due on the judgment.[53] A misstatement in the affidavit of the date of the entry of the judgment is not fatal.[54]

(d) Reference to Execution

As a general rule the affidavit should show the proper issuance of an execution, and, unless the application is made under a statute authorizing examination before the return, should show the return of the execution partly or wholly unsatisfied.

The regular issuance of an execution on the judgment against the property of the judgment debtor and its return unsatisfied in whole or in part must be appropriately shown,[55] unless the proceeding is authorized before return of execution, in which case, of course, no showing as to a return is necessary;[56] but the affidavit before the return of the execution should show that the execution is in the hands of the sheriff.[57] It is sometimes held that where the proceeding is in the court out of which the execution issued, its issuance need not be alleged as the court will take judicial notice thereof.[58] The affi-

37. Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370.
23 C.J. p 846 note 79.

38. Wash.—Flood v. Libby, 80 P. 533, 38 Wash. 366, 107 Am.S.R. 851.

39. N.Y.—Webster v. Sawens, 3 How. Pr.,N.S., 320.
23 C.J. p 847 note 81.

40. N.Y.—Sherl v. Kurzman, 113 N.Y.S. 288, 60 Misc. 332—Kennedy v. Weed, 10 Abb.Pr. 62.

41. N.Y.—Kress v. Morehead, 8 N.Y. St. 858—Webster v. Sawens, 3 How. Pr.,N.S., 320.
23 C.J. p 847 note 83.

42. N.Y.—Kress v. Morehead, 8 N.Y. St. 858.
23 C.J. p 847 note 84.

43. N.Y.—Kennedy v. Thorp, 2 Daly 258, 3 Abb.Pr.,N.S., 131, reversed on other grounds 51 N.Y. 174—Hawes v. Barr, 30 N.Y.Super. 452.

44. N.Y.—Bingham v. Disbrow, 37 Barb. 24, 14 Abb.Pr. 251—Kennedy v. Thorp, 2 Daly 258, 3 Abb.Pr.,N.S., 131, reversed on other grounds 51 N.Y. 174.

45. N.Y.—Sudlow v. Mead, 3 N.Y.S. 321.
23 C.J. p 847 note 87.

46. N.Y.—Matter of Wyman, 78 N.Y.S. 546, 76 App.Div. 292—Bridges v. Koppelman, 117 N.Y.S. 306, 63 Misc. 27.
23 C.J. p 847 note 88.

47. N.Y.—Sayer v. McDonald, 2 How. Pr.,N.S., 119.

48. N.Y.—Seeley v. Connors, 95 N.Y.S. 1109, 109 App.Div. 279.
23 C.J. p 847 note 90.

49. N.Y.—Whitlock's Case, 1 Abb. Pr. 320—Armstrong v. Cummings, 1 N.Y.Civ.Proc. 38 note, 2 N.Y.Month. L.Bul. 94.
23 C.J. p 847 note 91.

50. N.Y.—Conway v. Hitchins, 9 Barb. 378.

51. N.Y.—Hilbring v. Wisansky, 110 N.Y.S. 184, 59 Misc. 149.

52. Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370.

53. N.Y.—Douglass v. Mainzer, 40 Hun 75.
23 C.J. p 847 note 94.

54. N.Y.—Matter of Hatfield, 45 N.Y.S. 270, 17 App.Div. 430, affirmed 49 N.E. 1097, 155 N.Y. 628.

55. Ind.—Lewis v. Hanneman, 164 N.E. 319, 88 Ind.App. 430.
Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370.
Wash.—State v. Superior Court for King County, 277 P. 850, 152 Wash. 323.
23 C.J. p 847 note 97.

Not necessarily by affidavit

The statute does not require the affidavit accompanying an application for examination in supplementary proceedings to show an unsatisfied execution against debtor's property.—Phillips v. Bruton, 122 S.E. 514, 128 S.C. 369.

56. N.Y.—Hutson v. Weld, 38 Hun 142.

57. Ind.—Balz v. Benninghof, 5 Ind. App. 522.
N.Y.—Matter of Albany First Nat. Bank, 65 N.Y.S. 439, 52 App.Div. 601.
N.C.—National Bank of Westminster v. Burns, 13 S.E. 871, 109 N.C. 105.

58. Wash.—Timm v. Stegman, 32 P. 1004, 6 Wash. 13.

davit must show that the execution was issued within the time required by statute;[59] but a misstatement of the date of issuance is not a jurisdictional defect and may be disregarded.[60] It must be shown by the affidavit or substitute therefor that the execution was issued to the proper county;[61] that the execution was one against property;[62] that it issued out of a court of record;[63] and, where a return is necessary, that the execution was returned within the time limited for the institution of the proceeding.[64] Where the proceedings cannot be instituted until an execution has been issued either to the county where the judgment debtor has a place of business, or if a resident to the county where he resides, or if a nonresident to the county where the judgment roll or transcript of the judgment is filed, it follows that, if the judgment debtor is a resident, the affidavit must state his residence or his place of business.[65] An allegation in the alternative as to residence or place of business is insufficient,[66] as is an allegation as to place of business in person "or" by agent.[67] The allegation should refer to the time of instituting the proceedings rather than the time the execution was issued.[68]

Aider by presumption. Particular allegations of the issuance and return of an execution are sometimes held sufficient by resorting to presumptions of regularity.[69]

(e) Reference to Property of Debtor

The statutes vary as respects the allegation of the existence or nonexistence of property of the judgment debtor, where the execution has been returned unsatisfied. If the application is made before the return, the affidavit is sometimes required to allege that the debtor unjustly refuses to apply his property to the satisfaction of the judgment.

Because of the different statutory provisions in the several states, the decisions are not uniform as to the necessity for alleging the existence or nonexistence of property belonging to the debtor, where the proceedings are instituted after the return of execution. In some states an allegation that the judgment debtor has property has been held not necessary.[70] In other states it is necessary and sufficient to state a belief that the judgment debtor has property subject to execution;[71] and the property need not be specified or described in detail.[72] In still other states it is necessary to allege the want of known property liable to execution.[73]

Affidavit before return of execution. If the application is before the return of the execution, it is necessary, under the statutes in some of the states, to allege that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment.[74] The facts and circumstances showing the refusal to be unjust must be stated,[75] although it has been held that an affidavit in the language of the statute is sufficient, where supported by proof of the omitted facts.[76] Some courts hold that no demand on the debtor to apply his property in satisfaction of the judgment is necessary or need be shown,[77] while other courts hold that such a demand and noncompliance therewith must be shown.[78] Whatever other allegations respecting the property of the judgment debtor are

59. N.Y.—Hutson v. Weld, 38 Hun 142.

60. N.Y.—Batcheldor v. Nugent, 24 N.Y.S. 828, 23 N.Y.Civ.Proc. 178.

61. Ind.—McKinney v. Snider, 18 N. E. 526, 116 Ind. 160.
23 C.J. p 848 note 6.

62. N.Y.—People v. Hulburt, 5 How. Pr. 446, Code Rep.,N.S., 75, 9 N. Y.Leg.Obs. 245.

63. N.Y.—Joyce v. Spafard, 9 N.Y. Civ.Proc. 342—Webster v. Sawens, 3 How.Pr.,N.S., 320.

64. N.Y.—McGuire v. Hudson, 16 N. Y.S. 392.

65. N.Y.—Matter of Gagnon, 52 N.Y. S. 309, 32 App.Div. 22.
23 C.J. p 848 note 11.

66. N.Y.—Zelie v. Vroman, 50 N.Y. S. 836, 22 Misc. 486.
23 C.J. p 848 note 13.

67. N.Y.—Port Jefferson Bank v. Darling, 92 N.Y.S. 483, 102 App. Div. 431.

68. N.Y.—Matter of Gagnon, 52 N.Y. S. 309, 32 App.Div. 22.
23 C.J. p 848 note 15.

69. N.Y.—Vaques v. Willett, 104 N. Y.S. 500.
23 C.J. p 848 note 16.

70. N.Y.—Anonymous, 5 N.Y.Super. 725.
23 C.J. p 848 note 17.

71. Ind.—Lewis v. Hanneman, 164 N. E. 319, 88 Ind.App. 430.
23 C.J. p 848 note 18.

72. Mo.—Ackerman v. Green, 100 S.W. 30, 201 Mo. 231.
23 C.J. p 849 note 20.

73. N.C.—Hackney v. Arrington, 5 S. E. 747, 99 N.C. 110.
23 C.J. p 848 note 19.

74. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.
N.Y.—Martz v. Cohen, 259 N.Y.S. 302, 145 Misc. 284.
S.C.—Phillips v. Bruton, 122 S.E. 514, 128 S.C. 369.
23 C.J. p 849 note 21.

Affidavit held sufficient

An affidavit that judgment and execution remained unsatisfied, that there was no known property or equitable interest in realty sufficient to satisfy execution, that defendant listed for taxation notes due by certain persons and other evidences of debt of which defendant was still the owner, and that defendant had other choses in action and things of value, not exempt from taxation, which he unjustly refused to apply toward satisfaction of debt, was sufficient under statute to entitle plaintiff to an examination of the defendant and other persons.—First & Citizens Nat. Bank of Elizabeth City v. Hinton, 195 S.E. 359, 213 N.C. 162.

75. N.Y.—Matter of Albany First Nat. Bank, 65 N.Y.S. 439, 52 App. Div. 601.
23 C.J. p 849 note 22.

76. N.Y.—Rome First Nat. Bank v. Wilson, 13 Hun 232—Carbonating Apparatus Co. v. Bennett, 105 N.Y. S. 1052, 56 Misc. 47.

77. N.C.—Weiller v. Lawrence, 81 N. C. 65.
23 C.J. p 849 note 24.

78. N.Y.—Levy v. Beacham, 18 N.Y. S. 748, 64 Hun 62.
23 C.J. p 849 note 25.

necessary to bring the case within the applicable statute of the particular jurisdiction must be made.[79]

(f) For Third-Party Order

An affidavit for a third-party order must conform substantially to the statute, and must allege either that the third party is indebted to, or that he has property of, the judgment debtor, in a sufficient amount to justify the order.

To reach the funds of the judgment debtor in the hands of third parties, the affidavit must conform substantially to the requirements of the statute.[80] An affidavit for an order of examination of a third party must, in addition to the requirements of affidavits in general, considered in the preceding subdivisions of this section state that such third person is indebted to the judgment debtor in an amount over and above the amount specified in the statute,[81] or that he has in his possession or under his control property, of the amount specified in the statute, where there is such a specification, belonging to the judgment debtor.[82] In some jurisdictions it must be alleged that the debtor has no other property subject to execution from which the execution in question could be satisfied in whole or part.[83] It is not necessary to present positive proof of the indebtedness of the third person, or his possession of property of the debtor, but it is only necessary that the proof should be sufficient to satisfy the judge to whom application is made.[84] The allegations may be made on information and belief,[85] or at least an order based on an affidavit made on information and belief is effective until vacated;[86] but in such case the sources of the information and the grounds of the belief should be stated.[87] A positive statement in an affidavit made by the managing clerk of the plaintiff's attorney will be presumed to be made on personal knowledge.[88] It is not necessary, unless the statute so requires, to allege that an execution has been returned unsatisfied,[89] and a de-

79. Ind.—Cushman v. Gephart, 97 Ind. 46.
23 C.J. p 849 note 26.

80. Ind.—Earl v. Skiles, 93 Ind. 178.
Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370.
Ohio.—Southern Ohio Finance Corporation v. Wahl, 171 N.E. 369, 34 Ohio App. 518.

Form of affidavit
N.Y.—Seeley v. Garrison, 10 Abb.Pr. 460.

Where corporation is indebted to debtor
Order in supplementary proceedings directing assistant cashier of bank to show cause why he should not turn over to judgment creditor money in bank alleged to belong to judgment debtor, held void, in view of Code Civ.Proc. § 717, where neither order nor affidavit on which it was founded showed that any other debtor of judgment debtor than bank was sought to be brought before court, or that assistant cashier was "officer or member" of bank, within §§ 717 and 719.—Liberty Bank v. Superior Court of California, in and for Los Angeles County, 235 P. 995, 195 Cal. 766.

Verified petition held sufficient
An order requiring president and general manager of corporation to be examined before a special master concerning any moneys, capital stock, bonds, or other assets which corporation owed to judgment debtor, was not an abuse of discretion, where petition for examination showed that execution had been returned nulla bona, and examination of judgment debtor was barred by judgment debtor's illness, and petition alleged on information and belief that judgment debtor was a stockholder, and that corporation was indebted to judgment debtor, and trial judge permitted petitioners to supplement petition by introducing evidence in support of petition.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.

81. N.Y.—Davis v. Jones, 8 N.Y.Civ. Proc. 43—Davis v. Herrig, 65 How. Pr. 290.
23 C.J. p 849 note 33.

Where indebtedness is not claimed, and the object is to reach property of the debtor held by such third person, no such allegation is necessary. —Brett v. Brownie, 1 Abb.Pr.,N.S.,N. Y., 155.

82. Ind.—D. L. Adams Co. v. Federal Glass Co., 103 N.E. 414, 180 Ind. 576.
Ohio.—Southern Ohio Finance Corporation v. Wahl, 171 N.E. 369, 34 Ohio App. 518.

Constructive possession of debtor's property
Where third party did not offer proof to negative judgment creditor's allegation that the third party, as attorney for judgment debtor, had received or was about to receive money belonging to the judgment debtor, judgment creditor's allegation was sufficient to support order requiring third party to submit to examination in accordance with the civil practice act, since, if the third party was about to receive money of the judgment debtor, he had "constructive possession" of the money within the meaning of the act.—In re Lindenwald Bottling Corporation, 23 N.Y. S.2d 768.

83. Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370.
23 C.J. p 849 note 36.

84. N.Y.—Miller v. Adams, 52 N.Y. 409, affirming 7 Lans. 131.
23 C.J. p 850 note 37.

Proof insufficient
Judgment creditor's affidavit that third party's attorney informed affiant that third party had judgment debtor's property, but not stating time of conversation or attorney's name, or indicating that attorney had knowledge of facts averred, held insufficient to sustain third party order.—Jacobus v. Seracusa, 267 N.Y. S. 55, 149 Misc. 213.

85. N.Y.—Miller v. Adams, 52 N.Y. 409, affirming 7 Lans. 131.

86. N.Y.—Pierce v. Parrish, 50 N. Y.S. 735, 28 App.Div. 22—Fleming v. Tourgee, 16 N.Y.S. 2, 21 N.Y. Civ.Proc. 297, affirmed 32 N.E. 1015, 136 N.Y. 642.
Objections to affidavit and waiver generally see infra § 365 a (4).

A subsequent order made in the proceeding cannot be attacked, because the order for examination was on information and belief.—Cooman v. Board of Education, 37 Hun, N.Y., 96.

87. N.J.—Githens v. Mount, 44 A. 851, 64 N.J.Law 166.
23 C.J. p 850 note 40.

88. N.Y.—Bruen v. Nickels, 51 N.Y. S. 352, 30 App.Div. 396, 5 N.Y.Ann. Cas. 381, followed in Bucki v. Bucki, 56 N.Y.S. 439, 26 Misc. 69.

89. N.Y.—Seeley v. Garrison, 10 Abb. Pr. 460.

mand for payment or delivery of possession need not be shown.[90]

Alternative allegations. An affidavit that a third person has property of the debtor in excess of the statutory amount or is indebted to him beyond such amount, although in the language of the statute, is bad because in the alternative,[91] and an allegation that the third person has property of the debtor "as receiver or individually" is insufficient.[92]

Counter affidavits. The third person cannot prevent an order for his examination by submitting an affidavit asserting himself to be the owner of the property in question and stating the circumstances under which the transfer took place.[93]

(g) For Second Order or Examination

An affidavit for a second order or examination must allege the facts necessary to warrant such order or examination.

An affidavit is generally necessary to obtain a second examination,[94] except where the second examination is merely a continuance of the first.[95] The affidavit must show the facts with regard to the former proceeding and its status,[96] but failure so to do is a mere irregularity,[97] and an omission in this respect may be supplied by amendment.[98] The affidavit must state that the judgment is unpaid.[99] In addition the affidavit must specifically show the acquisition of property by the debtor since the former examination, that an alias execution has been issued and returned unsatisfied, or that new facts justifying a new order have come to the knowledge of the applicant.[1] If several examinations within a short time of one another have recently taken place, then facts should be shown from which it may be inferred that the judgment creditor will obtain useful information,[2] and that the examination is not being used as a club to enforce settlement of claims which the debtor is without property to pay.[3] The affidavit is insufficient where it merely alleges newly acquired property without stating what it is, or whether it is applicable to the payment of the judgment.[4] It is not sufficient to allege after-acquired property on information and belief without stating the source of the information or the grounds of the belief.[5] Conversely, the affidavit is sufficient in this respect where it shows grounds for a belief that the debtor has acquired property since his former examination.[6] An application for a second order on the ground of nonservice of the prior one must positively aver that the prior one was not served.[7]

(4) Objections and Waiver

Irregularities in affidavits may be waived or cured by failure to object or submission to examination, but jurisdictional defects cannot be so waived or cured.

Generally an order for examination based on a defective affidavit, where the defect is a mere irregularity is valid until vacated.[8] Such defects may be cured by amendment,[9] and they are likewise cured by the appearance and examination of the judgment debtor without objection;[10] but jurisdictional defects in the affidavit render an order based thereon void,[11] and the mere appearance and the examination of the judgment debtor without

90. N.Y.—Potts v. Davidson, 1 How. Pr.,N.S., 216.

91. N.Y.—Lowther v. Lowther, 97 N. Y.S. 5, 110 App.Div. 122.
23 C.J. p 850 note 44.

92. N.Y.—Fitchburg Nat. Bank v. Bushwick Chemical Works, 13 N.Y. Civ.Proc. 155.

93. N.Y.—Matter of De Leon, 71 N. Y.S. 380, 63 App.Div. 41.

94. N.Y.—Conovan v. McAndrew, 20 Hun 46—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.

95. Iowa.—McDonnell v. Henderson, 38 N.W. 512, 74 Iowa 619.

96. N.Y.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.
23 C.J. p 850 note 49.

97. N.Y.—Matter of Walker, 142 N. Y.S. 972, 157 App.Div. 609.

98. N.Y.—Goodall v. Demarest, 2 Hilt. 534.

99. N.Y.—O'Brien v. Howard, 16 N. Y.S.2d 290.

1. N.Y.—Losee v. Allen, 40 N.Y.S. 349, 17 Misc. 275.
23 C.J. p 850 note 52.

Likelihood of discovering assets

Affidavit for order for second examination of judgment debtor in supplementary proceedings is sufficient, if it sets forth facts indicating change in judgment debtor's financial condition since last examination, and reasonable likelihood that further examination may reveal assets available for satisfaction of judgment.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.

2. N.Y.—Livingston v. Livingston, 164 N.Y.S. 419.

3. N.Y.—Livingston v. Livingston, supra.

4. N.Y.—Rallings v. Pitman, 49 N. Y.Super. 307.

5. N.Y.—McGuire v. Schroeder, 63 N.Y.S. 968, 31 Misc. 179.
23 C.J. p 850 note 56.

6. N.Y.—Goodall v. Demarest, 2 Hilt. 534.

7. N.Y.—Leer Bldg. & Const. Co. v. Harris, 250 N.Y.S. 160, 140 Misc. 290.

Merely alleging debtor's denial of service is insufficient to warrant a second order.—Leer Bldg. & Const. Co. v. Harris, supra.

8. N.Y.—Pierce v. Parish, 50 N.Y.S. 735, 28 App.Div. 22—O'Brien v. Howard, 16 N.Y.S.2d 290—Boyd v. Hildebrandt, 185 N.Y.S. 235.
Vacation of order see infra § 368.

9. Ind.—Burkett v. Holeman, 21 N. E 470, 119 Ind. 141.
23 C.J. p 850 note 61.

10. N.Y.—Baker v. Herkimer, 6 N.Y. St. 581.

11. N.M.—Hammond v. District Court of Eighth Judicial Dist. of New Mexico, 228 P. 758, 30 N.M. 130, 39 A.L.R. 1490.
N.Y.—Hecht v. Sanger, 215 N.Y.S. 409, 126 Misc. 735, reversed on other grounds 218 N.Y.S. 675, 128 Misc. 380—Boyd v. Hildebrandt, 185 N.Y. S. 235.

objection will not confer jurisdiction.[12] Thus appearance and examination will not cure the failure to show the regular issuance of the execution.[13] Objections to the sufficiency of the preliminary affidavit should, as a rule, be tested by a motion to vacate the original order or motion to set aside the proceedings.[14]

(5) Filing

Under some circumstances the filing of the affidavits on which the order is based may be required.

In some states, after the satisfaction of the judgment and discontinuance of the proceedings, and subsequent to procuring an order to examine a third party, the debtor may compel the creditor to file the affidavits on which it was granted.[15] That the affidavit may tend to incriminate the party by whom it was presented will not justify a refusal.[16] Irregularity, consisting in the failure to file, before the report of the referee is filed, an affidavit to procure the examination of the judgment debtor, is waived by obedience to the order and submission to examination without objection.[17]

b. Subsequent Pleadings

Ordinarily there is no occasion or necessity for any pleadings subsequent to the application, except, perhaps, for an objection to the application by way of demurrer.

Under a statute providing that all proceedings under an act relating to supplementary proceedings, after an order has been made requiring parties to appear and answer, shall be summary, without further pleadings, all pleadings subsequent to the complaint or affidavit to procure the order are unnecessary.[18] Thus, under such a statute, no answers are contemplated.[19] Where a demurrer to the application for a third party order was filed, it was held to admit the truth of the allegations therein.[20]

§ 366. Order for Examination

a. In general
b. Title
c. Contents

a. In General

Where all the necessary facts are shown the judge ordinarily has no discretion to refuse an order for examination, but the granting of a second order is discretionary. In some jurisdictions an examination may be procured by process other than an order.

It is generally held that the judge has no discretion to refuse the order where the facts required by the statute are properly shown.[21] He is without the right to insist on additional facts or to impose other or further terms as a condition of its issuance.[22] A second order will not be granted as of course, but only in the sound discretion of the judge[23] on a sufficient showing by affidavit.[24] An order is necessary, and a voluntary appearance and submission to examination confers no jurisdiction.[25]

A finding by the trial court, from the evidence before it, of the requisite facts is deemed necessary under some statutes before the order may issue.[26]

Filing. In New York, under statutory provisions, the judgment debtor is entitled to an order granting his motion to compel the attorney for the judgment creditor to file an order against a third party for examination.[27]

Process other than order. In some states there

12. N.Y.—Bingham v. Disbrow, 37 Barb. 24, 14 Abb.Pr. 251.
23 C.J. p 851 note 62.

13. N.Y.—Schenck v. Irwin, 15 N.Y.S. 55, 60 Hun 361, 21 N.Y.Civ.Proc. 96—Zelie v. Vroman, 50 N.Y.S. 836, 22 Misc. 486.

14. Ind.—Corbin v. Goddard, 94 Ind. 419.
23 C.J. p 850 note 59.

15. N.Y.—Sinnott v. Hempstead First Nat. Bank, 54 N.Y.S. 417, 34 App.Div. 161.

16. N.Y.—Sinnott v. Hempstead First Nat. Bank, supra.

17. Cal.—Collins v. Angell, 14 P. 135, 72 Cal. 513.

18. Ind.—Automobile Underwriters v. Camp, 27 N.E.2d 370, 217 Ind. 328, 128 A.L.R. 1024, rehearing denied 28 N.E.2d 68, 217 Ind. 328, 128 A.L.R. 1024.

19. Ind.—Automobile Underwriters v. Camp, supra.

Provision for testing sufficiency of affidavit

Under an appropriate provision in such a statute the sufficiency of the order and of the affidavit first filed by plaintiff may be tested by demurrer.—Corbin v. Goddard, 94 Ind. 419.

20. Okl.—U. S. Fidelity & Guaranty Co. v. Cherry, 105 P.2d 544, 187 Okl. 666.

21. Minn.—Flint v. Webb, 25 Minn. 263.
23 C.J. p 851 note 66.
Right to have examination of third party see supra § 362.

22. Minn.—Flint v. Webb, 25 Minn. 263—Kay v. Vischers, 9 Minn. 270.

23. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19—Watson v. Pryor, 193 P. 797, 49 Cal.App. 554.
N.Y.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.
23 C.J. p 851 note 70.

24. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
N.Y.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.
23 C.J. p 851 note 71.
Sufficiency of affidavit see supra § 365 a (3) (g).

Nonservice of first order

A second order for examination of the judgment debtor may be issued where nonservice of the first order is sufficiently shown.—Lee Bldg. & Const. Co. v. Harris, 250 N.Y.S. 160, 140 Misc. 290.

25. N.Y.—De Comeau v. People, 30 N.Y.Super. 498—Sackett v. Newton, 10 How.Pr. 560.

26. Mo.—Ex parte Koehler, 156 S.W. 982, 174 Mo.App. 297.

27. N.Y.—Sinnott v. Hempstead First Nat. Bank, 54 N.Y.S. 417, 34 App.Div. 161.

are provisions for procuring an examination in supplementary proceedings otherwise than by an order. Thus there are provisions for the issuance of a summons in a proper case by the clerk of the court, directing the person named to appear at the time stated for examination.[28] Under a New York statute designed to make the collection of judgments more effective, an optional method is provided under which the attorney for the judgment creditor may issue a subpœna within two years from the recovery of the judgment, requiring the appearance of the judgment debtor, a third party or a witness for examination concerning the means of the debtor or for paying the judgment.[29]

b. Title

Where the proceedings are not considered part of the original action, the order should not be entitled in the original action, but rather as an order in a special proceeding.

Where supplementary proceedings are held not to be part of the original action, the order should not be entitled in the original action,[30] but rather as an order in a special proceeding before a judge out of court.[31] It is held that where the order is entitled in the action it will be vacated;[32] but there is authority in the same jurisdiction to the effect that jurisdiction will not be lost because the order is improperly entitled,[33] and that where the order is made by the judge of a court other than that out of which the execution issued it is properly entitled as of the latter court.[34] A mere clerical error in the title of the order, which despite such error clearly identifies the action, does not invalidate the order.[35]

c. Contents

(1) In general
(2) Before whom returnable
(3) Time of examination
(4) Place of examination

(1) In General

The order must conform to the statute and should recite the jurisdictional facts on which it is based. It should confine the inquiry to its proper sphere and may make proper directions for notice and service. A subpœna served in lieu of an order must conform to the statute.

Of course the order must comply with the statute.[36] It seems that it is the better practice for the order to recite the jurisdictional facts on which it is based,[37] and when all the necessary facts to constitute it a regular and valid order are recited it will be so deemed until attacked by a direct proceeding and the contrary is made to appear.[38] To justify an order before the execution is returned, it is held in some states that the order must be specific as to the property which it is alleged the judgment defendant unjustly refuses to apply toward the satisfaction of the judgment. It must describe such property in some way so that defendant may know how to answer concerning it.[39]

If the order is for the examination of a third party, notice of the proceedings is often required by the order to be given to the judgment debtor.[40]

28. N.M.—Hammond v. District Court of Eighth Judicial Dist. of New Mexico, 228 P. 758, 30 N.M. 130, 39 A.L.R. 1490.

Original summons in main action insufficient

A new statutory summons in proceedings supplemental to execution is necessary to invest court with jurisdiction of the person of defendant, the original summons on which judgment was obtained being insufficient for such purpose.—Hammond v. District Court of Eighth Judicial Dist. of New Mexico, supra.

In vacation, instead of the order for examination required by the statute, a summons issued by the clerk of court is sufficient.—Carpenter v. Vanscoten, 20 Ind. 50.

29. U.S.—Capital Co. v. Fox, C.C.A. N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F.Supp. 677.
N.Y.—Zwerdling v. Hamman Bldg. Corporation, 259 N.Y.S. 593, 145 Misc. 471.
"The intent of the legislature was to eliminate the red tape and the technicalities which in the past so frequently put obstacles in the way of the collection of judgments."—Novey v. Novey, 13 N.Y.S.2d 513, 171 Misc. 672.

Separate proceeding against witness

Supplementary proceedings by way of subpœna may be instituted by service of the subpœna against either the judgment debtor or a third party, but the examination of a witness must be predicated on prior proceedings against the debtor or a third party; in other words, while there may be simultaneous or separate "examinations" of debtor, third party, and witness, there can be no separate and independent "proceeding" against the latter.—Daniels v. Becker, 290 N.Y.S. 487, 160 Misc. 649.

30. N.Y.—Milliken v. Thomson, 54 N.Y.Super. 393, 12 N.Y.Civ.Proc. 168.
Whether part of original action see supra § 345.

31. N.Y.—Davis v. Turner, 4 How. Pr. 190.

32. N.Y.—Harris v. Weiss, 105 N.Y.S. 8.
23 C.J. p 851 note 79.

33. N.Y.—Lynch v. Riley, 22 N.Y. Wkly.Dig. 357.
23 C.J. p 851 note 80.

34. N.Y.—Ackerly & Gerard Co. v. Partz, 14 N.Y.S. 466, 20 N.Y.Civ. Proc. 282.
23 C.J. p 851 note 81.

35. Cal.—Drew v. Superior Court of California in and for Mendocino County, 190 P. 374, 47 Cal.App. 150.

36. N.Y.—Carter v. Clarke, 30 N.Y. Super. 490.

Forms of order

Kan.—White Sewing Mach. Co. v. Wait, 24 Kan. 136.
23 C.J. p 851 note 65.

37. N.Y.—Day v. Brosnan, 6 Abb. N.Cas. 312.
23 C.J. p 851 note 83.

38. N.Y.—Wright v. Nostrand, 94 N.Y. 31, affirming 47 N.Y.Super. 441.
23 C.J. p 851 note 84.

39. Wis.—Smith v. Weeks, 18 N.W. 778, 60 Wis. 94.

40. N.Y.—Pommerantz v. Bloom, 65 N.Y.S. 671, 32 Misc. 754.

Such provision is authorized by a statute providing that the judge, in his discretion, may require notice to be given.[41] An order made without requiring notice of it to be given the judgment debtor cannot be disregarded, but it may be vacated by the judge who made it.[42] Sometimes other conditions are imposed, such as the filing of an additional affidavit to obviate defects in the moving papers.[43]

Directing service on corporation. An order served on a corporation, its agent for the service of process, and several officers, directing them to appear for examination and produce certain books and documents was sufficient, as against a contention that the order did not direct the corporation through some officer designated therein to comply with the terms of the order;[44] but, where a judgment was obtained against the treasurer of the county committee of a political party, subpœnas directed to the committee as judgment debtor and served on successor officers not named therein were invalid, and not merely informal or irregular.[45] An order directing the assistant cashier of a bank to show cause why he should not turn over money in the bank alleged to belong to the judgment debtor was void, where neither the order nor the affidavit on which it was predicated showed that the assistant cashier was an "officer or member" of the corporation as required by statute.[46]

Scope of examination ordered. The order should confine the inquiry to its proper sphere;[47] and, at least in the case of a third party, should not be so broad as to permit the judgment creditor to embark on a "fishing expedition."[48] While, under a particular statute, it has been held to be the general rule that an order for a second examination should limit the examination to the period after the commencement of the first proceeding,[49] it has also been held to be within the court's discretion not so to limit it,[50] and even, in some circumstances, to constitute error to do so.[51]

Subpœna. A subpœna served under a statute providing for such process in certain instances in lieu of an order must comply with the statute.[52]

(2) Before Whom Returnable

The court, judge, or referee, as the case may be, before whom the order may be made returnable should be designated with reasonable particularity.

It is essential that the officer before whom the proceedings are made returnable should be designated with reasonable particularity;[53] but mere vagueness not amounting to uncertainty will, it has been held, not vitiate the order.[54] The order may be made returnable before the judge who granted it,[55] or, at least under some circumstances, before another judge specified in the order,[56] or before a referee designated in the order.[57] Where the statute in effect so requires, the order must be returnable before a judge rather than the court.[58]

The subpœna provided for under New York practice provides that the person served shall appear before one of the justices of the court.[59]

(3) Time of Examination

The order should fix a proper time for the appearance of the party served for examination. A summons is void if made returnable in less time than the statute allows.

The order should fix the time when the person whose examination is desired is required to appear for that purpose.[60] An order returnable on a Sun-

41. N.Y.—Lynch v. Johnson, 48 N.Y. 27, affirming 46 Barb. 56.
23 C.J. p 852 note 92.

42. N.Y.—Ward v. Beebe, 15 Abb.Pr. 372, affirmed 17 Abb.Pr. 1.

43. N.Y.—Matter of Stell, 137 N.Y.S. 703, 78 Misc. 40.

44. La.—Continental Supply Co. v. International Gas Products, 145 So. 119, 176 La. 1.

45. N.Y.—Saxer v. Democratic County Committee of Erie County, 291 N.Y.S. 18, 161 Misc. 35.

46. Cal.—Liberty Bank v. Superior Court of California, in and for Los Angeles County, 235 P. 995, 195 Cal. 766.

47. S.C.—Biltrite Bldg. Co. v. Adams, 7 S.E.2d 857, 193 S.C. 142.

48. S.C.—Biltrite Bldg. Co. v. Adams, supra.

49. N.Y.—Murphy v. Cram, 142 N.Y.S. 972, 157 App.Div. 609.

50. N.Y.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.

51. N.Y.—Bruen v. Goodman, 16 N.Y.S.2d 210, 172 Misc. 775.

52. **Address of attorney**
Subpœna in supplementary proceeding subscribed by judgment creditors' attorney with his street number, "Brooklyn, N. Y.," held sufficiently to state his office and post office address.—Zwerdling v. Hamman Bldg. Corporation, 259 N.Y.S. 593, 145 Misc. 471.

Name of justice
The subpoena must be filled out in the name of a justice of the court.—Lincoln Discount Corporation v. Parker, 296 N.Y.S. 42, 162 Misc. 946.

53. N.Y.—Shults v. Andrews, 54 How.Pr. 376.
23 C.J. p 852 note 96.

54. N.Y.—Kress v. Morehead, 8 N.Y.St. 858.

55. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308.
23 C.J. p 852 note 98.

56. N.Y.—Shults v. Andrews, 6 N.Y.Wkly.Dig. 156.
23 C.J. p 852 note 99.

57. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308, affirming 144 N.Y.S. 1122, 160 App.Div. 890.
23 C.J. p 851 notes 87, 88.

58. N.Y.—Barrington v. Watkins, 55 N.Y.S. 97, 36 App.Div. 31.

59. N.Y.—Lincoln Discount Corporation v. Parker, 296 N.Y.S. 42, 162 Misc. 946.

60. Neb.—Clarke v. Nebraska Nat. Bank, 77 N.W. 805, 57 Neb. 814, 73 Am.S.R. 507.
23 C.J. p 852 note 2.

Stated time after service instead of fixed date
An order for the examination of parties in supplementary proceed-

day is a nullity and may be disregarded;[61] but an objection to the omission of the year in the copy served, where appearance was ordered on a subsequent day of the same month, is frivolous.[62] A date for examination other than that fixed by the original order may be appointed on the opening of a default,[63] a modification of the order,[64] denial of a motion to vacate,[65] or on a reinstatement of the order.[66]

Return date of summons. Where the statute prescribes the service of a summons instead of the issuance of an order, the summons is void and confers no jurisdiction over the person of defendant if it is made returnable in less time than the minimum provided by the statute.[67]

(4) Place of Examination

A proper place, conforming to the statutory provisions, must be designated for the appearance or examination.

The place of appearance or where the examination is to be held must be specified in the order.[68] Statutes providing that the debtor may be examined only in the county where he resides or has a place for the regular transaction of business, or which otherwise limit the place of examination, must be complied with in the provision of the order fixing the place of examination.[69] If the debtor removes to another county after the return of execution and before supplementary proceedings are commenced, the order may require him to appear in the latter county.[70] The place where the examination of a third party is to take place may be ordered without regard to the residence of the judgment debtor.[71]

§ 367. —— Service

The order must be served seasonably, by and on the proper person, and in a proper manner.

The order must be served on the person to be affected thereby,[72] in the manner required by statute;[73] and the judge issuing the order has no power to dispense with or change the manner of service prescribed by statute.[74] Where there are no statutes specifically relating thereto, the courts apply general statutes prescribing the mode of serving notices in actions,[75] or general rules as to the service of other writs and processes.[76] The service must be timely[77] and perfected before the return day of the order.[78] Under some statutes the order must be served personally.[79] In some jurisdictions

ings may provide for the hearing a certain number of days after service of the order, instead of on a fixed date.—In re Zurich General Accident & Liability Ins. Co., 201 N.Y.S. 390, 121 Misc. 460.

61. N.Y.—Arctic Fire Ins. Co. v. Hicks, 7 Abb.Pr. 204.

62. N.Y.—Barrington v. Watkins, 55 N.Y.S. 97, 36 App.Div. 31.

63. N.Y.—Morrison v. Stember, 98 N.Y.S. 850, 49 Misc. 464.

64. N.Y.—Ward v. Stoddard, 128 N.Y.S. 846, 144 App.Div. 143, affirming 127 N.Y.S. 713, 70 Misc. 506.
Modification generally see infra § 368.

65. N.Y.—Johnson v. Tuttle, 17 Abb. Pr. 315.
Vacation generally see infra § 368.

66. N.Y.—Joyce v. Spafard, 9 N.Y. Civ.Proc. 342.

67. N.M.—Hammond v. District Court of Eighth Judicial Dist. of New Mexico, 228 P. 758, 30 N.M. 130, 39 A.L.R. 1490.

68. N.Y.—Kelly v. Yerby, 31 How. Pr. 95.
23 C.J. p 852 note 10.
Place of conducting examinations see infra § 374.

69. N.Y.—Martz v. Cohen, 259 N.Y.S. 302, 145 Misc. 284.
23 C.J. p 852 note 12.

Propriety of orders

(1) Where a statute providing that the debtor may be examined only in the county where he resides or has a place for the regular transaction of business was repealed under circumstances and in a manner which did not indicate that a contrary policy was being adopted, and where the effect of the repeal was to leave the matter of the place of examination to the court's discretion, the judge could exercise his discretion in accordance with the policy and practice before the repeal and direct the examinations to take place within the county of residence or place of business of the judgment debtor.—Franklin Simon & Co. v. Fisher, 233 N.Y.S. 118, 133 Misc. 751.

(2) Order for examination of judgment debtors under a judgment of the city court of New York, such debtors residing at and having place of business in Bronx County, should have provided for examination in Bronx County, although, as to judgments of the municipal court, the statute provides for examination in the county of the creditor's residence or where the judgment was entered. —Schwartzberg v. Weisblatt, 233 N.Y.S. 120, 133 Misc. 476.

70. N.Y.—Gould v. Moore, 51 How. Pr. 188.

71. N.Y.—Franklin Simon & Co. v. Fisher, 233 N.Y.S. 118, 133 Misc. 751.
23 C.J. p 853 note 14.

72. Iowa.—Marriage v. Woodruff, 42 N.W. 198, 77 Iowa 291.
23 C.J. p 853 note 15.

73. Wash.—State v. Hall, 207 P. 685, 120 Wash. 449.
23 C.J. p 853 note 17.

Certified copy

A statute providing that service of an order requiring a person to appear at supplementary proceedings and be examined shall be by a certified copy of the original implies certification by the custodian of the papers, and an order directing that the copy might be certified by the attorney of record for plaintiff was improper.—State v. Hall, supra.

74. N.Y.—Benjamin v. Myers, 3 N.Y.St. 284.

75. Iowa.—Marriage v. Woodruff, 42 N.W. 198, 77 Iowa 291.
N.C.—Turner v. Holden, 13 S.E. 731, 109 N.C. 182.

76. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 428.

77. Mass.—Lane v. Holman, 13 N.E. 602, 145 Mass. 221.
N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746.

Reasonable time

The order must be served a sufficient length of time before the return day to give the judgment debtor a reasonable time to obey it.—Levey v. Rosett, 166 N.Y.S. 1072.

78. N.Y.—Henderson v. Stone, 40 How.Pr. 333.

79. N.Y.—Barker v. Johnson, 4 Abb. Pr. 435.
23 C.J. p 853 note 23.

it has been held that service may be made on the debtor's attorney,[80] or by leaving a copy of the order with his wife.[81] Except as to orders issued by certain courts of local and limited jurisdictions,[82] the order may be served anywhere within the state;[83] and it is held that it may even be served without the state.[84]

Third party order. Service of the order for examination on a third party, and appearance in obedience thereto, confers jurisdiction of his person.[85] Unless the order or the statutes so require, a third party order need not be served on the judgment debtor.[86] Some statutes, although not providing the mode of service or notification, contemplate that the judgment debtor shall have notice of the examination of witnesses.[87] Under some statutes, while service of a third party order on the judgment debtor is one of the permissible modes of acquiring a lien on assets subsequently discovered, see infra § 394, a failure so to serve the order does not result in a defect of parties fatal to the proceedings.[88]

Exemptions. A resident is not exempt from service while in attendance on court as a witness[89] or juror,[90] but a nonresident is,[91] and so is a legislator during the time in which he is exempt from arrest on civil process.[92]

Who may serve. Under the statutes of some states, the order may be served by any person[93] other than the judgment creditor.[94] Under the statutes of other states, service may be made by any civil officer qualified to serve process.[95]

Proof of service. The order is not process so as to permit proof of service by a sheriff's certificate.[96]

Objections and waiver thereof. Objections to the service or proof thereof must be presented by motion to set aside the service.[97] The objections must be raised at the first opportunity; if the judgment debtor appears and submits to examination he thereby waives his right.[98] An appearance merely to ask an adjournment is held to constitute a waiver.[99]

§ 368. —— Vacation or Modification

a. In general
b. Procedure

a. In General

In proper cases, an order or subpœna for examination may be set aside on motion. A subpœna may be amended so as to remedy any irregularity therein.

An order[1] or subpœna[2] for examination may be set aside on motion in a proper case, as where the order is void for want of jurisdiction,[3] or has been improperly or improvidently granted,[4] or is unnecessary,[5] or because of the insufficiency of the original affidavits,[6] or because the judgment on which

80. U.S.—Bates v. Mexico International Co., C.C.Cal., 84 F. 518.
23 C.J. p 853 note 24.

81. N.C.—Turner v. Holden, 13 S. E. 731, 109 N.C. 182.
23 C.J. p 853 note 25.

82. N.Y.—Carroll v. Langdon, 18 N. Y.S. 290, 63 Hun 380.

83. N.Y.—Bingham v. Disbrow, 37 Barb. 24—Deane v. Sire, 95 N.Y. S. 556, 48 Misc. 606.

84. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 428.
Effect of such service
While the court may not be able to enforce obedience to the order, the service is not illegal or irregular.—Seyfert v. Edison, supra.

85. Cal.—Bronzan v. Drobaz, 29 P. 254, 93 Cal. 647.

86. N.Y.—Lynch v. Johnson, 46 Barb. 56.
Provisions for notice in order see supra § 366 c (1).

87. N.J.—Shannon v. McMurtrie, 5 A. 658, 48 N.J.Law 427—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 431.

88. Minn.—Ware v. Linderbergh, 68 N.W. 771, 66 Minn. 66.

89. N.Y.—Fretcher v. Francko, 15 N.Y.S. 674, 21 N.Y.Civ.Proc. 34.

90. N.Y.—Brown v. Edinger, 114 N. Y.S. 1116, 61 Misc. 366.
23 C.J. p 853 note 36.

91. N.Y.—Tribune Ass'n v. Sleeman, 12 N.Y.Civ.Proc. 20.

92. N.Y.—Everard v. Brennan, 2 N. Y.City Ct. 351.

93. N.Y.—Utica City Bank v. Buell, 9 Abb.Pr. 385, 17 How.Pr. 498.
Order for arrest
Under the statute providing that in supplementary proceedings the court may order the judgment debtor to appear and be examined, and that the order shall run to the sheriff where the arrest of the debtor is desired, service of an order for appearance merely, and not for arrest, by anyone competent to serve a summons, is proper, although a general statute provides that all "process" shall be served by the sheriff unless otherwise provided by statute; supplementary proceedings being merely auxiliary to the original action.—State v. Hall, 207 P. 685, 120 Wash. 449.

94. N.Y.—Matter of Dawes, 96 N.Y. S. 52, 108 App.Div. 174.

95. Mass.—French v. Goodnow, 56 N.E. 719, 175 Mass. 451.
A constable may make service under such a statute where the amount involved does not exceed that as to which he has authority to serve process generally.—French v. Goodnow, 56 N.E. 719, 175 Mass. 451.

96. N.Y.—Utica City Bank v. Buel, 9 Abb.Pr. 385, 17 How.Pr. 498.

97. N.Y.—Dorsey v. Cumings, 48 Hun 78.
23 C.J. p 853 note 43.

98. N.Y.—Newell v. Cutler, 19 Hun 76.
23 C.J. p 854 note 44.

99. N.Y.—Utica City Bank v. Buel, 9 Abb.Pr. 385, 17 How.Pr. 498.

1. N.Y.—Rupert v. Lee, 92 N.Y.S. 75, 101 App.Div. 492.
23 C.J. p 854 note 47.
Injunction see infra § 370 a.

2. N.Y.—New York Credit Men's Ass'n v. Schneider, 286 N.Y.S. 978, 247 App.Div. 896, appeal dismissed 7 N.E.2d 726, 273 N.Y. 625, motion denied 10 N.E.2d 590, 274 N. Y. 637.

3. N.Y.—Schenck v. Irwin, 15 N.Y. S. 55, 21 N.Y.Civ.Proc. 96.

4. N.Y.—Martz v. Cohen, 259 N.Y.S. 302, 145 Misc. 284.
23 C.J. p 854 note 49.

5. N.Y.—Crane v. Beecher, 6 N.Y. S. 225.

6. N.Y.—O'Brien v. Howard, 16 N. Y.S.2d 290.

it is based is void,[7] or where the judgment has ceased to be a lien,[8] or where the debt has been discharged in insolvency or bankruptcy,[9] or where the execution is void,[10] or the return is not one justifying an examination,[11] or where title to the property has vested in a receiver of the creditor appointed in prior supplementary proceedings.[12]

On the other hand, the order or subpœna will not be vacated if sufficient grounds for such vacation are not established.[13] So the fact that an execution, since returned, was outstanding when the order was served,[14] that the execution is irregular or erroneous,[15] that an alias execution on the same judgment is outstanding,[16] that at the time of the return of the execution unsatisfied the debtor was seized in fee of real property,[17] that an appeal from the judgment is pending,[18] or that the judgment was entered in violation of an agreement[19] has been held insufficient to require the vacation of the order. The proceedings will not be dismissed for a supposed want of authority on the part of an attorney to institute the proceedings,[20] for mere irregularities or informalities which are not prejudicial,[21] or where the affidavits as to service of process in the action are conflicting.[22] Irregularity in the judgment is not ground for vacating the order of examination,[23] especially where urged by one not a party to the judgment.[24] Defects in the service of the order, where not prejudicial, are ordinarily not ground,[25] especially where the motion is not made until after the examination.[26] Since the return of the sheriff on an execution, until set aside by motion in the original action, is conclusive in supplementary proceedings, see supra § 361, it cannot be attacked on a motion to vacate the order for examination.[27] An order for examination of the judgment debtor should not be set aside where the controlling facts are in controversy, the construc-

7. N.Y.—Nankivel v. Omsk All Russian Government, 142 N.E. 569, 237 N.Y. 150, reversing 197 N.Y.S. 467, 203 App.Div. 740—Stoneware Electric Stove Works v. Barrett, 190 N.Y.S. 120, 115 Misc. 605, reversed on other grounds 192 N.Y.S. 1, 117 Misc. 699.

Third parties

(1) Third parties may have orders vacated on this ground.—Hoferd v. Oster, 268 N.Y.S. 227, 149 Misc. 395.

(2) A third party is entitled on motion to have vacated and set aside an order for its examination in proceedings supplementary to execution upon a judgment rendered by default against a nonappearing defendant, if such third party shows such judgment to be void because defendant was a de facto government which could not be called upon to plead its immunity.—Nankivel v. Omsk All Russian Government, 142 N.E. 569, 237 N.Y. 150, reversing 197 N.Y.S. 467, 203 App.Div. 740.

(3) Under New York law, the debtor of a judgment debtor is entitled to attack the validity of an order authorizing supplementary proceedings against him.—Sherwood v. U. S., C.C.A.N.Y., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S. Ct. 171; 311 U.S. 640, 85 L.Ed. 408, and reversed on other grounds 61 S. Ct. 767, 312 U.S. 584, 85 L.Ed. 1058.

8. N.Y.—Glover v. Gargan, 42 N.Y. S. 74, 10 App.Div. 527.

9. N.J.—Gibson v. Gorman, 44 N.J. Law 325.
23 C.J. p 854 note 53.

10. N.Y.—Gray v. Lieben, 8 N.Y.Civ. Proc. 48.

11. N.Y.—Marx v. Spaulding, 35 Hun 478.

12. N.Y.—Moore v. Taylor, 40 Hun 56.

13. N.Y.—Feldman v. Baum, 292 N. Y.S. 760, 249 App.Div. 857—Draco Realty Corporation v. Krapp, 24 N. Y.S.2d 173, 175 Misc. 589.

Evasion of service

In proceeding to compel former husband of judgment debtor to pay alimony to judgment creditor, third party order would be allowed to stand until judgment debtor no longer sought to evade service.—Conlew, Inc., v. Thompson, 289 N.Y.S. 862, 160 Misc. 551.

Grounds not sustained

Subpœnas issued pursuant to statute permitting judgment creditor to issue subpœnas in third party proceedings supplementary to execution could not be vacated on ground that they did not show that persons and corporations whose accounts with subpœnaed third parties, who were stock brokers, were connected with judgment debtor, where subpœnas required third parties to attend and testify only as to property of judgment debtor, and affidavit of judgment creditor submitted on the argument showed that each one of group whose accounts were to be examined were closely connected with judgment debtor.—Capital Co. v. Fox, D.C.N.Y., 15 F.Supp. 677, affirmed, C.C.A., 85 F.2d 97, 106 A.L.R 376.

Effect of denial of motion

The original order for examination cannot be treated as a nullity after the court has denied a motion to set it aside.—Earle v. Stokes, 5 S.C. 336.

14. N.Y.—Lingsweiler v. Lingsweiler, 57 N.Y.Super. 395, 9 N.Y.S. 305, 18 N.Y.Civ.Proc. 81.

15. Ill.—Pirie v. Horwich, 204 Ill. App. 379.

16. N.C.—Vegelahn v. Smith, 95 N. C. 254.

17. N.Y.—Eleventh Ward Bank v. Heather, 48 N.Y.S. 449, 22 Misc. 87, 27 N.Y.Civ.Proc. 90, 5 N.Y.Ann. Cas. 80, reversing 47 N.Y.S. 718, 21 Misc. 539.
23 C.J. p 854 note 60.

18. N.Y.—Cowdrey v. Carpenter, 17 Abb.Pr. 107.

19. N.Y.—Gardner v. Lay, 2 Daly 113.

20. N.Y.—Kress v. Morehead, 8 N. Y.St. 858.

21. N.Y.—Barrington v. Watkins, 55 N.Y.S. 97, 36 App.Div. 31.
23 C.J. p 854 note 64.

Defect in subpœna

A defect in subpœna issued in supplementary proceedings in that subpœna was filled out in name of one who at time was no longer a justice of city court was a remediable one under statute providing that no subpœna shall be vacated or quashed nor shall judgment debtor be relieved from compliance therewith because of any informality or irregularity therein notwithstanding judgment debtor's attorney in good faith believed subpœna defective.—Lincoln Discount Corporation v. Parker, 296 N.Y.S. 42, 162 Misc. 946.

22. N.Y.—Greenhall v. Unger, 45 N. Y.S. 1035, 20 Misc. 412.

23. Ill.—Pirie v. Horwich, 204 Ill. App. 379.

24. N.Y.—Bucki v. Bucki, 56 N.Y.S. 439, 26 Misc. 69.

25. N.Y.—Barrington v. Watkins, 55 N.Y.S. 97, 36 App.Div. 31.

26. N.Y.—Newell v. Cutler, 19 Hun 74.

27. N.Y.—Maloney v. Klein, 102 N. Y.S. 43, 116 App.Div. 790.
23 C.J. p 855 note 96.

tion of an alleged agreement is not clear, and its legality is doubtful.[28]

Payment or satisfaction of the judgment is a ground for vacation of the order,[29] but not where anything remains unpaid on the judgment.[30] If payment or satisfaction is denied, the motion to vacate should not be granted;[31] in such case defendant should be left to pursue his other remedies,[32] such as a motion in the original action to have the judgment satisfied of record.[33]

A second order of examination may be vacated in a proper case.[34] Where the second order was obtained for the failure of the debtor to verify his deposition taken in the original proceedings, it may be vacated on condition that he make the required verification.[35] The order should not be set aside merely because some years before the debtor had been exhaustively examined by the same attorney upon a judgment recovered by the same plaintiff, but individually instead of as a personal representative.[36]

Modification or partial vacation. The order may be amended by extending the time for the debtor's appearance.[37] The fact that a severable part of the order is unwarranted does not require the vacation of the order in toto.[38] By express statutory provision, a subpœna directing the party served to appear for examination may be amended so as to remedy any irregularity or informality as justice may require.[39]

b. Procedure

A statutory mode of attacking the proceedings is exclusive. A motion to vacate should be seasonably made and notice thereof should be given to interested parties, and the moving affidavits must be sufficient.

If the statute specifies the mode of attacking the proceedings, that mode is exclusive.[40] Under the express limitations imposed by some statutes, the order may be vacated or modified only by the judge who made it or by the court out of which the execution was issued.[41] A motion to vacate for an irregularity, as distinguished from a jurisdictional defect, is too late when not made until after examination.[42] The moving affidavits must clearly show the grounds relied on.[43] Allegations therein may be such as to remedy defects in the affidavit on which the original order was granted.[44] If the moving papers are insufficient, it seems that leave to file an additional affidavit may be granted on the hearing of the motion to vacate.[45] The affidavit on which the motion is based is not necessarily conclusive as to the facts stated therein.[46] Notice of the motion should be given to interested parties,[47] including the judgment creditor,[48] and should point out the error or irregularity complained of,[49] unless the defect is jurisdictional.[50] If the proceedings are regular on their face, extrinsic matters cannot be considered.[51] Even if they may be considered, the vacation of the order because of them rests in the sound discretion of the court.[52] On vacating an order for the examination of a debtor, he may be required to appear for examination on the day named in the original order.[53]

28. N.Y.—American Fidelity Co. v. White, 106 N.Y.S. 738, 122 App.Div. 93, reversing 104 N.Y.S. 711, 54 Misc. 357.
23 C.J. p 854 note 75.

29. N.Y.—Thompson v. Sage, 94 N.Y.S. 31, 47 Misc. 357.
Pa.—Davis v. Mowbray, 9 Wkly.N.C. 47.

30. N.Y.—Austin v. Byrnes, 54 N.Y.Super. 552, 12 N.Y.Civ.Proc. 332.

31. N.Y.—Williams v. Irving, 1 Hun 720, 5 Thomps. & C. 671, modifying 47 How.Pr. 440.

32. N.Y.—Union Surety & Guaranty Co. v. Sire, 68 N.Y.S. 943, 34 Misc. 221.

33. N.Y.—Thompson v. Saye, 94 N.Y.S. 31, 47 Misc. 357.

34. N.Y.—Marshall v. Link, 13 N.Y.S. 224, 20 N.Y.Civ.Proc. 109.

35. N.Y.—Weiss v. Ashman, 32 N.Y.S. 161, 11 Misc. 377, 24 N.Y.Civ.Proc. 268, 1 N.Y.Ann.Cas. 314.

36. N.Y.—Smith v. Cowles, 99 N.Y.S. 747, 114 App.Div. 295.

37. N.Y.—Ward v. Stoddard, 128 N.Y.S. 846, 144 App.Div. 143, affirming 127 N.Y.S. 713, 70 Misc. 506.

38. N.J.—Githens v. Mount, 44 A. 851, 64 N.J.Law 166.

39. N.Y.—Lincoln Discount Corporation v. Parker, 296 N.Y.S. 42, 43, 162 Misc. 946.
"The purport of our present statutes relative to such proceedings is to minimize as far as may be objections of a technical nature. Liberality in procedure is the object."—Lincoln Discount Corporation v. Parker, supra.

40. Ind.—Hutchinson v. Trayerman, 13 N.E. 412, 112 Ind. 21.
N.Y.—Lisner v. Toplitz, 83 N.Y.S. 423, 86 App.Div. 1, affirmed 69 N.E. 1125, 177 N.Y. 559.
23 C.J. p 855 note 82.

41. N.Y.—Ward v. Stoddard, 128 N.Y.S. 846, 144 App.Div. 143, affirming 127 N.Y.S. 713, 70 Misc. 506.
23 C.J. p 855 note 83.

42. N.Y.—Baker v. Herkimer, 43 Hun 86—Gerhard Mennen Chemical Co. v. Dressner, 104 N.Y.S. 749, 53 Misc. 370.

43. N.Y.—Smith v. Cowles, 99 N.Y.S. 747, 114 App.Div. 295.
23 C.J. p 850 note 60.

44. N.Y.—Smith v. Cutter, 72 N.Y.S. 99, 64 App.Div. 412.

45. N.Y.—Matter of Stell, 137 N.Y.S. 703, 78 Misc. 40.

46. Mich.—Willison v. Desenberg, 2 N.W. 201, 41 Mich. 156.

47. N.Y.—Dorsey v. Cummings, 48 Hun 76—Kennedy v. Norcott, 54 How.Pr. 87.

48. N.Y.—Dorsey v. Cummings, 15 N.Y.St. 459, 48 Hun 76.
23 C.J. p 855 note 90.

49. N.Y.—Schneitzer v. Willner, 27 N.Y.S. 970, 7 Misc. 497—Lewis v. Beach, 112 N.Y.S. 200.
23 C.J. p 855 note 91.

50. N.Y.—Zelie v. Vroman, 50 N.Y.S. 836, 22 Misc. 486.

51. N.Y.—Robens v. Sweet, 1 N.Y.S. 839, 48 Hun 436.
23 C.J. p 855 note 93.

52. N.Y.—Lisner v. Toplitz, 83 N.Y.S. 423, 86 App.Div. 1, affirmed 69 N.E. 1115, 177 N.Y. 559.

53. N.Y.—Joyce v. Spafard, 9 N.Y.Civ.Proc. 342.

Procedure for vacating subpœna. While, under the New York practice, only a belief by the creditor's attorney that the third party has property of, or is indebted to, the judgment debtor is necessary to justify his issuing a subpœna, and no proof is required, nevertheless, where the third party moves to vacate the subpœna on the ground that such is not the case, the creditor must come forward with proof from which the court may reasonably infer that it is.[54]

§ 369. Arrest of Debtor and Security for Attendance on Examination

In some states, on proper proof that the judgment debtor has property which he refuses to apply to the judgment and that he is about to depart from the jurisdiction or conceal himself, a warrant for his arrest may issue. After his arrest, an undertaking may be required of him to attend for examination and not to dispose of his property.

By statute in some states, on proof that the judgment debtor has property which he refuses to apply to the satisfaction of the judgment and that he is about to depart from the jurisdiction or conceal himself, the judgment creditor is entitled to the issuance of a warrant of arrest.[55] Under some statutes the warrant may issue after the order for examination, or independently of such an order,[56] and may be issued against a nonresident as well as a resident judgment debtor.[57] The warrant is obtained on an affidavit setting out the facts existence of which, as specified in the statute, entitles the creditor to the summary relief sought.[58] Under some statutes, allegations on information and belief, without stating the sources thereof, are sufficient;[59] but under others the sources must be stated.[60] The affidavit must show that the debtor has property,[61] but it need not specify the property.[62] The warrant for the arrest may be issued by a judge residing in the same judicial district as the debtor, even though he does not reside in the same county as the debtor,[63] or it may be issued by the referee appointed to conduct the examination.[64] The warrant must contain a recital of the facts conferring jurisdiction on the court to entertain the proceedings, such as the issuance of execution,[65] and must state its purpose,[66] and its language must be clear.[67] On a motion to vacate the warrant, only the irregularities specified in the notice of motion can be availed of.[68]

Bond. After the arrest of the debtor, an undertaking may be required of him to attend for examination and not to dispose of his property.[69] Bonds not complying with the statute are sometimes held sufficient as common-law bonds.[70]

Effect of vacation of order of examination. Where a warrant is issued after an order of examination has been granted, the subsequent vacation of the order does not vacate the warrant. The judgment creditor may abandon the proceedings instituted by the order, and elect to proceed under the warrant, or he may keep the proceedings under the order alive until his right to proceed under the warrant is established.[71] The judge may, if necessary, direct an adjournment, or if the return day of the order has elapsed, a continuance of the proceedings under the order may be had until after the return of the warrant and a decision thereon.[72]

Custody and disposition on arrest. Where the statute authorizes the sheriff to arrest the debtor and bring him before the judge, the sheriff has no authority to imprison the debtor in the county jail,

54. N.Y.—New York Credit Men's Ass'n v. Schneider, 286 N.Y.S. 973, 247 App.Div 896, appeal dismissed 7 N.E.2d 726, 273 N.Y. 625, motion denied 10 N.E.2d 590, 274 N.Y. 637.

Creditor's affidavit sufficient

U.S.—Capital Co. v. Fox, D.C.N.Y., 15 F.Supp. 677, affirmed, C.C.A., 85 F.2d 97, 106 A.L.R. 376.

55. Kan.—Haglund v. Burdick State Bank, 164 P. 167, 100 Kan. 279.
23 C.J. p 855 note 1.
Arrest on mesne process see Arrest §§ 23–86.
Execution against the person see infra §§ 407–450.

56. N.Y.—Frost v. Craig, 9 N.Y.S. 528, 16 Daly 107, 18 N.Y.Civ.Proc. 296.

57. N.Y.—Denning v. Schieffelin, 7 N.Y.S. 98.

58. Ind.—Fox v. Close, 113 N.E. 1007, 63 Ind.App. 66.
23 C.J. p 855 note 5.

59. Pa.—Dorff v. Matthews, 36 Leg. Int. 382.

60. N.Y.—Cohen v. Allen, 170 N.Y.S. 892.

61. N.Y.—Heller v. De Leon, 7 N.Y.S. 97—Netzel v. Mulford, 59 How. Pr. 452.

62. Wis.—Enders v. Smith, 100 N.W. 1061, 122 Wis. 640.

63. N.Y.—Wilson v. Andrews, 9 How.Pr. 39.

64. Iowa.—Marriage v. Woodruff, 42 N.W. 198, 77 Iowa 291.

65. N.Y.—Barnett v. Lewinsky, 121 N.Y.S. 378, 66 Misc. 141.

66. N.Y.—Barnett v. Lewinsky, supra.
23 C.J. p 856 note 13.

67. N.Y.—Barnett v. Lewinsky, supra.

68. N.Y.—Frost v. Craig, 16 Daly 107, 9 N.Y.S. 528, 18 N.Y.Civ.Proc. 296.

69. N.Y.—Kaufman v. Thrasher, 10 Hun 438, 4 N.Y.Wkly.Dig 312.

Return of bond to court

Failure of the officer through no fault of plaintiff to return to the court or the justice the debtor's bond to disclose, taken by the officer, as provided by Rev.St c 115 § 15, was not fatal to the validity of the bond, the statute being directory and not mandatory.—Goodrich v. Soule, 110 A. 808, 119 Me. 280.

70. Wis.—Straw v. Kromer, 89 N.W. 821, 114 Wis. 91.

71. N.Y.—Frost v. Craig, 16 Daly 107, 9 N.Y.S. 528, 16 N.Y.Civ.Proc. 296, modifying 9 N.Y.S. 437—Wilson v. Andrews, 9 How.Pr. 39.

72. N.Y.—Frost v. Craig, 16 Daly 107, 9 N.Y.S. 528, 18 N.Y.Civ.Proc. 296.

even temporarily, during the period the judge is away from his office.[73]

§ 370. Injunction to Restrain Disposition of Property

a. In general
b. Effect

a. In General

In a proper case and on a sufficient application, the judgment creditor may procure an order enjoining or restraining the judgment debtor or other proper person from disposing or suffering any disposition of any property or debt which may be the subject of examination, until further direction. Under an appropriate statute, a subpœna requiring attendance for examination may operate as an injunction.

To effectuate the object of the proceedings the creditor may in a proper case procure an injunction restraining the person to whom it is directed from disposing or suffering any disposition of, or interference with, property of the debtor, or any property or debt concerning which any person may be required to be examined, until further direction.[74] Under some statutes, the power to restrain extends only to parties to the proceedings;[75] under others the power is not limited to the restraint of the debtor, but extends to property as to which any person may be required to attend and be examined.[76] A commissioner who has no power to require any person other than defendant to answer concerning property in his hands belonging to defendant is not vested with the power to make a preliminary order restraining such party from disposing of such property.[77] Some courts hold that, where the indebtedness in question is denied or where the property sought to be reached is claimed adversely, its transfer or disposition may be enjoined,[78] but other courts hold the contrary.[79]

Application. An injunction order must be based on a sufficient affidavit,[80] which, unless the statute otherwise requires, may be part of the moving papers constituting the application for the order of examination. It has been held that allegations on information and belief are not sufficient.[81] Notice of the application is ordinarily required by the statute,[82] and a bond may be required.[83] If not required, however, it is not necessary that the judgment creditor give security before taking such order.[84] Where an application is made in an action in aid of execution, the complaint must show that plaintiff is entitled to judgment.[85]

Order. A valid order made by a court or officer having jurisdiction in the premises is absolutely necessary.[86] It is usually contained in, and a part of, the order for examination or warrant of arrest.[87] It should be confined to the property involved in the proceeding.[88] Irregularity in the or-

73. Kan.—Haglund v. Burdick State Bank, 164 P. 167, 100 Kan. 279.

74. N.Y.—In re Dewint's Will, 292 N.Y.S. 198, 161 Misc. 398.
S.D.—Mohawk Rubber Co. of New York v. Cronin, 252 N.W. 642, 62 S.D. 249.
23 C.J. p 856 note 21.

75. N.C.—Westminster Nat. Bank v. Burns, 13 S.E. 871, 109 N.C. 105—Coates v. Wilkes, 94 N.C. 174.

76. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.
N.Y.—In re Dewint's Will, 292 N.Y.S. 198, 161 Misc. 398.
23 C.J. p 856 notes 21, 23.

77. Wis.—Blabon v. Gilchrist, 29 N.W. 220, 67 Wis. 38.

78. Wis.—Nick v. Holtz, 297 N.W. 387, 237 Wis. 407.
23 C.J. p 856 note 25.

Proceeds of insurance
Naming of judgment debtor in life policy as beneficiary authorizes court in supplementary proceeding to retain proceeds until ownership is decided.—Palmetto Bank & Trust Co. v. McCown-Clark Co., 141 S.E. 155, 143 S.C. 98.

In third party proceeding
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.

79. N.Y.—Rathers v. Kaplan, 138 N.Y.S. 1002, 3 N.Y.Civ.Proc.,N.S., 21.

80. N.Y.—Green v. Bullard, 8 How. Pr. 313.

Affidavit held sufficient
N.J.—Commercial Nat. Trust & Savings Bank of Los Angeles v. Hamilton, 137 A. 403, 101 N.J.Eq. 249, affirming 133 A. 703, 99 N.J.Eq. 492.

81. N.J.—Githens v. Mount, 44 A. 851, 64 N.J.Law 166.

Legal proof is necessary and sufficient.—Commercial Nat. Trust & Savings Bank of Los Angeles v. Hamilton, 137 A. 403, 101 N.J.Eq. 249, affirming 133 A. 703, 99 N.J.Eq. 492.

Verification on belief is sufficient to authorize an order for discovery, but is insufficient for an order forbidding transfer or payment.—Barr v. Voorhees, 37 A. 134, 55 N.J.Eq. 561.

82. Cal.—Thompson v. Cook, App., 120 P.2d 54.
Wash.—Meier v. Fidelity Nat. Bank, 86 P. 574, 43 Wash. 324.

83. Wash.—Meier v. Fidelity Nat. Bank, supra.

84. Cal.—Pioneer Investment & Trust Co. v. Muncey, 166 P. 591, 33 Cal.App. 740.

85. N.Y.—Kerr v. Dildine, 6 N.Y.St. 163.

86. U.S.—Gregory v. Hewson, C.C. Ohio, 10 F.Cas.No.5,801, 1 Bond 277.
Minn.—Benbow v. Kellom, 54 N.W. 482, 52 Minn. 433.
23 C.J. p 857 note 34.

Affidavit in lieu of personal appearance
Third party order forbidding transfer of property belonging to judgment debtor did not become a nullity on acceptance of third party's affidavit in lieu of personal appearance.—Neurohr v. Gwaltney, 285 N.Y.S. 84, 158 Misc. 15.

87. Wash.—Meier v. Fidelity Nat. Bank, 86 P. 574, 43 Wash. 324.

88. Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.
23 C.J. p 857 note 36.

Corporate stock
(1) Where levy on corporate stock is imperfect, auxiliary injunction restraining corporation from transferring stock is misuse of power.—Amm v. Amm, 175 A. 186, 117 N.J.Eq. 185.

(2) But a restraint on alienation by judgment debtor of shares of stock which was located in certain bank, and on which there had been a levy, actual or attempted, and

der for examination does not affect a subsequent injunction order.[89]

Subpœna. Under a New York statute, the service of a subpœna on the debtor or a third party requiring his appearance for examination operates as an injunction restraining the transfer or disposition of the judgment debtor's property, provided a copy of the section of the statute so providing is indorsed on the copy of the subpœna served.[90]

Abandonment. The commencement of a creditor's suit will not revive an injunction order granted in supplementary proceedings which have been abandoned.[91]

Vacation and modification. Where the injunction order is directed to a third person having possession of the property in question, a motion to vacate it may be made by the judgment debtor,[92] or by the third person where he or it claims title to the property.[93] The validity of the restraining order must be tested by a motion to set it aside, rather than by opposition to a motion to punish for contempt.[94] Proper grounds being shown therefor, the injunctive provisions of a subpœna in supplementary proceedings may be vacated.[95] An injunction may be modified in proper cases.[96]

b. Effect

The injunction operates to restrain the disposition of property of the judgment debtor; it does not and cannot be made to operate against the property of a third person. At a proper time, the restraining provisions may be released or may cease to operate.

The effect of the order obviously is to preclude the party addressed from disposing of or encumbering the property.[97] The injunction is no justification to the judgment debtor for refusal to comply with a judgment in another action to which the creditor in the supplementary proceedings is a party.[98] Neither is an injunction order in supplementary proceedings, restraining a third person from paying an indebtedness owing by him to the judgment debtor, a defense to such third person in a suit against him by the judgment debtor to recover the debt.[99] A party may be bound by an injunction order of which he has knowledge, although imperfect service is made on him;[1] but an injunction not directed to the debtor who had no notice of the supplementary proceedings is not binding on him, although it was served on him.[2]

A stay of all proceedings until the hearing of a motion to vacate the judgment will not stay the operation of an injunction granted on the supplementary proceeding.[3]

which was the subject of a deposition on knowledge, was proper.—Whitfield v. Kern, 6 A.2d 411, 125 N. J.Eq. 515.

89. N.Y.—Wilson v. Andrews, 9 How.Pr. 39.

90. U.S.—Capital Co. v. Fox, D.C. N.Y., 15 F.Supp. 677, affirmed, C.C. A., 85 F.2d 97, 106 A.L.R. 376.

Necessity of indorsing statute as amended

(1) The section of the statute required to be indorsed on the subpoena having been amended, it was held by the city court of New York that service of a subpoena bearing a copy of the section as it read before its amendment was insufficient to make the injunctive provision effective, since the statute was penal as well as remedial and should be strictly construed, and it was further held that by submitting to examination the third party did not waive the defect as to the injunctive provision, since the subpoena was valid in so far as requiring appearance for examination and invalid only as to the injunctive provision.—St. Luke's Hospital v. Godet, 11 N. Y.S.2d 900, 171 Misc. 7.

(2) However, in a subsequent opinion, the appellate term of the supreme court held that, since the amendments involved did not constitute a substantial variation, a subpoena bearing a copy of the section as it read before its amendment contained a valid and enforceable restraint.—Novey v. Novey, 13 N.Y.S. 2d 513, 171 Misc. 672.

91. N.Y.—Ballou v. Boland, 14 Hun 355.

92. N.Y.—Matulka v. Van Roosbroeck, 25 N.Y.S.2d 240, affirmed 25 N Y.S.2d 247.
23 C.J. p 857 note 38.

Showing held insufficient

S.C.—Ex parte Graham, 119 S.E. 842, 126 S.C. 254.

93. N.Y.—Rathers v. Kaplan, 138 N.Y.S. 1002, 3 N.Y.Civ.Proc.,N.S., 21.

94. N.Y.—In re Cornblum, 232 N.Y. S. 22, 133 Misc. 357.
Contempt see infra §§ 398–401.

95. N.Y.—Cunningham v. McCullough, 22 N.Y.S.2d 739—St. Luke's Hospital v. Hall, 20 N.Y.S.2d 602.

96. Cal.—Butcher v. Brouwer, App., 120 P.2d 510.

Permitting renewal of chattel mortgage

The trial court did not abuse its discretion in modifying provisions of a restraining order prohibiting judgment debtor from disposing of his property other than in transacting his business "in the ordinary course," by permitting debtor to renew a chattel mortgage existing on his property, where it appeared that such renewal was necessary for continued operation of debtor's business, especially where it appeared that under the procedure followed the security for the judgment would be increased.—Butcher v. Brouwer, supra.

97. Ohio.—Sam Savin, Inc. v. Burdsal, 22 N.E.2d 914, 61 Ohio App. 539.
Violation of injunction as contempt see infra § 399.

Issuance of bonds

A lodge's issuance of first mortgage bonds and exchange thereof for interim certificates previously issued by it constituted violation of previous court order, enjoining lodge from disposing of any of its property pending supplementary proceedings under judgment against lodge.—C. Hennecke Co. v. Columbia Lodge, No. 11, K. P., 287 N.W. 742, 233 Wis. 24.

98. N.Y.—Butler v. Niles, 35 How. Pr. 329.
23 C.J. p 857 note 42.

99. N.Y.—Glenville Woolen Co. v. Ripley, 43 N.Y. 206.
23 C.J. p 857 note 43.

1. N.Y.—Livingston v. Swift, 23 How.Pr. 1.

2. N.Y.—Edmonston v. McLoud, 19 Barb. 356, affirmed 16 N.Y. 543.

3. N.Y.—*Woolf v. Jacobs*, 38 N.Y. Super. 408.

Property affected. The injunction is not operative as to property of the third person, but is and can be made operative only as to property of the judgment debtor[4] owned by, earned before, or due him at the time of the order,[5] or money due or to become due him at such time;[6] it does not apply to money or property inapplicable to the satisfaction of the judgment,[7] or to after-acquired property.[8] So for reasons which are obvious the injunction will not affect the proceeds of exempt property.[9] An injunction against the disposition of the debtor's property precludes a valid discharge of a note and mortgage owned by the debtor by surrendering the note to the maker and discharging the mortgage.[10]

Under the New York statute relating to subpœnas in supplementary proceedings, the injunctive provisions of a subpœna are inapplicable where the effectiveness of any notice of adverse claim is by law conditioned on the commencement of an action, the giving of security, or other condition.[11] Thus a third party subpœna served on a bank does not restrain the transfer of a deposit in the name of someone other than the judgment debtor,[12] although the statute has been construed as restraining the transfer of accounts in the judgment debtor's

4. N.Y.—Rathers v. Kaplan, 138 N.Y.S. 1002.
N.C.—Westminster Nat. Bank v. Burns, 13 S.E. 871, 109 N.C. 105.

5. N.Y.—Wood v. Schwartz, 266 N.Y.S. 115, 148 Misc. 528.
23 C.J. p 857 note 47.

Advances on future earnings

Where restraining clause in subpoena obtained by judgment creditor in special proceeding supplementary to judgment operated on advances made to judgment debtor against future earnings for personal services, such advances could not be considered as past earnings so as to be exempt from execution, and, to avoid being held in contempt, judgment debtor should have applied to court for order vacating the restraining clause and releasing the fund in whole or in part, in which event the court in entertaining a subsequent application by judgment creditor would not have allowed judgment creditor more than ten per cent of any such advances.—St. Luke's Hospital v. Hall, 20 N.Y.S.2d 602.

Alimony

In proceeding to enforce judgment for rent of apartment contracted for by wife while alimony decree of English court was in force, and while wife was enjoying its benefits, court would not vacate injunctive provisions of third-party subpoena directed to bank to which wife's former husband transmitted alimony payments from England, in absence of showing that the alimony included provision for children or some person other than wife.—Sutton Studios v. Furness, 23 N.Y.S.2d 593.

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Judgment creditor was entitled to injunction restraining beneficiary under will from transferring his interest or doing any other act that would prejudice creditor's right to collect judgment out of such bequest.—Mohawk Rubber Co. of New York v. Cronin, 252 N.W. 642, 62 S.D. 249.

Residuary legacy

Any amount ultimately payable to residuary legatee is subject to directions of supreme court where alleged judgment creditor of residuary legatee had served on executor third-party order restraining payment of any distributable sums to residuary legatee.—In re Dewint's Will, 292 N.Y.S. 198, 161 Misc. 398.

6. N.Y.—Neurohr v. Gwaltney, 285 N.Y.S. 84, 158 Misc. 15.

Money about to be received by third party which belongs to the judgment debtor is within the restraint of the injunction.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.

Contract entered into after order

A "third party order" does not reach moneys becoming due under a contract entered into after the service of the order.—In re Lindenwald Bottling Corporation, supra.—Kaufung v. Doric Shop, 11 N.Y.S.2d 67, 170 Misc. 683.

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7. N.Y.—Morgan v. Von Kohnstamm, 9 Daly 355, 60 How.Pr. 161.
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Seaman's wages

The fact that a judgment against a seaman was for board and lodging of his daughter did not make his wages subject to the restraining provisions of a third-party subpoena, since such a judgment was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order.—Cunningham v. McCullough, 22 N.Y.S.2d 739.

Proceeds of insurance policies

Where payments due under insurer's supplementary contract with beneficiary were protected against legal process except garnishee execution under civil practice act and legal process directed against surplus beyond sum necessary for education and support, but judgment creditor had not made use of those remedies, beneficiary was entitled to have all payments due under contract freed from injunction contained in order issued in supplementary proceeding by judgment creditor.—Matulka v. Van Rooshroeck, 25 N.Y.S.2d 240, affirmed 25 N.Y.S.2d 247.

Trust property

In supplementary proceedings against judgment debtor, whose only property was income from trust created by one other than herself, appointing receiver of judgment debtor's and trustees' property and enjoining trustees from disposing of such property was error.—Stark v. Baldwin, 23 N.Y.S.2d 730.

8. N.Y.—McBreen Realty Co. v. Vogel, 241 N.Y.S. 196, 136 Misc. 458.
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Effect of application for receiver

Where the judgment creditor serves an order for examination on the judgment debtor and also serves a third-party order and applies for the appointment of a receiver, the third-party order affects property in the hands of the third party acquired by the judgment debtor after service of the order on him, so that, when the receiver is appointed and qualified, he may take the moneys in the hands of the third party and apply them to the satisfaction of the judgment.—Oriole Textile Co. v. Robert Silk & Woolen Co., 265 N.Y.S. 447, 147 Misc. 524.

9. N.Y.—McGivney v. Childs, 41 Hun 607.

10. N.C.—Rose v. Baker, 5 S.E. 919, 99 N.C. 323.

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Termination of restraining order. After the debtor has been examined and found to have no nonexempt assets, it is proper to enter an order releasing the restraining order,[14] and it has been held that, even where no such order is entered, the debtor is justified as treating the restraining order as terminated after the lapse of a considerable time after such examination.[15] Where the statute so provides, the restraining provisions in a third party order remain in force for a period specified in the statute.[16] The operation of an order restraining a third person from disposing of property until further order in the premises ceases on the making of an order appointing a receiver.[17]

§ 371. Proceedings on Examination

The examination in supplementary proceedings is largely governed by the rules applicable to the trial of an action. The proceedings may be adjourned.

The examination in supplementary proceedings is largely governed by the rules applicable to the trial of an action.[18] However, there are no pleadings and no formal issue.[19] Appearance and submission to examination without objection waives prior irregularities,[20] but does not waive jurisdictional defects.[21]

Persons injuriously affected by an order made in the course of the proceedings may attack it.[22]

Adjournments. A judge or referee may adjourn the proceedings from time to time,[23] in his discretion.[24] An adjournment may be had by consent of parties, agreed to by the judge or referee.[25] It may be had although the debtor refuses to consent.[26] An adjournment is proper where the referee fails to appear on the day set,[27] or a party fails to appeal,[28] or on account of the ill health or mental condition of the debtor.[29] The adjournment may be granted notwithstanding the debtor is enjoined meanwhile from disposing of his property.[30] The authority to adjourn should not be abused,[31] or exercised merely for the purpose of harassing the debtor.[32]

The proceedings cannot be adjourned indefinitely,[33] even though the debtor consents.[34] The proceedings will lapse if they are irregularly adjourned,[35] as where they are adjourned without date,[36] and they cannot thereafter be revived without notice to the debtor.[37]

13. N.Y.—St. Luke's Hospital v. Godet, supra.

14. Minn.—Ryan v. Colburn, 241 N. W. 388, 185 Minn. 347.

15. Minn.—Ryan v. Colburn, supra.

16. N.Y.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.

17. N.Y.—People v. Randell, 73 N. Y. 416—Sullivan v. U. S. Gas Fixture Co., 119 N.Y.S. 532, 134 App. Div. 658.

18. Ind.—Hutchinson v. Trauerman, 13 N.E. 412, 112 Ind. 21.
23 C.J. p 857 note 54.
Right to jury trial in supplementary proceedings see the C.J.S. title Juries § 70, also 35 C.J. p 187 note 12–p 188 note 15.

Protection of debtor's constitutional rights
Every constitutional right of the debtor will be respected and safeguarded.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.

19. Cal.—McCullough v. Clark, 41 Cal. 298.
Iowa.—Bennett v. Valley Min. Co., 120 N.W. 654, 142 Iowa 53.
In Massachusetts charges of fraud in supplementary proceedings against debtor are by statute in nature of action at law, although they may result in imprisonment of debtor, and are essentially civil and not criminal, so that after plea in district court plea need not be entered in superior court.—Restuccia v. Bonner, 192 N.E. 17, 287 Mass. 592.

20. Cal.—Bonner v. Lehfeldt, 179 P. 722, 39 Cal.App. 649.
23 C.J. p 864 note 18.

21. N.Y.—Schenck v. Irwin, 15 N.Y. S. 55, 60 Hun 361, 21 N.Y.Civ.Proc. 96.
23 C.J. p 864 note 19.

22. **Person held injuriously affected**
Execution creditor whose judgment was decreed fraudulent and void by order in proceedings supplementary to subsequent execution was entitled to attack such order, as against contention that he was not injured.—Richard v. McNair, 164 So. 836, 121 Fla. 733.

23. N.Y.—Kaufman v. Thrasher, 10 Hun 438.
23 C.J. p 860 note 39.
Stay of proceedings see supra § 357.
Effect of failure to adjourn proceedings see infra § 397.

Persons other than justice or referee
Only justice or referee before whom the proceeding is pending has jurisdiction to adjourn the proceeding once it has been instituted.—Nyamco Associates v. King, 265 N. Y.S. 29, 147 Misc. 904.

24. N.Y.—Morrison v. Stember, 98 N. Y.S. 850, 49 Misc. 464.

25. N.Y.—People v. Oliver, 66 Barb. 570.

26. N.Y.—Kaufman v. Thrasher, 10 Hun 438.

27. N.Y.—Keihen v. Shipherd, 4 N. Y.S. 339, 16 N.Y.Civ.Proc. 183.

28. N.Y.—Parker v. Hunt, 15 Abb. Pr. 410.
23 C.J. p 861 note 45.

29. N.Y.—Mason v. Lee, 23 How.Pr. 466.

30. N.Y.—Kaufman v. Thrasher, 10 Hun 438.

31. N.Y.—Kaufman v. Thrasher, supra.

32. N.Y.—Feinberg v. Kutcosky, 132 N.Y.S. 9, 147 App.Div. 393—Hudson v. Piets, 11 Paige 180, 3 N.Y. Leg.Obs. 120.

33. **Merely keeping proceedings open**
for examination of witnesses without fixing stated time and place therefor is not adjournment or continuation of proceedings.—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

34. N.Y.—Nyamco Associates v. King, supra.

35. N.Y.—Otten v. Stromeyer, 239 N. Y.S. 593, 228 App.Div. 360.

36. N.Y.—Walmor, Inc., v. Markel, 268 N.Y.S. 435, 240 App.Div. 1007—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

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Revival of proceedings
Service of order in supplementary proceedings revived proceedings which had lapsed on notice to judgment debtor.—Otten v. Stromeyer, 239 N.Y.S. 593, 228 App.Div. 360.

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The examination in supplementary proceedings is largely governed by the rules applicable to the trial of an action.[18] However, there are no pleadings and no formal issue.[19] Appearance and submission to examination without objection waives prior irregularities or defects which are not jurisdictional,[20] but does not waive jurisdictional defects.[21]

Persons injuriously affected by an order made in the course of the proceedings may attack it.[22]

Adjournments. A judge or referee may adjourn the proceedings from time to time,[23] in his discretion.[24] An adjournment may be had by consent of parties, agreed to by the judge or referee.[25] It may be had although the debtor refuses to consent.[26] An adjournment is proper where the referee fails to appear on the day set,[27] or a party fails to appeal,[28] or on account of the ill health or mental condition of the debtor.[29] The adjournment may be granted notwithstanding the debtor is enjoined meanwhile from disposing of his property.[30] The authority to adjourn should not be abused,[31] or exercised merely for the purpose of harassing the debtor.[32]

The proceedings cannot be adjourned indefinitely,[33] even though the debtor consents.[34] The proceedings will lapse if they are irregularly adjourned,[35] as where they are adjourned without date,[36] and they cannot thereafter be revived without notice to the debtor.[37]

13. N.Y.—St. Luke's Hospital v. Godet, supra.

14. Minn.—Ryan v. Colburn, 241 N. W. 388, 185 Minn. 347.

15. Minn.—Ryan v. Colburn, supra.

16. N.Y.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.

17. N.Y.—People v. Randell, 73 N. Y. 416—Sullivan v. U. S. Gas Fixture Co., 119 N.Y.S. 532, 134 App. Div. 658.

18. Ind.—Hutchinson v. Trauerman, 13 N.E. 412, 112 Ind. 21.
23 C.J. p 857 note 54.
Right to jury trial in supplementary proceedings see the C.J.S. title Juries § 70, also 35 C.J. p 187 note 12—p 188 note 15.

Protection of debtor's constitutional rights
Every constitutional right of the debtor will be respected and safeguarded.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.

19. Cal.—McCullough v. Clark, 41 Cal. 298.
Iowa.—Bennett v. Valley Min. Co., 120 N.W. 654, 142 Iowa 53.

In Massachusetts charges of fraud in supplementary proceedings against debtor are by statute in nature of action at law, although they may result in imprisonment of debtor, and are essentially civil and not criminal, so that after plea in district court plea need not be entered in superior court.—Restuccia v. Bonner, 192 N.E. 17, 287 Mass. 592.

20. Cal.—Bonner v. Lehfeldt, 179 P. 722, 39 Cal.App. 649.
23 C.J. p 864 note 18.

21. N.Y.—Schenck v. Irwin, 15 N.Y. S. 55, 60 Hun 361, 21 N.Y.Civ.Proc. 96.
23 C.J. p 864 note 19.

22. **Person held injuriously affected**
Execution creditor whose judgment was decreed fraudulent and void by order in proceedings supplementary to subsequent execution was entitled to attack such order, as against contention that he was not injured.—Richard v. McNair, 164 So. 836, 121 Fla. 733.

23. N.Y.—Kaufman v. Thrasher, 10 Hun 438.
23 C.J. p 860 note 39.
Stay of proceedings see supra § 357.
Effect of failure to adjourn proceedings see infra § 397.

Persons other than justice or referee
Only justice or referee before whom the proceeding is pending has jurisdiction to adjourn the proceeding once it has been instituted.—Nyamco Associates v. King, 265 N. Y.S. 29, 147 Misc. 904.

24. N.Y.—Morrison v. Stember, 98 N. Y.S. 850, 49 Misc. 464.

25. N.Y.—People v. Oliver, 66 Barb. 570.

26. N.Y.—Kaufman v. Thrasher, 10 Hun 438.

27. N.Y.—Keihen v. Shipherd, 4 N. Y.S. 339, 16 N.Y.Civ.Proc. 183.

28. N.Y.—Parker v. Hunt, 15 Abb. Pr. 410.
23 C.J. p 861 note 45.

29. N.Y.—Mason v. Lee, 23 How.Pr. 466.

30. N.Y.—Kaufman v. Thrasher, 10 Hun 438.

31. N.Y.—Kaufman v. Thrasher, supra.

32. N.Y.—Feinberg v. Kutcosky, 132 N.Y.S. 9, 147 App.Div. 393—Hudson v. Plets, 11 Paige 180, 3 N.Y. Leg.Obs. 120.

33. **Merely keeping proceedings open**
for examination of witnesses without fixing stated time and place therefor is not adjournment or continuation of proceedings.—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

34. N.Y.—Nyamco Associates v. King, supra.

35. N.Y.—Otten v. Stromeyer, 239 N. Y.S. 593, 228 App.Div. 360.

36. N.Y.—Walmor, Inc., v. Markel, 268 N.Y.S. 435, 240 App.Div. 1007—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

37. N.Y.—Walmor, Inc., v. Markel, 268 N.Y.S. 435, 240 App.Div. 1007—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

Revival of proceedings
Service of order in supplementary proceedings revived proceedings which had lapsed on notice to judgment debtor.—Otten v. Stromeyer, 239 N.Y.S. 593, 228 App.Div. 360.

§ 372. —— Jurisdiction to Conduct

If the order of reference in supplementary proceedings is not properly served, the referee acquires no jurisdiction to conduct the examination. Jurisdiction is not lost, however, by the arrest of a debtor who has evaded examination or by the absence of the referee at the time and place set for the examination.

If the order of reference in supplementary proceedings is not properly served on the person sought to be examined, the referee acquires no jurisdiction to conduct the examination.[38] However, jurisdiction is not lost by the arrest of a debtor who has evaded examination,[39] or by the absence of the referee at the time and place set for the examination.[40] Voluntary submission to examination will constitute a waiver of want of jurisdiction of the person.[41]

Jurisdiction and authority of the court or judge in supplementary proceedings generally are discussed supra § 358.

§ 373. —— Before Whom Examination Had; Reference

The examination in supplementary proceedings may be had before any officer or tribunal, such as a referee, authorized by law to conduct it.

The examination in supplementary proceedings may be had before any officer or tribunal authorized by law to conduct it.[42]

Referee. A referee may be appointed to take the testimony,[43] especially where it is apparent that a difficult or protracted investigation must ensue.[44] The appointment may be made with[45] or without[46] the consent of the parties, although as a rule it will not be ordered against the wishes of either party.[47]

The appointment of the referee is to be made by a court or judge possessing statutory authority to do so.[48] In a jurisdiction where statutory provision is made for appointment of a referee by the judge to whom the order for examination is returnable, a substitution or appointment of another referee is to be made by the same judge.[49] However, under some statutes, a judge acting in lieu of another judge or court exhausts his power when he makes the appointment and is without power to vacate it.[50] Where an order appointing a referee is still in existence, there is no jurisdiction to issue another order naming another referee.[51] As a matter of practice the creditor may be permitted to name the referee,[52] and, where the proceeding is on a justice's judgment, it is a recognized practice in some jurisdictions to appoint the justice who rendered the judgment.[53] An attorney who holds an unsatisfied judgment against the debtor should not be appointed referee.[54]

Powers and duties of referee. The powers and authority of the referee with reference to the examination are substantially similar to those of the judge when the examination is taken before such

38. N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746.

39. Kan.—Teats v. Herington Bank, 51 P. 219, 58 Kan. 721.

40. N.Y.—Reynolds v. McElhone, 20 How.Pr. 454.
23 C.J. p 858 note 60.

41. N.Y.—Viburt v. Frost, 3 Abb.Pr. 119.

42. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors, Inc., 186 So. 421, 136 Fla. 207.
Wash.—State v. Superior Court for King County, 268 P. 1038, 148 Wash. 376.
23 C.J. p 858 note 62.
Right to jury trial see the C.J.S. title Juries § 70, also 35 C.J. p 187 note 12–p 188 note 15.

Notary or commissioner of deeds
N.Y.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599.

Jurisdiction of court to appoint commissioners
Circuit court under statute providing for proceeding supplementary to execution had jurisdiction to appoint commissioners to accomplish purposes intended by statute, and it could not be anticipated that circuit court, having such jurisdiction, would act wrongly in connection therewith.—Adams v. Lewis, Fla., 200 So. 852.

43. Cal.—Ex parte Drew, 207 P. 249, 188 Cal. 717—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
Wash.—State v. Superior Court for King County, 268 P. 1038, 148 Wash. 376.
23 C.J. p 858 notes 63, 65, 66.

Residence of referee
Code Civ.Proc. §§ 714, 715, providing that in proceedings supplementary to execution the debtor cannot be required to attend before a referee out of the county in which he resides, creates an exception to § 640, providing for the appointment of referees generally, and requiring them to reside in the county in which the action is triable, so that in supplementary proceedings the court could appoint a referee who resided in another county, in which county the debtor also resided.—Ex parte Drew, 207 P. 249, 188 Cal. 717.

44. N.Y.—Hollister v. Spafford, 5 N.Y.Super. 742, Code Rep.,N.S., 120.

45. N.Y.—Hollister v. Spafford, supra.—Jones v. Lewlin, 3 N.Y.Super. 722.

46. N.Y.—Howe v. Welch, 11 N.Y. Civ.Proc. 444.

47. N.Y.—Hollister v. Spafford, 5 N.Y.Super. 742, Code Rep.,N.S., 120.
23 C.J. p 858 note 69.

48. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
Wash.—State v. Superior Court for King County, 268 P. 1038, 148 Wash. 376.
23 C.J. p 858 note 70.

49. N.Y.—Allen v. Starring, 26 How. Pr. 57.
However, it has been held that where a referee has been appointed by a judge in one district and further proceedings directed to be had before a judge in another district, the latter may substitute another referee.—Pardee v. Tilton, 83 N.Y. 623.

50. Kan.—Hunter v. Betts, App., 53 P. 86.

51. N.Y.—Brockway v. Brien, 37 How.Pr. 270.

52. N.Y.—Gilbert v. Frothingham, 13 N.Y.Civ.Proc. 288.

53. N.Y.—Hough v. Kohlin, Code Rep.,N.S., 232.

54. N.Y.—Higley v. Novark, 129 N.Y.S. 759, 145 App.Div. 7.

officer.[55] In addition to the general powers of the referee to conduct the examination, procure the attendance of witnesses, and the like, he may when so empowered by the order appointing him summon the debtor to appear before him.[56] He may also require the creditor to proceed with due diligence,[57] and entertain an application for a stay of proceedings.[58] It is his duty to take and not to make the examination, and if he attempts to act in an officious manner and partisan spirit he transcends his duty.[59]

A party voluntarily submitting evidence on a particular issue under an unappealed order of reference cannot later question the power of the referee to determine such issue.[60]

The oath of the referee need only be administered once, and need not be readministered on an adjourned day.[61]

Removal of referee. The referee should be unbiased and if he conducts the proceedings otherwise than with perfect fairness, he can be removed on proper application.[62] He may be removed where he is in the same office with the judgment creditor's attorney,[63] unless the judgment debtor has appeared and waived the objection.[64] However, the mere fact that the referee is a clerk of an attaching creditor is not of itself evidence of fraud warranting removal.[65]

§ 374. —— Place of Examination

The examination in supplementary proceedings must be held at the place designated by statute or order of court.

A person ordered to attend for examination in supplementary proceedings should appear at the place designated in the order for examination.[66] However, an adjournment may be taken to a place other than that designated in the order.[67]

The examination must be held at the place designated by statute.[68] Under various statutes the judgment debtor may not be required to attend or answer at a place without the county wherein he resides,[69] or outside the county to which execution against him was issued,[70] or outside of the county where he resides or has a place of business;[71] other statutes have provided that where the debtor is a nonresident he must be examined in the county where the judgment was rendered,[72] or that where he is a nonresident and has no place of business in the state, he must be examined in the county in which the judgment roll is filed.[73] By answering or submitting to an examination elsewhere without objection, the debtor may waive his right to have it conducted at the place prescribed by statute.[74] A statute limiting the place of examination to a particular locality has been held not to apply to the examination of witnesses other than the judgment debtor.[75]

55. N.Y.—Underwood v. Sutcliffe, 10 Hun 453, reversed on other grounds 77 N.Y. 58.
Wash.—State v. Superior Court for King County, 268 P. 1038, 148 Wash. 376.

56. N.Y.—Redmond v. Goldsmith, 2 N.Y.Month.L.Bul. 19.

57. N.Y.—Hudson v. Plets, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

58. N.Y.—Mason v. Lee, 23 How.Pr. 466.
Power to adjourn see supra § 371.

59. N.Y.—People v. Leipzig, 52 How. Pr. 410.

60. N.Y.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860, 256 App. Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810—Gotham Hotel Supply Co. v. Casa Cubana, 22 N.Y.S.2d 512.

Reference has same effect as a reference in a judgment creditor's action against a third party.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860, 256 App.Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810.

61. N.Y.—Hudson v. Plets, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

62. N.Y.—Gilbert v. Frothingham, 13 N.Y.Civ.Proc. 288.
23 C.J. p 859 note 84.

63. N.Y.—Gilbert v. Frothingham, 13 N.Y.Civ.Proc. 288.

64. N.Y.—Rouse v. Goodman, 28 N.Y.S. 524, 8 Misc. 691.

65. Cal.—Adams v. Hackett, 7 Cal. 187.

66. N.Y.—Myers v. Janes, 3 Abb.Pr. 301.
23 C.J. p 859 note 88.
Limitation on place witness can be compelled to attend see infra § 376.

67. N.Y.—Weaver v. Brydges, 33 N.Y.S. 132, 85 Hun 503.
23 C.J. p 859 note 89.

68. Fla.—State ex rel. All Florida Land Co. v. Thomas Manors, Inc., 186 So. 421, 136 Fla. 207.
Me.—West Cove Grain Co. v. Bartley, 74 A. 730, 105 Me. 293.

69. U.S.—Bates v. International Co., C.C.Cal., 84 F. 518.
23 C.J. p 859 note 90.

70. Kan.—State v. Burrows, 5 P. 449, 33 Kan. 10.
23 C.J. p 859 note 91.

71. Cal.—Corcoran v. Harris, 270 P. 391, 94 Cal.App. 19.
N.Y.—Schmidt v. Lavelle, 214 N.Y.S. 58, 126 Misc. 589
23 C.J. p 859 note 92.

In absence of showing by debtor that he neither did business nor resided in the county where he was required to appear and answer, the examination may take place in that county.—State v. Superior Court for King County, 277 P. 850, 152 Wash. 323.

"Place of business"
(1) A place of business, within the meaning of such statutes, must be one for the transaction of business in person, rather than through agents.—Brown v. Gump, 59 How.Pr., N.Y., 507.

(2) It need not be the debtor's principal place of business.—McEwan v. Burgess, 15 Abb.Pr., N.Y., 473, 25 How.Pr. 92.

72. Ind.—Folsom v. Clark, 48 Ind. 414.

73. N.Y.—Anway v. David, 9 Hun 296.

74. Kan.—State v. Burrows, 5 P. 449, 33 Kan. 10.
23 C.J. p 859 note 99.

75. N.Y.—Foster v. Wilkinson, 37 Hun 242.

§ 375. —— Right to Counsel

The debtor is entitled to be represented by counsel in supplementary proceedings, although participation by counsel in the examination of a witness is not a matter of right.

The debtor is entitled to be represented by counsel in supplementary proceedings.[76] However, participation by counsel in the examination of a witness is not a matter of right,[77] but rests in the discretion of the judge or referee.[78] Although, as appears infra § 378, it has been held that the debtor may be cross-examined in his own behalf, it has also been decided that the party examined is limited to the aid of counsel in framing his answers.[79]

Parties not to be examined cannot appear by counsel,[80] and where no notice of the examination of a third party has been given to the judgment debtor he cannot so appear;[81] although on examination of a third party who has a remedy against another, the latter may retain counsel to represent the former.[82]

§ 376. —— Witnesses and Attendance Thereof

In supplementary proceedings either party may be examined as a witness in his own behalf, and may examine other witnesses and procure their attendance by process of subpœna.

In supplementary proceedings either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as on the trial of an action.[83] Third persons alleged to be in possession of money or property belonging to the judgment debtor, or alleged to be indebted to the judgment debtor, may be called,[84] but such parties can only be required to answer concerning the alleged indebtedness and as to the fact whether they have property belonging to the judgment debtor.[85] The judgment debtor need not be examined but his possession of property may be shown entirely by the examination of other witnesses.[86]

Procuring attendance. In the absence of a statute otherwise providing, the attendance of a witness cannot be enforced by order,[87] but only by the process of subpœna.[88] A person subpœnæd as a witness is entitled to witness' fees as a condition of appearing and testifying;[89] but a third party required by order to attend is not so entitled.[90] If the examination is before a referee, the subpœna should be issued under his hand,[91] and if issued by a judge it must be issued under the hand of the judge before whom the proceeding is pending.[92] The subpœna must state the place where the person served shall attend.[93] A witness cannot be compelled to attend outside the locality prescribed by statute.[94]

A subpœna cannot issue until service of the order for examination or the debtor's voluntary appearance.[95] After the proceedings have terminated or lapsed, a subpœna should not be issued,[96] or, if issued, it should be vacated.[97] However, a sub-

76. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 432.
N.Y.—Frank L. Burns Coal Co. v. Gold, 239 N.Y.S. 303, 135 Misc. 545.

77. N.Y.—Sandford v. Carr, 2 Abb. Pr. 462.

78. N.Y.—Schwab v. Cohen, 13 N.Y. St. 709.

79. N.Y.—Corning v. Tooker, 5 How. Pr. 16.
23 C.J. p 859 note 8.

80. N.Y.—Corning v. Tooker, supra.

81. N.Y.—De Comeau v. People, 30 N.Y.Super. 498—Corning v. Tooker, 5 How.Pr. 16.

82. N.Y.—Corning v. Tooker, supra.

83. Iowa.—McDonnell v. Henderson, 38 N.W. 512, 74 Iowa 619.
23 C.J. p 859 note 13.

84. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.
23 C.J. p 860 note 14.

85. N.Y.—Tompkins County Bank v. Trapp, 21 How.Pr. 17.

86. Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.
23 C.J. p 860 note 16.

87. N.Y.—In re Depue, 77 N.E. 798, 185 N.Y. 60, reversing 95 N.Y.S. 1017, 108 App.Div. 58—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746.

Prisoners
Under a statute so providing on the application of a party to the proceedings, the court may make an order for the purpose of bringing a prisoner before the court to testify.—Tyson v. Owens, 22 N.Y.S.2d 261, 174 Misc. 401.

88. N.Y.—In re Depue, 77 N.E. 798, 185 N.Y. 60, reversing 95 N.Y.S. 1017, 108 App.Div. 58.
23 C.J. p 860 note 18.

89. N.Y.—In re Depue, supra.
23 C.J. p 860 note 19.

90. N.Y.—Heckman v. Bach, 20 Abb. N.Cas. 401.

91. N.Y.—Knowles v. De Lazare, 8 N.Y.Civ.Proc. 386, 3 How.Pr.,N.S., 35.
23 C.J. p 860 note 21.

92. N.Y.—Wilson v. Bracken, 135 N.Y.S. 435, 150 App.Div. 577.
23 C.J. p 860 note 22.

93. N.Y.—Kelty v. Yerby, 31 How. Pr. 95.

94. Cal.—Liberty Bank v. Superior Court of California in and for Los Angeles County, 235 P. 995, 195 Cal. 766.
N.Y.—Solomon v. Suffin, 205 N.Y.S. 214, 209 App.Div. 832.
Place where debtor can be required to attend see § 374 supra.

Third party cited to appear in proceedings is a party and not a witness who cannot be compelled to attend outside a certain locality.—State v. Superior Court for King County, 243 P. 11, 137 Wash. 552.

96. N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746—Benjamin v. Myers, 3 N.Y.St. 284.

96. N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E 407, 125 N.Y. 746.

Court was without jurisdiction to issue subpœna after the proceedings had lapsed.—Walmor, Inc., v. Markel, 268 N.Y.S. 435, 240 App.Div. 1007—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

97. N.Y.—Wilson v. Bracken, 135 N.Y.S. 435, 150 App.Div. 577.
Contra Westervelt v. Shapiro, 132 N.Y.S. 338.

pœna issued by a person without authority will not be vacated after the witness summoned has appeared and submitted to examination.[98] If no subpœna issues but the witness voluntarily attends, he is bound to answer questions the same as if duly subpœnæd.[99] Service of a subpœna on a person who is not a party does not make him such.[1]

§ 377. —— Production of Books and Papers

In supplementary proceedings necessary books and papers may be required to be produced by a subpoena duces tecum or an order of the referee.

In supplementary proceedings the power to compel the attendance of parties and a witness includes the right to compel the production of necessary books and papers by a subpœna duces tecum or an order of the referee,[2] and this is true where the debtor is a corporation.[3] That is, there is power to compel a party or a witness to produce books and papers and to examine them to refresh his memory,[4] but in the absence of statute there is no power to compel the debtor to produce books and papers for inspection or examination by the creditor.[5]

It is necessary and sufficient that the subpœna, order, or notice, and the service thereof, comply with statutory requirements.[6] The propriety of the refusal of a witness to produce papers claimed by him to relate to his private affairs is for the court, on a submission of the papers.[7]

§ 378. —— Scope and Conduct of Examination

a. In general
b. Collateral matters
c. Disputed ownership or indebtedness
d. Property transferred

a. In General

The examination in supplementary proceedings should be limited to ascertaining whether there is any property of the judgment debtor which should be applied to the payment of the judgment, but subject to this limitation great liberality should be allowed in the examination.

It is impossible to lay down any particular rule as to the scope of the examination in supplementary proceedings further than that the whole examination must have for its single object to ascertain whether there is any property of the judgment debtor which should be applied to the payment of the judgment,[8] and the questions propounded must have a tendency to elicit information as to, or discover property belonging to, the judgment debtor and applicable to payment of the judgment.[9]

Great liberality should be allowed in the examination.[10] The extent of the inquiry must be left largely to the good sense and discretion of the officer under whose direction the examination takes place.[11] Nevertheless, the judge or referee should not act capriciously or in a partisan spirit,[12] and a general inquiry into the debtor's private affairs is

98. N.Y.—Peck v. Austin, 29 N.Y.S. 2d 280.

99. N.Y.—People v. Marston, 18 Abb. Pr. 257.

1. N.Y.—In re Sickle, 5 N.Y.S. 703, 17 N.Y.Civ.Proc. 138.
23 C.J. p 860 note 29.

2. N.Y.—Pendergast v. Dempsey, 10 N.Y.S. 938, 18 N.Y.Civ.Proc. 198.
23 C.J. p 860 note 32.

Power to compel testimony by "subpœna ad testificandum," includes power to require witness, under process to appear and testify, to bring a specified document germane to issue. —Catty v. Brockelbank, 12 A.2d 128, 124 N.J.Law 360.

3. N.Y.—Pendergast v. Dempsey, 10 N.Y.S. 938, 18 N.Y.Civ.Proc. 198—Holmes v. Stietz, 6 N.Y.Civ.Proc. 362.

4. N.Y.—New York City First Nat. Bank v. Gow, 124 N.Y.S. 454, 139 App.Div. 582, modifying 124 N.Y.S. 755, 67 Misc. 547.

Even if oral examination is required, a motion to quash a subpœna duces tecum will be denied, since a debtor should not be in a position where he might say that his only knowledge of certain things is contained in documents which he has not brought with him.—Wayne Title & Trust Co. v. Melett, 29 Pa.Dist. & Co. 117, 38 Lack.Jur. 47, 8 Som.Leg.J. 364.

5. N.Y.—Barnes v. Levy, 29 N.Y.S. 1076, 23 N.Y.Civ.Proc. 253.
23 C.J. p 860 note 35.

6. N.Y.—Gaynor v. New York Breweries Co., 138 N.Y.S. 899, 154 App. Div. 881.
23 C.J. p 860 note 36.

7. N.Y.—Champlin v. Stoddart, 17 N.Y.Wkly.Dig. 76.

8. Ind.—Comstock v. Grindle, 23 N.E. 494, 121 Ind. 459.
23 C.J. p 861 note 50.

Property situated outside state may be the subject matter of the examination.
Cal.—Watson v. Pryor, 193 P. 797, 49 Cal.App. 554.
Fla.—Reese v. Baker, 123 So. 3, 98 Fla. 52.

9. Fla.—Reese v. Baker, supra.
N.Y.—Warber v. Rosenstein, 1 N.Y.L.Rec. 101.
23 C.J. p 861 note 51.

Disclosure of invention before patent obtained
The right of an inventor, before he has disclosed his secret by applying for patent is not "property" and therefore he may not be compelled to disclose the nature of his invention.—Rosenthal v. Goldstein, 183 N.Y.S. 582, 112 Misc. 606.

Questions relating to recorded mortgage are within scope of inquiry. —Wilkinson v. Harberson, La.App., 145 So. 28.

Questions beyond scope of inquiry
Judgment debtor, whose stock judgment creditor held as security, could not be questioned as to who owned controlling interest in corporation and value of stock.—Thompson v. Commonwealth, 159 S.E. 98, 156 Va. 1032.

10. N.Y.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.
23 C.J. p 861 note 56.

Technical objections will not be permitted to defeat the purpose of the proceeding.—Noyes v. Jesson, 6 Alaska 237.

11. Wis.—Heilbronner v. Levy, 26 N.W. 113, 64 Wis. 636.
23 C.J. p 861 note 54.

12. N.Y.—People v. Leipzig, 52 How. Pr. 410.
Wis.—Heilbronner v. Levy, 26 N.W. 113, 64 Wis. 636.

not permissible, in the absence of reasonable or well-founded belief of fraudulent transfer, see § 378 d infra, or concealment of property.[13] While it has been held that questions relating to property acquired since the institution of the proceedings should not be propounded,[14] it has also been held that the examination may include an investigation of financial transactions by the judgment debtor after the examination has begun.[15] The judgment debtor when called as a witness should be examined the same as any other witness.[16]

A second examination by the same creditor should ordinarily be limited to the time since the former examination was had,[17] but it cannot be so limited where the order for examination is general and the former proceedings have been abandoned by consent.[18]

Cross-examination. The debtor may be cross-examined in his own behalf,[19] and the creditor may cross-examine and contradict him.[20] The debtor may cross-examine other witnesses.[21]

b. Collateral Matters

On an examination in supplementary proceedings collateral matters, such as the merits of the original action and the validity of the judgment or execution, cannot be considered.

On an examination in supplementary proceedings, the merits of the original action cannot be considered,[22] nor can the validity of the judgment[23] or execution,[24] or, as appears supra, § 361, the truth of the return of the sheriff thereto, be called in question. Neither can the validity of the debtor's discharge as an insolvent be tried or determined in these proceedings.[25] The sufficiency of the service of the order for examination cannot be tried before the referee conducting the examination.[26]

An examination into the affairs of others than the judgment debtor should not be allowed merely on the hope that something may be brought out to enable the creditor to show a connection of the judgment debtor therewith or his interest in the subject matter of the particular questions.[27]

c. Disputed Ownership or Indebtedness

In the absence of a statute otherwise providing or of consent by the parties interested, ordinarily the court or referee is without jurisdiction in supplementary proceedings to determine the existence of an indebtedness to the judgment debtor which is denied, or the title to property to which a substantial claim is made by third persons.

In the absence of a statute otherwise providing,[28] or of consent by the parties interested,[29] in supplementary proceedings the court or referee is without

13. Fla.—Reese v. Baker, 123 So. 3, 98 Fla. 52.

14. N.Y.—Gregory v. Valentine, 4 Edw. 282.

15. Alaska.—Noyes v. Jesson, 6 Alaska 237.

16. **Debtor will not be allowed to make evidence** for himself by stating matter not called for by the question, but he cannot be expected on all occasions to give a categorical answer to a question skillfully put on a knowledge of facts, and possibly with a view to involve him in difficulties.—Leroy v. Halsey, 8 N.Y.Super. 589, Code Rep.,N.S., 275, 11 N.Y.Leg. Obs. 252.

17. N.Y.—Davidson v. Sokiran, 280 N.Y.S. 117, 155 Misc. 229.
23 C.J. p 861 note 63.

18. N.Y.—Carter v. Clarke, 30 N.Y. Super. 490.

19. N.Y.—Leroy v. Halsey, 8 N.Y. Super. 589, Code Rep.,N.S., 275, 11 N.Y.Leg.Obs. 252—Sandford v. Carr, 2 Abb.Pr. 462.

20. N.C.—Coates v. Wilkes, 92 N.C. 376.

21. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 428.

22. N.Y.—O'Neil v. Martin, 1 E.D. Smith 404.
23 C.J. p 862 note 68.

23. N.Y.—Feinberg v. Kutcosky, 132 N.Y.S. 9, 147 App.Div. 393.
23 C.J. p 862 note 69.

24. N.Y.—Greenlich v. Rose, 2 N.Y. City Ct. 174.

25. N.Y.—Coursen v. Dearborn, 30 N. Y.Super. 143.

26. N.Y.—Wilcox v. Harris, 59 How. Pr. 262.

27. Ind.—Comstock v. Grindle, 23 N. E. 494, 121 Ind. 459.

28. Fla.—State ex rel. Phœnix Tax Title Corporation v. Viney, 163 So. 57, 120 Fla. 657—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.
Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.
Duty to afford hearing to adverse claimants see supra § 358.
Property which may be reached see supra § 349.

Jurisdiction of nonresident
Court had no jurisdiction to proceed against property adversely claimed by nonresident unless some form of service on nonresident was authorized by statute, even though proceeding was regarded as one in rem and that property was within power or control of the court; and court did not obtain jurisdiction by service of a show cause order on nonresident.—Davis v. Woollen, 71 P. 2d 172, 191 Wash. 379.

Order to adverse claimant to show cause construed
Order requiring third parties claiming adversely to pay judgment or show cause why they should not pay presented prima facie findings which such third parties are required to answer, and on which issues may be made up for jury trial, if jury be demanded by either party, or upon which in default of issues made by pleadings default judgment might be entered and execution issued.—State ex rel. Phœnix Tax Title Corporation v. Viney, 163 So. 57, 120 Fla. 657.

Possession of debtor or adverse claimant
Whether possession of the property in dispute is in the debtor or the adverse claimant does not affect the jurisdictional requirements relative to the parties.—Junkin v. Anderson, Wash., 120 P.2d 548.

Statute held inapplicable
Wash.—Junkin v. Anderson, supra.

29. N.Y.—Gomprecht v. Scott, 57 N. Y.S. 799, 27 Misc. 192, affirming 55 N.Y.S. 239.
23 C.J. p 862 note 79.

Failure to object
Where at hearing before referee, third party raised objections on the merits but no objection was made to power of referee to try the issues, the parties conferred jurisdiction on trial court to determine disputed questions of fact as to existence of alleged indebtedness.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860,

jurisdiction to determine the existence of an indebtedness to the judgment debtor which is denied,[30] or the title to property to which a substantial claim is made by third persons.[31] However, this rule must be confined to third persons not parties to the original action, and against whom a trial of ownership in the summary proceeding would be without due process.[32] In some jurisdictions, although the matter cannot be determined in the supplementary proceedings, the creditor may nevertheless fully examine a third person as to property claimed by the latter to be his own or as to an indebtedness which is disputed,[33] but this rule is not universally adhered to.[34]

Jurisdiction to order payment of a debt or delivery of property in dispute is considered infra § 383.

d. Property Transferred

In supplementary proceedings inquiries relating to the bona fides of an assignment or transfer of property by the debtor may be made.

In supplementary proceedings inquiries may be made as to the circumstances attending an assignment or transfer of property by the debtor, for the purpose of ascertaining the bona fides of the transaction.[35] If the debtor is examined before return of the execution on the ground that he has property which he unjustly refuses to apply to the judgment, it is proper to inquire as to what has become of the proceeds of property disposed of by him.[36] However, a general inquiry into the debtor's private affairs is not permissible, where a reasonable basis for an inquiry to discover a fraudulent transfer of property is not shown.[37] A third person who is a witness may be asked concerning transactions of another with the judgment debtor to determine whether the former was merely a dummy to hold title for the judgment debtor.[38]

Assignment for benefit of creditors. Where it appears that the judgment debtor has made an assignment for the benefit of creditors, the examination is not necessarily limited to property acquired since the assignment, and it is error so to limit it.[39] The assignor may be asked whether in making the assignment he had any intent to defraud his creditors.[40] It seems, however, that on the examination of an assignee for the benefit of creditors the

256 App.Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810.

Objection held not waived

Cal.—Takahashi v. Kunishima, 93 P.2d 645, 34 Cal.App.2d 367.

30. Minn.—Freeman v. Larson, 272 N.W. 155, 199 Minn. 446.

Mont.—Johnson v. Lundeen, 200 P. 451, 61 Mont. 145.

N.Y.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860, 256 App.Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810.

Ohio.—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.

23 C.J. p 862 note 78.

Denial made in bad faith may be disregarded.—Parker v. Page, 38 Cal. 522.

31. Cal.—Blake v. Blake, 260 P. 937, 86 Cal.App. 377.

Colo.—Walker v. Staley, 1 P.2d 924, 89 Colo. 292.

Mont.—Missoula Trust & Savings Bank v. Northwestern Abstract & Title Ins. Co., 203 P. 854, 61 Mont. 370—Johnson v. Lundeen, 200 P. 451, 61 Mont. 145.

N.Y.—Liberty Storage & Warehouse Co. v. Van Wyck, 11 N.Y.S.2d 92, 256 App.Div. 641—Vaccari v. Maison Paris, 23 N.Y.S.2d 486, 175 Misc. 325.

Ohio.—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.

Wash.—Anderson v. Soderberg, 223 P. 1044, 128 Wash. 582.

Wis.—Nick v. Holtz, 297 N.W. 387, 237 Wis. 407—Paradise v. Giannini, 247 N.W. 472, 473, 211 Wis. 42, citing **Corpus Juris.**

23 C.J. p 862 note 77.

Enjoining disposition of property in dispute see supra § 370.

Court has no jurisdiction except to impound property adversely claimed and authorize actions to adjudicate rights therein.—Miller v. Gregory, 256 P. 431, 82 Cal.App. 634.

Right to money

A substantial controversy as to the debtor's right to the possession of certain moneys as against the claim of a third person cannot be adjudicated.

N.Y.—Orloff v. Pester, 257 N.Y.S. 111, 143 Misc. 685.

Wash.—Bounds v. Galbraith, 206 P. 357, 119 Wash. 596.

32. Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.

23 C.J. p 862 note 80.

33. N.Y.—New York City First Nat. Bank v. Gow, 124 N.Y.S. 454, 139 App.Div. 582, modifying 124 N.Y.S. 755, 67 Misc. 547.

23 C.J. p 862 note 81.

34. Verified answer denying the possession belonging to the judgment debtor or any fraudulent conveyance precludes further examination of the third party.—Lewis v. Chamberlain, 41 P. 413, 108 Cal. 525.

35. N.Y.—Matter of Sickle, 5 N.Y.S. 703, 52 Hun 527, 17 N.Y.Civ.Proc. 138.

23 C.J. p 862 notes 83, 84.

Jurisdiction to determine disputed title see supra § 378 c.

Burden of proof

Under a statute providing that where it appears that defendant in execution, within year prior to issuance of execution, had title to or paid purchase price of personalty to which his wife, relative, or person on confidential terms with defendant claimed title, the burden of proof shall be on such defendant to show that such transfer or gift from him was not made for the purpose of delaying, hindering and defrauding creditors, burden of proof devolves on claimant to establish right superior to that of defendant in execution as to such property.—State ex rel. Phœnix Tax Title Corporation v. Viney, 163 So. 57, 120 Fla. 657.

36. Ind.—Comstock v. Grindle, 23 N.E. 494, 121 Ind. 459—McCray v. Whitney, 104 N.E. 979, 56 Ind.App. 94.

37. Fla.—Reese v. Baker, 123 So. 3, 98 Fla. 52.

Minn.—Bradley v. Burk, 84 N.W. 123, 81 Minn. 368.

38. N.Y.—People v. Hanbury, 147 N.Y.S. 851, 162 App.Div. 337.

39. N.Y.—Schneider v. Altman, 8 N.Y.Civ.Proc. 242, 16 Abb.N.Cas. 312.

23 C.J. p 863 note 88.

40. N.Y.—Seymour v. Wilson, 15 How.Pr. 355.

proceedings can be had only in aid of the assignment, and not in hostility thereto;[41] and pending an action to set aside an assignment,[42] or where a creditor has proved his claim against a general assignee of the debtor,[43] the examination will be limited to after-acquired property.

§ 379. —— Privilege of Party or Witness

A party or witness in supplementary proceedings will be accorded the privileges recognized by law, such as a witness' privilege against self incrimination.

A witness in supplementary proceedings will be accorded only the privileges recognized by law.[44] In the absence of a statute otherwise providing, the debtor or an ordinary witness is privileged not to answer a question which will incriminate or tend to incriminate him.[45] Where by statute it is provided that the debtor or a witness shall not be excused from answering on the ground that his answer will tend to convict him of the commission of a fraud or to prove his participation in the disposition of property applicable to the judgment, the witness cannot refuse to answer questions having such a tendency, on the ground of privilege.[46] However, it is also provided by statute in some states that his answer cannot be used as evidence against him in any criminal prosecution or proceeding,[47] although it may be used in a civil proceeding.[48] Under a statute so providing a witness will not be excused from answering proper questions on the ground that he claims the property which is sought to be reached.[49]

In any event, a witness is entitled to refuse to answer questions considered by him to be improper until directed so to do by the person before whom the examination is had.[50]

§ 380. —— Form, Correction, and Disposition of Testimony; Filing

The evidence or depositions of witnesses taken at the examination in supplementary proceedings should be reduced to writing, and if correct should ordinarily be subscribed by the witness examined, and filed with the proper officer.

The evidence or depositions of witnesses taken at the examination in supplementary proceedings should be reduced to writing,[51] and if correct should be subscribed by the witness examined.[52] Corrections or explanations of the testimony should be permitted to be made by the party examined,[53] and it is not necessary that a witness should sign the deposition made by him when the effect will be to subject him to a new legal liability.[54] The validity of an order for the payment of money or delivery of property subsequently made is not affected by a failure of a party or witness to sign his deposition.[55]

Filing. The depositions or testimony as reduced to writing should be filed with the proper officer.[56]

41. N.Y.—Matter of Sickle, 5 N.Y.S. 703, 52 Hun 527, 17 N.Y.Civ.Proc. 138.

42. N.Y.—Schloss v. Wallach, 38 Hun 638, 16 Abb.N.Cas. 319—Bason v. Goldsmith, 1 N.Y.City Ct. 462.

43. N.Y.—Wilson v. Daggett, 9 N.Y. Civ.Proc. 408.

44. **Broker** is not entitled to refuse to disclose accounts on ground that accounts were confidential.—Capital Co. v. Fox, C.C.A.N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F.Supp. 677.

Trust company which is alleged to have possession of property of the judgment debtor is not justified in refusing to answer because of a statute requiring trust companies to keep inviolate all communications concerning private trusts.—Title Ins. & Trust Co. v. Superior Court in and for Los Angeles County, 176 P. 678, 179 Cal. 353.

45. Colo.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.

Determination by court

It is the province of the court to determine whether an answer will have a tendency to incriminate the witness.—Forbes v. Willard, 54 Barb., N.Y., 520, 37 How.Pr. 193.

Statute providing for examination of debtor does not contravene right of a defendant not to be compelled to testify against himself.—Leshefka v. Homa, 10 Pa.Dist. & Co. 156, 23 Sch.L.R. 175.

46. N.Y.—Forbes v. Willard, 54 Barb. 520, 37 How.Pr. 193.
23 C.J. p 863 note 94.

47. N.Y.—Forbes v. Willard, supra.
23 C.J. p 863 note 95.

Statements used in contempt proceedings

Statements of a witness may be used against him in contempt proceedings, since such proceedings do not involve the question of fraud within the meaning of a statute providing that no person examined on oath shall be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but that his answer shall not be used as evidence against him on a prosecution for such fraud.—Park v. Johnson, 53 N.W. 285, 86 Iowa 475.

48. N.Y.—Wright v. Nostrand, 94 N. Y. 31, reversing 47 N.Y.Super. 441.
23 C.J. p 863 note 96.

49. N.Y.—New York City First Nat. Bank v. Gow, 124 N.Y.S. 454, 139 App.Div. 582, modifying 124 N.Y. S. 755, 67 Misc. 547—Sandford v. Carr, 2 Abb.Pr. 462.

50. N.Y.—Price v. Creme de Mohr Co., 137 N.Y.S. 732, 78 Misc. 42.

51. N.C.—Coates v. Wilkes, 92 N.C. 376.

Proof may be made by affidavit

N.Y.—Tyson v. Owens, 22 N.Y.S.2d 261, 174 Misc. 401.

52. N.J.—Hershenstein v. Hahn, 71 A. 105, 77 N.J.Law 39.
N.Y.—Sherwood v. Dolen, 14 Hun 191.

53. N.Y.—Sherwood v. Dolen, supra.
23 C.J. p 863 note 6.

54. N.Y.—Marx v. Spaulding, 6 N.Y. St. 530, 43 Hun 365.

55. N.J.—Hershenstein v. Hahn, 71 A. 105, 77 N.J.Law 39.
Order for payment of money or delivery of property generally see infra § 383.

56. N.Y.—Axinn & Sons Lumber Co. v. Osinski, 276 N.Y.S. 245, 243 App. Div. 559.
23 C.J. p 863 note 10.

Proceedings instituted by subpoena

Examination must be filed notwithstanding proceedings are instituted by additional or alternative remedy

Filing may be compelled.[57] Refusal to file is not justified by objections which have been waived.[58] A failure to file before the making of an order for the payment of money or delivery of property does not affect the validity of the order.[59]

§ 381. —— Reopening

After the conclusion of the debtor's examination in supplementary proceedings a further examination should not be permitted unless special circumstances are shown.

After the conclusion of the debtor's examination in supplementary proceedings a further examination should not be permitted unless special circumstances are shown,[60] and then only by an order procured for that purpose.[61]

§ 382. —— Report and Fees of Referees

On the conclusion of the examination in supplementary proceedings the referee should return to the judge the oath administered to him as to the faithful discharge of his duties, with his report and the testimony, and an application must be made to determine the referee's fees.

On the conclusion of the examination in supplementary proceedings, it is the duty of the referee to return to the judge the oath administered to him as to the faithful discharge of his duties, with his report and the testimony.[62] Statutes requiring findings in civil actions do not apply to an examination in supplementary proceedings.[63] The findings of the referee are not binding on persons not parties to the proceedings.[64] Whether the referee's report transcends the scope of the reference can be reviewed only on appeal.[65]

Fees. An application must be made to determine the amount of the referee's fees.[66]

§ 383. Order for Payment or Delivery of Property

a. In general
b. Money to become due or future income
c. Debt or property in dispute
d. Application and hearing
e. Form and contents of order
f. Service and obedience to order
g. Objections, modification, and setting aside

a. In General

In supplementary proceedings if money or property applicable to the judgment is discovered in the possession or under the control of the debtor or any other person, its application to the satisfaction of the judgment ordinarily may be directed, and under a statute so providing the court may, in a proper case, make an order permitting, or requiring, a person indebted to the judgment debtor to pay his debt to a designated person.

In supplementary proceedings if money or property applicable to the judgment is discovered in the possession or under the control of the debtor or any other person, its application to the satisfaction of the judgment ordinarily may be directed by payment or transfer to the sheriff holding the execution, or to a receiver appointed in the proceedings, or in some jurisdictions direct to the creditor,[67] and un-

by subpœna.—Axinn & Sons Lumber Co. v. Osinski, supra.

57. N.Y.—Renner v. Meyer, 6 N.Y.S. 525, 22 Abb.N.Cas. 438—People v. McGoldrick, 24 N.Y.Civ.Proc. 292.
23 C.J. p 863 note 11.

58. N.Y.—Cowen v. Bernard, 141 N.Y.S. 252, 80 Misc. 394.

59. N.J.—Hershenstein v. Hahn, 71 A. 105, 77 N.J.Law 39.

60. Cal.—People ex rel. Dorris v. McKamy, 151 P. 743, 28 Cal.App. 196.
23 C.J. p 863 note 2.

61. N.Y.—Orr's Case, 2 Abb.Pr. 457.

62. N.Y.—Jones v. Lawlin, 3 N.Y. Super. 722.
23 C.J. p 864 note 15.

63. Cal.—Lyons v. Marcher, 51 P. 559, 119 Cal. 382.
Ind.—Beckman Supply Co. v. Newell, 118 N.E. 962, 68 Ind.App. 679.

64. **Garnishees are not bound**
Ohio.—Graver v. Guardian Trust Co., 163 N.E. 502, 29 Ohio App. 233.

65. N.Y.—Gotham Hotel Supply Co. v. Casa Cubana, 22 N.Y.S.2d 512.

66. N.Y.—Brush v. Kelsey, 62 N.Y.S. 214, 47 App.Div. 270.

67. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
Cal.—Booge v. First Trust & Savings Bank of Pasadena, Super., 116 P.2d 503—Medical Finance Ass'n v. Karnes, 84 P.2d 1076, 32 Cal.App.2d Supp. 767.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
N.Y.—Bender v. Kolber, 20 N.Y.S.2d 593, 259 App.Div. 1023—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App. Div. 992—Meth v. Greenspan, 7 N.Y.S.2d 273, 169 Misc. 378—Liberty Storage & Warehouse Co. v. Van Wyck, 1 N.Y.S.2d 149, 165 Misc. 890—Brown v. Guerin, 300 N.Y.S. 209, 164 Misc. 562—Abraham v. Abraham, 278 N.Y.S. 863, 155 Misc. 574—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768—Capitol Distributors Corporation v. Kent's Restaurant, 20 N.Y.S.2d 436.
N.C.—Boseman v. McGill, 114 S.E. 10, 184 N.C. 215.
Ohio.—Wilson v. Columbia Casualty Co., 160 N.E. 906, 118 Ohio St. 319—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.
Wash.—Bounds v. Galbraith, 206 P. 357, 119 Wash. 596.
23 C.J. p 864 note 20.

Fund in possession of third parties
An order may be made directing third parties to pay a fund in their hands where title to the fund remains in the judgment debtor.—Miller v. Clayton Coffee Pot, 264 N.Y.S. 430, 238 App.Div. 121.

Stay of enforcement of order
Where question whether creditor was authorized to institute supplementary proceedings on a judgment not signed or indexed by clerk had not been squarely passed on by any appellate court, order directing payment of fund to judgment creditor would be stayed until determination was had at appellate term, provided other claimants took necessary steps to perfect appeal.—Edelstein v. Oxman, 13 N.Y.S.2d 95, 171 Misc. 552.

der a statute so providing the court may in a proper case make an order permitting,[68] or requiring,[69] a person indebted to the judgment debtor to pay his debt to a person designated by the statute. However, an indebtedness cannot be ordered paid under a statute authorizing an order requiring the delivery of "money" or "property" belonging to, or under the control of, the debtor.[70] As against a debtor of the judgment debtor, the judgment creditor stands in the shoes of the judgment debtor,[71] and the court will be alert to make no order which might result in a third party having to pay his debt twice.[72] In the absence of statute, the order cannot be directed to a person or corporation not a party to the proceeding or the action on which it was based,[73] or to a person or corporation which has not been ordered to, and has not, appeared for examination;[74] and in jurisdictions where the statutes do not contemplate the examination of a third person, the order cannot be directed against a third person, even though he has been examined.[75]

The right to make the order will not be lost by the failure of the debtor to appear for examination,[76] by the fact that the debtor was arrested for evading an examination by leaving the jurisdiction,[77] or by the institution of an action by the receiver to recover other property;[78] but it may be lost by laches.[79] The order cannot require the execution debtor to pay the debt on receipt of money alleged to be due on an order, but in such a case the proper order is to appoint a receiver to collect the claim of the debtor.[80]

Any indebtedness, money, or property within the purview of the statute authorizing orders of this character may be ordered paid or delivered.[81] A

68. N.Y.—In re Delaney, 176 N.E. 407, 256 N.Y. 315, reversing 244 N.Y.S. 883, 230 App.Div. 821—Bender v. Kolber, 20 N.Y.S.2d 593, 259 App.Div. 1023—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App.Div. 992—Capital City Surety Co. v. De Luxe Sightseeing Co., 233 N.Y.S. 126, 133 Misc. 750—Grand Lodge K. P. v. Manhattan Sav. Inst., 34 N.Y.S. 253, 12 Misc. 326.
23 C.J. p 864 note 30.

69. N.Y.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860, 256 App.Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810—Goldmer v. Piansky, 23 N.Y.S.2d 232, 260 App.Div. 976—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App.Div. 992—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32—I. & I. Holding Corporation v. Bricken, 28 N.Y.S.2d 503.
Ohio.—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.

Order directing payment granted
N.Y.—Burnett v. Riker, 13 N.Y.Civ. Proc. 338.

Apportionment of payment
In the absence of statute, the court cannot on the basis of the needs of the judgment debtor apportion the amount ordered to be paid by a debtor of the judgment debtor between the judgment creditor and the judgment debtor.—Conlew, Inc., v. Thompson, 289 N.Y.S. 862, 160 Misc. 551.

70. N.Y.—Capital City Surety Co. v. De Luxe Sightseeing Co., 233 N.Y.S. 126, 133 Misc. 750.

Bank deposit will not be ordered paid under such statute.—In re Delaney, 176 N.E. 407, 256 N.Y. 315, reversing 244 N.Y.S. 883, 230 App.Div. 821—In re Equitable Casualty & Surety Co., 256 N.Y.S. 561, 235 App.Div. 250—Chanin Realty Corporation v. U. S. Bond & Mortgage Corporation, 262 N.Y.S. 600, 146 Misc. 658—Rosenberg v. Gamma Chapter, Pi Lambda Phi Fraternity, 233 N.Y.S. 128, 133 Misc. 624—Capital City Surety Co. v. De Luxe Sightseeing Co., 233 N.Y.S. 126, 133 Misc. 750.

71. N.Y.—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32.

72. N.Y.—D. L. & W. Coal Co. v. Kenlon, supra.

73. Mont.—Brindjonc v. Brindjonc, 31 P.2d 725, 96 Mont. 481.

Service of subpoena on employee of a corporation who was not an official thereof did not make the corporation a party to proceeding.—Finn v. Butler, 235 P. 992, 195 Cal. 759.

74. N.Y.—Cooman v. Board of Education, 37 Hun 96.

75. Iowa.—Osborne v. Reardon, 44 N.W. 346, 79 Iowa 175.

76. Kan.—Honce v. Schram, 85 P. 535, 73 Kan. 368.
Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.

77. Kan.—Teats v. Herington Bank, 51 P. 219, 58 Kan. 721.

78. N.Y.—Matter of Crane, 30 N.Y.S. 616, 81 Hun 96, 1 N.Y.Ann.Cas. 148.

79. N.Y.—Heatherington v. Martens, 26 N.Y.S. 115, 73 Hun 611.

80. Mont.—In re Downey, 78 P. 772, 31 Mont. 441.

81. Cal.—Medical Finance Ass'n v. Karnes, 84 P.2d 1076, 32 Cal.App.2d Supp. 767.
N.Y.—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32—Ecker v. Myer, 196 N.Y.S. 268, 119 Misc. 375, reversing 194 N.Y.S. 654, 118 Misc. 443.
23 C.J. p 864 note 34.
Property or rights which may be reached in supplementary proceedings see supra §§ 349–353.

After-acquired property cannot be reached by the order.—New York Plumbers' Specialties Co. v. Stein, 250 N.Y.S. 220, 140 Misc. 161, reversing 240 N.Y.S. 834, 136 Misc. 703—23 C.J. p 866 note 73.

Cash surrender value of insurance
(1) A statute authorizing an order directing delivery of money or property does not justify an order directing the debtor to execute a request for the payment of the cash surrender value of an insurance policy.—Bender v. Kolber, 20 N.Y.S.2d 593, 259 App.Div. 1023—Ecker v. Myer, 196 N.Y.S. 268, 119 Misc. 375, reversing 194 N.Y.S. 654, 118 Misc. 443.
Contra Rockwood & Co. v. Trop, 207 N.Y.S. 507, 211 App.Div. 421, reversed on other grounds 208 N.Y.S. 459, 212 App.Div. 883.

(2) Nor does such statute justify an order directing insurer to pay over the cash surrender value of a policy.—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App.Div. 992.

Exempt property cannot be ordered turned over.—Remick v. Bradley, 78 N.W. 326, 119 Mich. 399—23 C.J. p 866 note 65.

Mortgaged property
(1) The debtor cannot be required to deliver mortgaged property.—Griswold v. Tompkins, 7 Daly 214—Mayer Brewing Co. v. Rizzo, 34 N.Y.S. 457, 13 Misc. 336.

(2) This rule applies although the mortgage is past due.—Tinkey v. Langdon, 13 N.Y.Wkly.Dig. 384.

(3) Nor is the creditor entitled to have property of debtor encumbered by mortgage sold and the surplus applied to the judgment after payment of the encumbrances.

person cannot properly be ordered to pay over a sum of money or deliver property not shown to be in his possession or control,[82] or not shown to exist or to belong to the judgment debtor.[83] Where the debtor disclaims any interest in the property in question,[84] or it is of such a character that actual delivery cannot be made,[85] or is without the state or beyond the jurisdiction of the court,[86] an assignment or conveyance by the judgment debtor of all his rights, title, and interest therein may be directed.

Property previously transferred. In the absence of a statute otherwise providing, the court has no authority to direct application of property previ-

N.C.—McKeithan v. Walker, 66 N.C. 95.
Or.—Knowles v. Herbert, 4 P. 126, 11 Or. 54, 240.
23 C.J. p 867 note 89.

Real property

(1) In some jurisdictions the judge is authorized to order the delivery or transfer of only personal property, and has no jurisdiction to compel the conveyance of the judgment debtor's real property.—Ely v. Dolen, 219 N.Y.S. 805, 218 App.Div. 854—23 C.J. p 866 notes 66, 67.

(2) This rule applies especially where it has been sold on execution.—Canandaigua First Nat. Bank v. Martin, 2 N.Y.S. 315, 49 Hun 571, 15 N.Y.Civ.Proc. 324—Albany City Nat. Bank v. Gaynor, 67 How.Pr., N.Y., 421.

(3) In other jurisdictions, however, it has been held that the power of the court in supplementary proceedings is the same as that of a court of chancery on a creditors' bill, and that the judgment debtor's property may be applied in the same manner.—Tomlinson & Webster Mfg. Co. v. Shatto, C.C.Minn., 34 F. 380—23 C.J. p 866 note 69.

Personal property or rights held subject to order

(1) Alimony awarded after the contracting of the debt which forms the basis of the judgment.—Stevenson v. Stevenson, 34 Hun., N.Y., 157.

(2) Annuity.—Gifford v. Rising, 8 N.Y.S. 279, 55 Hun 61.

(3) Bank account.—Rosenberg v. Gamma Chapter, Pi Lambda Phi Fraternity, 233 N.Y.S. 128, 133 Misc. 624—23 C.J. p 865 note 39.

(4) Insurance policy.—Abraham v. Abraham, 278 N.Y.S. 863, 155 Misc. 574.

(5) Accumulated dividends on an insurance policy which insured could withdraw from insurer.—242 West 38th Street Corporation v. Meyrowitz, 293 N.Y.S. 708, 162 Misc. 488, affirmed 290 N.Y.S. 109, 248 App.Div. 708.

(6) Judgment.—Mallory v. Norton, 21 Barb., N.Y., 424.

(7) Money paid by the debtor for advance board for a period of years.—Davis v. Briggs, 5 N.Y.S. 323, 1 Silv.Sup. 326.

(8) Money paid into court on a judgment in favor of the debtor.—Minnesota Bank v. Hayes, 29 P. 90, 11 Mont. 533.

(9) Moneys actually due the debtor.—Stewart v. Foster, 1 Hilt., N.Y., 505—23 C.J. p 865 note 45.

(10) Property held by debtor subject to conditional sales contract.—Meth v. Greenspan, 7 N.Y.S.2d 273, 169 Misc. 378.

(11) Unliquidated claim for damages in favor of a judgment debtor to recover which an action by the debtor is pending.—Bryan v. Grant, 33 N.Y.S. 957, 87 Hun 68.

(12) Vested legacy payable on a contingency.—Spencer v. Greene, 24 A. 742, 17 R.I. 727.

(13) Other rights or property.—Keepsch v. Donald, 51 P. 352, 18 Wash. 150.

Personal property or rights held not subject to order

(1) Account books of a physician containing matters of a private character respecting his patients.—Kelly v. Levy, 2 N.Y.S. 849.

(2) Accounts exempt from sale or execution without the debtor's consent.—Chandler v. Caldwell, 17 Ind. 256.

(3) Alimony awarded before the contracting of the debt which forms the basis of the judgment.—Romaine v. Chauncey, 29 N.E. 826, 129 N.Y. 566, 26 Am.S.R. 544, 14 L.R.A. 712, affirming 15 N.Y.S. 198, 60 Hun 477, 21 N.Y.Civ.Proc. 76.

(4) Charity fund raised for the benefit of the debtor.—Wilder v. Clark, 11 N.Y.S. 683.

(5) Check borrowed for a specific purpose and to be returned to the lender if the purpose failed.—Nathans v. Satterlee, 18 Abb.N.Cas., N.Y., 310.

(6) Debt due on a contingency or for labor to be performed.—McCormick v. Kehoe, 7 N.Y.Leg.Obs. 184.

(7) Debt subsequently arising.—Ridabock v. Scanlon, 130 N.Y.S. 831, 71 Misc. 505—23 C.J. p 866 note 73.

(8) Money deposited in court subject to a contingency.—Fraser v. Ward, 13 Daly, N.Y., 431.

(9) Money deposited with a sheriff in lieu of bail.—Alexander v. Creamer, 61 N.Y.S. 539, 46 App.Div. 211—Hayes v. McClelland, 20 N.Y. Wkly.Dig. 393.

(10) Money in the hands of a receiver appointed in another state.—Smith v. McNamara, 15 Hun., N.Y., 447.

(11) Property not applicable to the judgment.
Cal.—Lyons v. Marcher, 51 P. 559, 119 Cal 382.
N.Y.—Gray v. Ashley, 53 N.Y.S. 547, 24 Misc. 396.

(12) Property which has been pledged.—Stengel v. Biggar, 176 So. 786, 129 Fla. 627.

(13) Property levied on in another action.—Griswold v. Tompkins, 7 Daly., N.Y., 214.

(14) Property the disposition of which has been enjoined in another action or proceeding.—Nieuwankamp v. Ullman, 2 N.W. 131, 47 Wis. 168.

(15) Property which may be reached by an execution.—Bennett v. Valley Min. Co., 120 N.W. 654, 142 Iowa 53—23 C.J. p 865 note 57.

(16) Right of action for a tort.—Ten Broeck v. Sloo, 2 Abb.Pr., N.Y., 234, 13 How.Pr. 28—23 C.J. p 865 note 58.

(17) Verdict in tort not reduced to judgment.—Davenport v. Ludlow, 4 How.Pr., N.Y., 337, 3 Code Rep. 66.

82. Cal.—Trounce v. Whittier Sav. Bank, 29 P.2d 789, 136 Cal.App. 761.
Minn.—Hanson v. Daniel Hayes Co. of Idaho, 201 N.W. 603, 161 Minn. 251.

83. Fla.—Stengel v. Biggar, 176 So. 786, 129 Fla. 627.
N.Y.—Brearton v. Twardowski, 10 N.Y.S.2d 146, 170 Misc. 264.
23 C.J. p 865 note 64.

Statement of third person is insufficient to establish debtor's ownership.—Tyson v. Owens, 22 N.Y.S. 2d 261, 174 Misc. 401.

84. Cal.—Collins v. Angell, 14 P. 135, 72 Cal. 513.

85. Cal.—Habenicht v. Lissak, 20 P. 874, 78 Cal. 351, 12 Am.S.R. 63, 5 L.R.A. 713.
23 C.J. p 865 note 36.

86. Ohio.—Wilson v. Columbia Casualty Co., 160 N.E. 906, 118 Ohio St. 319.
23 C.J. p 865 note 37.

If property would be exempt within the state, an assignment or conveyance will not be directed.—Bunn v. Fonda, 2 Code Rep., N.Y., 70.

ously transferred by the debtor,[87] at least where the bona fides of the transfer is not questioned by the creditor.[88] However, under a statute so providing, the court may in a proper case enter an order voiding a fraudulent transfer and directing a levy on the property fraudulently transferred.[89]

The fact that the debtor has made an assignment for the benefit of creditors does not preclude the order, where the assignee has not obtained possession and has made no claim to the property notwithstanding the lapse of a considerable time.[90] However, if the order was made after the assignment, and the assignee had no notice of the proceedings, property in the hands of a third person cannot be taken as against the title of the bona fide assignee.[91] Property in the hands of a general assignee which is not subject to levy and sale under an execution cannot be directed to be applied to the judgment on the ground that an execution issued, but not levied, before the assignment was a prior lien.[92]

Order as discretionary. The making of an order for payment or delivery of property has been held to rest in the discretion of the court.[93] Where vested with a discretion in the premises, the court instead of making an order for application may appoint a receiver,[94] or, where the property may be levied on, leave the creditor to his execution.[95] The test, it has been held, as to whether a third party order to pay over or deliver is proper, is whether the judgment debtor could maintain an action against the third party for the recovery of the specific debt, credit, or personal property.[96]

Who may make order. The power to make an order for the payment of money or transfer of property in satisfaction or partial satisfaction of the judgment may be vested in the court,[97] a judge thereof,[98] or the officer[99] by whom the examination is conducted. Under a statute so providing, the judge who granted the order for examination may make the order.[1] In some states, a court commissioner is without power to make the order.[2]

b. Money to Become Due or Future Income

Unless authorized by statute, moneys to become due on a contingency or on an executory contract, including wages or salary, cannot be ordered paid in supplementary proceedings.

Moneys to become due on a contingency or on an executory contract,[3] including wages or salary,[4]

87. S.C.—Wannamaker v. Bryant, 162 S.E. 779, 165 S.C. 107.

88. N.Y.—Hall v. McMahon, 10 Abb. Pr. 103.
23 C.J. p 867 note 83.

89. **In exercise of discretion granted** by the statute the court should not order the sheriff on a prima facie showing to take property allegedly fraudulently transferred unless every person whose rights may be affected thereby is served with a copy of the order and thereby impleaded and made party and directed to answer within a specified time, and unless the court is satisfied that plaintiff's application is well founded and bona fide, and in proper case security should be required to protect third party claimants; and if third party claimant fails to answer within time required and court is satisfied that allegedly fraudulent transfer is void, default should be entered and sheriff ordered to sell property so transferred.—Richard v. McNair, 164 So. 836, 121 Fla. 733.

Order made without making transferee a party by rule nisi, is invalid as to transferee.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

90. N.Y.—Eastern Nat. Bank v. Hulshizer, 2 N.Y.St. 115.

91. N.Y.—Gibson v. Haggarty, 23 How.Pr. 260.
23 C.J. p 867 note 85.

92. N.Y.—Abeel v. Anderson, 39 Hun 514, 3 How.Pr.,N.S., 489.

93. N.Y.—Conlew, Inc. v. Thompson, 289 N.Y.S. 862, 160 Misc. 551.
Making of order directing payment of debtor's income as discretionary see § 383 c infra.

Sense in which discretionary
The making of the order is discretionary in the sense that on a proper and sufficient showing, in the mode authorized by statute of the requisite facts, the judge may in his discretion make the order, but it is not discretionary in the sense that the order may be granted without the necessary showing.—Shannon v. Steger, 78 N.Y.S. 163, 75 App.Div. 279—Calkins v. Packer, 21 Barb., N. Y., 275—23 C.J. p 868 note 98.

94. Minn.—Flint v. Webb, 25 Minn. 263—Kay v. Vischers, 9 Minn. 270. N.Y.—Corning v. Tooker, 5 How.Pr. 16.
23 C.J. p 868 note 99.

95. N.Y.—Hall v. McMahon, 10 Abb. Pr. 103.

96. Philippine.—Manila v. Gambe, 13 Philippine 677.

97. Mass.—Tehan v. Justices of Municipal Ct., 77 N.E. 313, 191 Mass. 92.
23 C.J. p 868 note 3.

98. N.Y.—Phœnix Ins. Co. of Hartford, Conn., v. Sherman, 217 N.Y. S. 542, 127 Misc. 832.
23 C.J. p 868 note 4.

Judge outside county in which execution issued and examination took place has power to make order.—Kennesaw Mills Co. v. Walker, 19 S. C. 104.

99. Cal.—Parker v. Page, 38 Cal. 522.
Iowa.—Ex parte Grace, 12 Iowa 208, 70 Am.D. 529.

1. **Order not made by justice who granted order** for examination is void.—Phœnix Ins. Co. of Hartford, Conn. v. Sherman, 217 N.Y.S. 542, 127 Misc. 832.

2. Wis.—Nieuwankamp v. Ullman, 2 N.W. 131, 47 Wis. 168.

3. N.Y.—In re Lindenwald Bottling Corporation, 23 N.Y.S.2d 768.
23 C.J. p 866 note 71.

4. N.J.—Berkowitz v. First Dist. Court of Jersey City, 156 A. 666, 108 N.J.Law 345, reversing 152 A. 240, 8 N.J.Misc. 847.
N.Y.—Sobel v. Sobel, 291 N.Y.S. 4, 249 App.Div. 647—Waldman v. O'Donnell, 1 N.Y.City Ct. 146.

Federal employee
The court is without power to direct federal government to make deduction from salary of employee of federal agency on account of judgment against employee.—Cross Bay Lumber Co. v. Samoa, 293 N.Y.S. 794, 161 Misc. 458.

In California
(1) Order properly directed receiver, appointed in supplementary proceeding in aid of execution, to collect money representing salary earned by judgment debtor prior to and after appointment of receiver which was not exempt from execu-

cannot be reached in supplementary proceedings by service of the order on a third person, except where it is otherwise provided by statute.[5]

Under a statute so providing the court may order the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, such portion of his income, however or whenever earned or acquired, as the court may deem proper, after due regard for the reasonable requirements of the judgment debtor and his family, as well as payments required to be made by the judgment debtor to other creditors,[6] and where it appears that the

tion.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.

(2) A proceeding against a judgment debtor on the ground that he has property which he unjustly refuses to apply toward satisfaction of a judgment will be dismissed where it is shown that judgment debtor has earned certain wages, no part of which has yet been received and which will be received in the future.—Medical Finance Ass'n v. Karnes, 84 P.2d 1076, 32 Cal.App.2d Supp. 767.

5. N.J.—White v. Koehler, 57 A. 124, 70 N.J.Law 526.
23 C.J. p 866 note 70.
Special executions against wages and other credits see infra § 406.

"Income" includes "wages"
N.J.—Crown Oil Co. v. Eitner, 199 A. 901, 16 N.J.Misc. 330.
23 C.J. p 866 note 70 [a].

Directing payment by trustee
Under a statute authorizing an order against the debtor, where the debtor has been ordered to make monthly payments out of income from a trust the court may also order the trustee to pay such monthly installments.—Ryan v. Edgerton, 30 N.Y.S.2d 941, 177 Misc. 421.

6. N.Y.—In re Stupplebeen, 14 N.Y.S.2d 756, 171 Misc. 987—Rentall Realty Corporation v. Marksville, 11 N.Y.S.2d 121, 170 Misc. 825—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599—Schwartz Tire Corporation v. Gershon, 290 N.Y.S. 63, 160 Misc. 439.

Legislative purpose
The statute was intended to provide a remedy for a creditor where garnishment proceedings could not be invoked or would be inadequate, or to allow judgment creditors, other than the one then collecting on a garnishee execution, to procure some payment on their judgments without waiting for full payment of the judgment on which garnishee execution was then outstanding; and, since it would be contrary to the policy of the state to deprive a man for the benefit of a creditor of income at least sufficient to meet the reasonable requirements for the support and maintenance of himself and his dependents, no such purpose can be imputed to the legislature.—McDonnell v. McDonnell, 24 N.E.2d 134, 281 N.Y. 480, reversing 12 N.Y.S.2d 585, 257 App.Div. 810.

Only judgment creditors are entitled to the remedy.—McDonnell v. McDonnell, supra.

Payments out of "income"
(1) Only payments out of income can be ordered under the statute.—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App.Div. 545.

(2) All moneys coming into hands of judgment debtors, from whatever source, constitutes "income" within the statute, and contributions, although in the nature of gratuities donated by relatives, when and as received by judgment debtors constitute "income."—Bergman v. Buechler, 292 N.Y.S. 882, 249 App.Div. 553.

Amounts received as federal pension may be considered in determining whether debtor should be required to make payments to creditor.—Bowes v. Perkins, 8 N.Y.S.2d 525, 169 Misc. 624.

W.P.A. worker
(1) A W.P.A. worker should not be required to pay any part of his earnings on W.P.A. to judgment creditor.—Dibner v. Cousminer, 283 N.Y.S. 369, 157 Misc. 229.

(2) A judgment debtor, earning twenty-two dollars weekly as W.P.A. worker and having wife and two small children, should not be ordered to pay judgment creditor anything.—Dotlea Realty Corporation v. Abrams, 24 N.Y.S.2d 252, 175 Misc. 591.

W.P.A. publicity director may be ordered to pay a reasonable sum.—Bool Floral Co. v. Coyne, 284 N.Y.S. 960, 158 Misc. 13.

Alimony
Where judgment debtor's only income was alimony fixed by decree which did not allocate any part thereof for debtor or her children separately, court was without jurisdiction to allocate any portion thereof for debtor, and, in absence of any other means of allocation, could not compel debtor to make installment payments on judgment.—Rentall Realty Corporation v. Marksville, 11 N.Y.S.2d 121, 170 Misc. 825.

Payments to receiver ordered
Under statute payments may be directed to be made to receiver for application on judgment where court's attention is called to appointment of receiver of judgment debtor's property.—Herlihy v. Watkins, 10 N.Y.S.2d 7, 256 App.Div. 889.

Proof
(1) Where the evidence does not show that the debtor earns an amount in excess of the amount required for the support of himself and his family he should not be required to pay anything.—Morris Plan of New York v. Grant, 29 N.Y.S.2d 218.

(2) Judgment debtor must affirmatively show his reasonable requirements after creditor has established a prima facie case showing income or value of services sufficient, under ordinary circumstances, to warrant installment payments, and affidavit of attorney for judgment creditor made on information and belief without statement of source of information or grounds of belief is not sufficient information for proper exercise of discretion of court; but decision should be held in abeyance until judgment debtor could appear and be examined and cross-examined.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599.

Particular orders
(1) Where judgment debtor's monthly income was approximately thirty-two dollars more than his monthly expenditures, court would require payment of twenty dollars a month.—Bowes v. Perkins, 8 N.Y.S.2d 525, 169 Misc. 624.

(2) Where judgment debtor's monthly income amounted to approximately thirty-six dollars more than monthly expenditures, debtor would be required to pay $10 per month.—Oliver v. Patnoe, 25 N.Y.S.2d 144.

(3) Judgment-creditor was entitled to order directing judgment-debtor, receiving fifty dollars per week from business, to pay twelve dollars and fifty cents per week, where his wife drew one hundred dollars each week therefrom.—Economy Leases v. Bierman, 286 N.Y.S. 732, 159 Misc. 367.

(4) Judgment debtor who had income varying from nothing to twenty-five dollars per week, was married and was supported by her husband was properly required to pay three dollars per week.—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App.Div. 545.

(5) Where judgment debtors were receiving between ninety dollars and one hundred eight dollars per week as total income and were not paying off any other obligation, and were

judgment debtor is employed by a relative or other person, without salary or compensation, or at a salary or compensation so inadequate as to satisfy the court that such salary or compensation is merely colorable and designed to defraud or impede creditors, the court may direct such debtor to make payments based on a reasonable value of the services rendered by such debtor or upon the debtor's then earning ability.[7] Proceedings under this statute are to be distinguished from the garnishee process.[8] The making of an order under the statute is discretionary,[9] and ordinarily such orders will be granted only as a last resort,[10] if the remedy by ordinary execution or garnishee execution is not available,[11] or is not equally effective.[12]

Salaries of public officers or employees. Unless authorized by statute,[13] no order may be made directing the payment of the wages or salary of a debtor which have been earned in the performance of his official duties.[14]

c. Debt or Property in Dispute

Where the indebtedness to the debtor or the ownership of the property in question is in dispute, or a doubt exists as to such ownership, there is no power in supplementary proceedings to direct the application of the money or property to the judgment, unless the parties consent, or unless, under a statute so providing, the adverse claimant is a party to the proceeding.

Where indebtedness to the debtor or the ownership of the property in question is in dispute, or a doubt exists as to such ownership, there is no power in supplementary proceedings to try and determine the conflicting claims, as shown supra § 378 c, or to direct the application of the money or property to the judgment,[15] and this rule is applicable unless

not supporting other members of family, order directing them to pay ten dollars a week on account of judgment was not improper.—Bergman v. Buechler, 292 N.Y.S. 882, 249 App.Div. 553.

(6) Other orders.—San Marco Const. Corporation v. Luciano, 28 N.Y.S.2d 541, 262 App.Div. 884—D. Appleton Century Co. v. Partridge, 7 N.Y.S.2d 47, 255 App.Div. 830—Richman v. Strahl, 296 N.Y.S. 686, 251 App.Div. 833.

7. N.Y.—San Marco Const. Corporation v. Luciano, 28 N.Y.S.2d 541, 262 App.Div. 884.

Only compensation for services to be rendered may be fixed under this statute.—H. B. G. Holding Corporation v. Patt, 299 N.Y.S. 49, 164 Misc. 405.

Only after the court has determined the reasonable value of the services rendered by the debtor or the debtor's earning ability can an order directing payment be made.—In re Stupplebeen, 14 N.Y.S.2d 756, 171 Misc. 987.

Income from boarders in debtor's home was to be considered as belonging to debtor notwithstanding possible existence of special agreement between debtor and his wife relative to division of that income.—Oliver v. Patnoe, 25 N.Y.S.2d 144.

8. U.S.—In re Brecher, D.C.N.Y., 19 F.Supp. 283.
N.Y.—Dotlea Realty Corporation v. Abrams, 24 N.Y.S.2d 252, 175 Misc. 591.
Garnishee process see infra § 406.

9. N.Y.—Bergman v. Buechler, 292 N.Y.S. 882, 249 App.Div. 553—Metropolitan Life Ins. Co. v. Zaroff, 284 N.Y.S. 665, 157 Misc. 796.

10. N.Y.—Metropolitan Life Ins. Co. v. Zaroff, supra.

11. N.Y.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599—Metropolitan Life Ins. Co. v. Zaroff, 284 N.Y.S. 665, 157 Misc. 796.

12. N.Y.—Economy Leases v. Bierman, 286 N.Y.S. 732, 159 Misc. 367.

13. N.Y.—Reliance Investing Co. v. Power, 240 N.Y.S. 585, 136 Misc. 694.

Federal employees
N.Y.—Reeves v. Crownshield, 8 N.E. 2d 283, 274 N.Y. 74, 111 A.L.R. 389, affirming, 292 N.Y.S. 756, 162 Misc. 118—Bowes v. Perkins, 8 N.Y.S. 2d 525, 169 Misc. 624—Cross Bay Lumber Co. v. Samoa, 293 N.Y.S. 794, 161 Misc. 458—Dibner v. Cousminer, 283 N.Y.S. 369, 157 Misc. 229—Oliver v. Patnoe, 25 N.Y.S.2d 144.

14. Minn.—Knott v. Hawley, 207 N. W. 736, 166 Minn. 363.
N.J.—Crown Oil Co. v. Eitner, 199 A. 901, 16 N.J.Misc. 330.
Reaching salaries of public officers or employees in supplementary proceedings generally see supra § 353.

Federal employee
N.J.—Cahn v. Allen, 11 A.2d 315, 124 N.J.Law 159—Crown Oil Co. v. Eitner, 199 A. 901, 16 N.J.Misc. 330.

Pension
(1) A pension paid a public officer not subject to further call to public service may be ordered paid.—Passaic National Bank & Trust Co. v. Eelman, 183 A. 677, 116 N.J.Law 279.

(2) A retired federal employee, still liable to call for active duty, may be ordered to pay over a portion of his pension.—Asbury Park & Ocean Grove Bank v. Dam, 199 A. 418, 16 N.J.Misc. 285.

15. Cal.—Finn v. Butler, 235 P. 992, 195 Cal. 759—Takahashi v. Kunishima, 93 P.2d 645, 34 Cal.App.2d 367—Pacific Coast Automobile Ass'n v. Superior Court in and for City and County of San Francisco, 9 P.2d 880, 121 Cal.App. 664—Blake v. Blake, 260 P. 937, 86 Cal.App. 377—Miller v. Gregory, 256 P. 431, 82 Cal.App. 634.
Ill.—Fireman v. Smith, 173 N.E. 61, 341 Ill. 138.
Minn.—Freeman v. Larson, 272 N.W. 155, 199 Minn. 446.
Mont.—Brindjonc v. Brindjonc, 31 P. 2d 725, 96 Mont. 481.
N.Y.—Hunter Printing Co. v. Ace Restaurant, 17 N.Y.S.2d 24, 258 App.Div. 1020, reargument denied 18 N.Y.S.2d 750, 259 App.Div. 763—Esbeco Distilling Corporation v. Block, 14 N.Y.S.2d 765, 258 App. Div. 757, reargument denied 17 N. Y.S.2d 860, 258 App.Div. 1001—Foley v. Foley, 12 N.Y.S.2d 85, 257 App.Div. 154—Liberty Storage & Warehouse Co. v. Van Wyck, 11 N.Y.S.2d 92, 256 App.Div. 641—Powley v. Dorland Bldg. Co., 9 N. Y.S.2d 860, 256 App.Div. 934—Bank of U. S. v. Canal Securities Corporation, 294 N.Y.S. 760, 250 App. Div. 505—Rainear v. Harding, 226 N.Y.S. 890, 222 App.Div. 824—Broderick v. Stecher, 29 N.Y.S.2d 825, 177 Misc. 270—Schmelzel v. Mackey, 258 N.Y.S. 38, 144 Misc. 67—In re National Bank of Oxford, 16 N.Y.S.2d 429—Weinberg v. Schwartz, 14 N.Y.S.2d 554—Gelfman v. Hamershlag & Potash, 11 N.Y.S.2d 739.
Ohio.—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.
S.C.—Palmetto Bank & Trust Co. v. McCown-Clark Co., 141 S.E. 155, 143 S.C. 98.
Wis.—Paradise v. Giannini, 247 N.W. 472, 473, 211 Wis. 42, citing **Corpus Juris.**
23 C.J. p 866 note 75.

If it is apparent that there is no defense to a claim of set-off against

the parties consent,[16] or unless, under a statute so providing, the adverse claimant is a party to the proceeding,[17] but the creditor will be left to his other remedies, such as a plenary action to have the dispute settled.[18]

Under the express terms of some statutes the judge may order the application to the judgment of property in the possession or under the control of a third person only where the debtor's right to possession thereof is not substantially disputed.[19] A substantial dispute within the meaning of the statute is a bona fide controversy as distinguished from a mere colorable dispute.[20] The determining fact is not the existence of a mere dispute but the apparent substantiality of the dispute,[21] and the dispute must be based on controverted, as distinguished from conceded, facts.[22]

d. Application and Hearing

An order to apply money or property to the judgment can be made only when it is shown that the debtor or third person has money or property so applicable or has control of the same, and is able to comply with it, as well as such other facts as will authorize the exercise of the power conferred on the court or an officer thereof.

An order to apply money or property to the satisfaction of the judgment can be made only when it is satisfactorily shown that the debtor or a third person has money or property so applicable or has control of the same, and is able at the time of the order to comply with it, as well as such other facts as will authorize the exercise of the power conferred on the court or an officer thereof.[23]

The procedure on an application for such an order largely depends on applicable statutory provisions.[24] An application for an order need not be initiated by an order to show cause,[25] unless a statute so provides.[26] To warrant the order for payment or delivery of property, all the jurisdictional facts must be proved by direct evidence of the person or persons orally examined.[27] If the justice before whom the application is made feels that sufficient surplus funds to justify order requiring payment of definite sum toward satisfaction of judgment.—Hosmer v. Mutual Reserve Ins. Co., 65 P.2d 295, 145 Kan. 381.

funds belonging to the judgment debtor, it may be summarily allowed but the facts supporting the set-off must be made to appear on the motion papers.—Vaccari v. Maison Paris, 23 N.Y.S.2d 486, 175 Misc. 325.

Order denied with proviso that it was not a final determination of ownership and that the judgment creditor could bring an action to determine the issue.—Corwin v. Schafer, 23 N.Y.S.2d 772, 260 App.Div. 521.

Allegation and proof of assignment

An application for an order cannot be defeated by averring a prior assignment of the debt to a nonresident assignee unless sufficient evidentiary facts are shown fairly to support the averment that the assignment was made, but, when such showing is made, the issue cannot be tried on such application.—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S 126, 164 Misc. 32.

16. N.Y.—Powley v. Dorland Bldg. Co., 24 N.E.2d 109, 281 N.Y. 423, reversing 9 N.Y.S.2d 860, 256 App. Div. 934, motion denied 21 N.E.2d 696, 280 N.Y. 810.

17. **Purpose of statute**

The statute was intended to supplement the rest of the statute covering supplemental proceedings by providing a complete and adequate relief to judgment creditors of the character formerly available under the common-law procedure known as creditors' bill in equity.—Junkin v. Anderson, Wash., 120 P.2d 548.

18. N.Y.—Powley v. Dorland Bldg. Co., 9 N.Y.S.2d 860, 256 App.Div. 934—Broderick v. Stecher, 29 N.Y.S.2d 825, 177 Misc. 270.
Ohio.—Simmons Real Estate Co. v. Riestenberg, 200 N.E. 139, 51 Ohio App. 176.

19. Wash.—Junkin v. Anderson, 120 P.2d 548—Anderson v. Soderberg, 223 P. 1044, 128 Wash. 582.
23 C.J. p 867 note 79.

20. U.S.—Lilienthal v. Wallach, C.C. N.Y., 37 F. 241.

21. N.Y.—Matter of Flynn, 141 N.Y.S. 807, 157 App.Div. 241, reversing 140 N.Y.S. 799, 80 Misc. 79.

22. N.Y.—Matter of Flynn, 141 N.Y.S. 807, 808, 157 App.Div. 241, affirmed 103 N.E. 1124, 209 N.Y. 574.
23 C.J. p 867 note 82.

23. N.Y.—No. 6 Park Street v. Bramstedt, 292 N.Y.S. 63, 249 App. Div. 778—I. & I. Holding Corporation v. Bricken, 28 N.Y.S.2d 503—Novak v. Novak, 18 N.Y.S.2d 453, 173 Misc. 866—Ecker v. Myer, 194 N.Y.S. 654, 656, 118 Misc. 443, quoting **Corpus Juris,** and reversed on other grounds 196 N.Y.S. 268, 119 Misc. 375.
23 C.J. p 867 note 90.

Performance of condition

Where performance of policy condition requiring surrender of policy was impossible, it was not required to be shown.—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App.Div. 992.

Finding of concealment

Unless required by statute a finding that defendant is concealing his property is unnecessary, it being sufficient if there is a finding that he has property which he unjustly refuses to apply in satisfaction of the judgment.—Nichols v. Quinn, 147 P. 1103, 94 Kan. 742.

Evidence held sufficient to sustain finding that the judgment debtor had sufficient surplus funds to justify order requiring payment of definite sum toward satisfaction of judgment.—Hosmer v. Mutual Reserve Ins. Co., 65 P.2d 295, 145 Kan. 381.

24. **Trial**

Trial is not contemplated by statute.—D. L. & W. Coal Co v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32.

Discretion as to procedure

Under a statute giving the court discretion as to the procedure to be followed in determining property rights, the court must observe judicial process and all parties in interest brought before the court, and a proper trial had.—Florida Guaranteed Securities v. McAllister, D.C. Fla., 47 F.2d 762.

25. N.Y.—Zeitlin v. Ballenzweig, 284 N.Y.S. 290, 157 Misc. 219.

26. **Until the return of an order to show cause** served on the debtor, no order can be made requiring debtor to make payments on judgment out of income.—Berkowitz v. First Dist. Court of Jersey City, 156 A. 666, 108 N.J.Law 345, reversing 152 A. 240, 8 N.J.Misc. 847.

27. N.Y.—Gray v. Ashley, 53 N.Y.S. 547, 24 Misc. 396.
23 C.J. p 867 note 91.

In the absence of direct evidence, the court must assume that statements in affidavits of intervening party were supported by terms of mortgage and agreements referred to in such affidavits.—Bank of U. S. v. 258 Fifth Avenue Corporation, 20 N.Y.S.2d 444.

Affidavits

(1) Affidavits cannot be used to supply defects in proof.—Gray v. Ashley, 53 N.Y.S. 547, 24 Misc. 396.

ficient facts to justify the granting of the application have not been adduced, he may direct that it be made on motion papers.[28]

Who may make. The application for the order may be made by a judgment creditor who has assigned his judgment,[29] but not by creditors other than those who instituted the proceedings.[30]

Notice. Statutory provisions and valid orders made pursuant thereto, governing notice of an application for an order to pay over money or deliver property, must be complied with.[31] In the absence of statute or order of court, however, notice to the judgment debtor,[32] to his debtor,[33] or to one claiming a lien[34] is unnecessary, although as to property claimed by a third person, such person is entitled to be heard.[35] If notice is directed to be given, or is actually given to the judgment debtor, the one served must be a free agent with choice to take advantage of it or ignore it.[36]

e. Form and Contents of Order

While possession of money or property of the debtor cannot be acquired in supplementary proceedings without a valid order, no particular form of order is required other than that it must be definite and must set out specifically the act to be performed.

Possession of money or property of the debtor cannot be acquired in supplementary proceedings without a valid order.[37] No particular form of order is required other than that it must be definite and must set out specifically the act to be performed.[38] It should direct payment or delivery to the proper person.[39] It should not be so framed as to require the delivery of property of which a manual delivery cannot be made;[40] or so as unreasonably to compel its transportation to the person designated to receive it;[41] or, where the debtor's claim is payable in a commodity at a stipulated price, as to order the party liable to deliver to the creditor sufficient of the commodity at the agreed price to satisfy the debt.[42] It is not necessary to recite the amount due on the judgment; that is a matter of record;[43] nor is it necessary for the order to state that defendant is able to pay the judgment.[44]

It has been held that the order may be in the alternative requiring the debtor to apply property or in default that an attachment issue;[45] but it has also been held that an order in the alternative requiring the debtor to pay over money or undergo imprisonment is improper.[46]

An order for the payment of money should state the amount[47] and should direct a payment of so much only as is necessary to satisfy the debt, together with the costs of the proceedings.[48] It should not require the payment of money in a spe-

(2) Affidavit reciting on information and belief that affiant believes third party is in possession of debtor's funds or indebted to him is insufficient to warrant judgment against such third party.—Abate v. Raymond, 2 Canal Zone 48.

28. N.Y.—Zeitlin v. Ballenzweig, 284 N.Y.S. 290, 157 Misc. 219.

29. Cal.—Collins v. Angell, 14 P. 135, 72 Cal. 513.

30. N.C.—Righton v. Pruden, 73 N.C. 61.

31. N.Y.—Bartley v. Bartley, 8 N.Y.S.2d 327, 255 App.Div. 992.

Sufficiency of notice

(1) The usual notice of motion prescribed by rules of civil practice is sufficient.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599.

(2) Notice held sufficient.—Gutkin v. Villari, 296 N.Y.S. 676, 251 App.Div. 838—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32.

(3) Notice held insufficient.—Gutkin v. Brooklyn Sav. Bank, 283 N.Y.S. 877, 246 App.Div. 739.

Order prescribing the manner of service of notice on judgment debtor should be obtained before notice is served.—Gutkin v. Brooklyn Sav. Bank, supra.

Court was without power to order receivers to take possession of property found to belong to judgment debtor without first summoning wife having record title thereto.—Walker v. Staley, 1 P.2d 924, 89 Colo. 292.

32. N.Y.—Shannon v. Steger, 78 N.Y.S. 163, 75 App.Div. 279.
22 C.J. p 868 note 94.

Attornment of tenant

The city court had right to grant order, directing tenant of judgment debtor's realty to attorn to receiver without notice.—Brown v. Guerin, 300 N.Y.S. 209, 164 Misc. 562.

33. Cal.—Adams v. Hackett, 7 Cal. 187.
N.Y.—Sloane v. Tiffany, 93 N.Y.S. 149, 103 App.Div. 540, 34 N.Y.Civ. Proc. 208.

34. N.Y.—Corning v. Glenville Woolen Co., 14 Abb.Pr. 339.

35. Cal.—Bonner v. Lehfeldt, 179 P. 722, 39 Cal.App. 649.
23 C.J. p 868 note 97.

36. N.Y.—Tyson v. Owens, 22 N.Y.S.2d 261, 174 Misc. 401.

37. N.Y.—Edmonston v. McLoud, 16 N.Y. 543.
23 C.J. p 868 note 8.

38. N.Y.—Smith v. McQuade, 13 N.Y.S. 62, 59 Hun 374.
23 C.J. p 868 note 10.

Forms of orders to pay over money or stand committed.—Karney's Case, 13 Abb.Pr.,N.Y., 459—Reynolds v. McElhone, 20 How.Pr., N.Y. 454.

39. N.Y.—Gray v. Ashley, 53 N.Y.S. 547, 24 Misc. 396.
23 C.J. p 868 note 9.

40. **Money outside state**
N.Y.—Buchanan v. Hunt, 98 N.Y. 560, reversing 33 Hun 329.

41. N.Y.—Smith v. McQuade, 13 N.Y.S. 62, 59 Hun 374—Serven v. Lowerre, 23 N.Y.S. 1052, 3 Misc. 113.

42. N.C.—In re Daves, 81 N.C. 72.
23 C.J. p 868 note 13.

43. Kan.—Nichols v. Quinn, 147 P. 1103, 94 Kan. 742.

44. Kan.—Nichols v. Quinn, supra.

45. N.Y.—Crouse v. Wheeler, 33 How.Pr. 337.

46. S.C.—Kennesaw Mills Co. v. Walker, 19 S.C. 104.

47. Kan.—In re O'Connell, 30 P. 456, 49 Kan. 415—In re Burrows, 7 P. 148, 33 Kan. 675.

48. S.C.—Kennesaw Mills Co. v. Walker, 19 S.C. 104.

cific kind of currency.[49] Where the order is granted under a statutory provision merely "permitting" a payment to the sheriff, it should not be mandatory in its terms.[50]

f. Service and Obedience to Order

In supplementary proceedings, after service of the order for payment or delivery of property, coupled with a demand for compliance therewith, it is the duty of the person against whom the order runs to obey it, or to make application to have it modified, and obedience to the order by a third party ordinarily protects him from an action by the judgment debtor, or by an assignee of the judgment debtor who is not a bona fide purchaser, or who has given no notice of the assignment.

In supplementary proceedings, after service of the order for payment or delivery of property, coupled with a demand for compliance therewith,[51] it is the duty of the person against whom the order runs to obey it, or to make application to have it modified.[52] If the debtor disobeys an order to assign his property to a receiver, a further order of sequestration is unnecessary.[53] Disobedience of the order may, as shown infra § 399, constitute contempt, but it does not give rise to a cause of action in favor of the judgment creditor.[54]

Obedience to the order by a third party ordinarily protects him from an action by the judgment debtor,[55] or by an assignee of the judgment debtor who is not a bona fide purchaser[56] or who has given no notice of the assignment.[57] It is not a discharge of the indebtedness as against a transferee from the judgment debtor, in good faith and for a valuable consideration,[58] of whose rights the person making payment has actual or constructive notice when the payment is made.[59] It has been held that payment without notice to the judgment debtor is no defense to an action by him,[60] and that compliance with the order will not defeat the rights of claimant who has had no opportunity of asserting his claim.[61] Neither is the order an adjudication of the fact of liability to the debtor,[62] or of the extent of such liability.[63]

Service on the judgment debtor of an order directing a third person indebted to the judgment debtor to pay over the amount of the indebtedness to the judgment creditor has been held unnecessary.[64]

Duties of receiving officer. Ordinarily, money or property received by an officer under an order for its payment or delivery is to be treated as if it had been levied on by virtue of an execution.[65] The officer cannot apply the money on another execution.[66] The loss due to a misappropriation of moneys paid to an officer pursuant to an order procured by the creditor falls on the creditor.[67]

g. Objections, Modification, and Setting Aside

An order in supplementary proceedings directing payment or delivery of property, although it may and should be modified in a proper case, cannot be attacked col-

49. Cal.—Hathaway v. Brady, 26 Cal 581.

50. N.Y.—Grand Lodge K. P. v. Manhattan Sav. Inst, 34 N.Y.S. 253, 12 Misc. 626, 25 N.Y.Civ.Proc. 44.

51. N.Y.—McComb v. Weaver, 11 Hun 271.
23 C.J. p 869 note 30.

52. N.Y.—Kantor v. Wile, 158 N.Y.S. 115, 93 Misc. 438.

Debtor of judgment debtor becomes bound from service of order.—Lyric Piano Co. v. Mess, 184 N.E 834, 126 Ohio St. 224.

Judgment debtor lacks power to direct application of payments ordered to be made.—Wood v. Noyes, Alaska, 279 F. 321, certiorari denied 43 S.Ct. 94, 260 U.S. 732, 67 L.Ed. 486.

Third persons, not parties to the proceeding may refuse to comply with order.—Graver v. Guardian Trust Co., 163 N.E. 502, 29 Ohio App. 233.

53. N.Y.—West v. Fraser, 7 N.Y.Super. 653.
23 C.J. p 869 note 34.

54. N.Y.—Patten v. Connah, 13 Abb. Pr. 418.
23 C.J. p 869 note 33.

55. N.Y.—Lynch v. Johnson, 48 N.Y. 27.
23 C.J. p 869 note 35.

56. N.Y.—Lynch v. Johnson, 48 N.Y. 27, affirming 46 Barb. 56.

57. N.Y.—Baker v. Kenworthy, 41 N.Y. 215—Gibson v. Haggerty, 37 N.Y. 555, 97 Am.D. 752, 5 Transcr A. 143, reversing 15 Abb.Pr. 406, 23 How.Pr. 260.

58. N.Y.—Kennedy v. Carrick, 40 N.Y.S. 1127, 18 Misc. 40.
23 C.J. p 869 note 38.

59. N.Y.—Kennedy v. Carrick, 40 N.Y.S. 1127, 18 Misc. 10.
23 C.J. p 869 note 39.

60. N.Y.—Glenville Woolen Co. v. Ripley, 43 N.Y. 206—Waldheim v. Bender, 36 How.Pr. 181.
23 C.J. p 869 note 40.

61. N.Y.—Schrauth v. Dry Dock Sav. Bank, 86 N.Y. 390—Schrauth v. Dry Dock Sav. Bank, 8 Daly 106.
23 C.J. p 869 note 41.

62. Kan.—Board of Education v. Scoville, 13 Kan. 17.

63. N.Y.—Hauptman v. Catlin, 1 E.D.Smith 729.

64. N.Y.—Lynch v. Johnson, 46 Barb. 56, affirmed 48 N.Y. 27.

65. N.Y.—Stewart's Est., 8 N.Y Civ. Proc. 354.

Order for sheriff to pay to receiver
Where there is a receiver the judge is authorized to direct the sheriff to pay over to him money or property which may have come to his hands in the course of the proceedings.—Stewart's Est., 8 N.Y.Civ. Proc. 354.

Effect of adverse claims
If adverse claims are made against the sheriff on money received, he may move for leave to pay the money into court and on such motion the court may give such directions with regard to the money as may protect the rights of adverse claimants while being enforced.—Hexter v. Pennsylvania R. Co., 59 N.Y.S. 453, 43 App.Div. 113.

66. N.Y.—Baker v. Kenworthy, 41 N.Y. 215—Adams v. Welsh, 43 N.Y. Super. 52.

67. N.Y.—In re Dawson, 17 N.E. 668, 110 N.Y. 114, 6 Am.S.R. 346.

laterally, and objections thereto must be taken by a motion addressed to the judge who made it, who may vacate an order improvidently or erroneously made.

An order in supplementary proceedings directing payment or delivery of property, although it may and should be modified in a proper case,[68] cannot be attacked collaterally.[69] Objections to the order must be taken by a motion addressed to the judge who made it.[70] The motion must be made by the person affected by the order.[71] The order cannot be attacked for irregularity in granting the original order for examination.[72] The validity of an assignment by the debtor cannot be attacked on a motion to vacate an order to turn over property.[73] Mere irregularity in the form of the order will not vitiate it,[74] although an order improvidently or erroneously made may be vacated and the parties placed in statu quo.[75]

The failure of a receiver to file the order appointing him as required by law will not vitiate an order directing delivery of property to the receiver.[76]

§ 384. Actions or Proceedings in Aid of Execution

In some jurisdictions the judgment creditor may in a proper case bring an action or proceeding in aid of the execution or may intervene in a pending action.

In some jurisdictions the judgment creditor may in a proper case bring an action or proceeding in aid of the execution,[77] or may intervene in a pending action.[78] In the absence of statute the judgment creditor cannot maintain an action at law against a debtor of the judgment debtor.[79] Under statutes so providing, where it appears that a third person or corporation is indebted to the judgment debtor,[80] or where there is a dispute as to a debt or property owing by or in the hands of a third

68. N.Y.—Herlihy v. Watkins, 10 N.Y.S.2d 7, 256 App.Div. 339.

Jurisdiction to modify as affecting finality of judgment

Retention of jurisdiction to revise or modify, relating largely if not exclusively to change in debtor's ability to pay, does not affect finality of court's judgment as to other matters involved.—Goldman v. Adlman, 197 N.E. 632, 291 Mass. 492.

Effect of modification on order

After modification, the original order becomes inoperative.—Kantor v. Wile, 158 N.Y.S. 115, 93 Misc. 438.

Refusal to modify held error

N.Y.—Bergman v. Buechler, 292 N.Y.S. 882, 249 App.Div. 553.

69. N.Y.—Ryan v. Edgerton, 30 N.Y.S.2d 941, 177 Misc. 421.

70. N.Y.—Matter of Van Ness, 45 N.Y.S. 576, 17 App.Div. 581.

71. N.Y.—Chandler v. Fon du Lac, 56 How.Pr. 449.

23 C.J. p 869 note 24.

72. Defective affidavit

N.Y.—Cooman v. Board of Education, 37 Hun 96.

73. N.Y.—Beebe v. Kenyon, 3 Hun 73, 5 Thomps. & C. 271.

74. N.Y.—Goldreyer v. Shatz, 114 N.Y.S. 339.

75. N.Y.—Shannon v. Steger, 78 N.Y.S. 163, 75 App.Div. 279.

23 C.J. p 869 note 28.

76. N.Y.—Rockwood & Co. v. Trop, 208 N.Y.S. 459, 212 App.Div. 883, reversing 207 N.Y.S. 507, 211 App.Div. 421.

77. Ark.—Raley v. Mitchell, 118 S.W.2d 674, 196 Ark. 504—Mabry v. Manney, 77 S.W.2d 975, 190 Ark. 154.

Ga.—Jones Motor Co. v. Macon Sav. Bank, 142 S.E. 199, 37 Ga.App. 767, affirmed Macon Sav. Bank v. Jones Motor Co., 149 S.E. 217, 168 Ga. 805.

Kan.—Hosmer v. Mutual Reserve Ins. Co., 65 P.2d 295, 145 Kan. 381.

Ky.—Herrell v. Davenport's Ex'x, 82 S.W.2d 506, 259 Ky. 514.

N.Y.—Dillon v. Spilo, 9 N.E.2d 864, 275 N.Y. 275, affirming 294 N.Y.S. 876, 250 App.Div. 543.

23 C.J. p 887 note 62.

Actions to reach property not reachable by execution see Creditors' Suits § 7.

Relief of creditors against fraudulent conveyances see the C.J.S. title Fraudulent Conveyances § 304, also 27 C.J. p 701 note 95—p 702 note 97.

Nature of proceeding

(1) A "proceeding in aid of execution" is in fact garnishment after judgment and is very similar to a garnishee process.—Bazzoli v. Larson, 178 N.E. 331, 40 Ohio App. 321.

(2) It appeals directly to the equity side of the court which must give ear to any claim based on equitable principles.—Michigan State Industries v. Fischer Hardware Co., 197 N.E. 785, 50 Ohio App. 153.

Order directing opening of safe-deposit box

(1) An order directing a bank leasing a safe-deposit box to open it for levy by sheriff is primarily in direct aid of execution, rather than order in garnishment proceedings, and such order is proper.—O'Connor v. McManus, N.D., 299 N.W. 22.

(2) However, it has also been held that the court cannot require an execution debtor to open a safe deposit box rented by him, to enable the sheriff to seize the contents, although the aid of the court might be secured on proper showing to enforce the sheriff's right to open the box.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.

Action authorized by statute

Under a statute so providing, the judgment creditor may maintain an action against the debtor for refusing to pay the judgment debt while having sufficient property concealed from legal process.—Allen v. Lyness, 71 A. 936, 81 Conn. 626.

Execution on corporate stock

Pa.—Chin v. Teung, 34 Pa.Dist. & Co. 4.

Circumstances held not to warrant

action.—Benge v. Creech, 174 S.W. 517, 163 Ky. 810—23 C.J. p 887 note 63.

Claim of ownership by third person

In suit to enforce lien of execution, devisee of remainder as reward for taking care of testatrix and life tenant could not assert ownership of property because testatrix promised to devise it to him.—Deboe v. Brown, 22 S.W.2d 111, 231 Ky. 682.

78. Utah.—Wheelwright v. Salt Lake City National Copper Bank, 133 P. 132, 42 Utah 579.

23 C.J. p 887 note 64.

79. Cal.—Matteson & Williamson Mfg. Co. v. Conley, 77 P. 1042, 144 Cal. 483.

80. Nature of action

A judgment creditor's action brought pursuant to the statute is similar to an action by a receiver acting under the control of the court in supplementary proceedings, and the judgment creditor, like a receiver, can maintain the action as against contention that the statute in effect provides for garnishment.—Sherwood v. U. S., C.C.A.N.Y., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408, and reversed on other

party,[81] the court may authorize an action to be brought against such third party. In an action in aid of execution, as against third persons the judgment creditor ordinarily has no greater rights than the judgment debtor.[82]

In a judgment creditor's action to reach the judgment debtor's income from a trust fund, the fact that the income is insufficient for the support and maintenance of the debtor has been held not to constitute a valid legal defense.[83]

Proceedings in aid of execution seeking to reach wages of the debtor may be barred, where the statute so provides, by the appointment of a trustee on the application of the debtor for the pro rata distribution among listed creditors of his wages over the amount exempt to him.[84]

An attachment may be had as a matter of right in an action in aid of execution without the affidavit or bond usually required.[85]

Limitations. An action in aid of execution against the debtor of the judgment debtor is not barred as long as the judgment debtor's right of action is not barred.[86]

Jurisdiction and venue. An action in aid of execution must be brought in the court having jurisdiction thereof.[87] The statutes relating to the venue of ordinary adversary actions have been held not to apply to a statutory cause of action in aid of execution.[88]

Parties. Under some statutes where the action or proceeding is instituted to reach property held or claimed by a third person or an indebtedness owing by him to the debtor, both such person and the debtor are necessary parties thereto;[89] but third persons cannot be made defendants for any purpose other than to answer as to any property held by them belonging to the judgment defendant, or as to their indebtedness to him.[90] Apart from such statutes, it has been held that a bill in aid of execution should include the parties to whom the defendant claims to have sold the property.[91]

Where the creditor waives an answer by the debtor, the court may refuse to permit him to file an answer and make new parties.[92]

Notice to judgment debtor. Notice of the action need not be given the judgment debtor where it is brought under a statute authorizing an action against a third person indebted to, or having the possession or control of money or property of, the debtor and not expressly requiring that notice be given him or that he be made a party.[93]

Pleadings. The character of the pleadings in an action in aid of execution may be governed by statute.[94]

grounds 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058.

United States is a "person" within the language of the statute.—Sherwood v. U. S., supra.

81. Cal.—Travis Glass Co. v. Libbetson, 200 P. 595, 186 Cal. 724—Deering v. Richardson-Kimball Co., 41 P. 801, 109 Cal. 73—Herrlich v. Kaufmann, 33 P. 857, 99 Cal. 271, 37 Am.S.R. 50—Bryant v. Bank of California, 7 P. 128, 2 Cal.Unrep. Cas. 475, affirmed 8 P. 644, 2 Cal. Unrep.Cas. 567—Booge v. First Trust & Savings Bank of Pasadena, Super., 116 P.2d 503.
Mont.—Sweeney v. Schlessinger, 45 P. 213, 18 Mont. 326.
23 C.J. p 887 note 68.

Officer levying execution must at the request of the judgment creditor, under a statute so providing, institute a suit in his own name as such officer to liquidate the amount, if any, owed.—Barrett Co. v. United Bldg. & Const. Co., 135 A. 477, 5 N.J. Misc. 87.

Action is not part of supplemental proceedings
Cal.—Booge v. First Trust & Savings Bank of Pasadena, Super., 116 P.2d 503.

82. Rights of judgment creditors to notes, payable to debtor, in possession of third party, were identical with those of debtor.—Herrell v. Davenport's Ex'x, 82 S.W.2d 506, 259 Ky. 514.

83. N.Y.—Dillon v. Spilo, 9 N.E.2d 864, 275 N.Y. 275, affirming 294 N.Y.S. 876, 250 App.Div. 543.

84. Statute held valid
Ohio.—McWhorter v. Curran, 13 N.E.2d 362, 57 Ohio App. 233.

85. Ky.—Commonwealth v. Partin, 3 S.W.2d 779, 223 Ky. 405.

86. Cal.—Nordstrom v. Corona City Water Co., 100 P. 242, 155 Cal. 206, 132 Am.S.R. 81.

87. Court of equity
(1) Court of equity had jurisdiction of bill for discovery and accounting in aid of execution.—Johnson v. Lyon, 143 A. 373, 103 N.J.Eq. 315.

(2) Chancery court of Perry County had jurisdiction of statutory action for discovery, where judgment sought to be enforced and execution issued thereon were rendered and issued out of circuit court of Perry County, notwithstanding defendants were not residents of or summoned in Perry County.—Morgan Utilities v. Perry County, 37 S.W.2d 74, 183 Ark. 542.

88. Ark.—Morgan Utilities v. Perry County, supra.

89. Ind.—American White Bronze Co. v. Clark, 23 N.E. 855, 123 Ind. 230.
23 C.J. p 887 note 71.

90. Ind.—Burt v. Hoettinger, 28 Ind. 214.
23 C.J. p 887 note 72.

91. Puerto Rico.—Torrens v. Perez, 2 Puerto Rico Fed. 350.

92. Ind.—Cooke v. Ross, 22 Ind. 157.

93. Cal.—High v. Bank of Commerce, 30 P. 556, 95 Cal. 386, 29 Am.S.R. 121.
23 C.J. p 887 note 74.

94. In Indiana
(1) Under the statutes and practice, formal pleadings, other than the affidavit or verified complaint and demurrers and motions to test the sufficiency thereof, are unnecessary.—Eden v. Everson, 65 Ind. 113—Beckman Supply Co. v. Newell, 118 N.E. 962, 68 Ind.App. 679.

(2) Where pleadings other than those authorized by statute are filed they may be disregarded.—Beckman Supply Co. v. Newell, supra.

(3) After the making of an order requiring the parties to appear and answer, the proceedings are sum-

The complaint must state facts sufficient to constitute a cause of action.[95] It should show at least generally that judgment was recovered by the judgment creditor against the judgment debtor,[96] and the issuance of an execution thereon to the proper county.[97] Although there is contrary authority,[98] it has been held that the complaint should aver that the court made the requisite order permitting the action.[99] The complaint must also allege that the third party has property of the debtor or is indebted to him,[1] which with other property claimed by him as exempt will exceed the amount exempt by law;[2] that the judgment debtor holds no property other than that sought to be reached in the hands of such third person subject to execution sufficient to satisfy the judgment;[3] that the debtor unjustly refuses to apply the money or property sought to be reached to the satisfaction of the judgment;[4] the nature of the claim sought to be enforced against the third party;[5] and if it is sought to establish fraud or a trust relation between the debtor and the third party the necessary facts must be stated.[6] Plaintiff need not anticipate or negative matters of defense.[7] If the action is against the judgment debtor, under a statute, for refusing to pay the debt while having property concealed, the complaint need not aver that the action was brought under such statute.[8] In some jurisdictions, if the creditor seeks to subject a particular claim to the payment of his judgment he should file a verified complaint at first,[9] or he may compel the debtor to answer under oath and frame his complaint from the information thus obtained.[10] The failure to verify the complaint may be waived by the interposition of an answer to the merits.[11]

In some jurisdictions a written answer may be waived;[12] and where plaintiff has waived an answer by the debtor the court may refuse to permit him to file one.[13] Where a written answer is unnecessarily interposed, its sufficiency may be questioned by motion;[14] a demurrer is not required.[15] Indeed, rulings on a demurrer to the answer are immaterial and cannot constitute reversible error.[16] If an answer is filed, it has been held that it must be duly verified or it will be rejected.[17] Likewise it has been held a part of the answer not duly verified may be stricken out.[18] Even sworn denials by the debtor and the third person of any indebtedness between them is not conclusive on plaintiff;[19] the judgment debtor cannot in his pleadings raise the question of the liability of a third person alleged to be indebted to him.[20]

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Complaint held sufficient
Ark.—Raley v. Mitchell, 118 S.W.2d 674, 196 Ark. 504—Morgan Utilities v. Perry County, 37 S.W.2d 74, 183 Ark. 542.

96. Cal.—High v. Commerce Bank, 30 P. 556, 95 Cal. 386, 29 Am.S.R. 121—McCutcheon v. Weston, 2 P. 727, 65 Cal. 37.
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23 C.J. p 888 note 89.

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To support a judgment all the facts necessary to entitle plaintiff to the relief sought must be proved,[25] and such facts must be established in the same manner as in other civil actions.[26] Thus there must be not only proof of the issue of execution on the judgment against the debtor where that fact is denied,[27] but also evidence sufficiently describing the property sought to be reached[28] and showing that it is subject to execution,[29] as well as proof of the claim due the judgment debtor.[30]

Evidence affecting the original judgment is not admissible.[31] Evidence in behalf of plaintiff is admissible to overcome evidence of the debtor that he has no property subject to execution;[32] but evidence of the third party is not evidence against the debtor,[33] and written evidence of transactions as to which the facts may be elicited from the debtor is immaterial.[34]

The evidence must be sufficient to show the existence of property or an indebtedness applicable to the judgment.[35]

Trial and judgment. The question of the ownership of the property described in plaintiff's pleading may be tried and determined.[36] The party calling a witness is under no obligation to inform the court as to the testimony he expects to elicit if the witness is permitted to answer the question.[37]

Where errors occur on the trial, objections must be made and exceptions saved and presented in and by the record, in the same manner as in any other civil action.[38] An exception which treats one paragraph of an answer as an entire answer is bad for indefiniteness.[39]

The court is not required to make special findings of fact and to state its conclusions of law thereon.[40] Where a special finding of facts has been made, it will be treated as a general finding only.[41]

The judgment must be supported by the evidence,[42] and must grant appropriate relief.[43] A second personal judgment should not be rendered.[44]

§ 385. Receivers

A receivership in proceedings supplementary to execution is a creation of statute and not a remedy in equity. The receiver is not, except in a technical sense, an officer or instrumentality of the court, but represents and is an agent of the judgment debtor, the judgment creditor at whose instance he was appointed, and such other judgment debtors as may have caused the receivership to be extended to their claims.

A receivership in proceedings supplementary to execution is a creation of statute[45] and not a remedy in equity.[46] The authority for such a proceeding, where it exists, usually is found in a special statute,[47] and the proceeding is not governed by the

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Equitable garnishment by way of statutory suit for discovery warrants recovery up to filing of answer rather than to trial.—Mabry v. Manney, 77 S.W.2d 975, 190 Ark. 154.
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Equitable garnishment by way of statutory suit for discovery warrants recovery up to filing of answer rather than to trial.—Mabry v. Manney, 77 S.W.2d 975, 190 Ark. 154.

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rules or statutes relating to receivers in general.[48]

A receiver appointed in proceedings supplementary to execution stands in a position different from that of a receiver in equity[49] or in bankruptcy.[50] Thus he is not, except in a technical sense, an officer or instrumentality of the court,[51] and he represents only the judgment debtor, the judgment creditor at whose instance he was appointed, and such other judgment creditors as may have caused the receivership to be extended to their claims.[52] He is not only the agent or representative of the debtor,[53] but he also represents,[54] and is an instrumentality of,[55] and a trustee for,[56] the judgment creditors.

§ 386. —— Grounds for and Right to Receivership

a. In general
b. Conditions precedent in general
c. Property applicable to judgment
d. Absence of other remedies

a. In General

A receiver may be appointed in a proper case, and usually is appointed in such a case as a matter of course, although, in the absence of statutory provision to other effect, the matter is one within the discretion of the court. A receivership is proper as ancillary to an injunction restraining disposition of the debtor's property; to effectuate an order for payment or delivery of property; to permit suit to set aside alleged fraudulent transfers; and to afford a remedy where indebtedness or title is in dispute.

A receiver may be appointed in a proper case, as authorized by statute or otherwise,[57] and such an appointment is usually a matter of course.[58] In the absence of statutory provision to other effect, however, the matter is one within the discretion of the court,[59] and its discretion in this respect is broad,[60] although of course it must be exercised legally and not arbitrarily.[61]

A receivership is proper as ancillary to an injunction to restrain a disposition of the debtor's property;[62] to give effect to an order in the proceedings requiring the payment of money or delivery of property;[63] for the purpose of allowing suit to be brought to set aside alleged fraudulent transfers;[64] and in order to afford a remedy where an order to pay over or deliver cannot be made because the indebtedness or title is disputed by a third party.[65] The appointment of a receiver to examine claims of lien creditors and mortgagees to the property, and make recommendations to the court concerning them, is improper;[66] and it has been said to be questionable whether a receiver of a joint

Virginia-Carolina Chemical Co., 97 S.E. 833, 111 S.C. 299.
Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

48. N.Y.—Stephens v. Meriden Britannia Co., 54 N.E. 781, 160 N.Y. 178, 73 Am.S.R. 678—Berliner v. Kuttnerr, 147 N.Y.S. 308, 85 Misc. 461.

49. N.Y.—Smith v. Meader Pen Corporation, 6 N.Y.S.2d 919, 169 Misc. 238, reversed on other grounds 8 N.Y.S.2d 39, 255 App.Div. 397, affirmed 20 N.E.2d 13, 280 N.Y. 554.

50. N.Y.—Smith v. Meader Pen Corporation, supra.

51. N.Y.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571—In re Chambers' Estate, 7 N.Y.S.2d 250, 169 Misc. 124.

52. N.Y.—Stephens v. Meriden Britannia Co., 54 N.E. 781, 160 N.Y. 178, 73 Am.S.R. 678, reversing 43 N.Y.S. 226, 13 App.Div. 268.
23 C.J. p 870 note 48.

53. N.J.—Miller v. Mackenzie, 29 N.J.Eq. 291.
S.C.—Gardner v. Kirven, 175 S.E. 637, 639, 173 S.C. 302, quoting **Corpus Juris.**

54. Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333.
N.Y.—Stephens v. Perrine, 39 N.E. 11, 143 N.Y. 476, 1 N.Y.Ann.Cas. 81—Redondo S. S. Co. v. Irving Bank-Columbia Trust Co., 221 N.Y.S. 83, 219 App.Div. 825.

55. N.Y.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571—In re Chambers' Estate, 7 N.Y.S.2d 250, 169 Misc. 124.
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57. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67—Wood v. Noyes, C.C.A.Alaska, 279 F. 321, certiorari denied 43 S. Ct. 94, 260 U.S. 732, 67 L.Ed. 486.
Alaska.—Noyes v. Jesson, 6 Alaska 237.
Cal.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.
N.Y.—Steinman v. Conlon, 101 N.E. 863, 208 N.Y. 198.
23 C.J. p 870 note 51.

58. Cal.—Habenicht v. Lissak, 20 P. 874, 78 Cal. 351, 12 Am.S.R. 63, 5 L.R.A. 713.
23 C.J. p 870 note 52.

59. Cal.—Elson v. Nyhan, 113 P.2d 474, 45 Cal.App.2d 1.
Minn.—Ginsberg v. Davis, 252 N.W. 669, 191 Minn. 12—Healy-Owen-Hartzell Co. v. Montevideo Farmers' & Merchants' Elevator Co., 212 N.W. 455, 170 Minn. 290—Wilkins v. Corey, 209 N.W. 754, 168 Minn. 102.
23 C.J. p 870 note 53.
Discretion between appointing receiver and ordering payment or delivery see supra § 383.

60. Mich.—Dutton v. Thomas, 56 N.W. 229, 97 Mich 93.
Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.

61. N.J.—Wilkinson v. Markert, 47 A. 488, 65 N.J.Law 518.

62. N.Y.—Webb v. Overmann, 6 Abb. Pr. 92.

63. N.Y.—Patten v. Connah, 13 Abb. Pr. 418.
23 C.J. p 870 note 57.

64. Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.
Duty of court
It has been held to be the duty of the court to appoint a receiver where an unlawful transfer of the debtor's property is shown.—Hyman v. Spector, 268 N.Y.S. 342, 150 Misc. 145.

65. N.Y.—Becker v. Romanzo, 281 N.Y.S. 317, 245 App.Div. 185.
23 C.J. p 870 note 59.

66. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

stock association can be appointed in supplementary proceedings.[67]

As between creditors in different proceedings the earlier applicant is presumably entitled to the appointment.[68]

b. Conditions Precedent in General

A receiver will not be appointed unless an execution has duly issued and there have been supplementary proceedings. There is no right to a receiver where the judgment has been paid or satisfied; and a receivership may be refused where it would merely enable the judgment creditor to harass the judgment debtor without likelihood of benefit to the creditor.

There is no right to the appointment of a receiver unless an execution has duly issued,[69] and obviously a receiver cannot be appointed in supplementary proceedings where no supplementary proceedings have been had.[70] Also there is no right to a receiver where the judgment has been paid or satisfied;[71] and the court may properly refuse to appoint a receiver where a receivership would merely enable the judgment creditor to harass the judgment debtor without likelihood of benefit to the creditor.[72]

c. Property Applicable to Judgment

A receiver may be appointed where, and as a rule will be appointed only where, it appears that the judgment debtor has, or there is reasonable ground to believe that he has, property applicable to the judgment. Property for which an appointment may be proper includes real property, an equity of redemption, rents, and earnings; an appointment for income received under a trust has been held improper.

A receiver of the judgment debtor may be appointed where it appears that he has, or there is reasonable ground to believe that he has, property applicable to the judgment, either in his own hands and under his control or in the possession or under the control of others,[73] or even where no property has been discovered,[74] or where ownership appears but is disclaimed by the debtor[75] or is asserted by a third person, as noted supra subdivision a of this section, or where the facts raise a strong presumption of property, although the debtor denies it,[76] or although the debtor denies that the property is of any value,[77] or where a third person indebted to the judgment debtor has extinguished his indebtedness.[78] The general practice, however, is not to appoint a receiver unless it appears, or there is reasonable ground to believe, that the judgment debtor has some property applicable to the judgment.[79] The mere ownership of property does not warrant the appointment of a receiver if the property is exempt[80] or for any reason not applicable to the satisfaction of the judgment;[81] but a receiver may be appointed where the judgment debtor owns property over and above his exemptions.[82] A receiver should not be appointed where the debtor has been discharged in bankruptcy.[83]

Real property. Under some statutes a receiver may be appointed for real as well as personal property of a judgment debtor.[84]

Equity of redemption. An appointment is warranted where the judgment debtor has an equity of redemption in property.[85]

67. N.Y.—Bruns v. Kane, 12 N.Y. Civ.Proc. 86.

68. N.C.—Parks v. Sprinkle, 64 N.C. 637.

69. N.Y.—Diamers v. Sternberger, 102 N.Y.S. 740, 52 Misc. 532—Darrow v. Lee, 16 Abb.Pr. 216.
23 C.J. p 871 note 66.

70. Mont.—Forsell v. Pittsburg & Montana Copper Co., 113 P. 479, 42 Mont. 412.

71. N.Y.—Paterson v. Goorley, 35 N.Y.S. 297, 14 Misc. 56.
23 C.J. p 871 note 60.

72. N.Y.—Court Square Bldg. v. Frankel, 268 N.Y.S. 806, 150 Misc. 296.

73. U.S.—Bates v. International Co., C.C.Cal., 84 F. 518.
23 C.J. p 871 note 67.

Title adjudicated in proceedings on examination

Where adjudication of title in proceedings on examination is authorized by statute, and on such an adjudication title to the property in question is determined to be in the judgment debtor, the appointment of a receiver therefor may be proper.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

74. N.Y.—Court Square Bldg. v. Frankel, 268 N.Y.S. 806, 150 Misc. 296—Indell v. Tabor, 185 N.Y.S. 873.
23 C.J. p 871 note 68.

75. N.Y.—Hoyt v. Mann, 7 N.Y.St. 420, 26 N.Y.Wkly.Dig. 249.

76. N.J.—Journeay v. Brown, 26 N.J.Law 111.

77. N.Y.—Webb v. Overmann, 6 Abb. Pr. 92.

78. S.C.—Globe Phosphate Co. v. Pinson, 29 S.E. 549, 52 S.C. 185.

79. N.Y.—Berman v. Goldstein, 3 N.Y.S.2d 93, 254 App.Div. 629—1101 Park Ave. Corporation v. Cornell, 232 N.Y.S. 663, 133 Misc. 397—Stark v. Baldwin, 23 N.Y.S.2d 730—Burr v. Comar, 22 N.Y.S.2d 383.
23 C.J. p 871 note 74, p 872 note 81.

80. N.Y.—Hancock v. Sears, 93 N.Y. 79.
23 C.J. p 872 note 75.

Statute not mandatory

A statute providing that the court "must" appoint a receiver upon application of the judgment creditor does not require that a receiver be appointed where the only property of the judgment debtor is exempt.—Tosti v. Sbano, 11 N.Y.S.2d 321, 170 Misc. 828.

81. Ga.—Howell v. Mathieson, 92 S.E. 520, 146 Ga. 838.
23 C.J. p 872 note 76.

82. S.C.—Globe Phosphate Co. v. Pinson, 29 S.E. 549, 52 S.C. 185.

83. N.J.—Gibson v. Gorman, 44 N.J. Law 325.

84. Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.
23 C.J. p 871 note 67 [c].

Tenancy in common

The interest of a judgment debtor in property owned by him and another as tenants in common is subject to receivership.—Burr v. Comar, 22 N.Y.S.2d 383.

85. N.Y.—Burr v. Comar, supra.
23 C.J. p 871 note 67 [a].

Rents. A receiver may be appointed to collect rents due or to become due the judgment debtor.[86]

Income from trust. The appointment of a receiver for income to be received by the judgment debtor under a trust created by another has been held improper.[87]

Earnings. A receiver may be appointed for the purpose of securing the conversion of a salary check of the judgment debtor into money.[88] The appointment of a receiver for the purpose of reducing to possession contingent fees of an attorney as and when earned has been held to be proper,[89] although there is also authority to the contrary.[90]

d. Absence of Other Remedies

Where other adequate remedies are available to the creditor, a receivership is not a matter of right, and he may be required to pursue such other remedies. The fact that property may be reached by execution has variously been held to preclude and not to preclude appointment of a receiver. A resort to a remedy other than receivership does not necessarily preclude the subsequent appointment of a receiver.

Where other adequate remedies are available to the creditor, a receivership is not a matter of strict right,[91] and he may be required to pursue such other remedies.[92] It has been held that if the only property disclosed may be reached by execution a receiver cannot be appointed,[93] although even in the same jurisdictions there are a number of decisions to the contrary.[94] The power of appointment is not limited by statutory provisions authorizing an order permitting a third person indebted to the judgment debtor to make payment to the sheriff.[95] Where a creditor agrees to forbear enforcement of the judgment as long as the debtor performs a covenant to pay, for which the debtor furnishes security, the creditor is entitled to have a receiver appointed on the debtor's failure to perform the covenant, irrespective of whether the security has been exhausted.[96]

If a remedy other than receivership is the only remedy provided by statute, a receiver should not be appointed.[97]

Resort to other remedies. A resort by the creditor to a remedy other than a receivership does not necessarily preclude the subsequent appointment of a receiver.[98]

The pendency of a creditor's suit in a federal court to which the applicant is not a party will not preclude an appointment in the state court.[99]

§ 387. —— Appointment and Proceedings Therefor

a. Who may appoint
b. Who may be appointed

86. N.J.—A. Fink & Sons Co. v. John Huss Co., 195 A. 816, 16 N.J.Misc. 31.

Where debtor insolvent
Cal.—Hill v. Taylor, 22 Cal. 191.
N.J.—Bilder v. Robinson, 67 A. 828, 73 N.J.Eq. 169.

During period of redemption
(1) It has been held that a receiver may be appointed to collect rents during the period allowed for redemption after a sale under an execution.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954, 198 App.Div. 1022.

(2) However, there is authority to the contrary.—Pringle v. James, 109 Ill.App. 100.

Mortgagee's claim held not a bar
Where mortgagee did not take possession of mortgaged realty or institute any action for possession, but merely notified mortgagor's tenants that they should attorn to mortgagee, tenants stated they were willing to attorn, but did not actually do so, and mortgage did not expressly pledge rents, mortgagee, not being in actual or constructive possession, was not entitled to rents so as to bar appointment of receiver to collect rents on behalf of mortgagor's judgment creditor who had obtained levy on rents.—A. Fink & Sons Co. v. John Huss Co., 195 A. 816, 16 N.J.Misc. 31.

87. N.Y.—Stark v. Baldwin, 23 N.Y.S.2d 730—De Camp v. Dempsey, 10 N.Y.Civ.Proc 210.

88. Cal.—Medical Finance Ass'n v. Short, 92 P.2d 961, 36 Cal.App.2d Supp. 745.

Public employee
This is true although the debtor be a public employee.—Medical Finance Ass'n v. Short, supra.

89. N.Y.—Court Square Bldg. v. Frankel, 268 N.Y.S. 806, 150 Misc. 296.

90. N.Y.—Gibney v. Reilly, 56 N.Y.S. 1055, 26 Misc. 275.

91. Minn.—Poppitz v. Rognes, 78 N.W. 964, 76 Minn. 109.

92. Minn.—Ginsberg v. Davis, 252 N.W. 669, 191 Minn. 12—Healy-Owen-Hartzell Co. v. Montevideo Farmers' & Merchants' Elevator Co., 212 N.W. 455, 170 Minn. 290.
23 C.J. p 872 note 84.

93. N.Y.—Moyer v. Moyer, 40 N.Y.S. 258, 7 App.Div. 523.
23 C.J. p 872 notes 86, 88, 89.

Willingness to apply sufficient property
Where the debtor is willing to apply sufficient property, as by setting off a judgment which he has against the creditor, to satisfy the execution, a receiver should not be appointed.—De Camp v. Dempsey, 10 N.Y.Civ.Proc. 210.

Receivership refused where the garnishee did not admit a debt due the execution defendant and the execution was not returned nulla bona.—Moran v. Joyce, 11 A.2d 420, 124 N.J.Law 255.

94. N.Y.—Heroy v. Gibson, 23 N.Y. Super. 591.
23 C.J. p 872 note 87.

95. N.Y.—De Vivier v. Smyth, 1 How.Pr.,N.S., 48.

96. Cal.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.

97. Cal.—McDowell v. Bell, 25 P. 128, 86 Cal. 615.

98. Payments from debtor's income
The fact that the creditor has availed himself of the remedy afforded by a statute which provides for payments by debtors out of income does not preclude the appointment of a receiver for the purpose of reaching assets other than income.—White v. Saphire, 23 N.Y.S.2d 354, 260 App.Div. 638.

99. S.C.—Dauntless Mfg. Co. v. Davis, 22 S.C. 584.

c. Time
d. Application
e. Order
f. Bond or security

a. Who May Appoint

As a rule any court or judge who has power to entertain supplementary proceedings may appoint a receiver in supplementary proceedings instituted and pending before it or him.

As a general rule, any court or judge who has power to entertain supplementary proceedings may appoint a receiver in supplementary proceedings instituted and pending before it or him.[1] Conversely, jurisdiction to appoint a receiver is confined, under some statutes at least, to the court or judge before whom the supplementary proceedings were instituted[2] and to whom the order or warrant is returnable.[3] Objections to jurisdiction to appoint a receiver may be waived, however,[4] as by failure to appeal from the order appointing the receiver.[5]

b. Who May Be Appointed

Any competent person who is a resident of the state may be appointed receiver. The court in making an appointment will consider, however, the relationship of a prospective appointee to either of the parties to the special proceeding.

Any competent person who is a resident of the state may be appointed receiver.[6] The sheriff is eligible to appointment.[7] The court in making an appointment will consider, however, the relationship of a prospective appointee to either of the parties to the special proceeding.[8]

A referee may be permitted to nominate a person whom the judge in his discretion may appoint.[9]

Where the appointment of a designated officer of the court may be made only with the written consent of the parties, an appointment made without such consent is, nevertheless, a mere irregularity[10] which cannot be taken advantage of in a collateral proceeding.[11]

c. Time

Generally a receiver may be appointed at any time after the granting of an order for examination, or after a warrant of arrest granted in place thereof. Appointment before return of the execution has been variously held proper and improper.

A receiver cannot be appointed until after an order for examination or the issuance of a warrant of arrest.[12] Generally, however, the appointment may be made at any time after the granting of an order for the examination of the debtor or any other person.[13] Thus it may be made on or after the return of the order for examination, and while the proceedings are still pending,[14] during the examination,[15] while the proceedings are pending pursuant to an adjournment,[16] or at the conclusion of the debtor's examination.[17] Under some statutes, however, the appointment is not made until the evidence taken on the examination is placed before the judge.[18] The appointment may be made after a warrant of arrest granted in place of an order for examination,[19] or although the judgment debtor is not himself examined.[20]

The appointment of a receiver more than ten years after the docketing of the judgment has been held permissible if the supplementary proceeding was instituted within ten years after the return of execution unsatisfied.[21]

Before return of execution. The appointment of a receiver before return of the execution has been variously held proper[22] and improper.[23]

1. Idaho.—Spaulding v. Cœur D'Alene R. & Nav. Co., 59 P. 426, 8 Idaho 638.
23 C.J. p 872 note 91.

2. N.Y.—Kostor v. Kliss, 244 N.Y.S. 671, 137 Misc. 754.
The supreme court in New York has no power to appoint a receiver in supplementary proceedings instituted in the city court.—Greenbrier Realty Corporation v. Simon, 268 N.Y.S. 660, 240 App.Div. 42, motion granted 191 N.E. 582, 264 N.Y. 596.

3. N.Y.—Greenbrier Realty Corporation v. Simon, supra.

4. N.Y.—Viburt v. Frost, 3 Abb.Pr. 119.

5. N.Y.—Viburt v. Frost, supra.

6. N.Y.—Chamberlain v. Greenleaf, 4 Abb.N.Cas., N.Y., 92.

7. Kan.—Teats v. Herington Bank, 51 P. 219, 58 Kan. 721.
23 C.J. p 872 note 94.

8. N.Y.—Fraser v. Hunt, N.Y.Daily Reg., Dec. 19, 1882.
23 C.J. p 872 note 99 [a].

9. N.Y.—Jones v. Lawlin, 3 N.Y. Super. 722.

10. N.Y.—Moore v. Taylor, 40 Hun 56.

11. N.Y.—Moore v. Taylor, supra—Southwick v. Moore, 54 N.Y.Super. 126.

12. N.Y.—Port Jefferson Bank v. Darling, 92 N.Y.S. 483, 102 App. Div. 431, 17 N.Y.Ann.Cas. 237.

13. Minn.—Flint v. Webb, 25 Minn. 263.
23 C.J. p 873 note 2.

14. N.Y.—People v. Mead, 29 How. Pr. 360.

15. N.Y.—People v. Mead, supra.

16. N.Y.—Barnett v. Moore, 46 N.Y.S. 668, 20 Misc. 518.

17. N.Y.—Groot v. Greely, 5 N.Y. Month.L.Bul. 69.

18. N.J.—Howell v. McDowell, 1 A. 474, 47 N.J.Law 359.
23 C.J. p 873 note 10.

19. N.Y.—Wilson v. Andrews, 9 How. Pr. 39.

20. N.Y.—New York City First Nat. Bank v. Gow, 124 N.Y.S. 449, 139 App.Div. 576.
23 C.J. p 873 note 9.

21. N.Y.—Fawcett v. New York, 98 N.Y.S. 286, 112 App.Div. 155.

22. N.Y.—De Vivier v. Smith, 6 N.Y. Civ.Proc. 394, 1 How.Pr.,N.S., 48.
Where debtor refuses to apply property
N.Y.—People v. Hulburt, 5 How.Pr. 446, 9 N.Y.Leg.Obs. 245.

23. N.Y.—Darrow v. Lee, 16 Abb.Pr. 216.

Before return day of motion for receivership. An appointment after the return day of the motion for the receivership may be valid where the judge before whom the motion is returnable is out of the county on the return day.[24]

d. Application

(1) In general
(2) Notice

(1) In General

The judgment creditor on an application for appointment of a receiver must show all the facts which are necessary to warrant or require the appointment, and the judgment debtor should be afforded a full opportunity to be heard.

The judgment creditor on an application for appointment of a receiver must show all the facts which are necessary to warrant or require the appointment.[25] Thus it should appear that execution was duly issued on the judgment.[26] Where an examination has been had, that fact should appear,[27] and in some,[28] although not in other,[29] jurisdictions it must be shown that property was disclosed or exists.

Intervention by general creditors. General creditors are not required or authorized to intervene in supplementary proceedings in which a receiver is appointed.[30]

Hearing. The judgment debtor should have a full opportunity to be heard in proceedings for the appointment of a receiver.[31]

(2) Notice

At least where statutes so provide, the judgment debtor and other judgment creditors who have instituted supplementary proceedings or creditor's suits must ordinarily be given notice of an application for appointment of a receiver. The notice should be given within a time and served in a manner prescribed by statute. It may be general in form, but as to the debtor at least must be in writing.

By express provision of some statutes, notice of the application for a receiver must be given the judgment debtor,[32] unless the order for examination, or the warrant of arrest in lieu thereof, has been served on him and the appointment is on the return day thereof or at the close of the examination,[33] or unless the judge dispenses with notice in the order of appointment on the ground that the debtor cannot with reasonable diligence be found within the state.[34] These rules, however, have been held not to apply in cases where notice has been waived, as by an appearance of an attorney on behalf of the debtor,[35] or by a voluntary appearance of the debtor and submission to examination.[36]

Notice to other judgment creditors who have instituted supplementary proceedings or filed creditor's bills is also expressly required by some statutes.[37] Such other creditors are not entitled to a copy of the examination on which the application is based.[38] Failure to give notice to other creditors is not prejudicial where by their acts they have waived notice.[39]

24. N.Y.—Darrow v. Riley, 26 N.Y.S. 91, 5 Misc. 363.

25. N.J.—Park Place Discount Co. v. Weiszmiller, 193 A. 709, 15 N.J. Misc. 588.

Evidence held sufficient to warrant or require the appointment of a receiver.—Brady Coal & Ice Co. v. McAteer, 4 N.Y.S.2d 744, 254 App.Div. 776—Burr v. Comar, 22 N.Y.S.2d 383—23 C.J. p 873 note 19 [b].

26. N.Y.—Henry v. Furbish, 62 N.Y.S. 247, 30 Misc. 822.
23 C.J. p 873 note 17.

27. N.J.—Adler v. Turnbull, 30 A. 319, 57 N.J.Law 62.
23 C.J. p 873 note 18.

28. N.J.—Adler v. Turnbull, supra.
23 C.J. p 873 note 19.

29. N.Y.—Indell v. Tabor, 185 N.Y.S. 873.

30. U.S.—In re Loftus, D.C.N.Y., 16 F.Supp. 711.

31. **Full opportunity held afforded** Cal.—Bruton v. Tearle, 59 P.2d 953, 7 Cal.2d 48, 106 A.L.R. 580.

32. N.Y.—Henry v. Furbish, 62 N.Y.S. 247, 30 Misc. 822.
23 C.J. p 873 note 24.

33. N.Y.—Groot v. Greeley, 5 N.Y. Month.L.Bul. 69.
23 C.J. p 873 note 25.

Appointment "upon or after the return day"

A statute authorizing the appointment of a receiver "upon or after the return day" of an order for examination, warrant, or subpœna served on the judgment debtor without further notice to him refers to an application for receiver made during the course of an examination of the judgment debtor before the court, as any other construction would leave the time and place when an application might be made indefinite and the judgment debtor in ignorance of its making.—Universal Film Exchanges v. Austin, 287 N.Y.S. 109, 158 Misc. 935.

Independent application

Even where the examination has not been concluded, an independent application to the court for the appointment of a receiver without notice to the judgment debtor is not proper.—Universal Film Exchanges v. Austin, supra.

34. Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.
23 C.J. p 873 note 26.

Where receiver could not control property

A refusal to appoint a receiver for the purpose of taking possession or control of particular property of a nonresident debtor is at least within the discretion of the court where there has been no personal notice to the debtor and it does not appear that the receiver could acquire any effective control of the property.—Ulmann v. Thomas, 175 N.E. 192, 255 N.Y. 506, affirming 243 N.Y.S. 771, 229 App.Div. 855, and reargument denied 177 N.E. 156, 256 N.Y 598.

35. N.Y.—Moore v. Empie, 45 N.Y.S. 539, 17 App.Div. 218.

36. N.Y.—Bingham v. Disbrow, 37 Barb. 24, 14 Abb.Pr. 251.

37. N.Y.—Barnett v. Moore, 46 N.Y.S. 668, 20 Misc. 518.
23 C.J. p 873 note 21.

38. N.Y.—Todd v. Crooke, 6 N.Y. Super. 694, Code Rep.,N.S., 324.

39. N.Y.—Barnett v. Moore, 46 N.Y.S. 668, 20 Misc. 518.
N.C.—Corbin v. Berry, 83 N.C. 27.

Time. Where the time for giving notice is prescribed by statute, notice should be given in accordance therewith.[40] Notice given a few months after the appointment, without obtaining a new order, is insufficient.[41] A creditor in other proceedings is not entitled to the length of notice provided for on motions generally.[42] A requirement as to the time of notice may be waived, as by an appearance by attorney.[43]

Form. The notice need not be specific; a general notice will suffice.[44] Notice to the judgment debtor must be in writing,[45] but a verbal notice to other judgment creditors has been held sufficient.[46] A counternotice, on a motion to vacate an order appointing a receiver, that on the hearing the creditor would move for the appointment of another receiver, if defeated on the motion to vacate, is sufficient.[47]

Service of notice on the debtor must, under the statutes of some states, be personal;[48] service on the attorney of record in the action in which the judgment was recovered has been held not sufficient.[49] In other states the courts apply general statutes authorizing the leaving of a copy at the residence of the debtor.[50]

e. Order

(1) Nature and contents
(2) Filing
(3) Effect
(4) Objections and setting aside

(1) Nature and Contents

(a) In general
(b) Provisions with respect to property

(a) In General

The order appointing a receiver should recite the jurisdictional facts authorizing its issuance. It may grant the receiver specific powers within the range of those prescribed by statute. An error in the order may be corrected by an amendment nunc pro tunc.

The order appointing a receiver should recite the jurisdictional facts authorizing its issuance.[51] It may grant the receiver specific powers,[52] but it cannot confer on the receiver powers in excess of those prescribed by statute.[53] It need not incorporate directions to the receiver which may be embodied in subsequent orders.[54]

An immaterial erroneous designation of the court in the title does not vitiate the order.[55]

Amendment. An error in the order may be corrected by an amendment nunc pro tunc.[56]

(b) Provisions with Respect to Property

A receiver cannot be appointed for only a specified part of the debtor's property. The order may enjoin a disposition of the debtor's property. Under some statutes it should not direct an assignment or conveyance by the debtor or adjudicate disputed rights to property in the hands of a third person.

A receiver cannot be appointed for only a specified part of the debtor's property.[57] The order may properly except property, however, which is exempt.[58] A failure to make provisions for exemptions is at most a mere irregularity.[59]

Injunction against disposition. The order may enjoin a disposition of the debtor's property.[60]

Order for payment or delivery. Where by virtue of statute the title of property of the judgment debtor vests in the receiver on the filing of the order of appointment, a provision in the order of appointment requiring the judgment debtor to assign or convey his property to the receiver is unnecessary and improper.[61] However, it has been

40. N.Y.—Strong v. Epstein, 14 Abb. N.Cas. 322.
41. Minn.—Billson v. Linderberg, 68 N.W. 771, 66 Minn. 66.
42. N.Y.—Leggett v. Sloan, 24 How. Pr. 479.
43. N.Y.—Moore v. Empie, 45 N.Y.S. 539, 17 App.Div. 218.
44. S.C.—Dilling v. Foster, 21 S.C. 334.
45. N.Y.—Ashley v. Turner, 22 Hun 226.
46. N.Y.—Darrow v. Riley, 26 N.Y.S. 91, 5 Misc. 363.
47. N.Y.—Clark v. Clark, 11 Abb.N. Cas. 333.
48. N.Y.—Sayles v. Best, 20 N.Y.S. 951, affirmed 35 N.E. 636, 140 N. Y. 368—Barker v. Johnson, 4 Abb. Pr. 435.
49. N.Y.—Catholic Univ. of America v. Conrad, 57 N.Y.S. 820, 27 Misc. 326.
Contra De Bemer v. Drew, 57 Barb. 438.
50. N.C.—Turner v. Holden, 13 S.E. 731, 109 N.C. 182.
51. N.J.—Journeay v. Brown, 26 N. J.Law 111.
23 C.J. p 874 note 41.
52. N.Y.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571.
53. Idaho.—Spaulding v. Cœur d'Alene R. & Nav. Co., 59 P. 426, 6 Idaho 638.
Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 12 Wyo. 492, 2 L. R.A.,N.S., 1012.
54. S.C.—Dilling v. Foster, 21 S.C. 334.
55. N.Y.—Terry v. Bange, 9 N.Y.S. 311, 57 N.Y.Super. 546, 18 N.Y.Civ. Proc. 288.
56. N.Y.—Boynton v. Sprague, 91 N. Y.S. 839, 100 App.Div. 443, affirmed 76 N.E. 1089, 183 N.Y. 505.
23 C.J. p 874 note 54.
57. N.Y.—Andrews v. Glenville Woolen Co., 11 Abb.Pr.,N.S., 78.
S.C.—Dilling v. Foster, 21 S.C. 334.
23 C.J. p 874 note 50.
Particular debt
N.Y.—Andrews v. Glenville Woolen Co., 11 Abb.Pr.,N.S., 78.
58. N.Y.—Indell v. Tabor, 185 N.Y. S. 873.
59. N.Y.—Seeley v. Connors, 95 N.Y. S. 1109, 109 App.Div. 279—Finnin v. Malloy, 33 N.Y.Super. 382.
60. N.Y.—Teller v. Randall, 40 Barb. 242.
23 C.J. p 874 note 42.
61. N.Y.—Rourke v. Turrell, 138 N. Y.S. 648, 3 N.Y.Civ.Proc.,N.S., 15

held that an order appointing a receiver may be amended nunc pro tunc to require a tenant of the judgment debtor to attorn to the receiver.[62]

Determination of disputed rights. Under some statutes, the order should not adjudicate disputed rights to property in the hands of a third person.[63]

(2) Filing

The order appointing a receiver must be filed as required by statute, and the appointment is not complete until it is so filed.

The order appointing a receiver must be filed as required by statute,[64] and the appointment is not complete until the order is so filed.[65] It has been held sufficient to file an order extending the receivership, although the original order of appointment is not filed.[66]

(3) Effect

An order appointing a receiver does not terminate the proceedings or deprive the judge who granted it of further jurisdiction. The appointment does not affect the rights of other creditors or displace or affect existing liens. It also has been held not to preclude the debtor from disposing of his property; but after the appointment strangers to the proceedings deal with him and his property at their own risk.

An order appointing a receiver does not terminate the proceedings,[67] or deprive the judge who granted the order of further jurisdiction.[68]

The appointment does not affect the rights of other creditors,[69] or displace or affect existing liens.[70] It also has been held not to preclude the execution debtor from disposing of his property;[71] but after the appointment strangers to the proceedings deal with the judgment debtor and his property at their own risk,[72] although they are not precluded from enforcing rights incident to their prior acquisition of his property.[73] The debtor cannot, after the appointment and during the receivership, procure the issuance of execution on a judgment recovered by him.[74]

(4) Objections and Setting Aside

An order made by a court or judge authorized to make it and reciting the necessary jurisdictional facts furnishes conclusive evidence of its regularity when questioned collaterally, and can only be set aside for irregularity by a direct proceeding for that purpose. In a number of cases, various questions have been adjudicated relating to the grounds for vacation, who may object, who may vacate or modify, amendment of motion, evidence, conditional vacation, effect of vacation, and waiver, estoppel, and laches.

An order appointing a receiver in supplementary proceedings, made by a court or judge authorized by law to make it, and reciting the facts necessary to give jurisdiction to such court or judge, will furnish conclusive evidence of the regularity of the order when questioned collaterally; it can only be vacated or set aside for irregularity by a direct proceeding brought for that purpose.[75]

A subsequent countermand of the execution will not vitiate the order.[76]

Grounds for vacation. Vacation of an order appointing a receiver is proper where for any reason it has been erroneously granted,[77] as where personal service of notice of the application for the order has not been made on the judgment debtor.[78] An order will not be vacated merely because the receiver may have difficulty in getting possession of the debtor's property,[79] or because of the appointment of a receiver for a corporate creditor which has become insolvent.[80]

Who may object. Although the validity of an order appointing a receiver, as depending on a ju-

—Smith v. Tozer, 11 N.Y.Civ.Proc. 349.
23 C.J. p 874 note 47.
Order for payment or delivery of property to receiver generally see supra § 383.

62. N.Y.—Brown v. Guerin, 300 N. Y.S. 209, 164 Misc. 562.

63. Idaho.—Spaulding v. Cœur d'Alene R. & Nav. Co., 59 P. 426, 6 Idaho 638.
N.Y.—Manice v. Smith, 5 N.Y.Wkly. Dig. 255.

64. N.Y.—Moyer v. Moyer, 40 N.Y.S. 258, 7 App.Div. 523.
23 C.J. p 874 note 55.

65. N.Y.—Klatzkie v. Kimpel, 172 N. Y.S. 711.
23 C.J. p 874 note 56.

66. N.Y.—Webb v. Osborne, 7 N.Y. S. 762, 15 Daly 406.

67. N.Y.—Murphy v. Cram, 142 N.Y. S. 972, 157 App.Div. 609.
23 C.J. p 875 note 80.

68. N.Y.—People v. Mead, 29 How. Pr. 360—Leggett v. Sloan, 24 How. Pr. 479.

69. N.J.—Weiss v. Gever, 9 N.J.Law J. 312.

70. N.Y.—Leggett v. Waller, 80 N.Y. S. 13, 39 Misc. 408.
Wyo.—First Nat. Bank v. Cook, 76 P. 674, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

71. N.Y.—Eckert v. Truman, 148 N. Y.S. 48, 163 App.Div. 17.
As superseding injunction to restrain disposition of property see supra § 370.

72. N.J.—Guild v. Meyer, 38 A. 959, 56 N.J.Eq. 183.
23 C.J. p 875 note 83.

73. Wash.—Griffith v. Burlingame, 51 P. 1059, 18 Wash. 429.
23 C.J. p 875 note 84.

74. N.C.—Turner v. Holden, 94 N.C. 70.

75. N.Y.—Herlihy v. Watkins, 300 N. Y.S. 242, 252 App.Div. 605.
23 C.J. p 875 note 58.

76. N.Y.—Palmer v. Colville, 18 N. Y.S. 509, 63 Hun 536.

77. N.Y.—Thayer v. Dempsey, 25 N. Y.Wkly.Dig. 457.
23 C.J. p 875 note 60.

78. N.Y.—Universal Film Exchanges v. Austin, 287 N.Y.S. 109, 158 Misc. 935.
23 C.J. p 875 note 59.

79. Kan.—Teats v. Herington Bank, 58 P. 219, 58 Kan. 721.

80. N.Y.—Wright v. Nostrand, 94 N. Y. 31, reversing 47 N.Y.Super. 441.

risdictional objection, may be attacked by a party claiming title adversely to the debtor,[81] or by a junior judgment creditor,[82] or even by the judgment creditor who procured the appointment,[83] mere irregularities in the appointment can be taken advantage of only by the judgment debtor.[84] Mortgagees, pledgees, and lien creditors of the debtor who were not parties, cannot complain of the appointment of a receiver.[85]

Who may vacate or modify. The order of appointment can be vacated or modified only by the judge who made it.[86]

Amendment of motion. Where a motion to vacate the order contains technical defects, it may be amended by affidavit nunc pro tunc, in response to a direction by the court.[87]

Evidence. In some jurisdictions the order will not be set aside where there was any evidence to justify it.[88]

Conditional vacation. Where the receiver has a claim against only the party who moved for his appointment, the court cannot as a condition to vacating the receivership require the judgment debtor to pay the claim.[89]

Effect of vacation. The vacation of an order of appointment carries with it subsequent orders which depend on the order vacated.[90]

Waiver, estoppel, and laches. The rule is well settled that mere defects or irregularities in the appointment of the receiver or in the prior proceedings may be waived[91] by consenting to the appointment[92] or by appearing and failing to object when afforded an opportunity.[93] The fact that a lien creditor, not a party to the action, consents to the appointment of a receiver, does not estop him however, to object to the possession and control of the property by the receiver.[94] Laches may preclude a motion to vacate.[95]

f. Bond or Security

Before entering on his duties, the receiver is sometimes required by statute to execute and file a bond conditioned on the faithful performance of his duties, and even in the absence of such a statute the usual and better practice has been said to be to require a bond to be given. Objections for insufficiency of the bond can be urged only by the debtor.

Before entering on his duties, the receiver is sometimes required by statute to execute and file a bond conditioned on the faithful discharge of his duties as receiver,[96] except in certain cases in which security may be and is dispensed with.[97] Even in jurisdictions where a bond is not expressly required by statute, the usual and better practice has been said to be to require one to be given.[98] The appointment is not effective until the security required has been given and filed.[99]

Objections for insufficiency of the bond can be urged only by the debtor[1] in the court which appointed the receiver.[2] The fact that the bond is not under seal does not render it void,[3] but is an irregularity of which only the judgment debtor can take advantage.[4] Neither the sufficiency of the bond[5] nor an irregularity in its filing[6] can be determined in a collateral proceeding.

81. N.J.—Guild v. Meyer, 46 A. 202, 59 N.J.Eq. 390.

82. N.Y.—Shannon v. Steger, 78 N.Y.S. 163, 75 App.Div. 279.

83. N.Y.—Wilhelm v. Hayman, 126 N.Y.S. 374.
23 C.J. p 875 note 69.

84. N.Y.—Wright v. Nostrand, 94 N.Y. 31, reversing 47 N.Y.Super. 441.
23 C.J. p 875 note 70.
Lack of notice to the judgment debtor has been held a matter as to which only the judgment debtor may object.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

85. N.Y.—Powell v. Waldron, 89 N.Y. 328, 42 Am.R. 301.
Wyo.—First Nat. Bank v. Cook, 76 P. 674, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

86. N.Y.—Moschell v. Boar, 21 N.Y.S. 683, 66 Hun 557.

87. N.Y.—Rourke v. Turrell, 138 N.Y.S. 648, 3 N.Y.Civ.Proc.,N.S., 15.

88. N.J.—Colton v. Bigelow, 41 N.J. Law 266—Journeay v. Brown, 26 N.J.Law 111.

89. N.Y.—Williams & Co. v. Groveville Corporation, 8 N.Y.S.2d 204, 255 App.Div. 947.

90. N.Y.—Universal Film Exchanges v. Austin, 287 N.Y.S. 109, 158 Misc. 935.

91. N.Y.—Bingham v. Disbrow, 37 Barb. 24—Hobart v. Frost, 12 N.Y.Super. 672.

92. N.Y.—Powell v. Waldron, 89 N.Y. 328, 42 Am.R. 301—Webb v. Osborne, 7 N.Y.S. 762, 15 Daly 406.

93. N.Y.—Wright v. Nostrand, 94 N.Y. 45.
23 C.J. p 875 note 74.

94. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

95. N.Y.—Terry v. Bange, 9 N.Y.S. 311, 57 N.Y.Super. 546, 18 N.Y.Civ. Proc. 288.

96. N.Y.—National Wall Paper Co. v. Gerlach, 37 N.Y.S. 428, 15 Misc. 640.
23 C.J. p 876 note 86.

97. N.Y.—Banks v. Potter, 21 How. Pr. 469.

98. S.C.—Dilling v. Foster, 21 S.C. 334.

99. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308.
23 C.J. p 876 note 89.

1. N.Y.—Morgan v. Potter, 17 Hun 403.

2. N.Y.—Hyatt v. Dusenbury, 12 N.Y.Civ.Proc. 152—Peters v. Carr, 2 Dem.Surr. 22.

3. N.Y.—Morgan v. Potter, 17 Hun 403—Hyatt v. Dusenbury, 12 N.Y. Civ.Proc. 152, appeal dismissed 12 N.E. 711, 106 N.Y. 663.

4. N.Y.—Morgan v. Potter, 17 Hun 403.

5. N.Y.—Stanley v. National Union Bank, 22 N.E. 29, 115 N.Y. 122—Peters v. Carr, 2 Dem.Surr. 22.

6. N.Y.—Boynton v. Sprague, 91 N.Y.S. 839, 100 App.Div. 443, affirmed 76 N.E. 1089, 183 N.Y. 505.

§ 388. —— Extension of Receivership

A receivership in one proceeding may be extended to proceedings subsequently instituted or in which subsequent applications have been made. Notice of an application to extend must be given the judgment debtor, a new bond may be required, and the order of extension must be filed. An extension gives the judgment creditor the same rights as though the receiver had been then appointed on his own application.

Where several proceedings are pending against the same debtor, there should be but one receiver, and, to this end, a receivership in one proceeding may be extended to proceedings subsequently instituted or in which subsequent applications have been made.[7] A statutory rule to this effect does not render necessary, however, the appointment of the same person as receiver in supplementary proceedings and an action,[8] especially where the two receiverships will not conflict;[9] nor does it control appointments of the federal courts.[10] The receiver of all the assets of a partnership, appointed in an action to dissolve the partnership, should not be removed without cause and another person appointed in his stead as receiver in supplementary proceedings.[11]

A receivership cannot be extended after the death of the judgment debtor.[12]

Notice of application. The judgment debtor must be given notice of an application to extend a receivership.[13]

Bond. On extension of a receivership, a new bond may be required[14] if the existing security is inadequate,[15] but not otherwise.[16]

Filing of order. An order extending a receivership must be filed as required by statute.[17]

Effect of order. An order extending a receivership, when made, gives to the judgment creditor the same rights as though a receiver had been then appointed on his own application, including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed to those taken under his judgment.[18] The control and direction of the receiver remain in the court or justice to whose control and direction he was originally subject.[19]

Priorities are determined by the dates when the orders of examination were served rather than the date of appointing a receiver, and as between senior and junior creditors the receivership relates back to the commencement of the proceedings on the senior judgment.[20] The act of a receiver in leaving property in possession of the debtor does not affect the priority of the creditor at whose instance the receiver was appointed.[21]

§ 389. —— Termination of Receivership and Appointment of New Receiver

A payment of the judgment will terminate the receivership except as to proper claims of the receiver. A receivership also will end on the death of the debtor. A receiver may be removed and another person substituted for good cause in the discretion of the court.

A payment of the judgment will terminate a receivership[22] except as to proper claims of the receiver.[23] A receivership also will end on the death of the debtor.[24]

In jurisdictions where the direction and control of a receiver after his appointment are vested in the court out of which the execution issued rather than in the judge who made the appointment, the receiver can be discharged only by the court out of which the execution issued.[25]

7. Wis.—Kellogg v. Coller, 3 N.W. 433, 47 Wis. 649.
23 C.J. p 876 note 1.
Necessity of extension of receivership to vest title to after-acquired property in receiver see infra § 392 b (6).

Receivership in foreclosure against corporation
A receivership granted in a foreclosure suit against a corporation may, it seems, be extended to supplementary proceedings.—Kenney v. South Shore Natural Gas & Fuel Co., 94 N.E. 606, 201 N.Y. 89.

8. N.Y.—Syracuse State Bank v. Gill, 23 Hun 410.
23 C.J. p 876 note 3.

9. N.Y.—Harding v. Conlon, 138 N.Y.S. 1014, 3 N.Y.Civ.Proc.,N.S., 19.

10. U.S.—Young v. Aronson, D.C.N.Y., 27 F. 241.

11. N.Y.—Price v. Price, 47 N.Y.S. 772, 21 App.Div. 597.

12. N.Y.—Matter of Tribune Ass'n, 34 N.Y.S. 459, 13 Misc. 326.

13. N.Y.—Henry v. Furbish, 62 N.Y.S. 247, 30 Misc. 822—Benjamin v. Myers, 3 N.Y.St. 284.

14. Wis.—Kellogg v. Coller, 3 N.W. 433, 47 Wis. 649.

15. N.Y.—Matter of Wilds, 6 Abb.N.Cas. 307.

16. N.Y.—Banks v. Potter, 21 How.Pr. 469.

17. N.Y.—Webb v. Osborne, 7 N.Y. 762, 15 Daly 406.
23 C.J. p 874 notes 55, 56.

18. N.Y.—Murphy v. Cram, 142 N.Y.S. 972, 157 App.Div. 609.

19. N.Y.—Garfield Nat. Bank v. Bostwick, 14 N.Y.S. 919.
23 C.J. p 876 note 10 [a].

20. N.Y.—Youngs v. Klunder, 7 N.Y.S. 498—Guggenheimer v. Stevens, 7 N.Y.S. 263, 17 N.Y.Civ.Proc. 383.

21. N.Y.—Fessenden v. Woods, 16 N.Y.Super. 550.

22. N.Y.—Gifford v. Rising, 12 N.Y.S. 428, 59 Hun 42.
Vacation of order of appointment see supra § 387 f (4).

Assertion after argument of motion
However, after the argument of a motion by the debtor to vacate an order directing an attornment to the receiver, the court will not consider an assertion in a letter from the judgment debtor's attorney that the receivership should fall because of a satisfaction of the judgment prior to the time of the argument of the motion.—Brown v. Guerin, 300 N.Y.S. 209, 164 Misc. 562.

23. N.Y.—Lanigan v. New York, 70 N.Y. 454.
23 C.J. p 877 note 18.

24. N.Y.—Matter of Tribune Ass'n, 34 N.Y.S. 459, 13 Misc. 326.

25. N.Y.—People v. Lynch, 129 N.Y.S. 885, 72 Misc. 458.

Removal and appointment of new receiver. A receiver may be removed[26] and another person substituted[27] for good cause in the discretion of the court. He should have notice of the charges against him, and be afforded an opportunity of being heard.[28] There should be no removal unless accompanied by the substitution of a qualified person.[29]

A motion to substitute or appoint a new receiver on the death, resignation, or removal of the receiver originally appointed should be addressed to, and acted on, by the court which is by statute vested with the direction and control of the receiver rather than the judge who made the original appointment.[30]

A judgment debtor may, by accepting and recognizing as the receiver a person other than the person appointed by the court, preclude himself from questioning the authority of such person.[31]

§ 390. —— Control of Receiver

Under some statutes the receiver is subject to the direction and control of the court out of which the execution was issued. Where title to property is disputed, the receiver should apply to the court for instructions.

Under some statutes the receiver is subject to the direction and control of the court out of which the execution was issued.[32] If there is a dispute as to the title to property, an application should be made by the receiver to the court for instructions.[33]

§ 391. —— Rights, Powers, Duties, and Liabilities

a. In general
b. Sale of property
c. Disposition of funds
d. Requiring accounting by personal representatives
e. As party to actions or proceedings by others
f. Employment of attorney
g. Compensation
h. Liabilities

a. In General

The rights, powers, and duties of a receiver appointed in supplementary proceedings are limited to the purposes of such proceedings and those for which he was appointed, that is, to demanding and suing for, under the order of the court, and taking into possession and applying in satisfaction of the judgment, money, property, and interests of the judgment debtor.

The rights, powers, and duties of a receiver appointed in supplementary proceedings are limited to the purposes of such proceedings and those for which he was appointed.[34] They are not the same as those of general receivers,[35] but are in great measure analogous to those of a receiver appointed in a creditor's suit.[36] They are limited to receiving and then paying out,[37] or, more specifically, to demanding and suing for, under the order of the court, and taking into possession and applying in satisfaction of the judgment, money, property, and interests of the judgment debtor.[38] They do not include active management of property[39] or operation of a business[40] of the judgment debtor, or ad-

26. What is good cause
(1) The failure of receiver to cooperate with judgment creditor or judgment creditor's attorney.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571.
(2) Other matters see 23 C.J. p 877 note 22 [a], [b].
Discharge with creditor's consent
The discharge of a receiver at his request may be proper irrespective of the validity of the grounds urged by him where the discharge is consented to by the judgment creditor.—First Nat. Bank v. Milbauer, 1 N.Y.S.2d 317, 165 Misc. 643.

27. N.Y.—Connolly v. Kretz, 78 N.Y. 620—People v. Byrne, 78 N.Y. 619.

28. N.Y.—Bruns v. Stewart Mfg. Co., 31 Hun 195—Campbell v. Spratt, 5 N.Y.Wkly.Dig. 25.

29. N.Y.—Terry v. Bange, 9 N.Y.S. 311, 57 N.Y.Super. 546, 18 N.Y.Civ. Proc. 288.

30. N.Y.—Smith v. Barnum, 69 N.Y.S. 253, 59 App.Div. 291.
23 C.J. p 877 note 26.

31. N.Y.—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

32. N.Y.—Tillotson v. Wolcott, 48 N.Y. 188.
23 C.J. p 877 note 14.
Control after extension of receivership see supra § 388.

33. N.Y.—Matter of Hone, 47 N.E. 798, 153 N.Y. 522.
23 C.J. p 877 note 15.

34. Wis.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.
Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

35. Wis.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.
Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

36. N.Y.—Inglehart's Petition, Sheld. 514.

37. N.Y.—Brown v. Guerin, 296 N.Y.S. 837, 163 Misc. 79.

38. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.
23 C.J. p 877 note 29.
Grant of specific powers in order of appointment see supra § 387 e (1) (a).

39. N.Y.—Brown v. Guerin, 296 N.Y.S. 837, 163 Misc. 79.
Particular powers and duties
A receiver in supplementary proceedings cannot be authorized to borrow money to pay off superior existing liens and to satisfy them out of rents and profits and thereafter from same source pay judgment and expenses of receivership, since such functions are exclusively within powers and purview of equity receivership.—Brown v. Guerin, supra.

40. Wis.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.

ministration of his estate on the basis of his insolvency.[41]

For some purposes at least, the rights and powers of a receiver do not depend on his succession to the title of the judgment debtor.[42] The receiver has no greater right than the judgment creditor, however, as against other creditors.[43]

Where provision is made by statute, as is the case in some jurisdictions, respecting the rights, powers, and duties of receivers in supplementary proceedings, the rights, powers, and duties of a receiver are to such extent those, of course, which the statute prescribes.[44] Under some such statutes at least, a receiver is vested only with property of the judgment debtor[45] and does not succeed to purely personal rights of the debtor.[46]

Issuing execution. The receiver has no power to issue an execution on a judgment recovered by the debtor,[47] although it has been held that he may issue an execution on a judgment docketed in his favor in an action to which he was not a party.[48]

Inspection. The court has no inherent power, and in some states no statutory power, to direct a third person, a safe deposit company, to permit the receiver of the judgment debtor to open a safe deposit box in its vaults, standing in the joint names of the judgment debtor and another, and to examine the contents thereof, especially where no evidence was presented as to the contents.[49]

Settlement of debtor's claims. A receiver has no authority, without leave of court, to settle claims of the judgment debtor.[50]

b. Sale of Property

(1) In general

(2) Property which may be sold

(1) In General

Where so authorized by the court, the receiver may sell the property of the judgment debtor. A sale should not be directed where it is doubtful whether anything could be realized. The court may refuse to confirm or may set aside an invalid sale or one for an inadequate price.

When so authorized by the court, the receiver may sell the property of the judgment debtor.[51] His power in this respect has been said to be as extensive as that of a general receiver.[52]

A private sale of personalty may be directed when there is a probability of realizing a better sum than could be procured by a sale at auction.[53] A sale should not be directed where it is doubtful whether anything could be realized.[54]

Confirmation or setting aside. The court may refuse to confirm a sale for an inadequate price,[55] or may set aside an invalid sale[56] or one for a grossly inadequate price.[57]

An order of sale may be vacated on motion of the judgment debtor[58] or other claimant of the property.[59]

(2) Property Which May Be Sold

An order authorizing or directing a sale by the receiver should be limited to property of the debtor and his right, title, and interest in property of which he is not the absolute and sole owner. Generally speaking, a receiver may sell personal property, and in some jurisdictions he may sell real estate.

An order authorizing or directing a sale by a re-

Effect of order beyond court's authority

If the court nevertheless directs the receiver to operate a business of the judgment debtor, the legal effect of the order is limited to such powers and duties as can be lawfully vested in a receiver in supplementary proceedings.—U. S. Rubber Products v. Twin Highway Tire Co., supra.

41. U.S.—In re Loftus, D.C.N.Y., 16 F.Supp. 711.

42. Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333—Dunham v. Byrnes, 30 N.W. 402, 36 Minn. 106.

43. N.Y.—Klinger v. New York State Nat. Bank, 271 N.Y.S. 252, 151 Misc. 903.

44. N.Y.—Goddard v. Stiles, 90 N.Y. 199, reversing 25 Hun 63—Sonnabend v. Gittins, 257 N.Y.S. 562, 235 App.Div. 483—Maurice v. Travelers' Ins. Co., 201 N.Y.S. 369, 121 Misc. 427.

Character and status of receiver see supra § 385.

45. N.Y.—Sonnabend v. Gittins, 257 N.Y.S. 562, 235 App.Div. 483.

46. N.Y.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.

Disaffirmance of conveyance by infant

The right of disaffirmance of a conveyance made during infancy is one personal to the judgment debtor and does not vest in the receiver.—In re Ziemba's Will, supra.

47. N.Y.—Hyatt v. Dusenbury, 12 N.Y.Civ.Proc. 152.

48. N.Y.—Goodenough v. Davis, 4 N.Y.Month.L.Bul. 35.

49. N.Y.—Ehrich v. Root, 119 N.Y.S. 395, 134 App.Div. 432.

50. N.Y.—King v. Corning Trust Co., 221 N.Y.S. 404, 129 Misc. 377.

51. Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

23 C.J. p 877 note 34.

Sale without order and conveyance

A sale by the receiver without an order of the court, and, it has been held, without a conveyance to him by the debtor, passes no title.—Scott v. Elmore, 10 Hun, N.Y., 68.

52. Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

53. N.Y.—Monolithic Drain & Conduit Co. v. Dewsnap, 41 N.Y.S. 224, 25 N.Y.Civ.Proc. 380.

54. N.Y.—Matter of Patterson, 42 N.Y.S. 495, 12 App.Div. 123.

55. N.Y.—Hall v. Knott, 125 N.Y.S. 299, 69 Misc. 407.

56. N.Y.—Griffith v. Hadley, 23 N.Y.Super. 587.

57. N.Y.—Griffith v. Hadley, supra.

58. N.Y.—Lubliner v. Filomio, 11 N.Y.S.2d 714.

59. N.Y.—Faneuil Hall Nat. Bank v. Bussing, 42 N.E. 345, 147 N.Y. 665.

ceiver appointed in supplementary proceedings should be limited to the property of the debtor and to the right, title, and interest of the debtor in property of which he is not the absolute and sole owner.[60] The court is without power to order the sale of property to which a third person has record title without according such person an opportunity to be heard;[61] but a disposition, in obedience to an order of the court, of property taken as that of the debtor without knowledge of the claim of a third person does not constitute a conversion as to such person.[62]

A sale en masse should not be directed where sufficient can be realized by selling a portion of the property,[63] and it has been held that the sale of the interest of a debtor in a comparatively large fund should not be ordered where the judgment is small.[64]

The fact that property could be sold on execution has been held not to preclude its sale by the receiver.[65]

Personal property. Generally speaking, a receiver may sell personal property.[66] Choses in action should not be ordered sold, however,[67] unless they come under the head of desperate debts.[68]

Real property. It has been held that a receiver may sell an equitable[69] or dower[70] interest in realty, or the judgment debtor's interest in a fund which was produced by the sale of land in which the judgment debtor had a vested remainder in fee.[71] In some jurisdictions a receiver may sell real property of the judgment debtor without reserving an equity of redemption in the debtor's favor.[72] In other jurisdictions, however, the receiver is without general power to sell real estate,[73] at least if there is no reason why it cannot be sold on execution[74] and the effect of the sale would be to cut off or defeat the statutory right of redemption which the debtor has in the case of a sale under the execution.[75]

Property subject to liens. If property in the hands of the receiver is subject to liens, the court cannot direct its sale for the purpose of appropriating the proceeds to the payment of the costs and expenses of the receivership.[76]

Property held in trust cannot ordinarily be sold.[77]

c. Disposition of Funds

It is a duty of the receiver to apply money or effects in his hands to the payment of costs and expenses of the proceeding and debts due the creditors represented by him according to their priorities, and to restore anything remaining to the debtor or the debtor's successors in right. Claims of third persons to money or property in the receiver's hands or turned over by him to the judgment creditor cannot be determined on motion.

It is a duty of a receiver in proceedings supplementary to execution to apply money or effects in his hands to the payment of costs and expenses of the special proceeding and to the payment of debts due to the creditors represented by him according to their legal or equitable priorities, and to restore what remains, if anything, to the debtor or those who have succeeded to his rights.[78] Except on notice to the debtor, however, the court has no power to direct the receiver to apply moneys in his hands to the payment of anything but the judgment under which he was appointed or such other judgment or judgments as to which his receivership has been extended.[79]

60. Iowa.—Osborne v. Reardon, 44 N.W. 346, 79 Iowa 175.
23 C.J. p 877 note 36.

61. Colo.—Walker v. Staley, 1 P.2d 924, 89 Colo. 292.

62. N.Y.—Ochs v. Pohly, 84 N.Y.S. 1, 87 App.Div. 92.

63. N.Y.—Griffith v. Hadley, 23 N.Y. Super. 587—Wardell v. Leavenworth, 3 Edw. 244.

64. N.Y.—People v. McAdam, 1 N.Y. City Ct.Suppl. 38 note.

65. Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

66. **Seat or membership in stock exchange**
N.Y.—Roome v. Swan, 2 N.Y.S. 614, 15 N.Y.Civ.Proc. 344.
23 C.J. p 878 note 41.

67. S.C.—Dilling v. Foster, 21 S.C. 334.

68. S.C.—Dilling v. Foster, supra.

69. Kan.—Kiser v. Sawyer, 4 Kan. 503.

70. N.Y.—Payne v. Becker, 87 N.Y. 153.
23 C.J. p 878 note 47.

71. N.Y.—McGown v. Barnum, 75 N. E. 155, 182 N.Y. 547.

72. Wis.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.
Statutes held inapplicable
Statutes providing for redemption from execution sale or for the inclusion of a provision for redemption in judgments in actions for ejectment or unlawful detainer do not preclude a receiver from selling real property of the judgment debtor without reserving an equity of redemption in the debtor's favor.—U. S. Rubber Products v. Twin Highway Tire Co., supra.
Continuation of receivership
A judgment debtor is not entitled to time for redemption after a sale by a receiver in supplementary proceedings, especially where the receivership has been continued for his benefit for more than the usual period of redemption in the case of execution sales.—U. S. Rubber Products v. Twin Highway Tire Co., supra.

73. N.Y.—Chadeayne v. Gwyer, 82 N.Y.S. 198, 83 App.Div. 403.

74. N.Y.—Faneuil Hall Nat. Bank v. Bussing, 42 N.E 345, 147 N.Y. 665.
23 C.J. p 878 note 51.

75. N.Y.—Inglehart's Petition, Sheld. 514—Pfluger v. Cornell, 2 N.Y.City Ct. 145.

76. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

77. N.Y.—Scott v. Nevius, 13 N.Y. Super. 672.

78. N.Y.—Ward v. Petrie, 51 N.E. 1002, 157 N.Y. 301, 68 Am.S.R. 790, reversing 36 N.Y.S. 940, 92 Hun 605.
23 C.J. p 878 note 58.

79. N.Y.—Goddard v. Stiles, 90 N.Y. 199, reversing 25 Hun 63.

Where a receivership in a mortgage foreclosure suit is extended to supplementary proceedings, the creditor in the latter proceeding cannot obtain an order compelling the receiver to apply to the payment of his judgment a sum equal to the amount thereof, without regard to whether there was any surplus over the amount legally recoverable in the foreclosure suit;[80] nor should such order be granted while suits by the judgment creditor to set aside the mortgage and other judgments on the ground of fraud are pending.[81] The expense of a receivership cannot be given priority over the claims of mortgage creditors.[82]

The court may refuse to distribute a fund held by a foreign receiver.[83]

Determination of claims of third persons. Claims of third persons to money or property in the hands of the receiver or turned over by him to the judgment creditor cannot be determined on motion,[84] the proper remedy for such purpose being an action by the receiver, as noted infra § 393 a (2) (a). If the receiver undertakes to determine for himself who is entitled to the proceeds, he makes the distribution at his peril.[85]

The motion papers to procure an order directing the application of funds in the receiver's hands must show where judgment was originally recovered and out of what court the execution issued.[86]

Appeal from order. If notice of appeal is given from an order for the receiver to pay over moneys, he makes such payment at his peril before the disposition of the appeal.[87]

d. Requiring Accounting by Personal Representatives

A receiver of a party entitled to share in a decedent's estate may require decedent's personal representatives to account to him, but a receiver is not entitled to an accounting by an executor who is the judgment debtor.

A receiver of a party entitled as beneficiary or otherwise to share in a decedent's estate may require the personal representatives of the decedent to account to him,[88] but he has not such an interest in the estate as will entitle him to an accounting by an executor who is the judgment debtor.[89] It is the duty of the administrator of a deceased debtor to disclose to the receiver on request assets belonging to the intestate.[90]

e. As Party to Actions or Proceedings by Others

(1) In general
(2) Substitution in actions by debtor

(1) In General

A receiver in whom the debtor's rights of action and property have vested is a proper party to various actions involving rights or liabilities of the debtor.

A receiver in whom the debtor's rights of action and property have vested is a proper party to an action to set aside a judgment in favor of the debtor,[91] or an alleged fraudulent mortgage,[92] or to an action to apply land to payment of the judgment,[93] to partition land in which the debtor has an interest,[94] or where he has in his possession an instrument indemnifying the debtor against a cause of action sued on.[95]

Where neither the receiver nor the creditor is a party to an action, the former cannot be required in such action to pay over moneys received by him as the property of the debtor.[96]

Contest of probate of will. The receiver cannot contest the probate of a will which divests the debtor of all interest in the estate of another.[97]

(2) Substitution in Actions by Debtor

In a pending action by the debtor to recover claims against third persons the court may in its discretion substitute the receiver as plaintiff and permit him to prosecute the action for the benefit of the creditors whom he represents. Notice of the application for substitution is properly served on the judgment debtor's attorney in the action.

Where an action by the debtor to recover claims

80. N.Y.—Kenney v. South Shore Nat. Gas & Fuel Co., 94 N.E. 606, 201 N.Y. 89.

81. N.Y.—Kenney v. South Shore Nat. Gas & Fuel Co., supra.

82. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

83. N.J.—Harris v. Hibbard, Ch., 71 A. 737.

84. N.Y.—Twelfth Ward Bank v. Columbia Pub. Co., 99 N.Y.S. 908, 51 Misc. 62.
23 C.J. p 879 note 66.

85. N.Y.—In re Hone, 47 N.E. 798, 153 N.Y. 522.
Application to court for directions see supra § 390.

86. N.Y.—Galster v. Syracuse Sav. Bank, 29 Hun 594.

87. Wash.—Johnson v. Joslyn, 92 P. 413, 47 Wash. 531.

88. N.Y.—Matter of Beyea, 31 N.Y.S. 200, 10 Misc. 198.
23 C.J. p 879 note 74.

89. N.Y.—Worrall v. Driggs, 1 Redf. Surr. 449.

90. N.Y.—Reynolds v. Ætna Life Ins. Co., 51 N.Y.S. 446, 28 App.Div. 591, affirmed 55 N.E. 305, 160 N.Y. 635.

91. N.Y.—Tiffany v. Norris, 18 N.Y.S. 428, 28 Abb.N.Cas. 97.

92. N.Y.—Gere v. Dibble, 17 How. Pr. 31.

93. N.Y.—Moore v. Duffy, 26 N.Y.S. 340, 74 Hun 78.

94. N.Y.—Wood v. Powell, 38 N.Y.S. 196, 3 App.Div. 318.

95. U.S.—Moore v. Los Angeles Iron & Steel Co., C.C.Cal., 89 F. 73.

96. N.Y.—Galster v. Syracuse Sav. Bank, 17 N.Y.Wkly.Dig. 137.

97. N.Y.—In re Brown, 47 Hun 360.

against third persons is pending, the court in its discretion may substitute the receiver as plaintiff and permit him to prosecute the action for the benefit of the creditor or creditors whom he represents.[98] Such substitution is not a matter of right but rests in the discretion of the court,[99] especially where the receiver's interest is small as compared with that of other parties.[1] Where substituted, the receiver is bound by the acts and admissions of the original parties, to whose rights he has succeeded.[2]

Notice of the application for substitution is properly served on the attorney for the judgment debtor in the action.[3] The assignee of a claim against a debtor is not a necessary party to a motion by the receiver to be substituted for the debtor as plaintiff in an action brought by the latter on the claim.[4]

f. Employment of Attorney

Generally speaking, the court cannot require the receiver to employ any particular attorney. The receiver may, but need not, retain the judgment creditor's attorney who instituted or participated in the supplementary proceedings.

Generally speaking, the court cannot require the receiver to employ any particular attorney.[5] The receiver may,[6] but need not,[7] retain the attorney of the judgment creditor who instituted or participated in the supplementary proceedings. However, it has been held that an order substituting the receiver as plaintiff in a pending action by the judgment debtor should protect the judgment debtor's attorney, permitting him, if he so elect, to continue in the litigation for the preservation of his rights.[8]

Where the receiver is himself an attorney, it has been held that he cannot employ another attorney without an order by the court.[9]

g. Compensation

The court may award the receiver the expenses of the receivership and reasonable compensation for his services. The compensation depends on the duties involved, the size of the fund available for distribution, and the amounts of the judgment creditors' claims. Ordinarily the receiver should be permitted to deduct his commissions and expenses before paying over money in his hands.

The court has power to award to the receiver reasonable compensation for his services and to allow him in addition the expenses of the receivership.[10] If the expenses of the receivership are improperly refused, the receiver has a remedy by appeal.[11]

The compensation to which he is entitled depends on the duties which the position involves,[12] the size of the fund available for distribution, and the amounts of the claims of the judgment creditors.[13]

Ordinarily the receiver should be permitted to deduct his commission and expenses before paying over moneys in his hands.[14] However, where the receiver is appointed to sue to set aside alleged fraudulent transfers, it is improper to order the payment of the compensation and expenses of the receivership out of the debtor's property which may come into his hands from other sources; in such circumstances the costs and expenses should, rather, abide the results of the actions.[15] Where the receiver has no moneys in his hands at the termination of the receivership, the court has power, under some statutes at least, to make an allowance to the receiver only as against the party who moved for his appointment,[16] and then only on a showing of delinquency on the part of such party or of unusual merit in the receiver's services.[17]

Of attorneys. The court may make an allowance for the attorney for the receiver commensurate with the size of the fund available for distribution and the amounts of the claims of the judgment creditors.[18] Where the receiver is himself an attorney, however, it has been held that an attorney employed

98. N.Y.—Fitzpatrick v. Moses, 54 N.Y.S. 426, 34 App.Div. 242.
23 C.J. p 886 note 41.

99. N.Y.—In re Lansing, 17 N.Y. Wkly.Dig. 288.

1. N.Y.—Fitzpatrick v. Moses, 54 N.Y.S. 426, 34 App.Div. 242.

2. N.Y.—Forbes v. Waller, 25 N.Y. 430, 25 How.Pr. 166, affirming 17 N.Y.Super. 475.

3. N.Y.—Goddard v. Stiles, 90 N.Y. 199.

4. N.Y.—Fitzpatrick v. Moses, 54 N.Y.S. 426, 34 App.Div. 242.

5. N.Y.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571—Rondout First Nat. Bank v. Navarro, 17 N.Y.S. 900.

6. N.Y.—Baker v. Van Epps, 22 Hun 460, 60 How.Pr. 79.
23 C.J. p 879 note 72.

7. N.Y.—Powley v. Dorland Bldg. Co., 17 N.Y.S.2d 436, 173 Misc. 571—Moore v. Taylor, 40 Hun 56.

8. N.Y.—Fitzpatrick v. Moses, 54 N.Y.S. 426, 34 App.Div. 242.

9. N.Y.—First Nat. Bank v. Milbauer, 1 N.Y.S.2d 317, 165 Misc. 643.

10. N.Y.—Adams v. Elwood, 93 N.Y.S. 327, 104 App.Div. 138.
23 C.J. p 887 note 56.
Costs see infra § 402.

11. N.Y.—Monahan v. Fitzpatrick, 39 N.Y.S. 857, 16 Misc. 508.

12. N.Y.—Baldwin v. Eazler, 34 N.Y.Super. 274.

Statutes as to personal representatives and guardians do not limit the compensation to which a receiver in supplementary proceedings is entitled.—Baldwin v. Eazler, supra.

13. N.Y.—F. & M. Schaefer Brewing Co. v. Amsterdam Tavern, 12 N.Y.S.2d 701, 171 Misc. 352.

14. N.Y.—Gelster v. Syracuse Sav. Bank, 17 N.Y.Wkly.Dig. 137.

15. Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.

16. N.Y.—Williams & Co. v. Groveville Corporation, 8 N.Y.S.2d 204, 255 App.Div. 947.

17. N.Y.—First Nat. Bank v. Milbauer, 1 N.Y.S.2d 317, 165 Misc. 643.

18. N.Y.—F. & M. Schaefer Brewing

by him, unless by an order of the court, is not entitled to an allowance of compensation.[19] Where the receiver is substituted as plaintiff in a pending action by the judgment debtor, the judgment debtor is not bound by, and cannot be compelled by the court to adopt, an agreement, made without notice to him, between the judgment creditor and the judgment debtor's attorney fixing the amount of the fees of the attorney in the action.[20]

h. Liabilities

The receiver is liable to the debtor or creditor, as the case may be, for wrongful conduct or mismanagement of his property. He may also be required to account for property which may have come into his hands.

The receiver is liable to the debtor or creditor, as the case may be, for wrongful conduct or mismanagement of his property,[21] such as the sale of exempt property.[22] A person wrongfully deprived of his property by the receiver need not obtain leave of court to institute suit against him.[23]

Accounting. The receiver may be required to account for property which may have come into his hands.[24] Thus, on the death of the debtor, the debtor's personal representatives may compel an accounting as to the proceeds of real property conveyed to the receiver.[25] Where the receiver assumes to determine to whom a fund in his hands belongs, and erroneously pays it to persons not entitled, he may be compelled to account and justify his conduct, if he can.[26]

The court out of which the execution issued has jurisdiction, under some statutes, to require an accounting by a receiver appointed in proceedings supplementary to the execution.[27] Under other statutes, a person who questions the accuracy of an account rendered by the receiver to the judge who appointed him must apply for relief to such judge, and is not entitled to an accounting in the court of chancery, at least where the execution did not issue out of the court of chancery.[28]

§ 392. —— Title to and Rights in Property

a. In general
b. Particular property
c. Obtaining possession

a. In General

By express provision of statute in some jurisdictions the property of the judgment debtor vests in the receiver. The receiver holds such property for the judgment creditors to whose benefit the receivership inures.

By express provision of statute in some jurisdictions the property of the judgment debtor vests in a receiver appointed in proceedings supplementary to execution.[29] The title which he thus acquires is governed by the terms of the statute.[30] The receiver holds such property for the judgment creditor who procured his appointment,[31] and for other judgment creditors who may have procured an extension of the receivership for their benefit.[32]

Necessity of filing of bond. Where the proper filing of a bond by the receiver is required in order to make his appointment effective, the receiver has been held not to acquire rights with respect to the debtor's property prior to that time.[33] However, it has also been held that where the bond is not filed until after the order appointing the receiver, his title relates back to the date of the order.[34]

Co. v. Amsterdam Tavern, 12 N.Y.S.2d 701, 171 Misc. 352.

19. N.Y.—First Nat. Bank v. Milbauer, 1 N.Y.S.2d 317, 165 Misc. 643.

20. N.Y.—Goddard v. Stiles, 90 N.Y. 199, reversing 25 Hun 63.

21. N.Y.—Dewey v. Finn, 18 N.Y. Wkly.Dig. 558.

22. N.Y.—Finnin v. Malloy, 33 N.Y. Super. 382.

23. N.Y.—Dewey v. Finn, 18 N.Y. Wkly.Dig. 558.

24. N.Y.—Tillotson v. Wolcott, 48 N.Y. 188—Webber v. Hobbie, 13 How.Pr. 382.

25. N.Y.—Graham v. Lawyers' Title Ins. Co., 46 N.Y.S. 1055, 20 App. Div. 440.

26. N.Y.—In re Hone, 47 N.E. 798, 153 N.Y. 522—Barnes v. Courtright, 74 N.Y.S. 208, 37 Misc. 60.

27. N.Y.—In re James' Will, 236 N.Y.S. 363, 134 Misc. 645.

The surrogate's court in New York has jurisdiction to require an accounting by a receiver appointed by a justice of the supreme court in proceedings supplementary to an execution issued out of the surrogate's court.—In re James' Will, supra.

28. N.J.—Hackensack Sav. Bank v. Terhune, 23 A. 482, 50 N.J.Eq. 297.

29. Wash.—Pappas v. Taylor, 244 P. 390, 138 Wash. 22.

Property in custodia legis

The effect of an order appointing a receiver and granting an injunction is to place the property of the judgment debtor in custodia legis and preclude defendant from encumbering or disposing of it.—Sam Savin, Inc., v. Burdsal, 22 N.E.2d 914, 61 Ohio App. 539.

30. N.Y.—Maurice v. Travelers' Ins. Co., 201 N.Y.S. 369, 121 Misc. 427.

31. N.Y.—Kennedy v. Thorp, 51 N.Y. 174—Smith v. Meader Pen Corporation, 8 N.Y.S.2d 39, 255 App. Div. 397, reversing 6 N.Y.S.2d 919, 169 Misc. 238, affirmed 20 N.E.2d 13, 280 N.Y. 554—Ward v. Baker, 175 N.Y.S. 66, 185 App.Div. 652—Steinert v. Van Aken, 150 N.Y.S. 525, 165 App.Div. 206—In re Kaufman's Estate, 266 N.Y.S. 890, 149 Misc. 287.

Property which may be required to be delivered by the debtor see supra § 383.

32. N.Y.—Ward v. Baker, 175 N.Y.S. 66, 185 App.Div. 652—Steinert v. Van Aken, 150 N.Y.S. 525, 165 App. Div. 206—In re Kaufman's Estate, 266 N.Y.S. 890, 149 Misc. 287.

33. N.Y.—Mandelbaum v. Danziger, 267 N.Y.S. 117, 239 App.Div. 638.

34. N.Y.—Foley v. Equitable Life Assur. Soc. of U. S., 31 N.Y.S.2d 992, reversed on other grounds 33 N.Y.S.2d 917, 263 App.Div. 605.

b. Particular Property

(1) Personal property
(2) Real property
(3) Property transferred or encumbered
(4) Beneficial interest in trust
(5) Property held in representative capacity
(6) After-acquired property

(1) Personal Property

The title to personal property of the judgment debtor ordinarily passes to the receiver without an assignment. Such title vests in him, under some statutes, as of the time of filing the order appointing him or extending the receivership, but relates back for the judgment creditor's benefit to the time of service of the order for examination or warrant of arrest except as against a purchaser in good faith without notice and for a valuable consideration or against one to whom a debt has in good faith been paid after service of the order.

The title to personal property of the judgment debtor ordinarily passes to the receiver without an assignment.[35] All of the personal property of the debtor of a character to which the receiver is entitled should, regardless of amount, go to the receiver.[36] Generally speaking, the receiver steps into the shoes of the judgment debtor with respect to such property.[37]

The words "personal property," as used in a statute providing for the vesting of title in the receiver, comprehend money, chattels, things in action, and evidences of debt.[38] More specifically, property of the judgment debtor, title to which passes to the receiver, includes a bank account,[39] a debt due the judgment debtor,[40] a note payable to the debtor,[41] a seat in a stock exchange,[42] the interest of the debtor in the funds of an organization, where evidenced by a certificate of membership,[43] an award in eminent domain proceedings,[44] the interest of the judgment debtor in a partnership,[45] the interest of the judgment debtor in a fund provided for payment of a public contract which he has performed,[46] surplus in the hands of a sheriff after satisfaction of a prior judgment,[47] and installments of alimony falling due in the future under a decree previously rendered.[48] The receiver will not become vested, however, with rights which are not capable of alienation,[49] or those to which no right is given by the statute authorizing the proceedings;[50] nor is he entitled to property[51] or the proceeds of property[52] which is exempt from levy and sale under an execution.

A receiver acquires the title which a judgment debtor has in annuities at the time of institution of the supplementary proceedings,[53] and title to a life insurance policy payable to the debtor a certain number of years after date, or to his estate if deceased, owned by the debtor when the receiver was appointed;[54] but he does not acquire any title to a policy on the life of the debtor which is payable to a third person,[55] at least where the policy would lapse on a failure to pay premiums.[56]

35. N.Y.—Leonard v. Fink, 196 N.Y.S. 316, 119 Misc. 370.
23 C.J. p 879 note 89.

36. S.C.—Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 97 S.E. 833, 111 S.C. 299.

37. N.Y.—McCabe v. Union Dime Sav. Bank, 268 N.Y.S. 449, 150 Misc. 157.

38. N.Y.—McCorkle v. Herrman, 22 N.E. 943, 117 N.Y. 297, reversing 5 N.Y.S. 881.

39. N.Y.—Matter of Weld, 54 N.Y.S. 253, 34 App.Div. 471—Levy v. Cavanagh, 15 N.Y.Super. 100.

40. N.Y.—McCorkle v. Herrman, 22 N.E. 948, 117 N.Y. 297, reversing 5 N.Y.S. 881.

41. N.Y.—Briggs v. Merrill, 58 Barb. 389.

42. N.Y.—Londheim v. White, 67 How.Pr. 467.
23 C.J. p 880 note 97.

43. N.Y.—Dease v. Reese, 80 N.Y.S. 590, 39 Misc. 657.

44. N.Y.—Fawcett v. New York, 98 N.Y.S. 286, 112 App.Div. 155.

45. N.Y.—Lovins v. Laub, 147 N.Y.S. 304, 85 Misc. 336.

46. N.Y.—John Mulstein Co. v. New York, 107 N.E. 651, 213 N.Y. 308, affirmed 144 N.Y.S. 1122, 160 App. Div. 890.

47. N.Y.—Salter v. Bowe, 32 Hun 236.

48. N.Y.—Stevenson v. Stevenson, 34 Hun 157.

49. U.S.—Waterman v. Shipman, N.Y., 55 F. 982, 5 C.C.A. 371.

50. N.J.—Howell v. McDowell, 1 A. 474, 47 N.J.Law 359.
N.Y.—Matter of Stoddard, 113 N.Y.S. 157, 128 App.Div. 759.

51. N.Y.—Cooney v. Cooney, 65 Barb. 524.
23 C.J. p 880 note 7.

52. N.Y.—Bliss v. Raynor, 36 N.Y.S. 156, 91 Hun 250.
23 C.J. p 880 note 8.

53. N.Y.—Foley v. Foley, 12 N.Y.S. 2d 85, 257 App.Div. 154.

54. N.Y.—Reynolds v. Ætna L. Ins. Co., 39 N.Y.S. 885, 6 App.Div. 254, 256, 261, reversed on other grounds 42 N.Y.S. 1058, 11 App.Div. 99.

Not limited to surrender value

The right of the receiver to such a policy is not limited to its surrender value.—Reynolds v. Ætna L. Ins. Co., 55 N.E. 305, 160 N.Y. 635, affirming 51 N.Y.S. 446, 28 App.Div. 591—Abraham v. Abraham, 278 N.Y.S. 863, 155 Misc. 574.

Receiver's lack of knowledge immaterial

The title to such a life insurance policy passes to the receiver although its existence may have been unknown to the receiver at the time of his appointment—Reynolds v. Ætna L. Ins. Co., 55 N.E. 305, 160 N.Y. 635, affirming 51 N.Y.S. 446, 28 App.Div. 591.

55. N.Y.—Gershman v. Berliner, 211 N.Y.S. 881, 214 App.Div. 196.

Effect of power to change beneficiary

This has been held to be true even where the owner of the policy has power to change the beneficiary.—Gershman v. Berliner, supra.

Beneficiary's right to possession

The beneficiary is entitled to possession of the policy as against the receiver, notwithstanding a possibility that the beneficiary may predecease the debtor or that the debtor may transfer to himself the beneficial ownership.—Gershman v. Berliner, supra.

56. N.Y.—Masten v. Amerman, 4 N.Y.S. 681, 51 Hun. 244, reversing 20 Abb.N.Cas. 443.

The right of a receiver to money which the judgment debtor has deposited with a third person is superior to that of another who advanced the money, even where the advancement was for the purpose of making the deposit.[57]

When title vests. By some statutes, title vests in the receiver as of the time of filing the order appointing him[58] or extending the receivership,[59] as the case may be. When it has become vested it may extend back, however, by relation, for the benefit of the judgment creditor who instituted the proceedings, to the time of the service of the order for examination or warrant of arrest,[60] but this doctrine is invoked only where necessary to effect justice,[61] and the title of a purchaser in good faith without notice and for a valuable consideration, or the payment of a debt in good faith, is protected where made after the service of the order for examination but before the appointment of the receiver.[62] Independently of statute, where the debtor assigns property after supplementary proceedings commenced to one who has knowledge of the order for examination, the assignee's title is inferior to that of a receiver subsequently appointed.[63]

The burden is on the receiver to establish a right prior to that acquired under legal or equitable assignments by the judgment debtor,[64] and in the absence of proof as to the date of institution of supplementary proceedings, the rights of a receiver appointed subsequent to such an assignment will be deemed inferior to those acquired under the assignment.[65]

Effect of debtor's death. If the debtor dies before the making or filing of the order of appointment, his property or effects do not vest in the receiver,[66] but the title of the receiver, when once vested, will not be divested by the subsequent death of the debtor.[67]

Effect of orders in other proceedings. The receiver's title is not affected by an order made in a proceeding to which he is not a party.[68]

(2) Real Property

In the absence of statute, title to realty does not vest in the receiver merely by reason of his appointment. Under some statutes, however, a qualified title to real property vests in the receiver, without a conveyance or assignment from the debtor, from the time when the order appointing him or extending the receivership is filed with the clerk of the county where the real property is situated, and, under others, on an order of the court appointing the receiver for the judgment debtor's property, interests, rights, and so forth.

In the absence of statute, title to realty does not vest in the receiver, merely on his appointment.[69] However, a conveyance of the property by the debtor to the receiver vests in the latter the debtor's title or interest.[70]

Under some statutes, real property of a judgment debtor vests in the receiver, without a conveyance or assignment from the debtor, from the time when the order or a certified copy thereof appointing the

57. N.J.—Building & Loan Ass'n Harmonia v. Wolfskeil, 96 A. 89, 85 N.J.Eq. 218.

58. N.Y.—In re Ewald's Estate, 22 N.Y.S.2d 299, 174 Misc. 939—Collins v. Connelly, 212 N.Y.S. 369, 125 Misc. 871—Gilkey v. Koch, 201 N.Y.S. 703.
23 C.J. p 880 note 9.

Where debtor resides in other county
If the appointment is made in a county other than that of the debtor's residence, his property vests in the receiver only from the time of filing a certified copy of the order of receivership with the clerk of the county of such residence.—In re Wagenfohr, D.C.N.Y., 39 F.Supp. 117—23 C.J. p 880 note 9 [a].

Statutes governing particular rights
In proceedings under the New York Civil Practice Act on conflicting claims of a receiver and an assignee under an earlier assignment of personal property of the debtor, the rights of the receiver have been held governed by the article of the Act which was effective at the time of an order for examination of the debtor and the appointment of the receiver, while the rights of the assignee were governed by language of the Act which was in force at the time of the assignment.—In re Sullivan's Estate, 299 N.Y.S. 232, 164 Misc. 491.

59. N.Y.—In re Ewald's Estate, 22 N.Y.S.2d 299, 174 Misc. 939.

60. U.S.—In re McAllister, C.C.A. N.Y., 7 F.2d 9—In re Wagenfohr, D.C.N.Y., 39 F.Supp. 117.
N.Y.—Herlihy v. Watkins, 300 N.Y.S. 242, 252 App.Div. 605—Rockwood & Co. v. Trop, 208 N.Y.S. 459, 212 App.Div. 883, reversing 207 N.Y.S. 507, 211 App.Div. 421—In re Kaufman's Estate, 266 N.Y.S. 890, 149 Misc. 287—Rosen v. Lipshitz, 266 N.Y.S. 797, 149 Misc. 144—Foley v. Equitable Life Assur. Soc. of U. S., 31 N.Y.S.2d 992.
23 C.J. p 880 note 10.

Property in hands of person to be examined
A receiver's title extends to personal property of judgment debtor which was in hands or under control of person required to attend and be examined at time of service of order or subpœna.—In re Ewald's Estate, 22 N.Y.S.2d 299, 174 Misc. 939.

61. N.Y.—In re Sullivan's Estate, 299 N.Y.S. 232, 164 Misc. 491.

62. N.Y.—In re Sullivan's Estate, supra.
23 C.J. p 880 note 11.

Assignee for benefit of creditors
is not a bona fide purchaser without notice and for a valuable consideration.—Rosen v. Lipshitz, 266 N.Y.S. 797, 149 Misc. 144.

63. N.J.—Coleman v. Roff, 45 N.J. Law 7.

64. N.Y.—In re Kitching's Will, 253 N.Y.S. 112, 141 Misc. 704.

65. N.Y.—In re Kitching's Will, supra.

66. N.C.—Rankin v. Minor, 72 N.C. 424.

67. N.Y.—Reynolds v. Ætna L. Ins. Co., 55 N.E. 305, 160 N.Y. 635, affirming 51 N.Y.S. 446, 28 App.Div. 591.

68. N.Y.—Rogers v. Corning, 44 Barb. 229.

69. N.J.—Boid v. Dean, 21 A. 618, 48 N.J.Eq. 193.

70. N.Y.—Graham v. Lawyers' Title Ins. Co., 46 N.Y.S. 1055, 20 App. Div. 440, 4 N.Y.Ann.Cas. 379—Maples v. O'Brien, 116 N.Y.S. 175.

receiver or extending the receivership is filed with the clerk of the county where the real property is situated.[71] Notwithstanding the broad language of such statutes, however, it is held that the title is a qualified one[72] and amounts only to a right of possession as security for, or as a means of satisfying, the judgment;[73] that the judgment debtor retains the legal title, which he may convey subject to the receiver's right to resort to it to pay the judgment;[74] and that the receiver's right is divested when the property is sold under execution and a deed given to the purchaser,[75] or when the judgment lien terminates by the expiration of the statutory ten years.[76] The statutes do not apply so as to vest in the receiver title to real property on which the judgment or order on which the supplementary proceedings are based is not a lien.[77]

Under other statutes, the judgment debtor's beneficial interest in real property will pass to the receiver on an order of the court appointing the receiver for the property, interests, rights, and so forth, of the judgment debtor, in so far as may be necessary to effectuate the purpose of the supplementary proceedings.[78]

(3) Property Transferred or Encumbered

A receiver acquires no better or other title than the debtor had; that is, he does not acquire title to property assigned or transferred before the time when title vests in him, and takes property subject to all bona fide burdens previously imposed on it. A transfer by the debtor or a third party after title has vested in the receiver does not divest or affect his title, although an action may be necessary to set aside the transfer.

A receiver appointed in supplementary proceedings acquires no better or other title than the debtor had.[79] Thus, a receiver does not become vested with the title to property assigned or transferred prior to the time when title vests in him;[80] and, while he is entitled to take charge of such property where the transfer was wrongful,[81] he can do so only by means of an action to test the validity of the transfer.[82] Likewise, he takes the property subject to all burdens imposed by the debtor,[83] and subject to bona fide claims, liens, and encumbrances thereon.[84] He takes subject to existing mortgages.[85] Title to personal property pledged by the debtor passes to the receiver, subject to the pledge.[86] The receiver takes free from a mechanic's lien which was not perfected at the time the title of the receiver vested.[87]

A receiver's rights in property of the debtor are subordinate to those of bona fide purchasers without notice.[88]

Transfer after title vests in receiver. A transfer by the debtor or a third party made after the time

71. N.Y.—Wood v. Powell, 38 N.Y.S. 196, 3 App.Div. 318, 320, 73 N.Y. St. 689.
23 C.J. p 881 notes 17, 18.

On appointment of receiver
Under an earlier statute, title to the debtor's real property vested in the receiver on completion of his appointment.—Porter v. Williams, 9 N.Y. 142, 59 Am.D. 519, 5 Seld 142, 12 How.Pr. 107, Seld Notes 202.

72. N.Y.—Faneuil Hall Nat. Bank v. Bussing, 42 N.E. 345, 147 N.Y. 665—Damers v. Sternberger, 102 N.Y.S. 740, 52 Misc. 532.

73. N.Y.—Chadeayne v. Gwyer, 82 N.Y.S. 198, 83 App.Div. 453.
23 C.J. p 881 note 20.

74. N.Y.—Faneuil Hall Nat. Bank v. Bussing, 42 N.E. 345, 147 N.Y. 665—Moore v. Duffy, 26 N.Y.S. 340, 74 Hun 78.

75. N.Y.—Chadeayne v. Gwyer, 82 N.Y.S. 198, 83 App.Div. 403.
23 C.J. p 881 note 22.

76. N.Y.—Hall v. Senior, 106 N.Y.S. 29, 54 Misc. 463.

77. N.Y.—Matter of Stoddard, 113 N.Y.S. 157, 128 App.Div. 759.
23 C.J. p 881 note 24.

78. **Leasehold**
The judgment debtor's beneficial interest in a leasehold passes to a receiver appointed for the "property, equitable interests, rights," and so forth, of the judgment debtor.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.

79. N.Y.—Klinger v. New York State Nat Bank, 271 N.Y.S. 252, 151 Misc. 903.
23 C.J. p 882 note 32.

80. N.Y.—Klinger v. New York State Bank, 271 N.Y.S. 252, 151 Misc. 903—In re Leverich's Will, 238 N.Y.S. 533, 135 Misc. 774, affirmed 251 N.Y.S. 870, 234 App. Div. 625.
23 C.J. p 881 note 31.
Relation back of title to personal property see supra subdivision b (1) of this section.

Disaffirmance of minor's transfer
A receiver has no greater right to disaffirm a transfer which the judgment debtor made during his minority than has the debtor himself.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.

Money collected by judgment creditor
A receiver has been held not entitled to money which the judgment creditor had collected from the debtor prior to the receiver's appointment.—First Nat. Bank v. Milbauer, 1 N.Y.S.2d 317, 165 Misc. 643.

81. S.C.—Gardner v Kirven, 175 S.E. 637, 173 S.C. 302.

82. Minn.—Bean v. Heron, 67 N.W. 805, 65 Minn. 64.
23 C.J. p 881 note 31.

83. N.Y.—Corey v. Harte, 21 N.Y. Wkly.Dig. 247.
Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

84. N.Y.—Smith v. Meader Pen Corporation, 8 N.Y.S.2d 39, 255 App. Div. 397, reversing 6 N.Y.S.2d 919, 169 Misc. 238, affirmed 20 N.E.2d 13, 280 N.Y. 554.
23 C.J. p 882 note 34.

85. N.Y.—Manning v. Monoghan, 14 N.Y.Super. 459, reversed on other grounds 23 N.Y. 539.
Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.
23 C.J. p 882 note 35.

86. N.Y.—Armstrong v. McLean, 47 N.E. 912, 153 N.Y. 490—Powell v. Waldron, 89 N.Y. 328, 42 Am.R. 301.
23 C.J. p 882 note 36.

87. N.Y.—McCorkle v. Herrman, 22 N.E. 948, 117 N.Y. 297, reversing 5 N.Y.S. 881.
23 C.J. p 882 note 37.

88. Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333.

when title vests in the receiver does not divest him of his title nor affect it,[89] although it may be necessary to resort to an action to set aside the transfer.[90]

(4) Beneficial Interest in Trust

A receiver is not vested with title to real property held in trust for the judgment debtor, or with the income of a fund held in trust for the judgment debtor's support, except as to a surplus determined or conceded to exist.

A receiver is not vested with title to real property held in trust for the judgment debtor;[91] nor does the income of a fund held in trust for the support of a judgment debtor vest in the receiver,[92] except as to a surplus[93] which has been determined or conceded to exist.[94]

(5) Property Held in Representative Capacity

A receiver does not take title to property held by the judgment debtor in a representative capacity.

A receiver does not take title to property held by the judgment debtor in a representative capacity.[95]

(6) After-Acquired Property

Although the rule has been changed by statute in some jurisdictions, in the absence of such a statute a receiver takes no title to after-acquired property of the judgment debtor except by extension of the receivership as provided by law.

Although the rule has been changed by statute in some jurisdictions,[96] in the absence of such a statute a receiver takes no title to property acquired by the debtor after the time when, in the particular jurisdiction, title to the property of the judgment debtor vests in the receiver,[97] except by due extension of the receivership as provided by law.[98] For example, the receiver cannot sue on a cause of action which has accrued to the judgment debtor after the appointment of the receiver.[99] Wages not fully earned do not vest in the receiver.[1] However, the receiver takes whatever title the debtor has in a partially performed contract.[2]

c. Obtaining Possession

A receiver may take possession of property assigned by the debtor but allowed by the assignee, without claim on his part, to remain under the debtor's control. He cannot take forcible possession, however, of property in the hands of a third person claimant; and his right to possession is subordinate to that of prior lienors.

A receiver may take possession of property assigned by the debtor but allowed by the assignee, without claim on his part, to remain under the debtor's control.[3] He cannot take forcible possession, however, of property in the hands of a third person claiming the same.[4] Likewise, whatever right of possession the receiver may have at the time of his appointment is subordinate to the right of prior lienors to take possession whenever the provisions in their conveyances, conferring the right, become operative.[5]

§ 393. —— Actions

a. Right to maintain
b. Defenses
c. Jurisdiction
d. Parties
e. Pleading
f. Evidence and trial
g. Recovery

89. N.Y.—Fitzpatrick v. Moses, 54 N.Y.S. 426, 34 App.Div. 242.
23 C.J. p 881 note 27.

Assignment of claims

The title of a receiver to claims of the debtor is superior to that of an assignee of the claims under an assignment by the debtor made subsequent to the filing of the order of receivership.—Fitzpatrick v. Moses, supra—Foley v. Equitable Life Assur. Soc. of U. S., 19 N.Y.S.2d 502, 173 Misc. 1031—Foley v. Equitable Life Assur. Soc. of U. S., 31 N.Y.S. 2d 992, reversed on other grounds 33 N.Y.S.2d 917, 263 App.Div. 605—Gilkey v. Koch, 201 N.Y.S. 703—23 C.J. p 881 note 27 [a].

Transfer to receiver of corporation

A transfer of policies of insurance on the life of a debtor to a receiver of a corporation thereafter appointed does not affect the prior rights of the receiver in supplementary proceedings.—Reynolds v. Ætna L. Ins. Co., 55 N.E. 305, 160 N.Y. 635, affirming 51 N.Y.S. 446, 28 App. Div. 591—23 C.J. p 881 note 30.

90. N.Y.—William A. Thomas Co. v. Lowenthan, 113 N.Y.S. 1092.

91. N.J.—Bold v. Dean, 21 A. 618, 48 N.J.Eq. 193.
N.Y.—Sonnabend v. Gittins, 257 N. Y.S. 562, 235 App.Div. 483.

92. N.Y.—Continental Trust Co. v. Witmore, 21 N.Y.S. 746, 67 Hun 9.

93. N.Y.—McEwen v. Brewster, 19 Hun 337.
23 C.J. p 882 note 42.

94. N.Y.—Graff v. Bonnett, 31 N.Y. 9, 88 Am.D. 236, affirming 25 N.Y. Super. 54, 25 How.Pr. 470—Genet v. Foster, 18 How.Pr. 50.

95. N.Y.—Jones v. Arkenburgh, 98 N.Y.S. 532, 112 App.Div. 483.

96. N.Y.—Herlihy v. Watkins, 10 N. Y.S.2d 7, 256 App.Div. 339—Frederick Wachter, Inc. v. Rogers, 2 N.Y.S.2d 657, 165 Misc. 880.

97. N.Y.—Continental Trust Co. v. Wetmore, 21 N.Y.S. 746, 67 Hun 9—New York Plumbers' Specialties Co. v. Stein, 250 N.Y.S. 220, 140 Misc. 161, reversing 240 N.Y.S. 834, 136 Misc. 703.
23 C.J. p 882 note 44.

98. N.Y.—Murphy v. Crane, 142 N. Y.S. 972, 157 App.Div. 609.

99. N.Y.—Norcross v. Hollingsworth, 31 N.Y.S. 627, 83 Hun 127.

1. N.Y.—Browning v. Bettis, 8 Paige 568.

2. N.Y.—Boynton v. Seibert, 68 N. Y.S. 562, 33 Misc. 310.
23 C.J. p 882 note 47.

3. N.Y.—Eastern Nat. Bank v. Hulshizer, 2 N.Y.St. 115.
23 C.J. p 882 note 49.

4. N.Y.—Dewey v. Finn, 18 N.Y. Wkly.Dig. 558.
Order for payment or delivery of property see supra § 383.

5. Wyo.—Laramie First Nat. Bank v. Cook, 76 P. 674, 78 P. 1083, 12 Wyo. 492, 2 L.R.A.,N.S., 1012.

a. Right to Maintain

(1) In general
(2) Disputed indebtedness or ownership
(3) Property transferred
(4) Trust property

(1) In General

Broadly speaking, the authority of a receiver in supplementary proceedings to maintain an action is dependent on statute. He may bring an action in a proper case in order to effectuate the purpose of the receivership, but only where he has acquired title or a right to the property sought to be reached and where the creditor or judgment debtor might have brought a similar action. A demand is sometimes a condition precedent, and leave of court may be necessary. When authorized by statute or the order appointing him, he may sue in his own name as receiver.

Broadly speaking, the authority of a receiver in supplementary proceedings to maintain an action is dependent on statute.[6] He may bring an action in a proper case in order to effectuate the purpose of the receivership,[7] but only where the title to the property or money sought to be reached has vested in him, or he has acquired a right to it by reason of his appointment,[8] and where the creditor or judgment debtor might have brought a similar action.[9] The receiver succeeds to all the rights of action of the debtor,[10] but he cannot necessarily maintain an action in every instance in which the creditor can do so.[11]

An action cannot be maintained by the receiver where the relief can be obtained in the proceedings.[12]

Demand. Where a demand is a condition precedent to the particular action, it must be made.[13]

Leave of court. While it is the better practice for the receiver to procure the leave of the court to institute an action, and the procurement of such leave is ordinarily necessary,[14] there are decisions to the effect that the receiver has general power to institute actions, and that no leave to do so is necessary.[15]

If the party objecting had actual notice of the application for leave to sue, no further notice is necessary.[16]

Time. A receiver's action must be brought within the time fixed by the statute of limitations.[17] Relief in equity is properly denied where the receiver has been guilty of unreasonable delay in instituting the suit after acquiring knowledge of the facts giving rise to the cause of action.[18]

In whose name brought. When so authorized by statute,[19] or by the order appointing him,[20] the receiver may sue as such in his own name.

Particular actions. In addition to particular actions considered infra subdivisions a (2), (3), (4) of this section, a receiver may maintain an action for an accounting as to funds and securities of the debtor in the hands of a third person, and to compel payment and delivery over to the receiver;[21] to recover property in the possession of a third person;[22] to enforce an equitable lien to which the debtor is entitled;[23] to recover the surplus on an execution or judicial sale of the debtor's property;[24] to admeasure dower of the debtor;[25] to recover usurious sums paid by the debtor;[26] to compel a

6. N.Y.—King v. Corning Trust Co., 223 N.Y.S. 446, 129 Misc. 838, affirmed 225 N.Y.S. 848, 222 App.Div. 717.

7. N.Y.—Steinert v. Van Aken, 150 N.Y.S. 525, 165 App.Div. 206.
23 C.J. p 882 note 52.

8. N.Y.—Wright v. Nostrand, 94 N.Y. 31, reversing 47 N.Y.Super. 441—Gardner v. Smith, 29 Barb. 68.

9. N.Y.—Stephens v. Meriden Britannia Co., 54 N.E. 781, 160 N.Y. 178, 73 Am.S.R. 678, reversing 43 N.Y.S. 226, 13 App.Div. 268.
23 C.J. p 883 note 55.

Where creditor has resorted to other remedy

The receiver cannot sue in behalf of the creditor where the creditor has precluded himself by resorting to another remedy.—Kennedy v. Thorp, 51 N.Y. 174, reversing 2 Daly 258, 3 Abb.Pr.,N.S., 131.

10. N.Y.—Porter v. Williams, 9 N.Y. 142, 59 Am.D. 519, 12 How.Pr. 107, affirming 5 How.Pr. 441, Code Rep.,N.S., 144, 9 N.Y.Leg.Obs. 307.

11. N.Y.—Ward v. Petrie, 51 N.E. 1002, 157 N.Y. 301, 68 Am.S.R. 790, reversing 36 N.Y.S. 940, 92 Hun 605—Underwood v. Sutcliffee, 77 N.Y. 58.
23 C.J. p 883 note 58.

12. N.Y.—Richards v. Allen, 3 E.D. Smith 399.
23 C.J. p 883 note 68.

13. N.Y.—Delahunty v. Hake, 41 N.Y.S. 896, 10 App.Div. 230.
23 C.J. p 883 note 59.

14. N.Y.—Hyatt v. Dusenbury, 5 N.Y.St. 846, 12 N.Y.Civ.Proc. 152.
23 C.J. p 885 note 93.

15. N.Y.—Rockwell v. Merwin, 45 N.Y. 166, affirming 31 N.Y.Super. 484, 3 Abb.Pr.,N.S., 330.
N.C.—Weill v. Wilmington First Nat. Bank, 11 S.E. 277, 106 N.C. 1.
Wis.—Wisconsin Trust Co. v. Jenkins, 86 N.W. 153, 110 Wis. 531.

16. N.Y.—McMahon v. Shary, 114 N.Y.S. 852, 62 Misc. 236.

17. N.Y.—Van Loan v. New York, 92 N.Y.S. 734, 45 Misc. 482, affirmed 94 N.Y.S. 221, 105 App.Div. 572.

18. N.Y.—Rondout First Nat. Bank v. Navarro, 17 N.Y.S. 900.

19. N.J.—Miller v. Mackenzie, 29 N.J.Eq. 291.
23 C.J. p 883 note 73.

20. Ind.—Garver v. Kent, 70 Ind. 428.

21. N.Y.—Armstrong v. McLean, 47 N.E. 912, 153 N.Y. 490, reversing 36 N.Y.S. 764, 92 Hun 397.

22. N.Y.—Brein v. Light, 72 N.Y.S. 655, 36 Misc. 110, affirmed 76 N.Y.S. 935, 37 Misc. 771.

Moneys

N.Y.—Herlihy v. Watkins, 10 N.Y.S. 2d 7, 256 App.Div. 339.

23. N.J.—Walsh v. Rooso, 44 A. 708, 41 A. 669, 59 N.J.Eq. 123.

24. N.Y.—Davenport v. McChesney, 86 N.Y. 242.

25. N.Y.—Payne v. Becker, 87 N.Y. 153.

26. N.Y.—Palen v. Bushnell, 18 Abb. Pr. 301, reversed on other grounds 46 Barb. 24.

person for whom the judgment debtor is a surety to satisfy the debt;[27] and for conversion by the debtor of property which has vested in the receiver.[28] In a proper case a receiver may also invoke the remedy of injunction.[29]

He cannot sue to collect attached debts;[30] and he does not obtain such a title to or interest in the debtor's real estate as will entitle him to bring an action of partition.[31]

(2) Disputed Indebtedness or Ownership

Where an alleged indebtedness to the debtor or the ownership of property is disputed, the proper remedy generally is an action by the receiver to determine the fact of indebtedness or ownership.

Where an alleged indebtedness of a third person to the debtor is denied, or the ownership of property is disputed, the proper remedy generally is an action by the receiver to determine the fact of indebtedness or ownership.[32] A receiver should not sue unnecessarily to obtain a judgment that certain money is the property of the judgment debtor and to direct its application where the ownership has already been decided in the supplementary proceedings and all further necessary orders may be made therein.[33]

(3) Property Transferred

A receiver may maintain an action to set aside a transfer wrongfully or fraudulently made. He cannot, however, bring an action at law to recover damages for conversion of the property. Authority from the creditor to maintain an action to set aside a conveyance is sometimes required.

A receiver may prosecute an action to annul or set aside a transfer wrongfully or fraudulently made, with like effect as though the action were instituted by the judgment creditor.[34] He cannot, however, sue to set aside an assignment by the debtor for frauds perpetrated by the latter on others than the judgment creditor;[35] neither can he collaterally attack an assignment expressly authorized by statute.[36]

His rights in this respect are not confined to the property transferred, but he can follow, in equity, the proceeds into the possession of any person who is not a bona fide holder or owner thereof.[37] He cannot, however, bring an action at law to recover damages for conversion of the property,[38] nor can he bring an action to recover damages for conspiracy wrongfully to transfer the debtor's property in anticipation of the rendition of judgment.[39]

The death of the judgment creditor will not preclude the receiver from prosecuting the action, where the deceased has left heirs or next of kin entitled to any money collected on the judgment on which the supplementary proceeding is based.[40]

The right of the receiver to sue is not exclusive of the right of the judgment creditor to sue.[41]

Authority from the creditor to maintain an action to set aside a conveyance as a cloud on title so as to subject the property to the execution is sometimes required.[42]

Election. Where the receiver has elected to take

27. Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333.

28. N.Y.—Gardner v. Smith, 29 Barb. 68.

29. N.Y.—Hughes v. McKenzie, 14 N.Y.S. 352.
S.C.—Globe Phosphate Co. v. Pinson, 29 S.E. 549, 52 S.C. 185.
23 C.J. p 883 note 70.

30. N.Y.—Andrews v. Glenville Woolen Co., 11 Abb.Pr.,N.S., 78.

31. N.Y.—Payne v. Becker, 87 N.Y. 153, reversing 22 Hun 28.
23 C.J. p 884 note 89.

32. N.Y.—Bank of Richmondville v. Hicks, 197 N.Y.S. 369.
Wis.—Nick v. Holtz, 297 N.W. 387, 237 Wis. 407—Paradise v. Giannini, 247 N.W. 472, 211 Wis. 42.
23 C.J. p 883 note 75.
Adjudication of indebtedness or title on examination see supra § 378.

33. N.C.—Wilson v. Chichester, 12 S.E. 139, 107 N.C. 386, 10 L.R.A. 572.

34. Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333—Dunham v. Byrnes, 30 N.W. 402, 36 Minn. 106.
N.Y.—Leonard v. Fink, 196 N.Y.S. 316, 119 Misc. 370.
S.C.—Gardner v. Kirven, 175 S.E. 637, 639, 173 S.C. 302, quoting **Corpus Juris.**
23 C.J. p 884 note 78.
Revocation of trust created by debtor for own benefit see infra subdivision a (4) of this section.

Unfiled chattel mortgage

The receiver may sue in the right of the judgment creditor to set aside an unfiled chattel mortgage which by virtue of statute is void as to creditors.—Stephens v. Perrine, 39 N. E. 11, 143 N.Y. 476—Mandeville v. Avery, 26 N.E. 951, 124 N.Y. 376, 21 Am.S.R. 678.

Authorization by court or judge

In a proper case the court or judge may authorize the receiver to institute suits to determine the good faith of transfers by the judgment creditor.
N.Y.—McMahon v. Shary, 114 N.Y.S. 852, 62 Misc. 286.
Wash.—Smith v. Weed, 134 P. 1070, 75 Wash. 452.

35. N.Y.—Kennedy v. Thorp, 51 N. Y. 174, reversing 2 Daly 258, 3 Abb.Pr.,N.S., 131.
23 C.J. p 884 note 80.

36. N.Y.—Herman v. Goodson, 42 N. Y.S. 696, 18 Misc. 604.

37. N.Y.—Stephens v. Perrine, 39 N. E. 11, 143 N.Y. 476, reversing 24 N.Y.S. 21, 69 Hun 578.
23 C.J. p 884 note 83.

38. N.Y.—Stephens v. Meriden Britannia Co., 54 N.E. 781, 160 N.Y. 178, 73 Am.S.R. 678, 30 N.Y.Civ. Proc. 192, reversing 43 N.Y.S. 226, 18 App.Div. 268—Berliner v. Kuttnerr, 147 N.Y.S. 308, 85 Misc. 461.

39. N.Y.—Ward v. Petrie, 51 N.E. 1002, 157 N.Y. 301, 68 Am.S.R. 790, reversing 36 N.Y.S. 940, 92 Hun 605.

40. N.Y.—Palen v. Bushnell, 13 N.Y. S. 785, 18 N.Y.Civ.Proc. 56.

41. N.Y.—Ullman v. Cameron, 93 N. Y.S. 976, 105 App.Div. 159, affirmed 78 N.E. 1074, 186 N.Y. 339, 116 Am. S.R. 553.
23 C.J. p 884 note 82.

42. N.Y.—Wright v. Nostrand, 94 N. Y. 31, reversing 47 N.Y.Super. 441.
23 C.J. p 884 note 88.

a personal judgment against the transferee, he is not entitled to a judgment setting aside the conveyance.[43]

(4) Trust Property

A receiver has no actionable interest in property held in trust for the judgment debtor, especially where the trust was not created by the debtor himself; nor can he maintain an action to reach income of a trust fund remaining after satisfying the provisions of the trust.

A receiver has no actionable interest in property or moneys held in trust for the judgment debtor, where the trust was not created by the debtor himself, but the creditor himself must proceed by an action in equity.[44] In some circumstances he has even been held not entitled to maintain an action to revoke a trust created by the judgment debtor for his own benefit;[45] nor can he maintain an action to reach so much of the income of a trust fund as may remain after satisfying the provisions of the trust.[46]

b. Defenses

Mere irregularities in the proceedings on which a receivership is based are not fatal to the right of the receiver to maintain an action, especially where the judgment debtor has consented to the appointment. Defenses must be determined as they existed on the date of the receiver's appointment. A defense may be lost by failure to interpose it in time.

Mere irregularities in the proceedings on which a receivership is based are not fatal to the right of the receiver to maintain an action,[47] especially where the judgment debtor has consented to the appointment;[48] nor can the irregular appointment of the receiver be urged against the revival of an action against the personal representatives of a deceased debtor.[49]

In an action by the receiver to recover property in the hands of a third person, a claim by defendant that the judgment debtor had an interest in the property has been held without merit where it had been held in the proceedings for the appointment of the receiver, to which the judgment debtor was a party, that title was in the receiver as of the date of his appointment and that the judgment debtor had no title thereafter.[50]

Time as of which determined. Defenses must be determined as they existed on the date of the receiver's appointment.[51]

Loss of defense. A defense may be lost by failure to interpose it in time.[52]

c. Jurisdiction

In instituting an action the receiver is not confined to the court of his appointment, but may select any tribunal of competent jurisdiction.

In instituting an action the receiver is not confined to the court of his appointment, but may select any tribunal of competent jurisdiction.[53] He cannot maintain an action to apply to the satisfaction of the judgment property situated beyond the territorial jurisdiction of the court by which the judgment was rendered, except on complying with statutory requirements for that purpose.[54]

d. Parties

The judgment debtor is a proper and necessary party to an action to set aside an alleged fraudulent assignment, conveyance, or contract, or to reach an equitable interest in a trust fund; but he is not a necessary party to an action to recover usurious premiums or moneys belonging to him in the hands of a third person. In actions to set aside alleged fraudulent transfers, all the transferees are proper parties; but it is not necessary to make all creditors parties.

The judgment debtor is a proper and necessary party to an action to set aside as fraudulent an assignment[55] or conveyance[56] made by him, and to reach the property, an action to set aside alleged fraudulent contracts,[57] or an action to reach an equitable interest in a trust fund;[58] but he is not a necessary party to an action to recover usurious premiums paid by him,[59] or to recover moneys belonging to him in the hands of a third person.[60]

43. N.Y.—Fitts v. Beardsley, 8 N.Y.S. 567, affirmed 27 N.E. 853, 126 N.Y. 645.

44. N.Y.—Williams v. Thorn, 70 N.Y. 270.
23 C.J. p 884 note 91.

45. N.Y.—Sonnabend v. Gittins, 257 N.Y.S. 562, 235 App.Div. 483.

46. N.Y.—McEwen v. Brewster, 17 Hun 223.
23 C.J. p 885 note 92.

47. N.Y.—Stiefel v. Berlin, 51 N.Y.S. 147, 28 App.Div. 103, modifying 45 N.Y.S. 746, 20 Misc. 194.
S.C.—Green v. Bookhart, 19 S.C. 466.

48. N.Y.—Powell v. Waldron, 89 N.Y. 328, 42 Am.R. 301—Tyler v. Willis, 33 Barb. 327.

49. N.Y.—Palen v. Bushnell, 4 N.Y.S. 63, 51 Hun 423.

50. N.Y.—Foley v. Equitable Life Assur. Soc. of U. S., 31 N.Y.S.2d 992, reversed on other grounds 33 N.Y.S.2d 917, 263 App.Div. 605.
Collateral attack on order of appointment see supra § 387 f (4).

51. N.Y.—Steinert v. Van Aken, 150 N.Y.S. 525, 165 App.Div. 206.

52. N.Y.—Palen v. Bushnell, 13 N.Y.S. 785, 18 N.Y.Civ.Proc. 56.

53. N.Y.—Rockwell v. Merwin, 45 N.Y. 166, affirming 31 N.Y.Super. 484, 8 Abb.Pr.,N.S., 330.
23 C.J. p 883 note 69.

54. Utah.—Mathison v. Poultry & Stock Minerals Mining Co., 38 P.2d 741, 85 Utah 74.

55. N.Y.—Miller v. Hall, 70 N.Y. 250, affirming 40 N.Y.Super. 262.

56. N.Y.—Bostwick v. Menck, 40 N.Y. 383.
23 C.J. p 885 note 6.

57. N.Y.—Palen v. Bushnell, 18 Abb. Pr. 301, reversed on other grounds 46 Barb. 24.

58. N.Y.—Vanderpoel v. Van Valkenburgh, 6 N.Y. 190.

59. N.Y.—Palen v. Bushnell, 18 Abb. Pr. 301, reversed on other grounds 46 Barb. 24.

60. N.Y.—Fawcett v. New York, 98 N.Y.S. 286, 112 App.Div. 155.
N.C.—Wilson v. Chichester, 12 S.E. 139, 107 N.C. 386, 10 L.R.A. 572.

In an action to set aside alleged fraudulent transfers, all the transferees may be made parties, although they hold by separate conveyances;[61] but it is not necessary to make all creditors parties.[62] A beneficial membership corporation is not a necessary party to an action to compel the debtor to transfer his membership therein.[63]

A plea in abatement for defect of parties must set out the names of those whom defendant insists should be made parties.[64] Where the answer sets up that the debtor is a proper party, it is sufficient to present the question whether he is a proper party either as an individual or in a representative capacity.[65]

e. Pleading

The complaint should set out the receiver's appointment; the judgment, its amount, or the sum claimed, and the filing of the judgment roll where necessary; the issuance and, in some actions, a return of the execution unsatisfied; the cause of action; and the receiver's right to sue in a representative capacity. The answer must contain averments or denials absolving defendant of liability. The facts necessary to the receiver's recovery must be proved.

The complaint should appropriately allege the appointment of the receiver.[66] Some courts hold that a general allegation is not sufficient.[67] Other courts, however, hold that an allegation of due appointment is sufficient[68] and that an averment of the filing and recording of the order of appointment is not necessary,[69] unless the action is based on a claim by the receiver to title to real estate through his appointment as receiver, in which case the complaint must contain an allegation that the order appointing the receiver or a certified copy thereof was filed and recorded in the office of the clerk of the county where the real estate sought to be affected by the order is situated.[70]

The complaint should also set out the judgment on which the proceedings are based,[71] its amount or the sum claimed,[72] the filing of the judgment roll, where necessary,[73] and the issuance of a valid execution to the proper officer and, in some actions, its return by him unsatisfied in whole or in part.[74]

The complaint must also show that a cause of action exists in favor of the receiver,[75] or in favor of those whom he represents,[76] and his right to prosecute the action in a representative capacity.[77] In an action to recover money or property of the debtor in the hands of a third person, it must be alleged that defendant has in his hands money or property belonging to the debtor.[78] In any case the complaint must, in order to state a cause of action, allege sufficient facts to satisfy statutory requirements.[79]

Answer. To defeat an action by the receiver, the answer must contain averments or denials which if proved or not overcome will be sufficient to absolve defendant of liability.[80]

Issues and proof. At least where there is a statute to such effect, the issue in an action in replevin by the receiver against a third person claiming an adverse interest in property of the debtor is the validity of the adverse claim, and not the right of the receiver to possession.[81]

The facts of appointment, qualification, and title of plaintiff as receiver must be shown where in issue.[82] An allegation of fraud in an assignment must be sustained by competent proof.[83] In an action to recover property of the debtor in the hands

61. Wis.—Hamlin v. Wright, 23 Wis. 491.

62. N.Y.—Stiefel v. Berlin, 45 N.Y.S. 746, 20 Misc. 194, modified on other grounds 51 N.Y.S. 147, 28 App.Div. 103.
23 C.J. p 885 note 13.

63. N.Y.—Londheim v. White, 67 How.Pr. 467.

64. N.Y.—Stiefel v. Berlin, 51 N.Y.S. 147, 28 App.Div. 103.

65. N.Y.—Miller v. Hall, 70 N.Y. 250, affirming 40 N.Y.Super. 262.

66. Minn.—Tvedt v. Mackel, 69 N.W. 475, 67 Minn. 24.
23 C.J. p 885 note 17.

67. Minn.—Tvedt v. Mackel, supra.

68. N.Y.—Rockwell v. Merwin, 45 N.Y. 166.
23 C.J. p 885 note 19.

69. N.Y.—Rockwell v. Merwin, supra—Scroggs v. Palmer, 66 Barb. 505.

70. N.Y.—Wright v. Nostrand, 94 N.Y. 31—Dubois v. Cassidy, 75 N.Y. 298.

71. N.J.—Lever v. Bailey, 27 A. 799, 56 N.J.Law 54.
23 C.J. p 885 note 22.

72. N.Y.—Hughes v. McKenzie, 14 N.Y.S. 352.

73. N.Y.—Dubois v. Cassidy, 75 N.Y. 298.

74. N.Y.—Pendleton v. Friedman, 119 N.Y.S. 994, 135 App.Div. 420.
23 C.J. p 885 note 25.

75. N.Y.—Dubois v. Cassidy, 75 N.Y. 298.

76. N.Y.—Coope v. Bowles, 42 Barb. 87, 18 Abb.Pr. 442, 28 How.Pr. 10.

77. N.Y.—Coope v. Bowles, supra.

78. N.Y.—Graff v. Bonnett, 25 N.Y. Super. 54, 25 How.Pr. 470, affirmed 31 N.Y. 9, 88 Am.D. 236.
23 C.J. p 886 note 29.

Assignment from third person
A complaint which alleges merely that a third person has assigned to plaintiff his claim to moneys in the hands of defendant is fatally defective.—King v. Corning Trust Co., 223 N.Y.S. 446, 129 Misc. 838, affirmed 225 N.Y.S. 848, 222 App.Div. 717—King v. Corning Trust Co., 221 N.Y.S. 404, 129 Misc. 377.

79. N.Y.—King v. Corning Trust Co., 223 N.Y.S. 446, 129 Misc. 838, affirmed 225 N.Y.S. 848, 222 App.Div. 717.

80. N.Y.—McCorkle v. Herrman, 22 N.E. 948, 117 N.Y. 297, reversing 5 N.Y.S. 881.

81. Wis.—Nick v. Holtz, 297 N.W. 887, 237 Wis. 407.

82. N.Y.—Terry v. Wait, 56 N.Y. 91.
23 C.J. p 886 note 31.

83. N.Y.—Bostwick v. Elton, 25 How.Pr. 362.
23 C.J. p 886 note 32.

of a third person, the receiver must prove a claim superior to that of defendant,[84] and that there was a demand and refusal.[85]

f. Evidence and Trial

Supplementary proceedings are presumed to have been timely instituted in the absence of allegations or evidence to the contrary. A debtor claiming that property standing in his name in fact belongs to another has the burden of proof. Fraudulent intent is a question of fact.

It will be presumed that the supplementary proceedings were instituted within the time limited by statute in the absence of allegations or evidence to the contrary.[86] A debtor claiming that property standing in his name in fact belongs to another has the burden of proof.[87]

Prima facie evidence. Proof of issuance of an execution in the county where the firm debtor and one partner did business and its return unsatisfied prima facie establishes exhaustion of the legal remedy.[88]

Questions of fact. The question of fraudulent intent is one of fact.[89]

g. Recovery

The receiver can recover only sufficient funds to pay the judgment and the costs and expenses of the supplementary proceedings. Where the debtor conveys to one who takes only a mortgagee's interest and who conveys to innocent purchasers for value, the receiver cannot follow the land into the hands of such purchasers, but he can recover from the debtor's transferee the difference between his claims against the debtor and the proceeds of the sale.

The receiver can recover only sufficient funds to pay the judgment and the costs and expenses of the supplementary proceedings.[90] Thus, on the setting aside of a transfer by the debtor, the receiver is entitled to receive only so much of the property or its proceeds as may be necessary to satisfy the judgment on which the proceeding is based, or the claims represented by him, and to pay the expenses of the receivership, and the costs of the action.[91]

Where a debtor conveys to one who takes only a mortgagee's interest, and the latter conveys to innocent purchasers for value, the receiver cannot follow the land into the hands of such purchasers, but he is entitled to judgment against the transferee of the debtor for the difference between his claims against the debtor and the proceeds of the sale.[92]

§ 394. Liens Acquired by Proceedings

Under most provisions the creditor acquires a lien on the debtor's assets by the commencement of supplementary proceedings, although under some provisions the lien must be perfected by subsequent steps such as the appointment of a receiver.

The rights of parties in supplementary proceedings with respect to the acquisition of liens are in great measure analogous to the rights of the parties to a creditor's bill.[93] Generally, it is held that the judgment creditor acquires, by the service on the judgment debtor of an order for his examination, an equitable lien on the assets subsequently discovered in his hands or under his control,[94] or on funds or property of the debtor in the hands of a third party with notice or on whom like service is made.[95] The lien acquired, however, is inchoate and is not perfected until an order to deliver or pay over property is made or a receiver appointed or until such other steps are taken as may be required by the applicable statutes.[96] Where no notice is given to, or process served on, the judgment debtor, a third party order does not create a lien on property not in the hands of such third party.[97] In some jurisdictions the institution of the proceedings does not create a lien but is only a means of en-

84. Failure to petition to make lien effective
In an action by a receiver to recover property of the debtor in the hands of a third person claiming a prior lien thereon, the fact that such person did not petition the court which appointed the receiver to give effect to the lien does not entitle the receiver to recover where the lien is found to be valid and senior to any claim of the receiver.—Nick v. Holtz, 297 N.W. 387, 237 Wis. 407.

85. N.Y.—Livingston v. Stoessel, 16 N.Y.Super. 19.

86. N.Y.—Fawcett v. New York, 98 N.Y.S. 286, 112 App.Div. 155.

87. Fund
N.Y.—Matter of Weld, 54 N.Y.S. 253, 34 App.Div. 471.

88. N.Y.—Hyatt v. Dusenbury, 12 N.Y.Civ.Proc. 152.
23 C.J. p 886 note 34.

89. N.Y.—Hyatt v. Dusenbury, supra.

90. N.Y.—O'Connor v. Mechanics' Bank, 7 N.Y.S. 380, 54 Hun 272, reversing 2 N.Y.S. 225.
23 C.J. p 886 note 38.

91. N.Y.—Gifford v. Rising, 12 N.Y.S. 428, 59 Hun 42.
23 C.J. p 886 note 39.

92. N.Y.—Maples v. O'Brien, 116 N.Y.S. 175.

93. Wis.—Alexander v. Wald, 286 N.W. 6, 231 Wis. 550.
23 C.J. p 889 note 29.
Liens in creditors' suits see the C.J.S. title Creditors' Suits §§ 84–87.

94. N.J.—Beck v. Dennis, 15 A.2d 457, 128 N.J.Eq. 128.
N.Y.—Herlihy v. Watkins, 300 N.Y.S. 242, 252 App.Div. 605—Becker v. Romanzo, 281 N.Y.S. 317, 245 App.Div. 185—Met. Roofing Supplies Co. v. Stern, 18 N.Y.S.2d 694.
23 C.J. p 889 note 30.

95. N.Y.—Cobbe v. Stowe, 13 N.Y.S.2d 651, 171 Misc. 687.
Ohio.—Good v. Crist, 156 N.E. 146, 23 Ohio App. 484.
23 C.J. p 890 note 31.

96. N.C.—McIntosh Grocery Co. v. Newman, 114 S.E. 535, 184 N.C. 370.
23 C.J. p 890 note 32.

Where receiver could not be appointed, and was not, the mere service of a third party order did not give rise to a lien.—In re Vantine's Retail Stores, D.C.N.Y., 43 F.2d 870.

97. Minn.—Ware v. Linderbergh, 68 N.W. 771, 66 Minn. 66.

forcing an existing execution lien;[98] in others, no lien is acquired, unless the debtor is restrained from disposing of his property.[99]

A lien is acquired by the appointment of a receiver of the debtor's property,[1] or by proceedings taken by him on behalf of the creditor,[2] such as an action to set aside a transfer by the debtor as fraudulent;[3] but no lien is acquired, by the commencement of supplementary proceedings and the appointment of a receiver, on assets assigned or transferred by the debtor prior to the institution of the supplementary proceedings until the receiver institutes an action to set aside the transfer.[4] The appointment of a receiver does not confer on the creditor a lien on funds in the hands of the receiver by virtue of his prior appointment at the instance of another creditor in another action or proceeding.[5]

§ 395. —— Priorities

A lien acquired by the institution of supplementary proceedings is superior to that of a senior judgment creditor or to the rights of subsequent assignees, but not to prior existing bona fide rights. Priority between creditors is determined by the time of service of the order instituting the supplementary proceedings.

The lien acquired by the institution of supplementary proceedings is superior to that of a senior judgment creditor[6] or to the rights of a subsequent assignee of the property,[7] but not to an existing tax lien,[8] or to the rights of a prior assignee or transferee in good faith,[9] or, under some provisions, to equitable claims against the property held in good faith by claimant.[10] As between creditors, priority of judgments is immaterial,[11] and the one whose order instituting the supplementary proceedings is first served acquires a prior lien,[12] regardless, in some jurisdictions, of who first obtains the appointment of a receiver.[13] As between receivers, it is held in some states that priority will be determined by the time of the applications for the receiverships, and not by the time of appointment,[14] but in other states, as appears supra § 392, the title of the receiver relates back to the service of the order for examination. The lien acquired by a receiver on setting aside a transfer relates back to the commencement of the action brought for that purpose and will overreach the title of a purchaser pendente lite.[15] A lien acquired by the commencement of a creditor's suit will not relate back to the institution of supplementary proceedings on the same judgment.[16]

The question of priority is not the subject of action, but should be summarily presented to, and disposed of by, the court in a proceeding to which claimants are made parties.[17]

98. W.Va.—Hatfield ex rel. Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742—Park v. McCauley, 67 S.E. 174, 67 W.Va. 104, 28 L.R.A.,N.S., 1036, 21 Ann.Cas. 199.

99. Kan.—McConnell v. Wolcott, 78 P. 848, 70 Kan. 375, 109 Am.S.R. 454, 3 L.R.A.,N.S., 122.

1. N.Y.—Bevans v. Pierce, 1 N.Y. City Ct. 259.
N.C.—Rankin v. Minor, 72 N.C. 424.

2. Minn.—Billson v. Linderberg, 68 N.W. 771, 66 Minn. 66.

3. N.Y.—Jeffres v. Cochrane, 47 Barb. 557—Palen v. Bushnell, 13 N.Y.S. 785, 18 N.Y.Civ.Proc. 56.

4. N.Y.—Field v. Sands, 21 N.Y. Super. 685.

5. N.Y.—Field v. Sands, supra—Conger v. Sands, 19 How.Pr. 8.

6. N.Y.—Duffy v. Dawson, 19 N.Y.S. 186, 22 N.Y.Civ.Proc. 235.

7. N.Y.—Cobbe v. Stowe, 13 N.Y.S. 2d 651, 171 Misc. 687—Lebowitz v. Bowery Sav. Bank, 281 N.Y.S. 176, 155 Misc. 567.

8. N.Y.—Smith v. Meador Pen Corporation, 8 N.Y.S.2d 39, 255 App. Div. 397, reversing 6 N.Y.S.2d 919, 169 Misc. 238, and affirmed 20 N.E. 2d 13, 280 N.Y. 554.

9. N.Y.—Cobbe v. Stowe, 13 N.Y.S. 2d 651, 171 Misc. 687—In re Sullivan's Estate, 299 N.Y.S. 232, 164 Misc. 491.

Assignment of fund not yet in existence, however, is subordinate to the lien of creditors serving third party subpoenas after creation of the fund.—Palmer v. Tremaine, 20 N.Y.S.2d 145, 259 App.Div. 951—Atlas Advertising Agency v. Casa Cubana, 19 N.Y.S.2d 900, 259 App.Div. 951—F. & M. Schaefer Brewing Co. v. Amsterdam Tavern, 12 N.Y.S.2d 701, 171 Misc. 352.

10. U.S.—In re Toms, C.C.A.Mich., 101 F.2d 617.

11. N.Y.—Frederick Wachter, Inc. v. Rogers, 2 N.Y.S.2d 657, 165 Misc. 880—First Nat. Bank & Trust Co. of Elmira v. Lovell, 249 N.Y.S. 493, 139 Misc. 891.

12. N.Y.—Herlihy v. Watkins, 300 N.Y.S. 242, 252 App.Div. 605—Edelstein v. Oxman, 13 N.Y.S.2d 95, 171 Misc. 552—F. & M. Schaefer Brewing Co. v. Amsterdam Tavern, 12 N.Y.S.2d 701, 171 Misc. 352—Frederick Wachter, Inc., v. Rogers, 2 N.Y.S.2d 657, 165 Misc. 880—In re Kaufman's Estate, 266 N.Y.S. 890, 149 Misc. 287—First Nat. Bank & Trust Co. of Elmira v. Lovell, 249 N.Y.S. 493, 139 Misc. 891.
Wis.—Alexander v. Wald, 286 N.W. 6, 231 Wis. 550.
23 C.J. p 890 note 43.

Existence of assets at time of service
Although refund to which judgment debtor was entitled on surrender of liquor license was not due and owing from state comptroller until thirty days after debtor surrendered license, third party orders served during such thirty-day period took priority in order of their service as against contention that at time of service there was no fund of judgment debtor to be attached, and therefore no one creditor was entitled to priority.—Bailis Bros. Corporation v. Fitzgerald, 283 N.Y.S. 657, 157 Misc. 216.

13. N.Y.—Youngs v. Klunder, 7 N. Y.S. 498.

14. N.C.—Parks v. Sprinkle, 64 N.C. 637.

15. N.Y.—Jeffres v. Cochrane, 47 Barb. 557—Field v. Sands, 21 N.Y. Super. 685.

16. N.Y.—Edmonston v. McLoud, 16 N.Y. 543, affirming 19 Barb. 356.

17. N.Y.—Recher v. Gumpp, 300 N. Y.S. 665, 253 App.Div. 731, followed in 300 N.Y.S. 667, 253 App.Div. 726.
23 C.J. p 890 note 49.

Right of party to examine claimants
In supplementary proceedings, judgment creditor is entitled as an interested party to question validity and excessiveness of lien claimed by

§ 396. —— Loss of Lien

A lien acquired by the institution of supplementary proceedings may be lost by their abandonment, but not by other particular circumstances such as an adjudication in bankruptcy against the debtor or the latter's death.

A lien acquired by the institution of supplementary proceedings may be lost or divested by their abandonment,[18] but not by a subsequent assignment or transfer by the judgment debtor,[19] an amendment of the original affidavit,[20] a stay of the proceedings pending a determination of the validity of the judgment,[21] a subsequent adjudication of bankruptcy against the debtor,[22] or, where the party seeking to subordinate the lien is not acting in good faith, by laches;[23] nor will the lien be extinguished by the death of the debtor,[24] or in the absence of fraud or collusion by permitting the debtor to retain possession of the property.[25] However, where the lien has not attached or been perfected before the death of the judgment debtor, it cannot subsequently be perfected or enforced.[26]

§ 397. Termination of Proceedings

A supplementary proceeding may be terminated by consent or by an order of the court, or it may be deemed closed after the lapse of a given period. It may be discontinued at any time on the application of the judgment creditor, and may be discontinued for unreasonable neglect or delay of the judgment creditor, on the application of the judgment debtor. Under some conditions it will abate.

Pursuant to some statutory provisions regulating supplementary proceedings, and the judicial construction thereof, such a proceeding continues until closed or discontinued by consent,[27] or until discontinued, dismissed, or closed by order of court;[28] and it will be deemed closed if it remains inactive for a given period of time, such as two years, unless the court makes an order extending it for a definite period.[29] Under a statutory provision that the proceeding may be discontinued or closed at any time on the application of the judgment creditor, entry of an order discontinuing or dismissing the proceeding is necessary.[30] An order requiring defendant to pay over certain sums disclosed does not necessarily terminate the proceedings, which may be continued for the discovery of other assets;[31] and it is not ground for dismissal of the proceedings that no new property was disclosed, where the proceedings show that the judgment debtor retains a valuable interest in an estate.[32] Generally, notice of an application to dismiss or discontinue is necessary;[33] and if the entry of an order of dismissal is necessary, it is the duty of the prevailing party to enter it,[34] and the opposing party may move to compel him so to do.[35]

Neglect or delay in proceeding. The proceeding may be terminated by any act or lapse of time which indicates abandonment or an intention to prosecute it no further;[36] but a mere delay in instituting contempt proceedings does not have this effect,[37] and, under some statutes, the proceeding shall not be deemed closed or abandoned by reason of any irregularity on an adjournment.[38] Except where the

other creditors and of any other claims asserted to be preferred.—Recher v. Gumpp, 300 N.Y.S. 665, 253 App.Div. 731, followed in 300 N.Y.S. 667, 253 App.Div. 726.

18. N.Y.—Ballou v. Borland, 14 Hun 355.

19. Ind.—Cooke v. Ross, 22 Ind. 157—Graydon v. Barlow, 15 Ind. 197.

20. Ind.—Cooke v. Ross, 22 Ind. 157.

21. N.Y.—Met. Roofing Supplies Co. v. Stern, 18 N.Y.S.2d 694.

22. N.Y.—Palen v. Bushnell, 13 N.Y.S. 785, 18 N.Y.Civ.Proc. 56.

23. N.Y.—New York Loan & Improvement Co. v. De Navarro, 77 N.Y.S. 1006, 38 Misc. 436.

24. N.Y.—Reynolds v. Ætna Life Ins. Co., 55 N.E. 305, 160 N.Y. 635—Stewart's Estate, 8 N.Y.Civ.Proc. 354, 4 Dem.Surr. 265.

25. N.Y.—Fessenden v. Woods, 16 N.Y.Super. 550.

26. N.Y.—Stewart's Estate, 8 N.Y. Civ.Proc. 354, 4 Dem.Surr. 265.
N.C.—Rankin v. Minor, 72 N.C. 424.

27. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
N.Y.—Ace Mail Advertising, Inc. v. Newbold, 192 N.E. 483, 265 N.Y. 298, reversing 269 N.Y.S. 957, 241 App.Div. 674, affirming 269 N.Y.S. 187, 150 Misc. 320, and reargument denied 195 N.E. 172, 266 N.Y. 500—Kommel v. Karron, 283 N.Y.S. 953, 157 Misc. 557.

28. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
N.Y.—Kommel v. Karron, 283 N.Y.S. 953, 157 Misc. 557.

29. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
N.Y.—Kommel v. Karron, 283 N.Y.S. 953, 157 Misc. 557.

30. N.Y.—Lebowitz v. Bowery Sav. Bank, 281 N.Y.S. 176, 155 Misc. 567—Roscoe Lumber Co. v. Payne, 149 N.Y.S. 331.
23 C.J. p 891 note 82.

31. U.S.—Wood v. Noyes, C.C.A. Alaska, 279 F. 321, certiorari denied 43 S.Ct. 94, 260 U.S. 732, 67 L.Ed. 486.
Alaska.—Noyes v. Jesson, 6 Alaska 237.

32. Wash.—Washington Trust Co. v. Blalock, 285 P. 449, 155 Wash 510.

33. N.Y.—Kennedy v. Norcott, 54 How.Pr. 87.

34. N.Y.—McAlpin v. Stoddard, 105 N.Y.S. 9, 54 Misc. 647.

35. N.Y.—Sinnott v. Hempstead First Nat. Bank, 54 N.Y.S. 417, 34 App.Div. 161.
23 C.J. p 891 note 82 [a].

36. N.Y.—Ace Mail Advertising, Inc. v. Newgold, 192 N.E. 483, 265 N.Y. 298, reversing 269 N.Y.S. 957, 241 App.Div. 674, affirming 269 N.Y.S. 187, 150 Misc. 320, and reargument denied 195 N.E. 172, 266 N.Y. 500—Edmonston v. McLoud, 16 N.Y. 543, affirming 19 Barb. 356.
23 C.J. p 891 notes 65, 69 [b].

37. N.Y.—Stanley v. Lovett, 14 Hun 412.
23 C.J. p 891 note 69 [b].

38. N.Y.—Hutchison v. Weston, 290 N.Y.S. 334, 160 Misc. 890.
Under former statute in New York
(1) Failure regularly to adjourn or extend the proceedings was deemed an abandonment thereof.—Wilson

second proceeding is commenced on the failure of the other party to appear on the return day,[39] an abandonment of an original proceeding is not effected merely by commencing a second proceeding,[40] as where the second proceeding is against after-acquired property.[41]

Under a provision that the proceeding may be closed by order of the court where the judgment creditor unreasonably neglects or delays to proceed, on the application of the judgment debtor or third person, or of plaintiff in a judgment creditor's action against the debtor, an order discontinuing or dismissing the proceeding, on such application, is necessary.[42] The proceedings are not terminated as of course by the neglect of a party to appear on an adjourned day,[43] or because of the absence of the judge or referee at the time to which the proceedings were adjourned.[44] However, it is ground for dismissal that an adjournment was taken to a day to be fixed and nothing further was done for more than three years,[45] or that nothing was done under the order for examination except to serve it after the return day,[46] or that the creditor failed to appear on an adjourned day;[47] but an order terminating the proceedings for the judgment creditor's failure to appear, based on an adjournment not ordered by the court, is ineffectual formally to terminate the proceedings.[48] If an appeal has been taken and security given so as to suspend the proceedings, this is no ground for dismissal.[49] If the examination has been taken before a referee, the proceedings should not ordinarily be dismissed by a judge before the referee makes his report:[50] The judge or court dismissing the proceedings need not file a statement of his reasons therefor;[51] and an order of dismissal on account of plaintiff's default is not res judicata.[52]

Where the proceedings have lapsed by reason of an excusable default on the part of the judgment creditor, he is entitled to have the judgment debtor conclude his examination under the original order and sign his testimony although there has been an ineffectual order terminating the proceedings.[53]

Satisfaction or vacation of judgment. Under some statutes, the proceeding will also be deemed dismissed or closed on the satisfaction or vacation of the judgment and an order may be entered thereon; but even where there is no such provision, in the absence of an order of dismissal or discontinuance, the proceeding is deemed to be pending until satisfaction of the judgment, and is at an end when the judgment has been satisfied[54] or has become void,[55] but to terminate the proceeding an order is necessary.[56] Such a dismissal of the proceeding, however, should not be made while the matter of satisfaction is in dispute.[57] It is not ground for dismissal that there is a presumption of payment from the lapse of time,[58] or that the judgment on which the proceedings are based was entered in violation of an agreement to discontinue the action,[59] or that

v. Bracken, 135 N.Y.S. 435, 150 App. Div. 577—23 C.J. p 891 note 66.

(2) Where the proceeding lapsed because of an adjournment without date, the court was without further jurisdiction.—Walmor, Inc. v. Markel, 268 N.Y.S. 435, 240 App.Div. 1007—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904.

(3) Failure of record to show regular adjournment did not raise presumption of loss of jurisdiction.—Wright v. Nostrand, 94 N.Y. 31, reversing 47 N.Y.Super. 441—Robertson v. Hay, 33 N.Y.S. 31, 12 Misc. 7.

In Wisconsin it has been stated that the want of a formal entry by the commissioner, that the proceeding was adjourned to a particular day and hour, does not divest him of all further power to proceed.—Holton v. Burton, 47 N.W. 624, 78 Wis. 321.

39. N.Y.—Schanck v. Conover, 56 How.Pr. 437.

40. N.Y.—Hutchinson v. Weston, 290 N.Y.S. 334, 160 Misc. 890.
23 C.J. p 891 notes 65 [a].

41. N.Y.—Walter v. Pecare, 11 N. Y.S. 146, 57 Hun 587.
23 C.J. p 891 note 65 [a].

42. N.Y.—Walter v. Pecare, 11 N. Y.S. 146, 57 Hun 587—Lebowitz v. Bowery Sav. Bank, 281 N.Y.S. 176, 155 Misc. 567—Nyamco Associates v. King, 265 N.Y.S. 29, 147 Misc. 904—Leer Bldg. & Const. Co. v. Harris, 250 N.Y.S. 160, 140 Misc. 290.
23 C.J. p 891 note 69.

43. N.Y.—Underwood v. Sutcliffe, 10 Hun 453, reversed on other grounds 77 N.Y. 58.

44. N.Y.—Keihen v. Shipherd, 4 N. Y.S. 339, 16 N.Y.Civ.Proc. 183—Schanck v. Conover, 56 How.Pr. 437.

45. N.Y.—Meyers v. Herbert, 19 N. Y.S. 132, 64 Hun 200, 22 N.Y.Civ. Proc. 216.

46. N.Y.—Ballou v. Boland, 14 Hun 355.

47. N.Y.—Squire v. Young, 14 N.Y. Super. 690.

48. N.Y.—Otten v. Stromeyer, 239 N.Y.S. 593, 228 App.Div. 360.

49. N.Y.—Cowdrey v. Carpenter, 25 N.Y.Super. 601, 17 Abb.Pr. 107.

50. N.Y.—Kennedy v. Norcott, 54 How.Pr. 87.

51. Mass.—Bornstein v. Justices of Municipal Court of Roxbury Dist. of City of Boston, 169 N.E. 410, 269 Mass. 515.

52. N.Y.—Weiss v. Ashman, 32 N.Y. S. 161, 11 Misc. 377.

53. N.Y.—Otten v. Stromeyer, 239 N.Y.S. 593, 228 App.Div. 360.

54. Minn.—Northern Nat. Bank of Duluth v. McLaughlin, 280 N.W. 852, 203 Minn. 253.
N.Y.—Matter of Crane, 30 N.Y.S. 616, 81 Hun 96, 1 N.Y.Ann.Cas. 148—Avery v. Ackart, 46 N.Y.S. 1085, 20 Misc. 631.
23 C.J. p 891 notes 78, 79.

55. N.Y.—Roscoe Lumber Co. v. Payne, 149 N.Y.S. 331.
23 C.J. p 891 note 79 [a].

56. N.Y.—Rook v. Dickinson, 78 N. Y.S. 287, 38 Misc. 690, 11 N.Y.Ann. Cas. 454.
23 C.J. p 891 note 80.

57. N.Y.—Union Surety & Guaranty Co. v. Sire, 68 N.Y.S. 943, 34 Misc. 221.
23 C.J. p 891 note 80 [a].

58. N.Y.—Driggs v. Williams, 15 Abb.Pr. 477.

59. N.Y.—Gardner v. Lay, 2 Daly 113.

a second execution was issued after the return of the first unsatisfied.[60]

Abatement. The proceedings will abate by the death of the debtor,[61] or by the issuance of a new execution on which the judgment is collected,[62] but not by suing out an attachment against the property of the debtor,[63] or by an appeal from the judgment taken without a stay of proceedings.[64]

§ 398. Contempt

A person may be guilty of contempt in refusing or neglecting to obey a valid order or direction of a judge or referee, of which he has notice, in the course of the proceedings.

Under some of the statutes regulating supplementary proceedings, a person may be punished for contempt where he refuses or, without sufficient cause, neglects to obey a valid order of a judge or referee duly served on him, or a proper oral direction given directly to him by such judge or referee in the course of the proceedings,[65] whereby the right or remedy of a party to the action or proceeding may be defeated, impaired, impeded, or prejudiced.[66] A judgment creditor may be punished for contempt for violating an order, authorized by statute where a trustee has been appointed, barring further attachments and proceedings in aid of execution, after he has been given proper notice of the order.[67]

§ 399. —— Acts Constituting, and Defenses

a. In general
b. Failure to attend for examination
c. Refusal to answer questions and false answers
d. Violation of injunction
e. Disobedience of order to deliver or pay over
f. Defenses and excuses

a. In General

What specific act will constitute contempt generally rests in the discretion of the judge or court whose mandate is disregarded or disobeyed.

The question what specific act will constitute a contempt in a given case must be left somewhat to the discretion of the judge or court whose mandate has been disregarded or disobeyed;[68] but as statutes authorizing punishment for contempt involve the liberty of a citizen, they should be strictly construed.[69] Depriving the receiver in supplementary proceedings of possession of property of the judgment debtor is a contempt.[70] It has been held contempt to refuse to comply with an order requiring the production of books;[71] but where the order requires only the production of books, it is not a contempt to refuse to leave the books with the referee after their production.[72] An unwarranted interference by the judgment debtor with the examination of a witness is a contempt.[73] It has been held contempt to disobey an order for the payment of costs,[74] except where the order merely allows the costs out of funds realized out of the debtor's property.[75] A transfer of property by the judgment debtor, although forbidden by statute, is not contempt if the transfer is made through inadvertence or lack of understanding.[76]

An attorney may be guilty of contempt for conduct interfering with the orderly procedure in supplementary proceedings,[77] as where he prepares an agreement for the judgment debtor whereby the latter transfers his property in violation of a third

60. N.Y.—Fellerman's Case, 2 Abb. Pr. 155, 11 How.Pr. 528.

61. N.Y.—Hasewell v. Penman, 2 Abb.Pr. 230, 13 How.Pr. 114.

On appearance for examination

Where, on the appearance for examination of persons alleged to be indebted to a judgment debtor, it is shown that the debtor was dead at the time the order for examination was made, the proceedings will abate.—Hasewell v. Penman, supra.

62. N.Y.—Ritter v. Greason, 59 N.Y. S. 1053, 28 Misc. 656.

63. N.Y.—Hanson v. Tripler, 5 N.Y. Super. 733, Code Rep.,N.S., 154.

64. N.Y.—Arnoux v. Homans, 32 How.Pr. 382.

65. N.Y.—Foster v. Hastings, 189 N. E. 229, 263 N.Y. 311, affirming 264 N.Y.S. 954, 239 App.Div. 839—Jones v. Rettig, 164 N.Y.S. 730, 98 Misc. 487—Boyd v. Hildebrandt, 185 N.Y. S. 235.
23 C.J. p 892 note 88.

66. N.Y.—Foster v. Hastings, 189 N. E. 229, 263 N.Y. 311, affirming 264 N.Y.S. 954, 239 App.Div. 839—German Fur Dyeing Corporation v. F. & M. Fur Co., 253 N.Y.S. 575, 142 Misc. 6.

67. Ohio.—McWhorter v. Curran, 13 N.E.2d 362, 57 Ohio App. 233.

68. N.Y.—Walters v. Kenyon, 4 N. Y.St. 398.

69. N.Y.—Bernheimer v. Kelleher, 64 N.Y.S. 409, 31 Misc. 464.
Puerto Rico.—Sixto v. Sarria, 2 Puerto Rico Fed. 168.
23 C.J. p 892 note 90.

70. N.Y.—Verdi v. La Russo, 138 N.Y.S. 568, 3 N.Y.Civ.Proc.,N.S., 13.

71. N.Y.—Frideman v. Newman, 86 N.Y.S. 735.

72. N.Y.—Sudlow v. Knox, 4 Abb. Dec. 326, 7 Abb.Pr.,N.S., 411.

73. N.Y.—Falkenburg v. Frank, 43 N.Y.S. 1137, 19 Misc. 418.
23 C.J. p 892 note 96.

74. N.Y.—Holton v. Robinson, 69 N. Y.S. 33, 59 App.Div. 45—Kearney's Case, 13 Abb.Pr. 459, 22 How.Pr. 309.

75. N.Y.—In re Thompson, 62 N.Y.S. 1033, 31 Misc. 802, affirmed 65 N.Y. S. 1147, 31 Misc. 832.

76. N.Y.—Hudson P. Rose Co. v. Tompkins & Bevers, 287 N.Y.S. 689, 248 App.Div. 605.

77. N.Y.—Tri-State Investors' Corporation v. Kitching, 246 N.Y.S. 240, 231 App.Div. 143, dismissal of appeal denied 177 N.E. 137, 256 N.Y. 553, and dismissed 177 N.E. 173, 256 N.Y. 639, affirmed 178 N.E. 800, 257 N.Y. 573.

party restraining order,[78] or where he refuses to permit papers, called for by a subpœna, to be put in evidence.[79]

Suing receiver without leave. The debtor[80] or a third party whose property has been wrongfully taken from him[81] is not punishable as for a contempt in suing the receiver without leave of the court.

b. Failure to Attend for Examination

A refusal or failure to appear for examination may constitute contempt.

A refusal or failure to appear before the judge or referee, for examination may subject a party to punishment for contempt,[82] and this includes failure to appear on an adjourned day.[83] However, it should appear that the order for examination is such as the judge or referee is authorized to make,[84] and that the order or subpœna has been duly served,[85] and the power to punish should be limited to cases of willful disregard of the court's mandate.[86] Contempt cannot be based on a failure to attend for examination, where the subpœna is not issued by a proper authority;[87] or where the order is not served, as required by statute, on the judgment debtor,[88] and in the absence of such service, a person summoned as a witness cannot be held for contempt in refusing to testify on that ground;[89] nor can a failure to attend be regarded as contempt where the time between the service of the order and the time when it is returnable is not sufficient to enable it to be obeyed.[90] The mere appearance of an attorney for one who refuses to submit to an examination does not warrant the attorney's commitment for contempt because of the client's conduct, unless he is responsible for such conduct;[91] but the judgment debtor's attorney may be guilty of contempt in advising the judgment debtor and his witnesses to leave the court, instead of going before a justice hearing ex parte matters on objections made by the attorney.[92]

A failure to appear in accordance with a second order for examination, after the first proceeding is vacated or treated as abandoned, may constitute contempt;[93] but it is not contempt to refuse to be examined on a second order on the ground that defects with respect to the first order should have been corrected without the granting of a new order.[94] Where the second order supersedes the first, contempt cannot be based on the first order,[95] but a second order for the examination of the judgment debtor as to after-acquired property does not

78. N.Y.—In re Cornblum, 232 N.Y.S. 22, 133 Misc. 357.

79. N.Y.—Steinman v. Conlon, 141 N.Y.S. 79, 79 Misc. 527.

80. N.Y.—Kroner v. Reilly, 63 N.Y.S. 527, 49 App.Div. 41.

81. N.Y.—Dewey v. Finn, 18 N.Y. Wkly.Dig. 558.

82. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
Cal.—Drew v. Mendocino County Super. Ct., 182 P. 417, 180 Cal. 711.
N.J.—Mumma v. Schmitter, 142 A. 245, 1 N.J.Misc. 455.
N.Y.—Samuels v. Ganz, 21 N.Y.S.2d 268, 174 Misc. 399—Credit Assets Corporation v. Rockmore, 237 N.Y.S. 503, 135 Misc. 230—In re Reid, 188 N.Y.S. 336.
23 C.J. p 892 note 99.

In New Jersey, defendant is guilty of contempt for failure to appear so long as the order to appear stands unchallenged directly, regardless of whether execution actually has issued and regardless of a pending rule to show cause relative to setting aside the verdict as to one defendant, where inability to appear is not shown.—Mumma v. Schmitter, 142 A. 245, 1 N.J.Misc. 455.

83. N.Y.—Samuels v. Ganz, 21 N.Y.S.2d 268, 174 Misc. 399—L. B. Syndicate Corporation v. Lee, 259 N.Y.S. 937, 145 Misc. 573—Kreiser v. Kitoaka, 73 N.Y.S. 164, 36 Misc. 174—Baker v. Slotkin, 198 N.Y.S. 876—Parker v. Hunt, 15 Abb.Pr. 410 note.

84. N.Y.—Kennedy v. Weed, 10 Abb. Pr. 62.
23 C.J. p 892 note 2.
Invalidity of order as defense see infra subdivision f of this section.

85. N.Y.—In re Depue, 77 N.E. 798, 185 N.Y. 60, reversing 95 N.Y.S. 1017, 108 App.Div. 58.
23 C.J. p 892 note 3.
Improper or irregular service as defense see infra subdivision f of this section.

86. N.Y.—Credit Assets Corporation v. Rockmore, 237 N.Y.S. 503, 135 Misc. 230.

Failure to appear not contempt

Defendant, failing to appear, is not guilty of willful contempt, where he telephoned plaintiff's attorney that he was on his way, and, after the time set, notified the attorney that he had been delayed and offered to appear at any time, as his attitude was one of complete respect for the court, and his conduct tended in no way to impede the processes of justice.—Mensch v. Newcombe, 203 N.Y.S. 533.

87. N.Y.—Peck v. Austin, 29 N.Y.S. 2d 280.

By judgment creditor

Where a judgment creditor who is not an attorney issues in his own name a subpoena directed to a third party for examination in supplementary proceedings, failure of third party to appear for examination on original return date specified in subpoena cannot be made the basis of punishment for "contempt."—Peck v. Austin, supra.

88. N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746.

89. N.Y.—People v. Warner, 3 N.Y.S. 768, 51 Hun 53, affirmed 27 N.E. 407, 125 N.Y. 746.

90. N.Y.—Levey v. Rosett, 166 N.Y.S. 1072.
23 C.J. p 892 note 3 [b].

91. N.Y.—Tri-State Investors' Corporation v. Kitching, 246 N.Y.S. 240, 231 App.Div. 143, dismissal of appeal denied 177 N.E. 137, 256 N.Y. 553, and dismissed 177 N.E. 173, 256 N.Y. 639, affirmed 178 N.E. 800, 257 N.Y. 573.

92. N.Y.—Hotel Astor v. Gross, 233 N.Y.S. 294, 133 Misc. 704.

93. N.Y.—Matter v. Fancher, 110 N.Y.S. 157, 58 Misc. 11—In re Reid, 188 N.Y.S. 336.
23 C.J. p 896 note 81 [a] (2).

94. N.Y.—Hutchinson v. Weston, 290 N.Y.S. 334, 160 Misc. 890.

95. N.Y.—Gaylord v. Jones, 7 Hun 480—Brockway v. Brien, 37 How. Pr. 270.
23 C.J. p 896 note 81 [a] (3) (4).

supersede the first order so as to affect contempt proceedings pending thereon.[96]

c. Refusal to Answer Questions and False Answers

A refusal to answer a proper and pertinent question is generally punishable as contempt; and, under some statutes, this is also true where the answers given are willfully and knowingly false.

A refusal on the part of the judgment debtor or witness to answer any proper and pertinent question is punishable as a contempt,[97] as where the judgment debtor refuses to answer questions as to his property when directed by the court so to do;[98] and it has been held that the wife of a judgment debtor will be held in contempt if she fails to disclose in proper proceedings whether she has property of her husband under her control.[99] It has also been held that a premature refusal to answer questions propounded, on the ground of self-incrimination, constitutes contempt.[1]

However, for refusal to answer to constitute a contempt, there must be a willful disobedience[2] of a direction by the judge to answer a specific,[3] proper, and pertinent[4] question. Refusal to answer is not a contempt where the question is asked during the absence of the judge,[5] or in the absence of counsel, who had been excluded from the examination room.[6] Willful denial of knowledge may be punished on the theory that it is a refusal to testify.[7]

False or evasive answers. In New York, under Civ.Pract. Act § 788, as added by L.1935 c. 630, a judgment debtor, third party, or witness who willfully and knowingly testifies falsely concerning any material matter or subject in the course of a supplementary proceeding is guilty of civil contempt,[8] and this statutory rule has been held to apply although the false testimony is subsequently corrected,[9] and although the judgment debtor's conduct in giving false answers was not willful but on bad advice and his untruthful answers did not prejudice the judgment creditor.[10]

d. Violation of Injunction

A person who violates an injunction order issued in supplementary proceedings and duly served on him, or of which he has certain knowledge, or who procures or permits an act of violation by another for his benefit, is generally guilty of contempt.

Any person who disobeys an injunction order issued in supplementary proceedings and duly served

96. N.Y.—Walter v. Pecare, 11 N.Y.S. 146, 57 Hun 587.

97. Colo.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.
Minn.—Minneapolis Willys-Knight Co. v. Bergan, 226 N.W. 188, 178 Minn. 158.
23 C.J. p 893 note 4.

98. Ill.—Berkson v. People, 39 N.E. 1079, 154 Ill. 81.
13 C.J. p 29 note 16.

99. Wis.—In re O'Brien, 24 Wis. 547.

1. Colo.—Sweeney v. Cregan, 299 P. 1058, 89 Colo. 94.

2. N.Y.—East River Bank v. De Lacy, 76 N.Y.S. 927, 37 Misc 765, reversing 74 N.Y.S. 925, 36 Misc. 868.
23 C.J. p 893 note 5.
Inability to answer as excuse see infra subdivision f of this section.

3. N.Y.—Price v. Creme de Mohr Co., 137 N.Y.S. 732, 78 Misc. 42—East River Bank v. De Lacy, 76 N.Y.S. 927, 37 Misc. 765, reversing 74 N.Y.S. 925, 36 Misc. 868.
23 C.J. p 893 note 6.

4. N.Y.—People v. Hanbury, 147 N.Y.S. 851, 162 App.Div. 337, affirming 145 N.Y.S. 483—Wicker v. Dresser, 14 How.Pr. 465.
Va.—Thompson v. Commonwealth, 159 S.E. 98, 156 Va. 1032.

Evidence usable in other proceeding
A refusal to answer interrogatories not pertinent to the case, but seemingly asked to secure evidence usable in some other proceeding, is not contempt.—Thompson v. Commonwealth, supra.

5. N.Y.—Price v. Creme de Mohr Co., 137 N.Y.S. 732, 78 Misc. 42.

6. N.Y.—Frank L. Burns Coal Co. v. Gold, 239 N.Y.S. 303, 135 Misc. 545.

7. N.Y.—Becker v. Gerlich, 129 N.Y.S. 614, 72 Misc. 157.

8. N.Y.—Malmud v. Blackman, 30 N.Y.S 2d 174, 177 Misc. 162—Macmay Realty Corporation v. Katz, 15 N Y.S.2d 629, 172 Misc. 553—Rosen v. Wittenberg, 10 N.Y.S.2d 486, 170 Misc. 417.

Purpose of this statute was to provide summary remedy against judgment debtor for false swearing in view of prior decisions that perjury in supplementary proceedings did not constitute contempt.—Malmud v. Blackman, 30 N.Y.S.2d 174, 177 Misc. 162—Macmay Realty Corporation v. Katz, 15 N.Y.S.2d 629, 172 Misc. 553.

Prior to this statute
(1) Perjury in supplementary proceedings did not constitute contempt in this state.—Foster v. Hastings, 189 N.E. 229, 263 N.Y. 311, affirming 261 N.Y.S 954, 239 App.Div. 839—Ace Mail Advertising v. Newgold, 269 N.Y.S. 187, 150 Misc. 320, affirmed 269 N.Y.S. 957, 241 App.Div. 674, reversed on other grounds 192 N.E. 483, 265 N.Y. 298, reargument denied 195 N.E. 172, 266 N.Y. 500—Grief v. Masch, 264 N.Y.S. 647, 147 Misc. 756—Schumer v. Nadler, 260 N.Y.S. 911, 145 Misc. 802—23 C.J. p 893 note 8—13 C.J. p 25 note 71.

(2) It was held, however, that a deliberate and admitted perjury by the judgment debtor was punishable as contempt, as being disobedience to a lawful mandate of the court.—Ferguson v. Perk & Jenkins, 244 N.Y.S 667, 138 Misc. 326.

(3) Where the judgment debtor's conduct showed a purpose, by false promises and evasive and false testimony, to conceal fact that debtor, through insurance loans, was in possession of funds in amount sufficient to pay judgment, he was in contempt.—1050 Park Ave. Corporation v. Hagerty, 272 N.Y.S. 406, 151 Misc. 758.

(4) There was not a contempt where the answers of the witness were evasive and there was no objection or request for more specific answers.—Shorwitz v. Caminez, 137 N.Y.S. 545, 152 App.Div. 758—Burr Chevrolet v. De Forest, 274 N.Y.S. 252, 152 Misc. 912—Baum v. Rosenberg, 155 N.Y.S. 404.

Statutory rule does not apply where the false swearing did not relate to material matter and did not defeat, impair, impede, or prejudice rights or remedies of judgment creditor—Sobel v. Sobel, 291 N.Y.S. 4, 249 App.Div. 647.

9. N.Y.—Rosen v. Wittenberg, 10 N.Y.S.2d 486, 170 Misc. 417.

10. N.Y.—Osterman v. Rosken, 289 N.Y.S. 654, 160 Misc. 249.

on him,[11] or of which he has certain knowledge,[12] or who procures or permits an act of violation by another for his benefit,[13] is guilty of a contempt for which he may be punished. In order to punish one for the disposition of property or money in violation of an injunction order, it must affirmatively appear that the title to the property is in the judgment debtor,[14] and that the title was acquired prior to the granting or service of the restraining order,[15] since the disposition of after-acquired property is not a contempt.[16] If the property is owned at the time of the order, its subsequent collection and disposition, during the time the order is in effect, will constitute contempt.[17] It also must appear that the property disposed of was applicable to the payment of the judgment on which the proceedings were founded.[18] In other words, the extreme process of attachment for contempt for violation of an injunction order should not be exercised unless the evidence is sufficient to warrant the court in making an order requiring the judgment debtor to pay over the money, if in his hands, to the satisfaction of the judgment.[19] If the person enjoined claims the money or other property or asserts ownership in another than the judgment debtor, he cannot be punished for contempt, since the title cannot be determined in contempt proceedings,[20] but only in an appropriate action.[21]

The injunction order continues in force until vacated or modified by further order of the judge or court, and any violation of it prior to that time is a contempt;[22] but a violation after vacation of the order is not contempt, although a notice of appeal has been filed;[23] nor can the restraining order be used as a basis for contempt after a receiver has been appointed for the debtor,[24] or after the supplementary proceedings have been abandoned.[25]

Application of rules. Where the injunction or restraining order is thereby violated, it is a contempt to use or withdraw moneys on deposit in the name of the debtor,[26] or as trustee;[27] to collect or dispose of income from business;[28] to collect or dispose of earnings,[29] except where such earnings are exempt;[30] to confess[31] or suffer judgment[32]

11. N.Y.—Schmelzel v. Mackey, 258 N.Y.S. 38, 144 Misc. 67—Kennedy v. Swan, 240 N.Y.S. 81, 136 Misc. 367, affirmed 249 N.Y.S. 904, 232 App.Div. 741.
23 C.J. p 893 note 12.

Transfer prior to service
Judgment debtor's transfer of property after entry of order in supplementary proceedings restraining transfer, but before restraining order was served on him, did not subject him to punishment for contempt for violation of such order.—Ace Mail Advertising v. Newgold, 192 N.E. 483, 265 N.Y. 298, reversing 269 N.Y.S. 957, 241 App.Div. 674, affirming 269 N.Y.S. 187, 150 Misc. 320, and reargument denied 195 N.E. 172, 266 N.Y. 500.

12. N.Y.—Livingston v. Swift, 23 How.Pr. 1.
23 C.J. p 893 note 13.

13. N.Y.—Browning v. Chadwick, 62 N.Y.S. 476, 30 Misc. 420, affirming 61 N.Y.S. 246, 29 Misc. 607.

14. N.Y.—Matter of Duryea, 45 N.Y.S. 703, 17 App.Div. 540.
23 C.J. p 893 note 16.

15. N.Y.—Matter of Kutcosky, 138 N.Y.S. 263, 153 App.Div. 526.
23 C.J. p 893 note 17.

16. N.Y.—Mandelbaum v. Danziger, 267 N.Y.S. 117, 239 App.Div. 638—Rainsford v. Temple, 22 N.Y.S. 937, 3 Misc. 294—McSkiman v. Knowlton, 14 N.Y.S. 283, 20 N.Y. Civ.Proc. 276.

Payment by bank of moneys received for judgment debtors after service of supplementary order containing injunction is not contempt.—Hand v. Ortschreib Bldg. Corporation, 240 N.Y.S. 589, 136 Misc. 692, modified on other grounds 241 N.Y.S. 807, 228 App.Div. 835, appeal dismissed 171 N.E. 889, 254 N.Y. 15.

17. N.Y.—Henry Maillard, Inc., v. Gildenberg, 9 N.Y.S.2d 841, 170 Misc. 76.

18. N.Y.—Wolf v. Buttner, 26 N.Y.S. 52, 6 Misc. 119.

Transfer of excess
Under an order restraining bank from paying out so much of judgment debtor's deposit as would pay judgment, bank was not in contempt or in default when it paid out remainder of deposit to depositor.—In re Delaney, 176 N.E. 407, 256 N.Y. 315, reversing 244 N.Y.S. 883, 230 App.Div. 821.

19. N.Y.—Gerton Carriage Co. v. Richardson, 27 N.Y.S. 625, 6 Misc. 466.

20. N.Y.—Protter v. Lovell, 155 N.Y.S. 275, 91 Misc. 417—Matter of Becker, 73 N.Y.S. 577, 36 Misc. 322.

21. N.Y.—Protter v. Lovell, 155 N.Y.S. 275, 91 Misc. 417.
Action by receiver to determine ownership see supra § 393.

22. N.Y.—Henry Maillard, Inc., v. Gildenberg, 9 N.Y.S.2d 841, 170 Misc. 76—Woolf v. Jacobs, 36 N.Y.Super. 408.

23. Ohio.—Currie v. Baltimore & O. R. Co., 8 N.E.2d 453, 54 Ohio App. 505.

24. N.Y.—Sullivan v. U. S. Gas Fixture Co., 119 N.Y.S. 532, 134 App. Div. 658.
23 C.J. p 894 note 24.

25. N.Y.—Ace Mail Advertising v. Newgold, 192 N.E. 483, 265 N.Y. 298, reversing 269 N.Y.S. 957, 241 App.Div. 674, affirming 269 N.Y.S. 187, 150 Misc. 320, and reargument denied 195 N.E. 172, 266 N.Y. 500—Mandelbaum v. Danziger, 267 N.Y.S. 117, 239 App.Div. 638.

Restraining order held terminated by lapse of three years.—Ace Mail Advertising v. Newgold, 192 N.E. 483, 265 N.Y. 298, reversing 269 N.Y.S. 957, 241 App.Div. 674, affirming 269 N.Y.S. 187, 150 Misc. 320, and reargument denied 195 N.E. 172, 266 N.Y. 500.

26. N.Y.—Kennedy v. Swan, 240 N.Y.S. 81, 136 Misc. 367, affirmed 249 N.Y.S. 904, 232 App.Div. 741.
23 C.J. p 894 note 25.

27. N.Y.—Jackson v. Murray, 49 N.Y.S. 195, 25 App.Div. 140, 5 N.Y. Ann.Cas. 78.
23 C.J. p 894 note 26.

28. N.Y.—Prince v. Brett, 47 N.Y.S. 402, 21 App.Div. 190.
23 C.J. p 894 note 28 [b].

29. N.Y.—Newell v. Cutler, 19 Hun 74—Gillett v. Hilton, 11 N.Y.Civ. Proc. 108—Taggard v. Talcott, 2 Edw. 628.

30. N.Y.—Hancock v. Sears, 93 N.Y. 79, 4 N.Y.Civ.Proc. 255, reversing 29 Hun 96.
23 C.J. p 894 note 28.

31. N.Y.—Ross v. Clussman, 5 N.Y.Super. 676.

32. N.Y.—Fenner v. Sanborn, 37 Barb. 610.

for a fictitious debt; to assign a debt,[33] an interest in decedent's estate,[34] or for the benefit of creditors;[35] to transfer or convey property;[36] to use the proceeds of mortgaged property[37] or to pay rent;[38] to collect and dispose of rents of real estate,[39] or to interfere with the collection of rents by the receiver.[40]

On the other hand, there is no contempt in collecting debts due a firm of which the debtor is a member and using the same in its business;[41] disposing of income from furnished rooms, in the absence of an enforceable agreement with any subtenant or lodger to receive future income;[42] effectuating a prior assignment of a right of action;[43] paying a judgment debtor's deposit to a trustee for creditors;[44] preferring creditors by confessing judgment for a bona fide debt;[45] prosecuting to judgment an action pending at the time of the injunction;[46] failing to stop payment on checks drawn and given out before service of the order;[47] substituting a smaller for a larger mortgage;[48] issuance of execution by another creditor without leave;[49] or selling of personal ornaments and jewelry by a destitute debtor abandoned by her husband.[50] It is not contempt for the judgment debtor to transfer property which is exempt from execution,[51] to obtain a loan on exempt property,[52] or to deal with property belonging to the wife of the debtor.[53] The filing of a voluntary petition in bankruptcy by the judgment debtor,[54] or the transfer of his property by operation of law to a trustee in bankruptcy,[55] is not such a disposition of, or interference with, the judgment debtor's property as is contemplated by a restraining order, and is therefore not a contempt.

A bank may be punished for contempt in paying out or transferring, after service of a supplementary order, moneys had on deposit by the judgment debtor at the time of such service,[56] unless the payment or transfer is to one who is entitled to the moneys,[57] such as an assignee of the debtor.[58]

33. Wis.—In re Perry, 30 Wis 268.

34. Cal.—Myers v. Los Angeles County Super. Ct., 189 P. 109, 46 Cal.App. 206.
N.Y.—Wynkoop v. Myers, 7 N.Y.S. 898, 17 N.Y.Civ.Proc. 443.

35. N.Y.—Canda v. Gollner, 26 N.Y.S. 449, 73 Hun 493—National Wall Paper Co. v. Gerlach, 37 N.Y.S. 428, 15 Misc. 640.

36. N.Y.—Resource Holding Corporation v. Friedman, 28 N.Y.S.2d 529, 262 App.Div. 879—Ace Mail Advertising v. Newgold, 269 N.Y.S. 187, 150 Misc. 320, affirmed 269 N.Y.S. 957, 241 App.Div. 674, reversed on other grounds 192 N.E. 483, 265 N.Y. 298, reargument denied 195 N.E. 172, 266 N.Y. 500.
23 C.J. p 894 note 34.

Transfer of insurance
Judgment debtor, who obtained several adjournments in supplementary proceedings after defaulting on promise to pay judgment before first adjourned date, and who transferred life policies in violation of injunction, and thereafter consented to adjudication as bankrupt, is punishable for contempt of court.—Hansen v. Hechheimer, 208 N.Y.S. 451, 124 Misc. 509.

Mistake as to property being exempt
Where judgment debtor, erroneously deeming automobile truck exempt from execution as "working tool" or a "team," transferred his interest in truck notwithstanding the injunction contained in order directing examination of judgment debtor in supplementary proceedings, debtor is at least technically in contempt.—Northern New York Trust Co. v. Bano, 278 N.Y.S. 694, 151 Misc. 684.

Transaction whereby judgment debtor receives no money is not transfer of property in violation of injunction order.—Mandelbaum v. Danziger, 267 N.Y.S. 117, 239 App. Div. 638.

37. N.Y.—Millington v. Fox, 13 N. Y.S. 334.

38. N.Y.—Aschemoor v. Emmvert, 6 N.Y.Month.L.Bul. 81.

39. N.Y.—Stevens v. Dewey, 43 N. Y.S. 130, 13 App.Div. 312, 4 N.Y. Ann.Cas. 40.
23 C.J. p 894 note 37.

40. N.Y.—Vermont Marble Co. v. Wilkes, 30 N.Y.S. 381.

41. N.Y.—Joline v. Connolly, 24 N. Y.Wkly.Dig. 111.

42. N.Y.—Rossin v. Pisapio, 250 N. Y.S. 441, 140 Misc. 294.

43. N.Y.—Richardson v. Rust, 9 Paige 243.

44. N.Y.—German Fur Dyeing Corporation v. F. & M. Fur Co., 253 N.Y.S. 575, 142 Misc. 6.

45. N.Y.—McCredie v. Senior, 4 Paige 378.

46. N.Y.—Parker v. Wakeman, 10 Paige 485.

47. N.Y.—FitzGibbon v. Smith, 16 N.Y.S. 410.

48. N.Y.—Duffus v. Cole, 15 N.Y.S. 370.

49. N.Y.—Cooper v. Bailey, 69 App. Div. 358, 74 N.Y.S. 667.

50. N.Y.—Meyers v. Herbert, 19 N. Y.S. 132, 64 Hun 200, 22 N.Y.Civ. Proc. 216.

51. N.Y.—Vinciguerra v. Busam, 8 N.Y.S.2d 294, 169 Misc. 908.

52. N.Y.—1050 Park Ave. Corporation v. Hagerty, 272 N.Y.S. 406, 151 Misc. 758—Jacobs v. Strumwasser, 145 N.Y.S. 916, 84 Misc. 28.

53. N.Y.—Jacobs v. Strumwasser, supra.

54. N.Y.—Norton v. Bielby, 149 N. Y.S. 592, 86 Misc. 644.

55. N.Y.—In re Kepecs, 123 N.Y.S. 872.

56. N.Y.—Hand v. Ortschreib Bldg. Corporation, 240 N.Y.S. 589, 136 Misc. 692, modified on other grounds 241 N.Y.S. 807, 228 App. Div. 835, appeal dismissed 171 N. E. 889, 254 N.Y. 15.

57. N.Y.—Beverwyck Breweries v. Adelsberg, 298 N.Y.S. 47, 164 Misc. 38, reversing 289 N.Y.S. 544, 160 Misc. 130.

Transfer by bank of judgment debtor's deposit to itself when served by judgment creditor with third party subpœna restraining transfer of judgment debtor's credits, is not contempt, where bank held judgment debtor's unmatured note providing for its becoming due if judgment were recovered against him, judgment debtor had authorized bank to apply balance of account on his indebtedness on recovery of judgment against him and had given bank continuing lien on balance outstanding, and judgment creditor was not prejudiced.—Beverwyck Breweries v. Adelsberg, supra.

58. N.Y.—Tolk v. Corn Exchange Bank Trust Co., 277 N.Y.S. 112, 154 Misc. 296.

e. Disobedience of Order to Deliver or Pay Over

Disobedience of an order to pay money, deliver personalty, or convey realty may constitute a contempt.

Disobedience of an order requiring the payment of money, delivery of personal property, or the conveyance of real estate may constitute a contempt.[59] An order requiring such payment or delivery is a prerequisite,[60] and an order for the delivery of property should specify the property.[61] Service of the order is also a prerequisite;[62] and it is not enough that the possessor of the property has been served with the order and made acquainted with its effect, but a compliance therewith must be explicitly demanded of him personally by the party authorized to demand it.[63] Where the order directs the judgment debtor to pay or deliver money or property to a receiver, the judgment debtor cannot be punished for disobedience until the order appointing the receiver has been filed in the office of the county clerk of the proper county as required by statute.[64] Where the receiver has not qualified, refusal to turn over property to him is not a contempt;[65] and, moreover, the receiver is not an "officer of the court" within a statute making it contempt to disobey a judgment requiring the payment of money to such an officer.[66]

Disobedience to an order to turn over property must be evidenced by some act tending to hinder or delay the officer in taking possession thereof.[67] It is not a contempt to refuse to convey or deliver possession of real estate, the title to which has vested in the receiver by operation of law,[68] nor to refuse to deliver property the title to which is in dispute,[69] provided the dispute already exists or the question of ownership has previously been raised[70] and is still undetermined.[71] A party is not in contempt for not paying money to a person other than the one to whom it is directly payable according to the terms of the order, unless such person is expressly authorized by the person to whom it is payable to receive it.[72] A nonlitigant is not guilty of contempt in failing to deliver defendant's property to a receiver appointed in the supplementary proceeding pending an appeal from the judgment for plaintiff, where the judgment has been reversed.[73]

f. Defenses and Excuses

Matter may be set up in defense which shows that the alleged violation did not constitute contempt, or that it was excused, such as that the order, charged to have been violated, or the service thereof was invalid.

It is a good defense to an application to punish for a contempt that the judgment was satisfied before service of the motion papers to punish;[74] or that the property was transferred before the restraining order was served;[75] or that a claim of the debtor against a third person directed to be paid by the latter to the judgment creditor had been assigned by the debtor.[76] A defense arising after the making of the order in supplementary proceedings is sometimes proper, such as on a motion to show cause.[77] Disobedience may be excused in a proper

59. Alaska.—U. S. v. Wood, 6 Alaska 255.
N.Y.—Diamond & Frazer Iron Works v. Di Tullio, 284 N.Y.S. 658, 157 Misc. 800.
23 C.J. p 894 note 51.

Failure to pay installments on judgment debt as ordered
N.Y.—In re Morris Plan Co. of New York, 299 N.Y.S. 475, 164 Misc. 712—Rosevine Realty Corporation v. Stich, 298 N.Y.S. 758, 164 Misc. 339—Reeves v. Crownshield, 292 N.Y.S. 756, 162 Misc. 118, affirmed 8 N.E.2d 283, 274 N.Y. 74, 111 A.L.R. 389.

60. N.Y.—Holmes v. O'Regan, 74 N.Y.S. 10, 68 App.Div. 318.
Or.—State v. Guthridge, 80 P. 98, 46 Or. 215.
23 C.J. p 894 note 52.
Invalidity of order as defense see subdivision f of this section.

61. N.Y.—Fromme v. Jarecky, 43 N.Y.S. 1081, 19 Misc. 483.

62. N.Y.—Fromme v. Jarecky, supra.
23 C.J. p 895 note 53.

Sufficiency of service
Service of order directing judgment debtor to pay installment payments on account of judgment must be made in same manner required for service of any paper to bring a party into contempt before proceeding for contempt for failure to comply with the provisions of the order may be instituted.—Adirondack Furniture Corporation v. Crannell, 5 N.Y.S.2d 840, 167 Misc. 599.

63. N.Y.—McComb v. Weaver, 11 Hun 271.
23 C.J. p 895 note 54.

64. N.Y.—Moyer v. Moyer, 40 N.Y.S. 258, 7 App.Div. 523—Barelthers v. Brosche, 13 N.Y.S. 561, 19 N.Y.Civ.Proc. 446.
Necessity for filing order of appointment generally see supra § 387.

65. N.Y.—Klatzkie v. Kimpel, 172 N.Y.S. 711.

66. N.Y.—Manning v. Drapkin, 274 N.Y.S. 442, 242 App.Div. 782.

67. Iowa.—Reardon v. Henry, 47 N.W. 1022, 82 Iowa 134.
23 C.J. p 895 note 57.

68. N.Y.—Canandaigua First Nat. Bank v. Martin, 2 N.Y.S. 315, 49 Hun 571, 15 N.Y.Civ.Proc. 324.

69. N.Y.—Holmes v. O'Regan, 74 N.Y.S. 10, 68 App.Div. 318.
23 C.J. p 895 note 59.

70. Kan.—In re Lewis, 72 P. 788, 67 Kan. 340.

71. N.Y.—Goldreyer v. Shatz, 114 N.Y.S. 339.

72. N.Y.—People v. King, 9 How.Pr. 97.

73. Minn.—Proper v. Proper, 246 N.W. 481, 188 Minn. 15.

74. Cal.—Colyear v. Los Angeles County Super. Ct., 181 P. 74, 40 Cal. App. 462.
N.Y.—Avery v. Ackart, 46 N.Y.S. 1085, 20 Misc. 631.

75. N.Y.—Schmelzel v. Mackey, 258 N.Y.S. 38, 144 Misc. 67.

76. N.Y.—Beebe v. Kenyon, 5 Hun 73, 5 Thomps. & C. 271.

77. S.D.—Gardiner v. Ross, 104 N.W. 220, 19 S.D. 497.

Where motion for contempt order denied without prejudice
Where a motion for an order adjudging defendant guilty of contempt for failure to comply with an order previously made, is denied without prejudice, defendant is entitled, on

case, where exculpatory facts or circumstances are shown,[78] such as good faith,[79] illness,[80] or inability to comply with the order in question,[81] but partial inability to comply will not excuse entire noncompliance with the order.[82] It is no excuse that the debtor is in jail where all that is required of him is to execute a conveyance,[83] or that a bond ordered to be delivered was in good faith handed to an attorney for collection,[84] or that the goods ordered to be turned over were commingled with other goods consigned to the debtor for sale.[85] A discharge in bankruptcy or insolvency is not a good defense unless it is produced.[86] The debtor cannot purge himself of contempt for disregarding an order by a plea of advice of counsel,[87] but such advice precludes the contempt from being willful;[88] and where the acts constituting the contempt were done under a mistake of fact, the judgment debtor may be purged of his contempt on the condition of his making the judgment creditor whole.[89] The judgment debtor should not be punished for contempt where the judgment creditor's attorney has stated to him expressly or in effect that the order would not be enforced or insisted on either at all or at the time set.[90]

Invalidity of order or service. It is a good defense to an application to punish for a contempt that the order or direction charged to have been disobeyed or violated was made without authority or jurisdiction,[91] or has been superseded,[92] vacated,[93] modified,[94] or reversed,[95] or was improperly or irregularly served.[96] That the service was made on a party while attending court as a witness, juror, or litigant constitutes no defense.[97] The debtor cannot justify his misconduct by setting up a stay which was vacated before service of the order violated.[98]

Mere irregularities or immaterial defects in the

a subsequent motion to show cause why he should not be punished for contempt for the same reason, to present a defense arising after the making of the order in the supplementary proceedings.—Gardiner v. Ross, supra.

78. N.Y.—Loft Holding Co. v. Eagle Waist Co., Inc., 167 N.Y.S. 567.
23 C.J. p 895 note 66.

79. N.Y.—Lassere v. Stein, 54 N.Y.S. 939, 25 Misc. 423, affirmed 57 N.Y.S. 1140, 27 Misc. 847.

80. N.Y.—Walters v. Kenyon, 4 N.Y.St. 398.

81. N.J.—Mumma v. Schmitter, 142 A. 245, 1 N.J.Misc. 455.
N.Y.—In re Stupplebeen, 14 N.Y.S.2d 756, 171 Misc. 987—Downing v. De Vito, 293 N.Y.S. 784, 161 Misc. 788—Reeves v. Crownshield, 292 N.Y.S. 756, 162 Misc. 118, affirmed 8 N.E.2d 283, 274 N.Y. 74, 111 A.L.R. 389.
S.C.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.
23 C.J. p 895 note 69.

Lack of income

A judgment debtor who is ordered to apply a portion of his income to payment of the judgment in installments but who has no income during certain periods does not disobey the mandate by failing to make payments on such occasions and cannot be punished for contempt.—In re Stupplebeen, 14 N.Y.S.2d 756, 171 Misc. 987.

Removal of automobile

Where an automobile sold under an alleged levy was owned by and in the showrooms of parties other than defendant in execution and mortgaged by them to a bank, defendant in execution, denying ownership, could not be held responsible for its subsequent removal from the sheriff's control merely because he also conducted an automobile business in the same building.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.

Withholding wages

A treasurer of a company is not guilty of contempt in failing to withhold a part of weekly wages of judgment debtor toward payment of judgment as ordered by district court, where it is established that treasurer had no money in his possession, or under his control, to which judgment debtor was entitled, and that judgment debtor was not an employee of company, but was one of the executive officers thereof with nominal duties.—Bond Stores v. Fleisher, 13 A.2d 492, 125 N.J.Law 79.

82. Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.

83. N.Y.—Morris v. Walsh, 22 N.Y. Super. 636.

84. N.C.—Bond v. Bond, 69 N.C. 97.

85. N.Y.—Matter of Camerick, 53 N.Y.S. 1084, 34 App.Div. 31.

86. N.Y.—Coursen v. Dearborn, 30 N.Y.Super. 143.
23 C.J. p 895 note 74.

87. N.J.—Mumma v. Schmitter, 142 A. 245, 1 N.J.Misc. 455.
N.Y.—Shane Bros. & Wilson Co. v. Henshaw, 161 N.Y.S. 115, 174 App.Div. 606.
Advice of counsel as not a defense generally see Contempt § 38.

88. N.Y.—Shane Bros. & Wilson Co. v. Henshaw, supra—Goldberg v. Zimet, 180 N.Y.S. 273.
Advice of counsel as ground for reducing fine to be imposed as punishment see infra § 401.

89. N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

90. N.Y.—Germansky v. Guterman, 121 N.Y.S. 121, 136 App.Div. 581.
23 C.J. p 896 note 79.

91. Ark.—Leonard v. State, 278 S.W. 654, 657, 170 Ark. 41, quoting Corpus Juris.
N.Y.—Corrigan v. Kahn, 198 N.Y.S. 785, 120 Misc. 161—Peck v. Austin, 29 N.Y.S.2d 280.
23 C.J. p 896 note 80.

Issuing separate subpœnas for examination of judgment debtor in supplementary proceedings, with respect to each of two judgments held by same judgment creditor, is improper and precludes punishment of judgment debtor for contempt for disobedience thereof.—Golding Bros. Co. v. Kaufman, 300 N.Y.S. 838, 166 Misc. 127.

92. N.Y.—Gaylord v. Jones, 7 Hun 480—Brockway v. Brien, 37 How. Pr. 270.
23 C.J. p 896 note 81.

93. N.Y.—Serven v. Lowerre, 23 N.Y.S. 1052, 3 Misc. 113.

94. N.Y.—Kantor v. Wile, 158 N.Y.S. 115, 93 Misc. 438.

95. N.Y.—Smith v. McQuade, 13 N.Y.S. 63.

96. N.J.—Seyfert v. Edison, 1 A. 502, 47 N.J.Law 428.
Ohio.—McWhorter v. Curran, 13 N.E.2d 362, 57 Ohio App. 233.
23 C.J. p 896 note 85.

97. Cal.—Page v. Randall, 6 Cal. 32.
N.Y.—Fretcher v. Francko, 21 N.Y. Civ.Proc. 34.

98. N.Y.—Isaacs v. Calder, 59 N.Y.S. 21, 42 App.Div. 152.

order,[99] or the fact that the order was erroneously issued,[1] or the insufficiency of the affidavit on which it was granted,[2] is no defense or excuse, since an existing order which is not absolutely void for want of jurisdiction must be obeyed or proceedings taken to set it aside,[3] and cannot be questioned in the contempt proceedings;[4] nor can the truth of the affidavit be contested in contempt proceedings.[5] Defects, however, which are jurisdictional,[6] or are such as to make the order a nullity,[7] or improper in form, and necessitate a modification in material respects,[8] may constitute a defense; but a delivery of property according to the terms of an order which is void, and in violation of a valid order not to dispose of the property, is a voluntary delivery of the property, although made in good faith, and a debtor so acting is guilty of contempt.[9] Misnomer of the judgment debtor in the original summons and in the order may constitute a defense,[10] unless the misnomer is waived by appearance and examination,[11] or it is shown that he used the two names interchangeably.[12]

§ 400. —— Jurisdiction and Procedure

a. Jurisdiction
b. Procedure in general
c. Order

a. Jurisdiction

Power to punish for contempt is generally vested in the judge whose order has been violated or in the court out of which the execution issued.

The power to punish as for a contempt is generally vested in the judge whose order has been violated or in the court out of which the execution issued,[13] within the territorial jurisdiction conferred on such judge or court, although the judgment was docketed in another county.[14] When conferred on both the judge and the court, the jurisdiction is concurrent; that of the judge is not exclusive.[15] Courts or judges other than those specified in the statutes conferring jurisdiction are without jurisdiction.[16] The power to punish is derived from the original order and not from the order to show cause in the contempt proceedings;[17] and jurisdiction is not conferred on a particular judge or court by appearing and failing to object.[18] If the term of the judge entitled to entertain the contempt proceedings has expired they may be heard by his successor in office;[19] and under a statute permitting an order to show cause to be made returnable and continued before another judge, a motion on such an order may be heard by a judge other than the one issuing the order.[20] A motion for contempt for violation of an order requiring attendance can-

99. Cal.—Ex parte McCullough, 35 Cal. 97.
N.Y.—Rupert v. Lee, 92 N.Y.S. 75, 101 App.Div. 492.
23 C.J. p 896 note 88.

1. N.Y.—Rupert v. Lee, supra.
23 C.J. p 896 note 89.

2. N.Y.—O'Brien v. Howard, 16 N.Y.S.2d 290.
23 C.J. p 896 note 90.

3. Iowa.—Pirie v. Horwich, 204 Ill. App. 379.
N.Y.—Groshut v. Kinetophote Corp., 157 N.Y.S. 312, 93 Misc. 558—Boyd v. Hildebrandt, 185 N.Y.S. 235.

4. N.Y.—In re Cornblum, 232 N.Y.S. 22, 133 Misc. 357.

5. N.Y.—Hilton v. Patterson, 18 Abb. Pr. 245.

6. N.Y.—Katz v. Kosower, 117 N.Y.S. 316, 63 Misc. 25.
23 C.J. p 896 note 91.

7. N.J.—Bond Stores v. Friedman, 13 A.2d 493, 125 N.J.Law 80.

As to withholding wages
An order directing employer of judgment debtor to withhold a part of debtor's wages toward payment of judgment, but which did not state amount or percentage of wages to be retained, was a nullity, and failure to comply with order would not render one guilty of contempt.—Bond Stores v. Friedman, supra.

8. N.Y.—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App. Div. 545.

Not requiring payment out of income
Judgment debtor could not be punished for contempt in failing to obey order to pay indebtedness to judgment creditor in installments, where order was erroneous in failing to require the installments to be paid only out of judgment debtor's income.—F. E. Compton & Co. v. Williams, supra.

9. Wis.—Nieuwankamp v. Ullman, 2 N.W. 131, 47 Wis. 168.

10. N.Y.—Anderson v. Burrows, 192 N.Y.S. 195—Muldoon v. Pierz, 1 Abb. N.Cas. 309.
23 C.J. p 896 note 80 [b] (1) (2).

11. N.Y.—Matter of Johns, 1 N.Y. Month.L.Bul. 75.

12. N.Y.—People v. McCarthy, 84 N.Y.S. 1062, 41 Misc. 429.
23 C.J. p 896 note 80 [b] (4).

13. Okl.—Koran v. Dryer, Clark & Dryer Oil Co., 105 P.2d 526, 527, 187 Okl. 691, citing **Corpus Juris.**
23 C.J. p 896 note 95.

14. N.Y.—Matter of Backus, 86 N.Y.S. 638, 91 App.Div. 266, affirmed 72 N.E. 1139, 179 N.Y. 571.
23 C.J. p 897 note 97 [a].

15. N.Y.—Tremain v. Richardson, 68 N.Y. 617.
23 C.J. p 897 note 96.

16. N.Y.—Huber v. Moran-Greenberg Corporation, 198 N.Y.S. 434, 120 Misc. 104.
23 C.J. p 897 note 97.

Judge issuing order and not court rendering judgment has jurisdiction to punish disobedience of an order to appear for examination in proceeding in aid of execution before a referee in a county other than that in which the judgment was rendered, under 12 St.Annot. § 859.—Koran v. Dryer, Clark & Dryer Oil Co., 105 P.2d 526, 187 Okl. 691.

17. N.Y.—Myers v. Janes, 3 Abb.Pr. 301.

18. N.Y.—Blanchard v. Reilly, 11 N.Y.Civ.Proc. 278.

Personal appearance of judgment debtor before court lacking statutory authority to take jurisdiction of supplementary proceedings, does not give jurisdiction to the judge to punish judgment debtor for contempt in failing to obey an order of the court to appear on an adjourned date of the hearing, even though it might give jurisdiction where court had jurisdiction of such proceedings.—Huber v. Moran-Greenberg Corporation, 198 N.Y.S. 434, 120 Misc. 104.

19. N.Y.—Gamman v. Berry, 34 Hun 138—Holstein v. Rice, 24 How.Pr. 135.

20. N.Y.—Burr Chevrolet v. De Forest, 274 N.Y.S. 252, 152 Misc. 912.

not be entertained after the supplementary proceedings have lapsed.[21]

The referee cannot himself punish a party for disobedience to his orders; he must make application to the court for such purpose.[22]

Court commissioner. It has been held that a court commissioner has power to punish for contempt,[23] but there is authority to the contrary.[24] In any event, the court has power to punish disobedience of an order of, or to appear before, the commissioner.[25]

b. Procedure in General

The rules of procedure relating to contempt generally apply in a proceeding for contempt for violation of an order in a supplementary proceeding, except to the extent that such proceeding is controlled by special statutory provisions, or by particular rules applicable to such cases.

Except in so far as a proceeding for contempt for violation of an order in a supplementary proceeding is governed by special statutory provisions, or by particular rules growing out of the peculiar nature of such cases, the rules of procedure relating to contempt generally apply,[26] such as that the contempt proceeding should be instituted by, or with the consent of, the party aggrieved.[27] A contempt proceeding against the mayor of a city for the violation of a restraining order issued against city officials as such is not dismissable on the ground that the mayor, who was inducted into office after the commencement of the supplementary proceedings, was not a party to such proceedings, since they are against the office and not against the individual.[28]

Abandonment or abatement. Mere delay of a judgment creditor to proceed with contempt proceedings against the debtor for failing to appear for examination does not amount to an abandonment or waiver of such proceedings;[29] but where the party charged obeys the order, the court may release him and decline to proceed further with the proceedings.[30] The judgment creditor may be granted leave to withdraw his motion for contempt, where the issues presented have been referred to a referee, because of their difficulty of ascertainment, and the creditor's reason for withdrawing is to represent the issues in a more concise form.[31]

Entitling. It has been held that the papers may be entitled in the action,[32] but the better practice is to entitle them in the name of the people on the relation of the creditor against the debtor or contemner,[33] and although it is entitled in the action it is not a proceeding in the action.[34] Mere clerical errors in entitling the moving papers do not invalidate the proceedings.[35]

Affidavit. Generally an affidavit is necessary,[36] unless the contempt was committed in the presence of the court.[37] The affidavit should set out such facts constituting the contempt as are not judicially noticed;[38] but it need not set out the reasons for a short-time service of an order to show cause,[39] and an affidavit by an attorney need not show his authority to act.[40] Counteraffidavits may be filed;[41] but to be sufficient, they must set out facts which, if true, disprove or justify the contempt charged.[42]

Attachment or rule to show cause. While in some cases, under some statutes, the court or judge

21. N.Y.—People ex rel. Rogall v. Jacoby, 268 N.Y.S. 436, 241 App.Div. 608, affirmed 191 N.E. 527, 264 N.Y. 485, reargument denied 191 N.E. 628, 264 N.Y. 688.

22. N.Y.—Lathrop v. Clapp, 40 N.Y. 328, 100 Am.D. 493.
23 C.J. p 897 note 2.

23. W.Va.—Lewis v. Rosler, 19 W. Va. 61.

24. Wis.—In re Remington, 7 Wis. 643.

25. Mich.—Shepard v. Grove, 68 N. W. 221, 109 Mich. 606.
Wis.—Nieuwankamp v. Ullman, 2 N. W. 131, 47 Wis. 168.

26. N.Y.—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390.
Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.
Proceedings for contempt generally see Contempt §§ 62–89.

27. N.Y.—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390.
Proceeding by attorney
Order adjudging defendant in contempt for violating order in supplementary proceeding, granted at instance of attorney not shown to be authorized to act for judgment creditor, and in action which terminated in judgment, was unauthorized.—Ruf v. B. B. & F. Realty Corporation, supra.

28. Ohio.—Currie v. Baltimore & O. R. Co., 8 N.E.2d 453, 54 Ohio App. 505.

29. N.Y.—Putnam v. Anthony, 7 N. Y.St. 580.

30. N.Y.—Hilton v. Patterson, 18 Abb.Pr. 245.

31. N.Y.—S. I. K. Corporation v. Albert, 29 N.Y.S.2d 326, 176 Misc. 835.

32. N.Y.—Stafford v. Brown, 4 Paige 360.

33. N.Y.—People v. Craft, 7 Paige 325.
23 C.J. p 898 note 19.

34. N.Y.—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390.

35. N.Y.—Burr Chevrolet v. De Forest, 274 N.Y.S. 252, 152 Misc. 912.

36. N.Y.—Rinelander v. Dunham, 2 N.Y.Civ.Proc. 32.
N.C.—In re Daves, 81 N.C. 72.

37. N.Y.—Falkenburg v. Frank, 43 N.Y.S. 1137, 19 Misc. 418.
Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.

38. N.Y.—Miller v. Adams, 52 N.Y. 409.
23 C.J. p 897 note 9.

39. N.Y.—Burr Chevrolet v. De Forest, 274 N.Y.S. 252, 152 Misc. 912.

40. N.Y.—Miller v. Adams, 52 N.Y. 409, affirming 7 Lans. 131.

41. N.Y.—People v. Paine, 86 N.Y. S. 1109, 92 App.Div. 303.

42. N.Y.—Matter of Dalsace, 56 N. Y.S. 384, 26 Misc. 873.

may, in its discretion, proceed to punish the contempt summarily, as where the contempt is committed in the presence of the court or judge,[43] or where it consists of disobedience of an order to pay money,[44] the more usual course of practice, and the course required by some statutes in all cases other than those expressly excepted, is to cite the judgment debtor or other person alleged to be in contempt, either by an order to show cause or by warrant of attachment, and thus give him an opportunity to answer and be heard,[45] and if an attachment has issued the debtor should be furnished, within a reasonable time before its return, a copy of the affidavits on which it was based.[46] An order to show cause generally should be served on defendant personally,[47] although service on an attorney who appears for him generally in the supplementary proceedings may be sufficient to give the court jurisdiction,[48] but not where the attorney appears specially as for the purpose of taking an appeal.[49] The reasons for directing a short-time service of the order to show cause need not be set out in the order.[50] Under some statutes interrogatories, specifying the facts and circumstances of the contempt charged, must be filed where the proceeding is begun by attachment and the contempt is not admitted;[51] but not where the proceeding is begun by an order to show cause[52] or where the facts are not denied.[53] The proceedings should be made returnable before the court or judge who issued the attachment;[54] but an irregularity in this respect may be waived.[55] Objections to the mode by which the contempt proceedings were instituted are waived where the debtor or other person alleged to be in contempt, instead of appearing specially and presenting objections at the proper time, appears and answers generally and is accorded a full and fair hearing.[56]

Hearing and determination. The only matter brought before the court by a contempt petition is the fact of such contempt.[57] On the proofs submitted, that is, the original affidavits, the answers, and subsequent proofs, the court or judge must determine whether the contempt charged has been committed;[58] and the usual rules apply as to the burden of proof,[59] and the weight and sufficiency

43. N.Y.—Kern v. Zupha, 159 N.Y.S. 76.
S.D.—Aberdeen Clothing Co. v. Just, 143 N.W. 900, 32 S.D. 560.

44. N.Y.—Brush v. Lee, 1 Abb.Dec. 236, 2 Transcr.A. 95, 6 Abb.Pr.,N.S., 50—People v. King, 9 How.Pr. 97.

Statute not applicable
A statute authorizing a contempt warrant without notice and proof of personal demand, where the offense consists of neglect or refusal to obey a court order requiring the payment of money, is inapplicable where the offense involved is a refusal to obey an order in a supplementary proceeding seeking to enforce a fine imposed, and not a refusal to obey an order requiring the payment of money.—People ex rel. Hayes v. Pope, 247 N.Y.S. 393, 231 App.Div. 279.

Bank cannot be summarily brought to book, in receiver's proceeding to recover corporation's assets, for paying to judgment debtor, in disregard of order in supplementary proceedings, amount of judgment debtor's deposit ordered held to pay judgment.—In re Delaney, 176 N.E. 407, 256 N.Y. 315, reversing 244 N.Y.S. 883, 230 App.Div. 821.

45. N.Y.—Diamond & Frazer Iron Works v. Di Tullio, 284 N.Y.S. 658, 157 Misc. 800.
23 C.J. p 897 note 12.

Motion on order to show cause addressed to court's discretion
N.Y.—Downing v. De Vito, 293 N.Y.S. 784, 161 Misc. 788.

46. N.Y.—Ward v. Arenson, 23 N.Y. Super. 589—Matter of Smethurst, 4 N.Y.Super. 724, 4 How.Pr. 369, 3 Code Rep. 55.

47. N.Y.—Vingut v. Sire, 148 N.Y.S. 533, 163 App.Div. 529.

48. N.Y.—Isaacs v. Calder, 59 N.Y.S. 21, 42 App.Div. 152—New York Twelfth Bank v. Luckes, 129 N.Y.S. 227.
23 C.J. p 897 note 12 [c] (1) (2).

49. N.Y.—Vingut v. Sire, 148 N.Y.S. 533, 163 App.Div. 529.

50. N.Y.—Burr Chevrolet v. De Forest, 274 N.Y.S. 252, 152 Misc. 912.

51. N.Y.—De Witt v. Dennis, 30 How.Pr. 131.

52. N.Y.—Pitt v. Davison, 37 N.Y. 235, 4 Transcr.A. 266, 3 Abb.Pr.,N.S., 398, 34 How.Pr. 335—Brush v. Lee, 1 Abb.Dec. 238, 2 Transcr.A. 95, 6 Abb.Pr.,N.S., 50.

53. N.Y.—Lathrop v. Clapp, 40 N.Y. 328, 100 Am.D. 493, affirming 23 How.Pr. 423—Watson v. Fitzsimmons, 12 N.Y.Super. 629.

54. N.Y.—Kelly v. McCormick, 28 N.Y. 318, affirming 2 E.D.Smith 503.

55. N.Y.—Kelly v. McCormick, supra.

56. Iowa.—McDonnell v. Henderson, 38 N.W. 512, 74 Iowa 619.
N.Y.—Maigille v. Leonard, 92 N.Y.S. 656, 102 App.Div. 367, affirmed 74 N.E. 1120, 181 N.Y. 558.
23 C.J. p 898 note 22.

57. N.Y.—McDermott v. Justices of Municipal Court of City of Boston, 192 N.E. 18, 287 Mass. 563.

Docket entries as referring only to contempt proceedings
Where contempt petition for judgment debtor's alleged failure to comply with order in supplementary proceeding is pending, docket entry that "proceedings" be brought forward and continued and subsequent docket entry that "proceedings" were dismissed, made on creditor's failure to appear, refer merely to proceedings on such contempt petition and not entire supplementary proceedings.—McDermott v. Justices of Municipal Court of City of Boston, supra.

Findings of judge as conclusive in proceedings for prohibition and mandamus—McDermott v. Justices of Municipal Court of City of Boston, supra.

58. Cal.—Ex parte Zuker, 56 P.2d 1261, 13 Cal.App.2d 427.

Court cannot order payment of money into court, and adjudge defendant in contempt if he fails to do so, in the absence of allegations and findings that defendant was possessed of such amount of money.—Leonard v. State, 278 S.W. 654, 170 Ark. 41.

59. N.J.—Bond Stores v. Friedman, 13 A.2d 493, 125 N.J.Law 80.

Burden of showing contempt on judgment creditor
N.J.—Bond Stores v. Friedman, 13 A.2d 493, 125 N.J.Law 80.

Burden of showing defense or excuse on debtor
N.Y.—F. E. Compton & Co. v. Williams, 290 N.Y.S. 984, 248 App.Div. 545—In re Stupplebeen, 14 N.Y.S.2d 756, 171 Misc. 987.

of the evidence.[60] Before punishment may be ordered, there must be sufficient proof that the order or direction charged to have been disobeyed was duly made and served,[61] that compliance therewith was refused,[62] and that there was a willful disobedience.[63] Where, by statute, it must be adjudicated and recited in the order imposing punishment that the contempt committed was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the judgment creditor, proof of actual loss or damage by the creditor is not necessary,[64] unless the imposition of a larger fine, on account thereof, is desired, as explained infra § 401; and on the other hand, if such contempt is adjudged, the utmost good faith must be shown as a condition to any favor within the power of the court to grant or withhold.[65] A certificate or report of the referee or examiner appointed to conduct the examination is admissible to prove what took place at the examination or at the time and place set for the examination,[66] but it is not alone sufficient proof of a failure to appear.[67] Where the judgment debtor offers to pay a sum in reduction of any fine imposed to be applied on the judgment, and to serve an affidavit of the facts sought to be established on a hearing, applied for by him, respecting his financial condition, the court, in the event of compliance with the offer, will pass on the merits of the application, and on proof of noncompliance will adjudge him in contempt.[68]

Action on bond. In an action on a bond given to the sheriff for the purpose of obtaining the release of a party from arrest on an attachment issued for a contempt, in proceedings supplementary to execution, the objection that the complaint does not show that an execution on the judgment against the principal obligor was issued or returned, or that any order for his examination, or for the attachment, was made, is not available to defendants.[69]

c. Order

An order adjudging a party guilty of contempt is an order in the supplementary proceedings. It should specify the acts or conduct constituting the contempt, and otherwise comply with the statutory requirements as to its contents.

The order adjudging a party guilty of contempt is not one in an independent special proceeding but is an order in the supplementary proceedings.[70] An order which adjudges a debtor guilty of contempt and orders a warrant which is not in the nature of an attachment on which interrogatories are intended to be served, is an adjudication of contempt, and is not a mere order for process.[71] An oral order made in the absence of the party and without appearance on his behalf or any case made by the moving party is improper.[72] The order convicting of the contempt must specify the particular facts or misconduct constituting it,[73] should be confined to the conduct which the contemner was called on to explain,[74] and under some statutes, must

60. N.Y.—Soprinsky v. Tolman, 289 N.Y.S. 1110, 160 Misc. 381.

Evidence held sufficient to show judgment debtor guilty of contempt in willfully and knowingly giving false testimony.—Soprinsky v. Tolman, supra.

Evidence held insufficient to show judgment debtor guilty of contempt on ground that he willfully and knowingly testified falsely especially where he voluntarily made available to judgment creditor all his records and afforded full opportunity for examination and discovery.—Stafford v. Bruce, 289 N.Y.S. 1106, 160 Misc. 425.

61. N.Y.—Aborn v. Herbert, 158 N.Y.S. 565, 94 Misc. 637.
23 C.J. p 898 note 24.

62. N.Y.—McComb v. Weaver, 11 Hun 271.
Or.—State v. Downing, 58 P. 863, 66 P. 917, 40 Or. 309.

63. N.Y.—People v. Hanbury, 147 N.Y.S. 851, 162 App.Div. 337, affirming 145 N.Y.S. 483.
23 C.J. p 898 note 26.

Willful false swearing
N.Y.—Malmud v. Blackman, 30 N.Y.S.2d 174, 177 Misc. 162.

64. N.Y.—Matter of Seitz, 107 N.Y.S. 593, 56 Misc. 616.
Contra Robertson v. Hay, 33 N.Y.S. 31, 12 Misc. 7.

65. N.Y.—Moyer v. Feldman, 30 N.Y.S.2d 899.

66. N.Y.—Newell v. Cutler, 19 Hun 74.

67. N.Y.—Rinelander v. Dunham, 2 N.Y.Civ.Proc. 32.

68. N.Y.—Moyer v. Feldman, 30 N.Y.S.2d 901.

69. N.Y.—Kelly v. McCormick, 28 N.Y. 318, affirming 2 E.D.Smith 503.

70. N.Y.—Steinman v. Conlon, 101 N.E. 868, 208 N.Y. 198—Ruf v. B. B. & F. Realty Corporation, 236 N.Y.S. 361, 227 App.Div. 390.

71. N.J.—Hershenstein v. Hahn, 71 A. 105, 77 N.J.Law 39.

72. N.Y.—Tinkey v. Langdon, 60 How.Pr. 180.

73. Colo.—Handler v. Gordon, 120 P.2d 205.
N.Y.—Tri-State Investors' Corporation v. Kitching, 246 N.Y.S. 240, 231 App.Div. 143, dismissal of appeal denied 177 N.E. 137, 256 N.Y. 553, and dismissed 177 N.E. 173, 256 N.Y. 639, affirmed 178 N.E. 800, 257 N.Y. 573.
23 C.J. p 898 note 38.

Where there is paucity of recital of facts in judgment, in supplementary proceedings, adjudging one of parties in criminal contempt because of answers made in examination in relation to his property holdings, judgment is not supported.—Handler v. Gordon, Colo., 120 P.2d 205.

74. S.C.—Workman v. Thrower, 114 S.E. 409, 121 S.C. 430.

Limitation to charge in show cause order
Where petitioner had shown only that defendant had no connection with the automobile alleged to have been levied on, other than that it had been in the building where defendant conducted his business, and that it had been removed therefrom, an order requiring defendant to inform the sheriff where he could get the automobile was reversible, as not confined to defendant's alleged conduct, and as transgressing defendant's indictment in the show cause order, reciting only that defendant was keeping the automobile beyond reach of process.—Workman v. Thrower, supra.

Order punishing cashier of bank for disobeying a third party order which was directed to the bank and served only on the president of the

state that the contempt committed was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the judgment creditor.[75] An order made in supplementary proceedings, without proof of noncompliance and without contempt proceedings, that defendant comply therewith or be imprisoned, is improper.[76] However, an order in contempt proceedings relieving the offender from punishment on compliance with certain conditions therein contained is regular and proper,[77] provided the conditions named are within the authority and jurisdiction of the judge to impose.[78] An order adjudging a debtor guilty of contempt and imposing a fine need not be personally served before the court can sign a commitment order.[79] The order may be reversed where the record shows nothing contumacious about the party's conduct.[80] A warrant of commitment setting forth the matters contained in the contempt order is valid.[81]

§ 401. —— Punishment, and Discharge from Imprisonment

The scope of the punishment for contempt depends primarily on the governing statute, and usually consists of a fine and commitment of the contemner for a limited period, or until the mandate of the court is complied with, or until he is duly discharged.

Contempt in these proceedings is punishable as a civil and not as a criminal contempt.[82] The scope of the punishment depends primarily on the governing statute,[83] and usually consists, under the various statutes of imposing a fine on the contemner and committing him to jail until he pays the fine, or otherwise complies with the mandate of the court,[84] or until he has been duly discharged according to law, as for instance by release on bail.[85] The purpose is not punitive, but is remedial or coercive, the object being to compel obedience to, or the performance of, the court's order, and to benefit the injured creditor, whose rights have been impaired, impeded, or prejudiced by the debtor's contumacious conduct;[86] and the punishment cannot be imposed under a general power to punish contempt.[87] The length of the imprisonment, under some of these statutes, varies according to the amount of the fine,[88] and the imprisonment must be actual,[89] and if there is no express waiver by the judgment creditor of the commitment, the acceptance by him of payments on account of the fine does not waive the commitment.[90] The imposition of a fine for contempt is not a substitute for the relief appropriate to the supplementary proceeding, and does not prevent the proceeding from continuing until its aim has been achieved.[91]

Under some statutes, if the contempt has produced an actual loss or injury to the other party, and the case is not one where it is specially prescribed by law that an action may be maintained to recover damages for the loss or injury,[92] a fine

bank, where the motion for contempt asked only that the bank be punished, is improper.—German Fur Dyeing Corporation v. F. & M. Fur Co., 253 N.Y.S. 575, 142 Misc. 6.

75. N.Y.—Mengel v. Larkin, 244 N.Y.S. 697, 230 App.Div. 783—Gray v. Rife, 21 N.Y.S.2d 570.
23 C.J. p 898 note 39.

76. Kan.—In re O'Connell, 30 P. 456, 49 Kan. 415.
S.C.—Kennesaw Mills Co. v. Walker, 19 S.C. 104.

77. N.Y.—Billings v. Carver, 54 Barb. 40—People v. Sickles, 13 N.Y.S. 101, 59 Hun 342—Putnam v. Anthony, 7 N.Y.St. 580.

78. N.Y.—Meyer v. Dreyspring, 23 N.Y.S. 315, 3 Misc. 560—Durkee v. Bonnell, 125 N.Y.S. 790.

79. N.Y.—In re Landes, 242 N.Y.S. 710, 136 Misc. 719.

80. N.Y.—Blaufeld v. Hyams, 286 N.Y.S. 783, 247 App.Div. 212.

81. N.Y.—People ex rel. Hayes v. Pope, 247 N.Y.S. 393, 231 App.Div. 279.

82. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
N.Y.—Samuels v. Ganz, 21 N.Y.S.2d 268, 174 Misc. 399.
23 C.J. p 899 note 45.

83. Mass.—Brewer v. Casey, 82 N.E. 45, 196 Mass. 384.
23 C.J. p 899 note 44.

84. Alaska.—U. S. v. Wood, 6 Alaska 255.
N.Y.—Tri-State Investors' Corporation v. Kitching, 246 N.Y.S. 240, 231 App.Div. 143, dismissal of appeal denied 177 N.E. 137, 256 N.Y. 553, and dismissed 177 N.E. 173, 256 N.Y. 639, affirmed 178 N.E. 800, 257 N.Y. 573—In re Reid, 188 N.Y.S. 336.
23 C.J. p 899 note 46.

In Puerto Rico it has been held that an order committing defendant for contempt for failing to obey an order to pay the amount of the judgment into court, trenches so closely on imprisonment for debt that it will be set aside.—Sixto v. Sarria, 2 Puerto Rico Fed. 168.

85. N.Y.—Valentine v. Mandel, 11 N.Y.S. 718, 19 N.Y.Civ.Proc. 155—Walter v. Pecare, 11 N.Y.S. 146.
23 C.J. p 899 note 47.

86. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.
N.Y.—Russell Homes Corporation v. Lynch, 17 N.Y.S.2d 428, reversed on other grounds 20 N.Y.S.2d 787.

87. N.J.—Eggert v. McHose, 77 A. 801, 80 N.J.Law 101.
23 C.J. p 899 note 44 [a].

88. N.Y.—Russell Homes Corporation v. Lynch, 17 N.Y.S.2d 428, reversed on other grounds 20 N.Y.S.2d 787.

Imprisonment until fine is paid illegal
Where the statute limits the length of the imprisonment according to the amount of the fine, a judgment debtor cannot be deprived of his liberty by holding him in jail until he pays fine imposed on him for his contumacious conduct in failing to appear for examination pursuant to subpœna served on him.—Russell Homes Corporation v. Lynch, supra.

89. N.Y.—Russell Homes Corporation v. Lynch, supra.

90. N.Y.—Russell Homes Corporation v. Lynch, 20 N.Y.S.2d 787, reversing 17 N.Y.S.2d 428.

91. U.S.—Fox v. Capital Co., N.Y., 57 S.Ct. 57, 299 U.S. 105, 81 L.Ed. 67.

92. N.Y.—Westervelt v. Shapiro, 132 N.Y.S. 338.

Fine for amount of judgment and costs cannot be imposed against a witness for failure to appear before a referee and testify, where the judgment creditor has the right to recover

must be imposed which is sufficient to indemnify the aggrieved party, usually the judgment creditor, for such loss or injury,[93] such as the amount due on the judgment,[94] plus costs, expenses, and counsel fees incurred in connection with the contempt proceeding;[95] and if the fine imposed is excessive it may be reduced.[96] The loss or injury is reckoned at the time of the hearing of the contempt motion,[97] and must be proved as in an action;[98] and the fine when paid should be credited on the judgment.[99] Where, however, under such statutes, it is not shown that an actual loss or injury has been produced, the fine cannot exceed complainant's costs and expenses, and a specified sum, such as two hundred and fifty dollars, in addition thereto.[1] In such a case a fine in the amount of the judgment cannot be imposed;[2] but the fine may be for less than the statutory amount, although it is equal to the judgment and costs,[3] and if there has been contempt, more than a nominal fine should be imposed.[4] The costs and expenses in such a case may include attorney's fees,[5] and sheriff's fees;[6] but they must be reasonable,[7] and in the absence of an allegation or proof as to costs and expenses they cannot be allowed, although a fine is imposed.[8] A fine of the maximum statutory amount should not be imposed where there are extenuating circumstances,[9] as where the debtor relied on the advice of counsel,[10] or his failure to obey the order was due to a mistake of his attorney;[11] or where it is doubtful whether service of the order in the supplementary proceeding was made.[12] An order imposing an excessive fine cannot be treated as void;[13] but it cannot be upheld where there is no proof of actual loss.[14]

A female may be punished by imprisonment for refusal to obey an order to pay over money, notwithstanding a statute exempting females from imprisonment on any order of arrest or on an execution against the body.[15]

Stay of punishment. Commitment may be stayed on the debtor offering to pay a certain sum in reduction of the fine to be applied on the judgment and to pay certain sums thereafter at given periods;[16] but where his motion to set aside a default

all the damages he has sustained against the witness.—In re Depue, 77 N.E. 798, 185 N.Y. 60.

93. N.Y.—Resource Holding Corporation v. Friedman, 28 N.Y.S.2d 529, 262 App.Div. 879—Williamson v. Drogaris, 288 N.Y.S. 179, 248 App. Div. 627—Malmud v. Blackman, 30 N.Y.S.2d 174, 177 Misc. 162—S. S. & B. Live Poultry Corporation v. Fleischer, 300 N.Y.S. 617, 165 Misc 175—Reeves v. Crownshield, 292 N.Y.S. 756, 162 Misc. 118, affirmed 8 N.E.2d 283, 274 N.Y. 74, 111 A. L.R. 389—St. Luke's Hospital v. Hall, 20 N.Y.S.2d 602.
23 C.J. p 899 note 48.

94. N.Y.—Macmay Realty Corporation v. Katz, 15 N.Y.S.2d 629, 172 Misc. 553—Henry Maillard, Inc., v. Gildenberg, 9 N.Y.S.2d 841, 170 Misc. 76—1050 Park Ave. Corporation v. Hagerty, 272 N.Y.S. 406, 151 Misc. 758—Ace Mail Advertising v. Newgold, 269 N.Y.S. 187, 150 Misc. 320, affirmed 269 N.Y.S. 957, 241 App.Div. 674, reversed on other grounds 192 N.E. 483, 265 N.Y. 298, reargument denied 195 N.E. 172, 266 N.Y. 500.

95. N.Y.—Consumer's Poultry Dealers Corporation v. Podberesky Bros., 279 N.Y.S. 68, 244 App.Div. 754, reargument denied 280 N.Y.S. 1010, 244 App.Div. 827—Malmud v. Blackman, 30 N.Y.S.2d 174, 177 Misc. 162—Henry Maillard, Inc. v. Gildenberg, 9 N.Y.S.2d 841, 170 Misc. 76—1050 Park Ave. Corporation v. Hagerty, 272 N.Y.S. 406, 151 Misc. 758.

96. N.Y.—Williamson v. Drogaris, 288 N.Y.S. 179, 248 App.Div. 627—Consumer's Poultry Dealers Corporation v. Podberesky Bros., 279 N.Y.S. 68, 244 App.Div. 754, reargument denied 280 N.Y.S. 1010, 244 App.Div. 827.

97. N.Y.—Barnard v. Barnard, 296 N.Y.S. 155, 251 App.Div. 745—Williamson v. Drogaris, 288 N.Y.S. 179, 248 App.Div. 627—S. S. & B. Live Poultry Corporation v. Fleischer, 300 N.Y.S. 617, 165 Misc. 175.

98. N.Y.—Samuels v. Ganz, 21 N.Y.S.2d 268, 174 Misc. 399.

To be fined to full amount of judgment there must be positive proof that the judgment creditor's rights were impaired to such extent.—Samuels v. Ganz, supra—Kennedy v. Swan, 240 N.Y.S. 81, 136 Misc. 367, affirmed 249 N.Y.S. 904, 232 App.Div. 741.

99. N.Y.—Resource Holding Corporation v. Friedman, 28 N.Y.S.2d 529, 262 App.Div. 879—Macmay Realty Corporation v. Katz, 15 N.Y.S.2d 629, 172 Misc. 553—St. Luke's Hospital v. Hall, 20 N.Y.S. 2d 602.

1. N.Y.—Samuels v. Ganz, 21 N.Y.S. 2d 268, 174 Misc. 399—Kennedy v. Swan, 240 N.Y.S. 81, 136 Misc. 367, affirmed 249 N.Y.S. 904, 232 App. Div. 741—Starr v. Morange, 196 N. Y.S. 308, 119 Misc. 376.
23 C.J. p 899 note 50.

2. N.Y.—Starr v. Morange, supra.

3. N.Y.—Isaacs v. Calder, 59 N.Y.S. 21, 42 App.Div. 152.
23 C.J. p 899 note 50 [d].

4. N.Y.—Bird v. Wessels, 119 N.Y. S. 329.
23 C.J. p 899 note 50 [e].

5. N.Y.—Westervelt v. Shapiro, 132 N.Y.S. 338.

6. N.Y.—White v. Griffenhagen, 160 N.Y.S. 187, 95 Misc. 84.
23 C.J. p 899 note 50 [b].

7. N.Y.—Matter of Kutcosky, 138 N.Y.S. 263, 153 App.Div. 526.
23 C.J. p 899 note 50 [c].

8. N.Y.—Samuels v. Ganz, 21 N.Y.S. 2d 268, 174 Misc. 399.

9. N.Y.—Goldsmiths & Silversmiths Co. v. Haas, 134 N.Y.S. 602, 76 Misc. 210—Kreiser v. Kitaoka, 73 N.Y.S 164, 36 Misc. 174.
23 C.J. p 899 note 51.

10. N.Y.—Shane Bros. & Wilson Co. v. Henshaw, 161 N.Y.S. 115, 174 App.Div. 606.
23 C.J. p 899 note 51 [a].

11. N.Y.—Matter of Fancher, 110 N.Y.S. 157, 58 Misc. 11.
23 C.J. p 899 note 51 [b].

12. N.Y.—Kantor v. Smogler, 228 N. Y.S. 376, 131 Misc. 851.

13. N.Y.—Gumpel v. Gurvitch, 169 N.Y.S. 135, 102 Misc. 536.

14. N.Y.—German Fur Dyeing Corporation v. F. & M. Fur Co., 253 N.Y.S. 575, 142 Misc. 6.

15. Ind.—Joyce v. Everson, 69 N. E. 135, 161 Ind. 440.
Liability of females to arrest see infra § 419.

16. N.Y.—Moyer v. Feldman, 30 N. Y.S.2d 899.

in supplementary proceedings was denied on the merits and the ruling affirmed on appeal, he cannot have his punishment stayed pending an appeal from the order adjudging him guilty of contempt.[17]

Discharge. A person imprisoned for failure to obey an order in supplementary proceedings may move for his release from imprisonment on any statutory ground,[18] such as his inability to comply with the order of the court.[19] Failure to give notice to the judgment creditor of the application for a discharge renders it irregular but not void.[20] If the judgment debtor is discharged on bail, but no order is made as to the disposition of the money deposited as bail, and the debtor becomes entitled to the return thereof, the judgment creditor is entitled to an order directing the payment of the money to him in reduction of his judgment.[21]

§ 402. Costs

a. In general
b. In action by or against receiver
c. In contempt proceeding

a. In General

Except to the extent that they are governed by special statutory provisions, or by particular rules growing out of the peculiar nature of the subject matter, the costs in a supplementary proceeding are controlled by the usual rules relating to costs.

Costs in supplementary proceedings are in a great measure discretionary,[22] and depend largely on the peculiar circumstances of the particular case.[23] Some of the statutes, however, authorizing supplementary proceedings, provide for the allowance of costs and disbursements, or of a fixed sum in lieu thereof; and under such statutes, and the judicial construction thereof, costs may be allowed in a proper case, to the judgment creditor,[24] as where the misconduct of the judgment debtor has rendered necessary the supplementary proceeding;[25] and it has been held that the creditor may be allowed not only the sum provided by statute, but also such other costs as may be provided for the civil officers of the court, including attorney's fees, for any specified service in the action,[26] but the judgment debtor should not be held liable for increased costs due to the acts of third persons.[27] In a proper case also costs may be allowed to the judgment debtor;[28] but a provision allowing costs to the judgment debtor where he has been examined, and where property applicable to the payment of the judgment has not been discovered, does not apply where the debtor has not been examined,[29] nor does it apply to the costs of a motion to dismiss.[30] A third person whose examination discloses no possession or control of property belonging to the debtor, may also be allowed costs,[31] as may also one who, although not a party to the action, was made a party to the proceeding.[32] Under a statute authorizing a fixed sum, in addition to witnesses' fees and disbursements, as costs, the fact that the fixed sum is designated as "counsel fee," instead of "as costs," is not fatal, since costs usually include counsel fee.[33] Satisfaction of the judgment after the institution of the proceedings precludes the right to costs, where such satisfaction is procured by means of a new execution,[34] but not where it is made by voluntary payment by the debtor.[35]

Application and allowance. An application for and an allowance of a sum as costs should not be made until the close of the proceeding,[36] as where

17. N.Y.—Soule v. Lookstein, 151 N.Y.S. 67.

18. N.Y.—Stewart v. Smith, 175 N.Y.S. 468, 186 App.Div. 755.
23 C.J. p 900 note 57.

19. N.Y.—Russell Homes Corporation v. Lynch, 17 N.Y.S.2d 428, reversed on other grounds 20 N.Y.S.2d 787.
Inability to pay fine
N.Y.—Russell Homes Corporation v. Lynch, supra.

20. N.Y.—Goldreyer v. Foley, 139 N.Y.S. 190, 154 App.Div. 584.

21. N.Y.—Elite Distributing Co. v. Schrul, 136 N.Y.S. 607, 69 Misc. 206.
23 C.J. p 899 note 47 [a].
Disposition of bail money in satisfaction of plaintiff's judgment generally see Bail § 11 b.

22. N.Y.—In re Chambers' Will, 7 N.Y.S.2d 350, 169 Misc. 134, adhering to 4 N.Y.S.2d 875, 167 Misc. 843—Paterson v. Goorley, 35 N.Y.S. 297, 14 Misc. 57.
S.C.—Dauntless Mfg. Co. v. Davis, 24 S.C. 584.
23 C.J. p 900 note 59.

23. U.S.—In re Shepherd, C.C.N.Y., 154 F. 957.
23 C.J. p 900 note 60.

24. N.Y.—Holton v. Robinson, 69 N.Y.S. 33, 59 App.Div. 45.
Wis.—Enders v. Smith, 100 N.W. 1061, 122 Wis. 640.
23 C.J. p 900 note 61.

25. Wis.—Enders v. Smith, supra.
23 C.J. p 900 note 61 [c].

26. S.C.—Dauntless Mfg. Co. v. Davis, 24 S.C. 536.
23 C.J. p 900 note 61 [b].

27. U.S.—In re Shepherd, C.C.N.Y., 154 F. 957.
23 C.J. p 900 note 60 [a].

28. N.Y.—Boelger v. Swivel, 1 How. Pr.,N.S., 372.
23 C.J. p 900 note 62.

29. N.Y.—Engle v. Bonneau, 4 N.Y. Super. 679, 3 Code Rep. 205.
23 C.J. p 900 note 62 [a] (2).

30. N.Y.—Hutson v. Weld, 38 Hun 142.
23 C.J. p 900 note 62 [a] (3).

31. N.Y.—Howe v. Stuart, 123 N.Y.S. 971, 68 Misc. 352.
23 C.J. p 900 note 63.

32. N.Y.—Stettheimer v. Stettheimer, 2 N.Y.St. 358—Davis v. Turner, 4 How.Pr. 190.
23 C.J. p 900 note 64.

33. N.Y.—Hulsaver v. Wiles, 11 How.Pr. 446.

34. N.Y.—Ritter v. Greason, 59 N.Y.S. 1053, 28 Misc. 656.

35. N.Y.—Holton v. Robinson, 69 N.Y.S. 33, 59 App.Div. 45—Colne v. Girard, 19 Abb.N.Cas. 288.

36. N.Y.—Davis v. Turner, 4 How. Pr. 190.
23 C.J. p 900 note 65.

the proceedings are before a referee, the imposition of costs should not be made until the report of the referee is made.[37] It is not too late if made at any time before the final order for the application of the funds in the hands of the receiver or sheriff.[38] The order directing payment of costs may be made without notice to the debtor.[39]

Taxation and adjustment. Where the costs are to be taxed and adjusted by the court or a judge thereof as it or he may direct, on appeal from a taxation by the clerk, a judge to whom the appeal is taken may direct a readjustment by the clerk.[40]

Collection. Final costs in the proceeding for which an exclusive mode of collection is provided cannot be collected by execution.[41] An execution issued under a statute providing that costs in the proceedings shall be recovered in an action, and a separate execution issued therefor, is not within a general provision respecting the time when executions may issue generally.[42] Costs awarded to the debtor may be credited on the judgment;[43] but they do not come within statutory provisions authorizing the judge entertaining the supplementary proceedings to order applied to the satisfaction of the judgment money or property in the possession or control of the judgment debtor and disclosed by the examination or the testimony in the supplementary proceedings.[44] The final costs collectable by the creditor in the proceedings may be directed to be paid out of any money which has come or may come into the hands of the receiver or sheriff,[45] or under some,[46] but not other,[47] statutes, they may be directed to be paid by the judgment debtor.

Security for costs. Unless so provided by statute, the judgment debtor cannot require the creditor to file security for the costs of the proceeding.[48]

b. In Action by or against Receiver

Usual rules as to costs also generally govern the costs in an action by or against a receiver in a supplementary proceeding.

A receiver in a supplementary proceeding, is not entitled to costs and disbursements in an action in which he is a nominal defendant against whom no personal claim is made,[49] nor, when made a party to an action by the debtor in which he interposes an answer seeking affirmative relief, is he entitled to costs against his codefendant.[50] He is, however, entitled to an allowance of costs where the judgment debtor's conduct warranted him in bringing the action,[51] and an unsuccessful appeal will not affect his right to costs, if he was justified and was guilty of no impropriety in taking the appeal.[52] A receiver may be adjudged to pay costs personally where he has instituted and prosecuted an action without leave of the court,[53] or has inexcusably interfered with property of a third person.[54] Costs may be assessed against the receiver in a supplementary proceeding, where he is unsuccessful in a proceeding instituted therein at the instance of the judgment creditor, regardless of whether the creditor's basic claim was meritorious,[55] and the receiver cannot avoid such costs on the ground that, in instituting such proceeding in good faith at the request of the judgment creditor, he was acting as an officer of the court, since he was merely an instrumentality of the creditor;[56] nor can he avoid the costs on the ground that he has no funds with which to pay them, where, by statute, he has a right of indemnity against the creditor.[57] A receiver may be required to give security for costs,[58] as where he has no funds in his hands applicable to the payment of costs and has obtained leave to sue.[59]

Liability of judgment creditors. Judgment cred-

37. N.Y.—Kennedy v. Norcott, 54 How.Pr. 87.

38. N.Y.—Webber v. Hobbie, 13 How. Pr. 382.

39. N.Y.—Serven v. Lowerre, 23 N. Y.S. 1052, 3 Misc. 113.

40. N.Y.—Foley v. Rathbone, 12 Hun 589.

41. N.Y.—Valiente v. Bryan, 65 How. Pr. 203.

42. Me.—Stevens v. Manson, 32 A. 1002, 87 Me. 436.

43. N.Y.—Newville First Nat. Bank v. Yates, 47 N.Y.S. 484, 21 Misc. 373—Kress v. Morehead, 8 N.Y.St. 858.

44. N.Y.—Boelger v. Swivel, 1 How. Pr.,N.S., 372.

45. N.Y.—Holton v. Robinson, 69 N. Y.S. 33, 59 App.Div. 45—In re Merry, 42 N.Y.S. 617, 11 App.Div. 597.
Wash.—Howard v. Hanson, 95 P. 265, 49 Wash. 314.
23 C.J. p 901 note 76.

46. N.Y.—Kearney's Case, 13 Abb. Pr. 459—Valiente v. Bryan, 65 How. Pr. 205.

47. Wash.—Howard v. Hanson, 95 P. 265, 49 Wash. 314.

48. Iowa.—Estey v. Fuller Implement Co., 46 N.W. 1098, 82 Iowa 678.
N.Y.—Newville First Nat. Bank v. Yates, 47 N.Y.S. 484, 21 Misc. 373.
23 C.J. p 901 note 91.

49. N.Y.—Baldwin v. Eazler, 34 N.Y. Super. 274.

50. N.Y.—Arthur v. Dalton, 43 N.Y. S. 533, 14 App.Div. 108.

51. N.Y.—In re Merry, 42 N.Y.S. 617, 11 App.Div. 597.

52. N.Y.—In re Merry, supra.

53. N.Y.—Smith v. Woodruff, 6 Abb. Pr. 65.
23 C.J. p 901 note 82.

54. N.Y.—Robinson v. Wood, 15 N.Y. S. 169.

55. N.Y.—In re Chambers' Will, 7 N.Y.S.2d 250, 169 Misc. 124, adhering to 4 N.Y.S.2d 875, 167 Misc. 843.

56. N.Y.—In re Chambers' Will, supra.

57. N.Y.—In re Chambers' Will, supra.

58. N.Y.—Millis v. Pentelow, 36 N. Y.S. 906, 92 Hun 284.
23 C.J. p 901 note 92.

59. N.Y.—Welch v. Bogert, 3 N.Y. Wkly.Dig. 402.

itors are not personally liable for the costs of an unsuccessful action brought by a receiver, where they are not parties to the action, have not authorized or directed it, and have taken no part in its prosecution.[60] However, a creditor is so liable if he directs or takes an active part in prosecuting the action in the receiver's name for his own benefit,[61] or procures himself to be appointed receiver before the recovery of judgment, and illegally seizes property.[62] The creditor cannot be compelled to pay costs before the judgment therefor is perfected.[63]

Attorney's fees. A receiver in a supplementary proceeding, who is appointed and acts in behalf of all the creditors, may be allowed attorney's fees out of the fund or property recovered;[64] but this rule does not apply where the supplementary proceeding is had and the receiver appointed only in the interests of a particular creditor,[65] and in such a case the receiver is not entitled to attorney's fees, as against defendant, for prosecuting an action to set aside a fraudulent conveyance, which action the creditor could have prosecuted in his own name without resorting to the receivership proceedings.[66]

c. In Contempt Proceeding

The judgment creditor is entitled to reasonable costs in a proceeding for contempt only if the party charged is found guilty.

The judgment creditor is entitled to reasonable costs in proceedings to punish for a contempt in which the party charged has been convicted,[67] and a reasonable counsel fee may be allowed.[68] On the other hand, in the exercise of its discretion, costs may be awarded against him by the court when he does not succeed in securing a conviction of the party charged.[69]

XV. EXTENT, ELEGIT, AND SPECIAL EXECUTIONS AGAINST WAGES AND OTHER CREDITS

§ 403. Extending Executions, and Proceedings by Elegit

a. Definition and history
b. Property subject
c. Proceedings

a. Definition and History

Extents and elegits are execution processes by which property of the judgment debtor is taken over by the creditor, rather than sold, to satisfy the judgment. They have now become obsolete.

An extent, sometimes called an extendi facias, is an execution writ in the nature of a final process.[70] As used in this country, the term "extent" means a setting off of lands to the execution creditor in quantities sufficient to satisfy his writ, at their value as fixed by appraisers.[71] The writ of extent was also used in England as a summary process against a debtor of the crown by which his body, goods, and lands could all be taken at once in execution to compel the payment of the debt;[72] and it has been used similarly in this country as a summary remedy for recovering public revenue.[73]

Elegit is a writ of execution authorized by ancient statute whereby the sheriff is commanded to take the personal property of the debtor, to appraise it and deliver it at its appraised value to the creditor, and also to deliver to the creditor, formerly one half, but under later statutes the whole, of the judgment debtor's freehold estate of which he was seized at the time of the docket of the judgment.[74] This writ was unknown to American jurisprudence,

60. N.Y.—Ward v. Roy, 69 N.Y. 96.
23 C.J. p 901 note 84.

61. N.Y.—Ward v. Roy, supra.
23 C.J. p 901 note 85.

62. N.Y.—Robinson v. Wood, 15 N. Y.S. 169.

63. N.Y.—Fredericks v. Niver, 28 Hun 417.

64. Minn.—Small v. Anderson, 166 N. W. 340, 139 Minn. 292.

65. Minn.—Small v. Anderson, supra.

66. Minn.—Small v. Anderson, supra.
23 C.J. p 901 note 88.

67. N.Y.—Matter of Kutcosky, 138 N.Y.S. 263, 153 App.Div. 526.
23 C.J. p 901 note 89.
Costs as part of fine see supra § 401.

68. N.Y.—National Wall Paper Co. v. Gerlach, 37 N.Y.S. 428, 15 Misc. 640.
23 C.J. p 901 note 89 [a].

69. N.Y.—Rhodes v. Linderman, 17 N.Y.S. 628.
23 C.J. p 901 note 90.

70. N.H.—Nason v. Fowler, 47 A. 263, 70 N.H. 291, 293.
25 C.J. p 228 notes 45, 46.

71. Mass.—Roberts v. Whiting, 16 Mass. 186.

72. Va.—United States Fidelity & Guaranty Co. v. Carter, 170 S.E. 764, 768, 161 Va. 381, 90 A.L.R. 191.
25 C.J. p 228 note 46 [c].
"It was 'both an action and an execution in the first instance.' "—United States Fidelity & Guaranty Co. v. Carter, supra.
Extent in chief or in aid
"An extent in chief was the writ used by the king against his debtor. An extent in chief of the second or third, etc., degree was the writ used by the king against a debtor of his debtor, etc. An extent in aid was the writ used by a debtor of the king against his debtor to enforce the right of preference given to him because of his indebtedness to the king."—United States Fidelity & Guaranty Co. v. Carter, supra—25 C.J. p 228 note 46 [d].

73. Vt.—Hackett v. Amsden, 56 Vt. 201.
25 C.J. p 228 note 46 [e].

74. Del.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. 281.
23 C.J. p 307 note 55.
No sale of land
Under the writ of elegit the creditor was not entitled to have the debtor's land sold to pay his judg-

except in a few states, and even in these it has become obsolete.[75]

Extents and elegits were useful in reaching land of the judgment debtor,[76] where his personalty was insufficient,[77] since at common law lands of the debtor could not be sold on execution, see supra § 33. By the English statute of extents and elegits lands of the judgment debtor could be set off to the judgment creditor until his debt was paid;[78] and in some states, by similar statutes, lands were permitted to be set off or extended to the creditor pursuant to a writ of elegit instead of selling them.[79] The processes of extent and elegit became obsolete with the advent of statutes making the land of a judgment debtor subject to execution.[80]

b. Property Subject

Any property subject to execution is in general subject to levy.

Unless otherwise provided by statute, the rules set forth supra in §§ 18–55 as to what property is subject to execution apply equally in determining on what property an extent may be levied; and generally no estate or interest in land can be so transferred by extent except such as the debtor might have conveyed by a suitable instrument for a valuable consideration.[81] A levy by extent may be made on the lands of a deceased person,[82] and in some states on the interest of a mortgagor.[83] In some states not only land or an interest therein will pass by an extent but also permanent buildings upon such land,[84] such as a store[85] or a chamber in a house or store;[86] but this does not apply to buildings not levied on and not belonging to the debtor.[87] The fact that a part of the property is personal does not invalidate the extent as to the real estate.[88]

c. Proceedings

(1) In general
(2) Excessive levy
(3) Mode of set-off
(4) Delivery and acceptance of seizin
(5) Title or rights acquired

(1) In General

The proceedings under an extent must follow the governing statutes.

In order for the creditor to obtain title under an extent or like process it is necessary that all the requirements of the statutes be strictly complied with.[89] Under some statutes, an inquest is necessary to determine whether the rents and profits of real estate levied on will be sufficient to satisfy, within a prescribed time, the judgment on which the execution was issued;[90] if found in the affirmative a writ of liberari facias issues, under which the property is delivered to the creditor;[91] but if found in the negative the creditor is entitled to a venditioni exponas for the sale of the property.[92] The extent should be made in the name of the judgment creditor.[93]

An amendment of the extent cannot be allowed

ment, but only to hold possession thereof until he was satisfied out of the rents and profits—United States Fidelity & Guaranty Co. v. Carter, 170 S.E. 764, 161 Va. 381, 90 A.L.R. 191.

75. Utah.—Thompson v. Avery, 39 P. 829, 11 Utah 214.

76. Del.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. 281.
23 C.J. p 334 notes 29, 30, p 307 note 55 [a] (2).

77. Del.—First Nat. Bank v. Crook, supra.
23 C.J. p 334 note 29 [b].

78. N.Y.—Utica Bank v. Mersereau, 3 Barb.Ch. 528, 49 Am.D. 189.

79. U.S.—Ronald v. Barkley, C.C. Va., 20 F.Cas.No.12,031, 1 Brock. 356.
Va.—Lyons v. McGuire, 22 Gratt. 202, 63 Va. 202.
23 C.J. p 486 note 53.

80. N.Y.—Utica Bank v. Mersereau, 3 Barb.Ch. 528, 49 Am.D. 189.
23 C.J. p 334 note 31 [a].

81. Mass.—Bartlet v. Harlow, 12 Mass. 348, 7 Am.D. 76.

82. N.H.—Mead v. Harvey, 2 N.H. 341.
23 C.J. p 487 note 68.

83. Me.—Porter v. King, 1 Me. 297.
23 C.J. p 487 note 69.

Payment of mortgage
In a jurisdiction where unencumbered land could be levied on by extent only, payment of a mortgage on land by the debtor did not defeat a sale thereof on execution where such payment had been made after the mortgaged land was taken on execution and notice of sale given by the sheriff—Capen v. Doty, 13 Allen, Mass., 262.

84. Me.—Waterhouse v. Gibson, 4 Me. 230.
N.H.—Mills v. Peirce, 2 N.H. 9.

85. N.H.—Mills v. Peirce, supra.

86. Me.—Buck v. Hardy, 6 Me. 162.
23 C.J. p 487 note 72.

87. N.H.—Aldrich v. Parsons, 6 N. H. 555.
Vt.—King v. Catlin, 1 Tyler 355.
23 C.J. p 487 note 73.

88. Conn.—Camp v. Smith, 5 Conn. 80.

89. Pa.—Friedman v. Friedman, 28 Pa.Dist. & Co. 655, 38 Lack.Jur. 25, 85 Pittsb.Leg.J. 136, 50 York Leg.Rec. 208.
23 C.J. p 486 note 58.
Return of extent see infra § 405.

Death of joint defendant
Where plaintiff in a judgment against joint defendants sought to seize lands under a writ of elegit issued on that judgment, it was necessary for him to take the lands of the deceased defendant as well as those of the surviving defendant.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr., Del., 281.

90. Pa.—Thomas v. Wright, 9 Serg. & R. 87.
23 C.J. p 486 note 60.

91. Pa.—Sawyer v. Curtis, 2 Ashm. 127.
23 C.J. p 486 note 61.

92. Pa.—Black v. Aber, 2 Grant 206—President of Orphans' Court v. Bower, 9 Lanc.Bar 73.
23 C.J. p 487 note 62.

93. Me.—Mysroll v. Violette, 55 Me. 108.
23 C.J. p 486 note 59.

after a third person has acquired an interest in the land under the debtor.[94]

Waiver of defects. A quitclaim deed from the debtor to the creditor of land which has been set off to the latter on the execution is a waiver of all defects in the levy and a confirmation of the title.[95] However, the lapse of years does not raise a presumption that the requirements of the law have been complied with where the record of the extent is defective.[96]

(2) Excessive Levy

The property set off under an extent should not be in any greater amount than authorized by the writ.

An extent for an amount greater than that authorized by the writ is void,[97] except where the error is not attributable to the officer or judgment creditor.[98] While in some instances a slight excess has been held too trivial to be regarded,[99] in others the excess of a few dollars or cents has been held material.[1] The extent is not void because the officer taxes, and causes to be satisfied in the extent, fees unauthorized by law.[2] Where several levies are made under one writ, and the total is excessive, only the levies in excess are void,[3] and if the quantity of land stated in the return to have been set off on different executions exceeds the quantity contained in the whole tract the levy is not void, and the creditor who extends his execution last takes what remains after the previous extents.[4]

The usual remedy for an excessive levy made through mistake is in equity, where by proper decree a creditor may be compelled to relinquish as much of the property levied on as would be equal to the excess levied, or pay an equivalent therefor in money,[5] but audita querela has been held an appropriate remedy.[6]

(3) Mode of Set-Off

The land set off must be sufficiently described. Ordinarily the set-off must be by metes and bounds.

The land set off must be so described as to be capable of being ascertained.[7] It is sufficient to describe the land as bounded by the lands of others, provided its location can be ascertained.[8]

In several states where the levy is by an extent, it is required by statute that the officer shall set off the land levied on by metes and bounds, and not an undivided portion of it, except in cases where the property cannot be divided without great injury to the parties, when the officer may set off such an undivided portion of the real estate as shall be sufficient to satisfy the execution.[9] Where the tract of land levied on is more than sufficient to satisfy the writ, or part of the land is exempt from levy, the portion set off must be designated by metes and bounds.[10] In the case of an execution against one holding land as a tenant in common, the execution cannot be extended on a part of the land by metes and bounds,[11] but it must be extended over the whole, and a specified fractional undivided portion be set off to the creditor,[12] and if an extent is made on a specified number of acres in common and undivided as the property of one of the tenants in common, it must be understood to mean such fractional proportion of the whole as the number of acres taken bears to the whole number owned in common by the debtor.[13] If there is only a life estate it has been held that the extent need not be by metes and bounds but it may be on the rents and profits,[14] but in such a case such part only should be taken as will be sufficient to pay the debt.[15]

If the levy is subject to conditions recited to be contained in a deed, such conditions need not be

94. N.H.—Bowman v. Stark, 6 N.H. 459.

95. Me.—Freese v. McIntyre, 40 Me. 148.

96. Me.—Bannister v. Higginson, 15 Me. 73, 32 Am.D. 134.

97. Conn.—Coe v. Wickham, 33 Conn. 389.
23 C.J. p 487 note 75.

98. N.H.—Avery v. Bowman, 40 N. H. 453, 77 Am.D. 728.
23 C.J. p 487 note 76.

99. Conn.—Spencer v. Champion, 9 Conn. 536.
23 C.J. p 487 note 79.

1. Me.—Webster v. Hill, 38 Me. 78.
23 C.J. p 487 note 78.

2. Me.—Wilson v. Gannon, 54 Me. 384.
23 C.J. p 487 note 80.

3. Me.—Pierce v. Strickland, 26 Me. 277.

4. Mass.—Cutting v. Rockwood, 2 Pick. 443.

5. Conn.—Hathaway v. Heminway, 20 Conn. 191.
23 C.J. p 488 note 83.

6. Vt.—Hopkins v. Hayward, 34 Vt. 474.
23 C.J. p 488 note 84.

7. N.H.—Coburn v. Pomeroy, 44 N. H. 19—Morse v. Dewey, 3 N.H. 535.

8. N.H.—McConihe v. Sawyer, 12 N. H. 396.

9. Me.—Mansfield v. Jack, 24 Me. 98.
23 C.J. p 448 note 4.

10. Me.—Merrill v. Burbank, 23 Me. 538.

Vt.—Whitefield v. Adams, 27 A. 323, 65 Vt. 632.
23 C.J. p 488 note 88.

11. Vt.—Smith v. Benson, 9 Vt. 138, 31 Am.D. 614.
23 C.J. p 488 note 89.

12. Conn.—Starr v. Leavitt, 2 Conn. 243, 7 Am.D. 268.
23 C.J. p 488 note 90.

13. Me.—Webber v. Mallett, 16 Me. 88.

14. Me.—Sturdivant v. Frothingham, 10 Me. 100.

Levy on land or rents
An execution against a tenant for life may be levied by extent either on the land or on the rents and profits.—Barber v. Root, 10 Mass. 260—23 C.J. p 449 note 15.

15. Conn.—Wheeler v. Gorham, 2 Root 328.

set forth.[16] Part of a house may be set off by extent if there is no fraud or oppression.[17] If the land is without access except over other lands of the execution debtor, the appraisers may give the creditor the right of passing over the other lands of the debtor not set off.[18]

(4) Delivery and Acceptance of Seizin

Seizin must be delivered to, and accepted by, the creditor or some one acting on his behalf.

The offer of seizin must be made after and not before the appraisement.[19] Delivery may be made to the creditor's attorney as well as to the creditor,[20] and the attorney who receives seizin need not be one appointed by deed.[21] The creditor may refuse to accept seizin without assigning any reason therefor,[22] but his acceptance of seizin is sufficient evidence of his election to extend his execution on real estate.[23] A creditor's subsequent conveyance, with warranty, of property acquired by levy, is sufficient evidence of his acceptance of seizin.[24] Acceptance of seizin by any one on behalf of the creditor is sufficient if afterward ratified by the creditor.[25] The statutes sometimes prohibit a creditor who has received seizin from waiving it except in certain cases.[26]

(5) Title or Rights Acquired

Under the extent the creditor obtains such interest as the debtor had at the time of the levy. He is entitled to possession of the property and to any rents or profits arising therefrom.

By the extent, the creditor acquires the ownership of the debtor's title or interest, at the time of the levy, in the premises set off,[27] and, in the absence of a statutory provision to the contrary, the creditor, as an incident of such ownership, is solely entitled to the rents and profits during his occupation under the levy.[28] His ownership, however, is limited to property which belonged to the debtor,[29] and an extent on land not belonging to the judgment debtor gives no title or seizin to the judgment creditor[30] even where the debtor, after the levy, acquires title to the property.[31] If the debtor owns less than the quantity of or interest in land set off, such interest as he actually has will pass,[32] and if the extent is of land as owned by the debtor in fee, when in fact he has only a life estate, it will vest a freehold for the life of the debtor.[33] If two or more executions are extended on lands by metes and bounds, the creditors hold as tenants in common,[34] and, if land held in common and undivided is extended, the extent gives the creditor seizin in common of the property.[35] Where the execution is extended for a certain number of years on the rents and profits of land, it is a charge on the estate, but the legal seizin remains in the owner of the freehold.[36] If the judgment on which the execution is issued is afterward reversed, the debtor may recover the land.[37] Where suit is brought by an assignee in the name of his assignor, and judgment is rendered and execution issued in the name of the assignor, an extent, by direction of the assignee, passes title directly to him.[38]

The creditor may maintain partition against a stranger in possession of other undivided shares,[39] and may maintain trespass without regard to who is actually in possession.[40]

Mortgaged land. Where the extent is on mortgaged land and the mortgagee is in possession, there is no ouster of the mortgagee, although the legal

16. Mass.—Bates v. Willard, 10 Metc. 62.
17. N.H.—Tifft v. Walker, 10 N.H. 150.
23 C.J. p 488 note 88 [a].
18. Mass.—Taylor v. Townsend, 8 Mass. 411, 5 Am.D. 107.
19. Me.—Darling v. Rollins, 18 Me. 405.
20. Mass.—Herring v. Polley, 8 Mass. 113.
23 C.J. p 450 note 36 [c].
21. Mass.—Pratt v. Putnam, 13 Mass. 361.
22. Me.—Bingham v. Smith, 64 Me. 450.
23. Mass.—Herring v. Polley, 8 Mass. 113.
24. N.H.—Marston v. Osgood, 38 A. 378, 69 N.H. 96.
25. Me.—Cowan v. Wheeler, 31 Me. 439.
Mass.—Pratt v. Putnam, 13 Mass. 361.
N.H.—Newbury Bank v. Eastman, 44 N.H. 431.
26. U.S.—U. S. v. Poole, D.C.Me., 5 F. 412.
Me.—Gorham v. Blazo, 2 Me. 232.
27. Va.—Lyons v. McGuire, 22 Gratt. 202, 63 Va. 202.
23 C.J. p 488 notes 97 [b], 8.
28. N.H.—Russell v. Dyer, 33 N.H. 186.
Vt.—Moore v. McMillan, 54 Vt. 27.
29. Mass.—Bott v. Burnell, 9 Mass. 96.
Vt.—Abell v. Howe, 43 Vt. 403.
30. Mass.—Larcom v. Cheever, 16 Pick. 260—Bott v. Burnell, 9 Mass. 96.
23 C.J. p 489 note 12.
31. Me.—Freeman v. Thayer, 33 Me. 76.
32. Me.—Burnham v. Persons Unknown, 40 Me. 565.
N.H.—Coos Bank v. Brooks, 2 N.H. 148.
33. Mass.—Mechanics' Bank v. Williams, 17 Pick. 438.
34. Conn.—Lee v. Hinman, 6 Conn. 165.
23 C.J. p 489 note 17.
35. Mass.—Cutting v. Rockwood, 2 Pick. 433.
36. Mass.—Barber v. Root, 10 Mass. 260.
37. Me.—Bryant v. Fairfield, 51 Me. 149.
23 C.J. p 773 note 52.
38. N.H.—Gerrish v. Clough, 36 N. H. 519.
Vt.—Richards v. Pearl, 1 D.Chipm. 113
39. N.H.—Lyford v. Dunn, 32 N.H. 81.
40. Me.—Woodman v. Bodfish, 25 Me. 317.
23 C.J. p 489 note 28.

seizin of the equity of redemption is thereby vested in the creditor,[41] and if the equity of redemption is levied on and an undivided part is set off to the creditor, he cannot sustain a petition for the sale of the mortgaged premises and division of the proceeds among the parties interested.[42]

Right to possession. The creditor is entitled to possession,[43] and has the right to enter and maintain possession as against the debtor.[44] If the debtor continues in possession he must be regarded as a mere tenant at law.[45]

Growing crops. If there is an extent in the winter, and an entry under it in the autumn of the same year, the creditor is entitled to the growing crop.[46]

Time of acquisition of rights. Although the extent begins when the appraisers are sworn,[47] the title is not complete until return is made of the extent and delivery of seizin.[48] Thus as a general rule it is not until the officer has delivered seizin and the same has been accepted by the creditor that the extent becomes final and the title of the judgment debtor is divested,[49] although it has been held that the mere levy vests an actual seizin in the creditor.[50] In any event, the title when acquired relates back to the commencement of the extent,[51] and cuts off conveyances made since the levy.[52]

Objections. One who holds by a conveyance, fraudulent as to creditors of the judgment debtor, is not thereby precluded from insisting on an exception to the sufficiency of the extent under which plaintiff, a creditor of the fraudulent grantor, claims title to the premises.[53]

§ 404. —— Redemption

The debtor may, under the statutes, redeem property set off under an extent.

Redemption of property set off to the creditor under an extent may be had as provided by the governing statutes.[54] If no redemption is made within the statutory time, the debtor is considered as assenting to the complete alienation of his interest at the appraised value.[55]

§ 405. —— Return of Extent

a. In general
b. Form and requisites
c. Construction and effect
d. Recording

a. In General

To be effective the extent must be returned to the court at a proper time.

Nothing will pass by an extent of an execution on land, unless the execution, with the doings of the officer, is returned to the court from which it issued, so that the extent may there become a matter of record.[56]

Time for making. While the return of an extent on land should be made during the life of the execution,[57] nevertheless it is sufficient for the execution to be returned before it is offered in evidence of title, although after the return day.[58]

b. Form and Requisites

(1) In general
(2) Inventory and appraisement
(3) Amendment

(1) In General

The return must describe the property and must show that the law has been complied with.

All the material facts necessary to show that the law has been substantially complied with must appear explicitly or by necessary intendment by the officer's return.[59] The return must show that the officer delivered seizin and possession of the land appraised to the creditor or his attorney;[60] but if an execution is returned with an indorsement by the creditor or his attorney, acknowledging that he

41. Mass.—Shepard v. Pratt, 15 Pick. 32.
42. Conn.—Spencer v. Waterman, 36 Conn. 342.
43. N.H.—Drown v. Foss, 39 N.H. 525—Murray v. Emmons, 19 N.H. 483.
44. Mass.—Procter v. Newhall, 17 Mass. 81.
N.H.—Bergeron v. Dartmouth Sav. Bank, 62 N.H. 655.
45. Me.—Bryant v. Tucker, 19 Me. 383.
46. N.H.—Coolidge v. Melvin, 42 N. H. 510.
47. Me.—Allen v. Portland Stage Co., 8 Me. 207.
48. Mass.—Ladd v. Blunt, 4 Mass. 402.
49. Me.—Howe v. Willis, 51 Me. 226.
23 C.J. p 488 note 97.
50. Me.—Bryant v. Tucker, 19 Me. 383—Bartlett v. Perkins, 13 Me. 87.
51. Me.—Clement v. Garland, 53 Me. 427.
23 C.J. p 489 note 29.
52. Me.—Abbott v. Sturtevant, 30 Me. 40.
53. N.H.—Whittier v. Varney, 10 N. H. 291.
54. Me.—Foss v. Stickney, 5 Me. 390.
23 C.J. p 489 note 32.
Right to redeem generally see supra § 253.
55. Me.—Porter v. King, 1 Me. 297.
56. Conn.—Coe v. Slow, 8 Conn. 536.
23 C.J. p 809 note 87.
57. Vt.—Hall v. Hall, 5 Vt. 304.
58. N.H.—Odiorne v. Mason, 9 N.H. 24.
23 C.J. p 809 note 90.
59. Conn.—Bissell v. Mooney, 33 Conn. 411.
23 C.J. p 809 note 91.
60. Me.—Jackson v. Woodman, 29 Me. 266.

has received seizin from the officer, it is sufficient evidence that legal seizin was given, although the officer omits to return to that effect.[61] The return need not state that the execution and return were recorded in the proper clerk's office.[62] The fact that the return taxes the expenses in gross does not make the levy void.[63]

Description of property. The return must describe the property by metes and bounds, or in such other mode as will distinctly point out and identify it.[64] The quantity of land set off must be shown with reasonable certainty.[65] It is a sufficient description of the land to refer to the appraisers' certificate which properly describes the land.[66] Likewise it is sufficient for the return in describing the property to refer to deeds on record which sufficiently describe it by metes and bounds.[67] It is not sufficient, however, in describing the property to refer to the inventory of the estate of a deceased debtor.[68]

Where an officer makes an extent on the same parcel of land under two executions for and against the same parties, he need not levy on each execution separately, and describe distinct boundaries in each return.[69]

(2) Inventory and Appraisement

The return must show an inventory and appraisement by appraisers who were properly appointed, qualified, and sworn.

The return of the officer must show expressly or by necessary implication that the requirements of the statute with relation to the inventory and appraisement of the land set off were complied with.[70] An express reference to the certificate of the appraisers is sufficient to show inventory and appraisement.[71] The return is insufficient if it states the appraisers set off the estate by metes and bounds, where the appraisers' return sets off an undivided part.[72] If in the levy the appraisers certify the value of a part of the land, and it appears by the return that the whole land was set off, it seems that the interest of the debtor will pass, if it is the same as that which has been appraised.[73]

Appointment, qualifications, and oath of appraisers. A substantial compliance with all the requirements of the statute as to the appointment of appraisers must be shown by the officer's return, either expressly or by necessary inference.[74] Where the statute requires that the appraisers shall be residents of the county or town where the land lies, the return must show that fact.[75] The return must show that the appraisers were freeholders and possessed the qualifications required by the statute as to discretion and disinterestedness.[76]

The return must show, either in itself or by reference to the justice's certificate, that the appraisers were sworn as required by law,[77] and that the person by whom they were sworn was a magistrate.[78] It is sufficient that the return states that the appraisers were duly sworn as will appear by the certificates of the justices, although there was no name signed to one of the certificates.[79] If the return makes the magistrate's certificate a part thereof, it will control in case of any discrepancy in the certificate as to the taking of the oath by the appraisers.[80]

(3) Amendment

The return may be amended if rights of third persons have not intervened, and the amendment is sought at a proper time.

The return may be amended, in order to perfect the title, according to the truth and justice of the case, when no rights of third persons have intervened, and the evidence is full and satisfactory;[81] and even as against third persons the return may and will be thus amended, if such persons have knowledge of the facts, or if the return contains in itself sufficient matter to show that in making the levy

61. Mass.—Atkins v. Bean, 14 Mass. 404.

62. Conn.—Finch v. Bishop, 13 Conn. 576.

63. Me.—Tibbets v. Merrill, 12 Me. 122.

64. Conn.—Eels v. Day, 4 Conn. 95.
23 C.J. p 809 note 96.

65. Conn.—Coe v. Wickham, 33 Conn. 389.

66. Me.—French v. Allen, 50 Me. 437.
Mass.—Herring v. Polley, 8 Mass. 113.

67. Mass.—Boylston v. Carver, 11 Mass. 515.
23 C.J. p 809 note 98.

68. Mass.—Tate v. Anderson, 9 Mass. 92.

69. Vt.—Doe v. Foot, 1 Tyler 14.

70. N.H.—McConihe v. Sawyer, 12 N.H. 396.
23 C.J. p 809 note 3.

71. Me.—Fitch v. Tyler, 34 Me. 463.
23 C.J. p 810 note 4.

72. Me.—Chase v. Williams, 71 Me. 190.

73. N.H.—Smith v. Knight, 20 N.H. 9.

74. N.H.—Whittier v. Varney, 10 N. H. 291.
23 C.J. p 810 note 7.

75. N.H.—Libbey v. Copp, 3 N.H. 45.
23 C.J. p 810 note 8.

76. Conn.—Donahue v. Coleman, 49 Conn. 464.
23 C.J. p 810 note 9.

77. Mass.—Kellenberger v. Sturtevant, 11 Cush. 160.
23 C.J. p 810 note 10, p 462 note 3 [a].

78. Me.—Howard v. Turner, 6 Me. 106.

79. Me.—Phillips v. Williams, 14 Me. 411.

80. Mass.—Cowls v. Hastings, 9 Metc. 476.

81. N.H.—Whittier v. Varney, 10 N. H. 291.
23 C.J. p 810 note 15.

all the requirements of the statute were properly complied with.[82] Amended returns are binding on the parties to the levy.[83] An unauthorized alteration of the return will not vacate a levy made thereunder whereby a title has vested.[84]

Time of amendment. An amendment has been refused after the lapse of many years,[85] particularly where nothing appeared of record to amend by, and the officer making the return had gone out of office and had become the party interested in having the amendment made.[86] An amendment may be allowed at any time after the return day of the execution, in the discretion of the court to which the execution was returnable and returned.[87] The amendment relates back to the time of the levy or return,[88] but it has been held that an amendment after recordation does not relate to the time of the registry but takes effect from the time it is made.[89]

c. Construction and Effect

(1) Construction
(2) Operation and effect

(1) Construction

The return should, if possible, be construed so as to uphold its sufficiency.

In construing the return, every intendment will be made in favor of the sufficiency of the return, and of the regularity and legality of the officer's acts.[90] If the return has no date it will be presumed to refer to the date of the appraisement.[91] If the return incorporates and adopts the appraisement, the whole must be taken together in construing the description of the premises.[92] A statement in the return that the debtor had neglected and refused to choose an appraiser raises the implication that notice to choose an appraiser was duly given.[93]

(2) Operation and Effect

The return conveys the land and divests the debtor of his title; and it is conclusive evidence of such transfer of title.

It is the return of the officer of the appraisement and proceedings which operates as a statutory conveyance of land set off on execution, and divests the debtor of his title.[94] Where the return states a delivery of seizin to the agent or attorney of the creditor, it furnishes prima facie evidence that such person was agent or attorney for that purpose.[95] The return will not relate back to the levy so as to vest the title from that time in the execution creditor where such relation back would prejudice persons not parties or privies to the proceeding.[96] The return is admissible in evidence although it does not appear otherwise than by the return that it was ever returned into the clerk's office.[97]

Mistake in return. An obvious mistake in the date of a return will not defeat the levy.[98] A mistake in the return, in order to be ground for release, must be that of both parties.[99]

Conclusiveness. The return of a levy on real estate is conclusive on the parties and their privies, and against the whole world as evidence that thereby, as between the parties, the title of the debtor in the estate levied on passed to the judgment creditor.[1] Where a return is not necessary it is not conclusive.[2] The return is not conclusive evidence of an encumbrance existing on the property or as to the amount of such encumbrance.[3] A certificate that the levy was completed on a certain day may be controlled by evidence that it was made and sei-

82. Me.—Peaks v. Gifford, 5 A. 879, 78 Me. 362.
23 C.J. p 810 note 16.

83. Me.—Symonds v. Harris, 51 Me. 14, 81 Am.D. 553.

84. Vt.—Gilman v. Thompson, 11 Vt. 643, 34 Am.D. 714.

85. Me.—Russ v. Tilman, 16 Me. 209.
N.H.—Libbey v. Copp, 3 N.H. 45.
23 C.J. p 810 note 17.

86. Me.—Pierce v. Strickland, 26 Me. 277.

87. N.H.—Avery v. Bowman, 39 N. H. 393.

88. N.H.—Whittier v. Varney, 10 N. H. 291.

89. Me.—Means v. Osgood, 7 Me. 146.

90. Me.—Glidden v. Philbrick, 56 Me. 222.
23 C.J. p 810 note 24.

91. Me.—Gorham v. Blaso, 2 Me. 332.

92. N.H.—Vogt v. Ticknor, 48 N.H. 242.

93. Me.—Thompson v. Oakes, 13 Me. 407.
23 C.J. p 811 note 27.

94. Me.—Jewett v. Whitney, 51 Me. 233—Pope v. Cutler, 22 Me. 105.

The delivery of seizin is an acceptance of title by the creditor in satisfaction of the debt, as of the date of those proceedings.—Pope v. Cutler, supra.

Levy on two parcels

Where an officer levied on two parcels of land, at the same time, and had them both set off together, describing each parcel separately in his return, and it was claimed that the creditor's debt, according to the appraisement of the land, was fully satisfied by the parcel first described, and that, consequently no title to the second parcel was acquired by the levy thereon, it was held that the mere prior description of one of the parcels in the return did not make any difference in the legal effect of the execution.—Hathaway v. Hemingway, 20 Conn. 191.

95. N.H.—Odiorne v. Mason, 9 N.H. 24.
23 C.J. p 811 note 30.

96. Conn.—Coe v. Stow, 8 Conn. 536.

97. Me.—Hanly v. Sidelinger, 52 Me. 138.

98. Mass.—Shove v. Dow, 13 Mass. 529.

99. Me.—Young v. McGown, 62 Me. 56.

1. U.S.—Mattocks v. Farrington, D. C.Me., 16 F.Cas.No.9,298, 2 Hask. 331.
23 C.J. p 811 note 36.

2. Vt.—Hackett v. Amsden, 57 Vt. 432.
23 C.J. p 811 note 37.

3. Mass.—Hannum v. Tourtellott, 10 Allen 494.

zin delivered at an earlier date.[4] If there is a variance as to the estimated value of land between the report of the appraisers and the return, the latter governs and is conclusive as to the levy.[5] On a petition to the supreme court to vacate the levy of an execution for the want of notice to the debtor to choose an appraiser, the fact that no such notice was given may be shown by parol, notwithstanding the return states that notice was given.[6] As against the officer the return is conclusive,[7] but not as against third persons.[8]

d. Recording

The return must be recorded in the proper office and within the required time.

Some statutes require the officer to make his return to the clerk's office from which the execution issued and to cause the execution, with his return thereon, to be recorded in the registry of deeds, or in the town clerk's office, of the county, district, or town in which the land lies, on or before the return day; and unless this is done, no title passes except as against the debtor and his heirs and persons having actual knowledge of the facts.[9] It is otherwise as to the record in the office of the clerk of the court, or of the justice issuing the execution, for here it is sufficient if the record is made before suit is brought by which the title is to be tested.[10] It is not sufficient to leave the return in the clerk's office for record before the return day of the writ, where the record was not actually made until after such day.[11] If the return as recorded shows that the levy was for a larger amount than the execution, no title passes by such levy.[12] An error in the record which is not prejudicial to the interest of any one does not avoid it.[13] The record may be made from a copy of the execution with the return thereon.[14] In some jurisdictions it is the duty of the officer to procure the return to be recorded in the office of the clerk of the court and of the town where the land lies,[15] but in others the levying officer is not bound to procure the execution and levy to be registered.[16]

§ 406. Special Executions against Wages or Other Credits

a. In general
b. Under New York statutes
c. Under New Jersey statutes

a. In General

By some statutes a special execution is permitted under which the creditor obtains a continuing right to a portion of the debtor's wages or credits as they accrue.

In several jurisdictions the statutes provide a mode by which a judgment may be collected, under a special form of execution, by regular deductions from wages or other credits due or to become due to the judgment debtor.[17] Such an execution has been designated a "suggestee execution,"[18] a "garnishee execution," see infra subdivision b of this section, and an "installment execution," see infra subdivision c of this section.

b. Under New York Statutes

(1) In general
(2) Income subject
(3) Proceedings

(1) In General

A garnishee execution under the New York statutes

4. Me.—Balch v. Pattee, 38 Me. 353.
5. N.H.—Chase v. Hazelton, 7 N.H. 171.
6. Vt.—Briggs v. Green, 33 Vt. 565.
7. Me.—Allen v. Doyle, 33 Me. 420—Cowan v. Wheeler, 31 Me. 439.
8. Mass.—Bott v. Burnell, 11 Mass. 163.
23 C.J. p 811 note 43.
9. N.H.—Morse v. Child, 7 N.H. 581.
23 C.J. p 811 note 44.
10. Vt.—Little v. Sleeper, 37 Vt. 105, 86 Am.D. 697—Perrin v. Reed, 33 Vt. 62.
11. Vt.—Little v. Sleeper, 37 Vt. 105, 86 Am.D. 697.
12. Vt.—Skinner v. McDaniel, 5 Vt. 539.
13. Vt.—Skinner v. Watson, 4 Vt. 431.
14. Vt.—Skinner v. Watson, supra.
15. Vt.—Little v. Sleeper, 37 Vt. 105, 86 Am.D. 697—Hubbard v. Dewey, 2 Aik. 312.
16. Mass.—Tobey v. Leonard, 15 Mass. 200.
17. W.Va.—Kincaid v. Vinson, 14 S.E.2d 266.
Rules under:
New York statutes see infra subdivision b of this section.
New Jersey statutes see infra subdivision c of this section.
Repeal of prior statutes
The Act of 1939, by the express terms of which wages payable to any person engaged in private employment were made subject to suggestion by judgment creditors "only as provided by this article," superseded and repealed all prior statutory provisions whereby wages were made subject to suggestions on judgments, unless recognized by the Act of 1939.—Kincaid v. Vinson, supra.
The return of an execution wholly or partly unsatisfied is necessary before a suggestee execution can issue.—Kincaid v. Vinson, supra.
In Pennsylvania
(1) A wife seeking to enforce payments to her for support may proceed under a statute authorizing a levy on fifty per cent of her husband's interest in trust.—In re Stewart's Estate, 5 A.2d 910, 334 Pa. 356.
(2) The statute making trusts subject to execution to enforce decree against husband for support of wife, to extent of fifty per cent of husband's interest therein, did not expressly or by implication repeal statute giving wife right to reach entire income from testamentary trust, even though a spendthrift one.—In re Stewart's Estate, supra.
18. W.Va.—Kincaid v. Vinson, 14 S.E.2d 266.

is a remedial process designed to give the creditor a continuing execution against certain income of the debtor. Under such an execution, as the debtor's salary or income becomes payable a fixed percentage is deducted and applied to the judgment.

Under a New York statute, where a judgment has been recovered and execution thereon returned unsatisfied the judgment creditor may by a garnishee execution obtain a fixed percentage of any wages, debts, earnings, salary, profits, or income from trust funds, due or to become due the judgment debtor, provided such income exceeds a designated sum per week.[19] The garnishee execution is a remedial process[20] in aid of a judgment previously recovered against the judgment debtor.[21] It is an execution against property rather than one against the person,[22] and amounts to a demand and authorization by the court to pay the amounts specified therein.[23]

The purpose of the statute is to secure to the judgment creditor a continuing execution against the debtor's salary as it is earned, and to compel the employer to withhold from the debtor a designated percentage of such salary.[24] The statute is designed to enlarge, not restrict, the remedies of a judgment creditor.[25]

Retroactive operation. It has been held that such a statute is retroactive, and applicable to judgments recovered prior to the passage thereof as well as to those thereafter recovered,[26] and to existing trusts as well as to trusts thereafter established.[27]

(2) Income Subject

A garnishee execution may be used to reach trust income, and, in general, any remuneration for personal services, such as compensation in the form of a salary or commissions.

The term "earnings" as used in the statute covers all compensation for services.[28] It is not necessary that the earnings, wages, or salary be payable at definite times and in definite amounts[29] by virtue of an express contract.[30] Earnings under an implied contract by which the judgment debtor is to be paid the reasonable value of his services may be subjected to a garnishee execution;[31] and, in proper proceedings instituted by the judgment creditor, the court may find such an implied contract to exist, and may fix the reasonable value of the debtor's services for garnishee purposes,[32] notwithstanding a claim on the part of the debtor or his employer that the debtor receives a very small amount, or nothing at all, for his services.[33] Compensation in

19. Statute held valid
N.Y.—Smith v. Endicott-Johnson Corporation, 192 N.Y.S. 121, 199 App.Div. 194, affirming 189 N.Y.S. 673.

Prior decisions construing and applying earlier statute from which this statute was derived see 23 C.J. p 902 note 15–p 904 note 27.

20. N.Y.—Smith v. Endicott-Johnson Corporation, supra—Coller v. Sheffield Farms Co., 229 N.Y.S. 305, 129 Misc. 600.

21. N.Y.—Commercial Credit Corporation v. Young, 16 N.Y.S.2d 324, 258 App.Div. 323.
23 C.J. p 902 note 15 [a].

22. N.Y.—In re Howard Hotel Corporation, 270 N.Y.S. 259, 150 Misc. 782.
Orders directing debtor to pay judgment in installments see supra § 383.

23. N.Y.—Penrose & McEniry v. Manogue, 221 N.Y.S. 758, 129 Misc. 512.

24. N.Y.—Reliance Investing Co. v. Power, 240 N.Y.S. 585, 136 Misc. 694.
23 C.J. p 903 note 17.

Effect as continuing levy
The garnishee execution becomes a lien and a continuing levy on the earnings or other income due or to become due to the judgment debtor, to the extent of the percentage designated in the statute.—Sarver v. Towne, 34 N.E.2d 313, 285 N.Y. 264, reversing 23 N.Y.S.2d 700, 260 App. Div. 615—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.

25. N.Y.—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32.

Disability payments due under an insurance policy do not constitute debts, earnings, profits, or trust income under the statute, and such payments may be reached in their entirety.
U.S.—Samuels v. Quartin, C.C.A.N.Y., 108 F.2d 789.
N.Y.—Conlew, Inc., v. Baltowsky, 28 N.Y.S.2d 515, 262 App.Div. 214.

Debt due employee for past salary
Where an employer has withheld the entire salary of the judgment debtor for an extended period, a judgment creditor who thereafter proceeds against the fund accrued is not limited, by the garnishee statute, to a designated percentage of such fund.—Reliance Investing Co. v. Power, 240 N.Y.S. 585, 136 Misc. 694.

26. N.Y.—Laird v. Carton, 89 N.E. 822, 196 N.Y. 169, 25 L.R.A.,N.S., 189, reversing 116 N.Y.S. 851, 132 App.Div. 176.
23 C.J. p 902 note 12.

27. N.Y.—Brearley School v. Ward, 94 N.E. 1001, 201 N.Y. 358, 40 L. R.A.,N.S., 1215, Ann.Cas.1912B 251.

28. N.Y.—Burns v. Maurer, 131 N. Y.S. 344, 72 Misc. 481.
23 C.J. p 902 note 16 [a].

29. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.
Contra Jones v. Nicoll, 131 N.Y.S. 341, 343, 72 Misc. 483, 485.

30. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.

31. N.Y.—Wood v. Dock & Mill Co., supra—Flapan v. Rosenblum, 196 N.Y.S. 892, 119 Misc. 625, appeal dismissed 199 N.Y.S. 36, 205 App. Div. 76.

32. N.Y.—Schwartz Tire Corporation v. Gershon, 290 N.Y.S. 63, 160 Misc. 439.

33. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236—Pfeiffer v. Palace Market, 248 N. Y.S. 402, 139 Misc. 295.

Employment by corporation owned by debtor's wife
Where a judgment debtor was employed by a corporation which was practically owned by his wife, and received no pay for his services, although they were reasonably worth sixty dollars a week, it was held proper to issue a garnishee execution for six dollars a week.—Flapan v. Rosenblum, 196 N.Y.S. 892, 119 Misc. 625, appeal dismissed 199 N.Y. S. 36, 205 App.Div. 76.

Express contract
The judgment creditor is not entitled to have the court fix the debtor's salary for the purpose of a garnishee execution where there exists an express contract of employment at less than the minimum sal-

the form of commissions is subject to a garnishee execution.[34]

Debts. It has been held that the word "debts" as used in the statute should be given a limited meaning,[35] that it should be read ejusdem generis,[36] and that it embraces only debts of the character of wages, earnings, and salary.[37] However, it has also been held that the term "debts" in the statute is used in the general sense of the word,[38] that it includes contractual debts,[39] and that it is not limited to such debts as arise from the debtor's personal labor or service.[40]

Trust income. The income of a beneficiary from a trust fund may be reached by a garnishee execution.[41] In determining whether the judgment debtor has such an interest in the trust as may be reached by a garnishee execution the test is whether he has a right to the use of the income.[42] If under the terms of the trust the trustee may in his discretion apply the income either to the use of the judgment debtor or to the use of some one else, income allotted to the debtor can be reached by the garnishee,[43] but income applied to the sole use of some one other than the debtor cannot be;[44] and the income from a trust is not free from the creditor's right to garnishee where the trust requires that the trustee, if he does not pay the income to the judgment debtor, must apply it to the use of the debtor and his dependents.[45]

The wages or salary of public officials or employees,[46] other than those employed by the federal gov-

ary.—Francis H. Leggett & Co. v. Feldman, 268 N.Y.S. 340, 150 Misc. 24.

34. N.Y.—Laird v. Carton, 89 N.E. 822, 196 N.Y. 169, 25 L.R.A.,N.S., 189—Davidow v. John Hancock Mut. Life Ins. Co., 246 N.Y.S. 512, 231 App.Div. 300.

Drawings or loans against commissions

A garnishee execution is effective where the commissions earned exceed the minimum amount required under the garnishee statute, even where the employee has become indebted to his employer by borrowing, or by drawing against his commissions, a sum exceeding the amount of his commissions.—President and Directors of Manhattan Co. v. Washington Haberdasheries, 296 N.Y.S. 403, 163 Misc. 66—Rosenberg v. Parlay Hats, 258 N.Y.S. 949, 144 Misc. 519—23 C.J. p 902 note 16 [a] (5).

35. U.S.—Samuels v. Quartin, C.C. A.N.Y., 108 F.2d 789.
23 C.J. p 902 note 16 [c].

36. U.S.—Samuels v. Quartin, supra.

37. U.S.—Samuels v. Quartin, supra.

38. N.Y.—Coller v. Sheffield Farms Co., 223 N.Y.S. 305, 129 Misc. 600.

The term "debts" includes every claim and demand on which a judgment for a sum of money could be recovered in an action.—Coller v. Sheffield Farms Co., supra.

39. N.Y.—Coller v. Sheffield Farms Co., supra.

Gross proceeds due to a tenant farmer for farm products are subject to garnishment execution, notwithstanding the effect is to charge him with the whole cost of production.—Coller v. Sheffield Farms Co., supra.

40. N.Y.—Coller v. Sheffield Farms Co., supra.

41. N.Y.—Sarver v. Towne, 34 N.E.2d 313, 285 N.Y. 264, reversing 23 N.Y.S.2d 700, 260 App.Div. 615—Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N.Y.S 789, 244 App.Div. 784—Judis v. Martin, 218 N.Y.S. 423, 218 App. Div. 402, motion granted 155 N.E 916, 244 N.Y. 605—Schaefer v. Fisher, 242 N.Y.S. 308, 137 Misc. 420.

23 C.J. p 902 note 16 [e].

Exemption of insurance

Enactment of statute providing that proceeds of life policy might not be subject to encumbrance or legal process does not repeal statute providing that certain income from trust fund may be made subject to execution, but established exemption from its provisions.—Crossman Co. v. Rauch, 188 N.E. 748, 263 N.Y. 264, reversing 264 N.Y.S. 111, 238 App. Div. 299.

Intent of creator

It is immaterial that the creator of the trust intended the income therefrom to be entirely exempt from the claims of the beneficiary's creditors. —Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N.Y.S. 789, 244 App.Div. 784.

Income not yet due

It is not necessary that the income be due at the time the garnishee order is made and the execution served; the lien attaches when and if the day of payment arrives.—Hamilton v. Drogo, 150 N.E. 496, 241 N.Y. 401, reversing 210 N.Y.S. 859, 214 App.Div. 819—In re Randolph's Will, 288 N.Y.S. 678, 159 Misc. 688.

Assignment of income

Where the beneficiary's interest is inalienable, the percentage due the judgment creditor is based on the entire income rather than on the difference between the entire income and the portion thereof ineffectively assigned by him to his wife.—In re Randolph's Will, 288 N.Y.S. 678, 159 Misc. 688.

42. N.Y.—Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N.Y.S. 789, 244 App.Div. 784.
23 C.J. p 902 note 16 [f].

43. N.Y.—Sand v. Beach, supra—Hamilton v. Drogo, 150 N.E. 496, 241 N.Y. 401, reversing 210 N.Y.S. 859, 214 App.Div. 819.

44. N.Y.—Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N.Y.S. 789, 244 App Div. 784—Hamilton v Drogo, 150 N.E. 496, 241 N.Y. 401, reversing 210 N.Y.S. 859, 214 App.Div. 819.

Interference with trustee's discretion

Trustee's discretion under such circumstances is not subject to judicial interference, as regards creditor's right to reach beneficiary's interest.—Sand v. Beach, 200 N.E. 821, 270 N.Y. 281, modifying 280 N. Y.S. 789, 244 App.Div. 784—Hamilton v. Drogo, 150 N.E. 496, 241 N.Y. 401, reversing 210 N.Y.S. 859, 214 App. Div. 819.

45. N.Y.—Sand v. Beach, 200 N E. 821, 270 N.Y. 281, modifying 280 N.Y.S. 789, 244 App.Div. 784.

46. N.Y.—Rickey v. Slingerland, 256 N.Y.S. 901, 904, 143 Misc. 583.
23 C.J. p 903 note 20 [a].

Legislative power

"Statutes authorizing garnishment of the salaries or wages of public officials or employees are within the Legislature's power."—Rickey v. Slingerland, supra.

Necessity of specifying bureau

The salaries of employees of the city of New York are subject to garnishment, but the garnishee order must specify the particular department or bureau in which the judgment debtor is employed.—Draco Realty Corporation v. Krapp, 24 N. Y.S.2d 173, 175 Misc. 589.

ernment,[47] are subject to garnishment under this section.

A bounty or gift is not included under the terms of the statute.[48]

(3) Proceedings

Proceedings to obtain and enforce a garnishee execution must follow the statutes. While the debtor need not be notified, an execution against his salary must be served on his employer. Failure of the employer to pay over the required percentage renders him liable to an action therefor.

Garnishee proceedings are purely statutory,[49] and to enable the judgment creditor to avail himself thereof he must comply strictly with the provisions of the statute.[50] The garnishee execution must be issued out of a proper court[51] and served on the employer.[52] The garnishee execution may be obtained without notice to the judgment debtor[53] but must be preceded by the return of an execution unsatisfied.[54] If there is more than one garnishee execution outstanding, they are satisfied one at a time, in their order of priority.[55] A garnishee execution may be issued on an assigned claim.[56]

Order for garnishee execution. It is necessary to obtain an order for the issuance of the garnishee execution.[57] Such an order is an ex parte court order and not a judge's order.[58] It is better practice to file the order prior to the issuance of the garnishee execution,[59] and filing will be required on the motion of any interested party or person;[60] but the failure so to file is not a jurisdictional defect[61] and, in the absence of damage, or intervening rights of third persons, will not invalidate the garnishee execution.[62] The order will be granted only on satisfactory proof of the required facts.[63]

Modification. The garnishee order and execution

47. N.Y.—Reeves v. Crownshield, 8 N.E.2d 283, 274 N.Y. 74, 111 A.L.R. 339, affirming 292 N.Y.S. 756, 162 Misc. 118—Bool Floral Co. v. Coyne, 284 N.Y.S. 960, 158 Misc. 13.

Work relief payments

Money received for work on relief projects from Works Progress Administration, a federal agency, is not subject to garnishee process.—Dibner v. Cousminer, 283 N.Y.S. 369, 157 Misc. 229.

48. U.S.—In re Hoag, D.C.N.Y., 227 F. 480.
23 C.J. p 902 note 16 [d].

49. N.Y.—Coller v. Sheffield Farms Co., 223 N.Y.S. 305, 129 Misc. 600.

50. U.S.—In re Murphy, D.C.N.Y., 221 F. 449.
23 C.J. p 903 notes 18, 19.

Filing of transcript

(1) Where a garnishee execution is sought in a county other than the one in which a judgment was rendered, a transcript of the judgment must be filed in the county in which the execution is issued.—In re Howard Hotel Corporation, 270 N.Y.S. 259, 150 Misc. 782.

(2) A garnishee execution may be issued to a marshal of New York City under judgment entered in New York city court notwithstanding a transcript of that judgment has been docketed in office of clerk of county, since the filing of transcript in county clerk's office did not give supreme court exclusive jurisdiction over the issuance of a garnishee execution.—Hausman v. Steiner, 13 N.Y.S.2d 567, 171 Misc. 676, reversing 10 N.Y.S.2d 733, 170 Misc. 712.

Procedure as dependent on whether court is of record

If the garnishee order is to be issued out of a court which is not a court of record, the execution must be issued by a judge or justice of such court; if the court is one of record, a judge or justice thereof must issue an order directing that an execution issue.—Salm v. Stroheim & Romann, 261 N.Y.S. 694, 146 Misc. 173—23 C.J. p 903 note 19 [d].

51. **City court of Buffalo**
N.Y.—Shackman v. Osborne, 13 N.Y.S.2d 854, 257 App.Div. 1037.

52. N.Y.—Salm v. Stroheim & Romann, 261 N.Y.S. 694, 146 Misc. 173.
23 C.J. p 903 note 20 [c], [d].

Service of order only

It is insufficient to serve merely the order directing the issuance of an execution.—Salm v. Stroheim & Romann, 261 N.Y.S. 694, 146 Misc. 173.

Trustee in bankruptcy

If the employer has been adjudicated a bankrupt and a trustee appointed, the garnishee execution must be served on the trustee to reach wages accruing thereafter.—In re Murphy, D.C.N.Y., 221 F. 449.

53. N.Y.—Smith v. Endicott-Johnson Corporation, 192 N.Y.S. 121, 199 App.Div. 194, affirming 189 N.Y.S. 673.
23 C.J. p 903 note 19 [e].

54. N.Y.—Hausman v. Steiner, 13 N.Y.S.2d 567, 171 Misc. 676, reversing 10 N.Y.S.2d 733, 170 Misc. 712.
23 C.J. p 902 note 15 [a].

Rights of junior garnishee lienor

A junior garnishee lienor has such an interest as entitles him to apply for vacatur of order permitting issuance of garnishee execution in favor of another judgment creditor before return of execution unsatisfied.—Hausman v. Steiner, supra.

55. N.Y.—Pfeiffer v. Palace Market, 248 N.Y.S. 402, 139 Misc. 295.

56. N.Y.—Smith v. Endicott-Johnson Corporation, 192 N.Y.S. 121, 199 App.Div. 194, affirming 189 N.Y.S. 673.

57. **Contents of order**

(1) A garnishee order is not rendered invalid by its failure to state expressly that allowance is to be made for those weeks in which the debtor's salary falls below the minimum.—Smith v. Endicott-Johnson Corporation, 189 N.Y.S. 673, affirmed 192 N.Y.S. 121, 199 App.Div. 194.

(2) The garnishee order may direct the employer to turn over the required percentage at reasonable intervals, as for example, semiannually.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.

58. N.Y.—F. B. Matthews & Co. v. Maskin, 29 N.Y.S.2d 22, 176 Misc. 728.

59. N.Y.—Guaranteed Title & Mortgage Co. v. Calleran, 16 N.Y.S.2d 413.

60. N.Y.—F. B. Matthews & Co. v. Maskin, 29 N.Y.S.2d 22, 176 Misc. 728.

61. N.Y.—Guaranteed Title & Mortgage Co. v. Calleran, 16 N.Y.S.2d 413.

62. N.Y.—F. B. Matthews & Co. v. Maskin, 29 N.Y.S.2d 22, 176 Misc. 728—Guaranteed Title & Mortgage Co. v. Calleran, 16 N.Y.S.2d 413.

63. N.Y.—Friedman v. McHugh, 293 N.Y.S. 345, 161 Misc. 856.

Proof that an execution has been returned unsatisfied may be made by affidavit "or otherwise;" and a court clerk's notation that execution was returned unsatisfied has been held sufficient.—Harlem Metal Corporation v. Segal, 8 N.Y.S.2d 969, 971, 167 Misc. 321.

Facts obtained by telephone

Statement in affidavit for garnishee execution based on facts obtained by telephone is insufficient without

are subject to modification[64] on the application of either party[65] on a showing that conditions have changed from those existing when the order was made and the execution issued.[66] However, the fact that the order has not been appealed from, or in any way modified, does not render it res judicata on the rights of the parties.[67]

Enforcement of garnishee execution. The garnishee execution can be effective only if served on an employer who is amenable to the process and jurisdiction of the court.[68] Thus salary paid by a foreign corporation which is not present in the state for the purpose of process cannot ordinarily be reached.[69] In general, the acquisition of jurisdiction in the case of a nonresident employer or judgment debtor is governed by the principles applicable to attachments.[70] While it has been held that the situs of the contract between the judgment debtor and his employer must be within the court's jurisdiction,[71] it has also been held, by virtue of an amendment to the attachment statutes, that garnishee proceedings will lie with respect to a salary or debt payable by a foreign corporation to a nonresident if the corporation is subject to the process of the court.[72]

If the person to whom the execution is presented fails to pay over the percentage of indebtedness required, he is liable to an action at law therefor by the judgment creditor.[73] The action so provided for is the sole remedy for failure to comply with the execution;[74] the court has no authority to enforce it[75] by summary order.[76] The general rules as to parties,[77] pleadings,[78] and evidence[79] have been applied in such actions. The burden is on the judgment creditor to establish that the employer owed the judgment debtor earnings or salary in an

proof as to recognition of the voice. —Friedman v. McHugh, 293 N.Y.S. 345, 161 Misc. 856.

A typographical error in the affidavit accompanying the application for a garnishee order does not invalidate a garnishee execution issued thereon.—Harlem Metal Corporation v. Segal, 3 N.Y.S.2d 969, 167 Misc. 321.

64. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236 —Coller v. Sheffield Farms Co., 223 N.Y.S. 305, 129 Misc. 600.

Who may entertain application; collateral attack

(1) Application for modification of garnishee's execution may be made to judge or justice issuing it or to court from which execution issued. —In re Howard Hotel Corporation, 270 N.Y.S. 259, 150 Misc. 782.

(2) Garnishee execution against income due judgment debtor is not subject to collateral attack, and any modification of order must be sought in tribunal of original jurisdiction. —In re Randolph's Will, 288 N.Y.S. 678, 159 Misc. 688.

65. N.Y.—Smith v. Endicott-Johnson Corporation, 192 N.Y.S. 121, 199 App.Div. 194, affirming 189 N.Y.S. 673—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.

66. N.Y.—Wood v. Dock & Mill Co., supra.

67. N.Y.—VanValkenburgh v. Bishop, 164 N.Y.S. 86.

68. N.Y.—Penrose & McEniry v. Manogue, 221 N.Y.S. 758, 129 Misc. 512.

69. N.Y.—Penrose & McEniry v. Manogue, supra.

70. N.Y.—Commercial Credit Corporation v. Young, 16 N.Y.S.2d 324, 258 App.Div. 323—Brock v. Brock, 18 N.Y.S.2d 648, 173 Misc. 172—Carpenter v. Farabaugh, 262 N.Y.S. 609, 146 Misc. 625—Penrose & McEniry v. Manogue, 221 N.Y.S. 758, 129 Misc. 512.

71. N.Y.—Morris Plan Co. v. Miller, 169 N.Y.S. 37, 102 Misc. 470.

Employment contract with foreign corporation

(1) Where judgment debtor had resided in New York when served with summons and complaint, but had subsequently become a Pennsylvania resident and entered into contract of employment in Pennsylvania with Pennsylvania corporation, order directing issuance of garnishee execution against debtor's wages was held void for lack of jurisdiction on the ground that the res was the contract of employment and was beyond the court's jurisdiction.—Commercial Credit Corporation v. Young, 16 N.Y.S.2d 324, 258 App.Div. 323.

(2) "Prior to 1936 it was well settled that a garnishment of salary due or to become due from a foreign corporation only authorized to do business in this state would not lie where the non-resident debtor performs no services and in fact receives no remuneration here."—Brock v. Brock, 18 N.Y.S.2d 648, 173 Misc. 172.

72. N.Y.—Brock v. Brock, 18 N.Y.S.2d 648, 173 Misc. 172—Tishman Realty & Construction Co. v. Spencer, 24 N.Y.S.2d 297.

Retroactive operation

The amendment of section of civil practice act relating to garnishee execution, providing that managing agent of foreign corporation authorized to do business in the state should be deemed to represent the corporation for purposes of carrying out provisions of such section, was inapplicable to garnishment proceeding instituted prior to effective date of such amendment —Commercial Credit Corporation v. Young, 16 N.Y.S.2d 324, 258 App.Div. 323.

73. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236. 23 C.J. p 904 note 24.

Assignment

A judgment creditor's cause of action against an employer who has not complied with the garnishee order and execution may be assigned. —Smith v. Endicott-Johnson Corporation, 192 N.Y.S. 121, 199 App.Div. 194, affirming 189 N.Y.S. 673.

74. N.Y.—Penrose & McEniry v. Manogue, 221 N.Y.S. 758, 129 Misc. 512.
23 C.J. p 904 note 25.

75. N.Y.—Keve v. Columbia Kid Hair Curlers Mfg. Co., 145 N.Y.S. 1072, 161 App.Div. 918—Penrose & McEniry v. Manogue, 221 N.Y.S. 758, 129 Misc. 512.

76. N.Y.—Matter of Pratt, 143 N.Y.S. 1025, 158 App.Div. 695.

77. N.Y.—Demuth v. New York Life Ins. & Trust Co., 150 N.Y.S. 981, 165 App.Div. 77—Van Wie v. Delaware & Hudson Co., 127 N.Y.S. 184, 71 Misc. 25.
23 C.J. p 904 note 24 [b].

78. N.Y.—Rosenstock v. New York, 89 N.Y.S. 948, 97 App.Div. 337, affirmed 74 N.E. 1125, 181 N.Y. 550 —Lutkins v. Lutkins, 148 N.Y.S. 174, 85 Misc. 148—Reynolds v. Harlem Constr. Co., 128 N.Y.S. 642 71 Misc. 446—Van Wie v. Delaware & Hudson Co., 127 N.Y.S. 184, 71 Misc. 25.
23 C.J. p 904 note 24 [c].

79. N.Y.—Saks v. McDonald, 164 N.Y.S. 756.
23 C.J. p 904 note 24 [d].

amount equal to or exceeding the minimum specified in the statute.[80] Recovery in such an action is limited to the amount due under the garnishee for the period between the service of the garnishee execution and the commencement of the action.[81] An employer may raise the defense that the debtor was not in its employ at the time of the service on it of the garnishee execution;[82] but such defense will not prevail where the debtor subsequently became an employee, and the employer retained the execution without having moved to vacate or modify it.[83]

c. Under New Jersey Statutes

In New Jersey, an installment execution may issue under which a judgment creditor may obtain a portion of certain income regularly derived by the judgment debtor.

Under the New Jersey statutes, provisions similar to those in New York, see supra subdivision b of this section, permit a judgment creditor to obtain a percentage of the debtor's income through the issuance of an installment execution, by order of a judge or court, on an unsatisfied judgment, after the return of an execution unsatisfied, where the wages, debts, earnings, salary, income from trust funds, or profits due and owing to the judgment debtor, or thereafter to become due and owing to him, exceed a designated sum.[84] With respect to its intended effect, the statute is remedial and must be liberally construed,[85] in pari materia with other acts dealing with the subject of executions.[86] An installment execution may issue on an order or decree of the court of chancery as well as on a judgment of a court of law;[87] but the right to issue an installment execution under this section does not carry with it any authority to make an order directly requiring the debtor to pay a designated sum per week.[88] The execution creates a lien in favor of the judgment creditor on the wages due and to become due to the judgment debtor.[89]

The debtor's salary cannot be reached unless it exceeds the minimum set forth in the statute.[90] The salary of a public officer can be reached.[91]

Proceedings. The statute is in derogation of the procedure at common law[92] in that it takes from the debtor without notice and without a hearing, property which, except for the statute, is exempt from execution.[93] The procedure, therefore, must be in strict compliance with the express requirements of the statute,[94] and no intendment will be made to enable the court or a judge to assume jurisdiction, in the absence of the jurisdictional facts properly evidenced.[95]

Enforcement. The employer or garnishee is obliged to pay the amount called for in the execution, and if he fails to do so an action of debt will lie

80. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.
23 C.J. p 903 note 21 [a], [b].

81. N.Y.—Decorative Furniture Frame Corporation v. Strand Art Period Furniture Co., 257 N.Y.S. 631, 144 Misc. 1.

82. N.Y.—Smith v. Endicott-Johnson Corporation, 189 N.Y.S. 673, affirmed 192 N.Y.S. 121, 199 App. Div. 194.

83. N.Y.—Smith v. Endicott-Johnson Corporation, supra.

84. N.J.—Morris Plan Industrial Bank of New York v. Kemeny, 8 A.2d 769, 123 N.J.Law 389.
23 C.J. p 904 notes 28–30.

Trust income
This statute has been held to supersede a previous statute which afforded immunity from execution to trust income which did not exceed four thousand dollars per annum.—Harcum v. Greene, 166 A. 717, 111 N.J.Law 129.

Statute held retroactive
N.J.—Petersen v. Jersey City, 97 A. 963, 89 N.J.Law 93—Russell v. Mechanics' Realty Co., 96 A. 657, 88 N.J.Law 532.
23 C.J. p 902 note 12.

Effort to collect by ordinary execution
It must appear that a bona fide effort to collect by ordinary execution had been made and failed before resort can be had to the provisions of this legislation.—Trapp v. Brown, 104 A. 302, 303, 91 N.J.Law 481, affirmed 107 A. 413, 93 N.J.Law 171—23 C.J. p 904 note 28 [a].

85. N.J.—Harcum v. Greene, 166 A. 717, 111 N.J.Law 129—Russell v. Mechanics' Realty Co., 96 A. 657, 88 N.J.Law 532.

86. N.J.—Trapp v. Brown, 104 A. 302, 91 N.J.Law 481, affirmed 107 A. 413, 93 N.J.Law 171.

87. N.J.—White v. White, 120 A. 419, 94 N.J.Eq. 278—Poeter v. Poeter, 194 A. 792, 15 N.J.Misc. 691.

88. N.J.—Berkowitz v. First Dist. Court of Jersey City, 156 A. 666, 108 N.J.Law 345, reversing 152 A. 240, 8 N.J.Misc. 847.
Orders for payment see supra § 383.

89. N.J.—Credit Adjusters & Collectors v. Bergen Essex Const. Co., 11 A.2d 755, 124 N.J.Law 382.

90. N.J.—Georges v. Wegrocki, 4 A. 2d 274, 122 N.J.Law 109.
23 C.J. p 904 note 29 [b] (2).

91. N.J.—Peterson v. Jersey City, 97 A. 963, 89 N.J.Law 93.
23 C.J. p 904 note 29 [b].

Judge
N.J.—Cross v. La Corte, 168 A. 849, 11 N.J.Misc. 941.

Member of legislature
N.J.—Georges v. Wegrocki, 4 A.2d 274, 122 N.J.Law 109.

92. N.J.—Varbalow v. Philadelphia, Nat. Bank, 14 A.2d 548, 125 N.J. Law 147—Trapp v. Brown, 107 A. 413, 93 N.J Law 171, affirming 104 A. 302, 91 N.J.Law 481.

93. N.J.—Varbalow v. Philadelphia Nat. Bank, 14 A.2d 548, 125 N.J. Law 147—Trapp v. Brown, 107 A. 413, 93 N.J.Law 171, affirming 104 A. 302, 91 N.J.Law 481.

94. N.J.—Varbalow v. Philadelphia Nat. Bank, 14 A.2d 548, 125 N.J. Law 147—Trapp v. Brown, 107 A. 413, 93 N.J.Law 171, affirming 104 A. 302, 91 N.J.Law 481.
23 C.J. p 904 note 28.

The order must state the amount or percentage which is to be deducted from the debtor's wages and applied to the judgment.—Bond Stores v. Friedman, 13 A.2d 493, 125 N.J. Law 80.

95. N.J.—Trapp v. Brown, 104 A. 302, 91 N.J.Law 481, affirmed 107 A. 413, 93 N.J.Law 171.

against him.[96] If the garnishee is a corporation, liability extends not only to the corporation, but also to the person, agent, treasurer, or other fiduciary officer to whom the execution was presented.[97]

XVI. EXECUTION AGAINST PERSON

A. NATURE, RIGHT TO, AND PROCEEDINGS TO PROCURE

§ 407. Nature, Purpose, and Effect

Execution against the person is effected by a writ of capias ad satisfaciendum, under which the sheriff arrests the defendant and imprisons him until he satisfies the judgment or is discharged by proceeding of law. The taking out of a body execution precludes proceeding against the debtor's property while it is in force.

Execution against the person is effected by the writ of capias ad satisfaciendum, under which the sheriff arrests defendant and imprisons him until he satisfies the judgment or is discharged by proceeding of law.[98] Such an execution is an extraordinary remedy which as a general rule is not to be resorted to if the amount due on a judgment may be made by an ordinary execution against the property of the judgment debtor.[99] According to some decisions the purpose of such execution is the collection of the amount due,[1] but according to other authorities statutes allowing imprisonment for debt in certain cases have for their object both the enforcement of payment and the punishment of fraudulent debtors.[2] It is not intended as punishment for failure to pay the judgment, but is permitted for the purpose of compelling the debtor to reveal property presumably withheld by him in fraud of his creditor, from which the judgment may be satisfied.[3] Proceedings to procure an execution against the person are a "civil action" within the meaning of codes and statutes.[4]

Effect. The taking out of a body execution precludes the right to proceed against the debtor's property, while it is in force.[5] It extinguishes an order of arrest,[6] and the latter is not revived by a reversal of the judgment.[7] The arrest of the debtor does not, however, preclude the right of the creditor to retain collateral security.[8]

Imprisonment of one of several defendants. In the case of a judgment against several defendants, the taking of one does not affect plaintiff's right to pursue the others until there is a payment in fact,[9] and each may be successively arrested and imprisoned if they were all originally brought into court; but imprisonment of one of the defendants, so long as it continues, is a good defense to a joint action on the judgment against all the defendants.[10] On a joint judgment against several defendants the service of a capias ad satisfaciendum on one does not extinguish the lien of the judgment on the land of the others.[11]

§ 408. Constitutional and Statutory Provisions

Statutory provisions in the various jurisdictions provide for proceedings by capias ad satisfaciendum, and such statutes have been held constitutional.

Proceedings by capias ad satisfaciendum are statutory.[12] Statutes providing for imprisonment on a capias ad satisfaciendum or body execution have been held not unconstitutional as denying equal

98. N.J.—Credit Adjusters & Collectors v. Bergen Essex Const. Co., 11 A.2d 755, 124 N.J.Law 382.

97. N.J.—Credit Adjusters & Collectors v. Bergen Essex Const. Co., supra.

98. U.S.—In re Teuscher, C.C.Mo., 23 F.Cas.No.13,846.
9 C.J. p 1277 note 15.

Body execution and close-jail execution distinguished
A "body execution" is an "execution" which directs that, in accordance with the provisions therein set forth, the body of the defendant therein named be committed to jail, whereas a "close-jail execution" is a body execution which has indorsed in or on it the statement that the cause of action arose from the willful and malicious act or neglect of defendant, and that defendant ought to be confined in close jail.—Ex parte Thompson, 9 A.2d 107, 111 Vt. 7.

Object of capias ad satisfaciendum is to take and retain body of defendant as pledge for payment of debt, and hence requirement of bond therein is irregular.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa.Super. 280.

99. Ind.—Baker v. State, 9 N.E. 711, 109 Ind. 47.
23 C.J. p 905 note 34.

1. Colo.—Hershey v. People, 12 P. 2d 345, 91 Colo. 113.
23 C.J. p 905 note 35.

The normal function of a "capias ad satisfaciendum" is the compulsory surrender of judgment debtor's property for the benefit of his creditors.—Duro Co. v. Wishnevsky, 16 A.2d 64, 126 N.J.Law 7.

2. N.Y.—Matter of Prime, 1 Barb. 296, 1 Edm.Sel.Cas. 479.
23 C.J. p 905 note 36.

3. Mich.—McDonell v. Collingwood, 193 N.W. 283, 222 Mich. 516.

4. Ind.—Baker v. State, 9 N.E. 711, 109 Ind. 47.

5. Mich.—Baehr v. Decker, 274 N.W. 339, 280 Mich. 590.
23 C.J. p 906 note 53.

6. N.Y.—People v. Bowe, 81 N.Y. 43, 8 Abb.N.Cas. 234.

7. N.Y.—People v. Bowe, supra.

8. Me.—Smith v. Strout, 63 Me. 205.

9. N.Y.—New York Guaranty & Indemnity Co. v. Rogers, 71 N.Y. 377.
23 C.J. p 906 note 58.

10. N.Y.—Chapman v. Hatt, 11 Wend. 41.

11. Va.—Leake v. Ferguson, 2 Gratt. 419, 43 Va. 419.

12. Mich.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.

protection of law.[13] An act providing that the right to issue or enforce executions against the body on judgments theretofore rendered in particular causes of action is abolished abolishes the right to enforce such executions even when issued before the effective date of the act on judgments in such cases,[14] and such an act is not unconstitutional.[15] A statute providing for cases wherein an offender may be relieved from imprisonment does not authorize a stay of body execution.[16] A statutory provision for the release of civil prisoners confined under body execution does not repeal a provision for execution against the body of any defendant where judgment is obtained for a tort or trespass committed by such defendant.[17]

§ 409. Time for

The time within which the plaintiff is entitled after judgment to charge the body of the defendant in execution is generally provided for by statute; otherwise he must be allowed a reasonable time.

At common law the practice seems to have been to sue out the writ at any time within a year from the rendition of the judgment, and if a defendant had been arrested under mesne process he remained in the custody of the sheriff or his bail until he was charged in execution.[18] The time within which a plaintiff is entitled after judgment to charge the body of defendant in execution is sometimes expressly prescribed by statute;[19] and where this is the case defendant must be charged within such time or the execution will be vacated unless reasonable cause is shown to the contrary.[20] Where, however, such provision is not made, plaintiff must be allowed a reasonable time within which to charge his debtor.[21] Delay in issuance is not excused by the pendency of supplementary proceedings,[22] or the absence of the debtor from the state,[23] or the fact that an execution would have brought nothing in satisfaction,[24] or a scire facias against the debtor's bail,[25] but is excused where caused by negotiations for settlement[26] or where defendant is confined in a penitentiary.[27] The debtor's coming into court for surrender by bail does not operate as a waiver of time with respect to the issuance of an execution.[28]

13. Ill.—Lipman v. Goebel, 192 N. E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

14. Ill.—Bleiwiss v. Gawlinski, 9 N. E.2d 262, 290 Ill.App. 609—In re Monaco, 5 N.E.2d 755, 287 Ill.App. 540.

Mich.—Ex parte Landaal, 262 N.W. 897, 273 Mich. 248.

15. Mich.—Ex parte Landaal, supra.

16. N.Y.—Bazer v. Himmel, 2 N.Y. S.2d 855, 166 Misc. 563.

17. Colo.—Erisman v. McCarty, 236 P. 777, 77 Colo. 289.

18. U.S.—Norman v. Manciette, C.C. Or., 18 F.Cas.No.10,300, 1 Sawy. 484.

19. Colo.—Roll v. Davis, 277 P. 767, 85 Colo. 594.
23 C.J. p 905 note 40.

In Michigan

(1) Comp.L.1915 § 12838, providing that, when any defendant at the time judgment shall be rendered against him shall be in custody, either on process in the suit in which such judgment shall have been rendered, or on being surrendered in discharge of bail in such suit, plaintiff shall charge defendant in execution thereon within twenty days after judgment, applies only when defendant at the time the judgment is rendered is in custody, either on capias ad respondendum or by reason of his having been surrendered in discharge of his bail.—McDonell v. Collingwood, 193 N.W. 283, 222 Mich. 516.

(2) Comp.L.1915 § 12839, providing that when any defendant shall be in custody on a surrender in discharge of his bail, made after a judgment obtained against him, and such bail shall be thereafter exonerated, plaintiff must charge defendant in execution thereon, within twenty days after such surrender, or, if an execution against the property of such defendant shall have been issued, within twenty days after the return day of such execution, applies only when defendant is not in custody at the time the judgment is rendered, but is thereafter surrendered to the custody of the officer and his bail exonerated.—McDonell v. Collingwood, supra.

(3) The purpose of Comp.L.1915, §§ 12838 and 12839, relating to charging defendant in execution, is to compel a plaintiff who has procured the incarceration of a defendant to move with promptness in the enforcement of his rights; if defendant be actually in custody when judgment is rendered, plaintiff must cause execution against the body to be issued within twenty days thereafter, and, if not in custody by reason of compliance with the provisions as to bail, plaintiff must issue execution against defendant's property and have it returned before he can secure an execution against his body.—McDonell v. Collingwood, supra.

(4) Comp.L.1915 § 12838 does not apply where defendant is at large under jail-limits bond.—Weurding v. Ottawa Circuit Judge, 203 N.W. 87, 230 Mich. 300.

(5) Statute requiring plaintiff in judgment to charge defendant in execution within twenty days where defendant is in custody of officer applies only to cases commenced by capias ad respondendum, and did not apply to case begun by summons.—Lindow v. Mudge, 253 N.W. 196, 266 Mich. 11.

In New York, where no order of arrest was obtained by plaintiff and defendant was not imprisoned under any process issued in action in which judgment was entered pursuant to stipulation, failure to move for body execution for sixteen months after execution against property was returned unsatisfied did not constitute "laches," barring right to body execution.—Siegel v. Tobias, 19 N.Y.S. 2d 337, 173 Misc. 868.
23 C.J. p 905 note 40 [b].

20. N.Y.—Levison v. Harris, 134 N. Y.S. 12.
23 C.J. p 905 note 41.

21. U.S.—Norman v. Manciette, C.C. Or., 18 F.Cas.No.10,300, 1 Sawy. 484.

22. N.Y.—Newgas v. Solomon, 20 Abb.N.Cas. 175.

23. Vt.—Yatter v. Smilie, 47 A. 1070, 72 Vt. 349.

24. Vt.—Yatter v. Smilie, supra.

25. Vt.—Yatter v. Smilie, supra.

26. Mich.—Lapham v. Oakland Cir. Judge, 136 N.W. 594, 170 Mich. 564.

27. Colo.—Roll v. Davis, 277 P. 767, 85 Colo. 594.

28. Vt.—Yatter v. Smilie, 47 A. 1070, 72 Vt. 349.

§ 410. Jurisdiction and Authority to Issue

Jurisdiction and authority to issue the writ depend largely on the statutory provisions of the particular jurisdiction.

The rules as to jurisdiction and authority to issue the writ vary in different jurisdictions and depend largely on statutory provisions and the writ may be issued by, and only by, a court properly authorized to do so.[29] Where a body execution is issuable against a debtor who defrauds his creditors, the court of the state where a judgment against such debtor is recovered may award such execution against him, although some of the fraudulent acts were committed by him during his temporary absence from the state.[30] Imprisonment for debt on process from federal courts having been abolished by act of congress in all states which have abolished it by law, the federal courts in such states have no jurisdiction of a suit for the enforcement of a state statute, highly penal in its nature, with regard to fraudulent debtors.[31]

§ 411. Right to

The right to a capias ad satisfaciendum exists at common law in the case of trespass vi et armis, but in other cases the right depends on the statutes authorizing such execution, and one seeking to exercise such right must bring his case clearly within the statute.

The right to imprison by means of a capias ad satisfaciendum exists at common law and has long been authorized by statute.[32] Originally the capias ad satisfaciendum lay at common law only in trespass vi et armis.[33] Owing to the difficulty experienced in procuring the appearance of defendants statutes were enacted from time to time giving the capias ad respondendum as the mesne process in certain other cases,[34] and the capias ad satisfaciendum was held to follow as a common-law incident,[35] the rule being that a capias ad satisfaciendum would lie in all cases where a capias ad respondendum might have been used as the process to bring defendant before the court.[36] It follows then that the right to issue an execution against the body is dependent on statutes either expressly authorizing such execution or authorizing arrest on mesne process.[37] Such statutes have been held to be penal in their nature and to be subject to the rule of strict construction.[38] To entitle one to such an execution he must bring his case clearly within the provisions of the statute.[39] When this is done, however, he is entitled thereto, although other remedies may be available.[40] Where the statutes are uncertain, the common law is applicable.[41] In determining plaintiff's right to execution against the person the court is not concerned with the wisdom of plaintiff's procedure.[42] Under some statutes, execution against the person may issue in any action in which defendant may be civilly arrested because of the nature of the action.[43]

29. N.Y.—Adolf Gobel, Inc. v. Weil, 31 N.Y.S.2d 317, 263 App.Div. 817—Wilson & Co. v. Hershkowitz, 298 N.Y.S. 14, 163 Misc. 721.
23 C.J. p 905 note 49.

30. Nev.—Ex parte Bergman, 4 P. 209, 18 Nev. 331.

31. U.S.—Curtis v. Feste, D.C.La., 6 F.Cas.No.3,502.

32. Ill.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 83 L.Ed. 1545.

33. Mich.—Forsythe v. Washtenaw Cir. Judge, 147 N.W. 549, 180 Mich. 633.
23 C.J. p 906 note 62.

34. Ill.—People v. Walker, 122 N.E. 92, 286 Ill. 541.
23 C.J. p 906 note 64.

35. Ill.—Petition of Fetz, 239 Ill. App. 250.
23 C.J. p 906 note 65.

36. Mich.—Forsythe v. Washtenaw Cir. Judge, 147 N.W. 549, 180 Mich. 633.
23 C.J. p 906 note 66.

37. Mich.—Forsythe v. Washtenaw Cir. Judge, supra.
23 C.J. p 906 note 69.

38. Ill.—Peiffer v. French, 33 N.E.2d 591, 376 Ill. 376, affirming 28 N.E.2d 983, 306 Ill.App. 326.
23 C.J. p 906 note 70.

39. N.Y.—Elwood v. Gardner, 45 N.Y. 349.

40. Kan.—Tatlow v. Bacon, 165 P. 835, 101 Kan. 26.

Mandatory statutes

The provisions of the Civil Practice Act conferring the right to body execution are "mandatory."—Pacific Finance Corporation v. Trombino, 24 N.Y.S.2d 297.

Discretion of court

(1) Under the statute providing that an applicant for a body execution shall set forth certain specified things and "such other matters as the judge, justice, or court issuing the same may require," court must decide whether, despite the showing of the facts necessary to confer jurisdiction, the application should be denied in the exercise of a sound discretion.—Williams v. Smith, 12 N.Y.S.2d 124, 171 Misc. 501.

(2) Application by one, who had obtained judgment in personal injury action not involving a willful tort, for body execution would be denied, where judgment debtor was seventy-five years old, was on relief, and had no property other than a building, the rentals of which were being collected by a mortgagee.—Williams v. Smith, supra.

(3) Pedestrian who obtained judgment against motorist for injuries sustained when struck by automobile was not entitled to execution against motorist's person where motorist had no property applicable to satisfaction of the judgment, had only earned approximately five hundred dollars on odd jobs during preceding year and a half, was married, although without children, had made an unsuccessful application for employment insurance benefits and received occasional assistance from his mother and his wife's mother.—Morgan v. Cohen, 5 N.Y.S.2d 615, 168 Misc. 251.

41. Mich.—Westerhouse v. Ottawa Circuit Judge, 180 N.W. 378, 212 Mich. 457.

42. N.Y.—Condon v. Derringer, 12 N.Y.S.2d 647, 171 Misc. 381.

43. U.S.—B. I. P. (Export), Limited, v. Isaacs, D.C.N.Y., 10 F.Supp. 872.
N.Y.—White v. Denny, 15 N.Y.S.2d 849, 258 App.Div. 144—Siegel v. Tobias, 19 N.Y.S.2d 337, 173 Misc. 868.

Cause of action and cause of arrest

(1) Under a statute authorizing a

That property has been attached on mesne process does not preclude the writ, since plaintiff may elect between the alternative remedies.[44]

The filing of a creditor's bill by the judgment creditor does not preclude a body execution.[45]

Agreements as affecting. A defendant may by agreement be exempted from execution against the person.[46] So also, notwithstanding statutory specifications of cases in which an order of arrest may be issued, a defendant may consent in writing to the entry of a judgment against him which will authorize an execution against his person.[47]

§ 412. —— Constitutional or Statutory Prohibitions

Constitutional prohibitions against imprisonment for debt and statutory provisions of like effect prevent the use of a capias ad satisfaciendum in certain cases.

As shown in Constitutional Law § 204, the constitutions of most of the states contain provisions prohibiting imprisonment for debt or restricting the right to imprison debtors to certain cases. Under the statutes, in some jurisdictions, imprisonment for debt has been abolished, in whole or in part.[48] Such statutes do not prevent the arrest of a judgment debtor about to leave the state, the writ of arrest in such case not being, in effect, a capias ad satisfaciendum.[49] Under a statute so providing, all modifications, conditions, and restrictions on imprisonment for debt provided by the laws of any state are applicable to process issuing from federal courts to be executed therein.[50]

A law of a foreign country which protects the party to a contract from execution will, in the courts of the United States, protect the same individual from arrest upon the same contract.[51]

§ 413. —— As Dependent on Nature of Action

a. Actions ex contractu
b. Actions to recover fines, penalties, or forfeitures
c. Actions ex delicto
d. Actions for breach of promise to marry
e. Ejectment
f. Loss of right by joinder of different causes of action

a. Actions ex Contractu

Constitutional and statutory prohibitions against imprisonment for debt prevent, in most jurisdictions, execution against the body of defendant in actions ex contractu.

Under the provisions of the constitutions and statutes in most jurisdictions defendants in actions arising out of, or founded on, a contract, express or implied, are not subject to executions against the person,[52] unless, as considered infra § 414, they

body execution, judgment is not cause of action referred to in statute.—Ex parte Teeters, 280 P. 660, 130 Or. 631.

(2) A record, showing question of fraud was never adjudicated, and containing no findings of fact thereon, did not show cause of action was also cause of arrest and did not authorize body execution; and a body execution against defendant, where cause of action and cause of arrest are same, requires more than mere allegation charging fraud denied by answer.—Ex parte Teeters, supra.

Plaintiff held entitled to body execution

N.Y.—Barney Cohen Realty Co. v. Cagino, 264 N.Y.S. 518, 239 App. Div. 844.

Arrest held not warranted

N.Y.—Horowitz v. Harris, 221 N.Y.S. 185, 129 Misc. 236.

44. Mass.—In re Plympton, 82 N.E. 715, 196 Mass. 571.
23 C.J. p 907 note 78.

45. Ill.—Nelson v. Swanson, 186 Ill. App. 632.

46. N.H.—Chickering v. Greenleaf, 6 N.H. 51.
23 C.J. p 907 note 85.

47. N.Y.—Steinbock v. Evans, 25 N. E. 929, 122 N.Y. 551, affirming 18 N.Y.St. 325, 55 N.Y.Super. 278.

48. Ill.—Manaster v. Kioebge, 100 N. E. 989, 257 Ill. 431.
23 C.J. p 907 note 82.

49. La.—Hannagriff v. King, 123 So. 391, 11 La.App. 467.

50. U.S.—Low v. Durfee, C.C.Mass., 5 F. 256.
23 C.J. p 907 note 83.

51. U.S.—Camfranque v. Burnett, Pa., 4 F.Cas.No.2,342, 1 Wash.C.C. 340.

52. NH.—Hogan v. Finn, 111 A. 271, 79 N.H. 526.
Pa.—Ross v. Dever, 148 A. 75, 298 Pa. 146.
23 C.J. p 907 note 87.
Actions ex contractu as within constitutional prohibitions against imprisonment for debt see Constitutional Law § 204.
Body execution in equity suits see Equity § 617.

Statute relating to execution in favor of wage earner securing judgment for salary is complete and exclusive as to right of wage earner to execution against person and as to duty of clerk to grant execution, and is sole criterion of propriety of such execution and manner in which it is to be executed, and statutes relating to arrests and body executions are not applicable.—People ex rel. Sirotta v. Sampson, 295 N.Y.S. 61, 162 Misc. 601.

Punishment for contempt

(1) Statutory provision for punishment of judgment debtor for contempt for failure to pay installments directed to be paid on judgment in supplementary proceedings is constitutional, even as applied to federal employee, as against contention that statute would result in imprisonment for debt, contrary to statute, and would interfere with operation of federal instrumentality, in absence of showing that order directing payment was inequitable or harsh.—Reeves v. Crownshield, 8 N.E.2d 283, 274 N.Y. 74, 111 A.L.R. 389, affirming 292 N.Y.S. 756, 162 Misc. 118.

(2) Act abolishing imprisonment for debt expressly excepts contempts to enforce civil remedies.—Commonwealth v. Heston, 140 A. 533, 292 Pa. 63.

(3) Order directing judgment debtor to pay to receiver all salary received in excess of one hundred dollars monthly is obnoxious to statute forbidding imprisonment for debt

have been guilty of fraud. It has been held that if a judgment is based in part on a cause of action upon contract there can be no execution against the body, even though it is based in part also on a cause of action in tort.[53] Such an execution cannot issue, although the action is in form ex delicto where it is in fact ex contractu.[54] The mere fact that contractual relations exist between the parties will not, however, prevent the issuing of a capias ad satisfaciendum, where the gist of the action is tort, although the existence of the relations afforded occasion for the commission of the tort.[55]

Since the form of action adopted will not necessarily determine whether the cause of action is for a tort or breach of contract, the allegations of the declaration or complaint will be looked to in order to ascertain whether the acts complained of constitute a tort within the meaning of statutes allowing imprisonment of a defendant on an execution against the person.[56] Where it is doubtful whether a cause of action, as stated in a complaint, is in contract or in tort, it is presumed to be the former rather than the latter for the purpose of determining the right to a body execution.[57]

Where the action is ex contractu, allegations of fraud do not change the character of the action so as to authorize a body execution.[58] However, the action is ex delicto, where damages for fraud are sought, although the complaint sets forth a contract as the inducement to the right of action.[59]

According to some decisions, where plaintiff elects to rest his action as on contract and not on tort, he cannot, after obtaining judgment upon that theory, have an execution against defendant's person;[60] but it has been held that, where plaintiff waives the tort and sues in contract to recover money wrongfully converted to his own use by defendant, and the record shows that a tort has been actually committed, he is entitled to a body execution, notwithstanding the form of action adopted.[61] Where one is sued as a common carrier for the nondelivery of goods, in the form of an action on contract, a body execution cannot be issued.[62] However, a defendant is not entitled to be discharged from arrest on a body execution issued on a judgment against him as a common carrier, in an action on the case, for negligence.[63]

b. Actions to Recover Fines, Penalties, or Forfeitures

Where fines, forfeitures, or penalties are not regarded as debts, a body execution may be had in actions for their recovery.

Where fines, forfeitures, or penalties imposed by law are not regarded as debts, actions for the recovery or collection thereof are not within the purview of prohibitions against imprisonment for debt.[64] However, where a penalty is, by statute, directed to be recovered "as debts of like amount are by law recoverable," a body execution cannot issue in an action for the recovery thereof.[65]

The proper mode of recovering a fine or penalty for the violation of a municipal ordinance, where it is not otherwise provided, is by a civil action in the form of debt or assumpsit, and a person imprisoned by virtue of an execution against the body for such violation is entitled to the benefit of a statute for the relief of persons imprisoned on civil process.[66]

c. Actions ex Delicto

(1) In general
(2) Actions for injuries to person or reputation
(3) Actions for injuries to, or conversion of, property
(4) Actions to recover personal property

(1) In General

Statutes providing for issuance of body executions to enforce judgments in actions ex delicto ordinarily do not conflict with provisions against imprisonment for debt. Where the statutes so provide, the writ will issue in actions involving embezzlement, misapplication, etc., by

since it threatens imprisonment for contempt.—McGrew v. McGrew, 38 F.2d 541, 59 App.D.C. 230, certiorari denied 50 S.Ct. 349, 281 U.S. 739, 74 L.Ed. 1153.

53. N.Y.—Miller v. Scherder, 2 N.Y. 262.
Wis.—State v. Helms, 77 N.W. 194, 101 Wis. 280.

54. Pa.—Connolly v. Decker, Wilcox 133.
23 C.J. p 908 note 90.

55. Pa.—Lancaster Supply Co. v. Butt, 22 Pa.Dist. 170.

56. N.Y.—Ellis v. Cohen, 24 N.Y.S.2d 23, affirmed 24 N.Y.S.2d 24, 175 Misc. 349.
23 C.J. p 908 note 92.

57. N.Y.—Elwood v. Gardner, 45 N.Y. 349, 10 Abb.Pr.,N.S., 238, affirming 9 Abb.Pr.,N.S., 99.

58. Ill.—People v. Healey, 20 N.E. 692, 128 Ill. 9, 15 Am.S.R. 90.
23 C.J. p 908 note 94.

59. N.Y.—McDuffie v. Beddoe, 7 Hill 578.

60. N.Y.—Goodwin v. Griffis, 88 N.Y. 629, reversing 25 Hun 61.
23 C.J. p 908 note 96.

61. U.S.—Barney v. Chapman, C.C. Ill., 21 F. 903.
Ill.—In re Paar, 264 Ill.App. 372.

62. N.Y.—Catlin v. Adirondack Co., 81 N.Y. 379, 11 Abb.N.Cas. 377, reversing 20 Hun 19.

63. N.Y.—Burkle v. Ellis, 4 How.Pr. 288.

64. S.D.—Deadwood v. Allen, 68 N.W. 333, 9 S.D. 221.
23 C.J. p 908 notes 2, 3.

65. Pa.—Commonwealth v. Myers, 5 Lanc.Bar No. 2—Commonwealth v. Trewetz, 7 Leg.Gaz. 293.

66. N.J.—Brophy v. Perth Amboy, 44 N.J.Law 217.

fiduciaries and in actions to recover public property unlawfully received or disposed of.

Statutes in the various states provide for the issuance of body executions to enforce judgments in actions ex delicto.[67] Although in some jurisdictions such statutes have been held to conflict with provisions prohibiting imprisonment for debt,[68] ordinarily prohibitions of imprisonment for debt apply only to actions arising out of contract, express or implied, and do not extend to actions ex delicto.[69]

Under some statutes a body execution will not issue on a judgment in tort unless malice is the gist of the action.[70] Under other statutes a body execution will issue on a judgment in tort committed by defendant and that malice was gist of action are mandatory, and, if such findings do not appear on face of judgment, clerk is without authority to issue writ and a complaint which states cause of action having malice as the gist does not alone authorize clerk to issue writ.—Ingalls v. Raklios, 26 N.E.2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1—Peiffer v. French, 28 N.E.2d 983, 306 Ill.App. 326, affirmed 33 N.E.2d 591, 376 Ill. 376—Miles v. Glad, 19 N.E.2d 844, 299 Ill.App. 185.

(4) Prior to amendment of statute respecting capias ad satisfaciendum, issuance of a writ was not dependent on finding or reference to malice in judgment, but if action was in tort, clerk, on application, issued the writ. —Ingalls v. Raklios, supra.

(5) Plaintiff could have capias ad satisfaciendum, regardless of whether malice was gist of action, it being considered that whether malice is gist of action is material only when the judgment debtor sought for discharge from custody under Insolvent Debtors' Act.—In re Paar, 264 Ill.App. 372—Reinwald v. McGregor, 239 Ill.App. 240.

(6) Amended statute providing that no execution should issue against body of defendant except when judgment was for tort and it appeared from special finding that malice was gist of action is not controlling in determining whether malice was gist of judgment rendered prior to time statute as amended was in force.—Chalukonis v. Jozwiak, 4 N.E.2d 782, 287 Ill.App. 170.

Reference to statement of claim to resolve ambiguity in judgment

Where there is ambiguity in judgment, reference may be had to statement of claim to determine whether malice is gist of action in support of body execution.—Brandtjen & Kluge v. Forgue, 20 N.E.2d 616, 299 Ill. App. 585.

Correction of finding to warrant writ

Ill.—Krautseider v. Miley, 35 N.E.2d 392, 311 Ill.App. 242.

Finding of malice held proper

In suit to rescind land purchase contracts for fraud, allegations, supported by proof, relating to false representations and purchaser's reliance thereon, implied that subdividers and salesmen were actuated by improper motives and sustained

67. S.C.—Blackmon v. Kirven, 175 S.E. 814, 173 S.C. 322.

Actions "founded upon tort"

Action growing out of tort is "founded upon tort" within statute authorizing issuance of body execution in action founded on tort. Where the right of action grows out of tort, body execution may issue whether action is in tort for damages or in assumpsit for money had and received, and an action of assumpsit for money had and received by defendant who induced plaintiff by means of fraudulent representations to purchase stock grew out of tort, and hence body execution could issue in such assumpsit action.—Wheeler v. Wilkin, 58 P.2d 1223, 98 Colo. 568.

Statute regulating issuance as limitation on right to writ

Statute relating to issuance of writ of capias ad satisfaciendum on judgment in tort actions constitutes a limitation on the right to a capias ad satisfaciendum in actions ex delicto, since under pre-existing law the writ ordinarily issued as a matter of course in such actions.—Duro Co. v. Wishnevsky, 16 A.2d 64, 126 N.J.Law 7.

68. Wash.—Bronson v. Syverson, 152 P. 1039, 88 Wash. 264, 279, L.R.A. 1916B 993, Ann.Cas.1917D 833.

23 C.J. p 909 note 8.

Actions ex delicto as within constitutional prohibition against imprisonment for debt see Constitutional Law § 204.

69. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill.App. 556.

Mich.—Kirker v. Larson, 236 N.W. 896, 254 Mich. 648.

N.Y.—In re Perine, 287 N.Y.S. 535, 158 Misc. 597.

S.C.—Blackmon v. Kirven, 175 S.E. 814, 173 S.C. 322.

23 C.J. p 909 note 7.

70. Ill.—Granlie v. Valha, 37 N.E. 2d 931, 312 Ill.App. 181—Ingalls v. Raklios, 21 N.E.2d 856, 301 Ill. App. 1, reversed on other grounds 26 N.E.2d 468, 373 Ill. 404—Holub v. Paitl, 5 N.E.2d 751, 287 Ill.App. 629—Corwin v. Tillman, 255 Ill App. 280.

23 C.J. p 909 note 10.

Malice as gist of action

As respects propriety of capias ad satisfaciendum under amended statute, a defendant could be actuated by malice in committing tort against plaintiff and yet malice not be the "gist of the action".—Ingalls v. Raklios, 26 N.E.2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1.

Necessity of finding of malice as gist of action

(1) Under section of the Judgments Act requiring that, before body execution shall issue, judgment shall show that it was obtained for tort committed by defendant and that it shall appear from a special finding that malice is the gist of action, a capias ad satisfaciendum is not lawful where a case is tried before a court without a jury, unless the court includes in its judgment a special finding that malice is the gist of the action or where, in a case submitted to a jury, the jury makes a special finding of facts from which it shall appear that malice is the gist of the action and unless in such a case the judgment includes a special finding that malice was the gist of the action; and where jury in action for injuries returned a verdict in favor of plaintiffs, and made a special finding that conduct of defendant in operation of automobile was of such reckless character as to amount to willful and wanton misconduct, but judgment did not contain finding that malice was the gist of the action, a capias ad satisfaciendum could not properly issue against defendant.—Peiffer v. French, 33 N.E.2d 591, 376 Ill. 376, affirming 28 N.E.2d 983, 306 Ill.App. 326.

(2) The amendment to the Judgments Act requiring that no execution shall issue against the body of a defendant except when it appears from a special finding that malice is the gist of the action affects only the remedy and presupposes that the finding was on a charge of malice, as against contention that since enactment of amendment presumption that a general verdict not specifying count on which it is based is based on cause of action of which malice is the gist does not obtain.—Greene v. Noonan, 23 N.E.2d 720, 372 Ill. 286, reversing Greene v. Citro, 18 N.E.2d 237, 298 Ill.App. 25.

(3) The provisions of amended statute requiring that before body execution shall issue judgment shall show that it was obtained for tort

ecution may not issue unless the injury is willful or malicious;[71] such statutes contemplate the intentional doing of a wrongful act without just cause or excuse.[72]

Among the tort actions in which the writ is generally allowed are actions involving fraud or deceit,[73] and actions for neglect or misconduct in office or professional employment.[74]

Actions for misapplication, embezzlement, etc., by fiduciaries. Under some statutes the writ will issue in actions involving embezzlement, misapplication, and the like by officers, attorneys, agents, and other persons acting in a fiduciary capacity.[75]

Actions to recover public property unlawfully received or disposed of. Under statutes so providing, the writ is proper in actions to recover money, funds, credits, or property held or owned by the state, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, office, custodian, agency, or agent of the state, or

finding of malice, notwithstanding failure to allege malice specifically, as basis for execution on a capias ad satisfaciendum.—Veazey v. Summers, 26 N.E.2d 626, 304 Ill.App. 340.

Findings held sufficient to warrant issuance of writ.—Brandtjen & Kluge v. Forgue, 20 N.E.2d 616, 299 Ill.App. 585—Miles v. Glad, 19 N.E.2d 844, 299 Ill.App. 185—In re Gaida, 270 Ill.App. 247.

Findings held insufficient to warrant issuance of writ.—Centracchio v. Hill, 28 N.E.2d 315, 306 Ill.App. 278—Ingalls v. Raklios, 26 N.E.2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1.

71. N.H.—Hogan v. Finn, 111 A. 271, 79 N.H. 526.
N.J.—Duro Co. v. Wishnevsky, 16 A. 2d 64, 126 N.J.Law 7.
N.C.—Braxton v. Matthews, 154 S.E. 735, 199 N.C. 484.

Affirmative findings of malice held necessary

(1) In action for slander.—Crowder v. Stiers, 1 S.E.2d 353, 215 N.C. 123—Swain v. Oakey, 129 S.E. 151, 190 N.C. 113.

(2) In false arrest action.—Harris v. Singletary, 137 S.E. 724, 193 N.C. 583.

(3) In malicious prosecution action.—Klander v. West, 171 S.E. 782, 205 N.C. 524—Watson v. Hilton, 166 S.E. 589, 203 N.C. 574.

Abuse of process

(1) Person of defendant cannot be taken in execution for abuse of process in absence of finding of express malice or willful abuse of process.—Klander v. West, 171 S.E. 782, 205 N.C. 524.

(2) In an action for abuse of process, it is not necessary that there be a finding of malice to support a capias ad satisfaciendum, where the jury finds a willful abuse of process.—Ledford v. Smith, 193 S.E. 722, 212 N.C. 447.

Findings held sufficient

Vt.—Callahan v. Disorda, 16 A.2d 179, 111 Vt. 331.

Findings held insufficient

Under a statute authorizing an execution against the person of the judgment debtor if the action is one in which defendant might have been arrested, an execution against the person of the judgment debtor after execution against his property had been returned unsatisfied cannot issue where the verdict does not show an injury to plaintiff's person was inflicted intentionally or maliciously; and where complaint alleged unlawful, willful, and malicious assault, and answer pleaded self-defense as officers of the law in attempting to arrest plaintiff, and the reply alleged gross negligence in discharge of their duties, the finding of the jury that defendant "wrongfully and unlawfully" injured plaintiff's person "as alleged in the complaint," but awarding no punitive damages, is not a finding that the injury was inflicted intentionally or maliciously so as to permit execution against the debtor's person.—Coble v. Medley, 119 S.E. 892, 186 N.C. 479.

72. N.J.—Duro Co. v. Wishnevsky, 16 A.2d 64, 126 N.J.Law 7.
Vt.—North Adams Beef & Produce Co. v. Cantor, 156 A. 879, 103 Vt. 514.

Term "willful and malicious act or neglect," as used in execution statute, signifies wrongful act done intentionally without just cause or excuse, and malice contemplated is involved in intentional doing of wrongful act in disregard of what one knows to be his duty to injury of another.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Omission or neglect

Omission or neglect may be willful and malicious under execution statute, and that defendant did not intend injurious result which flowed from intentional act or omission does not warrant denial of certified execution; and, where verdict established that motorist's negligence caused death of pedestrian who was walking on highway in village at night, motorist's failure to sound warning was "willful and malicious neglect" so as to entitle plaintiff to close-jail certificate.—Healy v. Moore, supra.

73. Colo.—Clark v. Giacomini, 277 P. 306, 85 Colo. 530—Schtul v. Wilson, 266 P. 1112, 83 Colo. 528.
23 C.J. p 909 note 11.

Absence of fraud

Defendant's failure to deliver plaintiff new car for old car and cash consideration did not involve fraud, precluding capias ad satisfaciendum.—Carroll v. Mickens, 145 A. 620, 7 N. J.Misc. 409.

Writ held authorized

N.J.—Duro Co. v. Wishnevsky, 16 A. 2d 64, 126 N.J.Law 7.

74. N.C.—Olinger v. Camp, 1 S.E. 2d 870, 215 N.C. 340.
Vt.—Domina v. Pratt, 13 A.2d 198, 111 Vt. 166, followed in 13 A.2d 204, 111 Vt. 178.
23 C.J. p 910 note 12.

75. Colo.—Ferguson v. Turner, 194 P. 1103, 69 Colo. 504.
N.Y.—White v. Denny, 15 N.Y.S.2d 849, 258 App.Div. 144—Wirth v. Franzese, 25 N.Y.S.2d 122.
N.C.—East Coast Fertilizer Co. v. Hardee, 191 S.E. 725, 211 N.C. 653.
Or.—Wemme v. Hurlburt, 289 P. 372, 133 Or. 460.
Vt.—Lyon v. Prescott, 156 A. 679, 103 Vt. 442.
23 C.J. p 911 note 29.

Foreign corporation which was entitled to judgment against corporate and individual defendants for willful and fraudulent conversion and misappropriation of trust moneys was entitled to a body execution against the individual defendants.—Knight Products v. Donnen-Fuel Co., 20 N.Y.S.2d 135.

Requirement of actual fraud

A body execution may not be issued to enforce a judgment obtained pursuant to stock corporation law regarding preferences to officers and directors where the misapplication of funds of corporation was not accompanied by actual as distinguished from constructive fraud.—Ellis v. Cohen, 24 N.Y.S.2d 24, 175 Misc. 349, affirming 24 N.Y.S.2d 23—H. Schatia Co. v. Lampert, 24 N.Y.S.2d 25.

Findings of embezzlement, fraud, or other wrong is unnecessary.—Brown v. Father Divine, 26 N.Y.S.2d 570, 176 Misc. 10, affirmed Application of Brown, 29 N.Y.S.2d 508, 262 App.Div. 841.

of any other division or portion of the state, which defendant has without right obtained, received, converted, or disposed of, or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.[76]

(2) Actions for Injuries to Person or Reputation

A body execution is generally proper in actions to recover for injuries to person or reputation.

A body execution is generally proper in actions to recover damages for injuries to person[77] or reputation,[78] including actions for libel or slander,[79] seduction,[80] criminal conversation,[81] and malicious prosecution.[82]

(3) Actions for Injuries to, or Conversion of, Property

In some jurisdictions a body execution may issue in actions to recover damages for injuries to property.

A body execution is proper, in some jurisdictions, in actions to recover damages for injuries to property,[83] including the wrongful taking, detention, or conversion of personal property.[84] Where the statutes so provide, the injury to property must be intentional and not merely the result of negligence or accident.[85]

It has been held that an action by an administrator to recover for the wrongful death of his intestate is an action to recover for injuries to the property rights of the beneficiaries, subjecting defendant to a body execution.[86]

(4) Actions to Recover Personal Property

A body execution on a judgment in replevin may issue in those cases prescribed by statute.

At common law a body execution may not issue on a judgment in replevin;[87] and, where by statute a body execution is authorized in replevin, it may

76. N.Y.—People v. Tweed, 5 Hun 382.

77. Conn.—Campbell v. Klahr, 149 A. 770, 111 Conn. 225.
N.Y.—Condon v. Derringer, 12 N.Y.S.2d 647, 171 Misc. 381.
42 C.J. p 1287 note 18.

Assault and battery
Body judgment against manager of company holding chattel mortgage and deputy constable employed by him to take possession of mortgaged property on condition broken, for assault and battery on, and false imprisonment of, mortgagor's wife by such deputy, is unauthorized where there is no showing of "malice, fraud or wilful deceit."—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

Injury by servant
(1) Owner of an automobile, who was not present at accident resulting from negligence of one driving car, presumably on owner's business, is subject to body execution on judgment secured against him.—Dracup v. Lutgen, 211 N.Y.S. 305, 125 Misc. 775.

(2) Individual partner is liable to arrest under writ of capias ad satisfaciendum on judgment in suit for injuries caused by negligence of partnership's servants.—Baxter v. Wunder, 89 Pa.Super. 585.

(3) Willful, malicious act of servant cannot as matter of law be imputed to masters for purpose of warranting finding in tort action that they should be confined in close jail, but such finding is warranted only where masters directed wrongful act or participated in it or subsequently ratified it, since term "willful and malicious act or neglect" signifies wrongful act done intentionally without just cause or excuse, and refusal to award certified execution against all three defendants was not error, in absence of finding that masters directed wrongful act of servant or participated therein or subsequently ratified it.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258.

(4) Other cases see 23 C.J. p 910 note 13 [a].

Willful injury to person or property
(1) Complaints in action for injuries in automobile collision stated causes of action for "willful" injury, as regards right to execution against person.—Foster v. Hyman, 148 S.E. 36, 197 N.C. 189.

(2) Willful alienation of husband's affections being "willful injury to person and property" within statute permitting arrest in civil cases, wife on return of unsatisfied execution against defendant in action for alienation of affections was entitled to issuance of body execution against such defendant.—Holmstrom v. Wall, 268 N.W. 423, 64 S.D. 467.

78. N.C.—Michael v. Leach, 81 S.E. 760, 166 N.C. 223.

79. Ky.—Miller v. Howe, 53 S.W.2d 938, 245 Ky. 568.
23 C.J. p 910 note 15.

80. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.
23 C.J. p 910 note 16.

81. N.Y.—Ossman v. Crowley, 92 N.Y.S. 29, 101 App.Div. 597—Lasche v. Dearing, 53 N.Y.S. 58, 23 Misc. 722.

82. N.C.—Michael v. Leach, 81 S.E. 760, 166 N.C. 223.
23 C.J. p 910 note 18.

83. N.Y.—Marconi Realty Corporation v. Goldstein, 13 N.Y.S.2d 547.
23 C.J. p 910 note 19.

Finding of "unlawful and willful" injury to realty warranting treble damages pursuant to New York Penal Law justified arrest on civil process, "unlawful and willful" being practically synonymous with "willful and malicious."—Ex parte Goldstein, D.C.N.Y., 30 F.Supp. 443.

Action of trespass to recover treble damages for cutting and removing timber is one in which close-jail execution could properly be granted.—Parker v. Cone, 160 A. 246, 104 Vt. 421.

84. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.
Ill.—Greener v. Brown, 153 N.E. 825, 323 Ill. 221, affirming Brown v. People, 237 Ill.App. 537—Gillies v. Marshall, 31 N.E.2d 982, 308 Ill. App. 443.
N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.
23 C.J. p 910 note 20.

Debt based on conversion does not arise "upon a contract previously made," within Debtor and Creditor Law, so as to entitle insolvent judgment debtor to exemption from arrest on theory that, since tort had ripened into judgment, original cause of action was extinguished and original debt was based on contract, since a judgment is not a "contract."—In re Berman, 278 N.Y.S. 472, 244 App.Div. 95.

85. N.Y.—Scaranzello v. Pacione, 126 N.Y.S. 714, 70 Misc. 211.
N.C.—Oakley v. Lasater, 89 S.E. 1063, 172 N.C. 96.

86. N.Y.—People v. Gill, 83 N.Y.S. 135, 86 App.Div. 192, affirmed 68 N.E. 1112, 176 N.Y. 606.

87. Mich.—Fuller v. Bowker, 11 Mich. 204.

be issued only in those cases prescribed by the statute.[88] It has been held, however, that a body execution may issue in an action on a replevin or forthcoming bond,[89] and that in an action of replevin, where defendant's claim-property bond proves worthless, such an execution is proper.[90] Where a party elects in an action of replevin to take judgment for damages instead of for a return of the property in dispute, he cannot have execution against the body of defendant.[91]

Where the statutes so provide, a body execution may issue in actions to recover a chattel which it is alleged has been concealed, removed, or disposed of so that it cannot be found and taken by the sheriff, and with intent that it should not be so found or taken, or to deprive plaintiff of the benefit thereof.[92]

d. Actions for Breach of Promise to Marry

Whether a body execution may be had in an action for breach of promise to marry depends on statutory regulations.

Under some statutes a body execution is expressly authorized in actions for breach of promise to marry,[93] while under other statutes it is not allowed.[94] Breach of promise and seduction under such promise constitute "fraud" or "obligation fraudulently incurred" within a statute authorizing execution against the body of the judgment debtor in such cases.[95]

e. Ejectment

A body execution may be had in actions of ejectment.

An action of ejectment, including damages for withholding the property, is not based on contract so as to preclude a body execution,[96] and such an execution may issue for mesne profits recovered in this action.[97] Such an action is not, however, within a statute authorizing such an execution in actions for injuries to property,[98] nor is ejectment an action for the recovery of damages for "injuring, detaining or converting" property.[99]

f. Loss of Right by Joinder of Different Causes of Action

The right to a body execution may be lost by the joinder of causes of action which are not grounds for arrest with those which are, but the writ may issue in such case where the verdict clearly shows that it was based solely on a cause which could support a judgment on which a body execution might issue.

If several causes of action are united, some of which are grounds of arrest and some of which are not, the right to an execution against the person is thereby lost,[1] except, it has been held, where the verdict or finding clearly shows that it was based solely on a cause which could support a judgment on which a body execution might issue.[2]

The rule, however, is not applicable to the case of a plaintiff who fails to recover in such an action, and, if costs are recovered against him, he will be deemed to have conferred on defendant the most beneficial remedy for the collection thereof, and may be imprisoned.[3]

§ 414. —— As Dependent on Facts Extraneous to Cause of Action

Facts extraneous to the cause of action may, in some cases, justify the issuance of a body execution; fraud of defendant may warrant the issuance of a body execution in actions ex contractu.

In some jurisdictions a body execution may issue, even in actions based on contract, on a proper showing that defendant has been guilty of fraud, either in contracting or incurring the liability,[4] in

Right to body execution at common law see supra § 411.

88. Mich.—General Motors Acceptance Corporation v. Ellar, 220 N. W. 766, 243 Mich. 603.

On appeal to circuit court from justice

A body execution may be issued on a judgment of the justice's court in replevin, but the circuit court in replevin action may not issue the writ so that plaintiff in replevin is not entitled to body execution against defendant after appeal to circuit court from judgment of justice court.—General Motors Acceptance Corporation v. Ellar, supra—23 C.J. p 910 note 23 [a].

89. Ky.—Scott v. Maupin, Hard. 122.

90. Pa.—List v. Firth, 15 Wkly.N.C. 548.

91. Wis.—Pomeroy v. Crocker, 4 Chandl. 174.

92. N.Y.—Barnett v. Selling, 70 N. Y. 492, modifying 9 Hun 236.
23 C.J. p 911 note 28.

93. N.Y.—Graves v. Waite, 59 N. Y. 156.

94. R.I.—Drury v. Merrill, 36 A. 835, 20 R.I. 2.

95. Ohio.—Soinski v. Wardaszko, 176 N.E. 460, 38 Ohio App. 388.

96. Wis.—Howland v. Needham, 10 Wis. 495.

97. Pa.—Commonwealth v. Sheriff, 3 Pa.Dist. 74—Hopkinson v. Cooper, 8 Phila. 8.

98. N.Y.—Merritt v. Carpenter, 3 Abb.Dec. 285, 2 Keyes 462, 33 How. Pr. 428, reversing 30 Barb. 61—Griswold v. Sweet, 49 How.Pr. 171.

99. N.Y.—Fullerton v. Fitzgerald, 18 Barb. 441.

1. U.S.—B. I. P. (Export), Limited v. Isaacs, D.C.N.Y., 10 F.Supp. 872.
Colo.—Erisman v. McCarty, 236 P. 777, 781, 77 Colo. 289, citing **Corpus Juris.**
N.Y.—Moells v. Dworkin, 22 N.Y.S. 2d 113.
N.C.—Stewart v. Bryan, 28 S.E. 18, 121 N.C. 46.
23 C.J. p 912 note 41.

2. Mich.—Lindow v. Mudge, 253 N. W. 196, 266 Mich. 11—Kirker v. Larson, 236 N.W. 896, 254 Mich. 648.
S.D.—Hormann v. Sherin, 65 N.W. 434, 8 S.D. 36, 59 Am.S.R. 744.

3. N.Y.—Miller v. Scherder, 2 N.Y. 262.

4. N.Y.—Berkner v. Rubin, 260 N.Y. S. 747, 145 Misc. 666.
23 C.J. p 912 note 43.

Sufficiency of complaint

Complaint alleging that defendant falsely and fraudulently, with knowledge of falsity and to induce plain-

avoiding the payment of judgment debts,[5] or in disposing of property with intent to defraud creditors,[6] or has been, subsequent to the creation of the debt, guilty of fraudulent conduct for the purpose of defeating his creditor in the recovery of the debt, by due process of law.[7]

In some jurisdictions it is a separate ground for the writ that the debtor has nonexempt property which he conceals or refuses to apply in satisfaction of the judgment against him.[8] Under a statute providing that a body execution may issue where defendant refuses to deliver up his estate for the benefit of his creditors, it is not material whether the action is based on contract or on tort.[9]

§ 415. —— As Dependent on Previous Order of Arrest

Where the right to arrest depends on the nature of the action, no previous order of arrest is required for the issuance of a body execution, but where the grounds of arrest are extrinsic to the cause of action, in some jurisdictions the writ may issue only after a previous order of arrest has been obtained and served.

As a general rule, where the right to arrest depends on the nature of the action and is a part thereof, an execution against the person may issue, although no previous order of arrest has been granted,[10] as in the case of actions ex delicto.[11]

Where, however, the grounds of arrest are extraneous to the cause of action, an execution against the person may in some jurisdictions issue only after a previous order of arrest has been obtained and served,[12] and has not been vacated.[13] Although the allegations of the complaint show a ground for arrest, where such allegations are not necessary to the cause of action alleged, such execution cannot issue unless a previous order of arrest has been served.[14] Where a previous order of arrest is necessary, if only one of two defendants is arrested on a capias ad respondendum and judgment is entered against both, defendant not originally arrested cannot be arrested on execution,[15] although it is otherwise as to defendant originally arrested.[16] If an order of arrest is obtained before judgment and is not vacated, an execution against the person predicated thereon may be issued on the judgment, according to the authorities in some jurisdictions, although the cause of action as stated in the complaint is not a ground of arrest and under these circumstances it is not necessary that the judgment record show liability of defendant to arrest.[17] However, a directly opposite view has been taken, it being held that, even though an order of arrest has been obtained before judgment, the complaint must set out grounds sufficient to authorize the issuance of a capias ad satisfaciendum, whether extrinsic to the cause of action or not, and the judgment must state these facts.[18]

§ 416. —— As Dependent on Previous Issue and Return of Execution against Property

At common law, plaintiff may sue out a fieri facias or a capias ad satisfaciendum in the first instance, but statutory provisions in many jurisdictions require that an execution against the property of the debtor be issued and returned unsatisfied in whole or in part before an execution against the person may issue.

At common law plaintiff might sue out a fieri facias, and if his debt was not thereby satisfied he might then, in a proper case, take out a capias ad satisfaciendum, but the latter writ might, at plaintiff's option, be sued out in the first instance, the two writs thus issuing simultaneously,[19] and the

tiffs to part with money, represented that corporation owned premises and that he was officer therein, and that plaintiffs, relying on representations, entered into lease with corporation and paid rent to defendant, was sufficient to warrant issuance of body execution, and the fact that plaintiffs, sought recovery of entire consideration paid for lease, did not make action one for rescission so as to prevent issuance of body execution.—Schwartz v. Jacobs, 279 N.Y.S. 214, 154 Misc. 846.

Arrest on mesne process

Statute providing for defendant's arrest, where obligation sued on was incurred by fraud, authorizes arrest only on mesne process and not after default.—Hitteon v. Stanich, 258 P. 405, 84 Cal.App. 434.

5. Ind.—Baker v. State, 9 N.E. 711, 109 Ind. 47.
5 C.J. p 443 note 95.

6. Nev.—Ex parte Bergman, 4 P. 209, 18 Nev. 331.
23 C.J. p 912 note 45.

Complaint must allege fraud

N.Y.—Ellis v. Cohen, 24 N.Y.S.2d 23, affirmed 24 N.Y.S.2d 24, 175 Misc. 349.

7. N.J.—Ex parte Clark, 20 N.J. Law 648, 45 Am.D. 394.

8. Conn.—Morrison v. Martin, 80 A. 716, 84 Conn. 628.
23 C.J. p 912 note 47.

9. Ill.—Pappas v. Reabus, 20 N.E. 2d 327, 299 Ill.App. 499.

10. N.Y.—Sherman v. Grinnell, 53 N.E. 674, 159 N.Y. 50, affirming 34 N.Y.S. 1148.
23 C.J. p 912 note 48.

11. Mich.—Forsythe v. Washtenaw Cir. Judge, 147 N.W. 549, 180 Mich. 533.
23 C.J. p 913 note 49.

12. N.Y.—Allen v. Fromme, 88 N.E. 645, 195 N.Y. 404.
23 C.J. p 913 note 50, p 918 note 32 [d].

13. N.Y.—Elwood v. Gardner, 45 N.Y. 349, 10 Abb.Pr.,N.S., 238.
23 C.J. p 913 note 51.

14. N.Y.—Prouty v. Swift, 51 N.Y. 594.
23 C.J. p 913 note 52.

15. N.Y.—Ballou v. Hulbert, 1 Johns. 62.

16. N.Y.—Whitman v. James, 62 How.Pr. 132.

17. N.Y.—Smith v. Knapp, 30 N.Y. 581.
23 C.J. p 913 note 55.

18. Cal.—Payne v. Elliot, 54 Cal. 339, 35 Am.R. 80—Davis v. Robinson, 10 Cal. 411.

19. Pa.—Pontius v. Nesbit, 40 Pa. 309.
23 C.J. p 914 note 58.

fact that a fieri facias has been issued and is at the time in the hands of the sheriff does not preclude the right to the issuance of a capias ad satisfaciendum,[20] although, since the execution of either writ is usually held to operate prima facie as a satisfaction of the judgment, the two writs cannot be contemporaneously executed,[21] and if anything is done under a fieri facias, a capias ad satisfaciendum, which has been issued, cannot be executed until the former execution is returned,[22] and a levy on a fieri facias having once been made, it cannot be abandoned or withdrawn, and the body of defendant taken in execution thereafter.[23]

Under the statutory provisions in a number of jurisdictions an execution against the person cannot issue unless an execution against property has been previously issued and returned unsatisfied in whole or in part.[24] This prohibition, being for the benefit of the judgment debtor may, however, be waived by him.[25] Where goods taken under a fieri facias have been sold for a part of the amount due on the judgment, a capias ad satisfaciendum cannot be legally issued for the residue until the sheriff has made a final return of the fieri facias showing what has been done with the property.[26] When a party is entitled to an execution against the property and person of a debtor, the mere taking out of a fieri facias in the first instance without effect, or with only partial success, will not prevent the subsequent resort to the more stringent process of capias ad satisfaciendum.[27]

In some states the execution may be issued in the alternative so as to permit the officer or creditor to elect whether to take property or the body of the debtor.[28] Under the provisions of some statutes, where malice is the gist of the action an execution requiring defendant to turn over his estate is not a prerequisite to a capias ad satisfaciendum.[29]

Where an execution against the debtor's property has been returned unsatisfied, the pendency of supplementary proceedings will not prevent the issuance of a body execution.[30]

§ 417. —— On What Judgments Authorized

a. In general
b. Provisions in judgment

a. In General

A body execution may issue only on a judgment which is not within the prohibition of imprisonment for debt and the judgment must be in personam and must not be dormant.

As shown supra §§ 411–413, a judgment, in order to authorize the issuance of an execution against the person, must have been obtained in an action not within the prohibition of imprisonment for debt, but one in which an order of arrest is proper. The judgment must be one which has not become dormant at the time of the arrest,[31] must be in personam,[32] and must not be merely a cautionary judgment for a sum which may never become due.[33] Where defendant is not served with process and does not appear to a suit by attachment, the judgment, on publication of notice, is a special one, and does not authorize an execution against the body or against any property but that

20. Ky.—Leavison v. Rosenthal, 5 Ky.L. 132.
23 C.J. p 914 note 59.

21. Ky.—Cofer v. Woodyard, 5 Ky. L. 858, 12 Ky.Op. 608.
23 C.J. p 914 note 60.

22. Md.—Turner v. Walker, 3 Gill & J. 377, 22 Am.D. 329.
23 C.J. p 914 note 61.

If property is insufficient to satisfy judgment, capias ad satisfaciendum will issue.—Majeski v. Duzinski, 5 Pa.Dist. & Co. 22.

23. Pa.—State Bank v. Latshaw, 9 Serg. & R. 9.
21 C.J. p 914 note 62.

24. N.Y.—Jabitsky v. Solowachik, 267 N.Y.S. 781, 150 Misc. 713.
23 C.J. p 914 note 64.

Pendency of other proceedings
Statute providing that, in action for injury to person, execution could be issued against person of judgment debtor after return of execution against his property unsatisfied authorized arrest and imprisonment of judgment debtor who conveyed property to wife and daughter shortly after action of assault was brought against him, and the party who recovered judgment in action for assault, and who obtained appointment of receiver to recover property conveyed by judgment debtor to avoid payment of judgment, could proceed with execution against person of judgment debtor after return of execution against his property unsatisfied, as against contention that execution against person could not be had because of pendency of proceedings in execution against judgment debtor's property.—Blackmon v. Kirven, 175 S.E. 814, 173 S.C. 322.

25. N.Y.—New York Guaranty & Indemnity Co. v. Rogers, 71 N.Y. 377, affirming 43 N.Y.Super. 551.

26. Md.—Turner v. Walker, 3 Gill & J. 377, 22 Am.D. 329.

27. Mich.—Forsythe v. Washtenaw Cir. Judge, 147 N.W. 549, 180 Mich. 633.
23 C.J. p 915 note 67.

28. Mass.—Dooley v. Cotton, 3 Gray 496.
23 C.J. p 915 note 68.

29. Ill.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Greener v. Brown, 153 N.E. 825, 323 Ill. 221, affirming Brown v. People, 237 Ill.App. 537—In re White, 23 N.E.2d 401, 302 Ill.App. 69—Brandtjen & Kluge v. Forgue, 20 N.E.2d 616, 299 Ill.App. 585—Petition of Fetz, 239 Ill.App. 250.

30. N.Y.—White v. Denny, 15 N.Y.S.2d 849, 258 App.Div. 144.

31. Ga.—Strawbridge v. Mann, 17 Ga. 454.

32. La.—Hill v. Bowman, 14 La. 445.

33. Pa.—City Trust Bank v. Richards, 20 Wkly.N.C. 53.

attached.[34] A body execution cannot issue on a decree rendered solely on the unauthorized findings and conclusions of a referee.[35]

Whether a body execution may issue on the judgment of a particular court sometimes depends on statutory provisions.[36] Under some statutes no person shall be imprisoned for nonpayment of a judgment in a civil action except on conviction by a jury or the formal waiver of a jury trial.[37]

Consent judgment. A body execution may, in a proper case, be authorized when defendant consents to entry of judgment against him.[38]

Scire facias judgment. The award in an original judgment of the right to a close-jail execution does not authorize the clerk to issue such an execution on a scire facias judgment.[39]

Docketing of judgment. Unless required by statute the judgment need not be docketed in the county of the debtor's residence, in order to validate a body execution.[40]

Amount of debt. In some jurisdictions whether or not an execution will issue against the person of defendant depends on the amount of the debt.[41]

b. Provisions in Judgment

A body execution is sometimes authorized by the judgment, and under some statutes cannot issue, unless the judgment makes express provision therefor.

A body execution is sometimes authorized by order of court contained in the judgment,[42] and under some statutes a body execution cannot issue, unless it is so expressly provided in the judgment.[43] In the absence of such statutory requirement, this provision need not be incorporated in the judgment,[44] where the facts necessary to constitute a cause of action in which a body execution may issue are set out in the complaint,[45] and the proper findings to establish such cause of action have been made by the jury.[46]

§ 418. —— Persons Entitled to Writ

The assignee of a judgment is, in a proper case, entitled to a body execution. A successful defendant may be entitled to an arrest of plaintiff where the action is such that he could have been arrested if plaintiff had succeeded.

The assignee of a judgment in actions in which imprisonment is allowed is entitled to a body execution.[47] Where part of the judgment is assigned, the writ may issue in the name of the assignor for the full amount.[48] The assignment of a claim, based on contract, without the assignment of a claim for damages connected therewith, does not authorize the issue of a body execution at the instance of the assignee.[49]

A statute, prohibiting in the same action the issuance of a second execution against a judgment debtor who is in custody under an execution against his person does not prevent a further execution against the debtor by another judgment creditor whose claim was litigated in the same action.[50]

Defendant. The right of a defendant to arrest plaintiff on a body execution, where defendant has succeeded in the action, depends solely on the right of plaintiff to have defendant arrested, had the judgment been against defendant instead of against plaintiff.[51]

34. Mo.—Clark v. Holliday, 9 Mo. 711.

35. Or.—In re Level, 159 P. 558, 81 Or. 298.

36. Mich.—General Motors Acceptance Corporation v. Ellar, 220 N. W. 766, 243 Mich. 603.
23 C.J. p 915 note 76.

37. Ill.—Kearns v. Chocolowski, 223 Ill.App. 117.

38. N.Y.—Siegel v. Tobias, 19 N.Y. S.2d 337, 173 Misc. 868.

39. Vt.—Slayton v. Smillie, 28 A. 871, 66 Vt. 197.

40. N.Y.—Weinus v. Light, 170 N. Y.S. 173, 183 App.Div. 591.

41. Mass.—Hooper v. Cox, 117 Mass. 1.
23 C.J. p 915 note 78.
Joinder of plaintiffs
Under a statute providing for body execution for services rendered or remuneration earned, where the sum does not exceed one hundred dollars, painters, each of whom had claim against subcontractor in amount less than one hundred dollars for wages, did not, by joining together in a single action, waive right to have execution against defendant's person, although amount of combined claims exceeded one hundred dollars.—Changas v. C. & W. Construction Co., 279 N.Y.S. 84, 154 Misc. 824.

42. S.C.—Ex parte Hutto, 60 S.E. 34, 78 S.C. 560.
23 C.J. p 915 note 79.

43. N.Y.—Spitzer v. Ackerman, 194 N.Y.S. 447.
23 C.J. p 915 note 80.
Amendment of judgment
Where the summons did not contain the notice required by Mun.C. Code § 25, and the complaint was not verified, order amending judgment for plaintiff by directing body execution was erroneous.—Barud v. Secular, 182 N.Y.S. 693.

44. N.C.—Michael v. Leach, 81 S.E. 760, 166 N.C. 223.
Or.—Banning v. Roy, 82 P. 708, 47 Or. 119, 114 Am.S.R. 908.

45. N.C.—Michael v. Leach, 81 S.E. 760, 166 N.C. 223.
In New York, under Code Civ.Proc. § 549, plaintiff's right to a body execution is to be determined by the allegations in his complaint.—Fenton v. Duckworth, 115 N.Y.S. 686, 131 App.Div. 291—Bacon v. Grossmann, 86 N.Y.S. 66, 90 App.Div. 204.

46. N.C.—Michael v. Leach, 81 S.E. 760, 166 N.C. 223.

47. Ill.—Lasher v. Carey, 182 Ill. App. 147.
23 C.J. p 916 note 86.

48. N.Y.—Dougherty v. Gardner, 58 How.Pr. 284.

49. N.Y.—Birdsall v. Fuller, 11 Hun 204.

50. N.Y.—Parascandola v. Auditore, 213 N.Y.S. 463, 215 App.Div. 277, appeal dismissed 152 N.E. 432, 242 N.Y. 571.

51. N.Y.—Allen v. Fromme, 88 N.E.

Sureties. A surety who pays the debt being entitled to be put in the place of the creditor and to all means which the creditor possesses to enforce payment against the principal debtor, a body execution will issue, at the instance of such surety, against the principal where it would have issued at the instance of the creditor.[52] The sureties on a promissory note who have paid a judgment and fieri facias going against the principal and sureties jointly have no right to return the fieri facias and take out a capias ad satisfaciendum for the arrest of the principal.[53]

§ 419. —— Persons Subject to Writ

a. In general
b. Joint defendants

a. In General

Various classes of persons are exempt from arrest and imprisonment on body execution, by statute, or otherwise. Under statutes females are exempt or are exempt except in certain cases.

Various classes of persons have been held to be exempt from arrest and imprisonment on execution against the person, by statute or otherwise.[54] Thus idiots, lunatics, or infants,[55] spendthrifts under guardianship,[56] witnesses during attendance on, and while coming from, the court,[57] parties attending to their causes in court,[58] members of the legislature while in the execution of their duties,[59] electors while going to or returning from the polls on days of election,[60] and persons enlisting in the army where the debt is less than a certain amount[61] have been held to be exempt. An officer of a court, if arrested when not engaged in his official duties, nor on his way to or from his office, cannot claim exemption.[62]

In an action for assault and battery, in which plaintiff has judgment, an order for a capias has been held error where defendant has been fined for the same assault.[63]

Females. Under some statutes all females are exempt from body execution,[64] or are exempt except in certain cases.[65]

b. Joint Defendants

Where the right to a body execution depends on the nature of the action, the execution must follow the judgment and be issued and run against all defendants sued jointly or jointly liable, unless otherwise provided by statute.

Where the right to execution against the person depends on the nature of the action, the execution must follow the judgment and be issued and run against all defendants jointly sued or jointly liable,[66] except where otherwise provided by statute.[67] A separate body execution against one defendant on a joint judgment against two cannot be supported.[68] This is so, even after the other defendant has been discharged,[69] although in jurisdictions where there must be a finding of malice to support a body execution, see supra § 413 c, a finding of malice against only one of several joint defendants justifies the issuance of a body execution against such defendant alone.[70] In an action against joint debtors, where an order of arrest has been granted

645, 195 N.Y. 404—Allen v. Becket, 84 N.Y.S. 1009.

52. N.Y.—Rapp v. Masten, 4 Redf. Surr. 76.
23 C.J. p 916 note 91.

53. Ga.—Elam v. Rawson, 21 Ga. 139.

54. **Stockholders** of a corporation are exempt on execution issued on a judgment against the corporation. —Ex parte Penniman, 11 R.I. 333.

55. N.Y.—Bush v. Pettibone, 4 N.Y. 300, Code Rep.,N.S., 264.
23 C.J. p 916 note 95.

56. Mass.—In re Blake, 106 Mass. 501.

57. U.S.—In re Hurst, Pa., 4 Dall. 387, 1 L.Ed. 878.
23 C.J. p 916 note 97.

Arrest on execution for failure to pay valid judgment, while leaving court after hearing supplemental to issuance of execution, was held valid.—Wemme v. Hurlburt, 289 P. 372, 133 Or. 460.

58. Mass.—Ex parte McNeil, 6 Mass. 245.
23 C.J. p 916 note 98.

59. N.Y.—Corey v. Russell, 4 Wend. 204.

60. Conn.—Swift v. Chamberlain, 3 Conn. 537.
23 C.J. p 916 note 1.

61. N.Y.—Reynolds v. Lammond, 3 Johns. 445, 540.
Pa.—Wright v. Quinn, 1 Yeates 163.

62. Mass.—Brazill v. Green, 137 N. E. 346, 243 Mass. 252.
Mich.—Lindow v. Mudge, 253 N.W. 196, 266 Mich. 11.
23 C.J. p 916 note 4.

63. Colo.—Kennedy v. Simansky, 224 P. 233, 75 Colo. 103.

64. S.C.—Harrison v. Caudle, 139 S. E. 842, 141 S.C. 407.
23 C.J. p 916 note 6.

65. N.Y.—Ritz Carlton Apartments v. Fried, 235 N.Y.S. 624, 134 Misc. 347, reversing 232 N.Y.S. 519, 133 Misc. 607.
23 C.J. p 916 note 7.

Willful injury
Whether action involves willful injury affects right to procure order of arrest of woman, not right to body execution against her.—Ritz Carlton Apartments v. Fried, 235 N. Y.S. 624, 134 Misc. 347, reversing 232 N.Y.S. 519, 133 Misc. 607.

66. Del.—Fromberger v. Karsner, 6 Del. 290.
23 C.J. p 917 note 10.

Master and servant
In action of tort against employers and servant for willful, malicious act of servant, plaintiff was entitled to execution against bodies of all three defendants.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258.

67. Tenn.—Saunders v. Gallaher, 2 Humphr. 445.

68. N.C.—Judson v. McLelland, 44 N.C. 262.
23 C.J. p 917 note 12.

69. N.Y.—Farmers' & Mechanics' Nat. Bank v. Crane, 15 Abb.Pr.,N. S., 434.

70. Ill.—Pappas v. Reabus, 20 N.E. 2d 327, 299 Ill.App. 499.

against one of them and execution against all has been returned unsatisfied, the requirement that the execution must follow the judgment does not apply, but an execution running against the person of only the one arrested is regular.[71] Where, by proceedings subsequent to the judgment, the right of the judgment creditor to enforce a body execution against one of several defendants has been lost, the court may issue execution against only those liable to execution.[72]

§ 420. Proceedings to Procure

a. In general
b. Affidavit or complaint
c. Notice and hearing
d. Evidence
e. Order directing execution

a. In General

Statutory provisions governing the procedure to procure an execution against the person must be followed strictly. Such statutes variously involve application to, or certificate by, the court, motion before the clerk, submission of an issue to the jury, and demand on the debtor for delivery of his property in satisfaction of the judgment and a refusal by him.

The statutory provisions governing the procedure to procure an execution against the person must in all cases be strictly followed before the writ may issue.[73] In at least one jurisdiction, application for leave to issue a body execution is required to be made to the court.[74] Another method of obtaining a body execution is by motion before the clerk of the court;[75] from an adverse ruling, his action is subject to review on appeal.[76] Where a judgment is obtained in an action in which a body execution is authorized, it is the duty of the clerk to issue the writ on request,[77] and, if he refuses, plaintiff may apply for a writ of mandamus against him.[78]

Submission of issue, finding and judgment. In construing certain provisions as to executions against the person, it has been held that in order that such an execution may issue there must be a submission to the jury of a distinct and separate issue as to the essential fact on which the right to the execution is based,[79] arising on proper allegations in the complaint,[80] an affirmative finding thereon,[81] and a judgment entered in conformity therewith from which the liability of defendant to

71. N.Y.—Whitman v. James, 10 Daly 490, affirmed 89 N.Y. 635.

72. Mass.—Thomson v. Sleeper, 47 N.E. 106, 168 Mass. 373.

73. Pa.—Ritter v. Stricker, 20 Pa. Dist. & Co. 622.
23 C.J. p 917 note 16.

In New York

(1) Under the Municipal Court Code, a statement on the summons that plaintiff seeks defendant's arrest and imprisonment is a prerequisite to the issuance of a body execution, where no verified complaint is served with the summons.—Steiner v. Lewis, 288 N.Y.S. 640, 248 App. Div. 747—Jabitsky v. Solowachik, 267 N.Y.S. 781, 150 Misc. 713—23 C.J. p 917 note 16 [a].

(2) Plaintiff held entitled to a body execution, where the affidavit of service as amended showed that summons contained indorsement of defendant's liability to arrest and imprisonment.—Factrow v. Rothbart, 252 N.Y.S. 721, 141 Misc. 470.

(3) Where the summons, in an action for property damage sustained by reason of defendant's negligence, contained an indorsement as prescribed by statute and plaintiff recovered judgment, plaintiff was entitled as a matter of right to a body execution.—Pinkus v. Glass, 21 N.Y.S.2d 454, appeal denied 21 N.Y.S.2d 455, 259 App.Div. 1080.

74. N.Y.—In re Tannenbaum, 1 N.Y.S.2d 493, 165 Misc. 720.

Purpose of statute

The purpose of amending a statute authorizing a body execution, by requiring an application to the court for leave to issue execution, was to guard against the issuance of a body execution in cases not specifically authorized by law.—White v. Denny, 15 N.Y.S.2d 849, 258 App.Div. 144—In re Tannenbaum, 1 N.Y.S.2d 493, 165 Misc. 720.

Application of statute to particular courts

A statute requiring application for leave to issue body execution in actions in the supreme court does not affect the municipal court.—Rion Co. v. Zuckerman, 17 N.Y.S.2d 40, 173 Misc. 3.

Discretion to deny application

(1) Under a statute requiring application to court for leave to issue execution against person, the court does not have discretion to deny leave to issue body execution in cases where body execution is specifically authorized.—In re Tannenbaum, 1 N.Y.S.2d 493, 165 Misc. 720.

(2) Such statute merely modified the procedure for obtaining a body execution, and did not confer discretion upon the court affecting judgment creditor's right to such execution.—White v. Denny, 15 N.Y.S.2d 849, 258 App.Div. 144.

Prior to statutory amendment in New York, an application for leave to issue a body execution was unnecessary when authorized by the judgment.—Parascandola v. Auditore, 213 N.Y.S. 463, 215 App.Div. 277, appeal dismissed 152 N.E. 432, 242 N.Y. 571.

75. N.C.—Turlington v. Aman, 79 S.E. 1102, 163 N.C. 555.

76. N.C.—Turlington v. Aman, supra—Huntley v. Hasty, 43 S.E. 844, 132 N.C. 279.

77. Ill.—People v. Walker, 122 N.E. 92, 286 Ill. 541.
N.J.—Kintzel v. Olsen, Sup., 73 A. 962.

Ministerial act

The duty imposed by statute on the clerk to issue a writ of capias ad satisfaciendum is a "ministerial act" and the clerk is not permitted to refer to the pleadings to determine whether malice is the gist of the action, since the determination of such question is a "judicial act."—Ingalls v. Raklios, 26 N.E.2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1—Peiffer v. French, 28 N.E.2d 983, 306 Ill.App. 326, affirmed 33 N.E.2d 591, 376 Ill. 376.

78. Ill.—People v. Walker, 122 N.E. 92, 286 Ill. 541.

79. N.C.—Crowder v. Stiers, 1 S.E. 2d 353, 215 N.C. 123—Foster v. Hyman, 148 S.E. 36, 197 N.C. 189.
23 C.J. p 917 note 21.

80. U.S.—Mitchel v. Porter, Alaska, 194 F. 49, 114 C.C.A. 69.
23 C.J. p 917 note 22.

81. N.C.—McKinney v. Patterson, 93 S.E. 967, 174 N.C. 483.
23 C.J. p 917 note 23.

arrest will appear.[82] It has been held, however, that where the facts which authorize an arrest are extrinsic to the cause of action, it is not necessary, in order to sustain an execution against the person that the liability of defendant to arrest should appear from the judgment.[83]

Certificate of judge. In some jurisdictions provision is made by statute, in certain cases, for a certificate from the court or justice before whom the action was tried, as a part of the procedure for issuing a body execution.[84]

Demand and refusal. Under some statutes, before a body execution can issue it must appear that a demand was made on the debtor for the delivery of his property in satisfaction of the judgment against him and a refusal on his part.[85] However, a demand for payment of judgment has been held not necessary before the issuance of a body execution in a tort action.[86]

b. Affidavit or Complaint

(1) In General; Necessity
(2) Requisites

(1) In General; Necessity

The necessity for filing an affidavit to obtain a body execution depends on statutory provisions and the grounds for such execution; a statute requiring an affidavit in all or certain cases must be obeyed. Authorities differ as to the necessity of an affidavit where an order of arrest obtained before judgment has not been vacated.

Whether it is necessary to file affidavits to obtain a body execution depends on the grounds for such execution, and on the statutes governing the procedure in this regard.[87] If the statute requires an

82. N.C.—Doyle v. Bush, 86 S.E. 165, 171 N.C. 10.
23 C.J. p 917 note 24.

83. N.Y.—Lovee v. Carpenter, 3 Abb.Pr.,N.S., 309.

84. **In Massachusetts**
(1) The magistrate's certificate required by statute to be annexed to an execution in order to arrest the judgment debtor thereon need not in terms authorize an arrest in the daytime.—Manuel v. Bates, 104 Mass. 354.

(2) A certificate which sets forth that the magistrate, after due hearing, is satisfied that there is reasonable cause to believe the facts therein required to be sworn to, is correct in form, and is sufficiently signed by the magistrate if his surname is written at length, with the initial of his given name.—Webber v. Davis, 5 Allen 393.

In New Hampshire if the cause of action in any action of trespass or trespass on the case has arisen from the willful and malicious act or neglect of defendant, the court or justice before whom the action is tried shall cause a certificate thereof to be made on the back of the execution issued in such action; a court which refers a cause to a referee for trial, and afterward receives his report and renders judgment on it, may be said to try the cause, within a statute requiring a certificate.—Cooley v. Eastman, 57 N.H. 503.

In Vermont
(1) Under statute the court is required to issue execution with a certificate stated in, or indorsed on, such execution, where it is adjudged that the cause of action arose from the wilful and malicious act or neglect of defendant.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351—Adams v. Wait, 42 Vt. 16.

(2) The granting of a close jail certificate is no part of the principal judgment in the cause, but is independent of it and collateral thereto.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258—Stowe v. Powell, 46 Vt. 471—Spaulding v. Woodworth, 42 Vt. 570.

(3) The statute providing for the certificate contemplates a separate and independent examination of the evidence by the trial court as the basis for awarding the certificate.—Domina v. Pratt, 13 A.2d 198, 111 Vt. 166, followed in 13 A.2d 204, 111 Vt. 178—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

(4) A certified execution cannot be allowed without a consideration of the evidence to determine whether defendant's wrongful act was willful and malicious.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258.

(5) Whether the wrongful act of defendant was willful and malicious is usually for the trial court to determine, and may be determined on matters disclosed at trial or on a further hearing.—Jewett v. Pudlo, supra.

(6) Where the facts appear of record, whether a party is entitled to a certified body execution is a question of law.—Healy v. Moore, supra—Jewett v. Pudlo, supra—Lyon v. Prescott, 156 A. 679, 103 Vt. 442.

(7) The trial court must grant the certificate, if plaintiff is entitled thereto, as a legal right.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351—Styles v. Shanks, 46 Vt. 612.

(8) The burden of proof is on a plaintiff moving for a certified execution to show that the cause of action arose from the wilful and malicious act or neglect of defendant.—Benway v. Hooper, 8 A.2d 658, 110 Vt. 497—Healy v. Moore, supra—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258—North Adams Beef & Produce Co. v. Cantor, 156 A. 879, 103 Vt. 514.

(9) Evidence held sufficient to justify the granting of a close jail certificate.—Benway v. Hooper, supra—Eastman v. Jacobs, 162 A. 382, 104 Vt. 536.

(10) Other cases see 23 C.J. p 919 note 55 [c].

85. Ill.—Huntington v. Metzger, 41 N.E. 881, 158 Ill. 272.
23 C.J. p 920 note 70.

86. Ill.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—People v. Walker, 122 N.E. 92, 286 Ill. 541—Pappas v. Reabus, 20 N.E.2d 327, 299 Ill.App. 499.

87. **In Illinois,** where the judgment is in tort based on malice, an affidavit is not necessary as a prerequisite to the issuance of a capias.—Brandtjen & Kluge v. Forgue, 20 N.E.2d 616, 299 Ill.App. 585—Pappas v. Reabus, 20 N.E.2d 327, 299 Ill.App. 499—23 C.J. p 918 note 32 [a].

In Massachusetts, where a body execution is issued in an action of tort, no preliminary affidavit and certificate are necessary.—Brazill v. Green, 127 N.E. 535, 236 Mass. 93.

In Vermont an affidavit is not required where the right to the body execution is dependent on a finding by the court that the cause of action arose from the willful and malicious act or neglect of defendant.—Haskell v. Jewell, 7 A. 545, 59 Vt. 91.

affidavit in all or certain cases it must be obeyed.[88]

Under some statutes if an order of arrest has been obtained before judgment, and is not vacated, an execution against the person issues as of course,[89] and no new affidavit is necessary,[90] while under other statutes a new affidavit is necessary.[91] Where from the nature of the judgment a capias ad respondendum might have been properly issued in the first instance no affidavit is necessary.[92] Under some statutes, where the cause of arrest set forth in the complaint and the facts stated as causes of arrest are essential to, or constitute, plaintiff's cause of action, no affidavit is needed,[93] provided the complaint has been duly verified;[94] and where the cause of arrest is set forth in the complaint but is only collateral and extrinsic to plaintiff's cause of action, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but such statement must be as explicit as though set forth in an affidavit and properly verified.[95] Where, however, the cause of arrest is not set forth in the complaint, defendant can be arrested only by an order founded upon a sufficient affidavit.[96]

Where an affidavit is necessary, the court or judge will consider only such grounds for execution as are included in the affidavit.[97]

Amendment. The court in its discretion may permit the amendment of the affidavit as to matters of form.[98]

(2) Requisites

The affidavit must comply with statutory requirements as to form and allegations; an affidavit on information and belief may be sufficient.

The affidavit must be in such form and contain such allegations as to comply with statutory requirements.[99] It should make out a plain case for the issuing of the writ,[1] and should show such conduct on the part of defendant as brings him within the exceptions to the prohibitions against imprisonment for debt.[2] Where fraud is the ground on which the issuing of the writ is sought, the facts constituting the fraud must be specifically stated in the affidavit.[3] The affidavit should not be in the alternative.[4] Defective grammar, where the sense is apparent, will not invalidate it.[5]

The affidavit must be made by the person authorized by statute so to do, usually the judgment creditor or his attorney,[6] and may be sworn to before one authorized to administer oaths or affirmations to witnesses and others.[7]

Persons making affidavits to establish the fraud necessary to justify the issuing of a body execution should take care to swear only to facts and not to conclusions of law.[8]

An affidavit on information and belief may be sufficient;[9] when it is so made, the sources and nature of the information must be set out and the reason given why a positive statement cannot be procured.[10]

c. Notice and Hearing

Notice to the defendant, and a hearing, are necessary if required by statute.

Statutory provisions for notice to defendant and for a hearing,[11] or for a rule to show cause why execution should not issue,[12] must be complied with. Under other statutes, notice[13] or a rule to show cause, where the debtor has had notice of the cause of action and relief asked and opportunity to defend

88. Mass.—Bailey v. Bailey, 44 N.E. 143, 166 Mass. 226.
23 C.J. p 918 note 33.

89. N.Y.—Elwood v. Gardner, 45 N. Y. 349—Corwin v. Freeland, 6 N. Y. 560.

90. Vt.—Converse v. Washburn, 43 Vt. 129.
23 C.J. p 918 note 35.

91. N.H.—Kidder v. Farrar, 20 N.H. 320.
23 C.J. p 918 note 36.

92. Mich.—Lindow v. Mudge, 253 N. W. 196, 266 Mich. 11.

93. N.C.—Huntley v. Hasty, 43 S. E. 844, 132 N.C. 279.
23 C.J. p 918 note 38.

94. N.C.—State v. Foote, 83 N.C. 102.

95. N.C.—State v. Foote, supra.

96. N.Y.—Mirkowitz v. Jond, 161 N. Y.S. 258.
N.C.—State v. Foote, 83 N.C. 102.

97. Kan.—Newton First Nat. Bank v. Briggs, 50 P. 462, 6 Kan.App. 684.

98. Ill.—Doty v. Colton, 90 Ill. 453.
23 C.J. p 919 note 54.

99. Ga.—Dozier v. Dozier, 30 Ga. 523.
23 C.J. p 918 note 44.

1. N.Y.—People v. Albany, 6 Hill 429.

2. Mich.—Badger v. Reed, 39 Mich. 771.

3. Kan.—Tatlow v. Bacon, 165 P. 835, 101 Kan. 26.
23 C.J. p 919 note 47.

4. Ill.—Gorton v. Frissell, 20 Ill. 291.
N.Y.—People v. Albany, 6 Hill 429.

5. Mass.—Abbott v. Tucker, 4 Allen 72.

6. D.C.—Costello v. Palmer, 20 App. D.C. 210.
23 C.J. p 919 note 51.

7. Ill.—Fergus v. Hoard, 15 Ill. 357.
23 C.J. p 919 note 52.

8. N.J.—Kipp v. Chamberlin, 20 N. J.Law 656.

9. Cal.—Matoon v. Eder, 6 Cal. 57.
23 C.J. p 919 note 49.

10. N.Y.—De Weerth v. Feldner, 16 Abb.Pr. 295.

11. Mass.—Lane v. Holman, 13 N.E. 602, 145 Mass. 221.
23 C.J. p 917 note 26.
Requirement held implied
Kan.—Tatlow v. Bacon, 165 P. 835, 101 Kan. 26.

12. Ind.—Krohn v. Templin, 2 Ind. 146.

13. R.I.—In re Keene, 3 A. 418, 15 R.I. 294.

against the same,[14] is not necessary. A trial by jury has been declared not necessary to justify the issuance of an execution.[15]

d. Evidence

Satisfactory evidence of the existence of grounds for the issuance of a body execution must be presented to the court or officer hearing an application therefor.

Before issuing an order for a body execution, the court or officer hearing the application therefor must be satisfied, by the evidence presented in support of the application, that the statutory grounds for such order exist.[16] The record of the judgment is sufficient prima facie evidence of debt.[17] Plaintiff is a competent witness on an application for a capias ad satisfaciendum.[18]

A statement made by defendant when examined under a trustee act cannot afterward be sworn to as evidence of fraud to procure a capias ad satisfaciendum;[19] nor can the testimony of a debtor taken on his examination in supplementary proceedings be used as evidence of his fraud, such supplementary proceedings being in the nature of a bill in equity.[20] Where a judgment has been rendered by consent, evidence offered by defendant for the purpose of limiting the amount of a certified execution is properly excluded.[21] A stipulation on the part of the debtor, stating the cause of action to be money received, and allowing judgment to be entered, is not conclusive on a motion for execution against the person on the ground that the cause of action is one for which an arrest is allowed.[22]

e. Order Directing Execution

A court order directing the issuance of the writ is necessary where an affidavit is required to be filed after judgment; such order is not necessary where, from the nature of the action and the facts stated in the complaint, the plaintiff would have been entitled to an order of arrest, or where an order of arrest was in fact granted and remains in force.

Where an affidavit is required to be filed after judgment, as appears in subdivision b of this section, an order of the court is usually necessary to the issuance of a body execution,[23] and the order should show that the proof was to its satisfaction;[24] but an execution against the person may issue without any special order of court directing it if the action is one in which, from its very nature, and from the facts necessarily stated in the complaint as the cause of action, plaintiff would necessarily have been entitled to an order of arrest;[25] and in some jurisdictions, if an order of arrest has been in fact granted, and remains in force, the body of defendant may be taken in execution without any further order, although the facts entitling plaintiff to an order of arrest are not inherent in the cause of action itself.[26]

§ 421. The Writ

The form and requisites of the writ for body execution are considered in § 422, amendment thereof in § 423, alias or pluries writs in § 424, and return of writ in § 425.

Examine Pocket Parts for later cases.

§ 422. —— Issuance, Form, and Requisites

a. In general
b. Reference to judgment
c. Conformity to judgment

14. S.C.—Martin v. Hutton, 64 S.E. 421, 82 S.C. 432.

15. Ill.—Corwin v. Tillman, 255 Ill. App. 230.

Affidavit as to matters subsequent to judgment

However, where an affidavit is filed setting up matters accruing subsequent to the judgment as a ground for the issuing of the execution, defendant may be entitled to a trial by jury on such matters.—Boos v. White, 64 Ill.App. 177.

16. Kan.—Tatlow v. Bacon, 165 P. 835, 101 Kan. 26.
23 C.J. p 919 note 56.

Review

The officer making the order for the writ is to decide on the weight and credibility of the evidence, but its legality and applicability may be reviewed.—Wire v. Browning, 20 N. J.Law 364.

Disqualification of officer

A magistrate in determining whether the evidence laid before him is sufficient to satisfy him of such a state of facts as the statute requires, performs a judicial duty, and may therefore be disqualified from the performance thereof by reason of his relations to plaintiff, as where he is plaintiff's attorney.—McGregor v. Crane, 98 Mass. 530.

Fraudulent contracting of debt

A statement that defendant made certain representations to plaintiff, and that he had discovered recently they were false, is not sufficient evidence that the debt was fraudulently contracted.—Titus v. Bowne, 30 N.J. Law 340.

17. Pa.—City Trust Co. v. Richards, 20 Wkly.N.C., Pa., 53.

18. N.J.—Titus v. Bowne, 30 N.J. Law 340.

19. N.J.—Titus v. Bowne, supra.

20. N.Y.—Kelley v. Dusenbury, 2 Abb.N.Cas. 360.

21. Vt.—Manley v. Johnson, 81 A. 919, 85 Vt. 262.

22. N.Y.—Hall v. McMahon, 17 N.Y. Super. 649, 10 Abb.Pr. 103, modified on other grounds 10 Abb.Pr. 319.

23. N.J.—McKernan v. McDonald, 27 N.J.Law 541.
23 C.J. p 920 note 73.

24. N.J.—Kein v. Katz, 105 A. 210, 92 N.J.Law 406.
23 C.J. p 920 note 74.

25. N.Y.—Steamship Richmond Hill Co. v. Seager, 52 N.Y.S. 985, 31 App.Div. 288.
23 C.J. p 920 note 75.

Order contained in judgment see supra § 417.

26. N.Y.—Elwood v. Gardner, 45 N. Y. 349.
23 C.J. p 920 note 76.

Dismissal of motion for leave to issue

Under these circumstances, if a motion for leave to issue an execution is made, it should not be denied, but dismissed.—Bull v. Mellius, 13 Abb.Pr., N.Y., 241.

d. Issuance and return of fieri facias
e. Directions to sheriff

a. In General

Statutory requirements as to what a body execution should state must be substantially complied with. The writ should be in the name of the state, directed to the sheriff of the proper county, and properly tested and signed.

Statutory requirements as to what a body execution should state must be complied with[27] in substance.[28] Facts not required need not be recited therein.[29] The writ is not void on its face even though it does not recite that the oath required by law to be made was made before it issued,[30] nor, in the absence of statutory requirement, is it essential to its validity that it recite on its face that the affidavit required by statute has been made.[31] The writ need not state the nature of the action in which it was issued,[32] or the facts authorizing the arrest,[33] although it is well for the execution in connection with its other recitals briefly to refer to the cause of arrest.[34]

An execution against the body should recite that it is to pay and satisfy plaintiff in the judgment and not the state or commonwealth.[35] A mistake in the date of the execution which is the result of a manifest clerical error, admitting of correction by an inspection of the entire writ, will not invalidate it.[36]

The writ should be in the name of the state;[37] it should be directed to the sheriff[38] of the proper county,[39] and be properly tested[40] and signed;[41] and a writ which is directed outside the county of issuance should bear a seal.[42] The venue should be properly laid.[43]

b. Reference to Judgment

The writ should recite the recovery of a judgment by the plaintiff against the defendant, the date, the amount, and the court in which recovered.

The writ should recite the recovery of a judgment by plaintiff against defendant, the date, the amount, and the court in which it was recovered.[44] It need not recite the incidents of the judgment.[45] Where the execution states a recovery and docketing of judgment in a certain county, and an issue and return unsatisfied of an execution in another county, it is immaterial that it does not recite a docketing in the second county.[46]

c. Conformity to Judgment

A capias ad satisfaciendum must, generally, strictly follow the judgment and be warranted by it.

As a general rule a capias ad satisfaciendum must strictly follow the judgment, and be warranted by it.[47] The execution should issue in the name of plaintiff in the judgment,[48] and, it would seem, in the name of all the plaintiffs, if there are more than one.[49] An execution against two per-

27. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325—Finley v. Smith, 15 N.C. 95.
Form and contents of executions against property see supra §§ 69–84.

28. Vt.—Ex parte Hunt, 82 A. 178, 85 Vt. 345.
23 C.J. p 920 note 80.

29. N.Y.—Hutchinson v. Brand, 9 N. Y. 208, affirming 6 How.Pr. 73.

30. Ill.—Lattin v. Smith, 1 Ill. 361.

31. Tenn.—Street v. Vandervoort, 7 Yerg. 436.

32. Ill.—Feld v. Loftis, 88 N.E. 281, 240 Ill. 105, affirming 140 Ill.App. 530.
23 C.J. p 921 note 93.

33. N.Y.—Hutchinson v. Brand, 9 N. Y. 208, 1 Seld. 201.
23 C.J. p 921 note 94.

34. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.

35. Ky.—Abbott v. Daniel, 3 Metc. 339.

36. Mass.—Currier v. Bartlett, 122 Mass. 133.

37. Ind.—Webster v. Farley, 6 Blackf. 163.

38. N.C.—Walker v. Vick, 19 N.C. 99.
23 C.J. p 921 note 85.

39. N.J.—Drake v. Cochran, 18 N.J. Law 9.
23 C.J. p 921 note 86.
In New York, by statute, the execution may be issued to any county, without regard to the debtor's legal residence.—Spilker v. Abrahams, 121 N.Y.S. 818, 136 App.Div. 841—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.

40. Ga.—Jordan v. Porterfield, 19 Ga. 139, 63 Am.D. 301.
23 C.J. p 921 note 87.

41. Me.—Mahoney v. Ayoob, 125 A. 146, 124 Me. 20, 37 A.L.R. 85.
Facsimile signature
A statute requiring a disclosure commissioner to issue capias "under his hand and seal" for arrest of an execution debtor failing to get the benefit of an oath requires a signature in handwriting or written signature, and not facsimile signature impressed with a rubber stamp.—Mahoney v. Ayoob, supra.

42. N.C.—Finley v. Smith, 15 N.C. 95.

43. Vt.—Avery v. Lewis, 10 Vt. 332, 33 Am.D. 208.
23 C.J. p 921 note 89.

44. Conn.—Sibley v. Krauskopf, 171 A. 4, 6, 118 Conn. 158.
23 C.J. p 921 note 97.
"The chief object of describing the judgment in the execution is to refer the officer and others to the authority for its issuance, and if the recitals are sufficient to identify the judgment and it is shown to be intended, issued, and enforced as an execution upon that judgment it is not void even though there be variances—as in the names of parties."—Sibley v. Krauskopf, supra.
An execution omitting the day of the month on which the judgment was rendered is not void.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.

45. N.Y.—Hutchinson v. Brand, 9 N.Y. 208, affirming 6 How.Pr. 73.

46. N.Y.—O'Shea v. Kohn, 38 Hun 149.

47. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.
23 C.J. p 921 note 2.

48. Ky.—Abbott v. Daniel, 3 Metc. 339.

49. N.Y.—Farmers' & Mechanics' Nat. Bank v. Crane, 15 Abb.Pr., N.S., 434.

sons, in which the name of one only is erroneously stated, is not void as against the other; and a bond given by the latter to procure his release from arrest on such execution is valid.[50]

Where the Christian names of plaintiffs are not inserted in the warrant or judgment, a capias ad satisfaciendum which properly pursues the judgment gives the officer authority to make the arrest and take bond, although such Christian names are not inserted in the writ.[51] Where a person is sued by his Christian name only and judgment is rendered against him in such name, he may be arrested on a body execution issued against him in such name.[52]

Where the clerk of court does not know that anything has been paid on a judgment, an execution for the full amount of the judgment in accordance with the record of the court is not irregular or void.[53]

d. Issuance and Return of Fieri Facias

The issuance of a fieri facias and its return nulla bona should be stated, if required as conditions precedent to a capias ad satisfaciendum.

The issuance of a fieri facias and the return of the execution nulla bona should be stated if these steps are by statute made conditions precedent to the issuance of a capias ad satisfaciendum.[54] The writ should specify eo nomine the county to which the execution against the property was issued.[55]

e. Directions to Sheriff

The writ should substantially comply with statutory requirements as to directions to be given the officer, such as those as to arrest and commitment of the debtor and return of the execution.

If there is a statute prescribing what directions shall be given the officer in the writ, it is well for the writ to use the language of the statute,[56] although it has been held that a substantial compliance with the requirements of the statute is sufficient.[57] The writ must conform to a statutory provision that it shall require the sheriff to arrest the debtor and commit him to the jail of the county until he shall pay the judgment or be discharged according to law[58] and to make due return of the execution.[59] It need not provide that the sheriff shall hold defendant to bail in a certain sum.[60] It is not void for failure to direct the time,[61] or the place[62] of the return, since such omission is a mere irregularity which may be amended or disregarded.[63] Failure to limit the imprisonment to a certain time is not fatal where there is no absolute right to discharge until the execution has been satisfied at the rate of a certain sum per day for each day of imprisonment.[64]

A direction as to turning over moneys is mere surplusage.[65]

§ 423. —— Amendment

An execution against the body may be amended in a proper case. A writ void because it is against both the body and property cannot be amended.

An execution against the body may be amended,[66] as where there is a mistake in the amount as stated

Conformity with respect to joint defendants see supra § 419.

Omission through clerical error
The omission of an additional plaintiff's name through a clerical error will not invalidate the body execution.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.

Where one of two joint plaintiffs dies after the rendition of the judgment, and no entry of his death is made in court, the execution should be taken out in the name of both plaintiffs so that it may conform to the judgment.—Stewart v. Cunningham, 22 Ala. 626.

50. Me.—Blake v. Blanchard, 48 Me. 297.

51. N.C.—Wall v. Jarrott, 25 N.C. 42.

52. Ill.—Hammond v. People, 32 Ill. 446, 83 Am.D. 286.

53. Vt.—Ex parte Hunt, 82 A. 178, 85 Vt. 345.

54. N.Y.—O'Shea v. Kohn, 38 Hun 149.
23 C.J. p 921 note 10.

As affecting right to writ see supra § 416.

55. N.Y.—People v. Reilly, 58 How. Pr. 218.
23 C.J. p 921 note 11.

56. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.

57. N.Y.—Hutchinson v. Brand, 9 N. Y. 208.
Vt.—Ex parte Hunt, 82 A. 78, 85 Vt. 345.

Written directions
Under statute, an officer is not required to arrest a debtor on an execution unless written directions to arrest, signed by the creditor or his counsel, are indorsed on the execution.—Dyer v. Tilton, 71 Me. 413.

58. N.Y.—Padreshefsky v. Walton, 72 N.Y.S. 979, 65 App.Div. 432.
23 C.J. p 922 note 12.

Definite term of confinement
A body execution is not void because it does not definitely fix the term of confinement, where the judgment and the execution directed confinement for a period not to exceed one year.—Roll v. Davis, 277 P. 767, 85 Colo. 594.

59. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.

60. Ala.—Ex parte Cleveland, 36 Ala. 306.

61. N.Y.—Benedict & Burnham Mfg. Co. v. Thayer, 20 Hun 547.
23 C.J. p 922 note 15.

62. N.Y.—Fake v. Edgerton, 12 N.Y. Super. 681, 3 Abb.Pr. 229.

63. N.Y.—Douglas v. Haberstro, 88 N.Y. 611, 2 N.Y.Civ.Proc. 186, 14 N.Y.Wkly.Dig. 311.

64. Ill.—Subim v. Isador, 88 Ill.App. 96.

65. Ala.—Stewart v. Cunningham, 22 Ala. 626.

66. Mich.—In re Davis, 187 N.W. 288, 218 Mich. 220.
N.Y.—Douglas v. Haberstro, 88 N.Y. 611, 2 N.Y.Civ.Proc. 186, 14 N.Y. Wkly. Dig. 311—People v. Seaton, 25 Hun 305—Benedict & Burnham Co. v. Thayer, 20 Hun 547.
23 C.J. p 922 notes 25, 26.

in the execution,[67] an omission of the testatum clause,[68] want of seal of the proper court,[69] defective teste or omission of teste,[70] a wrong attestation as to the name of the chief justice,[71] failure to direct the time for its return,[72] or erroneous direction as to the place to which returnable[73] or as to the time when returnable.[74] Although mesne process against the person returnable on Sunday, or out of term, is void, a capias ad satisfaciendum, being final process, may in such case be amended.[75]

After delivery to the officer, the clerk of court cannot correct a mistake as to the amount thereof, without an order of court.[76]

If the writ is void because it is both a body execution and one against property it cannot be amended.[77]

§ 424. —— Alias, Pluries, and Renewed Writs

An alias or pluries body execution may be issued in a proper case, as where the original writ is improperly issued, is defective, or is returned not found, or where the execution defendant has escaped. Such writ cannot be issued where the defendant has been discharged from imprisonment with the plaintiff's consent or by due course of law.

An alias or pluries execution against the person may be issued in a proper case,[78] as where the prior execution has been improperly issued,[79] or is found to be so defective as to be invalid,[80] or where the original is returned not found[81] or is uncertified,[82] or the return is defective.[83] An alias or pluries execution may also be issued where an order vacating the original writ has been reversed,[84] or in case of an escape of a defendant in execution with the sheriff's consent or through his negligence,[85] or in case of a rescue.[86]

On the other hand, so long as defendant remains in custody on one execution, another execution on the same judgment cannot issue;[87] and if he has been discharged from imprisonment with plaintiff's consent,[88] or by due course of law,[89] as where plaintiff neglects to take him in execution within the proper time,[90] or neglects to pay or give security for prison fees,[91] he cannot be again imprisoned on an alias writ issued in the same case.

A new capias ad satisfaciendum may issue where defendant is illegally discharged,[92] since an illegal discharge amounts to nothing more than an escape.[93] If a defendant is arrested on a capias ad satisfaciendum and discharged because of some irregularity, he may be retaken on a second capias ad satisfaciendum.[94] An alias execution may issue where the discharge is on the ground that the court issuing the execution had no power to do so.[95] An

Amendment of executions generally see supra § 82.

67. N.Y.—Holmes v. Williams, 3 Cai. 98, Col. & C.Cas. 449.
23 C.J. p 922 note 27.

68. N.Y.—McIntyre v. Rowan, 3 Johns. 144.

69. N.Y.—Dominick v. Eacker, 3 Barb. 17.

70. N.Y.—Douglas v. Haberstro, 88 N.Y. 611, 2 N.Y.Civ.Proc. 186, 14 N.Y.Wkly.Dig. 311—People v. Seaton, 25 Hun 305.
An attorney in the cause has no right to alter the teste of the writ. —Merrill v. Townsend, 5 Paige, N.Y., 80.

71. N.Y.—Ross v. Luther, 4 Cow. 158, 15 Am.D. 341.

72. N.Y.—Douglas v. Haberstro, 88 N.Y. 611, 2 N.Y.Civ.Proc. 186, 14 N.Y.Wkly.Dig. 311—Benedict & Burnham Co. v. Thayer, 20 Hun 547, 59 How.Pr. 272.

73. N.Y.—McConkey v. Glen, 1 Cow. 141.

74. Mich.—In re Davis, 187 N.W. 288, 218 Mich. 220.
N.Y.—Gibbons v. Larcom, 3 Wend. 303.

75. N.Y.—Stone v. Martin, 2 Den. 185.

76. Ky.—Johnson v. Scott, 121 S.W. 695, 134 Ky. 736.

77. Mich.—Sink v. Oceana Cir. Judge, 109 N.W. 115, 146 Mich. 121.

78. N.Y.—Wintner v. National Surety Co., 200 N.Y.S. 109, 120 Misc. 613.
23 C.J. p 922 note 40.
Alias and pluries writs generally see supra § 85.

79. N.Y.—Wintner v. National Surety Co., supra.

80. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.
23 C.J. p 923 note 43.

81. U.S.—Peyton v. Brooke, D.C., 3 Cranch 92, 2 L.Ed. 376.
Mich.—People v. Kehl, 15 Mich. 330.

82. R.I.—McCrillis v. Sisson, 1 R.I. 143.
23 C.J. p 923 note 42.

83. N.Y.—Wintner v. National Surety Co., 200 N.Y.S. 109, 120 Misc. 613.

84. N.Y.—Carrigan v. Washburn, 9 N.Y.S. 541, 18 N.Y.Civ.Proc. 79.

85. N.Y.—Wesson v. Chamberlain, 3 N.Y. 331.
23 C.J. p 923 note 45.

86. N.J.—State v. Blundell, 39 N.J. Law 612, reversed on other grounds 40 N.J.Law 372.

87. Mass.—In re Plympton, 82 N.E. 715, 196 Mass. 571.
23 C.J. p 923 note 47.

88. Va.—Windrum v. Parker, 2 Leigh 361, 29 Va. 361.
23 C.J. p 923 note 48.
In Louisiana under Act March 28, 1840, § 1 defendant arrested on a capias ad satisfaciendum, and discharged from imprisonment by plaintiff, may be imprisoned again on the second capias ad satisfaciendum.—Martin v. Ashcraft, 8 Mart.,N.S., 313.

89. Pa.—Ritter v. Stricker, 20 Pa. Dist. & Co. 622.
23 C.J. p 923 note 49.

90. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.
N.Y.—Masters v. Edwards, 1 Cai. 515.

91. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.
23 C.J. p 923 note 51.

92. Ind.—Freeman v. Smith, 7 Ind. 582.
Pa.—Long v. Cherington, 28 A. 1086, 161 Pa. 248—Ritter v. Stricker, 20 Pa.Dist. & Co. 622.

93. Ind.—Freeman v. Smith, 7 Ind. 582.

94. N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.
23 C.J. p 923 note 53.

95. N.Y.—Ginochio v. Figari, 4 E. D.Smith 227, 2 Abb.Pr. 185.

alias writ may also issue where defendant has been discharged on account of a temporary privilege, after the privilege has terminated.[96]

Where there has been no return to the first writ, a second cannot issue;[97] but an alias may issue, or the same writ may be reissued, where there has been a return without service before the return day.[98] If, however, the writ has been served by an actual arrest of the body of defendant therein, it cannot ordinarily be used further for the purpose of a new arrest.[99]

It has been held that where a judgment debtor after arrest enters into a poor debtor's recognizance and makes default, an alias body execution cannot be issued at the instance of the judgment creditor,[1] his only remedy being on the recognizance;[2] but there is authority to the contrary.[3] An alias execution may be issued at the instance of the surety on the insolvent bond, who after forfeiture of the bond has paid the judgment creditor and taken an assignment of the judgment.[4] Where one of two judgment debtors is arrested on execution and enters into a poor debtor's recognizance and makes default thereon, an alias execution against the other judgment debtor can be issued after the return of the original execution.[5] Where bail have surrendered the principal on a scire facias, plaintiff is entitled to an alias execution against him, notwithstanding more than a year has elapsed since the return of the former execution.[6]

Proceedings to obtain. A pluries writ of capias ad satisfaciendum may be issued without a writ of fieri facias.[7] If the original writ has not been returned, no scire facias is necessary.[8] In case defendant has been arrested, and has escaped, the creditor may obtain an alias capias ad satisfaciendum either by scire facias[9] or on motion after reasonable notice to the adverse party;[10] and it has been held that, where a party has been discharged because of a defect in the original writ, no application to the court is necessary before the issuance of a new one.[11] The clerk cannot be required to issue an alias execution on a debtor's default on his poor debtor's recognizance until the facts entitling plaintiff to it have been found by the court, on plaintiff's application, and entered on the record.[12]

Form, requisites, and contents. A second execution is not invalidated by the omission of the statement that it is an alias execution or its failure to refer to the first.[13] If the first writ is returned non est, the second may include the costs of issuing both.[14] A writ purporting to be a pluries capias, but without date and signature, is void.[15]

§ 425. —— Return

a. In general
b. Time for return
c. Contents
d. Amendment
e. Effect

a. In General

The debtor's imprisonment does not end with the return or expiration of the writ.

The imprisonment of the debtor does not end with the return or expiration of the writ.[16]

No return of the execution is necessary to justify a commitment of defendant thereunder.[17]

b. Time for Return

Statutory requirements as to the time for returning the writ must be observed. In the absence of statute, it should be returned within a reasonable time. The officer need not retain it longer than is necessary for a search satisfying him that the defendant is not to be found.

In the absence of statute, what is a reasonable time for the return of the writ is a question of fact for the jury, depending on the circumstances of the case.[18] The writ need not remain in the sheriff's office longer than is necessary to make such a

96. N.Y.—Humphrey v. Cumming, 5 Wend. 90.
23 C.J. p 923 note 55.

97. Md.—Fulton v. Wood, 3 Harr. & M. 99.
23 C.J. p 923 note 56.

98. Mass.—Goldis v. Gately, 47 N.E. 96, 168 Mass. 300.

99. Mass.—Goldis v. Gately, supra.

1. Mass.—Thomson v. Sleeper, 47 N.E. 106, 168 Mass. 373.
23 C.J. p 923 note 59.

2. Mass.—Thomson v. Sleeper, 47 N. E. 106, 168 Mass. 373.
N.J.—State v. Blundell, 40 N.J.Law 372, reversing 39 N.J.Law 612.

3. Pa.—Palethorpe v. Lasher, 2 Rawle 272.

4. N.J.—State v. Blundell, 40 N.J. Law 372, reversing 39 N.J.Law 612.

5. Mass.—Thomson v. Sleeper, 47 N. E. 106, 168 Mass. 373.

6. Mass.—Bartlet v. Falley, 5 Mass. 373.

7. Pa.—Edmonds v. Cooper, 10 Pa. Dist. & Co. 230.

8. Va.—Fawkes v. Davison, 3 Leigh 554, 35 Va. 554.

9. Va.—Fawkes v. Davison, supra.
23 C.J. p 923 note 66.

10. Va.—Fawkes v. Davison, supra.

11. N.C.—Kinney v. Laughenour, 2 S.E. [illegible] 97 N.C. 325.

12. Mass.—Thomson v. Sleeper, 47 N.E. 106, 168 Mass. 373.
23 C.J. p 924 note 69.

13. Conn.—Woods v. Brzezinski, 18 A. 352, 57 Conn. 471.

14. U.S.—Peyton v. Brooke, D.C., 3 Cranch 92, 2 L.Ed. 376.

15. Va.—Hickam v. Larkey, 6 Gratt. 210, 47 Va. 210.

16. Ill.—People v. Hanchett, 111 Ill. 90.

17. Md.—Fulton v. Wood, 3 Harr. & M. 99.

18. Conn.—Edwards v. Gunn, 3 Conn. 316.

search as satisfies the sheriff that defendant is not to be found in his district,[19] and after he has made a return of non est inventus the court will presume that he has retained the writ a sufficient time to be sure of the truth of his return.[20]

For the purpose of charging bail it may be required that the execution against the principal be returned to the next succeeding term of the court from which it issued,[21] or to the day to which such term is adjourned,[22] in which case no intermediate return is sufficient to fix the bail, nor can it be regarded as the return required by law.[23] Other jurisdictions require that there be a legal return of non est inventus within a prescribed time from the time of rendering final judgment,[24] or from the time of the receipt of the writ by the officer,[25] or that the execution be in the hands of the officer for a prescribed time before the return thereof,[26] or that it shall not be returned in less than a prescribed time.[27]

c. Contents

A return of "cepi" is sufficient; or the return may show that the debtor is dead or too ill for the process to be executed. In a return of non est inventus, a strict compliance with the forms is unnecessary.

A return of "cepi" ("I have taken the body") is sufficient;[28] and a recital that the officer has the dead body of the prisoner is sufficient without stating where he died.[29] The return need not state that the officer has searched for goods.[30]

In a return of non est inventus a strict compliance with the forms is unnecessary; a return of the facts by the officer is sufficient.[31] The officer who makes the return of non est inventus on the execution against the principal may be required to state particularly in his return what notice he gave to the bail, or the bail cannot be charged.[32]

A return that the debtor is ill must show that he is so ill that it would endanger his life to execute the process.[33] Where the successor of a sheriff lets defendant against whom a writ had been executed by the former sheriff, to bail before the return day of the writ, he should state the fact in addition to the former sheriff's return.[34]

Although in arrest on mesne process a return of the arrest and of a rescue is a good return, yet in case of arrest on execution against the person such a return is not a good return, since the officer is bound to call to his aid the posse comitatus.[35]

d. Amendment

An officer may amend his return on application to the court within a reasonable time.

On application made to the court within a reasonable time,[36] the officer may amend his return.[37] The amendment, when made, relates to the time when the writ was returned.[38]

e. Effect

The return must be considered a true statement of the facts recited until the contrary is shown. It is conclusive on the parties and those claiming under them, but not on third persons whose interests are not connected with the suit.

The return must be considered as a true statement of the facts therein recited until the contrary is made to appear.[39] The return of a sheriff to a body execution "satisfied" is evidence that he received the money before the return day, although the execution is not, in fact, returned and filed until thereafter.[40]

Although generally parol evidence is inadmissible, when offered by the parties or their privies or the officer, to contradict or vary a return of a body execution,[41] yet proof of facts consistent with and not appearing on the face of the return may

19. S.C.—Saunders v. Hughes, 18 S.C.L. 504.
20. S.C.—Saunders v. Hughes, supra.
21. Ga.—Lichten v. Mott, 10 Ga. 138.
22. Ga.—Aycock v. Leitner, 29 Ga. 197.
23. Ga.—Lichten v. Mott, 10 Ga. 138.
24. Vt.—Muzzy v. Howard, 42 Vt. 23.
23 C.J. p 924 note 83.
25. Wis.—Reeg v. Adams, 87 N.W. 1067, 113 Wis. 175.
23 C.J. p 924 note 84.
26. N.J.—Paparo v. Farber, 153 A. 521, 107 N.J.Law 316—Boggs v. Chichester, 13 N.J.Law 209.
27. N.Y.—Stimmel v. Swan, 39 N.Y.S. 1074, 17 Misc. 354.
28. Md.—State v. Lawson, 2 Gill 62.
29. Md.—Christie v. Goldsborough, 1 Harr. & M. 540.
30. N.H.—In re Banfill, 46 A. 1088, 70 N.H. 132.
31. Mich.—Lichfelt v. Kopp, 38 Mich. 312.
23 C.J. p 924 note 89.
32. N.H.—Goodwin v. Smith, 4 N.H. 29.
33. Vt.—Bramble v. Poultney, 12 Vt. 342.
34. N.Y.—Richards v. Porter, 7 Johns. 137.
35. N.H.—Buckminster v. Applebee, 3 N.H. 546.
36. Ind.—Lines v. State, 6 Blackf. 464.
23 C.J. p 924 note 96.
Amendment of return of execution against property see supra § 322.
37. N.H.—Mahurin v. Brackett, 5 N.H. 9.
23 C.J. p 924 note 97.
38. Ky.—Malone v. Samuel, 3 A.K. Marsh. 350, 13 Am.D. 172.
39. Me.—Holmes v. Baldwin, 17 Me. 398.
40. N.Y.—Armstrong v. Garrow, 6 Cow. 465.
41. Ind.—Lines v. State, 6 Blackf. 464.
Pa.—Jordon v. Minster, 3 Pa.L.J.R. 457, 5 Pa.L.J. 542.

be heard.[42] As in the case of the return on an execution against property, see supra § 329, the return upon a body execution is conclusive on the parties to the suit and those claiming under them,[43] but is not conclusive on third persons whose interests are not connected with the suit.[44]

§ 426. Arrest, Custody, and Disposition of Debtor

a. Arrest
b. Custody and disposition; commitment
c. Jail fees

a. Arrest

(1) In general
(2) Time
(3) Mode

(1) In General

The arrest must be made by a proper officer and unless otherwise authorized by the court, within his territorial jurisdiction. He is not obliged, before making the arrest, to demand payment or to search for property.

The arrest must be made by a proper officer,[45] within his territorial jurisdiction,[46] although a court may have power to authorize an officer to make an arrest outside his own county.[47]

In the absence of statutory restriction, a capias ad satisfaciendum is not confined in its operation to the county of defendant's residence;[48] and under at least one statute this writ may issue to the sheriff of any county without regard to defendant's legal residence.[49]

Satisfaction of a debt by service on the part of a person imprisoned therefor, if no other means of payment can be found, may be provided for by statute.[50]

Demand for payment; search for or acceptance of property. An officer having in his hands an execution authorizing the arrest of a judgment debtor is not obliged, before making an arrest thereon, to demand payment,[51] or to search for property on which to levy the execution.[52] The diligence required of an officer in searching for property does not require inquiry on the subject by him of defendant before arresting the latter under an execution directing the officer to satisfy the judgment from the personal property of the debtor, and, if sufficient is not found, to arrest the debtor;[53] nor, after the arrest, can the officer be required to accept property in lieu of the debtor's person.[54]

Direction to arrest without commitment. If a judgment creditor directs the officer to whom the writ of execution is delivered to arrest the debtor thereon, but not to commit him until further orders, the officer is justified in not arresting the debtor.[55]

(2) Time

An officer may select the time of day he thinks most expedient for executing the writ.

In executing a precept where he is commanded to arrest the body of an individual, the officer has the right to select such particular time of day as he thinks most expedient under the circumstances.[56] If the debtor is under examination on a criminal complaint, the officer must await the result of such examination before executing the writ.[57]

When the service of an execution has been begun before the return day thereof, it may be completed after the return day by an arrest of the debtor's person; the taking of the debtor into custody by the officer on the execution after the certificate of the refusal of the debtor's oath has been annexed to it is not a new or second arrest, but is a resumption or continuance of the original arrest which

42. Pa.—Jordon v. Minster, supra.

43. Me.—Francis v. Wood, 28 Me. 69.

44. Me.—Francis v. Wood, supra.

45. Mass.—Dalton-Ingersoll Co. v. Hubbard, 54 N.E. 862, 174 Mass. 307.
23 C.J. p 925 note 8.
Wrongful:
Arrest see infra § 455.
Execution generally see infra §§ 451–458.

46. N.Y.—Fisher v. Young, 85 N.Y.S. 115, 41 Misc. 552, affirmed 88 N.Y.S. 1101, 95 App.Div. 610.
23 C.J. p 925 note 9.

47. Colo.—Roll v. Davis, 277 P. 767, 85 Colo. 594.
Debtor released from penitentiary in other county
A court had inherent power to direct a sheriff to act outside his own county in serving a writ of body execution on a debtor being released from a penitentiary in another county.—Roll v. Davis, supra.

48. Ala.—Ex parte Cleveland, 36 Ala. 306.

49. N.Y.—Spilker v. Abrahams, 121 N.Y.S. 818, 136 App.Div. 841—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.

50. Conn.—Huntington v. Jones, Kirby 33.

51. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.
Mass.—Brazill v. Green, 127 N.E. 535, 236 Mass. 93.

52. Mass.—Brazill v. Green, supra.

53. N.Y.—Blakely v. Weaver, 10 N.Y.St. 793, 46 Hun 174.

54. N.Y.—Blakely v. Weaver, supra.

55. Mass.—French v. Bancroft, 1 Metc. 502.

56. Ky.—Johnson v. Scott, 121 S.W. 695, 134 Ky. 736.
23 C.J. p 925 note 13.

57. Vt.—Warner v. Lowry, 1 Aik. 55.

has been suspended during the proceedings under the recognizance.[58]

Arrest on alias execution after return day of first. Where an execution on a judgment in tort is returned unsatisfied before its return day, and on the same day an alias execution is issued, an arrest on the alias execution made after the return day of the first execution is legal.[59]

(3) Mode

Holdings differ as to the necessity of a manual touching of the body. An officer is authorized to use such force as is necessary, but may not break and enter a dwelling except in pursuit after an escape.

It has been held that in order to constitute a legal arrest the officer should lay his hand on defendant or otherwise take possession of his person, so as to make him his prisoner in an unequivocal form;[60] but there is authority that no manual touching of the body is necessary,[61] and that the legality of the arrest depends on the intent and understanding of the parties at the time of the transaction.[62] An officer is authorized to use such force as is necessary to accomplish the arrest.[63]

Where the party sought to be charged is a prisoner, the lodging of the writ with the sheriff, whose prisoner he is, is a sufficient charging in execution.[64]

Right of officer to break and enter dwelling. An officer, in order to be justified under the writ, must execute the same in a legal way, and if a sheriff, in attempting to execute the writ, breaks open the outer door of the dwelling house of the debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful;[65] but if an arrest has been made, and the person arrested escapes and takes refuge in his dwelling house, the officer may break open the outer door of the house in pursuit of him after making known his business, and after having demanded and been refused admission.[66]

b. Custody and Disposition; Commitment

(1) In general
(2) Commitment
(3) Place of confinement
(4) Duration of imprisonment

(1) In General

The arresting officer must retain the debtor in custody until the judgment is satisfied or the debtor duly discharged.

It is the duty of the officer to whom the writ is addressed, after arresting the judgment debtor, to retain him in custody[67] until the judgment has been satisfied or he has been discharged by due process of law.[68] It is also his duty to take the prisoner before the court at the time specified in the writ, where it so provides.[69]

(2) Commitment

For a lawful commitment, there must be a delivery of the prisoner at the jail, to a person authorized to confine him.

It is not necessary that a return should be made on a body execution in order to justify a committitur.[70] In order to constitute a lawful commitment, there must be at least a delivery of the prisoner at the jail, to the sheriff or deputy, jailer, or someone authorized to confine in the jail.[71] The leaving of a certified copy of the execution with the officer in whose custody the debtor is placed may be required.[72] Where a debtor arrested on execution and carried before a magistrate does not ask to be admitted to take the poor debtor's oath, he may be committed to jail without examination.[73]

(3) Place of Confinement

Some authorities have required commitment of the debtor to the jail of the county from which the body execution issued; another view is that the sheriff should commit him to the jail of the sheriff's own county.

Under some authorities a person arrested on an execution against the person should be committed to the jail of the county from which the execution issued;[74] but it has also been held that it is the

58. Mass.—In re Ruberg, 43 N.E. 911, 166 Mass. 33.

59. Mass.—Chesebro v. Barme, 39 N.E. 1033, 163 Mass. 79.

60. Del.—Lawson v. Buzines, 3 Del. 416.

61. N.J.—Richardson v. Rittenhouse, 40 N.J.Law 230.

62. N.C.—Jones v. Jones, 35 N.C. 448, 46 N.C. 491.
23 C.J. p 925 note 22.

63. Ky.—Johnson v. Scott, 121 S.W. 695, 134 Ky. 736.
Me.—Wright v. Keith, 34 Me. 158.

64. N.Y.—Matter of Johnson, 21 Abb.N.Cas. 172.
23 C.J. p 925 note 23.

65. Vt.—State v. Hooker, 17 Vt. 658.
Force in levying against property see supra § 96.

66. N.Y.—Allen v. Martin, 10 Wend. 300, 25 Am.D. 564.

67. Pa.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa.Super. 280.
23 C.J. p 926 note 31.

68. Ky.—Johnson v. Scott, 121 S. W. 695, 134 Ky. 736.
23 C.J. p 926 note 32.

69. Vt.—In re Jennison, 51 A. 1061, 74 Vt. 40.

70. Md.—Fulton v. Wood, 3 Harr. & M. 99.

71. N.H.—Skinner v. White, 9 N.H. 204.

72. Mass.—Commonwealth v. Waite, 2 Pick. 445.
23 C.J. p 926 note 29.

73. Mass.—Hart v. Adams, 7 Gray 581.

74. Ky.—Long v. Wood, 78 Ky. 392.
N.C.—Kinney v. Laughenour, 2 S.E. 43, 97 N.C. 325.

duty of the sheriff to commit him to the jail of the sheriff's own county, although the writ issued from the court of another county.[75] A debtor may be committed to any jail in the proper county, if the creditor so directs, although the debtor himself requests that the commitment may be to the jail nearest his own residence.[76]

(4) Duration of Imprisonment

The duration of a debtor's imprisonment is determined by the provisions of applicable statutes.

In some jurisdictions, in certain cases of arrest on execution, the debtor must be imprisoned for a specific time before he can be discharged.[77] In others, no person may be imprisoned on execution beyond a certain designated period,[78] at the expiration of which he must be discharged without any order or proceedings on the prisoner's part.[79] Where no period of imprisonment is prescribed, the debtor can be discharged only in the manner prescribed by statute.[80]

c. Jail Fees

(1) In general
(2) Discharge for failure of creditor to pay

(1) In General

Where a debtor confined under execution has not the means to maintain himself, the person at whose instance the debtor is confined is ordinarily required to pay the jail fees. Such obligation is terminated by the release of the debtor from custody; and the creditor may recover of his debtor the amount paid the jailer for the latter's board.

It is the duty of a debtor confined under execution to maintain himself as long as he has the means.[81] If he is unable to do so, the jail fees must usually be paid in advance[82] to the jailer[83] by the person at whose instance the debtor is confined.[84] The release of the debtor from custody terminates the creditor's obligation to provide for the debtor's support,[85] as the creditor is liable only while the debtor is actually confined within the walls of the prison;[86] however, where the debtor

Contra Rutherford v. Allen, 4 N.C. 69.

75. Pa.—Avery v. Seely, 8 Watts & S. 494.

Jail of adjoining county
In Vermont where the jail in the county of arrest is destroyed, the debtor may be committed to a jail in an adjoining county.—Ex parte Hunt, 82 A. 178, 85 Vt. 345.

76. Mass.—Woodward v. Hopkins, 2 Gray 210.

77. Colo.—Hershey v. People, 12 P. 2d 345, 91 Colo. 113.
23 C.J. p 926 note 37.

Deductions from time of imprisonment
A statute providing for deductions from time of imprisonment of prisoners confined under "sentence" and providing for "parole" is inapplicable to a debtor confined under body execution.—Hershey v. People, supra.

78. N.Y.—Matter of Locke, 160 N.Y. S. 431, 174 App.Div. 287.
23 C.J. p 926 note 38.

79. N.Y.—Padreshefsky v. Walton, 72 N.Y.S. 979, 65 App.Div. 432.
23 C.J. p 926 note 39.

80. Pa.—Commonwealth v. McAleese, 12 Pa.Co. 147.

81. S.C.—Thomasson v. Kerr, 27 S. C.L. 340.
23 C.J. p 926 note 42.

82. Mich.—Butcher v. Lovitt, 273 N. W. 734, 280 Mich. 369—Reinert v. Fidelity & Casualty Co. of New York, 259 N.W. 340, 270 Mich. 607.
R.I.—Casey v. Viall, 21 A. 911, 17 R.I. 348.

Purpose and application of statute
A statute providing that a creditor must advance payment for the board of a prisoner held on body execution, and that failure to make such advance payment shall discharge the prisoner, was intended to protect the public against the expense of boarding the prisoner, and does not apply where the public is otherwise protected because the prisoner is allowed jail limits on bond, so that failure to prepay the board of the prisoner after he gives bond does not discharge him.—Schuier v. Kuswa, 186 N.W. 148, 176 Wis. 48.

The sending of a post office order by a creditor to pay debtor's board has been held to be payment in advance, as required by statute.—Gingras v. Linscott, 116 A. 195, 44 R.I. 112.

83. R.I.—Gingras v. Linscott, supra.
23 C.J. p 926 note 44.

84. N.J.—Potter v. Robinson, 40 N.J.Law 114.
23 C.J. p 926 note 43.

Expenses incurred; demand for payment
A statute obligating a creditor to pay the expense of board and keep of a person imprisoned on a writ of execution implies reimbursement and not a continuous charge under all conditions, and the creditors' failure to pay was not grounds for the debtor's release, unless expenses were incurred which the creditor, after demand, failed to pay.—Reinert v. Fidelity & Casualty Co. of New York, 259 N.W. 340, 270 Mich. 607.

Place and nature of confinement as affecting obligation
The confinement of a judgment debtor in a hospital under the custody and control of a doctor-deputy sheriff for an appendectomy, on transfer from county jail where he was in custody of sheriff on a writ of capias ad satisfaciendum, was "imprisonment" or "confinement at jail" within contemplation of statute requiring person at whose instance individual was put in jail to pay prisoner's lodging in advance.—Butcher v. Lovitt, 273 N.W. 734, 280 Mich. 369.

Payment of debtor's board by creditor's agent held not to entitle debtor to a discharge from custody.—People v. Traeger, 170 N.E. 214, 338 Ill. 101.

Creditor as poor person; sheriff's discretion
The mere filing with the sheriff of an affidavit that the judgment creditor is a poor person and unable to pay the costs of the judgment debtor's imprisonment satisfies the statute, and no authority is given the sheriff to hold a hearing and no discretion to pass upon truth of fact alleged.—Ex parte Thompson, 89 P. 2d 538, 104 Colo. 171.

85. Mich.—Reinert v. Fidelity & Casualty Co. of New York, 259 N.W. 340, 270 Mich. 607.
N.J.—Potter v. Robinson, 40 N.J. Law 114.
Wis.—Schuier v. Kuswa, 186 N.W. 148, 176 Wis. 48.

86. Mich.—Reinert v. Fidelity & Casualty Co. of New York, 259 N. W. 340, 270 Mich. 607.
N.C.—Phillips v. Allen, 35 N.C. 10.
Wis.—Schuier v. Kuswa, 186 N.W. 148, 176 Wis. 48.

is entitled to, and does, board at the jail while at liberty under bond, the creditor is obliged to pay the debtor's board.[87] The failure of the jailer to take a bond from the creditor for the payment of such fees will not release the creditor from his liability.[88]

Provision may be made by statute for the relief of a destitute debtor in jail on execution, out of the public funds of the town in which the jail is situated.[89]

Action to recover fees. The jailer may be given, by statute, a right of action against the creditor to recover jail fees[90] on due notice to the creditor of the debtor's imprisonment,[91] and on a proper showing as to the prisoner's inability to pay.[92] The creditor has a right to recover of his debtor the amount he has paid the jailer for his board while in prison on the creditor's execution.[93]

(2) Discharge for Failure of Creditor to Pay

The creditor's failure to pay the jail fees for which he is responsible entitles the debtor to his discharge from imprisonment.

Where the creditor at whose instance a prisoner is confined on an execution neglects or refuses to pay the jail fees for which he is responsible, the debtor's imprisonment becomes illegal and the debtor is entitled to his discharge;[94] but the failure of the jailer to take a bond from the creditor for the payment of jail fees will not release the debtor from imprisonment.[95]

Manner of discharge. In some jurisdictions, on the failure of the person at whose instance the debtor is imprisoned to pay or secure the payment of jail fees, after due notice and demand, the sheriff or jailer in whose custody the prisoner is may discharge him from confinement;[96] in others, the discharge must be on application to the proper court or magistrate.[97]

§ 427. Supersedeas and Quashing or Vacating Writ

a. Supersedeas
b. Quashing, vacating, or setting aside

a. Supersedeas

The defendant is generally entitled to a supersedeas where he is not charged in execution within the time prescribed by statute, whether he is in actual custody or not; but the court has discretion to deny an application for a supersedeas, and will do so when reasonable cause for the delay is shown.

Unless defendant is charged in execution within the time required by statute, he will, in general, be entitled to a supersedeas, whether he is in actual custody[98] or not.[99] This includes the failure of plaintiff to charge the debtor in execution within the time prescribed by law, where he is under arrest at the time the judgment is rendered,[1] on application to a judge of the court in which the judgment was rendered,[2] as well as where defendant has not been charged in execution within the proper time after the return day of an execution against his property.[3]

Where the debtor is surrendered in exoneration of bail and plaintiff proceeds to judgment but suffers the prescribed term to elapse without charging

87. Mich.—Reinert v. Fidelity & Casualty Co. of New York, 259 N. W. 340, 270 Mich. 607.
Ohio.—Kirkup v. Stickney, 5 Ohio Dec., Reprint, 499, 6 Am.L.Rec. 300.
23 C.J. p 926 note 48.

88. Ga.—Haas v. Bradley, 23 Ga. 345.

89. Me.—Norridgewock v. Solon, 49 Me. 385.
23 C.J. p 927 note 51.

90. N.C.—Bunting v. McIlhenny, 61 N.C. 579.
23 C.J. p 927 note 55.

91. Va.—Zimmerman v. Buzzard, 2 Va.Cas. 406, 4 Va. 406.

92. S.C.—Love v. Lowry, 12 S.C.L. 181.

93. Me.—Spring v. Davis, 36 Me. 399.
23 C.J. p 927 note 58.

94. R.I.—Casey v. Viall, 21 A. 911, 17 R.I. 348.
23 C.J. p 927 note 52.
Discharge in general see infra §§ 429–449.

95. N.H.—In re Banfill, 46 A. 1088, 70 N.H. 132.

96. Va.—Meredith v. Duval, 1 Munf. 76, 15 Va. 76.
23 C.J. p 927 note 53.

97. N.J.—State v. Stiles, 12 N.J.Law 296,
23 C.J. p 927 note 54.

98. N.Y.—Smith v. Knapp, 30 N.Y. 581.

99. N.Y.—Longuemare v. Nichols, 7 N.Y.S. 157, 17 N.Y.Civ.Proc. 107, 23 Abb.N.Cas. 221.
23 C.J. p 927 note 60.
Computation of time
"The time within which a defendant must be charged on execution before a supersedeas can be moved for is to be computed from the time the judgment is actually entered, not from the time the plaintiff is entitled to judgment."—Lippman v. Petersberger, 9 Abb.Pr., N.Y., 209, 18 How.Pr. 270—Standacher v. Pregenzer, 52 How.Pr., N.Y., 76.
The New York Municipal Court Act does not authorize a justice thereof to "stay an execution" by striking from the judgment a provision requiring defendant's arrest and imprisonment.—Scarangello v. Pacione, 126 N.Y.S. 714, 70 Misc. 211.

1. Mich.—McDonell v. Collingwood, 193 N.W. 283, 222 Mich. 516.
23 C.J. p 927 note 61.

2. N.Y.—Smith v. Knapp, 30 N.Y. 581.

3. Mich.—Porrett v. Lauer, 151 N. W. 619, 184 Mich. 497.
23 C.J. p 927 note 63.
Statute held inapplicable
A statute allowing a supersedeas where a defendant has not been charged in execution within the prescribed time was held to apply only in cases where the action was commenced by a writ of capias ad respondendum and defendant apprehended thereunder.—McDonell v. Collingwood, 193 N.W. 283, 222 Mich. 516.

defendant in execution, the latter may obtain a rule to show cause why a supersedeas should not be granted, and it will be granted unless good cause to the contrary is shown.[4] Although delivering a capias ad satisfaciendum to the sheriff is good cause against a supersedeas, yet if the sheriff returns the writ non est inventus, a supersedeas will be granted unless it is followed up by an alias, for the issuance of which the court may under special circumstances allow time.[5] Where defendant is discharged, under the act abolishing imprisonment for debt, between the verdict and judgment, the court will order a perpetual stay of the capias ad satisfaciendum, although if the discharge is objected to by plaintiff the court may open the case so as to give him a chance to try the question, the judgment standing as security.[6]

There is authority that if plaintiff after service of the rule to show cause why a supersedeas should not issue, and before the time assigned to show cause, charges defendant in execution, he may show this for cause and it will be sufficient to prevent a supersedeas;[7] and where a defendant in custody of the sheriff has been regularly charged in execution, after a rule to show cause why a supersedeas should not be granted, notwithstanding he was before supersedable, he is no longer entitled to a supersedeas.[8]

A supersedeas destroys the operation of a bond given by the debtor for jail liberties as well as of the body execution,[9] and after a supersedeas no formal discharge of a debtor who has given such a bond is necessary.[10] Where a bond is required to stay execution on the taking of an appeal, bail cannot be substituted in lieu of such bond.[11]

Discretion of court to refuse. It is within the discretion of the court to deny an application for a supersedeas, and it will do so when reasonable cause is shown for the delay.[12]

b. Quashing, Vacating, or Setting Aside

(1) In general
(2) Hearing
(3) Effect of order setting aside

(1) In General

An execution against the person may be quashed, vacated, or set aside in a proper case, on application to the proper court, but not for mere irregularities. The motion to set aside must be timely made.

An execution against the person may be quashed, vacated, or set aside on application to the proper court in certain cases,[13] as where a levy has been made on a fieri facias and the property is not disposed of,[14] or the writ has not been delivered to the sheriff within the statutory time,[15] or the writ was not issued within the prescribed time,[16] or no execution against property has been issued and returned unsatisfied,[17] or there was no finding by a jury on a separate and distinct issue sufficient to justify an execution,[18] or where defendant was a nonresident and it does not appear that the action

4. Mich.—Westerhouse v. Ottawa Circuit Judge, 180 N.W. 378, 212 Mich. 457.
23 C.J. p 927 note 64.
5. N.Y.—Gray v. Thornber, 5 Cow. 278.
6. N.Y.—Baker v. Taylor, 1 Cow. 165.
7. N.Y.—Minturn v. Phelps, 3 Johns. 446.
23 C.J. p 928 note 67.
8. S.C.—Robertson v. Shannon, 33 S.C.L. 419.
9. N.Y.—Warne v. Constant, 4 Johns. 32.
10. N.Y.—Warne v. Constant, supra.
11. N.C.—Howie v. Spittle, 72 S.E. 207, 156 N.C. 180.
12. Mich.—Lapham v. Oakland Cir. Judge, 136 N.W. 594, 170 Mich. 564.
23 C.J. p 928 note 72.
13. Ill.—Ingalls v. Raklios, 26 N.E. 2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1—Miles v. Glad, 19 N.E.2d 844, 299 Ill. App. 185—Kearns v. Chocolowski, 223 Ill.App. 117.
Or.—Wemme v. Hurlburt, 289 P. 372, 133 Or. 460.
Pa.—Ritter v. Stricker, 20 Pa.Dist. & Co. 622.
23 C.J. p 928 note 75.
Audita querela to set aside execution see Audita Querela § 2.
Quashing execution against property see supra §§ 142–145.

Discretion of court

It was discretionary for the court to reverse its order for the issuance of a capias ad satisfaciendum after the judgment had been paid and the debtor released, on showing by affidavits that the debtor was in fact a freeholder, in a proceeding brought a year and a half later because of possible influence of the order on other litigation.—Ash v. Brown, 3 A.2d 125, 121 N.J.Law 456.

Jurisdiction

The supreme court did not acquire jurisdiction to vacate order of body execution issued in municipal court of the city of New York by virtue of statute governing debtor's discharge from imprisonment, where debtor did not comply with statute requiring notice to creditors.—Adolf Gobel, Inc. v. Weil, 31 N.Y.S.2d 317, 263 App.Div. 817.

Judgment in contract action

Where, under a statute providing that no person shall be arrested or imprisoned by virtue of any mesne process which shall issue on any contract made or entered into after a certain date, a judgment creditor took out an execution against the body of defendant on a judgment recovered in an action on a contract entered into subsequent to such date, and the body of the debtor was arrested thereon, such execution will be set aside.—Stanley v. McClure, 17 Vt. 253.

14. N.C.—Wheeler v. Bouchelle, 27 N.C. 584.
15. Pa.—Rodney v. Hoskins, 2 Miles 465.
16. Md.—Stump v. Hopkins, 3 Bland. 327.
Time for issuance see supra § 409.
17. N.Y.—Noe v. Christie, 15 Abb. Pr.,N.S., 346.
Necessity of issuance of execution against property and return unsatisfied see supra § 416.
18. N.C.—Calhoun v. Stiers, 1 S.E. 2d 355, 215 N.C. 126—Crowder v. Stiers, 1 S.E.2d 353, 215 N.C. 123.

was one within the jurisdiction of the court.[19] A defendant may move to set aside an execution against his person on the ground that it is not warranted by the facts, and it will be no answer to his application to say that he had allowed himself to be arrested by preliminary process.[20]

When defendant is arrested on an execution defective enough to be voidable, but not void,[21] or incapable of amendment,[22] defendant's remedy is by motion to have the execution set aside, and not by habeas corpus.

On the other hand it has been held that the court should not interfere on an application to quash, or the like, based on mere irregularities,[23] such as irregularities in the method of obtaining the judgment,[24] in the entry of the judgment,[25] in the recitals of the writ,[26] in the recitals in the indorsement on the writ,[27] in the teste of the writ,[28] or in the manner of the service of the writ;[29] nor should the court interfere for reasons that existed at the time of the trial of the original suit and which might then have been presented by way of defense,[30] or for reasons set up in a prior motion which was denied.[31] The insolvency of the debtor is not a ground for setting aside the writ;[32] and the same has been held, in particular circumstances, as to the pendency of another proceeding.[33]

Necessity for actual custody. It has been held that where defendant in execution is at large by virtue of a bond given under the insolvent act, he cannot move to quash the proceedings because the writ is voidable, although he might do so by placing himself again in actual custody.[34]

Time of motion. Although if a motion to set aside an order of arrest is not made before judgment, a defendant may be imprisoned on a capias ad satisfaciendum issued on the judgment,[35] defendant may nevertheless, even after the entry of judgment, move to set aside the order of arrest, on showing that its issuance was unauthorized.[36] Where an order of arrest has been obtained on facts dehors the cause of action, and defendant omits to move to set it aside before judgment or fails in a motion to set it aside, he is concluded after judgment from questioning the right to an execution against his person.[37] Where, however, the action is one which gives plaintiff the right to an order of arrest, and the facts constituting it are identical with the facts constituting the cause of arrest, defendant can contest the right to arrest on a preliminary motion to set aside the order, and also contest the alleged cause of action upon the trial; he is not concluded by the order or the decision on the motion to set it aside, and may omit to make the motion altogether, as the trial on the alleged facts in the complaint will furnish an opportunity to contest the facts in a form preferable to that upon motion.[38] The motion may be made after the execution has been served and the debtor arrested and imprisoned thereunder.[39] A motion to quash is too late after the writ has been returned and defendant discharged on bonds to appear under insolvency laws, and after hearing on his petition in insolvency, and the forfeiture of his bond to appear therein.[40]

(2) Hearing

A motion to set aside a body execution will not be heard in defendant's absence. Parol evidence as to matters of record is inadmissible, but the theory on which the action was decided may be shown in a proper case.

A motion to set aside an execution against the person will not be heard in the absence of defend-

19. N.Y.—Noe v. Christie, 15 Abb. Pr.,N.S., 346.

20. N.Y.—Bridgewater Paint Mfg. Co. v. Messmore, 15 How.Pr. 12.

21. Va.—Hickam v. Larkey, 6 Gratt. 210, 47 Va. 210.

22. N.Y.—People v. Seaton, 25 Hun 305—Benedict & Burnham Mfg. Co. v. Thayer, 20 Hun 547.

23. Colo.—Roll v. Davis, 277 P. 767, 85 Colo. 594.

24. N.Y.—Whiting v. Putnam, 16 Abb.Pr. 382.
23 C.J. p 929 note 86.

25. N.Y.—Crosby v. Root, 43 N.Y.S. 512, 19 Misc. 359.
23 C.J. p 929 note 87.

26. N.Y.—Fullerton v. Fitzgerald, 18 Barb 441.
23 C.J. p 929 note 88.

27. N.J.—State v. Ferguson, 31 N.J. Law 283.
23 C.J. p 929 note 89.

Failure to show true balance due
The failure of the indorsement on the capias to show the true balance due the creditor on the judgment is not ground for setting aside the writ.—Oshushek v. Malinowski, N.J.Sup., 144 A. 451.

28. Md.—Docura v. Henry, 4 Harr. & M. 480.

29. Colo.—Roll v. Davis, 277 P. 767, 85 Colo. 594.
Va.—Purcell v. Richardson, 4 Hen. & M. 404, 14 Va. 404.

30. Ill.—Galena & S. W. R. Co. v. Ennor, 9 Ill.App. 159.

31. N.Y.—Beyer v. Sadvoransky, 177 N.Y.S. 705, 103 Misc. 413.

32. N.J.—Oshushek v. Malinowski, Sup., 144 A. 451.

33. N.J.—Oshushek v. Malinowski, supra.

34. N.C.—Bryan v. Brooks, 51 N.C. 580—Dobbin v. Gaster, 26 N.C. 71.

35. N.Y.—Smith v. Knapp, 30 N.Y. 581—Elwood v. Gardner, 9 Abb. Pr.,N.S., 99, affirmed 45 N.Y. 349, 10 Abb.Pr.,N.S., 238.

36. N.C.—Crowder v. Stiers, 1 S.E. 2d 353, 215 N.C. 123.
23 C.J. p 929 note 94.

37. N.Y.—Elwood v. Gardner, 45 N. Y. 349, 10 Abb.Pr.,N.S., 238, affirming 9 Abb.Pr.,N.S., 99.

38. N.Y.—Elwood v. Gardner, supra.

39. N.Y.—Pinckney v. Hegeman, 53 N.Y. 31.

40. Pa.—Stout v. Quinn, 9 Pa.Super. 179, 43 Wkly.N.C. 418.

ant.[41] Parol evidence as to matters of record is not admissible;[42] but the theory on which the action was tried and decided may be shown in a proper case,[43] and, where the judgment was by default in an action on contract with fraud alleged, affidavits denying the fraud may be presented.[44]

A mere contradiction in affidavits, as to whether the records showed that the debtor was a freeholder, does not establish fraud in obtaining the issuance of an execution, in that the debtor was not a freeholder, since untruthfulness alone is not fraud.[45]

(3) Effect of Order Setting Aside

A valid order setting aside an execution against the person justifies the sheriff in releasing the debtor from imprisonment.

An order setting aside an execution against the person, made by a court having jurisdiction to grant it, and valid upon its face, free from anything showing want of power or disclosing a vitiating irregularity, is a justification to the sheriff for releasing the debtor from imprisonment.[46]

§ 428. Waiver of Defects

Irregularities in the writ or affidavits in connection therewith must be objected to properly and seasonably or are waived. A person giving a bond on being arrested waives the privilege of immunity from arrest and the irregularity of, and defects in, the writ.

If the judgment of the court below is correct and legal, irregularity in the writ of execution against the person cannot be taken advantage of on a writ of error.[47]

Where an affidavit is necessary on an application for a certificate authorizing the arrest of a debtor, although the debtor appears after he has been defaulted in pursuance of a citation issued without an affidavit, such appearance will not constitute a waiver of the irregularity if he had no actual knowledge of the issuance of the citation before an affidavit had been made.[48] The objection that an affidavit is not sufficiently specific is waived by a failure to make it seasonably.[49] The falsity of an affidavit cannot be urged in an action on a recognizance given in the proceedings.[50]

Waiver by giving bond. Where the person arrested gives bond under the insolvent laws, he is held to have thereby waived the privilege of immunity from arrest,[51] the irregularity of the writ,[52] and his objections to the judgment on which the writ was issued,[53] and to defects in the writ.[54]

B. DISCHARGE AND REARREST

§ 429. Discharge in General

A debtor can obtain his discharge from imprisonment under an execution against his person only on complying with the governing statutes.

The right of a debtor held under an execution against the person to obtain his discharge, where given or created by statute, can be enforced only in the manner prescribed by the statute,[55] on application to the court or judge designated in the statute,[56] and on a showing of the required facts.[57] A statute authorizing a discharge has been held retrospective, so as to be applicable to persons in prison at the time when enacted.[58]

A debtor committed on a writ issued from a United States court cannot be discharged under the provisions of a state law relating to the discharge of

41. Md.—Guthers v. Langton, 3 Harr. & M. 185.

42. N.C.—McAden v. Banister, 63 N. C. 478.

43. N.Y.—Neftel v. Lightstone, 77 N. Y. 96—Booth v. Englert, 94 N.Y.S. 700, 105 App.Div. 284.

44. N.Y.—Humphrey v. Brown, 17 How.Pr. 481.

45. N.J.—Ash v. Brown, 8 A.2d 125, 121 N.J.Law 456.

46. N.Y.—Pinckney v. Hegeman, 53 N.Y. 31.

47. N.Y.—Dumond v. Carpenter, 3 Johns. 141.

48. Mass.—Williams v. Shillaber, 27 N.E. 767, 153 Mass. 541.
23 C.J. p 929 note 7.

49. Mass.—Rabovsky v. Sperling, 72 N.E. 949, 187 Mass. 202.

50. Mass.—Everett v. Henderson, 14 N.E. 932, 146 Mass. 89, 4 Am.S.R. 284.

51. Pa.—Winder v. Smith, 6 Watts & S. 424.

52. N.J.—Ex parte Case, 20 N.J.Law 653.
N.Y.—Kelly v. McCormick, 28 N.Y. 318, affirming 2 E.D.Smith 503.

53. N.C.—Dobbin v. Gaster, 26 N.C. 71.

54. N.C.—Bryan v. Brooks, 51 N.C. 580.
23 C.J. p 929 note 13.

55. N.Y.—Bullymore v. Cooper, 46 N.Y. 236, affirming 2 Lans. 71.
23 C.J. p 929 note 15.
Discharge on failure to pay jail fees see supra § 426.

56. Ky.—Sowle Mfg. Co. v. Bernard, 39 S.W. 239, 100 Ky. 658, 18 Ky.L. 1106—McGovern v. Maloney, 99 S. W. 935, 30 Ky.L. 801.
23 C.J. p 930 note 16.
Presumption of jurisdiction
Where a court order releasing prisoner on parole in custody of his attorney is regular on its face, jurisdiction of court will be presumed. —Land Finance Corporation v. Jacoby, 272 N.Y.S. 318, 151 Misc. 159, affirmed 275 N.Y.S. 890, 243 App Div. 530, affirmed 196 N.E. 600, 267 N.Y. 600.

57. **Evidence held sufficient** to sustain verdict in favor of debtor on his application to be discharged from imprisonment for having unjustly refused to surrender his property.—In re Bartlett, 261 Ill.App. 259.

58. Vt.—Sommers v. Johnson, 4 Vt. 278, 24 Am.D. 604.

persons taken into custody under writs of execution.[59]

A discharge on Sunday is proper where the debtor was legally arrested by virtue of an execution procured on that day.[60]

§ 430. On Payment or Satisfaction of Judgment

Payment or satisfaction of the judgment entitles the debtor to a discharge.

A debtor is entitled to be discharged on paying the amount of the execution and fees.[61] The debtor, however, is entitled to his discharge only on his making payment in money or its equivalent,[62] unless another form of payment or satisfaction, such as a note, is authorized by statute,[63] or unless plaintiff agrees to another form of payment[64] or subsequently ratifies the act of the officer in taking something other than money in satisfaction of the judgment.[65]

The fact that one joint obligor, against whom execution has been issued for costs, is discharged on the payment of such costs will not act as a discharge or release of the other obligor who has been taken on execution for the debt.[66]

§ 431. On Consent of Creditor

The debtor may be discharged if the creditor or his duly authorized agent consents. A discharge, by consent, of one of several defendants taken on a joint capias ad satisfaciendum discharges all.

Plaintiff in a civil action may at any time order the discharge of a debtor confined under execution issued on the judgment,[67] and may make such agreement or take such security as he pleases, on discharging his debtor from arrest, so long as the officer has no beneficial interest therein.[68]

By agent or attorney. It is commonly held that plaintiff's attorney as such has no power to allow a discharge of defendant without the actual payment of the money;[69] but there is authority to the contrary,[70] particularly where the judgment is merely for costs.[71] The authority of a person, as special agent of plaintiff, to discharge defendant without satisfaction of the debt must be clearly and fully proved and strictly pursued.[72]

Effect. The discharge of the debtor with the consent, or by the order, of plaintiff is not a payment of the debt so as to release a guarantor who consented to the discharge.[73] A discharge, by consent, of one of several defendants taken on a joint capias ad satisfaciendum is a discharge of all.[74]

§ 432. On Motion

In some jurisdictions proceedings to obtain a discharge may be by motion, in a proper case. The order for discharge should show on its face that it was made by the court. The court may require, as a condition on discharge, a stipulation by defendant that he will not sue for false imprisonment, but not where the arrest was on an illegal execution.

In some jurisdictions the debtor may be discharged from imprisonment on motion in a proper case, as where he is exempt from arrest,[75] or where the judgment was recovered on a cause of action for which he could not have been arrested.[76] Such a motion is also proper where the debtor has been discharged as an insolvent and has had no opportunity to plead his discharge,[77] or where plaintiff has delayed the enforcement of his remedies for the purpose of compelling the debtor to remain in prison,[78] or where the court lost jurisdiction because

59. Pa.—Duncan v. Klinefelter, 5 Watts 141, 30 Am.D. 295.
23 C.J. p 930 note 17.

60. Ind.—King v. Strain, 6 Blackf. 447.

61. Colo.—Hershey v. People, 12 P. 2d 345, 91 Colo. 113.
23 C.J. p 930 note 20.

62. N.Y.—Codwise v. Field, 9 Johns. 263.
23 C.J. p 930 note 21.

63. Me.—Bates v. Butler, 46 Me. 387.
23 C.J. p 930 note 22.

64. Pa.—McCauley v. Kelly, 2 Wkly. N.C. 30.

65. N.Y.—Townsend v. Olin, 5 Wend. 207.

66. N.Y.—McLean v. Whiting, 8 Johns. 339.

67. Nev.—Ex parte Bergman, 4 P. 209, 18 Nev. 331.
23 C.J. p 930 note 26.

The issuance of an alias writ of capias ad satisfaciendum while the original writ is still outstanding has been held tantamount to a consent to the debtor's discharge under the original writ.—Ritter v. Stricker, 20 Pa.Dist. & Co., 622.

68. N.Y.—Williams v. Evans, 2 N.Y.City Ct. 235.
23 C.J. p 930 note 27.

69. N.Y.—Jackson v. Bartlett, 8 Johns. 361.
23 C.J. p 930 note 28.

70. Pa.—Scott v. Seiler, 5 Watts 235.
23 C.J. p 931 note 29.

71. N.Y.—Davis v. Bowe, 54 N.Y. Super. 520, 3 N.Y.St. 531, 25 N.Y. Wkly.Dig. 455, affirmed 23 N.E. 166, 118 N.Y. 55.
23 C.J. p 931 note 30.

72. N.Y.—Crary v. Turner, 6 Johns. 51.

73. Conn.—Terrell v. Smith, 8 Conn. 426.
23 C.J. p 931 note 34.

74. N.J.—Craig v. Allen, 14 N.J.Law 102.
23 C.J. p 931 note 35.

A discharge of appearance bail, arrested on a joint capias ad satisfaciendum against him and his principal, does not release the principal. —Watson v. Summers, D.C., 29 F. Cas.No.17,289, 1 Cranch C.C. 200.

75. Or.—Wemme v. Hurlburt, 289 P. 372, 133 Or. 460.
23 C.J. p 931 notes 37, 38.
Motion to quash or set aside writ see supra § 427.

76. N.Y.—Smith v. Knapp, 30 N.Y. 581.
23 C.J. p 931 note 39.

77. N.Y.—Baker v. Judges Ulster C. Pl., 4 Johns. 191.

78. N.Y.—Hedges v. Payne, 32 N.Y.S. 969, 85 Hun 377, affirmed 42 N.E. 543, 146 N.Y. 397.

of an adjournment of the main action for more than the statutory time.[79]

On the other hand, it is not a sufficient ground for granting a debtor's motion for a discharge from custody that the debtor is insane[80] or unable to endure the imprisonment,[81] or that the sheriff violated the directions of a statute in respect of the mode of imprisonment,[82] or that the debtor was recaptured in one state by the sheriff after a negligent escape from his custody in another.[83]

A petition for discharge from imprisonment on the ground that the summons was served after death of the original plaintiff is properly denied where defendant appeared and answered, without objection, after plaintiff's executrix was substituted as party plaintiff.[84]

Hearing and determination. On the debtor's motion for discharge from a commitment founded only on the facts alleged as the ground for arrest, the facts are to be examined in the same manner as if the motion were to discharge from arrest.[85]

Where an execution against the person was allowed pursuant to a judgment claimed to be based on a charge of fraud, and the debtor was apprehended, it was held improper to discharge him without hearing evidence as to the truth of the charges.[86] A petitioner for a discharge may show that on the trial of the case the evidence was such that the verdict was necessarily on a count which would not warrant the issuing of the execution.[87] Where, in a proceeding by a debtor imprisoned for refusing to surrender his estate, he is charged with fraud, it is sufficient to sustain such charge by a preponderance of the evidence.[88]

The order for discharge should show on its face that it was made by the court.[89] If the debtor has been out on bail pending the hearing of his petition, and the petition is denied, the order should remand the petitioner to the custody of the sheriff.[90] If the statutes provide no method for reviewing the order, the decision is final.[91]

Imposing conditions. The court, in granting a discharge when the arrest is made on an execution issued without authority of law, has no power to impose a condition that the party discharged shall not bring an action for false imprisonment.[92] However, on discharging from imprisonment under an execution for irregularities therein, the court may compel defendant to stipulate that he will not sue for false imprisonment under the execution,[93] or will not bring a suit against plaintiff's attorney;[94] and such a condition may well be imposed where the court is satisfied that the arrest was without malice and on probable cause,[95] or where defendant has been guilty of laches and misleading conduct.[96]

§ 433. On Affidavit or Certificate

In some jurisdictions a discharge may be obtained on making an affidavit, or obtaining a certificate, setting forth facts showing that the commitment was not warranted.

Under some statutes allowing plaintiff a capias ad satisfaciendum on making an affidavit of certain facts, the debtor may obtain his release from custody by making a counteraffidavit denying the facts alleged in plaintiff's affidavit,[97] or by submitting himself to an examination by the magistrate who signed the process[98] and obtaining a certificate as to the nonexistence of the facts stated in plaintiff's affidavit.[99]

§ 434. On Prison-Limits Bond

a. In general
b. In what proceedings allowable
c. Form, requisites, and validity
d. Territorial limits of jail liberties
e. Assignment of bond

a. In General

In some jurisdictions a debtor may avoid actual con-

79. Ill.—Sankstone v. Peo., 175 Ill. App. 653.
23 C.J. p 931 note 42.

80. N.Y.—Bush v. Pettibone, 4 N.Y. 300.

Reason for rule
The only order that can be made in such a case is to send the debtor to an asylum.—Bush v. Pettibone, 5 Barb. 273, Code Rep.,N.S., 264, affirmed 4 N.Y. 300.

81. N.Y.—Moore v. McMahon, 20 Hun 44.

82. N.Y.—Lockwood v. Mercereau, 6 Abb.Pr. 206.

83. N.Y.—Lockwood v. Mercereau, supra.

84. Ill.—Ehrenwerth v. Moog, 23 N.E.2d 353, 302 Ill.App. 114.

85. N.Y.—Moore v. Calvert, 9 How. Pr. 474.

86. Ohio.—Soinski v. Wardaszko, 176 N.E. 460, 38 Ohio App. 388.

87. Ill.—Kitson v. Ellinger, 35 Ill. App. 55.

88. Ill.—First Nat. Bank v. Sanford, 83 Ill.App. 58.

89. N.Y.—Hayes v. Bowe, 12 Daly 193, 65 How.Pr. 347.
23 C.J. p 931 note 51.

90. Ill.—Biebel v. Kuttnauer, 147 Ill.App. 627.

91. R.I.—Shaw v. Silverstein, 44 A. 931, 21 R.I. 500.

92. N.Y.—Mayer v. Rothschild, 59 How.Pr. 510.

93. N.Y.—Walker v. Isaacs, 36 Hun 233—Deyo v. Van Valkenburgh, 5 Hill 242.

94. N.Y.—Davis v. Wiggins, 1 How. Pr. 159.

95. N.Y.—Northern R. Co. v. Carpentier, 4 Abb.Pr. 47.
23 C.J. p 932 note 57.

96. N.Y.—Sherwood v. Pierce, 50 N.Y.Super. 378.

97. Ala.—Marrow v. Weaver, 8 Ala. 288.

98. Vt.—Ex parte Davis, 18 Vt. 401
23 C.J. p 932 note 60.

99. Vt.—In re Proctor, 27 Vt. 118.
23 C.J. p 932 note 61.

finement within the jail by furnishing a prison-limits bond or depositing cash in lieu thereof. In legal contemplation, such a bond is in effect an extension of the prison walls to the jail limits, and a substitute for custody by the sheriff.

In a number of jurisdictions a debtor who is subject to imprisonment under an execution may be accorded the liberty of the jail limits, or the benefit of the prison bounds, on giving a prison-limits bond with proper security,[1] and otherwise complying with the statutory conditions.[2] The purpose of the bond is to enlarge the debtor's liberties by permitting him to avoid actual confinement within the physical limits of the jail, although at the same time requiring him to remain within designated territorial limits.[3] To authorize such a bond, actual confinement in jail is unnecessary,[4] provided the debtor has been arrested and is in the actual custody of the officer.[5] The bond is required for the protection of both the sheriff and the judgment creditor,[6] although it has been held that the indemnity of the bond is, in effect, to cover the liability of the sheriff to the judgment creditor by reason of the debtor's escape.[7]

Delivery and acceptance. A delivery of the bond to the jailer has been held to be a good delivery to the obligee.[8] The acceptance of the bond may be implied from the conduct of the party whose duty it is to accept it.[9]

Effect. In legal contemplation a debtor released under a prison-limits bond is considered as still confined[10] within the walls of the prison,[11] and the only effect of the undertaking, so far as the debtor is concerned, is to extend the walls of the jail to the jail limits.[12] A prison-limits bond is in effect a substitute for custody by the sheriff,[13] and the sheriff can confine the debtor again only on his bails becoming insufficient.[14]

Cash deposit in lieu of bond. In New York a debtor who is entitled to be released on giving an undertaking for jail liberties may, in lieu thereof, deposit a sum of money.[15] Plaintiff cannot have such moneys applied in satisfaction of the original judgment.[16] A summary order directing that the moneys be turned over to a party can be made only if there is no dispute as to the right to the fund.[17]

b. In What Proceedings Allowable

The right to jail liberties under bond may be limited by statute to certain classes of actions or proceedings. In a few jurisdictions the debtor may be confined under a certified or close-jail execution, in which case he cannot obtain jail liberties.

The right to jail liberties under bond may be limited by statute to certain classes of actions or proceedings;[18] thus it has been held, under various statutes, that bonds for the prison limits are allowable to persons in execution under an attachment for costs,[19] a defendant in an action for malicious

1. Mich.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.
N.Y.—Sowma v. Roizen, 233 N.Y.S. 288, 133 Misc. 562.
Wis.—Rutzen v. Mitten, 288 N.W. 172, 232 Wis. 584.
23 C.J. p 932 note 63.
Prison-limits bond for relief from arrest on mesne process see Arrest § 80 c.

2. R.I.—McManaman Petitioner, 16 A. 148, 16 R.I. 358, 1 L.R.A. 561.
23 C.J. p 932 note 64.
Waiver by sheriff
Where a prisoner desirous of being admitted to the prison bounds applies to the sheriff and offers to prepare a bond with ample security, and the sheriff refuses to take any bond, the sheriff thereby waives the performance of any further act by the prisoner.—Mann v. Vick, 8 N.C. 127.
An assignment for benefit of creditors, given under a statute governing liberty of the jailyard, is valid, although not accompanied by a sworn itemized schedule of assets and list of creditors as required by a general statute with respect to common-law assignments for benefit of creditors. —Andrews v. Reynolds, 120 A. 61, 45 R.I. 74.

3. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.
N.Y.—Wesenberg v. McCormack, 198 N.Y.S. 340, 119 Misc. 775.

4. Kan.—Doyle v. Boyle, 19 Kan. 168.
23 C.J. p 932 note 66.

5. Kan.—Doyle v. Boyle, 19 Kan. 168—Carthrae v. Clark, 5 Leigh 268, 73 Va. 268.

6. Mich.—Schwartz v. Golner, 224 N.W. 351, 246 Mich. 73.

7. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.

8. Me.—Kimball v. Preble, 5 Me. 353.

9. Me.—Coffin v. Herrick, 10 Me. 121.
23 C.J. p 934 note 8.

10. N.Y.—Wesenberg v. McCormack, 198 N.Y.S. 340, 119 Misc. 775.

11. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.
Ohio.—Buttles v. Carlton, 1 Ohio 32.
"An escape from the liberties is an escape from the prison."—Geddes v. Sibley, 163 A. 596, 599, 116 Conn. 22.

12. Conn.—Geddes v. Sibley, supra.
N.Y.—Wesenberg v. McCormack, 198 N.Y.S. 340, 119 Misc. 775.

13. Mich.—Smith v. Grosslight, 81 N.W. 975, 123 Mich. 87.
23 C.J. p 932 note 68—5 C.J. p 517 note 81 [a].
Loss of control by officer
After a debtor has given a bond for the prison limits, he is no longer in the hands of the officer and the latter has no control over him.—Wendover v. Tucker, 4 Ind. 381.

14. U.S.—McClean v. Plumsell, D. C., 15 F.Cas.No.8,693, 4 Cranch C.C. 86—U. S. v. Noah, C.C., 27 F.Cas. No.15,894, 1 Paine 368.

15. N.Y.—Wesenberg v. McCormack, 198 N.Y.S. 340, 119 Misc. 775.

16. N.Y.—World Exchange Bank v. Brown, 218 N.Y.S. 523, 128 Misc. 449—Wesenberg v. McCormack, 198 N.Y.S. 340, 119 Misc. 775.
Moneys deposited by a third person may be returned to him in a proper case.—Wesenberg v. McCormack, supra.

17. N.Y.—World Exchange Bank v. Brown, 218 N.Y.S. 523, 128 Misc. 449.

18. Vt.—Lowrey v. Barney, 2 D. Chipm. 11.

19. N.Y.—Jackson v. Billings, 1 Cai. 252.

prosecution,[20] or a defendant arrested under an execution issued for damages recovered in an action of trespass quare clausum fregit.[21] Where a special statute provides for an execution against the person in a particular kind of action, but makes no provision as to jail liberties, the general statute relating to jail liberties is ordinarily applicable.[22] A husband committed for contempt in not paying alimony is not entitled to the jail liberties on giving a bond to the sheriff, since such imprisonment is not pursuant to a body execution or an order of arrest.[23]

If the sheriff admits the debtor to jail liberties in a case not provided for by statute, the bond taken may be held void, and the sheriff held guilty of a voluntary escape.[24]

Certified or close-jail execution. In a few jurisdictions a defendant may be committed under a certified or close-jail execution where the cause of action on which the judgment is based is certified to have arisen from defendant's willful or malicious act, or from a misapplication of trust funds;[25] and a person so committed is not entitled to the jail liberties.[26]

The facts warranting such an execution must be properly adduced before the court;[27] but, where a proper showing has been made, plaintiff is entitled to a close-jail execution as of right, and the court has no discretion to refuse it.[28]

c. Form, Requisites, and Validity

A bond for the prison limits should be in proper form and should substantially comply with the governing statutes. It is commonly required to be for double the debt and costs, and has variously been held properly payable to the jailer, to the sheriff, or either to the officer or to the creditor.

A bond for the prison limits should be made pursuant to the statute in force at the time,[29] and should comply with the terms of the statute;[30] but the bond will suffice if it complies substantially with the statute without pursuing its very words,[31] and a bond which is insufficient as a statutory bond may nevertheless be good at common law.[32]

A bond is valid where blanks therein are afterward filled up by a third person by verbal authority

20. S.C.—Walker v. Briggs, 19 S.C. L. 118.

21. S.C.—Smith v. Hogg, 31 S.C.L. 86.

22. N.Y.—Peo. v. Monaco, 105 N.Y.S. 401, 54 Misc. 25.
23 C.J. p 932 note 78.

23. N.Y.—In re Clark, 20 Hun 551—Allen v. Allen, 58 How.Pr. 381.

24. Vt.—Lowrey v. Barney, 2 D. Chipm. 11.

25. Vt.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258—McAllister v. Benjamin, 121 A. 263, 96 Vt. 475.
23 C.J. p 933 note 79.

Distinction from ordinary body execution

A close-jail execution is a body execution which contains a statement that the action arose from defendant's willful or malicious act and that defendant should be confined to close jail; and the mere fact that the close-jail certificate on a close-jail execution is vacated does not entitle the debtor to a discharge from custody, since a body execution still remains.—Ex parte Thompson, 9 A.2d 107, 111 Vt. 7.

Trover

Plaintiff, recovering judgment in trover for willful and malicious appropriation of goods sold to defendant under consignment contract, is entitled to close-jail execution.—Smith v. Ladrie, 129 A. 302, 98 Vt. 429.

Motion in supreme court

(1) A motion for a certified execution will not be entertained in the supreme court where plaintiff had an opportunity to present it in the lower court.—Downer v. Battles, 152 A. 805, 103 Vt. 201.

(2) A plaintiff against whom judgment has been rendered in the lower court may, on prevailing in the supreme court, make a motion there for a certified execution, since he has not previously had an opportunity so to move.—North Adams Beef & Produce Co. v. Cantor, 156 A. 879, 103 Vt. 514—Smith v. Ladrie, 129 A. 302, 98 Vt. 429.
23 C.J. p 933 note 79 [e] (2).

A court of chancery has no power to issue a certified execution unless such power is conferred by statute.—Lyon v. Prescott, 156 A. 679, 103 Vt. 442.

26. Vt.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258.
23 C.J. p 933 note 79.

"While a person in jail on a body execution may apply to be admitted to the liberties of the jail yard or for the privilege of taking the poor debtor's oath, one in jail on a close jail execution is not entitled to make either of these applications while the close jail certificate is in force."—Ex parte Thompson, 9 A.2d 107, 111 Vt. 7.

27. Vt.—Ex parte Thompson, supra.

Judgment on agreement of counsel

The court cannot issue a close-jail certificate on a judgment rendered by agreement of counsel, without a hearing on the merits, notwithstanding the filing of an affidavit as to the facts.—Ex parte Thompson, supra.

28. Vt.—Ex parte Thompson, supra —Lyon v. Prescott, 156 A. 679, 103 Vt. 442.

29. Me.—Huntress v. Wheeler, 16 Me. 290—Gooch v. Stephenson, 15 Me. 129.

Approval by sheriff, preferably, although not necessarily, in writing, required.—Rutzen v. Mitten, 288 N. W. 172, 232 Wis. 584.

30. Mich.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.
23 C.J. p 933 note 85.

Justification or approval of sureties

(1) Surety held not required to justify.—Rutzen v. Mitten, 288 N.W. 172, 232 Wis. 584.

(2) Where a statutory provision that the sureties in the bond shall be approved by two justices is intended merely for the benefit of the debtor, to prevent his oppression by the creditor, and the creditor agrees to take the bond without such approval, the intent of the statute is fulfilled, and the bond cannot be avoided by the obligors for the want of such formality.—Bartlett v. Willis, 3 Mass. 86.

31. Mass.—Wiggin v. Peters, 1 Metc. 127.
23 C.J. p 933 note 86.

32. Conn.—Seymour v. Harvey, 8 Conn. 63.
23 C.J. p 933 note 87.

from the obligors.[33] It is not invalid because it bears a date prior to the commitment, if it was executed after commitment,[34] or because of a mistake in the recital of the writ under which the prisoner is confined, if it is at once corrected,[35] or because the records of the inferior court did not show at the time that a plan of the bounds had been returned by the sheriff, or that a survey of them had been made under the direction of such court as required by law.[36] Although the fact that a debtor is permitted at his own request to go outside the prison limits in company with the jailer may constitute a voluntary escape as between the sheriff and the creditor, yet it does not render void a bail bond afterward given.[37]

A bond is void if it contains terms or obligations not authorized by statute,[38] is executed by the debtor under duress,[39] or is executed without consideration,[40] as where the debtor was arrested on an invalid writ.[41]

Amount of bond. Although the ordinary rule is that a prison-limits bond should be for double the debt and costs,[42] yet a provision to this effect has been held merely directory;[43] and a bond in a less sum will be sufficient if accepted,[44] provided it is large enough to satisfy the judgment in favor of the creditor.[45]

By and to whom executed. Execution of the bond by the sureties alone has been held sufficient,[46] while under other authority such a bond is incomplete and may be repudiated by either party.[47]

The bond for the prison limits may be held properly payable to the jailer[48] or to the sheriff,[49] or either to the officer or to the creditor.[50] It has been held that a bond for prison liberties of a prisoner under federal process must be to the marshal, and that, if it is given to the sheriff, it is void.[51]

Joint bond. Two persons against whom there is a joint judgment and execution, and who are arrested and committed to prison, may execute a joint prison-bounds bond.[52]

d. Territorial Limits of Jail Liberties

The limits of jail liberties may be made sometimes coextensive with the county limits. Jail limits may be altered, in which case the prisoner must remain within the new limits. The prisoner has the same right as other persons to go anywhere within the jail limits.

A prisoner for debt is restricted to the jail limits fixed by the existing law, although they were more extensive when he gave his bond.[53] Under some statutes the limits of jail liberties are coextensive with the limits of the county,[54] and, in contemplation of law, the establishment of prison bounds coextensive with the county extends the prison walls to the county line,[55] even though such line has been extended.[56]

The power to establish and alter the territorial limits of jail liberties may be conferred on certain courts, such as the courts of sessions,[57] or on boards of supervisors on recommendation of the county courts.[58] The bounds may be required to be recorded,[59] but monuments are not necessary to define the limits.[60] Statutes of a state fixing bounds

33. Me.—Fullerton v. Harris, 8 Me. 393.
Redelivery has been held required in the case of a paper signed in blank with verbal authority given to fill it up as a prison-bounds bond. —Gilbert v. Anthony, 1 Yerg., Tenn., 69, 24 Am.D. 439.

34. Vt.—Clark v. Kidder, 12 Vt. 689.

35. Mich.—In re Fredrick, 71 N.W. 835, 113 Mich. 468.
23 C.J. p 933 note 93.

36. Ga.—Galloway v. Camp, 31 Ga. 586.

37. Conn.—Bulkley v. Finch, 37 Conn. 71.

38. Ky.—January v. Cartwright, Litt.Sel.Cas. 449, 12 Am.D. 331.
23 C.J. p 933 note 88.

39. N.Y.—Thompson v. Lockwood, 15 Johns. 256.
23 C.J. p 933 note 89.

40. Ind.—Gresham v. Bowen, 7 Blackf. 423.

41. Ind.—Gresham v. Bowen, 7 Blackf. 423.

42. Mich.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.
23 C.J. p 934 note 98.

43. Ala.—Croom v. Travis, 10 Ala. 237.

44. Me.—Pease v. Norton, 6 Me. 229 —Kimball v. Preble, 5 Me. 353.

45. Vt.—Udall v. Rice, 1 Tyler 213.

46. Kan.—Hickman v. Fargo, 42 P. 381, 1 Kan.App. 695.

47. La.—Curtis v. Moss, 2 Rob. 367.

48. Ky.—Barns v. Williams, 2 Bibb 562.

49. Ky.—McMeekin v. Foster, 3 Bibb 48, 6 Am.D. 635.
23 C.J. p 933 note 81.

50. Me.—Pease v. Norton, 6 Me. 229.
23 C.J. p 933 note 82.

51. Vt.—Warren v. Russel, 1 D. Chipm. 193.
23 C.J. p 933 note 83.

52. Va.—McGuire v. Pierce, 9 Gratt. 167, 50 Va. 167.

53. Me.—Lewis v. Staples, 8 Me. 173.
23 C.J. p 935 note 32.

54. Mich.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.
N.Y.—Katz v. Massachusetts Bonding & Insurance Co., 178 N.E. 560, 257 N.Y. 365, reversing 246 N.Y.S. 796, 231 App.Div. 848, affirming 249 N.Y.S. 21, 140 Misc. 79.
23 C.J. p 935 note 34 [a].

55. Ohio.—Kirkup v. Stickney, 5 Ohio Dec., Reprint, 499, 6 Am.L. Rec. 300.
23 C.J. p 935 note 34.

56. La.—Guion v. Ford, 12 Rob. 123.

57. Mass.—Walter v. Bacon, 8 Mass. 468.
23 C.J. p 935 note 28.

58. N.Y.—Roach v. O'Dell, 33 Hun 320, affirmed 1 N.E. 403, 99 N.Y. 635.
23 C.J. p 935 note 29.

59. Va.—McGuire v. Pierce, 9 Gratt. 167, 50 Va. 167.
23 C.J. p 935 note 30.

60. Ohio.—Lucky v. Brandon, 1 Ohio 49.

do not govern prisoners confined under process from the federal courts.[61]

The prisoner has the same right to go anywhere within the jail limits that other persons have.[62]

c. Assignment of Bond

The officer, or his deputy in the officer's name, or his successor in office, may assign the bond to the creditor after a breach thereof; and under some statutes such assignment releases the sheriff from liability for the debtor's escape.

The bond may be legally assigned by the officer to whom it is made to the party for whose benefit it was intended,[63] after a breach of the bond,[64] and in some jurisdictions, where a debtor gives the jailer a bond for the prison limits and escapes, it is the jailer's duty to assign the bond to the creditor;[65] but such assignment cannot be made to a third person.[66] The assignment may be made in the name of the officer who took the bond, by his deputy,[67] or, generally, by such officer's successor in office,[68] although it has been held that, if a bond taken by an outgoing officer is not assigned to the new officer within the time prescribed by statute, it is void in the hands of the undersheriff or his assignee.[69]

Effect. Under some statutes the sheriff's assignment of the bond to the judgment creditor and the latter's acceptance thereof release the sheriff from liability for the debtor's escape.[70] It has been held that after an assignment of the bond the sheriff cannot accept a surrender of the debtor.[71]

§ 435. —— Performance or Breach

a. In general
b. Escape

a. In General

The bond is forfeited if its conditions, or those of governing statutes, are not performed, as where the debtor fails to surrender himself or furnish a schedule of his assets. A discharge of the debtor under a poor debtors' act is generally considered a satisfaction of the bond.

The obligor in a prison-limits bond must faithfully perform the conditions of the bond and the governing statute, or the bond will be forfeited.[72] The bond may be forfeited by failure of the debtor to surrender himself in accordance with the conditions of the bond.[73] In South Carolina, the bond is forfeited if the obligor does not furnish a schedule of his assets within a certain time;[74] and plaintiff may sue and recover for a breach in not rendering a schedule within the proper time,[75] even where the prisoner has been discharged without opposition,[76] and unless there is a valid excuse for such failure, in which case he will be allowed to file it afterward nunc pro tunc.[77]

Creditor's receipt for satisfaction. The bond is discharged by the creditor's receipt, given to the debtor, in satisfaction of the judgment and execution, on an agreement fairly made by the creditor and a third person, although the creditor is not able to obtain any benefit from such agreement.[78]

Discharge as poor debtor. The general rule is that a discharge under a poor debtors' act is a release from, and a satisfaction of, the jail-limits bond,[79] even though the discharge was obtained by fraud.[80] Thus the failure of the debtor to surrender himself does not effect a breach of the bond if he has within the required time assigned his property for the benefit of his creditors and has obtained a discharge under an act for the relief of poor debtors.[81]

61. Ky.—Moore v. Allen, 7 J.J. Marsh. 651.

62. N.Y.—Rosenzweig v. U. S. Fidelity & Guaranty Co., 151 N.Y.S. 237.
Ohio.—Lucky v. Brandon, 1 Ohio 49.

63. Mich.—Kruse v. Kingsbury, 60 N.W. 443, 102 Mich. 100.
23 C.J. p 935 note 37.

64. Wis.—Muirhead v. Bruns, 223 N. W. 565, 198 Wis. 104.
23 C.J. p 936 note 38.
Assignment before particular breach
Where the bond has been breached several times, an assignment is valid where made after one breach, although before the particular breach for which liability is subsequently sought to be imposed.—Schwartz v. Golner, 224 N.W. 351, 246 Mich. 73.

65. Ky.—Barns v. Williams, 2 Bibb 562.
23 C.J. p 936 note 39.

66. S.C.—Wicker v. Pope, 47 S.C.L. 387, 75 Am.D. 732.
23 C.J. p 936 note 40.

67. Mich.—Hughes v. Hally, 100 N. W. 591, 137 Mich. 433.
23 C.J. p 936 note 41.

68. S.C.—McElwee v. White, 31 S.C. L. 95.
Va.—Vanmeter v. Giles, 1 Rob. 328, 40 Va. 328.

69. N.Y.—Ridgway v. Barnard, 28 Barb. 613.

70. Mich.—Schwartz v. Golner, 224 N.W. 351, 246 Mich. 73.
Wis.—Muirhead v. Bruns, 223 N.W. 565, 198 Wis. 104.

71. U.S.—U. S. v. Noah, C.C.N.Y., 27 F.Cas.No.15,894, 1 Paine 368.

72. S.C.—Wigfall v. Smyth, 13 S.C. L. 135.

73. R.I.—In re McManaman, 16 A. 148, 16 R.I. 358, 1 L.R.A. 561.
23 C.J. p 935 note 23.

74. S.C.—Wigfall v. Smyth, 13 S.C. L. 135.

75. S.C.—McElwee v. White, 31 S.C. L. 95.
23 C.J. p 954 note 16.

76. S.C.—McElwee v. White, supra.

77. S.C.—Crovat v. Coburn, 14 S.C. L. 14.
23 C.J. p 934 note 9 [a] (2), p 954 note 18.

78. Me.—Ellenwood v. Dickey, 9 Me. 125.

79. S.C.—Hamilton v. Hamilton, 45 S.C.L. 351.
23 C.J. p 970 note 67.

80. U.S.—Ammidon v. Smith, R.I., 1 Wheat. 447, 4 L.Ed. 132.

81. U.S.—Mason v. Haile, R.I., 12 Wheat. 370, 6 L.Ed. 660.
23 C.J. p 935 note 24.

b. Escape

An escape occurs, so as to breach the bond, when the prisoner goes outside the jail limits without any legal excuse, unless the obligee consents to such departure.

A prisoner having jail liberties is bound at his peril and at the risk of his sureties to keep within the proper limits; and, if the lines are in any part vague and indefinite, he should confine himself within the places where they are not so.[82] The conditions of the bond are broken where the debtor departs from such limits,[83] without the consent of the obligee in the bond;[84] unless a statute prescribes otherwise, such consent may be oral or in writing, or may be manifested by conduct indicating acquiescence.[85]

According to some decisions, an unauthorized departure constitutes a breach of the bond however innocent the departure, whatever the distance, and however soon the prisoner returns;[86] but according to others there will be no forfeiture where such transgression of the limits is unintentional and the debtor returns as soon as he is aware of his fault.[87]

It has been held that it is not a breach of the bond for the debtor to leave the prison limits where the judgment creditor refuses to pay in advance the prison fees for the subsistence of the judgment debtor;[88] or where the debtor escapes while insane;[89] or where the escape is made from necessity and without the consent of the debtor, as by his being carried out of the jail in a fit of sickness.[90]

Liberty during daytime only. Under some statutes, the debtor's liberty is during the daytime only; at night he is supposed to return to the apartments of the prison assigned for that purpose, and if he does not do so it constitutes an escape.[91] However, he is not guilty of an escape if he passes the night in a house appropriated by the county to the use of prisoners, although the jailer exercises no control over the house or prisoner.[92]

§ 436. —— Liability of Sureties

The liability of sureties depends on the provisions of the bond and the statutes. A surrender, discharge, or escape of the debtor may discharge or release the sureties in some circumstances, but not in others.

The liability of the sureties on a prison-limits bond depends on the terms of the undertaking which they have executed,[93] and of the statute under which it was executed.[94] The sureties are liable where the debtor escapes before the time is out for charging him in execution.[95] The liability of the surety to the creditor is fixed as soon as the bond has been breached and the creditor has acquired his right to the bond by assignment.[96] Where a new bond is taken in place of an old one, an addi-

82. N.Y.—Kip v. Brigham, 7 Johns. 168.

83. Ky.—Rudd v. Hanna, 4 T.B.Mon. 528.
Mich.—Schwartz v. Golner, 224 N.W. 351, 246 Mich. 73.
23 C.J. p 934 note 13.

Only act of God or enemies of the country will excuse an escape.—Optner v. Bolger, C.C.A.Mich., 95 F.2d 241—5 C.J. p 517 note 81 [a].

Professional engagements outside limits

In the absence of statutory authority therefor, an attorney who has given a jail-limits bond cannot excuse his going outside the limits on the ground of professional engagements in the supreme court.—Hughes v. Hally, 100 N.W. 591, 137 Mich. 433—23 C.J. p 937 note 85—5 C.J. p 530 note 41 [a].

84. Wis.—Muirhead v. Bruns, 223 N. W. 565, 198 Wis. 104.
23 C.J. p 934 note 14.
Consent of creditor as defense to action on bond see infra § 437.

Power of court

The court cannot over the creditor's objection permit the debtor to go into another county to attend to his business.—Behrens v. Chevrie, 237 N.W. 551, 255 Mich. 79.

85. N.Y.—Katz v. Massachusetts Bonding & Insurance Co., 178 N. E. 560, 257 N.Y. 365, reversing 246 N.Y.S. 796, 231 App.Div. 848, affirming 249 N.Y.S. 21, 140 Misc. 79.

Conduct showing acquiescence

Acquiescence is shown by the creditor's acceptance of a release furnished by the debtor pursuant to a court order extending the jail limits on condition that the debtor release the creditor from any liability for having caused the arrest.—Katz v. Massachusetts Bonding & Insurance Co., supra.

Termination of assent

An assent to the extension of jail limits pending the determination of an appeal terminates only when the order of the appellate court is remitted to the court below.—Katz v. Massachusetts Bonding & Insurance Co., supra.

86. Ky.—Crump v. Bennett, 2 Litt. 209.
23 C.J. p 934 note 15.
Voluntary return as defense to action on bond see infra § 437.
"A going at large beyond the limits, even for a short time and followed by a return to custody, is an escape for which the sheriff is liable and a breach of the conditions of the bond."—Geddes v. Sibley, 163 A. 596, 599, 116 Conn. 22.

Return before service of process

A breach occurs by the prisoner's going beyond the jail limits whether he returns before or after service of process.—Muirhead v. Bruns, 223 N. W. 565, 198 Wis. 104.

87. Vt.—Downer v. Dana, 19 Vt. 338.
23 C.J. p 934 note 16.

88. Ohio—Kirkup v. Stickney, 5 Ohio Dec., Reprint, 499, 6 Am.L. Rec. 300.

89. U.S.—Hazard v. Hazard, C.C.Vt., 11 F.Cas.No.6,278, 1 Paine 295.

90. Mass.—Baxter v. Taber, 4 Mass. 361.
23 C.J. p 935 note 19.

91. Mass.—McLellan v. Dalton, 10 Mass. 190.
23 C.J. p 935 note 20.

92. Mass.—Jacobs v. Tolman, 8 Mass. 161.

93. Kan.—Hickman v. Fargo, 42 P. 381, 1 Kan.App. 695.

94. N.Y.—Rosenzweig v. U. S. Fidelity & Guaranty Co., 151 N.Y.S. 237.
23 C.J. p 936 note 46.

95. Ky.—Hubbard v. Harrison, 1 Bibb 550.
Escape as breach of bond generally see supra § 435.

96. S.C.—McCarley v. Davis, 26 S. C.L. 34.
Assignment of bond see supra § 434.

tional surety who signs after delivery to, and on requirement of, the sheriff is bound.[97]

Where a debtor enjoying the jail limits is confined under a new commitment, and then escapes, his surety is not liable for the subsequent escape from the new commitment.[98]

Surrender of principal. If the debtor has escaped, the surety cannot surrender him in discharge of the condition of the bond.[99] Thus, while it has been held that the sureties may surrender their principal at any time before judgment is rendered against them on the bond,[1] they cannot, by a surrender made after suit has been commenced on the bond for an escape, have the bond given up and their liability discharged for such escape.[2] It has also been held that sureties on prison-limits bonds cannot release themselves from responsibility by surrendering the debtor.[3] If the bond requires the prisoner to surrender himself at the expiration of a certain period, and he voluntarily surrenders himself before that time, such surrender discharges his sureties,[4] unless the surrender is colorable merely and not intended to have that effect.[5]

Discharge of principal. The sureties to the bond are released where the debtor is discharged by plaintiff,[6] or by a judge in the absence of the sureties.[7]

The release of the surety on a bail bond by the discharge in bankruptcy of the principal is considered in the title Bankruptcy § 581 b (2) (c).

Escape caused by creditor. Sureties are released where the creditor, without the knowledge of the sureties, makes a contract with the debtor which induces the debtor to depart or escape the liberties.[8] The sureties are not, however, released because an escape by the debtor was induced by threats of the creditor to put him in close confinement.[9]

Right of surety against principal. To preserve his rights against the surety, the creditor must so conduct his proceedings as to be at all times able to subrogate the surety to all rights of the creditor against the debtor.[10] A surety who pays a sum of money and receives a discharge with the knowledge of the principal may recover that amount as well as counsel fees for defending a suit on the bond, even though judgment was entered up for its full amount against the principal.[11]

§ 437. —— Proceedings to Enforce Bonds

a. Form of remedy
b. Defenses
c. Parties
d. Pleadings
e. Evidence and trial
f. Damages
g. Judgment, enforcement, and review

a. Form of Remedy

A prison-limits bond may be enforced by an action thereon, or, in some jurisdictions, by a petition in the nature of a scire facias or by motion for summary judgment.

Generally the remedy on a prison-limits bond is by an ordinary action which must be brought within the time fixed by statute.[12] If the bond is forfeited by the prisoner's voluntarily leaving the jail limits, the sheriff has his option to retake and recommit him to close confinement or to sue on the bond.[13]

Scire facias. In some jurisdictions, where a bond for the jail liberties is taken and duly returned and enrolled, the court has jurisdiction of a petition in the nature of a scire facias on such bond,[14] which scire facias must issue from the court having the record on which it is founded.[15] The scire facias may be amended to an action of contract at any time before final judgment.[16]

Summary proceedings. A motion will lie in some

97. Mich.—Kruse v. Kingsbury, 60 N.W. 443, 102 Mich. 100.

98. N.Y.—Bradford v. Consaulus, 8 Cow. 128.
23 C.J. p 936 note 50—5 C.J. p 530 note 41 [b].
Commitment held new
Where the debtor, after giving a prison-limits bond, applies for the benefit of the honest debtor's act, but being convicted of fraud is ordered into custody until a full and fair surrender of his property is made, this is a new commitment, and no action will lie on the prison-limits bond for a subsequent escape. —Lamar v. Foley, 26 Ga. 180.

99. Ind.—Buford v. Ganson, 5 Blackf. 585.

1. N.Y.—Betts v. Livermore, 3 N.Y. Super. 684.
2. N.Y.—Betts v. Livermore, supra.
3. La.—Bryan v. Turnbull, 8 Mart., N.S., 108.
4. Ala.—Morrow v. Weaver, 8 Ala. 288.
5. Ala.—Morrow v. Weaver, supra.
6. La.—Elkins v. Zacharie, 6 La. 646.
23 C.J. p 936 note 55.
7. Kan.—Hickman v. Fargo, 42 P. 281, 1 Kan.App. 695.
23 C.J. p 936 note 56.
8. Vt.—Conant v. Patterson, 7 Vt. 163.
Escape with obligee's consent generally see supra § 435.
9. Ky.—Hubbard v. Harrison, 1 Bibb 550.
10. La.—Comstock v. Creon, 1 Rob. 528.
11. Vt.—Bancroft v. Pierce, 27 Vt. 668.
12. One year
Mass.—Call v. Hagger, 8 Mass. 423.
13. N.Y.—Barry v. Mandell, 10 Johns. 563—Jansen v. Hilton, 10 Johns. 549.
14. U.S.—Campbell v. Hadley, D.C. Mass., 4 F.Cas.No.2,358, 1 Sprague 470.
15. Mass.—Sewall v. Sullivan, 108 Mass. 355.
16. Mass.—Sewall v. Sullivan, 108 Mass. 355.
23 C.J. p 936 note 64.

jurisdictions for summary judgment on a prison-limits bond where the conditions thereof are in conformity with the requirements of the statute.[17] In New York, if judgment has been rendered against the sheriff in an action for escape, and notice of the pendency of the action was given to the prisoner and his suretics, the court must order a summary judgment for the sheriff in an action by him on the bond;[18] and the recovery in the action for escape may be set up by supplemental complaint in a summary proceeding on the bond.[19]

b. Defenses

Apart from numerous particular circumstances held or held not to constitute a defense to an action on a prison-limits bond, the obligors may, in general, assert by way of defense facts showing that the bond had no valid inception, that it was not in fact breached, or that it ceased to be effective and binding. Whether defendant's voluntary return to the bounds before commencement of the suit is a defense is in dispute.

It has been held a good defense to an action on the bond that a statute was subsequently passed abolishing imprisonment for debt,[20] although there is authority to the contrary.[21]

A surety in a bond for jail liberties has no equities to entitle him to any other defense than would avail his principal.[22]

Validity of levy or execution. The fact that the levy and imprisonment were illegal has been held not necessarily to relieve the debtor and his surety of their liability on a jail-liberties bond;[23] thus the debtor and his surety cannot escape liability on the ground that execution had been stayed at the time of the levy by reason of the pendency of a writ of error.[24] On the other hand, it has been held that defendant may interpose a valid defense to an action on a prison-bounds bond by showing that the execution under which the debtor was imprisoned was illegal,[25] or has been quashed for irregularity,[26] or rendered of no effect by a writ of supersedeas and certiorari obtained by defendant, under which the cause is ordered placed on the trial docket before a motion is made on the bond.[27]

Voluntary return. Defendant's subsequent voluntary return to the bounds before commencement of the suit has been held no defense;[28] but there is authority to the contrary,[29] particularly in jurisdictions where the statutes make such a return a defense.[30]

Miscellaneous defenses held valid. It has been held to constitute a valid defense to an action on the bond that the judgment and execution have been vacated on conditions which have been performed;[31] that the debtor left the bounds with the consent and license of the creditor[32] or with the consent of the sheriff;[33] that the debtor had been duly committed to an asylum as a lunatic;[34] that the bond was executed under duress;[35] that the debt has been paid;[36] that the debtor had been discharged as an insolvent and presented his discharge to the sheriff who there-

17. N.C.—Northam v. Terry, 30 N.C. 175.
23 C.J. p 937 note 65.

18. N.Y.—Buttling v. Hatton, 51 N. Y.S. 305, 30 App.Div. 191.
23 C.J. p 937 note 66.

19. N.Y.—Buttling v. Hatton, 53 N. Y.S. 1009, 33 App.Div. 551.

20. Conn.—Sedgwick v. Knibloe, 16 Conn. 219.
23 C.J. p 937 note 90.

21. Ala.—Croom v. Travis, 10 Ala. 237.
23 C.J. p 937 note 91.

22. Ala.—Tait v. Frow, 8 Ala. 543.
23 C.J. p 938 note 3.

23. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.

Waiver of illegality

So far as liability on the bond is concerned, the debtor and his surety, by their execution of the bond, waive whatever illegality may have existed in the levy.—Geddes v. Sibley, supra.

Voluntary bond by privileged person

Where a witness or other person privileged from arrest on capias ad satisfaciendum, instead of causing himself to be discharged by habeas corpus, gives a prison-bounds bond, it is a voluntary act, which he cannot afterward avoid.—Tipton v. Harris, 1 Peck, Tenn., 414.

24. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.

25. Vt.—Witt v. Marsh, 14 Vt. 303.
23 C.J. p 937 note 86.

Unauthorized writ

The obligors on a bond for jail limits may defend on the ground that the writ of capias ad satisfaciendum was void because not warranted by the nature of the action underlying the judgment.—General Motors Acceptance Corporation v. Ellar, 220 N.W. 766, 243 Mich. 603.

26. N.Y.—Battle v. National Surety Co., 138 N.Y.S. 46, 78 Misc. 253.
Ohio.—Hyatt v. Robinson, 15 Ohio 372.

27. N.C.—Gidney v. Hallsey, 9 N.C. 550.

28. Va.—McGuire v. Pierce, 9 Gratt. 167, 50 Va. 167.
23 C.J. p 938 note 98.

29. Ala.—Morrow v. Parkman, 14 Ala. 769.

30. Mich.—Smith v. Grosslight, 81 N.W. 975, 123 Mich. 87.
N.Y.—Milanese v. Lexington Surety & Indemnity Co., 270 N.Y.S. 530, 151 Misc. 44, affirmed 267 N.Y.S. 990, 240 App.Div. 888, appeal denied 268 N.Y.S. 925, 240 App.Div. 1020 and affirmed 195 N.E. 189, 266 N.Y. 538.
23 C.J. p 938 notes 1, 2.

Prevention of return

Action could not be maintained against surety by plaintiff who prevented prisoner's voluntary return to jail limits.—Milanese v. Lexington Surety & Indemnity Co., supra.

31. N.Y.—Battle v. National Surety Co., 138 N.Y.S. 46, 78 Misc. 253.

32. Vt.—Hobbs v. Whitney, 2 Tyler 409.
23 C.J. p 937 note 92.
Departure with creditor's consent as constituting escape see supra § 435.

33. N.Y.—Buttling v. Hatton, 45 N. Y.S. 720, 18 App.Div. 128.
23 C.J. p. 937 note 93.

34. Mass.—Fuller v. Davis, 1 Gray 612.

35. Ky.—Jones v. Turner, 5 Litt. 147.

36. Vt.—Allen v. Ogden, 12 Vt. 9.
23 C.J. p 938 note 97.

upon liberated him;[37] or that at the time of the alleged escape the debtor had been discharged from imprisonment by virtue of a statute limiting the length of time that a debtor could be imprisoned.[38]

Miscellaneous defenses held invalid. It has been held no defense to a proceeding on a prison-limits bond that the debtor's property has been sold under a fieri facias;[39] that the penalty of the bond is more or less than required by statute;[40] that there was a collateral promise not to arrest defendant on the particular execution;[41] that subsequently to the escape, plaintiff assented thereto;[42] that the sheriff promised that, if defendant escaped, he would not sue him until he had first sued the bail;[43] that the sheriff misinstructed the prisoner as to the limits;[44] that there was a discharge by a commissioner of special bail;[45] that there was a custom of the jailer to permit prisoners for debt who had the liberty of the yard to keep apartments not appropriated to their use by law;[46] or that action was not brought against the sheriff within a specified time;[47] and in addition to the foregoing, other particular facts have been held not to constitute a defense.[48]

c. Parties

The party to whom the bond was made, or his assignee, may sue thereon; but some authorities do not permit the sheriff to sue unless he shows injury to himself.

A suit on a prison-limits bond may be maintained by the party to whom it was made[49] or by his assignee.[50] Plaintiff may sue the surety on a prison-bounds bond without joining the principal and before judgment against the latter.[51] According to some decisions, a bond given to the sheriff for the prison liberties is for his indemnity only, and neither the sheriff nor his assignee can recover on such bond without showing that he has been injured;[52] however, where the bond is held to be not merely for indemnity, the necessity for damage is obviated,[53] and plaintiff is required only to show an escape,[54] or at least is not required to prove any special damage.[55]

A sheriff who has a right of action on the bond may maintain such action notwithstanding the recovery of a judgment by the creditor against his successor in office for the same escape;[56] but the former sheriff cannot maintain the action where the escape occurred after the prisoner had been assigned to the new sheriff.[57]

d. Pleadings

In an action on a prison-limits bond, it is sufficient for the declaration to assign the breach according to the substance of the condition. Facts asserted by way of defense, such as performance of the condition or a discharge, must be properly pleaded.

In an action on a prison-limits bond, it will be sufficient for the declaration to assign the breach according to the sense and substance of the condition;[58] and it is not necessary to plead a statutory requirement which is merely for the protection of the sheriff and is not a part of the bond.[59] A declaration averring a breach of condition of the bond must also allege the existence of the judgment and execution under which the prisoner was committed and the bond was given.[60]

37. N.Y.—Hayden v. Palmer, 2 Hill 205.
23 C.J. p 938 note 94.
Discharge of principal as releasing surety see supra § 436.

38. N.Y.—Sowma v. Roizen, 233 N.Y.S. 288, 133 Misc. 562.

39. S.C.—Miller v. Bagwell, 14 S.C.L. 429.

40. Ohio.—Hyatt v. Robinson, 15 Ohio 372.

41. U.S.—Hawes v. Marchant, C.C.R.I., 11 F.Cas.No.6,240, 1 Curt. 136.

42. U.S.—Slocum v. Hathaway, C.C.Vt., 22 F.Cas.No.12,952, 1 Paine 290.
23 C.J. p 937 note 71.

43. Vt.—Rice v. Pollard, 1 Tyler 230.

44. Mass.—Call v. Hagger, 8 Mass. 423.

45. S.C.—Williams v. Jones, 20 S.C.L. 431.

46. Mass.—Clap v. Cofran, 10 Mass. 373.

47. N.Y.—Hinds v. Doubleday, 21 Wend. 223.

48. **Waiver on terms**
An agreement to waive performance of the condition of the bond, on certain terms, is not a defense where the debtor has not complied with such terms.—Smith v. Burlingame, 4 R.I. 45.

Omission induced by debtor's deception
The failure of the creditor to advance money for the debtor's support, although ordinarily a ground for discharge, will be no defense in an action on a jail-limits bond, where such failure was induced by the debtor's deception which was known to the sureties.—Eldridge v. Bush, Smith, N.H., 288.

49. Vt.—Weeks v. Stevens, 7 Vt. 72 —Lowrey v. Hine, 2 D.Chipm. 59.

Sheriff
Mich.—Schwartz v. Golner, 224 N.W. 351, 246 Mich. 73.

50. Mich.—Schwartz v. Golner, supra.
23 C.J. p 938 note 5.

51. La.—Wood v. Fitz, 10 Mart. 196.

52. Conn.—Sedgwick v. Knibloe, 16 Conn. 219.
N.Y.—Barry v. Mandell, 10 Johns. 563.

53. N.J.—Camp v. Allen, 12 N.J.Law 1.
23 C.J. p 937 note 80.

54. Va.—Meredith v. Duval, 1 Munf. 76, 15 Va. 76.

55. Ky.—Hubbard v. Harrison, 1 Bibb 550.

56. N.Y.—Hinds v. Doubleday, 21 Wend. 223.

57. N.Y.—Hinds v. Doubleday, supra.
23 C.J. p 937 note 82.

58. N.J.—Camp v. Allen, 12 N.J.Law 1.

59. Ohio.—Lamborn v. Bowen, Tapp. 342.
23 C.J. p 938 note 13.

60. Vt.—Dyer v. Cleaveland, 18 Vt. 241.
23 C.J. p 938 note 14.

Where the declaration shows that the bond sets forth a judgment of a different date from that on which the execution issued, the variance is fatal;[61] and, where it is pleaded that no such execution issued as was described in the bond, which plea is traversed, a misdescription as to the damages and costs mentioned in the execution is a variance, and, if the execution offered varies from the one described in the bond and judgment, it will not support the action.[62]

Plea or answer. The facts asserted by way of defense must be properly pleaded.[63]

In an action of debt on the bond, a plea of performance in the words of the condition will be sufficient,[64] except that it is not a sufficient answer to a specific breach of a condition to plead generally a performance of the condition, but it should be specifically stated how the condition was performed.[65] A plea in avoidance of a bond on the ground of a discharge under a statute should show a discharge as provided for by the statute.[66]

An amendment should be allowed at the trial, to cover a point then brought for the first time to the attention of counsel.[67]

A replication setting out the condition of the bond and other pertinent facts should aver the existence of a judgment on which the execution issued and should conclude with a verification.[68] Since the right of action on a jail bond is in the sheriff until assignment, a replication to a plea of a release from him that he had no equitable interest therein has been held to be insufficient.[69]

A rejoinder in an action on a prison-limits bond is bad if it departs from the plea.[70]

e. Evidence and Trial

General rules pertaining to the trial of civil cases and the evidence adduced therein have been applied in actions on prison-limits bonds.

In an action on a jail bond, where the execution issued in pursuance of a rule of court, an inquiry cannot be made as to whether the execution issued regularly, or whether the rule was complied with.[71] Proof of actual damages is ordinarily not necessary.[72]

The burden of proving a breach of the bond is on plaintiff,[73] while the burden of showing a discharge by due course of law is on defendant.[74]

Evidence of reputed jail limits is the best evidence of the actual limits, where the limits as described in a map or survey on record are uncertain and contradictory;[75] but evidence of the habit of prisoners of going to certain places as within the bounds is not admissible to control the construction of a recent statute and return of officers.[76] Proof of the liability of an officer for neglect to levy an execution is not admissible to show that the officer was interested in the demand;[77] and evidence that the debtor, a short time before his discharge, had made a fraudulent disposition of his property is not admissible to invalidate his discharge from imprisonment as an insolvent.[78]

Questions of law and fact. Questions of fact, such as the debtor's intention in surrendering to the sheriff, are ordinarily to be determined by the jury.[79]

f. Damages

The measure of damages depends on the applicable statutory provisions; assessment by a jury has been required. Plaintiff cannot recover of the surety more than the penalty of the bond.

In some jurisdictions the measure of damages in an action on a forfeited bond for the prison limits is the amount of the debt on which defendant was confined,[80] together with interest and costs;[81] but it has been held that the debtor is not liable for the interest accruing on the debt, if he pays the amount due on the execution at the time of the commit-

61. Vt.—Sherwin v. Bliss, 4 Vt. 96.
62. Vt.—Avery v. Lewis, 10 Vt. 332, 33 Am.D. 203.
63. Creditor's failure to pay for debtor's support
La.—Wood v. Fitz, 10 Mart. 196.
64. Me.—Fisher v. Ellis, 6 Me. 455.
23 C.J. p 938 note 17.
65. Ala.—Morrow v. Parkman, 14 Ala. 769.
23 C.J. p 939 note 18.
66. N.C.—Langley v. Lane, 10 N.C. 313.
23 C.J. p 939 note 19.
67. Mich.—Smith v. Grosslight, 81 N.W. 975, 123 Mich. 87.
23 C.J. p 939 note 20.
68. Ind.—Spader v. Frost, 4 Blackf. 190.
69. Vt.—Weeks v. Stevens, 7 Vt. 72.
70. S.C.—Walker v. Riley, 44 S.C.L. 87.
71. Vt.—Gibson v. Scott, 7 Vt. 147.
72. N.J.—Smith v. Allen, 1 N.J.Eq. 43, 21 Am.D. 33.
73. Mass.—Thornton v. Adams, 11 Gray 391.
74. Va.—Meredith v. Duval, 1 Munf. 76, 15 Va. 76.
75. N.Y.—Ballou v. Kip, 7 Johns. 175.
76. Mass.—Trull v. Wheeler, 19 Pick. 240.
77. Vt.—Fletcher v. Crooker, 8 Vt. 314.
78. Ala.—Morrow v. Parkman, 14 Ala. 769.
79. Ala.—Morrow v. Weaver, 8 Ala. 288.
80. N.Y.—Flynn v. Union Surety & Guaranty Co., 70 N.Y.S. 403, 61 App.Div. 170, affirmed 63 N.E. 61, 170 N.Y. 145.
23 C.J. p 939 note 37.
81. Va.—McGuire v. Pierce, 9 Gratt. 167, 50 Va. 167.
Wis.—Muirhead v. Bruns, 223 N.W. 565, 198 Wis. 104.
23 C.J. p 939 note 38.

ment before departing the liberties.[82] In Massachusetts, the measure of damages has been declared to be the whole penalty of the bond,[83] except that, where the bond is not conformable to the statute, the debtor and sureties may be relieved against the whole penalty of the bond, by a judgment for the amount due on execution, with interest from the time of escape.[84]

Plaintiff cannot recover of the surety therein more than the penalty of the bond.[85] The measure of recovery cannot be reduced below what the statute prescribes by proof of the inability of the principal to have discharged the judgment on which the execution issued, either in whole or in part.[86]

A sheriff may recover the expenses of retaking an escaped prisoner on a bond giving the prisoner the liberties of the prison;[87] but, where the creditor fraudulently induced the escape, the sheriff can recover only nominal damages and costs.[88]

Assessment by jury. Where default has been made, the damages have been required to be assessed by a jury.[89]

g. Judgment, Enforcement, and Review

A judgment in an action of debt on a bond is not erroneous merely because it designates as damages the sum due. On a judgment for the whole penalty, plaintiff cannot have execution for more than the original debt with interest and costs. A judgment against a surety is reversible unless the record shows that the debtor passed beyond the prison bounds.

In an action of debt on a jail-limits bond, a judgment for the whole sum due in equity to the creditor is not erroneous merely because it designates the sum as damages, instead of debt.[90] Although judgment for plaintiff is for the whole penalty, he cannot have execution for more than the original debt with interest and costs.[91]

An appeal may be prosecuted by the surety in the name of a sheriff on a judgment against him for an escape.[92] A judgment against a surety on a jail-limits bond will be reversed unless the record affirmatively shows that the debtor has been guilty of an escape by passing beyond the prison bounds.[93]

§ 438. On Bond to Proceed under Insolvent or Poor Debtor Acts

a. In general
b. Designation of amount
c. Computation of time

a. In General

Persons arrested on execution against the person may, under some statutes, be released on giving proper and sufficient bond that they will take the benefit of the insolvent or poor debtor law, or surrender to the officer if not discharged within a specified time; and courts will construe such statutes liberally to avoid forfeiture of such bonds, a substantial compliance with such statute being sufficient. Where the arrest is unauthorized, such a bond may be regarded as void or voidable.

Under some statutes persons arrested on execution against the person may be released on their giving bond that they will take the benefit of the insolvent or poor debtor law of the state, or surrender to the officer if not discharged within a specified time.[94] Such a bond is not an engagement to the court, but is an obligation prescribed by statute as a security for creditors.[95] If one illegally arrested gives bond, with surety, conditioned for his appearance to take the benefit of the insolvent law, instead of suing out a habeas corpus, the surety will be bound by his obligation.[96] The question as to who may take the recognizance is governed by the local practice or statute.[97]

Except to the extent that the statutory requirements may be and are waived by the party for whose benefit they were intended,[98] the bond or recognizance must be made in conformity with the statutory provisions in force at the time, in all its material parts, or it will not be a good statutory bond,[99] although it may be good as a common-law obligation.[1] The bond is sufficient if it substan-

82. Vt.—Allen v. Adams, 15 Vt. 16.
83. Mass.—Smith v. Stockbridge, 9 Mass. 221.
No interest
Mass.—Bartlett v. Willis, 3 Mass. 86.
84. Mass.—Clap v. Cofran, 7 Mass. 98.
23 C.J. p 939 note 41.
85. N.J.—Tunison v. Cramer, 5 N.J. Law 498.
86. Ala.—Croom v. Travis, 10 Ala. 237.
87. Conn.—Lord v. Benton, 2 Root 335.
88. Conn.—Lord v. Atwood, 2 Root 336.
89. N.J.—Beatty v. Ivens, 3 N.J.Law 628.
90. Vt.—Sinclair v. Gadcomb, 1 Vt. 32.
91. N.Y.—Sprague v. Seymour, 15 Johns. 474.
92. N.Y.—People v. Judges Monroe C. Pl., 1 Wend. 19.
93. Ala.—Stewart v. Warfield, 37 Ala. 446.
94. N.J.—Carboy v. Smolensky, 165 A. 97, 11 N.J.Misc. 110.
23 C.J. p 940 note 51.
95. Pa.—Commonwealth v. Grimes, 9 A. 665, 116 Pa. 450.
96. Pa.—Johnston v. Coleman, 3 Watts & S. 69.
97. Special justice
Mass.—Gibbs v. Taylor, 9 N.E. 976, 143 Mass. 187.
Magistrate
Mass.—Cook v. Harrington, 29 N.E. 218, 139 Mass. 38.
98. N.C.—Hardison v. Benjamin, 31 N.C. 331.
23 C.J. p 940 note 55.
99. Ga.—Roberts v. Green, 31 Ga. 421.
23 C.J. p 940 note 56.
1. S.C.—General Motors Acceptance

tially follows the statute,[2] and it will not be invalidated by a mere verbal departure from the statute, imposing no additional specific obligation,[3] or by the fact that it does not recite matters which are not required to be recited.[4] The bond is void and unenforceable, however, if it materially differs from that prescribed by the statute,[5] as where it exacts more than the statute requires.[6] Any objection to the bond must be made at the court to which the bond is returnable and before judgment is rendered on it.[7]

Execution. In order to constitute a statutory bond, a bond must ordinarily be executed by the debtor as well as by the sureties,[8] although it may be good as a common-law bond if signed only by the sureties.[9] The bond is usually required to be made payable to the party at whose instance the arrest is made,[10] but, if the statute does not provide to whom the bond is to run, it may be given either to the creditor or to the officer.[11]

Conditions. The bond may provide that within a certain time after its date the debtor will cite the creditor before a designated tribunal, submit himself to examination, and take the poor debtor's oath, or pay the debt, interest, costs, and fees arising in the execution, or deliver himself into the custody of the keeper of the jail to which he is liable to be committed under such execution.[12] Such a bond or recognizance may be further conditioned that the debtor will abide by the order of the examining magistrate.[13] If the bond is conditioned to be performed in a shorter time than is required by statute, it is invalid as a statutory bond, but may be good at common law.[14]

Approval. In some jurisdictions it is an essential of a valid statutory bond for the release of a poor debtor that such bond be approved in the manner provided by statute,[15] and such bond must show that it was approved in the manner provided by law, or it can be held good, if at all, only as a common-law bond.[16] In some jurisdictions the provision in relation to the approval of bonds given by poor debtors is not imperative and may be waived by the creditor,[17] as where he voluntarily and without objection takes the bond without an approval.[18]

Return and recording. In the absence of a statute so requiring, it is not necessary that a poor debtor's recognizance should be returned or recorded in any court of record.[19]

Validity as dependent on authority to arrest. Where the arrest is unauthorized, a bond given under a statute to obtain release from such arrest is one which the obligor may avoid whenever it is attempted to be enforced,[20] and in some jurisdictions, if the arrest is made without authority of law, a recognizance entered into in consequence of it is absolutely void.[21] Where, however, a debtor who is privileged from arrest, but, having the right to waive that privilege, does so, and is taken on execution, the poor debtor's bond given to obtain his release is not void for duress.[22]

Construction. Courts will adopt liberal constructions to avoid forfeiture of such bonds.[23] A bond given by several joint debtors, as principals, is not a joint bond, but is a separate bond given by each; as between themselves, each is principal for the performance of the condition, so far as relates to himself and surety for his coöbligor, that he will duly perform the conditions to be performed by him.[24]

b. Designation of Amount

The bond should be for the sum designated by statute,

Corporation v. Hutto, 134 S.E. 232, 136 S.C. 207.
23 C.J. p 940 note 57.

2. Pa.—Lease v. Asper, 2 Rawle 182.
23 C.J. p 940 note 58.

3. Ala.—Thompson v. Pierce, 3 Stew. 427.

4. Mass.—Bent v. Stone, 68 N.E. 46, 184 Mass. 92.
23 C.J. p 940 note 60.

5. Pa.—Reuter v. Moskovitz, 65 Pa. Super. 229.
23 C.J. p 941 note 61.

6. Pa.—Power v. Graydon, 53 Pa. 198.

7. N.C.—Watts v. Boyle, 26 N.C. 331.

8. Me.—Howard v. Brown, 21 Me. 385.
23 C.J. p 941 note 64.

9. Me.—Howard v. Brown, supra.

10. N.C.—Wall v. Jarrott, 25 N.C. 42.
23 C.J. p 941 note 66.

11. Me.—Pease v. Norton, 6 Me. 229.

12. Mass.—Bliss v. Kershaw, 61 N. E. 823, 180 Mass. 99.
23 C.J. p 941 note 68.

13. Mass.—Adams v. Brown, 14 Gray 579.
Pa.—Crissy v. Vogt, 9 Pa.Super. 418, 43 Wkly.N.C. 527.

14. Me.—Hathaway v. Crosby, 17 Me. 448.

15. N.H.—Battle v. Knapp, 60 N.H. 361.
23 C.J. p 942 note 79.

16. Me.—Gould v. Ford, 39 A. 480, 91 Me. 146.
23 C.J. p 942 note 80.

17. Me.—Pease v. Norton, 6 Me. 229.
23 C.J. p 942 note 81.

18. N.H.—Battle v. Knapp, 60 N.H. 361.

19. Mass.—Thacher v. Williams, 14 Gray 324.

20. N.H.—Stearns v. Veasey, 33 N.H. 61.

21. Me.—Gibson v. Ethridge, 72 Me. 261.
23 C.J. p 942 note 85.

22. Me.—Chase v. Fish, 16 Me. 132.

23. U.S.—Simms v. Slacum, D.C., 3 Cranch 300, 2 L.Ed. 446.
23 C.J. p 942 note 92, p 953 note 87 [a].

24. Me.—Hatch v. Norris, 36 Me. 419.

usually in double the sum for which the debtor was arrested or imprisoned, with the legal cost of the execution.

In order to be a good statutory bond, the bond should be for the sum designated by statute,[25] usually in double the sum for which the debtor was arrested or imprisoned, with the legal cost of the execution;[26] but, where a statute so provides, a slight variance from the amount designated will not invalidate the bond,[27] as where the recognizance is taken in a sum less than double the amount of the ad damnum in the writ;[28] and it has been held that such a bond, although less than twice the amount of the arresting creditor's debt, is a valid bond, and binding on the parties,[29] and that it is no defense to a suit on the recognizance that it does not include the cost of the writ of execution.[30] In the absence of express authorization, the interest accruing on the judgment should make no part of the penal sum;[31] but, where a statute requires the officer levying an execution to collect lawful interest on the debt from the rendition of judgment, a relief bond in which interest is omitted is not a statutory, but a common-law, bond.[32]

c. Computation of Time

The time of performance of the conditions of a poor debtor's bond is computed from the date of the bond and its recital as to the day of arrest.

The time of performance of the conditions of a poor debtor's bond is computed from the date of the bond and its recital as to the day of arrest, although not in fact executed until a subsequent day.[33] In computing the number of days in which the debtor is to surrender himself according to the terms of his bond, fractions of a day are not to be included,[34] and, where the bond is conditioned that the prisoner shall surrender himself if he is not discharged in a certain number of days from the day of his commitment, such day of commitment is excluded.[35] So it has been held that, where a designated period was allowed the debtor from the date of the bond in which to take the oath or in default thereof surrender himself, the day of the date of the bond should be excluded.[36]

Where the condition of the bond is that the debtor, if not allowed to take the poor debtor's oath, shall surrender himself into custody within a certain number of days, the time does not commence to run until the justices to whom the debtor has applied have disallowed the oath, provided the debtor has done all in his power to take it and in the computation of days the day appointed for taking the oath is excluded.[37]

§ 439. —— Performance or Breach

a. In general
b. Appearance and petition
c. Departure of debtor
d. Failure to give notice or procure judge
e. Disclosure
f. Oath
g. Surrender
h. Discharge

a. In General

To avoid forfeiture of a bond given to proceed under insolvent or poor debtor acts, the debtor must comply with its conditions within the time fixed by law, unless performance is legally excused or waived.

In order to avoid the forfeiture of a statutory bond given by a debtor to obtain his release from arrest on execution, he must comply with the conditions of such bond, within the time fixed by law,[38] unless such performance is prevented or excused by an act of the obligee,[39] by the law,[40] or by an act of God,[41] or unless a strict performance is waived by the creditor.[42] In fulfilling the condi-

25. Me.—Flowers v. Flowers, 45 Me. 459.
23 C.J. p 941 note 71.

26. Me.—Bradley v. Pinkham, 63 Me. 164.
23 C.J. p 941 note 72.

27. Me.—Keith v. Bolier, 43 A. 499, 92 Me. 550.
23 C.J. p 941 note 73.

28. Mass.—Gilmore v. Edmunds, 7 Allen 360—Thacher v. Williams, 14 Gray 324.

29. Ga.—Colley v. Morgan, 5 Ga. 178.
Mass.—Thacher v. Williams, 14 Gray 324.

30. Mass.—Thacher v. Williams, supra.
N.C.—Williams v. Yarborough, 13 N. C. 12.

31. Mass.—Adams v. Brown, 14 Gray 579.
N.C.—Williams v. Yarborough, 13 N. C. 12.

32. Me.—Clark v. Metcalf, 38 Me. 122.

33. Me.—Scribner v. Mansfield, 68 Me. 74.
23 C.J. p 942 note 87.

34. Mass.—Clark v. Flagg, 11 Cush. 539.

35. Mass.—Wiggin v. Peters, 1 Metc. 127.

36. Me.—Moon v. Bond, 18 Me. 142.
23 C.J. p 942 note 90.

37. Me.—Pease v. Norton, 6 Me. 229.

38. Mass.—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531—Adams v. Pierce, 58 N.E. 591, 177 Mass. 206.
N.J.—Carboy v. Smolensky, 165 A. 97, 11 N.J.Misc. 110.
23 C.J. p 942 note 94.

39. Me.—Fales v. Goodhue, 25 Me. 423—Moore v. Bond, 18 Me. 142.

40. Me.—Newton v. Newbegin, 43 Me. 293.
23 C.J. p 942 note 96.

41. Me.—Newton v. Newbegin, supra—Fales v. Goodhue, 25 Me. 423.

42. Mass.—Jordan Marsh Co. v. Collins, 150 N.E. 202, 254 Mass. 356—Vinal v. Tuttle, 10 N.E. 489, 144 Mass. 14.

tions of a bond which is good only at common law, the debtor is not required to perform any of the statutory provisions other than those named in the bond.[43]

b. Appearance and Petition

A bond conditioned on the debtor's proceeding under the insolvent or poor debtor acts is forfeited by his failure to institute such proceedings in the time and manner fixed by the bond or prescribed by statute.

Where the condition of the bond is to petition for a discharge as an insolvent, the bond is forfeited unless the debtor applies for the benefit of the insolvent laws within the time fixed by the bond or prescribed by statute,[44] or in the alternative to procure a continuance to another term,[45] and takes and keeps in motion active steps to procure a discharge thereunder.[46]

Where the condition of the bond is to apply for discharge as a poor debtor, the condition ordinarily is broken if the debtor fails to appear at the time fixed for his examination or at an adjourned day,[47] in the county where arrested,[48] or if he appears but objects to the commencement of the examination before the execution is produced,[49] or if there is a continuance but for no fixed time;[50] but the creditor may waive the condition as to appearance for examination so as to preclude his reliance thereon as a breach.[51] Where the magistrate has no authority to adjourn the case after he decides to refuse the oath to the debtor, a bond conditioned that the debtor will deliver himself up for examination and abide the final order of the magistrate thereon does not cover such an adjournment.[52]

Where the day to which an examination was adjourned falls on Sunday, or a day which is dies non juridicus, it has been held to be the duty of the debtor to procure a further adjournment,[53] and, although the magistrate is absent at the time to which the first adjournment is made, the debtor, if he takes no further steps, it guilty of a breach of his recognizance.[54] A further adjournment ordered before the day to which an original adjournment was made is improper.[55]

The debtor is not excused from appearing for examination as a poor debtor by the fact that insolvency proceedings have been commenced,[56] or by an agreement for a continuance on terms not complied with by him.[57] It has been held sufficient, however, if the debtor appears and submits himself to examination at the time and place fixed for that purpose, and is discharged and allowed to go at large without taking the oath, although the magistrate may have erred in the performance of his duty;[58] and the fact that the record shows that the debtor first called the court's attention to his presence in court a few minutes after the hour set had elapsed does not show that he then appeared for the first time so as to constitute a breach of the recognizance.[59]

A failure to appear at the appointed time to take

43. Me.—Ross v. Berry, 49 Me. 434.
23 C.J. p 942 note 99.

44. N.J.—General Contract Purchase Corporation v. Weltchek, 168 A. 624, 111 N.J.Law 402—General Contract Purchase Corporation v. Bronstein, 167 A. 762, 11 N.J.Misc. 290—Jaskiewicz v. Salamander, 131 A. 387, 3 N.J.Misc. 1247.
23 C.J. p 943 note 1.

45. Pa.—Stanko v. Bianucci, 74 Pa. Super. 508.
23 C.J. p 943 note 2.

46. N.J.—Koch v. Costello, 108 A. 225, 93 N.J.Law 367.
23 C.J. p 943 note 3.

47. Mass.—Di Ruscio v. Popoli, 169 N.E. 548, 269 Mass. 482—Di Ruscio v. Popoli, 165 N.E. 403, 266 Mass. 434—H. B. Smith Co. v. Stone, 140 N.E. 750, 246 Mass. 190.
23 C.J. p 943 note 5—5 C.J. p 530 note 43.

The debtor's freedom from arrest because of impending bankruptcy proceedings did not deprive the court of the power to declare him in default on his recognizance, when he failed to appear at appointed time.—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531.

Clerk's refusal to file application of debtor arrested on mesne process to begin statutory supplementary proceedings to secure discharge and to issue notice because another supplementary proceeding was pending was improper.—Giantsi v. Christopher, 177 N.E. 807, 277 Mass. 47.

48. Mass.—Dalton-Ingersoll Co. v. Hubbard, 54 N.E. 862, 174 Mass. 307.
23 C.J. p 943 note 6.

49. Mass.—Simpson v. Trivett, 120 Mass. 147.

50. Mass.—Adams v. Pierce, 58 N.E. 591, 177 Mass. 206.

Court has no power to adjourn the examination of a debtor to a place and time when there is to be no session of the court, and to leave the case open under a general continuance.—Bliss v. Kershaw, 61 N.E. 823, 180 Mass. 99.

51. Mass.—Sturman v. McCarthy, 121 N.E. 522, 232 Mass. 42.
23 C.J. p 943 note 4.

Failure to take default
Judgment creditor, not taking defaults until debtor's third failure to attend for examination, waived no right of which surety on debtor's recognizance could complain.—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531.

52. Mass.—Russell v. Goodrich, 8 Allen 150.

53. Mass.—Hooper v. Cox, 117 Mass. 1—Morrill v. Norton, 116 Mass. 487.

54. Mass.—Sanford v. Quinn, 16 N.E. 570, 147 Mass. 69—Morrill v. Norton, 116 Mass. 487.

55. Mass.—Sanford v. Quinn, 16 N.E. 570, 147 Mass. 69.
23 C.J. p 963 note 89.

56. Mass.—Demelman v. Hunt, 46 N.E. 436, 168 Mass. 102.

57. Mass.—Driscoll v. Hurlburt, 45 N.E. 754, 167 Mass. 327.

58. Mass.—Haskell v. Cunningham, 108 N.E. 915, 221 Mass. 49—Willis v. Howard, 7 Allen 266.

59. Mass.—Warburton v. Gourse, 79 N.E. 270, 193 Mass. 203.

the poor debtor's oath is not a breach, where there remains sufficient time before the expiration of the statutory period to give a new notice;[60] and, hence, if the debtor fails to appear at an adjourned day, the judge cannot refuse the discharge because thereof, and if thereafter a new notice is served by the debtor as provided for by statute and the debtor discharged thereon, there is no breach of the recognizance.[61]

A petitioner who has given a bond cannot, instead of appearing before the court to exhibit an inventory and account, surrender himself to the sheriff and give a new bond to apply again for his discharge.[62]

c. Departure of Debtor

It is a breach of the bond for the debtor, after appearing, to depart from the court, with the intent to absent himself permanently, before the final order is made in some form.

If, having appeared, the debtor departs from the presence of the magistrate with the intent permanently to absent himself, before the final order is in some form made, declared, or announced, it constitutes a breach of his recognizance or bond,[63] and, where a debtor appears for examination and his counsel enters a general appearance, the fact that the citation is not in court does not justify the debtor in departing without leave.[64] It is competent for the magistrate to suspend the proceedings for a brief period and to resume them again, and, where he does so on the return of the debtor, he by implication sanctions his absence as being for a legitimate purpose.[65] A creditor who is present, ready to proceed with the debtor's examination, cannot be held to have waived his rights if he sees the debtor leave and makes no objection to his doing so.[66]

d. Failure to Give Notice or Procure Judge

In order to avoid forfeiture of the bond, notice must be given to the creditor, in the time and manner prescribed by statute, of the debtor's intention to appear for examination and take the poor debtor's oath; and he may be required to provide for the attendance of a judge.

Liability on a bond to proceed under the insolvent or poor debtor acts depends on compliance with statutes governing the notice to be given the creditor of the intention of the debtor to appear for examination and take the poor debtor's oath.[67] Thus a failure to give such notice is a breach of the recognizance,[68] and it is no excuse that the court refused to issue the notice.[69] The debtor must furnish proper proof of service of the notice;[70] but the condition of a recognizance by a poor debtor that within thirty days from the day of the arrest he will deliver himself up for examination, giving notice of the time and place thereof, does not require him to have the notice served on the creditor within the thirty days.[71]

The failure to give notice of the time and place at which the debtor would present his application cannot be collaterally questioned.[72]

It may be held a breach of the bond if the debtor does not make provision for a competent judge to attend at the time and place fixed for examination, and have him there at such time.[73]

e. Disclosure

A poor debtor bond is forfeited where the debtor refuses to disclose his affairs, or where his disclosures show that he has property which he does not cause to be appraised and set off for his creditor.

In the case of poor debtor bonds, a refusal by a debtor to submit to examination or to make disclosures before a tribunal having authority to act is a breach of his bond;[74] and the disclosure by the debtor, if undertaken, must be concluded and the oath taken within the time fixed by the bond, and it will not relieve from forfeiture that the disclosure was seasonably commenced,[75] unless the delay was at the request of the creditor or the objection is waived by him.[76] A breach of his bond

60. Mass.—Millett v. Lemon, 113 Mass. 355.

61. Mass.—Radovsky v. Sperling, 75 NE. 949, 189 Mass. 507.
23 C.J. p 943 note 14.

62. N.J.—Ohlmeyer v. Kent, 2 N.J.L. J. 52.

63. Mass.—Knight v. Sampson, 99 Mass. 36.
23 C.J. p 943 note 15.

64. Mass.—Manning v. Reynolds, 41 N.E. 62, 164 Mass. 150.

65. Mass.—Toll v. Merriam, 11 Allen 395.

66. Mass.—Spiers Fish Co. v. Robbins, 65 N.E. 25, 182 Mass. 128.

67. Mass.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

Attempt to make legal service
If debtor relies on not being able to make service of proper notice in poor debtor proceedings, it must appear that service was attempted at time when legal service was possible.—Kalbritan v. Isidor, supra.

68. Mass.—H. B. Smith Co. v. Stone, 140 N.E. 750, 246 Mass. 190.
23 C.J. p 944 note 19.

69. Mass.—Ryder v. Ouellett, 79 N. E. 820, 194 Mass. 24.

70. Mass.—Buckley v. Mitchell, 42 N.E. 557, 165 Mass. 106.

71. Mass.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494—H. B. Smith Co. v. Stone, 140 N.E. 750, 246 Mass. 190.
23 C.J. p 958 note 86.

72. N.J.—Louis v. Kaskel, 17 A. 120, 51 N.J.Law 236.

73. Mass.—Bliss v. Kershaw, 61 N. E. 823, 180 Mass. 99.
23 C.J. p 944 note 23.

74. Me.—Blake v. Peck, 1 A. 828, 77 Me. 588.
23 C.J. p 944 note 24.

75. Me.—Tarr v. Davis, 176 A. 407, 133 Me. 243—Morrison v. Corliss, 44 Me. 97.

76. Me.—Guilford v. Delaney, 57 Me. 589.

by the debtor in refusing to make disclosure is not waived by the creditor's subsequent participation in a disclosure by such debtor.[77]

A poor debtor's bond will be forfeited where the debtor when disclosing his affairs shows that he has money on hand or debts due him which he does not cause to be appraised and set off for his creditor;[78] but it has been held that, where a poor debtor, after he had given a relief bond, disclosed that he had a certain sum of money which he afterward paid to the creditor, and it was indorsed on the execution, the creditor could not sustain an action on the bond.[79]

f. Oath

In order to prevent a breach of the conditions of a poor debtor's bond, the debtor must take the poor debtor's oath, in the county in which he was arrested, unless legally excused.

Unless the creditor has done some act excusing or waiving the performance within the prescribed time,[80] or unless such performance has been rendered impossible by the act of the law or the act of God,[81] the debtor, in order to prevent a breach of the conditions of a poor debtor's bond, must show to the satisfaction of the justices that he is entitled to take, and must take, the oath, in accordance with the provisions of the statute.[82] The taking of the poor debtor's oath before a magistrate having no jurisdiction,[83] or in a county other than the one in which the debtor was arrested,[84] is not a performance of the condition.

It has been held, however, that the condition of the bond is not broken where the debtor is prevented from complying with the condition by a failure of one of the justices to attend,[85] or where the justice refused to permit the debtor to take the oath;[86] or where the debtor is in court at the appointed time and at the opening of the court, the proceeding is called to the attention of the judge but is not taken up within the statutory hour.[87] The certificate of justices of the administration of the poor debtor's oath will not support a plea of performance of the condition of the bond in a suit thereon, if it incorrectly states the amount of the judgment and the date of its rendition.[88]

g. Surrender

On failure to procure his discharge the debtor, in order to avoid a forfeiture on the bond, must surrender to the jailer in the time and manner prescribed by statute or fixed by the bond.

There is no breach of the bond where the debtor surrenders himself into custody on failure to procure his discharge, as provided for in the bond.[89] So, by surrendering himself into the custody of the jailer before his disclosure is completed, the debtor terminates the disclosure proceedings and discharges his bond for his appearance for examination.[90] He must "deliver himself into the custody of the jailer" and be received into jail, or deliver himself to the jailer at the jail in such a manner as will make it the duty of the jailer to receive him into custody in the jail,[91] but there is no breach if the jailer refuses to receive him.[92] The commitment of the debtor against his will, by the surety, is not a performance of the condition.[93]

The surrender must be within the time fixed by statute or the local practice or the bond;[94] and generally the surrender, after the refusal of a discharge, must be immediate;[95] but, if the sheriff is not at the jail to receive the debtor, the latter is entitled to a reasonable time to look for him.[96]

77. Me.—Blake v. Peck, 1 A. 828, 77 Me. 588.

78. Me.—Bray v. Kelley, 38 Me. 595.
23 C.J. p 944 note 28.

79. Me.—Bailey v. McIntire, 35 Me. 106.

80. N.H.—Scovell v. Holbrook, 22 N.H. 269.
23 C.J. p 944 note 30.

81. Me.—Tarr v. Davis, 176 A. 407, 133 Me. 243.
23 C.J. p 944 note 31.

82. Me.—Tarr v. Davis, 176 A. 407, 133 Me. 243.
N.H.—Head v. Clarke, 45 N.H. 287.

83. N.H.—Manning v. Cogan, 49 N. H. 331.

84. N.H.—Manning v. Cogan, 49 N. H. 331.
23 C.J. p 944 note 34.

85. Ala.—Rust v. Paine, 16 Ala. 352.

86. Ala.—Briggs v. Hobson, 3 Ala. 404.
23 C.J. p 945 note 36.

87. Mass.—Niles v. Silverman, 103 N.E. 476, 216 Mass. 242.
23 C.J. p 945 note 37.

88. Me.—Perry v. Plunkett, 74 Me. 328.

89. Pa.—Greenwaldt v. Kraus, 24 A. 67, 148 Pa. 517.
23 C.J. p 945 note 39.

90. U.S.—Burnham v. Adams, C.C. Me., 13 F.Cas.No.2,173, 2 Cliff. 569.
23 C.J. p 945 note 40.

91. Pa.—Wolfe v. McDevitt, 65 Pa. Super. 543.
23 C.J. p 945 note 41—5 C.J. p 529 note 34 [a].

Delivery held sufficient

Debtor who, while in jail awaiting removal to prison for serving sentence for criminal offense, told sheriff he surrendered himself under execution bond relieved bondsmen from liability.—Noyes v. Perkins, 152 A. 405, 129 Me. 385.

92. Pa.—Marks v. Drovers' Nat. Bank, 6 A. 774, 114 Pa. 490—Saunders v. Quigg, 3 A. 814, 112 Pa. 546.

93. Me.—Woodman v. Valentine, 24 Me. 551.

94. N.H.—Wojciechowski v. Wiltowski, 173 A. 380, 87 N.H. 41.
23 C.J. p 945 note 44—5 C.J. p 529 note 34 [b].

95. N.J.—Whitehead v. Moch, 89 A. 981, 85 N.J.Law 574.
23 C.J. p 945 note 45.

96. N.J.—Whitehead v. Moch, supra.

Where the statute requires a debtor surrendering himself to remain a designated time at the jail, his failure to remain for such time is a breach of the bond.[97] When the debtor has once seasonably surrendered himself into the custody of the jailer, the penalty of the bond is saved and he cannot be made liable thereon by reason of any misconduct or negligence of the jailer;[98] and, if the debtor is improperly discharged by the jailer, the forfeiture of the bond is nevertheless saved.[99] Where the debtor surrenders himself to the jailer within the time specified in the bond, it is satisfied, even though he does not furnish the jailer with a copy of the bond or execution or any other precept;[1] but in such case the jailer is not obliged to receive the debtor.[2]

Where surrender is made impossible by act of the law, the debtor's bail are entitled to relief.[3]

h. Discharge

A debtor who has been given a certificate of discharge by the magistrate must deliver it to the jailer, at least where the bond expressly so requires.

The debtor is not entitled to a discharge unless he complies with the conditions of the bond.[4] There is authority that, when the debtor has been given a certificate of discharge by the magistrate, the certificate must be delivered to the jailer,[5] or the going at large of the debtor will be a breach of his jail bond;[6] but it has been held that where the condition of the bond does not expressly require that the certificate shall be filed with the keeper of the prison, the bond will not be forfeited by the omission to file it,[7] and that it is not essential to the defense of a suit on a poor debtor's bond that the certificate should be filed with the prison keeper prior to the commencement of the suit.[8]

§ 440. —— Liability and Discharge of Sureties

The sureties on the bond are not liable beyond the precise terms of their undertaking. In addition to other circumstances having the effect of discharging them, they are ordinarily discharged by the discharge or surrender of the principal debtor in the time and manner prescribed by statute or fixed by the bond; but other facts or circumstances, such as obvious clerical errors, have been held not to relieve them.

The sureties cannot be released, and the bond canceled, unless the principal acts in compliance with statute.[9] On the other hand a surety is not liable beyond the precise terms of his undertaking, and his liability should not be extended by implication or intendment;[10] and he is discharged by any contract between the creditor and the debtor which changes the nature of the surety's liability.[11] The sureties are released from liability on the bond by the death of the principal debtor within the time named in the bond to perform,[12] by a valid contract giving time to the principal,[13] by the debtor's appearing or surrendering himself in accordance with the conditions of the bond,[14] by a discharge of the debtor,[15] although obtained by fraud, to which the surety was not a party,[16] by the debtor's recommitment to jail,[17] by a declaration of the invalidity of the bond by competent judicial authority,[18] or by the passage of a statute abolishing imprisonment for debt pending appeal from a judgment involving fraud against a poor debtor arrested on execution.[19] In some jurisdictions the appearance of the principal is all for which his sureties on the bond are liable, and if he fails to appear his sureties are liable.[20]

97. N.H.—Woodham v. Chase, 47 N. H. 58—Scovell v. Holbrook, 22 N. H. 269.

98. Me.—Rollins v. Dow, 24 Me. 123. 23 C.J. p 945 note 48.

99. Me.—Blanchard v. Blood, 32 A. 891, 87 Me. 255—White v. Estes, 44 Me. 21.

1. Me.—March v. Barnfield, 76 A. 958, 107 Me. 40.

2. Me.—Putnam v. Fulton, 160 A. 775, 131 Me. 232. 23 C.J. p 945 note 50.

3. N.J.—Steelman v. Mattix, 38 N. J.Law 247, 20 Am.R. 389. 23 C.J. p 945 note 51.

4. N.J.—Carboy v. Smolensky, 165 A. 97, 11 N.J.Misc. 110.

5. Vt.—Holbrook v. Pearce, 15 Vt. 616—Staniford v. Barry, Brayt. 200.

6. Vt.—Haight v. Richards, 3 Vt. 77.

7. Me.—Granite Bank v. Treat, 18 Me. 340. 23 C.J. p 968 note 35.

8. Me.—Brown v. Watson, 19 Me. 452.

9. N.J.—Carboy v. Smolensky, 165 A. 97, 11 N.J.Misc. 110.

10. Pa.—Reuter v. Moskovitz, 65 Pa. Super. 229.

11. Mass.—Jordan Marsh Co. v. Collins, 150 N.E. 202, 254 Mass. 356.

12. Me.—Lowell v. Haskell, 45 Me. 112. Pa.—Johnson v. Turner, 2 Ashm. 433.

13. Mass.—Abbott v. Tucker, 4 Allen 72. 23 C.J. p 945 note 56.

14. Ga.—Swinney v. Watkins, 22 Ga. 570. 23 C.J. p 946 note 57.

15. Pa.—Palethrope v. Lesher, 2 Rawle 272. 23 C.J. p 946 note 58.

Rescission of order refusing discharge

Where debtor was discharged on taking oath, after rescission of order refusing it, there was no breach of recognizances to abide magistrate's final order, so as to render surety liable to creditor.—Sallinger v. Hughes, 126 N.E. 278, 235 Mass. 104.

16. Ala.—Davis v. Cathey, 1 Stew. 402.

17. S.C.—Dixon v. Vanezara, 12 S.C. L. 373.

18. Pa.—Johnson v. Turner, 2 Ashm. 433.

19. N.C.—Bunting v. Wright, 61 N. C. 295. 23 C.J. p 946 note 62.

20. N.C.—Osborne v. Toomer, 51 N. C. 440. 23 C.J. p 946 note 63.

The sureties are not relieved because of obvious clerical errors subject to correction,[21] because of the conviction and sentence to imprisonment of the principal for a criminal offense before a breach of the bond,[22] by the continuance of a hearing on the debtor's petition for discharge, without their knowledge and consent,[23] or where, the principal not having attempted to perform any of the conditions of the bond within the prescribed time, it became forfeited by his afterward filing his petition and obtaining his discharge as a bankrupt.[24] In the absence of fraud, the sureties are not relieved from liability by the fact that they were misinformed as to the time when the conditions must be performed, where they did not read the bond but were truly informed of its date,[25] or by the fact that they were induced to sign by a mistake as to its contents produced by an incorrect statement of the judge as to its effect.[26]

Surrender of principal by sureties. The right of sureties to release themselves from liability by the surrender of their principal is usually given,[27] provided such surrender is made to the proper court or officer;[28] and the surrender may be a constructive one by substituting a new surety.[29] However, under a statutory provision for the release of a poor debtor by his giving a bond conditioned to perform certain acts or deliver himself into the custody of the keeper of the jail, the surety of the poor debtor's bond has no authority to surrender the debtor against the latter's will.[30]

§ 441. —— Actions on Bonds

a. In general
b. Defenses
c. Pleading
d. Evidence
e. Damages

a. In General

An action on a poor debtor's bond must be brought within the statutory period. It has been held that the remedy by action on the bond, after a breach thereof, precludes the enforcement of collection of the execution by other means.

An action on a poor debtor's bond must be brought within the time fixed by statute.[31] The right of action on a forfeited bond is not waived by the issuance of an alias capias ad satisfaciendum and the giving of another bond pursuant to which the debtor was discharged as an insolvent debtor.[32] The remedy by action on the bond, after a breach thereof, has been held to preclude the enforcement of collection of the execution by other means;[33] but it has been held that, where a debtor gives a bond to discharge an attachment of his goods on mesne process, and thereafter to obtain relief from arrest enters into a recognizance and is defaulted thereon, the creditor may sue on both instruments to the extent of obtaining the amount of his judgment with interest and costs.[34] If, during the pendency of a suit on a bond, there is another action against the debtor, alleging that he willfully made false disclosures, it cannot affect the rights of the parties to the suit on the bond.[35]

b. Defenses

Generally, the only bar to an action for the enforcement of a valid debtor's bond to proceed under insolvent or poor debtor acts is that there was a complete fulfillment on the part of the debtor of one of its alternative conditions; and various particular facts and circumstances have been held or held not to constitute defenses in such actions. Defenses which might have been pleaded in the original action cannot be set up in an action on the bond.

Generally, the only bar to an action on the bond is a complete fulfillment on the debtor's part of one of its alternative conditions,[36] including the taking of the poor debtor's oath,[37] or a discharge.[38] It

21. Mass.—Currier v. Bartlett, 122 Mass. 133.
22. Pa.—Smith v. Barker, 6 Watts 508.
23. Pa.—Wolfe v. McDevitt, 65 Pa. Super. 543.
24. N.H.—Claflin v. Cogan, 48 N.H. 411.
23 C.J. p 946 note 67.
25. Me.—Wing v. Kennedy, 21 Me. 430.
26. N.Y.—Wheaton v. Fay, 62 N.Y. 275.
27. Ga.—Compton v. Williams, 27 Ga. 29.
23 C.J. p 946 note 70.
28. Mass.—Ryder v. Ouellette, 79 N.E. 820, 194 Mass. 24.
23 C.J. p 946 note 71.
29. Mass.—Pacific Mut. Ins. Co. v. Canterbury, 104 Mass. 433.
30. Me.—Woodman v. Valentine, 24 Me. 551.
31. Me.—Patten v. Kimball, 73 Me. 497.
23 C.J. p 946 note 75.
32. Pa.—Heilner v. Bast, 1 Penr. & W. 267.
33. Mass.—Kalbritan v. Padover, 161 N.E. 898, 264 Mass. 26—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531.
23 C.J. p 946 note 77.
34. Mass.—Moore v. Loring, 106 Mass. 455.
35. Me.—Robinson v. Barker, 28 Me. 310.
36. Me.—Hackett v. Lane, 61 Me. 31.

Clerk's refusal to file application of debtor arrested on mesne process to begin statutory supplementary proceedings to secure discharge, and judge's executed agreement, to allow application to be filed and notice to issue as of timely date, did not preclude recovery on debtor's statutory bond.—Giantsi v. Christopher, 177 N.E. 807, 277 Mass. 47.

37. Me.—Ayer v. Fowler, 30 Me. 347.
23 C.J. p 947 note 81.
38. N.J.—Skillman v. Baker, 18 N. J.Law 134.
23 C.J. p 947 note 82.

Certificate of justice that poor debtor has been discharged will not defeat an action on the bond, if it

is also a good defense that defendant had been released by plaintiff,[39] that his arrest was illegal,[40] that the judgment or execution had been reversed or set aside,[41] that the bond is void,[42] or that the whole amount equitably due on the bond had been paid before suit was commenced thereon for the penalty.[43]

It is no defense to liability on the bond, however, that the creditor has made proof of his claim in bankruptcy, from which nothing was received;[44] and, where the breach relied on is a failure to appear, it is no defense that application for the benefit of the insolvent law was made pending the suit on the bond.[45] It has been held no defense to a failure to perform that such failure was due to the debtor's sickness[46] or lunacy,[47] or to the death of a relative.[48] So, it is no defense that the creditor made no attempt to find property of the debtor subject to levy,[49] that the trial court was not a court of record,[50] that the affidavit on which the arrest was made was false,[51] that the recognizance was taken in a sum less than the amount of the execution,[52] that the place fixed for the debtor's examination was not inserted in the condition of the recognizance,[53] or that the justices before whom the disclosure of the debtor was made erroneously decided that the debtor, having disclosed enough, in their opinion, to pay the debt, was not bound to answer further, and that, having offered the property disclosed, he was entitled to his discharge.[54] Likewise, it is no defense that the officer omitted to return into the clerk's office, during the lifetime of the precept, an execution on which a poor debtor's bond was taken by such officer,[55] that the debtor was so destitute of property that he might legally have taken the poor debtor's oath,[56] or that the judge was absent from the county and disabled by sickness from hearing the case, on the day fixed for the hearing.[57]

Defenses which might have been pleaded to the original action cannot be set up in an action on the bond;[58] and an act abolishing imprisonment for debt is no defense to a bond to take the benefit of the insolvent law.[59] A plea of performance of the condition of a bond according to the statute estops the debtor from claiming it to be a common-law bond by reason of its variance from the requirements of the statute.[60]

c. Pleading

The declaration, in an action on a poor debtor's bond, should allege all facts necessary to constitute the cause of action; so it should show the authority to take the bond and make the arrest. Matters of affirmative defense should be set up by plea or answer.

The declaration should allege all facts which are necessary to constitute the cause of action;[61] but it is not necessary for plaintiff in his declaration to count on any other than the penal part of the bond, and he may leave the condition to be pleaded by defendant if it affords him any defense.[62] The declaration should show the authority to take the bond[63] and to make the arrest,[64] and so state the breach of the condition as to show clearly the necessity of defendant's appearance within the meaning of the bond.[65]

The declaration need not aver affirmatively that the execution has not been paid,[66] or aver the truth

does not appear affirmatively from such certificate, or from the proofs in the case, that the justices were "disinterested."—Scamman v. Huff, 51 Me. 194.

39. Mass.—Bullen v. Dresser, 116 Mass. 267.
23 C.J. p 947 note 83.

40. Mass.—Mann v. Cook, 81 N.E. 286, 195 Mass. 440.

41. Mass.—Whitton v. Bicknell, 3 Allen 472—Mason v. Benson, 9 Watts 287.

42. Pa.—Mankey v. Stocking, 62 A. 913, 213 Pa. 299.
23 C.J. p 947 note 86.

43. Me.—Grimes v. Turner, 16 Me. 353.

44. Mass.—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531.

45. N.J.—Glynn v. Kelly, 58 A. 178, 71 N.J.Law 10.

46. N.H.—Symonds v. Carleton, 43 N.H. 444.

47. Me.—Haskell v. Green, 15 Me. 33.

48. Pa.—Wolfe v. McDevitt, 65 Pa. Super. 543.

49. Mass.—Watts v. Stevenson, 47 N.E. 447, 169 Mass. 61.

50. Mass.—Chesebro v. Barme, 39 N. E. 1033, 163 Mass. 79.

51. Mass.—Everett v. Henderson, 14 N.E. 932, 146 Mass. 89, 4 Am.S.R. 284.

52. Mass.—Whittier v. Way, 6 Allen 288.

53. Mass.—Whittier v. Way, 6 Allen 288.

54. Me.—Stone v. Tilson, 19 Me. 265.

55. Me.—Robinson v. Williams, 14 A. 67, 80 Me. 267.
Mass.—Chesebro v. Barme, 39 N.E. 1033, 163 Mass. 79.

56. Me.—Haskell v. Green, 15 Me. 33.

57. N.Y.—Cobb v. Harmon, 29 Barb. 472, affirmed 23 N.Y. 148.

58. Vt.—Allen v. Fisher, 1 D.Chipm. 277.

59. Pa.—McFadden v. Dilly, 2 Pa. 61.

60. Me.—Hackett v. Lane, 61 Me. 31.

61. Mass.—Stearns v. Hemenway, 37 N.E. 766, 162 Mass. 17.
23 C.J. p 947 note 6.

62. Me.—Colton v. Stanwood, 68 Me. 482.

63. Mass.—Webber v. Davis, 5 Allen 393.
23 C.J. p 947 note 8.

64. Mass.—Webber v. Davis, supra.
23 C.J. p 947 note 9 [a].

65. N.J.—Louis v. Kaskel, 17 A. 120, 51 N.J.Law 236.

66. Mass.—Webber v. Davis, 5 Allen 393.

of the affidavit on which a capias ad satisfaciendum issued, stating that defendant had refused to surrender his land, since the fact cannot be inquired into in such collateral action.[67]

Where a motion is made for judgment on the bond, it is not necessary to describe the bond, capias ad satisfaciendum, etc., which are matters of record already before the court.[68]

There is authority that a statement may be filed in an action on an insolvent's bond, on the theory that the action is within the compulsory arbitration law.[69]

Plea or answer. Matters of affirmative defense should be set up by plea or answer.[70] Where a statute makes it a requisite to the discharge of a poor debtor that a certificate be delivered to the jailer, a plea of discharge under the poor debtor's oath must allege such delivery of the certificate to the jailer.[71] If the breach of the condition alleged is the failure to appear at the next term of court, a plea merely averring that defendant appeared at a "subsequent" court is insufficient.[72]

d. Evidence

Rules of evidence governing civil actions generally have been applied in actions for the enforcement of poor debtors' bonds, with respect to presumptions and burden of proof, and admissibility, weight, and sufficiency of evidence.

Burden of proof; presumptions. The burden of proof is on plaintiff to show a breach of the bond,[73] or other facts sufficient to make out at least a prima facie case for him;[74] and, if such burden is not sustained, a verdict for defendant should be ordered.[75] The burden is on defendant to prove matters of affirmative defense.[76]

Where the case is submitted on an agreed statement of facts, such statement must be presumed to contain all the facts material to a correct decision of the case,[77] and, if it does not show an appraisement of the property disclosed, such appraisement will not be presumed to have been made.[78] Where the record shows that a certificate of arrest was made by a justice and attached to the execution, and it does not appear that no oath or affidavit was made and no objection seems to have been taken by the debtor when arrested, it may be assumed that there was an oath or affidavit which justified the certificate of arrest.[79]

Admissibility. General rules have been applied in regard to the admissibility of evidence,[80] as on the question of waiver.[81] Thus, in an action on the bond or recognizance, the record of the magistrate before whom the debtor was examined is admissible as evidence of the truth of the facts which it contains,[82] as is also the certificate of the justices who admitted the debtor to take the oath;[83] and this includes its admission to corroborate the statement of one of them where their testimony is conflicting.[84] So, also, the written disclosure made, signed, and sworn to by the debtor is admissible,[85] but not statements made by him in relation to the subject matter of his disclosure, although made at the time of such disclosure.[86] If the debtor was not legally entitled to take the poor debtor's oath, on the evidence actually produced before the magistrate within the time limited in the bond, testimony is not admissible to show that evidence might have been introduced which would have authorized the taking of the oath.[87]

The weight and sufficiency of the evidence has been adjudicated in a number of cases, in accordance with rules applicable thereto in civil actions generally.[88]

e. Damages

The measure of damages for breach of a poor debtor's

67. Ill.—Fergus v. Hoard, 15 Ill. 357.

68. Tenn.—Hubbard v. Cole, 9 Yerg. 502.

69. Pa.—Bowman v. Sharp, 6 Watts 324.

70. Vt.—Staniford v. Barry, Brayt. 200.
23 C.J. p 948 note 15.

71. Vt.—Staniford v. Barry, supra.

72. N.J.—Hart v. Boyle, 38 A. 801, 60 N.J.Law 320.

73. Mass.—Di Ruscio v. Popoli, 165 N.E. 403, 266 Mass. 434—Brazill v. Green, 137 N.E. 346, 243 Mass. 252—McKeon v. Briggs, 123 N.E. 387, 233 Mass. 99.
23 C.J. p 948 note 19.

74. Mass.—Damon v. Carrol, 40 N.E. 185, 163 Mass. 404.
23 C.J. p 948 note 20.

75. Mass.—Brazill v. Green, 127 N. E. 535, 226 Mass. 93.

76. Mass.—Browne v. Hale, 127 Mass. 158.
23 C.J. p 948 note 22.

77. Me.—Harding v. Butler, 21 Me. 191.

78. Me.—Harding v. Butler, supra.

79. Mass.—Bent v. Stone, 68 N.E. 46, 184 Mass. 92.

80. Mass.—McKeon v. Briggs, 123 N. E. 387, 233 Mass. 99—Way v. Lewis, 115 Mass. 26.
23 C.J. p 948 note 26—5 C.J. p 529 note 35 [g] (1).

81. Mass.—Lynde v. Richardson, 124 Mass. 557.
23 C.J. p 948 note 27.

82. Mass.—Barrett Mfg. Co. v. Shea, 114 N.E. 307, 225 Mass. 252—Lincoln v. Cook, 124 Mass. 383.

83. Me.—Granite Bank v. Treat, 18 Me. 340.
23 C.J. p 948 note 29.

84. Me.—Ayer v. Woodman, 24 Me. 196.

85. Me.—Jewett v. Rines, 39 Me. 9.

86. Me.—Jewett v. Rines, supra.

87. Me.—Robinson v. Barker, 28 Me. 310.

88. Mass.—Griffin v. Betts, 65 N.E. 386, 182 Mass. 323.
23 C.J. p 948 note 34.

Evidence held insufficient to prove breach of recognizance.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.

bond has been variously held to be the actual damage caused by the breach, the amount of the debt or judgment and costs, with interest, or the full penalty of the bond; but in some instances damages may be nominal.

Statutes fixing the measure of damages for breach of a poor debtor's bond must be complied with.[89] It has been variously held that the measure of damages is the actual damage caused by the breach,[90] or the amount of the debt or judgment and costs, with interest,[91] or the full amount of the penalty of the bond.[92] In some cases, however, only nominal damages are recoverable,[93] as where the breach is failure to assign property the title to which is already vested in an assignee in insolvency.[94]

§ 442. As Insolvent or Poor Debtor

a. In general
b. In what actions or proceedings allowable
c. Grounds for refusing discharge

a. In General

Under some statutes, on compliance with certain conditions, a poor or insolvent debtor may obtain his discharge from an arrest on an execution.

In many states, the statutes expressly provide for the discharge of poor or insolvent debtors, including the procedure to obtain such discharge;[95] the purpose of such statutes being to abolish imprisonment on civil process where the debtor is willing to deliver up all his estate to his creditors toward the payment of his debts,[96] and to release from imprisonment debtors who have no property or who will assign what they have to their creditors.[97] These statutes differ as to details but are quite similar as to the general practice. In some states they are called the "insolvent debtor's act" and the basis of the proceeding is a schedule of the debtor's property which must be assigned for the benefit of the execution creditor, at least so far as necessary.[98] In other states, the governing statute is called the "poor debtor's act," and while it primarily applies to those debtors having no nonexempt property, provision is made for appraisal and assignment of any property disclosed on the hearing.[99] Such statutes are generally not retrospective,[1] but the procedure applies to pending applications.[2]

Poor debtor proceedings are in their main features of a civil, and not of a criminal, nature.[3] Such proceedings are strictly statutory,[4] and while such statutes express the spirit of liberality toward poor debtors, such liberality is to be exercised strictly within the limitations that hedge and direct its bestowal.[5]

89. N.H.—Wojciechowski v. Wiltowski, 173 A. 380, 87 N.H. 41.

90. Me.—Houghton v. Lyford, 39 Me. 267.
23 C.J. p 949 note 36.

91. Mass.—Di Ruscio v. Popoli, 169 N.E. 548, 269 Mass. 482—National Surety Co. v. Reed, 160 N.E. 281, 262 Mass. 372, certiorari denied Reed v. National Surety Co., 49 S. Ct. 10, 278 U.S. 603, 73 L.Ed. 531.
23 C.J. p 949 note 37.

92. Mass.—Giantsi v. Christopher, 177 N.E. 807, 277 Mass. 47.
23 C.J. p 949 note 38.

93. Me.—Webster v. Bailey, 57 Me. 364.
23 C.J. p 949 note 39.

94. Me.—Smith v. Dutton, 74 Me. 468.

95. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L. Ed. 1246.

96. N.J.—West Hudson County Trust Co. v. Wichner, 187 A. 579, 121 N.J.Eq. 157.

Object of statute permitting imprisoned judgment debtors to seek release is to abolish imprisonment for debt, and statute is designed as a remedial and humane statute, relieving from incarceration in prison the honest but unfortunate debtor who no longer has means of satisfying his creditor.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.

97. N.H.—Massachusetts Breweries Co. v. Colburn, 57 A. 653, 72 N.H. 472.
Pa.—Petition of Di Maio, 89 Pittsb. Leg.J. 227.

In North Carolina a person arrested on execution against the person may be discharged, after judgment and without payment, only by surrendering all of his property in excess of fifty dollars. The effect of an execution against the person, therefore, is to deprive defendant in execution of his homestead exemption and of any personal property exemption over and above fifty dollars.—Coble v. Medley, 119 S.E. 892, 186 N.C. 479.

98. Ill.—Buck v. Alex, 182 N.E. 794, 350 Ill. 167.
23 C.J. p 949 note 43.

In Pennsylvania

(1) The right to a discharge from arrest on civil process is granted by two statutes. The only difference between the acts is one of application to the particular case. The first act, 39 Pub.St. §§ 4–8, is available where the debtor possesses property and makes an assignment thereof for the benefit of his creditors, and the second act, 39 Pub.St. §§ 9–12, provides for the discharge of a debtor who has neither property nor means to pay the judgment, and for whom it would be a vain thing to make an assignment. Accordingly, where there is no evidence of ownership of property justifying an assignment, proceedings under the second act are not improper.—Petition of Young, 192 A. 911, 327 Pa. 267.

(2) Under 39 Pub.St. §§ 9–12 a debtor may be discharged at any time if he impresses the court by a presentation of facts as provided by the act.—Kubit v. Witt, 193 A. 81, 127 Pa.Super. 434.

99. Vt.—In re Blake, 175 A. 252, 107 Vt. 18.
23 C.J. p 949 note 44.

1. Me.—Gooch v. Stephenson, 15 Me. 129.

2. Me.—Barnard v. Bryant, 21 Me. 206.

3. Mass.—Noyes v. Manning, 37 N. E. 768, 162 Mass. 14.

4. Mass.—H. B. Smith Co. v. Stone, 140 S.E. 750, 246 Mass. 190.

Compliance with statutory terms is necessary to entitle a debtor to a discharge.—Warner v. Mullin, 9 Pa. Dist. & Co. 665, 76 Pittsb.Leg.J. 86.

Particular statutes construed
N.Y.—In re Perine, 287 N.Y.S. 535, 158 Misc. 597.

5. Me.—Karam v. Marden, 148 A. 691, 128 Me. 451.

Mere bankruptcy of the debtor does not entitle him to a release from arrest where the judgment on which he is imprisoned is not dischargeable in bankruptcy.[6]

b. In What Actions or Proceedings Allowable

Except as otherwise limited by statute, the debtor may apply, under the insolvent or poor debtor's laws, for his discharge from imprisonment in any action or proceeding.

Except where the imprisonment is under execution issued in proceedings of a criminal character,[7] and except in so far as certain actions or proceedings are excluded from the benefit of the statute, the debtor may apply, under the insolvent or poor debtor's laws, for his discharge from imprisonment in any action or proceeding.[8] Under some statutes, however, the insolvent or poor debtor cannot claim the benefit of the statute, where his imprisonment is under a judgment or execution in certain specified actions or proceedings;[9] as where he is imprisoned for debts or penalties due to the state,[10] or under a judgment or execution for a tort or trespass,[11] or for a malicious injury to the person.[12]

Malice gist of action. Under some statutes a discharge under the insolvent debtor's act is allowable only when malice is not of the gist of the action.[13] The term "malice," as used in such a statute, applies to that class of wrongs which are inflicted with an evil intent, design, or purpose; implies that the guilty party was actuated by improper or dishonest motives; and requires intentional perpetration of an injury or wrong on another.[14] However, the term does not necessarily mean that the person committing the injury bears any spite, grudge, or ill will toward the person against whom the wrong is inflicted.[15] The term "gist of the action" means the essential ground or object of a suit, without which there is not a cause of action.[16] Whether malice is the gist of the action is determined from the charges made in the declaration.[17] In the absence of a statute to the contrary,[18] it is not necessary that the jury should have by its ver-

6. N.Y.—In re Snyder, 280 N.Y.S. 257, 155 Misc. 616, affirmed 280 N.Y.S. 259, 244 App.Div. 784.

7. N.J.—Perth Amboy v. Brophy, 43 N.J.Law 589, reversed on other grounds 44 N.J.Law 217.

Misuse of office

Where defendant was imprisoned for misuse of office and misappropriation of funds thereof, inability to pay judgment was insufficient to entitle him to a release based on the court's discretion under Judiciary L. § 775.—Weingart v. Whynman, 286 N.Y.S. 331, 247 App.Div. 814.

8. Pa.—Hefferon v. Sieminski, 43 Lack.Jur. 25.
23 C.J. p 950 notes 49–52.

Actions ex delicto

N.Y.—Creble v. Youswiak, 247 N.Y.S. 434, 138 Misc. 543.

9. S.C.—Smith v. Hogg, 31 S.C.L. 86—Glenn v. Lopez, 16 S.C.L. 105.
23 C.J. p 950 note 53.

10. N.J.—State v. Camden County Ct., 18 A. 118, 51 N.J.Law 424.

11. R.I.—In re Kimball, 41 A. 230, 20 R.I. 688.
23 C.J. p 950 note 55.

12. R.I.—Taylor-Symonds Co. v. Bliss, 76 A. 1, 30 R.I. 453—Taylor v. Bliss, 57 A. 939, 26 R.I. 16.
23 C.J. p 950 note 56.

Close jail execution

One in jail on a "body execution" may apply for the privilege of taking the poor debtor's oath, whereas one in jail on a "close-jail execution" is not entitled to make such application while the close-jail certificate is in force.—Ex parte Thompson, 9 A.2d 107, 111 Vt. 7.

13. U.S.—U. S. ex rel. Weber v. Meyering, C.C.A.Ill., 66 F.2d 347.
Ill.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—Jernberg v. Mix, 65 N.E. 242, 199 Ill. 254—In re White, 23 N.E.2d 401, 302 Ill. App. 69—Rosenberg v. Ott, 1 N.E. 2d 502, 285 Ill.App. 50—In re Teiszerski, 272 Ill.App. 305—In re Paar, 264 Ill.App. 372—Fromm v. Seyller, 245 Ill.App. 392—In re Bobzin, 220 Ill.App. 470.
23 C.J. p 950 note 60.

14. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill.App. 556—In re Paar, 264 Ill.App. 372—In re Petition of Floren, 251 Ill. App. 569—Gannon v. Kiel, 251 Ill. App. 389—Scanlon v. Whalen, 249 Ill.App. 19—In re Todd, 246 Ill. App. 587—Kaplan v. Williams, 245 Ill.App. 542—Fromm v. Seyller, 245 Ill.App. 392—Stoike v. Bonasera, 243 Ill.App. 281—Abbrassart v. Bouchard, 241 Ill.App. 484—Brown v. People, 237 Ill.App. 537, affirmed Greener v. Brown, 153 N.E. 825, 323 Ill. 221.
23 C.J. p 950 note 61.

15. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—Kaplan v. Williams, 245 Ill.App. 542.

Willful and wanton neglect in driving an automobile may constitute malice, even though no ill will was present.—Fromm v. Seyller, 245 Ill.App. 392. See Ratnofsky v. Wills, 2 N.E.2d 382, 284 Ill.App. 653.

16. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill.App. 556—Stoike v. Bonasera, 243 Ill.App. 281—Petition of Schikowski, 239 Ill.App. 447.
23 C.J. p 951 note 62.

17. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—In re Paar, 264 Ill.App. 372.

If there is no count in the declaration of which malice is the gist, the debtor should be discharged.—Rosenberg v. Ott, 1 N.E.2d 502, 285 Ill. App. 50.

18. **Prior to amendment of statute** respecting capias ad satisfaciendum, when debtor made application to be released under Insolvent Debtors Act, issue was raised as to whether malice was gist of the action, and in determining such question, court referred to pleadings, and if allegations showed that malice was gist of the action, doctrine of res judicata applied and the issuance of the writ was sustained.—Ingalls v. Raklios, 26 N.E.2d 468, 373 Ill. 404, reversing 21 N.E.2d 856, 301 Ill.App. 1.

dict specifically recited that the jury found defendant guilty of malice,[19] but a jury's finding that defendant was guilty of malicious conduct has been held to be conclusive in proceedings by defendant for a discharge.[20] Malice may be made the gist of the action in a tort action if properly pleaded, even though some other form of action might lie.[21] Malice may be the gist of the action in an action for alienation of affections;[22] assault;[23] fraud and deceit;[24] for forcibly, willfully and maliciously breaking and entering into plaintiff's office and conversion of chattels, and expulsion of plaintiff from the office so as to destroy his business;[25] obtaining money under false pretenses;[26] malicious prosecution;[27] slander;[28] or trespass for assault and battery.[29] On the other hand, malice has been held not to be the gist of an action for conversion,[30] negligence,[31] or seduction.[32]

c. Grounds for Refusing Discharge

Under the various statutes, particular circumstances, such as fraud and concealment, may be grounds for refusing a discharge to an imprisoned debtor.

Fraud and concealment generally deprive a debtor of the right to a discharge as an insolvent,[33] and the question whether the debtor has been guilty of fraud, or has secreted or assigned his property, is usually a matter of discretion dependent on the facts in each case.[34] In some jurisdictions a person committed for fraudulently disposing of property will not be discharged from imprisonment on his making an assignment of his property, since the statutory provisions for a discharge apply only to cases where there has been no disposal of property with intent to defraud creditors;[35] and it has been held that it is sufficient to prevent a discharge of the debtor that the fraudulent disposition of property was made by him before the commencement of the action, where the order for his imprisonment was based on the ground of such fraudulent disposition.[36] A discharge, however, should not be refused because of fraud or concealment of property at some prior time, where at the time of the application for discharge he is not guilty of fraud or concealment;[37] nor should a discharge be refused

19. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

20. Ill.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Mantske v. Rhutassel, 248 Ill.App. 492.

"Wantonly and willfully"

A finding that defendant "wantonly and willfully" injured plaintiff was held to be a finding that he maliciously injured him.—Kaplan v. Williams, 245 Ill.App. 542.

21. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

22. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482.

23. Ill.—Miles v. Glad, 19 N.E.2d 844, 299 Ill.App. 185—In re Bobzin, 220 Ill.App. 470.

By an automobile

Ill.—Rosenberg v. Ott, 1 N.E.2d 502, 285 Ill.App. 50.

24. Ill.—In re Petition of Floren, 251 Ill.App. 569.

25. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L. Ed. 1246.

26. Ill.—Bussin v. Bestmann, 246 Ill.App. 166.

27. Ill.—Beckman v. Menge, 82 Ill. App. 228.

28. Ill.—Matter of Warnke, 207 Ill. App. 459.

23 C.J. p 951 note 64.

29. Ill.—Salomon v. Buechele, 127 Ill.App. 420.

23 C.J. p 951 note 63.

30. Ill.—Kellar v. Norton, 81 N.E. 1037, 228 Ill. 356—Mansfield's Petition, 120 Ill.App. 511.

23 C.J. p 951 note 67.

Malice, however, has been held to be gist of action for trover in view of the record.—McNamara v. Bird-Sykes Co., 252 Ill.App. 273.

"Guilty of conversion"

A verdict that defendant was "guilty of conversion" has been held to be equivalent to a finding by the jury that malice was the gist of the action.—Brown v. People, 237 Ill. App. 537, affirmed Greener v. Brown, 153 N.E. 825, 323 Ill. 221.

31. Ill.—Stoike v. Bonasera, 243 Ill. App. 281.

Automobile collision

Ill.—In re Todd, 246 Ill.App. 587.

Constructive or legal willfulness is not sufficient to show that malice was the gist of the action.—Gannon v. Kiel, 251 Ill.App. 389.

Recklessness is not malice

Ill.—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill.App. 556—Scanlon v. Whalen, 249 Ill.App. 19.

32. Ill.—People v. Greer, 43 Ill. 213.

33. R.I.—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

23 C.J. p 951 note 68.

Failure to account

Defendant who, in his application for release, failed to account for total sums which he received from misuse of his office and misappropriation thereof, or his disposition of such moneys, was not entitled to vacation of execution and release from imprisonment.—Weingart v. Whynman, 286 N.Y.S. 331, 247 App. Div. 814.

Mortgage

The fact that the debtor gave a mortgage on her automobile during the pendency of the litigation is not, standing alone, sufficient to indicate bad faith. Likewise a surrender of the automobile to the mortgagee is not a fraudulent disposition of property where its value did not exceed the mortgage.—In re Savage, 22 A.2d 153, 112 Vt. 89.

Stated conversely, a debtor who has not secreted or assigned any of his property and is without means to pay his creditors, is entitled to a discharge from arrest or from imprisonment for debt, in the absence of a strong presumption of fraud arising from either the transaction on which the judgment is based, or the proceedings for discharge.—Petition of Young, 192 A. 911, 327 Pa. 267.

34. Pa.—Petition of Young, 192 A. 911, 327 Pa. 267.

35. N.J.—Iliff v. Banghart, 37 A. 894, 60 N.J.Law 400, affirmed 41 A. 1117, 61 N.J.Law 286.

23 C.J. p 951 note 69.

36. N.Y.—In re Brady, 69 N.Y. 215, 53 How.Pr. 128, affirming 8 Hun 437—In re Haigh, 11 N.Y.Civ.Proc. 227.

37. N.H.—Massachusetts Breweries Co. v. Colburn, 57 A. 653, 72 N.H. 472.

23 C.J. p 952 note 71.

because one liable to arrest on final process makes an assignment of his property for the benefit of creditors, which would be otherwise valid, before being charged in execution,[38] and after his arrest an insolvent debtor may in good faith pay or secure a preëxistent debt or sell his property;[39] nor should it be refused where at the time the debtor has no property subject to execution.[40] Other grounds for refusing a discharge, under the various statutes, are that the petitioner's actions or proceedings have not been "just and fair;"[41] that the petitioner gave undue preferences within a fixed time before his imprisonment;[42] that the petitioner is not of a "fair character;"[43] that a few days after his arrest he was adjudged a bankrupt on his own petition;[44] or that since the debt was contracted, he has hazarded and paid a certain sum or more in gaming prohibited by the laws of the state.[45] It seems that under some statutes the fact that defendant has a fairly substantial income does not affect his right to a discharge.[46] Where a statute prohibits a second discharge on bond to take the poor debtor's oath, after surrender on a bond previously given for that purpose, it does not preclude a discharge on taking the poor debtor's oath after such a surrender.[47]

Debtor not imprisoned. As a general rule a discharge cannot be granted where applicant is not under arrest or in custody;[48] but a debtor in the prison limits has the same right to apply for the benefit of such laws as if he were in close confinement,[49] and one released from arrest on giving any other bond may make application.[50]

Time of confinement. Under some statutes a discharge is unauthorized in some cases until the execution debtor has been confined a certain length of time.[51] A statute providing that a person imprisoned under an execution for a sum in excess of five hundred dollars cannot present a petition for a discharge until he has been imprisoned, by virtue of the execution, for at least three months, has been held not to deprive the court of jurisdiction to release a judgment debtor prior to the expiration of such time where, due to his physical condition, further imprisonment may endanger his life.[52]

Residence. Under some statutes residence for a specified time within the state or county is a condition precedent;[53] but this is not the rule where there is no statute so providing.[54]

Violation of prison limits, where not done for purpose of escape, has been held not to be a bar to a discharge.[55] Under some statutes a debtor applying for the benefit of the insolvent laws is entitled to his discharge, even though he has gone beyond the jail limits between his release on bond and the day of the hearing, unless he has disentitled himself to be discharged by failing to comply with the condition of the bond. Accordingly, where the condition of the bond is that he shall appear before the next court of common pleas to be held in the county and petition for the benefit of the insolvent laws, and shall in all things comply with such laws, and shall appear in person at every subsequent court until he shall be duly discharged, his discharge will not be denied because he has gone without the prison limits.[56] Also, in cases in which a statute, providing that the court shall stay all proceedings where it appears on examination of the debtor that he has gone without the prison limits, is applicable, it is improper to dismiss a petition for discharge where it appears that the debtor has gone without the prison limits.[57]

38. N.Y.—Roswog v. Seymour, 30 N.Y.Super. 427.

39. Ga.—Johnson v. Martin, 25 Ga. 268.
23 C.J. p 952 note 73.

40. La.—Miles v. His Creditors, 6 Mart. 500.
Or.—Heckinger v. Swank, 153 P. 784, 78 Or. 526.

41. N.Y.—Matter of Benson, 10 Daly 166, 60 How.Pr. 314.
23 C.J. p 952 note 75.

42. S.C.—Brenden v. Gowing, 41 S.C.L. 459.
23 C.J. p 952 note 76.

43. Conn.—Betts v. Lockwood, 8 Conn. 487.
23 C.J. p 952 note 77.

44. N.Y.—Matter of Fitzgerald, 8 Daly 188, 5 Abb.N.Cas. 357, 56 How.Pr. 190.
23 C.J. p 952 note 78.

45. Mass.—Bradley v. Burton, 24 N.E. 778, 151 Mass. 419.
23 C.J. p 952 note 79.

46. Pa.—Hefferon v. Sieminski, 43 Lack.Jur. 25.

47. N.H.—Somersworth Sav. Bank v. Wooster, 5 A. 764, 64 N.H. 57.

48. Mich.—Griffin v. Helme, 54 N.W. 173, 94 Mich. 494.
23 C.J. p 952 note 81.

49. N.J.—Sabia v. Court of Common Pleas in and for Hudson County, 128 A. 583, 101 N.J.Law 281.
N.Y.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.
23 C.J. p 952 note 82.

50. Me.—City Bank v. Norton, 48 Me. 73.

51. Pa.—Petition of Doescher, 18 Pa.Super. 346.
23 C.J. p 952 note 84, p 950 notes 57-59.
Time for application for discharge see infra § 443a.

52. N.Y.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.

53. La.—Rhendorff v. His Creditors, 4 Mart. 329.
Ohio.—Loines v. Philips, 2 Ohio 313.
23 C.J. p 952 note 85.

54. N.J.—Hogan v. Hutton, 20 N.J. Law 82.

55. N.J.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

56. N.J.—Sabia v. Court of Common Pleas in and for Hudson County, 128 A. 583, 101 N.J.Law 281.

57. N.J.—Sabia v. Court of Common Pleas in and for Hudson County, supra.

Infancy. Under a statute providing that "every person" may petition for the benefit of the statute, an infant as well as an adult is entitled to the benefit of the act; and, since the relief from imprisonment is so highly beneficial, his act in making an assignment must be regarded as valid notwithstanding nonage.[58]

§ 443. —— Application for Discharge

a. In general
b. Schedules and affidavits
c. Property of debtor

a. In General

The application for a discharge must be in substantial compliance with the statute as to form and requisites, and must be made, within the proper time, to the court, judge, or officer designated by statute.

The application for a discharge must be made within the time prescribed by statute or the bond,[59] and under some provisions the application cannot be made until after imprisonment for a certain length of time.[60]

The application should be made to the court, judge, or officer designated by statute.[61] Under some statutes, application for a discharge as a poor debtor must first be made to the jailer having him in custody, who in turn must apply to the proper magistrate or judge.[62] Under some statutes, application may be made to a justice of the peace.[63]

Although under some statutes the proceedings are summary, and without formal pleadings,[64] as a general rule an application or petition, under the insolvent or poor debtor's laws, for a discharge from imprisonment, should be in writing[65] and signed.[66] The application or petition must state facts which show such a compliance with the statute as to give the court or officer, to whom it is presented, jurisdiction;[67] and state all the facts which it is necessary to prove to entitle the debtor to the benefit of the statute,[68] and contain apt words to indicate his wish to be admitted to that benefit.[69] Thus it should show that the petitioner is so under arrest as to be entitled to a discharge,[70] describe the creditor,[71] show in substance, where the application is under a poor debtor act, that the debtor is unable to pay the debt on which he is committed,[72] and, under some statutes, show residence or imprisonment within the county where the offi-

58. N.Y.—People v. Mullin, 25 Wend. 698.

59. Mass.—Barnes v. Ladd, 130 Mass. 557.
R.I.—Taylor-Symonds Co. v. Bliss, 76 A. 1, 30 R.I. 453.
Performance or breach of bond given to proceed under insolvent or poor debtor's acts see supra § 439.

60. U.S.—Moran v. Secord, C.C.N.Y., 15 F. 509.
Mich.—Rusiewski v. Michalski, 98 N. W. 1, 135 Mich. 530.
N.H.—Priest v. Tarlton, 3 N.H. 93.
23 C.J. p 953 note 88.
Time of confinement as ground for refusal of discharge see supra § 442c.

In Rhode Island

(1) Under Gen.L.1923 § 5749, any person who shall be imprisoned for debt on any execution, except as limited by Gen.L.1923 § 5758, may request to be admitted to take the poor debtor's oath. A petitioner imprisoned on execution in an action of trespass on the case for negligence is not within the exceptions set forth in § 5758, and he may apply to take the oath under § 5749. —In re Kimball, 41 A. 230, 20 R.I. 688.

(2) Under Gen.L.1923 § 5775, providing that certain poor tort debtors who have been imprisoned for six months may petition to take the poor debtor's oath, a debtor imprisoned on execution in an action of trespass for less than a month cannot be admitted to the poor debtor's oath.—Read v. Dunn, 137 A. 9.

(3) Under the statute to recover for a death caused by wrongful act, the wrong to the estate may be considered as immediate and direct, warranting an action in trespass, if the wrongful act causing the death was immediate and direct. Accordingly, a debtor imprisoned on execution in trespass under such statute, cannot take the poor debtor's oath immediately after commitment.—Read v. Dunn, 138 A. 210, 48 R.I. 437.

(4) It has been questioned whether defendant, after permitting himself without objection to be sued in trespass and after allowing judgment to be entered against him in that form of action, and after imprisonment on execution on such judgment, can be heard to urge that he is being held on an execution in trespass on the case and not on an execution in trespass.—Read v. Dunn, supra.

61. Ky.—Bell v. Carter, 2 S.W.2d 389, 222 Ky. 734.
Vt.—In re Blake, 175 A. 252, 107 Vt. 18.
23 C.J. p 953 notes 89, 90.

62. Mass.—Dalton-Ingersoll Co. v. Hubbard, 54 N.E. 862, 174 Mass. 307—Dunham v. Burlingame, 2 Metc. 271.
23 C.J. p 953 note 91.

63. Md.—Winingder v. Diffenderffer, 5 Harr. & J. 181.
23 C.J. p 953 note 93.

64. Ill.—Kitson v. Farwell, 23 N.E. 1024, 132 Ill. 327.

65. N.H.—Fernald v. Noyes, 30 N. H. 39.
23 C.J. p 953 note 95.

66. Me.—Neal v. Paine, 35 Me. 158.

67. N.Y.—Develin v. Cooper, 84 N. Y. 410, affirming 20 Hun 188.
23 C.J. p 953 note 97.

68. N.H.—Fernald v. Noyes, 30 N. H. 39.
23 C.J. p 953 note 98.

Affidavit presenting application of judgment debtor for release from custody of marshal by reason of imprisonment for failure to pay judgment would be deemed a "petition" on which application was required by statute to be based, where affidavit contained material matter required to be alleged in such petition. —Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.

69. N.H.—Fernald v. Noyes, 30 N.H. 39.

70. N.J.—Van Waggoner v. Coe, 25 N.J.Law 197—Stagg v. Austin, 18 N.J.Law 82.

71. N.H.—Peck v. Wilson, 14 N.H. 587.

72. Mass.—Webster v. French, 11 Cush. 304.
23 C.J. p 953 note 3.

cer resides.[73] A mere misspelling of the debtor's name has been held not to bar a discharge where there is no question as to his identity.[74] Likewise, unless the statute so requires, the application need not state the amount of the execution,[75] nor describe the statute which contains the provision, and an erroneous description of it may be rejected as surplusage.[76] One application and notice, specifying that the oath is to be taken on two executions, may be sufficient.[77] It is no objection to the discharge of a poor debtor on his oath that the nature of the action in which the judgment was recovered is wrongly stated in his application, where such mistake is no injury to the creditor.[78]

Filing. The petition need not be filed with the clerk of the court, if presented to a judge as provided by statute;[79] and where the statute does not require the petition to be filed but only to be presented to the court, the failure of the judge to whom the petition was presented to file it within a reasonable time is immaterial.[80]

b. Schedules and Affidavits

Where the statute so requires, the debtor with his application must file, under oath, a schedule or inventory of his property.

Under some statutes, particularly under the insolvent debtor's acts, the debtor is required to file a scehdule or inventory under oath of all his property,[81] whether exempt or not,[82] accompanied, under some statutes, by an affidavit in the prescribed form.[83] A failure to file a schedule will not bar a discharge where it appears from the papers filed by the debtor that a schedule could not be annexed for the reason that he is without any property, real or personal.[84]

The schedule or inventory should set out the estate, choses in action, and money which the debtor has in possession or is entitled to,[85] or show that he has no property or effects of any kind, except such as is exempted in the oath prescribed by law for insolvent debtors.[86] If the petitioner has recently made a general assignment for the payment of his debts, it has been held that he must set forth in some way the property which passed by the assignment.[87] Under some statutes, the schedule should also contain a list of applicant's creditors;[88] but if the schedule is full and intelligible it is not necessary to give the residence of the creditor, the nature of the debt, and the consideration.[89] Under some statutes the accompanying affidavit must also state in effect that there have been no fraudulent transfers.[90] The schedule may be amended except in case of fraud,[91] as by inserting matter omitted through ignorance or inadvertency[92] or from an honest conviction of the worthlessness of a claim.[93]

73. N.Y.—Develin v. Cooper, 84 N. Y. 410, affirming 20 Hun 188—People v. Machado, 16 Abb.Pr. 460.
23 C.J. p 953 note 4.

74. N.J.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

75. N.H.—Allen v. Bruce, 12 N.H. 418.
23 C.J. p 954 note 5.

76. N.H.—Ladd v. Deming, 20 N.H. 487.

77. N.H.—Chesley v. Welch, 10 N.H. 251.

78. N.H.—Osgood v. Hutchins, 6 N. H. 374.

79. Md.—Bowie v. Jones, 1 Gill 208.

80. N.J.—Stokes v. Hardy, 60 A. 403, 71 N.J.Law 549, reversing 58 A. 650, 71 N.J.Law 116.

81. Ill.—In re Todd, 246 Ill.App. 587.
23 C.J. p 954 notes 11, 12.

Property sold

Where sale of automobile by petitioner to his wife was made months before right of action of plaintiff accrued, petitioner had no ownership in such automobile which his creditors could attach, regardless of whether legal title thereto passed or not, and such automobile was properly omitted from his inventory.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

Surrender of insurance policy

The fact that defendant did not state in his schedule that he had turned back an insurance policy on his car for a small consideration did not bar his right to a discharge, where such surrender took place before he knew he was going to be sued for damages arising from a collision.—In re Todd, 246 Ill.App. 587.

82. Ill.—Stricker v. Kubusky, 35 Ill. App. 159.
N.Y.—Seward v. Wales, 58 N.Y.S. 42, 40 App.Div. 539, affirmed 167 N. E. 1120, 167 N.Y. 568.
23 C.J. p 954 note 13.

83. N.Y.—Develin v. Cooper, 84 N. Y. 410, affirming 20 Hun 188.

84. N.Y.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.

85. Ga.—Rome v. Dickerson, 13 Ga. 302.
23 C.J. p 954 note 19.

86. Ga.—Lindsey v. Hunter, 18 Ga. 50.

87. Pa.—Oliver's Case, 1 Ashm. 112—Woodward's Case, 1 Ashm. 107.

88. N.Y.—Develin v. Cooper, 84 N. Y. 410, affirming 20 Hun 188—Matter of Andriot, 2 Daly 28.

Not bar to discharge

In application for discharge under Insolvent Debtors Act, failure of petitioner to list two creditors, to whom he owed sums of twenty-five dollars and fifty dollars respectively, will not bar discharge, where it does not appear that failure was intentional or fraudulent and neither of such creditors appeared at hearing.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

89. La.—Wilson v. His Creditors, 19 La. 33.
N.Y.—People v. Behrman, Lalor 81.
23 C.J. p 955 note 23.

90. N.Y.—In re Brown, 39 Hun 27—Matter of Watson, 2 E.D.Smith 429—In re Haight, 11 N.Y.Civ.Proc. 227.
23 C.J. p 955 note 24.

91. N.C.—McLeod v. Kirkham, 33 N. C. 509.
S.C.—Yeakle v. George, 46 S.C.L. 153—Bingley v. Smart, 12 S.C.L. 29.
23 C.J. p 955 note 25.

92. N.Y.—Brodie v. Stephens, 2 Johns. 289.
S.C.—Prescott v. Hubbell, 13 S.C.L. 64.
23 C.J. p 955 note 26.

93. Pa.—Oliver's Case, 1 Ashm. 112.

c. Property of Debtor

Where the statute so requires, on application for a discharge the debtor must make an assignment of his property for the benefit of the execution creditor.

The fact that the inventory filed discloses the existence of no property except that which is exempt does not excuse the making of the assignment required by statute.[94] The assignment may be of an undivided interest in personalty;[95] and, under some statutes, may be made to the state as assignee.[96] The surrender of the property must be absolute;[97] and it has been held that applicant is bound to make actual delivery of the goods to his assignee, or to do that which is equivalent thereto, and that mere readiness and willingness to deliver is not enough.[98] Where the debtor's schedule shows that he has property in another state, it has been held that he is not compelled to bring the same into the jurisdiction,[99] unless he moved it out of the state since his arrest.[1]

Title to and disposition of property. Under some statutes the title to the property of an insolvent debtor vests, on his discharge, in the sheriff of the county where it is situated,[2] who may sue to set aside fraudulent conveyances.[3] Property in the possession of a third person cannot be sold until recovered in the mode prescribed by the statute.[4] A sale of the schedule itself, as distinguished from the specific property, is improper, and the purchaser at such sale, if he acquires the legal title, will, in a court of equity, be treated as a trustee for the benefit of those interested.[5]

§ 444. —— Notice of Application

a. In general
b. Service and proof of service

a. In General

Where the statute so requires, notice of the application to be discharged as a poor or insolvent debtor must be given to the creditor or creditors.

Notice of the application is generally required by statute to be given to the creditor or creditors,[6] and the necessity therefor is not dispensed with by the fact that the bond to appear for examination does not require such notice.[7] Under some statutes, a justice cannot refuse to issue the notification when application is properly made to him, but is to act forthwith without any hearing of parties on the subject.[8]

The notice should be issued by the court, judge, or officer authorized by the statute to do so.[9] The justice who issues a citation to the creditor for the debtor's disclosure performs no judicial duties, but acts ministerially, and need not therefore be disinterested.[10] Where two justices are required for the examination, it has been held that one alone cannot issue the notice and fix the time and place for hearing the debtor's application,[11] although, under some statutes, the citation may be issued by a justice other than the one before whom the debtor is to appear.[12] Under some statutes the court or magistrate acquires no jurisdiction to issue the notice unless the debtor personally delivers himself up.[13]

The person to whom the notice or citation should be given is the creditor or creditors,[14] or their assignees,[15] although it has also been held that, notwithstanding an assignment, notice could be served on plaintiff in the original case,[16] and that notice to an assignee in bankruptcy appointed after the arrest and without the knowledge of the debtor is not necessary.[17] Where the execution is in favor of several, notice should be given to all creditors living in the commonwealth, although they are partners;[18] but it need not be given to plaintiff who is a nonresident and without the state.[19] Under some statutes the service may also be made on the cred-

94. N.J.—Stokes v. Hardy, 60 A. 403, 71 N.J.Law 549, reversing 58 A. 650, 71 N.J.Law 116.
23 C.J. p 955 note 28.

95. S.C.—Bentley v. Long, 20 S.C. Eq. 43, 47 Am.D. 523.
23 C.J. p 955 note 29.

96. S.C.—Attorney-General v. Baker, 30 S.C.L. 521.

97. Me.—Call v. Barker, 27 Me. 97.

98. S.C.—Walker v. Riley, 31 S.C.L. 87.
23 C.J. p 955 note 32.

99. Ala.—Croom v. Davis, 6 Ala. 40.
S.C.—Burns v. Evans, 21 S.C.L. 294.

1. S.C.—Burns v. Evans, supra.
23 C.J. p 955 note 34.

2. Va.—Clough v. Thompson, 7 Gratt. 26, 48 Va. 26.
23 C.J. p 955 note 35.

3. Va.—Clough v. Thompson, supra.

4. Va.—Clough v. Thompson, supra.

5. Va.—Clough v. Thompson, supra.

6. Mass.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.
N.J.—General Contract Purchase Corporation v. Weltchek, 168 A. 273, 11 N.J.Misc. 843.
23 C.J. p 955 note 40.

7. Mass.—Gilmore v. Edmunds, 9 Allen 379—Whittier v. Way, 6 Allen 288.

8. Mass.—Haskell v. Haven, 3 Pick. 404.

9. Clerk
Under some statutes the notice may be issued by the clerk of the court.—Betts v. Nixon, 32 S.C.L. 148.

10. Me.—Gray v. Douglass, 17 A. 320, 81 Me. 427.

11. Mass.—Paul v. Holden, 14 Allen 29.

12. Vt.—Paine v. Ely, 1 D.Chipm. 37.

13. Mass.—Howard v. Roach, 115 N.E. 289, 226 Mass. 80.

14. Mass.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.
23 C.J. p 956 note 48.

15. N.H.—Cameron v. Little, 13 N.H. 23.
N.Y.—Goodwin v. Griffis, 88 N.Y. 629, reversing 25 Hun 61.

16. Mass.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.

17. Me.—Hayes v. Kingsbury, 22 Me. 400.

18. Mass.—Putnam v. Longley, 11 Pick. 487.

19. N.Y.—Goodwin v. Griffis, 88 N.Y. 629, reversing 25 Hun 61.

itor's agent or attorney of record,[20] especially where the creditor is a nonresident;[21] and, under other statutes, where the creditor is dead or does not reside or have a place of business in the county where the arrest is made and has no agent or attorney therein, the debtor may give notice of his intention to take the poor debtor's oath to the officer making the arrest.[22]

Form and requisites. The notice or citation to the creditor lies at the foundation of the proceedings, and hence it must be substantially according to the requirements of the statute;[23] and the notice is sufficient if it substantially complies with the statute.[24]

Where the application is under the poor debtor act, the subject, of which notice is to be given, is the representation of the debtor that he is unable to pay the debt and is desirous of taking the benefit of the law for the relief of poor debtors;[25] and all that is required to make the notice effectual is that it shall contain an intelligible statement or recital of the facts which it is necessary or material for the party to be served to know.[26] The notice or citation should be in writing,[27] signed by the magistrate issuing it, and designating his official capacity,[28] and under seal.[29] It should inform the creditor of the time and place fixed for the examination[30] and should give such a description of the judgment and process to which it relates that the parties and case may be rightly understood,[31] and correctly describe the person to be cited[32] and the debtor.[33] A notice has been held not to be ineffective, however, because it described a single execution in favor of two joint creditors, which did not exist, in place of two executions in favor of distinct creditors.[34] The citation need not be a warrant commanding an officer to give notice, but may be addressed to the creditor himself,[35] and it need not name the magistrate before whom it is to be returned,[36] nor need it state the amount of the debt, nor describe the execution more particularly than as an execution at the creditor's suit, issued from a certain court at a certain date,[37] nor state the date of the judgment or of the execution.[38] An averment in the citation that the bond had not expired is unnecessary, when the citation gave the date of the bond, and the proceedings thereby appeared seasonable.[39]

Mere formal or immaterial defects which may be corrected by amendment and which cannot mislead the creditor will not vitiate the proceedings.[40]

Second notice. Some statutes providing for the giving of new notices are exclusive, and new notices may be given only in instances falling within the statute.[41] Under some statutes the rule is that when a debtor has given notice of his desire to take the benefit of the act for the relief of poor debtors, no new notice can be given until after a certain number of days unless the former notice is insufficient in form or service.[42] To entitle the

20. Mass.—Williams v. Kimball, 135 Mass. 411.
23 C.J. p 956 note 53.

21. Me.—Smith v. Bragdon, 48 Me. 101.
23 C.J. p 956 note 54.

22. Mass.—Homer v. Sinnott, 119 Mass. 191.
23 C.J. p 956 note 55.

23. Me.—Beaupre v. Schlosberg, 163 A. 653, 131 Me. 407.
23 C.J. p 956 note 56.

24. Ga.—Cheeseborough v. Van Ness, 12 Ga. 380.
N.Y.—People v. Behrman, Lalor 81.
23 C.J. p 956 note 57.

25. Mass.—Pierce v. Phillips, 101 Mass. 313—Dunham v. Burlingame, 2 Metc. 271.

26. Mass.—Hill v. Bartlett, 124 Mass. 399—Dana v. Carr, 124 Mass. 397.

27. N.H.—Madison v. Rano, 4 N.H. 79.
N.J.—Hogan v. Hutton, 20 N.J.Law 82.

28. Mass.—Callaghan v. Whitmarsh, 14 N.E. 149, 145 Mass. 340.
23 C.J. p 956 note 61.

29. Me.—Beaupre v. Schlosberg, 163 A. 653, 131 Me. 407—Miller v. Weisman, 130 A. 504, 125 Me. 4.
23 C.J. p 956 note 62.

Statute inapplicable
Failure to affix seal in a poor debtor's citation does not come under a statute prohibiting abatement of process for want of form or incidental errors, since omission of seal is not correctible.—Miller v. Weisman, supra.

30. Mass.—Danforth v. Knowlton, 111 Mass. 76.
N.H.—Sanborn v. Piper, 10 A. 680, 64 N.H. 335.
23 C.J. p 956 note 63.

31. Mass.—Way v. O'Sullivan, 106 Mass. 118.
23 C.J. p 957 note 64.

32. Mass.—Slasson v. Brown, 20 Pick. 436.
23 C.J. p 957 note 65.

33. Mass.—Dwyer v. Winters, 126 Mass. 186—Collins v. Douglass, 1 Gray 167.
23 C.J. p 957 note 66.

34. Mass.—Benway v. Jarratt, 146 N.E. 686, 251 Mass. 506.

35. Mass.—Dunham v. Burlingame, 2 Metc. 271.

36. Mass.—Dunham v. Burlingame, supra.

37. Mass.—Davis v. Putnam, 5 Gray 321.

38. Me.—Rand v. Tobie, 32 Me. 450.

39. Me.—Farrington v. Farrar, 73 Me. 37.

40. Me.—Miller v. Weisman, 130 A. 504, 125 Me. 4.
23 C.J. p 957 notes 73, 74.

41. Mass.—H. B. Smith Co. v. Stone, 140 N.E. 750, 246 Mass. 190.
Successive applications see infra § 445.

42. Mass.—Merrill v. Kaulback, 33 N.E. 515, 158 Mass. 328.
23 C.J. p 957 note 82.

Conversely, if the first notice is insufficient in form or service, a new notice may be given within seven days from the service of the first.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

Insufficiency of service means something more than a mere omission to make service. The debtor does not prove insufficient service unless it appears that there has been reasonable effort to make service in accordance with the statute at a

debtor to a new notice within seven days from the proper service of the previous one, he has the burden of proving such insufficiency.[43] It has been held that an insolvent who is in actual custody and whose discharge is not opposed may, where no motion is made on his behalf on the day appointed for hearing the creditors, be discharged subsequently without a new notice.[44]

Waiver of objections. The right to notice,[45] or defects therein,[46] or objections to the notice as premature,[47] may be waived by the creditor or his attorney, as by appearing at the examination without objecting to defects or irregularities in the notice.[48] The length of notice required by statute may be waived by the creditor,[49] although it has been held that if the court orders an advertisement for a certain number of weeks, an order of assignment made by mistake before the expiration of such time is a nullity.[50] Whether there has been a waiver of defective service of notice is a question of fact.[51]

b. Service and Proof of Service

Service of notice of application, and proof thereof, should be made in accordance with statutory requirements.

The debtor has the duty to make proper service of the notice.[52] The time for the service of the notice or citation on the creditor is usually fixed by statute.[53] Where the statute requires the notice to be served at least a certain number of days before the day of hearing, it is insufficient if it is served within that time.[54] In the absence of a statute to the contrary, the fact that service was made at night is immaterial.[55]

Notice of the debtor's intention to take the benefit of the act for the relief of poor debtors may be served in a county other than that in which the arrest was made,[56] but a discharge on taking the poor debtor's oath has been held to be invalid if the notice was served outside of the serving officer's precinct.[57]

Except in cases where the statute authorizes the service to be made by publication,[58] the statutes usually require the notice to be served personally on the creditor or creditors, or on their agents or attorneys, by delivering an attested copy,[59] or by leaving the same at their last and usual place of residence;[60] and where this is the case the reading of the notice by the officer to the creditor is not a legal service thereof.[61] A constable is a competent officer to serve the citation, although the amount due the creditor is in excess of the amount which limits the service of writs by him in a personal action or one in which damages are claimed;[62] and in some jurisdictions a copy of the application and order of the justice fixing a time and place of hearing, delivered to the proper party, is a sufficient notice, although the person attesting and delivering such notice, was not an officer.[63] Service

time when service legally could be made.—Kalbritan v. Isidor, supra.

43. Mass.—Kalbritan v. Isidor, supra.

44. La.—Martin's Case, 2 Mart. 77.

45. Me.—Page v. Plummer, 10 Me. 334.
S.C.—Rice v. Sims, 21 S.C.L. 5.
23 C.J. p 957 note 75.

46. Ky.—Bryant v. Crittenden, 10 Ky.Op. 605.
23 C.J. p 957 note 76.

47. Mass.—McInerny v. Samuels, 125 Mass. 214.

48. Mass.—Sturman v. McCarthy, 121 N.E. 522, 232 Mass. 44.
23 C.J. p 957 note 78.

49. U.S.—U. S. Bank v. Weisiger, Ky, 2 Pet. 331, 481, 7 L.Ed. 441, 492.

50. N.Y.—Underwood v. Irving, 3 Cow. 59.

51. Mass.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

52. Mass.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

53. Me.—Durstin v. Dodge, 20 A. 2d 671.
23 C.J. p 957 note 84.

After hour set for examination
No service in poor debtor proceeding can be made by officer on notice received by him for service after hour set for debtor's examination.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

Discharge void
Discharge in poor debtor proceeding is void, if made on return that fails to show that time required by Gen.L. c 224 § 30, was allowed.—Kalbritan v. Isidor, supra.

54. N.H.—Sanborn v. Piper, 10 A. 680, 64 N.H. 335.

55. Me.—Durstin v. Dodge, 20 A.2d 671.

56. Mass.—Carroll v. Rogers, 86 Mass. 70.

57. Mass.—Henshaw v. Savil, 114 Mass. 74.

58. S.C.—Ex parte Cantey, 45 S.C. L. 520.
23 C.J. p 958 note 89.

Costs
Clerk was not required to publish notice under insolvent debtor's statute without tender of fees, costs, and expenses in advance.—General Motors Acceptance Corporation v. Hutto, 134 S.E. 232, 136 S.C. 207.

59. N.H.—Eaton v. Miner, 5 N.H. 542.
23 C.J. p 958 note 90.

Seal
A copy of the seal is not an essential part of the attested copy of the citation to be served on the creditor.—Beaupre v. Schlosberg, 163 A. 653, 131 Me. 407.

60. N.H.—Flanders v. Thompson, 2 N.H. 421.
23 C.J. p 958 note 91.

Attorney's offices
Under a statute providing that notice shall "be served on or left at the usual place of residence of the attorney of the plaintiff," where notice of the application is served on the attorney, the place of service is not of vital concern, and service on a firm of attorneys representing plaintiff at their law office, and duly acknowledged by one of them, is sufficient.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

61. Me.—Hanson v. Dyer, 17 Me. 96.
Mass.—Young v. Capen, 7 Metc. 287.

62. Me.—Bliss v. Day, 68 Me. 201.

63. N.H.—Rankin v. Nettleton, 2 N.H. 305.

may be made by a constable de facto.[64]

Proof of service. Proof of service of the notice is usually necessary under the various statutes,[65] and it is the debtor's duty to prove to the court that there has been such service as will make it the duty of the tribunal to take jurisdiction.[66]

While the return of service of notice should be before the proper officer,[67] be sworn to,[68] and contain a recital of the time of service,[69] great liberality is exercised in amendments to supply omissions or to correct palpable errors therein for the purpose of sustaining the proceedings when the justice of the case requires it.[70] A return on a copy of the notice has been held to be sufficient where the original notice was delivered by the officer to the creditor.[71]

The return of the officer as to his service of the citation is conclusive between the parties, and must be taken as true unless it contains some repugnancy;[72] but where notice is served by a private person, his affidavit as to the service is not conclusive.[73]

Waiver of defective service. The creditor may either personally or through his attorney as by accepting the service of notice,[74] or appearance at the hearing,[75] waive any informality and irregularity therein; and in a suit on a poor debtor's recognizance, the question whether plaintiff had waived service of the notice in due form should be submitted to the jury.[76]

§ 445. —— Successive Applications

Under some statutes, where there has been a determination on the merits on an application for a discharge, a second application cannot be made unless there has been a change of circumstances.

Where there has been a decision on the merits on an application for a discharge under the insolvent or poor debtor's laws, under some statutes a second application cannot be made, unless there has been a change of circumstances in the meantime,[77] or unless the second application is authorized by statute.[78] Under such statutes, the making of a general assignment for the benefit of creditors is a sufficient change of circumstances to justify a second application.[79] It is no bar to a second application that the petitioner withdrew his first petition,[80] or that a discharge was denied him on a former petition, when he was committed on an execution in favor of another creditor who has since been paid.[81]

§ 446. —— Hearing and Procedure to Obtain

a. In general
b. Jurisdiction and authority

a. In General

The time and place for a hearing on an application for a discharge as a poor or insolvent debtor should be fixed in accordance with the requirements of the statute.

Under some statutes the time and place of the examination of a poor debtor is to be appointed by the magistrate and not fixed by the debtor;[82] but the place appointed must be a convenient one,[83] and the time fixed must be at a reasonable hour,[84] and far enough ahead as to enable the statutory notice to be given to the creditor.[85] The hearing must be had at the time and place stated in the notice of hearing, unless such hearing is delayed by

64. Mass.—Elliott v. Willis, 1 Allen 461.
23 C.J. p 958 note 95.

65. Mass.—Buckley v. Mitchell, 42 N.E. 557, 165 Mass. 106.
S.C.—Bettis v. Nixon, 32 S.C.L. 148.
23 C.J. p 958 note 98.

66. Mass.—Kalbritan v. Isidor, 152 N.E. 48, 255 Mass. 494.

67. Conn.—Smith v. Huntington, 2 Day 562.
23 C.J. p 958 note 99.

68. N.H.—Allen v. Bruce, 12 N.H. 418.
23 C.J. p 958 note 1.

69. Mass.—Smith v. Randall, 1 Allen 456.
23 C.J. p 958 note 2.

70. Mass.—Shepherd v. Jackson, 16 Gray 599.
23 C.J. p 958 note 3.

71. Mass.—Callaghan v. Whitmarsh, 14 N.E. 149, 145 Mass. 340.

72. Mass.—Leach v. Hill, 3 Metc. 173.
23 C.J. p 958 note 5.

73. N.H.—Woods v. Blodgett, 15 N. H. 569.

74. Mass.—Williams v. Kimball, 132 Mass. 214—Mutual Safety Fire Ins. Co. v. Woodward, 8 Allen 148.

75. N.J.—In re Walaska, 129 A. 418, 3 N.J.Misc. 139.

76. Mass.—Goldenberg v. Blake, 14 N.E. 171, 145 Mass. 354.

77. R.I.—Di Iorio v. Easton, 167 A. 137, 53 R.I. 429—Carlin v. Easton, 155 A. 527, 51 R.I. 421.
23 C.J. p 959 notes 7, 8, 10.

Denial of two applications of insolvent debtor for discharge does not justify dismissal of third application on ground of res judicata without examination to ascertain whether new matter is presented or whether debtor's position has changed.—Cofer v. Corio, 174 A. 758, 113 N.J.Law 498, reversing 170 A. 221, 112 N.J.Law 225.

78. Mass.—Lockhead v. Jones, 137 Mass. 25.
23 C.J. p 959 note 9.

79. R.I.—Di Iorio v. Easton, 167 A. 137, 53 R.I. 429—Carlin v. Easton, 155 A. 527, 51 R.I. 421.
23 C.J. p 959 note 11.

80. U.S.—Crawford's Case, D.C., 6 F.Cas.No.3,365, 2 Cranch C.C. 454.
23 C.J. p 959 note 12.

81. U.S.—Holtzman v. Plumsel, D. C., 12 F.Cas.No.6,650, 4 Cranch C. C. 184.

82. Mass.—Ithaca First Nat. Bank v. Gogin, 19 N.E. 780, 148 Mass. 448.

83. Mass.—Haskell v. Haven, 3 Pick. 404.

84. Mass.—May v. Foote, 7 Allen 354—Haskell v. Haven, 3 Pick. 404.
23 C.J. p 959 note 17.

85. Mass.—Ithaca First Nat. Bank v. Gogin, 19 N.E. 780, 148 Mass. 448.

an adjournment regularly made.[86] Under some statutes the examination need not take place in the actual presence of the court or magistrate;[87] nor has the debtor a right to confront the witnesses against him.[88] The notice and time of trial of suggestions filed by creditors is discretionary with the officer who is to hear them.[89]

Questions considered. By filing a petition for discharge the debtor recognizes the validity of the process under which he has been seized and imprisoned, and he cannot raise such question collaterally in a proceeding for a discharge.[90]

Procuring attendance of officer. Under some statutes, the burden of doing the necessary preliminary acts in the proceedings is on the debtor,[91] including the procuring of the attendance of the magistrate or other officer at the time and place fixed for examination.[92] Under other statutes, where both the debtor and creditor select a justice, it is the duty of the creditor to procure the attendance of the justice selected by him at the time and place appointed in the citation,[93] and this duty to procure the attendance of the justice applies at every lawful adjournment of the tribunal.[94]

The report of commissioners appointed to investigate the affairs of an insolvent, under some statutes, should be under seal.[95]

Time for appearance in court. The statutes providing for the relief of poor debtors sometimes designate the time within which the magistrate and parties shall appear, a usual allowance being one hour after the time fixed for the examination,[96] or to which such examination is adjourned,[97] and there will be no default on the part of either the debtor or creditor until the expiration of the full time.[98] It has been held, however, that there is no inflexible rule that, at the moment the hour expires, there is a discontinuance of all cases not then brought before the consideration of the magistrates;[99] and that the magistrate may keep open the hearing after the expiration of the hour to which it has been adjourned.[1] If the debtor does not appear on the day set he cannot be discharged.[2]

b. Jurisdiction and Authority

Only the judge or justice designated by statute has jurisdiction to hear the proceedings for the discharge of poor or insolvent debtors.

The statutes providing for the relief of poor debtors usually designate the magistrate or justice before whom the proceedings, examination, administration of oath, etc., are to be had,[3] and no other persons have jurisdiction;[4] and if the justices who administer the oath to the debtor are not authorized in conformity to the provisions of the statute to act in the matter, their certificate of discharge has no validity whatever.[5] It has been held that the examination must be by officers who are authorized to act in the county in which the arrest was made.[6] The presumption is in favor of

86. N.H.—Banks v. Johnson, 12 N.H. 445.

87. Mass.—McKeon v. Briggs, 123 N.E. 387, 233 Mass. 99.
23 C.J. p 959 note 20.

88. Mass.—Simon v. Justices & Special Justices Boston Municipal Ct., 112 N.E. 608, 224 Mass. 122.
23 C.J. p 959 note 21.

89. S.C.—Rice v. Sims, 21 S.C.L. 5.
23 C.J. p 960 note 22.

90. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

Malicious conduct

Where defendant in tort action was found guilty by jury of malicious conduct, question was concluded, and defendant could not attack validity of process under which he was seized and imprisoned under capias ad satisfaciendum in subsequent collateral proceedings for discharge from imprisonment.—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545.

91. Mass.—Morrill v. Norton, 116 Mass. 487.

N.Y.—Cobb v. Harmon, 23 N.Y. 148, affirming 29 Barb. 472.

92. Mass.—Chesebro v. Barme, 39 N.E. 1033, 163 Mass. 79.
23 C.J. p 960 note 26.

93. Me.—Stanley v. Reed, 28 Me. 458.

94. Me.—Tarr v. Davis, 176 A. 407, 133 Me. 243.

95. La.—Spencer's Case, 2 Mart. 149.

96. Mass.—Niles v. Silverman, 103 N.E. 476, 216 Mass. 242.
23 C.J. p 960 note 29.

97. Mass.—Lincoln v. Cook, 124 Mass. 383.
23 C.J. p 960 note 30.

98. Mass.—Hills v. Jones, 122 Mass. 412.
23 C.J. p 960 note 31.

99. Mass.—Niles v. Silverman, 103 N.E. 476, 216 Mass. 242—Niles v. Hancock, 3 Metc. 568.

1. Mass.—Lincoln v. Cook, 124 Mass. 383.
23 C.J. p 960 note 33.

2. La.—Bott v. His Creditors, 9 La. 40.
23 C.J. p 960 note 34.

3. Conn.—Anderson v. Durey, 100 A. 99, 91 Conn. 510.
23 C.J. p 960 note 35.

In Maine two disinterested justices of the peace may become a court, for the purpose of examining the debtor who has applied for this statutory procedure, after they have examined the citation and return and found it correct. If they do not find it correct, there is no court to examine the debtor.—Karam v. Marden, 148 A. 691, 128 Me. 451.

In New York under the Debtor and Creditor Law § 121, application for a discharge must be made by petition addressed to the court from which the execution issued, or to the county court of the county in which he is imprisoned, or, if he is imprisoned in the city of New York, to the supreme court.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858.

4. Mass.—Lang v. Bunker, 1 Allen 256—Barker v. Ryan, 1 Allen 72.

5. Me.—Williams v. Turner, 19 Me. 454.
23 C.J. p 960 note 37.

6. Mass.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.
23 C.J. p 960 note 38.

the jurisdiction and acts of justices administering the poor debtor's oath,[7] and the authority of one acting as commissioner in insolvency to take a debtor's recognizance will be presumed, in the absence of evidence that it was usurped.[8] Commissioners appointed under statute to take a defendant's disclosure need not be sworn.[9]

Under some statutes, the court, on vacating a close jail certificate, has jurisdiction to grant the power to the prisoner to petition the jail commissioners for liberation on taking the poor debtor's oath, but the court does not have jurisdiction to order the jail commissioners to admit the prisoner to oath.[10]

Selection. Under some statutes, one justice is selected by the debtor, and then one by the creditor if he desires;[11] and when this right of the creditor is denied, the justices taking the disclosure have no jurisdiction and their proceedings are void.[12] If the creditor is not present to select a justice, the appointment may be made for him by an officer.[13] If the two justices selected do not agree, they may choose a third justice to act with them, and if they cannot agree on a third, a legally qualified officer may choose him;[14] the three justices then constitute the tribunal, and although the concurrence of only two is required, all must act in deciding such questions as arise until the final decision is made.[15] The debtor may select one of the justices to take his disclosure at any time after the citation to the creditor has been prepared, and before the tribunal has been organized.[16]

Qualification of justice. Under some statutes, in order that their acts may be binding the justices before whom the examination is conducted must be disinterested,[17] and relationship to either party within a certain degree will disqualify a justice.[18] The issuing of a citation to a creditor does not, however, disqualify the justice issuing the same from hearing the disclosure, as a justice selected on the part of the debtor,[19] nor will the fact that a justice who heard a disclosure on the part of the debtor was counsel for the debtor in an action subsequently brought on the bond given to procure the release of the debtor from arrest under execution affect the validity of the disclosure.[20]

§ 447. —— Hearing and Further Proceedings on Application

a. In general
b. Contest by creditor
c. Evidence
d. Order

a. In General

Particular matters relating to hearings on applications for a discharge as a poor or insolvent debtor are, except as controlled by specific statute, governed by the general rules of procedure.

Except in so far as governed by statute,[21] an adjournment or continuance is within the discretion of the examining officers,[22] and they may postpone or delay the hearing or examination from time to time whenever it becomes proper or necessary in the performance of their duties,[23] and for reasons of which they are the proper judges.[24] The adjournment may be based on the consent of the parties,[25] in which case it may be for a longer time than that prescribed by statute.[26] There can be

7. Me.—Randall v. Bowden, 48 Me. 37.
23 C.J. p 960 note 39.
8. Mass.—Damon v. Carrol, 40 N.E. 185, 163 Mass. 404.
9. Me.—Lewis v. Foster, 65 Me. 555.
10. Vt.—In re Blake, 175 A. 252, 107 Vt. 18.
11. Me.—Tarr v. Davis, 176 A. 407, 133 Me. 243.
23 C.J. p 960 note 42.
12. Me.—Spaulding v. Record, 65 Me. 220.
13. Me.—Burnham v. Howe, 23 Me. 489.
23 C.J. p 961 note 44.
Adjourned hearing
Where the creditor's justice for no good reason fails to attend an adjourned hearing, at least in the absence of the creditor or his attorney, the officer in charge of the debtor may choose a justice to act in place of him who failed to appear.—Tarr v. Davis, 176 A. 407, 133 Me. 243.
14. Me.—Ross v. Berry, 49 Me. 434 —Moody v. Clark, 27 Me. 551.
15. Me.—McDougall v. Ricker, 98 A. 1025, 115 Me. 357.
23 C.J. p 961 note 46.
16. Me.—Chamberlain v. Sands, 27 Me. 458.
17. Me.—Ware v. Jackson, 24 Me 166.
N.H.—Osgood v. Thorne, 63 N.H. 375.
23 C.J. p 961 note 48.
18. Me.—Baker v. Carleton, 32 Me. 335.
23 C.J. p 961 note 49.
19. Me.—Cummings v. York, 54 Me 386.
20. Me.—Cummings v. York, supra.
21. N.Y.—People v. Locke, 8 N.Y. Leg.Obs. 164.
22. S.C.—Bently v. Page, 27 S.C.L. 52.
23 C.J. p 962 note 78.
23. Mass.—Niles v. Silverman, 103 N.E. 476, 216 Mass. 242.
23 C.J. p 962 note 79.
24. N.J.—Stagg v. Austin, 18 N.J. Law 82.
25. Ill.—Lipman v. Goebel, 192 N. E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.
23 C.J. p 962 note 81.
26. N.H.—Leach v. Pillsbury, 18 N. H. 525.
N.Y.—People v. Behrman, Lalor 81.
Reason for rule
The statute was enacted for benefit of petitioning judgment debtor and his consent to the adjournment waived the benefit of the statute.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.
Record that debtor consented to adjournment for longer period than permitted by statute imports verity. —Lipman v. Goebel, supra.

no adjournment after a final decision,[27] nor to a place and time when there is to be no session of the court.[28] An adjournment by one only of the two justices is invalid, although consented to by the attorney of the creditor.[29] Payment of fees or any formal organization of the tribunal to hear the disclosure are not ordinarily a prerequisite to the exercise of the power to adjourn.[30]

Where at the time and place to which the hearing was adjourned, the debtor appears but the creditor does not, this is an abandonment of charges of fraud, and of all opposition to the discharge of the debtor.[31]

Administration and requisites of oath. The governing statute usually prescribes the person or official by whom the poor debtor's oath should be administered,[32] as well as the form and requisites of the oath.[33] If, on the examination and hearing of the parties, the magistrate or justice is satisfied that the debtor's disclosure is true, and they do not discover anything therein inconsistent with his taking the oath, they should administer the same to him;[34] but if the examiner is not satisfied that the disclosure is true or anything is discovered which is inconsistent with the taking of the oath,[35] as where the debtor is found guilty on the charge of fraud,[36] there is no authority to administer the oath. Under some statutes, however, it is the inescapable duty of the jail commissioners to admit the prisoner to the poor debtor's oath when the requisite facts have been found by them;[37] and it has been held that the magistrates to whom a debtor applies for the oath of insolvency have no discretion where he has complied with the requisites of the act in relation to notice, schedule, etc., but are bound to administer the oath, although they may be of the opinion that the debtor is about to commit perjury.[38] Under a statute requiring the jail commissioners to find that the prisoner is entitled to take the oath before admitting him thereto, the mere tacit admission of the truth of facts stated in the sworn petition of the prisoner, made in a subsequent proceeding, is not such a finding of facts as the statute requires.[39] The oath may be administered outside of the prison yard,[40] and may be administered before the expiration of the hour fixed by statute in some states, if the creditor or his agent has previously assented thereto.[41] The officer administering the oath is not required, in some jurisdictions, to return to the clerk's office a certificate of the oath or a copy of the discharge, it being sufficient to return the schedule and to deliver the discharge to the jailer.[42]

Appraisal and assignment of property. Under some statutes, where a debtor discloses in his examination that he possesses any property not exempt by law, which cannot be attached, appraisers must be selected to appraise such property before he can be discharged;[43] and he must deliver up his property,[44] or assign it to his creditor.[45] If the debtor voluntarily disables himself to make the assignment it is equivalent to a refusal by him to make it.[46] Under some statutes the debtor is not entitled to an absolute and immediate release from confinement on making a surrender of his property and on obtaining the judge's order of acceptance thereof, but he must await the action of the meeting of his creditors.[47]

In the absence of statutory authorization, in proceedings based on the application of a debtor to take the oath for relief of poor debtors, the court has no authority to make an order for the transfer

27. Mass.—Russell v. Goodrich, 8 Allen 150.

28. Mass.—Bliss v. Kershaw, 61 N. E. 823, 180 Mass. 99.

29. Me.—Hovey v. Hamilton, 24 Me. 451—Williams v. Burrill, 23 Me. 144.

30. Me.—Gould v. Ford, 39 A. 480, 91 Me. 146.

31. Mass.—O'Connell v. Hovey, 126 Mass. 310—Doane v. Bartlett, 4 Allen 74.

32. Conn.—Betts v. Dimon, 3 Conn. 107.
R.I.—Wilcox v. Crowell, 19 A. 329, 16 R.I. 707.
23 C.J. p 965 note 52.

33. Me.—Little v. Cochran, 24 Me. 509.
In Massachusetts the material provisions of the oath are that debtor has not any property to the amount of twenty dollars except property which is by law exempt from being taken on execution, but not excepting intoxicating liquors; and that he has not any other property now conveyed, concealed, or in any way disposed of with the design to secure same to his own use nor to defraud his creditors.—First People's Trust v. District Court of Lawrence, 146 N.E. 353, 251 Mass. 206.

34. Conn.—Anderson v. Dewey, 100 A. 99, 91 Conn. 510.
23 C.J. p 965 note 54.

35. U.S.—Burnham v. Adams, C.C. Me., 4 F.Cas.No.2,173, 2 Cliff. 569.
Me.—Butman v. Holbrook, 27 Me. 419—Little v. Cochran, 24 Me. 509.

36. Mass.—Noyes v. Manning, 34 N. E. 682, 159 Mass. 446.

37. Vt.—In re Savage, 22 A.2d 153, 112 Vt. 89.

38. Va.—Harrison v. Emmerson, 2 Leigh 764, 29 Va. 764.

39. Vt.—Gaffney v. Commissioners of Jail Delivery for Rutland County, 13 A.2d 192, 111 Vt. 196.

40. Mass.—Commonwealth v. Alden, 14 Mass. 388.

41. Mass.—Lord v. Skinner, 9 Allen 376.

42. Ky.—Bryan v. Perry, 5 T.B.Mon. 275.

43. Me.—Wingate v. Leeman, 27 Me. 174.
23 C.J. p 965 note 47.

44. Ala.—Wade v. Judge, 5 Ala. 130.

45. N.J.—Stokes v. Hardy, 60 A. 403, 71 N.J.Law 549, reversing 58 A. 650, 71 N.J.Law 116.
23 C.J. p 965 note 49.

46. N.H.—Head v. Clarke, 45 N.H. 287.

47. La.—Cawley v. Judge Fourth Dist. Ct., 13 So. 196, 45 La.Ann. 948.

of the debtor's property to the creditor.[48]

Discontinuance, abandonment, or withdrawal. After service of notice the proceedings are not abated by the death of the creditor.[49] Failure of the petitioner to attend or have the proceedings adjourned discontinues the application.[50] The proceedings may be abandoned by the debtor on paying the debt.[51]

Reopening proceedings. Where the debtor's petition for discharge has been denied because he concealed some of his property,[52] or on the ground that he omitted from his account some claims owned by him,[53] the proceedings may be reopened on his showing that he acted in good faith, and stating facts which explain or justify his conduct. Under some statutes where an application to take the poor debtor's oath is denied for want of service of notice on the creditor, the court's jurisdiction over the application is at an end, at least where there was no mistake on the judge's part as to the nature or effect of his decision, further power of the court to deal with the application is gone, and it has no power thereafter to entertain a request for a revision of the ruling and the issuance of a new notice.[54]

Review. Under some statutes there is no appeal from the decision of the jail commissioners in denying an application for a discharge.[55] Under some statutes an appeal from an order refusing a discharge, with a prescribed bond, entitles the debtor to a discharge from custody;[56] a bond so given is not a mere cost bond, but is intended to protect the creditor's claim.[57] If the order of discharge is invalid because of failure to require an assignment, the appellate court, in reviewing the order of discharge, should remand the case to be proceeded with according to law and should not permit the creditors to sue on the bond given by the insolvent.[58]

On review there is a presumption that the proceedings had for the discharge of an insolvent or poor debtor were regular.[59]

Costs and fees. The creditor is entitled to recover of the debtor the expense of citing him on the execution to appear and make a disclosure.[60] The payment of the magistrate's fee is not a condition precedent to the discharge of a poor debtor.[61] A defendant who is discharged by taking the insolvent's oath is not entitled to costs.[62] Under some statutes, the debtor is not legally entitled to claim a discharge without paying the amount due the jailer for his support in jail; such a sum is a part of the jailer's fees.[63]

Action for false disclosure. By statute, in some states, if the debtor willfully makes a false disclosure, or withholds or suppresses the truth on a material issue, the creditor may bring a special action on the case against him.[64] The false oath of the debtor must be alleged and proved, either by the testimony of the disclosure commissioner, the certificate of the magistrate, or by circumstantial evidence.[65]

b. Contest by Creditor

Under some statutes the creditor may contest the debtor's right to a discharge as a poor or insolvent debtor, and the usual practice in such cases is to cause or permit a suggestion of fraud to be filed and an issue made up so that the matter may be tried as in other civil cases.

Under some statutes, when an insolvent debtor has made his application for a discharge and filed his schedule as provided by law, the creditor may contest his right to be discharged,[66] by traversing the schedule so filed, as by suggesting fraud or concealment of any property, money, or effects not embraced therein;[67] and if the issue is found against the debtor he may be imprisoned until he surrenders the property.[68] It has been held that a creditor, who is in no way injured or defrauded,

48. Mass.—First People's Trust v. District Court of Lawrence, 146 N.E. 353, 251 Mass. 206.

49. N.Y.—Cobb v. Harmon, 23 N. Y. 148, affirming 29 Barb. 472.

50. N.Y.—Comstock's Case, 16 Abb. Pr. 233, 25 How.Pr. 429.

51. S.C.—Sleeper v. Cohen, 46 S.C. L. 112.
23 C.J. p 965 note 63.

52. N.Y.—Matter of Thomas, 10 Abb.Pr.,N.S., 114.

53. N.Y.—Matter of Rosenberg, 10 Abb.Pr.,N.S., 450.

54. Mass.—H. B. Smith Co. v. Stone, 140 N.E. 750, 246 Mass. 190.

55. Vt.—In re Savage, 22 A.2d 153, 112 Vt. 89—In re Blake, 175 A. 252, 107 Vt. 18.

56. Ala.—Ex parte Whitehead, 23 Ala. 93.
Ill.—Strohm v. Fachet, 185 Ill.App. 127.

57. Ill.—Strohm v. Fachet, supra.

58. N.J.—Stokes v. Hardy, 60 A. 403, 71 N.J.Law 549, reversing 58 A. 650, 71 N.J.Law 116.

59. Pa.—Grissinger v. Miller, 180 A. 904, 119 Pa.Super. 283.

60. Me.—Emerson v. Lombard, 15 Me. 458.

61. Mass.—Coleman v. Hawkes, 120 Mass. 594.

62. Tenn.—Roberts v. Shell, 4 Yerg. 160.

63. Me.—McPheters v. Morrill, 66 Me. 123.

64. Me.—Doughty v. Sullivan, 93 A. 738, 113 Me. 243—Golder v. Fletcher, 71 Me. 76—Dyer v. Burnham, 48 Me. 298.

65. Me.—Doughty v. Sullivan, 93 A. 738, 113 Me. 243.
23 C.J. p 966 note 83.

66. Ill.—People v. Hanchett, 111 Ill. 90.
S.C.—Lowden v. Moses, 12 S.C.L. 120.

67. N.C.—Hayes v. Lancaster, 163 S. E. 602, 202 N.C. 515.
23 C.J. p 963 note 92.

68. N.C.—Adams v. Alexander, 23 N. C. 501.
Pa.—Hassinger's Case, 2 Ashm. 287.

cannot contest the debtor's discharge.[69] Under some statutes, where a debtor arrested on execution applies to take the poor debtor's oath, the creditor may file charges of fraud against him[70] at any time before the announcement of the magistrate's decision, although the hearing of evidence and arguments has closed, and the case has been continued for the purpose of considering questions of law and fact involved;[71] and where such charges are sustained,[72] the debtor cannot be released but may be subjected to additional punishment.[73]

Although it has been held that a creditor has the right to examine applicant before the judge or commissioner touching on the truth of his schedule,[74] without filing a suggestion of fraud,[75] the usual practice, under the statutes, is to cause or permit a suggestion of fraud to be filed and an issue to be made up so that the matter may be tried as in other cases.[76] The charges of fraud are in the nature of an action at law, notwithstanding the provision for punishment by imprisonment,[77] and are incidental to the debtor's application to be relieved from imprisonment, by taking the oath, and are set up by way of answer to that application.[78] The suggestions must allege fraud with sufficient fullness and certainty to indicate the charges the debtor must answer,[79] and the charges must be clear, distinct, and specific, and not founded on mere hearsay and rumor.[80] The suggestions, where filed, must also contain the charges and specifications to which the verdict must answer.[81] Vague or insufficient allegations do not authorize the court to direct interrogatories to be filed or an issue to be tried.[82] It is not, however, necessary to specify the time, place, sum, person, item, and other facts with the same precision required in an ordinary declaration, although advantage may be taken of defects in form or substance;[83] nor need charges of fraud be stated with the particularity requisite for an indictment, but only with sufficient clearness to inform the debtor of the nature and particulars of the transaction intended to be proved against him.[84] The charges may be alleged on belief, without venue, and as "on or about" a day named within the limitation presented by statute.[85] They may be signed and sworn to by one of several partners in behalf of his firm.[86] The question whether the charges of fraud were sufficient in form cannot be raised on motion in arrest of judgment,[87] and an objection to the specification on the ground that it is not sufficiently certain is too late after issue joined,[88] the remedy being to move for specifications.[89] It has been held that before requiring the debtor to join in an issue to try the fairness of his schedule, there should be some showing by affidavits, although the right to call therefor is waived by pleading to the suggestions.[90] Where the statute is specific in limiting the time in which to plead to the debtor's declaration, it has been held that the court cannot extend the time to plead or recognize a plea filed out of time.[91]

If the creditors do not appear and show cause at the time and place fixed there is a discharge by operation of law under some statutes;[92] or if the

69. N.Y.—In re Brady, 69 N.Y. 215, 53 How.Pr. 128, affirming 8 Hun 437—In re Brown, 39 Hun 27.

70. Mass.—Leonard v. Bolton, 26 N. E. 1118, 153 Mass. 428.
23 C.J. p 963 note 95.

71. Mass.—Andrews v. Cassidy, 7 N. E. 545, 142 Mass. 96.

72. Mass.—Morse v. Dayton, 125 Mass. 47.
23 C.J. p 963 note 98.

73. Mass.—Leonard v. Bolton, 26 N. E. 1118, 153 Mass. 428—Everett v. Henderson, 23 N.E. 318, 150 Mass. 411.
R.I.—Matteson v. Choquet, 90 A. 161, 36 R.I. 271.

74. S.C.—Fleming v. Close, 34 S.C.L. 362.
23 C.J. p 963 note 1.

75. S.C.—Rosser v. Moye, 30 S.C.L. 62—Fabre v. Zylstra, 2 S.C.L. 147.

76. N.C.—Hayes v. Lancaster, 163 S. E. 602, 202 N.C. 515.
23 C.J. p 963 note 3.

No issue
Where debtor amends his schedule on the filing of a suggestion of its falsity, and in the amendment states what he affirms to be the true condition of the property specified, and adds that he is ready to include in his schedule and assign whatever interest he has in it, the truth or falsity of his statements cannot be tried by a jury, but it is sufficient for him to assign his interest in the property. —Craig v. Pinson, 29 S.C.L. 176.

77. Mass.—Morse v. O'Hara, 142 N. E. 40, 247 Mass. 183.
23 C.J. p 963 note 4.

78. Mass.—Everett v. Henderson, 23 N.E. 318, 150 Mass. 411—Stockwell v. Silloway, 100 Mass. 287.

79. N.C.—Hayes v. Lancaster, 163 S.E. 602, 202 N.C. 515.

80. S.C.—Ex parte Maffet, 45 S.C.L. 358.

Allegations held insufficient
N.C.—Hayes v. Lancaster, 163 S.E. 602, 202 N.C. 515.

81. S.C.—Haviland v. Wolff, 48 S.C. L. 108—Robinsons v. Amy, 30 S.C. L. 289.

82. U.S.—Crawford's Case, D.C., 6 F. Cas.No.3,365, 2 Cranch C.C. 454.

83. S.C.—Gray v. Schroder, 33 S.C. L. 126.

84. Mass.—Anderson v. Edwards, 123 Mass. 273.
23 C.J. p 963 note 11.

85. Mass.—Stockwell v. Silloway, 100 Mass. 287.

86. Mass.—Brown v. Tobias, 1 Allen 385.

87. Mass.—Lamagdelaine v. Tremblay, 39 N.E. 38, 162 Mass. 339.

88. N.C.—Nixon v. Nunnery, 31 N. C. 28.

89. Mass.—Noyse v. Manning, 37 N. E. 768, 162 Mass. 14.
23 C.J. p 964 note 16.

90. S.C.—Baker v. Bushnell, 26 S. C.L. 66.
23 C.J. p 964 note 17.

91. N.J.—Compton v. Calvert, 72 A. 29, 77 N.J.Law 358.

92. La.—Toutain v. His Creditors, 14 La. 336—Caldwell v. Bloomfield, 2 La. 503—Martin's Case, 2 Mart. 77.

creditor has filed charges and does not appear at the time and place fixed, it constitutes an abandonment of his charges and of all opposition to the discharge of the debtor, even though the debtor promises to pay the execution,[93] and the magistrate has no further jurisdiction except to discharge the debtor.[94] The failure to appear, however, does not waive the right to attack the order of discharge, where the petition is on its face insufficient to give the court jurisdiction,[95] and even where charges have been filed, it has been held that petitioner must go on and prove his case, although the creditor does not appear.[96]

A motion by the debtor to dismiss charges of fraud may be entertained if seasonably made.[97]

Amendment. The charges contained in the suggestions filed are subject to amendment,[98] and where the creditor desires to file additional objections to the schedule, a new trial may be granted with leave to amend the suggestions.[99] It has been held, however, that the allegations of the contestor will not be allowed to be amended, after the jury is sworn, by inserting the name of another creditor.[1]

Evidence. It is incumbent on the persons filing the counter allegations to show that they are creditors of the insolvent,[2] and the debtor may show that the contestor is not his creditor;[3] and if fraud is relied on, the contestor must show that it was against creditors who were such at the time of the alleged fraudulent conveyance and at the time of the trial.[4] The burden of showing fraud is on the contesting creditors,[5] but the general rules of evidence in civil proceedings apply,[6] and such charges need not be proved beyond a reasonable doubt as in criminal cases.[7] Something more than a suspicion of artifice and deception is necessary to prove fraud.[8] The creditor may show that the debtor was seen with money or other property shortly before his arrest,[9] and may question the debtor as to his giving an inventory to the officer who arrested him.[10] The debtor and his wife may be called by the creditor as witnesses.[11]

A verdict must answer with reference to each charge and specification that it is true or untrue.[12]

Appeal. On the trial of charges of fraud, under some statutes, either party has a right of appeal from the decision and to a trial by jury,[13] such appeal being in like manner as in civil actions,[14] and statutes giving this right to the creditor are not unconstitutional as placing the debtor twice in jeopardy.[15] Under some statutes providing for trial of charges of fraud, a decision and finding of fraud is but one step in the procedure and sentence is necessary before the case reaches the stage of judgment from which the debtor can appeal.[16] An appeal will not be allowed merely for the purpose of enhancing the punishment.[17] This right of appeal, although claimed by the creditor, does not make it less the duty of the examining magistrates to administer the oath to the debtor and issue the certificate thereof, where they decide that the charges of fraud are not maintained,[18] nor will an appeal taken from the decision of the magistrate, finding the poor debtor guilty on charges of fraud filed, exempt the debtor from arrest on the execution.[19]

93. Mass.—O'Connell v. Hovey, 126 Mass. 310.
23 C.J. p 964 note 35.

94. Mass.—Longley v. Cleavland, 133 Mass. 256.

95. N.Y.—Seward v. Wales, 58 N. Y.S. 42, 40 App.Div. 539, affirmed 60 N.E. 1120, 167 N.Y. 538.

96. N.J.—Williamson v. Booram, 10 N.J.Law 351.

97. Mass.—Clatur v. Donegan, 126 Mass. 28.

98. Mass.—Lamagdelaine v. Tremblay, 39 N.E. 38, 162 Mass. 339.
23 C.J. p 964 note 19.

99. S.C.—Bowen v. Holleyman, 43 S. C.L. 65.
23 C.J. p 964 note 20.

1. U.S.—Newton's Case, D.C., 18 F. Cas.No.10,188, 2 Cranch C.C. 467.

2. U.S.—Newton's Case, supra.

3. U.S.—Mandeville v. Jamesson, D. C., 16 F.Cas.No.9,011, 1 Cranch C.C. 509.

4. U.S.—Ex parte Knowles, D.C., 14 F.Cas.No.7,895, 2 Cranch C.C. 576.

5. U.S.—Ex parte Knowles, supra.
La.—Parlange v. His Creditors, 18 La. 475.
Mass.—Everett v. Henderson, 23 N.E. 318, 150 Mass. 411.

6. Mass.—Taylor v. Jacobs, 138 Mass. 148.
23 C.J. p 964 note 27.

7. Mass.—Anderson v. Edwards, 123 Mass. 273.

8. N.C.—Hayes v. Lancaster, 163 S. E. 602, 202 N.C. 515.

9. Ga.—Johnson v. Martin, 25 Ga. 268.

10. N.J.—Bond v. Cox, 30 N.J.Law 381.

11. Mass.—Anderson v. Edwards, 123 Mass. 273.

12. S.C.—Haviland v. Wolff, 48 S.C. L. 108—Hedley v. Jordan, 31 S.C. L. 453.
23 C.J. p 964 note 33.

13. Conn.—Wheatley v. Dubuc, 105 A. 616, 93 Conn. 271.
Mass.—Everett v. Henderson, 23 N. E. 313, 150 Mass. 411—Morse v. Dayton, 125 Mass. 47.
N.C.—Wilkings v. Baugham, 25 N.C. 86.
23 C.J. p 964 note 41.

14. Mass.—Everett v. Henderson, 23 N.E. 318, 150 Mass. 411.

15. Mass.—Stockwell v. Silloway, 100 Mass. 287.

16. Mass.—Morse v. O'Hara, 142 N. E. 40, 247 Mass. 183.

17. Mass.—Smith v. Dickinson, 3 N. E. 40, 140 Mass. 171.
23 C.J. p 965 note 44.

18. Mass.—Ingersoll v. Strong, 9 Metc. 447.

19. Mass.—Fletcher v. Bartlett, 10 Gray 491.

c. Evidence

In determining the truth and justice of the application, the court will hear any legal and competent evidence.

It is the duty of the court to hear and examine into the truth and justice of the application or petition[20] by hearing any legal and competent evidence adduced on the part of the petitioner,[21] or of any one or more of the creditors.[22] The opposing creditors may introduce proof on the subject of the arrest of the debtor,[23] or to show that the debtor has not complied with the provisions of the statute.[24] The debtor should answer under oath the questions put to him on examination;[25] and he may prove by his own oath that he has been arrested and given the bond required by the statute in such case.[26] On application to take the poor debtor's oath, any course of examination which would have a tendency to exhibit conduct of the debtor inconsistent with the oath is pertinent and appropriate,[27] and the oath may be refused where one of several charges is proved,[28] or where the debtor cannot account for the appropriation of money traced to his hands;[29] but no inquiry is permissible as to disposition of property prior to the contracting of the debt for which judgment was rendered.[30] The debtor must make a true disclosure of his business affairs and property under oath, and the creditor may propose to the debtor any interrogatories pertinent to the inquiry.[31] Under some statutes the debtor has the burden of proving the facts stated in the oath and the facts stated in the certificate, and unless this burden is sustained the oath will be refused.[32] It has also been held that if the debtor has property in his possession which is not included in his schedule, and on which he pays taxes as his own, the burden is on him to show that it does not belong to him.[33] It has been held, however, that the statement exhibited under oath by a petitioner for the benefit of the insolvent laws is prima facie correct; and the burden of proving it to be erroneous lies on the opposing creditors,[34] and whether the statements made by a poor debtor at his examination before the justices are true, and if so whether they are consistent with the oath, are questions for the final decision of the magistrates under the statute.[35] If petitioner departed from the state it is necessary, in some jurisdictions, to show that he went with a clear intention of returning.[36] If the application is a second one, proof of a change of circumstances may be required by the court before any examination.[37]

As to nature of action. Whether the action belongs to the class in which a discharge may be granted cannot be determined by extrinsic evidence, but only from the record if such fact can be obtained therefrom;[38] but, in the absence of a statute to the contrary,[39] where the complaint contains several counts, on some of which a discharge may be granted, and where the verdict is a general one

20. N.J.—Wallace v. Coil, 24 N.J. Law 600.
Pa.—Hassinger's Case, 2 Ashm. 287.
23 C.J. p 961 note 53.

Evidence held sufficient to entitle debtor to discharge
N.J.—In re Walaska, 129 A. 418, 3 N. J.Misc. 139.

Evidence held insufficient to support finding that petitioner was insolvent or had made complete schedule of property.—Abbrassart v. Bouchard, 241 Ill.App. 484.

21. N.J.—Wallace v. Coil, 24 N.J. Law 600.
Pa.—Benney's Case, 1 Ashm. 261.
23 C.J. p 961 note 54.

22. Me.—Marr v. Clark, 56 Me. 542.
N.H.—Bunker v. Nutter, 9 N.H. 554.
N.J.—Wallace v. Coil, 24 N.J.Law 600.

23. N.J.—Bond v. Cox, 30 N.J.Law 381.

24. N.J.—Smick v. Opdycke, 12 N.J. Law 347.
23 C.J. p 961 note 57.

25. N.Y.—People v. Behrman, Lalor 81.
23 C.J. p 961 note 58.

26. N.J.—Hamilton v. Chevallier, 18 N.J.Law 433.

27. Me.—Little v. Cochran, 24 Me. 509.

28. Mass.—Macaig's Case, 137 Mass. 467.

29. Kan.—Heath v. Brown, 19 P. 363, 40 Kan. 33.
Ga.—Ex parte Bishop, T. U. P. Charlt. 267.
23 C.J. p 961 note 62.

30. Me.—Ledden v. Hanson, 39 Me. 355—Jewett v. Rines, 39 Me. 9.

31. Me.—Marr v. Clark, 56 Me. 542.
N.H.—Bunker v. Nutter, 9 N.H. 554.
23 C.J. p 962 note 64.

32. Mass.—First People's Trust v. District Court of Lawrence, 146 N. E. 353, 251 Mass. 206.

33. S.C.—Walker v. Briggs, 19 S.C. L. 118.

34. Pa.—Hassinger's Case, 2 Ashm. 287.

35. Me.—Ledden v. Hanson, 39 Me. 355.

36. Pa.—Senior's Case, 2 Ashm. 118.

37. R.I.—In re Ballou, 7 R.I. 466.

38. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill. App. 556—McNamara v. Bird-Sykes Co., 252 Ill.App. 273—In re Petition of Floren, 251 Ill.App. 569—Masterson v. Furman, 89 Ill.App. 291.
23 C.J. p 962 notes 72–74.

Matters considered
In determining the question the court must keep in mind the charge as laid in the declaration, and the construction placed on the language found therein, together with the finding of the jury.—Fromm v. Seyller, 245 Ill.App. 392.

Records of municipal court were properly received in evidence to determine if malice was of the gist of the action.—In re Bobzin, 220 Ill. App. 470.

39. In Illinois, since the amendment of July 11, 1935, Smith-Hurd St. c 77 § 5, it is no longer the province of the county court to determine whether malice was the gist of the action in which the judgment was recovered. That question, under the amendment, is left to the trier of facts in the action where the tort judgment is obtained.—In re Monaco, 5 N.E.2d 755, 287 Ill.App. 540.

responsive to all the counts, the court may hear evidence to determine such fact,[40] and the petitioner has the burden of proving that the verdict and judgment were based on a count authorizing a discharge.[41] Evidence as to the occurrence on which the suit resulting in the judgment was based is not admissible, since the petitioner is not entitled to a new trial of such suit on the merits, the sole question being what determination was reached on the trial of the case.[42]

d. Order

It is the duty of the court to make the proper and necessary orders.

It is the duty of the court hearing the application to make the requisite decisions and orders respecting the property, etc., surrendered, and the discharge of the prisoner,[43] if no sufficient cause is shown for disbelieving the prisoner's oath or affirmation and the proceedings are just and fair.[44] Although, in view of the harshness of the remedy, the debtor should be given the benefit of a doubt as to the regularity of the proceedings under which he was held,[45] the granting of a discharge ordinarily rests in the sound discretion of the court or officer hearing the petition therefor.[46] Under the constitutions and statutes of some states, it is the duty of the court to discharge the debtor if he is without means or property with which to pay the judgment and has not secreted or assigned his property, notwithstanding the length of time which has elapsed since his arrest.[47] The judgment of a court that the case is not one in which the debtor is entitled to a discharge on schedule and assignment of his property is final and conclusive until reversed or otherwise annulled.[48] It has been held that the discharge may be conditional.[49]

The order for the prisoner's discharge should show on its face whether made in court or out of court,[50] and it will not per se protect an officer

40. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Rosenberg v. Ott, 1 N.E.2d 502, 285 Ill.App. 50—Stoike v. Bonasera, 243 Ill.App. 281—Abbrassart v. Bouchard, 241 Ill.App. 484.

Evidence held to establish prima facie that malice was not gist of action.—Abbrassart v. Bouchard, supra.

41. Ill.—Petition of Blacklidge, 195 N.E. 3, 359 Ill. 482—Buck v. Alex, 182 N.E. 794, 350 Ill. 167, reversing 263 Ill.App. 556—Jernberg v. Mix, 65 N.E. 242, 199 Ill. 254, affirming 100 Ill.App. 264—Rosenberg v. Ott, 1 N.E.2d 502, 285 Ill.App. 50—In re Teiszerski, 272 Ill.App. 305—Gannon v. Kiel, 251 Ill.App. 389—Scanlon v. Whalen, 249 Ill.App. 19—Mantske v. Rhutassel, 248 Ill. App. 492—Kaplan v. Williams, 245 Ill.App. 542—Fromm v. Seyller, 245 Ill.App. 392—Stoike v. Bonasera, 243 Ill.App. 281—Abbrassart v. Bouchard, 241 Ill.App. 484—Petition of Fetz, 239 Ill.App. 250—In re Meinhardt, 202 Ill.App. 266—Mahler v. Sinsheimer, 20 Ill.App. 401.

Evidence held insufficient to show that malice was not of the gist of the action.—Chalukonis v. Joswiak, 4 N.E.2d 782, 287 Ill.App. 170.

42. Ill.—Rosenberg v. Ott, 1 N.E.2d 502, 285 Ill.App. 50.

43. Ala.—Morrow v. Weaver, 8 Ala. 288.
23 C.J. p 966 note 64.

Commitment for contempt

In view of Gen.L. c 224 § 11, where petitioner, taken on execution, during examination disclosed that after service he had assigned property for benefit of creditors which was not exempt, district court could commit him for contempt.—Petition of Connors, 149 N.E. 669, 254 Mass. 103.

44. N.Y.—Matter of Thomas, 10 Abb.Pr.,N.S., 114.
23 C.J. p 966 note 65.

45. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

46. Pa.—Kubit v. Witt, 193 A. 81, 127 Pa.Super. 434.

Fraud

Whether the debtor has been guilty of fraud or assigning or secreting his property rests in the judicial discretion of the court.—Petition of Young, 192 A. 911, 327 Pa. 267.

Where debtor is sick and further imprisonment may be a menace to his life, the court may, in an otherwise proper case, grant a discharge.—Sam Kass Corporation v. Kass, 1 N.Y.S.2d 783, 165 Misc. 858—Wintner v. Aron, 260 N.Y.S. 226, 145 Misc. 313, affirmed 259 N.Y.S. 967, reargument denied 259 N.Y.S. 1023, 236 App.Div. 840.

Where continuance of confinement will serve no good purpose, the debtor may be discharged.—In re Snyder, 280 N.Y.S. 257, 155 Misc. 616, affirmed 280 N.Y.S. 259, 244 App.Div. 784.

47. Pa.—Petition of Young, 192 A. 911, 327 Pa. 267—Bloomington v. Shapiro, 195 A. 642, 129 Pa.Super. 218—Hefferon v. Sieminski, 43 Lack.Jur. 25—Petition of Di Maio, 89 Pittsb.Leg.J. 227.

Discretion before sixty days

(1) Under 39 Pub.St. § 12 it has been held that, before the expiration of sixty days after the commitment, the court may exercise its discretion in granting a discharge, but after sixty days have expired, if defendant complies with the law, he is entitled to a discharge.—Kubit v. Witt, 193 A. 81, 127 Pa.Super. 434—De Turk v. Gackenbach, 96 Pa.Super. 38—Matz v. Haug, 80 Pa.Super. 583—Petition of Ostrowske, 79 Pa.Super. 311—McFadden v. Stamm, 7 Pa.Dist. & Co. 753—De Many v. Walner, 44 Pa.Co. 699—DeLeo v. Pachioli, 56 Montg.Co. 351.

(2) Cases so holding have been criticized on the ground that Const. art 1 § 16 was apparently not taken into account, since under that provision if a debtor is without means or property with which to pay the judgment, has not secreted or assigned any of his property, follows the procedure prescribed by statute, and there is not a strong presumption of fraud growing out of either the transaction which formed the basis of the judgment or the proceedings for discharge, he is entitled to a discharge without waiting sixty days.—Grissinger v. Miller, 180 A. 904, 119 Pa.Super. 283.

(3) Even conceding that a discharge before the expiration of sixty days is a matter of discretion, such discretion must not be abused.—Grissinger v. Miller, 180 A. 904, 119 Pa.Super. 283.

48. Ill.—People v. Hanchett, 111 Ill. 90.

49. Ohio.—Loines v. Philips, 2 Ohio 313.
23 C.J. p 966 note 67.

50. N.Y.—Hayes v. Bowe, 12 Daly 193, 65 How.Pr. 347.
23 C.J. p 966 note 68.

acting under it, unless it contains recitals of all the facts necessary to give jurisdiction to the court granting it;[51] but if the order fails in these particulars the facts needful to give jurisdiction may be established aliunde.[52] If a discharge is denied after a jury trial the judgment against the debtor is "that he be precluded from any benefit under the act entitled," etc.[53]

Recommitment. Under some statutes, if the petition is refused, but the petitioner is out on a prison-bounds bond, he will not be ordered into close custody.[54] In some jurisdictions it has been held that the debtor may be recommitted if he fails to comply properly with the statute for the relief of honest debtors,[55] or if the court has reason to believe him guilty of fraud.[56] The court, on refusing a discharge, may verbally order the debtor back into the officer's custody without process in the name of the people.[57]

Reconsideration of order. Where there has been no final order, the court has the power to reconsider its order refusing the oath to the debtor, and it may direct the clerk to remove the certificate for commitment from the execution, and, after rescinding the order, it may administer the oath and discharge the debtor.[58]

§ 448. —— Record

There should be a compliance with statutory requirements as to matters which should appear of record in proceedings of this character, and the usual rules as to conclusiveness of matters appearing of record apply. Where the statute so provides, a certificate of discharge should be given the debtor.

Under some statutes the jail commissioners in hearing an application for discharge do not constitute a tribunal of record, and they are not required to keep any record of their proceedings.[59] Under other statutes, however, the authority of the justices before whom the examination and disclosure of a poor debtor took place must appear from the record, and nothing will be presumed in favor of the jurisdiction;[60] but the record of the proceedings of justices administering a poor debtor's oath need not exhibit a compliance with statutory requirements which are merely directory.[61] It is competent for a justice, before whom a poor debtor is examined, to amend his record.[62] A statutory requirement that a record as to the administration of the oath to the debtor shall be returned to the court within a prescribed time is merely directory.[63]

When the justices adjudicate, as appears by their record, that it does not appear from the debtor's disclosure that he had in his possession any account against anyone, the record is conclusive and cannot be contradicted by the debtor's disclosure, signed and sworn to by him.[64] Where, however, the justices adjudge property disclosed by the debtor not to be subject to a creditor's lien, when by the disclosure it is clearly liable to be taken on execution, such adjudication is not conclusive, but is subject to revision in a suit on the bond.[65] The record of one of the magistrates before whom application was made, that the other was necessarily absent at the time originally assigned for a hearing, and that the application was postponed for this cause, is sufficient evidence of a legal postponement.[66] The record of the discharge of an insolvent is, in an action on his bond, conclusive as to his compliance with all things required by law to entitle him to a discharge.[67] A discharge of a person by a court of competent jurisdiction, as a poor insolvent debtor, cannot be impeached in a collateral way by proof that at the time of his discharge he was in possession of a sufficient sum of money to pay the debt for which he was confined.[68]

Even if certiorari lies to bring up the record of the proceedings of justices of the peace as to the disclosure of a poor debtor before them, only the record of the inferior tribunal can be brought up, and no facts to affect it are admissible.[69] The record of the justices of the peace, as to hearing the disclosure of and administering the oath to a

51. N.Y.—Bullymore v. Cooper, 46 N.Y. 236, affirming 2 Lans. 71—Seward v. Wales, 58 N.Y.S. 42, 40 App.Div. 539, affirmed 60 N.E. 1120, 167 N.Y. 538.
23 C.J. p 966 note 69.

52. N.Y.—Goodwin v. Griffis, 88 N.Y. 629, reversing 25 Hun 61.
23 C.J. p 966 note 70.

53. U.S.—Newton's Case, D.C., 18 F. Cas.No.10,188, 2 Cranch C.C. 467.

54. U.S.—Eckle v. Fitzgerald, D.C., 8 F.Cas.No.4,267, 4 Cranch C.C. 90—McClean v. Plumsell, D.C., 15 F. Cas.No.8,693, 4 Cranch C.C. 86.

55. Ga.—Mims v. Lockett, 20 Ga. 474—Governor v. Kemp, 12 Ga. 466.
23 C.J. p 966 note 73.

56. Pa.—Mullen v. Wallace, 2 Grant 389.

57. Ill.—People v. Hanchett, 111 Ill. 90.

58. Mass.—Sallinger v. Hughes, 126 N.E. 278, 235 Mass. 104.

59. Vt.—In re Blake, 175 A. 252, 107 Vt. 18.

60. Me.—Bowker v. Porter, 39 Me. 504—Granite Bank v. Treat, 18 Me. 340.

61. Me.—Clement v. Wyman, 31 Me. 50.

62. Mass.—Lincoln v. Cook, 124 Mass. 383.

63. N.H.—Allen v. Bruce, 12 N.H. 418.

64. Me.—Cannon v. Seveno, 4 A. 789, 78 Me. 307.

65. Me.—Jewett v. Rines, 39 Me. 9.

66. N.H.—Chesley v. Welch, 10 N.H. 251.

67. Pa.—Sheets v. Hawk, 14 Serg. & R. 173, 16 Am.D. 486.

68. Pa.—McKinney v. Crawford, 8 Serg. & R. 351.

69. Me.—Pike v. Herriman, 39 Me. 52.

poor debtor, is not affected by the granting merely of a writ of certiorari to bring it before the court.[70] Under some statutes, an order made by a proper officer on the application of an insolvent debtor for exoneration or discharge from imprisonment is not appealable, and the remedy in such a case is by certiorari.[71]

Certificate. Under some statutes it is the duty of the magistrates discharging a debtor to make out a certificate and deliver it to the debtor, this constituting the evidence on which the prison keeper is required to discharge him and the evidence of his exemption from imprisonment on that or any other execution, to be issued on the same judgment or any other judgment founded thereon,[72] and is all that is required to complete the debtor's discharge.[73] In the absence of a statute to the contrary, they are not required to give the creditor a certificate of attachable interest in real estate disclosed by the debtor, when the creditor is present by his attorney, unless requested to do so by such creditor or attorney, and a failure to do so does not affect the debtor's discharge.[74]

Where the statute prescribes the form, a compliance therewith is sufficient and nothing further need be inserted.[75] If the certificate states substantially the facts entitling the debtor to his discharge it will be sufficient.[76] Should a certificate be pleaded, it must, however, appear to apply with requisite certainty to the execution mentioned in the declaration.[77] The certificate of a justice that the poor debtor's oath has been administered to an imprisoned debtor, to be regular on its face, should contain a recital of all facts essential to give the justice jurisdiction to administer the oath.[78] The certificate need not be stamped.[79] A creditor can take no advantage of any informality in the certificate.[80]

If seasonably moved for, an amendment of the certificate will be allowed.[81] Where justices duly selected and qualified have administered the poor debtor's oath, after an examination, to a debtor who had been arrested on execution and had given bond, they may amend their certificate conformably to the truth of the case,[82] not only after the commencement of a suit on the bond[83] but on the trial thereof.[84]

The certificate of justices of their proceedings under an insolvent act is of itself evidence of the facts it contains,[85] and a party claiming under such proceedings is not compelled to prove such facts by evidence aliunde the certificate.[86] It is, however, evidence only of the facts required by the statute to be stated in the certificate.[87] A certificate of a debtor's insolvency is evidence only against plaintiff in the execution under which it was procured and his privies.[88]

In some jurisdictions the doctrine is expressly recognized that a creditor may go behind the certificate of the magistrates and show irregularity in the preliminary proceedings, as for instance in the notice.[89] In others, however, the adjudica-

70. Me.—Clark v. Metcalf, 38 Me. 122.

71. N.Y.—In re Roberts, 70 N.Y. 5, 53 How.Pr. 199, reversing 10 Hun 253.
R.I.—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

72. Conn.—Anderson v. Dewey, 100 A. 99, 91 Conn. 510.
23 C.J. p 967 note 8.

73. Mass.—Butler v. Fairbanks, 4 Gray 531.

74. Me.—Cannon v. Seveno, 4 A. 789, 78 Me. 307.

75. Mass.—Butler v. Fairbanks, 4 Gray 531.
N.H.—Chesley v. Welch, 10 N.H. 251—Keay v. Palmer, 5 N.H. 43.

76. Conn.—Anderson v. Dewey, 100 A. 99, 91 Conn. 510, 512.
23 C.J. p 967 note 12.

Date of execution

Where it appears by the justices' certificate to what debt the proceedings related, their omission to insert the date of the execution on which the arrest was made will not render the proceedings void.—Burnham v. Howe, 23 Me. 489.

Date of judgment

Where the citation and bond describe the judgment on which the debtor was arrested as rendered at a certain term of court, it is not a misrecital in the discharge to describe it as rendered on a particular day of such term.—Gray v. Douglass, 17 A. 320, 81 Me. 427.

77. Vt.—Holbrook v. Pearce, 15 Vt. 616.
23 C.J. p 967 note 13.

78. Conn.—Anderson v. Dewey, 100 A. 99, 91 Conn. 510.

Adjournment

A certificate by justices that a poor debtor made a disclosure and they administered to him the oath required, on a day named, and that the hearing before them was pursuant to a previous adjournment without certifying any time from which such adjournment was had, is invalid.—Bowker v. Porter, 39 Me. 504.

79. Me.—Angier v. Smalley, 58 Me. 425.

80. N.H.—Keay v. Palmer, 5 N.H. 43.

81. Me.—Scamman v. Huff, 51 Me. 194.
23 C.J. p 968 note 20.

82. Me.—Burnham v. Howe, 23 Me. 489.
Mass.—Ward v. Clapp, 4 Metc. 455.

83. Mass.—Ward v. Clapp, supra.

84. Me.—Burnham v. Howe, 23 Me. 489.

85. Md.—Winingder v. Diffenderffer, 5 Harr. & J. 181.
N.H.—Osgood v. Hutchins, 6 N.H. 374.
23 C.J. p 968 note 24.

86. Md.—Winingder v. Diffenderffer, 5 Harr. & J. 181.

87. Me.—Winsor v. Clark, 39 Me. 428.
23 C.J. p 968 note 26.

88. Ky.—Smith v. Blunt, 2 A.K. Marsh. 522.

89. Mass.—Baker v. Moffat, 7 Cush. 259.
23 C.J. p 968 note 28.

tion of the magistrates respecting the notice and return is conclusive,[90] unless its effect is destroyed by an agreed statement of facts or by a voluntary admission of illegal testimony.[91] The certificate, while prima facie evidence of jurisdiction of the justices, is not conclusive on the point, and want of jurisdiction may be shown.[92] Evidence to show that no legal service of the citation was made is admissible, although it may contradict the record and certificate of the magistrate who administered the oath.[93]

§ 449. —— Validity and Effect of Discharge

Fraud and concealment on the debtor's part may invalidate his discharge, but mere irregularities will not render it void. An execution debtor regularly discharged as a poor or insolvent debtor cannot be rearrested or imprisoned on the same or a subsequent execution founded or issued on the same judgment.

Where an imprisoned debtor procures a discharge of the execution by false representation or concealment of the truth the discharge will be void.[94] A poor debtor's discharge is not rendered invalid by reason of a mistake honestly made,[95] by the fact that the oath was unnecessarily administered to him,[96] or by failure to pay an amount stipulated to be paid by him until the day of adjournment of the proceedings.[97] A discharge is not invalidated because a poor debtor, before commencing his disclosure, delivered to his attorney a sum of money as payment in part of the amount he was indebted to him, and also for the payment of the justices' fees for taking the disclosure.[98] A discharge under the insolvent laws is valid, although the petitioner does not mention in the list of creditors returned to the court the name of plaintiff at whose suit he is imprisoned, provided he has given the notice prescribed by the court.[99] The creditor does not waive his right to object to the validity of the discharge by not accepting an offer of assignment of property to him by the debtor.[1] Except in so far as otherwise provided by statute,[2] an execution debtor regularly discharged as a poor debtor cannot be again arrested or imprisoned on the same or a subsequent execution issued on the same judgment or one founded thereon,[3] or, as it is provided in some jurisdictions, from arrest or imprisonment for the same debt, costs, or charges.[4] Under some statutes, where he surrenders his estate to his creditors and is discharged, he is protected from arrest by any creditor to whom he was indebted at the time,[5] or who was duly notified as required by law.[6] This exemption does not extend to another cause which did not exist at the time of the first arrest or imprisonment.[7] It only confers immunity from arrest on account of any debt provable under such proceed-

90. Me.—Gray v. Douglass, 17 A. 320, 81 Me. 427.
23 C.J. p 968 note 29.

91. Me.—Clement v. Wyman, 31 Me. 50.

92. Me.—Granite Bank v. Treat, 18 Me. 340.
23 C.J. p 968 note 31.

93. Me.—Cannon v. Seveno, 4 A. 789, 78 Me. 307—Lewis v. Brewer, 51 Me. 108—Baldwin v. Merrill, 44 Me. 55.

94. Mass.—Lewis v. Gamage, 1 Pick. 347.

95. Me.—Collins v. Lambert, 30 Me. 185.

96. Mass.—Hyatt v. Felton, 9 Allen 378.

97. Mass.—Osgood v. Kezar, 138 Mass. 357.

98. Me.—Levett v. Jones, 49 Me. 355.
23 C.J. p 968 note 40.

99. Pa.—Commonwealth v. Corman, 4 Serg. & R. 2.

1. Me.—Call v. Barker, 27 Me. 97.

2. S.C.—Man v. Lowden, 15 S.C.L. 485.
23 C.J. p 968 note 45.

Judgment in bastardy

Under some statutes, a discharge, under poor debtors' act, of defendant convicted of bastardy and imprisoned for failure to give bond precludes reimprisonment for obligations accruing to time of imprisonment, but contempt proceedings with same incidents as in divorce cases are available for collection of subsequent installments due under order for support of child.—People v. Johnson, 259 N.W. 343, 270 Mich. 622.

3. Va.—Quinling v. Commonwealth, 2 Va.Cas. 494.
23 C.J. p 969 note 46.

4. U.S.—U. S. v. Smith, D.C., 27 F.Cas.No.16,327, 3 Cranch C.C. 66.
23 C.J. p 969 note 47.

5. N.J.—West Hudson County Trust Co. v. Wichner, 187 A. 579, 121 N. J.Eq. 157.

Habeas corpus

If arrested on execution issued in a suit brought on the same judgment, the debtor is entitled to be discharged on habeas corpus.
Mass.—In re Davis, 111 Mass. 288.
N.J.—State v. Ward, 8 N.J.Law 120.

On motion

The second execution will be set aside on motion, if there is no dispute as to the regularity of the discharge from the first execution.—In re Foord, 5 N.H. 310.

Subsequent judgment on prior debt

If a person while he is applying for the benefit of the insolvent laws, and previous to his liberation, has a judgment rendered against him for a debt contracted previous to his confinement, and, after his discharge as an insolvent debtor, is arrested by virtue of an execution issued on that judgment and committed to jail, such arrest and imprisonment is unlawful.—State v. Ward, 8 N.J.Law 120.

6. N.C.—Williams v. Floyd, 27 N.C. 649—Crain v. Long, 14 N.C. 371.
23 C.J. p 969 note 62.

7. Me.—McLaughlin v. Whitten, 32 Me. 21.

Future maturing debts

"The relief which such statutes intended to give was release against imprisonment for failure to pay a past due debt, which might be collected in that manner; but such release was clearly never intended to apply to future maturing debts of like character—and which were collectible by like procedure—throughout the natural life of the defaulting debtor, who in the meantime and in some manner might become possessed of property not reachable by the ordinary processes of enforcement, but which nevertheless enabled him to discharge the obligation at the time it became due and payable."—Smith v. Smith, 152 S.W.2d 944, 945, 287 Ky. 287.

ings and does not bar a subsequent suit for such a debt.[8] Such discharge of one judgment debtor from imprisonment will not release his codefendants so as to prevent the subsequent issuance of an execution against their persons or property,[9] and where a wife may be imprisoned on a body execution without her husband, the husband's discharge as a poor debtor will furnish no legal reason for the exoneration of the wife.[10] It does not discharge a surety for a stay of execution.[11] It does operate as a release by act of law from performance of the condition of a bond for compliance with the requirements of the insolvency laws.[12] The discharge of one who gives bond for his appearance to take the benefit of the insolvent law is binding on the sheriff who has the debtor in custody, whether the bond given is legal or illegal.[13] A discharge, although erroneous, prevents the sheriff or the debtor's bailor from holding or restraining the debtor from going where he chooses.[14]

As discharge of debt. In the absence of a statute to the contrary, the debtor's discharge from arrest, without the consent of the creditor, by taking the poor debtor's oath does not discharge the debt.[15] Under the statutes in some jurisdictions the arrest of the debtor and his subsequent discharge does not have the effect to bar the creditor from collecting his claim out of the debtor's property.[16] The property of an insolvent debtor acquired after his discharge is not exempted from the claims of his prior creditors, it is only his person which is protected.[17] Under a statute providing that when the body of a party shall have been taken on an execution issued for that purpose, no other execution can be issued against him or his property, except in cases especially provided for by law, the exception means by statute or common law. Accordingly, such a statute does not change the common-law rule that the judgment creditor may have execution against the property of the debtor, notwithstanding his prior discharge under a body execution taken on the same judgment, where such discharge was obtained without the creditor's consent by taking the poor debtor's oath.[18]

Effect of discharge on second application. Where successive applications are allowed, a recognizance will be avoided by the discharge of the debtor by a qualified magistrate after due proceedings within the proper time, notwithstanding another application previously made with the proper time intervening to another magistrate by the debtor, and his failure to appear at the time and place fixed for this examination.[19]

Discharge in another state. A debtor's body will not be exempt from arrest under execution in one state because he has been committed in another state for the same debt and has been there discharged.[20]

§ 450. Rearrest

In the absence of fraud or an illegal escape, as a general rule a debtor once taken in execution and discharged from imprisonment cannot be again rearrested on the same judgment or debt.

It is a general principle that a man shall not be taken twice in execution for the same cause,[21] the arrest on execution by order of the creditor and discharge being considered at least to this limited extent as a satisfaction.[22] Accordingly, in the absence of fraud,[23] or an illegal escape,[24] when a

8. N.J.—Bannister v. Miller, 32 A. 1066, 54 N.J.Eq. 121, affirmed 37 A. 1117, 54 N.J.Eq. 701.

9. Mass.—Kellogg v. Underwood, 40 N.E. 104, 163 Mass. 214.

10. Conn.—Hall v. White, 27 Conn. 488.

11. Pa.—Sharpe v. Speckenagle, 3 Serg. & R. 463.

12. N.J.—Sholes v. Eisner, 100 A. 213, 90 N.J.Law 151.

13. Pa.—Frick v. Kitchen, 4 Watts & S. 30.

14. Ill.—People v. Hathaway, 102 Ill.App. 628, affirmed 68 N.E. 1053, 206 Ill. 42.

15. N.J.—West Hudson County Trust Co. v. Wichner, 187 A. 579, 121 N.J.Eq. 157.

"It is undoubtedly true, as contended by defendant, that there are many statements in the books to the effect that at common law the taking of the body of the debtor in execution is a satisfaction of the debt. This statement of the rule is a general one and may be technically correct. It certainly is correct while the debtor is in prison, because during that period no other process can issue to enforce the judgment. But this general rule has its exceptions; the cardinal exception being when the debtor is released or discharged without the consent of the plaintiff, it is no satisfaction of the debt. If the debtor escapes, dies in prison, or is discharged by operation of law, it is adjudged to be without the consent of plaintiff, and therefore no satisfaction of the debt."—Stephenson v. Purchase, 182 N.W. 431, 214 Mich. 95, 14 A.L.R. 496.

16. Mich.—Stephenson v. Purchase, supra.
23 C.J. p 969 note 64.

17. Va.—Payne v. Dudley, 1 Wash. 196, 1 Va. 196.

18. Mich.—Stephenson v. Purchase, 182 N.W. 431, 214 Mich. 95, 14 A.L.R. 496.

19. Mass.—Sweeney v. Gillooly, 103 Mass. 549.

20. Conn.—Woodbridge v. Wright, 3 Conn. 523.
Ga.—Joice v. Scales, 18 Ga. 725.
N.J.—Wood v. Malin, 10 N.J.Law 208.
23 C.J. p 969 note 66.

21. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.
Mich.—Stephenson v. Purchase, 182 N.W. 431, 214 Mich. 95, 14 A.L.R. 496.
23 C.J. p 970 note 69.

22. Mass.—Little v. Newburyport Bank, 14 Mass. 443.
S.C.—Aiken v. Moore, 19 S.C.L. 432.
23 C.J. p 970 note 70.

23. Mass.—Little v. Newburyport Bank, 14 Mass. 443.
S.C.—Mack v. Garrett, 44 S.C.L. 79.

24. Conn.—Howard v. Lyon, 1 Root 107.
23 C.J. p 970 note 78.

judgment debtor has been taken in execution, and discharged by the creditor's consent, he cannot be again taken on that execution or on any other which may be issued on that judgment.[25] The debtor cannot be rearrested on the same execution against his body, where he enters into a recognizance in compliance with the statute;[26] where he is allowed to take the poor debtor's oath or is excused by the nonappearance of the creditor from doing so;[27] where the release is through the failure and neglect of the creditor to pay the sheriff his statutory fees for the debtor's keeping;[28] where the jailer refuses to receive and retain the body of the debtor delivered to his custody by the arresting officer;[29] or where the creditor elects to bring action against the sheriff for escape.[30] Where, however, the debtor is illegally discharged from arrest,[31] or forfeits his prison-bounds bond by breaking the prison bounds,[32] it has been held that he may be retaken on the original execution and committed to custody. Where a prisoner under execution becomes insane and is discharged and sent to an asylum, he may, it seems, on being restored to sanity, be arrested again by his creditors.[33]

It seems that the debtor may sometimes by agreement,[34] or by his acts and conduct,[35] waive his right not to be arrested again on the same writ.

A statute, providing that no person shall be imprisoned within the jail liberties for a longer period than six months, and that on the expiration of such period he shall be discharged and that he shall not again be imprisoned on a like process issued in the same action or arrested in any action on any judgment under which the same may have been granted, refers only to a final process after an adjudication fixing the amount due, and it does not include orders of arrest issued at the time of the commencement of the action or before recovery. Consequently, the fact that the debtor has been imprisoned on mesne process and released on jail liberties does not prevent his further arrest on final judgment.[36]

On subsequent writ. While a debtor is in the custody of the sheriff under an execution against the person, his creditor has no right to issue another execution against the person of defendant on the same judgment to the sheriff of another county,[37] and where, after arrest on an execution against the person, the writ is set aside as void, there cannot on a reversal of the order be a rearrest under the same process; but a new execution against the person will issue on the judgment.[38] It has also been held, in the absence of a statute to the contrary, that the fact that a debtor was once imprisoned for debt on a void process will not prevent his rearrest and imprisonment for the same debt on a valid execution.[39]

After voluntary escape. Although there is authority to the contrary,[40] it has usually been held that if the officer voluntarily permits the escape of a defendant in execution he cannot afterward retake him[41] without new process issued by the creditor,[42] or at least without the permission of the creditor.[43] The sheriff may, however, rearrest defendant in case the escape is negligent.[44] If a defendant, taken into custody, has been released on

25. Mass.—Little v. Newburyport Bank, 14 Mass. 443.
Nev.—Ex parte Bergman, 4 P. 209, 18 Nev. 331.
23 C.J. p 970 note 71.

26. Mass.—Morgan v. Curley, 7 N. E. 726, 142 Mass. 107.
23 C.J. p 970 note 74.

27. Mass.—Doane v. Bartlett, 4 Allen 74.
23 C.J. p 970 note 75.

28. Mich.—Baehr v. Decker, 274 N. W. 339, 280 Mich. 590.

29. Mass.—Houghton v. Wilson, 10 Gray 365.
23 C.J. p 970 note 76.

30. Ind.—Ex parte Voltz, 37 Ind. 175, 10 Am.R. 86.

31. Ind.—Freeman v. Smith, 7 Ind. 582.
23 C.J. p 970 note 79.

32. U.S.—Owen v. Glover, D.C., 18 F.Cas.No.10,629, 10,630, 2 Cranch C.C. 522, 578.

33. N.Y.—Bush v. Pettibone, 4 N.Y. 300.

34. Mass.—Little v. Newburyport Bank, 14 Mass. 443.
N.Y.—Savage v. Sully, 153 N.Y.S. 532, 168 App.Div. 131.

Rule applied

Where a debtor who has been taken on execution is liberated by the creditor on an agreement that he will return on certain conditions, and the debtor afterward surrenders himself pursuant to the agreement, he may be again imprisoned on the same execution.—Little v. Newburyport Bank, 14 Mass. 443.

35. Mass.—Houghton v. Wilson, 10 Gray 365.
23 C.J. p 970 note 83.

36. N.Y.—Espro & Co. v. Mervis, 201 N.Y.S. 264.

37. N.Y.—Noe v. Christie, 15 Abb. Pr.,N.S., 346, 46 How.Pr. 496.

38. N.Y.—Carrigan v. Washburn, 9 N.Y.S. 541, 18 N.Y.Civ.Proc. 79.

39. **Statute construed**

The statute prohibiting an arrest on an execution, where defendant therein has been previously arrested on the original writ in same case, and has been released, and his bail, if any, discharged, applies only to defendant who was once arrested before trial on an original writ and does not apply to defendant who has been previously arrested on an execution.—Neary v. Barrows, R.I., 11 A.2d 618.

40. Ill.—People v. Hanchett, 111 Ill. 90.
Va.—Carthrae v. Clarke, 5 Leigh 268, 32 Va. 268.

41. N.Y.—Lansing v. Fleet, 2 Johns. Cas. 3, 1 Am.D. 142.
23 C.J. p 971 note 89.

42. N.H.—Cheever v. Mirrick, 2 N. H. 376.
N.Y.—Thompson v. Lockwood, 15 Johns. 256—Lansing v. Fleet, 2 Johns.Cas. 3, 1 Am.D. 142.

43. N.H.—Sherburn v. Beattie, 16 N.H. 437—Cheever v. Mirrick, 2 N. H. 376.

44. N.Y.—Lansing v. Fleet, 2 Johns. Cas. 3, 1 Am.D. 142.
23 C.J. p 971 note 92.

account of a temporary privilege, he may be arrested again on the same process after the privilege has expired.[45] The creditor may procure a second arrest of the party, who had been arrested or imprisoned, notwithstanding the escape voluntarily permitted by the jailer.[46] It has also been held that the right to sue out an alias execution can be assigned to the sheriff by parol or otherwise, and the sheriff may then exercise it in a manner as ample as could the creditor himself.[47] The right to imprison ceases where the creditor gives the debtor permission to go off the jail limits or to go at large,[48] unless it is otherwise provided by statute.[49]

XVII. WRONGFUL EXECUTION

§ 451. Nature and Grounds of Liability

The wrongful issuance of execution, and wrongful levy, sale, and arrest are considered infra §§ 452–455.

Examine Pocket Parts for later cases.

§ 452. —— Wrongful Issuance of Execution

An execution issued on a void, satisfied, or extinguished judgment is wrongful; and a party subjects himself to liability for abuse of process when he procures the issuance of an execution on a judgment which has been vacated or which he knows to have been obtained by fraud and perjury or to have been entered after the payment of the debt.

An execution is wrongful where the writ is issued on a void judgment,[50] or on a judgment which has been satisfied, either by payment[51] or by an express agreement,[52] or on a judgment which has been extinguished by a valid discharge in bankruptcy.[53]

A party issuing an execution on a judgment for a debt which he knew to have been paid before the entry of the judgment is liable in an action for malicious abuse of legal process, whether or not he caused the judgment to be entered.[54] It is an abuse of process to procure the issuance of an execution on a judgment which has been vacated[55] or which was obtained by fraud and perjury, where the party suing out the execution knows that the judgment is false and fraudulent.[56]

§ 453. —— Wrongful Levy

A wrongful levy constitutes a trespass.

A wrongful levy constitutes a trespass;[57] a sale under such a levy is not necessary to consummate it.[58] A levy is wrongful where: It is made under a writ which was wrongfully issued;[59] events subsequent to the issuance of the writ have made it improper to proceed thereunder;[60] it is excessive;[61] it is made in an unauthorized,[62] or in an unreasonable and oppressive,[63] manner; or it is made on property of a person other than the judgment debtor,[64] or on property of the judgment debt-

45. N.Y.—Humphrey v. Cumming, 5 Wend. 9—Van Wezel v. Van Wezel, 1 Edw. 113.

46. Mass.—Brown v. Getchell, 11 Mass. 11.
23 C.J. p 971 note 95.

47. N.H.—Cheever v. Mirrick, 2 N. H. 376.

48. N.Y.—Vidrard v. Fradneburg, 53 How.Pr. 339.
23 C.J. p 971 note 97.

49. S.C.—Barnstein v. Eggart, 14 S. C.L. 162, 15 Am.D. 625.

50. Minn.—Gunz v. Heffner, 22 N.W. 386, 33 Minn. 215.
23 C.J. p 971 note 1.

51. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486.
23 C.J. p 971 note 2.

52. Del.—Minus v. Stant, 1 Del. 445.
Neb.—Standard Oil Co. v. Goodman Drug Co., 95 N.W. 667, 1 Neb. Unoff., 443.

53. N.Y.—Ruckman v. Cowell, 1 N. Y. 505, 7 N.Y.Leg.Obs. 7—Deyo v. Van Valkenburgh, 5 Hill 242.

54. Pa.—Barnett v. Reed, 51 Pa. 190, 88 Am.D. 574.
Abuse of process generally see the C.J.S. title Process §§ 119–124, also 50 C.J. p 612 note 4–p 623 note 95.
Injury or prejudice as essential see infra § 456.

55. Minn.—Farmer v. Crosby, 45 N. W. 866, 43 Minn. 459.

56. Mich.—Antcliff v. June, 45 N.W. 1019, 81 Mich. 477, 21 Am.S.R. 533, 10 L.R.A. 621.

57. Pa.—Graham v. Lane, 3 Brewst. 92.
Tex.—Wollner v. Darnell, Civ.App., 94 S.W.2d 1225, 1226, citing **Corpus Juris.**

58. Pa.—Graham v. Lane, 3 Brewst. 92.

59. Ga.—Boyd v. Merriam, 53 Ga. 561.
23 C.J. p 971 note 8.
Levy under execution issued on void judgment
Minn.—Beede v. Nides Finance Corporation, 296 N.W. 413.

60. N.H.—Breck v. Blanchard, 20 N. H. 323, 51 Am.D. 222.
23 C.J. p 971 note 9.

61. Ky.—Commonwealth, for Use and Benefit of Harding v. Bartholomew, 98 S.W.2d 882, 266 Ky. 270.
La.—Jackson v. Kirschman, App., 175 So. 105, affirming 173 So. 562.
23 C.J. p 972 note 17.

62. Tex.—Hillman v. Edwards, Civ. App., 74 S.W. 787.

63. Ill.—Snydacker v. Brosse, 51 Ill. 357, 99 Am.D. 551.
N.Y.—Rogers v. Brewster, 5 Johns. 125.
Tex.—Casey v. Hanrick, 6 S.W. 405, 69 Tex. 44.

64. Ga.—Investment Securities Corporation v. Cole, 194 S.E. 411, 57 Ga.App. 97, affirmed 199 S.E. 126, 186 Ga. 809.
Idaho.—Beloit v. Green, 251 P. 621, 623, 43 Idaho 265, citing **Corpus Juris.**
La.—Pressner v. White Bros. Co., 7 La.App. 603.
Mo.—State ex rel. Webb v. King, App., 73 S.W.2d 460, 461, citing **Corpus Juris.**
Okl.—Farris v. Castor, 99 P.2d 900, 902, 186 Okl. 668, citing **Corpus Juris.**

or which is exempt.[65] Further, a levy is wrongful if made first on a class of property which the statute provides shall not be taken until another class is disposed of[66] or, where the judgment debtor is allowed by statute the right to designate the property to be levied on, if he is denied this right,[67] or the levy is afterward made on property other than that designated;[68] but no action lies for a levy on land unless personal property sufficient to satisfy the judgment has been tendered to the officer.[69]

In particular cases, the matters complained of in respect of the levy or execution of the writ may not constitute a trespass or conversion or give rise to liability for damages,[70] as where there is no interference with, or disturbance of, possession,[71] there is a proper compliance with the writ and the judgment rendered is merely irregular and not void,[72] the property is rightfully seized but is not sold because the mortgages thereon exceed in amount the highest bid,[73] or the levy is made before the expiration of the period within which the debtor may claim exemptions.[74]

Motive. It has been held that the motive is immaterial where there is a wrongful levy;[75] but it has been also held that a person is not liable for an excessive levy where he acts on the advice of counsel who is honest in his belief that his client is entitled to the amount claimed.[76]

§ 454. —— Wrongful Sale

An execution sale may be wrongful because, among other things, it embraces the property or interest of a person other than the execution debtor or because the issuance or levy of the execution was wrongful.

A sale of property under execution is wrongful, and the injured party may recover in an appropriate action for the damages sustained, where the original levy was wrongful,[77] or where after the levy the judgment has been satisfied,[78] or a proper tender made of the amount due thereunder,[79] or where the sale is made under an execution issued on a judgment which is afterward reversed,[80] or on an execution issued for a larger sum than is due on the judgment.[81]

A sale of the property of another person after notice of his claim is a conversion;[82] an unlimited sale of partnership property under an execution against only one of the partners is wrongful;[83] and where there has been a conditional sale of property, the title to remain in the seller until payment is made, a sale of such property under execution is wrongful unless made subject to the rights of the seller in the conditional sale.[84]

§ 455. —— Wrongful Arrest

Wrongfully causing the arrest of an execution debtor is a trespass for which an action may be maintained.

Causing the arrest of an execution debtor, where he has sufficient property to satisfy the judgment, is a trespass for which the person suing out the execution is liable,[85] provided it appears that the debtor was ready to acquiesce in the taking of his property.[86] An action of trespass will lie in cases where a person has been arrested on a process which was irregularly issued and void;[87] but where

Pa.—Shane v. Gulf Refining Co., 173 A. 738, 114 Pa.Super. 87.
23 C.J. p 972 note 11.

Constructive notice

Deed sufficient on face is entitled to be recorded, and imparts constructive notice to execution creditor.—Smith v. Jackson State Bank, C.C.A. Wyo., 63 F.2d 934.

65. Tex.—Wollner v. Darnell, Civ. App., 94 S.W.2d 1225, 1226, citing **Corpus Juris.**
23 C.J. p 972 note 12.

66. Ga.—Gorham v. Hood, 27 Ga. 299.

67. Tex.—Avindino v. Beck, Civ. App., 73 S.W. 539.

68. Tex.—Beck v. Avondino, 18 S. W. 690, 82 Tex. 314.

69. Tex.—Ellis v. Harrison, 57 S. W. 984, 24 Tex.Civ.App. 13.

70. Mont.—Beyerlein v. Whitcomb, 26 P.2d 349, 95 Mont. 293.
23 C.J. p 972 notes 11 [c], 17 [a], [b].

71. La.—Fontenot v. Stark, App., 192 So. 550
23 C.J. p 972 notes 11 [e], 18.

72. Okl.—Schuman v. Wallace, 104 P.2d 432, 187 Okl. 535.

73. La.—Vinyard v. Stassi, App., 158 So. 24.

74. Ill.—Chrenka v. Meyering, 3 N. E.2d 160, 285 Ill.App. 594.

75. Mich.—Allen v. Kinyon, 1 N.W. 863, 41 Mich. 281.

76. La.—Hamilton v. Antoine, App., 157 So. 795.
Liability of execution creditor for acts directed by attorney see infra § 456 b (2).

77. Mo.—State ex rel. Webb v. King, App., 73 S.W.2d 460, 461, citing **Corpus Juris.**
23 C.J. p 972 note 20.
Actions for wrongful execution see infra §§ 457, 458.

78. N.Y.—Vail v. Lewis, 4 Johns. 450, 4 Am.D. 300.
Tex.—Sanders v. Brock, Civ.App., 31 S.W. 311.
23 C.J. p 972 note 21.

79. N.Y.—Tiffany v. St. John, 5 Lans. 153, affirmed 65 N.Y. 314, 22 Am.R. 612.
23 C.J. p 972 note 22.

80. Cal.—Reynolds v. Hosmer, 45 Cal. 616.

81. N.Y.—Peck v. Tiffany, 2 N.Y. 451.

82. Minn.—Amick v. Exchange State Bank, 204 N.W. 639, 164 Minn. 136.

83. N.Y.—Bates v. James, 10 N.Y. Super. 45.

84. N.Y.—Herring v. Hoppock, 10 N. Y.Super. 20.

85. Pa.—Berry v. Hamill, 12 Serg. & R. 210—Allison v. Rheam, 3 Serg. & R. 139, 8 Am.D 644.
Property execution as condition to execution against person see supra § 416.

86. Vt.—Warner v. Stockwell, 9 Vt. 9.

87. Ky.—Johnson v. Scott, 121 S.W. 695, 134 Ky. 736.
N.Y.—Allen v. Froome, 88 N.E. 645, 195 N.Y. 404.

the process is merely voidable, it is, until set aside, a justification for an arrest made thereunder.[88] Where a person is taken on a good and a bad execution at the same time, he can recover only for the damages which were suffered solely on account of the bad process.[89]

A statutory penalty has been imposed in some jurisdictions for rearresting a debtor after discharge as an insolvent.[90]

§ 456. Persons Entitled to Damages and Persons Liable

a. Persons entitled to damages
b. Persons liable

a. Persons Entitled to Damages

The owner of, or any person having an interest in, property wrongfully taken under an execution may maintain an action for damages, provided he has sustained injury or prejudice and there has been no waiver or estoppel on his part.

The owner of, or any person having an interest in, property who sustains an injury by the wrongful taking thereof under an execution may maintain an action for the damages sustained;[91] and this right is not impaired by the fact that he purchased the property at the sale.[92] However, damages will not be allowed to one whose rights are not prejudiced by the wrongful act,[93] or to a claimant of the property whose title is involved in litigation,[94] or to one who has no title or claim,[95] as, for instance, one holding under a conveyance void for fraud.[96] If a person who owns the property jointly with the execution defendant sells his interest to the purchaser and voluntarily surrenders the possession, which has never been disturbed, he has no cause of action against plaintiff in the execution unless he alleges and proves that he surrendered the property under a mistake of law or fact.[97]

In case of a mere wrongful levy, where an action of trespass is brought, plaintiff must have had either the actual possession or the right of possession at the time of the levy.[98] In case of a wrongful sale, a conditional reversionary right of possession is sufficient to support the action.[99] The owner of an ultimate estate in chattels cannot maintain an action on the case for a wrongful sale, although the officer professed to sell the entire property, since the sale passes only such an interest as the debtor has and the ultimate estate is not thereby interfered with.[1]

Mortgagee. Under some statutes a mortgagee may recover where his rights have not been protected.[2]

Waiver or estoppel. One may be estopped to allege that a sale was wrongful;[3] but the receipt by plaintiff of the surplus produced by the sale, over and above the amount directed to be levied on the execution, is not an admission of the legality of the sale, so as to conclude him from subsequently questioning it;[4] and, where there is timely complaint of an illegal seizure, a failure to take steps to prevent such seizure is not a waiver of the cause of action, even though such failure may be offered in mitigation of damages.[5]

b. Persons Liable

(1) In general
(2) Execution creditor

(1) In General

Persons who procure, direct, or assist in the commission of a wrongful act by an officer in issuing an execution, or in making a levy or sale thereunder, are liable to the person injured by the act.

All persons who have anything to do with the wrongful issuance or levy of an execution, including persons who procure, direct, or assist in the commission of the wrongful act by the officer, are liable to the person injured thereby.[6] Even a stran-

88. N.Y.—Reynolds v. Corp, 3 Cai. 267.

89. Vt.—Lewis v. Avery, 8 Vt. 287, 30 Am.D. 469.

90. Ga.—Morgan v. Ely, 30 Ga. 768.
23 C.J. p 972 note 33.

91. Ky.—Pryse v. Hamilton, 7 Ky. L. 446, 13 Ky.Op. 817.
Mich.—Munroe v. Colling, 219 N.W. 605, 242 Mich. 530.
Minn.—Beede v. Nides Finance Corporation, 296 N.W. 413.
Pa.—Shane v. Gulf Refining Co., 173 A. 738, 114 Pa.Super. 87.
23 C.J. p 973 note 34.

92. N.Y.—Ford v. Williams, 24 N. Y. 359.

93. Ky.—Torian v. Caldwell, 181 S. W. 373, 167 Ky. 670.
23 C.J. p 973 note 36.

94. La.—Gilkerson-Sloss Commn. Co. v. Baldwin, 17 So. 246, 47 La. Ann. 696.

95. Ala.—Smiley v. Hooper, 41 So. 660, 147 Ala. 646.
La.—Pelletier v. State Nat. Bank, 41 So. 640, 117 La. 335.
23 C.J. p 973 note 38.

96. Mass.—Goodwin v. Hubbard, 15 Mass. 210.

97. Ky.—Clore v. Davis, 40 S.W. 380, 19 Ky.L. 353—Clore v. Davis, 15 Ky.L. 399.

98. Pa.—Dixon v. White Sewing Mach. Co., 18 A. 502, 128 Pa. 397, 15 Am.S.R. 683, 5 L.R.A. 659.

99. Pa.—Dixon v. White Sewing Mach. Co., supra.

1. N.C.—Homesley v. Hogue, 49 N. C. 481.

2. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486.

3. Pa.—Holfelder v. Schramm, 100 A. 267, 255 Pa. 493.
23 C.J. p 973 note 45.

4. N.Y.—Brown v. Feeter, 7 Wend. 301.

5. La.—Haas v. Buck, 162 So. 181, 182 La. 566.

6. Ind.—Ault v. Phillips, App., 27 N.E.2d 379.

ger or person not a party to the suit who officiously directs an officer in making a wrongful levy,[7] or who accompanies an officer and assists him in the commission of the wrongful act,[8] is equally liable with the officer for the injury sustained. However, one who merely instructs an officer as to his right or duty in the premises is not liable as a trespasser where the officer is not influenced thereby;[9] and one who merely requests the surety to sign an indemnity bond, and agrees to protect him from loss by reason thereof, does not thereby render himself liable for the trespass to the owner of the property.[10]

Obligors on bond of indemnity. Where a bond of indemnity is given to an officer to induce him to make a levy on certain property, the obligors on the bond are jointly liable with the officer in case the levy proves to be illegal.[11] This is also the rule where the indemnity bond is given, after seizure of the property by the sheriff or constable,[12] to induce him to proceed with the sale.[13] It has been held, however, that this rule does not apply to mere sureties on the bond who do not act other than signing the bond;[14] they are responsible only so far as they may have directed or assented to the doing of the acts complained of.[15]

The purchaser at an execution sale who does nothing more than purchase is not liable in trespass for the act of the officer in making a wrongful levy and sale; his purchase does not make him a trespasser by relation;[16] neither is the purchaser liable in trespass for subsequently carrying away the goods purchased, provided he received possession of the goods from the officer at the time of the sale,[17] but if the goods are not delivered at the time of the sale he may be liable in trespass for subsequently taking and carrying them away.[18] If the purchaser causes any damage in removing the property he alone is liable therefor.[19]

A purchaser obtaining a judgment for possession of property under an execution sale is not liable for consequences of an erroneous judgment.[20]

(2) Execution Creditor

The liability of an execution creditor for a wrongful levy or sale under an execution does not rest on his causing the writ to be issued and delivered to an officer, but rests on his direction or ratification, or assistance or participation in the commission, of the wrongful act, or on his authorization of directions or instructions given by his attorney.

When plaintiff places his execution in the hands of an officer for service, he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ,[21] and, in the absence of ratification, he will not be liable for a wrongful execution of the writ unless he ordered or directed the officer or participated directly or otherwise than by merely causing the issuance of the process and the delivery of it to the officer.[22] However, if it is shown that the execution creditor advised, directed, or assisted in, the commission of the unlawful act he will be equally liable with the officer for the injury sustained.[23]

Minn.—Beede v. Nides Finance Corporation, 296 N.W. 413.

Liability of:
- Attorney see Attorney and Client § 52 b.
- Clerk of court see Clerks of Courts, § 51.
- Persons for wrongful execution issued by justice of peace see the C.J.S. title Justices of the Peace § 123, also 35 C.J. p 709 notes 91–93.
- Sheriff or constable see the C.J.S. title Sheriffs and Constables §§ 62–90, also 57 C.J. p 817 note 97–p 870 note 36.
- Sureties on sheriff's bond see the C.J.S. title Sheriffs and Constables §§ 184–187, also 57 C.J. p 1027 note 94–p 1033 note 6.

Agent

Ga.—Chambers v. Self, 186 S.E. 203, 53 Ga.App. 437.

Codebtor

Ind.—Glover v. Horton, 7 Blackf. 295.

Body execution

N.Y.—Kreiser v. Scofield, 29 N.Y.S. 685, 9 Misc. 200.

7. Kan.—Fish v. Street, 27 Kan. 270.

Ky.—Youngs v. Moore, 7 J.J.Marsh. 646.

8. S.C.—McElhenny v. Wylie, 34 S. C.L. 284, 49 Am.D. 643.

9. Ala.—Stallings v. Gilbreath, 41 So. 423, 146 Ala. 483.

10. U.S.—Weller v. Hanaur, C.C.Pa., 95 F. 236.

11. N.C.—Martin v. Buffaloe, 38 S. E. 902, 128 N.C. 305, 83 Am.S.R. 679.
23 C.J. p 975 note 76.

12. N.Y.—Hayes v. Davidson, 34 Hun 243, 6 N.Y.Civ.Proc. 377, reversed on other grounds 98 N.Y. 19, 7 N.Y.Civ.Proc. 46, 1 How.Pr., N.S., 310.

13. Mo.—Long v. Robinson, 281 S. W. 78, 222 Mo.App. 503.

14. U.S.—Weller v. Hanaur, C.C.Pa., 95 F. 236.
23 C.J. p 975 note 78.

15. U.S.—Weller v. Hanaur, supra.
23 C.J. p 975 note 79.

16. Pa.—Ward v. Taylor, 1 Pa. 238.
23 C.J. p 975 note 80.

17. Pa.—Gloss v. Black, 91 Pa. 418 —Hammon v. Fisher, 2 Grant 330.

18. Pa.—Talmadge v. Scudder, 38 Pa. 517.

19. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486.

20. Ky.—Torian v. Caldwell, 181 S. W. 373, 167 Ky. 670.

21. Ala.—Brock v. Berry, 31 So. 517, 132 Ala. 95, 90 Am.S.R. 896.
23 C.J. p 973 note 58.

Limited implication of authority

Issuance of execution, without direction by judgment creditor as to its enforcement, implies authority of officer to whom issued to do only lawful act pursuant to its command. —Vangellow v. East Side Sav. Bank, 11 N.Y.S.2d 982.

22. Ill.—People, for Use of Boerger v. Martin, 29 N.E.2d 119, 306 Ill. App. 505—Bessermann v. Votupal, 11 N.E.2d 45, 292 Ill.App. 355.
Kan.—Custer v. Royse, 204 P. 995, 110 Kan. 397.
Minn.—Lundgren v. Western State Bank of Duluth, 250 N.W. 1, 2, 189 Minn. 476, 91 A.L.R. 919, citing **Corpus Juris.**
23 C.J. p 973 note 59.

23. Cal.—McPheeters v. Bateman, 58 P.2d 195, 11 Cal.App.2d 106.

The execution creditor may be liable for a wrongful execution in cases where no action will lie against the officer,[24] there being defenses available to the officer which, as shown infra § 457 e, are not available to the execution creditor.

For acts directed by attorney. An execution creditor is liable for a wrongful execution directed by an attorney whom he has retained generally to conduct the suit, or to recover the amount of the judgment.[25] A fortiori, an execution creditor who refers an officer to his attorney for instructions is liable for an unlawful levy directed by the attorney.[26] The mere presence, however, of the attorney of the execution creditor at the levy or sale will not render the execution creditor liable;[27] nor is he liable where the attorney gives unwarranted directions to the officer.[28]

For acts of officer subsequently ratified. An execution creditor who has not authorized or directed an unlawful levy or sale in the first instance may become liable by a subsequent ratification of the act of the officer.[29] Where he refuses, on demand, to direct a release of property wrongfully seized,[30] or where, with knowledge that a sale is wrongfully made, he becomes a purchaser of the property,[31] or receives the proceeds of the sale,[32] there is a ratification of the wrongful act which renders him equally liable with the officer; but he will not be liable where he receives the proceeds in ignorance of the fact that the sale was wrongfully made,[33] or where the officer makes a mistake of law in judging of his official duty, as distinguished from a mistake of fact.[34] It has also been held that, where the officer makes a wrongful seizure under a valid writ, a subsequent receipt of the proceeds will not, without any other participation, make the execution creditor liable as a trespasser for the wrongful taking.[35]

Extent of liability. The liability of the execution creditor is limited to such damages as may have resulted from the particular act or acts which he has directed, authorized, or ratified.[36]

§ 457. Actions

a. In general
b. Conditions precedent
c. Time to sue and limitations
d. Parties
e. Defenses
f. Pleading
g. Evidence
h. Trial

a. In General

The appropriate remedy to redress a wrongful execution or a wrongful act under an execution depends on the nature of the act complained of and the character of the relief sought.

The nature of the action to be resorted to in the case of a wrongful execution or a wrongful act under an execution depends on the circumstances of the particular injury and the character of the relief sought.[37] Thus, if the act is done under void

Fla.—Granat v. Biscayne Trust Co., 147 So. 850, 109 Fla. 485.
La.—Giangrosso v. Bernard, 127 So. 418, 13 La.App. 488—Chatman v. Wren & Turner, 123 So. 483, 11 La. App. 224—Connell v. David Bernhardt Paint Co., 6 La.App. 862, affirmed 112 So. 495, 163 La. 586.
23 C.J. p 974 note 60.

24. Wis.—Marks v. Wright, 51 N.W. 882, 81 Wis. 572.
23 C.J. p 974 note 62.

25. Mich.—Foster v. Wiley, 27 Mich. 244, 15 Am.R. 185.
6 C.J. p 671 note 47.

26. N.Y.—Armstrong v. Dubois, 1 Abb.Dec. 8, 4 Keyes 291.
23 C.J. p 974 note 66.

27. N.Y.—Welsh v. Cochran, 63 N. Y. 181, 20 Am.R. 519, reversing 2 Hun 675.

28. N.Y.—Welsh v. Cochran, supra.
6 C.J. p 671 note 48.

29. Minn.—Lundgren v. Western State Bank of Duluth, 250 N.W. 1, 2, 189 Minn. 476, 91 A.L.R. 919, citing Corpus Juris.
N.Y.—Goebel v. Clark, 275 N.Y.S. 43, 242 App.Div. 408.
Okl.—Farris v. Castor, 99 P.2d 900, 186 Okl. 668.
Pa.—Shane v. Gulf Refining Co., 173 A. 738, 114 Pa.Super. 87.
23 C.J. p 974 note 69.

30. Minn.—Lundgren v. Western State Bank of Duluth, 250 N.W. 1, 189 Minn. 476, 91 A.L.R. 919.

31. N.Y.—Goebel v. Clark, 275 N.Y. S. 43, 242 App.Div. 408.
23 C.J. p 974 note 70.

32. Tex.—McKay v. Irion, App., 15 S.W. 123.
23 C.J. p 974 note 71.

33. N.Y.—Clark v. Woodruff, 83 N. Y. 518, affirming 18 Hun 419.
23 C.J. p 974 note 72.

34. Vt.—Hyde v. Cooper, 26 Vt. 552.
23 C.J. p 974 note 73.

35. Ohio.—Coe v. Higdon, 1 Disn. 393, 12 Ohio Dec., Reprint, 691.
23 C.J. p 975 note 74.

36. Ill.—Buchanan v. Goeing, 3 Ill. App. 635.
23 C.J. p 974 note 61.
Damages in actions for wrongful execution see infra § 458.

37. Suit in equity
(1) As the relief afforded by the legal remedies in the case of wrongful executions is full and ample, equity will not entertain a bill for this purpose except under extraordinary circumstances.—Van Norden v. Morton, La., 99 U.S. 378, 25 L.Ed. 453—23 C.J. p 976 note 6.

(2) If there is a remedy by injunction, in a case of wrongful seizure, it is not exclusive and does not deprive a person injured by the wrongful seizure of his cause of action for damages.—Jackson v. Kirschman, La.App., 175 So. 105, affirming 173 So. 562.

(3) That plaintiff did not enjoin sheriff's sale did not preclude her recovery for illegal seizure, where plaintiff had proceeded by intervention and third opposition.—J. E. Bell & Co. v. Trahan, La.App., 151 So. 682.
Actions to enforce and protect exemptions see the C.J.S. title Exemptions §§ 143-165, also 25 C.J. p 148 note 81-p 165 note 44.

process, trespass is the remedy,[38] while case is the proper remedy for taking property under voidable process,[39] or for maliciously suing out an execution on a voidable judgment,[40] or for suing out an execution on a satisfied judgment.[41] Ordinarily trespass is the remedy for a wrongful levy on property of a person other than the judgment debtor;[42] and this remedy is independent of the technical rules applicable to malicious use or abuse of legal process;[43] but, where it is sought to charge the wrongdoers with exemplary damages because of malice and want of probable cause, malicious prosecution is the proper remedy.[44] Persons may be liable for conversion, although not liable as trespassers.[45] An action to recover property or the value thereof, because wrongfully sold under execution, is properly treated as one for damages only, where plaintiff does not attempt to obtain possession.[46]

The right to sue is not limited to an action on the indemnity bond.[47] Actions against officers or indemnitors are discussed in the C.J.S. title Sheriffs and Constables §§ 146–167 also 57 C.J. p 936 note 71–p 980 note 1.

Independent proceeding. The action in which the execution issued and a subsequent action in tort to recover damages for an unlawful and excessive levy are separate and independent proceedings,[48] and, therefore, service of summons on defendant in the subsequent action is necessary, even though he was plaintiff in the former action.[49]

b. Conditions Precedent

In an action for wrongful execution plaintiff must comply with the necessary conditions precedent.

A party claiming that his goods had been unlawfully sold at sheriff's sale should, in order to maintain trespass, move to have the sale set aside.[50] A person whose property is wrongfully taken under an execution against another person is not bound to file a claim and obtain a favorable decision thereon, or to notify the officer that the property is his, or to oppose the sale, but may at once seek relief by suit.[51] Where one not the owner of property pledges it to secure a note without authority so to do, and it is sold on execution as the property of the pledgor, the real owner, in an action for conversion, is not obliged to pay the note nor tender the amount thereof.[52] Further prosecution of a pending claim of exemption is not a condition precedent where an alias execution has been issued and levied in violation of a stipulation.[53]

Wrongful arrest. Where an execution debtor is arrested under process issued on a judgment which has been paid or otherwise discharged, it is not necessary to obtain a rule setting aside the process as a condition precedent to the right to maintain an action for the wrongful arrest,[54] but the rule is otherwise where the process is merely voidable.[55]

c. Time to Sue and Limitations

In actions for wrongful execution, a right of action accrues, and the applicable statute of limitations commences to run, at the time of the wrongful act of which complaint is made.

The mere seizure of one's property under execution against another gives an immediate right to sue;[56] and where a writ is wrongfully levied a right of action accrues at the time of the levy[57] and the owner of the property may recover, although no sale was made until after his suit was brought.[58]

In an action of trover for the taking of goods

38. S.C.—McCool v. McCluny, 16 S. C.L. 486.
23 C.J. p 976 note 98.

39. Ark.—Dixon v. Watkins, 9 Ark. 139.

40. Pa.—Barnett v. Reed, 51 Pa. 190, 88 Am.D. 574.

41. N.Y.—Brown v. Feeter, 7 Wend. 301.

42. Cal.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.
Ga.—Baldwin v. Davis, 4 S.E.2d 458, 188 Ga. 587—Duncan v. Ellis, 11 S. E.2d 841, 63 Ga.App. 687.
23 C.J. p 976 note 3.

43. Ga.—Baldwin v. Davis, 4 S.E.2d 458, 188 Ga. 587—Duncan v. Ellis, 11 S.E.2d 841, 63 Ga.App. 687.

44. Cal.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.

45. Ala.—Stallings v. Gilbreath, 41 So. 423, 146 Ala. 483.
Action for conversion for wrongful seizure and disposition of property under execution see the C.J.S. title Trover and Conversion § 40, also 65 C.J. p 33 note 65.

46. Utah.—Larsen v. Ryan, 180 P. 178, 54 Utah 250.
Replevin to recover property seized under execution see the C.J.S. title Replevin §§ 26–29, also 54 C.J. p 426 note 64–p 429 note 6.

47. La.—Hodge v. Monroe Mercantile Co., 30 So. 142, 105 La. 668.
Mo.—State v. Donnelly, 9 Mo.App. 519.

48. Ark.—Bridwell v. Anderson, 156 S.W.2d 231.

49. Ark.—Bridwell v. Anderson, supra.

50. Pa.—Holfelder v. Schramm, 100 A. 267, 255 Pa. 493.

51. Ga.—Baldwin v. Davis, 4 S.E.2d 458, 188 Ga. 587.
La.—Duperron v. Van Wickle, 4 Rob. 39, 39 Am.D. 509.

52. Tex.—Stephenville First Nat. Bank v. Thomas, Civ.App., 118 S. W. 221.

53. Idaho.—Van Sickle v. Barnett, 216 P. 1038, 37 Idaho 407.

54. N.Y.—Deyo v. Van Valkenburgh, 5 Hill 242.

55. N.Y.—Deyo v. Van Valkenburgh, supra.
23 C.J. p 976 note 9.

56. Ky.—Brock v. Church, 5 Ky.L. 855.
Or.—Sabin v. Chrisman, 175 P. 622, 90 Or. 85.

57. La.—Haas v. Buck, 162 So. 181, 182 La. 566.

58. Pa.—Graham v. Lane, 3 Brewst. 92.

under an execution which is irregular and void, the statute of limitations runs from the date of the original taking of the goods and not from the date that the execution was set aside.[59] Where the action is for wrongfully suing out an execution on a satisfied judgment the statute begins to run from the time the execution is sued out,[60] and is not suspended by an injunction restraining the enforcement of the execution.[61] The period of limitation depends on the statutes of the state where the action is brought. The application of particular statutes is considered in the C.J.S. title Limitations of Actions §§ 78, 79, also 37 C.J. p 779 note 37, p 780 note 60.

d. Parties

General rules relating to parties usually are applicable in actions for wrongful execution.

General rules relating to parties ordinarily apply in actions for wrongful execution.[62] If property belonging to different persons is wrongfully taken under the same execution, the owner of each parcel should sue separately for the injury sustained.[63]

Several defendants cannot be proceeded against jointly for a wrongful execution unless they are jointly liable, and to create such a liability there must have been a concert of action between them.[64] In actions by the execution defendant and a mortgagee of the property for wrongful execution by levying on mortgaged property after satisfaction of the judgment and without taking a bond to protect the encumbrancer, the purchaser at execution sale should be made a party defendant so as to settle the entire controversy in one suit.[65]

Substitution of parties. Under statutory authority, the execution creditor may be substituted as a defendant where the action has been brought against the officer.[66]

e. Defenses

In actions for wrongful execution, defenses appropriate to the form of action chosen may be presented where they have not been waived; but some defenses open to an officer are not available to an execution creditor or other defendant.

When plaintiff has an election of remedies to redress a wrongful execution, the form of action chosen is open to all the defenses peculiar to that form of action,[67] provided they have not been waived.[68] Fraud is a defense.[69] It is also a defense that the sale was abandoned and the property left in plaintiff's possession.[70] It is no defense that the judgment creditor derived no advantage from the levy,[71] or that defendant was acting in aid of the officer, when the assistance was not rendered at the officer's request,[72] or, to an action for a wrongful sale of exempt property, that the debtor had at the time of the levy and sale other property concealed sufficient to pay the debt.[73]

If plaintiff claims as a purchaser from the judgment debtor, it is no defense that the sale was in violation of the revenue laws where neither of the parties had repudiated the contract and it has been fully executed.[74] If defendant does not show the legality of the execution, the invalidity of the transfer from the judgment debtor to plaintiff is no defense.[75]

Recovery of the property wrongfully taken does not bar an action for the unlawful seizure and detention;[76] but a recovery of damages against the sheriff for the trespass is a bar to an action against the purchaser to recover the property.[77]

There are some defenses open to an officer which are not available to another defendant, such as the execution creditor.[78] For example, statutes releasing an officer from liability for seizing property claimed to be owned by a person other than the judgment debtor where no demand is made,[79] or a claim is interposed,[80] or there is an interpleader

59. N.Y.—Read v. Markle, 3 Johns. 523.
60. Cal.—Wood v. Currey, 57 Cal. 208.
61. Cal.—Wood v. Currey, supra.
62. U.S.—Hoxsie v. Nodine, Alaska, 123 F. 379, 61 C.C.A. 223.
63. Ky.—Weddington v. McGuire, 12 Ky.L. 143.
64. U.S.—Hoxsie v. Nodine, Alaska, 123 F. 379, 61 C.C.A. 223.
23 C.J. p 976 note 14.
65. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486.
66. Ky.—Gunn v. Gudehus, 15 B. Mon. 447.
23 C.J. p 976 note 15.
67. Ala.—Meredith v. Richardson, 10 Ala. 828.
68. La.—J. E. Bell & Co. v. Trahan, App., 151 So. 682.
69. Ark.—Harris v. Stewart, 47 S. W. 634, 65 Ark. 566.
70. Ky.—Heard v. Higginbotham, 182 S.W. 846, 168 Ky. 668.
71. La.—Lawrence v. Hozey, 6 Rob. 385.
Mo.—State v. Mitchell, 1 Mo.App. 386.
23 C.J. p 978 note 54.
72. N.Y.—Merrill v. Near, 5 Wend. 237.
73. Mo.—Megehe v. Draper, 21 Mo. 510, 60 Am.D. 245.
74. Mich.—Wessels v. Beeman, 49 N.W. 483, 87 Mich. 481.
75. S.D.—Hewett v. Usher, 78 N.W. 993, 11 S.D. 512.
76. Ark.—Walker v. Fuller, 29 Ark. 448.
23 C.J. p 978 note 52.
77. Ky.—Seber v. Nelson, 5 Ky.Op. 101.
78. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.
79. Minn.—Lundgren v. Western State Bank of Duluth, 250 N.W. 1, 189 Minn. 476, 91 A.L.R. 919.
80. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.
23 C.J. p 972 note 11 [f].

issue[81] do not apply where a person other than the officer is sought to be held liable. While a writ of execution, valid on its face and issued out of a court having jurisdiction of the subject matter and apparent jurisdiction in the particular case, affords complete protection to an officer from liability for any proper or necessary act done thereunder, see the C.J.S. title Sheriffs and Constables § 122, also 57 C.J. p 916 note 71, the execution creditor who caused the writ to be issued or directed the levy or sale must show a regular and valid judgment,[82] and when once set aside, the judgment and execution can no longer be set up by the party causing the same to be entered and issued as a defense for anything done under them.[83] A party may, however, justify under a regular execution although the judgment is erroneous, until the judgment is set aside,[84] and the same rule applies to an execution which is irregular but not void.[85]

f. Pleading

General rules of pleading apply in actions for a wrongful execution or a wrongful act under an execution.

General rules of pleading ordinarily apply in actions for a wrongful execution or for a wrongful act under an execution.[86] The declaration, petition, or complaint must state facts sufficient to show a cause of action.[87] If several articles are sold, it should state the particular articles and the value of each or show some reason why such statement cannot be given.[88] Where the fact that the act complained of was done maliciously is relied on, it is not necessary that the word "malice" should be used if language describing or defining it is used.[89] Immaterial allegations may be stricken out.[90]

Plea or answer. If defendant attempts to justify, under a special plea of title and possession, he must aver every material fact necessary to constitute a title.[91] A plea confessing the taking, but alleging that the property was taken under legal process, regularly issued out of a court of competent jurisdiction against the execution defendant, must also allege that the property was his, or it will be demurrable.[92] Fraud as a defense must be specially pleaded.[93]

Replication. In an action of trespass for a wrongful arrest, a replication to a plea of justification under legal process does not sufficiently allege a payment of the judgment unless it states facts showing that the payment was made and received in discharge of the debt and so as to extinguish it.[94]

g. Evidence

General rules of evidence usually apply in actions for wrongful execution.

General rules of evidence ordinarily apply in actions for wrongful execution.[95] The burden of proving the ownership,[96] seizure,[97] conversion,[98]

81. Pa.—Breyer Ice Cream Co. v. Rudley, 171 A. 96, 111 Pa.Super. 604.

Institution or abandonment of interpleader proceedings by claimant does not prevent recovery from judgment creditor in action of trespass. —Summit Hosiery Co. v. Gottschall, 141 A. 298, 292 Pa. 464.

82. Minn.—Beede v. Nides Finance Corporation, 296 N.W. 413, 415, citing **Corpus Juris.**
23 C.J. p 978 note 48.

83. Minn.—Beede v. Nides Finance Corporation, supra, citing **Corpus Juris.**
23 C.J. p 978 note 51.

84. U.S.—Bank of the United States v. Bank of Washington, D.C., 6 Pet. 8, 8 L.Ed. 299, reversing 2 F. Cas.No.947, 4 Cranch C.C. 86.
Vt.—Allen v. Huntington, 2 Aik. 249, 16 Am.D. 702.

85. N.Y.—Rosenfield v. Palmer, 5 Daly 318.

86. Iowa.—King v. Nelson, 94 N.W. 1095, 120 Iowa 606.

87. Cal.—Miller v. Price, 284 P. 1035, 103 Cal.App. 650.
Ga.—Brown v. Smith, 165 S.E. 243, 175 Ga. 470—George Muse Cloth-ing Co. v. Lee, 156 S.E. 281, 42 Ga.App. 353.
La.—Fontenot v. Stark, App., 192 So. 550.
23 C.J. p 976 note 18.

Tortious action of judgment creditor (1) Judgment debtor suing estate of judgment creditor for unlawful seizure under execution should allege facts showing affirmative tortious action of deceased judgment creditor.—Granat v. Biscayne Trust Co., 147 So. 850, 109 Fla. 485.

(2) A complaint, not alleging expressly or impliedly that judgment creditor suggested to or directed co-defendant constable how he should keep automobile, seized by him under execution, pleaded no cause of action against judgment creditor for damage to automobile because of constable's negligent exposure thereof to cold.—Vangellow v. East Side Sav. Bank, 11 N.Y.S.2d 982.

Ownership at time of conversion is sufficiently alleged by pleading ownership on day levy was made.—Klus v. Lamire, 230 P. 364, 71 Mont. 445.

Complaint held to state cause of action
La.—Harris v. Creco, 1 La.App. 216.
23 C.J. p 976 note 18 [a].

88. Tex.—Beck v. Avondino, 18 S. W. 690, 82 Tex. 314.

89. Iowa.—Gensburg v. Field, 74 N. W. 3, 104 Iowa 599.

90. Iowa.—King v. Nelson, 94 N.W. 1095, 120 Iowa 606.
23 C.J. p 976 note 19.

91. Vt.—Gleason v. Howard, Brayt. p 190.
23 C.J. p 977 note 24.

92. Ala.—Hill v. Elmore, 79 So. 148, 16 Ala.App. 474.

93. Colo.—Koerner v. Wilson, 274 P. 737, 85 Colo. 140, 63 A.L.R. 227.
Tex.—Willis v. Hudson, 63 Tex. 678.

94. N.H.—Breck v. Blanchard, 22 N. H. 303, 20 N.H. 323, 51 Am.D. 222.

95. Mont.—Kipp v. Silverman, 64 P. 884, 25 Mont. 296.

96. Mont.—Kipp v. Silverman, supra.
Tex.—Willis v. Hudson, 10 S.W. 713, 72 Tex. 598.

97. N.C.—O'Briant v. Wilkerson, 30 S.E. 126, 122 N.C. 304.
Tex.—Willis v. Hudson, 10 S.W. 713, 72 Tex. 598.
23 C.J. p 977 note 29.

98. Tex.—Willis v. Hudson, supra.

and value[99] of the goods is on plaintiff, as is also that of proving any circumstances of oppression or malice attending the levy or sale, as a basis for exemplary damages.[1] However, where property wrongfully levied on is in possession of claimant at the time of the levy, his possession is prima facie evidence of ownership, and the burden is on defendant to show the contrary.[2]

Where a sale is made in a manner other than that which the statute directs, the presumption is that the price realized is less than if the statute had been complied with.[3] Where time is material, the burden is on plaintiff to prove that the levy was made at such a time as to be wrongful.[4]

Admissibility. Evidence which is competent, relevant, and material is admissible,[5] provided it is within the issues raised by the pleadings.[6] However, evidence having no tendency to throw light on the real issues,[7] or which merely tends to arouse the animosity of the jury,[8] is not admissible. Evidence of the cost price of property levied on,[9] and also of what the property brought at the execution sale,[10] is admissible to show actual value.

Weight and sufficiency. The sufficiency of the evidence to show the ownership,[11] amount,[12] and value[13] of the property seized, a wrongful act,[14] defendant's connection therewith,[15] and actual damages resulting therefrom,[16] as well as its sufficiency to warrant or sustain a verdict for plaintiff[17] or defendant,[18] depends on the evidence in the particular case. The existence of the execution must be established by the production of the writ itself, or by proof of its loss or destruction and of its contents.[19]

h. Trial

General rules governing the trial of civil actions ordinarily control the trial of actions for wrongful execution.

The trial of an action for wrongful execution is usually governed by the rules regulating the trial of civil actions.[20]

Questions of law and fact. The question of ownership is ordinarily one for the jury,[21] as is the question as to whether the judgment creditor is liable on the ground that he has ratified the acts of the levying officer,[22] and the question as to whether circumstances exist justifying the imposition of exemplary damages.[23] The court should[24] or should not[25] direct a verdict for defendant accordingly as the evidence is insufficient or sufficient to authorize submission of the case to the jury.

Instructions. The necessity for,[26] and sufficiency of,[27] instructions in actions for wrongful execution are governed by the rules applicable to in-

99. Mont.—Kipp v. Silverman, 64 P. 884, 25 Mont. 296.
Tex.—Willis v. Hudson, 10 S.W. 713, 72 Tex. 598.

1. Tex.—Willis v. Hudson, supra.

2. Fla.—Mayer v. Wilkins, 19 So. 682, 37 Fla. 244.

3. Tex.—Gunter v. Cobb, 17 S.W. 848, 82 Tex. 598.

4. Or.—Hume v. Rice, 167 P. 578, 86 Or. 93.

5. N.Y.—Koenigsberg v. Blau, 119 N.Y.S. 708.
23 C.J. p 977 note 36.

6. Pa.—Lee v. Conard, 1 Whart. 155.
23 C.J. p 977 note 37.

7. Mont.—Kipp v. Silverman, 64 P. 884, 25 Mont. 296.
23 C.J. p 977 note 38.

8. N.Y.—Montignani v. E. V. Crandall Co., 54 N.Y.S. 517, 34 App.Div. 228.
23 C.J. p 978 note 39.

9. Mont.—Kipp v. Silverman, 64 P. 884, 25 Mont. 296.
Pa.—McElrath v. Kintzing, 5 Pa. 336.

10. N.Y.—Montignani v. E. V. Crandall Co., 54 N.Y.S. 517, 34 App.Div. 228.
Utah.—White v. Pease, 49 P. 416, 15 Utah 170.
23 C.J. p 978 note 41.

11. Cal.—Smart v. Sosey, 193 P. 167, 49 Cal.App. 332.
La.—Sims v. Matassa, App., 200 So. 666.
Minn.—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 180 N.W. 920, 148 Minn. 69.
N.Y.—Stambler v. Walsh, 220 N.Y.S. 41, 219 App.Div. 732, modified on other grounds 222 N.Y.S. 904, 220 App.Div. 771.
23 C.J. p 978 note 43.

12. La.—Chatman v. Wren & Turner, 123 So. 483, 11 La.App. 224.

13. N.Y.—Dal v. Dimon, 126 N.Y.S. 91.
23 C.J. p 978 note 44.

14. Mont.—Beyerlein v. Whitcomb, 26 P.2d 349, 95 Mont. 293.

15. N.Y.—Schuler v. Roberts, 21 N.Y.S. 27.

16. Idaho.—Beloit v. Green, 251 P. 621, 43 Idaho 265.
Special or substantial damages
Ark.—Bridwell v. Anderson, 156 S.W.2d 231.

17. Cal.—Karst v. Finn, 178 P. 973, 39 Cal.App. 369.

18. S.D.—Drew v. Lawrence, 259 N.W. 274, 37 S.D. 620.

19. S.D.—Hewitt v. Usher, 78 N.W. 993, 11 S.D. 512.

20. Tex.—Mertens First Bank v. Steffens, 111 S.W. 782, 51 Tex.Civ.App. 211.
Effect of admission of legality of levy
An admission on the trial that the levy was legal does not preclude objections to the validity of the sale.—Harvey v. McAdams, 32 Mich. 472.

21. Mich.—Jaddatz v. Grace Harbor Lumber Co., 160 N.W. 587, 194 Mich. 273.
N.Y.—Koenigsberg v. Blau, 119 N.Y.S. 708.
Evidence held sufficient to justify submission of issue of ownership to the jury.—Farris v. Castor, 99 P.2d 900, 186 Okl. 668.

22. Ala.—Stowers Furniture Co. v. Brake, 48 So. 89, 158 Ala. 639.

23. U.S.—Hoxsie v. Nodine, Alaska, 123 F. 379, 61 C.C.A. 223.
23 C.J. p 979 note 81.

24. Wash.—Eaid v. Connolly, 94 P. 188, 48 Wash. 584.

25. Ga.—Rollins v. Cox, 138 S.E. 76, 164 Ga. 231.

26. Tex.—Beck v. Avindino, 68 S.W. 827, 29 Tex.Civ.App. 500.

27. Pa.—Hurwitz v. Kelly, 28 Pa. Super. 104.
Utah.—Farr v. Swiart, 44 P. 711, 13 Utah 150.

structions in civil actions in general. Thus the instructions must be applicable to the pleadings and proof,[28] and must not be misleading,[29] or unduly emphasize particular issues,[30] or require too great a degree of proof,[31] or, in some jurisdictions, express an opinion as to the weight of the evidence.[32] These rules govern instructions as to the ownership of the property,[33] and the rules governing damages.[34]

Verdict. A verdict merely finding for plaintiff in certain sums for actual damages, exemplary damages, and expenses is sufficient where the charge has taken from the jury the issue of the validity of the judgment.[35] A general verdict for plaintiff embraces a finding that the judgment was satisfied where the court charged that if the jury should find that the judgment had been satisfied prior to the issuance of the execution they might find for plaintiff the value of the property.[36]

§ 458. —— Damages

Unless exemplary damages are also warranted, the recovery in an action for wrongful execution should be such as will compensate the injured party for the actual loss sustained.

In the absence of any circumstances which would warrant the allowance of exemplary damages, the recovery in an action for wrongful execution should be such as will compensate the injured party for the actual loss sustained[37] and no more.[38] Where there is no showing of actual damages, the owner is entitled to nominal damages.[39] Remote or speculative damages,[40] or damages which are not the proximate result of the wrongful act,[41] are not recoverable. As shown subsequently in this section, the damages sustained and recoverable may depend on whether the wrongful act deprived the complaining party wholly of the property or only of the use thereof during a limited period. The amount of damages which may be recovered may also depend on the nature of the action in which the relief is sought.[42] Only actual damages are recoverable for wrongful issuance of the writ without malice.[43]

Where there is merely a wrongful levy or seizure, recovery will be limited to the special damages sustained thereby,[44] and if no such injury is shown the damages will be nominal only,[45] as in case of a statutory levy on land[46] or where a crop is under seizure for one day only and no appreciable damage results;[47] but the owner is entitled to nominal damages where no special or actual damages are proved,[48] any unlawful seizure of private property being an invasion of private rights which is deemed to cause damage.[49]

Where the property has been sold or lost to the owner, damages for the loss are recoverable.[50] Ordinarily, in such case, the value of the property,[51] as distinguished from the price at which it was sold,[52] may be recovered; but a third person

28. Pa.—Clemens v. Price, 34 A. 561, 174 Pa. 306.
23 C.J. p 979 note 72.

29. Tex.—Mertens First Bank v. Steffens, 111 S.W. 782, 51 Tex.Civ. App. 211.

30. **Issue of exemplary damages**
Tex.—Mertens First Bank v. Steffens, supra.

31. Tex.—Nelson v. Ashmore, Civ. App., 56 S.W. 938.
23 C.J. p 979 note 75.

32. Tex.—Willis v. Hudson, 10 S.W. 713, 72 Tex. 598.

33. Ala.—Smiley v. Hooper, 41 So. 660, 147 Ala. 646.
23 C.J. p 979 note 77.

34. Tex.—Haughn v. Allen, Civ. App., 68 S.W. 207.
23 C.J. p 979 note 78.

35. Tex.—Deleshaw v. Edelen, 72 S. W. 413, 31 Tex.Civ.App. 416.

36. Tex.—Mertens First Bank v. Steffens, 111 S.W. 782, 51 Tex.Civ. App. 211.

37. Cal.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.
Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.
La.—Durden v. Rosenberg, App., 148 So. 728.
23 C.J. p 979 note 88.

38. La.—Saia v. Phœnix Building & Homestead Ass'n, 162 So. 640, 182 La. 844—Williams v. D'Asaro, 152 So. 68, 178 La. 513—J. E. Bell & Co. v. Trahan, App., 151 So. 682.
23 C.J. p 979 note 89.

39. Idaho.—Beloit v. Green, 251 P. 621, 43 Idaho 265.

40. Tex.—Wollner v. Darnell, Civ. App., 94 S.W.2d 1225.
23 C.J. p 980 note 2.

41. Ky.—Buckner v. Fleming, 5 Ky. L. 607.

42. Ky.—Wickliffe v. Sanders, 6 T.B. Mon. 296.
23 C.J. p 981 note 11.

43. La.—Zion v. Bodie, 6 La.App. 816.

44. La.—Sims v. Matassa, App., 200 So. 666.
23 C.J. p 979 note 90.

45. La.—Presas v. Lanata, 11 Rob. 288.
Tex.—Slaughter v. American Baptist Pub. Soc., Civ.App., 150 S.W. 224.
23 C.J. p 979 note 91.

46. Tex.—Adoue v. Wettermark, 82 S.W. 797, 36 Tex.Civ.App. 585.

47. La.—Vinyard v. Stassi, App., 158 So. 24.

48. La.—Jackson v. Kirschman, App., 175 So. 105, affirming 173 So. 562.
Okl.—Farris v. Castor, 99 P.2d 900, 186 Okl. 668.

49. La.—Jones v. Dietrich, App., 186 So. 881.

50. Cal.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.

51. Iowa.—Wertz v. Hale, 208 N.W. 859, 202 Iowa 305.
23 C.J. p 979 note 93.
Commercial value of property, or what plaintiff would have received for it if it had not been seized and sold, is the measure of damages.—Chatman v. Wren & Turner, 123 So. 483, 11 La.App. 224.
Grocery store stock
Retail value of wrongfully seized grocery store stock is not proper basis for determining stock's "market value," "market value" being what goods could have been promptly sold for in bulk or convenient lots.—J. M. Radford Grocery Co. v. Hothan, Tex. Civ.App., 42 S.W.2d 119.

52. Pa.—Rogers v. Fales, 5 Pa. 154.
23 C.J. p 980 note 94.

whose property has been levied on, and who has indemnified a receiptor, may recover the full amount of the sum agreed to be paid by the receiptor in case of the nondelivery of the property.[53] Where goods in the possession of a pledgee are wrongfully taken, the pledgee may recover the full value of the property, and not merely the amount of his lien against the pledgor.[54] Similarly, where a debtor assigns to his creditors property out of the proceeds of which a creditor is to pay himself and other creditors, and the property is wrongfully taken on execution by other creditors of the assignor, the assignee may recover the full value of the property, and not merely the amount due to the assignee from the assignor.[55] If an interest in property is wrongfully sold, the value of that interest, and not merely the selling price, is recoverable;[56] but where such interest has no actual value only nominal damages can be recovered.[57]

Matters in mitigation. The owner of property wrongfully taken under execution cannot be compelled to receive it back,[58] but if it is received the fact will be considered in mitigation of damages.[59] Where the property is bid in by plaintiff or for his benefit, the measure of damages is not the value of the property but the price paid at the sale with interest and such special damages as may have been sustained by the detention.[60] If a person against whose property an execution is wrongfully issued voluntarily disposes of the property at a reduced price in order to apply the proceeds to the execution, the measure of damages is the amount received for the property and not the actual value.[61] The owner may be required to accept less than the full value of the property at the time of conversion where he obtained an order restraining the sale and during the ensuing delay the property depreciated in value.[62]

Surplus proceeds of the sale paid to plaintiff will be deducted from the damages allowed;[63] but the expense of levy and sale cannot be deducted.[64] Matter in mitigation of damages as to one co-trespasser should extend to the others also.[65]

Exemplary damages generally. Exemplary damages may be allowed where it is shown that the act complained of was done wantonly, maliciously, or with a reckless disregard of the rights of the injured party;[66] but such damages may not be recovered where these circumstances do not exist,[67] and the creditor acted in good faith.[68] Exemplary damages are not recoverable where the evidence fails to show any actual damages,[69] or where exemplary or punitive damages are not allowable in civil actions.[70]

Damage to property. An owner who has recovered the property is entitled to recover for any damage done to it during the period he was deprived of it,[71] provided the damage was caused by some act or improper care by the officer as the agent of defendant.[72]

Interest or loss of use of property. Recovery may be had of interest from the time of the conversion[73] or, according to some,[74] but not other,[75] authorities, of the value of the use of the property

53. N.Y.—Phillips v. Hall, 8 Wend. 610, 24 Am.D. 108.

54. Me.—Soule v. White, 14 Me. 436.

55. N.Y.—Robbins v. Fitz, 33 N.Y. 420.

56. N.Y.—Boyce Hardware Co. v. Saunders, 196 N.Y.S. 259, 119 Misc. 365.

57. Ind.—Geisendorff v. Eagles, 70 Ind. 418.
23 C.J. p 980 note 1.

58. Mo.—Howell v. Caryl, 50 Mo. App. 440.
Pa.—Mansfield v. Bell, 24 Pa.Super. 447.

59. Ark.—Walker v. Fuller, 29 Ark. 448.
Cal.—Nightingale v. Scannell, 18 Cal. 315.
23 C.J. p 981 note 14.

60. Idaho.—Moreland v. Mason, 260 P. 1035, 45 Idaho 143.
Pa.—Drabant v. Cure, 124 A. 340, 280 Pa. 181.
23 C.J. p 981 note 16.

61. Ark.—Walker v. Fuller, 29 Ark. 448.

62. Ohio.—Midland Acceptance Corporation v. General Motors Acceptance Corporation, 197 N.E. 120, 49 Ohio App. 243.

63. Mo.—Gilliam v. Globe Tailoring Co., 133 S.W. 628, 152 Mo.App. 464.
23 C.J. p 981 note 15.

64. Tex.—Hillman v. Edwards, Civ. App., 74 S.W. 787.

65. Colo.—Bowman v. Davis, 22 P. 507, 13 Colo. 297.

66. Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.
23 C.J. p 981 note 20.

67. La.—Chatman v. Wren & Turner, 123 So. 483, 11 La.App. 224.
23 C.J. p 981 note 21.

Both malice and want of probable cause are essential to support an award of exemplary damages.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.

Where there is no established claim for exemplary damages, such damages are properly excluded from the case.—Ullmann, Stern & Krausse v. Rogers, Tex.Civ.App., 288 S.W. 1109.

68. N.D.—Galvin v. Tibbs, 119 N.W. 39, 17 N.D. 600.
23 C.J. p 981 note 22.

69. Tex.—Adoue v. Wettermark, 82 S.W. 797, 36 Tex.Civ.App. 585.

70. La.—Mundy v. Phillips, 102 So. 519, 157 La. 445.

71. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.

72. Ala.—Hutchinson v. Weaver, supra.

73. Iowa.—Wertz v. Hale, 208 N.W. 859, 202 Iowa 305.
23 C.J. p 980 note 95.

74. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.
La.—J. E. Bell & Co. v. Trahan, App., 151 So. 682.
Tex.—Ullmann, Stern & Krausse v. Rogers, Civ.App., 288 S.W. 1109.
23 C.J. p 980 note 96.

75. Iowa.—Wertz v. Hale, 208 N. W. 859, 202 Iowa 305.

during the period of wrongful detention or deprivation.

Loss of, or injury to, credit, profits, or business. Loss of, or injury to, credit may be considered in assessing exemplary damages,[76] but it is not an element of actual damages, either general or special.[77] Some authorities take a like position with regard to loss or destruction of business, or loss of profits from the interruption of business,[78] although others hold that recovery may be had[79] where the amount of the damages on this account is alleged and proved with reasonable certainty[80] and the seized goods could not be readily replaced.[81]

Expenses of litigation or for recovery of property. The owner of property wrongfully seized on execution is entitled to compensation or reimbursement for reasonable efforts or expenditures to recover the property,[82] including expenses of litigation.[83] He has been allowed recovery for the cost of transportation to attend trial,[84] but not for time consumed in preparing for, and attending, trial,[85] nor for the cost of printing briefs.[86]

Some courts allow a recovery of the amount paid counsel to vindicate the client's ownership and secure a release of the property.[87] In some instances the fees have been allowed as an element of exemplary damages;[88] and it is held that they are not allowable as an element of actual damages,[89] or in cases where exemplary damages are not recoverable,[90] or in the absence of malice, bad faith, want of probable cause, or statutory provision for the allowance or recovery of such fees.[91] They are not recoverable where there is no cause of action for any damages.[92]

Mental anguish, pain, or suffering has been allowed as an element of exemplary,[93] but not of actual,[94] damages. No recovery may be had where the judgment creditor acted without malice and had reasonable grounds for his belief as to ownership.[95]

Inconvenience and humiliation. Damages for humiliation and inconvenience or annoyance have been allowed,[96] but such damages have been refused where the owner was not deprived of the use and possession of the property, and the judgment creditor acted without malice and had reasonable grounds for his belief concerning ownership.[97]

EXECUTIVE. The exact legal meaning of the word has been many times authoritatively fixed and defined.[1]

As a noun, in modern commercial use, an "Exe-

76. Cal.—Birch Ranch & Oil Co. v. Campbell, 111 P.2d 445, 43 Cal.App. 2d 624.
Tex.—Ullmann, Stern & Krausse v. Rogers, Civ.App., 288 S.W. 1109.

77. Cal.—Birch Ranch & Oil Co. v. Campbell, 111 P.2d 445, 43 Cal.App. 2d 624.
Tex.—Ullmann, Stern & Krausse v. Rogers, Civ.App., 288 S.W. 1109.
23 C.J. p 980 note 4.

Too remote and speculative
Cal.—Birch Ranch & Oil Co. v. Campbell, 111 P.2d 445, 43 Cal.App. 2d 624.

78. Tex.—Wollner v. Darnell, Civ. App., 94 S.W.2d 1225—J. M. Radford Grocery Co. v. Hothan, Civ. App., 42 S.W.2d 119—Ullmann, Stern & Krausse v. Rogers, Civ. App., 288 S.W. 1109.
23 C.J. p 980 note 5.

79. Cal.—McPheeters v. Bateman, 53 P.2d 195, 11 Cal.App.2d 106.

80. Ark.—Summers v. Heard, 51 S. W. 1057, 66 Ark. 550.
23 C.J. p 980 note 6.

81. Ark.—Summers v. Heard, 51 S. W. 1057, 66 Ark. 550.
Mich.—McCausey v. Hoek, 124 N.W. 570, 159 Mich. 570, 18 Ann.Cas. 945.
23 C.J. p 980 note 7.

82. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.

83. Ga.—O'Neal v. Spivey, 145 S.E. 71, 167 Ga. 176.
La.—Vinyard v. Stassi, App., 158 So. 24.

As exemplary damages
Kan.—Duff & Repp Furniture Co. v. Read, 88 P. 263, 74 Kan. 730.

84. Ala.—Hutchinson v. Weaver, 93 So. 899, 208 Ala. 280.

85. La.—Hardee v. Beard, App., 152 So. 359—Giangrosso v. Bernard, 127 So. 418, 13 La.App. 488.

86. La.—Giangrosso v. Bernard, supra.

87. La.—Alfano v. Franek, 105 So. 598, 159 La. 498—Sims v. Matassa, App., 200 So. 666—Jones v. Dietrich, App., 186 So. 881—J. E. Bell & Co. v. Trahan, App., 151 So. 682—Giangrosso v. Bernard, 127 So. 418, 13 La.App. 488—Chatman v. Wren & Turner, 123 So. 483, 11 La. App. 224.

88. Tex.—Deleshaw v. Edelen, 72 S. W. 413, 31 Tex.Civ.App. 416.
23 C.J. p 981 note 26.

89. Tex.—Neese v. Radford, 19 S. W. 141, 83 Tex. 585—Slaughter v. American Baptist Pub. Soc., Civ. App., 150 S.W. 224.

90. Miss.—Kalmia Realty & Insurance Co. v. Hopkins, 141 So. 903, 163 Miss. 556.

91. Idaho.—Beloit v. Green, 251 P. 621, 43 Idaho 265.

92. Cal.—Birch Ranch & Oil Co. v. Campbell, 111 P.2d 445, 43 Cal.App. 2d 624.
La.—Hamilton v. Antoine, App., 157 So. 795.

93. Kan.—Duff & Repp Furniture Co. v. Read, 88 P. 263, 74 Kan. 730.

94. Tex.—Slaughter v. American Baptist Pub. Soc., Civ.App., 150 S. W. 224.
23 C.J. p 980 note 9.

95. La.—Sims v. Matassa, App., 200 So. 666.

96. La.—J. E. Bell & Co. v. Trahan, App., 151 So. 682.

Presumption of damages
Damages to judgment debtors, whose household furniture was removed to constable's warehouse after illegal seizure thereof on writ of fieri facias, are presumed to have been caused by consequent inconvenience and humiliation.—Jackson v. Kirschman, La.App., 173 So. 562, affirmed 175 So. 105.

97. La.—Sims v. Matassa, App., 200 So. 666.

1. Fla.—Opinion on Executive Communication, 6 So. 925, 23 Fla. 297, 298.

cutive" is a reasonably well understood term to designate one whose duties relate to active participation in control, supervision and management of a business,[2] defined generally as a person charged with administrative or executive work;[3] and, more specifically, as one employed in an executive capacity, that is, one whose primary duty is the management of an establishment, or a recognized department thereof, who directs the work of others, has authority to hire and discharge, promote, or change the status of, such others, or whose recommendations and suggestions with regard thereto are given particular weight, and who customarily and regularly exercises discretionary power,[4] being thus contrasted with, or distinguished from, "employee" see Employee 30 C.J.S. p 231 in Pocket Parts.

As designating the person, such as the governor or president, or the governmental department, charged with the duty of carrying out or enforcing the laws, see the C.J.S. titles Constitutional Law § 167 et seq; States § 60, also 59 C.J. p 114 note 10–p 115 note 34; and United States §§ 27–33, also 65 C.J. p 1270 note 55–p 1273 note 8.

As an adjective, it has been defined as qualifying for, or pertaining to, the execution of the laws.[5]

Usually the adjective is said to be synonymous or interchangeable with "administrative" see 2 C.J.S. p 56 note 64, and, while the terms "executive" and "ministerial" may be distinguishable, they have often been used as synonymous terms,[6] since the fact that an act is ministerial is not inconsistent with the fact that it is also executive,[7] for, in contradistinction with judicial duties, all executive duties are said to be ministerial.[8] "Executive" has been compared with, and frequently distinguished from, "administrative" see 2 C.J.S. p 56 note 65, "judicial,"[9] "legislative,"[10] and "ministerial."[11]

As relating to the separation of governmental powers and to the specific powers and functions of the law enforcement department see Constitutional Law §§ 104, 167 et seq. As to public executive officers and offices, together with the distinctions to be made between them and judicial, legislative, ministerial, or political officers and offices see the C.J.S. title Officers § 3, also 46 C.J. p 926 note 58–p 927 note 70, and 23 C.J. p 982 note 14–p 983 note 16.

Phrases employing the word are set out in the note.[12]

2. U.S.—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009, 1011, 1012.

3. Webster New Int.D.

4. U.S.—Wilkinson v. Noland Co., supra—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284, 286.

Held not to include

A chemist acting as director of research for a mining company.—Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board, C.C.A., 119 F.2d 903, 911.

5. Ind.—State v. Denny, 21 N.E. 252, 254, 118 Ind. 382, 4 L.R.A. 79.

6. Colo.—Sheely v. People, 129 P. 201, 203, 54 Colo. 136.

7. Mich.—People v. Salisbury, 96 N. W. 936, 940, 134 Mich. 537.

8. Colo.—Sheely v. People, 129 P. 201, 203, 54 Colo. 136.
N.J.—State v. Governor, 25 N.J.Law 331, 350.

9. Conn.—In re Gilhuly, 199 A. 436, 439, 124 Conn. 271.
Neb.—State ex rel. Good v. National Old Line Life Ins. Co., 261 N.W. 902, 904, 129 Neb. 473.
N.Y.—In re Rice, 226 N.Y.S. 585, 593, 131 Misc. 220.
S.C.—State v. Davis, 70 S.E. 417, 419, 88 S.C. 204.
23 C.J. p 981 notes 3, 4 [a].

10. Ind.—State v. Denny, 21 N.E. 252, 254, 118 Ind. 382, 388, 4 L.R.A. 79.
23 C.J. p 981 note 4.

11. Neb.—State v. Loechner, 91 N. W. 874, 875, 65 Neb. 814, 59 L.R.A. 915.
23 C.J. p 982 note 5.

12. **Executive act**

(1) Distinguished from "judicial act."—Yellowstone County v. Northern Pacific R. Co., 25 P. 1058, 1061, 10 Mont. 414—34 C.J. p 1179 note 58 [a].

(2) Held to include the transfer of prisoner from industrial institute to state penitentiary.—Uram v. Roach, 37 P.2d 793, 796, 47 Wyo. 335, 95 A.L.R. 1448.

"Executive function [or functions]"

(1) Defined or discussed generally.
U.S.—Morgan v. Tennessee Valley Authority, C.C.A.Tenn., 115 F.2d 990, 994—Havemeyer v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 74 F.2d 637, 642.
Ark.—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 43, 182 Ark. 897.
N.H.—White v. Arnold Wood Heel Co., 8 A.2d 737, 739—In re Opinion of the Justices, 179 A. 357, 359, 87 N.H. 492, 110 A.L.R. 819.
23 C.J. p 982 note 12 [b].

(2) Distinguished from "judicial function" and from "legislative function."—Morgan v. Tennessee Valley Authority, supra.

(3) The creation of offices is a "legislative function"; but the appointment and removal of officers is an "executive function."—Tucker v. State, Ind., 35 N.E.2d 270, 282, 292.

(4) The term has been held to imply activity in the management of all or some part of a business and so is distinguished from "ordinary labor," and "routine work".—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 43, 182 Ark. 897.

"Executive officer"

(1) Defined with relation to government generally see the C.J.S. title Officers § 3, also 46 C.J. p 926 note 58–p 927 note 70 and 23 C.J. p 982 note 14–p 983 note 16.

(2) Members of the board of canvassers and registration are not "executive officers" of the state.—Molloy v. Collins, R.I., 18 A.2d 639, 642.

(3) "Executive officer" of the court, as including a sheriff.—State v. Jacobs, 32 N.E.2d 574, 577, 66 Ohio App. 151.

(4) Defined or discussed with reference to a corporation, or other employing unit, and distinguished from "ordinary employee."
N.Y.—Small v. Gibbs Press, 225 N. Y.S. 141, 142, 222 App.Div. 699.
N.C.—Rowe v. Rowe-Coward Co., 181 S.E. 254, 257, 208 N.C. 484.
Pa.—Nirenstein v. Camp Colang, 169 A. 404, 406, 111 Pa.Super. 72.
See also the C.J.S. title Workmen's Compensation Acts § 82, and 71 C. J. p 506 note 52–p 508 note 72.

EXECUTOR DE SON TORT. See Executors and Administrators § 1063.

EXECUTORIAL DUTIES. See Duty 28 C.J.S. 597 note 2 and Executors and Administrators § 14

(5) "Executive officer or employes," defined as one who assumes command or control and directs the course of the business, or some part thereof, and who outlines the duties and directs the work of subordinate employees.—Arkansas Amusement Corporation v. Kempner, 83 S.W.2d 42, 43, 182 Ark. 897.

Executive power

(1) The power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them.—Tucker v. State, Ind., 35 N.E.2d 270, 290, 291.

(2) The power to execute the laws, vested in the governor of the state, administrative officers of the state, counties, townships, town, and cities. —State v. Denny, 21 N.E. 252, 254, 118 Ind. 382, 4 L.R.A. 79—23 C.J. p 982 note 12 [c].

(3) The power to appoint the subordinate officers and employees through whom the laws are executed is a necessary incident to the power to execute the laws.—Tucker v. State, supra.

(4) Held to include those governmental powers properly assigned to executive department, that is, those which are necessary to be done to carry out legislative policies and purposes already declared by legislative body, or such as are devolved upon it by organic law of its existence.—Dickson v. Hardy, La.App., 144 So. 519, 526.

Other phrases construed

(1) "Administrative and executive power" as distinguished from "judicial power".—Miller v. State, 49 N.E. 894, 898, 149 Ind. 607, 40 L.R.A. 109 —34 C.J. p 1179 note 58 [b].

(2) "Employed in a bona fide executive . . . capacity."—Wilkinson v. Noland Co., D.C.Va., 40 F. Supp. 1009, 1012—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284, 286.

(3) "Executive administration" or "executive ministry," as a political term in England applicable to the higher and responsible class of public officials by whom the chief departments of the kingdom are administered. The number of these amounts to fifty or sixty persons. Their tenure of office depends on confidence of a majority of the house of commons, and they are supposed to be agreed on all matters of general policy except such as are specifically left open questions.—Black L.D.

(4) "Executive agency."—U. S. v. Paramount Publix Corporation, Cust. & Pat.App., 73 F.2d 103, 105.

(5) "Executive agreement."—State of Russia v. National City Bank of New York, C.C.A., 69 F.2d 44, 48.
"Treaty" distinguished see the C.J.S. title Treaties § 1, also 63 C.J. p 826 note 9.

(6) "Executive appointment."—Harman v. Harwood, 58 Md. 1, 12—23 C.J. p 982 note 11 [a].

(7) "Executive authority."
Mass.—Commonwealth v. Hall, 9 Gray 262, 267.
Ohio.—State ex rel. Tietje v. Collett, 35 N.E.2d 568, 570, 138 Ohio St. 425.

(8) "Executive business."—Altemus v. New York, 13 N.Y.Super. 446, 455.

(9) "Executive capacity," as relating to active participation in the control, supervision, and management of the business, and contrasted with "menial labor".—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466, 473—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009, 1011.

(10) "Executive class", as including all persons who have function in the administration of public affairs, as contradistinguished from legislative and judicial functions.—People v. Salsbury, 96 N.W. 936, 93 134 Mich. 537.

(11) "Executive duties" see 28 C J.S. p 597 notes 96–1.

(12) "Executive governmental agency," as exercising quasi-judicial powers.—Howlett v. Social Security Commission, Mo., 149 S.W.2d 806 809.

(13) "Executive order reservation" see the C.J.S. title Indians § 29, also 31 C.J. p 499 note 41.

(14) "Executive or managing officer."—Gordon v. Industrial Accident Commission of California, Cal.App 249 P. 844, 848.

(15) "Executive pardon" see the C.J.S. title Pardons § 1, also 46 C.J p 1181 note 1.

(16) "Executive paroles," as intended for their effect on the convict himself to secure his moral reformation.—Law v. State, 191 So. 803, 806, 238 Ala. 428, citing **Corpus Juris.** See also the C.J.S. title Pardons §§ 18, 19, and 46 C.J. p 1204 notes 56–60, p 1205 notes 72–76.

(17) "Executive power or authority."—State v. Denny, 21 N.E. 252, 254, 118 Ind. 382, 4 L.R.A. 79—23 C. J. p 982 note 12.

(18) "Executive powers and duties," as meaning duties appertaining to the execution of the laws as they exist.—In re Advisory Opinion to the Governor, 111 So. 252, 254, 92 Fla. 989.

(19) "Executive trial" as executory process relating to mortgage foreclosure see Mortgages § 613.

(20) "Executive warrant" see the C.J.S. title Extradition § 16, also 25 C.J. p 268 notes 31–35.

EXECUTORS AND ADMINISTRATORS

This Title includes general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

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I. ADMINISTRATION IN GENERAL

§ 1. In General

When a person dies leaving property, his estate is usually set apart to be administered under the supervision of courts constituted for the purpose, the main objects of which in assuming jurisdiction are to collect and preserve the assets, pay decedent's debts, and distribute the residue to the persons lawfully entitled thereto.

In modern practice, when a person dies leaving property, his estate is usually set apart to be administered or settled under the immediate supervision of the courts. The jurisdiction, powers, and functions connected with such settlement are usually confided to special tribunals, ordinarily styled probate, surrogate, or orphans' courts which are usually county tribunals with jurisdiction and powers defined or created by statute,[1] although in sparsely settled states the county court sometimes exercises such functions as a special branch of jurisdiction.[2]

The main objects of such jurisdiction are that the personalty of the deceased, together with income and profits, be properly collected, preserved, and duly accounted for, that his just debts and the charges consequent on his death and the settlement of his estate be paid and adjusted,[3] and that the residue of the estate be distributed among such persons and in such proportion as the will of the decedent, if there is one, or otherwise the statutes of distribution, may prescribe.[4]

Retroactive effect of statutes. It has been held that statutes relating to the administration and settlement of the estates of deceased persons may have a retroactive effect so that their provisions may govern the administration of the estates of persons who died before the statutes were adopted,[5] but a statute changing the procedure[6] or authorizing the entry of orders dispensing with the necessity of formal administration proceedings in certain cases[7] does not apply to the administration of estates in the process of administration when the act became effective.

§ 2. What Law Governs

The law of the place from which the personal representative derives his authority, as it exists at the time of the administration, governs the administration of estates of decedents.

With regard to creditors the administration of the assets of a deceased person is governed exclusively by the law of the place where the executor or administrator acts and from which he derives his authority, and the domicile of the decedent or of the creditor cannot authorize the introduction of another law to defeat the law of the situs of the administration;[8] and the local law also governs with respect to the general conduct of the administration up to the time of distribution.[9] As shown in Conflict of Laws §§ 10, 18, 19, and Descent and Distribution §§ 3–5, with regard to heirs and dis-

1. Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
23 C.J. p 996 note 3.
Jurisdiction:
Generally see infra §§ 13–21.
Of chancery courts see Equity § 61.
Probate, establishment, and annulment of Wills see the C.J.S. title Wills §§ 307–585, also 68 C.J. p 873 note 86–p 1249 note 2.

Statute held constitutional
Tenn.—Commerce Union Bank v. Gillespie, 156 S.W.2d 425.

Ecclesiastical administration
(1) Ecclesiastical administration is inapplicable to conditions in the United States.—In re Viosca, 47 A. 233, 197 Pa. 280, 51 L.R.A. 876, affirming 29 Pittsb.Leg.J.,N.S., 299.
(2) In the absence of statutory directions the modes of procedure adopted by the ecclesiastical courts of England are necessarily in force in our probate courts.—Cowden v. Dobyns, 13 Miss. 82.
Ecclesiastical law as part of common law see Common Law § 7.

2. N.D.—In re Markhus' Estate, 249 N.W. 310, 63 N.D. 566.
23 C.J. p 996 note 4.

3. Cal.—In re Smith, 50 P. 701, 118 Cal. 462.
Ill.—Cotterell v. Coen, 92 N.E. 911, 246 Ill. 410, reversing 151 Ill.App. 463.
Purposes of administration see infra § 3 d.

4. Cal.—O'Day v. Superior Court of Los Angeles County, 116 P.2d 621.
Ill.—Cotterell v. Coen, 92 N.E. 911, 246 Ill. 410, reversing 151 Ill.App. 463.
Wyo.—Church v. Quiner, 224 P. 1073, 31 Wyo. 222.

5. U.S.—Hardy v. Harbin, C.C.Cal., 11 F.Cas.No.6,060, 4 Sawy. 536.
Cal.—People v. Senter, 28 Cal. 502.
23 C.J. p 998 note 35.
Constitutionality of retroactive laws generally see Constitutional Law §§ 414–420.

6. Kan.—State ex rel. Beck v. Good, 49 P.2d 633, 142 Kan. 434.

7. Fla.—Pitts v. Pitts, 162 So. 708, 120 Fla. 363.

8. N.Y.—In re Eaton's Estate, 211 N.Y.S. 845, 125 Misc. 629, affirmed In re Eaton's Will, 215 N.Y.S. 839, 217 App.Div. 704.
Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
23 C.J. p 1018 note 15.
Foreign and ancillary administration see infra §§ 988–1015.

Property considered as separate succession
When a person dies leaving property in two or more states, his property in each state is, for purpose of its administration, considered as a separate succession.—Jarel v. Moon's Succession, La.App., 190 So. 867.

9. Mass.—Hite v. Hite, 17 N.E.2d 176, 301 Mass. 294, 119 A.L.R. 517.
23 C.J. p 1019 note 16.

Sale of realty
The law of the situs of testator's realty merely regulates its sale, and has nothing to do with distribution of proceeds thereof among legatees and creditors, but that distribution is regulated by law of the testator's domicile.—Philadelphia Home for Incurables v. Philadelphia Sav. Fund Soc., 8 A.2d 193, 126 N.J.Eq. 104, affirmed 19 A.2d 349, 129 N.J.Eq. 243—Jenkins v. Guarantee Trust & Safe Deposit Co., 53 N.J.Eq. 194, 32 A. 203.

tributees the rule is that personal estate is to be distributed according to the law of the decedent's last domicile, while real estate descends according to the law of the place where it is situated.

The validity of the acts of an administrator must be determined by the law in force at the time of the administration of the estate.[10]

§ 3. Definitions, Nature and Purpose of Trust, and Classes of Estates and Representatives Thereof

a. In general
b. Executors and administrators
c. Legal representatives
d. Administration
e. Estates; testate; intestate; testator
f. Probate
g. Nature of trust

a. In General

The personal representatives of decedents on whom the duty of settling and distributing estates is confided are usually, although not necessarily, executors and administrators. At common law a "real" representative is an heir who succeeds to the real estate of his ancestor.

The duty of settling and distributing the estates of decedents under the supervision of the courts is confided to persons who are termed the "personal representatives" of the deceased, a term which, as ordinarily used, means executors and administrators.[11] Its meaning is not, however, necessarily so confined,[12] and it may sometimes mean heirs[13] next of kin,[14] descendants,[15] or even include assigns[16] or grantees.[17]

10. Tex.—Moore v. Wooten, Com. App., 280 S.W. 742, reversing, Civ. App., 265 S.W. 210, and rehearing denied, Com.App., 283 S.W. 153.

11. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.
Kan.—Nicholson v. Nicholson, 146 P. 340, 94 Kan. 153—Cox v. Kansas City, 120 P. 553, 555, 86 Kan. 298.
La.—Penny v. New Orleans Great Northern R. Co., 66 So. 313, 135 La. 962.
Mo.—Casey v. Hoover, 94 S.W. 982, 983, 197 Mo. 62.
N.J.—Swank v. Pennsylvania R. Co., 111 A. 44, 47, 94 N.J.Law 546, certiorari denied 41 S.Ct. 12, 254 U.S. 638, 65 L.Ed. 451.
N.Y.—People v. Fitzgerald, 21 N.Y.S. 911, 29 Abb.N.C. 471.
Okl.—Missouri, K. & T. Ry. Co. v. Lenahan, 135 P. 383, 385, 39 Okl. 283.
Or.—Murphy v. Tillson, 130 P. 637, 638, 64 Or. 558.
Tex.—Gutierrez v. El Paso & N. E. R. Co., 117 S.W. 426, 428, 102 Tex. 378, affirmed El Paso & N. E. R. Co. v. Gutierrez, 30 S.Ct. 21, 215 U.S. 87, 54 L.Ed. 106—Atchison, T. & S. F. Ry. Co. v. Berkshire, Civ. App., 201 S.W. 1093, 1095, error refused.
Va.—Atkinson v. Washington & Jefferson College, 46 S.E. 253, 260, 54 W.Va. 32.
Wis.—In re Gallun's Estate, 254 N.W. 542, 544, 215 Wis. 314, citing **Corpus Juris.**
23 C.J. p 996 note 8.

Special administrator
Minn.—Jones v. Minnesota Transfer Ry. Co., 121 N.W. 606, 607, 108 Minn. 129.
Wis.—Swan v. Norvell, 83 N.W. 934, 107 Wis. 625.

Temporary administrator
Ga.—Louisville & N. R. Co. v. Chaffin, 11 S.E. 891, 893, 84 Ga. 519—Wilson v. Pollard, 10 S.E.2d 407, 409, 62 Ga.App. 781.

Executor held "representative of estate"
Ga.—Dougherty-Little-Redwine Co. v. Hatcher, 151 S.E. 796, 169 Ga. 858.

As endowed with deceased's rights and liabilities
Administratrix is not a "personal representative" in the sense that she becomes legally endowed with deceased's rights and liabilities.—In re Gorday Garment Co., D.C.Or., 2 F. Supp. 162, affirmed, C.C.A., Crocker v. Kay, 62 F.2d 391, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L. Ed. 988.

12. Conn.—H. G. Craig & Co. v. Uncas Paper Board Co., 133 A. 673, 104 Conn. 559.
Ga.—Tucker v. Knights of Pythias of North & South America, 68 S. E. 796, 797, 135 Ga. 56—Cooper v. Cooper, 119 S.E. 335, 30 Ga.App. 710.
Minn.—Appeal of City of Duluth, 101 N.W. 1059, 1061, 94 Minn. 95.
Neb.—Sorensen v. Sorensen, 98 N.W. 837, 840, 68 Neb. 483, affirmed on second rehearing 103 N.W. 455, 68 Neb. 483—Sorensen v. Sorensen, 77 N.W. 68, 69, 56 Neb. 729—Kroh v. Heins, 67 N.W. 771, 773, 48 Neb. 691.
23 C.J. p 996 note 9.

Meaning determined by testator's intent
Conn.—Newman v. Jennings, 98 A. 321, 90 Conn. 685—Lepard v. Clapp, 66 A. 780, 80 Conn. 29.
Md.—Albert v. Albert, 12 A. 11, 68 Md. 352.
N.Y.—In re Osgood's Estate, 217 N.Y.S. 313, 127 Misc. 437.
Pa.—In re Harton's Estate, 62 A. 1058, 1059, 213 Pa. 499, 4 L.R.A., N.S., 939.

13. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.
Ga.—Tidwell v. Garrick, 99 S.E. 872, 149 Ga. 290—Ellard v. Coleman, 97 S.E. 111, 22 Ga.App. 693.
Kan.—Olson v. Frazer, 118 P.2d 505, 154 Kan. 310.
Mich.—Oldenburg v. Leiberg, 142 N.W. 1076, 177 Mich. 150.
Mo.—Wells v. Bente, 86 Mo.App. 264.
N.Y.—Davidson v. Jones, 98 N.Y.S. 265, 266, 112 App.Div. 254.

Heirs held not "personal representatives"
Ga.—Rudolph v. Washington, 91 S.E. 560, 146 Ga. 605.
La.—Savaria v. U. S. Railroad Administration, 91 So. 661, 151 La. 156.

14. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.
Conn.—Davies v. Davies, 11 A. 500, 503, 55 Conn. 319.
N.Y.—Davidson v. Jones, 98 N.Y.S. 265, 266, 112 App.Div. 254.
Pa.—In re Harton's Estate, 62 A. 1058, 1059, 213 Pa. 499, 4 L.R.A., N.S., 939—Appeal of Trustees of University of Pennsylvania, 97 Pa. 187.

Next of kin not personal representatives
N.J.—Shaver v. Shaver, 1 N.J.Eq. 437.

15. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.
Md.—Albert v. Albert, 12 A. 11, 15, 68 Md. 352.

16. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.
Minn.—Appeal of City of Duluth, 101 N.W. 1059, 1061, 94 Minn. 95.
Mo.—Wells v. Bente, 86 Mo.App. 264.

"Representatives" not usually designated "assignees"
U.S.—Sere v. Pitot, La., 6 Cranch 332, 336, 3 L.Ed. 240.

17. U.S.—Reed v. American-German Nat. Bank, C.C.Ky., 155 F. 233, 236.

Real representatives. At common law the heir succeeds to the real estate of the deceased ancestor, and for this reason he has been sometimes called a "real" representative.[18]

b. Executors and Administrators

Although the terms are frequently used synonymously, an "executor" is a personal representative appointed by a testator, while an "administrator" is one appointed to act where there is no executor. Executors and administrators are regarded as officers of the court, but are not generally considered to be public officers or agents. An executor or administrator as an official and as an individual is, legally, two separate persons.

The personal representatives of decedents are of two classes, executors and administrators; an executor is a person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease;[19] an administrator is a person authorized to manage and distribute the estate of an intestate or of a testator who has no executor.[20] However, the offices are very similar,[21] and the terms "executor" and "administrator" are frequently used as synonymous.[22]

Status. Executors and administrators are not public officers.[23] On the other hand, they are not mere employees,[24] but are distinctly officers without being invested with sovereign powers.[25] Executors and administrators are officers of the court[26] and occupy a fiduciary relation toward all parties having an interest in the estate.[27] They are not agents of

Vendee held not "personal representative"

Conn.—Liquid Carbonic Co. v. Black, 128 A. 514, 102 Conn. 390.

18. U.S.—Louisville Trust Co. v. Kentucky Nat. Bank, C.C.Ky., 87 F. 143, 145.
Conn.—In re Wilcox & Howe Co., 39 A. 163, 70 Conn. 220.
N.Y.—Lee v. Dill, 39 Barb. 516, 520, 16 Abb.Pr. 92, affirmed 41 N.Y. 619.

19. Black L.D.

Other definitions

Ky.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.
Miss.—Vicksburg Public Library v. First Nat. Bank & Trust Co., 150 So. 755, 756, 168 Miss. 88—Ricks v. Johnson, 99 So. 142, 145, 134 Miss. 676.
N.C.—In re Leonard's Will, 12 S.E. 2d 222, 218 N.C. 738.
Va.—Hofheimer v. Seaboard Citizens' Nat. Bank of Norfolk, 156 S.E. 581, 582, 154 Va. 896, affirming 153 S.E. 656, 154 Va. 392, and certiorari denied Seaboard Citizens' Nat. Bank of Norfolk v. Hofheimer, 51 S.Ct. 648, 283 U.S. 855, 75 L.Ed. 1462.
23 C.J. p 996 note 12 [a].
"Independent executor" defined see infra § 1056.
"Nonintervention executor" defined see infra § 1056.

Executress is a female executor.—Black L.D.

"Trustee" distinguished

An executor is a "trustee" in the broad sense of the term but not in the strict sense of the term, and many of the rules of law that are applicable to trustees are not applicable to executors.—Lockridge v. Citizens Trust Co. of Greencastle, Ind.App., 37 N.E.2d 728.
23 C.J. p 996 note 12 [c]—65 C.J. p 216 note 53.

Right of executor to administer estate undisposed of by will

In cases of partial intestacy, or where provisions of a will have become inoperative, the executor is entitled to administer and distribute the property undisposed of, and it is not necessary or even proper to appoint an administrator for that purpose.—Federal Trust Co. v. Ost, 186 A. 579, 120 N.J. 475, quoting **Corpus Juris,** and affirmed 191 A. 746, 121 N. J.Eq. 608—23 C.J. p 996 note 12 [b].

20. Va.—Hofheimer v. Seaboard Citizens' Nat. Bank of Norfolk, 156 S.E. 581, 582, 154 Va. 896, affirming 153 S.E. 656, 154 Va. 392, and certiorari denied Seaboard Citizens' Nat. Bank of Norfolk v. Hofheimer, 51 S.Ct. 648, 283 U.S. 855, 75 L.Ed. 1462, and quoting Bouvier L. D., tit Executors and Administrators.
23 C.J. p 997 note 13.

Kinds of general administrators

General administrators are of two kinds: First, when the grant of administration is unlimited; second, when the grant is made with the annexation of the will.—Clemens v. Walker, 40 Ala. 189, 198.

21. Mass.—Sheldon v. Smith, 97 Mass. 34.
23 C.J. p 997 note 14.

22. Md.—Linthicum v. Polk, 48 A. 842, 93 Md. 84.
23 C.J. p 997 note 15.

Word "administrator" within statute includes executor

Md.—Baker v. Forsythe, 16 A.2d 921.

23. Cal.—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal.App.2d 253.
Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.
23 C.J. p 997 notes 13 [b], 17 [a].
Contra Henry v. Henry, 103 N.W. 441, 107 N.W. 789, 73 Neb. 746.

Public and private administrators distinguished

(1) Public administrator discharges function of government and is a "public officer" whose duties concern the state at large, or the general public, whereas, a private administrator acts in a private capacity for private persons, and is not an "officer" within the legal definition of that term.—Crews v. Lundquist, 197 N.E. 768, 361 Ill. 193—Ramsay v. Van Meter, 133 N.E. 193, 300 Ill. 193.

(2) Status of public administrator generally see infra § 1050.

24. Cal.—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal.App.2d 253.

25. Cal.—In re Grafmiller's Estate, supra.
Iowa.—In re Meinert's Estate, 213 N. W. 938, 204 Iowa 355.
Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.
N.Y.—In re Vosburg's Estate, 5 N. Y.S.2d 804, 167 Misc. 611.

26. U.S.—In re Gorday Garment Co., D.C.Or., 2 F.Supp. 162, affirmed, C.C.A., Crocker v. Kay, 62 F.2d 391, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L.Ed. 988.
Cal.—In re Conkey's Estate, 96 P.2d 383, 35 Cal.App.2d 581—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal. App.2d 253.
Iowa.—Irwin v. Keokuk Sav. Bank & Trust Co., 255 N.W. 671, 218 Iowa 477—In re Harsh's Estate, 218 N.W. 537, 207 Iowa 84.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
Minn.—A. L. Goetzmann Co. v. Gazett, 214 N.W. 895, 172 Minn. 68.
Wash.—In re Olson's Estate, 77 P. 2d 781, 194 Wash. 219.

Quasi court officer

Ga.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.

27. Cal.—In re Conkey's Estate, 96 P.2d 383, 35 Cal.App.2d 581—In re Smith's Estate, 297 P. 927, 112 Cal. App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal. App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.
Administrator or executor as trustee see infra § 142.

Executrix held a "fiduciary"

Ohio.—Schreiner v. Cincinnati Alten-

the estate,[28] or of the decedent,[29] and have no principal whom they can bind;[30] they are merely instrumentalities established for performing the acts necessary for the transfer of the effects left by the deceased to those who succeed to their ownership.[31]

An executor or administrator as an individual and as an official is, in the eyes of the law, two separate and distinct persons.[32]

c. Legal Representatives

"Legal representatives" are ordinarily, but not always, executors or administrators.

The primary and ordinary meaning of the term "legal representatives," when there is nothing in the context to control its meaning, is "executors or administrators,"[33] and this is the meaning of the term when used in its strictly technical sense.[34] However, the term is not necessarily restricted to the personal representatives of one deceased,[35] but is sufficiently broad to cover all persons who, with respect to one's property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law,[36] and may mean heirs[37] and next of kin.[38]

d. Administration

Administration is the management of a decedent's estate for the purpose of collecting and preserving the assets, paying debts, and making distribution.

"Administration" is the management of the estate of a decedent and expresses the jurisdiction assumed by the proper court over it.[39] The purposes of administration are to collect the assets of the decedent, pay his debts and funeral expenses, etc., and make distribution to the persons entitled thereto,[40] and to do so expeditiously and efficiently.[41]

heim, 22 N.E.2d 587, 61 Ohio App. 344.

22. Minn.—A. L. Goetzmann Co. v. Gazett, 214 N.W. 895, 172 Minn. 68.

Agent of heirs held not personal representative

Minn.—Jones v. Tainter, 15 Minn. 512, 517.

Executors held agents to settle estate

N.Y.—Matter of Dorland, 166 N.Y.S. 616, 100 Misc. 236.

29. Neb.—Henry v. Henry, 103 N. W. 441, 73 Neb. 746, 107 N.W. 789.

30. Minn.—A. L. Goetzmann Co. v. Gazett, 214 N.W. 895, 172 Minn. 68.

31. N.Y.—In re Killough's Estate, 265 N.Y.S. 301, 318, 148 Misc. 73.

32. La.—Hargrave v. Turner Lumber Co., 193 So. 648, 194 La. 285.

N.Y.—Helme v. Buckelew, 128 N.E. 216, 229 N.Y. 363—In re Roth's Estate, 9 N.Y.S.2d 432, 256 App.Div. 181—In re Schwarzmann's Estate, 21 N.Y.S.2d 912, 174 Misc. 834—In re Gourlay's Estate, 19 N.Y.S.2d 122, 173 Misc. 930—In re May's Estate, 14 N.Y.S.2d 730, 172 Misc. 137—In re Sullivan's Estate, 6 N. Y.S.2d 783, 169 Misc. 16, affirmed 8 N.Y.S.2d 533, 255 App.Div. 1008—In re Ferber's Estate, 268 N.Y.S. 360, 149 Misc. 840.

Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, and rehearing denied Com.App., 283 S.W. 153—Moseley v. Evangelical Theological College, Civ.App., 34 S.W.2d 633, error refused.

Capacity in which representative sues or is sued see infra §§ 707–716.

Privity

As an individual, an executor is not a privy in estate, in blood, in representation, or in law, with himself as executor.—Eaton v. Walker, 138 N.E. 796, 244 Mass. 23.

Nonresidential status

There is no nonresidential status of a locally appointed representative of an estate, and his right to determine his personal domicile is not a right to determine the state in which he belongs in his representative capacity.—Lisbon Sav. Bank & Trust Co. v. Moulton's Estate, N.H., 22 A. 2d 331.

33. U.S.—Briggs v. Walker, Ky., 19 S.Ct. 1, 3, 171 U.S. 466, 43 L.Ed. 243.

36 C.J. p 977 notes 19–25, p 978 note 26.

Equivalent to "personal representatives"

Ala.—State v. Pearce, 71 So. 656, 657, 14 Ala.App. 628.

34. N.Y.—Davidson v. Jones, 98 N. Y.S. 265, 266, 112 App.Div. 254.

Wis.—Moyer v. Oshkosh, 139 N.W. 378, 380, 151 Wis. 586.

35. U.S.—New York Mutual Life Ins. Co. v. Armstrong, N.Y., 117 U.S. 591, 6 S.Ct. 877, 879, 29 L.Ed. 997, reversing, C.C., 11 F. 573, 20 Blatchf. 493—Adriance v. Higgins, D.C.N.Y., 30 F.Supp. 70.

Ga.—Tucker v. Knights of Pythias of North & South America, 68 S.E. 796, 797, 135 Ga. 56.

36 C.J. p 978 note 26.

36. N.Y.—New York Mutual Life Ins. Co. v. Armstrong, N.Y., 6 S. Ct. 877, 879, 117 U.S. 591, 29 L.Ed. 997, reversing, C.C., 11 F. 573, 20 Blatchf. 493—Adriance v. Higgins, D.C.N.Y., 30 F.Supp. 70, 75.

37. N.Y.—Davidson v. Jones, 98 N. Y.S. 265, 266, 112 App.Div. 254.

38. N.Y.—Davidson v. Jones, supra.

39. Ill.—In re Togneri's Estate, 15 N.E.2d 908, 296 Ill.App. 33.

23 C.J. p 997 note 22.

As administration of trust

An administration of an estate is an administration of a trust in whatever court the proceedings are pending.—Faulk v. Money, 181 So. 256, 236 Ala. 69—Birmingham Trust & Savings Co. v. Hightower, 169 So. 878, 233 Ala. 39—Keith & Wilkinson v. Forsythe, 151 So. 60, 227 Ala. 555.

Supervision by executor or administrator

The "administration of an estate" is the supervision by an executor or administrator.—Peterson v. Demmer, D.C.Tex., 34 F.Supp. 697.

Curatorship distinguished

Mo.—State v. Greer, 74 S.W. 881, 883, 101 Mo.App. 669.

17 C.J. p 404 note 18 [a].

40. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.

Ariz.—Smith v. Normart, 75 P.2d 38, 51 Ariz. 134, 114 A.L.R. 1456.

Cal.—O'Day v. Superior Court in and for Los Angeles County, 116 P.2d 621—Lilienkamp v. Superior Court of Los Angeles County, 93 P.2d 1008, 14 Cal.2d 293, superseding, App., 85 P.2d 577.

Ill.—In re Trost's Estate, 10 N.E.2d 857, 292 Ill.App. 60.

Ind.—Condo v. Barbour, 200 N.E. 76, 101 Ind.App. 483.

Iowa.—In re Acken, 123 N.W. 187, 144 Iowa 519, Ann.Cas.1912A 1166.

S.D.—Thomas v. Morristown State Bank, 221 N.W. 257, 53 S.D. 499.

Wash.—In re Mason's Estate, 66 P. 2d 310, 189 Wash. 641.

Distribution as act of administration

Distribution of an estate is not necessarily a part of the "administration of an estate".—Peterson v. Demmer, D.C.Tex., 34 F.Supp. 697.

41. Mont.—State ex rel. Steinfort v. District Court of Fourth Judicial Dist. in and for Ravalli County, 107 P.2d 890, 111 Mont. 216.

Ohio.—Naples v. Roberts, 182 N.E. 526, 42 Ohio App. 509.

Unnecessary delay or expense

It is the policy of the law to ex-

However, administration includes more than this; it involves all that may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights, and includes all which may be done, and rightfully done, with relation to adverse claims to assets which have come to the possession of the administrator as the property of the testator or intestate.[42]

e. Estates; Testate; Intestate; Testator

The "estate" of a deceased person is not a legal entity but is merely a name indicating the sum total of the decedent's assets and liabilities. It is "testate" if directions concerning it are embodied in a will, in which case the deceased is termed the "testator," or "intestate" if not included in a valid will, in which case the deceased is also termed the "intestate."

The estate of a deceased person is not an entity known to the law,[43] and is not a natural or an artificial person,[44] but is merely a name to indicate the sum total of assets and liabilities of a decedent.[45]

Estates of deceased persons fall into two classes: First testate, which includes those estates as to the settlement of which the deceased has left directions embodied in a will, in which case the deceased is termed the testator.[46] Second intestate, which includes the estates of persons who have left no valid wills.[47] The term "intestate" is also used to designate a person who has died without leaving a valid will.[48] There may, however, also be cases of partial intestacy, where the deceased has left a will containing directions as to the disposition of a portion of his property, but such instrument leaves a portion undisposed of.[49]

f. Probate

In common usage "probate" refers to proceedings incident to the settlement of decedents' estates and means the settlement of estates.

The term "probate" in common usage includes all matters of which probate courts have jurisdiction.[50] It is used with reference to the proceedings incident to the settlement of decedents' estates and means the settlement of estates, including the granting of letters testamentary or of administration, collection of assets, allowance of claims, payment of debts, and sale of real estate, if necessary, for that purpose, and the distribution of the property to those entitled thereto by the laws of descent or by will.[51]

pedite administration of estates and to avoid unnecessary delay and expense.

Cal.—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148—In re Smith's Estate, 60 P.2d 574, 16 Cal. App.2d 239—In re Matthiessen's Estate, 52 P.2d 248, 10 Cal.App.2d 323—In re Morrison's Estate, 14 P.2d 102, 125 Cal.App. 504.

N.H.—White v. Chaplin, 148 A. 21, 84 N.H. 208.

42. Cal.—Rucker v. Tennessee Coal, Iron & R. Co., 58 So. 465, 176 Ala. 456.

23 C.J. p 997 note 24.

Protection of creditors

A primary purpose of "administration" is the protection of creditors of the estate.—Southern Underwriters v. Lewis, Tex.Civ.App., 150 S.W.2d 162.

Protection of property

The ultimate object of statutory provisions affecting estates is to protect property against waste and dissipation.—Lyles v. Oheim, Tex.Civ. App., 142 S.W.2d 959, error granted.

43. Cal.—Tanner v. Best's Estate, 104 P.2d 1084, 40 Cal.App.2d 442.

Minn.—A. L. Goetzmann Co. v. Gazett, 214 N.W. 895, 172 Minn. 68.

Wash.—Hansen v. Stanton, 31 P.2d 903, 177 Wash. 257, 92 A.L.R. 1037.

"Estate" is generally used as meaning property belonging to a decedent, a ward, a mentally incompetent person or a bankrupt, and which is being administered in the courts. Hansen v. Stanton, 31 P.2d 903, 904, 177 Wash. 257, 92 A.L.R. 1037.

"Decedent's estate" is the property, both real and personal, which he possesses at the time of his death. —Mathey v. Mathey, 98 P.2d 373, 109 Mont. 467—23 C.J. p 1126 note 74 [a].

Party to contract

An "estate" of person deceased is not a legal entity, and cannot become party to contract.—Miller v. Phœnix Ins. Co. of Hartford, Conn., 254 N.W. 915, 191 Minn. 586.

44. Cal.—Tanner v. Best's Estate, 104 P.2d 1084, 40 Cal.App.2d 442.

Minn.—Miller v. Phœnix Ins. Co. of Hartford, Conn., 254 N.W. 915, 191 Minn. 586.

Miss.—Life Ins. Co. of Virginia v. Page, 172 So. 873, 178 Miss. 287.

45. Cal.—Tanner v. Best's Estate, 104 P.2d 1084, 40 Cal.App.2d 442.

As trust estate

For the purpose of equity jurisdiction, a decedent's property is regarded as a trust estate, held by his administrator for the benefit of decedent's creditors according to their priorities and preferences in right, and the remainder, if any, for distributees.—Hafey v. W. C. Mitchell Co., C.C.A.N.D., 293 F. 27.

46. Black L.D.

Testatrix means a female testator; and the term "testator" includes testatrix.—Walker v. Hyland, 56 A. 268, 70 N.J.Law 69.

47. Colo.—In re Schmidt's Will, 283 P. 1041, 86 Colo. 576.

23 C.J. p 998 note 26.

Inoperative and potentially void will

Under a statute providing that a will not mentioning an afterborn child shall have no effect during the life of such child, and shall be void unless the child die without having been married and before attaining his majority, the estate must be administered as though testator had died intestate, so long as his child shall live.—Taylor v. Martin's Estate, 3 S.W.2d 408, 117 Tex. 302, reversing, Civ.App., 263 S.W. 1102.

48. N.Y.—Matter of Cameron, 62 N. Y.S. 187, 47 App.Div. 120, affirmed 59 N.E. 1120, 166 N.Y. 610.

23 C.J. p 998 note 27.

49. N.Y.—In re Haughian, 75 N.Y. S. 932, 37 Misc. 457.

Ohio.—Goff v. Moore, 20 Ohio Cir. Ct.,N.S., 224, 3 Ohio App. 170.

50. Minn.—Johnson v. Harrison, 50 N.W. 923, 47 Minn. 575, 578, 28 Am. S.R. 382.

Neb.—In re Strelow, 219 N.W. 887, 116 Neb. 873, 877.

51. Ill.—London & Lancashire Indemnity Co. of America v. Tindall, 36 N.E.2d 334, 377 Ill. 308, reversing London & Lancashire Indemnity Co. of America, for Use of File v. Tindall, 29 N.E.2d 941, 307 Ill.App. 45.

50 C.J. p 423 notes 15, 16—68 C.J. p 873 note 87.

g. Nature of Trust

The trust arising from the appointment of an executor or administrator is highly personal, and involves no pecuniary interest on the part of the fiduciary.

The trust arising from an appointment as executor or administrator is highly personal. It is not commercial or contractual. It is not a property right and it involves no pecuniary interest on the part of the fiduciary.[52]

§ 4. Property Subject to Administration

All property owned by a deceased at the time of his death is subject to administration; and even land vesting at once in the heir on the owner's death is subject to a cloud on the title until it appears that the representative will not be compelled to resort to it because of a deficiency in the personal assets.

As a general rule, all property which a deceased person owned at the time of his death is properly subject to administration and is regarded as being in the custody of the law for the benefit of all persons interested therein.[53] At the common law, as shown infra § 103, real property descends directly to the heir of the decedent, and with that the executor or administrator has no concern, the management, settlement, or administration of the estates of deceased persons relating primarily and fundamentally to personal property alone, but nevertheless debts and charges remain obligatory on the estate as long as property of the deceased may be found for their satisfaction, and hence if the personal assets prove insufficient the real estate may be applied to make up the deficiency on license of the court, modern statutes greatly enlarging all earlier facilities in this respect. Accordingly, although, in the absence of a will making inconsistent provisions, the land may still be said, as formerly, to vest at once in the heir, on the owner's death, an encumbrance or cloud on the title thereto remains, until it appears, from lapse of time or otherwise, that the representative will not be compelled to resort to the land because of some deficiency in the personal assets, for settling debts, legacies, or other legal charges against the estate.[54]

§ 5. Necessity and Propriety of Administration

a. In general
b. For collection of assets
c. For purpose of distribution
d. To provide party to action
e. Effect of liability to inheritance tax
f. Small estates

a. In General

All estates of decedents are subject to administration, although in certain cases administration may be unnecessary. In the case of an escheated estate, administration is unnecessary unless the estate is indebted.

As a general rule all estates of decedents are subject to administration, as the policy and intent of the statutes on the subject clearly contemplate that property of decedents left undisposed of at death shall, for the purpose of collecting the same, ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court, and indeed there is no other method provided by statute whereby the existence of creditors or heirs of decedent may be conclusive-

When estate "probated"

(1) The phrase "never been probated" as used in statute providing that in all cases where estate left by deceased person has descended from another deceased person whose estate has "never been probated," court may grant letters of administration on such estates jointly, and they may be administered the same as though they were but one estate, means that "administration has never been commenced" rather than that "administration has not been completed." The term "probate" or "probated," means the proving under a properly drawn petition of facts necessary to vest court with jurisdiction to proceed with the administration of the estate, the establishment of the death of the decedent, his residence, the existence of an estate and all other facts necessary and proper to call into existence and exercise the functions and powers of the court to seise upon, control, and administer the estate for the protection of creditors and the devolvement of the property on proper heirs, legatees, devisees and others entitled to receive or enjoy the property or the usufruct thereof. Deceased husband's estate had been "probated" within meaning of statute, so that, on death of his widow, both estates could not be probated as one estate, where on husband's death letters of administration were issued to widow, who qualified, caused notice to creditors of estate to present their claims to be published as required by law, and filed an inventory and appraisement of the property, showing the estate to be valued at one thousand four hundred dollars, notwithstanding nothing further was done in the probate proceeding.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.

(2) Record showed that succession of grandparent had not been administered and closed when heir applied for letters of administration.—Vuillemont v. Gonsulin, 134 So. 419, 17 La.App. 661.

52. Mass.—Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444, modified on other grounds Ex parte Worcester County Nat. Bank, 49 S. Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 98—Petition of Commonwealth-Atlantic Nat. Bank of Boston, 144 N.E. 443, 249 Mass. 440.

53. U.S.—McClellan v. Carland, S.D., 187 F. 915, 110 C.C.A. 49.
Mo.—Bartlett v. Hyde, 3 Mo. 490.
Assets generally see infra §§ 95–128.
Sales under order of court see infra §§ 536–666.

Administration of part only of estate of decedent would be improper. —Moore v. Wooten, Tex.Com.App., 283 S.W. 153, denying rehearing 280 S.W. 742.

54. Ariz.—Faulkner v. Faulkner, 203 P. 560, 562, 23 Ariz. 313, citing **Corpus Juris.**
23 C.J. p 998 note 34.

ly established and the estate distributed.[55] As shown infra § 1018, where anything remains to be done in execution of a will after the death of the executor, the appointment of an administrator de bonis non with the will annexed is proper, even though the debts and all charges of administration have been paid.

On the other hand, it is not necessary that an estate be administered merely for the sake of administration,[56] and where there is nothing to go into the hands of a personal representative, administration is unnecessary.[57] The principle that the title to the personal estate of decedent can be transmitted only through the instrumentality of letters of administration has no application where neither the title nor right to possession to the property in question was in decedent;[58] and no administration can be had where decedent's interest in the property was that of a life tenant[59] or joint tenant,[60] since on his death title passes directly to the remainderman or survivor. On the death of the husband, title to a homestead previously declared by the wife in community property immediately vests in her without administration,[61] and on her death is subject to administration through probate of her will without requiring administration of the husband's estate.[62] Administration may be had, however, to subject a homestead to payment of vendor's or mechanic's liens.[63] The mere fact that some of the heirs are minors and that the land needs protection against trespassers, does not authorize the appointment of an administrator;[64] there must be need of an administrator to collect and distribute the estate to justify an appointment.[65]

55. U.S.—In re Gorday Garment Co., D.C.Or., 2 F.Supp. 162, affirmed, C.C.A., Crocker v. Kay, 62 F.2d 391, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L.Ed. 988.
La.—Succession of Harris, 121 So. 740, 168 La. 191.
Minn.—In re Daniel's Estate, 294 N.W. 465, 208 Minn. 420.
N.C.—Price v. Askins, 194 S.E. 284, 212 N.C. 583.
Pa.—In re Mickelson's Estate, 13 Pa. Dist. & Co. 686, 78 Pittsb.Leg.J. 537.
Tex.—Southern Underwriters v. Lewis, Civ.App., 150 S.W.2d 162.
Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.
23 C.J. p 998 note 36.

Settlement without administration as favored

(1) Settlement of decedent's affairs without the aid of the courts is not favored by the laws.—In re Card's Estate, 222 P. 145, 64 Cal.App. 268.

(2) However, it has also been stated that the settlement of the estate of decedents by agreement between heirs without administration, where fairly made, and where the rights of creditors are not affected, is favored by the law.—Faulkner v. Faulkner, 203 P. 560, 23 Ariz. 313.

Presumption of necessity

Necessity for administration must be presumed in every case, unless facts be shown making exception to general rule.—Pitts v. Thompson, Tex.Civ.App., 71 S.W.2d 368, error dismissed—Ferguson v. Mounts, Tex.Civ.App., 281 S.W. 616—23 C.J. p 998 note 36 [b].

Sale and distribution of proceeds of bank stock

If heirs of deceased owner of stock in private bank could not have personally disposed of stock without becoming liable as partners, administrator could have been appointed for estate of deceased owner and bank stock sold and proceeds divided.—Bickel v. Bibler, Ind.App., 32 N.E.2d 127.

56. Ill.—Robertson v. Yager, 158 N.E. 709, 327 Ill. 346—Van Meter v. Illinois Merchants' Trust Co., 239 Ill.App. 618.
Ind.—Cornet v. Guedelhoefer, 36 N.E.2d 933, mandate modified on other grounds 37 N.E.2d 681.

Inheritance of heirs

"Heirs inherit without the necessity of an administration."—Leal v. Leal, Tex.Civ.App., 291 S.W. 340, 342.

Statutory requirement of showing of necessity

Tex.—Pitts v. Thompson, Civ.App., 71 S.W.2d 368, error dismissed—Galveston, H. & S. A. Ry. Co. v. Blankfield, Civ.App., 253 S.W. 956.

Administrator held unnecessary

Appointment of administrator of mother's estate was unnecessary to enforce child's rights against stepfather's estate.—In re Peterson's Estate, 241 P. 964, 137 Wash. 137.

57. Ky.—Allen v. Foth, 275 S.W. 804, 210 Ky. 343.
Minn.—McHugo v. Norton, 198 N.W. 141, 159 Minn. 90.
N.Y.—In re Tangerman's Estate, 235 N.Y.S. 213, 226 App.Div. 162.
Tex.—Hale v. Hannah, Civ.App., 56 S.W.2d 259.
Wis.—In re Kuntz's Estate, 220 N.W. 206, 196 Wis. 344.
Small estates see subdivision f of this section infra.

Exempt property

Where the only property of an intestate is exempt, no necessity for administration exists.—Parker v. Miller, Tex.Civ.App., 258 S.W. 602, reversed on other grounds, Com.App., 268 S.W. 726.

Allowance for burial expenses

Statute providing for allowance toward funeral expenses and cost of burial lot for beneficiary of old age assistance does not manifest intent that administrator be appointed to receive and pay out the allowance, to undertaker, since legislature contemplated probability that beneficiary would not possess an estate.—State ex rel. Redgate v. Walcott, 3 A.2d 852, 125 Conn. 160.

58. Md.—Biemuller v. Schneider, 62 Md. 547.
23 C.J. p 999 note 38.

59. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.
Mo.—Woolery v. Todd, App., 139 S.W.2d 1005.
N.Y.—Ullmann v. Ullmann, 229 N.Y.S. 176, 223 App.Div. 636.

60. Wis.—In re Richardson's Estate, 282 N.W. 585, 229 Wis. 426.

61. Cal.—Spencer v. Stewart, 262 P. 331, 202 Cal. 695.

Where decedent's widow remained in possession of homestead no necessity for administration existed.—Hale v. Hannah, Tex.Civ.App., 56 S.W.2d 259.

62. Cal.—Spencer v. Stewart, 262 P. 331, 202 Cal. 695.

Death of child taking father's interest in community property

On the death of the husband, his half of the community property descends to his children, and, on the death of the only child during the life of the widow, the child's interest therein vested in the widow, so that she became the owner of all the property, and there was no necessity for administration of the estates of the husband and the child.—Succession of McGee, 91 So. 716, 151 La. 225.

63. Cal.—Hinkel v. Crowson, 206 P. 58, 188 Cal. 378.

64. Ala.—Ex parte Cone, 145 So. 571, 226 Ala. 64.

65. Ala.—Ex parte Cone, supra.

Discovery of will after intestate administration. Where, after the estate of decedent has been administered as intestate, the debts all paid, and the property assigned to a certain person as sole heir, a will is discovered and admitted to probate by which the real estate is devised to other persons, there is no need for the appointment of a new administrator.[66]

Escheated estates. The appointment of an administrator is unnecessary in the case of an escheated estate[67] unless the estate is indebted.[68]

b. For Collection of Assets

Administration is frequently held necessary for the collection of assets of the estate, although many cases hold that the heirs may collect and even sue for the debts due to, and the property of, the estate.

It has been frequently asserted that, where debts or assets of the estate are to be collected or choses in action are to be sued on, an administration is necessary in order that there may be some authorized representative of decedent to act in the premises, as the heirs are not, merely as such, entitled to sue for the recovery of his property or of debts due to him.[69] On the other hand, there are many cases holding that, where there are no debts of the estate the heirs may collect, and even if necessary sue for, the debts due to, and the property of, decedent,[70] although the existence of this right does not prevent the appointment of an administrator for the purpose of collecting such debts.[71]

Insurance policies. Where a policy of insurance on the life of decedent is, by its terms, payable to a designated beneficiary, there is no occasion for the appointment of an administrator to collect on the policy;[72] and it has been said that it should be the policy of the law to enforce industrial insurance policies which are taken out chiefly for the purposes of procuring a decent burial without the necessity of administration.[73]

c. For Purpose of Distribution

Administration is not necessary merely for the purpose of distribution where the entire estate goes to a single person or the several heirs are able satisfactorily to dispose of it among themselves; but administration may be necessary if, among other things, some of the heirs are not sui juris, or if some of the heirs demand it, or if there is a dispute among the heirs.

In a large number of jurisdictions, administration is not regarded as necessary merely for the purpose of distribution, and hence administration may be dispensed with where the entire estate goes to a single person,[74] or the several heirs or distributees are able to make a satisfactory distribution or disposition of the estate among themselves,[75] and where it further appears that there are no debts

66. Minn.—Thompson's Est., 58 N. W. 682, 57 Minn. 109.

67. Ga.—Smith v. Gentry, 16 Ga. 31.
Prosecution of escheat proceedings pending administration proceedings see Escheat § 12.

68. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.

69. Ky.—Fidelity & Deposit Co. of Maryland v. Barrett, 111 S.W.2d 631, 271 Ky. 163—Sowle v. Potter, 3 S.W.2d 174, 223 Ky. 136.
23 C.J. p 1001 note 54.

70. Ark.—Illinois Bankers' Life Assur. Co. v. Lane, 71 S.W.2d 189, 189 Ark. 261—Business Men's Acc. Ass'n of America v. Green, 227 S. W. 388, 147 Ark. 199.
Colo.—Metropolitan Life Ins. Co. v. Lanigan, 222 P. 402, 74 Colo. 386.
Ill.—Weiland v. Weiland, 17 N.E.2d 625, 297 Ill.App. 239.
Miss.—Williams v. Sykes, 154 So. 267, 170 Miss. 88, suggestion of error overruled 154 So. 727, 170 Miss. 88.
Wash.—In re Peterson's Estate, 241 P. 964, 137 Wash. 137.
23 C.J. p 1001 note 55.

Continuance of business
Where all persons interested as distributees in estate are of full age, they may with consent of creditors wind up deceased's business without administration, but they cannot conduct business or wind it up in name of estate, and estate is not liable for debts created after deceased's death. —Beneux v. Brown Shoe Co., 87 S.W. 2d 28, 191 Ark. 579.

Statutory fund for immediate necessities of spouse
Under Code Civ.Proc. § 1454, authorizing a surviving husband or wife without administration to collect from any bank deposits of deceased, not exceeding one thousand dollars on making affidavit, a husband after his wife's death, having made the proper affidavit, was held entitled to withdraw a fund amounting to three hundred twenty dollars and seventy cents from a bank, but such withdrawal did not give the husband title thereto, the intent of the statute being to provide a temporary fund for immediate necessities. —Brezzo v. Brangero, 196 P. 87, 51 Cal.App. 79.

71. Ala.—Gilchrist v. Gilchrist, 137 So. 406, 223 Ala. 562.
23 C.J. p 1002 note 56.

72. Miss.—Young v. Roach, 61 So. 984, 105 Miss. 6.

73. Mo.—Wallace v. Prudential Ins. Co., 157 S.W. 1028, 174 Mo.App. 110.

74. N.Y.—In re Lynas' Estate, 175 N.Y.S. 733—Dickinson v. Hoes, 84 N.Y.S. 152, 88 N.Y.Civ.Proc. 101.
Pa.—Gibboney v. Derrick, 12 A.2d 111, 338 Pa. 317.
23 C.J. p 1002 note 60.

Minor undisputed sole heir
Ga.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.

Next of kin of next of kin
Where one of the next of kin dies before distribution, his share ordinarily will be decreed to be paid to his executor or administrator, but where he dies intestate, leaving no debts, or his administrator having paid all of his debts, the administrator's title to such distributive share would obviously be but a mere naked legal title, which he would be required immediately to transfer to the equitable owner, the next of kin of such deceased next of kin, and where next of kin has died intestate, leaving no debts, and no administrator has ever been appointed, the appointment of an administrator for the mere purpose of taking the distributive share is unnecessary, and equity will dispense with such administration and decree distribution directly to secondary next of kin.—In re Riley's Estate, 113 A. 485, 92 N.J.Eq. 567.

75. U.S.—De Lappe v. Commissioner of Internal Revenue, C.C.A.La., 113 F.2d 48—Title Guaranty & Surety Co. v. State of Missouri, C.

of decedent or that all of his debts have been paid[76] or cared for in a manner satisfactory to the creditors,[77] or have become barred by failure of the creditors to present their claims for payment within the time limited for that purpose,[78] or by the running of the general statute of limitations.[79] Even where there is a will, the persons beneficially interested in the estate may, it has been held, in case there are no debts or the debts have all been paid, divide the property among themselves without probating the will,[80] although it would be otherwise where, as is sometimes the case, the statute requires that all wills shall be probated.[81] It has been held that dsitribution without administration is proper only when all the persons beneficially interested in the estate are sui juris,[82] but it has also been considered that, where the guardian of a minor heir agreed to a settlement and distribution of the estate without administration, the protection of the minor was no concern of the public administrator, so as to authorize a grant of administration to him.[83]

An administration of the estate is held to be necessary where any of the heirs or distributees demand it,[84] where the heirs cannot agree as to distribution,[85] where an attempt of the heirs to settle the estate results in a dispute,[86] or where a settlement out of court is challenged for fraud.[87]

Where, after an agreement has been made to settle an estate without administration, it becomes necessary to administer in the usual way, such agreement, so far as it remains executory, becomes inoperative, and the rights of the parties are to be determined as if no such agreement had been made.[88]

A court of chancery may decree a distribution of the property of decedent among the distributees when no administration has been granted in the state, without any letters of administration being

C.A.Mo., 105 F.2d 496, 527, citing **Corpus Juris.**
Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.
Conn.—Westport Paper-Board Co. v. Staples, 15 A.2d 1, 127 Conn. 115.
Ill.—Martin v. Central Trust Co. of Illinois, 159 N.E. 312, 327 Ill. 622.
Iowa.—Heinz v. Vawter, 266 N.W. 486, 221 Iowa 714.
Kan.—Hampson v. Stanfield, 103 P.2d 910, 152 Kan. 333.
Ky.—McGehee v. Dorman, 103 S.W. 2d 279, 267 Ky. 720—Trent v. Griffy, 235 S.W. 22, 193 Ky. 124.
Ohio.—In re Heintz' Estate, 38 N.E. 2d 431, 434, citing **Corpus Juris.**
Tex.—Scanlan v. Gulf Bitulithic Co., Civ.App., 27 S.W.2d 877, reversed on other grounds, Com.App., 44 S. W.2d 967, 80 A.L.R. 852.
Wash.—In re Lambrecht's Estate, 192 P. 1018, 112 Wash. 645.
Wis.—In re Kuntz's Estate, 220 N. W. 206, 196 Wis. 344.
23 C.J. p 1002 note 60.

Agreement as equivalent to administration

Where an estate has no creditors, and the heirs, who are sui juris, agree on a division of the property without administration, the division to be made by named arbitrators selected by them, and the arbitrators apportion the real estate and some of the personalty, but do not apportion the remainder of the personalty which is in possession of one of the heirs who refuses to permit division, the agreement is equivalent to an "administration", and the heirs own the undivided property as tenants in common.—Hemphill v. Hemphill, 7 S. E.2d 762, 62 Ga.App. 358.

76. Ga.—Owens v. Oliver, 97 S.E. 856, 148 Ga. 675.
Ill.—Martin v. Central Trust Co. of Illinois, 159 N.E. 312, 327 Ill. 622.
Iowa.—Heinz v. Vawter, 266 N.W. 486, 221 Iowa 714.
Kan.—Hampson v. Stanfield, 103 P.2d 910, 152 Kan. 333.
Ky.—McGehee v. Dorman, 103 S.W. 2d 279, 267 Ky. 720—Trent v. Griffy, 235 S.W. 22, 193 Ky. 124.
Wis.—In re Kuntz's Estate, 220 N. W. 206, 196 Wis. 344.
23 C.J. p 1002 notes 60–62.
Effect of absence of debts generally see infra § 6 c.

Debts and taxes

Where court of chancery is called on to render a decree directing distribution to next of kin, of those next of kin who have died before distribution and without administration, it must be made to appear by full and satisfactory proof that there were no debts owing by the next of kin of decedent, or that, if any debts existed, they have been paid, and that no transfer or succession taxes are leviable, or, if such be leviable, what they are, so that the decree may provide for their payment.—In re Riley's Estate, 113 A. 485, 92 N. J.Eq. 567.

Showing required by statute

Under statute authorizing settlement without administration when heirs are residents of state, and the estate is solvent, and no minors are insolvent, to pass title to deceased's property without administration, it is necessary to show absence of debts or payment thereof, and that estate is solvent.—Bell v. Kelly, D. C.Ill., 54 F.2d 395.

77. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.
Wash.—In re Lambrecht's Estate, 192 P. 1018, 112 Wash. 645.

78. Minn.—Granger v. Harriman, 94 N.W. 869, 89 Minn. 303.
Presentation of claims against estate see infra §§ 394–424.

79. Kan.—Brown v. Baxter, 94 P. 155, 77 Kan. 97, 106.
23 C.J. p 1002 note 64.

80. Ala.—Carter v. Owens, 41 Ala. 127.
23 C.J. p 1002 note 65.

Dispensing with formalities after probate

Heirs or legatees and devisees, after a will has been probated, may by agreement dispense with formalities prescribed by statute which, in absence of agreement, are binding on an administrator or executor.—Cornet v. Guedelhoefer, Ind., 36 N.E 2d 933, mandate modified on other grounds 37 N.E.2d 681.

81. Iowa.—Seery v. Murray, 77 N. W. 1058, 107 Iowa 384.

82. Mo.—Griesel v. Jones, 99 S.W. 769, 123 Mo.App. 45.
23 C.J. p 1003 note 67.

83. Ill.—Cotterell v. Coen, 92 N.E. 911, 246 Ill. 410, reversing 151 Ill. App. 463.

84. Ala.—Marshall v. Crow, 29 Ala. 278.
La.—Blake v. Kearney, 30 La.Ann. 388.
23 C.J. p 1003 note 69.

85. Mo.—Meyer v. Nischwitz, 199 S. W. 744, 198 Mo.App. 101—Griesel v. Jones, 99 S.W. 769, 123 Mo.App. 45.

86. Ind.—Bruning v. Golden, 64 N.E. 657, 159 Ind. 199.

87. Iowa.—Seery v. Murray, 77 N. W. 1058, 107 Iowa 384.

88. Ill.—Bennett v. Morris, 111 Ill. App. 150.

taken out.[89]

d. To Provide Party to Action

Administration is frequently required to provide a party to an action in which the estate is interested.

The estate of decedent cannot be a party to an action without some representative,[90] and hence a grant of administration frequently becomes necessary for the purpose of providing a party to an action in which the estate is interested.[91] Nevertheless, the fact that property in which decedent was interested is concerned in litigation does not always render it necessary to appoint a personal representative of decedent to appear therein.[92]

e. Effect of Liability to Inheritance Tax

Administration may or may not be necessary for inheritance tax purposes.

Although a formal administration of an estate by probate proceedings has been held unnecessary to determine the amount of an inheritance tax due from such estate,[93] it has been also held that a statute providing for collateral inheritance taxes contemplates that an estate must be duly administered where collateral heirs are entitled to distribution, regardless of whether or not there are any debts owing by the estate.[94]

f. Small Estates

Although the right to administration does not depend on the size or value of the estate, it is sometimes unnecessary to administer small estates.

The right to administer on the estate of deceased person does not depend on the size of the estate or the value thereof.[95] However, under some statutes administration is unnecessary where the estate of decedent does not exceed a specified amount,[96] and even independent of statute, it has been held that where the estate was not sufficient to defray the expenses of administration,[97] or the cost of burial of deceased,[98] it was not necessary to have an administrator appointed. A fortiori, where decedent left no estate, there is no necessity for administration.[99]

§ 6. —— Existence of Debts

a. In general
b. Character, amount, and number of debts
c. Effect of absence of debts

a. In General

Administration is usually necessary where decedent left unpaid debts and property available to pay them.

Administration is usually necessary where a person dies leaving unpaid debts and property which may be made available to pay them,[1] and the mere

89. Miss.—Wood v. Ford, 29 Miss. 57.
Jurisdiction in equity to administer estates see Equity § 61.

90. Ga.—Knight's Pharmacy Co. v. McCall, 183 S.E. 497, 181 Ga. 617.
Ind.—Guernsey v. Pennington, 70 N. E. 1008, 33 Ind.App. 119.

91. Ind.—Loftin v. Johnson, 24 N.E. 2d 916, 216 Ind. 537.
Kan.—Hotchkiss v. Ogle, 109 P.2d 134, 137, 153 Kan. 156, citing **Corpus Juris.**
Tex.—Faulkner v. Reed, Com.App., 241 S.W. 1002, reversing, Civ.App., 229 S.W. 945—Denton v. Meador, Civ.App., 268 S.W. 762.
23 C.J. p 1003 note 76.

Effect on estate's right to move for dismissal
Order directing administration of estate of deceased defendant was without prejudice to right of estate to move to dismiss suit for laches in prosecution.—In re Beach's Estate, 149 A. 492, 299 Pa. 293.

92. N.H.—Jones v. Herbert, 90 A. 854, 77 N.H. 282.
Tenn.—Crabb v. Cole, 84 S.W.2d 597, 19 Tenn.App. 201.
Tex.—Cook v. Baker, Com.App., 45 S. W.2d 161, reversing, Civ.App., 27 S.W.2d 893—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, error dismissed.
23 C.J. p 1003 note 77.

93. La.—Succession of Watkins, 101 So. 395, 156 La. 1000.
Wash.—In re Lambrecht's Estate, 192 P. 1018, 112 Wash. 645.

94. Me.—Whiting v. Farnsworth, 81 A. 214, 108 Me. 384.
23 C.J. p 1003 note 78.

95. Ill.—In re Trost's Estate, 10 N. E.2d 857, 292 Ill.App. 60.

96. N.J.—Romano v. Brown, 15 A.2d 818, 125 N.J.Law 293.
24 C.J. p 241 note 28.
Allowance to surviving spouse or children see infra § 333.

Construction of provision of banking law
Provision of Banking Law giving savings bank right to pay deposit not exceeding five hundred dollars, without administration, to husband, next of kin, funeral director, or other creditor who may appear to be entitled thereto, must be strictly construed.—Goldsmith v. Buffalo Sav. Bank, 282 N.Y.S. 783, 156 Misc. 889.

Deductions from estate of payments made by heir
An heir may not, after voluntarily paying ordinary obligations of deceased, claim the amounts of such payments, and thus reduce value of estate so as to entitle such heir to a summary distribution of the estate under exemptions allowed by statute, without the probate court assuming jurisdiction.—Columbia Trust Co. v. Anglum, 225 P. 1089, 63 Utah 353.

97. La.—Soubiran v. Rivollet, 4 La. Ann. 328.

98. Ill.—Van Meter v. Illinois Merchants' Trust Co., 239 Ill.App. 618.

99. Ky.—Webb v. Trimble, 136 S. W. 870, 143 Ky. 375.
N.Y.—Roughan v. Chenango Valley Sav. Bank, 144 N.Y.S. 508, 158 App. Div. 786, affirmed 110 N.E. 1049, 216 N.Y. 696.
23 C.J. p 1005 note 3.

1. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.
Ky.—Sowle v. Potter, 3 S.W.2d 174, 223 Ky. 136.
La.—Succession of Harris, 121 So. 740, 168 La. 191—Keith v. Lee, 127 So. 139, 13 La.App. 309.
Pa.—In re Martin's Estate, 19 Wash. Co. 122.
S.C.—Mitchell v. Dreher, 147 S.E. 646, 150 S.C. 125.
Tex.—Cook v. Baker, Com.App., 45 S.W.2d 161, reversing, Civ.App., 27 S.W.2d 893—Michigan Trust Co. v.

fact that there may be debts has been considered sufficient to render administration proper.[2] Where a person claiming to be a creditor of the estate applies for the appointment of an administrator, it is not necessary that he should conclusively prove the existence of the alleged debt, but if he makes a prima facie case this is sufficient to authorize and require the appointment of an administrator.[3] In such case administration is necessary to protect the rights of creditors, for a creditor has no right to collect a debt due to the estate from another person and apply it on his own demand;[4] and where there has been no administration, he cannot maintain an action against the estate of the debtor,[5] nor can he ordinarily sue the heirs of decedent.[6]

b. Character, Amount, and Number of Debts

The debt forming the basis of a grant of administration must be a legal claim on the deceased or his estate, but the amount or number of debts does not generally affect the right to administration.

In order for an alleged debt to form the basis of a grant of administration it must be a legal claim on deceased or his estate.[7] The fact that decedent's indebtedness is small does not render administration unnecessary;[8] and where there is a single debt, the power to appoint an administrator exists,[9] although refusal to do so in such case has been held not error.[10]

c. Effect of Absence of Debts

Administration may be granted although the estate is not indebted, but the absence of debts may render administration unnecessary.

While the power to grant administration is not restricted to cases in which the estate is indebted,[11] the absence of debts may render administration unnecessary,[12] it being considered, as shown supra §

Turney, Civ.App., 36 S.W.2d 787, error refused—Ferguson v. Mounts, Civ.App., 281 S.W. 616.
23 C.J. p 999 note 40.

Subsequent payment

For widow to sue under statute as personal representative of estate of husband leaving no lineal descendants, estate must be free from debts, and debts against estate defeats suit even though debts are subsequently paid.—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899.

Good faith of creditor

Trust company, named as coexecutor, to whom testator owed debt, could demand administration for purpose of collecting debt but not merely to earn executor's fees.—Martin v. Central Trust Co. of Illinois, 159 N.E. 312, 327 Ill. 622.

Devise to trustee with power to manage

That testator devised estate to trustee, with power to manage and limited power of disposition, does not oust probate court's jurisdiction to administer nonresident decedent's estate and pay its debts.—Michigan Trust Co. v. Turney, Tex.Civ.App., 36 S.W.2d 787, error refused.

2. S.C.—Cobb v. Brown, 17 S.C.Eq. 564.
Wash.—In re Collins, 173 P. 1016, 102 Wash. 697.
23 C.J. p 999 note 41.

3. Ga.—Conyers v. Bruce, 34 S.E. 279, 109 Ga. 190.
Ill.—In re McWhirter, 85 N.E. 918, 235 Ill. 607.
23 C.J. p 1000 note 42.

"One asserting a claim against an estate has the right to demand an administration so that his claim may be litigated even though it be defeated."—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 823, 214 Ind. 679.

4. Tex.—Cook v. Jordan, 21 Tex. 221.
23 C.J. p 1000 note 44.

5. Ga.—Knight's Pharmacy Co. v. McCall, 183 S.E. 497, 181 Ga. 617.
23 C.J. p 1000 note 45.

6. Ind.—Leonard v. Blair, 59 Ind. 516.
Mass.—Royce v. Burrell, 12 Mass. 395.
Right of action against heirs and distributees for debts of decedent see Descent and Distribution § 132.

7. Ga.—Summerlin v. Rabb, 31 S.W. 711, 11 Tex.Civ.App. 53.
23 C.J. p 1000 note 47.

Balance unpaid on mortgage debt, after application of credit resulting from foreclosure sale, was such a debt as gave mortgagee the right to provoke or bring about administration of mortgagor's succession.—Milburn v. Proctor Trust Co., D.C.La., 32 F.Supp. 635.

Cause of action for injuries

One claiming damages from nonresident's estate for personal injuries in automobile accident was a "creditor" so as to authorize appointment of administrator.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N.E.2d 748, 303 Ill. App. 139.

8. Tex.—Ragsdale v. Prather, Civ. App., 132 S.W.2d 625, error refused—Rye v. J. M. Guffey Petroleum Co., 95 S.W. 622, 42 Tex.Civ.App., 185.

9. Ind.—Holtz v. Mercantile Trust & Savings Co., 100 N.E. 398, 53 Ind.App. 194.
23 C.J. p 1000 note 49.

10. Tex.—Rogers v. Barbee, Civ. App., 32 S.W.2d 666.

11. Ala.—Ex parte Cone, 145 So. 571, 226 Ala. 64.
Ill.—Robertson v. Yager, 158 N.E. 709, 327 Ill. 346.
Kan.—Hotchkiss v. Ogle, 109 P.2d 134, 153 Kan. 156.
Ky.—Fidelity & Deposit Co. of Maryland v. Barrett, 111 S.W.2d 631, 271 Ky. 163.
Tex.—Ferguson v. Mounts, Civ.App., 281 S.W. 616—Wallace v. Dubose, Civ.App., 242 S.W. 351.
23 C.J. p 1000 note 50.

12. U.S.—Title Guaranty & Surety Co. v. State of Missouri, C.C.A. Mo., 105 F.2d 496, 527, citing **Corpus Juris**—Fairchild v. Lohman, D.C.Mo., 13 F.2d 252.
Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.
Ga.—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899.
Ill.—People v. Strom's Estate, 2 N.E.2d 94, 363 Ill. 241.
Ind.—Reed v. Reed, 14 N.E.2d 320, 105 Ind.App. 185.
Iowa.—Heinz v. Vawter, 266 N.W. 486, 221 Iowa 714.
La.—Succession of Davis, 168 So. 118, 184 La. 969—Crump v. Metropolitan Life Ins. Co., 162 So. 800, 183 La. 55, annulling, App., 156 So. 35, followed in Thomas v. Metropolitan Life Ins. Co., 156 So. 38, annulled 162 So. 799, 183 La. 53.
Mo.—Marshall v. Motten, App., 224 S.W. 8.
Ohio.—In re Heintz' Estate, App., 38 N.E.2d 431, 434, citing **Corpus Juris.**
Wash.—In re Railsback's Estate, 49 P.2d 934, 184 Wash. 42—In re Peterson's Estate, 241 P. 964, 137 Wash. 137.
23 C.J. p 1000 note 51.

Presumption of payment or bar

On petition for appointment of administrator more than eight years after decedent's death, it will be presumed, in the absence of showing to the contrary, that debts against

5 c, that in such case the heirs may properly take possession of the assets and make a division among themselves in kind or otherwise by mutual agreement.

§ 7. —— Effect of Lapse of Time

A long lapse of time since the death of the decedent without administration may raise a presumption against the necessity for administration.

In some states there are statutes providing that administration shall not be granted after a certain time from the death of decedent,[13] and where the statutory period has elapsed, it will be conclusively presumed that no administration was necessary.[14]

Even in the absence of statute a long lapse of time since the death of decedent without administration may raise a presumption against the necessity for any administration,[15] and a claim that there is a necessity for administration may be waived by delay in making it.[16] However, a grant of administration which is not prohibited by statute cannot be considered void merely because a number of years elapsed between the death of decedent and the issuance of the letters.[17]

Where no administration has been granted, and the time within which it might be granted has expired, the personal property of decedent passes to his distributees as of the date of his death.[18]

§ 8. —— Estates of Particular Classes of Persons

a. In general
b. Husband and wife

a. In General

The estate of an infant is subject to administration in a proper case. It has been both asserted and denied that state courts have power to administer on the estate of a deceased Indian.

The power of a state court to issue letters of administration on the estate of a deceased Indian has been both asserted[19] and denied.[20]

Infants. Although, as shown in the C.J.S. title Wills § 8, also 68 C.J. p 419 notes 16–19, an infant is incapable of making a will, the estate of an infant is subject to administration in a proper case.[21] As there is, however, no presumption that an infant had any creditors, it is considered by many authorities that administration on the estate of an infant is unnecessary[22] where it does not affirmatively appear that there are any debts which properly constitute a charge on his estate.[23]

b. Husband and Wife

The estate of a married person is subject to administration the same as any other estate, although administration is sometimes dispensed with.

As there is no presumption against a married woman having contracted debts during her lifetime, her estate is, as a general rule, subject to administration the same as any other estate.[24] However, under the community property system obtaining in some jurisdictions, on the dissolution of the community by death the survivor or the surviving husband has a right to administer the community property for the payment of community debts without any supervision of the probate court, as is discussed in the C.J.S. title Husband and Wife § 574, also 31 C.J. p 197 notes 80–86.

The statutes sometimes dispense with administration on the estate of a married person who dies

the estate have been paid or are barred by the statute of limitations. —Faulkner v. Faulkner, 203 P. 560, 23 Ariz. 313.

Extinguishment by inheritance

Where widow inherited husband's estate, existence of debt by community estate to husband's separate estate was not ground for appointment of administrator, since the debt was extinguished by being inherited by sole heir.—Succession of Watkins, 101 So. 395, 156 La. 1000.

13. Conn.—Colburn's Appeal, 56 A. 608, 76 Conn. 378.
Iowa.—Cummings v. Lynn, 96 N.W. 857, 121 Iowa 344.
Pa.—In re Treat's Estate, 23 Erie Co. 43.
23 C.J. p 1003 note 80.
Time for application for administration see infra § 52.

Lapse of period fixed for order of right to make application for letters of administration is no obstacle to appointment of administrator by court.—Andrew v. Dunn, 210 N.W. 425, 202 Iowa 364.

14. Tex.—Tunnell v. Moore, Civ. App., 53 S.W.2d 324, affirmed Pure Oil Co. v. Tunnell, 86 S.W.2d 207, 126 Tex. 57.

15. Ariz.—Faulkner v. Faulkner, 203 P. 560, 561, 23 Ariz. 313, citing **Corpus Juris.**
Mo.—Marshall v. Motten, App., 224 S.W. 8.
23 C.J. p 1003 note 81.

16. Ill.—Jespersen v. Mech, 72 N.E. 1114, 213 Ill. 488.
23 C.J. p 1004 note 82.

17. **Twenty years**
Ga.—Gorham v. Montfort, 72 S.E. 893, 137 Ga. 134.

18. Iowa.—In re Acken, 123 N.W. 187, 144 Iowa 519, Ann.Cas.1912A 1166.
Time when personalty vests in distributees see Descent and Distribution § 67.

19. Ala.—Reed v. Brasher, 9 Port. 438.

20. U.S.—U. S. v. Payne, C.C.Kan., 27 F.Cas.No.16,014, 4 Dill. 387.
N.Y.—Dole v. Irish, 2 Barb. 639.
23 C.J. p 1005 note 93.

21. Fla.—Bowden v. Jacksonville Electric Co., 41 So. 400, 51 Fla. 152, 7 Ann.Cas. 859.
23 C.J. p 1004 note 93.

22. Ill.—McCleary v. Menke, 109 Ill. 294.
23 C.J. p 1004 note 94.

23. Ala.—Campbell v. Conner, 42 Ala. 131.
23 C.J. p 1004 note 95.

24. Mo.—Locke v. McPherson, 63 S.W. 726, 153 Mo. 493, 85 Am.S.R. 546, 53 L.R.A. 420.
23 C.J. p 1004 note 85.

leaving his or her wife or husband as sole heir,[25] in case there are no debts,[26] or, if there are debts, in case the heir will pay them.[27] In a case where testator's widow was the sole legatee, and all debts and expenses had been paid, it was held that there need be no administration of the estate.[28] Administration is also regarded as unnecessary where the entire estate does not exceed the amount allowed by statute to the surviving spouse.[29]

§ 9. —— Determination as to Necessity

The necessity for administration is to be determined by the probate court in the exercise of its discretion.

It may be stated generally that the question of necessity for administration is one for the court having probate jurisdiction,[30] and it appears to be a matter resting largely in the discretion of the court, especially where there are no debts, whether an administration shall be had or the estate awarded to the persons entitled to it without any administration;[31] nor does the jurisdiction of the court to determine the question depend on the existence of assets of the estate.[32] It cannot be regarded as necessary that there should be an administration of an estate unless this is demanded by a creditor or a person beneficially interested.[33] The necessity for an administration should be determined as of the time of the hearing on the application therefor.[34]

§ 10. Intermeddling in Administration

Executors de son tort are treated infra §§ 1063–1068.

Examine Pocket Parts for later cases.

§ 11. Withholding or Withdrawing Estate from Administration

An estate may be withheld from administration by the terms of the testator's will or withdrawn from administration by the heirs on giving bond for the payment of the debts of the decedent.

In some states, as shown infra §§ 1056–1062, by authority of statutes a testator is empowered, by provisions to that effect in his will, to withhold the settlement of his estate from the probate court; and in a case where a testator explicitly declared in his will that the executors named should not assume or exercise any duties as such until after the death of his widow to whom he gave the use of his property for life with the right to use the principal of the personalty if she chose and there were no creditors, it was held that the children to whom the property was given after the widow's death could not compel the executors to assume any functions during the widow's life.[35] The heirs may, when permitted by statute, withdraw the estate from administration by giving bond for the payment of the debts of decedent,[36] and, as shown supra § 5 c,

In Philippines liquidation of the conjugal partnership after the wife's death must take place in a different proceeding from the administration of her estate.—Matter of Amancio, 13 Philippine 297—40 C.J. p 1481 note 95.

25. Ga.—Owens v. Oliver, 97 S.E. 856, 148 Ga. 675.
23 C.J. p 1004 note 87.

26. Ga.—McElhaney v. Crawford, 22 S.E. 895, 96 Ga. 174.
23 C.J. p 1004 note 88.

27. Ga.—McElhaney v. Crawford, supra.
23 C.J. p 1004 note 89.

28. Ind.—Block v. Butt, 84 N.E. 357, 41 Ind.App. 487.

29. Mo.—Parson v. Harvey, App., 195 S.W. 530.

30. La.—Vuillemont v. Gonsulin, 134 So. 419, 17 La.App. 661.
Okl.—Stock v. Sentinel Rural & Long Distance Tel. Co., 87 P.2d 656, 657, 184 Okl. 380, citing **Corpus Juris.**
Tex.—Becknal v. Becknal, Civ.App., 296 S.W. 917.
Wash.—State v. Superior Court of State of Washington for Spokane County, 275 P. 694, 151 Wash. 289.
23 C.J. p 1005 note 4.

Matters to be considered
In determining the necessity for an administration, courts will take into consideration all the duties which under the prevailing laws an administrator is required to perform, and all the rights to be secured by an administration.—Lancaster & Wallace v. Sexton, Tex.Civ.App., 245 S.W. 958.

31. La.—Succession of Comeau, 104 So. 119, 158 La. 370—Vuillemont v. Gonsulin, 134 So. 419, 17 La.App. 661—Keith v. Lee, 127 So. 139, 13 La.App. 309.
Okl.—In re Carter's Estate, 240 P. 727, 113 Okl. 182.
Pa.—In re Beach's Estate, 149 A. 492, 299 Pa. 293.
23 C.J. p 1005 note 5.

Finding that there were no creditors of estate could not be made until statutory period for filing claims had expired.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N.E.2d 748, 303 Ill.App. 139.

32. Okl.—Stock v. Sentinel Rural & Long Distance Telephone Co., 87 P.2d 656, 184 Okl. 380.
Existence of assets as jurisdictional requisite generally see infra § 17.

33. Ohio.—In re Heintz' Estate, 38 N.E.2d 431, 434, citing **Corpus Juris.**
23 C.J. p 1005 note 6.

34. Tex.—Ragsdale v. Prather, Civ. App., 132 S.W.2d 625, error refused.

35. Pa.—Lininger's Appeal, 101 Pa. 161.

36. Pa.—In re Martin's Estate, 19 Wash.Co. 122.
Wash.—Fulmer v. Gable, 132 P. 641, 73 Wash. 684.
23 C.J. p 1005 note 9.
Payment or nonexistence of debts as rendering administration unnecessary see supra §§ 5, 6.

Estoppel
Where family agreement was entered into between administratrix and three sons of deceased under which estate was to be handled outside of the probate court and administratrix was to settle claims without filing or approval thereof, and to use insurance money for payment of debts and for her own support and maintenance, son who participated in the benefits both directly and indirectly and advised administratrix in carrying out the family agreement, with full knowledge of the manner in which the assets were handled, was precluded by an estoppel in pais from objecting to settlement, although administratrix failed to comply with statute in settling the affairs of the estate.—In re Helm's Estate, Mo.App., 136 S.W.2d 421.

where the heir or heirs have paid all of the debts, and no question of distribution arises, there is no necessity for administration. A creditor can collect a claim against the estate although there is no administrator or executor where the estate is withdrawn from administration.[37]

Liability of sureties. Sureties on the bond of an heir given for the purpose of withdrawing the estate from administration under the statute are liable for all the unpaid debts of the estate, and their liability is not limited by the assets of the estate or to the share of the estate to which the heir whose sureties they are is personally entitled on distribution.[38]

Defense in action on withdrawal bond. In an action brought by a creditor against one of the heirs, and his sureties on a bond given for the purpose of withdrawing the estate from administration, such heir cannot be heard to say in defense that the bond is invalid because an inventory and list of claims have not been returned.[39]

§ 12. Nature of Administration Proceedings

An administration proceeding is not a civil action but is a probate proceeding, statutory in origin. In its most important bearing it is a proceeding in rem.

A proceeding for the settlement of a decedent's estate is a probate proceeding.[40] Such a proceeding is not a civil action;[41] it is not an action at law or a suit in equity.[42] While the proceeding is in some respects in personam, it is in its most important bearing a proceeding in rem.[43]

The administration of decedent's estate is purely statutory, and the procedure outlined in the statutes is controlling,[44] and unless authorized by statute two or more separate estates may not be administered jointly.[45] The administration is one indivisible judicial proceeding from the order appointing the administrator until his discharge.[46]

Guardian of minor heirs

Judgment of district court on the minutes on appeal from order of probate court appointing guardian for minor heirs, denying application of applicant to be appointed guardian, but not confirming appointment of appellee, is insufficient to sustain a judgment ordering the estate withdrawn from administration. That application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as persons of minors did not deprive county court of jurisdiction to determine whether estate should be withdrawn, and to whom it should be delivered, if withdrawn, applicant having executed bond required by statute.—Drew v. Jarvis, 216 S.W. 618, 110 Tex. 136.

37. Tex.—Cook v. Baker, Com.App., 45 S.W.2d 161, reversing, Civ.App., 27 S.W.2d 893.
Allowance and payment of claims generally see infra §§ 367–481.

38. Tex.—Thomas v. Bonnie, 2 S.W. 724, 66 Tex. 635.

39. Tex.—Thomas v. Bonnie, supra.

40. Okl.—Boyes' Estate v. Boyes, 87 P.2d 1102, 184 Okl. 438.

41. Cal.—In re Raymond's Estate, 100 P.2d 1085, 38 Cal.App.2d 305.

42. Okl.—Boyes' Estate v. Boyes, 87 P.2d 1102, 184 Okl. 438.

43. Ala.—Nelson v. Boynton, 54 Ala. 368.
Cal.—Murray v. Superior Court of California in and for Marin County, 278 P. 1033, 207 Cal. 381—In re Raymond's Estate, 100 P.2d 1085, 38 Cal.App.2d 305.
Ga.—Robinson v. Haisten, 11 S.E.2d 802, 63 Ga.App. 676.
Iowa.—Gibbs v. Beckett, 295 N.W. 165, 167, 229 Iowa 619, citing **Corpus Juris**—Van Iperen v. Hays, 259 N.W. 448, 219 Iowa 715.
Mass.—Anderson v. Qualey, 103 N.E. 90, 216 Mass. 106.
Minn.—Finnerty v. Gerlach, 223 N. W. 683, 176 Minn. 433—Fridley v. Farmers' & Mechanics' Sav. Bank, 162 N.W. 454, 136 Minn. 333, L.R.A. 1917E 544—Hutchins v. St. Paul M. & M. R. Co., 46 N.W. 79, 44 Minn. 5.
Miss.—Steen v. Steen, 25 Miss. 513.
Neb.—Nilson v. Tekamah Inv. Co., 274 N.W. 465, 133 Neb. 180.
N.J.—Buckley v. Howard Sav. Inst., 186 A. 52, 14 N.J.Misc. 620.
N.Y.—Roseman v. Fidelity & Deposit Co. of Maryland, 277 N.Y.S. 471, 154 Misc. 320—Matter of Leland, 160 N.Y.S. 372, 96 Misc. 419, reversed on other grounds 161 N.Y.S. 316, 175 App.Div. 62.
Tex.—Commander v. Bryan, Civ.App., 123 S.W.2d 1008—Dunaway v. Easter, Civ.App., 119 S.W.2d 421, reversed on other grounds 129 S.W. 2d 286, 133 Tex. 309.
Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
Wash.—In re Upton's Estate, 92 P. 2d 210, 199 Wash. 447, 123 A.L.R. 1220—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.
Wis.—In re Mathews' Will, 223 N. W. 434, 198 Wis. 128—In re Sipchen's Estate, 193 N.W. 385, 180 Wis. 504.
23 C.J. p 1006 note 14.
"In the particular that the grant of letters creates a repository of the abeyed title of the deceased owner of personal property, it operates upon the status, the thing, and is, hence, a proceeding in rem. . . . But in the aspect that the grant of letters of administration determines the right thereto . . . the proceeding is in personam."—White v. Hill, 58 So. 444, 446, 176 Ala. 480.
Probate of will as proceeding in rem see the C.J.S. title Wills § 308, also 68 C.J. p 874 note 14.

44. Cal.—Perry v. Superior Court in and for Marin County, 84 P.2d 250, 29 Cal.App.2d 114.
Iowa.—In re Rugh's Estate, 234 N. W. 278, 211 Iowa 722.
S.C.—Seabury v. Green, 175 S.E. 639, 173 S.C. 235, certiorari granted 55 S.Ct. 143, 293 U.S. 549, 79 L.Ed. 652, reversed on other grounds 55 S.Ct. 373, 294 U.S. 165, 79 L.Ed. 834, 96 A.L.R. 1463.
Tex.—White v. Baker, Civ.App., 118 S.W.2d 319—Morrell v. Hamlett, Civ.App., 24 S.W.2d 531, error refused.
Wis.—In re Robinson's Will, 261 N. W. 725, 218 Wis. 596.
Statutory jurisdiction of court see infra § 13.

Construction of statutes

The administration of estates being wholly statutory, the court may construe the statutes so as to best accord with their purpose and spirit, without regard to the rigid rules of the common law.—In re Langill's Estate, 201 P. 28, 117 Wash. 268.

45. Ga.—Robinson v. Haisten, 11 S. E.2d 802, 63 Ga.App. 676.
Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123.

46. Cal.—In re Dobbins' Estate, 97 P.2d 1051, 36 Cal.App.2d 536.

§ 13. Jurisdiction

The states have exclusive jurisdiction of the settlement of decedent's estates; the jurisdiction of the courts with respect to letters testamentary or of administration is purely statutory.

The jurisdiction of the courts with respect to letters testamentary or of administration is purely statutory,[47] and can be exercised only in the cases provided for[48] and in the manner prescribed[49] by the controlling statutes. In the grant of letters testamentary and of administration, the probate court is a court of general jurisdiction;[50] and in the conduct of estates the courts have a wide discretion.[51]

Exclusive jurisdiction of states. The general subject of the settlement of estates of deceased persons is within the exclusive jurisdiction of the state,[52] and, as shown in the C.J.S. titles Equity § 61a, and Federal Courts § 12, also 25 C.J. p 695 notes 6–11, the United States courts have no constitutional jurisdiction to affirm or set aside the probate of a will in the proper state forum, or to disturb or interfere with the due administration of an estate under state probate direction, although an equitable jurisdiction of United States courts, incidental to the enforcement of trusts, the construction of wills, or other matters, is recognized.

§ 14. —— Particular Courts or Officers

Statutory regulations determine what particular courts or officers have jurisdiction to administer decedent's estate. In the absence of statutory authorization courts of equity are without jurisdiction.

As shown supra § 13, the power to grant letters testamentary or of administration on decedent's estate is purely statutory, and in determining what particular courts have jurisdiction in the administration of estates, the statute regulating such matters in the particular jurisdiction must govern.[53] In

47. Idaho.—Russell v. Bow, 295 P. 437, 50 Idaho 264.
Ind.—Chicago I. & L. Ry. Co. v. Hemstock, 4 N.E.2d 677, 102 Ind. App. 654, followed in 5 N.E.2d 1010, 103 Ind.App. 705.
Wash.—In re Guye, 103 P. 25, 54 Wash. 264, 132 Am.S.R. 1111.
Wis.—In re Robinson's Will, 261 N. W. 725, 218 Wis. 596.
Jurisdiction of proceedings to probate will see the C.J.S. title Wills §§ 351–353, also 68 C.J. p 937 note 92–p 942 note 37.

Action under Confederate authority
(1) The probate of a will, and qualification of executors or the appointment of administrators by a probate court of one of the Confederate States during the Civil War, cannot be regarded by the courts of the same state after the close of the war as the acts of a foreign court, but such acts are in every respect legal and binding.—Nelson v. Boynton, 54 Ala. 368—23 C.J. p 1018 note 13.

(2) Letters of administration issued by a clerk of probate under the authority of a Confederate state constitution, after it had been superseded by a new and valid one, are null and void.—Page v. Cook, 26 Ark. 122.

48. Ill.—In re Panico's Estate, 268 Ill.App. 585.
Ind.—Chicago, I. & L. Ry. Co. v. Hemstock, 4 N.E.2d 677, 102 Ind. App. 654, followed in 5 N.E.2d 1010, 103 Ind.App. 705.
Mo.—State ex rel. Pryor v. Anderson, App., 112 S.W.2d 857, mandamus quashed 123 S.W.2d 181, 343 Mo. 895.
N.M.—Baca v. Buel, 210 P. 571, 28 N.M. 225.

49. **Appointment contrary to exclusive method**
Although jurisdiction over subject matter of estate authorized appointment by superior court of an administrator, where statutory provisions provided exclusive method for exercise of such authority, an appointment contrary to applicable statute would be in excess of court's "jurisdiction."—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.

Inquiry as to jurisdiction
Jurisdiction of county court, in which administration on decedent's estate has been properly opened, attaches for purposes thereof, and inquiry respecting subsequent proceedings therein is merely whether court exceeded authority.—Kreis v. Kreis, Tex.Civ.App., 36 S.W.2d 821, error dismissed.

50. Ala.—Peek v. Haardt, 177 So. 634, 235 Ala. 145, 113 A.L.R. 1395—Smith v. Smith, 103 So. 557, 212 Ala. 522.
Ga.—Scarborough v. Long, 197 S.E. 796, 186 Ga. 412, certiorari denied 59 S.Ct. 107, 305 U.S. 637, 83 L.Ed. 410—Smith v. Scarborough, 185 S. E. 105, 182 Ga. 157.
Idaho.—Kline v. Shoup, 226 P. 729, 38 Idaho 202.
Ill.—People, for Use of Stough, v. Danforth, 12 N.E.2d 227, 293 Ill. App. 280.
Iowa.—In re Kladivo's Estate, 176 N. W. 262, 188 Iowa 471.
"The probate court has general supervision of all estates."—In re Olson's Estate, 77 P.2d 781, 785, 194 Wash. 219.

Entire and exclusive jurisdiction
U.S.—Cole v. Franklin Life Ins. Co., C.C.A.Tex., 93 F.2d 620.

Plenary jurisdiction
Wis.—In re Robinson's Will, 261 N. W. 725, 218 Wis. 596.

Conformity to statute
While probate court is court of general jurisdiction in matters of administration of estates, and as such may exercise certain equitable powers, it must administer estates in accordance with provisions of statute.—In re Grant's Estate, 20 N. E 2d 817, 300 Ill.App. 179.

Effect of escheat statute
Escheat statute did not curtail jurisdiction of probate court in respect of claims against estate and costs and expenses of administration.—In re Anderson's Estate, 71 P.2d 1013, 157 Or. 365.

On appeals from probate court to the circuit court, the circuit court has the same jurisdiction in the settlement of estates as the probate court has.—People, for Use of Stough, v. Danforth, 12 N.E.2d 227, 293 Ill.App. 280.

51. Utah.—In re Robison's Estate, 204 P. 321, 59 Utah 431.

52. Mass.—Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444, modified on other grounds Ex parte Worcester County Nat. Bank, 49 S.Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 98.

53. U.S.—Bacon v. Federal Land Bank of Columbia, C.C.A.Ga., 109 F.2d 285—Cuff v. U. S., C.C.A.Cal., 64 F.2d 624, certiorari denied 54 S.Ct. 96, 290 U.S. 676, 78 L.Ed. 583.
Ga.—Stevens v. First Nat. Bank & Trust Co., 160 S.E. 243, 173 Ga. 332, certiorari denied First Nat. Bank & Trust Co. in Macon v. Stevens, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578.
Ill.—Kerner v. Peterson, 12 N.E.2d

some states the clerk of the court having probate jurisdiction has power to appoint an administrator during a vacation or recess of the regular sessions of such court[54] or where there is no contest.[55]

The institution of a suit to partition the lands of decedent, thereby bringing such lands within the jurisdiction of the court in which the suit is brought, does not preclude the probate court from granting letters of administration on the personal estate of decedent.[56]

Courts of equity. In the absence of statute, courts of equity are without jurisdiction to appoint executors or administrators, or their successors,[57] and a creditor, legatee, or distributee must, if such course is open to him, apply to the probate court for the appointment of an executor or administrator, and cannot resort to chancery in the first instance.[58] Some decisions, however, recognize the right of a creditor, legatee, or distributee, to resort to equity in the absence of an executor or administrator.[59]

§ 15. —— Jurisdictional Requisites in General

The probate court is authorized to determine whether the fundamental jurisdictional facts essential to the administration of a decedent's estate exist; and included among such facts is the erstwhile legal existence of the alleged decedent. The venue as fixed by statute is jurisdictional.

The probate court has the right to investigate and determine the existence of fundamental jurisdictional facts essential to the administration of a decedent's estate.[60] It is a requisite to the appointment of an administrator of a person alleged to be deceased that such person shall have had a legal existence;[61] hence there can be no administrator appointed for the estate of an unborn child.[62] Other jurisdictional requisites are treated infra §§ 16–20. Intestacy as a requisite to the appointment of an administrator is considered infra § 30.

The venue as fixed by statute is jurisdictional.[63]

§ 16. —— Fact of Death

Death of the person on whose estate administration is sought is a jurisdictional requisite; and while the presumption of death arising from absence may present a prima facie case sufficient to warrant a grant of administration, yet if it subsequently develops that such person was in fact alive, the administration is void.

It is absolutely essential to jurisdiction of the administration of an estate that the person on whose estate such administration is granted shall be dead.[64] Any administration on the estate of a living person is void.[65]

884, 368 Ill. 59—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.
Iowa.—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.
Kan.—Citizens Building & Loan Ass'n v. Knox, 74 P.2d 161, 146 Kan. 734.
Ky.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.
Ohio.—Fidelity & Deposit Co. v. Wolfe, 126 N.E. 414, 100 Ohio St. 332.
Okl.—Secrest v. Secrest, 294 P. 91, 146 Okl. 235.
Pa.—Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567, 305 Pa. 583, 81 A.L.R. 660—In re Wood, 16 Pa.Dist. & Co. 405—In re Martin's Estate, 19 Wash.Co. 122.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Smitha, 232 S.W. 494, 111 Tex. 285, affirming, Civ. App., 190 S.W. 237.
Wash.—In re Mundt Estates, 14 P.2d 59, 169 Wash. 593.
Wis.—In re Robinson's Will, 261 N. W. 725, 218 Wis. 596.
23 C.J. p 1006 note 19.

Order of county judge pro tempore, appointing administratrix, held valid
Ky.—Louisville & N. R. Co. v. Bays' Adm'x, 295 S.W. 452, 220 Ky. 458.

54. Minn.—Drake v. Sigafoos, 40 N. W. 257, 39 Minn. 367.
23 C.J. p 1006 note 20.

55. Iowa.—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.

56. Mo.—Stevens v. Larwill, 84 S.W. 113, 110 Mo. 140.

57. U.S.—Bacon v. Federal Land Bank of Columbia, C.C.A.Ga., 109 F.2d 285.
Ga.—Goff v. First Nat. Bank, 153 S. E. 767, 170 Ga. 691.
S.C.—Campbell v. Charleston Bank, 3 S.C. 384.

58. Ill.—Houston v. Maddux, 53 N. E. 599, 179 Ill. 377, reversing 73 Ill.App. 203.
21 C.J. p 129 note 12.

59. Ky.—Shannon v. Dillon, 8 B. Mon. 389, 48 Am.D. 394.
21 C.J. p 129 note 13.

60. Ala.—Peek v. Haardt, 177 So. 634, 235 Ala. 145, 113 A.L.R. 1395.
23 C.J. p 1010 note 47.
Determination of jurisdictional question of residence or domicile see infra § 18.

61. N.Y.—In re Roberts' Estate, 286 N.Y.S. 476, 158 Misc. 698.

62. N.Y.—In re Roberts' Estate, supra.

Infant dead when delivered
Ala.—Moring v. Lisenby, 4 So.2d 4, 241 Ala. 626.

Mother killed before birth of child
N.Y.—In re Roberts' Estate, 286 N. Y.S. 476, 158 Misc. 698.

63. Tex.—White v. Baker, Civ.App., 118 S.W.2d 319.
Wash.—State v. Superior Court of State of Washington for Spokane County, 275 P. 694, 151 Wash. 289.

64. Ga.—National Surety Co. v. Wages, 173 S.E. 451, 48 Ga.App. 720, affirmed Wages v. National Surety Co., 179 S.E. 761, 180 Ga. 574—Bank of Jonesboro v. Wilson, 160 S.E. 653, 654, 43 Ga.App. 839, quoting **Corpus Juris.**
Kan.—Withers v. Root, 73 P.2d 1113, 1115, 146 Kan. 822, quoting **Corpus Juris.**
Minn.—Bornemann v. Ofsthun, 221 N.W. 876, 175 Minn. 493.
N.Y.—In re Wyllie's Estate, 236 N. Y.S. 370, 134 Misc. 715.
N.C.—Chamblee v. Security Nat. Bank, 188 S.E. 632, 211 N.C. 48.
Tex.—Pollock v. Wuntch, Civ.App., 116 S.W.2d 796.
Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
Wash.—State ex rel. Brisbin v. Frater, 95 P.2d 27, 1 Wash.2d 13.
Wis.—In re Ott's Estate, 279 N.W. 618, 228 Wis. 462.
23 C.J. p 1007 note 24.

Production of body is not required to prove death in a civil matter, such as the appointment of an administrator.—Philpott v. Vesta Coal Co., D. C.Pa., 21 F.Supp. 37.

65. Ga.—Bank of Jonesboro v. Wilson, 160 S.E. 653, 654, 43 Ga.App. 839, quoting **Corpus Juris.**
Kan.—Withers v. Root, 73 P.2d 1113, 1115, 146 Kan. 822, quoting **Corpus Juris.**

While it is true that the presumption of death arising from a person's absence, unheard from, for a considerable length of time, see Death § 6, may present a prima facie case sufficient to warrant a grant of administration on his estate,[66] the arising of such presumption does not take the case out of the operation of the general rule on the subject, and if it is made to appear that the person was in fact alive at the time such administration was granted, the administration is absolutely void.[67] Although there is authority to the contrary,[68] it has been held that payment to an administrator of an absentee who is not in fact dead is no defense against the absentee or his legal representative;[69] nor are costs and disbursements incurred by such administrator a legal charge against the absentee or his property;[70] but where the administrator has paid debts of the absentee, he is subrogated to the rights of the creditors whom he has paid.[71] It has been considered, however, that the invalidity of the administration does not relate back, but that it is invalid only from the time when the presumption of death is rebutted;[72] and the objection to administration of the estate of one presumed to be dead is obviated by a statute authorizing the courts to provide for administration of such an estate under reasonable regulations and adequate protection of the property rights of the absentee if he should turn out to be alive.[73]

§ 17. —— Existence of Assets

a. In general
b. Cause of action for wrongful death

a. In General

In order to render administration on a decedent's estate proper, assets within the jurisdiction are ordinarily necessary, at least where administration is sought elsewhere than in the domicile of decedent.

While it has been broadly asserted that, in order to render administration on the estate of a decedent proper, the decedent must have died possessed of

N.Y.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.
N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
Okl.—Winter v. Klein-Schultz, 76 P.2d 1051, 1052, 182 Okl. 231, citing **Corpus Juris.**
23 C.J. p 1007 note 25.

66. Ga.—Bank of Jonesboro v. Wilson, 160 S.E. 653, 654, 43 Ga.App. 839, quoting **Corpus Juris.**
Kan.—Withers v. Root, 73 P.2d 1113, 1115, 146 Kan. 822, quoting **Corpus Juris.**
Minn.—Bornemann v. Ofsthun, 221 N.W. 876, 878, 175 Minn. 493, citing **Corpus Juris.**
Mont.—Williams v. Hefner, 297 P. 492, 495, 89 Mont. 361, citing **Corpus Juris.**
23 C.J. p 1008 notes 26, 27.
Administration on estates of absentees as absentees see Absentees § 5 b.

Conclusiveness of judgment
Judgment of probate judge having jurisdiction, declaring death of person who had disappeared, was conclusive until set aside or shown that person was alive.—Marrero v. Nelson, 116 So. 722, 166 La. 122.

Extreme conservatism required
Courts must exercise extreme conservatism in granting administration based on presumption of death from absence.—In re Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861.

Presumption held not to apply so as to give court jurisdiction in proceeding for appointment of special administrator where absentee had disappeared under circumstances tending to indicate suicide a few months before proceeding was instituted; and appointment under such circumstances was invalid for lack of court's jurisdiction where death of absentee was not proved.—In re Ott's Estate, 279 N.W. 618, 228 Wis. 462.

67. Ga.—National Surety Co. v. Wages, 173 S.E. 451, 48 Ga.App. 720, affirmed Wages v. National Surety Co., 179 S.E. 761, 180 Ga. 574—Bank of Jonesboro v. Wilson, 160 S.E. 653, 654, 43 Ga.App. 839, quoting **Corpus Juris.**
Iowa.—Chamberlain v. Anderson, 190 N.W. 501, 195 Iowa 855, 26 A.L.R. 957.
Kan.—Withers v. Root, 73 P.2d 1113, 1115, 146 Kan. 822, quoting **Corpus Juris.**
Mich.—Beckwith v. Bates, 200 N.W. 151, 228 Mich. 400, 37 A.L.R. 819.
Minn.—Bornemann v. Ofsthun, 221 N.W. 876, 175 Minn. 493.
Mont.—Williams v. Hefner, 297 P. 492, 495, 89 Mont. 361, citing **Corpus Juris.**
Neb.—Ericsson v. Streitz, 273 N.W. 17, 24, 132 Neb. 692, citing **Corpus Juris.**
Tex.—Pollock v. Wuntch, Civ.App., 116 S.W.2d 796.
23 C.J. p 1008 note 28.

68. N.J.—Hamilton v. Orange Sav. Bank, 124 A. 62, 99 N.J.Law 503.

69. Ga.—Bank of Jonesboro v. Wilson, 160 S.E. 653, 654, 43 Ga.App. 839, quoting **Corpus Juris.**
N.Y.—Marks v. Emigrant Industrial Sav. Bank, 107 N.Y.S. 491, 122 App. Div. 661—In re Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861.

70. N.D.—Clapp v. Houg, 98 N.W. 710, 12 N.D. 600, 102 Am.S.R. 589, 65 L.R.A. 757.

71. Ark.—Beam v. Copeland, 14 S.W. 1094, 54 Ark. 70.

72. Ga.—Sligh v. Whitley, 153 S.E. 237, 41 Ga.App. 428.
Ill.—Donovan v. Major, 97 N.E. 231, 253 Ill. 179.

73. Ill.—Eddy v. Eddy, 134 N.E. 801, 302 Ill. 446.

Purpose and effect of statute
(1) The purpose of the Fiduciaries Act in recognizing common-law presumption of death of person after seven years from time when he was last known to be living was to set up a conservator for his property within the state if facts raised legal presumption of death, and was not to supply procedure to determine whether the person was alive or dead, the conserving of the property and not the distribution of the estate being primary purpose of the act.—In re Wesner's Estate, 11 A.2d 521, 139 Pa.Super. 314.

(2) A proceeding under the act to have a person declared to be a presumed decedent is a "proceeding in rem" and not a "proceeding in personam."—In re Wesner's Estate, supra.

(3) Insurer which issued policy on life of insured who disappeared and was not heard of for more than seven years was not a "proper party" to such a proceeding.—In re Wesner's Estate, supra.

(4) Decree declaring insured to be a presumed decedent constituted merely an adjudication of insured's death prima facie, and on trial of an action on insured's life policies, insurer might rebut the presumption.—In re Wesner's Estate, supra.

some assets or property,[74] as shown infra § 18, this cannot be held to be established beyond dispute where administration is sought in the domicile of the decedent, although, as shown infra § 21, there is no doubt that assets within the jurisdiction are ordinarily necessary when administration is sought elsewhere than in the domicile.

Where property relied on to establish jurisdiction came into an absentee's beneficial ownership during his absence, jurisdiction must fail unless the applicant establishes the absentee's acquisition of the beneficial ownership prior to his death.[75]

b. Cause of Action for Wrongful Death

Although there is some authority to the contrary, as a general rule the existence of a cause of action for wrongful death is a sufficient basis for a grant of administration in the jurisdiction where such cause of action arose or may be enforced, even though decedent was a nonresident and left no other assets therein.

The existence of a cause of action for wrongful death is usually regarded as a sufficient basis for a grant of administration in the jurisdiction where such cause of action arose,[76] or where it may be enforced,[77] even though decedent was a nonresident[78] and left no other assets in the jurisdiction.[79] This view has been maintained notwithstanding a contention that the cause of action did not accrue in decedent's lifetime,[80] that, under the statute, no right of action arose in behalf of anyone until after an administrator had been appointed,[81] or that the administration should properly be in the state of decedent's residence;[82] and a statute providing that the sum recovered for decedent's death shall not be an asset in the hands of the administrator means only that it shall not be an asset subject to payment of decedent's debts.[83]

There is, however, authority for the view that administration on the estate of a nonresident cannot be granted in the jurisdiction where the cause of action arose or was enforceable merely for the purpose of qualifying a representative to bring an action for the death, where decedent left no property in the jurisdiction,[84] and it has been held that such a claim will not warrant administration in one state where the decedent was a resident of another state in which the death and the negligence causing it occurred and under the statutes of which the right of action arose,[85] particularly where the

74. Minn.—Finnerty v. Gerlach, 223 N.W. 683, 176 Minn. 433.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
23 C.J. p 1008 note 33.

Showing of property not made
Nev.—In re Dickerson's Estate, 268 P. 769, 51 Nev. 69, 59 A.L.R. 84.

75. N.Y.—In re Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861.

76. Mass.—McCarron v. New York Cent. R. Co., 131 N.E. 478, 239 Mass. 64.
N.Y.—In re Wenkhous' Estate, 286 N.Y.S. 518, 158 Misc. 663.
Wash.—Lund v. City of Seattle, 1 P.2d 301, 163 Wash. 254.
23 C.J. p 1009 note 38.
Action for wrongful death by executor or administrator or by administrator ad prosequendum see Death § 58 a.
Cause of action:
As basis for local jurisdiction generally see infra § 20 b.
For wrongful death as asset of estate see infra § 102.

Statute held inapplicable
N.Y.—Van Dusen v. Sturm, 12 N.Y.S.2d 133, 257 App.Div. 914, reversing 8 N.Y.S.2d 757.

Applicability of foreign law
On petition for appointment of administrator by resident for estate of decedent, who was temporary resident, on claim of liability founded on cause of action arising in state, question of foreign law depriving court of jurisdiction was not involved.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

77. Minn.—Peterson v. Chicago, R. & Q. Ry. Co., 244 N.W. 823, 187 Minn. 228—State v. Probate Court in and for Hennepin County, 184 N.W. 43, 149 Minn. 464.
Tex.—Lancaster & Wallace v. Sexton, Civ.App., 245 S.W. 958.
Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
23 C.J. p 1009 note 39.

78. Mass.—McCarron v. New York Cent. R. Co., 131 N.E. 478, 239 Mass. 64.
Minn.—State v. Probate Court in and for Hennepin County, 184 N.W. 43, 149 Minn. 464.
N.Y.—Van Dusen v. Sturm, 12 N.Y.S.2d 133, 257 App.Div. 914, reversing 8 N.Y.S.2d 757.
Tex.—Lancaster & Wallace v. Sexton, Civ.App., 245 S.W. 958.
23 C.J. p 1009 note 40.

79. Mass.—McCarron v. New York Cent. R. Co., 131 N.E. 478, 239 Mass. 64.
Minn.—State v. Probate Court in and for Hennepin County, 184 N.W. 43, 149 Minn. 464.
Tex.—Lancaster & Wallace v. Sexton, Civ.App., 245 S.W. 958.
Wash.—Lund v. City of Seattle, 1 P.2d 301, 163 Wash. 254.
23 C.J. p 1009 note 41.

80. Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
23 C.J. p 1010 note 42.

81. U.S.—De Valle da Costa v. Southern Pac. R. Co., C.C.Mass., 160 F. 216, reversed on other grounds 176 F. 343, 100 C.C.A. 313, certiorari denied 30 S.Ct. 696, 217 U.S. 606, 54 L.Ed. 900.

82. S.C.—In re Mayo, 38 S.E. 634, 60 S.C. 401, 54 L.R.A. 660.
23 C.J. p 1010 note 44.

83. Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.

84. Ind.—Chicago, I. & L. Ry. Co. v. Hemstock, 4 N.E.2d 677, 102 Ind.App. 654, followed in 5 N.E.2d 1010, 103 Ind.App. 705—Mercer v. Dobbyn, 173 N.E. 338, 91 Ind.App. 682—Tri-State Loan & Trust Co. v. Lake Shore & M. S. Ry. Co., 131 N.E. 523, 76 Ind.App. 141.
Contra Mesker v. Bishop, 103 N.E. 492, 105 N.E. 644, 56 Ind.App. 455—Cleveland, C., C. & St. L. R. Co. v. Osgood, 73 N.E. 285, 36 Ind.App. 34—Ex parte Jenkins, 58 N.E. 560, 25 Ind.App. 532, 81 Am.S.R. 114—Toledo, St. L. & K. C. R. Co. v. Reeves, 35 N.E. 199, 8 Ind.App. 667.
Okl.—McCoubrey v. Pure Oil Co., 66 P.2d 57, 59, 179 Okl. 344, quoting **Corpus Juris.**
23 C.J. p 1010 note 45.

85. Okl.—McCoubrey v. Pure Oil Co., supra quoting **Corpus Juris.**
Wash.—In re Yarbrough's Estate, 216 P. 889, 890, 126 Wash. 85, quoting **Corpus Juris,** and affirmed 222 P. 902, 126 Wash. 85.
23 C.J. p 1010 note 46.

courts of the jurisdiction in which administration is sought are not impelled by comity to enforce the cause of action.[86]

§ 18. —— Domicile or Place of Business of Decedent

As a general rule, letters testamentary or of administration should be taken out in the county where decedent was domiciled at the time of his death; and where jurisdiction is based on domicile, assets are not necessary unless required by statute.

The general rule is that the place of decedent's last domicile determines the probate jurisdiction to grant letters and supervise the settlement of his estate, and the sole, or at least the principal, grant of letters ought to be taken out and the will proved in the country, the state, and indeed the very county where decedent was domiciled at the time of his death.[87] In accordance with the general rule stat-

86. Okl.—McCoubrey v. Pure Oil Co., 66 P.2d 57, 179 Okl. 344.

87. U.S.—Sealey v. U. S., D.C.Va., 7 F.Supp. 434.
Ark.—Watson v. Lester, 31 S.W.2d 955, 182 Ark. 506—Shelton v. Shelton, 23 S.W.2d 629, 180 Ark. 959.
Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P. 2d 127, 5 Cal.2d 35.
Conn.—Giannattasio v. Silano, 161 A. 336, 115 Conn. 299.
Del.—Coca-Cola International Corporation v. New York Trust Co., Ch., 8 A.2d 511, reversed on other ground, Sup., New York Trust Co. v. Riley, 16 A.2d 772, certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105, 312 U.S. 555, 85 L.Ed. 1517, motion granted 62 S. Ct. 357, affirmed 62 S.Ct. 608, rehearing denied 62 S.Ct. 903—In re Beauchamp's Estate, Orph., 2 A. 2d 900.
Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Iowa.—Crawford County v. Kock's Estate, 290 N.W. 682, 227 Iowa 1235—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.
Ky.—Hite's Adm'r v. Gibson, 65 S. W.2d 731, 251 Ky. 651—Payne v. Payne, 39 S.W.2d 205, 239 Ky. 99 —Bailey v. Norman's Adm'r, 15 S.W 2d 1005, 228 Ky. 790.
La.—Guidry v. Caire, 196 So. 56, 195 La. 167—Succession of Franklin, 114 So. 583, 164 La. 654—Succession of Hausmann, 112 So. 408, 163 La. 537—Taylor v. Williams, 110 So. 100, 162 La. 92—Gravet v. Gonsoulin, 119 So. 785, 10 La.App. 553, rehearing denied 120 So. 643, 10 La.App. 553—Taylor v. Williams, 3 La.App. 772—Carter v. Cambrice, 1 La.App. 156.
Md.—Norfolk v. Connor, 176 A. 618, 167 Md. 688.
Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.
Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.
N.J.—Trust Co. of New Jersey v. Spalding, 4 A.2d 401, 125 N.J.Eq. 66—In re Gilbert's Estate, 15 A.2d 111, 18 N.J.Misc. 540.
N.Y.—In re Kelley's Estate, 17 N.Y. S.2d 22, 258 App Div. 469—In re Curtis' Estate, 185 N.Y.S. 507, 194 App.Div. 334—Cornell v. Delehanty, 18 N.Y.S.2d 153, 173 Misc. 483—In re Handy's Estate, 7 N.Y.S.2d 893, 169 Misc. 504—In re Humpfner's Estate, 263 N.Y.S. 309, 146 Misc. 461, affirmed In re Humpfner, 265 N.Y.S. 966, 240 App.Div. 745—In re Lyon's Estate, 190 N.Y. S. 488, 116 Misc. 640.
N.C.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 305, 188 N.C. 268.
N.D.—In re Langer's Estate, 219 N. W. 562, 56 N.D. 793.
Ohio—Hill v. Blumenberg, 19 Ohio App. 404.
Okl.—Griffin v. Hannan, 93 P.2d 1078, 185 Okl. 433—Wolfe v. Graham, 90 P.2d 1067, 185 Okl. 318—Breedlove v. Tulsa County Court, 58 P.2d 305, 177 Okl. 124—Sewell v. Christison, 245 P. 632, 114 Okl. 177—Presbury v. County Court of Kay County, 213 P. 311, 88 Okl. 273.
Or.—In re Armstrong's Estate, 82 P. 2d 880, 159 Or. 698.
Pa.—In re Pusey's Estate, 184 A. 844, 321 Pa. 248, certiorari denied Lavely v. Young Women's Christian Ass'n of Pittsburg, 57 S.Ct. 36, 299 U.S. 572, 81 L.Ed. 422, rehearing denied 57 S.Ct. 114, 299 U. S. 621, 81 L.Ed. 458—In re Blessing's Estate, 110 A. 76, 267 Pa. 380.
R.I.—Eckilson v. Greene, 1 A.2d 117, 61 R I 394.
Tex.—Balfour v. Collins, 25 S.W.2d 804, 119 Tex. 122, answer to certified question conformed to, Civ. App., 27 S.W.2d 185—Ragsdale v. Prather, Civ.App., 132 S.W.2d 625, error refused—Kreis v. Kreis, Civ. App., 36 S.W.2d 821, error dismissed—Halverson v. Livengood, Civ.App., 4 S.W.2d 588.
Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
Wis.—In re Read's Estate, 217 N.W. 709, 195 Wis. 128.
23 C.J. p 1010 note 48.

"Residence"

(1) Not synonymous with "domicile."—Wilkinson v. Spiller, 129 S.E. 235, 143 Va. 267—23 C.J. p 1010 note 48 [a].

(2) Substantial equivalent of "domicile."
Kan.—Ford v. Peck, 225 P. 1054, 116 Kan. 74, rehearing denied 227 P. 527, 116 Kan. 481.
N.Y.—In re Daggett's Will, 174 N.E. 641, 255 N.Y. 243, 75 A.L.R. 1251, reversing In re Daggett, 241 N.Y. S. 918, 229 App.Div. 760—In re Hone's Estate, 286 N.Y.S. 394, 158 Misc. 183, affirmed 295 N.Y.S. 232, 250 App.Div. 635—In re Wendel's Estate, 259 N.Y.S. 260, 144 Misc. 467—In re Bennett's Estate, 238 N. Y.S. 723, 135 Misc 486—In re Seymour, 177 N.Y.S. 702, 107 Misc. 330—In re Horth's Estate, 25 N.Y. S.2d 262—23 C.J. p 1010 note 48 [a].

(3) Imports legal residence or "domicile," as contradistinguished from "actual residence"; that is, where decedent may be temporarily abiding at time of demise.
Ky.—Burr's Adm'r v. Hatter, 43 S. W.2d 26, 240 Ky. 721.
Md.—Shenton v. Abbott, 15 A.2d 906, 178 Md. 526—Brafman v. Brafman, 125 A. 161, 144 Md. 413, certiorari denied 44 S.Ct. 633, 265 U.S. 588, 68 L.Ed. 1193.
Okl.—In re Davis' Estate, 43 P.2d 115, 171 Okl. 575—Anderson v. Jackson, 41 P.2d 815, 170 Okl. 612. 23 C.J. p 1010 note 48 [b].

(4) Decedent's legal "residence" is prima facie in county where decedent made his abode for many years and died.—Burr's Adm'r v. Hatter, 43 S.W.2d 26, 240 Ky. 721.

"Domiciled" or "last dwelt"

Under statutes giving courts of probate jurisdiction of estate of a person who died "domiciled" or having "last dwelt" in the probate district, the quoted phrases mean a dwelling or residence as a permanent home, and hence probate court of a particular district properly assumed jurisdiction of estate of one who died a resident of, and owning property in, such district.—Palmer v. Palmer, D.C.Conn., 31 F.Supp. 861.

Automobile license not conclusive

Del.—New York Trust Co. v. Riley, 16 A.2d 772, reversing Coca-Cola International Corporation v. New York Trust Co., Ch., 8 A.2d 511, and certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105, 313 U.S. 555, 85 L.Ed. 1517, motion granted 62 S.Ct. 357, affirmed 62 S.Ct. 608, rehearing denied 62 S.Ct. 903.

Declarations of decedent not conclusive

Ariz.—Hiatt v. Lee, 61 P.2d 401, 48 Ariz. 320, 107 A.L.R. 444.

ed supra § 15, the jurisdictional question of decedent's residence or domicile is to be determined by the court whose jurisdiction is invoked,[88] and the court first assuming jurisdiction for the purpose must be allowed to pursue and exercise its jurisdiction to the exclusion of all co-ordinate tribunals.[89] Each case must be disposed of on its own

Del.—New York Trust Co. v. Riley, 16 A.2d 772, reversing Coca-Cola International Corporation v. New York Trust Co., Ch., 8 A.2d 511, and certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105, 312 U.S. 555, 85 L.Ed. 1517, motion granted 62 S.Ct. 357, affirmed 62 S.Ct. 608, rehearing denied 62 S.Ct. 903.

N.Y.—In re Strebeigh's Estate, 27 N.Y.S.2d 569, 176 Misc. 381.

Pa.—In re Nelson's Estate, 21 Pa. Dist. & Co. 29.

Place of voting not conclusive

Ky.—Burr's Adm'r v. Hatter, 43 S.W.2d 26, 240 Ky. 721.

Domicile in China

Where an American citizen died in China, where she had acquired a domicile, the United States district court for China had jurisdiction to administer on her estate.—In re Coppock's Estate, 234 P. 258, 72 Mont. 431, 39 A.L.R. 1152.

Domicile of married woman

(1) Domicile of married woman ordinarily follows the domicile of her husband.—See Domicile § 16 b.

(2) Domicile of deceased living apart from husband was fixed in city where husband lived, as regards jurisdiction of court to open succession.—Howell v. Kretz, 131 So. 204, 15 La.App. 454.

(3) Prima facie, the domicile of testatrix at time of execution of will was the matrimonial domicile in another state, in which husband was living.—Kahl v. Chicago Title & Trust Co., D.C.Ill., 299 F. 793.

(4) Where husband's domicile was in Michigan, and wife, while living apart from husband, recognized such state as her home and described herself in her will as a resident of such state, she was a resident thereof when she made the will, and not of Illinois, where she was temporarily residing.—Kahl v. Chicago Title & Trust Co., supra.

(5) Other cases see 23 C.J. p 1010 note 48 [g].

Infant

Where husband left state to escape prosecution, county, to which wife moved with infant child, became their domicile and remained their domicile when husband was apprehended and sent to penitentiary, so that, on death of infant son during father's stay in penitentiary, right to appoint administrator for son was not in court of county where father resided before flight.—Ferguson's Adm'r v. Ferguson's Adm'r, 73 S.W.2d 31, 255 Ky. 230.

Person of unsound mind

(1) One mentally incompetent is incapable of choosing legal residence after appointment of guardian, and court of county appointing guardian had jurisdiction to appoint administrator of her estate.—State v. Superior Court for Thurston County, 255 P. 376, 143 Wash. 358.

(2) County court of county in which decedent had resided prior to her alleged adjudication of lunacy has exclusive general jurisdiction to appoint administrator of decedent's estate, where it was not shown that decedent had been restored to competency, notwithstanding decedent had not resided in county after adjudication.—Bartlett v. Buckner's Adm'r, 97 S.W.2d 805, 265 Ky. 747.

(3) Where guardian committed care of person of unsound mind to daughter in another county, and she lived with daughter until death, domicile was changed, and court of county of original residence could not appoint administrator.—Wilson v. Bearden, Tex.Civ.App., 59 S.W.2d 214, error refused.

(4) Other cases see 23 C.J. p 1010 note 48 [i].

Residence in more than one county

Under Comp.St. § 2, the clerk of superior court who first gains and exercises jurisdiction of an estate thereby acquires exclusive jurisdiction, even if decedent had fixed place of domicile in more than one county.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 306, 188 N.C. 274.

Evidence as to domicile or residence

Del.—New York Trust Co. v. Riley, 16 A.2d 772, reversing Coca-Cola International Corporation v. New York Trust Co., Ch., 8 A.2d 511, and certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105, 313 U.S. 555, 85 L.Ed. 1517, motion granted 62 S.Ct. 357, affirmed 62 S.Ct. 608, rehearing denied 62 S.Ct. 903.

Kan.—Ford v. Peck, 225 P. 1054, 116 Kan. 74, rehearing denied 227 P. 527, 116 Kan. 481.

Ky.—Burr's Adm'r v. Hatter, 43 S.W.2d 26, 240 Ky. 721—Stell v. Williams' Adm'r, 26 S.W.2d 8, 233 Ky. 441.

La.—Succession of Webre, 136 So. 67, 172 La. 1104—Howell v. Kretz, 131 So. 204, 15 La.App. 454.

Md.—Pattison v. Firor, 126 A. 109, 146 Md. 243.

N.Y.—In re Baker's Estate, 16 N.Y.S.2d 625, 258 App.Div. 936, reargument denied In re Baker, 18 N.Y.S.2d 751, 259 App.Div. 783, reargument denied Baker v. New York Cent. R. Co., 20 N.Y.S.2d 844, 259 App.Div. 971, appeal dismissed In re Baker's Estate, 29 N.E.2d 657, 284 N.Y. 576, and order amended 24 N.Y.S.2d 872, 260 App.Div. 992—In re Fischer's Estate, 271 N.Y.S. 101, 151 Misc. 74, affirmed 277 N.Y.S. 939, 243 App.Div. 685—In re Betancourt's Estate, 258 N.Y.S. 649, 144 Misc. 173, affirmed In re Betancourt's Will, 260 N.Y.S. 990, 237 App.Div. 811—In re Crook's Estate, 252 N.Y.S. 373, 140 Misc. 721—In re Comincio's Estate, 240 N.Y.S. 691, 135 Misc. 733, affirmed In re Comincio, 243 N.Y.S. 814, 229 App.Div. 862, and reversed on other grounds Santovincenzo v. Egan, 52 S.Ct. 81, 284 U.S. 30, 76 L.Ed. 151—In re Horth's Estate, 25 N.Y.S.2d 262.

N.C.—In re Finlayson's Estate, 173 S.E. 902, 206 N.C. 362.

Ohio.—Cunningham v. Bessemer Trust Co., 178 N.E. 217, 39 Ohio App. 535.

Okl.—Franklin v. Beard, 42 P.2d 835, 171 Okl. 254—Anderson v. Jackson, 41 P.2d 815, 170 Okl. 612—In re Gray's Estate, 250 P. 422, 119 Okl. 219—Wood v. Wood, 221 P. 24, 94 Okl. 86.

Pa.—In re Koleff's Estate, 16 A.2d 384, 340 Pa. 423.

W.Va.—First Nat. Bank v. Tate, 178 S.E. 807, 116 W.Va. 138.

23 C.J. p 1010 note 48 [k].

88. N.Y.—In re Humpfner's Estate, 263 N.Y.S. 309, 146 Misc. 461, affirmed In re Humpfner, 265 N.Y.S. 966, 240 App.Div. 745.

Okl.—Anderson v. Jackson, 41 P.2d 815, 170 Okl. 612.

Pa.—In re Pusey's Estate, 184 A. 844, 321 Pa. 248, certiorari denied Lavely v. Young Women's Christian Ass'n of Pittsburgh, 57 S.Ct. 36, 299 U.S. 572, 81 L.Ed. 422, rehearing denied 57 S.Ct. 114, 299 U.S. 621, 81 L.Ed. 458—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.

Motion to transfer matter of administration of estate to another county is question of law.—In re Ozias' Estate, Mo.App., 29 S.W.2d 240.

What law governs

Whether decedent had transferred his domicile prior to his death from New York to Nassau, Bahama Islands, would be decided under New York law.—In re Strebeigh's Estate, 27 N.Y.S.2d 569, 176 Misc. 381.

89. Ala.—McDonnell v. Farrow, 31 So. 475, 132 Ala. 227.

peculiar facts.[90] A private act of the legislature removing the administration of decedent's estate from the county of his residence at the time of his death to another county has been held not violative of any constitutional provision.[91]

Where one was living away from his domicile at the time of his death, but had no intention of changing[92] or no capacity to change[93] his domicile, jurisdiction with respect to administration of his estate is at his domicile. However, administration may be had in the county of decedent's residence, as distinguished from his domicile, where authorized by statute.[94]

In case one dies while traveling, outside the state or country of his domicile, the foreign court should take no jurisdiction, unless it be ancillary merely,[95] although one who roams after leaving permanently one domicile is sometimes held to have acquired a domicile in the place where he died.[96]

Necessity for assets. Where jurisdiction is based on domicile it is not necessary that there should be assets in order for the administration to be properly granted,[97] unless such a requirement is created by statute.[98] It has been considered, however, that it would be an abuse of discretion to appoint an administrator for deceased resident of the county, where there is no estate to be administered and no other statutory ground for the appointment.[99]

Place where decedent engaged in business. Under a statute providing for the appointment of an administrator for a nonresident who had been engaged in business in the state at the time of his decease, it is not sufficient to show that decedent had been so engaged in business, but the fact that he was so engaged at the time of his death must be shown.[1]

§ 19. —— Place of Death

Jurisdiction over nonresidents' estates is sometimes given to the probate court of the county in which decedent died.

In some jurisdictions, where deceased had no fixed residence within the state, jurisdiction over the administration of his estate is conferred on the probate court of the county where he died,[2] but such jurisdiction is usually given in the alternative, to such court or to the court of the county wherein decedent's property or the greater part thereof is situated.[3]

§ 20. —— Situs of Assets

a. In general
b. Character of assets
c. Jurisdiction based on real estate
d. Value of assets
e. County jurisdiction
f. Property brought into jurisdiction after decedent's death
g. Where particular assets deemed located

a. In General

Personal assets of decedent's estate, situated within the territorial jurisdiction of the court, confer a local

90. Ky.—Hite's Adm'r v. Hite's Ex'r, 97 S.W.2d 811, 265 Ky. 786—Burr's Adm'r v. Hatter, 43 S.W.2d 26, 240 Ky. 721.

91. Ala.—Wright v. Ware, 50 Ala. 549.

92. Ark.—Easterling v. Farrell, 12 S.W.2d 889, 178 Ark. 937.
N.C.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 305, 188 N.C. 268.
S.C.—Henson v. Wolfe, 125 S.E. 293, 130 S.C. 273.
23 C.J. p 1012 note 51.

93. N.J.—In re Collins' Estate, 165 A. 286, 11 N.J.Misc. 233.
Wash.—State v. Superior Court for Thurston County, 255 P. 376, 143 Wash. 358.
23 C.J. p 1012 note 52.

94. Va.—Wilkinson v. Spiller, 129 S.E. 235, 143 Va. 267.

95. Fla.—Murphy v. Murphy, 170 So. 856, 125 Fla. 855.
23 C.J. p 1012 note 53.
Foreign and ancillary administration see infra §§ 988–1015.

96. Iowa.—Olson's Will, 18 N.W. 854, 63 Iowa 145.
23 C.J. p 1012 note 54.

97. Ind.—Chicago, I. & L. Ry. Co. v. Hemstock, 4 N.E.2d 677, 102 Ind. App. 654, followed in 5 N.E.2d 1010, 103 Ind.App. 705.
N.Y.—In re Katz' Estate, 239 N.Y.S. 722, 135 Misc. 861.
Okl.—Griffin v. Hannan, 93 P.2d 1078, 1079, 185 Okl. 433, quoting **Corpus Juris**—Wolfe v. Graham, 90 P.2d 1067, 185 Okl. 318—In re Thompson's Estate, 65 P.2d 442, 179 Okl. 240, certiorari denied St. John v. Thompson, 58 S.Ct. 38, 302 U.S. 718, 82 L.Ed. 554—Okfuskey v. Corbin, 40 P.2d 1064, 1065, 170 Okl. 449, citing **Corpus Juris**—Wolf v. Gills, 219 P. 350, 96 Okl. 6.
Vt.—In re Holden's Estate, 1 A.2d 721, 110 Vt. 60, 119 A.L.R. 487—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
Wash.—State ex rel. Brisbin v. Frater, 95 P.2d 27, 1 Wash.2d 13.
23 C.J. p 1012 note 55.

98. Ky.—Holburn v. Pfanmiller, 71 S.W. 940, 114 Ky. 831, 24 Ky.L. 1613.
Nev.—In re Dickerson's Estate, 268 P. 769, 51 Nev. 69, 59 A.L.R. 84.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
Okl.—Okfuskey v. Corbin, 40 P.2d 1064, 1065, 170 Okl. 449, citing **Corpus Juris.**

99. Okl.—Okfuskey v. Corbin, 40 P. 2d 1064, 170 Okl. 449—Wolf v. Gills, 219 P. 350, 96 Okl. 6.
Wis.—In re Barlass, 128 N.W. 58, 143 Wis. 497, 139 Am.S.R. 1111.

1. Ohio.—In re McCreight, 9 Ohio S. & C. P. 450, 6 Ohio N.P. 479.

2. Ky.—Bartlett v. Buckner's Adm'r, 97 S.W.2d 805, 265 Ky. 717—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.
23 C.J. p 1012 note 59.

3. La.—Succession of Bibbins, App., 152 So. 592.
23 C.J. p 1012 note 60.

probate jurisdiction, regardless of the domicile or residence of the decedent.

Every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction.[4] Accordingly, locality of personal assets belonging to the estate of decedent confers a local probate jurisdiction, regardless of the consideration of last domicile or residence of decedent,[5] and such jurisdiction is not dependent on an ultimate determination of the existence of assets of the estate but is ordinarily invoked by a prima facie showing as to the existence of assets.[6] It is, however, necessary, in order to support the local grant of administration, that the property within the jurisdiction should be assets of decedent liable for his individual debts or to be distributed among his widow and heirs.[7]

Effect of removal of property from jurisdiction. It has been held that administration might properly be granted in a county in which a nonresident had property at the time of his death, although after his death some one without authority sent such property to decedent's wife in another state.[8]

b. Character of Assets

The assets relied on as furnishing a basis for local administration need not be of a tangible nature, a mere claim or right of action being sufficient.

It is not necessary that the assets relied on as furnishing a basis for local administration should be of a tangible nature,[9] but a mere claim or right of action arising or existing and enforceable within the jurisdiction is sufficient;[10] and a bona fide

4. Cal.—In re Clark's Estate, 82 P. 760, 148 Cal. 108, 1 L.R.A.,N.S., 996, 113 Am.S.R. 197, 7 Ann.Cas. 306.
Kan.—Thompson v. Parnell, 105 P. 502, 81 Kan. 119, 33 L.R.A.,N.S., 658.
Tenn.—Woodfin v. Union Planters Nat. Bank & Trust Co., 125 S.W.2d 487, 174 Tenn. 367.
Tex.—Hare v. Pendleton, Civ.App., 214 S.W. 948, reversed on other grounds Pendleton v. Hare, Com. App., 231 S.W. 334.
Vt.—In re Holden's Estate, 1 A.2d 721, 110 Vt. 60, 119 A.L.R. 487.

5. U.S.—Palmer v. Palmer, D.C. Conn., 31 F.Supp. 861.
Cal.—In re Estrem's Estate, 107 P. 2d 36, 16 Cal.2d 563, prior opinion, App., 101 P.2d 510.
D.C.—Claudy v. Duvall, 5 F.2d 381, 55 App.D.C. 319.
Hawaii.—In re Estate of Grant, 34 Hawaii 559.
Ind.—Mercer v. Dobbyn, 173 N.E. 338, 91 Ind.App. 682.
Ky.—Payne v. Payne, 39 S.W.2d 205, 239 Ky. 99—Stell v. Williams' Adm'r, 26 S.W.2d 8, 233 Ky. 441—Louisville & N. R. Co. v. Jones' Adm'r, 286 S.W. 1071, 215 Ky. 774, 53 A.L.R. 1255.
La.—Causey v. Opelousas-St. Landry Securities Co., 175 So. 448, 187 La. 659.
Mass.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.
Minn.—In re Eklund's Estate, 218 N.W. 235, 174 Minn. 28.
Mo.—First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.
N.Y.—Van Dusen v. Sturm, 12 N.Y.S.2d 133, 257 App.Div. 914, reversing 8 N.Y.S.2d 757—In re Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861—In re Bliss' Estate, 202 N.Y.S. 185, 121 Misc. 773.
Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
Wash.—State ex rel. Brisbin v. Frater, 95 P.2d 27, 1 Wash.2d 13—In re Rowley's Estate, 35 P.2d 34, 178 Wash. 460.
23 C.J. p 1012 note 61.
Foreign and ancillary administration see infra §§ 988–1015.

Order of probate
Probating of will in state of decedent's domicile before proving it in any other state in which he may own property might be better practice, but its probate in the first instance in some other state is not so illegal on its face as to give executors therein named no power or authority as such in that state.—Bowles v. R. G. Dun-Bradstreet Corporation, Del.Ch., 12 A.2d 392.

In absence of domicile in state
assets in county will give jurisdiction to grant letters of administration.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 305, 188 N.C. 268.

Residence and property
Probate court's jurisdiction rests primarily on deceased's residence within county, and property therein requiring administration.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

Statute liberally construed
Statute providing for granting of administration for nonresident decedents having estate in commonwealth must be liberally construed.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

Statute held declaratory of common law
Vt.—In re Holden's Estate, 1 A.2d 721, 110 Vt. 60, 119 A.L.R. 487.

6. **Property in name of decedent**
Fact that property disposed of by will stood of record in testatrix' name was sufficient prima facie showing as to existence of assets and fair probability of right to give probate court jurisdiction to grant letters testamentary.—In re Helm's Estate, 45 P.2d 250, 6 Cal.App.2d 752.

Estate suspected of being concealed
Statute providing that person suspected of having concealed, embezzled, or conveyed away personal estate of deceased may, on complaint of administrator, be examined for discovery of estate, implies authority to appoint administrator where there is no other estate than what is suspected of being concealed.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

7. Me.—In re Shaw's Estate, 16 A. 662, 81 Me. 207.
23 C.J. p 1013 note 63.

8. Tenn.—Anderson v. Louisville & N. R. Co., 159 S.W. 1086, 128 Tenn. 244.

9. Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
Wash.—In re Rowley's Estate, 35 P. 2d 34.
23 C.J. p 1013 note 64.

Dower rights
County court of county in which decedent had died and in which decedent's rights to dower, if any, accrued had exclusive general jurisdiction to appoint administrator of her estate.—Bartlett v. Buckner's Adm'r, 97 S.W.2d 805, 265 Ky. 747.

10. Idaho.—Russell v. Bow, 295 P. 437, 50 Idaho 264.
Ill.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N.E.2d 748, 303 Ill.App. 139.
Ky.—Chesapeake & O. Ry. Co. v. Ryan's Adm'r, 209 S.W. 538, 183 Ky. 428.
Mass.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.
Neb.—In re Buder's Estate, 219 N.W. 808, 117 Neb. 52.
Ohio.—Bucyrus Steel Castings Co. v. Farkas, 15 Ohio N.P.,N.S., 609.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Smitha, 232 S.W. 494, 496, 111 Tex. 285, citing Cor-

claim will support a grant of administration even though it proves invalid or unenforceable after letters are issued.[11] The term "estate" as used in a statute relating to the granting of letters of administration includes all kinds of property which the deceased left at the time of his death.[12]

Unborn child. No property rights which would authorize the appointment of an administrator for an unborn child ever came into existence where the mother was killed in an accident, since an unborn child could not, after birth, enforce a claim for prenatal injuries.[13]

c. Jurisdiction Based on Real Estate

Local real property or an equitable claim thereto may afford a sufficient basis for the grant of administration.

Administration may be granted on the basis of local real property alone under suitable circumstances conformably to the legislative policy of many American states,[14] and an equitable claim to real property has been held sufficient to authorize a grant of administration in advance of the establishment of the claim in a court of equity.[15] However, a claim by a creditor of a nonresident decedent, that real estate in the state purchased by a relative of decedent, prior to and shortly after his death, was purchased with money belonging to decedent or his estate, is not property in the state, belonging to decedent, justifying the appointment of an administrator of his estate in the state.[16]

Real estate "devised." A statute authorizing proof of a will in any county where there is real estate "devised by the testator" does not give to the court of the county in which land is located jurisdiction to grant administration, where the owner died intestate in another county of which he was a resident.[17]

d. Value of Assets

In some states the existence of local assets, irrespective of their value, may support a local grant of administration, but in other states there must be property of a specified value.

In some states the mere existence of local assets, irrespective of their value, may support a local grant of administration,[18] and even articles or money rights of trifling consequence, if bona fide within the local jurisdiction, will suffice;[19] but in other states there must be personal property of a specified value, or debts to a fixed amount and local real estate chargeable therewith.[20]

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pus Juris, and affirming, Civ.App., 190 S.W. 237—Ragsdale v. Prather, Civ.App., 132 S.W.2d 625, error refused.

Wash.—In re Rowley's Estate, 35 P. 2d 34, 178 Wash. 460.

23 C.J. p 1013 note 65.

Cause of action for wrongful death see supra § 17 b.

Life insurance policy

Ark.—Rice v. Metropolitan Life Ins. Co., 238 S.W. 772, 152 Ark. 498, 24 A.L.R. 143.

23 C.J. p 1013 note 65 [1].

Automobile liability policy

(1) The right of exoneration and indemnity under automobile liability policy while driving automobile in commonwealth against liability for payment of damages for injuries, for property damage, and for consequential damage, is an "estate" authorizing granting of administration.

Mass.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

Or.—In re Vilas' Estate, 110 P.2d 940.

(2) A contrary result has been reached.—Olson v. Preferred Automobile Ins. Co., 244 N.W. 178, 259 Mich. 612.

Right arising subsequent to appointment

The appointment of administratrix for estate of nonresident deceased was not invalid even if right of exoneration and indemnity under automobile liability policy issued to deceased was not an estate of deceased until judgment was recovered against him in tort action, since judgment recovered subsequently to appointment affords an occasion for administrator to act and appointment is valid.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

Right of stakeholder for claimants

If one or more of a number of claimants to property dies, right of stakeholder that there should be administrator for estate of decedent claimant would not be defeated by lack of proof of property belonging to decedent.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

11. Me.—Neely v. Havana Electric Ry. Co., 10 A.2d 358, 136 Me. 352.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
N.Y.—Sullivan v. Fosdick, 10 Hun 173.

Good faith will be presumed in assertion of a claim on behalf of decedent's estate in absence of contrary proof.—Ragsdale v. Prather, Tex.Civ.App., 132 S.W.2d 625, error refused.

12. Mich.—Olson v. Preferred Automobile Ins. Co., 244 N.W. 178, 259 Mich. 612.

13. N.Y.—In re Roberts' Estate, 286 N.Y.S. 476, 158 Misc. 698.

14. Cal.—Murphy v. Crouse, 66 P. 971, 135 Cal. 14, 87 Am.S.R. 90.
Pa.—In re Gates' Estate, 31 Berks Co.L.J. 316.
23 C.J. p 1014 note 67.

Word "assets," as used in the statute authorizing a grant of letters of administration on the estate of nonresidents who die leaving assets, includes land situate in the county where the administration is granted.—Condo v. Barbour, 200 N.E. 76, 101 Ind.App. 483—23 C.J. p 1014 note 67 [b].

15. Cal.—In re Daughaday, 141 P. 929, 168 Cal. 63.

Claim of right to set aside deeds made by decedent constitutes property of the estate in the nature of real property on which administration may be had in the discretion of the court.—In re Rees' Estate, 212 P. 234, 60 Cal.App. 92.

16. Conn.—Beach's Appeal, 55 A. 596, 76 Conn. 118.

17. Or.—Henkle v. Slate, 68 P. 399, 40 Or. 349.

18. Ky.—Louisville & N. R. Co. v. Jones' Adm'r, 286 S.W. 1071, 215 Ky. 774, 53 A.L.R. 1255.
23 C.J. p 1014 note 71.

19. Ky.—Louisville & N. R. Co. v. Jones' Adm'r, supra.
23 C.J. p 1014 note 72.

20. Me.—In re Shaw's Estate, 16 A. 662, 81 Me. 207.
23 C.J. p 1015 note 73.

Bona notabilia

(1) "Bona notabilia," as used in

e. County Jurisdiction

In some states the probate court of the county where the property or the greater part of it is situated has jurisdiction to administer a decedent's estate; and where decedent leaves property in two or more counties it is provided in some states that the courts in each county shall have concurrent jurisdiction, so that the court which first acquires jurisdiction retains it to the exclusion of the others.

In many states jurisdiction over the administration of the estate of a decedent who had no fixed residence within the state is given to the probate court where his property or the greater part thereof is situated,[21] but even within the same sovereign jurisdiction the locality of personal property may sometimes afford occasion for probate jurisdiction in two or more local courts, as where one domiciled abroad and intestate leaves effects in two different counties, in which case local statute regulates the matter of jurisdiction, which usually, however, belongs to the court of the county where proceedings are first commenced,[22] the jurisdiction of the various county courts being concurrent.[23]

f. Property Brought into Jurisdiction after Decedent's Death

In some jurisdictions, but not in others, the property must be within the jurisdiction at the time of the owner's death to afford a basis for a grant of administration.

According to some authorities the property must be within the jurisdiction at the time of the death of the owner in order to afford a basis for a grant of administration,[24] but other authorities find such a requirement too narrow to meet the practical wants of modern administration, and hence for the welfare of creditors or other interested persons local jurisdiction is usually upheld where there are local bona notabilia at the time when letters are applied for, notwithstanding the goods were brought into the county or the debtor removed thither after the death of the owner or creditor.[25]

Property brought in temporarily or for a special purpose, and removed from the jurisdiction before an administrator is appointed, cannot serve as a basis for a grant of administration;[26] and the same is true where assets are brought into the state solely for the purpose of procuring the appointment of an administrator to prosecute a negligence action against a foreign corporation on a cause of action arising in another state between residents of such other state.[27]

g. Where Particular Assets Deemed Located

(1) In general
(2) Simple contract debts; specialty debts
(3) Judgment debts
(4) Claims against United States
(5) Corporate stock
(6) Insurance policies

(1) In General

For the purpose of probate jurisdiction, tangible assets are deemed located where they happen to be, but the locality of intangible assets may depend on the exact nature of the particular asset.

The location of tangible assets, for the purposes of probate jurisdiction, is the place where such assets happen to be,[28] and this is true although a bill

the probate law, means notable goods, or property worthy of notice, or of sufficient value to be accounted for.
Ga.—Neal v. Boykin, 64 S.E. 480, 132 Ga. 400.
N.C.—In re Franks' Estate, 16 S.E.2d 831, 833, 220 N.C. 176.
Wash.—In re Rowley's Estate, 35 P. 2d 34, 178 Wash. 460.

(2) Where residents of Kentucky were killed in an automobile collision in North Carolina and immediately after collision automobile in which they met their deaths was worth two hundred dollars to three hundred dollars and motorist also left a watch of value of twenty-five dollars and cash and travelers' checks to amount of fifty dollars and greater portion of property was removed from North Carolina, giving rise to a cause of action against person or persons guilty of such removal, decedents had sufficient personalty in North Carolina to constitute "bona notabilia" and justified appointment of an administrator. The statute providing a method by which a debtor in the sum of three hundred dollars or less to an estate for which no administrator has been appointed may relieve himself of such debt by paying the amount thereof to the clerk of superior court provides the debtor with a permissive right and is in no wise "mandatory" and does not fix the amount of "bona notabilia" at three hundred dollars.—In re Franks' Estate, supra.

21. Ky.—Louisville & N. R. Co. v. Shumaker's Adm'x, 56 S.W. 155, 108 Ky. 263, 21 Ky.L. 1701, 53 S.W. 12, 21 Ky.L. 803.
23 C.J. p 1015 note 74.

22. Cal.—Hill v. Superior Court of San Luis Obispo County, 205 P. 430, 188 Cal. 352.
23 C.J. p 1015 note 75.
Priority and retention of jurisdiction see Courts § 492.

23. Ga.—Neal v. Boykin, 64 S.E. 480, 132 Ga. 400.
23 C.J. p 1015 note 76.

24. Ky.—Payne v. Payne, 39 S.W.2d 205, 239 Ky. 99.
23 C.J. p 1015 note 78.

25. Ga.—Neal v. Boykin, 64 S.E. 480, 132 Ga. 400.
23 C.J. p 1015 note 79.

26. N.Y.—Kohler v. Knapp, 1 Bradf. Surr. 241.
23 C.J. p 1016 note 80.

27. N.Y.—Hoes v. New York, N. H. & H. R. Co., 66 N.E. 119, 173 N.Y. 435, 441, reversing 77 N.Y.S. 117, 73 App.Div. 363.
23 C.J. p 1016 note 81.

28. Tex.—Lancaster & Wallace v. Sexton, Civ.App., 245 S.W. 958.
23 C.J. p 1016 note 83.
Situs of property generally see Conflict of Laws §§ 18, 19.

Real assets

Notes received by testator for unpaid purchase price of devised land are real assets and subject to jurisdiction of situs for purpose of administration.—Phillips v. Phillips, 104 So. 234, 213 Ala. 27.

of sale transferring the chattel to decedent may be found in another state;[29] but with respect to intangible assets the locality for jurisdictional purposes may depend on the exact nature of the particular asset.[30] It has also been said that personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction into possession.[31]

(2) Simple Contract Debts; Specialty Debts

For the purpose of administration, simple contract debts are assets in the locality where the debtor resides. A specialty debt is an asset where the instrument happens to be unless a different situs has been fixed by statute.

The general rule is that simple contract debts are, for the purpose of administration, assets in the locality where the debtor resides,[32] and it is usually considered that the locality of such a debt for this purpose is not affected by the fact that a bill of exchange or promissory note has been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable,[33] although it has also been held that such a debt is to be regarded as being located at the place where the instrument by which it is evidenced is found;[34] and that promissory notes are bona notabilia at the domicile of the decedent when they were left there at the time of his death.[35]

The locality of a debt evidenced by the note of the debtor is not affected by the fact that the note is secured by a mortgage of real estate.[36]

Specialty debts. Unless a different situs has been fixed by statute,[37] a specialty debt is an asset in the locality where the instrument happens to be.[38]

Proceeds of draft drawn in foreign country

Distribution, under will bequeathing property in state, of proceeds of drafts drawn in Australia more than month before death, was not error in absence of showing that drafts did not or could not have reached the state before death of decedent.—In re Tymms' Estate, 247 P. 1091, 78 Cal.App. 79.

29. N.Y.—Holyoke v. Union Mut. L. Ins. Co., 22 Hun 75, affirmed 84 N. Y. 648.

30. **Domicile of owner**

Where testatrix' domicile was in another state, and, exclusive of choses in action, there was no substantial tangible personalty of testatrix within the state, there was reason for application of the usual rule that, for administrative purposes, intangibles have their situs at the domicile of the owner, and, even assuming that there was some personalty of testatrix in the state, the surrogate's court, in the exercise of sound discretion, should have declined jurisdiction.—In re MacKean's Will, 18 N.Y.S.2d 230, 259 App.Div. 728.

Violation of federal Safety Appliance Act

The surviving right of action for injuries resulting from violation of the federal Safety Appliance Act, for purposes of administration, must be regarded as having a situs in each jurisdiction where the injured person was authorized to maintain suit.—St. Louis Southwestern R. Co. of Texas v. Smitha, 232 S.W. 494, 111 Tex. 285, affirming, Civ.App., 190 S. W. 237.

Situs of cause of action for wrongful death see supra § 17 b.

31. Ala.—Phillips v. Phillips, 104 So. 234, 236, 213 Ala. 27, citing **Corpus Juris.**

W.Va.—Richards v. Riverside Iron Works, 49 S.E. 437, 56 W.Va. 510.

Unpaid purchase money of devised lands sold by testator prior to death, and held in state, was subject to administration and distribution by court of state, although testator at time of death was domiciled in another state.—Phillips v. Phillips, 104 So. 234, 213 Ala. 27.

32. Ala.—Phillips v. Phillips, 104 So. 234, 236, 213 Ala. 27, citing **Corpus Juris.**

Me.—Neely v. Havana Electric Ry. Co., 10 A.2d 358, 136 Me. 352.

Mass.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.

N.Y.—In re DeBaun's Will, 293 N. Y.S. 836, 162 Misc. 111.

Tex.—Lancaster & Wallace v. Sexton, Civ.App., 245 S.W. 958.

Wash.—In re Rowley's Estate, 35 P. 2d 34, 178 Wash. 460.

23 C.J. p 1016 note 87.

Bank deposits

For purposes of administration of estate of deceased depositor, bank deposits which are simple contract debts are considered as having situs at domicile of debtor.—In re Lloyd's Estate, 52 P.2d 1269, 185 Wash. 61—23 C.J. p 1016 note 87 [b].

33. Mont.—State v. Jones, 261 P. 356, 80 Mont. 574, 60 A.L.R. 551.

23 C.J. p 1017 note 88.

34. Kan.—Toner v. Conqueror Trust Co., 293 P. 745, 750, 131 Kan. 651, quoting **Corpus Juris.**

In New York

(1) Statute relating to debts owed to decedent was intended to limit surrogate's jurisdiction based on situs of documents to "negotiable" or quasi-negotiable instruments, meaning those transferable by indorsement or delivery only, as distinguished from assignment, and in case of debt not evidenced by negotiable instrument, jurisdiction depends on debtor's residence.—In re DeBaun's Will, 293 N.Y.S. 836, 162 Misc. 111—In re Deveson's Estate, 287 N.Y.S. 98, 158 Misc. 868.

(2) A debt evidenced by a negotiable instrument is, for the purpose of conferring jurisdiction, regarded as personal property at the place where the instrument is, whether within or without the state.—In re DeBaun's Will, supra—Matter of Miller, 5 Dem.Surr. 381.

35. Kan.—Toner v. Conqueror Trust Co., 293 P. 745, 131 Kan. 651.

23 C.J. p 1017 note 90.

36. U.S.—Wells v. Holder, C.C.Kan., 12 F. 668, 2 McCrary 622.

Iowa.—Chamberlin v. Wilson, 45 Iowa 149.

37. **In New York,** as shown supra this subdivision, under the statute relating to debts owed to decedent, in case of a debt not evidenced by a negotiable instrument jurisdiction depends on the debtor's residence. The rule announced by the court of appeals in Beers v. Shannon, 73 N.Y. 292, decided in 1878, that the situs of a specialty is where the instrument happens to be is consequently superseded.—In re DeBaun's Will, 293 N. Y.S. 836, 162 Misc. 111.

38. Ill.—Martin v. Central Trust Co. of Illinois, 159 N.E. 312, 327 Ill. 622.

23 C.J. p 1017 note 92.

Foreclosure of realty mortgage

An executrix appointed by Arizona court probating will of testator dying in Illinois was not entitled to foreclosure of Arizona realty mort-

(3) Judgment Debts

For the purpose of jurisdiction, judgment debts are assets in the locality where the judgment was recorded or the debtor resides.

It has been laid down that for the purpose of jurisdiction judgment debts are assets in the locality where the judgments are recorded,[39] but it has also been held that a judgment, like a simple contract debt, is an asset in the place where the debtor resides, and hence will support a grant of administration in the state and county of the debtor's residence on the estate of the deceased creditor who lived in another state.[40] Where an administrator sends into another state a judgment obtained by him in the state of his appointment, in order that realty situated in the former state may be subjected to its payment, the judgment constitutes assets there for purposes of administration.[41]

(4) Claims against United States

Except as to such claims as can be enforced only in the District of Columbia, for the purpose of probate jurisdiction claims against the United States have their situs in the locality where decedent resided.

A claim against the United States is not a local asset at the seat of government in the District of Columbia,[42] but for the purpose of administration is deemed to have its locality in the state where decedent resided.[43] It has, however, been held otherwise with respect to claims of such nature that they can be enforced only in the District of Columbia.[44]

Funds in the custody of the alien property custodian may be considered as having their situs in any state as regards the appointment of an administrator of the owner's estate.[45]

(5) Corporate Stock

For purposes of administration, shares of stock have been variously held to be located where the corporate property is situated, where the corporation was organized or has its principal place of business, and at the domicile of the owner.

The location of certificates of stock does not determine the location of the property represented thereby for purposes of administration,[46] but shares of corporate stock are usually considered personal property in the place where the corporate property is located,[47] or where the corporation was organized[48] or has its principal place of business.[49] Nevertheless, under a statute designating corporate stock as personal estate, it has been held that the situs of such stock is at the domicile of the owner, rather than at the place where the corporation is organized and has its place of business.[50]

(6) Insurance Policies

For the purpose of administration, insurance policies have been regarded as assets at the place of the insurer's residence, at the place where the insurer does business, at the place where the policy happens to be, and at the decedent's domicile.

According to some authorities, an insurance policy, although under the corporate seal of the insurer, is not regarded as a specialty for the purpose of administration, but is considered a simple contract debt having its situs at the place of the insurer's residence,[51] or at a place where the insurer was doing business;[52] but it has also been held

gage in possession of administrator with will annexed appointed by Illinois court probating will.—Smith v. Normart, 75 P.2d 38, 51 Ariz. 134, 114 A.L.R. 1456.

39. Iowa.—Edwards v. Popham, 220 N.W. 16, 206 Iowa 149.
23 C.J. p 1017 note 93.

40. Tenn.—Swancy v. Scott, 9 Humphr. 327.

In Texas

(1) Judgment debts are bona notabilia and have their situs at the residence of the debtor.—Saner-Ragley Lumber Co. v. Spivey, Com.App., 238 S.W. 912, 916, citing **Corpus Juris**, and reversing, Civ.App., 230 S.W. 878.

(2) Where decedent had no fixed domicile and no property save a judgment, administration should be taken in the county where decedent died and was not authorized in the county where the judgment was rendered.—Angier v. Jones, 67 S.W. 449, 28 Tex.Civ.App. 402.

41. N.C.—Morefield v. Harris, 36 S. E. 125, 126 N.C. 626.

42. D.C.—In re Grinnage's Estate, 101 F.2d 695, 69 App.D.C. 370.
23 C.J. p 1017 note 97.

43. U.S.—Wyman v. U. S. ex rel. Halstead, 3 S.Ct. 417, 109 U.S. 654, 27 L.Ed. 1068—King v. U. S., 27 Ct.Cl. 529.

44. Vt.—Manning v. Leighton, 26 A. 258, 65 Vt. 84, 24 L.R.A. 684.

45. Neb.—In re Buder's Estate, 219 N.W. 808, 117 Neb. 52.

46. Ill.—Harris v. Chicago Title & Trust Co., 170 N.E. 285, 338 Ill. 245, affirming 251 Ill.App. 240—Martin v. Central Trust Co. of Illinois, 159 N.E. 312, 327 Ill. 622.
23 C.J. p 1017 note 1.

Claim of ownership as affecting situs

That complainant claimed equitable ownership of stock of foreign corporation owned by nonresident at his death, but pledged as security with local creditor, cannot affect situs of property.—Harris v. Chicago Title & Trust Co., 170 N.E. 285, 338 Ill. 245, affirming 251 Ill.App. 240.

47. N.Y.—In re Fitch, 54 N.E. 701, 160 N.Y. 87, 30 N.Y.Civ.Proc. 1, affirming 57 N.Y.S. 786, 39 App. Div. 609.
23 C.J. p 1018 note 2.

48. Okl.—Black Eagle Mining Co. v. Conroy, 221 P. 425, 94 Okl. 199.

49. Okl.—Black Eagle Mining Co. v. Conroy, supra.
23 C.J. p 1018 note 3.

50. Kan.—In re Miller, 136 P. 255, 90 Kan. 819, L.R.A.1915D 856, Ann. Cas.1915B 699, rehearing denied 136 P. 932.

51. Ill.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N. E.2d 748, 303 Ill.App. 139.
23 C.J. p 1018 note 5.

52. Ind.—Rochford v. Metropolitan Life Ins. Co., 164 N.E. 713, 88 Ind. App. 540.

that the policy is an asset where it happens to be at the time of decedent's death, if the insurer was doing business in that jurisdiction and could be sued therein,[53] and in some cases the policy has been regarded as an asset at the domicile of decedent.[54]

§ 21. —— Where Neither Domicile Nor Assets within Jurisdiction

Unless authorized by statute, administration cannot be granted on the estate of a nonresident decedent who left no property within the jurisdiction.

As a general rule a court cannot grant administration on the estate of a nonresident decedent who left no property within the jurisdiction,[55] although administration may be granted where the statutes contemplate administration under such circumstances.[56]

II. APPOINTMENT, QUALIFICATION, AND TENURE

A. EXECUTORS

§ 22. Appointment

a. In general

b. Sufficiency of designation

c. Delegation of power to nominate

d. Rights under testamentary appointment

a. In General

A testator has the right to choose his executor, who derives his authority from the will and his power to act from his due qualification in compliance with the law.

A testator has the right to name the person who, after his death, shall have charge of his estate for the purpose of administering it,[57] provided such person is not disqualified by law.[58] The interest of

N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
Or.—In re Vilas' Estate, 110 P.2d 940.

53. U.S.—New England Mut. L. Ins. Co. v. Woodworth, Ill., 4 S.Ct. 364, 111 U.S. 138, 28 L.Ed. 379.

54. N.Y.—Holyoke v. Union Mut. L. Ins. Co., 22 Hun 75, affirmed 84 N.Y. 648.

Temporary residence

Situs of insurer's liability on automobile liability policy was in county in which administration was sought, where decedent was temporary resident of that county and insurer was doing business in the state.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

55. Idaho.—Russell v. Bow, 295 P. 437, 50 Idaho 264.
Mass.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.
Neb.—In re Buder's Estate, 219 N.W. 808, 117 Neb. 52.
Okl.—Griffin v. Hannan, 93 P.2d 1078, 1079, 185 Okl. 433, quoting **Corpus Juris.**
23 C.J. p 1009 note 35, p 1018 note 11.
Location of assets as giving jurisdiction to grant administration see infra § 20.

Action against nonresident decedent

(1) According to one view, the mere fact that a nonresident decedent is defendant in pending action which survives death does not authorize court to appoint administrator, there being no res for administration; and so, where counterclaim of nonresident decedent defendant had been disallowed, and no appeal taken, appointment of administrator was unauthorized.—Russell v. Bow, 295 P. 437, 50 Idaho 264.

(2) However, it has been held that the pendency of tort actions in a court of the commonwealth against nonresident defendant, where personal jurisdiction had been obtained over such defendant, was sufficient to support appointment of administratrix upon suggestion of defendant's death.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

56. Utah.—In re Tasanen, 71 P. 984, 25 Utah 396.
23 C.J. p 1018 note 12.

57. Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
Ga.—Bruce v. Fogarty, 186 S.E. 463, 464, 53 Ga.App. 443, citing **Corpus Juris.**
Iowa.—In re Birkholz's Estate, 197 N.W. 896.
N.Y.—In re Flood's Will, 140 N.E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602—In re Kennedy's Estate, 266 N.Y.S. 883, 149 Misc. 188—In re Walsh's Will, 264 N.Y.S. 72, 147 Misc. 281.
Or.—In re Workman's Estate, 49 P. 2d 1136, 151 Or. 475.
Va.—Bruce v. Farrar, 158 S.E. 856, 156 Va. 542, 75 A.L.R. 872.
23 C.J. p 1019 note 18.

Policy of the law

It is broad general policy of law to give effect to testator's desires and see that his intentions are carried out so far as ascertainable, as by issuing letters testamentary to executor named in will.—In re Russell's Estate, 110 P.2d 718, 43 Cal. App.2d 319.

Right to appoint not vested right

The right to appoint an executor or trustee by will to carry its provisions into effect is in no sense a vested right, but is restricted and regulated by statute, as is the action of the court in issuing letters conferring authority on the person so appointed to act.
Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 99, 79 Ind.App. 537, citing **Corpus Juris.**
N.Y.—Matter of Avery, 92 N.Y.S. 974, 45 Misc. 529.

Request by family of testator that executor renounce, in order that administration with the will annexed may be issued in accordance with their wishes, is unreasonable and inconsistent with proper respect for the memory of the deceased, and is properly refused.
Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E 97, 99, 79 Ind.App. 537, citing **Corpus Juris.**
Pa.—In re McManus, 61 A. 892, 212 Pa. 267.

Conservator of incompetent is not, following his death, authorized to administer his estate under statutes providing that such conservator shall have full power under the letters issued to him to settle the estate of such deceased ward without further letters of administration in such manner as is required by law of the administrators of the estates of deceased persons, where the facts show that the deceased ward left a valid will appointing another as executor, since the statutes relate only to an intestate's estate.—Belleville Sav. Bank v. Schrader, 214 Ill.App. 388.

58. Or.—In re Workman's Estate, 49 P.2d 1136, 151 Or. 475.

every executor in his testator's estate is what the testator gives him, and a testator may make the trust absolute or qualified respecting either the subject matter, the place where the trust shall be discharged, or the time when the executor shall begin, or during which he shall continue to act as such.[59] Testamentary appointment of an executor may be either express or constructive,[60] and may be by way of request or suggestion rather than mandate, on the testator's part.[61]

Source of authority. The common-law doctrine is that an executor derives his authority solely from the will by which he is appointed,[62] and not from the probate of such will, which is held to be only evidence of his right.[63] However, the modern view is that, while an executor's authority is derived primarily from the will,[64] it is not derived solely therefrom in the sense that mere nomination in the will standing alone is sufficient to constitute one an executor,[65] but the full powers of an executor come from the court of probate jurisdiction, which, recognizing and confirming the testator's selection, clothes the executor therein named with plenary authority by issuing to him letters testamentary, which are usually granted in connection with the probate of the will.[66]

The fact that an executor derives his authority primarily from the will serves to distinguish him from an administrator,[67] since the latter, as shown infra § 30, derives his source of power solely from his appointment by the court. The tendency of the courts is to assimilate the powers and duties of these two classes of legal representatives, and to require both executors and administrators to take out letters and qualify in the same special court, rendering their accounts on a similar plan and under a like judicial supervision;[68] and both derive their power to act from the order of the court.[69]

b. Sufficiency of Designation

(1) In general
(2) Appointment by the tenor

(1) In General

The will must name or provide the means of identification of the executor intended and evidence the intention of the testator that such person shall act as executor.

A nomination of an executor cannot be operative unless there are some means of identifying with certainty the person whom the testator intended to serve, although a designation of a person who can be identified even if not specifically named may be sufficient.[70] Further, the will must show that it was the intention of the testator that such person should act in the capacity of executor.[71] The in-

Subject of regulation

The right to make a will or appoint an executor is purely a matter of statutory regulation.—State ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 257 S.W. 784, 302 Mo. 130, reversed on other grounds State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 44 S.Ct. 427, 263 U.S. 361, 68 L.Ed. 339.

Testator's intent, as respects right to administration, as disclosed by will is controlling, unless violative of law.—In re Kelly's Will, 235 N.Y.S. 683, 134 Misc. 399.

59. U.S.—Hill v. Tucker, La., 13 How. 458, 14 L.Ed. 223.
23 C.J. p 1019 note 20.

60. N.Y.—In re Brocato's Estate, 258 N.Y.S. 111, 143 Misc. 664.
Appointment by the tenor see infra subdivision b (2) of this section.

61. Ky.—Sauer v. Taylor, 212 S.W. 583, 184 Ky. 609.

62. Or.—State v. Tazwell, 283 P. 745, 746, 132 Or. 122, citing **Corpus Juris.**
23 C.J. p 1019 note 21.

63. N.Y.—In re Bergdorf's Will, 99 N.E. 714, 206 N.Y. 309, affirming 133 N.Y.S. 1012, 149 App.Div. 529.
23 C.J. p 1019 note 22.

64. D.C.—Hutchins v. Hutchins, 48 App.D.C. 286.
Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.
Miss.—Ricks v. Johnson, 99 So. 142, 134 Miss. 676.
N.Y.—In re Cornell's Will, 196 N.E. 396, 267 N.Y. 456, 101 A.L.R. 1502, reversing 276 N.Y.S. 14, 242 App. Div. 562, reversing In re Cornell's Estate, 267 N.Y.S. 649, 149 Misc. 553, and reargument denied 198 N. E. 532, 268 N.Y. 637, 101 A.L.R. 1510, certiorari denied Alford v. Cornell, 56 S.Ct. 500, 297 U.S. 703, 80 L.Ed. 995, rehearing denied 56 S.Ct. 589, 297 U.S. 728, 80 L.Ed. 1011—In re Kennedy's Estate, 266 N.Y.S. 883, 149 Misc. 188—In re Walsh's Will, 264 N.Y.S. 72, 147 Misc. 281—In re Brocato's Estate, 258 N.Y.S. 111, 143 Misc. 664—In re Rath's Estate, 176 N.Y.S. 887, 107 Misc. 598.
Pa.—See In re Mayer's Estate, 52 York Leg.Rec. 101, 1 Fay.L.J. 122.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.
23 C.J. p 1020 note 23.

65. Iowa.—In re Birkholz's Estate, 197 N.W. 896.
Or.—State v. Tazwell, 283 P. 745, 132 Or. 122.
23 C.J. p 1020 note 24.

66. U.S.—Lindley v. U. S., C.C.A. Cal., 59 F.2d 336.
Iowa.—Davenport v. Sandeman, 216 N.W. 55, 204 Iowa 927.
N.H.—Lisbon Sav. Bank & Trust Co. v. Moulton's Estate, 22 A.2d 331.
N.Y.—In re Forrest's Estate, 249 N. Y.S. 766, 140 Misc. 14, reversed on other grounds Grossman, In re, 254 N.Y.S. 1012, 234 App.Div. 890, affirmed 182 N.E. 177, 259 N.Y. 553—In re Avery's Estate, 92 N.Y.S. 974, 45 Misc. 529.
Tex.—Anderson v. Caulk, Civ.App., 5 S.W.2d 816, affirmed Caulk v. Anderson, 37 S.W.2d 1008, 120 Tex. 253.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.
Wis.—Saxe v. Saxe, 97 N.W. 187, 119 Wis. 557.
23 C.J. p 1020 note 25.

67. Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.

68. La.—McNeely's Succession, 24 So. 338, 50 La.Ann. 823.
Mich.—Attorney General v. Bay City First Nat. Bank, 159 N.W. 335, 192 Mich. 640.
N.Y.—In re Haughian, 75 N.Y.S. 932, 37 Misc. 457.

69. Cal.—Los Angeles County v. Morrison, 101 P.2d 470, 15 Cal.2d 368, 129 A.L.R. 443.

70. N.Y.—Matter of Hardy, 2 Dem. Surr. 91.
23 C.J. p 1020 note 26.

71. N.C.—In re Leonard's Will, 12 S.E.2d 222, 218 N.C. 738.

tent of the testator governs with respect to the appointment of an executor,[72] and his desires in respect of the naming of an executor will be respected, although not expressed directly, if reasonably deducible from the language of the will.[73] Slight expressions in the will may suffice to determine testator's intent,[74] and in general each case of doubt must be resolved in the light of its own peculiar facts.[75] A will appointing as executor the priest of testator's church, without naming him, will be construed to mean the priest at the time of testator's death.[76] When the description of the executor is imperfect or ambiguous, extrinsic evidence may be admitted to identify the person actually intended.[77]

(2) Appointment by the Tenor

An appointment of an executor by the tenor occurs, and may be sufficient, where the will confers the rights, powers, and duties of an executor on a particular person, either expressly or by implication, although not designating him as executor or although designating him by some other name.

It is not necessary to the designation of an executor that the word "executor" should be used,[78] but any words which substantially confer on a person, whether expressly or by implication, the rights, powers, and duties of an executor, amount to a due appointment under the will;[79] and the person thus clothed with the essential functions of the office is said to be an executor under the will according to the tenor.[80] Thus one to whom the essential powers and duties of the office of executor are committed by the will is to be deemed an executor although the testator may have miscalled his appointee,[81] as by calling him an administrator,[82] cus-

"Have this in charge"

Where second page of holograph will was headed "All I have is this," statement therein that named person "have this in charge" was not sufficient to name such person as executrix.—In re Leonard's Will, supra.

72. Mo.—State v. Holtcamp, 185 S. W. 201, 267 Mo. 412, Ann.Cas.1918 D 454.
23 C.J. p 1020 note 29.

73. Cal.—In re Russell's Estate, 110 P.2d 718, 43 Cal.App.2d 319.

74. N.Y.—Matter of Robitscher, 156 N.Y.S. 265, 92 Misc. 653.

75. Cal.—In re Spencer's Estate, 264 P. 765, 203 Cal. 424.

76. Ga.—Mueller v. First Nat. Bank of Atlanta, 156 S.E. 662, 663, 171 Ga. 845, quoting **Corpus Juris.**
La.—Lefort's Succession, 71 So. 215, 139 La. 51, Ann.Cas.1917E 796.

77. N.Y.—Matter of Hardy, 2 Dem. Surr. 91.

78. Cal.—In re Spencer's Estate, 264 P. 765, 203 Cal. 424—In re Parker's Estate, 259 P. 431, 202 Cal. 138.
La.—Succession of Rassat, App., 157 So. 412, 414, quoting **Corpus Juris.**
N.Y.—In re Gorra's Will, 236 N.Y. S. 709, 135 Misc. 93.
S.C.—Des Portes v. Des Portes, 154 S.E. 426, 430, 157 S.C. 407, quoting **Corpus Juris.**
23 C.J. p 1021 note 33.

If word "executor" is wholly omitted from will, but there is cast on some named person an affirmative duty to collect debts, adjust claims, and make distribution of assets, an appointment of that person as executor is validated.—In re Hazen's Estate, 25 N.Y.S.2d 293, 175 Misc. 851.

79. Cal.—In re Parker's Estate, 259 P. 431, 202 Cal. 138.
La.—Succession of Rassat, App., 157 So. 412, 414, quoting **Corpus Juris.**
N.C.—Dulin v. Dulin, 148 S.E. 175, 178, 197 N.C. 215, citing **Corpus Juris.**
S.C.—Des Portes v. Des Portes, 154 S.E. 426, 430, 157 S.C. 407, quoting **Corpus Juris.**
23 C.J. p 1021 note 34.

Particular directions

A will directing testator's brother to pay legacy, educate testator's nieces, and divide rest was held to designate brother as executor.—Dulin v. Dulin, 148 S.E. 175, 197 N.C. 215.

"Have charge of my affairs"

Where holographic will provided for bequest of property to each of testatrix's children, and also to one F. C., husband of daughter, and contained clause, "and request that F. C. have charge of my affairs," it was held that latter legatee was not, in view of Code Civ.Proc. §§ 1350a and 1365, improperly appointed executor.—In re Henderson's Estate, 238 P. 938, 196 Cal. 623.

80. La.—Succession of Rassat, App., 157 So. 412, 414, quoting **Corpus Juris.**
S.C.—Des Portes v. Des Portes, 154 S.E. 426, 430, 157 S.C. 407, quoting **Corpus Juris.**
23 C.J. p 1021 note 34.

Language held sufficiently definite

A will, although not directly nominating one as executor and trustee, is sufficiently definite to constitute him an executor by the tenor, where in different parts of the will testator shows an intention that such a one shall have charge of carrying out provisions of will, and provision is made for the appointment of a substitute executor to be appointed on his death.—In re Tactkian's Estate, 179 N.Y.S. 188, 109 Misc. 519.

81. N.Y.—In re Hazen's Estate, 25 N.Y.S.2d 293, 175 Misc. 851.

Naming woman "executor" sufficient to make her executrix

Where holographic will named certain woman as "executor" and provided that any one breaking will "is debarred from same, with payment of $5.00," language was effective to make named woman executrix of will.—Andrew's Ex'x v. Spruill, 112 S.W.2d 402, 271 Ky. 516.

82. Colo.—Frazier v. Frazier, 263 P. 413, 83 Colo. 188.
Ky.—Sauer v. Taylor, 212 S.W. 583, 184 Ky. 609.

Will asking that court appoint certain person "administrator" of the testator's estate warrants the issuance of letters testamentary to such person.
Ky.—Sauer v. Taylor, supra.
La.—Succession of Rassat, App., 157 So. 412, 414, quoting **Corpus Juris.**

Expressing wish that one should "administer"

Where deceased in writing to nephew informed him as to location of her valuables, expressed desire that public administrator should not handle her property, and told him to keep letter in safe depository, an addendum to letter reading: "I have stated to you before that I wish you to administer on my estate, when it has to be. So will put it in writing. Distributed equally among my nieces and nephews. You receive your pay besides out of the estate" —was written in view of possible death, and should be construed as a holographic will making nephew executor.—In re Dexter's Estate, 176 P. 168, 179 Cal. 247.

Lack of power to appoint "administrator"

Since a testator has no authority to appoint an administrator, such authority being reposed in judge of

todian,[83] guardian,[84] or trustee.[85]

The intention of the testator must be sufficiently definite, and the court, in determining whether the will effectively appoints an executor, cannot proceed on loose conjectural interpretation, or by considering what a man might be imagined to do in the testator's circumstances,[86] nor spell out the designation of one as executor by the tenor from the mere mention of his name in the will.[87] So executorship according to the tenor will not be granted where the will does not import that the person named shall collect dues, pay debts and legacies, and settle the estate, like an executor, as in the mere designation to perform some trust or to be guardian,[88] where the will makes the nugatory direction that the testator's property shall go at once to the legatees or to trustees as if to dispense with administration and the payment of debts altogether,[89] or where the will does not sufficiently confer an executor's rights and duties on anyone or on the person claiming the office,[90] and it may be stated generally that the appointment of executors by construction or implication from the terms of the will should not be favored, but in doubtful cases administration with the will annexed should be resorted to.[91] A fortiori, a provision in the will authorizing or directing the executor to consult or employ a certain person as adviser does not constitute such person an executor.[92]

c. Delegation of Power to Nominate

A testator may by provision in his will delegate to others the power to appoint an executor.

A testamentary appointment may be either an immediate designation or an appointment by others by authority of the will.[93] A testator may delegate to some person or persons named in the will, or to the probate court, the power to name an executor, and letters testamentary may be issued to a person nominated pursuant to such power,[94] and it has been held that a provision in the will that "I authorize and empower and request my said executors" to appoint others to act with them in case the number of executors should fall below the certain number, imposed on the acting executors the duty to appoint, which they could be compelled to perform.[95]

d. Rights under Testamentary Appointment

The person designated as executor by the testator has a right to administer the estate, of which he may be deprived only by his ineligibility or his failure or refusal to act.

Where a testator designates an executor, the person so designated has a right to administer the es-

court of probate in which mortuary proceedings are instituted, where his will in terms appoints a person as "administrator of my estate after my death," person appointed will be deemed a testamentary "executor" entitled to letters testamentary without requirement of giving security, since word "administrator" did not render invalid nomination of a person as executor.—Succession of Rassat, La.App., 157 So. 412.

83. Cal.—In re Spencer's Estate, 264 P. 765, 203 Cal. 424.
Colo.—Frazier v. Frazier, 263 P. 413, 83 Colo. 188.

84. Cal.—In re Spencer's Estate, 264 P. 765, 203 Cal. 424.

85. N.Y.—In re Hazen's Estate, 25 N.Y.S.2d 293, 175 Misc. 851.
S.C.—Des Portes v. Des Portes, 154 S.E. 426, 430, 157 S.C. 407, citing **Corpus Juris.**
23 C.J. p 1021 note 36.

86. S.C.—Des Portes v. Des Portes, supra, quoting **Corpus Juris.**
23 C.J. p 1021 note 38.
Designation held insufficient
(1) Widow was held not entitled to letters testamentary under will merely directing that all testator's property should go to wife, with remainder in children on wife's remarriage.—In re Brocato's Estate, 258 N.Y.S. 111, 143 Misc. 664.
(2) Under will requesting certain bequest to be placed in trust with bank, and appointing testator's wife and the bank as trustees, which will made no use of word "executor", the joinder of wife with bank as "trustees" standing alone was not enough to warrant a holding that executorial functions were conferred by will on bank jointly with widow.—In re Hazen's Estate, 25 N.Y.S.2d 293, 175 Misc. 851.
To establish right to letters testamentary, applicant must seek and find in the will a designation of himself as executor.—In re Healy's Will, 8 N.Y.S.2d 394, 255 App.Div. 361.

87. N.Y.—In re Hazen's Estate, 25 N.Y.S.2d 293, 175 Misc. 851.

88. Mo.—In re Hill, 77 S.W. 110, 102 Mo.App. 617.
23 C.J. p 1022 note 39.

89. Md.—Hunter v. Bryson, 5 Gill & J. 483, 25 Am.D. 313.
Mass.—Drury v. Natick, 10 Allen 169—Newcomb v. Williams, 9 Metc. 525.

90. Tex.—Frisby v. Withers, 61 Tex. 134.
23 C.J. p 1022 note 41.

91. Mo.—In re Hill, 77 S.W. 110, 102 Mo.App. 617.
N.Y.—Conklin v. Egerton, 21 Wend. 430.
23 C.J. p 1022 note 42.
Administration with the will annexed is discussed generally infra §§ 1031–1034.

92. Cal.—In re Ogier, 35 P. 900, 101 Cal. 381, 40 Am.S.R. 61.
Tenn.—Young v. Alexander, 16 Lea 108.

93. N.Y.—In re Brocato's Estate, 258 N.Y.S. 111, 143 Misc. 664.

94. Ala.—Thomas v. Field, 98 So. 474, 210 Ala. 502.
Conn.—Bishop v. Bishop, 14 A. 803, 56 Conn. 208.
23 C.J. p 1023 note 51.
Exhaustion of power
(1) Where it was clear testator desired administration, either by four brothers, or one of them, or some fit person selected and nominated by two named daughters as long as they lived, the right of the daughters to select an executor did not terminate on the selection of one who failed to act and resigned, but continued while the estate remained unadministered and undivided.—Thomas v. Field, 98 So. 474, 210 Ala. 502.
(2) A testamentary power given to the survivor of two executors to appoint a successor is exhausted by such appointment.—Bonning's Estate, 14 Pa.Dist. 236.

95. N.J.—Hutton v. Hutton, 3 A. 882, 41 N.J.Eq. 267, 268.

tate,[96] of which he can be deprived only by his refusal or neglect to prove the will and take out letters,[97] or his inability or unsuitableness to execute the trust, as discussed infra § 28; and no other person can execute the trust while any of the executors is living and has not declined the office nor been shown to be unsuitable.[98] It has been held, however, that where there are no debts nor legacies to be paid, the appointment of an executor became inoperative.[99]

§ 23. —— Designation of More than One Executor

On the naming of two or more as executors all available should qualify. In case all do not qualify, the powers of all may be exercised by those who do qualify.

Where several executors are named or designated together they are presumably intended to be coexecutors and should be qualified together, all being thus legally regarded as an individual in place of a sole executor, and of various persons named as coexecutors he or they who may be alive and willing and competent to accept the trust on the testator's decease can alone be deemed qualified for the office.[1] Where a testator nominates two or more persons as executors but only one qualifies, that one has all the authority which all would have had if all had qualified.[2]

§ 24. —— Conditional Appointment

An executor's appointment may be made conditional, and in such case letters testamentary may be issued only on compliance with the conditions named.

The executor's appointment may be made conditional, as on his giving security for paying the debts and legacies, or possessing certain qualifications at the time of the testator's decease, or provided he prove the will within a specified time after the testator's death, or otherwise, and unless the conditions are fulfilled the nomination goes for naught.[3] Where a testator appoints his wife executrix if she survives him and appoints another executor on condition that testator and wife die at the same time, where the wife survives the testator but dies very shortly thereafter, meanwhile expressly renouncing her executrixship, such other is not entitled to letters testamentary since the condition of testator and wife dying at the same time has not been fulfilled.[4]

§ 25. —— Substitutionary or Successive Appointments

A testator may properly provide for succession or substitution of executors and designate who they shall be.

A testator may name two or more persons as his executors, not to serve as coexecutors, but by way of providing for succession or substitution in case the person or persons primarily designated die, or fail or are unable to serve,[5] and a successor thus duly appointed to discharge the duties which were left unperformed by his predecessor, or to act in the place of the primary appointee is an executor by substitution and not a mere administrator de bonis non with the will annexed.[6] A testator may also name several executors, each of whom will be entitled to qualify and become a coexecutor with the others on the happening of a certain event, as for instance where the will provides that each of testator's sons, on becoming of age, shall be an executor.[7]

§ 26. —— Revocation of Appointment

A testator may revoke his designation of an executor by a subsequent testamentary instrument.

96. Pa.—In re Miller, 65 A. 681, 216 Pa. 247.
Wash.—State v. Superior Court, 37 P.2d 209, 211, 179 Wash. 198, citing **Corpus Juris.**
23 C.J. p 1023 note 58.

97. Pa.—In re Miller, 65 A. 681, 216 Pa. 247.

98. La.—Downing's Succession, 47 So. 604, 122 La. 275.
Pa.—In re Miller, 65 A. 681, 217 Pa. 247.
23 C.J. p 1023 note 61.

Application of heirs
The appointment of an executor rests with the testator and not with his heirs and legatees, or with the court, his motive in making such appointment not being open to inquiry, so that, under Burns St.Annot.1914 § 2737, the court on application of the heirs has no authority to substitute one trust company for another named by the testator.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 79 Ind.App. 537.

Beneficiaries under the will may not select a representative for the estate in disregard of the selection made by the testator.
Ill.—Belleville Sav. Bank v. Schrader, 214 Ill.App. 388.
N.Y.—In re Phelps' Estate, 295 N.Y.S. 840, 162 Misc. 703.

99. La.—Walker's Succession, 32 La. Ann. 321—Depuy's Succession, 4 La.Ann. 570.

1. Hawaii.—Matter of Parker, 19 Hawaii 393.
N.Y.—Stolzel v. Cruikshank, 4 Dem. Surr. 352.
23 C.J. p 1022 note 44.

2. Miss.—Bodley v. McKinney, 20 Miss. 339.
Mo.—Phillips v. Stewart, 59 Mo. 491.

3. N.J.—Knox v. Newman, 15 A. 415, 44 N.J.Eq. 309.

4. Cal.—In re Kimball's Estate, 253 P. 591, 200 Cal. 247.

5. Ill.—Kinney v. Keplinger, 50 N.E. 131, 172 Ill. 449, reversing 71 Ill.App. 334.
23 C.J. p 1022 note 47.

Appointment of successor before probate
Appointment of successor by testamentary executor and trustee before probate of will or issuance of letters testamentary is valid, where will granted him power to name successor and letters testamentary were subsequently issued to testamentary executor and trustee.—In re Walsh's Will, 264 N.Y.S. 72, 147 Misc. 281.

6. Del.—State v. Rogers, 6 Del. 569.
Ill.—Kinney v. Keplinger, 50 N.E. 131, 172 Ill. 449, reversing 71 Ill. App. 334.

7. Tex.—Frisby v. Withers, 61 Tex. 134.

The appointment of executors under a will may be revoked by the substitution of others in a codicil[8] or a subsequent will;[9] but a contract stipulation not in direct conflict with a provision of the will appointing an executor has been held insufficient to preclude the appointment in accordance with the provisions of the will.[10] In a case where the testator erased the name of the executor in his will, and wrote the name of another person over the erasure, and also wrote on the margin of the paper that the latter person was to be executor, and it appeared probable that the name of such person was inserted before the execution of a codicil to the will, it was held that such person was entitled to letters testamentary.[11] Death of the nominee before qualification as executor terminates his right to letters testamentary.[12]

§ 27. —— Power and Duty of Court

The court may not appoint as executor a person not so nominated in the will and should appoint the nominee in the absence of an adequate reason for refusing. It has been held that the court has no discretionary power to refuse to appoint a duly qualified nominee, but there is contrary authority.

A court of probate has no power to appoint as executor a person not nominated as such in the will of the testator.[13] In the absence of an adequate cause for disregarding the testator's designation, the court should appoint his nominee as executor,[14] and properly does so where no objections are filed as required by statute,[15] and in the absence of strict proof of statutory grounds of incompetency,[16] it being the duty of the court to issue letters testamentary to the person named as executor on his application where the will has been proved and admitted to probate,[17] and in the absence of a statutory disqualification or fraud on the part of the nominee[18] or of his renunciation and waiver of the right to act.[19]

Statutes with reference to the issuance of letters testamentary must be strictly followed,[20] and, where mandatory, deprive the court of discretion to issue such letters to others than the testator's nominee unless he is incompetent or disqualified by law.[21] However, in the absence of a contrary statute, it has been held that the court is not bound by the testator's nomination[22] and may in its discretion either appoint the nominee or refuse to do so,[23] although the testator's selection should be followed in the absence of a strong showing to the contrary;[24]

8. Cal.—In re Ringot, 56 P. 781, 124 Cal. 45.
La.—Bowles' Succession, 3 Rob. 31.
N.Y.—Matter of Robitscher, 156 N.Y.S. 265, 92 Misc. 653.

9. Pa.—Nelson's Estate, 23 A. 373, 147 Pa. 160, affirming 9 Pa.Co. 552.
23 C.J. p 1023 note 55.

10. Cal.—In re Forrest's Estate, 110 P.2d 1023, 43 Cal.App.2d 347.

Revocation not shown by settlement agreement between separated spouses

Property settlement agreement executed after separation of husband and wife did not preclude wife from serving as executrix under husband's will, in absence of inconsistency, although agreement provided that each party relinquished the right to administer on the estate of the other, although it might have precluded the wife from being administratrix. —In re Forrest's Estate, supra.

11. N.J.—Smith v. Haines, 98 A. 317, 86 N.J.Eq. 224.

12. Cal.—In re Kimball's Estate, 252 P. 591, 200 Cal. 247.

13. Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269.
Wash.—State v. Superior Court, 37 P.2d 209, 211, 179 Wash. 198, citing Corpus Juris.
23 C.J. p 1023 note 63.

14. Ala.—Thomas v. Field, 98 So. 474, 210 Ala. 502.
Ariz.—In re Lawrence's Estate, 35 P.2d 45, 53 Ariz. 1.
Cal.—In re Barreiro's Estate, 13 P. 2d 1017, 125 Cal.App. 153.
Ind.—Abbott v. Appleton, 159 N.E. 167, 86 Ind.App. 607.
Ky.—Kuechler v. Rubbathen, 99 S.W.2d 193, 266 Ky. 390.
La.—Serres' Succession, 66 So. 342, 135 La. 1005.
Minn.—In re Betts' Estate, 240 N.W. 904, 185 Minn. 627, reversed in part on other grounds 243 N.W. 58, 185 Minn. 627.
Miss.—Ricks v. Johnson, 99 So. 142, 134 Miss. 676.
N.Y.—In re Cullen's Estate, 297 N.Y.S. 280, 163 Misc. 410—In re Rosenfeld's Estate, 284 N.Y.S. 491, 157 Misc. 686.

Testator's intent as controlling

In appointing executors, the court must follow so far as possible what was plainly the testator's intention. It must put aside technicalities, fill in as necessary that which is missing, and interpret liberally that which is written, and once ascertained, that intention will be carried out in so far as it is not inimical to law.—In re Healy's Will, 8 N.Y.S.2d 394, 255 App.Div. 361.

15. Cal.—In re Maddux' Estate, 32 P.2d 392, 138 Cal.App. 430.

16. N.Y.—In re Erlanger's Estate, 242 N.Y.S. 249, 136 Misc. 793.

17. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
Utah.—Welsh, Driscoll & Buck v. Buck, 232 P. 911, 914, 64 Utah 579, quoting Corpus Juris.
23 C.J. p 1023 note 64.

18. Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.
Administrators with the will annexed generally see infra §§ 1031–1034.

19. Wash.—State ex rel. Lauridsen v. Superior Court for King County, supra.

20. Mo.—State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 327 Mo. App. 902.

21. Ariz.—In re Lawrence's Estate, 35 P.2d 45, 53 Ariz. 1.
Ill.—Belleville Sav. Bank v. Schrader, 214 Ill.App. 388.
Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 79 Ind.App. 537.
Or.—In re Workman's Estate, 49 P. 2d 1136, 151 Or. 475.
Tex.—Hutcherson v. Hutcherson, Civ. App., 135 S.W.2d 757, error refused.

22. Wash.—In re Robinson's Estate, 270 P. 1020, 149 Wash. 307—In re Bredl's Estate, 201 P. 296, 117 Wash. 372.

23. Iowa.—Davenport v. Sandeman, 218 N.W. 55, 204 Iowa 927—In re Birkholz's Estate, 197 N.W. 396.
23 C.J. p 1024 note 66.

24. Iowa.—In re Schneider's Estate,

and to justify the court in the exercise of its discretionary power to disregard the testator's choice, there must be some basis more substantial than the contrary wishes of collateral relatives.[25] Further, it has been held that the designation by the testator must control unless it sufficiently appears that it would not have been made had the testator known the facts and conditions as they exist at the time the court is asked to confirm the appointment.[26]

The court may disregard the testator's wishes where his nominee is for some reason legally disqualified, as where he is incompetent,[27] or dishonest,[28] or has attempted to suppress the will,[29] or even, it has been held, where the court determines that under conditions as they have changed since the execution of the will the selection would not have been made by the testator.[30]

Insolvency of an estate does not affect the right of a qualified person to be appointed executor, but affects only the manner in which he shall administer the estate.[31]

Exhaustion of court's power. It has been held that where a probate court has made a decree appointing one of two executors named in a will as sole executor, its power in the premises is exhausted, and while such decree stands it cannot appoint the other person named as coexecutor.[32]

§ 28. Competency

a. In general
b. Character and habits of nominee
c. Financial condition
d. Interest adverse to estate
e. Mental incompetence
f. Alienage or nonresidence
g. Infancy or marital status
h. Official status as judge of probate
i. Witness to will
j. Corporations

a. In General

Generally speaking, and except as the rule may be changed by statute, all persons capable of making wills are eligible to become executors on nomination by the testator, the power to name an executor is co-extensive with the power to devise or bequeath the estate, and the testator's nominee may qualify although old and feeble or ignorant and inexperienced. This broad eligibility is, however, subject to statutory restrictions which must be observed by the courts and one failing to meet the statutory standard cannot qualify.

All persons, generally speaking, who are capable of making wills are capable of becoming executors,[33] and indeed the favor of the law extends even further in this respect,[34] the general rule being that a testator has the right to determine the qualifications and suitability of the person selected by him as executor,[35] that in the absence of controlling statute the power to name an executor is coextensive with the power to devise or bequeath

277 N.W. 567, 224 Iowa 598—In re Birkholz's Estate, 197 N.W. 896.

25. Iowa.—In re Schneider's Estate, 277 N.W. 567, 224 Iowa 598.

Presumption of testator's belief as to fitness

The court is not bound to recognize the nomination of an executor by will, and the court has discretion in such matters, but where person is named as executor in will, it is presumed that in the judgment of the testator such person possessed a special fitness for the discharge of the trust.—In re Schneider's Estate, supra.

26. Iowa.—In re Schneider's Estate, supra.

27. Neb.—In re Cachelin's Estate, 247 N.W. 422, 124 Neb. 556.
N.Y.—In re Leland's Will, 161 N.Y.S. 316, 175 App.Div. 62, reversing 160 N.Y.S. 372, 96 Misc. 419, and affirmed 114 N.E. 854, 219 N.Y. 387.
23 C.J. p 1024 note 65.

28. N.Y.—In re Cullen's Estate, 297 N.Y.S. 280, 163 Misc. 410.

Charges of improvidence or dishonesty not sustained

N.Y.—In re Flood's Will, 140 N.E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602—In re Rosenfeld's Estate, 284 N.Y.S. 491, 157 Misc. 686.

29. Wash.—In re Robinson's Estate, 270 P. 1020, 149 Wash. 307.

30. Iowa.—In re Birkholz's Estate, 197 N.W. 896.
23 C.J. p 1024 note 66 [a].

Straitened circumstances

Where an executor nominated by will had been in charge of testator's affairs for some six years before her death, necessitating an accounting, and was in straitened circumstances, with little property and many debts, at the time of his application for appointment, the court did not abuse its discretion in refusing to appoint him.—In re Birkholz's Estate, supra.

31. Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.

Retention of administrators with will annexed was not justified over objection of one designated executor by will, even though estate may have been insolvent, as to which in any event there was no due adjudication. —State ex rel. Lauridsen v. Superior Court for King County, supra.

32. Mass.—Cogswell v. Hall, 67 N.E. 638, 183 Mass. 575, following Jewell v. Turner, 52 N.E. 1082, 172 Mass. 496.

33. Or.—In re Workman's Estate, 49 P.2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**
23 C.J. p 1024 note 69.

34. Or.—In re Workman's Estate, supra, quoting **Corpus Juris.**
23 C.J. p 1024 note 70.

35. Or.—In re Workman's Estate, supra, quoting **Corpus Juris.**
Utah.—Welsh, Driscoll & Buck v. Buck, 232 P. 911, 64 Utah 579.
22 C.J. p 1024 note 71.

Preferring individual to trust company

"Where the ties of kindred and long acquaintanceship lead the testator to choose the inexperienced wife or friend rather than the modern trust company the relative advantage to the beneficiaries will not justify a judicial veto on such choice."—In re Flood's Will, 140 N.E. 936, 937, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602—Matter of Leland, 114 N.E. 854, 856, 219 N.Y. 387.

the estate,[36] and that testator may appoint anyone whom he deems proper.[37] Accordingly, one named as executor is not disqualified by old age,[38] bodily infirmities,[39] lack of business experience,[40] or ignorance of law,[41] and one named in the will as executrix may qualify although she was the testator's concubine.[42] Neither is the appointment as executrix of a person nominated by the will as one of the executors improper because of the fact that she is the divorced wife of the testator and has a residuary claim under the will.[43]

It has been said that where the eligibility or right to qualify is contested, the court will give greater consideration to one seeking an executorship than to applicant for letters of administration.[44]

The legislature has power to provide who may or who may not act as executor,[45] the court may exercise judicial discretion in determining whether one nominated as executor complies with the statutory standard,[46] and any nominee failing to comply with the statutory standard of eligibility may be refused letters.[47] On the other hand, statutory limitations placed on the broad right of the testator to select his own executor should be strictly construed in favor of the eligibility of the nominee,[48] and where he is not shown to fall within the grounds of disqualification enumerated by the statute invoked, letters testamentary should issue.[49] Some courts state that they will not add disqualifications to those specified by statute,[50] but others hold that statutory disqualifications are not exclusive and that one nominated as executor may be disqualified on grounds other than those specified in the statute.[51]

Failure to comply with statutory formalities; offering will for probate. It is proper to refuse letters to applicant who fails or refuses to comply with statutory regulations respecting the furnishing of information or other essential formalities.[52]

The fact that executors designated by testator fail

36. Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 99, 79 Ind.App. 537, citing **Corpus Juris.**
Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.
23 C.J. p 1019 note 18 [a].

37. Or.—In re Workman's Estate, 49 P.2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**
23 C.J. p 1024 note 72.

38. N.Y.—In re Leland, 114 N.E. 854, 219 N.Y. 387, affirming 161 N.Y.S. 316, 175 App.Div. 62, reversing 150 N.Y.S. 372, 96 Misc. 419.
Or.—In re Workman's Estate, 49 P. 2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**

39. N.Y.—In re Leland, 114 N.E. 854, 219 N.Y. 387, affirming 161 N. Y.S. 316, 175 App.Div. 62, reversing 160 N.Y.S. 372, 96 Misc. 419.
Or.—In re Workman's Estate, 49 P. 2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**

40. Or.—In re Workman's Estate, supra, quoting **Corpus Juris.**
23 C.J. p 1024 note 75.

41. N.Y.—In re Leland, 114 N.E. 854, 219 N.Y. 387, affirming 161 N. Y.S. 316, 175 App.Div. 62, reversing 160 N.Y.S. 372, 96 Misc. 419.
Or.—In re Workman's Estate, 49 P. 2d 1136, 151 Or. 475.

42. La.—Succession of Bankston, App., 166 So. 900.

43. Iowa.—In re Doolittle, 149 N. W. 373, 169 Iowa 639.

44. Ky.—Nunn v. Hamilton, 26 S. W.2d 526, 233 Ky. 663.

45. Ariz.—In re Lawrence's Estate, 85 P.2d 45, 53 Ariz. 1.

46. Neb.—In re Blochowitz' Estate, 245 N.W. 440, 124 Neb. 110.

Legal competency

(1) Probate court may exercise judicial discretion in determining whether one nominated as executor is "legally competent", as prescribed by statute.—In re Blochowitz' Estate, supra.

(2) Words "legally competent" in statute prescribing qualifications of executor mean qualified to act according to judicial standards essential to proper course of justice.—In re Blochowitz' Estate, supra.

47. Minn.—In re Holterman's Estate, 282 N.W. 132, 203 Minn. 519.
23 C.J. p 1026 note 8.

"Suitability"

The additional requirement on revision of the probate law, that an executor be "suitable" as well as "competent" to discharge his trust, must be given effect, and letters should be denied to an applicant found "unsuitable".—In re Holterman's Estate, supra.

48. N.Y.—In re Cohen's Will, 298 N. Y.S. 368, 164 Misc. 98, affirmed 2 N.Y.S.2d 764, 254 App.Div. 571, affirmed 16 N.E.2d 111, 278 N.Y. 584—In re Canter's Will, 261 N.Y.S. 872, 146 Misc. 123.

Respect for testator's wishes

The courts will not disregard the solemnly expressed wishes of the testator by too liberal an interpretation of statutory disqualifications.—Nunn v. Hamilton, 26 S.W.2d 526, 233 Ky. 663.

49. Ala.—Kidd v. Bates, 23 So. 735, 120 Ala. 79, 74 Am.S.R. 17, 41 L. R.A. 154.
23 C.J. p 1027 note 4.

50. Ky.—Nunn v. Hamilton, 26 S.W. 2d 526, 233 Ky. 663.
N.Y.—In re Flood's Will, 140 N.E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602.
23 C.J. p 1027 note 4.

Statutory disqualifications only as generally controlling

Aside from the common-law doctrine which excludes idiots and lunatics, the desire of the testator is a controlling factor in determining the right to administer an estate, and it is only statutory disqualifications which may operate to defeat such desire.—In re Cardoner's Estate, 201 P. 1051, 27 N.M. 337, 18 A.L.R. 575.

51. Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.

52. N.C.—In re Gulley's Will, 118 S.E. 839, 186 N.C. 78.
Failure to qualify or act see infra § 68.

Refusal to be sworn

Where applicant for letters testamentary refused to be sworn or examined, or give any information regarding the nature or value of the property of the estate in his possession, the clerk of the superior court was justified in refusing to allow him to qualify, in view of Comp.St. § 33, requiring the clerk to obtain the value of the personal property "by examination on the oath of the applicant or some other competent person."—In re Gulley's Will, supra.

to file the will of testator's wife, which is incorporated in his will, within the time specified by law for the filing of the wife's will, does not disqualify them;[53] and it has been held that, in any event, statutory provisions for appointment of an administrator where the designated executor fails to make a timely petition for probate of the will are not mandatory but commit the matter to the discretion of the court.[54]

Grounds for removal. The existence of grounds which might warrant removal of an executor, which grounds are discussed infra § 90, does not in itself justify refusal of letters on the original application of one named in the will as executor.[55]

b. Character and Habits of Nominee

Under statutes which have changed the common law in some respects, it is now generally held that to qualify as executor one nominated by the testator must have a character and habits suitable to a proper discharge of the duties of the office, although whether or not any particular characteristic or habits will disqualify him will depend on the terms of the particular statutes involved and their construction by the courts.

While the common law paid so great regard to a testator's wishes, that crime, drunkenness, or dissolute habits seldom disqualified one from serving as executor,[56] under statutes which in varying terms broadly disqualify one who is legally incompetent or unsuitable, the court may find a nominee unfit and refuse to issue letters to him where his dissolute or criminal habits, or his dishonesty or lack of integrity bring him within the condemnation of the statute.[57] It is now said to be the duty of the court, before appointing an executor, to make careful inquiry as to his character, integrity, soundness of judgment and general capacity, and to appoint him only after a favorable finding on these matters. Such is its duty under statutes requiring the court to find that a person named as executor is "legally competent and a suitable person" before issuing letters testamentary to him.[58] Under statutes of this character letters may be denied a nominee of the testator where it is sufficiently shown that he has been convicted of crime,[59] or is addicted to gambling,[60] or that he is by character dishonest,[61] immoral,[62] or improvident,[63] or that he is lacking in in-

53. Cal.—In re Martin's Estate, 88 P.2d 234, 31 Cal.App.2d 501.

54. Cal.—In re Martin's Estate, supra.

55. Minn.—In re Betts' Estate, 243 N.W. 58, 185 Minn. 627, reversing in part 240 N.W. 904, 185 Minn. 627.

56. Ky.—Berry v. Hamilton, 12 B. Mon. 191, 54 Am.D. 515.
Pa.—Sill v. McKnight, 7 Watts & S. 244.

57. Colo.—Deeble v. Alerton, 143 P. 1096, 58 Colo. 166, Ann.Cas.1916C 863.
28 C.J. p 1026 note 8.

Broad construction of "legally incompetent"

Notwithstanding executor named in will is otherwise qualified, county court may refuse to appoint him on ground that he is incapable or unsuitable to discharge trust, since this renders him "legally incompetent."—In re Cachelin's Estate, 247 N.W. 422, 124 Neb. 556.

58. Mass.—Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444, modified on other grounds Ex parte Worcester County Nat. Bank, 19 S.Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 98.

59. La.—Townsend's Succession, 36 La.Ann. 535.

Convicted by court within jurisdiction

A testator's son, named as one of executors, who had been convicted in a court in New York of forgery in the first degree, which was punishable by imprisonment in a state prison, was a "felon" within statute disqualifying a "felon" from acting as executor and hence was incompetent to act as such.—In re Cohen's Will, 298 N.Y.S. 368, 164 Misc. 98 affirmed 2 N.Y.S.2d 764, 254 App. Div. 571, affirmed 16 N.E.2d 111, 278 N.Y. 584.

60. N.Y.—McMahon v. Harrison, 6 N.Y. 443.

61. N.Y.—In re Cullen's Estate, 297 N.Y.S. 280, 163 Misc. 410.
Wash.—In re Bredl's Estate, 201 P. 296, 117 Wash. 372.

"Habit of mind" toward wrongful action

(1) A person is not rendered incompetent to act as an executor by reason of dishonesty and incapable of acting as an executor because of an isolated act of wrongdoing, but must be shown to have a tendency or "habit of mind" toward wrongful action.—In re Cohen's Will, 298 N.Y.S. 368, 164 Misc. 98, affirmed 2 N.Y.S.2d 764, 254 App.Div. 571, affirmed 16 N.E.2d 111, 278 N.Y. 584.

(2) A testator's son, who had been convicted of petty larceny and at time of his application for appointment stood charged with the crime of perjury, a felony, was disqualified from receiving letters at such time under statute making a person incompetent to receive letters by reason of dishonesty at time of application.—In re Cohen's Will, supra.

Character of crime as misdemeanor or felony

In determining whether a person was disqualified by reason of dishonesty, fact that crime of which he was convicted was a misdemeanor and not a felony would be immaterial.—In re Cohen's Will, supra.

Offering improperly obtained paper for probate

A testatrix' nominee for executor would be refused letters testamentary on ground of his dishonesty, where former judgment established that nominee by undue influence had sought to obtain for himself a greater part of testatrix' property, and that nominee had offered for probate a paper so improperly obtained and sought to procure its admission as genuine will of testatrix.—In re Cullen's Estate, 297 N.Y.S. 280, 163 Misc. 410.

62. Colo.—Deeble v. Allerton, 143 P. 1096, 58 Colo. 166, Ann.Cas.1916 C 863.

Woman who sustained mere meretricious relations with a testator, whose estate is insolvent, should not be appointed executrix.—Deeble v. Allerton, supra.

63. Ala.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.

Habits of mind and conduct rendering nominee unfit

(1) Under Surrogate's Court Act § 94, providing no person is competent to serve as an executor who is incompetent by reason of improvidence, the word "improvidence" refers to habits of mind and conduct which become a part of the man and render him generally, and under all ordinary circumstances, unfit for the trust or employment in

tegrity.[64]

On the other hand, statutes of this description have been subjected to a strict construction in favor of the eligibility of the testator's nominee, as shown in the preceding subdivision of this section, and where the particular ground of objection does not fall within the contemplation of the statute as interpreted by the court, the nominee will not be disqualified to serve as executor by reason of his character or habits,[65] and may be appointed to act by the court although he has been convicted of crime,[66] and despite evidence to show that he has been guilty of some degree of dishonesty[67] or immorality,[68] or where the facts fail to support the charge that the executor is improvident[69] or wanting in integrity.[70] Statutes broadly providing that the court shall appoint an administrator cum testamento annexo in place of an executor who is "incapable" do not empower the court to reject a designated executor on the ground that he is lacking in honesty, integrity, or business experience.[71]

c. Financial Condition

Except as the matter may be otherwise controlled by statute, the poverty or insolvency of a nominee is ordi-

question.—In re Flood's Will, 140 N. E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602.

(2) "Improvidence" which will defeat a right to act as executor means a lack of care, foresight, or business capacity endangering the safety of the estate, and capacity for care and foresight need not be evidenced by the accumulation of any considerable estate.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.

64. Cal.—In re Plaisance, Myr.Prob. 117.

Gross immorality as shown by the mode of life of the person named as executor is evidence of such "lack of integrity" as will authorize the court to refuse to qualify him.—In re Plaisance, supra.

Want of integrity not shown

A simple conflict of interest in regard to the estate between the legatees and the executor does not show a "want of integrity" on the part of the latter so as to authorize the court under the statute in refusing to qualify him.

Cal.—Bauquier's Estate, 26 P. 178, 532, 88 Cal. 302.

Or.—In re Workman's Estate, 49 P. 2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**

65. La.—Serres' Succession, 66 So. 342, 135 La. 1065.
23 C.J. p 1027 note 4.

Delay in qualifying

Executor's delay in qualifying or offering to qualify is insufficient evidence of unfitness to discharge trust to justify refusal to permit executor to qualify.—Kuechler v. Rubbathen, 99 S.W.2d 193, 266 Ky. 390.

Lack of sympathy with legatees

Insistence that executor is not in sympathy with legatees, and therefore would not or might not accord them fair treatment in settlement and distribution of estate, is insufficient to justify refusal to permit executor to qualify, since the law presumes honesty and fair dealings until the contrary has been shown.—Kuechler v. Rubbathen, supra.

66. N.Y.—In re Cohen's Will, 2 N. Y.S.2d 764, 254 App.Div. 571, affirming 298 N.Y.S. 368, 164 Misc. 98, and affirmed 16 N.E.2d 111, 278 N.Y. 584.

Strict construction

The disqualification of the right to act as an estate fiduciary because of conviction of a crime is an additional punishment inflicted on the individual for the offense, and must for that reason be strictly construed. —In re Cohen's Will, 298 N.Y.S. 368, 164 Misc. 98, affirmed 2 N.Y.S.2d 764, 254 App.Div. 571, affirmed 16 N.E.2d 111, 278 N.Y. 584.

Crime not felony under state law

(1) A person convicted in another jurisdiction of a crime which is there a felony is not guilty of "felony" within Penal Law, and consequently such person is not a "felon" within Surrogate's Court Act so as to be incompetent to receive letters testamentary.—In re Cohen's Will, 2 N.Y. S.2d 764, 254 App.Div. 571, affirming 298 N.Y.S. 368, 164 Misc. 98, and affirmed 16 N.E.2d 111, 278 N.Y. 584.

(2) Conviction in federal court for felony does not disqualify nominee from acting as executor under state statute disqualifying "felon," where offense was not felony under state law.—In re Canter's Will, 261 N.Y.S. 872, 146 Misc. 123.

67. N.Y.—In re Canter's Will, supra.

Conviction for single criminal offense of conspiracy to defraud United States was held not to disqualify nominee as executor by reason of "dishonesty," where no other acts of dishonesty were proved.—In re Canter's Will, supra.

"Dishonesty" as referring only to money matters

(1) Dishonesty within a statute declaring one incompetent to serve as an executor who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by reason of dishonesty, means dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor.—Matter of Latham, 130 N.Y.S. 535, 145 App.Div. 849.

(2) Where record did not reveal that crime for which applicant for letters testamentary was convicted involved money matters, applicant was not disqualified to receive letters by reason of "dishonesty" within Surrogate's Court Act, since "dishonesty" contemplated by statute referred to dishonesty in money matters.—In re Cohen's Will, 2 N.Y.S.2d 764, 254 App.Div. 571, affirming 298 N.Y.S. 368, 164 Misc. 98, and affirmed 16 N.E.2d 111, 278 N.Y. 584.

Intermingling of funds

The fact that an attorney has intermingled his own funds with those of a client does not of itself show such dishonesty as to disqualify him from acting as executor.—Matter of Haag, 165 N.Y.S. 401, 99 Misc. 164.

68. Ill.—Clark v. Patterson, 73 N.E. 806, 214 Ill. 533, 105 Am.S.R. 127, affirming 114 Ill.App. 312.

Ky.—Berry v. Hamilton, 12 B.Mon. 191, 54 Am.D. 515.

Sexual immorality is not ground of rejection.—Clark v. Patterson, 73 N.E. 806, 214 Ill. 533, 105 Am.S.R. 127.

69. Ala.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.

N.Y.—In re Flood's Will, 140 N.E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602.

70. Cal.—In re Kelley's Estate, 186 P. 1041, 182 Cal. 81.

Discourtesy

Showing that the executor named in a will was not courteous to testator's widow and disregarded her requests or wishes concerning the selection of an attorney to advise him in administration is no support of the claim that he is incompetent to act as executor by reason of want of integrity.—In re Kelley's Estate, supra.

71. Conn.—Appeal of Smith, 24 A. 273, 61 Conn. 420, 16 L.R.A. 533.

narily no ground for refusing to issue him letters testamentary, although it may be proper to require a bond or other security.

Mere poverty, or even insolvency, constitutes no legal cause for refusing the executorship to the testator's chosen appointee,[72] and courts have thus respected the testator's choice even where the insolvency occurred after the testator's death.[73] A fortiori it is no ground for withholding letters that the person named as executor is worth less than the testator[74] or is indebted to the estate.[75] However, courts of equity have intervened in consequence of the hardships thus inflicted on creditors and legatees, and appointed receivers under strict judicial direction, restraining the bankrupt or insolvent from committing acts injurious to the estate,[76] or they have required the insolvent executor to furnish security,[77] further the court may refuse letters unless a bond is given,[78] although aside from statute they have hesitated to control the executor thus, where it was shown that the testator made his choice while fully aware of his appointee's insolvency.[79]

d. Interest Adverse to Estate

The fact that one nominated as executor has interests adverse to the estate or legatees under the will does not necessarily disqualify him, but under statute or otherwise he may be held disqualified where he claims for himself property given by the will to others or where he is engaged in litigation hostile to the estate.

A person is not rendered incompetent to act as executor of an estate because he claims individually property which ostensibly belongs to the estate,[80] and the fact that the person nominated as executor has some claim or interest adverse to that of the estate or legatees under the will will not in itself serve to disqualify him.[81] On the other hand, it has been held that one claiming property which the will directs to be sold and the proceeds thereof divided is not a suitable person to execute the will,[82] unless he renounces such right.[83] It has been held that a person named in the will as one of the executors should not receive letters testamentary during the pendency of a suit by him on a claim against the estate;[84] but it has also been considered that no disqualification of an executor results from the fact that he is the executor of a prior executor between whom and the estate of the testator there are unsettled accounts, or that he is a trustee under the will of a large amount of real and personal estate

72. Ky.—Berry v. Hamilton, 12 B. Mon. 191, 54 Am.D. 515.
N.Y.—Matter of Riede, 122 N.Y.S. 600, 138 App.Div. 83, affirmed 95 N.E. 1127, 201 N.Y. 596.
23 C.J. p 1026 note 94.

73. La.—Gourjon's Succession, 7 Rob. 422.

74. N.Y.—Grubb v. Hamilton, 2 Dem.Surr. 414—Ballard v. Charlesworth, 1 Dem.Surr. 501.

75. Mich.—Breen v. Kehoe, 105 N. W. 28, 142 Mich. 58, 113 Am.S.R. 558, 1 L.R.A.,N.S., 349.
N.Y.—In re Rosenfeld's Estate, 284 N.Y.S. 491, 157 Misc. 686.
23 C.J. p 1026 note 97.

76. N.Y.—Elmendorf v. Lansing, 4 Johns.Ch. 562.
S.C.—Stairley v. Rabe, 16 S.C.Eq. 22.

77. N.Y.—Mandeville v. Mandeville, 8 Paige 475.

78. N.Y.—In re Flood's Will, 140 N. E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602.

79. Ky.—Bowman v. Wootton, 8 B. Mon. 67.
23 C.J. p 1026 note 1.

80. Ala.—Marcus v. McKee, 151 So. 456, 227 Ala. 577, citing **Corpus Juris.**
N.M.—Woodson v. Raynolds, 76 P.2d 34, 38, 42 N.M. 161, citing **Corpus Juris.**
Or.—In re Workman's Estate, 49 P. 2d 1136, 1139, 151 Or. 475, quoting **Corpus Juris.**
23 C.J. p 1027 note 5.

81. U.S.—U. S. Nat. Bank & Trust Co. of Kenosha, Wis. v. Sullivan, C.C.A.Wis., 69 F.2d 412.
Minn.—In re Betts' Estate, 240 N.W. 904, 185 Minn. 627, reversed in part on other grounds 243 N.W. 58, 185 Minn. 627.
Or.—In re Workman's Estate, 49 P. 2d 1136, 151 Or. 475.
Utah.—Welsh, Driscoll & Buck v. Buck, 232 P. 911, 64 Utah 579.

Claim of corporation in which executor a stockholder

One was held not disqualified to act as executor under will with respect to claim against the estate by corporation in which he was a stockholder.—Welsh, Driscoll & Buck v. Buck, supra.

Creditor

Under will and trust agreement, bank, although creditor of estate, may be entitled to act as executor.—U. S. Nat. Bank & Trust Co. of Kenosha, Wis. v. Sullivan, C.C.A.Wis., 69 F.2d 412.

Honest claim

Claim individually, by person named as executor in will, to property which other legatees insist belongs to estate, does not show want of integrity or disqualify him from serving as executor, if adverse claim is honestly made.—In re Workman's Estate, 49 P.2d 1136, 151 Or. 475.

Inactive officer of corporation dealing with estate

Executor appointed in will who was inactive officer and held qualifying shares in corporation which held trust deed for property belonging to testator was held not disqualified, where executor had little interest in corporation and knew little about it, no controversy regarding trust property was shown, and there was no refusal by corporation to furnish written declaration of trust.—In re Workman's Estate, supra.

Indebtedness to estate as affecting the eligibility of one nominated as executor is discussed supra subdivision c of this section.

82. Mo.—Arrington v. McCluer, 34 S.W.2d 67, 326 Mo. 1011.

83. Mo.—Arrington v. McCluer, supra.

84. Mass.—Cogswell v. Hall, 67 N.E. 638, 183 Mass. 575.
23 C.J. p 1027 note 6.

"Unsuitable" within statute

Where it appears that by pending litigation one named in the will as executor is put in a position of hostility to numerous legatees and their interests, and that the latter are in an attitude of ill will toward such nominee, he is "unsuitable" within the meaning of statutory provisions requiring an executor to be "suitable and competent," and his application for letters should be denied.—In re Holterman's Estate, 282 N.W. 132, 203 Minn. 519.

Legal incompetency

Person nominated as executor, whose duties would require him to prosecute, on behalf of adversary litigants, suit which he would defend as individual, was not "legally competent".—In re Blochowitz' Estate, 245 N.W. 440, 124 Neb. 110.

respecting which there are unsettled accounts, or that a lawsuit is pending between him and the estate of the testator, respecting the title of certain real estate which he holds adversely to claimants under the will of such testator.[85] A person is not disqualified as executor because he claims the benefit of a contract between himself and the testator, although there is strong evidence that the testator was of unsound mind at the time of the execution of the contract, and by such contract the executor secured great pecuniary advantage to the detriment of the estate.[86] A surviving husband's renunciation of devises and bequests made to him in the will and election to take his legal rights in lieu thereof is not in itself so hostile to the will as to preclude his qualifying as executor,[87] but administration of an estate will not be granted to one who has entered into a contract with the heirs to renounce, and has renounced, letters testamentary.[88]

e. Mental Incompetence

Mental incompetence disqualifies a nominee for an executorship.

Idiots and lunatics are incapable of becoming executors.[89] Letters may be refused to one who is in fact incompetent, although he has never been adjudged to be so,[90] and it is also proper to refuse to issue letters to one who is unable, by reason of incurable bodily disease, to understand his duties sufficiently to safeguard the interests of the estate.[91] Under some statutes there is a disqualification in case of want of understanding,[92] by which is meant, however, a lack of intelligence,[93] and not mere ignorance of legal rights.[94]

f. Alienage or Nonresidence

In the absence of contrary statute neither nonresidence nor alienage disqualifies a testamentary nominee as executor, although either may under statutes disqualify him or commit the matter to the discretion of the court.

Except as the rule may be changed by statute, one nominated in the will as executor may qualify although he is a nonresident[95] or an alien.[96]

Under some statutes it has been held discretionary with the court to appoint a nonresident or alien executor or to refuse to do so,[97] and under statutes of this character it has been held that the testator's nomination is entitled to substantial consideration even though the nominee be a nonresident,[98] although the fact of nonresidence is a factor against his appointment.[99] Under other statutes it has been held that a nonresident alien may not qualify as executor.[1] Under statutes requiring the court to appoint as executor the person named as such in the will provided he appears and submits himself to the jurisdiction of the court, the fact that one is not a permanent resident of the state but is there only for the purpose of administering on the estate of the decedent does not disqualify him.[2] Under statutes providing that no person not a citizen of the United States and a resident of the state shall be "appointed" as a personal representative of an estate, it has been held that a nonresident designated as executor by will may qualify as executor, since such statutes refer exclusively to appointments by the courts of administrators and not to testamentary designations of executors.[3] Under statutes in terms forbidding nonresidents to act as executors, but also providing that if a nonresident is named in the will

85. R.I.—Perry v. DeWolf, 2 R.I. 103.

86. N.Y.—Matter of Gleason, 41 N.Y.S. 418, 17 Misc. 510.

87. Md.—Tillinghast v. Lamp, 176 A. 629, 168 Md. 34.

88. N.Y.—In re Johnston's Will, 299 N.Y.S. 43, 164 Misc. 412.

89. Ala.—Kidd v. Bates, 23 So. 734, 120 Ala. 79, 74 Am.S.R. 17, 41 L.R.A. 154.
N.Y.—McGregor v. McGregor, 3 Abb. Dec. 82, 1 Keyes 133, 33 How.Pr. 456.

90. N.Y.—In re Leland, 114 N.E. 854, 219 N.Y. 387, affirming 161 N.Y.S. 316, 175 App.Div. 62, reversing 160 N.Y.S. 372, 96 Misc. 419.

91. N.Y.—In re Leland, supra.

92. N.Y.—Matter of Leland, 161 N.Y.S. 316, 175 App.Div. 62, reversing 160 N.Y.S. 372, 96 Misc. 419, and affirmed 114 N.E. 854, 219 N.Y. 387.

93. Cal.—Li Po Tai's Estate, 41 P. 486, 108 Cal. 484.
N.Y.—Matter of Manley, 34 N.Y.S. 258, 12 Misc. 472.
23 C.J. p 1025 note 86.

94. N.Y.—In re Shilton, Tuck Surr. 73.

95. Cal.—Brown's Estate, 22 P. 233, 80 Cal. 381.
N.J.—In re Acker, 62 A. 556, 70 N.J. Eq. 669.
23 C.J. p 1025 note 88.

"Under the general rule, and independent of statute, a nonresident of the state in which the will is admitted to probate may qualify and act as executor."—Hecht v. Carey, 78 P. 705, 706, 13 Wyo. 154, 110 Am.S.R. 891.

96. Mich.—Breen v. Kehoe, 105 N.W. 28, 142 Mich. 58, 113 Am.S.R. 558, 1 L.R.A.,N.S., 349.
23 C.J. p 1025 note 88.

Nonresident alien may qualify.—Breen v. Kehoe, supra.

97. Mich.—Breen v. Kehoe, supra.
Wis.—Cutler v. Howard, 9 Wis. 309.

Nature of duties to be performed for a particular estate is a proper consideration for the court in the exercise of its discretion relative to appointment of a nonresident executor.—In re Gray's Estate, 208 N.W. 358, 201 Iowa 876.

Abuse of discretion not shown
Iowa.—In re Gray's Estate, supra.

98. Iowa.—In re Gray's Estate, supra.

99. Iowa.—In re Gray's Estate, supra.

1. N.Y.—Matter of Taylor, 3 Redf. Surr. 259.
23 C.J. p 1026 note 89.

2. Cal.—In re Kelley's Estate, 186 P. 1041, 182 Cal. 81—Brown's Estate, 22 P. 233, 80 Cal. 381.

3. Fla.—In re Sherman's Estate, 1 So.2d 727, 146 Fla. 643.

as executor he may qualify within a specified time of the removal of such disability, it has been held that the residence required for qualification as executor is an actual residence and nothing more.[4]

It has been said that, in determining whether one nominated in the will is qualified under statutes relating to residence, the rules for determination of residence should be applied liberally in favor of the nominee,[5] and it has been held that the court should permit a testamentary nominee to qualify as executor where he has been in the state for several days and declared his intention to remain there even though prior thereto he was a resident of a different state.[6]

What law governs. The eligibility of a nonresident to act as executor of a domestic will should be determined by the law existing at the time the will take effect,[7] and subsequent legislation affecting eligibility will not be construed retrospectively.[8]

g. Infancy or Marital Status

An infant may be designated as executor by the will but his right to qualify is suspended during minority. A married woman may qualify as executrix and common-law restrictions formerly attaching to her rights in this respect, such as the requirement of the husband's consent, have very generally been removed by statute.

While a testator may by will appoint an infant executor of his will, and such infant may become entitled to letters testamentary on attaining his majority,[9] he may not qualify as executor during his minority.[10]

At common law and in the absence of statutory restriction a married woman nominated as executrix in the will may qualify as such,[11] although it was at one time held that her husband's consent was essential[12] and that on the marriage of a feme sole acting as sole executrix her husband became a joint administrator with her.[13] In an early case discussing the right of a feme covert to qualify as executrix it was stated that the tendency of legislation and of public sentiment was to expand rather than to restrict women's rights,[14] and under present statutory provisions a married woman may qualify as executrix,[15] and where a feme sole does so qualify her subsequent marriage will not abate her right,[16] unless the testator so provides, which it has been held he may validly do in respect of his widow nominated executrix without imposing an illegal restraint against marriage.[17] The purpose of statutes in terms conferring on married women the right to act as executrixes is not to confer a vested right which testator may not alter, but merely to remove restrictions formerly attaching to the right of a married woman to be an executrix.[18]

h. Official Status as Judge of Probate

The official status of one as judge of probate disqualifies him from acting as executor within his own jurisdiction.

A probate judge or ordinary cannot act as executor in the county of which he is probate judge,[19] and a petition seeking his appointment may be dismissed on demurrer.[20]

i. Witness to Will

It has been both affirmed and denied that a subscribing witness to a will may qualify as executor thereunder.

Under some statutes, where the person named as executor in the will is also an attesting witness, he may be compelled to testify in probate proceedings, where his testimony is necessary to establish the

4. N.M.—In re Cardoner's Estate, 201 P. 1051, 27 N.M. 337, 18 A.L.R. 575.

5. Ky.—Nunn v. Hamilton, 26 S.W. 2d 526, 233 Ky. 663.

6. Ky.—Nunn v. Hamilton, supra.

7. Ga.—Stevens v. Duncan, 7 S.E. 2d 745, 189 Ga. 730.

Former provisions of law construed

(1) Where testator died Sept. 29, 1934, before effective date of code of 1933, which codified for the first time an old statute making appointment of nonresident as executor conditional on his being heir at law "of equal, greater or sole interest," nonresident son of testator to whom one third of the estate was devised was eligible to serve as executor, under provisions of former codes which superseded the old statute.—Stevens v. Duncan, supra.

(2) Under former code sections authorizing nonresidents to act as executor of resident's will "when such executor has the interest in the estate of the deceased," the word "the" before "interest" should be construed as "an."—Stevens v. Duncan, supra.

8. Ga.—Stevens v. Duncan, supra.

9. Pa.—McKernan's Estate, 14 Pa. Dist. 693.
23 C.J. p 1025 note 80.

10. N.Y.—In re Tippett's Will, 13 N.Y.S.2d 971.
Pa.—McKernan's Estate, 14 Pa.Dist. 693.
23 C.J. p 1025 note 81.

Qualifying at eighteen under statute

In Mississippi under statute eighteen years has been held the legal age for an executor, and if a testator directs that his son shall be executor when he becomes of age, he will be entitled to act as soon as he arrives at the age of eighteen years.—Christopher v. Cox, 25 Miss. 162.

Administration of estate during minority of nominated executor see infra § 1035.

11. Me.—Stewart's Appeal, 56 Me. 300.
23 C.J. p 1024 note 78.

12. Me.—Stewart's Appeal, supra.

13. Mass.—Barber v. Bush, 7 Mass. 510.

14. Me.—Stewart's Appeal, 56 Me. 300.

15. Ga.—Bruce v. Fogarty, 186 S.E. 463, 53 Ga.App. 443.

16. Ga.—Bruce v. Fogarty, supra.

17. Ga.—Bruce v. Fogarty, supra.

18. Ga.—Bruce v. Fogarty, supra.

19. Ga.—Marshall v. Walker, 170 S.E. 267, 47 Ga.App. 195.
23 C.J. p 1026 note 90.

20. Ga.—Marshall v. Walker, supra.

will, but the result is to disqualify him to act as executor,[21] and such a statute has been held to disqualify a corporation named as executor, one of whose stockholders was an attesting witness whose testimony was necessary.[22] On the other hand, it has been held that a subscribing witness has no interest in the estate and would acquire none by accepting an executorship, and therefore is not disqualified to act in such capacity[23] and that a trust company named as executor may qualify even though its officers or agents were subscribing witnesses to the will.[24]

j. Corporations

Broadly speaking, corporations possessing the requisite charter powers may qualify as executors. The right of a successor or foreign corporation to act as executor is governed by statutory provisions under which such right may be affirmed or denied.

While it was once held on technical grounds that a corporation could not act as executor,[25] this doctrine has been abrogated and it is now generally held that a corporation possessed of the appropriate corporate powers may qualify as an executor.[26] The right to act as executor is usually restricted to corporations of a fiduciary character,[27] and will ordinarily be denied a corporation designated by the will as executor where its charter powers do not include the right to act in such capacity;[28] but a corporation not of such character may qualify as executor where it is named in the will as residuary legatee and where the statutes permit such a corporation so named to qualify as an administrator cum testamento annexo.[29]

Successor corporations. Ordinarily a corporation succeeding to the rights and privileges of another by merger or otherwise succeeds to its rights to the office of executor.[30] Where a testator after the date of merger executes a will naming the former and merged corporation as executor, it has been held that its appointment as executor by the court is voidable, although not open to attack by a defendant in an action brought by the executor for the wrongful death of testator.[31] On the conversion of a state bank into a national bank, some authorities have held that the latter cannot qualify for an executorship conferred on the state bank,[32] although other authority has held that the national bank may act as executor under the designation of the state bank,[33] and it has been stated that the difference in the holdings arises in part from differences in the legislative policy of the states concerned, as favoring or not favoring continuance of trust powers on consolidation of corporations.[34]

Domestic corporation in different county. The fact that a domestic corporation has its place of business in a county distant from that of the testator's residence does not disqualify it from becoming executor of his will.[35]

21. Ill.—Jones v. Grieser, 87 N.E. 295, 238 Ill. 183, 15 Ann.Cas. 787, followed in Fearn v. Postelthwaite, 88 N.E. 1057, 240 Ill. 626.

22. Ill.—Olson v. Larson, 150 N.E. 337, 320 Ill. 50—Scott v. O'Connor-Couch, 111 N.E. 272, 271 Ill. 395, L.R.A.1916D 179.

23. Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 79 Ind.App. 537.

24. Ind.—Farmers' Loan & Trust Co. of Columbia City v. Security Trust Co. of Indianapolis, supra.

25. Md.—Georgetown College v. Browne, 34 Md. 450.
14a C.J. p 295 note 43.

26. Conn.—Equitable Trust Co. v. Plume, 103 A. 940, 92 Conn. 649.
N.Y.—In re Rath's Estate, 176 N.Y.S. 887, 107 Misc. 598.
23 C.J. p 1026 note 92—14a C.J. p 295 note 34.

Trust companies may act as executors and as trustee under express statutory provisions.—Mahoney v. McBirney, 84 P.2d 600, 184 Okl. 75.

27. N.Y.—In re Esmond's Will, 258 N.Y.S. 961, 144 Misc. 609.

28. Md.—German-American Bank v. Kopp, 103 A. 1009, 132 Md. 422.
23 C.J. p 1026 note 93.

29. N.Y.—In re Esmond's Will, 258 N.Y.S. 961, 144 Misc. 609.

Validity of provisions in will

Provisions of will naming corporation as executor, directing it to invest specified sum for named individual for life, and that principal should remain corporation's property, held valid.—In re Esmond's Will, supra.

30. Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
N.Y.—In re Bergdorf, 99 N.E. 714, 206 N.Y. 309, affirming 133 N.Y.S. 1012, 149 App.Div. 529.

Consolidation during lifetime of testatrix

Where national bank named executor was consolidated with another bank during testatrix's lifetime, consolidated bank could qualify as executor.—Mueller v. First Nat. Bank, 156 S.E. 662, 171 Ga. 845.

Validity of statute for succession of rights upheld

Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.

31. N.Y.—In re Barmeier's Estate, 288 N.Y.S. 318, 248 App.Div. 636, modifying 282 N.Y.S. 695, 156 Misc. 657, and affirmed 5 N.E.2d 351, 272 N.Y. 601.

32. Mass.—Petition of Commonwealth-Atlantic Nat. Bank of Boston, 144 N.E. 443, 249 Mass. 440.
Va.—Hofheimer v. Seaboard Citizens' Nat. Bank of Norfolk, 153 S.E. 656, 154 Va. 392, affirmed 156 S.E. 581, 154 Va. 896, and certiorari denied Seaboard Citizens' Nat. Bank of Norfolk v. Hofheimer, 51 S.Ct. 648, 283 U.S. 855, 75 L.Ed. 1462.

Designation as executor not "property right"

Naming of trust company as executor in will was not a thing which passed as property or an asset when trust company was converted into national bank, or when that bank was consolidated into another national bank, designation as executor not conferring any property right.—Petition of Commonwealth-Atlantic Nat. Bank of Boston, 144 N.E. 443, 249 Mass. 440.

33. S.C.—Citizens & Southern Nat. Bank of South Carolina v. Conner, 11 S.E.2d 271, 195 S.C. 203, 131 A.L.R. 748.

34. S.C.—Citizens & Southern Nat. Bank of South Carolina v. Conner, supra.

35. Ind.—Farmers' Loan & Trust

Foreign corporations. The right of foreign corporations to act as executors of domestic estates depends on the public policy of the forum as manifested in its legislative enactments. Where such policy permits the designation of such a corporation, and testator has nominated one as his executor, it is erroneous to refuse it appointment on the ground of nonresidence,[36] and where the statutes broadly authorize a trust company incorporated under the laws of the forum to be an executor and provide that a foreign corporation whose articles empower it to act as executor shall on qualification in the forum enjoy the same privileges as a domestic corporation, a foreign corporation nominated by a domestic testator may act as executor of his will.[37] On the other hand, a foreign corporation may not qualify as executor of a domestic will where it is expressly or by necessary implication prohibited from doing so by the statutes of the forum.[38] Where the statutes of the forum permit foreign corporations to transact only such business as may be transacted by domestic corporations organized under the general corporation law, and where domestic corporations organized under such law are not permitted to act as executors, the courts will not permit a foreign corporation to qualify as executor even though it was so designated by the testator and is by the laws of its creation empowered to act as executor.[39]

§ 29. Acceptance or Renunciation

a. In general
b. Time and manner of acceptance or renunciation
c. Effect of renunciation
d. Retraction of renunciation

a. In General

A testamentary nominee is ordinarily free to accept or renounce an executorship, but it has been held that he may not renounce for a consideration.

Renunciation, as it has been defined with reference to the executor of a will, is an act whereby a person named in a will as executor declines to take on himself the burden of that office.[40] A person nominated as an executor cannot be compelled to act as such,[41] but the office may be accepted or refused at discretion,[42] and acceptance of the office is essential to constitute one nominated by testator, executor of his will.[43] If the nominee does accept the executorship he should carry out the trust in accordance with law.[44] An executor has, however, no right to the property of the testator unless he accepts the executorship.[45] The right of renunciation is available only in the tribunal of the testator's domicile, and after the executor has qualified as such in that tribunal a renunciation in an ancillary jurisdiction is void.[46] While it has been said that one should either accept entirely or not at all,[47] it has also been held that the nominated executor may impose conditions on his acceptance,[48] and that an executor may accept the office free of illegal conditions sought to be imposed by the testator.[49]

Renunciation for consideration. It has been considered that a renunciation of executorship,[50] or an agreement to renounce[51] in consideration of some benefit to the person named as executor, is

Co. of Columbia City v. Security Trust Co. of Indianapolis, 138 N.E. 97, 79 Ind.App. 537.

36. Ariz.—In re Lawrence's Estate, 85 P.2d 45, 53 Ariz. 1.

37. Ariz.—In re Lawrence's Estate, supra.

38. N.Y.—Matter of Avery, 92 N.Y.S. 974, 45 Misc. 529.

Trust company organized under federal law is not eligible to accept a testamentary nomination as executor under statutes forbidding any corporation to be so nominated unless subject to supervision of the state banking department, where such corporation was not so subject, and this was true although the will was executed prior to the enactment of such statute, where the testator died after its enactment.—In re Trust Companies Organized under Federal Law, 3 Pa.Dist. & Co. 431.

39. Conn.—Farmers' L. & T. Co. v. Smith, 51 A. 609, 74 Conn. 625.
14a C.J. p 1327 note 48.

40. N.J.—In re Maxwell, 3 N.J.Eq. 611, 614.

41. N.Y.—In re Chapin's Will, 3 N.Y.S.2d 932, 167 Misc. 388.
S.C.—Beacham v. Ross, 2 S.E.2d 690, 190 S.C. 219.
23 C.J. p 1028 note 12.

Refusal for cause
Representative of estate is not required to accept office as such if office is encumbered with personal liability to action for libel appearing on face of will.—In re Payne's Estate, 290 N.Y.S. 407, 160 Misc. 224.

42. Mo.—State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas.1918D 454.
23 C.J. p 1028 note 13.

43. N.J.—Donnelly v. Slaughter, 168 A. 762, 114 N.J.Eq. 302, affirmed 174 A. 507, 116 N.J.Eq. 542.

44. S.C.—Beacham v. Ross, 2 S.E.2d 690, 190 S.C. 219.

45. Ind.—Calloway v. Doe, 1 Blackf. 372.

46. Mo.—State v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas.1918D 454.
Pa.—Ross v. Barclay, 18 Pa. 179, 55 Am.D. 616.

47. Mo.—State v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas.1918D 454.
Pa.—Ross v. Barclay, 18 Pa. 179, 55 Am.D. 616.
23 C.J. p 1028 note 14.

48. N.Y.—In re Chapin's Will, 3 N.Y.S.2d 932, 167 Misc. 388.

49. Pa.—In re Schwalbe's Estate, 26 Pa.Dist. & Co. 131.

50. N.Y.—Staunton v. Parker, 19 Hun 55.
23 C.J. p 1028 note 19.

51. Mont.—In re Cummings' Estate, 298 P. 350, 352, 89 Mont. 405, citing **Corpus Juris.**
23 C.J. p 1028 note 20.

Invalidity of entire contract
Where contract in which party renounced executorship contained single consideration, and therefore was not severable, illegality of

void as against public policy and unenforceable; but, on the other hand, a renunciation in consideration of a share of the commissions from a coexecutor has been upheld as legal.[52]

b. Time and Manner of Acceptance or Renunciation

One should accept an executorship within a reasonable time, but may renounce at any time prior to acceptance. As a rule neither acceptance nor renunciation need be made in any set or formal manner, but may be implied from circumstances or acts in pais, although it has been held that a renunciation should be formal or of record.

One designated by will as executor is entitled to a reasonable time within which to accept, and where he does so without undue delay will not be deemed to have waived his rights.[53] The right of an executor to renounce is unlimited only so long as he has not proved the will, or done any act as executor, or otherwise accepted the office,[54] but the court may permit him to renounce after acceptance, although he has no longer an absolute right to do so.[55]

Although there may be a formal acceptance or renunciation in writing of the office of executor,[56] and, in case of renunciation, a formal act is sometimes required under statute,[57] the more general view is that an acceptance or renunciation may be by matter in pais,[58] and no formal or particular act of the person named as executor is necessary.[59]

What constitutes acceptance. Any acts of the executor with relation to his decedent's estate showing his intention to assume the trust confided to him may evidence an election to take the office.[60] An intention to accept is sufficiently evidenced by proving the will,[61] taking out letters testamentary,[62] taking the oath of office as executor,[63] and giving bond,[64] and where the executor intermeddles with the estate he loses his right to renounce, and may be compelled to take up probate;[65] but mere inaction or delay, unaccompanied by intermeddling, cannot amount to an acceptance,[66] neglect affirmatively to renounce appointment as executor does not forestall a subsequent renunciation if meanwhile the nominee has not acted in such a way as to indicate his acceptance of the office,[67] and one named as ex-

agreement to renounce executorship rendered entire contract void.—In re Cummings' Estate, 298 P. 350, 89 Mont. 405.

52. Md.—Ohlendorf v. Kanne, 8 A. 351, 66 Md. 495.

53. Ill.—See In re McClary's Will, 32 N.E.2d 316, 308 Ill.App. 668.
Okl.—Secrest v. Secrest, 294 P. 91, 146 Okl. 235.
Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.

Good cause for delay, as where the nominee is in excusable ignorance of his designation and proceeds with due dispatch after learning thereof, precludes waiver of rights and warrants appointment.—Secrest v. Secrest, 294 P. 91, 146 Okl. 235.

Delay until contest showed necessity for probate

Where testator's property, except fifty dollars in bank, was transferred by him to his wife after execution of his will and before his death, and the widow after the death did not seek to probate the will until forced to do so by subsequent conduct of contestant in bringing action to set aside testator's deed to his wife, by failing to file the will for probate within thirty days after testator's death the court in its discretion was justified in holding that his widow did not forfeit her right to letters testamentary under code provisions and had not renounced her right to such letters.—In re Vernon's Estate, 187 P. 11, 182 Cal. 91.

54. Mass.—Sears v. Dillingham, 12 Mass. 358.
23 C.J. p 1028 note 17.

55. N.C.—Sawyer v. Dozier, 27 N.C. 97—Mitchell v. Adams, 23 N.C. 298.
Pa.—Malone's Estate, 9 Pa.Dist. 115.

56. Mo.—State v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas.1918D 454.
N.Y.—In re Cornell, 41 N.Y.S. 255, 17 Misc. 468.

57. N.Y.—Staunton v. Parker, 19 Hun 55.
23 C.J. p 1028 note 23.

58. Mo.—State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.
N.J.—Donnelly v. Slaughter, 168 A. 762, 763, 114 N.J.Eq. 302, quoting **Corpus Juris**, and affirmed 174 A. 507, 116 N.J.Eq. 542.
23 C.J. p 1028 note 24.

59. Va.—Thornton v. Winston, 4 Leigh 152, 31 Va. 152.

60. N.J.—Donnelly v. Slaughter, 168 A. 762, 763, 114 N.J.Eq. 302, quoting **Corpus Juris**, and affirmed 174 A. 507, 116 N.J.Eq. 542.
23 C.J. p 1029 note 26.

61. Md.—Decker v. Fahrenholtz, 68 A. 1048, 72 A. 339, 107 Md. 515.
23 C.J. p 1029 note 27.

62. Md.—Hanson v. Worthington, 12 Md. 418.
N.C.—Worth v. McAden, 21 N.C. 199.

63. N.Y.—Seaman v. Jamison, 131 N.Y.S. 155, 146 App.Div. 428—Oakeshott v. Smith, 93 N.Y.S. 659, 104 App.Div. 384, affirmed 78 N.E. 1108, 185 N.Y. 583.
Pa.—Bowman's Appeal, 62 Pa. 166.

64. Mass.—Sears v. Dillingham, 12 Mass. 358.

65. Md.—Decker v. Fahrenholtz, 68 A. 1048, 72 A. 339, 107 Md. 515.
23 C.J. p 1029 note 34.

66. N.J.—Donnelly v. Slaughter, 168 A. 762, 114 N.J.Eq. 302, affirmed 174 A. 507, 116 N.J.Eq. 542.
Pa.—In re Ralston, 28 A. 139, 158 Pa. 645.
Wis.—In re Howey's Estate, 256 N.W. 620, 216 Wis. 94.

Estoppel not shown

That bank nominated as executor of estate immediately prior to bank holiday tendered resignation about four months later when bank was closed permanently, did not estop bank from denying it had ever acted as executor or accepted appointment.—In re Howey's Estate, supra.

67. Wis.—In re Howey's Estate, supra.

Determination as to acceptance by bank closed after nomination

(1) In determining whether bank which was nominated executor immediately prior to national bank holiday accepted executorship, it would be presumed that bank did not act in way which would be violation of spirit of emergency rules under which it had been placed by proclamation of president, and in way which would act as detriment to its creditors, and subsequently appointed administrator had burden of proving by concrete evidence acceptance of executorship by bank.—In re Howey's Estate, supra.

(2) Evidence warranted finding that bank which failed to reopen aft-

ecutrix of her husband's will, who did not qualify as executrix or presume to act as such, cannot be held to have accepted the office merely by being made the grantee of land for which her deceased husband held a bond for a deed, where no estate funds were used to purchase it.[68] One who is appointed both executor and trustee under a will does not by accepting the trust accept also the executorship.[69]

What constitutes renunciation. Except as the rule may be altered by statutes to the contrary, no particular form of renunciation is required,[70] and without an express declaration to that effect one's renunciation may be implied from circumstances,[71] and on such a showing the court may commit the trust to others, as discussed in subdivision c of this section infra. Renunciation may be implied from inexcusable delay in offering the will for probate,[72] or in seeking or qualifying for the office of executor,[73] or from assumption of a position inconsistent with that of an executor under the will,[74] as where the nominee qualifies as administrator with the will annexed instead of as executor,[75] or takes a position antagonistic to rights conferred by the will.[76] Acting as administrator under due appointment of the court is not to be deemed a renunciation of the executorship under a will, should such a will be afterward proved;[77] and it has been held that filing a caveat or otherwise opposing the probate of a will is not equivalent to a renunciation,[78] although there is authority for the contrary view.[79] The election of a testator's widow to take under statute instead of under the will does not preclude her from acting as executrix under the will.[80]

Record of renunciation. In some jurisdictions it has been required that a renunciation should appear of record.[81]

c. Effect of Renunciation

Renunciation of a sole executorship vacates the office and permits appointment of an administrater with the will annexed, and following renunciation by one of two or more executors ordinarily the other or others may accept and qualify.

Renunciation has been said to effect a disclaimer of the title and office of executorship, including all its burdens, rights and powers.[82] In case of renunciation by a sole executor, or all of several executors, the administration is left vacant,[83] and letters of administration with the will annexed may be issued to the renouncing executor or to others, as discussed infra § 1031. In case one of several executors renounces, letters testamentary are properly issued to the other executor,[84] but the common-law rule is that under such circumstances the executor who renounced does not finally lose his right to letters testamentary, but may secure such letters either jointly with the other executors, or in case of a vacancy, as where the acting executors died, resigned, or are removed, at any time before letters of administration with the will annexed have been issued,[85] although it has been held that, where the probate court has issued letters testamentary to one of two executors named in the will, his power to appoint is exhausted and a subsequent petition by the declining executor cannot be entertained.[86]

d. Retraction of Renunciation

Ordinarily one who renounces an executorship conferred by the will may retract his renunciation at any time before issuance of letters of administration, and retraction may also be permitted after qualification of another who subsequently dies, resigns, or is removed.

er banking holiday and which was appointed executor did not accept executorship, so that funds of estate on deposit in bank when appointment was made did not become assets in hands of bank which must be accounted for to subsequently appointed administrator.—In re Howey's Estate, supra.

68. Ill.—Gall v. Stoll, 102 N.E. 225, 259 Ill. 174.
23 C.J. p 1029 note 33.

69. N.Y.—Cocks v. Barlow, 5 Redf. Surr. 406.

70. Mo.—State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.
Pa.—Commonwealth v. Mateer, 16 Serg. & R. 416.
23 C.J. p 1029 note 36.

71. Conn.—Ayres v. Weed, 16 Conn. 291.
23 C.J. p 1029 notes 37, 38.

72. Cal.—In re Alfrey's Estate, 83 P.2d 291, 12 Cal.2d 255.

73. Ind.—Abbott v. Appleton, 159 N. E. 167, 86 Ind.App. 607.
Iowa.—In re Van Vleck, 98 N.W. 557, 123 Iowa 89.
23 C.J. p 1029 note 38 [d].

74. Cal.—In re Phillips' Estate, 261 P. 709, 202 Cal. 490.
Refusal to sign petition for probate Where contestant named as executor refused to sign petition for probate of will, he renounced right to serve as executor.—In re Phillips' Estate, supra.

75. Ky.—Briscoe v. Wickliffe, 6 Dana 157.

76. Iowa.—In re Van Vleck, 98 N.W. 557, 123 Iowa 89.

77. Ky.—Taylor v. Tibbatts, 13 B. Mon. 177.

78. Ga.—Gaither v. Gaither, 23 Ga. 521.
N.J.—In re Maxwell, 3 N.J.Eq. 611.

79. R.I.—Briggs v. Westerly Prob. Ct., 50 A. 335, 23 R.I. 125.
23 C.J. p 1030 note 42.

80. Kan.—Tomb v. Bardo, 114 P.2d 320, 153 Kan. 766.

81. Ark.—Newton v. Cocke, 10 Ark. 169.
23 C.J. p 1030 note 43.

82. N.J.—In re Horvath's Estate, 22 A.2d 194, 19 N.J.Misc. 608.

83. Va.—Thornton v. Winston, 4 Leigh 152, 31 Va. 152.
Renunciation as affecting testamentary power to sell real property see infra § 279.

84. N.Y.—Matter of Stevenson, 3 Paige 420.
Pa.—Miller v. Meetch, 8 Pa. 417.
R.I.—Briggs v. Westerly Prob. Ct., 50 A. 335, 23 R.I. 125.

85. Ala.—Pruett v. Pruett, 32 So. 638, 131 Ala. 578.
23 C.J. p 1030 notes 48, 49.

86. R.I.—Briggs v. Westerly Prob. Ct., 50 A. 335, 23 R.I. 125.

As a general rule an executor nominated in the will who has renounced may retract his renunciation and assume the office at any time before final issuance of letters to others,[87] and where a coexecutor has renounced and the court has erroneously refused to issue letters to the other coexecutor and appointed administrators with the will annexed, it has been held that the renouncing coexecutor may thereafter retract,[88] although it has been considered by some authorities that the acceptance of a retraction rests in the discretion of the probate court.[89] Where the designated executor has been excused from the office on his own request and due renunciation, and another has been appointed and qualified instead, the election once made is for the time being irrevocable.[90] It has been stated that under such circumstances a fresh opportunity to accept the office is afforded the declining executor, whenever a vacancy occurs, especially should a new state of things arise, as in case of the death, resignation, or removal of the person appointed in his stead,[91] although this has been denied.[92]

B. ADMINISTRATORS

§ 30. Intestacy Requisite to Appointment

The grant of ordinary administration on the estate of a decedent and the appointment of an administrator necessarily involves and is based on a finding of intestacy, the administrator deriving his power from the statutes and his appointment by the court.

While there may of course be a grant of administration with the will annexed, and the law also provides for various kinds of special administration which recognize the existence or possible existence of a valid will, it is a necessary prerequisite to a grant of ordinary administration on the estate of a decedent that he should have died intestate.[93] A grant of such administration necessarily involves, and is based on, a finding or adjudication of intestacy,[94] but such a determination does not preclude any party in interest from subsequently instituting proceedings to establish a will.[95] Moreover, the mere fact that there was a will in existence at the time of appointment of an administrator does not necessarily deprive the court of jurisdiction to make the appointment,[96] or render the appointment void,[97] and the subsequent probate of a will does not invalidate the official acts of the administrator or destroy the jurisdiction of the court up to the time of probate.[98] A grant of administration as in case of intestacy, where the decedent left a valid will which was not known of at the time, but is afterward produced and probated, is voidable only and not void;[99] and the court may grant letters of administration although a purported will has been placed on file, where probate thereof

87. Ky.—Nunn v. Hamilton, 26 S.W.2d 526, 233 Ky. 663.
Pa.—In re McNichol's Estate, 127 A. 461, 282 Pa. 187.
23 C.J. p 1030 note 56.

88. Ky.—Nunn v. Hamilton, 26 S.W.2d 526, 233 Ky. 663.

89. N.Y.—Matter of Baldwin, 50 N.Y.S. 872, 27 App.Div. 506, appeal dismissed 53 N.E. 218, 158 N.Y. 713—In re Cornell, 41 N.Y.S. 255, 17 Misc. 468.
23 C.J. p 1031 note 57.

90. R.I.—Briggs v. Westerly Prob. Ct., 50 A. 335, 23 R.I. 125.
23 C.J. p 1031 note 58.

91. N.Y.—Judson v. Gibbons, 5 Wend. 224.
Pa.—Gallagher v. Gallagher, 6 Watts 473.
23 C.J. p 1031 note 59.

92. Va.—Thornton v. Winston, 4 Leigh 152, 31 Va. 152.

93. Cal.—In re Danford's Estate, 238 P. 76, 196 Cal. 339.
Ga.—Walden v. Mahnks, 174 S.E. 538, 542, 178 Ga. 825, citing **Corpus Juris.**
Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 223 Iowa 91, quoting **Corpus Juris.**
Ky.—Hite's Adm'r v. Gibson, 65 S.W. 2d 731, 251 Ky. 651.
N.M.—Baca v. Buel, 210 P. 571, 28 N.M. 225.
23 C.J. p 1031 notes 62–64.

Presumption

(1) Where letters of administration were issued the day after deceased's death, the presumption was that deceased's dying intestate was notorious or was proved.—Kaiser v. Ebersberger, Md., 19 A.2d 701, 133 A.L.R. 1479.

(2) Notorious intestacy as affecting time of application see infra § 52.

Validity of will

The statute providing that letters of administration may not be granted where there is a will refers to a valid will.—In re Friedman's Estate, 299 N.Y.S. 103, 164 Misc. 440.

Where deceased dies testate, the surrogate may not issue letters of administration in the absence of proof that will is invalid.—In re Wedemeyer's Estate, 300 N.Y.S. 1201, 253 App.Div. 766.

94. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 223 Iowa 91, quoting **Corpus Juris.**
Kan.—Weichold v. Day, 61 P.2d 1328, 1332, 144 Kan. 432, quoting **Corpus Juris.**
23 C.J. p 1031 note 65.

95. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 223 Iowa 91, quoting **Corpus Juris.**
Kan.—Weichold v. Day, 61 P.2d 1328, 1332, 144 Kan. 432, quoting **Corpus Juris.**
N.Y.—Bulkley v. Redmond, 2 Bradf. Surr. 281.

96. Iowa.—Murphy v. Hahn, 223 N.W. 756, 208 Iowa 698.

97. Alaska.—In re Person's Estate, 7 Alaska 489.

98. Wis.—Simpson v. Cornish, 218 N.W. 193, 196 Wis. 125.

99. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 223 Iowa 91, quoting **Corpus Juris.**
23 C.J. p 1032 note 67.

Where existence of a valid will is not proved at time of application for letters of administration and no document purporting to be an original will is in court, the probate court has jurisdiction to appoint an administrator, even though it may later have to revoke the letters of administration should the existence of a valid will subsequently be established.—Di Blasi v. Di Blasi, 159 A. 477, 114 Conn. 529.

has been denied;[1] but general letters of administration granted during the pendency of a contest respecting the probate of an alleged will are utterly null and void,[2] and cannot be supported as a grant of administration pendente lite;[3] and letters of administration issued after a will has been admitted to probate and an executor qualified, and while the action of the court with respect to the will remains unrevoked and unreversed, would seem to be necessarily void.[4]

Other administrators. The appointment of administrators de bonis non is discussed infra §§ 1016–1022, that of administrators with the will annexed in §§ 1031–1033, and that of temporary or special administrators infra §§ 1035–1039.

Source of authority. The source of an administrator's power should be sought in the statutes[5] and he derives his authority primarily from his appointment by the court,[6] in contradistinction to an executor who, as shown supra § 22, derives his powers primarily from the will which designates him.

§ 31. Persons Entitled to Appointment

Since the rights of particular persons to administer on the estates of decedents are not inherent, letters of administration must be granted to the persons entitled and in the order prescribed by statute.

The right to letters of administration is statutory,[7] not inherent,[8] and is a valuable right,[9] which may be given or withheld in the wisdom of the legislature.[10] Since the rights of particular persons to administer on the estates of decedents are entirely regulated by statute,[11] letters must be granted in the order and under the rules thereby prescribed;[12] where the person first entitled waives his right, administration should go to the next in statutory order of preference,[13] and the right to appointment as administrator cannot be delegated to another to the exclusion of the person on whom the statute casts such right.[14]

The status of the parties and the conditions existing at the time of the application for letters control the right thereto rather than the status and conditions prevailing at the time of intestate's death.[15] Questions as to who is most suitable for appointment arise only when there is a contest by rival claimants,[16] and it has been held that statutory preferences apply only where there is a con-

1. Ga.—Scarborough v. Long, 197 S. E. 796, 186 Ga. 412, certiorari denied 59 S.Ct. 107, 305 U.S. 637, 83 L.Ed. 410—Smith v. Scarborough, 185 S.E. 105, 182 Ga. 157.

2. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 117, 223 Iowa 91, quoting **Corpus Juris.**
23 C.J. p 1032 note 68.

Not merely voidable
Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 223 Iowa 91.

3. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 117, 223 Iowa 91, quoting **Corpus Juris.**
N.C.—Slade v. Washburn, 25 N.C. 557.

4. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 116, 117, 223 Iowa 91, quoting **Corpus Juris.**
23 C.J. p 1032 note 70.

Executor appointed by another court
Appointment of administrator by superior court of county in which testator died after appointment of executor of his estate by superior court of county in which he resided was void, and decree against such administrator, reforming deeds from testator to plaintiff, had no legal effect on testator's heirs, from whom defendants, in plaintiff's subsequent action to quiet title to realty covered by reformed deeds, claimed title thereto, and did not perfect any record or color of title in plaintiff.—Jordan v. Clausen, 56 P.2d 240, 13 Cal. App.2d 16.

5. Utah.—In re Harris' Estate, 105 P.2d 461, 99 Utah 464, certiorari granted Harris v. Zion's Sav. Bank & Trust Co., 61 S.Ct. 611, 312 U.S. 670, 85 L.Ed. 1112, and certiorari dismissed 61 S.Ct. 840, 313 U.S. 541, 85 L.Ed. 1509.

6. Mo.—In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.
R.I.—Glidden v. Rines, 128 A. 4, 124 Me. 286.

7. Cal.—In re Herriott's Estate, 28 P.2d 355, 219 Cal. 529.
Ill.—In re Barker's Estate, 214 Ill. App. 275.

8. Wis.—Welsh v. Manwaring, 98 N. W. 214, 120 Wis. 377.

9. Md.—Phillips v. Clark, 6 A.2d 220, 176 Md. 578.

Deprivation without cause
Right to be appointed or to designate person to be appointed as administrator is valuable one, of which party legally entitled thereto cannot be deprived without cause.—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 338—Hood v. Higgins' Curator, 9 S.W.2d 1078, 225 Ky. 718.

10. Wis.—Welsh v. Manwaring, 98 N.W. 214, 120 Wis. 377.

11. Mo.—State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo. App. 902.
N.D.—Borner v. Larson, 293 N.W. 836, 70 N.D. 313.

12. Ariz.—In re Graham's Estate, 231 P. 918, 919, 27 Ariz. 167, citing **Corpus Juris.**
N.D.—Borner v. Larson, 293 N.W. 836, 70 N.D. 313.
23 C.J. p 1032 note 72.

Consent of person first entitled
(1) Under Code art 93 § 15, the court cannot grant administration of an intestate's estate to two or more persons without the consent of the person first entitled.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167.

(2) Right to administer on estate is valuable one that cannot be denied to person given priority without his consent.—State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo. App. 902.

"Grantee of interest"
Under statute providing for administration of intestate's estate by widow, husband, or next of kin, or "grantee of the interest" of one or more of them, "grantee of the interest" does not include one who receives his interest from a deceased person by operation of law, such as sole heir at law of intestate's deceased widow.—In re Halsted's Estate, 276 N.W. 438, 282 Mich. 253, 114 A.L.R. 272.

13. Ky.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.

14. Ala.—Bivin v. Millsap, 189 So. 770, 238 Ala. 136.

15. Cal.—In re Herriott's Estate, 28 P.2d 355, 219 Cal. 529.
Mich.—In re Halsted's Estate, 276 N. W. 438, 282 Mich. 253, 114 A.L.R. 272.
23 C.J. p 1032 note 73.

16. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.

test as to the appointment.[17]

Under a statute providing that, if there be no next of kin or creditor competent and willing to take administration, the same may be committed to such other person as the court may think proper, where surviving next of kin fail for an unreasonable time to apply for appointment they may be deemed "unwilling" to act and the court may appoint the administrator of the estate of a relative of the intestate as administrator of the intestate's estate.[18]

A grant to the wrong person, although erroneous, is not void.[19]

Interest in estate. The policy of the law is to commit the administration of a decedent's estate to those having a beneficial interest therein,[20] persons interested being as a general rule preferred,[21] and statutes conferring priority of right to administration on certain classes have for their purpose the effectuation of such policy.[22] Ordinarily one not entitled to share in the estate is not entitled to letters of administration,[23] and interested parties are the only ones who can demand an administration of the estate.[24] On the other hand, if it is necessary or provident to appoint an administrator, the fact that the person selected is not directly interested in the estate will not per se disqualify him;[25] the court may exercise a discretion in the matter,[26] and under special circumstances it may be both proper and advisable for the court to appoint one because he is disinterested and therefore impartial.[27] An "interested applicant" under statutory provisions providing for issuance of letters to any "interested applicant," is not entitled to receive them until after expiration of the statutory period given to those with prior right to apply for administration.[28] Where the statute provides that if neither next of kin nor creditor apply for administration within a designated period, anyone in whose favor a cause of action exists, which cannot be maintained without appointment of an administrator, may apply for and obtain the appointment, the administrator of the estate of a relative of intestate may, on the ground of the interest of such relative's estate in the estate of the intestate, be considered as having a cause of action warranting his appointment as administrator of the intestate's estate.[29]

Construction of statutes. Statutes relating to appointment of administrators and preferences accorded in making such appointments should be construed together so as to give effect to each provi-

17. La.—Succession of Hair, App., 195 So. 43.

18. Wis.—In re Reilly's Estate, 243 N.W. 506, 208 Wis. 557.

19. Ky.—Buckner v. Louisville & N. R. Co., 87 S.W. 777, 120 Ky. 600, 27 Ky.L. 1009.
23 C.J. p 1033 note 74.

20. Ind.—Abbott v. Appleton, 159 N. E. 167, 86 Ind.App. 607.
Beneficial interest in estate as affecting right to administer as next of kin see infra § 36.
Right of stranger to administration see infra § 42.
"Historically, the right of administration was placed on the ground of interest in the estate . . . administration should only be granted to those having an interest in the estate."—In re Friese's Estate, 176 A. 225, 227, 317 Pa. 86.
One not named in statute may be appointed administrator although there be survivor therein named, if appointee has interests to be protected superior to survivor's interests.—In re Reilly's Estate, 243 N.W. 506, 208 Wis. 557.
Who are directly interested
Widow, heirs, and distributees or their successors in interest and creditors are only persons directly interested in estate, as respects administration.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.

21. N.J.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.
Pa.—See In re Henry's Estate, 51 York Leg.Rec. 185.
Wis.—In re Bartz' Estate, 242 N.W. 171, 207 Wis. 639.

22. Utah.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.
Object of conservation of estate
Statutes providing that surviving spouse, next of kin, and largest resident creditor shall be preferred in the order indicated, and that if none applies within the reserved period any other competent resident may be appointed administrator, rest on the theory that a person with an interest in the estate of the decedent will be more likely to conserve the rights of all concerned than would a person who is an utter stranger.—Union Savings & Trust Co. v. Eddingfield, 134 N.E. 497, 78 Ind.App. 286.

23. N.Y.—In re Bunimowitz's Estate, 219 N.Y.S. 763, 128 Misc. 518.
Next friend of decedent
Court of ordinary is without jurisdiction to appoint next friend of decedent, who is without interest in the estate, administrator of estate. —Stanley v. Metts, 149 S.E. 786, 169 Ga. 101.

24. U.S.—Fairchild v. Lohman, D.C. Mo., 13 F.2d 252.

25. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.

26. Mo.—State ex rel. Smith v. Hull, 152 S.W.2d 106, transferred, see, App., 147 S.W.2d 214.
Nonmandatory preference
Although statute requires the probate court, in appointing an administrator to continue administration, to give preferential consideration to those entitled to distribution, it is not compelled to appoint either distributee but must exercise discretion, which cannot be controlled by those entitled to preference.—State ex rel. Smith v. Hull, supra.

27. Iowa.—In re Tracy's Estate, 243 N.W. 309, 214 Iowa 881.
Wis.—In re Edward's Estate, 289 N. W. 605, 234 Wis. 40.
Nonresident and incompetent heirs
Where decedent's sole heirs were a sister residing in foreign country and an incompetent brother, and sister sought appointment of herself or son as administrator, while incompetent brother's guardian sought appointment of himself, court properly appointed a disinterested, competent third person with sister's consent.—In re Edwards' Estate, supra.

28. Utah.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.

29. Wis.—In re Reilly's Estate, 243 N.W. 506, 208 Wis. 557.

sion so far as feasible.[30] Statutes regulating appointments of administrators must be strictly followed,[31] and the court has only such discretion in the matter as may be granted by the statute.[32]

What law governs. The law of the place where the estate is to be administered, and not the law of the domicile of the decedent, governs in determining who is entitled to administer.[33] With respect to time, the law in force at the time when the application is made or when letters are granted governs, rather than the law in force at the time of decedent's death.[34]

Partnership estate. Where the surviving partner who, as shown in the C.J.S. title Partnership § 286, also 47 C.J. p 1062 note 93–p 1063 note 21, may become executor or administrator of his deceased partner waives appointment as administrator of the partnership estate, the administration of the assets and property of the partnership devolves on the general administrator of the deceased partner.[35]

§ 32. —— Effect of Priority of Application

Priority of application is not ordinarily a ground for preference except as among creditors, since the nearness of relationship governs preference as among kindred.

As among kindred, the scheme of preferences is based on nearness of kin to the intestate, and hence priority of application has been considered not a ground for preference, except among creditors,[36] although there is authority to the effect that the person first seeking the appointment has some claim to precedence.[37]

§ 33. —— Necessity for Timely Application

Ordinarily one loses a preferential right to appointment as administrator by failing to apply within a specified or reasonable time, although the court may in its discretion thereafter appoint such a person if not thereby violating the rights of others.

In some jurisdictions the right to priority is conditioned on an application for appointment being made within a certain time after the intestate's death, and if the application is not made within the specified time the court may appoint one of the next class,[38] and even where no time is fixed by statute it has been considered that the application must be made within a reasonable time[39] and one failing to make timely application for appointment thereby waives his prior right.[40] Where there is no resident relative entitled to letters, the court may appoint an administrator on motion of a creditor without waiting the time prescribed by statute in case there is a resident relative so entitled,[41] and even where there are next of kin entitled to administration the court may, it has been held, in its discretion appoint another without waiting where the security of the estate and the rights of creditors require immediate action;[42] but administration cannot in general be granted to a creditor or

30. Mo.—In re Wilson's Estate, App., 16 S.W.2d 737, transferred, see 8 S.W.2d 973, 320 Mo. 975.

31. Mo.—State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo. App. 902.

32. Mo.—State ex rel. Fansher v. Guinotte, supra.

Discretion of court as to appointments generally see infra § 34.

33. N.Y.—Public Administrator v. Hughes, 1 Bradf.Surr. 125.

34. Cal.—In re McLaughlin, 37 P. 410, 103 Cal. 429.

Md.—Griffith v. Coleman, 61 Md. 250.

Mont.—In re Connor, 41 P. 271, 16 Mont. 465.

35. Or.—Anderson v. Johnson, 45 P. 2d 168, 150 Or. 386.

36. N.Y.—In re Hawley, 76 N.Y.S. 461, 37 Misc. 667.

Priority among creditors see infra § 41.

37. La.—Baraud's Succession, 21 La. Ann. 666.

38. Ga.—Alabama Great Southern R. Co. v. Hill, 76 S.E. 1001, 139 Ga. 224, 43 L.R.A.,N.S., 236, Ann.Cas. 1914D 996.

Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775, citing **Corpus Juris.**

Neb.—In re Sheerer's Estate, 289 N. W. 529, 137 Neb. 374.

N.M.—In re Miller's Estate, 38 P. 2d 1116, 39 N.M. 40.

Utah.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606.

23 C.J. p 1033 note 78.

Application to court of different state as not a compliance

Widow who within forty days after decedent's death applied to probate court in Kentucky for appointment of administrator did not thereby comply with Washington statute which limits widow's preference right to apply for letters of administration to forty-day period, and widow lost her statutory right of nomination where no one applied for letters of administration in Washington during statutory forty-day period. —In re Mason's Estate, 66 P.2d 310, 189 Wash. 641.

Intestacy as prerequisite to appointment see supra § 30.

Time of application generally see infra § 52.

39. Tenn.—Rodes v. Boyers, 61 S.W. 776, 106 Tenn. 434.

23 C.J. p 1033 note 79.

40. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.

41. Ky.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584.

42. Md.—Kaiser v. Ebersberger, 19 A.2d 701, 133 A.L.R. 1479.

Allowance of time for court's discretion

The matter of the allowance of time to apply for letters of administration by one who is not a next of kin when none of the next of kin has applied for letters of administration must be left to the judgment and discretion of the orphans' court.—Kaiser v. Ebersberger, supra.

Appointment of brother-in-law creditor upheld

Where deceased had no next of kin living within the state, and her brother-in-law paid her funeral expenses, and was probably the only creditor which she had, and before deceased's death she had asked him to look after her affairs, the application of the brother-in-law for letters of administration the day after deceased's death did not constitute "fraud" on her next of kin who lived outside the state, and the granting of the letters of administration was regular, although it was open to correction if necessary on petition by next of kin.—Kaiser v. Ebersberger, supra.

other third person until after the lapse of the statute time allowed for the application of husband, widow, next of kin, or others entitled to priority and suitable, or except upon their failure to pursue their respective rights notwithstanding a due citation;[43] and the appointment of one who is not next of kin to the deceased within the time allowed by law for the next of kin to apply for administration is irregular.[44] It has been held that failure to apply for appointment within the proper time does not forfeit the right to administer,[45] and that, where no one else has been appointed in the interim, the person entitled to preference may secure appointment even after expiration of the time limited by statute.[46] In other words, after expiration of the statutory period the possessor of the preference, while still qualified to act, has no greater right than anyone else to appointment as administrator.[47]

§ 34. —— Discretion of Court

As a general rule, statutes regulating the order in which administration may be granted are mandatory and leave the court no discretion except as between members of a particular class.

Statutes regulating the order in which administration may be granted are ordinarily construed as mandatory and as leaving the courts no discretion in the matter,[48] save where there are two or more persons equally entitled under the statute,[49] or where a question arises as to the fitness or qualifications of the person or persons primarily entitled to the appointment.[50]

43. Mo.—Pikey v. Riles, 20 S.W.2d 550, 223 Mo.App. 921.
28 C.J. p 1033 note 80.

Premature appointment of nephew not entitled to share

Under statute thirty days must expire after death before person other than surviving spouse or one entitled to distribution of estate can be appointed administrator, and appointment of intestate's nephew, not entitled to share in estate, as administrator, twelve days after death, was revocable at instance of brother of intestate.—In re Wilson's Estate, App., 16 S.W.2d 737, transferred, see 8 S.W.2d 973, 320 Mo. 975.

44. Wis.—Brunson v. Burnett, 1 Chandl. 136, 2 Pinn. 185.
Appointment as void or voidable see infra § 73.

45. R.I.—In re Randall, 63 A. 806.

46. N.M.—In re Miller's Estate, 38 P.2d 1116, 39 N.M. 40.

47. Utah.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606.

Discretion of court

Where parties interested in estate sought appointment of administrator more than three years after death of intestate, appointment of competent person other than party interested in estate was discretionary.—In re Smith's Estate, supra.

48. Ala.—Marcus v. McKee, 151 So. 456, 227 Ala. 577.
Colo.—In re Webb's Estate, 10 P.2d 947, 90 Colo. 470.
Ga.—Sims v. Horne, App., 15 S.E. 2d 549.
Idaho.—Vaught v. Struble, 120 P.2d 259, 261, citing **Corpus Juris.**
Ind.—State v. Jeffries, 149 N.E. 373, 83 Ind.App. 524.
Ky.—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 338.
Mich.—Grand Trunk Western R. Co. v. Kaplansky, 258 N.W. 423, 428, citing **Corpus Juris.**
Mo.—In re Wilson's Estate, App., 16 S.W.2d 737, transferred, see 8 S.W.2d 973, 320 Mo. 975—Linder v. Burns, App., 243 S.W. 361.
Neb.—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.
Nev.—In re Taylor's Estate, 114 P. 2d 1086, 1088, 135 A.L.R. 580, citing **Corpus Juris.**
N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214—In re Karp's Estate, 298 N.Y.S. 903, 163 Misc. 855—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560—In re Conde's Estate, 259 N.Y.S. 129, 144 Misc. 357—In re Gant's Estate, 254 N.Y.S. 715, 142 Misc. 446—In re Albrecht's Estate, 196 N.Y.S. 765, 119 Misc. 554, affirming 194 N.Y.S. 432, 118 Misc. 737.
N.D.—Borner v. Larson, 293 N.W. 836, 838, 70 N.D. 313, quoting **Corpus Juris.**
Or.—In re Roedler's Estate, 222 P. 301, 302, 110 Or. 147, quoting **Corpus Juris.**
23 C.J. p 1034 note 84.

Not merely directory

Burns St.Annot.1914 § 2742, fixing the order of preference in which administration shall be issued, is mandatory and not merely directory.—Union Savings & Trust Co. v. Eddingfield, 134 N.E. 497, 78 Ind.App. 286.

Where sole distributee, who is qualified, applies to be appointed administrator, county court has no discretion.—Hood v. Higgins' Curator, 9 S.W.2d 1078, 225 Ky. 718.

Insolvency of estate is no reason why one having statutory preference should not be granted letters of administration.—Johnston v. Pierson, 155 So. 695, 229 Ala. 85.

Relative qualifications of applicants

The probate court has no discretion in respect of enforcing the statutory preferential right to administer an estate, and may not weigh the relative qualifications of two applicants where one of them has a statutory preference, and the latter does not lose his right to appointment because the other may be found by the court to be better qualified unless there exists a statutory disqualification barring the possessor of the statutory preference.—Calvert v. Beck, 199 So. 846, 240 Ala. 442—Johnston v. Pierson, 155 So. 695, 229 Ala. 85.

49. Ky.—Hood v. Higgins' Curator, 9 S.W.2d 1078, 225 Ky. 718.
Or.—In re Roedler's Estate, 222 P. 301, 302, 110 Or. 147, quoting **Corpus Juris.**
23 C.J. p 1034 note 85.

Applicants of same class

(1) Under statute successively authorizing spouse, next of kin, creditors, and others to apply for administration, court has discretion as between applicants of same class.—In re Wright's Estate, 230 N.W. 552, 210 Iowa 25.

(2) Matter of selecting administrator within class is within discretion of orphan's court.—Baldwin v. Hopkins, 187 A. 884, 171 Md. 97.

(3) Trial judge has large discretion in selecting administrator as between contesting heirs of age and present in state, and should consider business capacity, experience, property, integrity, and other matters going to make up personal fitness, including applicant's indebtedness to estate.—Succession of Virgets, 162 So. 53, 182 La. 491.

50. Colo.—In re Webb's Estate, 10 P.2d 947, 90 Colo. 470.
Ky.—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 338.
Mont.—State ex rel. McCabe v. District Court of Third Judicial Dist. in and for Deer Lodge County, 76 P.2d 634, 106 Mont. 272—In re Rinio's Estate, 30 P.2d 803, 96 Mont. 344.
Or.—In re Roedler's Estate, 222 P. 301, 302, 110 Or. 147, quoting **Corpus Juris.**
23 C.J. p 1034 note 86.

It has been held that a surrogate has no discretion to ignore the order of priority in appointment of an administrator as prescribed by statute except as may be expressly permitted therein,[51] unless the person having the prior right is incompetent to receive letters for a cause specified by statute;[52] but other authority is to the effect that statutes prescribing the order of priority create no absolute right[53] and are not mandatory,[54] and that a court finding one entitled to a preference to be disqualified on grounds not mentioned by statute may appoint another to act in his place.[55] In jurisdictions where the courts are not bound by mandatory statutes on the subject of preferential right of appointment, or by enumerated causes of disqualification to act, they may appoint another instead of the person ordinarily accorded preference where the latter is found to be in hostility to the estate or to those entitled to benefit from its assets,[56] and, where the statute broadly permits disqualification of a candidate for administrator for incompetence or other causes, the court may refuse letters to a preferred applicant because of incompetency or, in the exercise of a sound discretion, for other cause.[57] Where the statute enumerates the order of priority to be followed, but adds qualifying words such as "unless the court deems it proper to appoint some other person," the legislative enumeration is a strong,[58] but not imperative,[59] direction, and the court may vary the statutory order and appoint another for sound judicial reasons appealing to its wisdom and conscience, provided the interests of all persons concerned will thereby be promoted.[60]

Where there is no one entitled to preference, the appointment of an administrator is committed to the sound discretion of the court,[61] as where the intestate leaves no relatives residing within the state, and no creditor applies for letters,[62] or where all persons having a prior right under statute have renounced or otherwise lost their preferential status.[63] In the selection of an administrator after expiration of the statutory preference the court should use its best judgment and discretion,[64] and if there is no necessity for any administration to conserve the rights of those directly interested in the estate the court will not appoint an administrator at the instance of one whose interest is remote or indirect.[65]

Agent as not within preference. It has been held that the statutory order of preference may not be extended to an agent or other representative except to join a competent person with a competent distributee or to appoint a competent person on the

51. N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

52. Ala.—Calvert v. Beck, 199 So. 846, 240 Ala. 442.
N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App. Div. 609—In re McOwen's Estate, 185 N.Y.S. 907, 114 Misc. 151.

53. Wash.—State v. Superior Court for Thurston County, 255 P. 376, 143 Wash. 358—In re Stotts' Estates, 233 P. 280, 133 Wash. 100.

Discretion of court

The priorities granted by statute in the appointment of administrators cannot be insisted on as a matter of right, but a discretion rests in the court in the making of appointments. —In re Christensen's Estate, 296 N.W. 198, 229 Iowa 1162.

Appointment of person outside family sustained

Court was held not to have abused discretion in appointing as administrator one who had acted as guardian of decedent, where dissension made it advisable to appoint some one outside family.—In re St. Martin's Estate, 27 P.2d 326, 175 Wash. 285.

54. Wash.—In re Stotts' Estates, 233 P. 280, 133 Wash. 100.

55. Wash.—In re Stotts' Estates, supra.

56. Wash.—In re Stotts' Estates, supra.

57. Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

58. Mass.—In re Waverley Trust Co., 167 N.E. 274, 268 Mass. 181.

59. Mass.—In re Waverley Trust Co., supra.

60. Mass.—In re Waverley Trust Co., supra.

In determining suitableness of proposed administrator, court must consider circumstances which would influence him in managing affairs of distributees, and be guided by nominee's personal fitness.—In re Barts' Estate, 242 N.W. 171, 207 Wis. 639.

61. Md.—Schneider v. Hawkins, 16 A.2d 861, 179 Md. 21.
N.Y.—In re Cavendish's Will, 7 N.Y.S.2d 393, 255 App.Div. 854.

Not mere "legal discretion"

Under statute pronouncing priority to be given in appointment of administrators, probate court, in making appointment, where there are no persons entitled to priority, is not exercising a "legal discretion", which is the exercise of a discretion where there are two alternative provisions of law applicable, under either of which the court could proceed.—Shannon v. Hendrixson, Ohio App., 32 N.E.2d 431.

Abuse not shown

Under statute pronouncing priority to be given in appointment of administrators, probate court did not abuse its discretion in appointing maternal grandmother of minor child of deceased, who had custody of child, as administrator, rather than deceased's brother.—Shannon v. Hendrixson, supra.

62. Md.—Schneider v. Hawkins, 16 A.2d 861, 179 Md. 21.

63. Hawaii.—In re Maalo's Estate, 31 Hawaii 97, 101, citing **Corpus Juris.**
23 C.J. p 1035 note 87.

Abuse of discretion not shown

(1) By appointment of qualified person of court's own selection, where petitioner and heirs disagree as to person to be appointed.—In re Maalo's Estate, 31 Hawaii 97.

(2) By appointing competent party which was not interested party three years after death of intestate.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606.

64. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.

65. Ala.—Murphy v. Freeman, supra.

Creditor of a distributee

Ala.—Murphy v. Freeman, supra.

consent of all distributees, provided the latter are themselves all competent to serve.[66]

§ 35. —— Husband or Wife of Intestate

a. In general
b. Husband of intestate
c. Widow of intestate

a. In General

A surviving spouse is ordinarily entitled to preference in respect of appointment as administrator of the estate of the deceased intestate spouse; but the right may be lost by agreement before or after marriage.

Statutes providing that the surviving spouse shall, if entitled to succeed to some part of the estate, be preferred to other applicants for letters of administration have been said to make it mandatory on the court to appoint such a spouse, or his nominee, in preference to anyone else,[67] and under statutes of this character it has been held that a surviving spouse is entitled to preference over a creditor.[68] On the other hand, it has also been said that while the surviving spouse should, other things being equal, be accorded priority under a statute providing for the issuance of letters of administration to such spouse, his right thereto is not absolute.[69]

Agreements between spouses. The right to administration of the estate of a spouse may be either expressly or impliedly renounced by antenuptial[70] or postnuptial[71] agreement, but a mere agreement for alimony in contemplation of a divorce not secured before death is no bar to the right of the surviving spouse to administer the estate of the deceased spouse.[72]

A woman who releases all her interest in her husband's estate by an antenuptial contract is generally held to lose her right to administer,[73] although there is authority to the effect that an antenuptial contract releasing the wife's right in the property of her husband does not bar her right to administer his estate.[74]

A postnuptial contract, such as a separation agreement, which bars a widow's rights to share in her husband's estate ordinarily deprives her of the right to appointment as his administratrix;[75] but a postnuptial contract has been held not to have this effect at common law, because of the incapacity of a married woman to make binding agreements with her husband.[76] The fact that, after a husband and wife had executed a contract embodying a mutual waiver of all rights in each other's estates, they had sexual relations, but without occupying the same habitation as husband and wife, has been held not to entitle the wife to letters of administration on the husband's subsequent death.[77]

b. Husband of Intestate

(1) In general
(2) Validity of marriage and effect of separation or divorce
(3) Right to share in wife's estate
(4) Representative of subsequently deceased husband

(1) In General

Ordinarily a surviving husband is preferred over all others as administrator of his deceased wife's estate, although this rule may be varied by statute or the right may be lost where the husband is for some reason disqualified to act.

The general rule is that, where it becomes necessary or proper to appoint an administrator of the estate of a deceased married woman, her surviving husband is entitled to the appointment in preference to all other persons,[78] if he has not forfeited his

66. N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

67. Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

68. La.—Succession of Kalish, App., 143 So. 524.

69. Pa.—In re Boytor's Estate, 198 A. 484, 130 Pa.Super. 591.

70. Mo.—In re Evans, 93 S.W. 922, 117 Mo.App. 629.
23 C.J. p 1052 note 85.
Agreements to renounce generally see infra § 47 b.

71. Cal.—In re Walker, 146 P. 868, 169 Cal. 400.
23 C.J. p 1052 note 85.

72. Miss.—Kirby v. Kent, 160 So. 569, 172 Miss. 457, 99 A.L.R. 1303.
Widow
Contract between husband and wife in contemplation of divorce, whereby wife released all claims for alimony or property adjustment, held not to have affected rights of wife as widow where divorce was not granted before husband's death, as a mere agreement for alimony in contemplation of divorce is no bar to the right of the surviving spouse, if no divorce has in fact been granted.—Kirby v. Kent, 160 So. 569, 172 Miss. 457, 99 A.L.R. 1303.

73. Cal.—In re Davis, 39 P. 756, 106 Cal. 453.
Md.—Edelen v. Edelen, 11 Md. 415—Maurer v. Naill, 5 Md. 324.
Mich.—In re Sprague, 84 N.W. 293, 125 Mich. 357.
N.Y.—In re Bunimowitz's Estate, 219 N.Y.S. 763, 128 Misc. 518.
Pa.—In re Friese's Estate, 176 A. 225, 317 Pa. 86.
23 C.J. p 1037 note 18.

74. Mo.—State v. Thompson, 187 S. W. 804, 196 Mo.App. 12.

75. Mich.—In re Berner, 187 N.W. 377, 217 Mich. 612.
N.Y.—In re Gilmour's Estate, 260 N. Y.S. 761, 146 Misc. 113.

76. Iowa.—Read v. Howe, 13 Iowa 50.
Md.—Nusz v. Grove, 27 Md. 391.

77. Cal.—In re Martin, 137 P. 2, 166 Cal. 399.

78. N.J.—Skinner v. Reinhardt, 153 A. 632, 108 N.J.Eq. 24.
N.Y.—In re Rechtschaffen's Estate, 16 N.E.2d 357, 278 N.Y. 326, reversing 300 N.Y.S. 1005, 252 App. Div. 853, affirming 294 N.Y.S. 604, 162 Misc. 874, motion denied 1 N.

right and is entitled to share in her estate,[79] although under some statutes the husband is not entitled to administer on his wife's estate to the exclusion of her children who are also beneficially interested therein.[80] Where the husband has been guilty of misconduct or is otherwise an unfit person, he may be denied appointment,[81] but his right to administer on his wife's estate cannot be denied because he claims land which the court believes to be community property.[82]

(2) Validity of Marriage and Effect of Separation or Divorce

One may be regarded as a surviving husband entitled to administration of his deceased wife's estate although his marriage was voidable or was a common-law marriage, and even though he may be separated from his wife or the marriage bonds are in course of dissolution, but he will not be held entitled to letters as surviving husband where his former wife died after entry of a final decree of absolute divorce.

The right of a husband to administration is not affected by the fact that the marriage was voidable, in the absence of any annulment during the lifetime of the wife,[83] and his right to administration has been upheld in the case of a common-law marriage.[84]

Separation or divorce. The right of the husband to administration is not affected by the fact that the spouses were separated,[85] or even, it has been held, by a judicial decree of separation from bed and board,[86] or by an incomplete decree of divorce,[87] and a void foreign decree of divorce will not deprive a surviving husband of the right to letters of administration of the estate of his deceased wife;[88] but where the former wife dies after a final decree of absolute divorce her former spouse is not entitled to letters of administration on her estate as surviving husband.[89] Statutes providing that a judgment dissolving a marriage in an action brought by the husband shall not impair his rights in any property then owned by the wife do not entitle him to letters of administration on his divorced and deceased wife's estate.[90]

(3) Right to Share in Wife's Estate

It is ordinarily deemed prerequisite to the surviving husband's preferential right to letters of administration on the estate of his deceased wife that he be entitled to share in her estate.

A surviving husband is not entitled to letters as such where he has no right to share in his deceased wife's estate,[91] and a husband who has released all his interest in his wife's estate is not entitled to administer thereon.[92]

Preference of husband to illegitimate relatives; separate estate. Where the surviving husband is not entitled to any portion of his deceased wife's separate estate if she left surviving relatives, but is so entitled if she did not, on proof that the deceased wife left only illegitimate relatives the surviving husband is entitled to letters of administration on her estate as against the claims of cousins

Y.S.2d 652, 253 App.Div. 718—In re Schwartz' Estate, 246 N.Y.S. 478, 138 Misc. 537.
23 C.J. p 1035 note 88.

Representative of community and separate estates
Where will executed by wife was void, the surviving husband had right to qualify as community survivor of the community estate and was entitled to be given preference in qualifying as administrator of the separate estate of the wife.—Cole v. Houston, Tex.Civ.App., 152 S.W.2d 522, error granted.

79. N.Y.—In re Rechtschaffen's Estate, 16 N.E.2d 357, 278 N.Y. 336, reversing 300 N.Y.S. 1005, 252 App. Div. 853, affirming 294 N.Y.S. 604, 162 Misc. 374, motion denied 1 N.Y.S.2d 652, 253 App.Div. 718.

80. Ala.—Randall v. Shrader, 17 Ala. 333.
23 C.J. p 1035 note 89.

81. Pa.—Coover's Appeal, 52 Pa. 427.
Tenn.—Cooper v. Maddox, 2 Sneed 135.

82. Wash.—Buchser v. Buchser, 131 P. 193, 132 P. 239, 72 Wash. 675.
23 C.J. p 1035 note 91.

83. Cal.—In re Shiels, 52 P. 808, 120 Cal. 347.

84. N.Y.—In re Mahel's Estate, 274 N.Y.S. 625, 153 Misc. 228.

85. Pa.—Altemus' Case, 1 Ashm. 49.

86. Pa.—Clark v. Clark, 6 Watts & S. 85.

87. La.—Barry's Succession, 17 So. 307, 47 La.Ann. 838.
Md.—Nusz v. Grove, 27 Md. 391.

88. N.Y.—In re Dorsett's Estate, 242 N.Y.S. 232, 136 Misc. 236.

89. N.Y.—In re Albrecht's Estate, 194 N.Y.S. 432, 118 Misc. 737.

90. N.Y.—In re Albrecht's Estate, 196 N.Y.S. 765, 119 Misc. 554, affirming 194 N.Y.S. 432, 118 Misc. 737.

91. N.Y.—In re Wagner, 20 N.Y.S.2d 470, 174 Misc. 203.
Wis.—In re Barts' Estate, 242 N.W. 171, 207 Wis. 639.

Son beneficiary preferred to second husband
Guardian of intestate's son by first marriage should be appointed administrator in preference to second husband, where son was the sole beneficiary.—In re Barts' Estate, supra.

Bar of right to share estate not shown
(1) Where there was no indication that husband had ever refused to provide support for his wife or that the wife or any person authorized to speak for her ever intimated that any contribution by the husband was needed or desired, the husband could not be deemed to be in default in respect of his obligation for support, so as to be denied the right to share in her estate and letters of administration on the death of the wife.—In re Wagner, 20 N.Y.S.2d 470, 174 Misc. 203.

(2) Where wife was adjudicated an incompetent and committed to state hospital, and subsequently regained her sanity, the wife who failed to return to her husband's home and accompanied another man to his home, and did not endeavor to resume her marital domicile, "abandoned" the husband.—In re Wagner, supra.

92. U.S.—Marshall v. Beall, D.C., 6 How. 70, 12 L.Ed. 347.
23 C.J. p 1035 note 97.
Effect of antenuptial or postnuptial contracts see supra subdivision a of this section.

and half sisters not legitimately related to deceased.[93]

(4) Representative of Subsequently Deceased Husband

The courts have both affirmed and denied the right of the representatives of the estate of a husband to administration on the estate of his predeceased wife.

It has been held that, where the husband survives his wife, but afterward dies, his executor is entitled to administration on the estate of the wife,[94] and also, under statute, that in such case there can be no administration on the estate of the wife except through the administrator of the husband.[95] On the other hand, the right of the administrator of a surviving husband to administer the estate of the wife has been denied,[96] and it has also been held that if the husband died before taking out administration on his wife's estate his administrator is not entitled to letters.[97]

c. Widow of Intestate

(1) In general
(2) Validity of marriage and effect of separation or divorce
(3) Right to share in husband's estate

(1) In General

A widow is ordinarily accorded the right to administer the estate of her deceased intestate husband unless she is disqualified. Under many statutes she is given a preferential right to letters of administration, which may or may not be absolute, but next of kin may be preferred.

The widow is very generally held to be entitled to administer on the estate of her deceased husband,[98] unless debarred by misconduct or other unsuitableness.[99] It has been held that the right of the widow is not affected by the fact that she had had adulterous relations with a person other than her husband where such relations had ceased several years before the husband's death.[1] It has been held that the widow may either administer the estate herself or nominate some competent person in whom she reposes confidence.[2]

Under the law prevailing in many jurisdictions the widow is preferred to all others as administratrix of her deceased husband's estate,[3] even though she has interests adverse to those of the next of kin,[4] and her right to letters, where she is qualified, has been held absolute and mandatory.[5] She may not be excluded from her preferential right on mere speculation that from lack of business experience she will mismanage the estate.[6] Under

93. La.—Succession of Young, 117 So. 150, 166 La. 285.

94. N.Y.—Matter of Harvey, 3 Redf. Surr. 214.

Husband's executors entitled to personalty and administration

Where deceased wife left realty and personalty worth about fourteen thousand five hundred dollars, of which personalty was worth less than ten thousand dollars, her surviving husband's executors were entitled to take all of personalty before resorting to realty in satisfaction of husband's share, under statute giving husband "ten thousand dollars and one half of the residue," and hence were entitled to letters of administration on wife's estate to exclusion of wife's sister.—In re Karp's Estate, 298 N.Y.S. 902, 163 Misc. 855.

95. N.C.—Wooten v. Wooten, 31 S. E. 491, 123 N.C. 219.

96. N.Y.—Matter of O'Neil, 2 Redf. Surr. 544.

97. N.C.—Whitbie v. Frazier, 2 N.C. 775.

98. Okl.—In re Walker's Estate, 36 P.2d 10, 169 Okl. 100.
23 C.J. p 1036 note 4.

99. Pa.—Odiorne's Appeal, 54 Pa. 175, 93 Am.D. 683.
23 C.J. p 1036 note 7.

Improvidence, ignorance, and conflicting interests

Where evidence showed that widow was improvident and displayed want of care and foresight which would be likely to render intestate decedent's estate unsafe in her hands, that widow exhibited lack of knowledge of ordinary business dealings, that widow's interest as administratrix of her husband's estate would be in conflict with interest of widow as accountant for husband who had been administrator of husband's first wife's unsettled estate and in conflict with the interests of husband's child by first marriage and that antagonism existed between widow and husband's child by first marriage, widow was disqualified from being accorded usual preferential right to administer.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

Disqualification not shown

That deceased left minor children by a former wife who were interested in estate was held, as a matter of law, not a disqualification of widow to serve as administratrix.—State ex rel. Gregory v. Henderson, 88 S.W. 2d 893, 230 Mo.App. 1.

1. Mich.—In re Dettman, 161 N.W. 836, 195 Mich. 231.

2. Mont.—State v. District Court of Fifth Judicial Dist. in and for Madison County, 197 P. 741, 59 Mont. 505.
Okl.—In re Walker's Estate, 36 P.2d 10, 169 Okl. 100.

3. U.S.—Sealey v. U. S., D.C.Va., 7 F.Supp. 434.
Ala.—Brown v. Brown, 85 So. 439, 204 Ala. 157.
Ga.—Montgomery v. Paradise, App., 15 S.E.2d 899—Sampson v. Sampson, 163 S.E. 326, 44 Ga.App. 803—Maddox v. Maddox, 108 S.E. 304, 27 Ga.App. 369.
Okl.—In re Walker's Estate, 36 P.2d 10, 169 Okl. 100.
Wis.—In re Fink's Estate, 210 N.W. 834, 191 Wis. 349.

Preferred to son

Widow's right to letters of administration is prior to that of son. —In re Bunimowitz's Estate, 219 N. Y.S. 763, 128 Misc. 518.

4. Ala.—Brown v. Brown, 85 So. 439, 204 Ala. 157.

5. Mont.—State v. District Court of Fifth Judicial Dist. in and for Madison County, 197 P. 741, 59 Mont. 505.
Pa.—In re Malinowski's Estate, 19 Pa.Dist. & Co. 335, 15 Erie Co.L.J. 224.

6. Ga.—Montgomery v. Paradise, App., 15 S.E.2d 899—Sampson v. Sampson, 163 S.E. 326, 44 Ga.App. 803—Maddox v. Maddox, 108 S.E. 304, 27 Ga.App. 369.

other statutes it has been held that while the widow is entitled to a preference,[7] her right to administration is neither absolute nor exclusive,[8] that the court may exercise its sound discretion in the matter of appointing the widow,[9] and that statutes conferring a preference mean merely that where other things are equal the widow should be appointed,[10] and that to construe the statute as conferring an absolute right would deprive the court of its inherent power to judge as to the qualification and fitness of an applicant for letters of administration.[11] Under a statute providing that administration shall be granted to some one or more of the persons enumerated in the following order, widow, husband, or next of kin, or such of them as the court may think proper, the widow has a preferential right to appointment as administratrix of her deceased husband's estate,[12] but proof that she is a suitable person does not under such a statutory provision give her an absolute right to the appointment,[13] and the court may for sound reasons, such as dissension among the distributees, appoint a disinterested third person as administrator.[14]

Where the statute provides that in the choice of administrator the preference shall be given to the beneficiary heir over every other person, if of age and present in the state, the court lacks discretion to appoint the widow instead of such a beneficiary heir,[15] and appointment of next of kin instead of the widow may be proper under either the discretionary power of the court or statutes affording preferential rights to the next of kin.[16]

(2) Validity of Marriage and Effect of Separation or Divorce

To become entitled to letters of administration as the widow of intestate the applicant must show a lawful marriage subsisting at the time of his death, although her right will not be defeated by proof that it was voidable. A final and absolute divorce precludes applicant from securing letters as the widow, but neither an interlocutory decree nor one which is void or subsequently annulled will have this effect. The mere separation of the spouses does not ordinarily disentitle the widow to letters, but the practice differs in respect of the effect of the wife's abandonment of the husband.

In order to entitle the widow to administration the parties must have been legally married,[17] and the widow has no right where the marriage was void,[18] as in such cases she is not really a "widow" within the meaning of statutes conferring the right

7. N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

8. N.J.—In re Messler's Estate, supra.

9. Ark.—Williamson v. Furbush, 31 Ark. 539.
Ohio.—Garretson v. Garretson, 3 Ohio Cir.Ct. 336, 2 Ohio Cir.Dec. 581.
Va.—Smith v. Lurty, 59 S.E. 403, 107 Va. 548.

10. N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

11. N.J.—In re Messler's Estate, supra.

12. Mich.—In re Abramovitz' Estate, 270 N.W. 294, 278 Mich. 271.

13. Mich.—In re Abramovitz' Estate, supra.

14. Mich.—In re Abramovitz' Estate, supra.

15. La.—Succession of Rabe, 111 So. 658, 163 La. 149.

Second wife deferred to son by first wife

(1) Second wife could not be appointed administratrix in preference to son by first wife, although all intestate's property was interest in community with second wife.—Succession of Rabe, supra.

(2) That son had neglected to support child did not deprive him of right to preference as administrator of father's succession, as against second wife.—Succession of Rabe, supra.

16. Ind.—Haughey v. Haughey, 127 N.E. 454, 73 Ind.App. 318.
La.—Succession of Rabe, 111 So. 658, 163 La. 149—Coste's Succession, 9 So. 62, 43 La.Ann. 144.
23 C.J. p 1036 note 6 [b].

17. N.Y.—In re Merrill's Estate, 281 N.Y.S. 424, 245 App.Div. 323, reversing 256 N.Y.S. 923, 143 Misc. 110—In re Crook's Estate, 252 N.Y.S. 373, 140 Misc. 721.
S.C.—Ex parte Blizzard, 193 S.E. 633, 185 S.C. 131.
23 C.J. p 1037 note 9.

18. N.Y.—O'Gara v. Eisenlohr, 38 N.Y. 296.

Bigamous second wife of deceased held not a "widow" or "distributee" of deceased and therefore not entitled to administer his estate.—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258.

Survivor of alleged common-law marriage

Survivor of alleged common-law marriage with deceased seaman, not being "wife" within statute governing letters of administration because of her preëxisting ceremonial marriage with another, was not entitled to preference over decedent's nonresident father as to limited letters for purpose of prosecuting death action under federal statute.—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.

Void second marriage following invalid dissolution of first marriage

Attempted dissolution of marriage, solemnized by rabbi in Russia, at instance of husband by Jewish rabbis in New York, was invalid, precluding wife from obtaining letters of administration as widow of alleged second husband, since attempted divorce was not by due "judicial proceeding" and she was still married to the first husband at the time of her alleged marriage to intestate.—In re Goldman's Estate, 282 N.Y.S. 787, 156 Misc. 817.

Valid common-law marriage

Where rabbinical marriage was performed in 1923 following a rabbinical divorce granted to husband and another ceremonial marriage was performed in 1927 following husband's obtaining of void divorce decree from his first wife, and first wife died in 1929, second wife was held to have become lawful wife of husband immediately following death of his first wife, and hence could become administratrix of estate of husband who died in 1936, parties having evinced continuous desire and intention to live as husband and wife morally, and statute outlawing common-law marriages not having been passed until after death of first wife. The woman was not precluded from becoming administratrix of decedent's estate because of rule that relationship meretricious in its inception will be deemed to have continued to be of like nature, where parties had evinced a continuous desire and intention to live as husband and wife morally.—In re Cherney's Estate, 295 N.Y.S. 567, 162 Misc. 764.

of administration on "widows;"[19] but the widow's right is not defeated by the fact that the marriage was voidable where it was not actually annulled during the lifetime of the husband,[20] or by subsequent bigamous marriages of both parties where the original and valid marriage between intestate and applicant for administration remains unannulled.[21]

Separation or divorce. Where the parties have been absolutely divorced, the surviving wife is not entitled to administration,[22] but her right to letters is not defeated by an interlocutory decree of divorce,[23] or by a void decree,[24] such as one granted in another state but not regarded as valid in the state of the domicile where administration is sought,[25] or a decree which has been vacated and annulled, even after the husband's death;[26] neither is the widow's right necessarily lost by the fact that she and her husband were separated,[27] nor by a decree of separation from bed and board,[28] and the wife's abandonment of the husband has been held not to destroy her preferential right to letters of administration on his estate,[29] although there is contrary authority denying a widow the right to administer the estate of a husband whom she abandoned in his lifetime.[30]

(3) Right to Share in Husband's Estate

The general view is that a widow without beneficial interest in her husband's estate lacks preferential or other right to administer it.

It has been held that where a widow has theretofore disposed of all interest in her husband's estate, aside from statutory allowances pertaining to administration, so that she can have no beneficial interest as distributee after payment of creditors, she is not entitled to preference respecting appointment as administratrix,[31] and under statutory provisions expressly or impliedly requiring the administrator of an estate to have a beneficial interest therein, a widow without such an interest is not entitled to letters.[32]

§ 36. —— Next of Kin

a. In general
b. Preferences

a. In General

Where the rights of a surviving spouse are not involved, letters of administration will ordinarily be issued to next of kin of an intestate entitled to share in the distribution of his estate, as determined on the date of his death, and the right of administration may extend to relatives by affinity, to stepchildren and to adopted children, although illegitimates are ordinarily excluded in the absence of statutory provision for their appointment or special circumstances.

Apart from the claim of a surviving spouse, the right to administer belongs usually to the next of kin of the decedent, that is to say, those persons who are entitled under the statute of distributions to the decedent's property, the theory of the law being that the right to administer should follow the interest or right of property in the estate,[33] and

19. N.Y.—In re Crook's Estate, 252 N.Y.S. 373, 375, 140 Misc. 721.

Definition

In connection with the right of the widow to administration, it has been pointed out that "a widow is a woman who has lost her husband by death and has not married again."—In re Crook's Estate, supra, quoting Webster D.

20. Mo.—In re Guthery's Estate, 226 S.W. 626, 205 Mo.App. 664.
N.Y.—In re Sanders' Estate, 227 N.Y.S. 543, 131 Misc. 266.
23 C.J. p 1037 note 11.

21. N.Y.—In re Eichelberger's Estate, 273 N.Y.S. 535, 152 Misc. 834.

22. N.Y.—In re Ensign, 8 N.E. 544, 103 N.Y. 284, 57 Am.R. 717.

23. Cal.—In re Martin, 137 P. 2, 166 Cal. 399.

Husband's death before decree became final

Where husband died before divorce decree became final, wife became vested with every right which law grants to surviving spouse, and was entitled to have letters of administration of estate issued to her as matter of right, in absence of showing of some good and sufficient reason to contrary.—In re Johnson's Estate, 35 P.2d 305, 84 Utah 168.

24. N.Y.—In re Bennett's Estate, 238 N.Y.S. 723, 135 Misc. 486.
23 C.J. p 1037 notes 13, 14.

Decree not signed by judge

A judgment of divorce will not defeat the widow's right to administer unless it appears to have been signed by the judge.—Barry's Succession, 17 So. 307, 47 La.Ann. 838.

25. Cal.—In re Bruneman's Estate, 90 P.2d 323, 32 Cal.App.2d 606.
N.Y.—In re Bennett's Estate, 238 N.Y.S. 723, 135 Misc. 486.
23 C.J. p 1037 note 14.

26. Pa.—Boyd's Appeal, 38 Pa. 246.

27. Pa.—In re Malinowski's Estate, 19 Pa.Dist. & Co. 335, 15 Erie Co. L.J. 224.
23 C.J. p 1037 note 16.

Separation in fact

Wife from whom decedent was separated became decedent's widow on his death and was entitled to letters of administration on his estate, rather than woman with whom decedent had cohabited for fifteen years after separation, and whom decedent acknowledged as his wife, and who was so regarded, where decedent made no effort to annul marriage after separation and did not make diligent search to ascertain whether wife was alive.—In re Merrill's Estate, 281 N.Y.S. 424, 245 App.Div. 323, reversing 256 N.Y.S. 923, 143 Misc. 110.

28. Pa.—Fyock's Est., 19 A. 1056, 135 Pa. 522, affirming 7 Pa.Co. 425—Heins' Estate, 22 Pa.Super. 31, affirming 18 Montg.Co. 177.

29. Ala.—Brown v. Brown, 85 So. 439, 204 Ala. 157.

30. N.Y.—In re Banaszak's Estate, 1 N.Y.S.2d 15, 164 Misc. 829.

31. Mich.—In re Berner, 187 N.W. 377, 217 Mich. 612.

32. N.Y.—In re Bunimowitz's Estate, 219 N.Y.S. 763, 128 Misc. 518.
Pa.—In re Friese's Estate, 176 A. 225, 317 Pa. 86.

33. Ky.—Hunt v. Crocker, 55 S.W. 2d 20, 246 Ky. 338.
Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.
Or.—In re Paquet's Estate, 200 P. 911, 101 Or. 393.
Pa.—In re King's Estate, 7 Pa.Dist.

relatives of decedent without a beneficial interest in his estate will ordinarily be excluded from the right to letters of administration as next of kin.[34] The prescribed relationship and the right to share in the estate must coexist to entitle applicant to letters.[35] The term "next of kin" as employed in statutes providing for issuance of letters of administration as a general rule means those relatives whose relationship to the intestate is such that they are entitled to share in his estate as distributees under rules governing descent and distribution,[36] and under this view the right of a particular next of kin to letters of administration depends on whether he is given the right, by provision of statutes governing descent and distribution, to share in the net assets of the estate,[37] and not on whether there will be any assets available for distribution after completion of administration.[38] It has been held that where the statute of descent and distribution would exclude relatives from a distributive share in the estate they are not "next of kin" within the meaning of statutes conferring the right of administration on next of kin, even though they may be closely related to the decedent by consanguinity,[39] but other courts have construed the term "next of kin" as including persons who would be entitled to share in the estate if there was none nearer in relationship.[40]

Ordinarily provisions for issuance of letters of administration to the next of kin of an intestate, or

& Co. 483, 39 Lanc.L.Rev. 491, 39 York.Leg.Rec. 103. See In re Henry's Estate, 51 York Leg.Rec. 185.
23 C.J. p 1037 note 22.

Blood relative preferred to widow of decedent's son

Widow of decedent's son and administratrix of such son's estate is not entitled to letters of administration, as against decedent's cousin.—In re Crandall's Estate, 258 N.Y.S. 797, 144 Misc. 58.

Son and sole heir entitled to letters

Ga.—Jackson v. Jackson, 177 S.E. 591, 179 Ga. 696.

Heir of heir as not entitled to letters

(1) Son of intestate's surviving brother is not "beneficiary heir" of intestate, either by disposition of law or by representation of brother, on death of surviving brother who had inherited an interest in intestate's succession, notwithstanding brother died without either accepting or rejecting intestate's succession, and hence was not entitled to appointment as administrator of intestate's succession.—Succession of Coco, 171 So. 70, 185 La. 901.

(2) Statutes providing for transmission of succession to heirs of heirs, for suits by heirs in actions which deceased had right to institute, and suspending right of heir until acceptance or rejection of succession do not entitle son of intestate's surviving brother to appointment as administrator in intestate's succession where son acquired interest in intestate's succession as heir of surviving brother who had died without exercising his right to accept or reject succession.—Succession of Coco, supra.

34. Ky.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584.
N.Y.—In re Grant's Estate, 3 N.Y.S.2d 867, 253 App.Div. 504—In re Franko's Estate, 7 N.Y.S.2d 594, 169 Misc. 356—In re Brown's Estate, 274 N.Y.S. 496, 153 Misc. 41.
Wash.—State v. Superior Court for King County, 291 P. 481, 158 Wash. 546, 70 A.L.R. 1460.
23 C.J. p 1038 notes 23, 27.
Interest in estate as affecting right to administration generally see supra § 31.

Blood relatives without interest in estate

Under statute prescribing order in which persons are entitled to administer decedents' estates, phrase "next of kin" does not include relatives by blood who have no interest in estate.—In re Covington's Estate, 33 P.2d 87, 177 Wash. 668.

Lack of resident distributees immaterial

Resident relatives of a decedent who are not distributees cannot qualify as administrators of estate of decedent when there are no distributees who are residents of Kentucky since "relations" referred to in statute providing for appointment of administrator are those entitled to distribution in the estate of the decedent.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584.

35. N.Y.—In re Wenkhous' Estate, 286 N.Y.S. 518, 158 Misc. 663.

"Entitled to take or share"

(1) Phrase "persons entitled to take or share," in statute prescribing persons entitled to administration, means surviving spouse and next of kin, except those who have alienated their interest.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

(2) Words "persons entitled to take or share," in statute prescribing who is entitled to administration, do not include assignees, and others not distributees.—In re Kassam's Estate, supra.

"Any other next of kin entitled to share"

Assignee of sole surviving next of kin is not entitled to administration as "any other next of kin entitled to share in distribution of estate."—In re Kassam's Estate, supra.

36. Iowa.—In re Wright's Estate, 230 N.W. 552, 210 Iowa 25.
Minn.—Long v. Christopher, 260 N.W. 314, 194 Minn. 238.
N.J.—In re Stewart's Estate, 175 A. 360, 117 N.J.Eq. 256.
Tex.—Gillespie v. Isbell, Civ.App., 51 S.W.2d 746, error refused.

37. N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214—In re Brown's Estate, 274 N.Y.S. 496, 153 Misc. 41.

Father not entitled to share

Where intestate left six year old son as only next of kin, intestate's father was not "next of kin entitled to distribution" within statute, and therefore he could not object to granting of letters of administration to intestate's divorced wife, the mother of intestate's son.—In re Stewart's Estate, 175 A. 360, 117 N.J.Eq. 256.

38. N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214—In re Brown's Estate, 274 N.Y.S. 496, 153 Misc. 41.

39. Minn.—Long v. Christopher, 260 N.W. 314, 194 Minn. 238.

40. Ill.—Sanders v. Buenger, 143 N.E. 431, 311 Ill. 572.

Qualification of cousin on waiver by brothers and sisters

"Next of kin" under Administration Act § 18 subd 8, relating to preferences to appointment as administrator, may include persons who would be next of kin if there were not others occupying that position, so that a cousin of deceased may so classify, although there are brothers and sisters of deceased living, where same have waived their right to administer or to nominate.—Sanders v. Buenger, supra.

to specified relatives, refer to and are limited to those related by consanguinity,[41] but there may be circumstances and statutory provisions under which letters will issue to relatives by affinity,[42] as under statutes providing for issuance of letters to the surviving kin of a predeceased spouse of the intestate.[43]

Date of determining next of kin. Generally speaking, a person's next of kin, within statutes governing appointment of administrators, are to be determined as of the date of his death.[44]

Adopted children. While there is authority to the effect that an adopted child acquires no right to administer the estate of his adopted parent,[45] other authorities regard an adopted child as entitled to letters of administration on much the same basis as a natural child would be,[46] and differences in viewpoint may perhaps find their explanation in differences in statutory provisions as well as in differences of judicial construction. The word "children," as employed in statutes regulating appointment of administrators, has been held to include children by adoption as well as children by birth,[47] but, unless the adoption has been completed in compliance with statutory formalities, persons claiming to be children by adoption will not be so classified.[48] If the adoption has been formally completed, however, the adopted child may be entitled to letters even though proceedings are pending to vacate the judgment of adoption.[49]

Stepchildren. The stepchild of an intestate may become entitled to letters of administration.[50]

Illegitimate relatives. Ordinarily illegitimate relatives are not entitled to letters of administration as kin of an intestate[51] but the right of an illegitimate child to administer his deceased mother's estate has been recognized by some authorities,[52] and where a bastard grantee predeceases his mother, and later she dies, her legitimate children may become entitled to administration on the land originally owned by their illegitimate half brother, deriving their rights through the mother and not direct from the illegitimate half brother.[53]

b. Preferences

As a general rule kin of nearer degree to the intestate will be appointed administrators of his estate in preference to those of more remote degree. Where applicants are of equal degree of kinship, appointment may in the

41. Ala.—Clark v. Whorton, 194 So. 661, 239 Ala. 238.

"Nephew" and "niece"

The terms "nephew" and "niece" in their primary sense, and within meaning of statute conferring on "next of kin" entitled to share in distribution of an estate, second in preference to the right of appointment as administrator, include only relationship by consanguinity.—Clark v. Whorton, supra.

42. N.Y.—In re Gant's Estate, 254 N.Y.S. 715, 142 Misc. 446.

Discretion of court

In absence of application for letters of administration by next of kin not required to be notified, letters of administration could be issued to deceased's brother-in-law, in discretion of orphans' court, whether or not the brother-in-law was a creditor.—Kaiser v. Ebersberger, Md., 19 A.2d 701, 133 A.L.R. 1479.

43. N.Y.—In re Ziesenitz's Estate, 218 N.Y.S. 233, 128 Misc. 100.

As intestate's next of kin

In absence of specified surviving relatives of intestate decedent, predeceased spouse's relatives are "next of kin entitled to share in distribution of estate" as respects right of administration.—In re Gant's Estate, 254 N.Y.S. 715, 142 Misc. 446.

Preference to creditor

Sisters of deceased's predeceased wife are entitled to administration in preference to deceased's creditor.—In re Gant's Estate, supra.

44. Wash.—In re Covington's Estate, 33 P.2d 87, 177 Wash. 668.

45. Pa.—In re Smith, 74 A. 622, 225 Pa. 630, 133 Am.S.R. 894—McCully's Estate, 13 Phila. 296.

46. Cal.—In re Heaton, 73 P. 186, 139 Cal. 237, 67 P. 321, 135 Cal. 385.

Tenn.—Redmond v. Wardrep, 257 S. W. 394, 149 Tenn. 35.

Where deceased left no widow or natural children, adopted daughter was person next entitled to distribution of estate, and was entitled to appointment as administrator.—Hood v. Higgins' Curator, 9 S.W.2d 1078, 225 Ky. 718.

47. N.D.—Borner v. Larson, 293 N. W. 836, 70 N.D. 313.

48. N.D.—Borner v. Larson, supra.

49. Ky.—Hood v. Higgins' Curator, 9 S.W.2d 1078, 225 Ky. 718.

50. Cal.—In re Sweitzer's Estate, 11 P.2d 633, 215 Cal. 489.

Regarded as next of kin

Under statutory provisions defining the term "next of kin" as including all persons entitled under the provisions of law relating to distribution of personal property to share in the unbequeathed residue of the assets of decedent, a stepchild so entitled may be appointed administrator as next of kin.—In re Neukirchen's Estate, 186 N.Y.S. 240.

51. Cal.—In re Pico, 52 Cal. 84.
Ill.—Myatt v. Myatt, 44 Ill. 473.
N.Y.—Ferrie v. Public Administrator, 3 Bradf.Surr. 249—Public Administrator v. Hughes, 1 Bradf.Surr. 125.
Pa.—In re McLaughlin's Estate, 172 A. 107, 314 Pa. 574.

Nullius filius

Parents' alleged common-law marriage being invalid because of mother's preëxisting ceremonial marriage, child of deceased seaman was held nullius filius as respects decedent, and hence, not being classifiable as "child" within statute governing letters of administration, was not entitled to preference over decedent's father as to limited letters for purpose of prosecuting action under federal statute for decedent's death.—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.

In Rhode Island it has been held that even if a statute conferring rights of inheritance on illegitimates does not make them kindred in the sense permitting their appointment as administrators, the court should have under the circumstances prevailing in the case at bar appointed an illegitimate grandson of intestate administrator as a "suitable person."—Johnson v. Johnson, 23 A. 106, 15 R.I. 109.

52. La.—Succession of McGee, 91 So. 716, 151 La. 225.
N.J.—Matter of Potter, 8 N.J.L.J. 137.

53. Ga.—Langmade v. Tuggle, 3 S. E. 666, 78 Ga. 770.

sound discretion of the court be made in accordance with the best interests of the distributees after due consideration of the personal capacity, experience, and moral fitness of the applicants and of other pertinent factors. Next of kin are usually preferred to creditors and to strangers, although creditors may be preferred where the relatives lack substantial beneficial interest in the estate.

The right to administration arising from kinship being usually dependent on the right to share in the distribution of decedent's estate, as shown in the preceding subdivision of this section, the nearest of kin to decedent are as a rule preferred to those more remotely related,[54] since they, when entitled to share in the estate, are the "next" of kin, and relatives not so entitled are not "next" of kin within the statutes;[55] and, where the statute classifies the different kinds of relatives, as children, brothers and sisters, etc., and gives preference to one over another, the court should follow the statutory preference in issuing letters of administration.[56] Under some statutes the degree of kinship, with reference to determination of the right to administration, will be computed in accordance with the rules of the civil law,[57] beginning with the intestate and ascending from him to a common ancestor, descending from that ancestor to claimant, and reckoning a degree for each generation both in ascending and in descending.[58] Where the court has on petition appointed a next of kin as administrator, on a subsequent application within the statutory period by another kin more closely related, the court in its discretion may vacate the first appointment and issue letters of administration to the kin more closely related to intestate.[59] Where the statute relating to appointment of administrators places all the next of kin in one preferential class, it has been held that one nearer in kinship than another has no preferential right to administration over such other, the selection as between those in the same preferential class in respect of administration resting in the sound discretion of the court.[60] Equality of interest may give equality of right to administer;[61] but it has been held that the test of the right to letters of administration is the nearness of relationship to intestate and not the relative proportion of the estate to which applicant may be entitled.[62] From among two or more persons equally akin to deceased who seek the appointment, the court may choose the most suitable, judging fairly as to each one's fitness for the trust and exercising a sound discretion in the interests of the distributees generally;[63] and in making a selection among

54. Md.—Phillips v. Clark, 6 A.2d 220, 176 Md. 578.
N.Y.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.
Tex.—Gillespie v. Isbell, Civ.App., 51 S.W.2d 746, error refused.
23 C.J. p 1039 note 28.

Brother may be preferred to niece and nephew
Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

Personal fitness of nonbeneficiary heir is not material.—Succession of Coco, 165 So. 646, 184 La. 144.

55. N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

56. Mont.—In re Mapes' Estate, 118 P.2d 755—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
N.D.—Borner v. Larson, 293 N.W. 836, 70 N.D. 313.

Children preferred to sister
Under statute prescribing order in which letters of administration must be granted, decedent's children are placed in a class superior to that of a sister of decedent, and hence children have, within limits prescribed by statute, a right to administration of estate superior to right of a sister of decedent, although to be so entitled they must show that they are children within the meaning of the statute.—Borner v. Larson, supra.

57. Ala.—Calvert v. Beck, 199 So. 846, 240 Ala. 442—Johnston v. Pierson, 155 So. 695, 229 Ala. 85.
Computation of degree of kindred under rules regulating descent and distribution see Descent and Distribution §§ 22, 23.

58. Ala.—Calvert v. Beck, 199 So. 846, 240 Ala. 442.

Brother preferred over niece's husband
A brother of the whole blood of deceased was in the second "degree of kindred", and a husband of niece of deceased was in the third "degree of kindred", and hence brother had preferential right to administer estate of deceased and was entitled, as against husband of niece, to grant of letters of administration, where brother was not disqualified.—Calvert v. Beck, supra.

Uncle preferred over first cousin's husband
Uncle of intestate who died without widow, descendants, or parents, and who was not disqualified, was entitled to letters of administration as a relative in the third degree as against husband of intestate's first cousin, such first cousin being a relative in the fourth degree.—Johnston v. Pierson, 155 So. 695, 229 Ala. 85.

59. Colo.—In re Woody's Estate, 24 P.2d 754, 93 Colo. 169.

60. Iowa.—In re Wright's Estate, 230 N.W. 552, 210 Iowa 25.

Sister not preferred over niece
Under statute authorizing "next of kin" to request administration, intestate's sister had no preferential right over niece.—In re Wright's Estate, supra.

61. Mich.—Rajnowski v. Detroit, B. C. & A. R. Co., 41 N.W. 847, 74 Mich. 20.

62. Tex.—Gillespie v. Isbell, Civ. App., 51 S.W.2d 746, error refused.

As between cousins
(1) First cousin of half blood, rather than second cousin of whole blood, was "next of kin" of deceased within statute prescribing preferential rights to letters of administration.—Gillespie v. Isbell, supra.

(2) That second cousin of whole blood of deceased would receive larger share of estate than first cousin of half blood was immaterial in determining right to letters of administration.—Gillespie v. Isbell, supra.

63. Ga.—Sims v. Horne, App., 15 S.E.2d 549.
La.—Succession of Eberle, 99 So. 464, 155 La. 603.
N.J.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.
23 C.J. p 1039 note 30.

Appointment sustained
Appointment as administratrix of beneficiary heir who was mature woman of experience, capacity, and business ability, who transacted her father's business exclusively for six months before his death, and who was the only applicant for administration not alleged to be indebted to

such persons it is proper to regard moral fitness,[64] as well as age[65] and business experience.[66] Relatives of the whole blood are generally preferred to those of half blood in equal degree of relationship.[67] The policy of some jurisdictions distinctly places the male of kin before the female for receiving the appointment,[68] but this rule may be controlled by other considerations.[69] In some jurisdictions a feme sole is preferred to a married woman.[70] It has been considered that relatives on the male side should be preferred to those in the female line,[71] but in a case where the estate was insolvent so far as personalty was concerned, but the intestate left real estate derived from his mother, it was held that administration would be granted to a maternal cousin in preference to a paternal uncle.[72] One determining consideration as between next of kin in cases of doubt may be their relative extent of interest,[73] but another is the confidence reposed by kindred, and hence it is not uncommon to appoint the one on whom a majority of the parties in interest agree,[74] and the wishes of the person or persons having the largest amount of interest may in certain respects preponderate in the selection,[75] although the wishes of a majority do not impose an absolute duty on the court.[76]

Preferred to creditors. As a general rule next of kin will be appointed administrators in preference to creditors of the intestate;[77] but it has been held that a creditor is entitled to preference over a relative who is not entitled to share in the estate,[78] or is not a member of any of the classes named in the statute providing the order in which administration may be granted.[79]

The reason why a creditor is selected under these circumstances is that, should the estate be plainly inadequate for yielding a surplus over the debts, the next of kin have comparatively slight interest in settling it, while under no circumstances ought an honest creditor's claim be lost for want of an administrator.[80]

Preference to strangers. It has been both affirmed[81] and denied[82] that relatives without beneficial interest in an intestate's estate should be preferred to strangers.

§ 37. —— Guardian or Trustee of Person Entitled

In some, but not all, jurisdictions the guardian or trustee of an infant or other incompetent may qualify as administrator in place of his ward or cestui. Where

estate, was held proper.—Succession of Virgets, 162 So. 53, 182 La. 491.

"Most solid"

In determining "most solid" within statute authorizing judge to select most solid of two or more beneficiary heirs as administrator, business capacity, experience, property, integrity, and everything else going to make up personal fitness should be considered.—Succession of Coco, 165 So. 646, 184 La. 144.

64. N.J.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.
23 C.J. p 1039 note 31.

65. Md.—Owings v. Bates, 9 Gill 463.
N.J.—In re Hill, 37 A. 952, 55 N.J.Eq. 764.
N.Y.—Wickwire v. Chapman, 15 Barb. 302.

66. La.—Chaler's Succession, 1 So. 820, 39 La.Ann. 308.
23 C.J. p 1039 note 33.

67. N.Y.—Matter of Tator, 141 N.Y.S. 927, 81 Misc. 83.
23 C.J. p 1039 note 34.

68. N.Y.—In re McOwen's Estate, 185 N.Y.S. 907, 114 Misc. 151.
23 C.J. p 1039 note 35.

69. N.Y.—Wickwire v. Chapman, 15 Barb. 302.
23 C.J. p 1040 note 36.

70. Md.—Smith v. Young, 5 Gill 197.
N.Y.—In re Curser, 89 N.Y. 401, reversing 25 Hun 579.
23 C.J. p 1040 note 37.

71. Md.—Kearney v. Turner, 28 Md. 408.

72. Pa.—Cantlin's Estate, 2 Pa.Dist. 522, 13 Pa.Co. 381.

73. Ga.—Leverett v. Dismukes, 10 Ga. 98.

74. Ga.—Hill v. Akins, 194 S.E. 893, 57 Ga.App. 198.
Mont.—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
23 C.J. p 1040 note 41.

Appointment as mandatory

Ga.—Sims v. Horne, App., 15 S.E.2d 549.

75. Pa.—McClellan's Appeal, 16 Pa. 110.

76. Ky.—Moran v. Moran, 189 S.W. 248, 172 Ky. 344.

77. Ga.—Sims v. Horne, App., 15 S.E.2d 549.
La.—Succession of Eugene, 120 So. 403, 10 La.App. 294.

Selection by less than majority as controlling

Where next of kin equally near in degree selected one of their number as administratrix, and there was no evidence that one selected was not a person of sound mind or that she was laboring under any disability, the ordinary could not appoint a creditor of deceased as administrator in preference to the one so selected, although it did not appear that the next of kin making the selection constituted a majority of the decedent's next of kin.—Sims v. Horne, Ga.App., 15 S.E.2d 549.

Solvency of estate

(1) Under mandatory statutes, next of kin, where no husband or wife survives, are entitled to administer, rather than creditor, whether estate is solvent or insolvent.—Parker v. Batchellor, 151 S.E. 118, 40 Ga. App. 669.

(2) Earlier cases from Georgia are to the contrary.—Sturges v. Tufts, R.M.Charlt., Ga., 17.
23 C.J. p 1042 note 64.

78. Ind.—Cooper v. Cooper, 88 N.E. 341, 43 Ind.App. 620.
23 C.J. p 1042 note 61.

79. Wash.—In re Hoss, 109 P. 1071, 59 Wash. 360.

80. Mich.—Aldrich v. Annin, 19 N. W. 964, 54 Mich. 230.
23 C.J. p 1042 note 63.

81. N.Y.—In re D'Adamo, 106 N.E. 81, 212 N.Y. 214, L.R.A.1915D 373.
23 C.J. p 1038 note 24.

82. Wash.—In re Covington's Estate, 33 P.2d 87, 177 Wash. 668.

Decedent's sister, appealing from order appointing stranger to estate as administratrix, was held to have no preferential right to appointment in absence of showing that she had interest in estate, where order appointing stranger recited that all of decedent's property was community property.—In re Covington's Estate, supra.

a cestui is competent, his trustee may be denied the right to serve in his place.

It has been said to be a rule of the common law that the trustee or guardian of an infant or person non compos mentis, who would otherwise be entitled to administer on an estate, is entitled to administer in the right of his cestui or ward;[83] and in some jurisdictions by virtue of the common law or statute, where a person entitled to administration is a minor or incompetent, letters of administration may be granted to the guardian of such person,[84] unless disqualified,[85] as where the tutor of minors is given the right to administer the succession of the ward's ancestor when the ward is the only person in interest or adult heirs and creditors raise no objection.[86] The natural guardian of an infant may qualify as administrator in the infant's place according to some authority,[87] but other authority has denied the right of administration to a natural guardian and restricted it to a guardian appointed by law.[88] The guardian of the estate of an incompetent will be preferred to the guardian of his person.[89] It has been held that, where, of several next of kin equally entitled, one is a minor, the guardian of the minor is postponed to the adult next of kin,[90] but there is also authority for the view that under such circumstances the court has power to grant letters to the guardian of the minor.[91] Where the guardianship appointment is void, the person claiming to be guardian does not become administrator by operation of law.[92]

Under the law of other jurisdictions letters of administration may be refused to a guardian seeking to take the place of his ward,[93] and it has been held that the guardian of the property of minor children has neither a statutory nor a natural right to administer on the estate of their ancestor,[94] and that the mere facts that the incompetent would have been entitled to letters if competent, and that statutes broadly give the guardian the right to represent the ward in all actions, suits, and proceedings, do not singly or together entitle the guardian to appointment as administrator of an estate to the residue of which his ward is not entitled.[95] Where

83. Ind.—Kinnick v. Coy, 81 N.E. 107, 40 Ind.App. 139.

84. La.—Dorsey v. Metropolitan Life Ins. Co., App., 145 So. 304.
N.Y.—In re Clark's Estate, 274 N.Y.S. 282, 152 Misc. 723—In re McGuire's Estate, 189 N.Y.S. 62, 115 Misc. 84.
Okl.—In re Copperfield's Estate, 12 P.2d 490, 158 Okl. 40.
W.Va.—Murphy v. Karnes, 106 S.E. 655, 88 W.Va. 242.
23 C.J. p 1040 note 45.

General guardian
The term "guardian," as used in Code Civ.Proc. c 18, applies to general guardian, and a "general guardian" is one appointed by the supreme or surrogate's court, under § 2642, for an infant, either over or under fourteen years of age.—In re McGuire's Estate, 189 N.Y.S. 62, 115 Misc. 84.

Ancillary guardian
(1) Ancillary guardian of illegitimate child of deceased seaman may be entitled to priority in issuance of letters of administration for purpose of enforcing liability for death of seaman as against father of seaman where no estate of seaman was involved except right to recover for his death.—In re Wenkhous' Estate, 286 N.Y.S. 518, 158 Misc. 663.

(2) In determining right of priority to letters of administration to enforce claim for death of seaman where no other estate of seaman was involved, court could not adopt rule of discrimination based on selection of one attorney as against another, but substantive rights of parties alone would be considered and letters issued to guardian representing infant.—In re Wenkhous' Estate, supra.

Guardian of issue of miscegenetic marriage
Guardian of children born as result of marriage between Indian and negro held void for miscegenation is entitled on their father's death to preference over deceased father's half brothers and half sisters, in appointment of administrator.—In re Atkins' Estate, 3 P.2d 682, 151 Okl. 294, 84 A.L.R. 491.

85. N.Y.—In re Clark's Estate, 274 N.Y.S. 282, 152 Misc. 723.
Wash.—In re Stotts' Estates, 233 P. 280, 133 Wash. 100.

86. La.—In re Scarborough, 8 So. 940, 43 La.Ann. 315—Dumestre's Succession, 4 So. 328, 40 La.Ann. 571—Succession of Story, 3 La. Ann. 502—Succession of Reed, App., 157 So. 765—Succession of Brierre, 135 So. 762, 19 La.App. 400, affirmed 140 So. 488, 174 La. 314.

Life policies not subject to creditors' claims
Rule that tutor's right to appear as representative of succession of deceased whose property is inherited by minor depends on absence of objection by creditors did not apply to suit by tutrix on life policies not subject to creditors' claims.—Dorsey v. Metropolitan Life Ins. Co., La.App., 145 So. 304.

87. W.Va.—In re Stollings' Estate, 95 S.E. 446, 82 W.Va. 18.

88. N.Y.—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.

Must be guardian of person or property
Only "guardian" of infant distributee within statute governing letters of administration is guardian of infant's person or property, or both, appointed by surrogate's court or supreme court, and hence illegitimate child's mother was not entitled, as alleged natural guardian, to issuance of letters in preference to father's father.—In re Winkhous, supra.

89. N.Y.—In re Blowstein's Estate, 263 N.Y.S. 412, 147 Misc. 111—In re McGuire's Estate, 189 N.Y.S. 62, 115 Misc. 84.

90. N.Y.—Cottle v. Vanderheyden, 56 Barb. 622.
23 C.J. p 1041 note 49.

91. Cal.—In re Turner, 77 P. 144, 143 Cal. 438.

92. Ga.—Payne v. Shirley, 104 S.E. 17, 25 Ga.App. 644.

Want of jurisdiction
Where an application for appointment of an administrator is filed, and a caveat thereto filed by one who had been appointed guardian of deceased, under a commission of lunacy issued under Civ.Code 1910 § 3092, on the ground that the caveator, as guardian, was by operation of law the administrator of the estate, such ground of the caveat cannot be sustained, where the guardianship appointment was void for want of jurisdiction.—Payne v. Shirley, supra.

93. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.

94. Iowa.—O'Neill v. Read, 162 N. W. 775, 179 Iowa 1208.

95. Mass.—McDonald v. O'Dea, 152 N.E. 341, 256 Mass. 177.

statutes expressly providing for appointment of the guardian have been repealed, it has been held that such repeal did not reëstablish the common-law rule that the guardian was entitled to letters of administration in place of his incompetent ward.[96]

Competent cestui. A cestui que trust, if rational and competent, is entitled rather than his trustee.[97]

§ 38. —— Attorney of Person Entitled

It has been held proper to appoint as administrator of a decedent's estate the resident attorney in fact of a nonresident having an interest in the estate.

The resident attorney in fact of the nonresident guardian of a minor may be appointed curator of the estate of the deceased ancestor.[98]

§ 39. —— Guardian or Conservator of Deceased Infant or Incompetent

The administration of the estate of a deceased infant or mental incompetent may be intrusted to his guardian or conservator under some statutes.

Under some statutes the administration of the estate of an infant belongs to his guardian,[99] while the estate of a lunatic, drunkard, or spendthrift is to be administered by his conservator.[1]

§ 40. —— Assignee of Next of Kin

The assignee of a sole next of kin has been held not entitled to administer or to nominate an administrator in the absence of statutory provision.

It has been held that the assignee of the sole next of kin and distributee is not entitled to administration and cannot nominate an administrator.[2] Under statutes conferring the right of administration on the grantee of the interest of one entitled, a person securing his interest by operation of law is not to be deemed such a grantee.[3] It has been held that the trustee in bankruptcy of a person having an interest in an unadministered estate may be appointed administrator.[4]

§ 41. —— Creditors

a. In general
b. Status as "creditor"
c. Priority among creditors

a. In General

Subject to those having prior rights, a creditor may be entitled to appointment as administrator in preference to noncreditors.

It is a very general rule, established by positive statute in many of the United States, that a creditor of deceased may be appointed administrator where no application for appointment is made within a suitable time by those having legal priority of right, or where the latter are unsuitable for appointment or incompetent.[5]

96. Nev.—In re Taylor's Estate, 114 P.2d 1086, 135 A.L.R. 580.

Effect of repeal discussed

(1) Where legislature in repealing statute specified persons entitled to letters of administration with their priorities and a guardian of a minor was not named, axiom "expressio unius est exclusio alterius" applied as against contention that repealed statute which had entitled a guardian to letters was merely declaratory of the common law, which was not repealed by repealing statute.—In re Taylor's Estate, supra.

(2) The repeal of statute which had made provision that, when person entitled to letters of administration was a minor, letters should be issued to guardian repealed the common law of which such statute was declaratory, where repealing statute was a revision of whole subject of settlement of estates of deceased persons and appointment of legal representatives.—In re Taylor's Estate, supra.

97. N.Y.—In re Thompson, 33 Barb. 334.

98. La.—Manson's Succession, 1 Rob. 235.

99. Ga.—National Lumber Co. v. Turner, 59 S.E. 15, 2 Ga.App. 750.

1. Ill.—Lang v. Friesenecker, 73 N.E. 329, 213 Ill. 598.
23 C.J. p 1041 note 54.

2. N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

Assignee of nonresident alien sole next of kin and distributee was not entitled to administration and could not nominate administrator; hence public administrator had right to administration.—In re Kassam's Estate, supra.

3. Mich.—In re Halsted's Estate, 276 N.W. 438, 282 Mich. 253, 114 A.L.R. 272.

Half sister preferred to widow's niece taking by operation of law

Under a statute providing that administration shall be given to an intestate's widow, or next of kin, or to a "grantee of the interest of one or more of them," where the intestate died leaving a widow and a half sister, and thereafter the widow died, leaving a niece as her own next of kin, letters of administration on the estate of the husband were properly issued to, or on the nomination of, his half sister to the exclusion of the widow's niece who, having secured her interest in the estate of the intestate husband by operation of law, was not a "grantee" of the widow's interest within the meaning of the statute.—In re Halsted's Estate, supra.

4. Mich.—Osmun v. Galbraith, 92 N.W. 101, 131 Mich. 577.

5. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.
Ark.—Lineback v. Howerton, 26 S.W.2d 74, 181 Ark. 433.
Ga.—Howard v. Davis, 15 S.E.2d 865—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.
Ill.—In re Wynn's Estate, 35 N.E.2d 702, 311 Ill.App. 190—In re Bacher's Estate, 261 Ill.App. 547.
La.—W. B. Smith & Co. v. Lowe, 134 So. 707, 16 La.App. 425.
Mass.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180—Bickford v. Furber, 170 N.E. 796, 271 Mass. 94, 70 A.L.R. 469.
Mich.—In re Morgan, 176 N.W. 606, 209 Mich. 65.
Wash.—In re Utter's Estate, 191 P. 836, 112 Wash. 197—In re Fellin's Estate, 185 P. 604, 108 Wash. 626.

"May" appoint as meaning "must"

Word "may," as used, in connection with the appointment of creditors as administrators, in statute providing that county court may grant administration to any creditor who shall apply therefor, is equiva-

A creditor may be preferred to a person lacking priority of right and not a creditor,[6] although the latter is supported in his application by some of the creditors;[7] but it has been held, as shown infra § 43, that, where decedent was an alien, the consul of the country of which he was a citizen should be preferred to a creditor.

"Entitled to take or share." Provisions of a statute conferring preferential right to administer an intestate's estate on persons "entitled to take or share" such estate are confined to distributees and do not include creditors.[8]

b. Status as "Creditor"

An applicant for letters of administration as a creditor must show that he is such within the meaning of the statute, and a creditor of a distributee is not entitled as a creditor of decedent.

In order to entitle one to administration as a creditor, it is necessary that he should actually be a creditor[9] and it has been held that he must be a creditor of decedent,[10] and have a claim or demand which may properly be proved against the administrator when appointed,[11] although, under statutes granting the right of administration to a surviving spouse, next of kin, creditor and then, as a fourth class, to "any other persons showing good grounds therefor", the judgment creditor of an heir of the intestate has been held to have "good grounds" to administer the estate.[12] Where, however, applicant's status as a creditor is sufficiently

lent to words "must" or "shall."—In re Webb's Estate, 10 P.2d 947, 90 Colo. 470.

Nonresident decedent

Probate court could appoint creditor as administrator of nonresident debtor, leaving assets in commonwealth.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.

Default or waiver of persons having priority

Where sole distributee is deceased's brother, residing in Canada, whose general guardian, as deceased's general guardian, had been called to account for alleged misuse of funds, and deceased's attorney and creditor applied for letters of administration and citation was served on infant distributee's general guardian, public administrator, who renounced appointment, and British consul general, although it did not appear whether infant distributee was an alien, letters of administration should issue to deceased's attorney.—In re Clark's Estate, 274 N.Y.S. 282, 152 Misc. 723.

6. Colo.—In re Webb's Estate, 10 P. 2d 947, 90 Colo. 470.
23 C.J. p 1041 note 58.

Preferred to tutor

Creditor who objects to the administration of the estate by natural tutor may require the appointment of an administrator.—Succession of Reed, La.App., 157 So. 765.

7. Ga.—Tanner v. Huss, 6 S.E. 18, 80 Ga. 614.
Minn.—Austro-Hungarian Consul v. Westphal, 139 N.W. 300, 120 Minn. 122.
23 C.J. p 1041 note 59.

8. N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

9. N.J.—In re Killough's Estate, 182 A. 34, 119 N.J.Eq. 255.
Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.
23 C.J. p 1042 note 66.

Nonresident

Resident of another state asserting tort claim against estate of foreign decedent is not a bona fide "creditor" of estate within statute authorizing issuance of letters of administration on application of such creditor.—In re Killough's Estate, 182 A. 34, 119 N.J.Eq. 255.

Claim for damages

(1) The word "creditors," within statute providing that, if widow or surviving husband of deceased or his next of kin or other preferred persons without cause neglect for thirty days to petition for administration, one or more of principal creditors may file such petition, includes a person having a claim for injuries against deceased due to his negligence.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

(2) One claiming unliquidated damages as for conversion by deceased of trust property is not a "creditor" within Remington Comp.St. § 1431, so as to be entitled to preference right to appointment as administrator.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

Unauthorized debt incurred by administratrix

Where administratrix took oath and gave bond in December, 1927, and on March 14, 1928, petitioned the ordinary for authority to execute a crop mortgage in order to make a crop on decedent's farm during 1928, note and crop mortgage signed by administratrix created no debt for which estate was bound, and holder of instruments was not a "creditor" entitled to be appointed or to have someone appointed administrator of the estate on his application, since the ordinary had no authority to authorize administratrix to incur indebtedness to operate farm beyond calendar year in which she qualified. —Harris v. O'Quinn, Ga.App., 17 S.E. 2d 758.

10. D.C.—In re Pitchlynn, 20 D.C. 55.
23 C.J. p 1042 note 67.

Creditor lacking direct interest

Creditor of intestate's son does not have such direct interest in estate as to entitle him to administration against wishes of those directly interested, such as the next of kin and creditors of the estate.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.

11. Kan.—In re Dumback's Estate, 119 P.2d 476, 154 Kan. 501.

Claim and appointment barred

A creditor was not entitled to appointment of an administrator in order that creditor might establish claim against decedent's estate where appointment could not be made within one year after death of decedent and creditor could not have lawfully established his claim.—In re Dumback's Estate, supra.

12. Iowa.—Moreland v. Lowry, 241 N.W. 31, 213 Iowa 1096.

Application not premature under facts

Where statute gave twenty days each to the surviving spouse, next of kin, and creditors within which to apply for letters of administration on a preferential basis, after which period of sixty days any other person showing good grounds could apply as a member of the fourth class entitled to letters, an application brought by a judgment creditor as one of such fourth class was not premature, although made within forty-five days of death, where it appeared that there was no surviving spouse, that the time for application of next of kin had expired at the end of forty days, and that no creditor member of the third class objected to the application. This was true without deciding whether heirs or next of kin had twenty days or forty days in which to apply where there was no spouse, since in either event their right to preference ex-

shown, he may become entitled to letters of administration as such.[13] When the status as creditor ceases, the right to appointment ceases also,[14] and one who is indebted to the estate, in a sum greater than his claim against the estate, is not a creditor entitled to administration;[15] but it is not a sufficient reason for rejection that the claim of one applying for administration would be barred by limitations if the statute were pleaded.[16] One may be a creditor by representation, entitled to administer in certain cases,[17] but it has been held that, where debts of a decedent are assigned after his death, the assignee does not become a creditor entitled to administer.[18] Administration should not be granted to an officer of a corporation which is a creditor,[19] or to one who claims as a trustee or fiduciary and not in his individual capacity.[20] A claimant whose claim arises in strictness after the death of the intestate and yet in close connection with the last offices, like an undertaker, has been held entitled to administration,[21] but there is also authority for the contrary view,[22] especially where the amount is small and the payment was made for the purpose of obtaining administration.[23]

Survival of cause of action. One who has a cause of action against a decedent which survives the latter's death is a creditor entitled to administration,[24] but it is otherwise where the cause of action does not survive.[25]

c. Priority among Creditors

Priority will ordinarily be accorded the principal creditor in selection of an administrator, although the choice will depend on the particular provisions of the applicable statute and the discretion of the court as exercised in the light of the fitness of the applicant and of other pertinent factors.

The priority of right among creditors is ordinarily regulated by statute, and under some statutes there may be a discretion vested in the court as respects choice of the creditor who is to act.[26] The usual determining factors are the respective amounts of the claim of different creditors[27] or priority of application;[28] but the rule in this respect is not imperative, and it is proper to consider the fitness of

pired at the end of forty days.—Moreland v. Lowry, supra.

Judgment appealed from

Right of judgment creditor of heir of deceased to apply for appointment of administrator was not affected by appeal from judgment and filing of supersedeas bond.—Moreland v. Lowry, supra.

Unconsummated agreement between heirs for distribution of property did not prevent application for appointment of administrator by judgment creditor of heir.—Moreland v. Lowry, supra.

13. Md.—Kaiser v. Ebersberger, 19 A.2d 701, 179 Md. 417, 133 A.L.R. 1479.

Mortgagee is "creditor" of estate and as such entitled to injunction against tutor of decedent's minor heirs prohibiting further administration of estate where, after foreclosure of mortgage and sale of property, there appeared a substantial deficiency between proceeds of sale and amount due under mortgage.—Succession of Reed, La.App., 157 So. 765.

14. Ill.—Culley v. Mohlenbrock, 36 Ill.App. 84.
La.—Rust v. Randolph, 5 Mart. 89.
N.M.—In re Englehart, 128 P. 67, 17 N.M. 299, 45 L.R.A.,N.S., 237, Ann. Cas. 1915A 54.
23 C.J. p 1042 note 68.

15. Ill.—In re Wilson, 80 Ill.App. 217.
23 C.J. p 1043 note 69.

16. Ga.—Ex parte Caig, T. U. P. Charlt. 159.

17. Ind.—Bowen v. Stewart, 26 N. E. 168, 28 N.E. 73, 128 Ind. 507.
La.—Vick's Succession, 19 La.Ann. 75.
S.C.—Ex parte Ostendorff, 17 S.C. 22.
23 C.J. p 1043 note 73.

Receiver of note holder

(1) The receiver of an alleged creditor of a decedent could not request appointment of administrator for decedent's estate, unless it appeared that decedent died owing debt to alleged creditor.—Thompson v. Carter's Estate, 177 So. 356, 180 Miss. 104.

(2) The possession and ownership of a decedent's note on which there was a balance due disclosed, prima facie, such a debt as entitled receiver of alleged creditor of decedent to request appointment of administrator for decedent's estate.—Thompson v. Carter's Estate, supra.

18. N.C.—Pearce v. Castrix, 53 N.C. 71.
Wash.—In re Hoss, 109 P. 1071, 59 Wash. 360.
23 C.J. p 1043 note 74.

19. Ga.—Meyers v. Cann, 22 S.E. 611, 95 Ga. 383.
23 C.J. p 1043 note 75.

20. Md.—Glenn v. Reid, 24 A. 155, 74 Md. 238.
23 C.J. p 1043 note 76.

21. Minn.—Austro-Hungarian Consul v. Westphal, 139 N.W. 300, 120 Minn. 122.
23 C.J. p 1043 note 77.

Person advancing funeral expenses

Deceased's brother-in-law who paid for deceased's funeral expenses was a "creditor" who was entitled to have letters of administration issued to him, in absence of application by deceased's next of kin, although deceased's estate was good for the amount of the funeral expenses.—Kaiser v. Ebersberger, Md., 19 A.2d 701, 133 A.L.R. 1479.

22. Ind.—Hildebrand v. Kinney, 87 N.E. 832, 172 Ind. 447, 19 Ann.Cas. 788, reversing, App., 83 N.E. 379.
23 C.J. p 1043 note 78.

23. S.C.—In re Neubert, 36 S.E. 908, 58 S.C. 469.
23 C.J. p 43 note 79.

24. Mass.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.
23 C.J. p 1043 note 71.

25. Mass.—Smith v. Sherman, 4 Cush. 408—Stebbins v. Palmer, 1 Pick. 71, 11 Am.D. 146.

26. Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.
Wyo.—In re Coolidge's Estate, 41 P. 2d 503, 507, 47 Wyo. 488, citing **Corpus Juris.**

"One or more of the principal creditors"

Under Remington Comp.St. § 1431, enumerating what and in which order persons shall be entitled to administer an estate, the phrase in subd 3, "one or more of the principal creditors," implies a choice, and vests discretion in the court to exercise such choice.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

27. S.C.—Ex parte Ostendorff, 17 S. C. 22.
23 C.J. p 1043 note 81.

28. N.Y.—In re Hawley, 76 N.Y.S. 461, 37 Misc. 667.
23 C.J. p 1043 note 82.
Priority of application generally see supra § 32.

applicants and the wishes of those who are interested in the estate.[29]

§ 42. —— Strangers

Generally speaking a stranger may not insist on administration of an estate or, where administration is requisite, be appointed administrator unless selected by interested persons or chosen by the court under special circumstances. It may become proper, however, for the court to appoint a stranger administrator where there is no qualified person entitled to a statutory preference or where special circumstances, such as antagonism between claimants of the estate, render it desirable.

In accordance with rules governing restriction of the administration of an estate to persons beneficially interested therein, which are discussed supra § 31, a stranger has no right to insist on administration of an estate,[30] nor may he apply for letters as matter of right,[31] or be appointed administrator on his own unsupported application,[32] and as a rule he may not be appointed unless selected by those who are beneficially interested in the estate,[33] or in other special cases hereinafter described, and generally speaking it is only where no one given statutory preference is competent and suitable that a stranger may be appointed administrator.[34] A stranger cannot be preferred to the next of kin without good cause,[35] and, where there is a suitable applicant falling within a preferred class, it is improper to appoint a stranger.[36] So, also, where the next of kin of decedent, a citizen of a foreign country, requested a cousin of decedent to take charge of decedent's estate, it was held that the court could not grant letters of administration to a third person on his application.[37]

The court may, however, appoint a suitable stranger as administrator of an intestate's estate where there are no persons competent and entitled to preference under statute,[38] or where those entitled to appointment consent to selection of a stranger,[39] or where antagonism existing among claimants of the estate renders it desirable to appoint an impartial and disinterested person as administrator;[40] and, where the persons having the

29. Ga.—Freeman v. Worrill, 42 Ga. 401.

30. Utah.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.

Interested parties content to omit administration

(1) If decedent's heirs are content to let property remain in common or undivided ownership, and agree among themselves for care and use, a stranger has no right to interfere. —In re Cloward's Estate, supra.

(2) If there is only a spouse surviving, or minor children, or both, or disabled heirs of decedent who may need possession and usufruct of decedent's property, and other heirs, if any, permit them to have it, a stranger should not be permitted to decree otherwise and to institute probate proceedings.—In re Cloward's Estate, supra.

No right to subject property to debts and expenses

A stranger to an estate, who is not a creditor and who has no interest in the property of the estate on distribution, and who can receive nothing from it except fees and commissions as administrator or attorney, has no right to subject property to debts and expenses, or to disturb the use or occupancy of the property and change its title or ownership.—In re Cloward's Estate, supra.

31. Mo.—In re Hill, 77 S.W. 110, 102 Mo.App. 617.

32. Utah.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.

33. Ga.—Smith v. Collins, 7 S.E.2d 600, 61 Ga.App. 801.

Appointment of stranger not policy of law

It is not the policy of the law that an estate of a decedent should fall into the hands of strangers, and, where a relative applying for appointment is qualified, a stranger should not be appointed in his stead simply because his brothers and sisters could not work with him on account of enmity existing between them, under Rev.St. art 3282.—Dooley v. Dooley, Tex.Civ.App., 240 S.W. 1112.

34. Mo.—State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo. App. 902.

35. N.Y.—Matter of Ciotto, 93 N.Y.S. 973, 105 App.Div. 143.
Pa.—Kelly's Estate, 15 Pa.Dist. 427.
R.I.—In re Randall, 63 A. 806.

36. Mass.—McDonald v. O'Dea, 152 N.E. 341, 256 Mass. 177.
Neb.—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.

37. N.J.—In re Sinovcic, 86 A. 917, 80 N.J.Eq. 260.

38. Ky.—Hunt v. Crocker, 55 S.W. 2d 20, 246 Ky. 338.
Md.—Schneider v. Hawkins, 16 A.2d 861, 179 Md. 21.
Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123.
23 C.J. p 1043 note 84.

Any fit applicant

In absence of any qualified kin of a deceased, the surrogate may grant letters of administration to any fit person applying therefor.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46.

Nonresident distributees

Under statute providing that letters of administration can be granted at any time to any person deemed suitable if proof be made of renunciation by preferred persons or that no persons entitled to preference reside in Missouri, probate court could appoint a stranger as administrator of intestate's estate prior to expiration of thirty days after death of intestate, notwithstanding distributees did not file a renunciation of their preference, where distributees were all nonresidents at the time of appointment.—State ex rel. Pryor v. Anderson, 123 S.W.2d 181, 343 Mo. 895, quashing mandamus, App., 112 S.W.2d 857.

39. Cal.—In re Silvar, 46 P. 296, 5 Cal.Unrep.Cas. 494.

40. Mich.—In re Abramovitz' Estate, 270 N.W. 294, 278 Mich. 271.
Wash.—In re Mason's Estate, 66 P.2d 310, 189 Wash. 641—In re Mundt Estates, 14 P.2d 59, 169 Wash. 593 —In re Thomas' Estate, 8 P.2d 963, 167 Wash. 127.
23 C.J. p 1043 note 84 [c] (2).

Duty to name one not related to disputants

Where none of the property of an estate was exempt from claims of creditors, and the estate was insolvent, but, notwithstanding that fact, the heirs and the beneficiaries under the will contested its validity, and a decree denying probate was affirmed, the district court should name as administrator some one not interested in or related to any of the proponents or contestants.—In re Jones' Estate, 202 P. 206, 59 Utah 99.

right, under the statute, to control the appointment of an administrator do not agree as to the management and disposition of the estate, it is not an abuse of discretion for the court to appoint a disinterested third person as administrator.[41]

§ 43. —— Foreign Consuls

In case of the death of an alien leaving property within the jurisdiction, the consul of the country of which decedent was a citizen or subject has sometimes, by virtue of the provisions of treaties or statutes, the right to administer the estate. Administration by such an official is discussed infra § 1053.

§ 44. —— Nominee of Person Entitled

a. In general
b. Qualification of person nominating
c. Sufficiency of nomination
d. Waiver of right to nominate and termination of nomination

a. In General

In the absence of contrary statute the courts are not obligated to appoint the nominee of one preferentially entitled to administration and will ordinarily appoint the next in statutory order, although in the exercise of its discretion the court may under some statutes appoint the nominee of one lacking express statutory authorization to nominate. Where the statute confers a right of nomination, it may become mandatory for the court to appoint the nominee, the rights of nominees in general depending on the particular statute and the circumstances disclosed.

In the absence of statutory authorization, express or implied, the right to letters of administration is personal and nondelegable,[42] one entitled to letters in his own right lacks the right to nominate another to serve for him,[43] and a person entitled to precedence in administration cannot himself renounce the office and vest the right of appointment in his nominee to the exclusion of those who are next entitled in the statute order.[44] Where the statutes make no express provision for nomination or for delegation of the right to administer, it has been held that the prior right of one to administer an estate does not include the right to nominate an administrator,[45] and that the court lacks power to appoint the nominee of one personally entitled to preference but not accorded the express statutory right of nomination.[46] Other courts have taken the view that, even where there is no express provision in the statutes requiring recognition of the right of one belonging to a preferred class to renounce his right to qualify as administrator and at the same time to nominate another for appointment in his stead, they should so interpret statutes conferring preferential rights to administration as to give sanction to the right of nomination and substitution,[47] and should sustain the right of a suitable nominee of one preferentially entitled to appointment when the person nominating is himself competent by reason of residence, age, and capacity to act.[48] It has also been held that, where the person having the prior right has renounced in favor of a member of the class next in order, such nominee must be appointed unless personal unfitness or legal incompetency is shown.[49] Even where there is no right to nominate, the court may properly appoint the nominee of the person entitled in preference to another person having no right to letters under the statute.[50] One in a prior class will be appointed in preference to the nominee of one in a subsequent class.[51]

Under some statutes the court will as a general rule approve the nominee of next of kin against whom no objection exists,[52] and may in its discre-

41. N.D.—Ellis v. Ellis, 174 N.W. 76, 42 N.D. 535.

42. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.
N.Y.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 886, 235 App.Div. 609.

In Oregon
A petition by an alleged creditor for appointment of one therein named as administrator does not put the person so designated in the preferred class, under Or.L. § 1150.—In re Roedler's Estate, 222 P. 301, 110 Or. 147.

43. Idaho.—Schwarze v. Logan, 90 P.2d 692, 60 Idaho 251.

44. Ala.—Curtis v. Williams, 33 Ala. 570.
Ga.—Mabry v. Mabry, 15 S.E.2d 447, 449, 65 Ga.App. 132, citing Corpus Juris.
23 C.J. p 1045 note 97.

45. N.M.—In re Miller's Estate, 38 P.2d 1116, 39 N.M. 40.

46. Colo.—In re Webb's Estate, 10 P.2d 947, 90 Colo. 470.

Creditor
That alleged creditor of intestate nominated noncreditor as administrator does not empower county court to make the appointment since a creditor has no right of nomination.—In re Webb's Estate, supra.

47. N.C.—In re Smith's Estate, 188 S.E. 202, 210 N.C. 622.

48. N.C.—In re Smith's Estate, supra.

49. Pa.—In re Swarts, 41 A. 1000, 189 Pa. 71.

50. N.J.—In re Alpaugh, 91 A. 588, 83 N.J.Eq. 616.

51. Idaho.—Schwarze v. Logan, 90 P.2d 692, 60 Idaho 251.

Waiver of right not shown
A resident son of deceased person did not waive priority in right of administration over nominee of nonresident sister and creditor of deceased by waiting approximately ten months before filing petition, where the son appeared before the sister's nominee's appointment and objected to issuance of letters to him and at same time claimed letters for himself.—Schwarze v. Logan, supra.

52. N.J.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.
N.Y.—In re Stege's Estate, 299 N.Y.S. 115, 164 Misc. 95.
23 C.J. p 1045 note 99.

tion appoint such nominee,[53] but is not bound to do so.[54]

Statutes conferring right of nomination. Under some statutes the persons primarily entitled to administration have the right to nominate a person to serve in their stead who, if suitable for the office, should be appointed by the court,[55] and under statutes of this character it has been held that the right of nomination by those on whom the statute confers it is absolute and that appointment of the nominee, if qualified, becomes mandatory on the court.[56] Where, however, the person making the nomination is a nonresident and is not a surviving spouse, it has been said that the nomination is not binding on the court,[57] and in general the statutory right of nomination and its binding character will depend on the particular provisions of the statute invoked, as applied to the circumstances involved. Generally speaking, one with a prior right to appointment as administrator also has a prior right in respect of nominating another to act in his place.[58] The nominee has no greater rights than those of the person who nominated him.[59]

Particular statutory provisions. Under statutes providing that, where there are "several" next of kin equal in degree, the court shall appoint the nominee of a majority of those interested as distributees, the word "several" means two or more,[60] and in the event of a disagreement between those who are next of kin, distributees not next of kin are entitled to vote on the selection of an administrator.[61] In such a case the court should appoint

53. Mass.—In re Waverley Trust Co., 167 N.E. 274, 268 Mass. 181.

Nominee of creditor

On creditor's petition for appointment of administrator, creditor need not be appointed, but any suitable person may be appointed, and such appointee is not a stranger to the estate.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

Discretion properly exercised in favor of nonresidents

Appointing nominee of three nonresident daughters as administrator in preference to resident daughter was not abuse of discretion.—In re Cameron's Estate, 284 P. 143, 86 Mont. 455.

54. N.J.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.
23 C.J. p 1045 note 98.

55. U.S.—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901, applying Tennessee law.
Cal.—In re Mercer's Estate, 271 P. 1067, 205 Cal. 506.
Ga.—Mabry v. Mabry, 15 S.E.2d 447, 449, 65 Ga.App. 132, citing **Corpus Juris**—Jackson v. Jackson, 177 S. E. 591, 179 Ga. 696.
Iowa.—In re Rugh's Estate, 234 N. W. 278, 211 Iowa 722.
Mont.—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
Okl.—In re Walker's Estate, 36 P.2d 10, 169 Okl. 100.
Utah.—In re Johnson's Estate, 35 P. 2d 305, 84 Utah 168.
23 C.J. p 1044 note 96.

Illegitimate son

Where deceased properly acknowledged himself to be father of illegitimate son, a resident of Germany, the son was held a "child" within statute entitling nonresident child to nominate administrator.—In re Wehr's Estate, 29 P.2d 836, 96 Mont. 245.

In Texas

(1) It has been held that a granddaughter of decedent is not entitled to appointment as administratrix in preference to one unrelated but nominated by two children.—Eckeberger v. Stroud, Civ.App., 103 S.W.2d 803.

(2) In a case where the nephew of an intestate, being one of the next of kin, was held entitled to appointment as administrator in preference to one more distantly related, although such one had been designated as administrator by other nieces and nephews, it was said that sections of the statutes invoked by the nominee applied only in cases where decedent disposed of his property by will and not where, as in the case at bar, he died intestate.—Zamora v. Garza, Civ.App., 129 S.W.2d 401.

(3) A person later in statutory order of preference has been appointed in preference to the nominee of one of a higher order of statutory preference but disqualified by physical infirmity from acting.—Slay v. Davidson, Civ.App., 88 S.W.2d 650, error refused.

(4) It has been held by the supreme court of Texas that a nonresident widow, qualified to act as executor and entitled to preference if seeking letters personally, may renounce the right to letters and nominate another who will be appointed in preference to the nominee of a creditor.—Stevens v. Cameron, 101 S. W. 791, 100 Tex. 515, reversing, Civ. App., 96 S.W. 1086.

56. Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.
Mont.—In re Cameron's Estate, 284 P. 143, 86 Mont. 455—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
Utah.—In re Johnson's Estate, 35 P. 2d 305, 84 Utah 168.
23 C.J. p 1045 note 1.

No discretion

Under Civ.Code 1910 § 3943 subd 3, if person selected for appointment as administrator by majority of interested distributees, capable of expressing a choice, be competent, qualified, and disinterested, neither ordinary nor jury on appeal have any discretion in matter of his appointment.—Davis v. Davis, 127 S.E. 779, 33 Ga.App. 628.

Nomination by sister sharing in estate

The nominee of a decedent's sister is prima facie entitled, as of right and not as a matter of discretion, to be preferred to decedent's nephew in granting letters of administration, if sister succeeds to any part of decedent's estate, even though nephew, and not such nominee, is entitled to share in some part of the estate.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

57. Cal.—In re Pardue's Estate, 70 P.2d 678, 22 Cal.App.2d 178.

Nomination by nonresident sister

Under probate code enumerating persons entitled to letters of administration, rendering only bona fide residents competent to serve as administrators, and permitting person entitled to letters of administration to designate appointee, request of nonresident sister of decedent that certain person be appointed administrator created no priority right and was not binding on court.—In re Pardue's Estate, supra.

58. Mont.—In re Mapes' Estate, 118 P.2d 755.

59. Cal.—In re Somerville's Estate, 55 P.2d 597, 12 Cal.App.2d 430.

60. Ga.—Walker v. Rowe, 154 S.E. 722, 41 Ga.App. 769—Rowe v. Walker, 148 S.E. 762, 40 Ga.App. 1.

61. Ga.—Walker v. Rowe, 154 S.E. 722, 41 Ga.App. 769.

the nominee favored by a majority of the distributees.[62] Provisions of the statute giving preference to the next of kin apply only where there is a single next of kin or where all the next of kin in equal degree act as a unit in designating the person to be appointed as administrator,[63] and in such case the nominee of the nearest in kin will be preferred to the nominee of more distant kin, even though the latter may constitute a majority both in numbers and in interest;[64] but, where the majority of next of kin of equal degree select a nominee, he will be preferred to a single next of kin seeking administration for himself,[65] and their nominee may be preferred irrespective of the vote of distributees less closely related.[66] It has also been held that distributees not next of kin have the vote of their common ancestor and only such vote in a contest between distributees who are next of kin and distributees who are not next of kin.[67] Under provisions of the statute conferring preference on the widow or her nominee, where the widow is qualified to act, she may nevertheless nominate another to administer in her stead, and letters issued to her nominee are not void;[68] and, if the widow is disqualified, she may still nominate another who is qualified for such purpose even as against contesting claimants next entitled to letters of administration.[69] Where the widow is first in order of preference, her selection of a qualified person for administrator precludes the right of any persons in a lower order of preference to express any choice or to act personally as administrators.[70]

Under statutes expressly giving preference only to the nominee of a surviving spouse, further providing for preference to specified next of kin and then authorizing the grant of administration to a person, although not entitled thereto, "at the written request of the person entitled, or, if otherwise entitled, is not competent to serve, filed in the court," the court may grant administration to any competent person on the request of a person entitled but incompetent to serve,[71] the nominee of such entitled but incompetent person may be preferred to others listed later in the statutory classification of preferences,[72] and under statutes of this character the nominee of the surviving spouse is given a mandatory preference but that of the nominees of other classes is discretionary with the court.[73] Where the surviving spouse of an intestate is mentally incompetent, his guardian may not nominate another to act as administrator to the exclusion of the right which the statute gives to those next in order.[74]

Under statutes providing that the court has power to nominate one for administrator at the request of the "person entitled," such phrase refers to the entire class entitled,[75] and the nominee of one member of such class has, in the court's discretion, an

62. Ga.—Rowe v. Walker, 148 S.E. 762, 40 Ga.App. 1.

Nominee of majority preferred to sister

Where an intestate left a surviving sister and brother as his next of kin, and also nieces and nephews not next of kin but entitled to share in the estate as distributees, on a contest the court should appoint a fit and disinterested person nominated by the brother and the nieces and nephews in preference to the sister. —Rowe v. Walker, supra.

63. Ga.—Walker v. Rowe, 154 S.E. 722, 41 Ga.App. 769.

64. Ga.—Dawson v. Shave, 132 S.E. 912, 162 Ga. 126, answer to certified question conformed to 133 S. E. 313, 35 Ga.App. 343.

Sister's nominee preferred to that of nieces and nephews

Where intestate left one sister and children and grandchildren of deceased sisters and brother all being qualified, person selected in writing by sister was held entitled to letters of administration over person selected by majority of the others, although constituting majority numerically and in interest.—Dawson v. Shave, supra.

65. Ga.—Popwell v. Nail, 107 S.E. 364, 27 Ga.App. 97.

66. Ga.—Sullens v. Pierce, 164 S.E. 93, 45 Ga.App. 207.

Nominee of children preferred irrespective of grandchildren

Person selected in writing by majority of living children of intestate widow was entitled to letters of administration, regardless of vote of children of intestate's deceased children.—Sullens v. Pierce, supra.

Void deed as not precluding vote of children

Warranty deed made by intestate's children before intestate's death, attempting to convey their interests in intestate's land to another child, was void; hence it did not affect their right to select administrator.—Sullens v. Pierce, supra.

67. Ga.—Pierce v. Smith, 102 S.E. 648, 25 Ga.App. 101.

Children of intestate's deceased brother entitled to one vote

In a contest as to selection of an administrator of a decedent, who left no children, but several sisters and the children of two deceased brothers as his heirs at law, the children of a deceased brother would together have one vote, but only one, in the selection of the administrator, under applicable statutes.—Pierce v. Smith, supra.

68. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75.

69. Ga.—Rivers v. Alsup, supra.

70. Ga.—Mabry v. Mabry, 15 S.E. 2d 447, 65 Ga.App. 132.

71. Ariz.—In re Gerard's Estate, 72 P.2d 952, 50 Ariz. 458, 113 A.L.R. 776.

72. Ariz.—In re Gerard's Estate, supra.

Brother's nominee preferred to creditor

The court may give preference to request of intestate's brother, incompetent to serve as administrator because of nonresidence, for appointment of competent person nominated by him, over petition of any person such as creditor, whose statutory right to administration is inferior to that of brother, for issuance of letters to petitioner.—In re Gerard's Estate, supra.

73. Ariz.—In re Gerard's Estate, supra.

74. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.

75. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

equal right to be appointed with the members of a subsequent class,[76] but has no right as against any other member of the same class who demands letters in his own right.[77]

Statutes providing that administration of an intestate's estate shall be granted in the named order to widow or husband, next of kin, or a grantee of the interest of one of them, or to such person as they request to have appointed, confer a priority on the widow not only as among relatives but also as among those who may request the appointment of some other person.[78] Where there is no widow entitled to letters, a child shown prima facie to be the lawful daughter of intestate is entitled to exercise the statutory right of nominating an administrator for her deceased father's estate,[79] and the right of nomination vested in next of kin is not divested by infancy or incompetency,[80] but may be exercised for the infant or incompetent by the general guardian.[81] Statutes relative to public administrators, discussed infra §§ 1050–1052, which provide for appointment of a public administrator where there is no widow, husband, or next of kin entitled to a distributive share, resident in the United States and competent or willing to act, are not designed to deprive the probate court of the right to appoint a suitable resident of the state as administrator on request of the widow or next of kin.[82]

Under statutes conferring priority first on the next of kin, in the absence of application by a surviving spouse, and next on the nominee of a next of kin, where there are two next of kin in equal degree, the next of kin applying for letters personally will be preferred to the nominee of the other next of kin.[83]

Under statutes prescribing the order of preference and expressly granting preference to the nominee of a surviving spouse but to no other nominee, the only nominee entitled to preference is the nominee of the surviving spouse,[84] and other persons qualified to act must either accept appointment personally or waive the right absolutely,[85] and their preferential rights extend only to personal appointment and not to nomination of others for appointment.[86] Under statutes of this character the request or suggestion of next of kin of a fit and suitable person for appointment as administrator is entitled to serious consideration, but is not controlling on the court's discretionary power and ultimate decision respecting appointment of an administrator.[87]

Delegation of power to nominate. It has been held that the power conferred by statute on a surviving spouse to nominate an administrator cannot be delegated.[88]

b. Qualification of Person Nominating

In some jurisdictions the right to nominate is dependent on the right to administer in the sense that a person entitled to distribution but disqualified from serving as administrator may not nominate another to act in his place, while in other jurisdictions there is no such interdependence of the right to administer and the right to nominate an administrator. Hence one lacking financial interest in an estate may or may not be held empowered to nominate an administrator. One mentally incompetent cannot make a nomination, although under some statutes the guardian of an infant or incompetent may be permitted to do so.

There is much conflict of authority in the different states as to whether the right to nominate an administrator is or is not dependent on the right to administer, some courts holding that one disqualified from acting as administrator may nominate and others holding the contrary; and the decisions are frequently dependent on the language of a statute expressly conferring the right of nomination.[89]

In some jurisdictions one himself incompetent to take letters of administration may not effectively nominate anyone in his stead,[90] as where it is expressly provided by statute that only such persons as are entitled to administer shall have the right to nominate,[91] and the right of nomination has been denied to nonresidents,[92] as in the case of nonresident aliens,[93] themselves ineligible for appointment. The dependence of the right to nominate on the

76. Cal.—In re Olcese's Estate, supra.

77. Cal.—In re Olcese's Estate, supra.

78. Mich.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

79. Mich.—In re Corby's Estate, 203 N.W. 877, 231 Mich. 235.

80. Mich.—In re Corby's Estate, supra.

81. Mich.—In re Corby's Estate, supra.

82. Mich.—Grand Trunk Western R. Co. v. Kaplansky, 258 N.W. 423, 270 Mich. 135.

83. Tenn.—Williams v. Stewart, 64 S.W.2d 194, 166 Tenn. 615.

84. Wash.—State v. Superior Court for King County, 291 P. 481, 158 Wash. 546, 70 A.L.R. 1460.

85. Wash.—State v. Superior Court for King County, supra.

86. Wash.—In re Utter's Estate, 191 P. 836, 112 Wash. 197.

87. Wash.—In re St. Martin's Estate, 27 P.2d 326, 175 Wash. 285.

88. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.
Okl.—In re Johnson's Estate, 114 P. 2d 469.

89. N.C.—Boynton v. Heartt, 74 S. E. 470, 158 N.C. 488, Ann.Cas.1913D 616.

90. N.Y.—In re Marret's Estate, 274 N.Y.S. 117, 152 Misc. 713.
23 C.J. p 1046 note 4.

91. Ill.—In re McWhirter, 85 N.E. 918, 235 Ill. 607.

92. Ky.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584.

93. N.Y.—In re Marret's Estate, 274 N.Y.S. 117, 152 Misc. 713—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

right to administer has also been affirmed where there was no controlling statutory provision on the subject.[94] The next in statutory order will be preferred to one who has a prior statutory classification but who is disqualified to serve.[95]

Under the practice prevailing in other jurisdictions, the fact that one is incompetent to serve as administrator personally does not per se deprive him of the statutory right to nominate an administrator,[96] and the courts have recognized the right of nomination in persons who were incompetent to serve personally because of nonresidence,[97] or because of ignorance of English.[98]

One mentally deficient may not make a nomination of an administrator,[99] but an adjudication of incompetency subsequent to the appointment of the administrator is not evidence that the nominator was incompetent at the time of the nomination or at any other time prior to the date of the adjudication of incompetence.[1] Where incompetence to act arises from infancy or mental disability, some courts permit a nomination to be made by guardian,[2] but others refuse to accept such a nomination as against the claims to administration of others next in the statutory line of preference.[3]

Lack of financial interest. Under some decisions one lacking a financial interest in the estate has no standing to nominate an administrator,[4] but under other decisions it has been held that next of kin who are not distributees may nevertheless have the right to nominate an administrator.[5]

c. Sufficiency of Nomination

Except as the matter may be otherwise regulated by statute, a nomination is sufficient if on file at the time of the hearing and need not be made in any particular form.

It is ordinarily sufficient if the nomination for appointment of an administrator is filed in court at the time of the hearing,[6] and, in the absence of contrary statutory regulation, it would seem that nomination need not be made in any set form.[7]

d. Waiver of Right to Nominate and Termination of Nomination

While a statutory right to nominate is subject to waiver, the waiver of the right of personal administration is not per se a waiver of the right to nominate. A nomination is subject to revocation before it has been acted on but not thereafter. Death of the nominator before appointment of his nominee terminates the nominee's right to appointment.

A statutory right to nominate an administrator may be waived;[8] but a widow's statutory right to control in limine the administration of her deceased husband's estate carries with it the continuing right to nominate administrators where necessary to such control,[9] and the fact that she has waived her personal right to administer and has

Resident daughter of nonresident alien sole next of kin could not be appointed administratrix under power of attorney or assignment executed by her mother.—In re Kassam's Estate, supra.

94. N.C.—Boynton v. Heartt, 74 S.E. 470, 158 N.C. 488, Ann.Cas.1913D 616.

95. Tex.—Slay v. Davidson, Civ. App., 88 S.W.2d 650, error refused.

96. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75.
Minn.—Long v. Christopher, 260 N.W. 314, 194 Minn. 238.
23 C.J. p 1045 note 3.

97. Mont.—In re Cameron's Estate, 284 P. 143, 86 Mont. 455—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
23 C.J. p 1045 note 3 [e].

98. Minn.—Long v. Christopher, 260 N.W. 314, 194 Minn. 236.

99. Cal.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

1. Cal.—In re Calhoun's Estate, supra.

2. Mich.—In re Corby's Estate, 203 N.W. 877, 231 Mich. 235.

3. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.

4. Pa.—In re Reamer's Estate, 172 A. 655, 315 Pa. 148.

5. Ill.—Lundberg v. Johnson, 231 Ill.App. 400, affirmed 143 N.E. 434, 312 Ill. 161.

Difference between resident and nonresident decedents

(1) Under Administration Act § 18, prescribing the preferences to be observed in the appointment of an administrator, it is not necessary, under subd. 8, that the next of kin be entitled to a distributive share of the estate in order to entitle them to nominate one for such appointment, where deceased was a resident of the state, the provision of the statute containing that requirement being applicable only to estates of nonresident intestates.—Sanders v. Buenger, 143 N.E. 431, 311 Ill. 572.

(2) A half brother of deceased, a nonresident of the state, was held not entitled, under Administration Act § 18, to nominate one for appointment of administrator, although he might classify as a "person interested," under § 46, if the estate involved was a proper one for administration by the public administrator.—Sanders v. Buenger, supra.

6. Cal.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.

Need not be filed with petition

Under statute requiring that nomination of administrator be in writing and that it be filed with court, nomination by decedent's nonresident brother was not required to be filed at time petition for letters was made but it was sufficient that nomination was on file when hearing was had.—In re Mapes' Estate, Mont., 118 P.2d 755.

7. **Nomination by telegram**

A telegram from father, who was first in precedence of existing next kin of intestate dying in Tennessee, to coroner reading, "I hereby appoint you administrator of the estate", was authority from father to coroner to qualify as administrator.—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901.

8. Mont.—In re Infelise, 149 P. 365, 51 Mont. 18.
Tenn.—In re Wooten, 85 S.W. 1105, 114 Tenn. 289.
23 C.J. p 1046 note 6.

9. Mont.—State ex rel. McCabe v. District Court of Third Judicial Dist. in and for Deer Lodge County, 76 P.2d 634, 106 Mont. 272.

already made one nomination does not preclude her from making a second nomination on death of her first nominee.[10]

A nomination may be revoked at any time before it has been acted on,[11] but without adequate cause a nominator may not revoke his nomination after the court has acted on it by appointing the nominee,[12] or after a proceeding has been instituted by the nominee to obtain letters.[13]

Death of the nominator before the appointment of his nominee has been held to terminate the latter's right to appointment.[14]

§ 45. —— Joint Administrators

While sole administration is ordinarily to be preferred to joint administration, the matter of appointing sole or joint administrators is ordinarily committed to the sound discretion of the court, as explained infra § 1041.

§ 46. Competency or Suitableness to Serve

a. In general
b. Mental and physical disabilities of applicant
c. Business capacity and literacy
d. Financial condition
e. Improvidence, bad character, insobriety, or conviction of crime
f. Nonresidence and alienage
g. Married women and infants
h. Hostility to estate or distributees; intermeddling
i. Corporations
j. Miscellaneous persons

a. In General

Broadly speaking, anyone of sound mind and morals, not under legal disability, is eligible to become an administrator, and the grounds of disqualification prescribed by express statute are regarded by some, but not all, courts as exclusive.

Generally speaking, anyone is competent to act as administrator, except such as are forbidden by law,[15] and it has been broadly stated that any citizen of sound mind and good moral character resident in the state and laboring under no disability is eligible for appointment as administrator.[16]

It is the duty of the court before appointing an administrator or similar officer to make careful inquiry into his character, integrity, soundness of judgment, and general capacity;[17] in many jurisdictions the court may pass over a person whose relation to the decedent would otherwise entitle him to preference, because of his unsuitableness for the trust;[18] and, except as such appointment may be controlled by mandatory statutes, the court may refuse to appoint an applicant if for any reason he is unsuitable to administer the trust.[19] In this connection it has been said that the best interests of the estate as a whole are to be considered,[20] that the court acts judicially and not ministerially in appointing an administrator,[21] that an administrator should be qualified to administer the estate for the best interests of all concerned,[22] and that an applicant may be unsuitable to become administrator because the problems involved in the settlement of the estate are unusual and troublesome and his appoint-

10. Mont.—State ex rel. McCabe v. District Court of Third Judicial Dist. in and for Deer Lodge County, supra.

11. Cal.—In re Shiels, 52 P. 808, 120 Cal. 347—Bedell's Estate, 32 P. 1117, 97 Cal. 339.
Idaho.—McCormick v. Brownell, 136 P. 613, 25 Idaho 11.

No estoppel

Request for appointment of nominee does not estop person entitled to administration from revoking request.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

12. Cal.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

13. Cal.—In re Silvar, 46 P. 296, 5 Cal.Unrep.Cas. 494.

14. Cal.—In re Connick's Estate, 209 P. 356, 189 Cal. 498.

15. Ky.—Moran v. Moran, 189 S.W. 248, 172 Ky. 344.
N.Y.—Matter of Reichert, 69 N.Y.S. 344, 34 Misc. 288, 9 N.Y.Ann.Cas. 472—Matter of Haley, 49 N.Y.S. 397, 21 Misc. 777.
23 C.J. p 1046 note 13.
Competency of:
Administrators de bonis non see infra § 1019.
Administrators with the will annexed see infra § 1031.
Public administrators see infra § 1051.
Executors see supra § 28.
Surviving partner as executor or administrator of deceased partner see the C.J.S. title Partnership § 286, also 47 C.J. p 1062 note 93-p 1063 note 21.

16. Ga.—Walker v. Rowe, 154 S.E. 722, 41 Ga.App. 769.

17. Mass.—Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444, modified on other grounds Ex parte Worcester County Nat. Bank, 49 S. Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 98.

18. N.J.—In re Messler's Estate, 1 A.2d 322, 324, 16 N.J.Misc. 434, citing **Corpus Juris.**
S.C.—Ex parte Small, 48 S.E. 40, 69 S.C. 43.
23 C.J. p 1046 note 14.

19. Mass.—Morgan v. Morgan, 166 N.E. 747, 267 Mass. 388.

Unfit person

Since preference rights given by statute to administer an estate are not absolute, the rule does not require the court to appoint one as an executor or administrator who has given evidence of dishonesty of purpose in seeking the appointment or who is unfit to administer the trust. —In re Bredi's Estate, 201 P. 296, 117 Wash. 372.

20. Mass.—Morgan v. Morgan, 166 N.E. 747, 267 Mass. 388.

21. Wash.—In re Langill's Estate, 201 P. 28, 117 Wash. 268.

22. N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

ment would under the facts be likely to render execution of the trust perplexing or difficult.[23] In other words, unfitness may arise solely from the situation of the applicant in connection with the estate without proof of mental or physical incapacity,[24] and the person appointed administrator should be a fit person in the light of the special conditions of the particular estate and those interested in it as creditors, legatees, and next of kin.[25] Subject to statutory disqualifications, the probate court exercises a wide discretion in determining the persons who are suitable and competent to administer an estate,[26] and its discretion will not be reviewed in the absence of abuse.[27] Statutes broadly giving any person the right to apply for letters of administration must be construed in conjunction with other statutory provisions defining who are qualified to act.[28]

Limitation of grounds of disqualification. Some authorities hold that statutory grounds of disqualification are exclusive and that the court may not refuse appointment to one otherwise entitled thereto for reasons not enumerated in the statute as a ground for disqualification,[29] but other authorities are to the contrary.[30]

Where the statute accords one a preferential right to appointment if "suitable and competent," and where a fair issue of fact is raised by those opposing the appointment in respect of the applicant because of unsound mind, intemperance, dishonesty, want of integrity, dissolute habits, or other disqualifying moral delinquencies, there is some discretion reposed in the probate court as to whether or not it will make the appointment, but where no such issues are raised the court lacks discretion to appoint another in preference to an applicant having a prior statutory right to administer the estate, and may not appoint such other even though by comparison he is better qualified and more capable than the applicant having the prior statutory right to administer.[31]

Grounds for removal of an administrator, which are discussed infra § 90, authorize and require a denial of the right to qualify if existing at the time appointment is sought.[32]

b. Mental and Physical Disabilities of Applicant

Mental disability amounting to insanity or want of understanding will ordinarily disqualify one from acting as administrator, but weakness of mind or ignorance of business or legal subjects not amounting to lack of a normal intelligence is not sufficient to do so. Neither old age nor physical disability is ordinarily regarded as a ground of disqualification.

Insane persons are incompetent to be appointed or serve as administrators,[33] as, for example, one legally adjudicated to be insane.[34]

"Want of understanding," as the phrase is used in statutes rendering it a disqualification for service as administrator, means a want of common intelligence amounting to a defect in intellect,[35] which lack constitutes a ground for disqualification of one as administrator,[36] and it has been held that the want of understanding need not be such as would warrant a general adjudication of incompetency or the appointment of a committee;[37] but where one is possessed of common intelligence he may be qualified to serve as administrator,[38] and he will not be disqualified as in want of understanding merely because he is poorly informed on business or legal subjects.[39] While it has been held that weakness

22. Mass.—Morgan v. Morgan, 166 N.E. 747, 267 Mass. 388.

24. Mass.—Morgan v. Morgan, supra.

25. Mass.—Morgan v. Morgan, supra—Petition of Davis, 129 N.E. 366, 237 Mass. 47.

26. Mo.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1.

Facts of particular case

In determining whether a person is incompetent to be appointed administrator, each case must rest on its particular facts, and evidence of incompetency must be clear to defeat the right to letters of administration.—In re Taylor's Estate, Nev., 114 P.2d 1086, 135 A.L.R. 580.

27. Mo.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1.

28. Tex.—Balfour v. Collins, 25 S.W.2d 804, 119 Tex. 122, answer to certified question conformed to, Civ.App., 27 S.W.2d 185.

29. Ala.—Bell v. Tulgham, 80 So. 39, 202 Ala. 217.
23 C.J. p 1047 note 15.

30. Wash.—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819—In re Langill's Estate, 201 P. 28, 117 Wash. 268.

31. Mich.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

Comparative capacity not the test

Widow may be "suitable and competent" to administer husband's estate within Comp.L.1915 § 13820, although there is another who by comparison is better qualified and more capable than she, such statute not requiring a comparison of widow's business knowledge and ability with that of some one else, or that she be skilled in husband's calling and familiar with the details of his business.—In re Morgan, supra.

32. Ky.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.

33. Iowa.—O'Neil v. Read, 162 N.W. 775, 179 Iowa 1208.
Mass.—McGooch v. McGooch, 4 Mass. 348.
N.Y.—McMahon v. Harrison, 6 N.Y. 443.

34. Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

35. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

36. N.Y.—In re Phyfe's Estate, 182 N.Y.S. 729, 115 Misc. 699.
23 C.J. p 1050 note 63.

37. N.Y.—In re Phyfe's Estate, supra.

38. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

39. Cal.—Li Po Tai's Estate, 41 P. 484, 108 Cal. 484.
Illiteracy as not constituting want of understanding see infra § 46 c.

of mind not amounting to want of understanding will not debar one from his right to administer,[40] there is also authority for the view that weakness of mind or will, such as would or might subject one to sinister influence or coercion against the general interest of the estate, will constitute a sufficient objection.[41] One possessing mental capacity sufficient for execution of a valid deed or contract has been held qualified for the post of administrator.[42]

Old age[43] or mere physical disability[44] does not disqualify.

c. Business Capacity and Literacy

Ordinarily neither lack of business capacity and experience nor illiteracy will constitute a ground of disqualification.

As a general rule one otherwise entitled to letters of administration will not be disqualified because of lack of business capacity or experience,[45] and a widow of sound mind and preferentially entitled to administer the estate of her deceased husband may not be denied letters on the mere speculation that she will, on account of lack of business experience and want of capacity, mismanage the estate and prove unfit for the trust.[46] Knowledge of bookkeeping and business management is not a necessary qualification of an administrator,[47] but it has also been held that one who could not write or read writing, and had no experience in keeping accounts or settling estates, was incompetent.[48]

Illiteracy of the applicant may furnish a sufficient ground for refusing to appoint him,[49] although one who is intelligent and upright in accounts and business is not necessarily incompetent simply because of illiteracy,[50] and illiteracy does not constitute the statutory disqualification contemplated by the ground of "want of understanding,"[51] which latter is discussed in the preceding subdivision of this section.

d. Financial Condition

Poor financial condition is not ordinarily a ground of disqualification but actual insolvency may be.

A lack of means on the part of the applicant is not sufficient to preclude his appointment,[52] but insolvency may make one ineligible for appointment as administrator.[53]

e. Improvidence, Bad Character, Insobriety, or Conviction of Crime

In some jurisdictions the applicant's improvidence, bad character, or habitual drunkenness may disqualify him from acting as administrator, as may conviction of an infamous crime or of a misdemeanor involving moral turpitude. Conviction in a foreign jurisdiction of a crime there classified as infamous will not disqualify one if the crime is not so classified in the jurisdiction wherein appointment is sought.

A person may be disqualified by reason of improvidence,[54] which in this connection may be defined as such a lack of care and foresight as would endanger the administration of the estate if it were committed to the management of an applicant dis-

40. N.Y.—Matter of Ireland, 99 N.Y.S. 1079, 47 Misc. 545.

41. Mass.—Stearns v. Fiske, 18 Pick. 24.
23 C.J. p 1050 note 65.

42. Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

43. Cal.—In re Wright, 170 P. 610, 177 Cal. 274.
N.Y.—Matter of Ireland, 99 N.Y.S. 1079, 47 Misc. 545.
23 C.J. p 1050 note 66.

44. Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.
23 C.J. p 1050 note 67.

Feebleness
That person was not very strong physically did not render her incompetent as administratrix under statute.—In re Stege's Estate, 299 N.Y.S. 115, 164 Misc. 95.

Paralysis is not necessarily a disqualification.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

Person "incapable"
Under a statute providing for appointment of others if one with a prior right was "incapable," it has been held that the word "incapable" did not include a new statutory disqualification but, since the clause wherein such word appeared was at the end of many provisions, should be regarded as merely a generalization to include various enumerated causes of disqualification and that, as physical incapacity was not so enumerated, one physically disabled was not to be deemed "incapable" of acting as administrator.—Mobley v. Mobley, supra.

45. Ga.—Davis v. Davis, 127 S.E. 779, 33 Ga.App. 628.
N.Y.—In re Stege's Estate, 299 N.Y.S. 115, 164 Misc. 95.
23 C.J. p 1051 note 72.

46. Ga.—Montgomery v. Paradise, App., 15 S.E.2d 899—Maddox v. Maddox, 108 S.E. 304, 27 Ga.App. 369.

47. Mont.—In re Rinio's Estate, 30 P.2d 803, 96 Mont. 344.

48. N.C.—Stephenson v. Stephenson, 49 N.C. 472.

49. N.C.—Stephenson v. Stephenson, supra.
23 C.J. p 1048 note 29.

50. Ind.—Gregg v. Wilson, 24 Ind. 227.
Pa.—Bowersox's Appeal, 100 Pa. 434, 45 Am.R. 387.
23 C.J. p 1048 note 30.

51. Ala.—Bell v. Fulgham, 80 So. 39, 202 Ala. 217.
23 C.J. p 1050 note 62 [b].

52. N.Y.—Croft v. Williams, 88 N.Y. 384.
23 C.J. p 1048 note 26.

53. Pa.—Levan's Appeal, 3 A. 804, 112 Pa. 294.
23 C.J. p 1048 note 28.

54. N.Y.—McMahon v. Harrison, 6 N.Y. 443—Matter of Ferguson, 84 N.Y.S. 1102, 41 Misc. 465.
23 C.J. p 1051 note 68.

Incurring excessive funeral expenses
In determining whether intestate's sister acted improvidently in ordering an expensive funeral service, so as not to be entitled to letters of administration over intestate's divorced wife, court was bound to consider fact that sister could not bind the estate for an excessive amount, and that in payment of the expense, not only value of estate, but extent of sister's personal resources, were to be considered.—In re Taylor's Estate, Nev., 114 P.2d 1086, 135 A.L.R. 580.

playing such lack.[55] It has been said that improvidence of a disqualifying character must amount to a lack of intelligence,[56] and cannot consist merely of failure to appreciate moral obligations.[57] One may also be disqualified from acting as administrator by reason of bad character[58] or a lack of integrity;[59] but it has also been held that such defects of character are not a ground for refusing administration to one entitled thereto under the statute and not within the provisions of the statute relating to disqualification.[60]

Insobriety. Drunkenness may constitute a disqualification,[61] but something more gross than occasional intoxication must appear in order to preclude the appointment of the person entitled.[62]

Conviction of crime. Under some statutes letters of administration must not be granted to a person who has been convicted of an infamous crime[63] or of a felony or a misdemeanor involving moral turpitude.[64] If a person is convicted in a foreign jurisdiction of an offense which, if committed in the domestic state, would disqualify him on conviction from being an administrator, the foreign judgment will be received as evidence of his disqualification and will be sufficient, if unexplained, to require his disqualification.[65] On the other hand, conviction in a foreign jurisdiction of an offense there classified as an infamous crime will not disqualify the person convicted where the crime is a mere misdemeanor and not an infamous crime in the jurisdiction where appointment as administrator is sought,[66] although such foreign conviction might be considered as evidence of want of integrity if offered on that ground.[67]

f. Nonresidence and Alienage

(1) Nonresidence generally
(2) Alienage

(1) Nonresidence Generally

Nonresidents are eligible to administer an intestate's estate unless made ineligible by statute, although the courts in the exercise of discretionary power may decline to appoint a nonresident. Temporary absence does not render one ineligible as a nonresident.

In the absence of statutory prohibition the court may appoint a nonresident as administrator of a decedent's estate,[68] or may appoint the nominee of nonresidents.[69] Statutes merely providing that an administrator's removal from the state warrants his removal from office do not of themselves alone render a nonresident ineligible for appointment.[70]

A nonresident may not serve as administrator in violation of statutory prohibitions such as provisions rendering nonresidence a ground of disqualification.[71] The courts have upheld the validity of statutes denying to nonresident heirs the right to administer on the property of decedents within the state.[72]

Even where nonresidence is not expressly made a disqualification it is a matter to be considered in determining the propriety of the appointment;[73] nonresidence is ground for the exercise of discretion as to appointment of an administrator,[74] and as a general rule in the absence of special circumstanc-

55. Ala.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.

56. N.Y.—In re Schwartz' Estate, 246 N.Y.S. 478, 138 Misc. 537.
23 C.J. p 1051 note 68 [b].

57. N.Y.—In re Schwartz' Estate, supra.

58. Mass.—Martin v. Otis, 124 N.E. 294, 233 Mass. 491.
23 C.J. p 1051 note 69.

Mother of bastard
The alleged fact that deceased's mother gave birth to a bastard thirty or more years before she sought appointment as administratrix did not require denial of her request to serve as administratrix, on ground that she was disqualified under statute because of bad character, where at time of request she was married and living with her husband and had been so for many years.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.

59. N.J.—Cramer v. Sharp, 40 A. 962, 49 N.J.Eq. 558.
23 C.J. p 1051 note 70.

60. Mo.—State v. Thompson, 187 S. W. 804, 196 Mo.App. 12.
23 C.J. p 1051 note 71.

61. Ala.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.
23 C.J. p 1050 note 51.

62. N.Y.—Matter of Reichert, 69 N. Y.S. 644, 34 Misc. 288, 289, 9 N.Y. Ann.Cas. 472.
23 C.J. p 1050 note 52.

63. Ala.—Nichols v. Smith, 65 So. 30, 186 Ala. 587.
23 C.J. p 1049 note 49.

64. Wash.—McLean v. Roller, 73 P. 1123, 33 Wash. 166.

65. Okl.—In re Dunham's Estate, 74 P.2d 117, 181 Okl. 407.

66. Okl.—In re Dunham's Estate, supra.
23 C.J. p 1049 note 49 [c].

67. Okl.—In re Dunham's Estate, supra.

68. Iowa.—Reidy v. Chicago, B. & Q. Ry. Co., 249 N.W. 347, 216 Iowa 415—Finnerty v. Shade, 228 N.W. 886, 210 Iowa 1338.
Tex.—Thacker v. Sams, Civ.App., 44 S.W.2d 391, dictum.
23 C.J. p 1048 notes 31 [a], 35.

69. Tex.—Stevens v. Cameron, 101 S.W. 791, 100 Tex. 515.
23 C.J. p 1048 note 35.

70. Ala.—Brown v. Brown, 85 So. 439, 204 Ala. 157.

71. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Ky.—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 338—Fishel v. Dixon, 278 S.W. 545, 212 Ky. 2.
Wash.—In re Olson's Estate, 77 P.2d 781, 194 Wash. 219.
23 C.J. p 1048 note 34.
Competency of nonresident to nominate administrator see supra § 44 b.

Residence sufficiently shown
Mont.—In re Nix's Estate, 213 P. 1089, 66 Mont. 559.

72. Cal.—In re Barnes' Estate, 203 P. 100, 187 Cal. 566.

73. Conn.—Eva's Appeal, 104 A. 238, 93 Conn. 38.
23 C.J. p 1049 note 36.

74. Mich.—Grand Trunk Western R.

es a nonresident should not be appointed as long as any other distributee competent to act and willing to assume the trust is within the jurisdiction of the court.[75]

A nonresident who has applied for letters of administration within the state and has obtained from the court an order of sale of the property of his intestate, even though he may as an individual be a nonresident, is officially an administrator of the state and will not be heard to assert that the courts of the state have no jurisdiction over him with reference to property of his intestate located within the state.[76]

Temporary absence from the state for business purposes does not disqualify one whose intention it is to return and to retain his residence within the state.[77]

Residence in different county. Under a statute authorizing appointment as administrator of a qualified person residing in the county wherein appointment is sought, one not residing in the county is ineligible.[78]

(2) Alienage

Where the court is not bound by contrary statutory restrictions it may appoint an alien, or nonresident alien, although the matter may be confided to a judicial discretion which may be exercised against the appointment. Under restrictive statutes aliens may be ineligible for appointment, particularly where nonresident, although it has been held under statutes of this character that the single fact of alienage does not disqualify the applicant.

At common law and in the absence of contrary statute an alien may qualify as administrator of a decedent's estate,[79] even if a nonresident,[80] although it has been said that the courts ordinarily will frown on the practice of appointing aliens and in the exercise of discretion may and should as a rule refuse to make such an appointment.[81]

Under the practice prevailing in some jurisdictions there are statutory restrictions imposed on the granting of letters of administration to aliens, who may be ineligible to serve if nonresident,[82] although under statutes of this character it has been held that alienage alone does not disqualify the applicant.[83]

g. Married Women and Infants

Broadly speaking, an infant is ineligible to act as administrator, but a married woman may do so.

An infant is not competent to be appointed or serve as an administrator,[84] although an exception to this rule has been recognized in case of an infant who has been emancipated[85] otherwise than by marriage.[86] It has been held that letters issued to an infant are void,[87] but there is also authority to the effect that such letters are voidable only,[88] and that the right of the appointee to the office is complete where he ratifies after reaching majority.[89]

Under the common law and statutes declaratory thereof a married woman can qualify as adminis-

Co. v. Kaplansky, 258 N.W. 423, 270 Mich. 135.

75. Iowa.—Chicago, B. & Q. R. Co. v. Gould, 20 N.W. 464, 64 Iowa 343.
23 C.J. p 1049 note 37.

76. Ga.—Faughnan v. Bashlor, 136 S.E. 545, 163 Ga. 525.

77. N.C.—Fann v. North Carolina R. Co., 71 S.E. 81, 155 N.C. 136.

78. Tex.—Balfour v. Collins, 25 S.W.2d 804, 119 Tex. 122, answer to certified question conformed to, Civ.App., 27 S.W.2d 185.

79. Mich.—Grand Trunk Western R. Co. v. Kaplansky, 258 N.W. 423, 270 Mich. 135.
23 C.J. p 1048 note 32.

80. Iowa.—In re Rugh's Estate, 234 N.W. 278, 211 Iowa 722.

81. Mich.—Grand Trunk Western R. Co. v. Kaplansky, 258 N.W. 423, 270 Mich. 135.

82. D.C.—Lely v. Kalinoglu, 76 F.2d 983, 64 App.D.C. 218, 100 A.L.R. 1523, certiorari denied 55 S.Ct. 925, 295 U.S. 765, 79 L.Ed. 1707.
N.Y.—In re Franko's Estate, 7 N.Y.S.2d 594, 169 Misc. 356—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.
23 C.J. p 1048 note 33.

Discretion of court
The fact that one is a nonresident alien will not as matter of law bar him from appointment as administrator, the propriety of appointing a nonresident alien being committed to the discretion of the court in the light of all the facts and circumstances involved, and a nonresident alien may be appointed if a suitable person, and also has the right to nominate a local corporation as administrator.—In re Rugh's Estate, 234 N.W. 278, 211 Iowa 722.

Alien brother not "inhabitant"
Decedent's alien brother, where not "inhabitant" of state, was incompetent to receive letters of administration.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.

Alien enemies, if nonresidents, are incompetent.—Carthey v. Webb, 6 N.C. 268.

83. N.Y.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.

Necessity that alien be inhabitant of state
"Inhabitant," as applied to aliens who must be inhabitants of state to be entitled to administration, comprehends fixed or permanent dwelling in state, as distinguished from transient or occasional visitor.—In re Gaffney's Estate, supra.

84. Ill.—In re Barker's Estate, 214 Ill.App. 275.
Miss.—Rea v. Englesing, 56 Miss. 463.
N.Y.—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.
23 C.J. p 1049 note 41.

Next friend of infant has no greater rights in respect of appointment of administrator than the infant himself.—In re Barker's Estate, 214 Ill.App. 275.

85. La.—Gaines' Succession, 7 So. 788, 42 La.Ann. 699.

86. La.—Briscoe v. Tarkington, 5 La.Ann. 692.

87. N.Y.—Knox v. Nobel, 28 N.Y.S. 355, 77 Hun 230, affirming 27 N.Y.S. 206.

88. Ala.—Davis v. Miller, 17 So. 323, 106 Ala. 154.

89. Ala.—Davis v. Miller, supra.

tratrix with her husband's consent,[90] and statutes removing the disabilities of coverture, which are discussed generally in the C.J.S. title Husband and Wife § 166, also 30 C.J. p 716 notes 87–90, have so far broadened the rights and privileges of a married woman that she may possess an unrestricted right to qualify as administratrix.[91] The purpose of statutes permitting women to act or continue as executors or administrators after marriage is merely to change former legal rules excluding them from such right and privilege, and such statutes do not create a public policy and vested right which cannot be changed by appropriate testamentary provision.[92]

h. Hostility to Estate or Distributees; Intermeddling

(1) In general
(2) Persons indebted to estate
(3) Intermeddling with estate

(1) In General

As a general rule serious hostility of interest between the applicant and the estate or other distributees is ground for holding the applicant disqualified, but mere personal antagonism between the applicant and other distributees does not disqualify, and under some authority not even an actual conflict of interest with the other distributees will render an applicant ineligible.

Where mandatory statutes confer priority on persons within designated classifications, and statutory grounds of disqualification not including hostility of interest are deemed exclusive in character, one otherwise entitled to appointment is not disqualified by the nonenumerated ground of hostility of interest.

Except as the rule may be changed by the application of mandatory statutes, a person whose individual interests are so adverse to the estate or to the interests of other distributees that both cannot fairly be represented by the same person is not a proper person to administer the estate,[93] and unsuitableness to serve as administrator may consist of an adverse interest of some kind, or hostility to those immediately interested in the estate, whether as creditors or distributees,[94] or of an interest adverse to the estate itself;[95] but an applicant for letters of administration is not necessarily disqualified by the mere existence of personal prejudice or antagonism between himself and other distributees,[96] or by some degree of adverse interest in respect of the estate,[97] and the fact that there is some degree of conflict between the interests of the applicant and those of other distributees is not always ground for holding him unsuitable for appointment as administrator.[98] A person otherwise suitable is not to be deemed incompetent merely because he is, or represents, a creditor;[99] and one

90. Ala.—English v. McNair, 34 Ala. 40.
23 C.J. p 1049 note 39.

91. Cal.—In re Dow's Estate, 64 P. 402, 132 Cal. 309.
S.C.—In re Nurnberger, 18 S.E. 935, 40 S.C. 334.
23 C.J. p 1049 note 40.

92. Ga.—Bruce v. Fogarty, 186 S.E. 463, 53 Ga.App. 443.

93. Or.—In re Elder's Estate, 83 P. 2d 477, 160 Or. 111, 119 A.L.R. 802.

Farming for decedent

The fact that a son, entitled to letters of administration as next of kin in the absence of a surviving spouse, had farmed for his deceased father on shares did not adversely affect his competency to qualify as administrator.—In re King's Estate, 7 Pa.Dist. & Co. 483, 39 Lanc.L.Rev. 491, 39 York Leg.Rec. 103.

94. Iowa.—In re Christensen's Estate, 296 N.W. 198, 200, citing **Corpus Juris**—In re Tracy's Estate, 243 N.W. 309, 311, 214 Iowa 881, citing **Corpus Juris.**
N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.
23 C.J. p 1047 note 16.

95. Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.
Ky.—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 338.
23 C.J. p 1047 note 17.

Proper matters for consideration

Ordinary, or jury on appeal, determining question of fitness of one selected for appointment as administrator by majority of interested distributees, can properly consider all proved facts and circumstances reasonably leading to belief that interest of such person is so adverse to that of estate as would be likely to jeopardize its interest.—Davis v. Davis, 127 S.E. 779, 33 Ga.App. 628.

Hostility not shown

A daughter of decedent's sister, nominated by sister to act as administratrix, must be treated as standing in the same position as sister in determining whether interest adverse to interests of the estate, which would disqualify daughter from acting as administratrix exists; and that cotenancy in land existed between decedent and husband of decedent's sister, and that sister subsequently acquired husband's interest, did not establish existence of partnership between sister and decedent, such as would disqualify sister's nominee for appointment as administratrix.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

96. Cal.—In re Wright, 170 P. 610, 177 Cal. 274.
Ky.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.
23 C.J. p 1047 note 16 [c], [d].

Family enmity

The fact that some of the brothers and sisters of one applying for letters of administration on the estate of his mother are his enemies and oppose his appointment is no ground for disqualification.—Dooley v. Dooley, Tex.Civ.App., 240 S.W. 1112.

97. Mont.—In re Rinio's Estate, 30 P.2d 803, 96 Mont. 344.

Appointment not clear abuse of discretion

Appointment of son of surviving brother of decedent as administrator on father's nomination, notwithstanding father's claim against estate, is not clear abuse of discretion.—In re Rinio's Estate, supra.

98. Ky.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.
Tenn.—In re Wooten, 85 S.W. 1105, 114 Tenn. 289.
23 C.J. p 1047 note 16 [e].

Not "incapable to discharge trust"

The existence of various conflicting interests between the mother of intestate and the latter's husband did not disqualify the former from becoming administratrix where the evidence showed no interest being asserted by the mother incompatible with the interest of the estate.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.

99. Wyo.—In re Coolidge's Estate,

otherwise qualified to act as administrator is not disqualified because he had been the guardian of decedent for many years, where his accounts as guardian had been finally allowed.[1] It has also been held that a person is not disqualified because he claims the ownership of property which is also claimed to belong to the estate,[2] although where his claim is resisted the conflict of interests may become so serious that it would be improper for him to act as administrator.[3] One holding stock in a corporation having a claim against an estate is not necessarily disqualified from administering the estate.[4]

Mandatory character of statutes. Under statutes mandatory in conferring prior rights to administration on specified classifications of persons and other statutes specifying the exclusive grounds for disqualification without including adverse interest as one of them, a court having exercised its discretion in determining that general letters of administration should issue has no discretion to refuse them to the widow or her nominee on the ground that she is disqualified by reason of her claim in adverse interest to the estate.[5] Under statutes not mandatory in respect of appointment of those primarily entitled thereto, the court may refuse to appoint any of those within the statutory classification and appoint some other suitable person where ill feeling between next of kin exists which would be conducive to continuous litigation with resultant loss to the estate.[6]

(2) Persons Indebted to Estate

Where the courts are not controlled by mandatory statutes, some regard indebtedness to the estate as a ground for disqualification while others regard it as merely a matter for consideration but not necessarily conclusive against eligibility. Under statutes enumerating the grounds for disqualification and construed as exclusive, a nonenumerated ground of indebtedness to the estate will not disqualify an applicant.

Where statutory grounds of disqualification are exclusive and do not include indebtedness to the estate, the court cannot make such indebtedness a ground of disqualification,[7] and irrespective of such a consideration it is held by some authorities that an applicant's indebtedness to the estate is not necessarily a ground of disqualification.[8] Where, however, the court is not bound by contrary statutes the applicant's indebtedness to the estate is a proper subject for its consideration,[9] and some authorities have held that it is against the policy of the law to appoint a debtor as administrator,[10] and that the appointment of such a person is unauthorized.[11]

(3) Intermeddling with Estate

A technical intermeddling with the estate does not per se disqualify one from becoming administrator, but material intermeddling may do so.

A technical intermeddling with the effects before appointment does not of itself, where not willfully wrong, disqualify the intermeddler from being appointed;[12] but it has been considered proper to refuse to commit the administration of an estate to one who has, without authority, removed personal property of decedent from the state, such removal tending to hinder or delay the collection of the collateral inheritance tax.[13]

i. Corporations

A corporation possessing corporate powers of a trust character may act as administrator under the view generally prevailing, although there is some authority holding corporations ineligible. The rights of national banks and of foreign corporations to act as administrators depend on applicable provisions of governing statutes.

It was at one time held, on the technical ground that it could not take an oath of office, that a corporation was at common law unable to act as administrator of a decedent's estate,[14] and where there

41 P.2d 503, 508, 47 Wyo. 488, citing **Corpus Juris.**
23 C.J. p 1047 note 18.

Deceased's former trustee in bankruptcy

Appointment as administrator of person previously acting as trustee in deceased's bankruptcy may be justified, in view of involved conditions, deceased's fraudulent transactions, pending litigation, and possibility of hidden assets and where no personal interest of administrator was shown and no conflict of interest.—Morgan v. Morgan, 166 N.E. 747, 267 Mass. 388.

1. R.I.—Ballou v. Ballou, 75 A. 97, 30 R.I. 331.

2. Cal.—In re Brundage, 75 P. 175, 141 Cal. 538.
Mont.—In re Blackburn, 137 P. 381, 48 Mont. 179.
Utah.—Farnsworth v. Hatch, 151 P. 537, 47 Utah 62.

3. Utah.—Farnsworth v. Hatch, supra.

4. Utah.—Welsh, Driscoll & Buck v. Buck, 232 P. 911, 64 Utah 579.

5. Cal.—In re Rees' Estate, 212 P. 234, 60 Cal.App. 92.

6. Wash.—In re Thomas' Estate, 8 P.2d 963, 167 Wash. 127.

7. Ariz.—In re Graham's Estate, 231 P. 918, 27 Ariz. 167.

8. Ala.—McFry v. Casey, 101 So. 449, 211 Ala. 649.
Kan.—Ford v. Peck, 227 P. 527, 116 Kan. 481, denying rehearing 225 P. 1054, 116 Kan. 74.
Md.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167.
23 C.J. p 1047 note 22.

9. Ala.—McFry v. Casey, 101 So. 449, 211 Ala. 649.
Md.—Kailer v. Kailer, 48 A. 712, 92 Md. 147.

10. Pa.—Neustadt's Estate, 12 Phila. 8.

11. N.M.—Territory v. Valdez, 1 N. M. 533, 539.
23 C.J. p 1048 note 25.

12. Ala.—Bingham v. Crenshaw, 34 Ala. 683.
Ga.—Carnochan v. Abrahams, T.U.P. Charlt. p 210.

13. Pa.—Robertson's Estate, 1 Pa. Dist. 317.

14. Neb.—Continental Trust Co. v. Peterson, 107 N.W. 786, 110 N.W. 316, 76 Neb. 411.
14a C.J. p 295 note 43.

is no statutory repeal of the doctrine, and no public policy evidencing its abrogation, the old rule is still followed,[15] and statutes providing for appointment of persons to such positions of trust are construed to apply to real and not to artificial persons.[16] In most jurisdictions, however, this rule has been changed; where it is the established policy of a state to grant to corporations organized to do a trust company business the privilege of acting as executor or administrator, it is held that the common law of such a state does not deny to corporations the privilege of so acting,[17] and, under the rule that a corporation has implied power to do all acts necessary to enable it to exercise the powers expressly conferred, an officer may execute the requisite oath for a corporation empowered to do a trust business and to act as administrator.[18] The right of corporations possessing the requisite powers to act as administrators has been recognized under statutes expressly or by necessary implication providing for the appointment of corporations as administrators,[19] and the courts have upheld the constitutionality of such statutes;[20] nor are they void because a corporation is incapable of taking the oath required by law of persons appointed to such positions of trust,[21] although a corporation lacking the requisite charter powers may be denied the right to administer an estate.[22]

National banks. A statutory prohibition against the appointment of a bank has been held to preclude the appointment of a national bank, although the federal reserve board has granted to it a special permit to act as administrator,[23] the reserve board having power under act of congress authorizing it to grant such permits only when not in contravention of state or local law,[24] and the courts have upheld the validity of statutes of this character.[25] Under statutes providing that trust companies organized under the laws of the state may act as administrators and federal statutes construed as requiring state courts to appoint national banks to fiduciary positions on the same conditions as state trust companies, a national bank is eligible to act as administrator under appointment by the courts of the state even though there is no state statute authorizing such appointment.[26]

Foreign corporations. The power of a foreign corporation to act as administrator of a decedent's estate has been both affirmed[27] and denied.[28] Where a corporation may be organized under the laws of the state with power to act as administrator, and there is no statute prohibiting it, a foreign corporation which enjoys in the state of its domicile the privilege of acting as administrator may enter the state for the purpose of carrying on the business of administrator on the same basis as a domestic corporation.[29] Where a foreign corporation, by virtue of comity, has the right to acquire, hold, convey, or encumber real or personal property situated in a state other than that of its creation, it may, if authorized by its charter or governing statute, in the absence of prohibitions or limitations imposed by the laws of the domestic state, exercise such rights in the capacity of executor, or administrator.[30]

j. Miscellaneous Persons

The attorney for an applicant for letters has been held unsuitable to administer the estate, and a judge of probate should not appoint himself or his immediate relatives. It has been held that a nun is not ineligible to act as administratrix and that a clerk of court may so act.

15. Neb.—Continental Trust Co. v. Peterson, supra.

16. Neb.—Continental Trust Co. v. Peterson, supra.

17. Conn.—Equitable Trust Co. v. Plume, 103 A. 940, 92 Conn. 649.

18. Nev.—In re McGill's Estate, 280 P. 321, 52 Nev. 35, 65 A.L.R. 1232.

19. Ga.—Mulherin v. Kennedy, 48 S.E. 437, 120 Ga. 1080.
Tenn.—Union Bank & Trust Co. v. Wright, Ch.A., 58 S.W. 755, 52 L.R.A. 469.
23 C.J. p 1050 note 55—14a C.J. p 295 note 35.

No inherent disability

"There is, then, no inherent disability or disqualification belonging to a corporation as such which excludes it from acting as an administrator, and it may accept the office if not prohibited by its charter, or forbidden by statute, whenever from the objects of its incorporation and the nature of its business it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bonds, etc."—Fidelity Ins. Trust & Safe Deposit Co. v. Nevin, 10 Del. 416, 430, 1 Am.S.R. 150.

20. Ky.—Coleman v. Parrott, 13 S.W. 525, 11 Ky.L. 947.
Tenn.—Union Bank & Trust Co. v. Wright, Ch.A., 58 S.W. 755, 52 L.R.A. 469.
14a C.J. p 295 note 49.

21. Tenn.—Union Bank & Trust Co. v. Wright, supra.

22. Md.—German-American Bank v. Kopp, 103 A. 1009, 132 Md. 422.
N.Y.—In re Rhoda, 93 N.Y.S. 973, 105 App.Div. 143—Matter of Thompson's Estate, 33 Barb. 334.
23 C.J. p 1050 note 54.

23. N.H.—Woodbury's Appeal, 96 A. 299, 78 N.H. 50.
Pa.—In re National Bank of Germantown and Southwark Nat. Bank, 30 Pa.Dist. 603.

24. N.H.—Woodbury's Appeal, 96 A. 299, 78 N.H. 50.

25. N.H.—Woodbury's Appeal, supra.
14a C.J. p 296 note 52.

26. Mass.—Petition of Worcester County Nat. Bank of Worcester, 161 N.E. 797, 263 Mass. 394.

27. Nev.—In re McGill's Estate, 280 P. 321, 52 Nev. 35, 65 A.L.R. 1232.
Presumption prevails that no public policy exists against qualification of foreign corporation as administrator, where it is qualified so to act in state of its domicile.—In re McGill's Estate, supra.

28. N.D.—Grunow v. Simonitsch, 130 N.W. 835, 21 N.D. 277.

29. Nev.—In re McGill's Estate, 280 P. 321, 52 Nev. 35, 65 A.L.R. 1232.

30. Del.—Fidelity Ins. Trust & Safe Deposit Co. v. Niven, 10 Del. 416, 1 Am.S.R. 150.

It has been held that an attorney of the applicant for administration is, by reason of his relation to the parties, an unsuitable person to receive letters of administration.[31]

Court officials and their relatives. For a judge of probate to be concerned in his own appointment as administrator is plainly unsuitable,[32] and it has also been regarded as improper for such a judge to appoint one of his own immediate relatives.[33] On the other hand, under statutes enumerating persons who are incompetent to act as administrators and failing to embrace such official, it has been held proper to appoint the clerk of a district court administrator.[34]

Nuns. The fact that the woman entitled to appointment is a nun does not disqualify her.[35]

§ 47. Renunciation or Waiver of Right

a. In general
b. Agreements respecting renunciation
c. Effect of renunciation
d. Retraction of renunciation

a. In General

The right of administration is subject to renunciation or waiver, as by written instrument or by conduct, and the facts in each case determine whether or not the writing or conduct constitutes a renunciation or waiver.

Renunciation or waiver of a precedent right to administer is clearly permissible,[36] and it has been held not a badge of fraud that persons entitled to administer waive their right after taking out letters jointly with a person not entitled.[37]

Renunciation of the right to administer may appear by writing,[38] although it has been held that a writing is unnecessary.[39] Whether or not a writing amounts to a renunciation depends on its fair and reasonable import.[40]

One may waive his right to administration by conduct,[41] as well as by express declaration,[42] as where one having a prior right delays an unreasonable time in asserting it,[43] or acquiesces in the appointment of another,[44] as by failure to interpose

31. Mass.—Dexter v. Brown, 3 Mass. 32.

32. Ga.—Echols v. Barrett, 6 Ga. 443.

33. Ala.—Plowman v. Henderson, 59 Ala. 559.
Mass.—Hall v. Thayer, 105 Mass. 219, 7 Am.R. 513.

34. Wyo.—Bamforth v. Ihmsen, 204 P. 345, 28 Wyo. 282, rehearing denied 205 P. 1004, 28 Wyo. 282.

35. Md.—Smith v. Young, 5 Gill 197.

36. Md.—Phillips v. Clark, 6 A.2d 220.
Mo.—State v. Nortoni, 191 S.W. 429, 269 Mo. 563.
23 C.J. p 1051 note 77.

Widow's waiver

Surviving wife may waive or relinquish her preferential right to administer deceased husband's estate under Code 1907 § 2520.—Brown v. Brown, 85 So. 439, 204 Ala. 157.

37. N.Y.—Matter of Ireland, 95 N.Y.S. 1079, 47 Misc. 545.

38. Miss.—Muirhead v. Muirhead, 14 Miss. 451.
23 C.J. p 1051 note 79.

39. Pa.—Weidner's Estate, 39 Pa. Super. 120.
S.C.—Rowell v. Adams, 65 S.E. 207, 83 S.C. 124.

40. Mass.—Arnold v. Sabin, 1 Cush. 525.

41. Tex.—Vannoy v. Gibson, Civ. App., 102 S.W.2d 492.

Waiver not shown

(1) Appointing agent at time of making application for letters of administration is not renunciation or waiver of right to letters.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

(2) Instrument appointing another to collect funds due deceased's wife is not waiver of wife's statutory rights to administer deceased's estate.—Alexander v. Moyers, Tex.Civ. App., 22 S.W.2d 727.

(3) In view of Civ.Code art 1042, giving beneficiary heir preference to appointment as administrator, article 1043, authorizing the judge to select as such the most solid of the beneficiary heirs, article 883, defining a "beneficiary heir," as one who has accepted succession under the benefit of inventory regularly made, and Acts 1920 No. 160 § 1, relating to descent of community estates, a widow, by accepting her deceased husband's succession unconditionally by mere written declaration, does not lose her right to be appointed, in a contest with heirs who had accepted the succession with benefit of inventory.—Succession of Damico, 99 So. 862, 155 La. 1036.

42. Tex.—Vannoy v. Gibson, Civ. App., 102 S.W.2d 492.

43. Md.—Silverwood v. Farnan, 22 A.2d 444.
23 C.J. p 1052 note 82.

Twenty-five years

Petitioner lost the preferential right given by Comp.L.1917 § 7596, to letters of administration of his father's estate, where he failed to appear within three months, as required by § 7598, but delayed nearly twenty-five years in applying for appointment, and then filed a cross petition, objecting to the appointment of decedent's married daughter as being disqualified according to § 7600.—In re Slater's Estate, 184 P. 1017, 55 Utah 252.

Excusable delay in seeking appointment

(1) The whole purpose of testamentary laws is to guard against all needless delay and secure as prompt and speedy settlements of deceased persons' estates as practicable. Where decedent's surviving husband was engaged in ascertaining assets of decedent's estate, locating her heirs, and seeking legal information during time between her death and grant of letters of administration to him on application filed about three months after her death, and no injury inured to estate because of his delay in making application, such delay was not so unreasonable as to forfeit his right to administration and notice of another's appointment as administrator.—Silverwood v. Farnan, Md., 22 A.2d 444.

(2) Widow's failure to apply for letters of administration within thirty days after husband's death did not deprive her of right to be appointed under Comp.L.1915 § 13820, as against son who applied for letters within five days after father's death, the widow having the right of priority over her son, and the statutory provision as to application of widow within thirty days having reference only to the rights of creditors.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

44. Tex.—Lee v. Earnest, Civ.App., 299 S.W. 931.

timely objection,[45] or actively seeks another's appointment;[46] and one may become estopped to assert his right where he permits another to administer without objection.[47] Renunciation or waiver may be the result of nonappearance when duly cited.[48] The right to administration is not renounced by joining in a petition for the probate of an alleged will of the decedent, which is afterward declared invalid.[49] Waiver may be made only in the court having jurisdiction and not in a court lacking jurisdiction of the administration.[50] Where statute provides for waiver in open court or by the filing of a duly authenticated instrument in a court having jurisdiction of the estate, the fact that no formal statutory waiver is shown does not preclude the showing of waiver in other ways,[51] and even in the absence of a formal waiver one contesting the right of applicant to appointment may show a waiver by acts, verbal statements, and conduct.[52]

b. Agreements Respecting Renunciation

The courts have disagreed respecting the validity of an agreement to renounce administration in favor of another.

It has been held that a contract by a person entitled to administer to relinquish his right in favor of another person who is a stranger to the estate, in consideration of a share of the commissions, is valid and binding;[53] but it has also been held that an agreement to renounce the right to administer in favor of another is void as against public policy,[54] and for the same reason a promise to pay a person for securing a renunciation by the person having the right to administer and procuring the appointment of the promisor has been held void.[55]

c. Effect of Renunciation

Renunciation devolves the right of administration on those next entitled by statute and, except as legislation may change the rule, the right of administration expires with the renunciation and may not be transferred to another. Some authorities permit one to renounce on condition that another designated person be appointed but others hold that the renunciation may not be so conditioned.

The effect of a renunciation is to devolve the right to administration on the class next entitled,[56] and, except as the rule may be changed by statute, one renouncing his right of administration may not transfer such right to another.[57]

It has been held that, where one entitled to administer renounces in favor of a stranger, but other persons entitled do not ratify such nomination, the renunciation of the person entitled does not deprive him of his right to letters,[58] and also that, where letters were granted to the nominee of the person entitled, but subsequently revoked, the person who had renounced might then claim the right to administration.[59] A waiver in favor of another designated person has been held inoperative where such other person does not qualify as administrator.[60] On the other hand, however, it has been

45. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Tex.—Vannoy v. Gibson, Civ.App., 102 S.W.2d 492.

Delay amounting to acquiescence
Person having superior right to be appointed administrator, who, without valid excuse, fails to contest appointment of another person, or who, while in position to do so, fails to demand revocation of letters granted to such other person, will be held to have waived his right to letters testamentary or of administration. Adult son who returned home shortly after creditor, in the early part of December, 1933, was appointed administrator of estate of deceased intestate father, waived right to priority to administer father's estate, by acquiescing in such appointment until Aug. 10, 1934.—Vannoy v. Gibson, supra.

46. Ala.—Bivin v. Millsap, 189 So. 770, 238 Ala. 136.
23 C.J. p 1052 note 84.

47. Wash.—In re Hill, 33 P. 585, 6 Wash. 285.

Recognition of appointees by presentation of claims
Brother of deceased waived his right to appointment as administrator in first instance by failing to object to administrators who were appointed, and presenting to them his claims against estate.—Slay v. Davidson, Tex.Civ.App., 88 S.W.2d 650, error refused.

48. Mass.—Stebbins v. Lathrop, 4 Pick. 33.

49. Md.—McIntire v. Worthington, 12 A. 251, 68 Md. 203.

50. Ky.—Barnett's Adm'r v. Pittman, 137 S.W.2d 1098, 282 Ky. 162.

Securing appointment of another in court lacking jurisdiction
The fact that deceased's mother, prior to appointment of an administrator for deceased's estate in the Lincoln County court, had secured the appointment of a third person as administrator in the Fayette County court, which did not have jurisdiction, was not a "waiver" of her right to qualify as administratrix in the Lincoln County court, and did not "estop" her from thereafter asserting her right to qualify as administratrix in the Lincoln County court.—Barnett's Adm'r v. Pittman, supra.

51. Tex.—Beeman v. Jones, Civ.App., 102 S.W.2d 490.

52. Tex.—Beeman v. Jones, supra.

53. Md.—Bassett v. Miller, 8 Md. 548.
23 C.J. p 1052 note 87.
Antenuptial or postnuptial agreements between spouses see supra § 35 a.

54. Pa.—Bowers v. Bowers, 26 Pa. 74, 67 Am.D. 398.

55. Ohio.—Swiggett v. White, 8 Ohio Dec., Reprint, 452, 8 Cinc.L.Bul. 22.

56. Md.—Slay v. Beck, 68 A. 573, 107 Md. 357—McColgan v. Kenny, 11 A. 819, 68 Md. 258.

57. Md.—Phillips v. Clark, 6 A.2d 220.
Right to nominate an administrator see supra § 44.

Right as expiring with renunciation
A person entitled to letters of administration may renounce or decline the right to administer, but the right inheres in the person and expires with a renunciation or refusal to serve, so that the right may not be transferred.—Phillips v. Clark, supra.

58. Pa.—Lœffler's Estate, 8 Kulp 199.
23 C.J. p 1053 note 94.

59. Pa.—Gause's Estate, 1 Chest.Co. 105.

60. Cal.—In re Robinson's Estate, 224 P. 765, 65 Cal.App. 588.

held that a renunciation cannot be made conditional on the appointment of a particular person, but when once made is binding.[61]

One who has waived a preferential right to administer cannot object to mere prematurity of the issuance of letters to another.[62]

d. Retraction of Renunciation

Broadly speaking a renunciation may be retracted before, but not after, appointment of another to the office of administrator, and in cases of doubt the matter is addressed to the discretion of the court.

While retraction of a renunciation of the right to administer a decedent's estate is not favored,[63] such retraction is ordinarily permissible prior to the grant of administration to another,[64] and it has been held that the question of permitting a retraction is committed to the sound discretion of the court.[65] Generally speaking, however, retraction should not be permitted while proceedings for the appointment of another are pending,[66] or after another person has been appointed to the office,[67] unless it appears to the satisfaction of the court that the renunciation was executed by a mistake.[68]

§ 48. Second Appointment

There can be only one valid administration of an estate within the same jurisdiction and the administrator first appointed is the only person authorized to represent the estate. A second appointment may not be made until the office has become vacant and a purported second appointment made before such time is a nullity.

There cannot be two valid administrations of the same estate at the same time within the same state jurisdiction,[69] and the administrator first in time is first in right and the only person entitled to represent the estate.[70] No new appointment may be made until the office is vacated by the death or removal of the incumbent or in some other way,[71] and it has been said that a vacancy must occur by order of court in the administration of an estate before the court has power to appoint an administrator to replace one who has been appointed to administer the affairs of an estate.[72] A purported second appointment is a nullity while the first appointee retains his office[73] and, even though a will does not dispose of all the testator's property, an executor who has qualified thereunder is entitled to administer the entire estate, and an administrator should not be appointed for the intestate property.[74]

The court first obtaining jurisdiction of an estate will retain it until the same is set aside by direct attack,[75] and even though the first appointment in one county is erroneous to the extent of being voidable, although not void, another appointment cannot

Limited or conditional character of waiver

Where decedent's daughter declined the administration and waived her right in favor of a designated person, she did not thereby waive her right except as to such person, and on his resignation her failure to contest the appointment of another as administrator did not, under Code Civ.Proc. § 1383 et seq, forfeit her preferential right to be appointed administratrix. —In re Robinson's Estate, supra.

61. Mo.—State v. Romjue, 118 S. W. 1188, 136 Mo.App. 650.

62. Ala.—Garrett v. Harrison, 77 So. 712, 201 Ala. 186.

63. Mo.—State v. Romjue, 118 S.W. 1188, 136 Mo.App. 650.
23 C.J. p 1053 note 99.

64. Idaho.—McCormick v. Brownell, 136 P. 613, 25 Idaho 11.
S.C.—Rowell v. Adams, 65 S.E. 207, 83 S.C. 124.
23 C.J. p 1053 note 98.

65. Cal.—In re Lowe, 172 P. 583, 178 Cal. 111.

66. Cal.—In re Kirtlan, 16 Cal. 161 —In re Silvar, 46 P. 296, 5 Cal. Unrep.Cas. 494.

67. Cal.—In re Keane, 56 Cal. 407.
Md.—Jones v. Harbaugh, 48 A. 827, 93 Md. 269.
23 C.J. p 1053 note 2.

68. Md.—Thomas v. Knighton, 23 Md. 318, 87 Am.D. 571.
23 C.J. p 1053 note 3.

Not fully advised of rights

Where widow on April 7 signed waiver of her right to administer the estate of her deceased husband and at the same time his sister filed a petition for her own appointment, and on April 13 the widow filed a retraction of her renunciation, the court accepted her retraction because she had executed the renunciation without being fully advised regarding her rights and the effect of the waiver.—In re Grant's Estate, 3 N. Y.S.2d 867, 253 App.Div. 504.

69. Cal.—La Paloma Land Co. v. Shannon, 265 P. 295, 89 Cal.App. 469.
Ill.—In re Graney's Will, 245 Ill.App. 407—In re Purvechio, 188 Ill.App. 81.
Iowa.—Brown v. Tank, 297 N.W. 801, 230 Iowa 370.
W.Va.—Waynesboro v. Lopinsky, 182 S.E. 283, 284, 116 W.Va. 551, citing **Corpus Juris.**

Administration in two or more counties

Valid letters of administration cannot be granted in same estate in two or more counties.—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.

70. Cal.—La Paloma Land Co. v. Shannon, 265 P. 295, 89 Cal.App. 469.

71. Ga.—Dame v. McGowen, 138 S.E. 785, 164 Ga. 332.

72. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.

73. Ga.—Dame v. McGowen, 138 S. E. 785, 164 Ga. 332.
W.Va.—Waynesboro v. Lopinsky, 182 S.E. 283, 284, 116 W.Va. 551, citing **Corpus Juris.**
23 C.J. p 1053 note 5.

74. Ga.—Knowles v. Knowles, 65 S. E. 128, 132 Ga. 806.
N.Y.—Matter of Maccaffil, 107 N.Y.S. 1115, 57 Misc. 264, affirmed 111 N. Y.S. 315, 127 App.Div. 21.
23 C.J. p 1054 note 6.

Appointment of administrator as improper

In cases of partial intestacy, or where provisions of a will have become inoperative, the executor is entitled to administer and distribute the property undisposed of, and it is not necessary or even proper to appoint an administrator for that purpose.—Federal Trust Co. v. Ost, 186 A. 579, 120 N.J.Eq. 475, quoting **Corpus Juris,** and supplementing 183 A. 830, 120 N.J.Eq. 43, affirmed 191 A. 746, 121 N.J.Eq. 608.
23 C.J. p 996 note 12 [b].

75. Iowa.—Brown v. Tank, 297 N. W. 801, 230 Iowa 370.

properly be made until due revocation of the former letters;[76] nor is an existing executor or administrator removed simply by the appointment of another person to his place in the same jurisdiction, but the office must have first been made vacant by an accepted resignation or a removal of the first appointee, or by the occurrence of such events as by law create a vacancy.[77] Where, however, the appointment of an administrator is void because of a lack of jurisdiction in the probate court of the county where it was granted, the court having jurisdiction may properly ignore such appointment and take any necessary steps for the settlement of the estate,[78] and if a sole administrator has become incapable as distinguished from incompetent, as where he becomes and is adjudged to be insane, the court may grant new letters without citing the incapable person.[79] It has been held also that, where administration has been granted to a stranger, and the sole distributee, who has not declined the appointment, appears and designates a suitable person for appointment, it is the duty of the court to appoint such person, and such appointment revokes the former appointment.[80] If the procedure is regular in the various steps, the probate court may at the same term appoint an administrator, remove him, and reappoint him, with or without an additional administrator, or appoint another in his place.[81]

Remedies in event of invalid second appointment. The administrator first appointed may move to vacate a second appointment,[82] may maintain an action in equity therefor,[83] or, in a proper case, may move to vacate a judgment in an action to quiet title against the administrator appointed by another court.[84]

C. PROCEEDINGS FOR APPOINTMENT

§ 49. Necessity

An administration proceeding is necessary for the appointment of an administrator.

An administration proceeding has been said to be of necessity required for the appointment of a personal representative of a decedent;[85] but other authorities have held that the admission of a will to probate is in effect an appointment of the person designated therein as executor.[86]

§ 50. Nature of Proceeding

Proceedings for the appointment of an administrator or for letters testamentary are special proceedings which are in rem or in the nature of proceedings in rem, although in certain respects they may assume the character of proceedings in personam. The granting of letters is a judicial act.

The proceedings for the appointment of an administrator are purely statutory, and must be conducted in conformity to the statute governing them.[87] Proceedings for letters testamentary are distinct from, and independent of, a proceeding to probate a will,[88] and an application for such letters should be a separate proceeding from an action to appoint a successor trustee under the will.[89]

76. Ala.—Milbra v. Sloss-Sheffield Steel & Iron Co., 62 So. 176, 182 Ala. 622, 46 L.R.A.,N.S., 274.
23 C.J. p 1054 note 7.

77. Cal.—Barboza v. Pacific Portland Cement Co., 120 P. 767, 162 Cal. 36—Haynes v. Weeks, 20 Cal. 288.
23 C.J. p 1054 note 8.

78. Iowa.—In re Rowe, 161 N.W. 626, 179 Iowa 541—In re King, 75 N.W. 187, 105 Iowa 320.
Va.—Ex parte Barker, 2 Leigh 719, 29 Va. 719.

79. Cal.—In re Blinn, 33 P. 841, 99 Cal. 216.

80. W.Va.—Taylor v. Virginia-Pocahontas Coal Co., 88 S.E. 1070, 78 W.Va. 455.
23 C.J. p 1054 note 11.

81. U.S.—Goff v. Norfolk & W. R. Co., C.C.Va., 36 F. 299.
Tenn.—Harris v. Henderson, 7 Heisk. 315.
Va.—Lingle v. Cook, 32 Gratt. 262, 73 Va. 262.

82. Cal.—La Paloma Land Co. v. Shannon, 265 P. 295, 89 Cal.App. 469.

83. Cal.—La Paloma Land Co. v. Shannon, supra.

84. Cal.—La Paloma Land Co. v. Shannon, supra.

85. U.S.—In re Gorday Garment Co., D.C.Or., 2 F.Supp. 162, affirmed, C.C.A., Crocker v. Kay, 62 F.2d 391, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L.Ed. 988.
La.—Succession of Coco, 165 So. 646, 184 La. 144.
N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.
23 C.J. p 1054 note 14.
Proceedings for appointment of:
Administrator de bonis non see infra § 1020.
Administrator with the will annexed see infra § 1032.
Public administrator, with respect to particular estate see infra § 1051.
Temporary or special administrator see infra § 1036.

86. Pa.—In re Miller's Estate, 65 A. 681, 216 Pa. 247—Miller v. Henderson, 61 A. 913, 212 Pa. 263.

87. La.—Succession of Coco, 165 So. 646, 184 La. 144.
N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.
23 C.J. p 1054 note 15.
Nature of administration proceedings generally see supra § 12.

Proceeding by tax commission for appointment of administrator to collect and pay inheritance tax on assets which had been held in joint tenancy with right of survivorship, invoked exercise of probate jurisdiction, which is limited, special and statutory, not plenary.—In re Swan's Estate, 79 P.2d 999, 95 Utah 408.

88. N.Y.—Matter of Mayer, 145 N.Y.S. 665, 84 Misc. 9.
23 C.J. p 1054 note 16.

A probate cannot be decreed in a proceeding for an administration.—In re Billet's Estate, 174 N.Y.S. 488, 106 Misc. 229, reversed on other grounds In re Billet, 175 N.Y.S. 482, 187 App.Div. 309.

89. N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.

A proceeding for the appointment of an administrator has been considered a special proceeding, not governed by the rules applicable to civil actions generally;[90] but such a proceeding is an action within the meaning of a statute providing that there shall be but one form of civil action and that the word "action" shall include a special proceeding of a civil nature.[91] It has been said that a proceeding for letters testamentary or for administration on the estate of a decedent is one in rem, or in the nature of a proceeding in rem,[92] the res being the estate of the decedent, and the only identification of it being the name of the deceased as set forth in the petition;[93] but it has also been said that in certain respects such a proceeding may by the act of interested parties assume the character of a proceeding in personam,[94] and that such a proceeding is either in rem or in personam, being in personam so far as it determines the right to take letters, and in rem so far as it holds in abeyance the title to the personalty.[95]

The granting of letters to personal representatives is a judicial act.[96]

§ 51. Who May Apply for Administration

As a general rule, and unless otherwise provided by statute, only a person having an interest in an estate may apply for the administration thereof.

An application for the administration of an estate may be made by any person who is interested in the estate,[97] whether his interest is a beneficial one, as in the case of a distributee or legatee,[98] or exists by reason of his being a creditor of the estate;[99] but an assignee of a fund to which deceased was entitled is under no duty to procure an administrator's appointment as against another claimant to the fund.[1]

Conversely, a person having no interest in the estate generally has no standing to apply for the administration thereof,[2] although a grant of administration made on the application of such a person

90. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

Dismissal of action

A petition for the appointment of an administrator is not an action within statute relative to the dismissal of actions by plaintiff.—In re Glover's Estate, 175 N.W. 1017, 104 Neb. 151.

91. Idaho.—Gwinn v. Melvin, 72 P. 961, 9 Idaho 202, 108 Am.S.R. 119, 2 Ann.Cas. 770.

92. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

Minn.—Samels v. Samels, 218 N.W. 546, 174 Minn. 133—In re Eklund's Estate, 218 N.W. 235, 174 Minn. 28.

Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

N.J.—Charles Wiener & Sons v. Fischer, 179 A. 632, 118 N.J.Eq. 387.

Pa.—In re Garrett's Estate, 6 A.2d 858, 335 Pa. 287.

93. Mass.—Anderson v. Qualey, 103 N.E. 90, 216 Mass. 106.

Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Nature of title

The proceeding is one in rem, notwithstanding title and possession of decedent's assets, if established, are fiduciary only, and not beneficial.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

94. Ala.—Awbrey v. Estes, 112 So. 529, 216 Ala. 66.

95. Ala.—White v. Hill, 58 So. 444, 176 Ala. 480.

96. Pa.—In re Garrett's Estate, 6 A.2d 858, 335 Pa. 287—West v. Young, 2 A.2d 745, 332 Pa. 248—In re McNichol's Estate, 127 A. 461, 282 Pa. 187—Snyder v. McGill, 108 A. 410, 265 Pa. 122.

S.C.—Mitchell v. Dreher, 147 S.E. 646, 150 S.C. 125.

Quasi-judicial capacity

Register of wills acts in quasi-judicial capacity in granting letters of administration.—In re Friese's Estate, 176 A. 225, 317 Pa. 86—In re Phillip's Estate, 143 A. 9, 293 Pa. 351.

97. La.—Succession of Coco, 165 So. 646, 184 La. 144.

Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

23 C.J. p 1055 note 21.

Persons entitled to appointment as administrators see supra §§ 31–45.

Effect of specification in statute

A statute specifying the persons entitled to appointment does not limit the persons having the right to petition for administration, and any one sufficiently interested may so petition and thus give the court jurisdiction to act.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

98. La.—Succession of Coco, 165 So. 646, 184 La. 144.

Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.

Va.—Cornwall v. Cornwall, 168 S.E. 439, 160 Va. 183, followed in Cornwall v. Cornwall, 168 S.E. 442, 160 Va. 193.

23 C.J. p 1055 note 22.

Distributee's assignee or creditor

(1) Distributee's assignee is "person interested" in estate and may petition for appointment of administrator.—In re Kassam's Estate, 252 N.Y.S. 706, 141 Misc. 366, affirmed In re Kassam, 255 N.Y.S. 836, 235 App.Div. 609.

(2) However, mere creditor of heir theretofore assigning share of estate to another is without standing to petition for administration.—In re Leskela's Estate, 223 N.W. 133, 176 Minn. 223.

99. La.—Succession of Coco, 165 So. 646, 184 La. 144.

Mass.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.

Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.

Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

23 C.J. p 1055 note 23.

Evicted grantee

In absence of administration on warrantor's estate, evicted grantee may have administrator appointed and present claim.—Harmon v. Nofire, 267 P. 650, 131 Okl. 1.

Pledgee

Under particular statute, where no administration was granted within forty days after insured's death to persons given prior right, insurer, claiming share of policy as pledgee, could procure administrator's appointment.—Missouri State Life Ins. Co. v. Robertson Banking Co., 134 So. 800, 223 Ala. 177.

1. Ala.—Missouri State Life Ins. Co. v. Robertson Banking Co., supra.

2. La.—Succession of Watkins, 101 So. 395, 156 La. 1000.

Mich.—Diem v. Drogmiller, 122 N. W. 637, 158 Mich. 380.

Minn.—In re Leskela's Estate, 223 N. W. 133, 176 Minn. 223.

Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.

One owning land in co-mmon with estate cannot on that ground alone secure appointment of **administrator**

is valid, where interested parties have consented thereto,[3] or where it has not been reversed on appeal;[4] but under some statutes a person petitioning for administration need have no beneficial interest in the estate,[5] and it is within the discretionary power of the court to appoint an administrator regardless of who presents the petition and the facts.[6]

Foreign consul. Where decedent and his next of kin are aliens, the consul of the country of which decedent was a citizen or subject may apply for administration.[7]

§ 52. Time for Application

Application for administration must be made within the time limited by statute, or, in the absence of statute, within a reasonable time; but an application for letters testamentary should not be made until after the will has been admitted to probate.

Where express statutory provisions exist, the time within which original administration may or must be applied for is limited thereby;[8] and it has been held that a proceeding for the appointment of an administrator is one for the protection of a private right, so that a general statute of limitations is applicable thereto.[9] However, a grant of letters after the expiration of the statutory period is not beyond the jurisdiction of the court so as to subject its action to collateral attack.[10]

If, as may occur,[11] there is no express statutory provision limiting the time within which administration must be applied for, application may and should be made within a reasonable time.[12] Accordingly long acquiescence by persons sui juris in an informal distribution of an estate in which they are interested will debar them from seeking administration merely to disturb such settlement, there being no creditors interested.[13] Likewise a creditor cannot secure administration after an unreasonable length of time,[14] but an application for administration by a creditor a considerable number of years after the death of decedent has been held not too late.[15] Under a statute providing that if a person named as executor fails to apply for letters testamentary within a specified time after probate of the will, and if any others named as executors apply for such letters, they must be issued to such persons, the court has no jurisdiction to grant letters to one who fails to apply therefor within the time limited.[16]

Premature grant. Compliance must be had with statutory provisions that administration shall not be granted until the expiration of a certain period after the decedent's death;[17] but the appointment of an administrator after the lapse of the prescribed period is not invalidated by the mere fact that the application therefor was made before such time.[18] In the absence of some such statute, letters granted

merely to have his interest segregated.—Cyphers v. Birdwell, Tex.Civ.App., 32 S.W.2d 937, error refused.

3. Ga.—Hill v. Akins, 194 S.E. 893, 57 Ga.App. 198.

4. R.I.—Mowry v. Latham, 40 A. 236, 341, 20 R.I. 786.

5. Neb.—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.

6. Colo.—Rosenboom v. Cline, 6 P. 2d 453, 90 Colo. 1.

7. Mich.—Paperno v. Michigan R. Engineering Co., 168 N.W. 503, 202 Mich. 257.

8. Ky.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

23 C.J. p 1055 note 27.

Lapse of time as affecting necessity and propriety of administration see supra § 7.

Necessity for timely action to entitle person to appointment see supra § 33.

Initiation of proceeding

A distributee is deemed to have applied for letters within meaning of statute if within limited period he has taken steps necessary to initiate a proceeding and if he prosecutes proceeding in due course.—In re Braddell's Estate, 299 N.Y.S. 1021, 164 Misc. 893.

9. Idaho.—Gwinn v. Melvin, 72 P. 961, 9 Idaho 202, 108 Am.S.R. 119, 2 Ann.Cas. 770.

10. Tex.—Nelson v. Bridge, 86 S. W. 7, 98 Tex. 523.

Grounds of collateral attack generally see infra § 76.

Attempted dismissal of petition

Where a creditor filed a petition within the time permitted by statute, the court acquired jurisdiction to appoint an administrator notwithstanding petitioner attempted to secure dismissal of petition after expiration of period of limitations and other parties failed to file petition until after such time.—In re Glover's Estate, 175 N.W. 1017, 104 Neb. 151.

11. Minn.—In re Daniel's Estate, 294 N.W. 465, 208 Minn. 420.

23 C.J. p 1056 note 30.

12. Ohio.—In re Patterson's Estate, 26 Ohio N.P.,N.S., 580.

Delay not prejudicial

A delay of about four and one half years in applying for administration without resulting prejudice was no bar to the right to have an administrator appointed.—In re Daniel's Estate, 294 N.W. 465, 208 Minn. 420.

13. Mich.—Diem v. Drogmiller, 122 N.W. 637, 158 Mich. 380.

23 C.J. p 1056 note 31.

14. Ark.—Brewer v. Wilson, 46 S. W.2d 3, 185 Ark. 94.

Eighteen years

Ark.—Brewer v. Wilson, 46 S.W.2d 3, 185 Ark. 94.

15. Ga.—Gorham v. Montfort, 72 S. E. 893, 137 Ga. 134.

23 C.J. p 1056 note 32.

16. Ala.—Pruett v. Pruett, 32 So. 638, 131 Ala. 578.

Effect of failure to qualify or act see infra § 68.

17. Md.—Burgess v. Boswell, 116 A. 457, 139 Md. 669.

23 C.J. p 1056 note 34.

Notoriety of death and intestacy

Under some statutes administration may be granted forthwith if the fact that decedent died intestate is notorious, but otherwise a specified period must elapse before an application for administration can be made.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167—Burgess v. Boswell, 116 A. 457, 139 Md. 669—23 C. J. p 1056 note 34 [a].

18. R.I.—Mowry v. Latham, 40 A. 236, 341, 20 R.I. 786.

after the decedent's death, no matter how soon after, are valid;[19] but a petition for administration may not be granted within a short time after decedent's death before reasonable time is afforded for a party having a prior right to administration to file petition therefor.[20] Even where a statute restricts premature application by one not entitled to preference, application by a person of such class before the termination of the prescribed period is not improper where there was no person eligible for preference.[21]

Where decedent left a will, an application for letters testamentary should not be made until after the will has been admitted to probate.[22] Where litigation over the validity of a will has not yet terminated and the intestacy of decedent has not been finally determined, it is premature to apply for the appointment of a general administrator to supplant a special administrator theretofore appointed.[23]

§ 53. Parties, and Citation or Notice

a. Parties
b. Citation or notice

a. Parties

All persons interested in an estate are proper parties to a proceeding for the administration thereof.

In a contest as to the right of administration, there are strictly no plaintiffs or defendants; all applicants are actors, and some may withdraw and others come in at any time during the progress of the cause, even after an appeal.[24] All persons who are interested in the estate are proper parties to the proceeding,[25] and a foreign consul, as such, has been held entitled to intervene in proceedings for the appointment of an administrator of the estate of a citizen or subject of his country.[26] Conversely, a person who is neither a creditor, a legatee, nor a distributee of the estate cannot make himself a party to the petition filed with the probate court for letters of administration,[27] and a person claiming the right to be heard in proceedings for the appointment of an administrator must show that he has an interest in the choice of an appointee.[28]

Filing a caveat against an application does not amount to making one a party to such application in the full sense.[29]

b. Citation or Notice

(1) Necessity
(2) Form and sufficiency; publication and record

(1) Necessity

As a general rule, notice of proceedings for letters of administration must be given to all persons who have a prior right to that of petitioner and who have not waived such notice, and to other persons specified by statute; citation of interested persons is likewise proper on a petition for letters testamentary.

The appointment of an executor or administrator may be made, under statute, on an ex parte application without previous notice.[30] As a general rule, however, before the granting of letters of administration, proceedings are required on the part of the petitioner tantamount to citing in or summoning those entitled to preference to appear and exercise their right if they so desire.[31] To dispense

19. Pa.—Comfort's Estate, 12 Pa.Co. 571.
23 C.J. p 1056 note 36.

20. Ohio.—In re Patterson's Estate, 26 Ohio N.P.,N.S., 580.
Or.—In re MacMullen's Estate, 243 P. 89, 117 Or. 505, rehearing denied 244 P. 664 (first case), 117 Or. 505.

21. Wash.—In re Utter's Estate, 191 P. 836, 112 Wash. 197.

22. N.Y.—In re Mayer, 144 N.Y.S. 438.

23. Iowa.—In re Whitehouse's Estate, 272 N.W. 110, 223 Iowa 91.
Intestacy requisite to appointment of administrator see supra § 30.

24. N.C.—Atkins v. McCormick, 49 N.C. 274.

25. Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.
23 C.J. p 1056 note 40.

Particular persons held proper or necessary parties

(1) Public administrator.
Cal.—In re Graves, 96 P. 792, 8 Cal. App. 254.
Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

(2) Executor under will challenged by petitioner as invalid.—In re Garland's Estate, 294 N.Y.S. 538, 162 Misc. 42.

(3) Since property escheats in absence of surviving heirs, next of kin, or husband, and commonwealth have adversary interest.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

(4) Guardian or administrator of ward or estate having interest in decedent's estate may have duty of participating in proceedings.—In re Edwards' Estate, 289 N.W. 605, 234 Wis. 40.

Nonresidents

(1) In some jurisdictions a nonresident heir or distributee is entitled to be heard.
Cal.—In re Graves, 96 P. 792, 8 Cal. App. 254.
W.Va.—Butcher v. Kunst, 64 S.E. 967, 65 W.Va. 384.

(2) However, under statute a nonresident was held not a "necessary party" to proceeding for letters of administration on estate of her father, in absence of order by surrogate which directed citation of service upon her.—In re Mullens' Estate, 277 N.Y.S. 652, 243 App.Div. 779.

26. Minn.—Austro-Hungarian Consul v. Westphal, 139 N.W. 300, 120 Minn. 122.

27. N.Y.—In re Marshall's Estate, 262 N.Y.S. 528, 146 Misc. 601, affirmed 263 N.Y.S. 936, 239 App. Div. 768.
23 C.J. p 1056 note 42.

28. Ga.—Williams v. Williams, 39 S.E. 474, 113 Ga. 1006.
Mich.—Diem v. Drogmiller, 122 N.W. 637, 158 Mich. 380.

29. S.C.—Ex parte Crafts, 5 S.E. 718, 28 S.C. 281.

30. Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

31. D.C.—Morris v. Foster, 278 F. 321, 51 App.D.C. 238, certiorari denied 42 S.Ct. 586, 259 U.S. 582, 66 L.Ed. 1074.

with such citation, those of the class entitled to preference may and should renounce their claim or else signify their assent to the grant of the petitioner's request for appointment by indorsement of his petition or by other writing of record.[32] Citation is usually required only where there are persons having a right prior to that of the person applying for letters of administration,[33] and formal citation may be dispensed with where several are equally entitled, among whom the court is free to select.[34]

The grant of letters by the court should follow reasonably soon after such citation, as otherwise a new citation or notice may be requisite;[35] but on the hearing letters may be denied to the original applicant and granted to another person, and in such case no new citation is necessary with reference to those already cited.[36]

On a petition for the probate of a will and letters testamentary to an executor, citation to the next of kin and others interested is likewise proper.[37]

Foreign consul. It may be required by statute that notice be given to the consul of the country of which decedent was a citizen, or of which his heirs are citizens,[38] but only the foreign heirs can take advantage of a failure to give the required notice,[39] and they may waive such notice at any time before the estate is closed.[40] On the death of a naturalized citizen of this country, notice need not be given to the consul of the nation of his birth.[41]

Inheritance tax proceedings. A statute authorizing the court to appoint an administrator in inheritance tax proceedings without notice if no application for letters has been made within three months is not invalid because not requiring that notice be given, especially where property cannot be sold to satisfy the tax without notice.[42]

(2) Form and Sufficiency; Publication and Record

The form and sufficiency of the required notice are determined by the provisions of the statute; but one having actual notice cannot ordinarily complain of the insufficiency of the notice. Requirements as to publication and recording must be observed.

The form and sufficiency of the requisite notice are ordinarily determined by the provisions of the statute.[43] Personal notice to parties interested in the estate has been held not required, it being suf-

Ga.—Callaway v. Arnold, 164 S.E. 773, 175 Ga. 55.
Md.—Hewitt v. Shipley, 161 A. 345, 169 Md. 221—Horton v. Horton, 145 A. 355, 157 Md. 127.
R.I.—Capwell v. Knight, 135 A. 699, 48 R.I. 81.
Utah.—In re Phillips' Estate, 44 P. 2d 699, 86 Utah 358.
23 C.J. p 1056 note 45.

Notice to heirs alone required.—Simpson v. Cornish, 218 N.W. 193, 196 Wis. 125.

Nonresidents

(1) It has been held that nonresidents need not be cited.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167—Chryssikos v. Demarco, 107 A. 358, 134 Md. 533.

(2) Under other authority, notice of application should be given to a nonresident relative having prior rights.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.

(3) Provision that notice need not be given to a party "if he be out of the state" does not dispense with necessity of giving notice to party who makes intermittent trips out of state.—Silverwood v. Farnan, Md., 22 A.2d 444.

32. D.C.—Morris v. Foster, 278 F. 321, 51 App.D.C. 238, certiorari denied 42 S.Ct. 586, 259 U.S. 582, 66 L.Ed. 1074.
N.Y.—In re Rowe, 189 N.Y.S. 395, 197 App.Div. 449, affirming In re Rowe's Estate, 170 N.Y.S. 742, 103 Misc. 111, and affirmed 134 N.E. 569, 232 N.Y. 554.
Wis.—Simpson v. Cornish, 218 N.W. 193, 196 Wis. 125.
23 C.J. p 1057 note 46.

33. Md.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167.
N.J.—In re Stewart's Estate, 175 A. 360, 117 N.J.Eq. 256.
Okl.—Continental Oil Co. v. Helms, 105 P.2d 214, 187 Okl. 633—Appeal of Sim's Estate, 18 P.2d 1077, 162 Okl. 35.
23 C.J. p 1057 note 47.

Rule unaffected by time of application
Wash.—In re Brown's Estate, 16 P. 2d 823, 170 Wash. 450.

Requesting appointment of another Preferred party presenting petition need not give others notice even though such party asks for appointment of some one else as administrator.—Manning v. Alcott, 241 P. 287, 137 Wash. 13.

Females need not receive notice where the statute provides that males shall be preferred to females in equal degree or kin.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167.

Executor under worthless will is not entitled to notice.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46.

34. N.Y.—Peters v. Public Adm'r, 1 Bradf.Surr. 200.
23 C.J. p 1057 note 48.

35. Neb.—Elgutter v. Missouri Pac. R. Co., 74 N.W. 255, 53 Neb. 748.
23 C.J. p 1057 note 49.

36. S.C.—Ex parte Small, 48 S.E. 40, 69 S.C. 43.
23 C.J. p 1057 note 50.

37. R.I.—Perry v. De Wolf, 2 R.I. 103.
23 C.J. p 1057 note 51.

38. Mich.—Rice v. Hosking, 63 N.W. 311, 105 Mich. 303, 55 Am.S.R. 448.
Minn.—Austro-Hugarian Consul v. Westphal, 139 N.W. 300, 120 Minn. 122.

39. Mich.—Rice v. Hosking, 63 N. W. 311, 105 Mich. 303, 55 Am.S.R. 448.

40. Mich.—Rice v. Hosking, supra.

41. Minn.—In re Eklund's Estate, 218 N.W. 235, 174 Minn. 28.

"Native of foreign country," within statute requiring notice to consul, means citizen of foreign country as distinguished from citizen of this country.—In re Eklund's Estate, supra.

42. Tex.—Dodge v. Youngblood, Civ. App., 202 S.W. 116.

43. Tex.—Williams v. White, Civ. App., 105 S.W.2d 1105.

Continued wrongful practice in the form of notice over a number of years does not make such practice right as against the requirements of the statute.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

Notice for probate as sufficient A contestant of a will may, under

ficient that a general notice is published as directed by the court;[44] nor need the citation state the name of any person as contemplated for appointment as administrator.[45]

One who has actual notice and seasonably appears cannot complain that the citation was insufficient;[46] but actual notice of petitioner's intention to commence proceedings is insufficient to bind one who had a right to assume that his interests would not be affected until legal notice was given.[47]

Publication or posting. It is usual to publish the citation in a newspaper, or post copies thereof in conspicuous places, or both, the manner of publication and the time at which it must be made or during which it must continue being regulated by statute or rule of court or even by particular directions of the court in individual cases;[48] and failure to publish the notice as prescribed has been considered a jurisdictional defect,[49] even though it is shown that complaining creditors would not have received notice if it had been posted as prescribed, or that no claim could arise, or that creditors were guilty of conduct which would defeat their claim.[50] It will be presumed in the absence of evidence to the contrary that the required publication was made,[51] and a statement or recital, in the order granting administration, that citation has been published as required by law is an adjudication that this has been done which cannot be inquired into in a collateral proceeding.[52]

Record. Where the statute authorizes the filing of an affidavit of publication in cases in which notice of application for a judicial order is required to be published, a probate order appointing an administrator and based on such an affidavit is invalid where the affidavit did not conform to the statute.[53] An ex parte order for publication of an application for dative executorship is revocable by the court at any time without a hearing, if found to have been made improvidently.[54] Under a statute authorizing the clerk of the district court to exercise the powers and jurisdiction of the court in certain probate matters, and requiring administrators to publish such notice of their appointment as the court or clerk may direct, which direction shall be indorsed on the letters when issued, the clerk's direction to publish notice of the appointment of an administrator, whether made by him in his capacity as clerk, or while acting as the court, need only be indorsed on the letters and need not be entered on the records of the court.[55]

§ 54. Joinder of Proceedings

One administrator cannot be appointed in a single proceeding for several persons' estates.

One administrator cannot be appointed in a single proceeding for the estates of several different persons.[56]

§ 55. Petition or Bill

a. In general
b. Form, contents, and sufficiency

statute, be appointed administrator without further notice than that given on original application for probate.—Williams v. White, Tex.Civ. App., 105 S.W.2d 1105.

Notice by legal process is not required by statute providing for "proper summons or notice."—Silverwood v. Farnan, Md., 22 A.2d 444.

Time of notice held sufficient
Mont.—In re Esterly's Estate, 34 P. 2d 539, 97 Mont. 206.

44. Mass.—McDonald v. O'Dea, 152 N.E. 341, 256 Mass. 177.

45. Fla.—Robinson v. Epping, 4 So. 812, 24 Fla. 237.

46. Cal.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.
Md.—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167.
23 C.J. p 1057 note 57.

47. D.C.—Morris v. Foster, 278 F. 321, 51 App.D.C. 238, certiorari denied 42 S.Ct. 586, 259 U.S. 582, 66 L.Ed. 1074.

48. S.D.—Davey v. McShane, 197 N. W. 680, 47 S.D. 265.
23 C.J. p 1057 note 58.

Formal order for publication is unnecessary, where the statute does not require one, although the court has the right to make an order directing the method of publication, which order must be complied with. —Davey v. McShane, supra.

Place of posting
Where statute requires two notices to be posted in places in county, other than at courthouse, most likely to reach interested parties, notices should be so posted at conspicuously public points, and mere posting of all notices on courthouse property is insufficient.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

49. S.C.—Hartley v. Glover, 33 S.E. 796, 56 S.C. 69.

50. Utah.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

51. S.C.—Hendrix v. Holden, 36 S. E. 1010, 58 S.C. 495.

52. Fla.—Robinson v. Epping, 4 So. 812, 24 Fla. 237.
23 C.J. p 1058 note 60.

53. Mich.—Gillett v. Needham, 37 Mich. 143.
23 C.J. p 1058 note 61.

Affidavit held sufficient
A statute providing that the affidavit of the printer of publication of notice of hearing for appointment of administrator "annexed to a printed copy of such notice taken from the paper in which it was published, and specifying the time when," etc., may be filed, etc., does not require that the notice shall be cut from the paper; and such an affidavit setting forth what appears to be a copy of the notice, attested as true, and stating that "the annexed notice has been duly published in said paper," etc., is sufficient.—Wilkinson v. Conaty, 32 N.W. 841, 65 Mich. 614.

54. La.—Downing's Succession, 47 So. 604, 122 La. 275.

55. Iowa.—Mosher v. Goodale, 106 N.W. 195, 129 Iowa 719.

56. Philippine.—Sy Hong Eng v. Sy Lioc Suy, 10 Philippine 209.

a. In General

A petition or bill is the usual and regular method of applying for administration.

The usual and regular method of applying for administration is by a petition or bill;[57] and it has been held that an administrator can be appointed only when a proper petition is filed for that purpose,[58] and not when the matter is raised by answer in another proceeding;[59] but there is also authority for the view that a petition is not jurisdictional.[60]

Under some statutes the application for appointment need not be in writing;[61] but it has been held, on the other hand, that a court acquires jurisdiction of an estate only by a written petition, and that an oral communication to the court prior to the filing of a petition is insufficient to entitle applicant to priority as against another petition first filed.[62]

b. Form, Contents, and Sufficiency

(1) In general
(2) Signature, verification, and affidavit

(1) In General

A petition for administration should affirmatively show the existence of jurisdiction to make the appointment and should allege all the necessary facts; but a misnomer, inaccuracy, or omission in the petition is often indulgently treated, and an amendment may be permitted to remove an ambiguity.

A petition for the appointment of an administrator should affirmatively show the existence of jurisdiction to make the appointment sought,[63] and should allege all the necessary facts,[64] such as death,[65] the name[66] and last residence[67] of decedent, the existence, and situs if need be, of assets,[68] intestacy, where this is relied on,[69] and the right of the person who seeks administration, as

57. N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.
Or.—In re Roedler's Estate, 222 P. 301, 110 Or. 147.
23 C.J. p 1058 note 66.

Petition asking for appointment of petitioner
N.Y.—Matter of Batchelor, 64 How. Pr. 350.

58. N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.
23 C.J. p 1058 note 68.

Petition by contestant
Petition supported by proof is essential where one contesting issuance of letters testamentary to another also seeks issuance of letters testamentary to himself.—In re Coolidge's Estate, 41 P.2d 503, 47 Wyo. 488.

59. N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.

60. Fla.—Robinson v. Epping, 4 So. 812, 24 Fla. 237.

61. Md.—Baltimore Sav. Bank v. Weeks, 72 A. 475, 110 Md. 78, 22 L.R.A.,N.S., 221.
23 C.J. p 1058 note 70.

62. Or.—In re Roedler's Estate, 222 P. 301, 110 Or. 147.

63. Ala.—Moring v. Lisenby, 4 So.2d 4, 241 Ala. 626—Denson v. Crossley, 2 So.2d 916, 241 Ala. 445.
23 C.J. p 1058 notes 71, 72.

Petition held sufficient to confer jurisdiction.—In re Miller's Estate, 226 P. 493, 130 Wash. 199.

64. Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.
N.Y.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.
Tex.—Galveston, H. & S. A. Ry. Co. v. Blankfield, Civ.App., 253 S.W. 956.
23 C.J. p 1058 note 73.

Identity of distributees
Under statute requiring enumeration of all persons concerning whom court is required to have information, petition must contain identified listing of all statutory distributees.—In re Anonymous, 300 N.Y.S. 292, 165 Misc. 62—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.

In Nebraska the only averments essential to court's jurisdiction are that deceased died intestate and was at the time of his death a resident or inhabitant of the county where the petition was filed or, if a nonresident, that he left an estate in the county to be administered.—In re Sheerer's Estate, 289 N.W. 529, 137 Neb. 374—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432—Larson v. Union Pac. R. Co., 97 N.W. 313, 70 Neb. 261.

Variance
Where petition for letters recited that petitioner was the public administrator of certain county, proof that petitioner was entitled to letters because of his nomination by decedent's brother did not constitute a "fatal variance."—In re Mapes' Estate, Mont., 118 P.2d 755.

65. Mont.—Williams v. Hefner, 297 P. 492, 89 Mont. 361.
23 C.J. p 1058 note 74.

Presumption of death from absence
(1) That it appeared allegation of death was based on presumption of death from seven years' absence did not affect sufficiency of petition.
Mont.—Williams v. Hefner, supra.
Wash.—State v. Superior Court of State of Washington for Spokane County, 275 P. 694, 151 Wash. 289.
23 C.J. p 1058 note 74 [a].

(2) However, a petition which failed to conform to provisions of statute with respect to alleging that death was presumed from absence was insufficient.—Lee v. Allen, 59 A. 184, 100 Md. 7.

66. Ala.—Denson v. Crossley, 2 So. 2d 916, 241 Ala. 445.
23 C.J. p 1059 note 75.

Wrong name
A petition for administration of estate of named decedent was ineffective to invoke jurisdiction of court over decedent's estate where it was shown that decedent never adopted or used such name.—Denson v. Crossley, supra.

67. Fla.—State ex rel. Campbell v. Chapman, 1 So.2d 278, 145 Fla. 647.
23 C.J. p 1059 note 76.

Sufficient allegations
An allegation that decedent was "late of the county" is a sufficient allegation of residence.—State ex rel. Campbell v. Chapman, supra—23 C.J. p 1059 note 76 [a].

When jurisdiction is not founded on residence but on locality or assets, an allegation of residence is not necessary.—Rankin v. Anderson, 8 Baxt., Tenn., 240.

68. D.C.—In re Grinnage's Estate, 101 F.2d 695, 69 App.D.C. 370.
23 C.J. p 1059 note 77.

Petition held sufficient
A petition showing that District of Columbia resident died in Virginia and that his personalty consisted of adjusted service bonds and treasury check averred that personalty was in District of Columbia as required by statute.—In re Grinnage's Estate, supra.

69. Neb.—In re Sheerer's Estate, 289 N.W. 529, 137 Neb. 374—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.
23 C.J. p 1059 note 78.

next of kin, creditor, or otherwise, to be appointed.[70]

Details not necessary to jurisdiction, such as the exact value of the estate, need not be averred,[71] and hence it is not necessary to aver that the petitioner is qualified for the office,[72] to set out the amount or nature of the claim of one applying as creditor[73] or that he is a principal creditor,[74] or to deny the pendency of other applications.[75] It is not necessary that the petition should contain a description of either the real or the personal property belonging to the estate.[76]

As jurisdictional facts and their correctness may be determined at the hearing, a misnomer or inaccuracy in the petition, or even the omission of essential allegations, is often indulgently treated;[77] and a fortiori a clerical error in the petition will not invalidate the grant of administration.[78] So, also, where limited letters of administration have been granted authorizing the administrator to maintain an action against the party or parties who wrongfully caused the death of decedent, it is immaterial that the petition for such appointment undertook to specify the person through whose negligence the death occurred, and that thereafter it appeared that the death was caused by the negligence of another person.[79]

A creditor petitioning for appointment as administrator of the estate of a nonresident testator is not required to present a copy of the will.[80]

Amendment. An amendment of the petition to remove an ambiguity therein may be permitted.[81] However, a petition asking for the judicial administration of the affairs of a certain deceased person cannot be so amended as to include a request for the judicial administration of the estate of another deceased person.[82] The filing of another petition referred to as an amended petition, without obtaining an order permitting the amendment, and without citation issued on such amended petition, should be disregarded.[83]

(2) Signature, Verification, and Affidavit

Proper signature and verification of the petition may be required, but an impropriety in this respect or in respect of an accompanying affidavit has been held not a fatal defect.

While compliance must ordinarily be had with a statute requiring a petitioner to sign his petition for letters of administration,[84] the failure of a pe-

70. Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.
N.Y.—In re Murphy's Estate, 252 N.Y.S. 446, 141 Misc. 272.
23 C.J. p 1059 note 79.

Failure of heirs to act

It is necessary for a creditor seeking letters of administration to plead and to prove that none of the heirs is willing to act and that none has filed a written designation of nominee in the court.—In re Cloward's Estate, 82 P.2d 336, 95 Utah 453, 119 A.L.R. 123.

Petition held sufficient

(1) A petition for administration is sufficient which alleges the invalidity of purported will and annexes copy thereof to petition.—In re Garland's Estate, 294 N.Y.S. 538, 162 Misc. 42.

(2) Petition by county administrator was not void on its face for failure to contain allegations showing that applicant was entitled to administration, where petition did not seek to have applicant appointed as administrator, but merely alleged the propriety and necessity of administration.—Walker v. Hall, 166 S.E. 757, 176 Ga. 12.

Petition held insufficient

(1) An application for letters of administration, failing to allege that applicant is an heir or creditor, or otherwise entitled to administration, will be dismissed on motion of the heirs appearing as caveators.—Towner v. Griffin, 42 S.E. 262, 115 Ga. 965—Burkhalter v. Waters, 111 S.E. 73, 28 Ga.App. 296.

(2) Petition by stepchild, merely stating names of alleged next of kin, was held insufficient showing of effort to ascertain existence and identity of blood relatives entitled to preference.—In re Murphy's Estate, 252 N.Y.S. 446, 141 Misc. 272.

Effect of proof

(1) Where application is defective for failure to show right of applicant to secure administration, the appointment of an administrator is not justified by proof of facts showing such right.—Galveston, H. & S. A. Ry. Co. v. Blankfield, Tex.Civ.App., 253 S.W. 956.

(2) On the other hand, a petition for administration which is valid on its face with respect to allegation of interest confers full jurisdiction to hear and dispose of the petition, although such allegation is ultimately not sustained.
Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.
Minn.—In re Eklund's Estate, 218 N.W. 235, 174 Minn. 28.

71. N.Y.—In re Quinlan, 158 N.Y.S. 319.
23 C.J. p 1059 note 80.

Scandalous allegations

Court will not tolerate inclusion of unnecessary and scandalous allegations, reflecting on legitimacy or paternity of child, and will order filing of amended petition omitting such allegations.—In re Anonymous, 300 N.Y.S. 292, 165 Misc. 62.

72. Neb.—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.
23 C.J. p 1059 note 81.

73. Mich.—Johnson v. Johnson, 33 N.W. 413, 66 Mich. 525.

74. Mich.—Johnson v. Johnson, supra—Wilkinson v. Conaty, 32 N.W. 841, 65 Mich. 614.

75. Mich.—Wilkinson v. Conaty, supra.
Wash.—Stern v. Sill, 81 P. 1007, 39 Wash. 557.

76. Neb.—In re Miller, 49 N.W. 427, 32 Neb. 480.

77. Fla.—State ex rel. Campbell v. Chapman, 1 So.2d 278, 145 Fla. 647.
23 C.J. p 1060 note 86.

78. Tex.—Steele's Unknown Heirs v. Belding, Civ.App., 148 S.W. 592.

79. N.Y.—Matter of Halligan, 100 N.Y.S. 622, 50 Misc. 481.

80. Mass.—Bianco v. Piscopo, 161 N.E. 605, 263 Mass. 549.

81. Mont.—In re Myer's Estate, 15 P.2d 846, 92 Mont. 474.

82. Philippine.—Sy Hong Eng v. Sy Lioc Suy, 10 Philippine 209.

83. N.Y.—Matter of Sheldon, 103 N.Y.S. 518, 118 App.Div. 488.

84. Cal.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.

Where petitioner is nominated as administrator, petition is properly

titioner to sign has been deemed not to prevent the court from acquiring jurisdiction to make an appointment.[85]

Verification of the petition has been held not necessary,[86] and it has also been held that a defective verification is not necessarily fatal;[87] but there is also authority for the view that an unverified petition cannot be considered.[88] Under a statute requiring an oath as to the value of the property, in the administration of small estates, in the statement accompanying the petition, an oath to the best of the knowledge and belief of affiant is sufficient.[89]

Accompanying affidavit. Where the statute requires that application for letters of administration shall be made by proper petition in writing, setting forth the facts essential to give the court jurisdiction of the case, and that such applicant at the same time shall make an affidavit stating to the best of his knowledge and belief the names and places of residence of the heirs of deceased, and that deceased died without a will, the jurisdiction of the court is based on the petition required by such statute, and is not dependent on the affidavit specified, and hence, where a petition for letters sets out all the facts required, the court is not deprived of jurisdiction by reason of the petitioner's failure to make the affidavit at the time of filing the petition.[90]

§ 56. Answer, Traverse, or Caveat

Depending on the local practice, opposition to the petition may be raised by an answer, traverse, demurrer, or caveat; but petitioner need not answer objections to the petition.

An answer or traverse to the petition, or a demurrer, is found in the practice of some states,[91] but opposition in the form of caveat is also recognized.[92] The allegations of the caveat or answer must be sufficient in form and subject matter to withstand demurrer.[93]

Affidavits in opposition to the appointment of the person applying for administration, claiming that such appointment would be improper because of litigation which might arise in which the interest of applicant would probably compel him to oppose the interests of the person objecting, are insufficient to preclude the appointment of applicant.[94]

Under the practice of at least one state, no answer is necessary to objections to the petition.[95]

§ 57. Objections to Appointment

a. In general
b. Who may object

a. In General

While a petition may be dismissed even in the absence of objection, an opposition to the petition made in proper time and on a proper ground, such as noncompliance with statutory requirements, or absence of necessity of administration, stands as an answer, and suspends the issuance of letters until its determination. The overruling of a demurrer to objections is an adjudication of the existence of facts warranting a refusal of letters.

An application for administration is not necessarily granted in the absence of objections, but the court may dismiss the petition on its own motion where the facts stated are insufficient to authorize the appointment of an administrator.[96]

Time for objection. A limitation of time within which opposition to the appointment of a curator must be made has been held to apply only to cases where due and regular notice has been given of the application to be appointed.[97] Opposition to the appointment, made after the sale of property by the

signed by him or his counsel, while, if he nominates another as administrator, it is sufficient if petitioner or counsel signs and that the nominee consents to act without signing petition.—In re Johnson's Estate, supra—Jerauld v. Chambers, 187 P. 33, 44 Cal.App. 771.

85. Neb.—In re Gaff, 125 N.W. 1091, 86 Neb. 535.
23 C.J. p 1060 note 89.

86. Ala.—Davis v. Miller, 17 So. 323, 106 Ala. 154.
Neb.—In re Miller, 49 N.W. 427, 32 Neb. 480.

87. N.Y.—Matter of Ireland, 95 N.Y.S. 1079, 47 Misc. 545.

88. Cal.—In re Pina, 71 P. 171, 138 Cal.Unrep.Cas. 101.
23 C.J. p 1060 note 92.

89. La.—Zuffle's Succession, 6 La.A., Orleans, 257.

90. Wash.—McLean v. Roller, 73 P. 1123, 33 Wash. 166.

91. Cal.—In re Wooten, 56 Cal. 322.
Mich.—In re Brooks, 67 N.W. 975, 110 Mich. 8.

92. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.
11 C.J. p 43 note 95—23 C.J. p 1061 note 98.
"The office of a caveat in an estate is to arrest the proceedings, and it inures to the benefit of all parties interested in the subject."—In re Phillips' Estate, 143 A. 9, 293 Pa. 351.

Proof of probate of alleged will required

Allegation in caveat that alleged intestate had left valid will, and had not died intestate, and that, therefore, no administrator could be appointed, was not sustained without proof of probate of alleged will.—Carson v. Blair, 124 S.E. 808, 32 Ga. App. 728.

93. Ga.—Sampson v. Sampson, 163 S.E. 326, 44 Ga.App. 803.

94. Ky.—Watkins v. Watkins' Adm'r., 124 S.W. 301, 136 Ky. 266.
23 C.J. p 1061 note 99.

95. Mont.—In re Mapes' Estate, 118 P.2d 755.

96. Ariz.—In re Wilson, 168 P. 503, 19 Ariz. 205.

Where court learned of existence of will in proceeding for appointment of administrator, will should have been ordered brought into court and general administrator should not have been appointed until validity of will was established in proper probate proceedings.—In re Larson's Estate, 49 P.2d 919, 184 Wash. 75.

97. La.—Yilden v. Kendrick, 3 La. 471.

administrator, is within the proper time where it did not appear until after the sale that the objector would have an interest in the estate.[98] An objection that a relative of deceased is a nonresident alien has been required to be urged against him if and when he applies for letters.[99]

Grounds of objection. Objection to the petition may be made on the ground that the express requirements of the statute have not been complied with,[1] such as those with respect to the proper county in which to administer the estate;[2] and it is always proper to question the court's jurisdiction.[3] So also an interested party may oppose the application of another for administration by raising the issue of the right of the applicant to secure administration,[4] or by raising the issue of the existence of an estate to administer, or that of necessity vel non of administration;[5] but the objection must show that the applicant for letters is incompetent on some ground specified by statute or is not entitled to the appointment.[6] Allegations of fraud cannot be noticed in an opposition to an application for administration, as they form the subject of an independent litigation and should not be tried collaterally.[7] An objection that executors seeking to qualify have interests adverse to that of the estate is not subject to general demurrer.[8]

Effect of objection. Objections stand as an answer to the petition for appointment,[9] and, where objection has been duly made by a party in interest, the issuance of letters should be suspended until the determination of the objection or its withdrawal.[10] An objection raised by one party inures to the benefits of all parties interested in the subject, and it is unnecessary that each separately file the same objection.[11]

Demurrer to objections. A demurrer to objections to a petition to appointment as executor admits the truth of the allegations,[12] and, where such a demurrer is overruled, the effect is an adjudication that the facts alleged in the objections are sufficient to warrant a refusal to issue letters to the applicant.[13] Where the objecting party has acquiesced to the ruling of the court in effect sustaining a demurrer to his objections and striking certain allegations therefrom, such allegations must be considered abandoned.[14]

b. Who May Object

Generally, objections to the petition may be made by a person having an interest in the estate, even though such person is not himself eligible for appointment; a creditor of the estate is generally a proper party to object, but a debtor is not. The sufficiency of the objector's interest may be disputed or its insufficiency waived.

98. La.—Succession of Reed, App., 157 So. 765.

99. N.Y.—In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453.

1. Md.—Pattison v. Firor, 126 A. 109, 146 Md. 243.

2. Md.—Pattison v. Firor, supra.

Sequence of objections

A party who claims the jurisdiction to be in a county other than that in which the petition for letters of administration has been filed, and who has a will in his possession, may resist the granting of letters for want of jurisdiction, without asking probate of the will, and, on failure to show want of jurisdiction, may then present his petition to the court to have the will probated in such county.—Hill v. Superior Court of San Luis Obispo County, 205 P. 430, 188 Cal. 352.

3. La.—Succession of Bibbins, App., 152 So. 592.

4. La.—Succession of Damico, 99 So. 862, 155 La. 1036.

Question of validity of marriage may be raised to determine whether applicant is entitled to administration as surviving widow.—Succession of Damico, 99 So. 862, 155 La. 1036—Succession of Kalish, La.App., 143 So. 524.

Set-off against claim

However, where creditor sues for appointment of administrator, heirs may not object thereto on ground that set-off exceeds amount of petitioner's claim on note against estate, since such issue could be raised only in course of administration or in suit on note against administrator.—Thompson v. Carter's Estate, 177 So 356, 180 Miss. 104.

5. Ga.—Bearden v. Baldwin, 162 S.E. 802, 174 Ga. 191.

La.—Aronstein's Succession, 25 So. 932, 51 La.Ann. 1052.

When objection proper

(1) Ordinarily heirs may object to petition in order to prevent waste by unnecessary administration.—Bearden v. Baldwin, 162 S.E. 802, 174 Ga. 191.

(2) In so objecting, however, the heirs have no right to litigate the situation with one who asserts that he is a creditor.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.

6. Ga.—Sampson v. Sampson, 163 S. E. 326, 44 Ga.App. 803.
23 C.J. p 1062 note 18.

Unsoundness of mind

Allegations of caveat that applicant was not mentally or temperamentally able to perform administratrix' duties, or to perform them fairly, was insufficient to show unsoundness of mind making applicant ineligible under terms of statute.—Sampson v. Sampson, supra.

Estoppel

Fact that heir joined in suit to cancel trust instrument executed by decedent on ground that decedent was of unsound mind at time of execution of the instrument did not estop the heir from seeking appointment as administrator where the petition in the former suit did not allege that there was no necessity for administration.—Ragsdale v. Prather, Tex.Civ.App., 132 S.W.2d 625, error refused.

7. La.—Martin's Succession, 13 La. Ann. 557.

8. Ga.—Thomasson v. Barber, 3 S. E.2d 858, 60 Ga.App. 327.

9. Ind.—Studabaker v. Faylor, 114 N.E. 772, 66 Ind.App. 175.

10. Pa.—In re Phillips' Estate, 143 A. 9, 293 Pa. 351.
23 C.J. p 1062 note 21.

11. Pa.—In re Phillips' Estate, supra.

12. Ind.—Studabaker v. Faylor, 114 N.E. 772, 66 Ind.App. 175.

13. Ind.—Studabaker v. Faylor, supra.

14. Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 188 P. 137, 57 Mont. 315.

Except where otherwise provided by statute,[15] objections to the issuance of letters testamentary or of administration can be made only by persons having an interest in the estate,[16] but, where one has such interest, the fact that he himself is not eligible to appointment does not deprive him of the right to object to the appointment of another.[17] The objector's right to appear may be disputed notwithstanding his affidavit,[18] and, on the other hand, the incompetency of a caveator to make the objection may be waived.[19]

The public administrator has been held to be a person "interested" who may contest a petition for administration.[20]

The state has a right to be heard, as an interested party, where the estate is subject to an inheritance tax;[21] but the state's right of escheat is not such an interest as entitles it to intervene in administration proceedings,[22] although there is authority apparently to the contrary.[23]

Claimant of property. A mere claim to ownership of the property named in the petition for administration has been held not sufficient,[24] but, on the other hand, a person in possession of certain of the property under circumstances indicating a claim of right has been held to have such an interest in the matter as entitles him to appear and oppose the application.[25]

Creditors and debtors. As a general rule, a creditor of the estate is a proper party to raise an objection in the proceedings for administration.[26] A person claiming under oath to be a creditor may raise an objection, although the person named as executor in the will alleges the objector to be a debtor instead of a creditor;[27] but ordinarily no right to raise an objection can be claimed by an alleged creditor who does not establish his status as such.[28]

A debtor to the estate, or one against whom the administrator may assert a right of action, is not a party in interest in such sense as to be entitled to oppose the petition,[29] except on the ground that the appointment of the administrator is void on the face of the record;[30] nor is the garnishee of a debtor entitled to raise objection.[31]

Imputation of consent to appointment. Consent of a party to appointment of another as administrator will not ordinarily be imputed from acts done under a misapprehension.[32]

§ 58. Abandonment of Application

An application for administration may be regarded as abandoned on the court's failure to take action or the withdrawal of an application for letters and the substitution of a nomination of another as administrator.

An application for administration must be regarded as abandoned where no action or steps whatever

15. Tex.—Balfour v. Collins, 25 S.W.2d 804, 119 Tex. 122, answer to certified question conformed to, Civ. App., 27 S.W.2d 185.

16. Ariz.—In re Miller's Estate, 92 P.2d 335, 54 Ariz. 58.
Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.
Iowa.—Finnerty v. Shade, 228 N.W. 886, 210 Iowa 1338.
N.Y.—In re Barmeier's Estate, 288 N.Y.S. 318, 248 App.Div. 636, modifying 282 N.Y.S. 695, 156 Misc. 657, affirmed 5 N.E.2d 351, 272 N.Y. 601—In re Crook's Estate, 252 N.Y.S. 373, 140 Misc. 721.
23 C.J. p 1061 note 3.
"While ordinarily one to be qualified to caveat an application . . . must be either an heir at law or a creditor of the decedent, still the law includes any other person who has a real interest in the estate or an interest of his own to protect, by which he can prevent useless waste, annoyance, and injury to himself."—Bearden v. Baldwin, 162 S.E. 802, 807, 174 Ga. 191.

Extent of interest
Interested person, in order to move to set aside appointment of administrator, must have such interest that, on court's failure to act, he is entitled to statutory appeal.—In re Bacher's Estate, 261 Ill.App. 547.

Son omitted from will
Son of testatrix, omitted from will, could oppose appointment of executor without first reducing legacies to disposable portion of estate.—Succession of Kneipp, 134 So. 376, 172 La. 411.

Natural father of adopted child
Where adopted child is beneficiary under adopting parent's will, its natural father is a stranger to proceeding to appoint administrators.—Sutherland v. Barker, 132 S.E. 119, 35 Ga.App. 42.

17. W.Va.—Butcher v. Kunst, 64 S.E. 967, 65 W.Va. 384.
23 C.J. p 1061 note 4.

18. N.Y.—Burwell v. Shaw, 2 Bradf. Surr. 322.
23 C.J. p 1061 note 5.

19. Ga.—Berry v. Van Hise, 68 S.E. 423, 134 Ga. 615.

20. Cal.—In re Healy, 54 P. 736, 122 Cal. 162.
23 C.J. p 1061 note 7.

21. Pa.—Robertson's Estate, 1 Pa. Dist. 317.

22. S.D.—In re McClellan, 129 N.W. 1037, 27 S.D. 109, Ann.Cas.1913C 1029.

23. Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

24. Ga.—Williams v. Williams, 39 S.E. 474, 113 Ga. 1006.
23 C.J. p 1061 note 10.

25. Wis.—Wiesmann v. Daniels, 90 N.W. 162, 114 Wis. 240.

26. La.—Succession of Bibbins, App., 152 So. 592.

No estoppel by filing claim
Creditor by filing claim is not estopped to question improper appointment of administrator.—In re Bacher's Estate, 261 Ill.App. 547.

27. N.Y.—Ferris' Will, Tuck.Surr. 15.

28. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.

29. Iowa.—Finnerty v. Shade, 228 N.W. 886, 210 Iowa 1338.
Minn.—State v. Probate Court in and for Hennepin County, 184 N.W. 43, 149 Minn. 464.
23 C.J. p 1061 note 13.

30. Minn.—State v. Probate Court in and for Hennepin County, supra.

31. Me.—Veazie Bank v. Young, 53 Me. 555.

32. N.J.—In re Hill, 37 A. 952, 55 N.J.Eq. 764.
23 C.J. p 1062 note 15.

are taken by the court in the proceeding for a substantial period after the date fixed in the notice to the next of kin of the time and place of the hearing.[33] A præcipe withdrawing an application for letters of administration and substituting therefor a nomination of another as administrator ipso facto works an abandonment of the petition, without formal order of the court.[34]

§ 59. Issues

Generally it is not within the court's province to pass on matters not directly involved in the application before it for letters of administration, but it has been held that incidental matters may be adjudicated.

As a general rule, it is not within the province of the court, on an application for letters of administration, to determine questions of title or property rights[35] or other matters not directly involved in the application before it.[36] Accordingly, in a suit by a creditor for appointment of an administrator, the court is concerned only with the creditor's prima facie right to secure administration, and may not consider issues with respect to the validity or amount of the alleged indebtedness.[37] It has been held, however, that in determining the right to administration the court may adjudicate incidental matters arising from the principal question for determination,[38] such as the validity of applicant's marriage to deceased.[39]

§ 60. Evidence

a. Burden of proof and presumptions
b. Admissibility
c. Weight and sufficiency

a. Burden of Proof and Presumptions

A person seeking administration has the burden of showing that administration is necessary and proper and that he has a right to seek it; and one urging the disqualification of a person entitled to preference has the burden of showing the disqualification. Effect will be given to proper presumptions, such as the presumption of competency in favor of a petitioner for administration.

It is incumbent on the person seeking administration to establish the facts showing administration to be necessary or proper,[40] such as the death of the alleged decedent,[41] the existence and locality of assets,[42] and his right to seek administration.[43] Even where an application is wholly ex parte and unopposed, the court may require proof of essential facts, if it has any reason to doubt the validity of the asserted basis of the application.[44] A person urging the disqualification of one preferentially entitled to appointment as administrator has the burden of showing the basis of the disqualification.[45]

33. Neb.—Elgutter v. Missouri Pac. R. Co., 74 N.W. 255, 53 Neb. 748.

Nearly two years

Neb.—Elgutter v. Missouri Pac. R. Co., supra.

34. Mont.—State v. District Court of Fifth Judicial Dist. in and for Madison County, 197 P. 741, 59 Mont. 505.

35. N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

Tex.—Ragsdale v. Prather, Civ.App., 132 S.W.2d 625, error refused.

23 C.J. p 1062 note 25.

36. Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

Mental capacity

Court has no power to try the question of the alleged unsoundness of mind of a person entitled to administration, but this question must be decided by a writ de lunatico inquirendo.—Mobley v. Mobley, supra—Kearney v. Turner, 28 Md. 108.

Validity of alleged will

In proceeding for appointment of administrator, court has not jurisdiction to determine validity of alleged will, probate of which had been revoked in previous proceeding.—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal. App. 468.

37. Miss.—Hancock's Estate v. Pyle, 193 So. 812, 187 Miss. 801.

Claim against creditor

In such a suit the heirs may not file a claim for judgment against the creditor for amounts due the decedent in excess of the creditor's claim.—Thompson v. Carter's Estate, 177 So. 356, 180 Miss. 104.

38. S.C.—Ex parte Blizzard, 193 S. E. 633, 185 S.C. 131.

39. S.C.—Ex parte Blizzard, supra.

40. Ind.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.

N.Y.—In re Breding's Estate, 291 N. Y.S. 750, 161 Misc. 322, affirmed 297 N.Y.S. 681, 251 App.Div. 737.

23 C.J. p 1062 note 27.

41. Iowa.—In re Barrett, 149 N.W. 247, 167 Iowa 218.

23 C.J. p 1062 note 28.

42. Md.—Grimes v. Talbert, 14 Md. 169.

Nev.—Wright v. Smith, 7 P. 365, 19 Nev. 143.

43. N.Y.—In re Wagner, 20 N.Y.S.2d 470, 174 Misc. 203—In re McCoy's Estate, 26 N.Y.S.2d 401.

Tex.—Brown v. Brown, Civ.App., 115 S.W.2d 786.

23 C.J. p 1062 note 30.

Fitness to discharge trust

It is incumbent on one applying to be appointed administrator to produce satisfactory testimony as to his fitness to discharge the trust.—In re Pollard's Estate, 181 N.W. 133, 105 Neb. 432.

Status as creditor

(1) An alleged creditor, to be entitled to be appointed or to have someone appointed on his application, must establish the fact that he is a creditor.—Harris v. O'Quinn, Ga.App., 17 S.E.2d 758.

(2) It has been held, on the other hand, that a petitioning creditor need not prove his claim to be valid before the petition is granted.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

44. N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

Judicial notice

Letters of administration must be denied where facts of which court may or should take judicial notice affirmatively demonstrate that grounds on which assertion of right to letters are predicated are untrue.—In re Reilly's Estate, supra.

45. Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

Colo.—In re Webb's Estate, 10 P.2d 947, 90 Colo. 470.

Mich.—In re Berner, 187 N.W. 377, 217 Mich. 612—In re Morgan, 176 N. W. 606, 209 Mich. 65.

N.Y.—In re Stege's Estate, 299 N.Y. S. 115, 164 Misc. 95.

Effect will be given to proper presumptions.[46] There is a strong presumption of competency operating in favor of petitioner for administration; and the burden of disproof rests on a party claiming otherwise.[47]

Intestacy. It has been held that where administration as of an intestate estate is sought, it is incumbent on the applicant to prove intestacy,[48] unless such fact is notorious;[49] but there is also authority for the view that intestacy will be presumed until proof of a will is made,[50] and the burden of proving a will is on the person denying intestacy.[51]

b. Admissibility

In a proceeding for administration, only relevant and material evidence is admissible.

In a proceeding for administration, evidence which tends to establish the right to administer is always admissible,[52] as is also evidence to show the superior claims of one applicant over those of another.[53] The person opposing the application is entitled to introduce evidence of any facts which tend to show that administration is not necessary,[54] or to disprove applicant's right or qualification to administer.[55] A statute providing that affidavits of a person outside the state may be received as prima facie evidence of his identity does not preclude proof of identity by oral testimony.[56]

On the other hand, evidence which is not relevant or material to the issues should be excluded.[57] Affidavits have been refused admission in administration proceedings.[58]

Preponderance of evidence

Such proof must be by fair preponderance of evidence.—In re Stege's Estate, supra.

Mental incapacity

Cal.—In re Johnson's Estate, 189 P. 280, 182 Cal. 642.

Abandonment

Burden of establishing abandonment of wife by husband so as to entitle another to letters of administration on wife's death, in preference to husband, is on person asserting abandonment.—In re Rechtschaffen's Estate, 16 N.E.2d 357, 278 N.Y. 336, reversing 300 N.Y.S. 1005, 252 App. Div. 853, affirming 294 N.Y.S. 604, 162 Misc. 374, motion denied 1 N.Y. S.2d 652, 253 App.Div. 718.

Citizenship

Petitioner having offered proof in support of his citizenship, burden of proving change thereof was on party alleging it.—In re Ray's Estate, 270 N.Y.S. 333, 150 Misc. 728.

Marriage

(1) Burden of proving that decedent's widow was not entitled to letters of administration, because she was never married to decedent, was on persons asserting it.—In re Brugnoli's Estate, 127 A. 165, 97 N.J.Eq. 349, 2 N.J.Misc. 422.

(2) So, where decedent's first wife, although present at the proceeding for granting letters of administration, offered no evidence to show that the marriage was still in effect when decedent contracted a second marriage, the second marriage must be held valid, and second wife entitled to letters of administration.—In re Hafner's Estate, 202 N.Y.S. 638, 122 Misc. 277.

46. Cal.—In re Rollins' Estate, 208 P. 280, 189 Cal. 392.

Particular presumptions

(1) It will be presumed that testator intended European and American executors to handle affairs in country in which each respectively resided.—In re Kelly's Will, 235 N.Y. S. 683, 134 Misc. 399.

(2) It will not be presumed that one having preferential right to appointment will not carry out duties of administrator faithfully and efficiently.—Succession of Strange, 177 So. 579, 188 La. 478.

47. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262—In re Rollins' Estate, 208 P. 280, 189 Cal. 392.
Mich.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

48. Md.—Grimes v. Talbert, 14 Md. 169.
23 C.J. p 1062 note 31.

49. U.S.—Eslin v. D. C., 22 Ct.Cl. 160.
Md.—Stouffer v. Stouffer, 72 A. 843, 110 Md. 368.

50. Ga.—Atkinson v. Hardaway, 73 S.E. 556, 10 Ga.App. 389.
23 C.J. p 1062 note 33.

51. N.Y.—In re Chapin's Will, 3 N.Y.S.2d 932, 167 Misc. 388.
23 C.J. p 1062 note 34.

52. Ariz.—In re Lawrence's Estate, 85 P.2d 45, 53 Ariz. 1.
23 C.J. p 1062 note 35.

Evidence held admissible

(1) Record of conviction of husband of decedent for disorderly conduct is admissible as evidence of abandonment forfeiting husband's right to appointment.—In re Rechtschaffen's Estate, 16 N.E.2d 357, 278 N.Y. 336, reversing 300 N.Y.S. 1005, 252 App.Div. 853, affirming 294 N. Y.S. 604, 162 Misc. 374, motion denied 1 N.Y.S.2d 652, 253 App.Div. 718.

(2) On an application for letters of administration by the public administrator, where there is no contest, sworn declarations taken before a notary in a foreign state are admissible to prove death and intestacy, although no commission to take depositions issued from the court, and no notice was given nor interrogatories prepared, as required by the statute.—In re Liter, 48 P. 753, 19 Mont. 474.

(3) Instrument executed and telegrams sent by interested party nominating administrator were admissible without affidavit of identity of person signing instrument, where instrument was acknowledged and there was oral testimony tending to identify signer.—In re Mapes' Estate, Mont., 118 P.2d 755.

53. La.—Succession of Damico, 99 So. 862, 155 La. 1036—Rust v. Randolph, 4 Mart. 370.

Assertion of doubtful claims

Where two children of decedent separately petitioned for appointment to administer the estate, evidence that one of them asserted doubtful claims to decedent's property was competent to aid the court in its discretionary choice.—In re Rollins' Estate, 208 P. 280, 189 Cal. 392.

54. La.—Pratt's Succession, 11 La. Ann. 201.
23 C.J. p 1063 note 37.

55. La.—Succession of Damico, 99 So. 862, 155 La. 1036.
23 C.J. p 1063 note 38.

56. Mont.—In re Mapes' Estate, 118 P.2d 755.

57. La.—Succession of Patterson, 177 So. 692, 188 La. 635.
23 C.J. p 1063 note 40.

Destruction of will

That deceased had made a will and had been intimidated into destroying it is not relevant, on an application for administration on his estate, to negative the fact of intestacy.—Pate v. Pate, 113 S.E. 50, 28 Ga.App. 798.

58. Cal.—In re Paulsen, 170 P. 855, 35 Cal.App. 654.

c. Weight and Sufficiency

General rules as to the weight and sufficiency of evidence have been applied in proceedings for the appointment of executors and administrators, with respect to various matters pertinent to such application, such as decedent's domicile, testacy or intestacy, relation of the applicant to decedent, and qualification of the person seeking to act as executor or administrator.

General rules as to the weight and sufficiency of evidence have been applied in proceedings for the appointment of executors and administrators, with respect to such matters as decedent's domicile,[59] testacy or intestacy,[60] applicant's right to secure administration,[61] relationship of applicant to decedent,[62] qualification of the person seeking to act as executor or administrator,[63] legitimacy,[64] and resumption of marital relations.[65]

One who claims administration as a creditor is not bound to make full proof of his claim as such, but a prima facie case is sufficient.[66] Much weaker proof is sufficient to raise the presumption of the death of an intestate on an application for the appointment of a temporary administrator to collect, than of a permanent administrator.[67] A statutory requirement that the death of a deceased be proved by the testimony of applicant or others is complied with where two separate applications are made and filed for the appointment of two different persons as administrator, and both petitions allege the death of the testator and the evidence supports the allegations.[68]

Where it is sought to deny appointment to a preferred applicant by reason of a statutory disqualification, such disqualification must be clearly made to appear by competent and substantial proof.[69] Likewise, in order that one named as executor or administrator may be excluded from acting as such by reason of his character or habits, the proof of the disqualifying characteristic should be clear and convincing,[70] and should establish that the disqualification exists at the time when the nominee seeks

59. Tex.—Halverson v. Livengood, Civ.App., 4 S.W.2d 588.

60. N.Y.—In re Friedman's Estate, 299 N.Y.S. 103, 164 Misc. 440.
23 C.J. p 1063 note 49.

61. Minn.—In re Person's Estate, 178 N.W. 738, 146 Minn. 230.
N.Y.—In re Sultan's Estate, 294 N.Y.S. 207, 162 Misc. 265.

Spouse's abandonment of deceased precluding appointment
N.Y.—In re Rechtschaffen's Estate, 16 N.E.2d 357, 278 N.Y. 336, reversing 300 N.Y.S. 1005, 252 App.Div. 853, affirming 204 N.Y.S. 604, 102 Misc. 374, motion denied 1 N.Y.S.2d 652, 253 App.Div. 718—In re Remlinger's Estate, 16 N.Y.S.2d 367, 258 App.Div. 911—In re Grant's Estate, 3 N.Y.S.2d 867, 253 App.Div. 504—In re Wagner, 20 N.Y.S.2d 470, 174 Misc. 203—In re McCoy's Estate, 26 N.Y.S.2d 401.

Presence of unadministered assets
Minn.—In re Hokanson's Estate, 270 N.W. 689, 198 Minn. 428.
Pa.—In re Treat's Estate, 19 A.2d 354, 341 Pa. 342.

Prior right in another
An application for letters by decedent's half sister would be denied as a matter of law, where record in proceeding for letters established that decedent left husband surviving, contrary to allegation of petition.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

62. Cal.—In re Morris' Estate, 264 P. 752, 203 Cal. 411—In re Purcell's Estate, 53 P.2d 784, 11 Cal.App.2d 237—In re Ganes' Estate, 299 P. 550, 114 Cal.App. 17.
Ga.—Montgomery v. Gable, 7 S.E.2d 426, 61 Ga.App. 859.
La.—Ledet's Succession, 47 So. 506, 122 La. 200.
N.Y.—In re Durham's Estate, 8 N.Y.S.2d 764, 255 App.Div. 941, reargument denied 11 N.Y.S.2d 541, 256 App.Div. 1043.

Child
Where the right of an applicant is denied on the ground that he is not the child of decedent, and the evidence is conflicting, weight should be given to a certificate of baptism and other testimony corroborative in character.—Ledet's Succession, 47 So. 506, 122 La. 200—23 C.J. p 1063 note 46.

Common-law marriage
In a proceeding by an alleged common-law widow for letters of administration, the next of kin denying that petitioner was the widow of deceased, the alleged marriage should be established very clearly to entitle her to administer the estate.—In re Maguire, 175 N.Y.S. 728.

63. Ga.—Stevens v. Duncan, 7 S.E.2d 745, 189 Ga. 730.
Mass.—Morgan v. Morgan, 166 N.E. 747, 267 Mass. 388.
Minn.—In re Holterman's Estate, 282 N.W. 132, 203 Minn. 519.
Neb.—In re Cachelin's Estate, 247 N.W. 422, 124 Neb. 556.
Okl.—Secrest v. Secrest, 36 P.2d 57, 168 Okl. 576.

Citizenship
N.Y.—In re Ray's Estate, 270 N.Y.S. 333, 150 Misc. 728.

Honesty
N.Y.—In re Flood's Will, 140 N.E. 936, 236 N.Y. 408, reversing 198 N.Y.S. 693, 206 App.Div. 602—In re Aebly's Estate, 25 N.Y.S.2d 993, 261 App.Div. 839.

Improvidence
Nev.—In re Taylor's Estate, 114 P.2d 1086, 135 A.L.R. 580.

Mental incapacity
Cal.—In re Johnson's Estate, 189 P. 280, 182 Cal. 642.
Ga.—Montgomery v. Paradise, App., 15 S.E.2d 899.

Hostility to other heirs
Utah.—In re Pingree's Estate, 279 P. 901, 74 Utah 384.

Interests adverse to estate
Cal.—De Brum's Estate v. Soares, 79 P.2d 414, 26 Cal.App.2d 319.

Residence within state
Cal.—In re Barnes' Estate, 203 P. 100, 187 Cal. 566.
Mont.—In re Myer's Estate, 15 P.2d 846, 92 Mont. 474.

Action as to other estate
Evidence that executor named in will had failed to administer another estate with diligence and proper efficiency, and that he was antagonistic to cestui que trust, sustained finding that he was person unsuitable for appointment.—Osborne v. Craig, 146 N.E. 263, 251 Mass. 169.

64. La.—Ledet's Succession, 47 So. 506, 122 La. 200.

65. Cal.—In re Martin, 137 P. 2, 166 Cal. 399.

66. Cal.—In re Mumford, 160 P. 667, 173 Cal. 511.
La.—Helmke's Succession, 62 So. 487, 133 La. 93.

67. N.Y.—Czech v. Bean, 72 N.Y.S. 402, 35 Misc. 729.

68. Idaho.—McCormick v. Brownell, 136 P. 613, 25 Idaho 11.

69. Nev.—In re Taylor's Estate, 114 P.2d 1086, 135 A.L.R. 580.

70. Cal.—Bauquier's Estate, 26 P. 178, 532, 88 Cal. 302.

to assume the duties of the office.[71]

§ 61. Examination of Applicant for Letters before Trial

Parties objecting to the physical and mental qualifications of an executor are not entitled to a physical examination before trial, and are not prejudiced by denial of a mental examination before trial, where he was examined on the hearing.

Where objections to the qualifications of an executor set forth that he is mentally and physically disqualified for the duties of the office, the objectors are not entitled to a physical examination of such person before trial,[72] nor are they prejudiced by a denial of a mental examination before trial, where the ground of denial was that the person could be examined on the hearing, and such examination was had.[73]

§ 62. Trial or Hearing, and Determination

a. Trial or hearing
b. Determination

a. Trial or Hearing

The essentials of judicial investigation and decree should be preserved in proceedings for the appointment of an executor or administrator; it is the court's duty to take proof of the facts, and it has discretion as to postponement of the proceedings.

While the proceedings in probate courts may be somewhat informal, as though in the disposition of executive business, and may be conducted without even the employment of legal counsel,[74] the essentials of judicial investigation and decree should be preserved in proceedings for administration.[75] It is the duty of the court to take proof of the facts,[76] and the original applicant is entitled to open and close.[77] The court may properly refuse to hear evidence in support of issues raised by the answer where no material issues were raised by the pleadings.[78]

Where an opposition is filed to the appointment of a certain person as administrator, it should be tried with the original application for administration, and all the issues involved determined in one judgment.[79] However, where the opposition shows on its face that it is without legal foundation, it need not be tried on the merits.[80]

Postponement of proceedings for appointment of an administrator or executor is peculiarly within the trial court's discretion.[81] Where it appears that an alleged will is in existence, it is proper to postpone the consideration of an application for administration until the question of the validity or invalidity of such instrument has been determined;[82] but the court may refuse a continuance because of the illness of caveator where none of the grounds of the caveat would have been aided by any possible testimony by her, and her presence in court was not apparently necessary.[83]

b. Determination

The court has a sound discretion to investigate and determine as to the essential facts and to order the issuance of letters to a person eligible for appointment whom it finds qualified; in a proper case the court may direct a verdict, or grant a new trial after denial of an application.

The court or officer authorized to issue letters has in each case a sound discretion to investigate and determine as to death and other facts fundamental

71. Mass.—Drake v. Green, 10 Allen 124.
23 C.J. p 1063 note 48.

72. N.Y.—Matter of Leland, 161 N.Y.S. 315, 175 App.Div. 56, affirming 159 N.Y.S. 533, 95 Misc. 440.

73. N.Y.—Matter of Leland, supra.

74. Ga.—De Lorme v. Pease, 19 Ga. 220.

75. Md.—Horton v. Horton, 145 A. 355, 157 Md. 127.
23 C.J. p 1063 note 56.

76. N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.
23 C.J. p 1064 note 57.

Residence

Where question was raised whether decedent was resident of county, court should take proof on, and determine, jurisdictional question of residence.—In re Skerencak's Estate, 270 N.Y.S. 533, 241 App.Div. 767.

Question held one of fact

Question whether due diligence was exercised by applicant in ascertaining existence of blood relatives entitled to preference is question of fact.—In re Murphy's Estate, 252 N.N.Y.S. 446, 141 Misc. 272.

Evidence held sufficient for jury as to decedent's domicile.—Halverson v. Livengood, Tex.Civ.App., 4 S.W.2d 588.

77. Ga.—Weeks v. Sego, 9 Ga. 199.

78. Utah.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606.

79. La.—Miguez v. Delcambre, 38 So. 820, 114 La. 1032.

80. La.—Succession of Strange, 177 So. 579, 188 La. 478.

81. Wash.—In re Mason's Estate, 66 P.2d 310, 189 Wash. 641.

Notice to heirs

Court had jurisdiction to continue hearing of petition for purpose of having notice given to heirs as required by statute, where no notices had been mailed to heirs named in petition of hearing at which continuance was granted.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.

Amended petition

Where, after the filing by a widow of a petition for letters of administration, various other persons also petitioned for letters, contesting the widow's petition, and thereafter the widow filed an amended petition contesting the other petitions, but stating no jurisdictional fact, the court had jurisdiction to hear all the petitions on the date set for the hearing of the widow's original petition, and was not required to wait until the time set for hearing her amended petition.—In re Turner, 77 P. 1099, 142 Cal. 549.

82. Cal.—In re Edwards, 97 P. 23, 154 Cal. 91.
23 C.J. p 1064 note 59.

83. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.

to the grant of administration, and to issue letters or not, in accordance with its determination;[84] but, where the proceeding is purely ex parte, and the verified application shows the person entitled to letters, they should be granted.[85] The court may ordinarily exercise its discretion in determining whom to appoint within the class of persons eligible for appointment;[86] but it cannot disturb the order of appointment prescribed by the statute,[87] and it should not appoint a person whose removal would be compulsory on application of a person of the class mentioned by statute as entitled to secure the revocation of letters granted to another.[88]

The determination of the qualifications of an applicant for letters is ordinarily a matter within the discretion of the court which, it has been held, the court may decide without any trial or hearing;[89] but the court may not refuse appointment to a person entitled to preference without first affording an opportunity for a hearing,[90] and the court has been required to make and sign written findings in order to support its refusal of a petition for appointment of an administrator.[91]

Where the petition for administration sets forth all the jurisdictional facts necessary to be set forth under the statute, but applicant fails to qualify, the jurisdiction under the petition is sufficient to authorize the appointment of any person whom the court deems suitable, without formal application by him or by formal renunciation by applicant;[92] but, where two children filed petitions, one filing opposition to that of the other, whose appointment the remaining children joined in requesting, it was held that the court, having found both competent, could only appoint one or both of the two petitioning, and that the appointment of one of the others was erroneous.[93] The court may grant a joint petition for administration as to one or more of the petitioners.[94]

Directed verdict. The court may properly direct a verdict for the appointment of a person who is, as a matter of law, entitled to such appointment;[95] and likewise it may direct verdict against a caveator whose objection to the appointment of another is clearly without merit.[96]

New trial. Newly discovered evidence may require the court to grant a new trial after denial of an application for administration.[97]

§ 63. Order or Decree of Appointment

For the appointment of an executor or administrator,

84. Colo.—Rosenboom v. Cline, 6 P. 2d 453, 90 Colo. 1.
N.Y.—In re Johnston's Will, 299 N.Y. S. 43, 164 Misc. 412.
N.C.—In re Gulley's Will, 118 S.E. 839, 186 N.C. 78.
Pa.—Wiggins v. Western & Southern Life Ins. Co., 173 A. 751, 114 Pa. Super. 198.
23 C.J. p 1064 note 62.

Residence of deceased
Ariz.—Hiatt v. Lee, 61 P.2d 401, 48 Ariz. 320, 107 A.L.R. 444.
Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Presumption of death
Court may decide whether legal presumption of death is made out from seven years' absence.—Wiggins v. Western & Southern Life Ins. Co., 173 A. 751, 114 Pa.Super. 198.

Submission to referee
Issues necessarily involved in the proceeding may be remitted to a referee for hearing and report.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

Issue not raised by conclusion of witness
Conclusion by witness that from his knowledge of widow he would say she was not a fit and proper person to manage an estate would not raise such an issue as to defeat her legal right to appointment.—Causey v. Causey, 97 S.E. 98, 22 Ga.App. 679.

Findings as to marriage relationship construed
Tex.—Manire v. Burt, Civ.App., 121 S.W.2d 630, error refused.

85. Ind.—Ex parte Jenkins, 58 N.E. 560, 25 Ind.App. 532, 81 Am.S.R. 114.

86. Pa.—In re Friese's Estate, 176 A. 225, 317 Pa. 86.

87. Pa.—In re Friese's Estate, supra.

88. Idaho.—Schwarze v. Logan, 90 P.2d 692—Estate of Daggett, 98 P. 849, 15 Idaho 504.

89. Mo.—Stevens v. Larwill, 84 S. W. 113, 110 Mo.App. 140.

Requisites of finding
Finding that person having prior right to administer estate is not a competent or suitable person must be clear and unequivocal to warrant disqualification of that person.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

Time of determination
The qualifications of the person nominated must be determined as of the time when the appointment was made.—In re Zartner's Will, 198 N. W. 363, 183 Wis. 506.

90. Mo.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1.

91. Cal.—In re Ingram's Estate, 279 P. 208, 99 Cal.App. 660.
Oral opinion, stating reasons for denying petition, is not part of findings.—In re Ingram's Estate, 279 P. 208, 99 Cal.App. 660.

92. Wash.—In re Miller's Estate, 226 P. 493, 130 Wash. 199—Wilkie v. Bailey, 133 P. 388, 74 Wash. 241.

93. Wyo.—In re Barrett, 138 P. 865, 141 P. 95, 22 Wyo. 281.

94. Cal.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.
Right of each joint petitioner is not to appointment of himself, but to have court exercise discretion and appoint one or more fit persons from those entitled, applying, and competent.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

95. Ga.—Pate v. Pate, 113 S.E. 50, 28 Ga.App. 798—Maddox v. Maddox, 108 S.E. 304, 27 Ga.App. 369.

Selection by heirs
Where evidence in contest for appointment of administrator showed that majority of living children of intestate widow selected in writing disinterested, competent, and qualified person, court properly directed verdict in his favor.—Sullens v. Pierce, 164 S.E. 93, 45 Ga.App. 207.

96. Ga.—Carson v. Blair, 124 S.E. 808, 32 Ga.App. 728.

97. Wash.—In re Anderson's Estate, 1 P.2d 231, 163 Wash. 228.

Evidence as to relationship of applicant to deceased
Wash.—In re Anderson's Estate, 1 P.2d 231, 163 Wash. 228.

there must be a proper and sufficient order or decree of appointment, to which should be attached no conditions other than those provided by law, and which need not be entered on the record; the making of such order by a clerk may be authorized, at least with ratification by the court. While an order with minor defects is not void and may to some extent be corrected or amended, vital defects may constitute the basis for a proceeding to vacate the order.

It is necessary to the appointment of an executor or administrator that there be a proper and sufficient order to that effect;[98] and reference should be made to such order for the purpose of determining the character and status of one assuming to administer an estate.[99] The decree or order must of course designate the estate on which administration is granted,[1] and it may incorporate the court's findings of fact on issues presented by objections to the appointment,[2] and decision respecting decedent's residence has been held an essential part of the order;[3] but it is not necessary for the order to specify the relation which the appointee holds to the estate.[4] Even though an order does not in apt language show the appointment of an administrator, it will be held sufficient if the language used shows that the appointment was intended.[5]

A court cannot attach to an order granting administration any conditions[6] save such as are provided by law,[7] and an order granting administration will not be construed as conditional where the language does not render such construction necessary.[8] A decree granting letters of administration is limited in its effect to the grant of letters, and should not confirm a finding of a referee as to the date of the alleged intestate's death.[9]

An order of appointment under a petition setting forth no interest in the estate or other right to administration has been held void;[10] but an order is not void because it was made without mailing a notice to the executor named in the will as required by statute,[11] because it was made after adjournment of the court for the day, without a formal reopening of the court,[12] because it was made permanent at a later term of court, without a statement in the order of temporary appointment that it should become permanent at the next term of court unless contested,[13] or because it was prematurely entered.[14]

The administration proceeding is terminated by the entry of an order or decree granting letters.[15] An order granting letters of administration notwithstanding a caveat that deceased had left a will is not res judicata in a proceeding by the caveator to probate the will.[16] So, also, the court's adjudica-

98. Ark.—Groschner v. Winton, 226 S.W. 162, 146 Ark. 520.
23 C.J. p 1064 note 67.

Requisites for binding order
Where facts essential to jurisdiction over subject matter exist and court determines from evidence that it has authority to administer estate, order appointing executor or administrator is binding and effective.—In re Eklund's Estate, 218 N.W. 235, 174 Minn. 28.

Support in record
Where record did not disclose what issues were considered, whether there was hearing of parties, or whether testimony was taken or opportunity afforded to offer proof, record did not support order appointing administratrix.—Phillips v. Clark, Md., 6 A.2d 220.

The publication of a citation for appointment of an administrator need not appear on the face of the judgment of appointment.—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.

Lost or destroyed will
Surrogate, in issuing letters of administration on lost or destroyed will established in supreme court, acts ministerially and not judicially.—St. John v. Putnam, 220 N.Y.S. 141, 128 Misc. 714.

Effect of order dispensing with administration
Where the county court had found that the estate of a decedent was of less value than five hundred dollars, and had made an order vesting the entire estate in the widow and dispensing with letters of administration, a subsequent appointment of an administrator without any order revoking the first decision, or without notice to the widow, was voidable, but not void.—Ferguson v. State, 90 Ind. 38.

99. N.M.—Bull v. Bal, 130 P. 251, 17 N.M. 466.

1. Tex.—Harwood v. Wylie, 7 S.W. 789, 70 Tex. 538.

2. Cal.—In re Forrest's Estate, 110 P.2d 1023, 43 Cal.App.2d 347.

3. Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

4. Mich.—Wilkinson v. Conaty, 32 N.W. 841, 65 Mich. 614.

5. Ky.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.
23 C.J. p 1065 note 71.

Presumption of correctness
County court finding that deceased was intestate resident of such county, and appointing administrator, was entitled to as strong presumption of correctness as findings of another county court that deceased died resident of latter county, leaving will and naming executor.—Hite's Adm'r v. Gibson, 65 S.W.2d 731, 251 Ky. 651.

6. Wyo.—Leach v. Misters, 79 P. 28, 14 Wyo. 239.
23 C.J. p 1065 note 72.

7. Tex.—Cain v. Haas, 18 Tex. 616.
23 C.J. p 1065 note 73.

8. N.C.—Spencer v. Cohoon, 18 N.C. 27.
23 C.J. p 1065 note 74.

9. N.Y.—Matter of Sanford, 91 N.Y.S. 706, 100 App.Div. 479.

10. Ga.—Stanley v. Metts, 149 S.E. 786, 169 Ga. 101.

11. Wyo.—Rice v. Tilton, 82 P. 577, 14 Wyo. 101.
23 C.J. p 1065 note 76.

12. Tex.—Reeves v. Fuqua, Civ. App., 184 S.W. 682.

13. Tex.—Eckeberger v. Stroud, Civ. App., 103 S.W.2d 803.

Citation of parties
That clerk failed to issue citation to all persons interested to appear at next term of court and contest temporary appointment did not make such appointment void so as to deprive court of jurisdiction to make appointment permanent at later term after citation was issued and served.—Eckeberger v. Stroud, supra.

14. Ky.—Leach v. Owensboro City R. Co., 125 S.W. 708, 137 Ky. 292.

15. N.Y.—In re Nocton's Estate, 162 N.Y.S. 215.

16. Ga.—Thomasson v. Hudmon, 196 S.E. 462, 185 Ga. 753.

tion of decedent's death is not conclusive of the matter with respect to an independent suit prosecuted by one not a party to the proceeding.[17] The allowance or probate of a will and the granting of letters testamentary involve two different judgments of the judge of probate, dependent on different conditions, although the evidence of both decrees may be contained in the same paper.[18]

Record. The entry of the order on the record is not essential,[19] and, where the record of the appointment of an administrator clearly shows that the appointment was made by the probate court, the words, "in vacation" at the top of such record will not invalidate the appointment.[20] It has been held that, where an administrator's bond and oath were executed in blank, and letters were issued in blank, but no record was made of the appointment, the record could be made subsequently nunc pro tunc, and that when it was made, the appointment was legal.[21]

Appointment by clerk. The clerk of the court may be given limited authority to order the appointment of an administrator, and his order of appointment is the full equivalent of the court's order, in the absence of a contest by the party aggrieved.[22] Another view is that an appointment made by the clerk during vacation confers no authority on the appointee unless confirmed or ratified by the court;[23] but acts of the clerk in granting letters testamentary should be ratified by the court, unless good cause be shown for vacating such acts.[24]

Correcting or amending order. The judge has a right to correct typographical errors in the order and make his records speak the truth;[25] but, where no mistake was made in entering an order appointing two persons as coadministrators, it cannot be amended nunc pro tunc to show that one of them had been found incompetent to serve alone.[26] A court order in term time, confirming one made during vacation, renders the former order valid ab initio.[27]

Vacating order or decree. A court which has assumed jurisdiction over an estate by appointing an administrator has power to dismiss the proceedings for want of jurisdiction,[28] or to vacate its decree of appointment, in conformity with governing statutes.[29] The heirs of a decedent are proper parties to institute and maintain an equitable proceeding to vacate a judgment appointing an administrator;[30] but, where the party suing in equity shows no cause for equitable relief, the action is required to be dismissed,[31] and a decree of appointment is not voidable on attack by nonresidents not embraced within any class designated by statute as qualified for appointment.[32] Where a finding of residence is implicit in the court's assumption of jurisdiction, interested persons are limited to appeal from the challenged order of appointment, and are precluded from moving in another proceeding to vacate the order for lack of jurisdiction over the estate of a nonresident.[33] To warrant vacation of a judgment for fraud in the procurement, the fraud must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the true facts.[34]

§ 64. Review

a. In general

17. N.J.—Moyna v. Prudential Life Ins. Co., 125 A. 99, 96 N.J.Eq. 293.

18. Me.—In re Gurdy, 63 A. 322, 101 Me. 73.

19. Cal.—McNeil v. Morgan, 108 P. 69, 157 Cal. 373.

20. Kan.—Brubaker v. Jones, 23 Kan. 411.

21. N.C.—Dallago v. Atlantic Coast Line R. Co., 81 S.E. 318, 165 N.C. 269.

22. Iowa.—Finnerty v. Shade, 228 N. W. 886, 210 Iowa 1338.

Appointment of nonresident, even if made without authority, was not void in the absence of contest by interested party.—Finnerty v. Shade, supra.

23. Ark.—Groschner v. Winton, 226 S.W. 162, 146 Ark. 520.

24. Ill.—Wilkinson v. Nowers, 217 Ill.App. 314.

Ind.—Barricklow v. Stewart, 68 N. E. 316, 31 Ind.App. 446.

25. Cal.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

26. Mo.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1.

27. Mo.—Eulingberg v. Quick Payment Old Line Life Ins. Co., 261 S.W. 725.

28. R.I.—Eckilson v. Greene, 1 A.2d 117, 61 R.I. 394.

Revocation of letters see infra §§ 84–88.

29. R.I.—Capwell v. Knight, 135 A. 699, 48 R.I. 81.

Notice by advertisement is not required before order vacating decree appointing administrator on uncontested application.—Capwell v. Knight, supra.

Contested or uncontested application

Application to revoke decree of probate court entered on uncontested application for appointment does not refer back to time of original application so as to make the latter a contested one ab initio.—Capwell v. Knight, supra.

30. Ga.—Powell v. McKinney, 108 S. E. 231, 151 Ga. 803.

Petition not demurrable

Petition for vacation of judgment based on alleged fraudulent acts of person securing appointment as administrator was held not demurrable on ground that there was no necessity for suit and that adequate remedy existed at law.—Powell v. McKinney, supra.

31. Me.—In re Neely's Estate, 1 A. 2d 772, 136 Me. 79.

32. Wash.—In re Upton's Estate, 92 P.2d 210, 199 Wash. 447, 123 A.L. R. 1220.

33. R.I.—Eckilson v. Greene, 1 A.2d 117, 61 R.I. 394.

34. Ga.—Rivers v. Alsup, 2 S.E.2d 632.

b. Proceedings to obtain review
c. Questions reviewable
d. Hearing on appeal
e. Disposition of cause

a. In General

Where permitted by statute, review may be had of a determination on an application for administration, provided the order, judgment, or decree is final and appealable under the prevailing appellate court practice and the party appealing has some interest in the controversy which is adversely affected by the decision. The usual effect of an appeal from an appointment is to stay proceedings under the appointment.

Under various statutory provisions, an appeal may usually be taken from an appointment of, or a refusal to appoint, a representative, by any aggrieved party in interest,[35] provided the order, judgment, or decree is final and appealable under the prevailing appellate court practice.[36] On the other hand, it has been held that, in the absence of statute allowing it, no appeal will lie from the determination on an application for administration.[37] One court may not exercise appellate jurisdiction over administration proceedings in another court, in the absence of statutory provision therefor.[38]

35. Cal.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.
La.—Succession of Bibbins, App., 152 So. 592.
23 C.J. p 1065 note 87.

Certiorari

(1) Certiorari was proper, where probate court exceeded jurisdiction in appointing administrator in place of executrix.—State ex rel. Barlow v. Holtcamp, 14 S.W.2d 646, 322 Mo. 258.

(2) Widow contesting husband's will, and not referring to community property in petition for letters of administration, was not entitled to peremptory writ of certiorari to review denial of letters as to the community property pending appeal from denial of petition.—State v. Superior Court of Walla Walla County, 237 P. 301, 135 Wash. 202.

Devolutive appeal

(1) The appeal from a judgment dismissing an application for administration of a succession should be devolutive.—Wintz's Succession, 35 So. 377, 111 La. 40.

(2) Where a bond was furnished by one suspensively appealing from order appointing an administrator, appeal would not be dismissed but would be allowed to operate devolutively rather than suspensively.—Succession of Heinig, 188 So. 39, 192 La. 388.

Supervisory jurisdiction

(1) Supervisory jurisdiction will not be exercised to interfere with appointment of administrators, as between beneficiary heirs, the remedy of the aggrieved party being by appeal from the judgment denying his petition.—Succession of Guate, 109 So. 784, 161 La. 981.

(2) However, since no suspensive appeal can be taken by an opponent claiming appointment as administrator from an adverse judgment, radical defects and illegal proceedings with respect thereto are open to examination by the supreme court in the exercise of its supervisory jurisdiction.—State v. Hingle, 23 So. 616, 50 La.Ann. 683.

Fraud or misrepresentation

Where petitioner for administration did not misrepresent facts and took no active part in administration, there was no fraud or misrepresentation within statute providing for appeal from probate to district court.—In re Eklund's Estate, 218 N. W. 235, 174 Minn. 28.

36. Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.
3 C.J. p 570 note 44 [b].

Particular orders held appealable

(1) Order appointing administrator.
Minn.—In re Firle's Estate, 253 N.W. 889, 191 Minn. 233.
N.C.—In re Styers' Estate, 164 S.E. 123, 202 N.C. 715.
Philippine.—Sy Hong Eng v. Sy Lioc Suy, 8 Philippine 594, 5 Off. Gaz. 699.
S.C.—Ex parte Small, 48 S.E. 40, 69 S.C. 43.
Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.

(2) Order that executrix was entitled to administer estate as sole beneficiary.—Swarthout v. Swarthout, 86 N.W. 558, 111 Wis. 102.

(3) Order denying petition to set aside appointment of administrator.
Utah.—In re Tasanen, 71 P. 984, 25 Utah. 396.
Wash.—In re Sutton, 71 P. 1012, 31 Wash. 340.

(4) Order denying application of executor for letters testamentary.—Shook v. Journeay, Civ.App., 149 S.W. 406, reversed on other grounds 152 S.W. 809, 105 Tex. 551.

(5) Decision of probate court in proceedings to probate will suspending executor and appointing an administrator pendente lite, on determining that a will contest proceeding was pending in the circuit court. State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

(6) Order vacating order appointing administrator.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735—In re Bouysson, 82 P. 1066, 1 Cal.App. 657.

Discretionary orders

(1) According to some decisions, court's selection of appointee from class of persons entitled thereto is solely within its discretion and hence not reviewable.—Schneider v. Hawkins, 16 A.2d 861, 179 Md. 21—Baldwin v. Hopkins, 187 A. 884, 171 Md. 97—Dorsey v. Dorsey, 116 A. 915, 140 Md. 167—3 C.J. p 575 note 62 [a] (2)-(4).

(2) So, also an order vacating a stay on probate, denying letters testamentary, and granting administration with the will annexed, is not reviewable by the court of appeals, being within the surrogate's discretion.—In re Baldwin, 53 N.E. 218, 158 N.Y. 713, dismissing appeal 50 N.Y. S. 872, 27 App.Div. 506.

(3) However, the discretion to grant letters will be reviewed when acts are done in contravention of plain letters of statutes.—Horton v. Horton, 145 A. 355, 157 Md. 127.

37. Mo.—Lucitt v. Toohey's Estate, 89 S.W.2d 662, 338 Mo. 343.
N.C.—In re Suskin's Estate, 198 S.E. 661, 662, 214 N.C. 218, citing **Corpus Juris.**
23 C.J. p 1066 note 89.

Ex parte ruling denying appointment as administrator held not appealable because, among other reasons, appellant cannot comply with statute prescribing making and serving of cost bond; proceedings to review ex parte petition should make court or judge party thereto.—In re Spear's Estate, 242 P. 435, 29 Ariz. 377.

In Ohio, it has been held that the general code of the state does not give a right of appeal to the common pleas court from an order of the probate court appointing an administrator.—Luburg v. Luburg, 13 Ohio App. 220.

Apparently contra.—Schumacher v. McCallip, 69 N.E. 986, 69 Ohio St. 500.

38. Ark.—Nissen v. Elliott, 224 S.W. 958, 145 Ark. 540.

Chancery court

It is not within the jurisdiction of the chancery court to lift adminis-

Who may appeal. The right of appeal is, of course, dependent on the existence of some interest in the subject matter of the controversy, which is adversely affected by the decision.[39] One who, although not a party to the proceeding wherein an administrator was appointed, was a party in interest and had duly complied with the statutory requirements has been held entitled to an appeal from the order appointing an administrator.[40] A failure to demur below to a petition to set aside the appointment of an administrator is a waiver of the objection that, under a statute providing that any party to a judgment or decree may appeal therefrom, the petitioner cannot appeal from a denial of his petition because not a party to the probate proceedings.[41] There is no such acquiescence as will prevent an appeal from a judgment contradictorily rendered in a contest between two applicants for the appointment of an administrator, because the unsuccessful party has thereafter joined issue on the merits with the successful party in a suit instituted by him as administrator of the succession.[42]

Effect of appeal. The usual effect of an appeal from the appointment of an executor or administrator is to stay proceedings under the appointment,[43] at least where a supersedeas is issued by the appellate court.[44] Pending an appeal from such an order, the probate court is without jurisdiction to order the discharge of the administrators so appointed and appoint others in their stead;[45] and the effect of the appeal has been held to be to transfer to the appellate court complete and perfect jurisdiction of the litigation.[46]

b. Proceedings to Obtain Review

Proper procedure may and should be followed in securing appellate review of proceedings for the appointment of an executor or administrator, with respect to such matters as time for taking the appeal, notice of appeal, parties, and record and bill of exceptions.

Proper procedure should be followed in securing appellate review of proceedings for the appointment of executors and administrators.[47]

Time for taking appeal. The time within which an appeal must be taken is governed by the requirements of the statute;[48] but provision may be

tration proceedings out of the probate court, the action of the probate court in appointing administratrix being conclusive of the necessity for administration and the chancery court not being entitled to assume jurisdiction to set aside the order of appointment for fraud.—Nissen v. Elliott, supra.

39. La.—Succession of Bibbins, App., 152 So. 592.
N.J.—Moyna v. Prudential Life Ins. Co., 125 A. 99, 96 N.J.Eq. 293.
Okl.—In re Johnson's Estate, 114 P. 2d 469.
23 C.J. p 1066 note 90.

Creditor may have right of appeal. —Succession of Bibbins, La.App., 152 So. 592—23 C.J. p 1066 note 90 [c].

Heirs

(1) On dismissal by the court of the petition of an heir at law against granting letters testamentary or of administration, on the ground of nonresidence of decedent, he could appeal without proof of special damage.—Pattison v. Firor, 126 A. 109, 146 Md. 243.

(2) Heirs losing their suit to annul will had no interest authorizing appeal from order appointing universal legatee testamentary executor. —Succession of Guglielmo, 105 So. 12, 158 La. 917.

Single joint petitioner for administration has right to appeal from denial of petition, and remaining joint petitioners failing to appeal lose right to have appointment made.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

Widow held entitled to appeal from judge's appointment of another as administrator and from judge's finding that widow was incompetent to act as administratrix, although she had filed no contest or objection to petition for appointment of administrator appointed.—In re Walker's Estate, 36 P.2d 10, 169 Okl. 100.

40. Okl.—Thompson v. State, 154 P. 508, 54 Okl. 647.

Purchaser of interest of heirs
Tex.—McCarthy v. Texas Co., Civ. App., 235 S.W. 679, error granted.

41. Utah.—In re Tasanen, 71 P. 984, 25 Utah 396.

42. La.—Lamm's Succession, 4 So. 53, 40 La.Ann. 312.

43. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.
23 C.J. p 1066 note 88.

Suspensive appeals are not permitted by statute in at least one jurisdiction.—Succession of Heinig, 188 So. 39, 192 La. 388—Succession of Beattie, 112 So. 802, 163 La. 831—23 C.J. p 1066 note 88 [c].

44. Ky.—Louisville Trust Co. v. Fidelity & Columbia Trust Co., 272 S.W. 759, 209 Ky. 289.

Supersedeas bond

Where a temporary administrator appealed from order appointing another as permanent administrator, probate court's order that bond of temporary administrator should operate as supersedeas bond on appeal was void, since court could not without consent of surety add to obligation of administrator's bond.—Stephenson v. Manire, Tex.Civ.App., 93 S.W.2d 559, error refused.

Order not superseded

(1) However, where order of superior court appointing widow administrator was not superseded on appeal therefrom, widow was authorized to proceed with the administration until the order was finally reversed, and the reversal certified to the court, so that when the administration thereby ended the court was empowered to settle accounts, and determine the disposition of the property and the credits to which she was entitled by way of compensation, etc.—In re Levy's Estate, 215 P. 811, 125 Wash. 240.

(2) Filing of a supersedeas on appeal by a party aggrieved does not stay proceedings against him by administrator, under a statute authorizing the court to require a person suspected of having taken wrongful possession of any of the effects of decedent to appear and submit to an examination, although the trial court may in its discretion stay the proceedings until the determination of the appeal.—In re Acken, 123 N.W. 187, 144 Iowa 519, Ann.Cas.1912A 1166.

45. N.J.—In re Hill, 37 A. 952, 55 N. J.Eq. 764.

46. Tex.—Ex parte Robertson, 72 S. W. 859, 44 Tex.Cr. 566.
23 C.J. p 1067 note 3.

47. Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.

48. Wash.—State ex rel. Barry v.

made for the allowance of an appeal after the statutory period, where the party seeking a review was without fault.[49]

Notice of appeal. An appeal from an order appointing an administrator will not be dismissed because of the notice of appeal being entitled as in the superior court of a county other than that wherein the appointment was made, where the parties treated the notice as sufficient throughout the proceedings, and the appellee's attorneys were not misled.[50]

Parties to appeal. Any real party in interest is a proper party to an appeal from the judgment.[51] Where two persons petition for the issuance of letters of administration to both or either of them, both are necessary parties to an appeal from an adverse judgment.[52] Where an individual has applied for, and obtained, an appointment as dative testamentary executor, and a party interested appeals from such appointment, the succession of the testator is not a necessary party, and the dative executor need not be cited.[53]

Record; bill of exceptions. Where orders from which an appeal is taken were made in a summary proceeding and on the testimony of witnesses, the appeal may not be maintained if the evidence was not reduced to writing and incorporated in the record.[54] The record on appeal should not contain any matters having no bearing on the questions in issue;[55] the trial judge's oral opinion, stating his reasons for denying a petition for appointment as administrator, is not properly part of the record.[56]

When an order denying an application for letters of administration is general in its terms, implying an adverse finding on all the allegations of the petition, and the bill of exceptions does not specify any insufficiency of evidence to sustain the decision, the order will not be reviewed on appeal.[57]

Effect of death of appellant. An appeal by an applicant denied appointment as administrator will be dismissed without more where he dies pending the appeal.[58] However, where appellant from an order granting letters of administration to another died pending the appeal, the respondent was not entitled to have orders granted authorizing him to proceed with the administration; but such other parties as were interested should have been brought in, and the appeal determined, before the administration proceeded.[59]

c. Questions Reviewable

The appellate court will consider only such questions as are properly within the scope of appellate review and are properly before it for determination.

Only matters properly within the scope of appellate review and properly before the court for determination will be considered on appeal from the lower court's decision on an application for administration.[60] Appellant is restricted in the higher court to the reasons for appeal filed within the time allowed by the statute.[61]

Superior Court in and for King County, supra.
23 C.J. p 1066 note 94.

Motion for new trial in proceeding wherein court appointed administrator was held not to prevent running of time within which certiorari proceedings should be commenced.—State ex rel. Barry v. Superior Court in and for King County, supra.

49. Iowa.—Reynolds v. Miller, 6 Iowa 459.
23 C.J. p 1066 note 95.

50. Cal.—In re Damke, 65 P. 888, 133 Cal. 433.

51. Cal.—Sheldon v. Superior Court, Los Angeles County, Long Beach Department, 108 P.2d 945, 42 Cal. App.2d 406.

52. Ala.—White v. Hill, 58 So. 444, 176 Ala. 480.

53. La.—Henry's Succession, 37 So. 756, 113 La. 787.

54. Md.—Phillips v. Clark, 6 A.2d 220.

55. Miss.—Hancock v. Pyle, 200 So. 716.

56. Cal.—In re Ingram's Estate, 279 P. 208, 99 Cal.App. 660.

57. Cal.—In re Depeaux, 50 P. 387, 118 Cal. 290.

58. Ind.—Lampman v. De Dario, 6 N.E.2d 716, 103 Ind.App. 216.

59. Ga.—Glisson v. Carter, 28 Ga. 516.

60. Wash.—In re Mason's Estate, 66 P.2d 310, 180 Wash. 641.

Residence

On appeal from order appointing an administrator, controversy between state and those interested in deceased's estate regarding whether deceased was resident of state or of another state at time of his death was not before court.—In re Mason's Estate, supra.

Separate appeals

In a case where proceedings for the appointment of an administrator were appealed, and thereafter another and separate appeal was taken by persons who were not parties at the time the proceeding was first removed to the appellate court, it was held that, irrespective of the question whether the last appeal was properly perfected, it was nevertheless sufficient to constitute a written opposition to the petitions of the parties to the original appeal, and hence to justify the appellate court in considering as one case all the questions raised by both appeals.—In re McClellan, 107 N.W. 681, 20 S.D. 498, 111 N.W. 540, 21 S.D. 209.

Preference

On an appeal by one who applied for letters of administration prior to the appointment of another against whom he claimed a preference, the question of preference is properly before the appellate court.—Cooper v. Cooper, 88 N.E. 341, 43 Ind.App. 620.

The rights of legatees to take under a will are not matters in issue on an appeal from an order appointing an executor, except in so far as disqualification of the executor is shown.—In re Forrest's Estate, 110 P.2d 1023, 43 Cal.App.2d 347.

61. Mass.—Hayden v. Keown, 122 N.E. 264, 232 Mass. 259, certiorari denied Keown v. Hayden, 40 S.Ct. 10, 250 U.S. 661, 63 L.Ed. 1195.

A motion to dismiss an application for administration on grounds not shown to have been urged below, and not filed until three months after perfecting the appeal in the supreme court, may be properly denied, in

The appellate court is precluded from considering issues or contentions not raised in the original proceedings for appointment;[62] and accordingly the objection that a petitioner for letters of administration did not sign his petition[63] or that letters were issued without due notice to all persons interested[64] cannot be made for the first time on appeal; nor may a party complain of alleged error in the findings of facts where such corrections as were asked were granted in the court below.[65] So also the fact that a party alleged the necessity of administration in his petition for appointment precludes him, on appeal from an order appointing another, from raising the question of the necessity of administration.[66]

An order not appealed from is not before the appellate court for review;[67] and a motion for appointment which was never acted on by the trial court will be considered by the reviewing court as abandoned.[68]

Academic questions pertaining to the appointment need not be considered by the appellate court.[69] So, where a party could not have sustained an appeal from the judgment below, it was immaterial that his motion for a continuance was overruled.[70] Error assigned on the trial court's refusal to sustain objection to one petition for appointment will not be considered where another petition was before the trial court which was sufficient to give it jurisdiction.[71]

d. Hearing on Appeal

In some jurisdictions, the appellate court may try the matter de novo on the issues made in the lower court, but in others the review is purely appellate in character, on the proofs made below. The appellate court will give effect to such presumptions as are warranted by the state of the record.

In some jurisdictions the matter may be tried de novo in the appellate court.[72] In such case the court has only power to render such judgment or order as the lower court might have made,[73] and trial de novo may be had only on issues made by the litigants in the lower court, so that amendments to the pleadings which inject new issues before the appellate court should not be allowed.[74] On the other hand, where the jurisdiction of the court of review is strictly of an appellate character, the review must be on the proofs which were before the trial court,[75] and the appellate court cannot receive

view of such delay.—Mowry v. Latham, 40 A. 236, 341, 20 R.I. 786.

62. La.—Succession of Lewis, 189 So. 118, 192 La. 734—Succession of Coco, 165 So. 646, 184 La. 144.

Failure to demur

Appellant, not demurring to opposition to his appointment as administrator, cannot urge its insufficiency to put his competency in issue.—In re Ingram's Estate, 279 P. 208, 99 Cal.App. 660.

Comparative merits of candidates

The court to which an appeal is taken from an order granting letters of administration ought not to take into consideration, in deciding on such appeal, the comparative merits of the grantee and of the party who opposed him as candidates for the office, unless it appears by some evidence from the record that a motion for the appointment of such opposing party was substantially made in the court below.—Bohn v. Sheppard, 4 Munf. 403, 18 Va. 403.

63. Neb.—In re Graff, 125 N.W. 1091, 86 Neb. 535.

64. N.Y.—In re Nesmith, 1 N.Y.S. 343.

65. Conn.—Appeal of Eva, 104 A. 238, 93 Conn. 38.

66. La.—Succession of Damico, 99 So. 862, 155 La. 1036.

67. Wis.—In re Richardson's Estate, 282 N.W. 585, 229 Wis. 426.

Order fixing time for appeal and bill of exceptions

Wis.—In re Richardson's Estate, 282 N.W. 585, 229 Wis. 426.

68. Tenn.—Crabb v. Cole, 84 S.W.2d 597, 19 Tenn.App. 201.

69. S.C.—In re Youman's Estate, 163 S.E. 884, 165 S.C. 337.

70. Ga.—Sutherland v. Barker, 132 S.E. 119, 35 Ga.App. 42.

71. Wash.—In re Mason's Estate, 66 P.2d 310, 189 Wash. 641.

72. N.M.—In re Miller's Estate, 38 P.2d 1116, 39 N.M. 40.
23 C.J. p 1067 note 9.

Severable judgments

Judgment accepting resignations of administrators and judgment appointing another person as administrator were severable; hence appeal from judgment appointing administrator did not require trial de novo in district court of both phases of proceedings.—Slay v. Davidson, Tex. Civ.App., 88 S.W.2d 650, error refused.

Prior right

On appeal from probate to district court, trial de novo should have been had of issue of prior right between two claimants to administer estate of intestate.—In re Miller's Estate, 38 P.2d 1116, 39 N.M. 40.

73. Okl.—In re Copperfield's Estate, 12 P.2d 490, 158 Okl. 40.

Immaterial evidence is inadmissible.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

Determination of facts by jury

Jury on appeal, determining question of fitness of appointee can properly consider all proved facts and circumstances reasonably leading to belief that interest of such person is adverse to that of estate; verdict sustaining judgment appointing administrator held not without sufficient evidence to support it.—Davis v. Davis, 127 S.E. 779, 33 Ga. App. 628.

Directed verdict in favor of appellant claiming right to appointment as administrator held proper on trial de novo where previously existing disqualification had been removed.—McSoley v. Slepkow, 173 A. 124, 54 R.I. 374.

Separate findings

In proceeding for issuance of letters wherein an appeal was taken to the circuit court after the probate court overruled motion to set aside appointment theretofore made, where there was no controversy over the facts, circuit court was not required to file separate findings of fact and conclusions of law.—In re Helm's Estate, Mo.App., 136 S.W.2d 427.

Affirmance of order on trial de novo held proper

Idaho.—Vaught v. Struble, 120 P.2d 259.

74. Okl.—In re Copperfield's Estate, 12 P.2d 490, 158 Okl. 40.

75. Mass.—Gordon v. Shea, 14 N.E. 2d 105, 300 Mass. 95.

further evidence or award an issue to be tried by a jury.[76]

It has been held that the trial court's findings of fact will not be disturbed by the appellate court unless they are manifestly erroneous;[77] and the burden is on appellant to establish that the findings and judgment appealed from are against the clear weight of the evidence.[78] However, where evidence was improperly admitted by the trial court, the appellate court will make the finding of fact required after the elimination of such improper evidence.[79]

Presumptions. The appellate court will make such assumptions as are warranted by the state of the record.[80] In the absence of evidence on which the court acted in appointing an administrator, it must be presumed on appeal that the person appointed was a proper person to act as administrator.[81] The appellate court will also presume that a trial court which dismissed the petition for lack of jurisdiction did not decide the merits of questions involved;[82] and, where a contest was dismissed because of insufficiency of interest to intervene as a party, the reviewing court in passing on such question will conclusively presume the truth of the facts alleged in the contest.[83]

A motion by appellee to dismiss the appeal is made too late where filed after the case was argued and submitted to the court.[84]

e. Disposition of Cause

The decision of the lower court with respect to the appointment of an executor or administrator will be affirmed if correct, or may be modified so far as incorrect, but a discretionary order or appointment will not be interfered with in the absence of manifest abuse of discretion. An erroneous decision will be reversed so far as needful, the case being remanded to permit the making of the proper appointment, although, according to some decisions, the appellate court may direct the appointment of a particular person or make the appointment itself.

The lower court's decision as to the appointment of an executor or administrator will be affirmed by the appellate court, if correct, or it may be modified by it so far as it is incorrect.[85] Unless the decree of appointment was unwarranted on the record or was inconsistent as a matter of law with the facts reported, the appellate court will permit the decree to stand,[86] and it will not interfere with a discretionary order in the absence of a demonstration of manifest abuse of discretion.[87] So the appellate courts are not disposed to set aside an appointment regularly made by the court or judge except where the latter has clearly abused the wide discretion which the law confides to it or him.[88]

Qualifications of executor

In Nebraska the province of the clerk of the superior court is to pass on the qualification of an executor, subject to the right of the superior court to review his judgment on appeal, and subject to the right of appeal to the supreme court as to matters of law only.—In re Gulley's Will, 118 S.E. 839, 186 N.C. 78.

76. N.Y.—Devin v. Patchin, 26 N.Y. 441, 445.
23 C.J. p 1067 note 10.

77. S.C.—Ex parte Blizzard, 193 S. E. 633.

Weight and credibility of testimony

The appellate court will not pass on the credibility of witnesses before the trial court and the weight to be given to their testimony.—Manire v. Burt, Tex.Civ.App., 121 S.W.2d 630, error refused.

Domicile of decedent

Lower court's findings of fact as to domicile of decedent on grant of letters of administration, if supported by competent evidence, is conclusive.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 305, 188 N.C. 268.

78. Okl.—Secrest v. Secrest, 36 P.2d 57, 168 Okl. 576.

79. N.Y.—In re Lucey's Estate, 23 N.Y.S.2d 308, 260 App.Div. 936, reargument denied 24 N.Y.S.2d 1012, 260 App.Div. 1028.

80. R.I.—Eckilson v. Greene, 1 A.2d 117, 61 R.I. 394.

Grounds for dismissing appeal

Where record did not show grounds on which superior court dismissed an appeal from probate court, reviewing court would assume that appeal was dismissed on grounds relied on by appellee to sustain such dismissal.—Eckilson v. Greene, supra.

Proof of nomination

Where trial court rejected petition for letters of administration of appellant, claiming to be nominee of deceased's surviving widow, appellate court would presume, in support of the order, that no proof that appellant's nomination was genuine was made, in absence of record showing evidence taken at the hearing.—In re Woodcock's Estate, Cal. App., 120 P.2d 96.

81. Mass.—Copeland v. Shapley, 100 N.E. 1080, 214 Mass. 132.

82. R.I.—Eckilson v. Greene, 1 A.2d 117, 61 R.I. 394.

83. Tex.—Balfour v. Collins, 25 S. W.2d 804, 119 Tex. 122, answer to certified question conformed to, Civ.App., 27 S.W.2d 185.

84. La.—Succession of Coco, 171 So. 70, 185 La. 901.

85. Or.—In re Workman's Estate, 65 P.2d 1395, 156 Or. 333, rehearing denied 68 P.2d 479, 156 Or. 333.

Assignments held not to present error

Utah.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606.

86. Ala.—McFry v. Casey, 101 So. 449, 211 Ala. 649.
Mass.—Gordon v. Shea, 14 N.E.2d 105, 300 Mass. 95.

Weight of evidence

Appellate court will weigh evidence, but will not reverse trial court's judgment determining jurisdictional facts unless clearly against weight of evidence.—Franklin v. Beard, 42 P.2d 835, 171 Okl. 254—Anderson v. Jackson, 41 P.2d 815, 170 Okl. 612.

Finding supported by evidence

The finding that one named as executor is not "suitable" as he is required by statute to be will not be disturbed on appeal, where it rests on adequate evidence.—In re Holterman's Estate, 282 N.W. 132, 203 Minn. 519.

87. N.Y.—In re Johnston's Will, 299 N.Y.S. 43, 164 Misc. 412.

Ruling on application to retract renunciation of appointment

N.Y.—In re Johnston's Will, supra.

88. Cal.—In re Woodcock's Estate, App., 120 P.2d 96.
Hawaii.—In re Maalo's Estate, 31 Hawaii 97.
Ind.—Haughey v. Haughey, 127 N.E. 454, 73 Ind.App. 318.

An appeal from a decree refusing to grant letters testamentary will be dismissed where it does not appear that the will has been admitted to probate.[89]

On the other hand, an erroneous order, judgment, or decree will be reversed,[90] although such action will not be taken where only harmless error occurred in the proceedings below,[91] or where the ruling of the court below was more favorable to appellant than he had a right to expect.[92]

Ordinarily the appellate court will reverse an erroneous judgment only so far as may be needful, once more remanding the cause so that the lower court may proceed to exercise a sound discretion in making the due appointment accordingly;[93] and it has been held that the abatement of appeal proceedings by the death of the person appointed as administrator does not entitle the court to appoint his successor on such appeal.[94] According to a few decisions, however, the remand may be with directions to appoint a particular person,[95] and under at least one statute the appellate court may itself make the appointment which it deems proper.[96]

The appellate court's decision is determinative of issues disposed therein with respect to further proceedings in the cause;[97] but it cannot finally pass on the validity of claims asserted by or against decedent's estate.[98]

Where a widow applied for letters of adminis-

Iowa.—In re Rugh's Estate, 234 N.W. 278, 211 Iowa 722.
La.—Succession of Virgets, 162 So. 53, 182 La. 491—Succession of Eberle, 99 So. 464, 155 La. 603.
Mass.—Osborne v. Craig, 146 N.E. 263, 251 Mass. 169.
Mont.—In re Rinio's Estate, 30 P.2d 803, 96 Mont. 344—In re Welscher's Estate, 250 P. 447, 77 Mont. 164.
Utah.—In re Smith's Estate, 40 P.2d 180, 85 Utah 606—In re Slater's Estate, 184 P. 1017, 55 Utah 252.
23 C.J. p 1067 note 12.

89. Me.—In re Gurdy, 63 A. 322, 101 Me. 73.

90. La.—Succession of Coco, 171 So. 70, 185 La. 901.
Minn.—In re Betts' Estate, 243 N.W. 58, 185 Minn. 627, reversing in part 240 N.W. 904, 185 Minn. 627.

Particular grounds for reversal

(1) Exclusion of material evidence.—Beeman v. Jones, Tex.Civ. App., 102 S.W.2d 490.

(2) Where, on the application of one to be appointed administrator of the estate of an intestate, a caveat was filed by another contesting such appointment, and praying that the caveator be appointed administrator, and the ordinary, after a hearing, passed an order vesting administration in the clerk of the superior court of the county where the application was made, it was error, on appeal by the original caveator from this order of the ordinary, for the presiding judge of the superior court to dismiss the appeal on the ground "that there had been no caveat to the appointment of the clerk."—Hancock v. Minshew, 36 S.E. 296, 111 Ga. 843.

Defective record

(1) Where record, on appeal, did not disclose what issues were considered or that hearing was had or that testimony was taken or opportunity afforded to offer testimony, appeal would not be dismissed, but orders would be reversed and case remanded so as to afford the respective parties an opportunity to have matter heard and duly determined.—Phillips v. Clark, Md., 6 A.2d 220.

(2) Record did not support finding that petitioner for administration was incompetent for "want of understanding" where finding was predicated only on trial court's opportunity to observe petitioner.—In re Olcese's Estate, 291 P. 193, 210 Cal. 262.

Demurrer to petition

On appeal from order sustaining demurrer to petition to set aside probate proceedings, court will order judgment dismissing petition set aside, but will not order probate proceedings set aside on theory that notices of hearing were improperly posted, where court was confined to facts set out in petition to set aside for information as to location of notices posted.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

Decision not deferable

Appellee in suit opposing his appointment was not entitled to have court defer its decision of removal and remand case to await action of district court on provisional account of administrator as administrator ad interim and on the rule of certain heirs, to be placed in possession.—Succession of Coco, 171 So. 70, 185 La. 901.

91. Mont.—In re Meyer's Estate, 15 P.2d 846, 92 Mont. 474.
Tex.—Aldana v. Aldana, Civ.App., 42 S.W.2d 661, error dismissed.

Improper admission or exclusion of evidence may under the circumstances fail to constitute reversible error.
Mich.—In re Corby's Estate, 203 N. W. 877, 231 Mich. 235.
Tex.—Aldana v. Aldana, Civ.App., 42 S.W.2d 661, error dismissed.

Reservation of ruling on evidence

On application for letters of administration, that court reserved ruling on admissibility of testimony over objection, promising to disregard inadmissible testimony, was held harmless to opponent.—In re Myer's Estate, 15 P.2d 846, 92 Mont. 474.

92. Ga.—Popwell v. Nail, 107 S.E. 364, 27 Ga.App. 97.

93. Md.—Horton v. Horton, 145 A. 355, 157 Md 127.
Okl.—In re Barrett's Estate, 72 P.2d 482, 181 Okl. 262.
23 C.J. p 1068 note 13.

In North Carolina

(1) Judge after reversing clerk's order appointing administrator had no jurisdiction to appoint another of his own selection, since appointment by clerk was not "civil action" or "special proceeding" within statute authorizing judge to render final judgment in such cases; cause should have been remanded by court for further proceedings.—In re Styers' Estate, 164 S.E. 123, 202 N.C. 715—23 C.J. p 1068 note 13 [a] (1).

(2) Formerly the appellate court had jurisdiction to make the appointment on reversing the action of the lower court.—Blunt v. Moore, 18 N.C. 10.

94. La.—Succession of Coco, 164 So. 326, 183 La. 517.

95. Pa.—Gause's Estate, 1 Chest.Co. 105.
Wyo.—In re Barrett, 138 P. 865, 141 P. 95, 22 Wyo. 281.

96. La.—Bossu's Succession, 38 So. 878, 115 La. 13.

97. La.—Succession of Coco, 165 So. 646, 184 La. 144.

Failure to observe judgment

Where, on prior appeal, an administrator was directed to be appointed, a refusal by the trial court to enter an order substituting him for the acting administrators until they had fully settled their account is error.—State v. Superior Court for King County, 201 P. 25, 117 Wash. 376.

98. Tex.—Ragsdale v. Prather, Civ. App., 132 S.W.2d 625, error refused.

tration on her husband's estate, and asked that if she could not be appointed by reason of disabilities the letters be issued to another person selected by her, it was no ground for dismissing her appeal from the judgment of the ordinary awarding administration to a person other than the one named by her that the person so named was the security on her appeal bond.[99] It has been held that an administratrix who has been duly appointed should not be removed on a dilatory appeal from the order of appointment, unless she is indemnified against liability for acts properly performed by her as administratrix before the date of the filing of the petition to enter an appeal.[1]

§ 65. Costs

A party failing in his application for a curatorship, and one contesting in bad faith petitioner's right to appointment, have been required to pay costs. The decedent's estate has been held not chargeable with the expense of litigating relative rights to letters.

It has been held that a party failing in his application for a curatorship must pay costs,[2] and, where the probate court finds that a party to a proceeding to appoint an administrator did not act in good faith in contesting the petitioner's right to the appointment, costs are properly awarded against such contestant.[3] The right to costs on appeal from a decision as to the appointment of executors and administrators depends on the provisions of the applicable statute.[4] It has been held that the estate of the decedent cannot be charged with the expense incident to parties' litigating their relative rights to letters of administration;[5] but there is also authority holding that where the appeal proceeding is abated by the death of the party appointed, thus depriving other parties ordered to pay costs of the opportunity to set aside the order, liability for costs of the appeal may be imposed on the estate.[6]

A judgment for fees of an attorney who was not a party to the litigation should be rendered in favor of the party employing him and not in his own favor.[7]

D. QUALIFICATION AND FAILURE TO QUALIFY OR ACT

§ 66. Oath

An executor or administrator is generally required to take an oath of office, prescribed by statute, before entering on his duties. One who acts as administrator cannot escape liability by failure to take the oath.

As a general rule an executor or administrator is required, before entering on his duties as such, to take an oath of office prescribed by statute,[8] but informalities in the taking of the oath are regarded with lenience.[9] Where a contested will has been admitted to probate, it is neither requisite nor proper to insert in the oath of the executor a clause averring that the will is the true last will and testament of the testator.[10]

The taking and filing of the oath is an acceptance of the office,[11] but one who takes charge of an estate as administrator cannot escape liability by reason of his having failed to take the oath and file the bond required by law.[12] Letters of administration are presumptive evidence that the requisite oath has been taken,[13] and that letters were not issued until the duty was performed.[14]

§ 67. Bond

a. Requirement
b. Amount
c. Sureties

99. Ga.—Headman v. Rose, 63 Ga. 458.

1. Mass.—Nash v. Whitcomb, 114 N.E. 669, 225 Mass. 487.

2. La.—Succession of Miller, 88 So. 185, 145 La. 903.
23 C.J. p 1068 note 22.
Counsel fees and costs as expenditures recoverable by representative against estate see infra §§ 223–228.

3. N.Y.—In re Clark, 15 N.Y.S. 370.

4. La.—Succession of Miller, 88 So. 185, 145 La. 903.

5. Utah.—In re Pingree's Estate, 25 P.2d 937, 82 Utah 437, 90 A.L.R. 96.

6. La.—Succession of Coco, 164 So. 326, 183 La. 517.

7. Utah.—In re Pingree's Estate, 25 P.2d 937, 82 Utah 437, 90 A.L.R. 96.

8. Tex.—Reed v. Harlan, Civ.App., 103 S.W.2d 236, error refused.
23 C.J. p 1068 note 24.

Change to permanent status

Temporary administrator, on being made permanent administrator, must take new oath as permanent administrator.—Reed v. Harlan, Tex. Civ.App., 103 S.W.2d 236, error refused.

Where the statute does not require an executor to take an oath as such, the fact that he does not take an oath will not affect his right to maintain an action to collect assets of the estate.—Leahy v. Haworth, Neb., 141 F. 850, 73 C.C.A. 84, 4 L.R.A.,N.S., 657.

9. Tex.—Caddell v. Lufkin Land & Lumber Co., Com.App., 255 S.W. 397, affirming Civ.App., 234 S.W. 138.
23 C.J. p 1068 note 25.

Lack of caption

Where an oath filed by the administrator contained a recital, "I am the same person mentioned in the above letters of administration," and was at one time attached to the letters of administration, the oath was sufficiently identified as the one required, regardless of a lack of caption identifying the oath.—Moe v. Judd, 208 P. 82, 121 Wash. 14.

10. N.J.—In re Maxwell, 3 N.J.Eq. 611.
23 C.J. p 1069 note 26.

11. N.Y.—Seaman v. Jamison, 131 N.Y.S. 155, 146 App.Div. 428.

12. Idaho.—Harris v. Coates, 69 P. 475, 8 Idaho 491.

13. La.—Craig's Heirs v. Frost Lumber Industries, 120 So. 709, 10 La. App. 541.
23 C.J. p 1069 note 29.

14. La.—Brooks v. Walker, 3 La. Ann. 150.
N.Y.—Dayton v. Johnson, 69 N.Y. 419.

d. Form and requisites
e. Effect of failure to provide, or cancellation of, bond
f. New or additional security
g. Proceedings
h. Relief or protection of sureties

a. Requirement

(1) Of executors
(2) Of administrators

(1) Of Executors

(a) In general
(b) Circumstances in which bond properly required

(a) In General

The general rule is that an executor must give bond, although some statutes leave the requirement within the court's discretion, while others dispense with it; but the court is usually empowered to dispense with this requirement where the will provides that no bond need be given, and it may permit the executor to furnish only a limited bond where he is residuary legatee.

Although the necessity of a bond is ordinarily dispensed with in the case of an executor under some statutes,[15] at least where the will does not exact a bond,[16] the general rule is that an executor must give a bond for the faithful performance of his trust,[17] unless, as will appear, the testator by his will has dispensed with such security.

The bond is for the benefit of all interested in the testator's estate, and not merely for those who ask for security.[18] Some statutes requiring executors to give bond have been regarded as mandatory,[19] but others have been regarded as directory merely, leaving it within the discretion of the court to dispense with security under some circumstances.[20]

Security may be required of an executor after letters testamentary have been issued without bond,[21] and, indeed, it has been held that it is only after letters have been granted to an executor that the probate court acquires jurisdiction to compel him to give security.[22]

Effect of testamentary provisions dispensing with security. The general rule, above stated, that an executor must give a bond does not apply where the testator by his will has dispensed therewith.[23] However, a testamentary provision that the executor need give no bond or need have no sureties on the bond given merely empowers the court to dispense with the bond or sureties which it would otherwise be its duty to require in case the court deemed it prudent to do so, but does not deprive the court of power to require the executor to give bond or sureties if this is deemed necessary or prudent, or some person interested in the estate demands it;[24] although the testator's directions in this respect will be regarded unless good reason to the

15. Pa.—In re Walker's Estate, 17 Pa.Dist. & Co. 713, 14 Erie Co. 128.
23 C.J. p 1069 note 34.

Absence of claims

Executor is not required to give bond, where there are no debts due from succession and no property in possession thereof claimed by other persons; right to appointment without bond is not affected by fact that in succession was included succession of testator's predeceased wife, since, when wife's succession consists only of community property, it is administered by, and rights of her heirs settled in, her husband's succession.—Succesion of Rassat, La. App., 157 So. 412.

16. S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.

17. Ky.—Hopkins v. Howard's Ex'x, 99 S.W.2d 810, 266 Ky. 685.
Miss.—Brown v. Franklin, 127 So. 561, 157 Miss. 38.
N.Y.—In re Gimbel's Estate, 29 N.Y.S.2d 283, 176 Misc. 781.
Tex.—National Surety Corporation v. Ladd, 115 S.W.2d 600, 131 Tex. 295, reversing In re Turner's Estate, Civ.App., 94 S.W.2d 1204—Land v. Land, Civ.App., 40 S.W.2d 207, error refused.
23 C.J. p 1069 note 35.

Liability on bond see infra §§ 944–987.
English rule see 23 C.J. p 1069 notes 31–33.

Reasonable construction of statute

Statute requiring executors to execute bonds to state and prescribing terms thereof must be given reasonable and effectual construction.—Neighbors v. Beck, 159 A. 748, 162 Md. 362.

Except for the reasons specified by statute executors cannot be called on to furnish bonds.—Sandford v. Bronx Boro Builders, 161 N.Y.S. 975, 175 App.Div. 384—23 C.J. p 1069 note 35 [e].

18. N.Y.—Holmes v. Cock, 2 Barb. Ch. 426.

19. U.S.—Wall v. Bissell, Ind., 8 S. Ct. 979, 125 U.S. 382, 31 L.Ed. 772, construing Indiana statute.
23 C.J. p 1069 note 37.

20. Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
23 C.J. p 1069 note 38.

The clerk has no such discretion but must always take bond and security when he issues letters.—Dillen v. Fancher, supra—Bankhead v. Hubbard, 14 Ark. 298.

21. Cal.—In re White, 53 Cal. 19.
Kan.—In re Dennis' Estate, 68 P.2d 1083, 1085, 146 Kan. 121, quoting **Corpus Juris**, and appeal dismissed Keach v. McDonald, 58 S.Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
Okl.—In re Dillard's Estate, 88 P.2d 639, 184 Okl. 534, 121 A.L.R. 947.

22. Pa.—Harberger's App., 98 Pa. 29.
Tex.—Daniels v. Jones, Civ.App., 224 S.W. 476, errpr refused.

23. Ky.—Hopkins v. Howard's Ex'x, 99 S.W.2d 810, 266 Ky. 685.
Ohio.—Tieman v. Smith, 30 Ohio N.P.,N.S., 544.
23 C.J. p 1069, note 36.

A direction in a will that no sureties shall be required does not relieve the executors of the necessity of giving their personal bonds.—Hammond v. Wood, 10 A. 623, 15 R.I. 566.

24. Ala.—Rudulph v. Hodo, 153 So. 238, 228 Ala. 170.
Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
Ga.—Powell v. Smith, 174 S.E. 341, 178 Ga. 737.
Kan.—In re Dennis' Estate, 68 P.2d 1083, 146 Kan. 121, appeal dismissed Keach v. McDonald, 58 S.Ct. 147, 302 U.S. 647, 82 L.Ed. 502.

contrary is made to appear.[25] Where a bond is required by the court notwithstanding direction to the contrary, it may continue to exercise such discretion with respect to abandoning or discontinuing the requirement on application by the executor.[26]

Limited bond where executor is residuary legatee. When the executor is residuary legatee and it appears that so extensive a security is not needful for the protection of any person interested in the estate, the usual bond may be dispensed with, and the executor allowed at his option to give a bond with condition merely to pay all funeral charges, debts, legacies, and statutory allowances.[27] By giving such a bond the executor, as appears infra § 944, conclusively admits assets sufficient to pay debts, legacies, and allowances, and binds himself and sureties absolutely in the penal sum to pay accordingly, even though the estate should prove insolvent. It has been held that the whole estate passes to the residuary legatee when the bond is given and the administration thereupon terminates,[28] but there is also authority for the view that the bond does not vest the assets in the residuary legatee, or close the administration, in any such sense as to prejudice other legatees or creditors.[29] Such a special bond cannot be canceled or surrendered and a bond in common form substituted after the lapse of considerable time from the date when an inventory should in ordinary course have been filed.[30] The bond is not invalidated, so far as the conditions contained therein are lawful, by the addition of unnecessary or illegal conditions, such as a requirement that the executor account.[31]

(b) Circumstances in Which Bond Properly Required

Circumstances under which a bond is properly required of the executor include nonresidence, financial circumstances affording inadequate security for due administration, conduct showing a want of fidelity, and actual or threatened waste or mismanagement of the estate; the existence of facts rendering a bond necessary is for the determination of the judge in the exercise of his discretion.

Reasons which may or must lead to a person nominated as executor being required to give bond include the fact that he is a nonresident,[32] that he is insolvent,[33] and that his financial circumstances are precarious[34] or not such as to afford adequate security for the due administration of the estate.[35] On the other hand, it has been held that mere poverty of an executor does not render security necessary,[36] nor is such security required by the fact that the executor's property is not equal to the value of the estate,[37] especially if his property exceeds the amount which he will probably have in his hands

Ky.—Hopkins v. Howard's Ex'x, 99 S.W.2d 810, 266 Ky. 685.
La.—Succession of Bankston, App., 166 So. 900.
23 C.J. p 1070 note 48.

Rule applicable to bond for nonresident executor
N.Y.—In re Gimbel's Estate, 29 N.Y.S.2d 283, 176 Misc. 781.

Statutory provisions construed
(1) Statutory requirement of bond of executor, relieved therefrom by will, is only on a judicial finding that estate is likely to be wasted to prejudice of some person interested therein.—Naugher v. Hinson, 100 So. 221, 211 Ala. 278.

(2) Statute requiring executor to give bond under some circumstances, even though testator states none is required, is not for benefit of creditors only.—Brown v. Franklin, 127 So. 561, 157 Miss. 38.

25. Ala.—Rudulph v. Hodo, 153 So. 238, 228 Ala. 170.
Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
Ohio.—Tieman v. Smith, 30 Ohio N. P.,N.S., 544.
Pa.—In re Walker's Estate, 17 Pa. Dist & Co. 713, 14 Erie Co. 128.
Wash.—In re Passage's Estate, 210 P. 370, 122 Wash. 249.
23 C.J. p 1070 note 49.

In New York
(1) No bond can be required of an executor in contravention of the terms of the will, where the fiduciary has qualified and is acting as such.—In re Berardini, 270 N.Y.S. 182, 241 App.Div. 753—In re Kennedy's Estate, 266 N.Y.S. 883, 149 Misc. 188—Matter of Chisholm's Estate, 263 N.Y.S. 423, 147 Misc. 99—In re Van Deusen's Will, 181 N.Y.S. 330, 111 Misc. 74.

(2) However, direction in will that executrix serve without bond was held inapplicable after widow completed duties as executrix and turned over assets of estate to herself as widow and as trustee for remaindermen.—In re Ross' Estate, 273 N.Y.S. 53, 151 Misc. 366.

26. Okl.—In re Dillard's Estate, 88 P.2d 639, 184 Okl. 534, 121 A.L.R. 947.

Statutes held inapplicable
Statutes dealing with release on application of surety of executors or administrators were inapplicable to limit executrix' application to be relieved from retaining bond which county court, in its discretion, had required, where circumstances warranted discontinuance.—In re Dillard's Estate, supra.

27. Mich.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.
23 C.J. p 1070 note 42.

28. R.I.—Bowler v. Emery, 70 A. 7, 29 R.I. 310.
23 C.J. p 1070 note 44.

29. Mich.—In re Vedder, 81 N.W. 356, 122 Mich. 439.
23 C.J. p 1070 note 45.

30. R.I.—Adams v. Central Falls Prob. Ct., 58 A. 782, 26 R.I. 239.
23 C.J. p 1070 note 46.

31. R.I.—Central Falls Prob. Ct. v. Adams, 60 A. 769, 27 R.I. 97, 8 Ann.Cas. 1028.

32. N.Y.—In re Gimbel's Estate, 29 N.Y.S.2d 283, 176 Misc. 781.
N.C.—In re Dexter's Estate, 189 N.Y.S. 366, 116 Misc. 17.
23 C.J. p 1071 note 50.

33. Pa.—In re Walker's Estate, 17 Pa.Dist. & Co. 713, 14 Erie Co. 128.
23 C.J. p 1071 note 51.

34. Ga.—Powell v. Smith, 174 S.E. 341, 178 Ga. 737.
23 C.J. p 1071 note 52.

35. Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
23 C.J. p 1071 note 53.

36. N.C.—Fairbairn v. Fisher, 57 N.C. 390.

37. N.Y.—Mandeville v. Mandeville, 8 Paige 475.

unadministered at any one time.[38]

A bond is also properly required where the conduct of the executor shows a want of fidelity in the execution of the trust,[39] or where he has wasted or mismanaged the estate, or there is reasonable ground for apprehending that he will do so.[40] However, where the person committing such waste is by the will entitled to immediate possession of all the property, and it is not shown that there were any debts, the executor cannot be required to give bond.[41]

The existence of facts rendering a bond necessary is for the determination of the probate judge in the exercise of his discretion,[42] and a surrogate under a state of facts warranting exercise of the power to revoke letters testamentary and direct and control the conduct of an executor, may, as a condition of not exercising such power, compel the executor to give a bond.[43]

(2) Of Administrators

An administrator is universally required to give bond.

It is the universal rule to require an administrator to give bond,[44] and the fact that the estate of a decedent is insignificant in value, the principal asset being a claim alleged to be due for the wrongful death of deceased, is not ground for exempting an administrator from giving bond.[45]

b. Amount

The amount of the bond should conform to the provision of the statute, and such discretion as remains in the court with respect to fixing or reducing the amount should be exercised with regard to the circumstances of the estate. The value of all assets within the administration should usually be included in computing the value of the estate on which the penal sum is based.

The amount of the penalty of an executor's or administrator's bond must conform to the provision of the statute, the amount usually being fixed with reference to the estimated value of the estate.[46] It has been held that, if the bond is given for more than is required by law, it is void as to the surplus only.[47]

Statutory provisions for modified security in stat-

38. N.Y.—Mandeville v. Mandeville, supra—Martin v. Duke, 5 Redf. Surr. 597, criticizing Freeman v. Kellogg, 4 Redf.Surr. 218.

39. N.J.—Holcomb v. Coryell, 12 N. J.Eq. 289.

Failure to file inventory

However, where will relieved executors of giving bond, filing inventory or reporting to the courts, failure to file inventory was not a dereliction material to legatee's application to require executors to give bond.—Bowie v. Phenix-Girard Bank, 185 So. 363, 237 Ala. 44.

40. Ky.—Hopkins v. Howard's Ex'x, 99 S.W.2d 810, 266 Ky. 685.
23 C.J. p 1071 note 58.

"Endangered" interest

Beneficiary's interest is not "endangered", within statute fixing this as condition of requiring bond, unless prejudicial waste is likely to result.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

A bond will not be required where it does not appear that the executor is wasting or misapplying the assets, and there is no well grounded apprehension of such action.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995—23 C.J. p 1071 note 58 [f].

41. Ga.—Pass v. Pass, 192 S.E. 64, 56 Ga.App. 59.

42. Ark.—Dillen v. Fancher, 125 S. W.2d 110, 197 Ark. 995.
Kan.—In re Dennis' Estate, 68 P.2d 1083, 1085, 146 Kan. 121, quoting **Corpus Juris,** and appeal dismissed Keach v. McDonald, 58 S.Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
Okl.—In re Dillard's Estate, 88 P.2d 639, 184 Okl. 534, 121 A.L.R. 947.
23 C.J. p 1071 note 59.

43. Kan.—In re Dennis' Estate, 68 P.2d 1083, 1085, 146 Kan. 121, quoting **Corpus Juris,** and appeal dismissed Keach v. McDonald, 58 S. Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
N.Y.—Matter of Wischmann, 80 N. Y.S. 789, 80 App.Div. 520.

44. U.S.—The Linseed King, D.C.N. Y., 48 F.2d 311, affirmed, C.C.A., In re Spencer Kellogg & Sons, 52 F.2d 129, certiorari granted Spencer Kellogg & Sons v. Hicks, 52 S.Ct. 126, 284 U.S. 610, 76 L.Ed. 522, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed 903.
Mo.—Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.
Ohio.—U. S. Fidelity & Guaranty Co. v. Decker, 171 N.E. 333, 122 Ohio St. 285, 68 A.L.R. 1538.
23 C.J. p 1072 note 61.
Bond of:
Administrator de bonis non see infra § 1022.
Administrator with the will annexed see infra § 1033.
Public administrator see infra § 1051.
Temporary or special administrator see infra § 1037.
A foreign consul who is appointed administrator of the estate of a citizen of the country which he represents must ordinarily give bond.
Mass.—In re Wyman, 77 N.E. 379, 191 Mass. 296, 114 Am.S.R. 601.
N.Y.—Matter of D'Adamo, 144 N.Y.S. 429, 159 App.Div. 40.
23 C.J. p 1072 note 61 [e].

Temporary administrator, on being made permanent administrator, must give new bond as permanent administrator.—Reed v. Harlan, Tex.Civ. App., 103 S.W.2d 236, error refused.

Statute held mandatory

Provision of statute requiring administrator to furnish bond in ten days from appointment is mandatory.—Dixon v. Davis, La.App., 155 So. 407.

45. Nev.—In re Bailey, 103 P. 232, 31 Nev. 377, Ann.Cas.1912A 743.

46. Okl.—Wacoche v. Moss, 288 P. 955, 143 Okl. 288.
Tex.—Land v. Land, Civ.App., 40 S. W.2d 207, error refused.
23 C.J. p 1072 note 63.

Amount named by testator

Although testator requests that bond be given by his executor in a stated amount, court must fix the amount of the bond in accordance with statutory requirement for bond of double the value of the estate, since court has no discretion to follow testator's request except where testator dispenses altogether with necessity of bond.—Tieman v. Smith, 30 Ohio N.P.,N.S., 544.

Irregularity in inventory

Irregularity, if any, in executrix' inventory declaring contested item therein was not claimed as part of estate, did not invalidate statutory bond equaling valuation of estate including such item.—Land v. Land, Tex.Civ.App., 40 S.W.2d 207, error refused.

47. La.—Denys v. Armitage, 5 Mart. 629.

ed circumstances, that is, for a smaller bond than is usually required, are strictly construed,[48] and modified security cannot be taken on any terms except those provided for in the statute;[49] however, a provision authorizing the acceptance of a limited bond covering only the amount necessary to pay debts, taxes, and assessments, where the will excused the executor from giving bond, has been held to apply to a case where the will required nominal bond.[50]

Discretion of court. Under some statutes the amount of the bond is left to the discretion of the court, to a certain extent and within certain limits;[51] but the court must give due consideration to the circumstances of the estate in balancing the requirements that adequate security be afforded and that estate funds should not be wasted in payment of premiums for an excessive bond,[52] and it has been held error to require a bond for more than double the estimated value of the property.[53]

Considerations governing in fixing amount. In computing the value of the estate on which the penal sum is based, property personally possessed, as well as choses in action and all other property to the actual possession of which decedent was entitled as legal owner, should be considered,[54] and the whole amount of assets, not the surplus of assets over debts, furnishes the criterion;[55] but security should not be required on an estimate of more property than that which the local administration will cover,[56] and it is the value of the property, and not the amount of the claims which governs in fixing the amount of the bond.[57]

Exempt property which does not form any part of the estate of decedent should not be considered,[58] nor should property of the legal title to which decedent divested himself in his lifetime, whether such transfer was procured by fraud or otherwise,[59] although the latter has been held not a hard and fast rule, since in some cases the main object of taking out letters is to recover property fraudulently conveyed.[60] Where property has been pledged, only its value in excess of the debt for which it is pledged should be considered.[61]

When the administrator has a clear and vested interest in a part of the fund, it has been held proper to consider only the residue in fixing the amount of the bond.[62]

The estimated or appraised value of the estate is not conclusive in fixing the penalty of the administration bond, but, if the estimate is not correct, the amount of the penalty will be fixed according to the actual value of the estate.[63]

In case of joint administration. The bond to be required from one of several coexecutors or coadministrators is to be fixed in view of the actual amount of the fund, and cannot be reduced by reason of an arrangement between him and his colleagues by which they assume the exclusive control

48. N.Y.—Le Roy's Estate, 5 N.Y.S. 555, 16 N.Y.Civ.Proc. 343, 1 Conn. Surr. 491, disapproving Allen's Estate, 7 N.Y.Civ.Proc. 159, 3 Dem. Surr. 63.
23 C.J. p 1072 note 64.

49. N.Y.—Week's Estate, 1 N.Y.Civ. Proc. 164.

50. Md.—Neighbors v. Beck, 159 A. 748, 162 Md. 362.

51. Md.—Neighbors v. Beck, supra.
N.Y.—In re Gimbel's Estate, 29 N. Y.S.2d 283, 176 Misc. 781.
23 C.J. p 1073 note 70.

A nonresident executor need not give bond in full amount of estate as required by statutory provisions applicable to other administrators, but amount is within discretion of court.—In re Gimbel's Estate, supra.

Bond for legacy

Where former decree directed that certain legacy should be retained by executors until legatee posted bond, which she failed to do, issuance of letters to such legatee as substitute fiduciary will be conditioned on her filing bond in amount including such sum, since she will not be permitted to circumvent direction of court in that regard.—In re Ayvazian's Estate, 275 N.Y.S. 123, 153 Misc. 467.

52. N.Y.—In re Gimbel's Estate, 29 N.Y.S.2d 283, 176 Misc. 781.

Amount held excessive

In a case where executors had entered on their duties, and accounted for all moneys coming to their hands, and disbursed the assets of the estate pursuant to the terms of the will, with the exception of the payment of part of the legacies, the balance due on which, if anything, after applying a fund admitted to be in the hands of the executors, could be determined only by an accounting between the executors and legatees, a decree of the orphans' court requiring the executors to give bond in a sum five times more than the amount shown to remain in their hands for the faithful performance of their duties was held unjustified, as being an excessive amount even if the court was correct in requiring bond.—In re Woolsey, 59 A. 463, 67 N.J.Eq. 574, reversed on other grounds 62 A. 686, 68 N.J.Eq. 763.

53. R.I.—Sarle v. Scituate Prob. Ct., 7 R.I. 270.
Tex.—In re Bowden, 33 Tex. 730.

54. Okl.—Wacoche v. Moss, 288 P. 955, 143 Okl. 288.
23 C.J. p 1073 note 73.

Property held by government

Value of personal property belonging to estate, held by secretary of interior, cannot be excluded in determining amount of administrator's bond.—Wacoche v. Moss, supra.

55. N.Y.—Senior v. Ackerman, 2 Redf.Surr. 302.

56. N.J.—Lewis v. Grognard, 17 N. J.Eq. 425.

57. La.—Weeks' Succession, 29 So. 219, 104 La. 573.

58. Tex.—In re Bowden, 33 Tex. 730.
23 C.J. p 1073 note 78 [a].

59. N.Y.—Peck v. Peck, 3 Dem.Surr. 548.

60. N.Y.—In re Filley, 20 N.Y.S. 427, 1 Pow.Surr. 234.

61. Cal.—In re Kidd, Myr.Prob. 239.

62. N.Y.—Cotterell v. Brock, 1 Bradf.Surr. 148.
23 C.J. p 1073 note 80.

63. La.—Weeks' Succession, 29 So. 219, 104 La. 573.
23 C.J. p 1073 note 81.

and responsibility of the trust.[64]

Reduction of amount. According to some decisions, the court may exercise the prerogative of reducing the amount of the bond where the condition of the estate and the circumstances justify such reduction.[65] It has been held, however, that the bond will not be reduced for a cause which could have been urged on the application to require bond,[66] and that, after the amount of the bond has once been fixed, it cannot be reduced by showing that property of the succession has been sold at less than its inventoried value, that the assets have been reduced by the payment of debts, and that the debts presently due do not require for their payment a bond as large as that furnished.[67]

The statute may permit a reduction of the amount of the bond by depositing securities belonging to the estate with a designated public officer to be held subject to the order of the personal representative countersigned by the surrogate.[68]

c. Sureties

Compliance must be had with statutory provisions for the furnishing of sureties on the bond of an executor or administrator, including matters as to number of sureties, who may be sureties, requisite financial condition, and justification as to such condition.

As a general rule, under statutes providing for the giving of bond by an executor or administrator, compliance must be had with provisions for the furnishing of sureties on such bond, usually two or more in number;[69] but the fact that a bond is accepted without sureties, or without the requisite number of sureties, does not render the appointment invalid,[70] unless the defect is made a fatal one by statute.[71] A bond which divides up the penal liability of sureties so as to limit it to a fixed amount for each is not favored, but such a bond if approved holds good.[72]

Who may be sureties. Who may or may not be sureties is a matter of statutory regulation, which must be followed.[73] Sureties are usually required to be residents of the state,[74] although they need not reside in the county where letters are granted;[75] but it has been held that in the absence of any statute expressly requiring that the sureties be residents of the state a bond is not invalidated by the fact that all the sureties are nonresidents.[76]

It has been held that a husband or wife may be surety on an administration bond of his or her spouse,[77] but there is also authority for the view that the wife of an administrator should not be accepted on his bond.[78]

Attorneys at law have been declared not competent to be sureties on administration bonds;[79] but it has been held that an administrator's bond whereon one of the sureties is a practicing attorney is at most voidable.[80]

Corporations having the necessary power under charter or statute may be accepted as sureties on administration bonds,[81] and a corporation authorized by statute to become sole surety for the faithful performance of any trust, etc., has been held a sufficient surety on an executor's bond, although a prior general statute required two sureties;[82] but a statute requiring that an executor or administrator shall give a surety company as bondsman has been held invalid.[83]

Sufficiency. Each surety ought to be worth at least the amount of the penalty of the bond over and above all debts and property exempt from execution,[84] but the acceptance of an insolvent surety

64. N.Y.—Senior v. Ackerman, 2 Redf.Surr. 302.

65. Okl.—In re Dillard's Estate, 88 P.2d 639, 184 Okl. 534, 121 A.L.R. 947.
23 C.J. p 1073 note 83.

66. N.Y.—In re Filley, 20 N.Y.S. 427, 1 Pow.Surr. 234.

67. La.—Weeks' Succession, 29 So. 219, 104 La. 573.
23 C.J. p 1073 note 85.

68. N.Y.—In re Lubin, 178 N.Y.S. 777, 109 Misc. 474.
23 C.J. p 1072 note 68.

69. Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
23 C.J. p 1074 note 87.
English rule see 23 C.J. p 1074 note 86.

70. Ohio.—Slagle v. Entrekin, 10 N.E. 675, 44 Ohio St. 637.
23 C.J. p 1074 note 88.

71. Pa.—McWilliams v. Hopkins, 4 Rawle 382.

72. Mass.—Baldwin v. Standish, 7 Cush. 207.

73. Iowa.—Cuppy v. Coffman, 47 N.W. 1005, 82 Iowa 214.
23 C.J. p 1074 note 91.

74. Ga.—Jones v. Smith, 48 S.E. 134, 120 Ga. 642.
23 C.J. p 1074 note 95.
Requirements in England as to residence see 23 C.J. p 1074 notes 92-94.

75. Ga.—Barksdale v. Cobb, 16 Ga. 13.

76. Ky.—Rutherford v. Clark, 4 Bush 27.
S.C.—Jones v. Jones, 45 S.C.L. 623.

77. N.Y.—Matter of Grove, 13 N.Y. St. 179, 6 Dem.Surr. 369, 13 N.Y. Civ.Proc. 267, disapproving Master's Estate, 12 N.Y.Civ.Proc. 177.

78. La.—Weeks' Succession, 29 So. 219, 104 La. 573.

79. Iowa.—Cuppy v. Coffman, 47 N.W. 1005, 82 Iowa 214.
23 C.J. p 1074 note 1.

80. N.Y.—Matter v. Heinze, 163 N.Y.S. 415, 97 Misc. 525, appeal dismissed 163 N.Y.S. 1119.

81. Ind.—Barricklow v. Stewart, 63 N.E. 316, 31 Ind.App. 446.
23 C.J. p 1074 note 3.

82. Pa.—Commonwealth v. Miller, 45 A. 921, 195 Pa. 230.

83. Ohio.—State v. Robins, 73 N.E. 470, 71 Ohio St. 273, 69 L.R.A. 427, 2 Ann.Cas. 485.
23 C.J. p 1074 note 5.

84. N.Y.—Sutton v. Weeks, 5 Redf. Surr. 353.
23 C.J. p 1075 note 6.

does not invalidate the appointment.[85] Approval of the sureties by the court or judge may be required.[86]

Justification. In some jurisdictions sureties have been required to justify as to their pecuniary responsibility,[87] but it has been held that an executor's bond is not such an official bond as will fall within the provision of a statute that all sureties on official bonds shall make justification under oath of their pecuniary responsibility,[88] although the judge may require sureties to justify if there is any reasonable doubt of their responsibility.[89] Sureties are usually permitted to prove their sufficiency by their own oath as in the qualifying of bail, and it then devolves on the opponent to show insufficiency, if he can, by cross-examination or evidence aliunde.[90]

Who may object. A person not interested in the assets of an estate of a decedent cannot raise any question as to the sufficiency or legality of the surety on an administrator's bond which has been accepted.[91]

Indemnification of sureties. A pledge of assets of the estate to secure a surety against loss is contrary to public policy and void.[92]

d. Form and Requisites

It is sufficient and necessary that there be substantial compliance with statutory requirements as to the form and requisites of an executor's or administrator's bond, such as with respect to naming of the obligee, proper execution of the instrument, and approval and filing of the bond by and with the proper officer and within the proper time. A bond which is defective as a statutory bond may be upheld as a common-law bond.

The form and requisites of an executor's or administrator's bond are usually prescribed by statute,[93] the provisions of which must be considered as written into the bond, regardless of its actual terms.[94] A substantial compliance with the statutory requirements is, however, usually deemed sufficient, and mere informalities or immaterial omissions will not necessarily invalidate the bond or defeat the appointment,[95] nor will the fact that a bond contains conditions and recitals in addition to those required by statute invalidate it;[96] and even though the bond is fatally defective as a statutory bond it may be upheld as a common-law bond,[97] and the appointment of the representative will not be a nullity, but may be effective as being de facto and voidable only.[98]

Joint or several bonds. Under a statute authorizing the probate court to prescribe the forms of bonds to be given by executors, the court may, when there are two or more executors, require a joint bond, or several bonds, as it may deem proper.[99]

Obligee. The bond is usually executed with the state or the judge of probate and his successors as obligee;[1] but where the will requires executors to give security the bond should run to the legatees.[2]

85. La.—Herriman v. Janney, 31 La. Ann. 276.

86. Me.—Mathews v. Patterson, 42 Me. 257.
23 C.J. p 1075 note 6.
Approval of bond generally see infra subdivision d of this section.

87. Iowa.—Foley v. Hamilton, 57 N. W. 439, 89 Iowa 686.
N.Y.—Matter of Thompson, 19 N.Y. St. 900, 6 Dem.Surr. 56.

88. Mich.—Bissell v. Probate Judge, 24 N.W. 886, 58 Mich. 237.

89. Mich.—Carpenter v. Probate Judge, 12 N.W. 197, 48 Mich. 318.

90. Miss.—Ross v. Mims, 15 Miss. 121.
23 C.J. p 1075 note 12.

91. Ga.—Jones v. Smith, 48 S.E. 134, 120 Ga. 642.

92. U.S.—Jennings v. Smith, D.C. Ga., 232 F. 921, reversed on other grounds 238 F. 48, 151 C.C.A. 124, certiorari denied 37 S.Ct. 399, 243 U.S. 635, 61 L.Ed. 940.

93. Ark.—Meyer v. Fidelity & Deposit Co. of Maryland, 122 S.W.2d 586, 197 Ark. 418.
Iowa.—In re Durey's Estate, 245 N. W. 236, 215 Iowa 257.
23 C.J. p 1075 note 15.

A personal bond must be given by an executor or administrator, and a bond executed by a third person, in which the executor or administrator does not join, is not sufficient.—Hammond v. Wood, 10 A. 623, 15 R. I. 566—Townsend v. Hazard, 9 R.I. 254.

94. Iowa.—In re Durey's Estate, 245 N.W. 236, 215 Iowa 257.

95. Ark.—Meyer v. Fidelity & Deposit Co. of Maryland, 122 S.W.2d 586, 197 Ark. 418.
Neb.—In re Hoferer's Estate, 216 N. W. 826, 827, 116 Neb. 249, citing **Corpus Juris.**
Wash.—Moe v. Judd, 208 P. 82, 121 Wash. 14.
23 C.J. p 1075 note 16.

A bond is not invalidated by:

(1) Failure to correctly entitle the court in which the proceedings were pending.—Moe v. Judd, supra.

(2) Omission of the amount of the penalty.—Soldini v. Hyams, 5 La. Ann. 551—23 C.J. p 1075 note 16 [b].

(3) The omission of conditions required by law does not invalidate the bond; it binds the obligors to the extent of the legal and unexceptionable conditions which it contains. —Yost v. Ramey, 48 S.E. 862, 103 Va. 117.

96. Md.—State v. Talbott, 128 A. 908, 148 Md. 70.
23 C.J. p 1076 note 17.

Unauthorized conditions rejected as surplusage
Ark.—Meyer v. Fidelity & Deposit Co. of Maryland, 122 S.W.2d 586, 197 Ark. 418.
Mo.—Woods v. State, 10 Mo. 698.

Waiver of privilege
Where executor excused by will from giving bond has privilege of giving special limited bond if a bond is nevertheless required by the court to protect creditors, no objection can be raised if he waives such privilege and gives a general bond not so limited.—State v. Talbott, 128 A. 908, 148 Md. 70.

97. Neb.—In re Hoferer's Estate, 216 N.W. 826, 827, 116 Neb. 249, citing **Corpus Juris.**
23 C.J. p 1076 note 18.

98. Neb.—In re Hoferer's Estate, supra, citing **Corpus Juris.**
23 C.J. p 1076 note 19.

99. R.I.—Chamberlain v. Anthony, 43 A. 646, 21 R.I. 331.

1. W.Va.—Hensley v. Copley, 11 S. E.2d 755.
23 C.J. p 1076 note 21.

2. N.Y.—Sullivan's Will, Tuck.Surr. 94.

A bond naming no obligee is void, since it is neither a statutory nor a common-law bond.[3]

Execution. Where sureties are necessary, the bond should be signed and executed by both the principal and the sureties.[4] It is usually considered that the signature of the principal is necessary to give validity to the bond for any purpose, and until signed by him it is not binding on the sureties, although they have signed it;[5] but the rule seems to be otherwise as to joint and several bonds.[6] The signature of the principal in the body of the instrument is a sufficient signing by him,[7] and a bond may be valid even though it was signed by the administrator before his appointment.[8] An administrator may execute the bond by an attorney in fact.[9]

A bond is binding on the sureties by whom it is signed even though they are not named in the body of the instrument,[10] and it will bind them even though their names were signed by a third person, without authority, if they acquiesced in his act;[11] but a mere expression of willingness to become a surety is not sufficient to render a person liable as such.[12]

Approval. It is frequently required that the bond be approved by the probate court or judge, or other proper officer,[13] although it has been held that approval is not essential to the validity of the bond,[14] and that the lack of approval will not invalidate the letters of administration.[15] A written approval has been required,[16] but it has been considered not essential that the approval be indorsed on the bond,[17] and prima facie evidence of approval is furnished by the signing, sealing, and delivering of an administration bond, in the absence of specific statute requirement beyond this.[18] So also there is a sufficient approval of the bond where an order has been made reciting that bond with good and sufficient security has been given and directing that letters issue,[19] or reciting that an appointment as administrator has been accepted and that the administrator has, with his sureties, executed a bond, all of which is approved by the court.[20]

An approval of the bond dated on the day when the will was first presented for probate has been held sufficient;[21] and, on the other hand, although the statute provides that if the executor shall fail to give bond within a certain time after probate the court may grant letters testamentary to others, the court can approve a bond given by an executor after the expiration of such time.[22]

Filing. It has been required that the bond be filed,[23] but the failure of the principal to file the bond as required by law does not affect the liability of the surety.[24]

Time for giving bond. Where the statute does not fix the time within which a bond must be furnished, it is sufficient that it be filed within a reasonable time after entry of the order requiring the bond; it need not be filed before such order.[25] It has been held within the discretion of the court to extend the time within which bond must be fur-

3. Neb.—Tidball v. Young, 78 N.W. 507, 58 Neb. 261, 76 Am.S.R. 98.
Va.—Cowling v. Nansemond County, 6 Rand. 349, 27 Va. 349.

4. Cal.—Weir v. Mead, 35 P. 567, 101 Cal. 125, 40 Am.S.R. 46.
N.H.—Heydock v. Duncan, 43 N.H. 95.

5. Cal.—Weir v. Mead, 35 P. 567, 101 Cal. 125, 40 Am.S.R. 46.
23 C.J. p 1077 note 25.

6. Mont.—Kenck v. Parchen, 57 P. 94, 22 Mont. 519, 74 Am.S.R. 625.

7. Mont.—Kenck v. Parchen, supra.

8. Iowa.—Morris v. Chicago, R. I. & P. R. Co., 23 N.W. 143, 65 Iowa 727, 54 Am.R. 39.

9. Tex.—Hall v. Monroe, 27 Tex. 700.

10. Ala.—Grimmet v. Henderson, 66 Ala. 521.
23 C.J. p 1077 note 29.

11. Ark.—State v. Hill, 8 S.W. 401, 50 Ark. 458.

12. La.—Canal, etc., Co. v. Grayson, 4 La.Ann. 511.

13. Iowa.—Morris v. Chicago, R. I. & P. R. Co., 23 N.W. 143, 65 Iowa 727, 54 Am.R. 39.
23 C.J. p 1077 note 32.
Approval of sureties see supra subdivision c of this section.

Assistant register of probate was held authorized to examine and approve executrix's bond.—Everett Trust Co. v. Waltham Theatre Amusement Co., 166 N.E. 831, 267 Mass. 350.

Approval by clerk; collateral attack
"The act of the clerk of the county court in receiving and approving the bond of an administrator or executor constitutes a judgment having all the dignity and force of a judgment of a court of general jurisdiction, which cannot be the subject of collateral attack."—Frazier v. Copen, 121 S.E. 503, 95 W.Va. 482.

14. Mo.—Brown v. Weatherby, 71 Mo. 152.
23 C.J. p 1077 note 33.

15. Wis.—Cameron v. Cameron, 15 Wis. 1, 82 Am.D. 652.
23 C.J. p 1077 note 34.

16. Me.—Austin v. Austin, 50 Me. 74, 79 Am.D. 597—Mathews v. Patterson, 42 Me. 257.

17. Ky.—Chesapeake & O. R. Co. v. Banks, 135 S.W. 285, 142 Ky. 746.
23 C.J. p 1077 note 37.

18. Md.—Wilson v. Ireland, 4 Md. 444.

19. Ga.—Ford v. Adams, 43 Ga. 340.

20. Ky.—Chesapeake & O. R. Co. v. Banks, 135 S.W. 285, 142 Ky. 746.

21. Mass.—Wells v. Child, 12 Allen 330.
23 C.J. p 1077 note 41.

22. Wis.—Schnorenberg v. Schnorenberg, 137 N.W. 752, 150 Wis. 537.

23. Ala.—Miller v. Gee, 4 Ala. 359.
Ga.—Richardson v. Whitworth, 30 S.E. 573, 103 Ga. 741.

Delivery sufficient
Where an administrator's bond was placed by the principal in a desk where other probate papers were kept, such desk being in the office of the probate judge, and under his control, the delivery was sufficient.—Brown v. Weatherby, 71 Mo. 152.

24. N.Y.—Haywood v. Townsend, 38 N.Y.S. 517, 4 App.Div. 246.

25. Tex.—Land v. Land, Civ.App., 40 S.W.2d 207, error refused.

nished;[26] but under other authority furnishing the bond within the time specified is mandatory and a failure to do so renders the appointment void.[27]

e. Effect of Failure to Provide, or Cancellation of, Bond

Although there is some authority to the contrary, the common view is that failure to give bond renders an appointment not void, but merely voidable; nor does mere cancellation of the bond revoke an appointment.

Effect of failure to give bond. The common view is that the failure of an executor or administrator to give bond does not render his appointment void, but merely renders it voidable, so that the acts of the representative are valid so long as the letters remain in force;[28] nor will such failure relieve from liability as administrator.[29] Where an administrator was appointed without compliance with a statute requiring administrators to give bond before entering upon their duties, the defect was cured by the giving and approval of the bond after objection had been raised in a proceeding brought by the administrator as such.[30] Nevertheless, there is authority for the view that letters of administration are void if the administrator fails to give bond, or if the bond is not valid,[31] the administration being suspended;[32] and this would certainly seem to be the case where the administrator is appointed to take office on his executing and filing a bond,[33] under which circumstances failure to give a bond within a reasonable time gives the court the right to disregard and set aside its order of appointment and appoint another administrator.[34] The rule has been followed that an executor becomes functus officio if he fails to furnish the bond required of him within a specified time after service of the order on him.[35]

Effect of cancellation of bond. After an administrator has qualified by giving bond, his appointment is not revoked by the mere cancellation of the bond.[36]

f. New or Additional Security

Under a number of statutes, the court may in its discretion direct that new bonds or additional security be furnished in such amount as it deems necessary, if the interest of the estate requires such action, as where some new situation arises; but the court cannot compel an executor or administrator to furnish additional security, having only the power to direct him to do so on pain of being deprived of office for noncompliance. Such new bond is not a substitute for an existing one, but constitutes additional security.

Under a number of statutes, new bonds or additional security are required to be furnished by the executor or administrator in certain cases where the interest of the estate requires it, and especially where some new situation arises, as an increase of assets, or the insufficiency of one or both sureties since qualification;[37] and even after an executor has been qualified without a bond, if some change in the situation or circumstances of the executor or his conduct of the trust appears to render this a prudent measure, the court may in its discretion sub-

26. Ala.—Gordy v. King, 154 So. 525, 228 Ala. 532.

27. La.—Dixon v. Davis, App., 155 So. 407.

28. Kan.—Stanley v. Martin, 22 P. 2d 951, 953, 137 Kan. 894, citing **Corpus Juris.**
Neb.—In re Hoferer's Estate, 216 N. W. 826, 827, 116 Neb. 249, citing **Corpus Juris.**
Okl.—Mahoney v. McBirney, 84 P.2d 600, 602, 184 Okl. 75, citing **Corpus Juris.**
Tex.—Reed v. Harlan, Civ.App., 103 S.W.2d 236, 240, citing **Corpus Juris,** error refused.
23 C.J. p 1077 note 45.
As ground for collateral attack on appointment see infra § 76.

Testamentary requirement of bond
Where the testator's will, while directing that the executors furnish bonds, did not make their qualification or the issuance of letters to them conditional on compliance with such direction, the failure of the executors to give bond did not disqualify them, but merely authorized the surrogate to withhold the issuance of letters testamentary until a bond was furnished.—**Sandford v. Bronx** Boro Builders, 161 N.Y.S. 975, 175 App.Div. 384.

29. Idaho.—Harris v. Coates, 69 P. 475, 8 Idaho 491.

30. Iowa.—In re Wiltsey, 109 N.W. 776, 135 Iowa 430.

31. Mo.—Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.
23 C.J. p 1078 note 47.

32. N.H.—Davis v. Davis, 56 A. 747, 72 N.H. 326.
23 C.J. p 1078 note 47 [a].

33. Ala.—Gray v. Cruise, 36 Ala. 559.
Cal.—Pryor v. Downey, 50 Cal. 388, 19 Am.R. 656.

34. Ala.—Stanley v. Stanley, 81 So. 617, 202 Ala. 661.

35. La.—Dixon v. Davis, App., 155 So. 407—Bobb's Succession, 27 La. Ann. 344.

36. R.I.—Clarke v. Rice, 23 A. 801, 15 R.I. 132.
23 C.J. p 1081 note 97.

37. N.Y.—In re Valionis' Estate, 26 N.Y.S. 540, 176 Misc. 110—In re Damsky's Estate, 298 N.Y.S. 937, 164 Misc. 881.
Tex.—National Surety Corporation v. Ladd, 115 S.W.2d 600, 131 Tex. 295, reversing In re Turner's Estate, Civ.App., 94 S.W.2d 1204—Morris v. Williams, Civ.App., 92 S.W.2d 541, error refused.
23 C.J. p 1078 note 53.
Special bond for sale of real estate under order of court see infra § 590.

It is only for the reasons specified in the statute that a new bond may be required.—Wood v. Williams, 61 Mo. 63.

Removed administrator
Court would not require additional bond from a removed administrator, since such requirement would not be practicable.—Tsaraclis v. Characklis, 3 A.2d 725, 176 Md. 28.

Effect of error
Where an administratrix married and the probate court passed an order requiring her and her husband to execute a new bond, the error of the court in requiring her to join in the bond did not affect her rights as administratrix by virtue of her original appointment or deprive her of authority, in conjunction with her husband, to prosecute a suit on a cause of action due to her intestate. —Cassedy v. Jackson, 45 Miss. 397.

sequently require a bond to be given.[38] New bonds may also be permitted by substitution upon due procedure for the prospective relief of those already bound.[39]

However, if the estate has been completely administered, a new bond cannot be required.[40]

The court cannot compel an executor or administrator to furnish new or additional security;[41] its power extends only to directing him to do so, leaving him the option to comply with such requirement or to be deprived of his office by reason of noncompliance.[42]

Discretion of court. Ordinarily the necessity for new or additional security is a matter resting in the discretion of the court,[43] and the exercise of such discretion should not be disturbed except in case of abuse.[44] The terms of the statute, however, may require the court to call for a new bond on establishment of the circumstances set out in the statute.[45]

The amount of the new or additional security to be required ordinarily rests in the discretion of the court.[46] In determining the amount, regard ought to be had to the value of the estate remaining unadministered, including any accessions thereto beyond the original estimate, and to the extent of the available security still furnished by the original bond;[47] and the additional security should be made to cover all the additional assets and not merely that part to which the moving party is entitled.[48] A statutory requirement that, when a new bond is taken, it shall be in like penalty as the first, is satisfied by taking two new bonds the aggregate of the penalties of which are just equal to the first bond.[49]

Effect of proceedings or order for new security. An administrator against whom a motion has been made to compel the giving of a new bond has, notwithstanding the service of notice of such motion, the right to prosecute a pending action or do any other act having for its direct object the saving of the estate from loss or damage, although he would not have authority to institute an action after service of such notice.[50] An order requiring an executor to give security does not have the effect of suspending his right to exercise the functions of his office in the interim between the time of his appointment and the time fixed at which he is to give security.[51]

Execution of new bond. A new bond required of an executor or administrator may be executed by an attorney in fact duly authorized;[52] and where a new bond is given for the purpose of adding or submitting a new surety, it may be executed by the new surety alone.[53]

Effect of new bond. New bonds, given by an administrator after he has previously given bond, are not substitutes, but are enforceable as additional security, the proportion of contribution between the sureties being determined by the penalties of the several bonds.[54]

g. Proceedings

A proceeding to require security may be instituted by the court of its own motion or by any person interested in the estate. In such proceedings, various questions have been adjudicated with respect to jurisdiction

38. Okl.—In re Dillard's Estate, 88 P.2d 639, 184 Okl. 534, 121 A.L.R. 947.
23 C.J. p 1078 note 54.

39. Ill.—People v. Lott, 27 Ill. 215.
La.—Norris v. Fristoe, 3 La.Ann. 646.

40. Tex.—Hanlon v. Wheeler, Civ. App., 45 S.W. 821.

41. Kan.—In re Dennis' Estate, 68 P.2d 1083, 1085, 146 Kan. 121, quoting **Corpus Juris,** and appeal dismissed Keach v. McDonald, 58 S. Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
23 C.J. p 1079 note 57.

42. Kan.—In re Dennis' Estate, supra, quoting **Corpus Juris.**
23 C.J. p 1079 note 58.
Failure to give security as ground for removal see infra § 90.

43. Kan.—In re Dennis' Estate, supra, quoting **Corpus Juris.**
23 C.J. p 1079 note 59.

Corpus Juris statement quoted at length and applied with respect to increasing bond of guardian.—Lide v. Fidelity & Deposit Co. of Maryland, 4 S.E.2d 263, 266, 191 S.C. 297.

Petition for additional bond properly dismissed
Md.—Neighbors v. Beck, 159 A. 748, 162 Md. 362.

44. Kan.—In re Dennis' Estate, 68 P.2d 1083, 1085, 146 Kan. 121, quoting **Corpus Juris,** and appeal dismissed Keach v. McDonald, 58 S. Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
23 C.J. p 1079 note 60.

45. Tex.—National Surety Corporation v. Ladd, 115 S.W.2d 600, 131 Tex. 295, reversing In re Turner's Estate, Civ.App., 94 S.W.2d 1204.

46. U.S.—Taylor v. Sherburne, D.C., 23 F.Cas.No.13,805, 1 Hayw. & H. 106.

Acquired realty
Where administratrix was in possession of realty acquired by mortgage foreclosure as a salvage operation, which she was required to retain pending opportunity for advantageous sale, she should give new bond in an amount predicated on reasonable values of equity in the realty, deficiency claim against mortgagor, any other assets that were not presently to be distributed, and gross rentals of the realty.—In re Valionis' Estate, 26 N.Y.S.2d 540, 176 Misc. 110.

47. Va.—Atkinson v. Christian, 3 Gratt. 448, 44 Va. 448.

48. La.—Hardy's Estate, 16 So. 208, 46 La.Ann. 1309.

49. Ill.—People v. Lott, 27 Ill. 215.

50. Tex.—Hitson v. Dillahunty, 38 Tex. 585.

51. Ky.—Farmers' Nat. Bank v. McFerren, 11 Ky.L. 183.

52. Tex.—Hall v. Monroe, 27 Tex. 700.

53. N.Y.—In re Patullo, Tuck.Surr. 140.

54. W.Va.—Central Banking & Security Co. v. U. S. Fidelity & Guaranty Co., 80 S.E. 121, 73 W.Va. 197, 51 L.R.A.,N.S., 797.
23 C.J. p 1079 note 69.

and form of the proceedings, notice and appearance, pleading, proof, and the order or decree; appeal from the court's action as to the bond has been permitted by some authorities, but not by others.

The court may of its own motion require security, either in the first instance or in addition to that already given,[55] or it may be demanded by any person interested in the estate,[56] whether as creditor,[57] legatee,[58] or distributee;[59] and the devisees under a will and remaindermen may be given, by statute, the absolute right to require an executor to give bond, even though he is acting under a will exempting him from giving bond.[60]

Jurisdiction; form of proceedings. Proceedings to compel the giving of security by an executor who has received letters without a bond, or to compel the giving of new or additional security, must be instituted in a court of competent jurisdiction[61] by petition, allegation, and answer,[62] or in some cases by rule or order to show cause without petition.[63]

Notice and appearance. Where it is deemed necessary that a bond or an additional bond be required of an executor, the executor is entitled to notice and an opportunity to be heard on the matter.[64]

Where an estate was unsettled when a new bond was required, it was not material that the deceased surety's heirs, who were also beneficiaries of the estate, did not personally appear in the proceedings for a new bond or make any application in their own behalf.[65]

Pleading. Averments substantially in the terms of the prescribed statutory affidavit respecting the petitioner's interest and the necessity of protection are sufficient to present the issue as to whether a bond should be required.[66]

Where those entitled to monetary legacies, made a charge on an estate in remainder, filed a bill in equity seeking to compel the remaindermen to pay such legacies before the death of the life tenant, and the remaindermen were executors of the estate, a mere allegation that the executors had not been required to give bond and that complainants feared their rights might be impaired would not justify the court in exerting its powers to preserve the estate.[67]

Objections to necessity for security. In a proceeding against an administrator by the heirs to compel him to give a new bond, he may plead no funds in his hands belonging to the estate.[68] A party who proceeded to trial on an application to require bond thereby waived the executor's failure to file a written defense to the application, if it was

55. N.Y.—In re Damsky's Estate, 298 N.Y.S. 937, 164 Misc. 381.
23 C.J. p 1079 note 72.

Capacity to initiate proceeding

(1) Irrespective of a person's capacity to initiate proceeding to compel administrator to furnish increased bond, he was privileged to call facts to court's attention by petition, so that court could act on its own motion under statute.—In re Damsky's Estate, 298 N.Y.S. 937, 164 Misc. 381.

(2) However, it has been held that court is without jurisdiction to require bond of its own motion in a statutory proceeding instituted by one having no interest in the estate, warranting institution of such proceeding, since court may so act only in a proceeding conducted in compliance with other statutory provisions pertaining to action of its own motion.—Lasswell v. McFarland, 284 S.W. 843, 219 Mo.App. 665.

56. Ala.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.
Miss.—Prince v. Prince, 93 So. 245.
N.Y.—In re Sweeney's Estate, 213 N.Y.S. 174, 125 Misc. 859.
23 C.J. p 1079 note 73.

A person not interested in the assets of an estate has no right to raise any question as to the sufficiency of legality of the surety on an administrator's bond which has been accepted by the ordinary.
Ga.—Jones v. Smith, 48 S.E. 134, 120 Ga. 642.
Pa.—In re Heasley's Estate, No. 3, 23 Pa.Dist. & Co. 658.

Adopting father of decedent was held not an "heir or other person interested in estate" entitled to proceed to force administrator to furnish bond.—Lasswell v. McFarland, 284 S.W. 843, 219 Mo.App. 665.

57. La.—Kranz's Succession, 39 So. 594, 115 La. 545.
23 C.J. p 1080 note 74—40 C.J. p 1476 note 96 [a].

58. N.Y.—In re Sweeney's Estate, 213 N.Y.S. 174, 125 Misc. 859.
23 C.J. p 1080 note 75.

59. Mo.—In re Main's Estate, App., 152 S.W.2d 696, transferred, see, 146 S.W.2d 597.
23 C.J. p 1080 note 76.

Quantum of distributee's share is immaterial.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

60. Ala.—Cronk v. Cronk, 42 So. 450, 148 Ala. 337.
23 C.J. p 1080 note 77.

61. **In North Carolina** jurisdiction to require additional security is vested in the clerk of the superior court as judge of probate.—Hunt v. Sneed, 64 N.C. 180.

In Pennsylvania the right to order additional security in cases where letters testamentary have been granted to nonresident executors is vested in the register of wills, and not in the orphans' court.—Blinn's Estate, 21 Pa.Dist. 427.

62. Ala.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.
23 C.J. p 1080 note 78.

63. La.—Block v. Bordelon, 2 So. 833, 39 La.Ann. 872.
N.J.—Bird v. Wiggins, 35 N.J.Eq. 111.

64. R.I.—Leonard v. Clark, 53 A. 636, 24 R.I. 470.

65. Iowa.—Banker's Surety Co. v. Wyman, 120 N.W. 116, 141 Iowa 574.

66. Ala.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

Information and belief

Averments in bill, on information and belief by interested party, that estate was "likely to be wasted to the prejudice" of complainant's interest unless executor was bonded, were sufficient.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

67. Va.—Armentrout v. Armentrout, 72 S.E. 721, 112 Va. 660.

68. Tex.—Hanlon v. Wheeler, Civ. App., 45 S.W. 821.

necessary for the executor to file such a defense.[69]

Proof. A sworn petition showing the petitioner's interest in the estate and that such interest is or will be endangered for want of security presents a prima facie case,[70] and places on the executor the burden of showing no necessity for a bond.[71]

Order or decree. The decree made in the premises may be opened, vacated, or modified, where sufficient cause is shown.[72] Where the statute does not expressly require the order for additional security to be served on the administrator, an administrator who was present in person and represented by attorney at the hearing on the application for additional security, and who took an exception to the order when it was made, cannot object that the order was not served on him.[73] In a proper case, depending on the results of the suit, the party making application to require a bond may recover his attorney's fees as part of the costs, by request therefor in the prayer or on costs adjudication.[74]

Review. An appeal from the action of the court with respect to the bond has been held permissible in a number of decisions;[75] but others have denied the right to such appeal,[76] and it has been held that an order for additional security can be reviewed only by certiorari and not by appeal.[77] Even where an appeal is allowed, the review will not be extended beyond the inquiry whether the trial court has abused its discretion.[78]

h. Relief or Protection of Sureties

Within the terms of applicable statutes, a surety may bring proceedings to procure his discharge, reserving existing rights, or to compel the executor or administrator to give countersecurity to indemnify him against apprehended loss or else forfeit his office.

Proceedings may be entertained at the instance of sureties, after due notice to all interested, for their discharge, reserving existing rights to others, so as to compel the executor or administrator to file a new bond or else vacate the office.[79] In some jurisdictions a surety who is in fear of suffering loss by reason of his suretyship may obtain an order of court requiring the executor or administrator to give countersecurity to indemnify him against such apprehended loss, in default of which the letters testamentary or of administration may be revoked;[80] but this right is not an incident of the contract of suretyship, and it does not exist unless

69. Ga.—Pass v. Pass, 192 S.E. 64, 56 Ga.App. 59.

70. Ala.—Bowie v. Phenix-Girard Bank, 185 So. 363, 237 Ala. 44.

71. Ala.—Bowie v. Phenix-Girard Bank, supra—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

Evidence not requiring bond

Evidence was held to sustain decision not to require bond of executrix on ground of dissipation and waste of estate.—In re Miller's Estate, 262 P. 646, 146 Wash. 324.

72. N.Y.—In re Filley, 20 N.Y.S. 427, Pow.Surr. 234.
23 C.J. p 1080 note 86.

73. Cal.—Barrett v. Placer County Super. Ct., 43 P. 519, 111 Cal. 154.
23 C.J. p 1081 note 87.

74. Ala.—Farmers' Bank & Trust Co. v. Borroughs, 114 So. 909, 217 Ala. 97.

When client liable

Attorneys must seek their compensation from client, and not from estate, for services rendered in requiring executrix to give bond, if services did not inure to benefit of other creditors of estate; such matter is for the determination of the probate court.—Keith & Wilkinson v. Forsythe, 151 So. 60, 227 Ala. 555.

75. Va.—Fairfax v. Fairfax, 7 Gratt. 36, 48 Va. 36.
23 C.J. p 1081 note 89.

76. Ala.—Betts v. Cobb, 25 So. 692, 121 Ala. 154.
3 C.J. p 571 note 47 [c] (1)–(4).

Interlocutory decree overruling demurrers of defendants, individually and as executors, to petition filed by legatee praying for order requiring executors to give bond and for other relief, was not "appealable order" or "decree" within statute authorizing appeals from certain interlocutory decrees.—Hart v. Greet, 134 So. 658, 223 Ala. 34.

77. Cal.—In re McPhee, 101 P. 530, 10 Cal.App. 162.

Requisites for certiorari

Certiorari to review a failure to require sufficient bond is not a proper remedy in absence of a showing of an application made to the probate court for a new appraisement of the estate and for additional bond.—Morris v. Williams, Tex.Civ.App., 92 S.W.2d 541, error refused.

78. Ark.—Dillen v. Fancher, 125 S.W.2d 110, 197 Ark. 995.
Md.—Pratt v. Hill, 92 A. 543, 124 Md. 252.

Record not showing estate

Where no estate was disclosed in record of proceeding in which a bond was requested, reviewing court would not impute error to trial court in denying legatee's petition to require bond, but would make the decree without prejudice to rights of any party in interest to make an application to require bond.—Bowie v. Phenix-Girard Bank, 185 So. 363, 237 Ala. 44.

79. Tex.—National Surety Corporation v. Ladd, 115 S.W.2d 600, 131 Tex. 295, reversing In re Turner's Estate, Civ.App., 94 S.W.2d 1204.
23 C.J. p 1081 note 93.
Discharge of sureties by order of court see infra § 960.

Right to invoke jurisdiction

Although court of ordinary has general jurisdiction over discharge of sureties on administrators' bonds and substitution of new sureties, no one may invoke that jurisdiction except those specifically authorized by statute to do so.—Great American Indemnity Co. v. Jeffries, 16 S.E.2d 135, 65 Ga.App. 686.

Court must require a new bond, where, under circumstances detailed in statute, surety applies to be discharged from liability for future acts of executor or administrator.—National Surety Corporation v. Ladd, 115 S.W.2d 600, 131 Tex. 295, reversing In re Turner's Estate, Civ.App., 94 S.W.2d 1204.

80. Tenn.—Hartford Accident & Indemnity Co. v. White, 115 S.W.2d 249, 22 Tenn.App. 1.
23 C.J. p 1081 note 94.

Issuance of such order is not obligatory, but court has discretion to decline grant of such relief.—Hartford Accident & Indemnity Co. v. White, supra.

it is clearly given by law.[81] A surety may not seek indemnification from third parties under a contract which is illegal.[82]

§ 68. Failure to Qualify or Act

Generally, while heirs may not sue to compel one named as executor to qualify or formally renounce, the court may take cognizance of a nominee's failure to qualify as executor or administrator within a reasonable time, and appoint another person; but a nominee may qualify after the time provided where the failure to act within the proper time was not due to his fault.

An executor named in a will who has failed to qualify to act has no authority to bind the estate.[83]

In the absence of statute, no action will lie by heirs to compel the person nominated as executor either to qualify or formally renounce,[84] but in general the court itself may take cognizance that the person nominated as executor or appointed administrator has not qualified within a reasonable time, and appoint another person to serve in his place,[85] and this having been done, the person who was primarily entitled to letters loses his right and cannot subsequently have the appointee removed merely because he becomes prepared to qualify, and desires the appointment,[86] nor can he even intervene in a subsequent contest for administration.[87] It has been held, however, that unexplained delay by a person designated as executor in offering to qualify as such and to proceed to administer the estate does not deprive him of such right in the absence of a showing of an express refusal to qualify or other conduct establishing unfitness.[88]

Where the failure of an executor to qualify within the statutory period after the probate of the will was due to the refusal of the judge to permit letters testamentary to issue, he could qualify later;[89] and a failure to qualify within the time provided by the will will not disqualify an executor who acted with reasonable diligence, and whose failure to qualify was due to unavoidable delay in probating the will.[90] A creditor applying for appointment as dative testamentary executor or administrator does not disqualify himself by the mere fact of his delay in taking inventory and publishing letters of administration.[91]

E. ISSUANCE OF LETTERS, NOTICE, AND EVIDENCE OF APPOINTMENT OR AUTHORITY

§ 69. Issuance of Letters

a. In general
b. Form and contents of letters

a. In General

The authority of an executor or administrator is usually evidenced by letters testamentary or letters of administration issued after due appointment and qualification.

The authority of an executor or administrator is evidenced by letters testamentary or of administration[92] issued to him pursuant to an order of the court on his appointment and qualification.[93] Such

81. Tenn.—Hartford Accident & Indemnity Co. v. White, supra.
23 C.J. p 1081 note 95.

82. **Recovery against partnership**
In a case where a surety signed an administration bond under the representation of a firm of which the administrator was a member, that the firm would take possession of the assets of the estate and conduct the administration as a partnership affair, and that the surety would become in effect the surety of the firm and not of the partner who was appointed administrator, it was held that such arrangement was contrary to the policy of the law, because it was designed to enable persons other than the one to whom the administration was granted to obtain possession of the estate, and that, therefore, the surety could not force the firm to make good any loss sustained by him in consequence of his suretyship.—Forsyth v. Woods, Mo., 11 Wall, U.S., 484, 20 L.Ed. 207.

83. Pa.—Lowrie v. Dollar Savings & Trust Co., 109 A. 607, 266 Pa. 135.

84. Iowa.—Cable v. Cable, 40 N.W. 700, 76 Iowa 163.
Acceptance or renunciation:
Administrator see supra § 47.
Executor see supra § 29.

85. Wash.—Wilkie v. Bailey, 133 P. 388, 74 Wash. 241.
23 C.J. p 1091 note 91.

Under civil law, where the executorship becomes vacant, the Roman practice usually revives and the administration devolves on the heirs.—Ex p. Ramos, 19 Puerto Rico 154—40 C.J. p 1479 note 55.

86. N.Y.—Williams' Case, 18 Abb. Pr., N.Y., 350.
Wyo.—Rice v. Tilton, 80 P. 828, 13 Wyo. 420.

87. Ga.—Howard v. Worrill, 42 Ga. 397.

88. Ky.—Kuechler v. Rubbathen, 99 S.W.2d 193, 266 Ky. 390.

89. Tex.—Journeay v. Shook, 152 S. W. 809, 105 Tex. 551, reversing, Civ.App., 149 S.W. 406.

90. Tex.—Rosenberg v. Wickes, Civ. App., 169 S.W. 968.
23 C.J. p 1091 note 95.

91. La.—Succession of Strange, 177 So. 579, 188 La. 478.

92. Colo.—Denver, S. P. & P. R. Co. v. Woodward, 4 Colo. 1.
La.—Vogel's Succession, 20 La.Ann. 81.
23 C.J. p 1081 note 98.
Evidence of appointment see infra § 71.

"Letters testamentary" defined
"An instrument in writing granted by the judge or officer having jurisdiction of the probate of wills, after the probate of a will, to an executor, authorizing him to act as such."—In re Gurdy, 63 A. 322, 323, 101 Me. 73, quoting Bouvier L.D.

Formerly there was no such thing as letters testamentary. The probate and the executor's authority consisted of a copy of the will, made out under seal and delivered to the executor, together with a certificate of its having been proved, and such copy and certificate were called in the alternative "the probate or letters".—In re Kennedy's Will, 174 N. Y.S. 429, 106 Misc. 216.

93. La.—Wirt v. Pintard, 4 So. 14, 40 La.Ann. 238.
23 C.J. p 1082 note 99.

letters are, however, usually considered merely as credentials furnished him for his own convenience, and are not necessary where the decree and records of the court show his right to act.[94] Letters should be granted by the proper judicial authority without delegation of power.[95]

The probate of a will is necessary before letters testamentary can be issued,[96] but such probate does not determine the persons to whom letters are to be issued or the time of issuance.[97]

Issuance pending appeal. General letters cannot, as a rule, issue while an appeal is pending concerning the right to administration or the probate of the will,[98] but it is sometimes provided by statute that an appeal from a surrogate's decree admitting a will to probate does not stay the issuing of letters testamentary, where, in the surrogate's opinion, manifested by an order, the preservation of the estate requires the issuance of the letters.[99]

Presumptions. The grant of letters of administration may not be presumed from the mere lapse of time,[1] although the grant or issuance of letters testamentary may be presumed from other facts proved.[2]

Domiciliary letters. Domiciliary letters testamentary are letters testamentary issued at the place of the testator's domicile, as distinguished from ancillary letters issued at some place other than the domicile, where personalty of the testator is found.[3]

Issuance to wrong person. Where the court orders letters to issue to one person, an issue of letters to another is unauthorized and void.[4]

Premature delivery. A delivery of the letters before the bond is given does not render the appointment void, but is only an irregularity, which is cured by the subsequent filing of the bond.[5]

b. Form and Contents of Letters

A variance from the prescribed form of letters testamentary or letters of administration or from the form usually used ordinarily does not invalidate the letters or the acts of the executor or administrator.

Letters testamentary or of administration usually bear the seal of the court and the signature of the judge, and are countersigned by the register or clerk,[6] but the want of a seal or of the signature of the clerk does not necessarily invalidate the letters.[7]

The special phraseology of letters of administration is unimportant,[8] and, where the law prescribes no specific form, a variance from the form usually used is immaterial.[9] Even where the form of letters is prescribed by statute, the acts of executors are not invalidated because their letters are not in precisely the form prescribed.[10]

Presumptions. It is presumed that letters of administration which are not introduced in evidence conform to statutory requirements where the grant of letters is established.[11]

Ministerial act
Ala.—Glover v. Lyon, 57 Ala. 365.

Duty of court
Under a statute which makes it the duty of a court to grant letters testamentary to the executors named in the will, the court may and must adjudicate, after the probate of the will, whether letters testamentary shall issue.—Taylor v. Martin's Estate, 3 S.W.2d 408, 117 Tex. 302, reversing, Civ.App., 263 S.W. 1102.

Issuance during life of child born after execution of will
Statute protecting child born after execution of will forbids issuance of letters testamentary during child's life, although will is probated.—Taylor v. Martin's Estate, supra.

94. La.—Vogel's Succession, 20 La. Ann. 81.
23 C.J. p 1082 note 1.

95. N.Y.—Roderigas v. East River Sav. Inst., 76 N.Y. 316, 32 Am.R. 309.
23 C.J. p 1082 note 2.

96. Ala.—Blacksher Co. v. Northrup, 57 So. 743, 176 Ala. 190, 42 L.R.A., N.S., 454.
Me.—In re Gurdy, 63 A. 322, 101 Me. 73.

Necessity of probate of will generally see the C.J.S. title Wills § 310, also 68 C.J. p 876 note 33-p 878 note 59.

Want of formal order or decree of probate as affecting validity of letters see infra § 73.

97. Me.—Chadwick v. Stilphen, 74 A. 50, 105 Me. 242—In re Gurdy, 63 A. 322, 101 Me. 73.

98. Md.—State v. Williams, 9 Gill 172.
N.C.—Slade v. Washburn, 25 N.C. 557.
Administrators pendente lite see infra § 1031.

99. N.Y.—In re Riede, 122 N.Y.S. 600, 138 App.Div. 83, affirmed 95 N.E. 1127, 201 N.Y. 596.

1. Md.—Smith v. Wilson, 17 Md. 460, 79 Am.D. 665.
Presumption of validity of appointment and letters see infra § 74.

2. U.S.—Platt v. McCullough, C.C. Ohio, 19 F.Cas.No.11,113, 1 McLean 69.

Simultaneous issuance with probate of will
It may be presumed that letters testamentary were issued simultaneously with the probate of the will.—Foulks v. Foulks, 6 N.Y.S. 112, 2 Silv.Sup. 516.

3. N.Y.—Lockwood v. U. S. Steel Corp., 138 N.Y.S. 725, 727, 153 App. Div. 655.
Foreign and ancillary administration see infra §§ 988–1015.

4. Cal.—In re Frey, 52 Cal. 658.

5. Mich.—Brown v. Hannah, 115 N. W. 980, 152 Mich. 33.

6. Cal.—Sharp v. Dyre, 27 P. 789, 64 Cal. 9.
23 C.J. p 1082 note 8.

7. Cal.—Dennis v. Bint, 54 P. 378, 122 Cal. 39, 68 Am.S.R. 17.
Mo.—Post v. Caulk, 3 Mo. 35.
23 C.J. p 1082 note 8 [a], [b].

8. N.Y.—Matter of McDonald, 145 N.Y.S. 267, 160 App.Div. 86, reversing 143 N.Y.S. 775, 82 Misc. 135, and affirmed 105 N.E. 407, 211 N. Y. 272.

9. La.—Carlon's Succession, 26 La. Ann. 329.

10. Md.—Parker v. Leighton, 102 A. 552, 131 Md. 407.

The trust confided to an executor is set forth and defined by his letters testamentary.—Gibbons v. Riley, 7 Gill, Md., 81.

11. Mo.—Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

§ 70. Notice of Appointment

Statutes sometimes require that an executor or administrator shall cause notice of his appointment to be published.

The appointment of an administrator is a matter of public record and constitutes constructive notice to all concerned.[12]

However, it is sometimes required by statute that an executor or administrator shall cause notice of his appointment to be published in some newspaper of general circulation.[13]

§ 71. Evidence of Appointment or Authority

Under certain circumstances the appointment and qualification of an executor or administrator may be presumed; letters testamentary or letters of administration are evidence, but not the only evidence, of the appointment and authority of an executor or administrator.

A presumption that a person was duly appointed administrator and that he was duly acting in that capacity in certain matters may arise after the lapse of an extended period, where documents in evidence tend to show that such person was administrator and was recognized as such by the court,[14] and one who has been recognized as the administrator of an estate, both by the court in which the administration was pending and by all parties interested in the estate, for an extended period, may be conclusively presumed to be the legal administrator when his acts are collaterally attacked.[15]

The presumption that an administrator had duly qualified arises after the lapse of a considerable period of time where there is evidence that he acted as administrator and was recognized as such by the court,[16] and it may be presumed that an administrator qualified at the time of appointment.[17] The party who asserts want of qualification ordinarily must establish his claim.[18]

Letters of administration are always prima facie evidence of appointment,[19] and are sometimes regarded as conclusive.[20] They are not, however, the only means by which the appointment of an administrator may be proved.[21] Thus the original judgment appointing an administrator has been held prima facie evidence of the appointment,[22] and an attested copy of the order of appointment has been held conclusive.[23]

Letters testamentary or of administration are admissible to show the authority of an executor or administrator,[24] and are prima facie evidence of his authority or of his right to act thereunder,[25] and,

12. Ky.—Albert Neurath & Son v. Dugan's Adm'r, 63 S.W.2d 769, 250 Ky. 601.

13. Ohio.—Ardrey v. Shell, 82 N.E. 1075, 77 Ohio St. 218.
23 C.J. p 1082 note 16.

14. Me.—Battles v. Holley, 6 Me. 145.
Tex.—Pendleton v. Shaw, 44 S.W. 1002, 18 Tex.Civ.App. 439.
23 C.J. p 1083 note 18 [c].
Presumptions as to issuance of letters see supra § 69.

15. Tex.—Halbert v. Martin, Civ. App., 30 S.W. 388.

About eighteen years
Tex.—Halbert v. De Bode, 40 S.W. 1011, 15 Tex.Civ.App. 615.

16. Me.—Battles v. Holley, 6 Me. 145.
23 C.J. p 1083 note 18 [c] (1).

17. **Presumption indulged after verdict**
Or.—Aiken v. Coolidge, 6 P. 712, 12 Or. 244.

Filing bond
It may be presumed that an administratrix filed her bond at the time of her appointment.—Gilbert v. Branchflower, 231 P. 982, 114 Or. 508.

18. Or.—Gilbert v. Branchflower, supra.

Oath
(1) Where letters of administration have been issued, a party who denies that the person to whom the letters were issued took the required oath has the burden of proving the want of an oath.—Craig's Heirs v. Frost Lumber Industries, 120 So. 709, 10 La.App. 541.

(2) In a suit by heirs of intestate in which they questioned acts of administrator to whom letters of administration had been issued, the court must assume that the administrator took the required oath in view of plaintiffs' failure to make proof to the contrary.—Craig's Heirs v. Frost Lumber Industries, supra.

19. U.S.—In re Agnew, D.C.N.Y., 255 F. 650.
23 C.J. p 1083 note 19.
Letters as prima facie evidence of validity of appointment see infra § 71.

Sufficiency of evidence
Evidence which included certified copies of letters of administration and affidavit showing facts as to appointment was sufficient to show the appointment of the person designated in such letters and also to show that another person was not the duly appointed administrator of the estate involved.—La Paloma Land Co. v. Shannon, 265 P. 295, 89 Cal.App. 469.

20. La.—Hamblin's Succession, 8 Rob. 130.
Minn.—Moreland v. Lawrence, 23 Minn. 84.
23 C.J. p 1083 note 20.

21. Colo.—Denver, S. P. & P. R. Co. v. Woodward, 4 Colo. 1.
23 C.J. p 1083 note 18 [b].

22. Okl.—Daugherty v. Feland, 157 P. 1144, 59 Okl. 122.

Order of appointment, oath, and bond
Where a party alleged his appointment and qualification as administrator and the adverse party admitted such qualification, introduction by the former of the order of the probate court appointing him administrator and of the oath and bond constituted proof of appointment.—Pierre v. Baker, Tex.Civ.App., 143 S.W.2d 681, error refused.

23. W.Va.—Rush v. Brannon, 95 S. E. 521, 82 W.Va. 58.

24. N.Y.—Shaw v. New York Cent. & H. R. Co., 91 N.Y.S. 746, 101 App. Div. 246.
23 C.J. p 1082 note 17.

25. La.—Succession of Sullivan, 144 So. 505, 175 La. 813—Cherry's Succession v. Metropolitan Life Ins. Co., App., 176 So. 645.

Right to act and to close administration
Letters testamentary were prima facie evidence of right to act thereunder and after six months to close administration if the facts warranted.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80.

Sufficiency of evidence
(1) Letters testamentary designating a person as executrix and

under some circumstances, may be conclusive evidence of the authority and qualification of the person to whom they are granted.[26] They are not, however, the only evidence by which his authority may be established.[27] The date on which the administrator qualified may be established either by the letters of administration or the order of appointment.[28]

F. OPERATION AND EFFECT OF APPOINTMENT

§ 72. In General

The appointment of an administrator or the confirmation of a person as executor is operative and effective until the representative status or authority of the executor or administrator is duly terminated; the acts of the executor or administrator under a voidable appointment or grant of letters are binding if performed before his authority is revoked.

The appointment of an administrator or the grant of letters of administration by a court or tribunal of competent jurisdiction constitutes the person appointed or designated the administrator of the estate,[29] even though erroneously made or granted,[30] and such appointment and letters are valid and effective until revoked or terminated in an appropriate direct proceeding.[31] A judgment confirming a person as executor is given effect until it is reversed on appeal or is voided in an appropriate proceeding,[32] and, where a will is probated as a will in common form, and letters testamentary are issued to the executor designated in the will and are recorded as provided by statute, the executor may proceed with the regular administration of the estate.[33] Where the probate court, having jurisdiction of a decedent's estate, granted letters of administration during the prescribed period, and the person appointed duly qualified, the administration was thereupon properly opened and remained in force, although the administrator failed to do any further act.[34] The responsibilities of the representative are fixed by the appointment,[35] and an executor, whether named in the will or by delegated power, has the right to defend, in the courts, his authority to act.[36]

deed conveying to her the land involved constituted sufficient evidence of such person's representative capacity.—Coastal Public Service Co. v. Mordecai, 174 S.E. 147, 49 Ga.App. 60.

(2) Letters of administration, if not revoked or suspended, are sufficient proof of the representative character of the administrator designated, unless the record affirmatively shows want of jurisdiction to make the appointment.—Jerauld v. Chambers, 187 P. 33, 44 Cal.App. 771.

26. Cal.—In re Way's Estate, 85 P. 2d 563, 29 Cal.App.2d 669—Lane v. Starkey, 210 P. 277, 59 Cal.App. 140.
N.Y.—Carroll v. Carroll, 60 N.Y. 121, 19 Am.R. 144.
23 C.J. p 1083 note 20.

27. Miss.—Barr v. Sullivan, 23 So. 772, 75 Miss. 536.
23 C.J. p 1083 note 18.

Copy of will
"The proof of the authority of the executor to act as such is a production of the copy of the will by which he was appointed, certified under the seal of the ordinary. This is usually called probate."—In re Miller's Estate, 65 A. 681, 682, 216 Pa. 247—Miller v. Henderson, 61 A. 913, 914, 212 Pa. 263.

Execution of deed
Deed by executors duly recorded was admissible as tending to show title over objection that letters testamentary did not accompany deed.—Tietjen v. Meldrim, 159 S.E. 231, 172 Ga. 814.

Order appointing administrator
showing on its face that administrator qualified before clerk on date prior to that on which suit was instituted by administrator for death of his deceased was admissible in evidence to establish date on which administrator qualified, notwithstanding order was not spread on records by clerk until after such action was begun.—Clinchfield Coal Corporation v. Webber, 181 S.E. 357, 165 Va. 49.

In Texas
(1) The probate proceeding in which a person was appointed administrator was admissible to show such person's authority.—Rogers v. Tompkins, Civ.App., 87 S.W. 379.

(2) Where a party alleged his appointment and qualification as administrator and the adverse party admitted such qualification, introduction by the former of the order of the probate court appointing him administrator and of the oath and bond constituted proof of qualification.—Pierre v. Baker, Civ.App., 143 S.W.2d 681, error refused.

28. Va.—Clinchfield Coal Corporation v. Webber, 181 S.E. 357, 165 Va. 49.

29. N.J.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46—Buckley v. Howard Sav. Inst., 186 A. 52, 14 N.J.Misc. 620.
Validity of appointment of administrator where decedent left will see supra § 30.

Right to office fixed
Judgment appointing administrator fixes appointee's right to office at least quoad parties dealing with him as such.—Arceneaux v. Cormier, 144 So. 722, 175 La. 941.

30. N.J.—Charles Wiener & Sons v. Fischer, 179 A. 632, 118 N.J.Eq. 387—Quidart v. Perglaux, 18 N.J.Eq. 472—Buckley v. Howard Sav. Inst., 186 A. 52, 14 N.J.Misc. 620.
Effect of errors and irregularities see infra § 73.

31. Iowa.—In re Riese Estate, 297 N.W. 796, 230 Iowa 397.
La.—Succession of Berdennagel, 163 So. 843, 183 La. 398.
Collateral and direct attack generally see infra § 76, 77.
Duration and termination of authority see infra §§ 78–94.

32. La.—Vogel's Succession, 20 La. Ann. 81.

33. Ga.—Harris v. Adams, 103 S.E. 229, 150 Ga. 204, answers to certified questions conformed to 103 S.E. 473, 25 Ga.App. 373—Maund v. Maund, 20 S.E. 360, 94 Ga. 479.
Operation and effect of probate of will see the C.J.S. title Wills §§ 573–580, also 68 C.J. p 1226 note 36 —p 1245 note 28.

34. Tex.—Kuck v. Dixon, Civ.App., 127 S.W. 910.
23 C.J. p 1083 note 30.

35. La.—Brownson v. Baker, 11 La. 409.
23 C.J. p 1083 note 28.

36. Mich.—Brown v. Just, 77 N.W. 263, 118 Mich. 678.

It has been held that letters of administration issued by the judge of the probate court in vacation are not limited in point of time to the succeeding term, and are valid until rejected by the court.[37]

Appointment by clerk in general. The appointment, pursuant to statute, of an administrator by the clerk of court, when the appointment is not contested, has the same force and effect as if made by the court, if there has been no appeal or if the appointment is not set aside.[38] Under a statute making the grant of letters by the clerk of court in vacation subject to confirmation or rejection by the court, letters of administration so granted are not limited in point of time so as to continue only to the succeeding term and then expire unless confirmed by the court; if otherwise valid, they remain valid and effective unless and until they are rejected by the court.[39]

Jurisdiction or authority to appoint. The appointment of an administrator is void where it is made by a court which is wholly without authority to make the appointment,[40] or where want of jurisdiction to make the appointment in the particular case appears on the face of the record.[41] The grant of administration is at least prima facie valid, however, where the facts giving the probate court jurisdiction properly appear of record;[42] and, where the probate court is a court of general jurisdiction in regard to probates and the grant of administrations, and has jurisdiction in regard to the whole subject matter, although it may err in taking jurisdiction of the particular case, yet the order is generally not void but only voidable.[43] Where the court of the county in which decedent had resided or had been domiciled is the court authorized to grant administration or letters, a grant made in another county ordinarily is not void but only voidable,[44] and cannot be disregarded by the court of the county in which decedent was actually domiciled.[45] However, according to some decisions, a grant of administration in a political subdivision of the state other than that in which decedent was domiciled at the time of his death is a nullity,[46] and it has been held that the appointment of an administrator by the clerk of the probate court in vacation, which was not affirmed by the court, is abso-

37. Mo.—Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

38. Iowa.—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.
Authority of clerk to appoint administrator see supra § 14.

39. Ark.—Jonesboro, L. C. & E. R. Co. v. Gunn, 298 S.W. 485, 174 Ark. 1148—St. Louis-San Francisco Ry. Co. v. Pearson, 281 S.W. 910, 170 Ark. 842, certiorari denied 47 S.Ct. 101, 273 U.S. 711, 71 L.Ed. 853.

Maintenance of action by administrator

(1) Administrator may maintain action for damages for deceased's pain and suffering, although letters of administration, issued by clerk in vacation, have never been approved by probate court.—Jonesboro, L. C. & E. R. Co. v. Gunn, 298 S.W. 485, 174 Ark. 1148.

(2) Administratrix appointed by clerk in vacation could bring action under Federal Employers' Liability Act as such to recover damages for the wrongful killing of intestate, even though probate court did not confirm appointment when it next convened.—St. Louis-San Francisco Ry. Co. v. Pearson, 281 S.W. 910, 170 Ark. 842, certiorari denied 47 S.Ct. 101, 273 U.S. 711, 71 L.Ed. 853.

40. Okl.—Barrett v. Steele, 117 P.2d 1020.
Collateral attack on void appointment see infra § 76 b.

41. Ga.—Stewart v. Patterson, 111 S.E. 421, 152 Ga. 754.

42. Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.

43. Tex.—Salas v. Mundy, Civ.App., 125 S.W. 633.
Va.—Andrews v. Avory, 14 Gratt. 229, 55 Va. 229, 73 Am.D. 355.
23 C.J. p 1089 note 69.

44. Ala.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597—Kling v. Connell, 17 So. 121, 105 Ala. 590.
Ill.—Chicago & E. I. R. Co. v. Wolfrum, 136 Ill.App. 161.
Ind.—Sample v. Adams, 100 N.E. 573, 54 Ind.App. 680.
Iowa.—Ferguson v. Connell, 230 N. W. 859, 210 Iowa 419—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.
W.Va.—Colley v. Calhoun, 109 S.E. 484, 89 W.Va. 399.
23 C.J. p 1012 note 49.
Domicile or residence of decedent as basis of jurisdiction see supra § 18.

Validity of appointment until vacated

(1) Appointment of administratrix by probate court of wrong county was valid until vacated.—Thompson v. Kansas City C. C. & St. J. Ry. Co., 27 S.W.2d 58, 224 Mo.App. 415.

(2) Appointment of an administrator in a county wherein intestate left no estate, and did not reside at his death is treated as valid until vacated or otherwise abrogated.—Colley v. Calhoun, 109 S.E. 484, 89 W. Va. 399.

Necessity for appeal

One desiring to attack appointment of administrator by register of county in which decedent died on ground that decedent resided in another county should appeal from register's decision.—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.

45. Mo.—In re Davidson, 73 S.W. 373, 100 Mo.App. 263.

Validity of second letters

Where there was doubt as to which of two counties administration belonged because of conflicting claims as to the county of which decedent died a resident, and administration had been granted and letters issued in one of such counties, letters of administration subsequently issued in the other county were absolutely void.—In re Kladivo's Estate, 176 N. W. 262, 188 Iowa 471.
Second appointment in general see supra § 48.

46. In Louisiana

In view of the fact that the only court that has jurisdiction to open a succession and put the heirs in possession or appoint or confirm an administrator or executor is the court in the parish in which decedent had his domicile if he had a domicile or fixed place of residence within the state, a decree of any other court in the state opening a succession and putting heirs in possession or appointing an administrator is a nullity.
U.S.—Davis v. Martin, La., 108 F. 6, 51 C.C.A. 27.
La.—Succession of Franklin, 114 So. 583, 164 La. 654—Taylor v. Williams, 110 So. 100, 162 La. 92—Miltenberger v. Knox, 21 La.Ann. 399—Succession of Williamson, 8 La.Ann. 261—Carter v. Cambrice, 1 La.App. 156.

lutely void, where decedent was not a resident of the county and did not die therein.[47] The appointment of an administrator in a county other than that in which decedent died a resident has been regarded as wholly void where want of jurisdiction in that regard appears on the face of the record of the proceeding in which the appointment was made.[48]

Time as of which appointment or letters effective. A probate decree appointing an administrator of decedent's estate is effective from the date of its rendition, and not merely from the date of its entry.[49] The appointment of, or grant of letters to, an executor or administrator relates back to the death of decedent.[50]

Extraterritorial effect. A grant of administration, strictly speaking, operates only within the jurisdiction where it is made;[51] letters testamentary or letters of administration ordinarily have no legal force or effect beyond the territorial limits of the state in which they are granted.[52]

Effect on proceedings in another court. If a suit is instituted in chancery to determine the ownership of a trust fund, the question to be ascertained being as to when a cestui que trust died, the grant of letters of administration by the probate court and the making of a finding as to the date of the death of such cestui que trust does not affect the jurisdiction of chancery in such suit.[53]

Estoppel or loss of right to question or object. Heirs or next of kin, by acquiescing in the appointment of an administrator, may be estopped to question the propriety of making the appointment.[54]

Where a claimant against a decedent's estate filed his claim with decedent's widow after she had been appointed administratrix with the will annexed, and after the court had annulled her appointment as independent executrix under the will, and claimant thereafter appealed from the court's action in postponing his claim in favor of others, he was not entitled to object to the validity of the court's proceedings in changing the character of the administration.[55]

The right to object to an appointment may be lost by undue delay in making the objection.[56]

Validity of representative's acts or dealings. As a general rule all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appoint-

47. Ark.—Groschner v. Winton, 226 S.W. 162, 146 Ark. 520.

48. Iowa.—In re King, 75 N.W. 187, 105 Iowa 320.
Kan.—Anderson v. Walter, 99 P. 270, 78 Kan. 781.

49. Ala.—Louisville & N. R. Co. v. Perkins, 44 So. 602, 152 Ala. 133.

50. Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.
Ky.—Gibson's Adm'r v. Gibson, 43 S. W.2d 343, 241 Ky. 74.
Vt.—Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100—Taylor v. Phillips, 30 Vt. 238.
Relation back of:
Appointment or letters so as to validate acts of executor or administrator see infra § 151.
Title to personal property see infra § 299.

51. Me.—Nash v. Benari, 105 A. 107, 117 Me. 491.
N.J.—Normand v. Grognard, 17 N.J. Eq. 425.
Foreign and ancillary administration see infra §§ 988–1015.
Recognition of judgments or decrees of probate courts of sister states see the C.J.S. title Judgments § 898, also 34 C.J. p 1155 note 95–p 1156 note 24.

52. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Tex.—Clarke v. Webster, Civ.App., 94 S.W. 1088.

Letters issued in domiciliary jurisdiction

Letters testamentary, issued in domiciliary jurisdiction, have no extraterritorial effect.—Michigan Trust Co. v. Turney, Tex.Civ.App., 36 S.W. 2d 787, error refused.

Administrations in different states as independent

The estate of a decedent, wherever he may reside at the time of his death, and in whatsoever different states or countries portions of the property and assets may be situated, is a unit; but, where administrations are granted in different states or countries, in which part of the property is situated, they are separate and independent of one another.
Ala.—Equitable Life Assur. Soc. v. Vogel, 76 Ala. 441, 52 Am.R. 344.
Tex.—Clarke v. Webster, Civ.App., 94 S.W. 1088.

53. Ill.—Dickinson v. Donovan, 160 Ill.App. 195.

54. S.C.—Mitchell v. Dreher, 147 S. E. 646, 150 S.C. 125.

55. Tex.—King v. Battaglia, 84 S. W. 839, 38 Tex.Civ.App. 28.

56. **Failure to object by one having due notice of proceeding**

In proceeding for appointment of an administrator, wherein petition was filed and statutory notice was duly given, and objector had actual notice of pendency of proceedings in ample time to have filed objections thereto prior to hearing, but failed to do so until more than one year after appointment of an administrator, no objection to court's jurisdiction to appoint administrator could be predicated on alleged fact that one appointed administrator was not legally married to deceased or had no beneficial interest in her estate. —In re Sheerer's Estate, 289 N.W. 529, 137 Neb. 374.

Objection to necessity of appointment

(1) Where judgment ordering administration of successions and appointing administrator therefor was not appealed from within one year, question of necessity for administration of successions was concluded, and claimant was not entitled to sheriff's sale of property belonging to successions to effect partition by licitation until termination of administration, especially where administration of successions had been in progress with claimant's acquiescence for more than a year.—Hogan v. Hogan, 162 So. 772, 182 La. 1057.

(2) The right to have the appointment of an administrator set aside on the ground that it was not necessary has been denied as urged too late where the application for letters was duly advertised and objection to the appointment was first made by way of objection to the final accounting of the administrator.—Succession of Lawson, 120 So. 538, 10 La.App. 52.

ment is voidable[57] and his status or authority as representative of the estate is subsequently terminated,[58] and he will be protected in all lawful and bona fide acts done before such termination.[59] A person who deals in good faith with an administrator whose appointment is not void ordinarily is protected,[60] even though the status of the administrator as such is subsequently terminated.[61]

If, on the other hand, the grant is absolutely void, the general rule is that all acts done pursuant to it are void also,[62] although, according to some cases, some acts may be valid even when the grant of letters is void.[63]

Representative's denial of, or attack on, representative character. As a general rule it is never permissible for an administrator to impeach his own appointment,[64] but it has been held that an administrator may show in defense to a suit against him

57. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 671, 131 Fla. 516, citing **Corpus Juris.**

Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 380, 180 Ga. 500, citing **Corpus Juris.**

Mont.—In re Esterley's Estate, 34 P.2d 539, 541, 97 Mont. 206, quoting **Corpus Juris.**

Or.—In re Workman's Estate, 65 P. 2d 1395, 1403, 156 Or. 333, quoting **Corpus Juris.**

Wash.—In re Upton's Estate, 92 P. 2d 210, 199 Wash. 447, 123 A.L.R. 1220—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A. L.R. 819.

23 C.J. p 1085 note 57.

Illegal appointment

(1) Acts of an administrator performed under a judgment of appointment are valid, even though the appointment was illegal.—Arceneaux v. Cormier, 144 So. 722, 175 La. 941—Rizzotto v. Grima, 113 So. 658, 164 La. 1.

(2) If appointment of administrator was illegal because administrator was under age of twenty-one years, acts of administration performed by him were not necessarily void.—Vidrine v. Deshotels, 158 So. 618, 181 La. 50.

Irregularities in appointment

Mere irregularities in appointment of administrator or curator will not vitiate acts done under such appointment.—Craig's Heirs v. Frost Lumber Industries, 120 So. 709, 10 La.App. 541.

Acts valid until appointment of successor

Irrespective of illegality of appointment of administrator nominated by nonresident stepmother of deceased, and of his retention as temporary administrator after his appointment was annulled, acts of such administrator up to the time of appointment of successor were valid and binding on the succession, treated as a vacant succession.—Succession of Hair, La.App., 195 So. 43.

Court's approval of acts

Acts of a de facto administrator approved by court are valid.—Giglio v. Woollard, 88 So. 401, 126 Miss. 6, 14 A.L.R. 616.

58. Conn.—Di Biasi v. Di Biasi, 159 A. 477, 114 Conn. 539.

Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 671, 131 Fla. 516, citing **Corpus Juris.**

Ga.—Shadbrun Banking Co. v. Streetman, 179 S.E. 377, 380, 180 Ga. 500, citing **Corpus Juris.**

Mont.—In re Esterley's Estate, 34 P. 2d 539, 541, 97 Mont. 206, quoting **Corpus Juris.**

Or.—In re Workman's Estate, 65 P.2d 1395, 1403, 156 Or. 333, quoting **Corpus Juris.**

Wis.—Simpson v. Cornish, 218 N.W. 193, 196 Wis. 125.

23 C.J. p 1085 note 57.

59. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 671, 131 Fla. 516, citing **Corpus Juris.**

Mont.—In re Esterley's Estate, 34 P.2d 539, 541, 97 Mont. 206, quoting **Corpus Juris.**

Or.—In re Workman's Estate, 65 P. 2d 1395, 1403, 156 Or. 333, quoting **Corpus Juris.**

23 C.J. p 1086 note 58.

60. La.—Arceneaux v. Cormier, 144 So. 722, 175 La. 941.

S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.

23 C.J. p 1085 note 57.

Release or acquittance by administrator

If recovery to estate of decedent should ensue in action by administrator, even an imperfectly appointed administrator would have capacity to execute an acquittance to defendant under direction of the court, and the judgment would in an appropriate plea be "res judicata".—Brinkley v. Allen, 143 S.W.2d 187, 200 Ark. 1147.

Payment to executor under forged will

Where bank had paid deposit standing in decedent's name to person to whom letters testamentary on forged will had been granted by surrogate and letters had not been revoked, bank was not liable for deposits to administratrix of decedent's estate subsequently appointed by surrogate of another county.—Buckley v. Howard Sav. Inst., 186 A. 52, 14 N.J.Misc. 620.

61. Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 380, 180 Ga. 500.

23 C.J. p 1085 note 57.

Appointment or confirmation subsequently decreed void

A person dealing with an administrator or executor is protected by the order appointing or confirming the administrator or executor, even though the appointment or confirmation is subsequently decreed to be void.—Dimitry v. Shreveport Mut. Bldg. Ass'n, 120 So. 581, 167 La. 875.

Lease approved by court

Where a minor has been appointed administrator and has qualified as such and makes a contract of sale and lease of property of decedent which has been approved by the court, such contract is valid, if fair, or not contaminated by fraud, and cannot be set aside merely because a better contract can be secured, even though the administrator is not legally qualified to be appointed and has been removed.—Giglio v. Woollard, 88 So. 401, 126 Miss. 6, 14 A.L.R. 616.

62. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 671, 131 Fla. 516, citing **Corpus Juris.**

23 C.J. p 1086 note 59.

Certifying correctness of claim for burial expenses

Where the appointment of an administrator was void, his waiver of notice of presentation of claim for burial expenses and his certifying the correctness of such claim were of no effect and, therefore, the claim was improperly allowed by the probate court.—In re Graves' Estate, Mo.App., 73 S.W.2d 844.

Executor not named in will

Acts of executor, who was not named as executor in the will but who was appointed by the probate court on representations that testator had said he wanted appointee to act as executor, were void, since such representations did not warrant appointment.—Dial v. Martin, 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

63. Tex.—Hurt v. Horton, 12 Tex. 285.

23 C.J. p 1086 note 60.

64. N.D.—Dobler v. Strobel, 81 N. W. 37, 9 N.D. 104, 81 Am.S.R. 530.

23 C.J. p 1091 note 86.

as such that the judge of probate who appointed him was interested in the estate of deceased, and, therefore, that his appointment was a nullity.[65] Where one has qualified as administrator of a succession and has performed acts of administration, he cannot deny that he was administrator.[66]

§ 73. Effect of Errors and Irregularities

Mere errors or irregularities in the proceedings ordinarily do not invalidate the grant of administration or letters.

A grant of administration is not invalidated by errors or irregularities in the proceedings[67] which do not affect the substantial rights of the adverse party,[68] such as a grant of administration, on application of one who is neither next of kin nor creditor,[69] and, according to the rule usually recognized, an administrator appointed and qualified by a court of competent authority is the lawful representative of the estate until his appointment is rescinded, although another had the better right to be the administrator.[70] It has been held, however, that the

Acting as general administrator and administrator durante absentia

Party assuming to act as administrator durante absentia and also as one of general administrators of the estate could not question authority of orphans' court to grant administration durante absentia.—Kick v. McCauley, 178 A. 637, 118 N.J.Eq. 252.

65. Mass.—Coffin v. Cottle, 9 Pick. 287.

66. La.—Kerlec v. New Orleans Land Co., 57 So. 647, 130 La. 111.

67. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.
S.D.—Bottum v. Kamen, 180 N.W. 948, 43 S.D. 498.
Tex.—Eckeberger v. Stroud, Civ. App., 103 S.W.2d 803.
Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
23 C.J. p 1083 note 36.

Defects in petition or application for appointment

(1) The appointment of an administrator is not void although applied for by a minor heir.—In re Bacher's Estate, 261 Ill.App. 547.

(2) Failure of petition for appointment of administrator to allege that applicant for appointment was a resident of the state and that he had attained majority did not make the order of appointment void on its face.—Castillo v. Warren, 113 P.2d 232, 44 Cal.App.2d 903.

(3) Where the petition for the appointment of an administrator bore the caption of the court of another county, and was filed in the court of the proper county, and was treated as a proper petition and acted on as such, and in its order appointing the administrator the court found the necessary facts to exist which authorized it to assume jurisdiction, the error in the caption of the petition was not a fatal defect and did not render the proceedings void.—Moe v. Judd, 208 P. 82, 121 Wash. 14.

(4) Other instances see 23 C.J. p 1083 note 36 [a].

Want of notice

(1) Erroneous finding by the court, in appointing administrator, that notice of the proceeding to another was not necessary rendered the appointment voidable but not void, and, until set aside, it was valid.—King v. Salyer, 44 P.2d 11, 172 Okl. 130—In re Green's Estate, 251 P. 1008, 114 Okl. 283.

(2) Appointment of clerk of court as administrator of small heavily indebted estate of resident alien was not an absolute nullity notwithstanding failure to give notice to the consul representing the country of such alien as required by treaty; such failure was an irregularity or informality which was cured after the lapse of five years.—Rizzotto v. Grima, 113 So. 658, 164 La. 1.

Bond

Irregularities in the bond of the administrator did not render void the proceedings in which he was appointed.—Moe v. Judd, 208 P. 82, 121 Wash. 14.

Typographical error

An order appointing an administrator which contained what was clearly a typographical error which had been corrected by the trial judge of his own motion was not subject to attack on the ground that it was void on its face.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

Appointment of alleged widow

Decree appointing alleged widow as administratrix, later revoked because administratrix was not widow, was valid until revoked.—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 272 Mass. 448, 72 A.L.R. 1143.

68. Mont.—In re Esterley's Estate, 34 P.2d 539, 541, 97 Mont. 206, quoting **Corpus Juris.**
23 C.J. p 1084 note 37.

69. Mont.—In re Esterley's Estate, supra, quoting **Corpus Juris.**
R.I.—Mowry v. Latham, 40 A. 236, 341, 20 R.I. 786.

70. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Mont.—In re Esterley's Estate, 34 P. 2d 539, 541, 97 Mont. 206, quoting **Corpus Juris.**
Or.—In re Workman's Estate, 65 P. 2d 1395, 1403, 156 Or. 333, quoting **Corpus Juris,** and rehearing denied 68 P.2d 479, 156 Or. 333.
23 C.J. p 1084 note 39.

Appointment as voidable

(1) Appointment of a person as administrator instead of another who has a preferential right to appointment is erroneous and voidable but is not void.—In re Pingree's Estate, 25 P.2d 937, 82 Utah 437, 90 A.L.R. 96—In re Owen's Estate, 91 P. 283, 32 Utah 469.

(2) In a case in which apparently there was a direct attack on the appointment of a general administrator, after the letters of another person as temporary administrator had been revoked by the court of ordinary, it was stated that, in view of Code 1933 § 133–1202 subd 8, the appointment of the general administrator, who was neither an heir of decedent nor otherwise interested in the estate, was voidable.—Rainey v. Moon, 2 S.E.2d 405, 187 Ga. 712.

Failure to give next of kin opportunity to accept appointment

An order by a court of competent jurisdiction appointing administrator, without giving decedent's next of kin opportunty to accept such position, is not void.

Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Ky.—Cunningham v. Clay, 112 S.W. 852.

Erroneous finding as to preference

Erroneous finding by the court, in appointing an administrator, that person so appointed was entitled to a preference rendered the appointment voidable, but not void; it was valid until set aside, and could be questioned only by person having preference rights over person appointed by asking that one having first preference be appointed in lieu of one erroneously appointed.—King v. Salyer, 44 P.2d 11, 172 Okl. 130—In re Green's Estate, 251 P. 1008, 114 Okl. 283.

Validity of letters

Letters of administration are not invalid because another had a better right to them.—In re Esterley's Estate, 34 P.2d 539, 97 Mont. 206.

appointment of an administrator without the issuance or due publication of a citation in compliance with law is without legal force where the want of due citation appears on the face of the record of the proceeding for appointment,[71] and that the grant of administration to a person who has no interest in the estate and who has no right to the appointment is void for want of jurisdiction where such want of interest and right to appointment appear on the face of his application.[72] Where the fact that application for appointment as administrator is made after the expiration of the statutory period within which application should be made appears on the face of the application, and there is no showing sufficient to take the case out of the operation of the statute, the entire proceeding has been regarded as void.[73]

Letters testamentary issued by a court which has jurisdiction are valid unless and until they are revoked, notwithstanding there may be irregularities in the proceedings.[74] Absence from the minutes of the court of a formal order or decree admitting a will to probate does not invalidate letters testamentary if a decree for probate was actually rendered and announced by the court.[75]

Premature appointment. The appointment of a person as administrator within the period during which others have the preferential right to appointment is voidable but not void,[76] but such appointment has been regarded as void where it appears on the face of the record that the court was without authority to make it.[77]

§ 74. Matters Concluded and Presumptions

All presumptions are indulged in favor of the validity of the appointment of, or of the grant of letters to, executors or administrators.

As a general rule all presumptions or intendments are indulged in favor of the validity of the appointment of, or of the grant of letters to, executors or administrators.[78] Letters are presumed to have been rightfully granted or issued[79] after due judicial investigation and procedure.[80]

It will be presumed that an appointment was necessary[81] and was made on sufficient grounds,[82] that the court acted on proof of facts essential to its jurisdiction,[83] that it made a finding of the existence

71. Ga.—Rusk v. Hill, 45 S.E. 42, 117 Ga. 722—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.
Necessity of citation see supra § 53.
Order of appointment showing want of notice
Where, under the statute, notice of application for appointment of special administrator was necessary to give court jurisdiction but order of appointment recited that notice was not necessary and was dispensed with, order was void on its face.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.

72. Ga.—Stanley v. Metts, 149 S.E. 786, 169 Ga. 101.

73. Iowa.—Cummings v. Lynn, 96 N.W. 857, 121 Iowa 344.

74. Neb.—In re Hoferer's Estate, 216 N.W. 826, 116 Neb. 249.
Matters affecting bond
Unless statute requires, failure of sureties on executor's bond to make affidavit as to qualifications will not render letters testamentary void.—In re Hoferer's Estate, supra.

75. Ala.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80.
Probate of will as condition precedent to issuance of letters testamentary see supra § 69.

76. Ala.—Bivin v. Millsap, 189 So. 770, 238 Ala. 136.
Ky.—Thompson v. Archie's Adm'r, 165 S.W. 977, 158 Ky. 590—Leach v. Owensboro City R. Co., 125 S. W. 708, 137 Ky. 292—Phillips v. Hundley, 122 S.W. 147, 135 Ky. 269—McFarland v. Louisville & N. R. Co., 113 S.W. 82, 130 Ky. 172—Spayd's Adm'r v. Brown, 102 S.W. 823, 31 Ky.L. 438.
Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775.
Or.—In re MacMullen's Estate, 243 P. 89, 117 Or. 505, rehearing denied 244 P. 664 (first case), 117 Or. 505.
Utah.—In re Owen's Estate, 91 P. 283, 32 Utah 469.
23 C.J. p 1084 note 39 [a].
Premature delivery of letters see supra § 69 a.
Disqualification of distributees
Appointment of administrator who is not a person within the preferred class, within the period for exercising the preferential right is at most voidable but not void where distributees, who, if qualified, would have preference, are disqualified.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584—Hunt v. Crocker, 55 S.W.2d 20, 246 Ky. 388.

77. Mo.—Pikey v. Riles, App., 20 S. W.2d 550—In re Wilson's Estate, App., 16 S.W.2d 737.
Appointment of stranger
In view of Rev.St.1929 § 7-9 and of the want of written waiver or consent to the appointment in writing on the part of one claiming to be the daughter of deceased, the appointment of a stranger to deceased as administrator, made four days after death was void.—In re Graves' Estate, Mo.App., 73 S.W.2d 844.

78. Ala.—Webb v. Sprott, 144 So. 569, 225 Ala. 600—Tubbs v. Barnard, 143 So. 448, 225 Ala. 435—Burnett v. Nesmith, 62 Ala. 261.
Tex.—Eckeberger v. Stroud, Civ.App., 103 S.W.2d 803.
23 C.J. p 1084 note 43.
Reason for rule
With respect to such appointment or grant, the probate court is a court of general jurisdiction.—Webb v. Sprott, 144 So. 569, 225 Ala. 600—Tubbs v. Barnard, 143 So. 448, 225 Ala. 435—Burnett v. Nesmith, 62 Ala. 261.

79. Ala.—Burnett v. Nesmith, supra.
Iowa.—Milligan v. Bowman, 46 Iowa 55.
23 C.J. p 1084 note 43.
Evidence of appointment and authority of executor or administrator see supra § 71.

80. Ala.—Burke v. Mutch, 66 Ala. 568.
Mo.—Lackland v. Stevenson, 54 Mo. 108.

81. Ark.—Turley v. Gorman, 202 S. W. 822, 133 Ark. 473.
23 C.J. p 1084 note 47.
Appointment of administrator is conclusive as to its necessity only on collateral attack.—McGraw v. Miller, 44 S.W.2d 366, 184 Ark. 916.

82. Ind.—Peterson v. Erwin, 62 N. E. 719, 28 Ind.App. 330.
23 C.J. p 1084 note 48.

83. Ala.—Whitaker v. Kennamer, 155 So. 855, 857, 229 Ala. 80, citing **Corpus Juris.**

of the facts on which its jurisdiction depended,[84] that the proceedings were in all respects regular,[85] and that the person appointed was a proper person for the appointment,[86] both in respect of his possessing the qualifications rendering him suitable to undertake and capable of performing the duties of the office, and there being no available person having a prior right to administer.[87] The appointment, however, is conclusive only as to the matters directly adjudged, that is, those necessary to confer jurisdiction to make the order,[88] and not as to matters not directly involved in the proceeding.[89]

Idaho.—In re Barr's Estate, 252 P. 676, 677, 43 Idaho 400, citing **Corpus Juris.**
23 C.J. p 1084 note 49.

84. Ala.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80—Webb v. Sprott, 144 So. 569, 225 Ala. 600—Tubbs v. Barnard, 143 So. 448, 225 Ala. 435—Smith v. Smith, 103 So. 557, 212 Ala. 522.
Mo.—McIntyre v. St. Louis & S. F. Ry. Co., 227 S.W. 1047, 286 Mo. 234, certiorari denied St. Louis-San Francisco R. Co. v. McIntyre, 41 S.Ct. 376, 255 U.S. 573, 65 L.Ed. 792.

Order as finding of jurisdictional facts
An order appointing an administrator in a regular proceeding in a county court is a finding of every necessary jurisdictional fact.—Wolf v. Gills, 219 P. 350, 96 Okl. 6.

Residence of decedent
Cal.—In re Relph's Estate, 198 P. 639, 185 Cal. 605—Holabird v. Superior Court in and for Fresno County, 281 P. 108, 101 Cal.App. 49.
Fla.—State ex rel. Campbell v. Chapman, 1 So.2d 278, 145 Fla. 647.
Iowa.—Ferguson v. Connell, 230 N. W. 859, 210 Iowa 419—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.
Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078—Linder v. Burns, App., 243 S.W. 361.

Assets within jurisdiction
Granting letters of administration was an adjudication that nonresident decedent died possessed of personal assets within the county in which the appointment was made.—Seaboard Trust Co. v. Topken, 20 A. 2d 709, 130 N.J.Eq. 46.

85. Ga.—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.
23 C.J. p 1084 note 50.

Notice of hearing
Where the record of the probate court is silent as to mailing notice of hearing of application for letters testamentary, it will be presumed, in a collateral proceeding, that the notices were mailed.—Knowles v. Kasiska, 268 P. 3, 46 Idaho 379.

86. Ga.—Milner v. Allgood, 191 S.E. 132, 184 Ga. 288.
23 C.J. p 1085 note 51.

87. Mass.—Copeland v. Shapley, 100 N.E. 1080, 214 Mass. 132.
23 C.J. p 1085 note 51.

Approval of appointment
Approval by the probate court of the appointment of an administrator imports a finding that the appointee was qualified for appointment and resided in the state.—Day v. Johnston, 250 S.W. 532, 158 Ark. 478.

88. Existence of debts
Question whether succession owed debts requiring appointment of administrator was foreclosed by order appointing him after publication of notice.—Succession of Sullivan, 144 So. 505, 175 La. 813.

In California
(1) The rule stated in the text has been announced.—Layne v. Johnson, 124 P. 860, 19 Cal.App. 95.

(2) After appointment of administrator on nomination of decedent's mother, probate court was not required again to adjudicate question of competency of mother to make nomination in subsequent proceeding on petition of guardian of mother for revocation of letters of administration on ground that mother was incompetent at time of execution of nomination, since question was directly involved in proceeding on mother's nomination of administrator.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

(3) It has also been held, however, that a finding by probate court that petitioner for letters of administration is "the next of kin," and an "heir at law" of deceased, and "entitled" to letters of administration, was not res judicata in a subsequent proceeding under statute by the public administrator to have the letters revoked and himself appointed on the ground that certain nonresidents bore a closer relationship to intestate than did the person so appointed.—In re O'Dea's Estate, 93 P.2d 222, 34 Cal.App.2d 179.

(4) An order appointing a cousin of decedent as administrator was not conclusive as to the right of such cousin to administer the estate, in a subsequent proceeding by the public administrator for revocation of such cousin's letters.—In re Way's Estate, 85 P.2d 563, 29 Cal.App.2d 669.

In Florida
(1) If petition originally filed with county court for letters of administration was sufficient to invoke the jurisdiction, and if county court had power to determine whether it had jurisdiction to proceed, had so determined, and had granted letters of administration, its judgment with reference to a general subject matter over which its authority extended under statute was conclusive unless reversed on appeal or voided for error or fraud in a direct proceeding, regardless of how erroneous that judgment might be, since the judgment would become the "law of the case".—State ex rel. Campbell v. Chapman, 1 So 2d 278, 145 Fla. 647.

(2) The fact that the Sarasota County court after granting letters of administration and after determining that it had jurisdiction, permitted an amendment alleging that intestate was a resident of and domiciled in Manatee County at the time of his death, was not sufficient to divest the Sarasota County court of the jurisdiction that it had assumed or revoke letters that it had granted.—State ex rel. Campbell v. Chapman, supra.

89. Ala.—Beasley v. Howell, 22 So. 989, 117 Ala. 499.
Cal.—In re Daughaday, 141 P. 929, 168 Cal. 63.
23 C.J. p 1085 note 53.

Application of real property to debts
Appointment of administrator is not conclusive of question as to whether lands of estate are needed to pay debts.—Turley v. Gorman, 202 S.W. 822, 133 Ark. 473.

Heirship
(1) Heirship or right to share in estate is not determined.
Cal.—In re Haskell, Myr.Prob. p 204—In re Way's Estate, 85 P.2d 563, 29 Cal.App.2d 669.
La.—Succession of Raphael, 144 So. 429, 175 La. 715.
Minn.—In re Firle's Estate, 253 N. W. 889, 191 Minn. 233.

(2) In an action for the specific performance of a contract to leave property at death to one who had lived with decedents as their child, but who was never legally adopted, the judgment of the surrogate's court appointing an heir as administratrix was not res judicata as to right to enforce the contract.—Barrett v. Miner, 196 N.Y.S. 175, 119 Misc. 230.

(3) Other cases see 23 C.J. p 1085 note 53 [f].

Marriage and widowhood
(1) In compensation proceeding, order of county court appointing claimant as administratrix of estate of deceased on ground that claimant was common-law wife of deceased was not "res judicata" on issue of relationship between claimant and

Letters of administration are prima facie evidence of the validity and regularity of the appointment,[90] of all facts necessary to their validity,[91] and of all they purport to show.[92] They are conclusive evidence of the regularity of the proceedings leading up to their issuance in case of collateral attack,[93] and letters testamentary have been regarded as conclusive proof of the executor's ownership of certain personal property.[94]

Death. The grant of administration and letters of administration are prima facie evidence of the death of the person on whose estate administration was granted, in a proceeding to which the administrator is a party in his representative capacity,[95] or in which the validity of the administration dependent on the death of such person is in issue,[96] and the appointment of an administrator and the finding of the probate court that the person whose estate was involved was dead are conclusive proof of death in a proceeding to which the administrator is a party, in the absence of evidence to the contrary.[97] However, the prima facie case of death made by letters of administration has been regarded as of the weakest and most inconclusive character.[98] According to some cases, even in proceedings in which the administrator is a party, the grant of administration and letters of administration are not prima facie evidence of death.[99]

Intestacy. The appointment of an ordinary or general administrator or the granting of ordinary or general letters of administration usually amounts to, or necessarily includes, an adjudication, determination, or finding that the person on whose estate administration is granted died intestate,[1] and is prima facie evidence that no valid will exists,[2] and letters of administration, or a certified transcript of the record thereof, is prima facie evidence of intestacy.[3] The granting of letters of administration does not, however, under all circumstances, amount to an adjudication that decedent died intestate,[4] and a determination in a proceeding in which an administrator is appointed that decedent died intestate is not a bar to a subsequent proceeding for the probate of the will of such decedent.[5]

§ 75. Persons Concluded

The appointment of an administrator is binding on the parties to the proceeding and their privies, but not, under all circumstances, on other persons, at least as to incidental matters determined by the order of appointment.

deceased, but constituted nothing more than formal prima facie evidence of relationship between claimant and deceased.—State Compensation Ins. Fund v. Mattivi, 106 P.2d 463, 106 Colo. 461.

(2) Other cases see 23 C.J. p 1085 note 53 [c], [d].

90. La.—Succession of Sullivan, 144 So. 505, 175 La. 813—Cherry's Succession v. Metropolitan Life Ins. Co., App., 176 So. 645.
Letters as evidence of appointment or authority see supra § 71.

91. Kan.—Brubaker v. Jones, 23 Kan. 411.

92. U.S.—In re Agnew, D.C.N.Y., 225 F. 650.
Iowa.—Milligan v. Bowman, 46 Iowa 55.

93. Cal.—In re Way's Estate, 85 P. 2d 563, 29 Cal.App.2d 669—Lane v. Starkey, 210 P. 277, 59 Cal.App. 140.

94. Corporate stock owned by testator at death
N.J.—Elevator Supplies Co. v. Wylde, 150 A. 347, 106 N.J.Eq. 163.

95. Miss.—Cock v. Abernathy, 28 So. 18, 77 Miss. 872.
Mo.—Lancaster v. Washington Life Ins. Co., 62 Mo. 121.
Evidence as to fact of death see Death § 9.

Letters of administration
Letters of administration, or a certified transcript of the record thereof, is prima facie evidence of the death of the person on whose estate administration was granted.—Smith v. Smith, 103 So. 557, 212 Ala. 522.

96. Tex.—Steele's Unknown Heirs v. Belding, Civ.App., 148 S.W. 592.

97. Or.—Brown v. Truax, 115 P. 597, 58 Or. 572.

98. Mo.—Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

99. N.Y.—In re Kelley's Estate, 19 N.Y.S.2d 837, 174 Misc. 53, affirmed 23 N.Y.S.2d 464, 260 App.Div. 852, appeal granted 24 N.Y.S.2d 994, 260 App.Div. 1007, affirmed 33 N.E.2d 561, 285 N.Y. 644.

Administration granted on estate of absentee
U.S.—Swanson v. U. S., D.C.N.Y., 3 F.Supp. 813.
N.Y.—Bering v. U. S. Trust Co. of New York, 193 N.Y. 753, 201 App. Div. 35—In re Rowe, 189 N.Y.S. 395, 197 App.Div. 449, affirming In re Rowe's Estate, 170 N.Y.S. 742, 103 Misc. 111, and affirmed 134 N.E. 569, 232 N.Y. 554, amendment of remittitur denied 134 N.E. 599, 232 N.Y. 628—Marks v. Emigrant Industrial Sav. Bank, 107 N.Y.S. 491, 122 App.Div. 661.

1. N.J.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46.
Or.—Wilson v. Hendricks, 102 P.2d 714, 164 Or. 486.
Intestacy as requisite to appointment of administrator see supra § 30.

2. In Pennsylvania
(1) The rule stated in the text has been announced.—Snyder v. McGill, 108 A. 410, 265 Pa. 122.

(2) A grant of administration cannot be regarded as an adjudication that deceased died intestate where the form of oath provided by statute for administrators expressly provides for the surrender of the letters of administration, if it subsequently appears that a last will and testament was made by the deceased and the same is proved according to law.—Buchle's Estate, 3 Pa.Dist. 16, 14 Pa.Co. 99.

3. Ala.—Smith v. Smith, 103 So. 557, 212 Ala. 522.

4. Existence of will shown by petition for letters of administration
In view of Code of Law 1901 § 290, providing that the subsequent discovery and probate of a will shall revoke letters of administration, an order granting letters of administration, on a petition which recited that a will executed by decedent was in existence, so that the letters were improvidently granted, was not an adjudication that decedent died intestate.—Morris v. Foster, 278 F. 321, 51 App.D.C. 238, certiorari denied 42 S.Ct. 586, 259 U.S. 582, 66 L.Ed. 1074.

5. Mich.—In re Broffee's Estate, 172 N.W. 541, 206 Mich. 107.
23 C.J. p 1085 note 53 [g] (2).

The appointment of an administrator is binding on parties to the proceeding and their privies,[6] and, while it has been stated that an order of a tribunal of competent jurisdiction appointing an administrator is, as a judgment in rem, binding on the whole world regardless of whether the persons affected were parties or were entitled to be made parties,[7] the order is not, under all circumstances, binding on persons not parties,[8] at least as to matters incidental to the appointment which may be determined by the order.[9]

As to matters concluded and presumptions see supra § 74; and as to who may apply for revocation of letters see infra § 85.

§ 76. Collateral Attack

a. In general
b. Want of jurisdiction and void order or appointment

a. In General

As a general rule a grant of administration or of letters which is merely voidable and not void is not subject to collateral attack.

As a general rule a grant of administration which is not void, although it may be voidable, is not open to collateral attack,[10] on the ground of irregularity

6. Cal.—Layne v. Johnson, 124 P. 860, 19 Cal.App. 95.
Wis.—Jenks v. Allen, 139 N.W. 433, 151 Wis. 625.
23 C.J. p 1085 note 54.

Party claiming right to letters

Where daughter named as executrix in mother's will failed to appeal from order denying letters to daughter and granting letters of administration with will annexed, to another, and where motion to vacate the order was properly rejected on a subsequent date, daughter was not entitled to raise the issue again by way of collateral attack in proceeding for confirmation of sale of real estate, since order and denial constituted a final adjudication of the issue.—In re Alfrey's Estate, 83 P.2d 291, 12 Cal. 2d 255.

7. Pa.—In re Wesner's Estate, 11 A. 2d 521, 139 Pa.Super. 314.
Administration proceeding as judgment in rem in general see supra § 12.

Other statement

In a proceeding which involved the estate of a decedent as to which an administrator was appointed, it was said, in connection with the characterization of actions concerning estates of decedents as in rem, that such actions are binding on everyone having an interest in the estate involved, when statutory proceedings are followed.—Dunaway v. Easter, Civ.App., 119 S.W.2d 421, reversed on other grounds 129 S.W.2d 286, 133 Tex. 309.

Decree declaring presumption of death and appointing administrator

Final decree of the orphans' court declaring a party to be a presumed decedent and appointing an administrator of his estate, being a "judgment in rem" was binding on the world irrespective of whether those affected were parties or were entitled to be made parties to the litigation in which the decree was entered.—In re Wesner's Estate, 11 A. 2d 521, 139 Pa.Super. 314.

8. Kan.—Horan v. Dore, 74 P.2d 147, 146 Kan. 883.
23 C.J. p 1085 note 54 [a].

Determination as to domicile or residence

(1) Decedent's brother, seeking revocation of letters granted to administrator substituted for decedent's husband who became incompetent, was not bound by adjudication, in proceeding wherein original letters were granted, that decedent was domiciled in New Jersey, where brother was not party to such proceeding and had no notice or opportunity to be heard therein.—In re Fischer's Estate, 180 A. 633, 118 N.J. Eq. 599.

(2) In proceeding on petition to probate will in a certain county, granting of letters of administration in another county was not "res judicata" on issue of county of residence of decedent at time of death since same parties and same subject matter were not involved.—In re Mills' Estate, 11 N.Y.S.2d 929, 171 Misc. 42.

Effect on debtor of estate

Where jurisdiction to appoint an administrator is based on the presence within the jurisdiction of an asset of the estate consisting of the right to bring an action there on a claim in favor of the estate, the appointment of an administrator to enforce or collect the claim, without making the debtor a party or permitting him to be heard, does not constitute such a seizure of the res as will conclude or even prejudice the debtor.—Fennell v. U. S., C.C.A. Tex., 67 F.2d 768.

9. Iowa.—Brigham's Estate, 120 N. W. 1054, 144 Iowa 71.
23 C.J. p 1085 note 55.

10. U.S.—Harrison v. Love, C.C.A. Mich., 81 F.2d 115—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901—Northwestern Mut. Life Ins. Co. v. Johnson, C.C.A.Iowa, 275 F. 757.
Ala.—Peek v. Haardt, 177 So. 634, 635, 235 Ala. 145, 113 A.L.R. 1395, citing **Corpus Juris**—Webb v. Sprott, 144 So. 569, 225 Ala. 600—Tubbs v. Barnard, 143 So. 448, 225 Ala. 435.
Alaska.—In re Person's Estate, 7 Alaska 489.
Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P. 2d 127, 5 Cal.2d 35—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360—Estate of Way, 85 P.2d 563, 29 Cal.App.2d 669—Lane v. Starkey, 210 P. 277, 59 Cal.App. 140.
Conn.—Di Biasi v. Di Biasi, 159 A. 477, 114 Conn. 539.
Ga.—Stewart v. Patterson, 111 S.E. 421, 152 Ga. 754—Harris v. Shelton, 107 S.E. 842, 151 Ga. 615.
Ky.—Louisville & N. R. Co. v. Bays' Adm'x, 295 S.W. 452, 220 Ky. 458.
La.—Succession of Sullivan, 144 So. 505, 175 La. 813—Flanagan v. Land Development Co. of Louisiana, 83 So. 39, 145 La. 843—Cherry's Succession v. Metropolitan Life Ins. Co., App., 176 So. 645.
Mich.—Chapin v. Chapin, 201 N.W. 530, 229 Mich. 515.
N.J.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46—Charles Wiener & Sons v. Fischer, 179 A. 632, 118 N.J.Eq. 387—Buckley v. Howard Sav. Inst., 186 A. 52, 14 N.J.Misc. 620.
Ohio.—In re Gingery's Estate, 134 N. E. 449, 103 Ohio St. 559.
Or.—Wilson v. Hendricks, 102 P.2d 714, 164 Or. 486—In re Armstrong's Estate, 82 P.2d 880, 881, 159 Or. 698, citing **Corpus Juris.**
Pa.—West v. Young, 2 A.2d 745, 332 Pa. 248—Snyder v. McGill, 108 A. 410, 265 Pa. 122—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.
S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437—Mitchell v. Dreher, 147 S.E. 646, 150 S.C. 125.
S.D.—Bottum v. Kamen, 180 N.W. 948, 43 S.D. 498.
Tex.—Reed v. Harlan, Civ.App., 103 S.W.2d 236, error refused—Becknal v. Becknal, Civ.App., 296 S.W. 917—Champ v. Wilson, Civ.App., 244 S.W. 260—McCarthy v. Texas Co.,

in the proceedings,[11] a mistake in the character of letters granted where a proper case for administra-

Civ.App., 235 S.W. 679, error granted.

Wash.—In re Upton's Estate, 92 P. 2d 210, 199 Wash. 447, 123 A.L.R. 1220—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 A.L.R. 819.

23 C.J. p 1086 note 61.

Collateral attack on judgments generally see the C.J.S. title Judgments §§ 401–435, also 34 C.J. p 511 note 46–p 567 note 70.

Collateral impeachment of probate of will see the C.J.S. title Wills § 578, also 68 C.J. p 1235 note 87–p 1238 note 34.

Grant or appointment by clerk or register

(1) An appointment by the clerk of the court is not subject to collateral attack.

Iowa.—In re Kladivo's Estate, 176 N. W. 262, 188 Iowa 471.

N.C.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 306, 188 N.C. 274—Batchelor v. Overton, 74 S.E. 20, 158 N.C. 395.

(2) Order by clerk of superior court granting letters of administration and appointment of administrator could be avoided in a collateral proceeding only by showing that decedent was not, in fact, dead.—Chamblee v. Security Nat. Bank, 188 S.E. 632, 211 N.C. 48.

(3) The granting of letters of administration by the register of wills is a judicial act, and can be set aside only on an appeal from his action in the matter, and hence is not subject to attack in a collateral proceeding.—Ubil v. Miller, 16 Pa.Super. 497.

Collateral attack by stranger

In administrator's action against a stranger, the stranger could not make a collateral attack on plaintiff's appointment as administrator, since it would not be material to defendant who represented the estate as administrator.—Bamforth v. Ihmsen, 204 P. 345, 28 Wyo. 282, rehearing denied 205 P. 1004, 28 Wyo. 282.

What constitutes collateral attack

A collateral attack is an attempt to avoid, defeat, or evade a judicial proceeding or to deny its force and effect in some manner not provided by law. It is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying the decree.

Ohio.—In re Gingery's Estate, 134 N. E. 449, 451, 103 Ohio St. 559.

Or.—Wilson v. Hendricks, 102 P.2d 714, 716, 164 Or. 486—In re Armstrong's Estate, 82 P.2d 880, 884, 159 Or. 698.

Equity suit against curator of decedent's estate

Appointment by county judge of curator for intestate's estate is not subject to collateral attack in equity by alleged beneficiary of estate, no special equity to have curator superseded being shown.—Anderson v. Spencer, 149 So. 658, 111 Fla. 760.

Actions or proceedings in which collateral attack not permissible

(1) Action by personal representative for wrongfully causing death of decedent.

U.S.—Harrison v. Love, C.C.A.Mich., 81 F.2d 115.

Cal.—Castillo v. Warren, 113 P.2d 232, 44 Cal.App.2d 903.

Ill.—Bremer v. Lake Erie & W. R. Co., 234 Ill.App. 105, affirmed 148 N.E. 862, 318 Ill. 11, 41 A.L.R. 1345.

Ky.—Louisville & N. R. Co. v. Bay's Adm'x, 295 S.W. 452, 220 Ky. 458.

Mo.—McIntyre v. St. Louis & San Francisco Ry. Co., 227 S.W. 1047, 286 Mo. 234, certiorari denied St. Louis-San Francisco R. Co., 41 S. Ct. 376, 255 U.S. 573, 65 L.Ed. 792.

N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.

S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.

S.D.—Bottum v. Kamen, 180 N.W. 948, 43 S.D. 498.

Tenn.—Yellow Cab Co. v. Maloaf, 3 Tenn.App. 11.

Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.

23 C.J. p 1086 note 61 [a] (11).

(2) Proceeding under workmen's compensation act to obtain compensation for death of decedent.—Keystone Steel & Wire Co. v. Industrial Commission, 124 N.E. 542, 289 Ill. 587.

(3) Proceeding for removal from state to federal court of action by administrator for wrongfully causing death of decedent.—Mecom v. Fitzsimmons Drilling Co., Okl., 52 S. Ct. 84, 284 U.S. 183, 76 L.Ed. 233, 77 A.L.R. 904, reversing, C.C.A., 47 F.2d 28, certiorari granted Mecon v. Fitzsimmons Drilling Co., 51 S.Ct. 488, 283 U.S. 815, 75 L.Ed. 1431.

(4) Action by administrator on insurance policy on life of decedent.—Northwestern Mut. Life Ins. Co. v. Johnson, C.C.A.Iowa, 275 F. 757.

(5) Action by administrator against debtor for the benefit of next of kin.—In re Trost's Estate, 10 N.E. 2d 857, 292 Ill.App. 60.

(6) Action in trespass to try title brought by an administrator.—Pierce v. Baker, Tex.Civ.App., 143 S.W.2d 681, error refused.

(7) Suit by administratrix to quiet title to lands belonging to estate of decedent.—Jerauld v. Chambers, 187 P. 33, 44 Cal.App. 771.

(8) Suit by administrator to quiet title to an interest in an irrigation ditch.—Bamforth v. Ihmsen, 204 P. 345, 28 Wyo. 282, rehearing denied 205 P. 1004, 28 Wyo. 282.

(9) Suit by administratrix as such to set aside a conveyance of property which, it was alleged, had been held in trust for decedent.—West v. Young, 2 A.2d 745, 332 Pa. 248.

(10) Action by administratrix against heirs to settle estate of decedent, in which the administratrix sought to recover the amount of her claim as an individual based on a loan by her to decedent.—Cox v. Monday, 95 S.W.2d 785, 264 Ky. 805.

(11) Suit by administrator of deceased beneficiary of trust to determine to whom beneficiary's share of trust fund should be paid.—Hedden v. Hedden, 162 A. 114, 10 N.J.Misc. 1047.

(12) Action by mortgagor against executor of mortgagee to declare foreclosure proceedings null and void, remedy being by appeal from order appointing executor.—Lehman v. Norton, 253 N.W. 663, 191 Minn. 211.

(13) Suit by children of decedent to prevent drawing of widow's allowance, in which plaintiffs sought to attack appointment of administrator.—McKana v. Englund, 251 N.W. 308, 265 Mich. 214.

(14) Proceeding for approval of claims against the estate.—Clark v. Murrah, Civ.App., 136 S.W.2d 652, followed in Markward v. Murrah, Civ.App., 136 S.W.2d 656, and both cases reversed on other grounds, Tex., 156 S.W.2d 971—Markward v. Murrah, Civ.App., 136 S.W.2d 649, affirmed, Tex., 156 S.W.2d 971.

(15) Suit to establish claim against decedent's estate.—Clark v. Murrah, Civ.App., 136 S.W.2d 652, followed in Markward v. Murrah, Civ.App., 136 S.W.2d 656, and both cases reversed on other grounds, Tex., 156 S.W.2d 971, error granted.

(16) Other actions or proceedings.

Ariz.—Barth v. Platt, 100 P.2d 589, 55 Ariz. 241.

N.C.—Security Nat. Bank (Tarboro Unit) v. Bridgers, 176 S.E. 295, 207 N.C. 91.

23 C.J. p 1086 note 61 [a].

Matters not constituting collateral attack

Ky.—Stell v. Williams' Adm'r, 26 S. W.2d 8, 233 Ky. 441.

23 C.J. p 1086 note 61 [g].

11. Cal.—In re Way's Estate, 85 P. 2d 563, 29 Cal.App.2d 669—Lane v. Starkey, 210 P. 277, 59 Cal.App. 140.

S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.

W.Va.—Starcher v. South Penn Oil Co., 95 S.E. 28, 81 W.Va. 587.

23 C.J. p 1088 note 62.

tion existed,[12] that administration was not necessary,[13] that the grant was premature,[14] or that the person appointed was not a proper person for the appointment,[15] as, for example, that the person to whom letters of administration have been granted was not entitled by priority to administer,[16] or

Defects in petition or application for appointment

(1) Failure of person who was appointed administratrix to sign petition for appointment was not ground for collateral attack on the appointment, in an action by the administratrix.—Jerauld v. Chambers, 187 P. 33, 44 Cal.App. 771.

(2) Judgment of court first appointing administrator could not be collaterally attacked on the ground that application for appointment did not give county of decedent's residence.—Ferguson v. Connell, 230 N. W. 859, 210 Iowa 419.

(3) Failure of petition for appointment of administrator to allege that applicant for appointment was a resident of the state and had attained majority did not render appointment subject to collateral attack in an action by the administrator; nor did such collateral attack oust the court of jurisdiction of such action or deprive the administrator of his capacity to act.—Castillo v. Warren, 113 P.2d 232, 44 Cal.App.2d 903.

Bond

(1) Failure of executor or administrator to give bond does not render his appointment or his capacity subject to collateral attack.

Mo.—Connor v. Paul, 119 S.W. 1006, 138 Mo.App. 13.

Okl.—Mahoney v. McBirney, 84 P.2d 600, 184 Okl. 75.

Tex.—Reed v. Harlan, Civ.App., 103 S.W.2d 236, error refused.

23 C.J. p 1077 note 45, p 1088 note 62 [a] (1).

(2) Fact that administrator gave no bonds, being excused by probate court, did not disqualify administrator from maintaining actions to set aside deeds given by decedent during her lifetime, the order appointing administrator and excusing him from giving bond not being subject to collateral attack.—Stanley v. Martin, 22 P.2d 951, 137 Kan. 894.

(3) Proceedings in which an administrator was appointed are not subject to collateral attack on the ground of irregularities or defects in his bond.—Moe v. Judd, 208 P. 82, 121 Wash. 14—23 C.J. p 1088 note 62 [a] (2), (3).

(4) Letters testamentary are not vulnerable in collateral attack because sureties on bond of executor failed to make affidavit as to their qualifications.—In re Hoferer's Estate, 216 N.W. 826, 116 Neb. 249.

(5) However, a temporary administrator's failure to file his bond and have it approved, and otherwise to qualify, is a ground of defense in an action of trover, brought by him for certain property of the estate.—Stewart v. Patterson, 111 S.E. 421, 152 Ga. 754.

(6) Failure to give bond in general see supra § 67.

Oath

(1) Failure of administrator to take the prescribed oath does not render his appointment subject to collateral attack.—Reed v. Harlan, Tex. Civ.App., 103 S.W.2d 236, error refused—23 C.J. p 1088 note 62 [a] (4).

(2) Failure of an executor to take the prescribed oath is not ground for collateral attack on his capacity.—Connor v. Paul, 119 S.W. 1006, 138 Mo.App. 13.

(3) Where, in an action by an administrator, the records of the probate court granting administration had been admitted, it was not proper to ask the administrator on cross-examination if he had been sworn in, because it was not permissible to assail any portion of the record collaterally.—Nickles v. Seaboard Air Line R. Co., 54 S.E. 255, 74 S.C. 102.

Competency of petitioner for appointment

In an action by administrator as such, his appointment was not subject to attack by defendant on the ground that a third person who was the petitioner for such appointment was mentally incompetent, as shown by plaintiff's bill in the present suit. Chandler v. White, 221 N.W. 618, 244 Mich. 532.

12. N.M.—Amberson v. Candler, 130 P. 255, 17 N.M. 455.
23 C.J. p 1088 note 63.

13. Mich.—McKana v. Englund, 251 N.W. 308, 265 Mich. 214.
Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775.
Tex.—Clark v. Murrah, Civ.App., 136 S.W.2d 652, followed in Markward v. Murrah, Civ.App., 136 S.W.2d 656, and both cases reversed on other grounds, Sup., 156 S.W.2d 971—Markward v. Murrah, Civ.App., 136 S.W.2d 649, affirmed, Sup., 156 S.W.2d 971.
23 C.J. p 1088 note 64, p 1005 note 4 [c].
Determination as to necessity of administration generally see supra § 9.

14. N.M.—Amberson v. Candler, 130 P. 255, 17 N.M. 455.
Va.—Hutcheson v. Priddy, 12 Gratt. 85, 53 Va. 85.

15. Ga.—Milner v. Allgood, 191 S.E. 132, 184 Ga. 288.
Wyo.—Bamforth v. Ihmsen, 204 P. 345, 28 Wyo. 282, rehearing denied 205 P. 1004, 28 Wyo. 282.

Person claiming as widow

Decree appointing alleged widow of decedent as administratrix, who was subsequently shown not to be decedent's widow, was not subject to collateral attack.

Ky.—Cox v. Monday, 95 S.W.2d 785, 264 Ky. 805.

Mass.—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 272 Mass. 448, 72 A.L.R. 1143—Fidelity & Casualty Co. of New York v. Huse & Carleton, 150 N.E. 230, 254 Mass. 359.

Nonresident

Where a court may, in the exercise of discretion, appoint a nonresident as administrator, the appointment of a nonresident is not subject to collateral attack.—Reidy v. Chicago, B. & Q. Ry. Co., 249 N.W. 347, 216 Iowa 415.

Debtor

Where it is not beyond the jurisdiction of the court to appoint as administrator a person who is indebted to the estate, the appointment of such a person is not subject to collateral attack.—Ford v. Peck, 227 P. 527, 116 Kan. 481, denying rehearing 225 P. 1054, 116 Kan. 74.

Absence of appeal in contested proceeding

Order of probate court appointing administrator for estate, made in a contested proceeding, in absence of timely appeal therefrom, becomes final as to person appointed, except in direct attack on ground of fraud or mistake.—In re Firle's Estate, 253 N.W. 889, 191 Minn. 233.

16. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Utah.—In re Owen's Estate, 271 P. 225, 72 Utah 459.
23 C.J. p 1088 note 66.

Waiver by next of kin

Appointment of administrator could not be attacked collaterally on the ground that there was a want of a showing that next of kin of decedent had waived their priority.—Pierce v. Baker, Tex.Civ.App., 143 S.W.2d 681, error refused.

Attack in action by administrator

(1) An objection to the capacity of an administrator to sue on the ground of the failure of the court to give preference to the wife or next of kin as required by the statute may not be taken by a stranger sued by the administrator.—Chesapeake & O. R. Co. v. Banks, 135 S.W. 285, 142 Ky. 746.

(2) Where the record of the probate court relating to the appointment of an administrator was not in evidence and there was no showing whatever as to whether the widow

lacked the required qualifications.[17]

Fraud or collusion. It has been held that the appointment may be collaterally attacked on the ground of fraud or collusion,[18] although the right to attack the appointment on such ground has also been denied.[19]

Acts of personal representative. The authority of an administrator to perform acts as administrator may not be attacked collaterally where letters of administration have duly been issued to him and he has been recognized by the probate court as the duly authorized administrator.[20]

b. Want of Jurisdiction and Void Order or Appointment

A grant of administration or of letters ordinarily may not be collaterally attacked for want of jurisdiction when the lack of jurisdiction is not apparent on the face of the record.

A want of jurisdiction to grant administration or letters, when not apparent on the face of the record, is not, as a rule, a ground of collateral attack,[21] for where, as is usually the case, the probate court

of decedent had renounced her right to administer, the appointment of the administrator could not be collaterally attacked by defendant railroad on the theory that, as decedent's widow had the first right to administer on the estate, the court, could not, within thirty days, appoint another person to administer without showing that widow had renounced her right.—McIntyre v. St. Louis & San Francisco Ry. Co., 227 S.W. 1047, 286 Mo. 234, certiorari denied St. Louis-San Francisco R. Co. v. McIntyre, 41 S.Ct. 376, 255 U.S. 573, 65 L.Ed. 792.

17. Ark.—Day v. Johnston, 250 S.W. 532, 158 Ark. 478.
Pa.—In re McNichol's Estate, 127 A. 461, 282 Pa. 187.
S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.
23 C.J. p 1089 note 67.

Weak-minded person as administrator
Appointment of administrator is not subject to collateral attack on the ground that the person appointed was weak-minded.—West v. Young, 2 A.2d 745, 332 Pa. 248.

18. N.Y.—Hoes v. New York, N. H. & H. R. Co., 66 N.E. 119, 173 N.Y. 435, reversing 77 N.Y.S. 117, 73 App.Div. 363—Ziemer v. Crucible Steel Co., 90 N.Y.S. 962, 99 App. Div. 169.

19. Ala.—Carr v. Illinois Cent. R. Co., 60 So. 277, 180 Ala. 159, 43 L. R.A.,N.S., 634.

20. Tex.—Rindge v. Oliphint, 62 Tex. 682—Frost v. Crockett, Civ. App., 109 S.W.2d 529, error dismissed.

21. Fla.—State ex rel. Campbell v. Chapman, 1 So.2d 278, 145 Fla. 647—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Ga.—Wash v. Dickson, 94 S.E. 1009, 147 Ga. 540—Jones v. Smith, 48 S. E. 134, 120 Ga. 642.
Iowa.—Ferguson v. Connell, 230 N. W. 859, 210 Iowa 419.
Me.—In re Neely's Estate, 1 A.2d 772, 136 Me. 79.
N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.
Vt.—Berry v. Rutland R. Co., 154 A. 671, 103 Vt. 388.
23 C.J. p 1089 notes 68, 69.
Jurisdictional defects as ground for collateral attack of judgments generally see the C.J.S. title Judgments §§ 421–427, also 34 C.J. p 528 note 14 et seq.

Residence or domicile of decedent
(1) Order of a court or tribunal of competent jurisdiction granting letters of administration is not generally open to collateral attack on the ground that decedent was not a resident of, or domiciled in, the county in which the grant was made.
Ill.—Bremer v. Lake Erie & W. R. Co., 148 N.E. 862, 318 Ill. 11, 41 A.L.R. 1345, affirming 234 Ill.App. 105—Chicago & Eastern Illinois R. Co. v. Wolfrum, 136 Ill.App. 161.
Iowa.—Ferguson v. Connell, 230 N. W. 859, 210 Iowa 419—In re Klavido's Estate, 176 N.W. 262, 188 Iowa 471.
Mo.—Johnson v. Beazley, 65 Mo. 250, 27 Am.R. 276.
Okl.—Wolf v. Gillis, 219 P. 350, 96 Okl. 6.
Pa.—Zeigler v. Storey, 69 A. 894, 220 Pa. 471, 17 L.R.A.,N.S., 878—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.
W.Va.—Colley v. Calhoun, 109 S.E. 484, 89 W.Va. 399.
23 C.J. p 1089 notes 68, 69.

(2) Where the record is silent concerning decedent's residence in the county, the appointment may not be attacked collaterally.—Ferguson v. Connell, 230 N.W. 859, 210 Iowa 419.

(3) Order or judgment appointing administrator, based on finding, supported by evidence, that decedent was a resident of the county in which the appointment was made, was conclusive on collateral attack made nearly five years after entry in the form of a motion to dismiss the probate or administration proceeding.—In re Spencer's Estate, 245 P. 176, 198 Cal. 329.

(4) Finding by the court which issues letters testamentary or of administration that decedent had his domicile in the county over which the jurisdiction of the court extended, and the letters based on such finding, may not be impeached collaterally on the ground that decedent was not a resident of, or domiciled in, such county.—Sewell v. Christison, 245 P. 632, 114 Okl. 177.

(5) Adjudication in granting letters of administration that decedent had been a resident of the county in which the court has jurisdiction is binding for all of the administration of the estate of decedent, unless vacated or set aside on direct attack; it cannot be attacked collaterally.—In re Relph's Estate, 198 P. 639, 185 Cal. 605—Holabird v. Superior Court in and for Fresno County, 281 P. 108, 101 Cal.App. 49.

(6) Where appointment of administrator was attacked collaterally on the ground that decedent had not died a resident of the county in which the appointment was made, it was not necessary for the party who relied on the effectiveness of the appointment to furnish evidence that decedent was a resident of such county notwithstanding the adverse party had introduced evidence tending to show want of such residence.—Ferguson v. Connell, 230 N.W. 859, 210 Iowa 419.

(7) Evidence has been held insufficient to show that fraud was exercised on the court in inducing it to take jurisdiction of the proceeding in which it appointed an administrator so as to permit a collateral attack on the appointment on the ground that decedent was not a resident of the county in which the appointment was made, even if it were assumed that such fraud would have permitted a collateral attack.—Ferguson v. Connell, 237 N.W. 354, 212 Iowa 1155—Ferguson v. Connell, 230 N.W. 859, 210 Iowa 419.

(8) Probate court's determination that decedent lived in another state, made in assuming jurisdiction over administration of estate, is conclusive against collateral attack, where the appointment of the administrator had been sought on the ground that decedent was a nonresident of the state in which administration was sought and owned real property

is a court of general jurisdiction with regard to probates and the grant of administrations, and has jurisdiction with regard to the whole subject matter, although it may err in taking jurisdiction of a particular case, yet the order is generally not void but only voidable, as shown supra § 72. According to some cases, however, a lack of jurisdiction may be shown collaterally.[22] Where the probate court is a court of limited jurisdiction a lack of jurisdiction may be shown collaterally.[23] The appointment may be attacked collaterally when the record affirmatively shows that the court granting the letters acted without jurisdiction,[24] and indeed any appointment which is void, as distinguished from voidable merely, may be collaterally attacked.[25] Thus it has been held that it may be shown collaterally that the estate had already been fully administered and closed,[26] or that at the time of the grant the probate court of another county had previously taken jurisdiction of, and granted administration on, the same estate, and that there was no vacancy in the administration.[27] Where the petition in an action by an administrator affirmatively shows a lack of jurisdiction in the court which appointed him, defendant may take advantage of such want of jurisdiction.[28]

Where a partnership or corporation is incapable of acting as an executor or administrator, the record of the appointment of an executor may be collaterally attacked where the name of the appointee indicates that it is a corporation or partnership.[29]

Fact of death. As a general rule it may be shown collaterally that the alleged decedent was not dead at the time of the grant of administration,[30] although there appears to be authority to the contrary.[31]

§ 77. Direct Attack

A grant of administration is subject to direct attack in an appropriate proceeding.

An order granting administration is subject to direct attack in an appropriate proceeding.[32] A certiorari proceeding to test the jurisdiction of the

in such state.—State ex rel. Gott v. Fidelity & Deposit Co., 298 S.W. 83, 317 Mo. 1078.

22. Ky.—Bartlett v. Buckner's Adm'r, 97 S.W.2d 805, 265 Ky. 747. 23 C.J. p 1089 note 70.

Burden of proof

The burden of showing want of jurisdiction is on the party who asserts it.—Bartlett v. Buckner's Admr., supra—Jacob's Adm'r v. Louisville & N. R. Co., 10 Bush, Ky., 263.

Sufficiency of evidence

In action by administrator to recover dower allegedly due decedents of whose estates he was administrator, evidence was insufficient to establish that county court which had appointed administrator was without jurisdiction so to do.—Bartlett v. Buckner's Adm'r, 97 S.W.2d 805, 265 Ky. 747.

23. R.I.—Peoples' Sav. Bank v. Wilcox, 3 A. 211, 15 R.I. 258, 2 Am. S.R. 894.
23 C.J. p 1089 note 70.

24. Ark.—Brinkley v. Allen, 143 S.W.2d 187, 200 Ark. 1147.
Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P. 2d 127, 5 Cal.2d 35.
Iowa.—Ferguson v. Connell, 230 N.W. 859, 210 Iowa 419.
Kan.—Anderson v. Walter, 99 P. 270, 78 Kan. 781.
Wis.—Newcomb v. Ingram, 243 N.W. 209, 212, 211 Wis. 88, quoting **Corpus Juris.**
23 C.J. p 1089 note 71.

Want of jurisdiction shown by petition for appointment

Mich.—Olson v. Preferred Automobile Ins. Co., 244 N.W. 178, 259 Mich. 612.

Want of notice or citation

Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.
Ga.—Rusk v. Hill, 45 S.E. 42, 117 Ga. 722—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.

Want of jurisdiction as defense to action by administrator

Ga.—Stewart v. Patterson, 111 S.E. 421, 152 Ga. 754.

25. Ga.—Stanley v. Metts, 149 S.E. 786, 169 Ga. 101.
La.—Flanagan v. Land Development Co., 83 So. 39, 145 La. 843—Carter v. Cambrice, 1 La.App. 156.
Mo.—In re Graves' Estate, App., 73 S.W.2d 844—Linder v. Burns, App., 243 S.W. 361.
N.Y.—Van Dusen v. Sturm, 8 N.Y.S.2d 757, reversed on other grounds 12 N.Y.S.2d 133, 257 App.Div. 914.
N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.
Okl.—Barrett v. Steele, 117 P.2d 1020.
Wis.—Newcomb v. Ingram, 243 N.W. 209, 212, 211 Wis. 88, quoting **Corpus Juris.**
23 C.J. p 1090 note 72.

26. Tex.—Fisk v. Norvel, 9 Tex. 13, 58 Am.D. 128.

27. Ala.—Beasley v. Howell, 22 So. 989, 117 Ala. 499.
23 C.J. p 1090 note 76.

28. By special demurrer

Ky.—Louisville Trust Co. v. Louisville & N. R. Co., 43 S.W. 698, 102 Ky. 480, 80 Am.S.R. 358, 19 Ky.L. 1529.

29. Ohio.—Western Union Tel. Co. v. Union Sav. & Trust Co., 30 Ohio Cir.Ct. 380.

30. Iowa.—In re Barrett's Estate, 149 N.W. 247, 167 Iowa 218.
N.C.—Chamblee v. Security Nat. Bank, 188 S.E. 632, 211 N.C. 48—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.
Tex.—Fisk v. Norvel, 9 Tex. 13, 58 Am.D. 128.
Validity of grant of administration on estate of living person see supra § 16.

Burden of proof is on the party who collaterally attacks the grant.—In re Barrett's Estate, 149 N.W. 247, 167 Iowa 218.

Temporary administration

In a grant of temporary administration it is not to be expected, so far as the presumption of death is concerned, that there should be the same certainty as in cases of general administration, and slight proof of death will suffice to preclude a collateral attack on the appointment of such an administrator.—Czech v. Bean, 72 N.Y.S. 402, 35 Misc. 729.

31. N.J.—Hamilton v. Orange Sav. Bank, 124 A. 62, 99 N.J.Law 503.
23 C.J. p 1093 note 73, New Jersey case.

32. U.S.—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901.
Ala.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597—Bell v. Fulgham, 80 So. 39, 202 Ala. 217.
Ohio.—In re Gingery's Estate, 134 N.E. 449, 103 Ohio St. 559.
Or.—In re Armstrong's Estate, 82 P.2d 880, 159 Or. 698.
Wash.—In re Upton's, 92 P.2d 210, 199 Wash. 447, 123 A.L.R. 1220—

court to make an order appointing an administrator is a direct attack on the order,[33] and a proceeding to revoke the appointment or letters of an administrator made in the same court in which the appointment was made is a direct, and not a collateral, attack on the appointment.[34]

Any person may directly attack a void grant of administration,[35] but, according to some cases, a grant of administration valid on its face can be attacked only by a creditor or next of kin of the decedent or some other person in some way interested in the estate.[36]

Where a direct attack on an appointment is made, and such appointment is claimed to be void and ultra vires, no right or title to the property of the succession can absolutely vest in the appointee so long as the opposition remains undisposed of.[37] The probate court alone has jurisdiction in a direct proceeding to question the authority of the public administrator to administer an estate.[38]

G. DURATION AND TERMINATION OF AUTHORITY

§ 78. In General

a. General rules
b. Statutory limitations
c. Final account and settlement
d. Testacy or intestacy apparent after action based on contrary supposition

a. General Rules

The authority of an executor or administrator continues until the estate has been completely administered, or until he dies, resigns, or is removed, or his letters revoked, or a temporary order of suspension is made.

As a general rule, the authority of an executor or administrator continues until the estate has been completely administered by payment of debts and legacies and distribution among those entitled, and the personal representative has been finally discharged,[39] or until he dies, see infra § 81, resigns,

State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 179 Wash. 198, 95 L.R.A. 819.

Appointment in wrong county.

The improper appointment of an administrator by a probate court in a county in which decedent did not reside or did not have his domicile may be avoided in a direct proceeding.
Ala.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597.
Ohio.—In re Gingery's Estate, 134 N. E. 449, 103 Ohio St. 559.
Or.—In re Armstrong's Estate, 82 P. 2d 880, 159 Or. 698.

"Direct attack" defined

(1) A direct attack is "one by which the judgment is directly assailed in some mode authorized by law."—In re Gingery's Estate, 134 N.E. 449, 451, 103 Ohio St. 559.

(2) A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law in a proceeding instituted for that very purpose.—In re Armstrong's Estate, 82 P.2d 880, 884, 159 Or. 698.

Proceedings not constituting direct attack

Attack on proceedings in administration of an estate for fraud, irregularities in sale, and on administrator's claim against estate, was not a direct attack on order granting administration.—Gillette's Estate v. State, Tex.Civ.App., 286 S.W. 261, reversed on other grounds State v. Gillette's Estate, Com.App., 10 S.W.2d 984.

33. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.

34. Ala.—Bell v. Fulgham, 80 So. 39, 202 Ala. 217.
Cal.—Estate of Way, 85 P.2d 563, 29 Cal.App.2d 669.
Ohio.—In re Gingery's Estate, 134 N.E. 449, 103 Ohio St. 559.
Wash.—In re Upton's Estate, 92 P.2d 210, 199 Wash. 447, 123 A.L.R. 1220—State ex rel. Lauridsen v. Superior Court for King County, 37 P. 2d 209, 179 Wash. 198, 95 A.L.R. 819.
Revocation of letters see infra §§ 84–88.

Attack by executor subsequently appointed

Where administrator was appointed in one county court, will of deceased was probated in another county court and executrix therein appointed, a proceeding by executrix in the first county court to vacate the order appointing the administrator and to revoke the letters of administration, was a direct attack and not a collateral attack on the order and could be properly maintained.—In re Armstrong's Estate, 82 P.2d 880, 159 Or. 698.

35. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.
Ga.—Stewart v. Golden, 25 S.E. 528, 98 Ga. 479.
23 C.J. p 1090 note 82.
Who may apply for revocation of appointment or letters see infra § 85.

36. Ga.—Jones v. Smith, 48 S.E. 134, 120 Ga. 642.
23 C.J. p 1090 note 83.

37. La.—State v. Hingle, 23 So. 616, 50 La.Ann. 683.
Custody and management of estate see infra §§ 184–322.

38. Mo.—Vermillion v. Le Clare, 89 Mo.App. 55.
Public administrators see infra §§ 1050–1053.

39. Mo.—State ex rel. and to Use of Bremer v. Schulte, App., 90 S. W.2d 1078—Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.
N.Y.—In re Bloomingdale's Estate, 13 N.Y.S.2d 674, 171 Misc. 843.
N.C.—Edwards v. McLawhorn, 11 S. E.2d 562, 218 N.C. 543—Rocky Mount Savings & Trust Co. v. McDearman, 195 S.E. 531, 213 N.C. 141—Creech v. Wilder, 193 S.E. 281, 212 N.C. 162.
23 C.J. p 1091 note 97.

Failure to distribute estate

Executrix retained all powers and duties of executrix provided by law so long as she remained executrix, even if she failed to perform statutory duty of distributing realty to heirs or devisees.—Walker Bank & Trust Co. v. Steely, 34 P.2d 56, 54 Idaho 591.

Continuance as executors or trustees

(1) Will may extend duties of distribution by executors in that unaltered capacity to distant date after closing of administration, but failure thereof to specify that trust fund is to be held by them thereafter as trustees, guardians, or legatees will not always continue office of executors, as trust or other second holding may be made clear without explicit declaration.—Zimmerman v. Coblentz, 185 A. 342, 170 Md. 468.

(2) Where will created trust in executor, as where will appointed corporation "executor and trustee" to

see infra § 82, or is removed, see infra §§ 89–94, or his letters are revoked, see infra §§ 84–88, or a temporary order of suspension is made, see infra § 1035. The appointment of a guardian for minor heirs does not oust the administrator from his office or terminate the administration,[40] and it has been held that the office of a residuary legatee as executor is not terminated on the filing and approval of the bond to pay debts and legacies.[41] However, it has been held that, where the creditors of the estate consent to the delivery of possession, there is no legal obstacle in the way of the heirs receiving possession of the property, and such voluntary delivery by the administrator terminates his administration, and transfers the claim of creditors over against the heirs,[42] although the assumption of possession during the administration by a universal legatee, who is also the testamentary executor, of the property bequeathed to him by the will, is held not to have, ipso facto, the effect of closing the succession and discharging the executor.[43]

A testamentary provision giving an executor five years to wind up the estate has been held not to fix an arbitrary limit beyond which the administration could not extend if necessary, but to have been merely intended as an enlargement of the time allowed by law and an expression of opinion that the estate could not be wound up in less than five years.[44]

Power of equity to prevent undue prolongation. Where a will provides that the executor shall receive in lieu of commission a given sum annually during the time he acts as such, and it is evident from the whole scheme of the will that the testator contemplated that the executorship should last for several years, the court of equity affords abundant remedy to prevent an undue and improper prolongation of the executorship.[45]

Consolidation of corporate executor. Statutory provisions for the consolidation of state banks with national banks have been held not to transfer the office of executor from a state trust company to the succeeding national bank,[46] but a national bank, appointed as administrator, was held not deprived of authority on consolidation with a state bank, especially where it continued to exercise its corporate functions without modification under the same charter.[47]

Expiration of term of public administrator as terminating his authority is discussed infra § 1051.

b. Statutory Limitations

The tenure of an executor or administrator is terminated by statutes in some jurisdictions at the expiration of a designated time, but extensions are provided for in suitable cases.

By virtue of statutes in a few jurisdictions, the tenure of an executor or administrator is terminated at the expiration of a designated time,[48] but extensions are provided for in suitable cases,[49] and it is not readily to be presumed that at the expira-

manage estate and pay income to life beneficiaries, duration of executorship was limited only by continuance of trust, and appointee could appeal as executor, without filing appeal bond, from decision construing rights of beneficiary under will.—Houston Land & Trust Co. v. Campbell, Tex. Civ.App., 105 S.W.2d 430, error refused.

"Period of administration" of an estate is the time required by legal representatives to perform ordinary duties pertaining to its settlement, especially the collection of assets and the payment of debts and legacies.—In re Lewis' Will, 18 N.Y.S.2d 133, 259 App.Div. 4, appeal denied 20 N.Y.S.2d 414, 259 App.Div. 933, affirmed 30 N.E.2d 720, 284 N.Y. 671.

Protection of creditors

When administration is necessary solely to protect creditors, it stops when the creditors are protected.—In re Rainbow's Estate, 298 N.Y.S. 79, 163 Misc. 732, affirmed 298 N.Y.S. 89, 251 App.Div. 809.

40. Tex.—Wilkin v. Simmons, Civ. App., 151 S.W. 1145.

41. Mich.—Lafferty v. People's Sav. Bank, 43 N.W. 34, 76 Mich. 35. 23 C.J. p 1091 note 99.

42. La.—Barton v. Burbank, 38 So. 150, 114 La. 224—Scott v. Briscoe, 36 La.Ann. 278.

43. La.—McNeely v. McNeely, 24 So. 338, 50 La.Ann. 823.

44. Tenn.—Ensley v. Ensley, 58 S. W. 288, 105 Tenn. 107.

45. D.C.—Marfield v. McMurdy, 25 App.D.C. 342.

46. U.S.—Ex parte Worcester County Nat. Bank of Worcester, 49 S.Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 987, modifying Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444.

Must apply for appointment

National bank after consolidation with state trust company acting as administrator must immediately apply for appointment of itself as administrator, and refusal to receive return and application for discharge filed by national bank as administrator was held proper, where bank merely took over by consolidation assets of state trust company acting as administrator.—Stevens v. First Nat. Bank & Trust Co., 160 S.E. 243, 173 Ga. 332, certiorari denied First Nat. Bank & Trust Co. in Macon v. Stevens, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578.

47. Mass.—Petition of Worcester County Nat. Bank of Worcester, 161 N.E. 797, 263 Mass. 394.

Change of name immaterial

Mass.—Petition of Worcester County Nat. Bank of Worcester, supra.

48. Tex.—Murphy v. Wright, Civ. App., 273 S.W. 637. 23 C.J. p 1092 note 5.

49. Wis.—In re Hurley's Will, 213 N.W. 639, 193 Wis. 20. 23 C.J. p 1092 note 6.

Duty to care for estate

Although statute limits time in which estates should be settled, it is executor's duty to care for estate thereafter until settled.—In re Hurley's Will, supra.

One year

Extension will not exceed one year where heirs or legatees do not act unanimously in agreeing to extend the term.—Alvarado v. Ortiz, 15 Puerto Rico 129.

tion of the period named by statute the estate shall vest immediately by mutation of title in the heirs, as though fully settled, or that the legal representative becomes discharged by operation of law.[50]

Repeal of statute authorizing appointment. Where a statute authorizing probate courts to appoint an agent to take charge of lands belonging to decedent's estate is repealed, the authority of an agent previously appointed under such statute terminates.[51]

c. Final Account and Settlement

The functions of a representative do not necessarily cease on a final settlement and approval of his account.

As a general rule the functions of an executor or administrator do not necessarily cease on a final settlement and approval of his account, but he may, if occasion arises, pursue his duties further for the benefit of the estate, unless the probate records show a formal discharge from the trust;[52] but some cases have held the contrary where it appeared that the estate had been fully settled and there could be nothing further on which to exercise the functions of an administrator or executor.[53] So, also, while the office of an executor as such terminates on distribution of the estate,[54] an order of distribution cannot discharge executors until the estate is distributed,[55] and where administration had not been closed, the original administrator can be required to take charge of additional assets.[56]

d. Testacy or Intestacy Apparent after Action Based on Contrary Supposition

Ordinarily the office of an executor or administrator with the will annexed ceases when the will is judicially declared invalid and set aside, and conversely, the admission of a will to probate will supersede and nullify a grant of administration based on an assumption of intestacy.

The office of executor ceases when the will is judicially declared invalid and set aside,[57] notwithstanding an appeal from the order revoking probate;[58] but a will contest does not authorize the court to terminate the authority of an executor whose appointment has been confirmed,[59] and although it may appoint an administrator pendente lite as shown infra § 1035, in the absence of such appointment, an executor continues to have power pending an appeal from a decision vacating probate of the will until the estate is administered or the decision affirmed and the estate turned over to his successor.[60] While the same rule has been held to apply to an administrator with the will annexed,[61] there is authority to the contrary,[62] and it has been held that if decedent died intestate or the probate of an instrument as his will is void, administration with the will annexed is not void but only voidable,[63] although it is clear that when probate of an alleged will is set aside, it is proper to remove an administrator with the will annexed and appoint a general administrator.[64]

The admission of a will to probate will supersede and nullify a grant of administration based on an

50. Md.—Citizens' Nat. Bank v. Sharp, 53 Md. 521.

Closing of estate will not be presumed from mere lapse of time.—Houston Land & Trust Co. v. Campbell, Tex.Civ.App., 105 S.W.2d 430, error refused.

51. Mo.—Wendleton v. Kingery, 84 S.W. 102, 110 Mo.App. 67.
23 C.J. p 1096 note 54.

52. Okl.—Hickman v. Barrett, 52 P. 2d 40, 44, 175 Okl. 262, citing **Corpus Juris.**
Wash.—In re Dyer's Estate, 297 P. 196, 161 Wash. 498.
23 C.J. p 1094 note 37.
Effect of payment or distribution in general see infra § 500.

Estate is not fully administered, until nothing remains to be done to vest title in the beneficiary, whether creditor, next of kin, legatee, or devisee.—Wyatt v. Stillman Institute, 260 S.W. 73, 303 Mo. 94.

Right to sue
That an administrator had filed his final settlement was held not to defeat his action for the negligent killing of his intestate, where the settlement had not been approved or the administrator discharged.—Powell v. Jonesboro, L. C. & E. Ry. Co., 266 S.W. 78, 166 Ark. 252.

53. Ill.—People v. Kohlsaat, 66 Ill. App. 505, 507, affirmed 48 N.E. 81, 168 Ill. 37.
23 C.J. p 1095 note 38.

54. Pa.—Hart's Estate, 12 Pa.Dist. 47, 28 Pa.Co. 126.

55. Wash.—In re Dyer's Estate, 297 P. 196, 161 Wash. 498.
23 C.J. p 1095 note 40.

56. Wash.—In re Dyer's Estate, supra.

Vacating distribution decree unnecessary
Decree of distribution which did not attempt to dispose of corporate stock in controversy was held not required to be vacated to obtain additional administration.—In re Dyer's Estate, supra.

57. N.Y.—Matter of Cavanaugh, 131 N.Y.S. 982, 72 Misc. 584, 586.
23 C.J. p 1095 note 41.

58. N.Y.—Matter of Cavanaugh, supra.
23 C.J. p 1095 note 42.

59. Mo.—Kinnerk v. Smith, 41 S.W. 2d 381, 328 Mo. 513.

60. D.C.—Brosnan v. Fox, 284 F. 923, 52 App.D.C. 143.

61. N.C.—In re Smith's Will, 10 S. E.2d 676, 218 N.C. 161.
Tex.—Cavanaugh v. Cavanaugh, Civ. App., 249 S.W. 264.
23 C.J. p 1095 note 43.

By implication
Where the court admitted a will to probate and appointed an administrator with will annexed, and on appeal the will was set aside and the probate thereof annulled, but the appointment of the administrator was not expressly vacated, it was held in view of a statute requiring appeals to be tried de novo, that the judgment of the lower court was superseded, and that the appointment of the administrator with will annexed was revoked by implication.—Cavanaugh v. Cavanaugh, supra.

62. N.C.—Floyd v. Herring, 64 N. C. 409.

63. Ala.—Ward v. Oates, 42 Ala. 225.

64. Ky.—Hamilton v. Williams, 118 S.W. 358, 133 Ky. 558, 21 L.R.A.,N. S., 975.

assumption of intestacy,[65] or at least furnish sufficient ground for revocation of the letters of administration, as shown infra § 84, but where letters testamentary are denied, because of disqualification of the executor, the letters of administration remain in full force and effect.[66] Indeed, as the person named as executor in a will is entitled to administer the estate, see supra § 27, the establishment of a will necessarily requires a revocation of letters of administration granted on a supposition of intestacy,[67] and where letters of administration were revoked by a decree admitting a will to probate, the authority of the administrator ceased, and it was not revived by the fact that such decree was subsequently set aside.[68] While a payment to an administrator prior to the discovery of the will has been held valid,[69] it has been held that a disposition of assets by the supposed administrator is void.[70]

§ 79. Final Discharge

a. In general
b. Proceedings
c. Order of discharge
d. Effect
e. Revocation or setting aside

a. In General

Ordinarily an executor or administrator is not entitled to a final discharge until after full settlement of the estate.

The court has no legal authority to discharge the executor or administrator, pending a complete settlement of the estate, except as the statute may have permitted, and the usual rule is that a representative is not entitled to his final discharge until after full settlement of the estate, including final payment and delivery of all the property by way of distribution to those entitled to the balance, and the rendering and approval of his final accounts.[71] When, however, an executor or administrator has fully performed all of his duties, he is entitled to be discharged from the trust.[72]

b. Proceedings

In proceedings for a final discharge, an executor or administrator must comply with applicable statutory requirements, and only interested persons may object to the discharge of an executor or administrator and a valid ground for refusing discharge must be interposed in order to prevent a final discharge being granted to the representative.

In applying for a discharge, an executor or administrator must comply with applicable statutory requirements,[73] and it is usually required that notice of an application for a discharge shall be given.[74] Where letters testamentary were granted by a court, the proper practice is to apply to such court for the discharge,[75] but a discharge will not be granted where the court has no jurisdiction of the issues raised in such proceeding.[76] Where an executor petitions for a discharge, the burden is on a caveator to sustain an affirmation that the estate has not been fully administered, and that petitioner is not entitled to a discharge.[77]

A person must have a proper interest in the estate in order to be entitled to object to the discharge of an administrator.[78] Where a surviving administrator makes final returns, approved by the ordinary, and full commissions are charged and allowed for services of himself and his deceased coadministrator, and application is made for discharge, the representative of deceased coadministrator has no right to maintain a caveat thereto because the survivor has not paid the estate of deceased coadministrator the proper amount of such commissions.[79]

65. N.Y.—Morris v. Morris, 158 N.Y.S. 361, 172 App.Div. 719.
N.C.—In re Suskin's Estate, 198 S.E. 661, 214 N.C. 219.
23 C.J. p 1095 note 47.

Until executor qualifies
Whenever an administrator is appointed for an estate, he continues to act until the will is probated and executor has qualified.—Hankamer v. State, Tex.Cr., 150 S.W.2d 794.

66. N.C.—In re Gulley's Will, 118 S.E. 839, 186 N.C. 78.

67. N.H.—Kittridge v. Folsom, 8 N.H. 98.
23 C.J. p 1096 note 50.

68. N.Y.—Belden v. Belden, 103 N.Y.S. 346, 118 App.Div. 296.

69. Pa.—Zeigler v. Storey, 69 A. 894, 220 Pa. 471, 17 L.R.A.,N.S., 878.

70. Eng.—Ellis v. Ellis, [1905] 1 Ch. 613.

71. La.—Succession of Taylor, 141 So. 847, 174 La. 822.
Mo.—In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.
S.C.—Dickinson v. Peeples, 13 S.E. 2d 124, 196 S.C. 124—Beckwith v. McAlister, 162 S.E. 623, 165 S.C. 1.
23 C.J. p 1092 note 9.

72. La.—In re Courtin, 81 So. 457, 144 La. 971.
23 C.J. p 1093 note 10.

73. Pa.—Wiseman's Estate, 12 Phila. 11, 4 Wkly.N.C. 59.
23 C.J. p 1093 note 17.

74. Fla.—Anderson v. Northrup, 30 Fla. 612.
23 C.J. p 1093 note 16.

75. **Foreign state**
Where letters testamentary were granted in a foreign state where testator was domiciled, proper practice, if executrix desired to be discharged, was to apply to the court of the foreign state for her discharge, and such court on granting petition could appoint a substituted executor or trustee.—Buhring v. National Standard Co., 12 A.2d 632, 127 N.J.Eq. 243.

76. Ga.—Fulford v. Sweat, 16 S.E. 2d 102, 65 Ga.App. 521.

Existence of disputed claim
In proceeding by administrator for discharge before expiration of twelve months from time of appointment, where agreed statement of facts showed dispute as to whether mortgage had been discharged by an agreement between the creditors and administrator, court of ordinary was without jurisdiction to adjudicate such disputed claim.—Fulford v. Sweat, supra.

77. Ga.—Rogers v. Culver, 94 S.E. 266, 21 Ga.App. 95.

78. Ark.—Gulf Refining Co. v. Haire, 1 S.W.2d 76, 175 Ark. 1036.

79. Ga.—Groover v. Ash, 64 S.E.

The heirs cannot object to the discharge of the administrator on the ground that he had not sold all the real estate, since on the closing of the estate the title thereto would vest in them,[80] and the discharge of an executor cannot be resisted by the life tenant of the estate because he failed to sue for a certain debt due the estate and took credit for certain legal expenses, where it appears that the estate was in no way injured by the neglect to bring suit and that the expenses complained of were occasioned by the life tenant herself.[81] Pendency of an action by an attorney who assisted in defending a contest of a will, against the executor and trustee under the will, to have a lien on the judgment in the will contest case declared in plaintiff's favor for the amount of his fee, and for an order that the fee be paid from the trust fund, is no ground for refusal to approve the final report of the executor, and order his discharge.[82]

c. Order of Discharge

Action of the court evidenced by an order or decree is necessary to close administration and relieve executors or administrators from their responsibility.

Action of the probate court evidenced by order or decree is necessary to close administration and relieve executors or administrators from their responsibility or change their possession as representatives into possession as legatees or distributees.[83] It has been held that an order discharging an administratrix on the condition of paying a certain sum to the heirs of the estate and filing vouchers therefor does not effect the discharge until the money is paid and the vouchers filed,[84] and that an order directing that an administrator be discharged on making distribution, and obtaining from the heirs receipts for their respective shares, does not discharge the administrator until the order is made absolute.[85] Where a final account is delivered by an executor to an attorney representing the beneficiaries under the will with the accompanying statement that he expects remuneration and is willing to accept such fees as may be fixed by the court, an order of discharge made without fixing the fees of such executor should be set aside at his petition.[86]

d. Effect

Where an executor or administrator is finally discharged, all his powers and liabilities thereupon cease and, unless obtained by fraud, such discharge is binding on all parties appearing until duly set aside.

On discharge of an executor or administrator, all his powers and liabilities thereupon cease,[87] and thereafter he has nothing to do with the estate,[88] and cannot be required to make further accounting in the absence of fraud or error in the entry of the decree discharging him.[89] While a decree against an administrator who has been discharged by a judgment of the court of ordinary and a successor appointed during the pendency of the case has been held a nullity so far as the estate is concerned,[90] a judgment in favor of a representative, who was discharged as such after commencement of the action but before judgment, has been held neither void nor valid, but voidable.[91]

A final discharge granted after a hearing is binding on all parties appearing[92] until it is duly set aside either on motion in the court in which it was rendered or in an equitable proceeding instituted for that purpose,[93] but an order discharging an administrator on a settlement made by him without giving notice required by statute will not affect the rights of heirs or creditors not appearing at the final set-

323, 132 Ga. 371, 131 Am.S.R. 201, 22 L.R.A.,N.S., 1119.

80. Tex.—De Berry v. Wootters, Civ. App., 57 S.W. 885.

81. Pa.—Marley's Estate, 18 Pa. Super. 303.

82. Colo.—Hallett v. Lathrop, 77 P. 1096, 20 Colo.App. 212.
23 C.J. p 1093 note 15.

83. Mont.—State v. District Court of Nineteenth Judicial Dist. in and for Toole County, 245 P. 529, 76 Mont. 143.
Pa.—Ferrell v. South Penn Oil Co., 87 Pittsb.Leg.J. 44.
23 C.J. p 1092 note 8.

Approval of final account
A discharge is not effected by the approval of the representative's final account, without a formal order of discharge.—Edwards v. McLawhorn, 11 S.E.2d 562, 218 N.C. 543.

84. U.S.—Cosgrove v. U. S., 33 Ct. Cl. 167.

85. Wash.—State v. Walla Walla County Super. Ct., 42 P. 630, 13 Wash. 25.

86. Ill.—Smith v. Griswold, 161 Ill. App. 483.

87. La.—In re Courtin, 81 So. 457, 144 La. 971.
Mont.—State v. District Court of Nineteenth Judicial Dist. in and for Toole County, 245 P. 529, 76 Mont. 143.
23 C.J. p 1093 notes 10, 22.
Effect of discharge as executor on right of devisee to sell real property under testamentary power see the C.J.S. title Wills § 1070, also 69 C.J. p 847 note 38.

Judgment held valid
Mo.—Gorg v. Rutherford, App., 31 S.W.2d 585.

88. Mont.—State v. District Court of Nineteenth Judicial Dist. in and for Toole County, 245 P. 529, 76 Mont. 143.

N.Y.—Earle v. McGoldrick, 36 N.Y.S. 803, 15 Misc. 135.
23 C.J. p 1093 note 11.

89. Pa.—Sheet's Estate, 25 Pa.Dist. 383.

90. Ga.—Groce v. Field, 13 Ga. 24.

Discharge binding
A judgment discharging a person as administrator of the estate of guardian was binding and precluded a judgment against such administrator until judgment of discharge was set aside for sufficient cause.—Crow v. Martin, Ga.App., 17 S.E.2d 90.

91. Cal.—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.

92. Cal.—In re McDermott, 59 P. 783, 127 Cal. 450.
23 C.J. p 1093 note 24.

93. Ga.—Summerlin v. Floyd, 53 S.E. 452, 124 Ga. 980.
23 C.J. p 1094 note 25.

tlement,[94] nor does an order settling an estate and discharging the executor necessarily revoke a power, vested in the executor by the will, to sell testator's land as soon as practicable, and distribute the proceeds, as shown infra § 279. The court does not lose jurisdiction of the estate by an order discharging the administrator, where such order was founded on, and conditioned on, compliance with a decree of distribution which has been vacated on appeal.[95] A discharge obtained by an executor by means of a fraud practiced on the legatees or the probate court is void;[96] and, while it may be set aside on motion in the probate court on proof of the fraud,[97] it may also be collaterally attacked as a nullity by an equitable petition in another court.[98] However, where the order discharging an executor is not void, it is not subject to collateral attack;[99] and an order refusing to discharge a representative has been held not appealable,[1] and the same has been held as to an order discharging a public administrator.[2]

e. Revocation or Setting Aside

An order discharging a representative may be set aside by the court by which it was made, provided the proceeding is brought within the time which is sometimes limited by statute.

An order discharging an executor or administrator may be set aside by the court by which it was made,[3] even at a subsequent term,[4] but the time within which proceedings to set aside the discharge may be instituted is sometimes limited by statute.[5] A decree requiring the restoration of funds to a discharged administrator has been held, in effect, to set aside the order of discharge,[6] and where an administrator on settlement of his final account was discharged by the probate court, but he was afterward recognized by, and acted in, such court as administrator, it was held that it was to be presumed, in an action to compel an accounting, that the order of discharge was revoked.[7] The fact that one has been sued by an administrator will not authorize such person to resist in the county court an application made therein to vacate an order discharging the administrator.[8]

§ 80. Marriage of Executrix or Administratrix

At common law the marriage of an executrix or administratrix casts the administration on her husband acting in her right, but under some statutes the marriage terminates her authority.

The common-law rule is that the marriage of an executrix or administratrix does not extinguish her powers,[9] but has the effect of casting the administration on her husband acting in her right.[10] However, by statute it is sometimes provided that the marriage of an executrix or administratrix terminates her authority,[11] and where this is the case her authority is not revived by her subsequently becoming a widow.[12] A familiar distinction is that, where a feme sole is executrix or administratrix with others and afterward marries, her power is determined; but that, where she is sole administratrix, her power does not determine, but her husband becomes by the marriage jointly interested with her in the trust.[13]

§ 81. Death or Insanity of Representative

Death or insanity of an executor or administrator terminates his functions as such.

The death of an executor or administrator necessarily terminates his functions as such,[14] and, where the representative is a married woman, a right of her husband as such to administer the estate terminates on her death.[15]

The office of executor or administrator may terminate by the insanity of the incumbent.[16]

94. Mich.—Cole v. Shaw, 96 N.W. 573, 134 Mich. 499.
23 C.J. p 1094 note 26.

95. Cal.—In re Walker, 181 P. 792, 180 Cal. 478.

96. Ga.—Pass v. Pass, 25 S.E. 752, 98 Ga. 791.

Void equivalent of voidable
As used in a statute, relative to a judgment discharging an administrator, obtained by fraud, "void" is to be understood as the equivalent of "voidable".—Summerlin v. Floyd, 53 S.E. 452, 124 Ga. 980.

97. Ga.—Pass v. Pass, 25 S.E. 752, 98 Ga. 791.

98. Ga.—Pass v. Pass, supra.

99. N.M.—Cravens v. Coldren, 279 P. 944, 34 N.M. 209.

1. Ala.—Hamilton v. Gwynn, 24 Ala. 515.
3 C.J. p. 571 note 47 [b] (2), (3).

2. Cal.—In re Mitchell's Estate, 1 P.2d 536, 115 Cal.App. 348.

3. Ill.—Heppe v. Szczepanski, 70 N. E. 737, 209 Ill. 88, 101 Am.S.R. 221.

4. Ill.—Gahan v. Golden, 162 N.E. 164, 330 Ill. 624.

5. Ariz.—In re Ralph's Estate, 67 P. 2d 230, 49 Ariz. 391.
23 C.J. p 1094 note 35.

6. Fla.—Lewis State Bank v. Raker, 189 So. 227, 138 Fla. 227.

7. Tex.—Bayne v. Garrett, 17 Tex. 330.
23 C.J. p 1094 note 33.

8. Neb.—Edney v. Baum, 80 N.W. 502, 59 Neb. 147.

9. S.C.—Hamilton v. Levy, 19 S.E. 610, 41 S.C. 374.
23 C.J. p 1096 note 56.

10. N.J.—Wood v. Chetwood, 27 N.J. Eq. 311.
23 C.J. p 1096 note 57.

11. R.I.—Bailey v. Brown, 9 R.I. 79.
23 C.J. p 1096 note 58.

12. Ohio.—Matter of Fagin, 10 Ohio Dec., Reprint, 180, 19 Cinc.L.Bul. 149.

13. Mass.—Barber v. Bush, 7 Mass. 510.
23 C.J. p 1096 note 60.

14. N.C.—Edwards v. McLawhorn, 11 S.E.2d 562, 218 N.C. 543.
23 C.J. p 1096 note 62.

15. Ala.—Sands v. Hickey, 33 So. 827, 135 Ala. 322.
Miss.—Edmundson v. Roberts, 1 Miss. 322.

16. Cal.—In re Moore, 9 P. 164, 68 Cal. 281.
23 C.J. p 1097 note 64.

§ 82. Resignation

a. In general
b. Procedure
c. Effect
d. Collateral attack on, and vacation of, order

a. In General

While statutes now permit an executor or administrator to resign, the right is not absolute and the matter is sometimes discretionary with the probate court.

While it has been held that an executor or administrator who has once fully accepted and entered upon his trust cannot resign it unless a statute permits him to do so;[17] and it has been held by some authorities that the probate court has no power to accept the resignation of an executor or administrator,[18] it has also been held that the power to remove a personal representative includes the power to permit him to resign, and that the acceptance of a resignation is, in effect, a removal;[19] and in many jurisdictions statutes now permit an executor or administrator to resign.[20]

Although this right is usually not absolute but conditional and qualified,[21] and the matter is subject to the discretionary powers of the probate court[22] which may refuse its assent, unless the executor or administrator shows that he has good cause for resigning,[23] it has also been held that the moment a resignation in writing is filed it becomes an established fact,[24] and acceptance by the probate court is not required.[25] It is usually required as a condition to the acceptance of the resignation that the personal representative shall settle his accounts,[26] and deliver up all assets of the estate in his hands.[27]

A resignation may be implied as well as express.[28]

Agreements to resign. An agreement to resign for a consideration has been held illegal and void as against public policy,[29] but in a case where there were no creditors whose interest could be affected an agreement by one coadministrator with the other, the latter being the sole distributee of the estate, that the former would apply for a discharge and release in consideration of a designated sum of money in satisfaction of a claim made by him against the decedent and of his commissions, was held valid and binding.[30]

Retraction of resignation. It has been held that an executor who has resigned cannot retract his resignation,[31] and the court has but one duty to perform, that is, to require the representative to ac-

17. La.—Broadway's Succession, 38 So. 430, 114 La. 492.
23 C.J. p 1097 note 65.

18. Ala.—Driver v. Riddle, 8 Port. 343.
23 C.J. p 1097 note 66.

19. Tex.—Slay v. Davidson, Civ.App., 88 S.W.2d 650, error refused.
23 C.J. p 1097 note 67.

20. Cal.—Waterland v. Superior Court in and for Sacramento County, 98 P.2d 211, 15 Cal.2d 34.
Ky.—Warden v. Hoover's Adm'r, 283 S.W. 444, 214 Ky. 370.
23 C.J. p 1097 note 68.

Acts not constituting resignation

Where letters of administration were granted on the estate of a deceased person who had an interest in remainder under a will, and thereafter, on the death of the life tenant, letters of administration were granted on the estate of the remainderman to another, the fact of the first administration being overlooked, that the first administrator took to the second administrator a paper, whereby the wife of the first administrator renounced her right to administer on the life tenant's estate, and nominated the second administrator as such, did not constitute a resignation by the first administrator, where it appeared that he, as well as the court and the second administrator, failed to recall the fact of the first administration, and hence could not make the second administration effective.—Mitchell v. McCormick, 122 A. 245, 143 Md. 328.

Independent executor may resign

Tex.—Roy v. Whitaker, 48 S.W. 892, 49 S.W. 367, 92 Tex. 346—Rankin v. Rankin, Civ.App., 134 S.W. 392, reversed on other grounds 151 S.W. 527, 105 Tex. 451.

21. Pa.—Forster's Estate, 2 Lanc.L. Rev. 206.
23 C.J. p 1097 note 69.

Public administrator should not be permitted to resign at his own option, but, for good cause shown, probate court could accept resignation of public administrator having given due notice of his intention to resign, and such order accepting resignation is appealable.—State ex rel. Russell v. Mueller, 60 S.W.2d 48, 332 Mo. 758, 91 A.L.R. 705.

22. Puerto Rico.—Mollfulleda v. Ramos, 3 Puerto Rico 239.
23 C.J. p 1097 note 70.

Independent executors cannot resign without some court action.—Ewing v. Wm. L. Foley, Inc., Civ.App., 239 S.W. 251, reversed on other grounds 280 S.W. 499, 115 Tex. 222, 44 A.L.R. 627.

23. N.Y.—In re Gates' Estate, 254 N.Y.S. 614, 142 Misc. 83, modified on other grounds 268 N.Y.S. 686, 239 App.Div. 666.
23 C.J. p 1097 note 71.

24. Cal.—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal.App.2d 253.

Statute construed

The legislature intended same construction to be given to statute specifying when an office becomes vacant as to statute authorizing an executor or administrator to resign his appointment by writing filed in superior court to take effect on settlement of his accounts, relative to effect of a written resignation, where, prior to enactment of statute, executors and administrators were denied right to resign without receiving permission of appointing power, and same rule prevailed as to public officers until enactment of statute.—In re Grafmiller's Estate, supra.

25. Cal.—In re Grafmiller's Estate, supra.

26. Cal.—Waterland v. Superior Court in and for Sacramento County, 98 P.2d 211, 15 Cal.2d 34.
23 C.J. p 1098 note 72.

27. Cal.—Waterland v. Superior Court in and for Sacramento County, supra.
23 C.J. p 1098 note 73.

28. Cal.—Allen's Estate, 78 Cal. 581.
23 C.J. p 1098 note 74.

29. Colo.—Currier v. Clark, 75 P. 927, 19 Colo.App. 250.

30. Md.—Cummings v. Robinson, 51 A. 1105, 95 Md. 83, 53 A. 795, 95 Md. 759.

31. Cal.—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal.App.2d 253.
23 C.J. p 1098 note 77.

count and to appoint his successor.[32]

b. Procedure

A representative desiring to resign should apply to the court appointing him, by a petition in due form and should give the parties in interest notice of his intention, and the acceptance of the resignation should be in the form of an order.

The representative desiring to resign should apply to the court which appointed him and in which the administration of the estate is pending,[33] by petition in due form, setting forth his reasons for wishing to be relieved from the trust, and requesting the appointment of some suitable person in his place.[34] It would seem proper to file an account with such petition,[35] and it is generally required by the statutes that the representative wishing to resign shall give to the parties in interest notice of his intention,[36] although the giving of the proper notice may be presumed.[37]

The acceptance of the resignation is properly in the form of an order[38] which should be made and entered of record,[39] but a formal order is not essential,[40] and a resignation may be accepted by acting on or recognizing it.[41]

c. Effect

An effective resignation terminates an executor's or administrator's powers and duties and has the effect of a revocation of his letters.

While a resignation does not become effective prior to the settlement of his accounts,[42] the resignation[43] or the acceptance thereof[44] terminates his authority and duties, otherwise than to account,[45] and to preserve the estate until the assets can be delivered to a successor,[46] and has in general the effect of a revocation of his letters,[47] and terminates the jurisdiction of the probate court over him.[48] An executor's resignation in the jurisdiction of the testator's domicile terminates his right to act in other jurisdictions under ancillary letters.[49] The representative ceases to have any interest in the estate,[50] and title to the assets and all the rights and duties of further administration devolve on his successor,[51] or, in case of the resignation of one of two or more coexecutors or coadministrators, on the representatives remaining in office.[52]

However, although a discharge from office by resignation relieves from further responsibility, it does not relieve from the consequences of malfeasance and neglect while in office, and one cannot by resigning avoid the rendition of judgments or decrees against him in suits already begun, for assets unadministered upon at the time of resignation, nor can he thereby escape personal liability for official acts and contracts in his own name.[53] The acceptance of the representative's resignation does not set aside an adjudication that the court which appointed him had jurisdiction of the estate.[54] Where an ap-

32. Cal.—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal.App.2d 253.

33. Tex.—Wells v. Houston, Civ. App., 56 S.W. 233.
23 C.J. p 1098 note 78.

34. Minn.—Balch v. Hooper, 20 N. W. 124, 32 Minn. 158.

35. Minn.—Balch v. Hooper, supra.

36. Mo.—State ex rel. Ramsey v. Green, App., 17 S.W.2d 629.
23 C.J. p 1098 note 83.

Next of kin

(1) Under statute requiring citation of next of kin, on administrator's application to resign, testate's next of kin are entitled to same notice as intestate's next of kin, and next of kin who are also legatees are entitled to formal written notice of executor's resignation and appointment of successor and ordinary's order allowing executor to resign and appointing another person as administrator de bonis non cum testamento annexo was invalid, where record showed that no notice was given to testator's next of kin or to beneficiaries, and that petition for resignation and appointment was filed, hearing had, and order passed in single day.—Gormley v. Watson, 171 S.E. 280, 177 Ga. 763, answer conformed to 171 S.E. 880, 48 Ga.App. 46.

(2) Notice to testator's widow of executor's application to resign would not fulfill requirement for notice to testator's next of kin, who was testator's child and person most beneficially interested under will.—Gormley v. Watson, 171 S.E. 880, 48 Ga. App. 46, conforming to answer 171 S.E. 280, 177 Ga. 763.

37. Mo.—Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

38. Ohio.—State v. Moffit, 33 Ohio Cir.Ct. 238, affirmed 92 N.E. 1124, 82 Ohio St. 433.
23 C.J. p 1098 note 85.

39. Minn.—Balch v. Hooper, 20 N. W. 124, 32 Minn. 158.

40. Iowa.—U. S. Rolling Stock Co. v. Potter, 48 Iowa 56.
23 C.J. p 1099 note 87.

41. Okl.—Appeal of Sims' Estate, 18 P.2d 1077, 162 Okl. 35, followed in Sims v. Billings, 18 P.2d 1084, 162 Okl. 51.
Tex.—Slay v. Davidson, Civ.App., 88 S.W.2d 650, error refused.
23 C.J. p 1099 note 88.

42. Cal.—Waterland v. Superior Court in and for Sacramento County, 98 P.2d 211, 15 Cal.2d 34.

43. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.

44. N.C.—Edwards v. McLawhorn, 11 S.E.2d 562, 218 N.C. 543.
23 C.J. p 1099 note 89.

45. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.

46. Ala.—Gayle v. Elliott, 10 Ala. 264.
23 C.J. p 1099 note 90.

47. Ind.—Sample v. Adams, 100 N. E. 573, 54 Ind.App. 680.
23 C.J. p 1099 note 91.

48. Tex.—Francis v. Northcote, 6 Tex. 185.
23 C.J. p 1099 note 92.

49. Mo.—State v. Holtcamp, 185 S. W. 201, 267 Mo. 412, Ann.Cas.1918 D 454.

50. Ohio.—Banning v Gotshall, 56 N.E. 1030, 62 Ohio St. 210.

51. Ohio.—Banning v. Gotshall, supra.
23 C.J. p 1099 note 95.

52. Pa.—Commonwealth v. Smith, 4 Phila. 270.
23 C.J. p 1099 note 96.

53. Ala.—Grimball v. Mastin, 77 Ala. 553.
23 C.J. p 1099 note 97.

54. Ind.—Sample v. Adams, 100 N. E. 573, 54 Ind.App. 680.

plication for a receiver of an estate made to a chancery court is based on the incompetency of the executrix, her resignation and the appointment of an administrator de bonis non by the probate court will defeat the application.[55]

Executor as trustee. It is held that an executor to whose office a trust is attached cannot resign the executorship and retain the trust.[56]

d. Collateral Attack on, and Vacation of, Order

An order accepting a resignation cannot be collaterally attacked, but it may be vacated in a proper case.

While an order accepting the resignation of an executor or administrator cannot be collaterally attacked,[57] an order dismissing an administrator on his own application may be vacated by the court where it has been procured by the fraud of the parties or was irregularly or improvidently passed.[58]

§ 83. Forfeiture of Office

An executor or administrator may forfeit his office by reason of his acts or conduct.

It has been held that an executor forfeited his trust by joining the Confederate army,[59] and that he became functus officio by refusing to take the oath of allegiance and going beyond the jurisdiction of the proper authorities;[60] but the office of an administrator is not forfeited by the mere omission to file an account,[61] nor are letters ipso facto vacated or revoked by the removal of the representative from the state in which he was appointed,[62] although such removal may be ground for revocation of the letters as shown infra § 84, or removal of the representative as shown infra § 90.

An administrator who was also an officer of a corporation which was a large creditor of decedent should not continue as administrator while asserting a substantial preference for his corporation.[63]

§ 84. Revocation of Letters

a. In general
b. Distinction between revocation and removal
c. Grounds

a. In General

Probate courts have plenary jurisdiction in revoking or vacating their own decrees improperly rendered and are usually invested with discretion in determining whether letters of an administrator or executor shall be revoked.

While revocation or removal proceedings are frequently provided for by statutes,[64] probate courts have always exercised a plenary jurisdiction in revoking or vacating their own decrees improperly rendered, and hence they have power to revoke letters testamentary or of administration which have been issued illegally or without jurisdiction.[65] The court is usually invested, sometimes by virtue of statute, with discretion in determining whether the letters of an administrator or executor shall be revoked,[66] and may refuse to entertain a petition for the revocation of letters,[67] and letters of administration will not be revoked unless sufficient grounds therefor exist.[68]

55. Ala.—Lunsford v. Lunsford, 25 So. 171, 122 Ala. 242.

56. N.Y.—Cushman v. Cushman, 102 N.Y.S. 258, 116 App.Div. 763, affirmed 84 N.E. 1112, 191 N.Y. 505.
23 C.J. p 1099 note 99.

57. Ga.—Summerlin v. Floyd, 53 S.E. 452, 124 Ga. 980.
23 C.J. p 1100 note 4.

58. La.—Broadway's Succession, 38 So. 430, 114 La. 492.
23 C.J. p 1100 note 3.

59. La.—Gilbert v. Herbert, 28 La. Ann. 429—Herbert v. Jackson, 28 La.Ann. 377.

60. La.—Vogel's Succession, 20 La. Ann. 81—Poindexter's Succession, 19 La.Ann. 22.

61. La.—McCleland v. Bideman, 5 La.Ann. 563.

62. Neb.—Bethel v. Pawnee County, 145 N.W. 363, 95 Neb. 203.
23 C.J. p 1100 note 9.

63. Wis.—In re Dunlap's Estate, 199 N.W. 387, 184 Wis. 345.

64. **Purpose of statute**
The statute regarding removal of executors was passed for the benefit of decedents' estates and to aid in the administration of justice and not for the purpose of giving any executor any property right in an estate.—In re Bump's Estate, 28 N.E.2d 352, 306 Ill.App. 264.

65. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38—Minor v. Thomasson, 182 So. 16, 236 Ala. 247.
Mo.—State ex rel. Ramsey v. Green, App., 17 S.W.2d 629.
N.Y.—In re Tyrrell's Estate, 185 N.Y.S. 762, 115 Misc. 714, affirmed 190 N.Y.S. 955, 198 App.Div. 1001.
N.C.—In re Meadows' Will, 116 S.E. 257, 185 N.C. 99—In re Johnson's Will, 109 S.E. 373, 182 N.C. 522.
N.D.—In re Smith's Will, 10 S.E.2d 676, 218 N.D. 161.
Wash.—In re Olson's Estate, 77 P.2d 781, 194 Wash. 219.
23 C.J. p 1100 note 12.

Intervention
Devisee's intervening at same term letters were granted administratrix in ex parte proceeding, to have letters revoked, held not governed by general statutory proceedings for removing administrator.—Bell v. Bell, 180 N.E. 39, 94 Ind.App. 145.

After expiration of term
A probate court may set aside its order issuing letters of administration after expiration of the term, where it appears it was without jurisdiction to grant them.—Sanders v. New Staunton Coal Co., 213 Ill.App. 493.

66. Cal.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706—In re Watterson's Estate, 20 P.2d 772, 130 Cal.App. 741.

Dependent on statute
Whether or not the surrogate has any discretion when the statutory grounds are established depends on the terms of the statute.—Matter of Engel, 140 N.Y.S. 286, 155 App.Div. 467, reversing 133 N.Y.S. 1105, 74 Misc. 308, and reargument denied 140 N.Y.S. 1118, 156 App.Div. 887.

67. N.Y.—Matter of Baldasarro, 156 N.Y.S. 175, 92 Misc. 627.

68. Ill.—Wilkinson v. Nowers, 217 Ill.App. 314.
Md.—Robinson v. Robinson, 16 A.2d 854, 178 Md. 623.
23 C.J. p 1100 note 12 [e].

Propriety of revocation where original grant void. Even though the grant of letters may be void, revocation may still be proper before a new appointment is made, in order to prevent abuses and preserve order in the record,[69] although it has been held that a grant of administration which is void for lack of jurisdiction need not be set aside in order to give effect to a grant by a competent tribunal.[70]

b. Distinction between Revocation and Removal

While the distinction is not observed to any great extent, revocation is ordinarily proper when it is made to appear that the letters should not have been issued or were improperly issued, while removal is proper where facts occurring since the appointment render it inadvisable to continue the representative in office.

Strictly speaking, a revocation of letters testamentary or of administration is proper when it is made to appear that for some reason the letters should not have been issued or were improperly issued,[71] while removal is proper where some circumstances arising since the issuance of the letters render it improper or inadvisable to continue the person to whom they were issued in office any longer, as shown infra § 90. This distinction is not, however, observed to any great extent,[72] and many instances may be found in the reports where letters have been "revoked" when, according to the distinction noted, removal would have been proper,[73] or where the representative has been removed on a ground which would, according to the above distinction, have called for a revocation of the letters.[74]

c. Grounds

Letters testamentary or of administration are properly revoked whenever it is made to appear that they were irregularly or improvidently granted.

The grounds for revocation of letters of administration are sometimes enumerated by statute,[75] and it has been held that where the statute specifies the grounds for revocation of letters, the court cannot revoke for any other cause.[76] As a general rule letters testamentary or of administration are properly revoked whenever it is made to appear that they were irregularly or improperly granted,[77] as when it is made to appear that the supposed decedent was living at the time the letters were issued,[78] that his last residence or the situs of his property conferred the whole jurisdiction elsewhere than in the court by which the letters were issued,[79] or that

The appointment of a person not unfit or disqualified should not be revoked, either ex mero motu or on application, except to preserve the statutory or other legal priority.—Starlin v. Love, 185 So. 380, 237 Ala. 38.

69. Ala.—Pruett v. Pruett, 32 So. 638, 131 Ala. 578.
22 C.J. p 1101 note 19.

70. W.Va.—Caperton v. Ballard, 4 W.Va. 420.

71. Ala.—Curtis v. Williams, 33 Ala. 570.
23 C.J. p 1100 note 14.

72. N.Y.—Matter of Jacob, 38 N.Y.S. 1083, 5 App.Div. 508.
23 C.J. p 1100 note 16.

73. Cal.—In re McPhee, 101 P. 530, 10 Cal.App. 162.
23 C.J. p 1100 note 17.

74. N.M.—Koury v. Castillo, 79 P. 293, 13 N.M. 26.
23 C.J. p 1100 note 18.

75. Public administrator
Provision of statute defining powers of public administrator is intended to define conditions under which administrator will be superseded, if it be ascertained that deceased left will or that he was resident elsewhere and some other court had jurisdiction over estate of decedent.—In re Glaser's Estate, 290 N.Y.S. 966, 160 Misc. 814.

Disqualification or priority
While probate court has inherent right to revoke letters of administration, it can be done only when some other person has prior right either under a will or the law, and has not waived that right and is seeking to enforce it, or when person appointed is unfit or disqualified.—Starlin v. Love, 185 So. 380, 237 Ala 38.

76. Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325—In re Hebblethwaite's Estate, 12 N.E.2d 923, 293 Ill.App. 493.
23 C.J. p 1101 note 23.

Forgery of will
Under statutes setting forth grounds on which probate court may revoke letters testamentary, probate court had no jurisdiction to revoke letters or set aside will under petition alleging that will was forged, and circuit court had no jurisdiction of appeal from order striking petition, the only remedy for contesting validity of will being under the Wills Act.—In re Hebblethwaite's Estate, supra.

77. N.Y.—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258—In re Anderton's Estate, 184 N.Y.S. 277, 112 Misc. 686.
N.D.—In re Smith's Will, 10 S.E.2d 676, 218 N.D. 161.
Pa.—In re Davies' Estate, 21 A.2d 517, 146 Pa.Super. 7.
23 C.J. p 1101 note 22.

Mere irregularity in the appointment has been held not a sufficient basis for revoking letters of administration, in the absence of a showing that the letters should not have been issued.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.

Letters already issued
(1) Where an orphans' court under misapprehension appoints an administrator of an estate which already has an administrator, the court has power to pass an order revoking the letters last granted, its act in granting such letters being a nullity.—Mitchell v. McCormick, 122 A. 245, 143 Md. 328.

(2) Letters of administration on a testator's estate granted some time after the probate of a will have been held properly revoked.—Bell v. Bell, 180 N.E. 39, 94 Ind.App. 145.

Cause of action not enforceable
Grant of administration on estate of nonresident, based solely on existence of alleged cause of action in favor of decedent under statutes of state of decedent's residence, was held properly vacated where alleged cause of action was not enforceable within state.—McCoubrey v. Pure Oil Co., 66 P.2d 57, 179 Okl. 344.

78. N.Y.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.
Wash.—In re Olson's Estate, 77 P.2d 781, 785, 194 Wash. 219, quoting **Corpus Juris.**
23 C.J. p 1101 note 25.

79. Ala.—Tubbs v. Barnard, 144 So. 448, 225 Ala. 435.
Ohio.—In re Gingery's Estate, 134 N.E. 449, 103 Ohio St. 559.
23 C.J. p 1101 note 26.

a will was admitted to probate after the grant of letters of administration,[80] but the pendency of a will contest was held not to authorize the revocation of letters already granted to an executor.[81]

Also letters testamentary or of administration may be revoked on the ground that they were procured by fraud,[82] or a false statement or suggestion as to a material fact,[83] that the issuance was premature,[84] that such issuance was improvident,[85] or without authority of law,[86] that administration was not necessary,[87] that letters of administration were issued without regard to the legal priorities,[88] without a renunciation by the person primarily entitled[89] or on a renunciation executed by mistake,[90] that a person having a right to intervene was not cited or cognizant of the proceedings,[91] or that the person appointed does not bear the relationship to decedent which was made the basis of the grant of administration.[92]

Letters may be revoked when it appears that administration with the will annexed was granted regardless of the rights of the person named as execu-

Letters not revoked

The fact that the court after granting letters of administration and after determining that it had jurisdiction, permitted an amendment alleging that intestate was a resident of, and domiciled in, another county at the time of his death, was held not sufficient to divest the court of the jurisdiction that it had assumed or revoke letters that it had granted.—State ex rel. Campbell v. Chapman, 1 So.2d 278, 145 Fla. 647.

Prior appointment

Register granting letters of administration, without knowledge of prior appointment of administrator by register of another county, properly revoked letters when apprised of situation.—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236.

Domiciliary letters revoked

Where domiciliary, instead of ancillary, letters of administration were granted to decedent's husband on his representation that domicile was in New Jersey, and domicile was actually in New York, letters granted to administrator substituted for husband would be revoked.—In re Fischer's Estate, 180 A. 633, 118 N.J.Eq. 599.

80. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Conn.—Di Blasi v. Di Blasi, 159 A. 477, 114 Conn. 539.
Md.—Burgess v. Boswell, 116 A. 457, 139 Md. 669.
Miss.—Austin v. Patrick, 176 So. 714, 179 Miss. 718.
N.Y.—In re Shonts' Will, 128 N.E. 225, 229 N.Y. 374, reversing 181 N.Y.S. 553, 191 App.Div. 427, which reversed In re Shonts' Estate, 178 N.Y.S. 762, 109 Misc. 276.
N.C.—In re Suskin's Estate, 198 S. E. 661, 214 N.C. 219—In re Meadows' Will, 116 S.E. 257, 185 N.C. 99—In re Johnson's Will, 109 S.E. 373, 182 N.C. 522.
23 C.J. p 1095 note 48.

Later will

Where superior court admitted to probate a will of deceased without notice of later will, if later will was admitted to probate, the preëxisting grant of letters testamentary would be revoked, and executor whose grant of authority was thus terminated would be required to render an account of his administration within such time as the court might direct.—In re Estrem's Estate, 107 P. 2d 36, 16 Cal.2d 563, prior opinion 101 P.2d 510.

81. Mo.—Kinnerk v. Smith, 41 S. W.2d 381, 328 Mo. 513.

82. Ga.—Lefkoff v. Sicro, 6 S.E.2d 687, 189 Ga. 554, 133 A.L.R. 738—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653—Jackson v. Jackson, 177 S.E. 591, 179 Ga. 696—Williams v. Cave, 186 S.E. 694, 53 Ga.App. 582.
La.—Hebert v. Hebert, App., 187 So. 317.
Okl.—Forgy v. Lamphear, 291 P. 83, 144 Okl. 245.
23 C.J. p 1101 note 27.

Extraneous fraud necessary

The judgment of the county court appointing an administrator will not be set aside for fraud unless the fraud pleaded and proved is some extraneous fraud practiced on the court.—Wolf v. Gills, 219 P. 350, 96 Okl. 6.

Damage not necessary

Ala.—Hall v. Santangelo, 60 So. 168, 178 Ala. 447.

83. N.Y.—In re Hone's Estate, 295 N.Y.S. 232, 250 App.Div. 635, affirming 286 N.Y.S. 394, 158 Misc. 183—In re Damsky's Estate, 298 N.Y.S. 937, 164 Misc. 381—In re Duff's Estate, 257 N.Y.S. 648, 143 Misc. 905—In re Gant's Estate, 254 N.Y.S. 715, 142 Misc. 446.
Pa.—In re Davies' Estate, 21 A.2d 517, 146 Pa.Super. 7—In re Henry's Estate, 51 York Leg.Rec. 185.
23 C.J. p 1101 note 28.

Good faith immaterial

N.Y.—In re Gaffney's Estate, 252 N. Y.S. 649, 141 Misc. 453.

84. Wash.—In re Olson's Estate, 77 P.2d 781, 785, 194 Wash. 219, quoting **Corpus Juris.**
23 C.J. p 1101 note 29.

85. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Md.—Silverwood v. Farnan, 22 A.2d 444—Burgess v. Boswell, 116 A. 457, 139 Md. 669.
N.C.—In re Smith's Will, 10 S.E.2d 676, 218 N.C. 161—Security Nat. Bank (Tarboro Unit) v. Bridgers, 176 S.E. 295, 207 N.C. 91.
Tenn.—Williams v. Stewart, 64 S.W. 2d 194, 166 Tenn. 615.
23 C.J. p 1102 note 30.

86. Mo.—McCabe v. Lewis, 76 Mo. 296.

Wrong name of decedent

A petition for administration on estate of decedent named "Crossley," which gave name of decedent as "Crawley," was ineffective to invoke jurisdiction of probate court, where evidence supported finding that decedent had never adopted or used name of "Crawley," and hence letters of administration were properly revoked on petition of decedent's widow.—Denson v. Crossley, 2 So.2d 916, 241 Ala. 445.

87. Ala.—Murphy v. Freeman, 127 So. 199, 220 Ala. 634, 70 A.L.R. 381.
Ark.—Raley v. Grayson, 57 S.W.2d 828, 186 Ark. 1046.
Wash.—Murphy v. Murphy, 34 P. 646, 42 Wash. 142.

88. Ala.—Bivin v. Millsap, 189 So. 770, 238 Ala. 136—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Cal.—In re O'Dea's Estate, 93 P.2d 222, 34 Cal.App.2d 179.
Md.—Silverwood v. Farnan, 22 A.2d 444.
Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775.
Pa.—In re Malinowski's Estate, 19 Pa.Dist. & Co. 335, 15 Erie Co. 224.
23 C.J. p 1102 note 33.

89. Pa.—Gaines' Estate, 56 Pa.Super. 118.
23 C.J. p 1102 note 34.

90. Md.—Thomas v. Knighton, 23 Md. 318, 87 Am.D. 571.

91. Md.—Silverwood v. Farnan, 22 A.2d 444.
23 C.J. p 1102 note 36.

92. Ga.—Jackson v. Jackson, 177 S. E. 591, 179 Ga. 696.
Ill.—In re Panico's Estate, 268 Ill. App. 585.
N.Y.—In re Shuff's Estate, 272 N.Y. S. 418, 151 Misc. 754—In re Gallagher's Estate, 262 N.Y.S. 381, 146 Misc. 112—In re Wright's Estate, 180 N.Y.S. 635, 110 Misc. 480.
23 C.J. p 1102 note 37.

tor,[93] that an administrator de bonis non has been appointed while there was an executor acting with powers not limited by the will,[94] that letters of general administration have been issued when letters de bonis non were proper,[95] that letters have been issued to a disqualified person[96] or one having no right whatever to letters,[97] that person receiving letters was a nonresident,[98] that no security had been given or that which was given is insufficient,[99] that the administrator has not given notice to creditors as required by statute,[1] or that the judge who granted the letters was disqualified by interest.[2] It has been held that, where all the debts of a testator have been paid by a devisee, letters of administration should be revoked,[3] but there is also authority for the view that the fact that after the appointment of an administrator the heirs pay into court the amount of a judgment against decedent, which was his only debt, does not compel annulment of the letters of administration.[4]

Letters will not be revoked because of failure of an administrator to pay his attorney's fees,[5] failure to insert the exact value of the estate in the petition for letters of administration,[6] or failure to give notice of an application for temporary administration to next of kin or legatees;[7] and where the same person is executor or administrator of two estates, it is not a ground for revocation of his letters that the interests of the estates are conflicting[8] or that one estate has claims against the other.[9] Letters issued to copartners of decedent should not be vacated in order that an administrator may be appointed to sue in chancery for legatees of decedent to determine his share in the partnership assets.[10] Neither is it a ground for setting aside an appointment as temporary administrators of executors named in the will that they are also interested in the estate.[11] Where the estate has not suffered and is not likely to suffer any evil results from the executor's or administrator's imperfect knowledge of the English language, his letters will not be revoked for that cause.[12] Letters of administration properly issued to the consul representing a foreign country for the administration of the estate of an intestate who left surviving a widow and minor child, residents and subjects of the foreign country, cannot be revoked on the widow coming with her child to the state and taking up her residence therein,[13] although it has been held, under some treaty provisions, that the authority of a consul is superseded where the distributee appeared by an attorney in fact.[14] The subsequent enactment of a statute as to distribution of estates was held not to authorize revocation of let-

93. Md.—Thomas v. Knighton, 23 Md. 318.
Pa.—Patton's Appeal, 31 Pa. 465.
Tenn.—Baldwin v. Buford, 4 Yerg. 16.

94. N.C.—Springs v. Erwin, 28 N.C. 27.
23 C.J. p 1102 note 39.

95. Miss.—Gasque v. Moody, 23 Miss. 153.

96. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
23 C.J. p 1102 note 41.

Person convicted of infamous offense
U.S.—In re Allen's Estate, D.C.D.C., 30 F.Supp. 243.

97. Cal.—In re Way's Estate, 85 P. 2d 563, 29 Cal.App.2d 669.
23 C.J. p 1102 note 42.

Defense of invalidity of settlement
On petition by decedent's son for revocation of letters of administration issued to decedent's widow, on the ground that by a marriage settlement she had waived her marital rights, she could defend on the ground that the settlement was void because procured by fraud and undue influence, and was not required to bring direct proceeding to have the settlement set aside, since her right to administer depended on the right to succeed to his personal estate under the statute, which in turn depended on the validity of the settlement, and the wife was not barred by limitations, or by laches, from setting up the invalidity of the settlement because of fraud and undue influence, limitations and laches being inapplicable since wife was merely seeking defensive relief.—In re Cover's Estate, 204 P. 583, 188 Cal. 133.

98. Ill.—In re Bump's Estate, 28 N. E 2d 352, 306 Ill.App. 264.
Mich.—Grand Trunk Western R. Co. v. Kaplansky, 258 N.W. 423, 270 Mich. 135.
Wash.—In re Olson's Estate, 77 P.2d 781, 194 Wash. 219.

Administration practically completed
Where administration of estate had been practically completed by nonresident executor, in the absence of showing of illegal conduct of affairs of estate, such executor would not be removed on petition of person who had no justiciable interest in the estate and who had coöperated with executor for hire in the administration of the estate from the time of executor's appointment, notwithstanding statute prohibiting appointment of nonresident as personal representative of estate.—In re Sherman's Estate, 1 So.2d 727, 146 Fla. 643.

99. Pa.—In re Huff's Estate, 149 A. 179, 299 Pa. 200.
23 C.J. p 1103 note 43.

In connection with nonresidence
N.Y.—In re Chisholm's Will, 264 N. Y.S. 352, 148 Misc. 158.

1. Cal.—Atwood's Estate, 59 P. 770, 127 Cal. 427.
23 C.J. p 1103 note 45.
2. Ga.—Echols v. Barrett, 6 Ga. 443.
23 C.J. p 1103 note 46.
3. Ark.—Adamson v. Parker, 85 S. W. 239, 74 Ark. 168.
4. Ind.—Holtz v. Mercantile Trust & Sav. Co., 100 N.E. 398, 53 Ind. App. 194.
5. N.Y.—In re Nocton, 162 N.Y.S. 215.
6. N.Y.—In re Quinlan, 158 N.Y.S. 319.
7. N.Y.—In re Curtis, 175 N.Y.S. 288—In re Curtis, 175 N.Y.S. 285.
8. Ind.—Wright v. Wright, 72 Ind. 149.
9. Ind.—Wright v. Wright, supra.
10. Mich.—In re Sloman, 152 N.W. 957, 186 Mich. 434.
11. N.Y.—Matter of Ashmore, 96 N. Y.S. 772, 48 Misc. 312, 35 N.Y.Civ. Proc. 268.
12. N.Y.—In re Bloom's Estate, 278 N.Y.S. 157, 154 Misc. 741—Hassey v. Keller, 1 Dem.Surr. 577.
13. N.Y.—In re Orlando, 148 N.Y.S. 270.
14. N.Y.—In re Reiss' Estate, 248 N.Y.S. 169, 138 Misc. 845.

ters of administration,[15] and where neither of two persons could demand the appointment as a matter of law, the appointment of one will not be set aside in the absence of an abuse of discretion.[16]

§ 85. —— Proceedings

a. In general
b. Who may apply
c. Time for application
d. Jurisdiction
e. Parties and notice
f. Pleading
g. Evidence
h. Hearing and determination
i. Judgment, order, or decree
j. Review
k. Costs and allowances

a. In General

Proceedings for the revocation of letters testamentary or of administration must comply with applicable statutory provisions.

Proceedings for the revocation of letters testamentary or of administration must comply with applicable statutory provisions.[17] Under a statute providing that the court may suspend the powers of an executor for various causes, and on so doing must cite the executor to appear and show cause why his letters should not be revoked, suspension is not a necessary step toward the revocation of the letters.[18]

b. Who May Apply

Ordinarily persons acting in their individual capacity are entitled to ask for the revocation of letters testamentary or of administration only when they are interested in the estate.

While a court of probate jurisdiction may on its own motion institute and carry on proceedings to revoke letters testamentary or of administration,[19] or revocation may be on the suggestion of an amicus curiæ,[20] the right of individuals to petition for revocation of letters is frequently regulated by statute,[21] and ordinarily, persons acting in their individual capacity are entitled to ask for the revocation of such letters only when they are interested in the estate.[22]

A person who is entitled to administration in

15. N.Y.—In re Irving's Estate, 276 N.Y.S. 427, 153 Misc. 807.

16. Or.—In re Roedler's Estate, 222 P. 301, 110 Or. 147.

17. **Public administrator**
Proceedings to revoke the letters of administration of a public administrator cannot be taken under a statute relating to revocation which does not include a public administrator.—In re Carter's Estate, 50 P. 2d 1057, 9 Cal.App.2d 714.

18. Cal.—In re Kelley, 55 P. 136, 122 Cal. 379.

19. Ala.—Brown v. Brown, 85 So. 439, 204 Ala. 157.
Ill.—Wilkinson v. Nowers, 217 Ill. App. 314.
Mo.—In re Allen's Estate, 271 S.W. 755, 307 Mo. 674.
N.J.—In re Gilbert's Estate, 15 A.2d 111, 18 N.J.Misc. 540.
23 C.J. p 1103 note 58.

Void grant
Where the granting of letters of administration by probate court is void, probate court has the inherent power to revoke letters on its own motion.—Moring v. Lisenby, 4 So.2d 4, 241 Ala. 626.

20. Ala.—Moring v. Lisenby, supra.
23 C.J. p 1103 note 59.

21. **Alleged decedent**
Under provisions of Surrogate's Court Act concerning revocation of letters of administration, legislature did not intend to leave a supposed decedent without recourse to secure revocation of letters issued on his estate, where such supposed decedent was in fact alive when letters were issued.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.

22. Ala.—Moring v. Lisenby, 4 So. 2d 4, 241 Ala. 626—Starlin v. Love, 185 So. 380, 382, 237 Ala. 38, citing **Corpus Juris.**
Ark.—Brinkley v. Allen, 143 S.W.2d 187, 188, 200 Ark. 1147, citing **Corpus Juris.**
La.—Succession of Berdennagel, 163 So. 843, 183 La. 398.
N.Y.—In re Gourlay's Estate, 19 N. Y.S.2d 122, 173 Misc. 930.
Or.—In re Roedler's Estate, 222 P. 301, 110 Or. 147.
Wash.—In re Upton's Estate, 92 P. 2d 210, 213, citing **Corpus Juris**—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 213, 179 Wash. 198, citing **Corpus Juris.**
23 C.J. p 1103 note 60.

Any person interested in the estate may move to set aside the appointment of an administrator.
Ala.—Clark v. Whorton, 194 So. 661, 239 Ala. 238.
Ohio.—In re Gingery's Estate, 184 N. E. 449, 103 Ohio St. 559.
23 C.J. p 1103 note 60 [a].

Coexecutor
An executor has been held not entitled to move for revocation of letters of a coexecutor except in his individual capacity as a beneficiary. —In re Bloomingdale's Estate, 13 N. Y.S.2d 674, 171 Misc. 843.

Alleged decedent has been held an interested person.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.

Will contestant, who, but for will, would be heir at law of deceased, has such interest in estate as entitles him to bring proceeding for removal of curator of estate pending determination of contest.—Moore v. Thomas, 174 S.E. 876, 115 W.Va. 237.

Receiver of legatee's property appointed in supplementary proceedings on return of execution unsatisfied, is "person in interest," entitled to maintain proceeding to revoke letters testamentary.—In re Sweeney's Estate, 213 N.Y.S. 174, 125 Misc. 859.

Maternal uncle of illegitimate child was not entitled to bring proceeding to set aside letters of administration on estate of deceased illegitimate child, where it appeared that such child left married brother who had not been heard from in over seven years, in absence of evidence disclosing whether such brother left any lineal heirs.—Williams v. Cave, 186 S.E. 694, 53 Ga.App. 582.

Arbitration agreement entered into between the widow and a granddaughter of testator concerning personal property which both were claiming, not under the will, but against it, does not necessarily estop the widow from petitioning to have recalled the letters of administration issued to her as executrix, so that she might dissent from the will, especially when the arbitration agreement was made the day after the will was admitted to probate, so that the allegations of the petition as to the widow's incapacity would apply alike to the probate of the will, the qualification as execu-

preference to the one who has been appointed ordinarily has the right to procure the revocation of such appointment,[23] unless his right to do this has been waived or lost[24] by a failure to apply for letters within the time prescribed by law, as shown infra subdivision c of this section, or by renunciation.[25] However, a statute authorizing revocation on application of one entitled to priority has been held not absolute and available at all times under all conditions.[26] Thus, while a person having a superior right to letters may directly attack the issue of letters to one having a secondary right thereto,[27] revocation on the ground that priorities were not observed can be asked only by one having a right prior to the appointee,[28] and who is qualified for the office[29] and who seeks to have the appointment of himself made instead of the one appointed.[30] Also, a statute authorizing the surviving spouse or close relative of deceased to obtain revocation of letters of administration has been held applicable only in cases of intestacy,[31] and not to the appointment of a public administrator with the will annexed.[32] The fact that petitioner is disqualified from being appointed is immaterial where he seeks revocation of letters because appointee was unfit or disqualified.[33]

Persons entitled to citation or notice in probate or administration proceedings may ask revocation on the ground that letters were issued without these formalities or prematurely as to them,[34] unless they have waived the right to object.[35] The public administrator may apply for revocation of letters wrongfully issued to a disqualified person.[36]

A creditor of the estate is sometimes given the right to ask for the revocation of letters,[37] although this right is limited to those who were creditors at

trix, and the agreement to arbitrate.—In re Meadows' Will, 116 S.E. 257, 185 N.C. 99.

23. Ala.—Moring v. Lisenby, 4 So. 2d 4, 241 Ala. 626—Starlin v. Love, 185 So. 380, 237 Ala. 38—Brown v. Brown, 85 So. 439, 204 Ala. 157.
23 C.J. p 1104 note 61.

24. Ga.—McCowen v. Flanders, 118 S.E. 351, 155 Ga. 701.
Wash.—State v. Superior Court for Thurston County, 255 P. 376, 143 Wash. 358.
23 C.J. p 1104 note 62.

Right not waived or lost
Mont.—In re Nix's Estate, 213 P. 1089, 66 Mont. 559.

Tender of taxes paid
Where defendant knowing that deceased had been dead for more than twenty years caused tax executions to be issued against her which executions were transferred to defendant who, alleging himself to be a creditor, was appointed administrator by court of ordinary which authorized sale of realty claimed by plaintiff as sole heir of deceased, heir would not be precluded from equitable relief by failure to tender sums paid by defendant as taxes on the premises, since payments were voluntary and void.—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653.

25. N.C.—In re Saville, 72 S.E. 220, 156 N.C. 172.
Okl.—King v. Salyer, 44 P.2d 11, 172 Okl. 130.

26. Mont.—In re Cameron's Estate, 284 P. 143, 86 Mont. 455.

27. Cal.—In re O'Dea's Estate, 93 P.2d 222, 34 Cal.App.2d 179—In re Way's Estate, 85 P.2d 563, 29 Cal. App.2d 669.

Direct attack
The statutes governing rights of prior claimants of letters of administration manifest intent to provide procedure for direct attack on grant of letters without relying on appeal, motion for new trial, or statutory relief from judgment or order.—In re Way's Estate, supra.

28. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
23 C.J. p 1104 note 64.

Persons in same class
(1) No person in any of the preferred classes mentioned in the statute can assert prior rights if original letters have been issued to any person within any one of the classes specifically mentioned therein.—In re Carter's Estate, 50 P.2d 1057, 9 Cal. App.2d 714.

(2) Under statute, letters of administration granted to public administrator may not be revoked merely on petition of deceased's brother or other person asserting prior right in absence of statutory showing of cause, since court could not say that words "public administrator" were inadvertently included in statute.—In re Carter's Estate, supra.

(3) Where administrator was appointed as nominee of a person of a preferred class named in statute, administrator could not be removed from its office on petition of guardian of person in the same or lower class, as a guardian stands in no better position than the ward would have been had there been no guardianship.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

29. Ala.—Starlin v. Love, 185 So. 380, 382, 237 Ala. 38, citing **Corpus Juris.**
Ky.—Ellwanger v. Ellwanger's Adm'r, 129 S.W.2d 127, 278 Ky. 584.
Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775.
N.Y.—In re Fresegna's Estate, 290 N.Y.S. 807, 160 Misc. 817.
23 C.J. p 1104 note 65.

Nominee
The statute only authorizes any of the relatives named to act through a nominee when such relative is personally competent to qualify as administrator.—In re Mintaberry's Estate, 191 P. 909, 183 Cal. 566.

30. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.

31. Nev.—In re Garrison's Estate, 91 P.2d 818, 59 Nev. 302.

Surviving spouse is not entitled to revocation of letters of administration with the will annexed where such spouse has no right to take under the will.—In re Garrison's Estate, supra.

32. Nev.—In re Garrison's Estate, supra.

33. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.

34. Ga.—Jackson v. Jackson, 177 S. E. 591, 179 Ga. 696.
23 C.J. p 1104 note 66.

Publication of citation does not preclude sole heir without actual knowledge of application for letters of administration from seeking to have judgment granting application canceled.—Jackson v. Jackson, supra.

35. Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.

36. Cal.—In re O'Dea's Estate, 93 P. 2d 222, 34 Cal.App.2d 179.
N.Y.—Matter of McMullen, 148 N.Y. S. 1092, 85 Misc. 661.

37. Iowa.—Crawford County v. Kock's Estate, 290 N.W. 682, 227 Iowa 1235.
23 C.J. p 1104 note 68.

the time the letters were issued.[38] It has been held that a debtor cannot intervene as one interested in mere irregularities of appointment,[39] but on the other hand the right of a debtor to ask for revocation has been sustained,[40] as has also the right of one who is being sued by the representative,[41] although there is authority to the contrary.[42] So, also, that a corporation, against whom an action is being prosecuted by an administrator for injuries causing the death of the intestate, has a right to petition the court for a revocation of the letters of administration, has been both asserted[43] and denied.[44]

Heirs of decedent have been held not in a position to complain of the appointment of an administrator in another jurisdiction where such appointment could not injure them;[45] and persons who were heard in the proceeding for appointment are ordinarily precluded from obtaining revocation of letters on evidence not newly discovered.[46] In proceedings to revoke letters testamentary on the joint petition of an infant legatee and her father, who is also a legatee for a nominal amount, the petition will not be dismissed because one petitioner by reason of infancy is incapable of maintaining the proceedings.[47]

c. Time for Application

In the absence of an applicable statute, an application for revocation of letters testamentary or of administration must ordinarily be made within a reasonable time.

The time within which an application for revocation of letters testamentary or of administration must be made is sometimes regulated by statute and application must be made within the time allowed.[48] In the absence of an applicable statute, the application must be made within a reasonable time,[49] and laches may defeat the right to proceed for revocation.[50] While it has been stated that, where a person entitled to priority in administration must assert

38. N.Y.—Matter of Ciotto, 93 N.Y.S. 973, 105 App.Div. 143.

39. Ill.—In re Trost's Estate, 10 N.E.2d 857, 292 Ill.App. 60.
N.Y.—Drexel v. Berney, 1 Dem.Surr. 163.

40. Mo.—Donaldson v. Lewis, 7 Mo. App. 403.
23 C.J. p 1104 note 71.

41. Tex.—Cooper v. Gulf, C. & S. F. Ry. Co., 93 S.W. 201, 41 Tex.Civ. App. 596.
23 C.J. p 1104 note 72.

42. Ill.—In re Trost's Estate, 10 N.E.2d 857, 292 Ill.App. 60.
N.Y.—In re Barmeier's Estate, 282 N.Y.S. 695, 156 Misc. 657, modified on other grounds 288 N.Y.S. 318, 248 App.Div. 636, affirmed 5 N.E.2d 351, 272 N.Y. 601.

One who might be sued in tort by administrator of an estate was not an "interested party" with authority to proceed directly in probate court for revocation of letters of administration.—Brinkley v. Allen, 143 S.W. 2d 187, 200 Ark. 1147.

43. Tex.—Cooper v. Gulf, C. & S. F. Ry. Co., 93 S.W. 201, 41 Tex.Civ. App. 596.
23 C.J. p 1104 note 73.

Jurisdictional defects
S.C.—Southern Ry. Co. v. Moore, 155 S.E. 740, 158 S.C. 446, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 283 U.S. 816, 75 L.Ed. 1432.

44. D.C.—Kent v. Pennsylvania R. Co., 17 D.C. 335.
23 C.J. p 1104 note 74.

45. Ind.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.
Or.—In re Vilas' Estate, 110 P.2d 940.

46. Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

Statutory disqualification
While persons who had knowledge of disqualification of administrator at time of grant of letters should have brought matter to court's attention while appointment was under consideration, where the policy of the law is clear, the letters will be revoked.—In re Allen's Estate, D.C.D.C., 30 F.Supp. 243.

47. N.Y.—Matter of Denyse, 116 N.Y.S. 1127, 62 Misc. 595.

48. Idaho.—In re Barr's Estate, 252 P. 676, 43 Idaho 400.
N.Y.—In re Lohman's Estate, 290 N.Y.S. 964, 160 Misc. 929, affirmed 288 N.Y.S. 1047, 248 App.Div. 556.

Statutes construed
Provisions of statute that powers of public administrator shall be superseded where letters of administration are granted by surrogate having jurisdiction at any time within six months after public administrator became vested with power of administrator were held inapplicable to application of widow for revocation of letters of administration granted to public administrator by surrogate of county having jurisdiction over estate, and the petition must be denied, notwithstanding that notice of application of public administrator for letters stated that there was no widow, where notice was notice to next of kin generally.—In re Glaser's Estate, 290 N.Y.S. 966, 160 Misc. 814.

Last day falling on Sunday
The fact that last day of period fell on Sunday extends period to next business day.—In re Braddell's Estate, 299 N.Y.S. 1021, 164 Misc. 893.

49. Idaho.—In re Barr's Estate, 252 P. 676, 43 Idaho 400.

Will subsequently discovered
Where letters of administration were granted by an orphans' court on a showing that decedent had died intestate, and subsequently a will was discovered, a petition to revoke the letters was not too late where the will had not been admitted to probate.—Burgess v. Boswell, 116 A. 457, 139 Md. 669.

50. N.Y.—In re Gori's Will, 222 N.Y.S. 250, 129 Misc. 541.
23 C.J. p 1104 note 62, p 1105 note 81.

Laches not shown
(1) Widow, who petitioned for appointment of administrator for her husband's estate, alleging that he had been resident of District of Columbia, was held not guilty of laches, precluding her from denying, approximately a year later, that he was in fact resident of District.—Claudy v. Duvall, 5 F.2d 881, 55 App. D.C. 319.

(2) Where defendant knowing that deceased had been dead for more than twenty years caused tax executions to be issued against her, which executions were transferred to defendant who, alleging himself to be a creditor, was appointed administrator by court of ordinary, sole heir of deceased claiming realty was not barred from attacking orders of court of ordinary authorizing sale of property on ground that heir was negligent in failing to keep himself informed as to appointment of administrator.—Bowers v. Dolen, 1 S.E. 2d 734, 187 Ga. 653.

such priority within a specified time after the death of decedent or lose his right, the same limitation of time would apply to an application by him for the revocation of letters granted to another person, on the ground that they were prematurely granted to a person not entitled to priority,[51] it has been held that the application to revoke letters of administration can be made within the same time after applicant has knowledge that letters have been granted as that provided by law within which an original application for letters is to be made,[52] or within which an appeal from an order granting letters may be taken,[53] and also that a motion to set aside the appointment of an administrator, filed within a reasonable time after the appointment, should be considered when made by one not having had notice of the appointment.[54]

Where the supposed decedent was not dead at the time when letters were granted, an application for the revocation may be made within a reasonable time, and a statute limiting the time within which relief from judgments on the ground of mistake, inadvertence, or excusable neglect may be sought does not apply.[55]

d. Jurisdiction

The court which granted letters of administration is ordinarily the proper one to revoke them.

The court which granted the letters is as a general rule the proper one to revoke them, and proceedings for revocation should be commenced in that court,[56] but it has been held that a court of equity has jurisdiction to set aside a grant of letters of administration by the ordinary.[57] The power to revoke letters is not affected by the pendency of proceedings for relief elsewhere,[58] or by the fact that a court of equity has assumed jurisdiction of the administration of the estate.[59] Where the court of probate is a court of general jurisdiction every presumption is in favor of the jurisdiction until the contrary appears,[60] but where it is a court of limited jurisdiction, its jurisdiction to revoke letters testamentary will not be presumed but jurisdictional facts must be averred and proved by the party relying on the decree of revocation.[61]

e. Parties and Notice

Ordinarily an executor or administrator must be made a party to, and given nottice of, proceedings for the revocation of his letters.

The letters cannot be revoked without making the executor or administrator a party to the proceedings.[62] Creditors will sometimes be permitted to intervene in a proceeding for revocation of letters.[63]

Notice. Ex parte proceedings for the revocation of letters testamentary or of administration are improper,[64] the representative being entitled to citation and notice.[65] However, it has been held that

51. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38—Castleberry v. Hollingsworth, 111 So. 35, 215 Ala. 445.
Miss.—Kevey v. Johnson, 150 So. 532, 167 Miss. 775.
23 C.J. p 1104 note 77.

52. Md.—Stocksdale v. Conway, 14 Md. 99, 74 Am.D. 515.

53. Md.—McColgan v. Kenny, 11 A. 819, 68 Md. 258.

54. Ohio.—In re McCreight, 9 Ohio S. & C. P. 450, 6 Ohio N.P., 479.

55. Cal.—In re Paulsen, 170 P. 855, 35 Cal.App. 654.

56. Me.—Kneeland v. Buzzell, 197 A. 155, 135 Me. 363.
Md.—Tsaraclis v. Characklis, 3 A.2d 725, 176 Md. 28.
N.J.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46.
Pa.—In re Phillips' Estate, 143 A. 9, 293 Pa. 351—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236—In re Hugg's Estate, 7 Pa.Dist. & Co. 112, 39 York Leg.Rec. 162.
23 C.J. p 1105 note 84.

While right to appeal exists

Surrogate had jurisdiction of petition to revoke decree for letters of administration because allegedly obtained by fraud, although petition for revocation was filed within period within which petitioner had right to appeal to orphans' court.—In re Crociani's Estate, 166 A. 626, 11 N.J.Misc. 828.

Where issues submitted to circuit court

Orphans' court was without authority to proceed on petition seeking revocation of order appointing administratrix pendente lite during pendency of disposition of issues of fact which had been submitted to circuit court for trial by jury, since findings of jury relative to faithful conduct of administratrix in execution of trust would be binding on orphans' court.—Baldwin v. Hopkins, 191 A. 565, 172 Md. 219.

Statute permissive

The statutory authority of the register of wills to revoke letters of administration granted by him to persons who are not next of kin is merely permissive.—In re Boytor's Estate, 198 A. 484, 130 Pa.Super. 591.

57. Ga.—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653—Jackson v. Jackson, 177 S.E. 591, 179 Ga. 696.
23 C.J. p 1105 note 85.

Proceeding equitable in nature

Although county courts possess power to vacate proceedings for appointment of an administrator when procured by fraud, an affirmative proceeding, equitable in its nature, with accompanying pleadings, supported by proper proofs, and sustained by competent evidence, which clearly established the material fraud charged, is necessarily involved.—In re Sheerer's Estate, 289 N.W. 529, 137 Neb. 374.

58. N.Y.—Hood v. Hood, 2 Dem. Surr. 583.

59. Ala.—Pruett v. Pruett, 32 So. 638, 131 Ala. 578.

60. Ga.—Langmade v. Hamilton, 15 S.E. 535, 89 Ga. 441.

61. N.Y.—People v. Hartman, 32 N.Y.Super. 576.

62. S.C.—Watson v. Mayrant, 18 S.C.Eq. 449.

63. Pa.—In re Follmer's Estate, 5 Pa.Dist. & Co 521, 7 Northumb. Leg.J. 132.

64. Pa.—Bieber's Appeal, 11 Pa. 157.

65. Ga.—Stewart v. Patterson, 111 S.E. 421, 152 Ga 754.
Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.
23 C.J. p 1105 note 92.

Service on attorney

Where his attorney accepted service of citation and appeared, former administrator could not object to

his appearance may be a waiver of citation,[66] and that where the representative is a fugitive from justice, the letters may be revoked without issuing a citation.[67] So, also, under a statute which provides that, if sufficient security is not given within the time fixed, the right of an administrator to the administration shall cease, an administrator who fails to comply with an order requiring him to furnish additional security, and obtains no further time, is not entitled to notice of an order revoking his letters after the limitation has expired.[68]

A public administrator is not entitled to notice of a proceeding to revoke letters granted to him, on discovery of a will.[69]

f. Pleading

A petition or complaint for revocation of letters testamentary or of administration must state facts sufficient to warrant such action on the part of the court.

It is necessary in a proceeding for the revocation of letters that there should be a petition or complaint,[70] which must state facts sufficient to warrant such action on the part of the court;[71] but where charges sufficient to warrant removal have been formulated in a sworn statement on the basis of which the executor has been suspended and cited to show cause why he should not be removed, there is no reason why they should be afterward reiterated in a separate document.[72] A prayer for the appointment of petitioner is properly joined in a petition for the revocation of letters of administration,[73] and where the petitioner is the nominee of the person entitled to administer, the petition should show that a request for the appointment of the petitioner has been filed in court.[74] The representative has been held not entitled to file a cross complaint in favor of the estate in such a proceeding.[75]

Objections to the sufficiency of a petition for the revocation of letters testamentary may be taken by answer to the petition.[76]

g. Evidence

General rules of evidence are applicable in proceedings for the revocation of letters testamentary or of administration.

On an application for the revocation of letters the facts necessary to induce the court to act should be made to appear by proof,[77] and a mere statement of

jurisdiction to revoke appointment — Capwell v. Knight, 135 A. 699, 48 R. I. 81.

66. Colo.—In re Woody's Estate, 24 P.2d 754, 93 Colo. 169.
23 C.J. p 1106 note 93.

Appearance on appeal
County court's order revoking plaintiff's appointment as administrator is not invalid because of lack of notice, where on appeal and trial de novo in district court plaintiff's counsel appeared generally.—In re Woody's Estate, supra.

67. N.Y.—Sutherland v. St. Lawrence County, 85 N.Y.S. 696, 42 Misc. 38, reversed on other grounds 91 N.Y.S. 962, 101 App.Div. 299.

68. Cal.—Barrett v. Placer County Super.Ct., 47 P. 592, 5 Cal.Unrep. Cas. 569.

69. Mo.—Brinckwirth v. Troll, 181 S.W. 403, 266 Mo. 473, Ann.Cas. 1918B 1056.

70. Neb.—In re Sheerer's Estate, 289 N.W. 529, 137 Neb. 374.
R.I.—Briggs v. Westerly Prob. Ct., 50 A. 335, 23 R.I. 125.

Petition held direct attack
Ga.—Brown v. Parks, 151 S.E. 340, 169 Ga. 712, 71 A.L.R. 271.

71. La.—Succession of Berdennagel, 163 So. 843, 183 La. 393.
Nev.—In re Garrison's Estate, 91 P. 2d 818, 59 Nev. 302.
N.Y.—In re Gori's Will, 222 N.Y.S. 250, 129 Misc. 541.
Or.—In re De Force's Estate, 249 P. 632, 119 Or. 556.
23 C.J. p 1106 note 99.

Complaint or petition held sufficient
(1) In general.
Ala.—Kelen v. Brewer, 124 So. 247, 220 Ala. 175.
Ga.—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653.

(2) On general demurrer.
Ga.—Donehoo v. Standifer, 178 S.E. 455, 180 Ga. 181—Brown v. Parks, 151 S.E. 340, 169 Ga. 712, 71 A.L.R. 271.
W.Va.—Moore v. Thomas, 174 S.E. 876, 115 W.Va. 237.

(3) To raise question of want of jurisdiction to appoint.—Linder v. Burns, Mo.App., 243 S.W. 361.

Complaint or petition held insufficient
Ga.—Walker v. Hall, 166 S.E. 757, 176 Ga. 12—Brown v. Parks, 151 S.E. 340, 169 Ga. 712, 71 A.L.R. 271.
N.Y.—In re Bloom's Estate, 278 N.Y. S. 157, 154 Misc. 741.

Equitable petition to set aside appointment of administrator because fraudulently procured was held not demurrable because plaintiff had legal remedy.—Brown v. Parks, 151 S.E. 340, 169 Ga. 712, 71 A.L.R. 271.

72. Cal.—In re Rathgeb, 52 P. 1010, 125 Cal. 202.

73. Ala.—Fields v. Woods, 67 So. 1016, 191 Ala. 93, following Curtis v. Williams, 33 Ala. 570.
Mont.—In re Infelise, 149 P. 365, 51 Mont. 18.

74. Mont.—In re Infelise, supra.

75. **Results in misjoinder**
In proceeding on petition for removal of administrator, permitting administrator to file cross complaint for personal judgment in favor of estate against petitioner was error because of misjoinder of parties, since administrator was defending against petition in his own right but was seeking to prosecute cross complaint in the right of the estate, although cross complaint was in name of administrator.—McCool v. Old Nat. Bank in Evansville, 17 N. E.2d 820, 214 Ind. 679.

76. N.Y.—Kelly v. Langevin, 137 N. Y.S. 1099, 153 App.Div. 322.

77. Ark.—Easterling v. Farrell, 12 S.W.2d 889, 178 Ark. 937.
Cal.—In re Kimball's Estate, 252 P. 591, 200 Cal. 247.
Ind.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.
Neb.—In re Sheerer's Estate, 289 N. W. 529, 137 Neb. 374.
N.J.—In re Gilbert's Estate, 15 A.2d 111, 18 N.J.Misc. 540.
N.Y.—In re Sciscenti's Estate, 283 N.Y.S. 960, 157 Misc. 499, affirmed 290 N.Y.S. 108, 248 App.Div. 702—In re Ferry's Estate, 279 N.Y.S. 919, 155 Misc. 198.
N.C.—In re Johnson's Will, 109 S.E. 373, 182 N.C. 522.
23 C.J. p 1106 note 8.

Evidence overcoming presumption
In proceeding to set aside revocation of appointment of administrator of deceased, who was child of first marriage, evidence that no divorce was granted to parties of first marriage overcame presumption of

such facts in the petition is not to be regarded as evidence thereof.[78] It has been held, however, that, where administration has been granted to a stranger, the burden is on him to show the legality of his appointment,[79] and that, on entry of an order requiring administrator to show cause why his letters should not be revoked, the burden is on the administrator.[80] Where no question with respect to the appointment is raised, it will be presumed that due notice was given before the appointment.[81] The admissibility[82] and sufficiency[83] of the evidence are governed by the general rules of evidence.

h. Hearing and Determination

The representative is entitled to a hearing in a proceeding to revoke his letters, but the court cannot determine matters not involved in the issues and may deny the application because of the practical situation existing in the estate.

Letters can be revoked only for cause shown after due hearing,[84] and where charges of misconduct are denied the court cannot revoke letters without taking evidence and making findings of fact.[85] While preliminary questions should be determined before the merits of the proceeding are inquired into,[86] the discretion of the court should not be exercised in ruling on a demurrer to the petition for revocation,[87] but should only be exercised in decisions on facts.[88] The proceeding may be submitted to a referee to hear evidence and report,[89] and in some jurisdictions, issues may be submitted to a jury,[90] but the verdict is not necessarily controlling, and the court may accept and act on it or disregard it as it may deem best and right.[91]

Where a jury is called, to pass on the disputed question of decedent's residence, the court may instruct as to the rules governing the submission and determination of special questions of fact, but nei-

their divorce, and placed on children of alleged second marriage burden of proving that divorce decree had been obtained.—In re McLaughlin's Estate, 172 A. 107, 314 Pa. 574.

78. N.Y.—Holland v. Ferris, 2 Bradf.Surr. 334.
Tenn.—Wilson v. Hoss, 3 Humphr. 142.

79. Md.—Slay v. Beck, 68 A. 573, 107 Md. 357.
23 C.J. p 1106 note 10.

80. Colo.—In re Peters' Estate, 215 P. 128, 73 Colo. 271.

81. Mont.—In re Infelise, 149 P. 365, 51 Mont. 18.

82. Ala.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597.
Ga.—Hicks v. Stalnaker, 200 S.E. 484, 59 Ga.App. 148.
Ill.—In re Panico's Estate, 268 Ill. App. 585.
23 C.J. p 1107 note 12.

Immaterial evidence is not admissible
Ala.—Holmes v. Holmes, 97 So. 628, 210 Ala. 227.
Ark.—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152.

83. Iowa.—Moreland v. Lowry, 241 N.W. 31, 213 Iowa 1096.
Md.—Kaiser v. Ebersberger, 19 A.2d 701, 133 A.L.R. 1479.
23 C.J. p 1107 note 13.

Presumption of validity of succession proceedings carried on under orders of district court would not sustain proceedings against attack by heirs on ground of fraud, if it appeared that court had been imposed on through fraud of so-called administrator.—Hebert v. Hebert, La. App., 187 So. 317.

Evidence identical with that before the court when it made the order of appointment will not justify revocation on the ground that the appointment was inadvertently made.—In re Johnson's Estate, 67 P.2d 1079, 20 Cal.App.2d 735.

Evidence held sufficient
(1) In general.
Cal.—Bengochea v. Bengochea, 271 P. 760, 94 Cal.App. 647.
Iowa.—Moreland v. Lowry, 241 N.W. 31, 213 Iowa 1096.
N.Y.—In re Krasnicki's Estate, 278 N.Y.S. 247, 154 Misc. 771—In re Kotlik's Estate, 274 N.Y.S. 204, 152 Misc. 802, adhered to 274 N.Y.S. 838, 153 Misc. 355—In re Clark's Estate, 246 N.Y.S. 732, 138 Misc. 651.
Wash.—In re Olson's Estate, 77 P.2d 781, 194 Wash. 219.

(2) To authorize revocation of letters.
Ala.—Clark v. Whorton, 194 So. 661, 239 Ala. 238—Kelen v. Brewer, 124 So. 247, 220 Ala. 175.
N.Y.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.

(3) To show interest in decedent's estate.
Cal.—In re Robinson's Estate, 224 P. 765, 65 Cal.App. 588.
N.Y.—In re Burke's Estate, 256 N.Y.S. 862, 143 Misc. 268.

(4) To support verdict.—Tyler v. Bartlett, 144 S.E. 168, 166 Ga. 673.

Evidence held insufficient
(1) In general.—In re Murtha's Estate, 249 N.Y.S. 537, 232 App.Div. 285, reversing 243 N.Y.S. 225, 136 Misc. 424, and reversed on other grounds 182 N.E. 82, 259 N.Y. 456—In re Lohmann's Estate, 283 N.Y.S. 38, 157 Misc. 169, affirmed In re Lohmann's Adm'r, 290 N.Y.S. 135, 248 App.Div. 714.

(2) To warrant revocation of letters.
Ind.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.
Miss.—Alexander v. Hancock, 164 So. 772, 174 Misc. 482, suggestion of error overruled 165 So. 126, 174 Miss. 482—Anderson v. Anderson, 130 So. 91, 158 Miss. 116.
N.Y.—In re Caplan's Estate, 258 N.Y.S. 570, 236 App.Div. 302, reversing 249 N.Y.S. 110, 139 Misc. 142, and affirmed 184 N.E. 141, 260 N.Y. 674—In re Gropen's Estate, 294 N.Y.S. 558, 162 Misc. 346—In re Lawson's Estate, 287 N.Y.S. 9, 158 Misc. 902—In re Sciscenti's Estate, 283 N.Y.S. 960, 157 Misc. 499, affirmed 290 N.Y.S. 108, 248 App.Div. 702.

84. Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.
23 C.J. p 1107 note 15.

85. N.Y.—In re Clemens' Estate, 22 N.Y.S.2d 168, 174 Misc. 1052.
23 C.J. p 1107 note 16.

86. N.Y.—Matter of Reinhardt, 156 N.Y.S. 171, 92 Misc. 96.
23 C.J. p 1107 note 17.

87. Cal.—In re Calhoun's Estate, 81 P.2d 605, 27 Cal.App.2d 706.

88. Cal.—In re Calhoun's Estate, supra.

89. N.Y.—In re Dade, 168 N.Y.S. 359.
23 C.J. p 1107 note 18.

Compelling filing of report
In an early case it was held that the surrogate is powerless to direct a referee, to whom the revocation proceeding was referred, to file his report.—In re Kraus, 4 Dem.Surr., N.Y., 217.

90. **Evidence sufficient to go to jury**
Ark.—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152.

91. N.C.—In re Meadow's Will, 116 S.E. 257, 185 N.C. 99.

ther party has the right to demand instructions.[92] While the facts alleged in the petition together with reasonable inferences are taken as admitted and the right to relief is a question of law where no answer is interposed,[93] the rule that an averment of the petition must be taken as true on a motion to dismiss does not apply where the averment is contrary to facts of which the court takes judicial notice.[94]

On the trial the court has power to pass on all matters brought in issue and properly involved in the questions before it for decision;[95] but it cannot determine matters not involved in the issue,[96] or not affecting the right to letters,[97] and the failure of the court to find on a matter not in issue will not render the judgment erroneous.[98] Where an application to set aside letters of administration involves the marital relations between decedent and the administratrix, the surrogate's court will move with caution, especially since it has no direct authority to annul or dissolve marriage relationships.[99] On a summary application to revoke letters of administration with the will annexed, the surrogate will not pass on a doubtful question as to the construction of the will which is pending before the supreme court, but the proceeding will be dismissed without prejudice,[1] and where a will is offered for probate after the issuance of letters of administration, revocation should not be ordered until it is determined that the will is entitled to probate.[2]

The application may be denied because of the practical situation existing in the estate,[3] as where the estate is ready for a final decree of distribution[4] and the rights of all parties can be protected in an accounting proceeding.[5] Also, where letters of administration were issued without a bond, the court could order the filing of a bond, if necessary, without revoking the letters.[6]

i. Judgment, Order, or Decree

In order that letters testamentary or of administration may be revoked, there must be an order of court to that effect and it must comply with statutory requirements.

In order that letters testamentary or of administration may be revoked, it is necessary that there be an order of court to that effect.[7] The order must show compliance with statutory requirements,[8] and must be supported by the verdict,[9] but it is not required to be in any particular form, it being sufficient if it shows a purpose that the powers of the

92. Kan.—In re Holloway, 164 P. 298, 100 Kan. 368.

93. N.Y.—In re Irving's Estate, 276 N.Y.S. 427, 153 Misc. 807.

94. N.J.—In re Queen, 89 A. 290, 82 N.J.Eq. 583.

95. Ala.—Tubbs v. Barnard, 143 So. 448, 225 Ala. 435.
23 C.J. p 1106 note 5.

Fraud in obtaining appointment
Surrogate's court, on application for revocation of letters of administration, had jurisdiction to determine whether assignment of petitioners' interest in estate was procured by fraud.—In re Caplan's Estate, 249 N.Y.S. 110, 139 Misc. 142, reversed on other grounds 258 N.Y.S. 570, 236 App.Div. 302, affirmed 184 N.E. 141, 260 N.Y. 674.

Judgment and deed canceled
Where judgment appointing administrator is void for fraud to which grantee in administrator's deed was party or of which grantee knew at time of purchase, both judgment and deed may be canceled in suit in equity against administrator and grantee.—Jackson v. Jackson, 177 S.E. 591, 179 Ga. 696.

96. N.Y.—In re Sweeney's Estate, 213 N.Y.S. 174, 125 Misc. 859.
23 C.J. p 1106 note 6.

Validity of will
Charges that will offered for probate by administrator was product of forgery, fraud, and undue influence could not be determined in proceeding for removal of administrator.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.

Validity of claims of creditors
In suit by alleged creditors of estate to annul appointment of administrator, question of validity of claims of creditors was not before the court.—Crawford County v. Kock's Estate, 290 N.W. 682, 227 Iowa 1235.

Priority of third person
The priority of a person to appointment will not be considered where he did not join in the petition for revocation.—Tyer v. J. B. Blades Lumber Co., 124 S.E. 305, 188 N.C. 268.

97. Iowa.—In re King, 75 N.W. 187, 105 Iowa 320.
23 C.J. p 1106 note 7.

98. Ind.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.

99. N.Y.—Matter of Spondre, 162 N.Y.S. 943, 98 Misc. 524.

1. N.Y.—Matter of Dunn, 118 N.Y.S. 561, 63 Misc. 180.

2. Tex.—In re Fowler's Estate, Civ. App., 87 S.W.2d 896, error dismissed.

3. N.Y.—In re Feciuch's Estate, 21 N.Y.S.2d 424—In re Lohman's Estate, 290 N.Y.S. 964, 160 Misc. 929, affirmed 288 N.Y.S. 1047, 248 App. Div. 556—In re Irving's Estate, 276 N.Y.S. 427, 153 Misc. 807.

Few persons before court
Application for order revoking letters of temporary administration, on ground deceased was resident of another county, should be denied, where relatively few of interested persons were before court and question of residence had been raised in probate proceedings.—In re Wendel's Estate, 257 N.Y.S. 97, 143 Misc. 817.

4. N.Y.—Matter of Baldasarro, 156 N.Y.S. 175, 92 Misc. 627.
Pa.—In re Bechtold's Estate, 57 Montg.Co. 295, 55 York Leg.Rec. 105.

5. N.Y.—In re Chinsky's Estate, 288 N.Y.S. 666, 159 Misc. 591.

6. N.Y.—In re Caplan's Estate, 258 N.Y.S. 570, 236 App.Div. 302, reversing 249 N.Y.S. 110, 139 Misc. 142, and affirmed 184 N.E. 141, 260 N.Y. 674.

7. Mo.—State v. Rucker, 59 Mo. 17.

Order construed
Order refusing letters of administration may be held as to surety, revocation of prior order at same term appointing administratrix.—Holland v. Reburn, Mo.App., 52 S.W.2d 219.

8. Alaska.—Sylvester v. Willson, 2 Alaska 325.

9. Ga.—Rainey v. Moon, 2 S.E.2d 405, 187 Ga. 712.

representative shall cease.[10] An order revoking letters is sufficiently supported where entered for two reasons, one of which was good.[11] It is proper to incorporate in a decree of revocation an order requiring the property to be turned over to a designated officer for safe custody,[12] or to incorporate an order for the issuance of letters to the persons who are entitled thereto.[13] An order revoking letters granted while a previous valid appointment was in force need not make any direction concerning the acts of the administrator done in pursuance of the invalid appointment.[14]

Collateral attack. An order dismissing a petition for revocation of letters on the ground that administrator was not decedent's surviving spouse was held not conclusive of such issue so that it could not be raised on distribution.[15]

j. Review

General rules apply on review of orders revoking or refusing to revoke letters testamentary or of administration.

While appeals generally in probate proceedings have been treated in Appeal and Error § 146 et seq, ordinarily an appeal will lie from a decree revoking letters testamentary or of administration,[16] and, although there is authority to the contrary,[17] an order refusing to revoke letters is also held appealable.[18] However, an appeal can be taken only by parties in interest who are aggrieved by the action of the trial court,[19] and while a representative whose letters have been revoked ordinarily has been held an aggrieved party,[20] a stranger to the estate who was appointed administrator, knowing that the appointment was subject to revocation if any one of the preferred class should apply, has been held not entitled to appeal,[21] nor can an administrator appeal from revocation of his letters on the admission of a will to probate, where none of his acts were impeached and his right to compensation is left open,[22] and an executor cannot appeal from an order setting aside his appointment because the will was set aside and not because of misconduct or neglect of duty.[23] Also, a representative cannot secure

10. S.C.—McLaurin v. Thompson, 23 S.C.L. 335.
23 C.J. p 1107 note 27.

11. Colo.—In re Woody's Estate, 24 P.2d 754, 93 Colo. 169.

12. Pa.—In re Huff's Estate, 149 A. 179, 299 Pa. 200.

Right to have accounts settled

Where one will was admitted to probate and individual was appointed executor, but, after individual had qualified as executor, the will naming him as executor was set aside on ground that it was not testator's last will, county court exceeded its jurisdiction in thereafter ordering individual to turn over assets of estate forthwith to trust company named as executor in a subsequent will, before giving individual a chance to have his accounts passed on.—In re Blyman's Estate, 32 N.E. 2d 637, 309 Ill.App. 30.

13. N.Y.—Matter of Blauvelt, 131 N. Y.S. 111, 72 Misc. 287.
Pa.—In re Neidig, 38 A. 1033, 183 Pa. 492.

14. Ill.—In re Purvechio, 188 Ill. App. 81.

15. Pa.—In re Boytor's Estate, 198 A. 484, 130 Pa.Super. 591.

16. Ala.—Starlin v. Love, 185 So. 380, 237 Ala. 38.
Mo.—In re Crooks' Estate, App., 138 S.W.2d 6.
Or.—State v. Taswell, 283 P. 745, 132 Or. 122.
3 C.J. p 646 note 17—23 C.J. p 1107 note 31.

Suspension order

(1) An order of the probate court, entered when a suit to contest a will was filed in the circuit court suspending the executor appointed under the will and appointing a temporary administrator, is appealable to the circuit court under a statute allowing appeals from all orders revoking letters testamentary or of administration, since the effect of the order was to revoke the letters testamentary, temporarily, at least. —Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

(2) Where the probate court in one order appointed an administrator pendente lite, and suspended the letters testamentary previously issued to the executor during the pendency of the will contest, the executor could appeal from the portion of the order suspending its letters without involving the portion appointing the administrator pendente lite.—Baker v. St. Louis Union Trust Co., Mo. App., 234 S.W. 858.

Executors removed without hearing on filing of a will contest and appointment of an administrator pendente lite were entitled to appeal. —State ex rel. and to Use of Kotany v. Holtcamp, Mo., 277 S.W. 907.

17. Colo.—Peters v. Peters, 261 P. 874, 82 Colo. 503.
Minn.—In re Firle's Estate, 253 N.W. 889, 191 Minn. 233.
23 C.J. p 1108 note 33.

18. Ala.—Johnston v. Pierson, 155 So. 695, 229 Ala. 85.
Md.—Stake v. Stake, 113 A. 591, 138 Md. 51.
Mo.—In re Helm's Estate, App., 136 S.W.2d 427.
Mont.—In re Davis, 28 P. 645, 11 Mont. 196.
Utah.—In re Tasanen, 71 P. 984, 25 Utah 396.
Wash.—In re Sutton, 71 P. 1012, 31 Wash. 340.
3 C.J. p 570 note 44 [b] (11), (12)—23 C.J. p 1108 note 32.

Special administrator

Order of probate court denying motion to strike an appointment of a special administratrix of an estate was not appealable.—Wiley v. Braggs, 57 P.2d 315, 47 Ariz. 526.

19. Tex.—Saros v. Strickland, Civ. App., 148 S.W.2d 865, error dismissed, judgment correct.
23 C.J. p 1108 note 35.

Waiver of right to object

Failure to demur below to a petition to set aside the appointment of an administrator has been held to be a waiver of the objection that the petitioner cannot appeal from a denial of his petition, because not a party to the probate proceedings.—In re Tasanen, 71 P. 984, 25 Utah 396.

20. D.C.—Webb v. Lohnes, 96 F.2d 582, 68 App.D.C. 310.
Mo.—In re Crooks' Estate, App., 138 S.W.2d 6.
Tex.—Saros v. Strickland, Civ.App., 148 S.W.2d 865, error dismissed, judgment correct.

21. Ind.—Union Savings & Trust Co. v. Eddingfield, 134 N.E. 497, 78 Ind.App. 286.

22. N.C.—In re Suskin's Estate, 198 S.E. 661, 662, 214 N.C. 219, citing **Corpus Juris.**
Wash.—Cairns v. Donahy, 109 P. 334, 59 Wash. 130.

23. Mo.—Lucitt v. Toohey's Estate, 89 S.W.2d 662, 338 Mo. 343.

review of a decision postponing the hearing of a petition for revocation of letters testamentary until after an accounting ordered by the court.[24] An order refusing to dismiss a proceeding for revocation of letters was held not appealable as affecting a substantial right,[25] and dismissal of a motion to set aside an order appointing an administrator was held not appealable where it would not finally dispose of the cause.[26] The representative's right of appeal from an order revoking his letters can be taken only as an individual.[27]

General rules are applied on review of proceedings for the revocation of letters testamentary or of administration,[28] and statutory requirements and rules of court must of course be complied with.[29]

Effect of appeal. While an appeal from an order of revocation has been held not to suspend its effect,[30] at least where a statute so provides,[31] it has also been held that an appeal from a decree of revocation suspends the operation of the decree and leaves the executor or administrator in office as before.[32] Appeals from orders dismissing petitions for removal of coexecutors have been held not to stay such proceedings as could be consistently carried on,[33] and the lower court has been held to have jurisdiction to enter a nunc pro tunc order correcting a prior order removing a representative, even though an appeal therefrom is pending.[34]

Hearing on appeal. On appeal the matter is sometimes tried de novo,[35] and the court has jurisdiction to determine all issues involved.[36] However, where the higher court exercises a strictly appellate jurisdiction it will not consider objections which were not raised in the court below,[37] nor matters which are not assigned as error,[38] or which could not properly be considered by the lower court,[39] and where letters of administration issued to a creditor of deceased were properly revoked, an appellate

24. N.Y.—In re Kelly, 137 N.Y.S. 1099, 153 App.Div. 322.

25. N.Y.—In re Kelly, supra.

26. Ga.—Vanzant v. First Nat. Bank, 139 S.E. 537, 164 Ga. 772.

27. Nev.—In re Pedroli's Estate, 193 P. 852, 44 Nev. 258.

Appeal not in individual capacity

Notice of appeal and undertaking on appeal by one "as administrator" from an order revoking his letters of administration cannot be considered as an appeal by such administrator in his individual capacity, and he will not be permitted to perfect an appeal in his individual capacity, under a statute which provides that no appeal shall be dismissed for insufficiency of a notice of appeal or undertaking thereon.—In re Pedroli's Estate, supra.

28. **Certiorari**

Where losing party in proceedings for appointment of administrator filed petition to revoke letters of administrator, such petition would be treated as motion for new trial, as respects such party's right to bring certiorari.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.

29. Wash.—State ex rel. Barry v. Superior Court in and for King County, supra.

23 C.J. p 1108 note 36 [a].

Time for review

(1) Certiorari was held not to lie to review order of superior court refusing to revoke letters of administrator, where proceedings for certiorari were instituted forty four days after order appointing administrator was entered.—State ex rel. Barry v. Superior Court in and for King County, supra.

(2) The action of the trial court in proceeding on petition for removal of administrator, in permitting filing of cross complaint after issue joined and tried on petition had been decided, could not have effect of changing issue theretofore presented and determined and of changing effect of judgment denying petition from a final one to a mere "interlocutory judgment" as respects the time within which appeal was required to be taken.—McCool v. Old Nat. Bank in Evansville, 17 N.E.2d 820, 214 Ind. 679.

30. Ind.—Union Savings & Trust Co. v. Eddingfield, 134 N.E. 497, 78 Ind.App. 286.

31. N.Y.—Aubuchon v. Murphy, 118 N.Y.S. 553, 64 Misc. 286.

32. Md.—Biddison v. Story, 57 Md. 96.

23 C.J. p 1108 note 37.

33. Md.—Robinson v. Robinson, 16 A.2d 854, 178 Md. 623.

34. Ark.—Davie v. Smoot, 150 S.W. 2d 50.

35. Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.

N.Y.—In re Murtha's Estate, 249 N.Y.S. 537, 232 App.Div. 285, reversing 243 N.Y.S. 225, 136 Misc. 424, and reversed on other grounds 182 N.E. 82, 259 N.Y. 456—In re Shonts' Will, 181 N.Y.S. 553, 191 App.Div. 427, reversing In re Shonts' Estate, 178 N.Y.S. 762, 109 Misc. 276, reversed on other grounds In re Shonts' Will, 128 N.E. 225, 229 N.Y. 374.

Tex.—Saros v. Strickland, Civ.App., 148 S.W.2d 865, error dismissed, judgment correct.

23 C.J. p 1108 note 39.

36. Tex.—Saros v. Strickland, supra.

Making appointment permanent

Where proceedings for appointment of administrator went over more than three terms of probate court after its appointment of applicant as temporary administrator, without contest other than one on which appeal from order revoking such appointment was based, district court, after determining such contest in appointee's favor on jury's findings, should have made his appointment permanent.—Saros v. Strickland, supra.

37. Ala.—Bivin v. Millsap, 189 So. 770, 238 Ala. 136.

Cal.—In re Randall, 170 P. 835, 177 Cal. 363.

38. Ariz.—In re Gerard's Estate, 72 P.2d 952, 50 Ariz. 458, 113 A.L.R. 776.

Issuance of letters presumed proper

In proceeding to revoke letters of administration, in which the petition for revocation did not assail their issuance on the ground that deceased died without leaving any estate, it will be presumed, in the absence of the record of jurisdictional facts requisite to the granting in the first instance of the letters of administration, that the order granting letters of administration was made on a proper and sufficient showing that deceased died leaving an estate in the state.—In re Cover's Estate, 204 P. 583, 188 Cal. 133.

39. Mo.—In re Greening's Estate, 89 S.W.2d 123, 232 Mo.App. 78.

Finding in proceeding for appointment

On appeal in revocation proceedings, the appellate court cannot review a finding made in the proceeding for appointment of the representative.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180.

court will not on appeal from the order of revocation review the discretion of the trial court in appointing a successor.[40] Ordinarily, the appellate court cannot consider questions relating to the weight of evidence and the credibility of witnesses,[41] and the findings of the court have been held to have the force of a jury verdict, and can be set aside on appeal only when clearly against the weight of the evidence.[42] The appellate court will assume that the trial court found facts sufficient to support his action,[43] where the evidence is not before the appellate court,[44] and where an order denying revocation was rendered on the pleadings, the appellate court will take as true the facts alleged in the petition, answer, and response to the citation.[45]

Disposition of cause. An appellate court is not inclined to reverse the action of the court below where the appeal was not seasonable,[46] or the court of review has not before it all the evidence on which the revocation was based,[47] where different conclusions can be drawn from the evidence,[48] or the finding below is based on the examination of witnesses ore tenus,[49] or where it does not appear manifest that the lower court abused its discretion,[50] or disregarded its duty in the premises.[51] However, an order revoking letters testamentary may be reversed where it appears to have been founded in part on the refusal of the executor to account as to a matter for which he was not accountable,[52] or where "the justice of the case" may require a reversal.[53]

Where the appeal is dismissed on the sole ground that appellant is not entitled to appeal, the decree stands as if not appealed from.[54]

k. Costs and Allowances

The imposition of costs in a proceeding to revoke letters is a matter largely within the discretion of the court.

The imposition of costs in proceedings to revoke letters is a matter largely within the discretion of the court.[55] A representative who successfully defends against a proceeding to revoke his letters may be allowed reasonable counsel fees and expenses out of the estate,[56] but ordinarily no such allowance should be made to a representative whose letters are revoked because of his own misconduct or fault.[57]

40. Wash.—In re Farnham, 84 P. 602, 41 Wash. 570.

41. Wash.—In re Olson's Estate, 77 P.2d 781, 194 Wash. 219.

Appeal from intermediate court

A petition to revoke letters testamentary or of administration is properly heard and determined by the superior court on appeal from the clerk of such court, and the findings of fact made by the judge on competent evidence are conclusive on appeal therefrom.—In re Finlayson's Estate, 173 S.E. 902, 206 N.C. 362—In re Ryan's Estate, 122 S.E. 289, 187 N.C. 569—In re Martin's Estate, 117 S.E. 561, 185 N.C. 472.

42. Pa.—In re Bechtold's Estate, 57 Montg.Co. 295, 55 York Leg.Rec. 105.

Finding clearly against evidence

N.Y.—In re Curtis' Estate, 185 N.Y.S. 507, 194 App.Div. 334, affirmed 132 N.E. 917, 231 N.Y. 632.

43. Pa.—In re Bechtold's Estate, 57 Montg.Co. 295, 55 York Leg.Rec. 105.

Tex.—Saros v. Strickland, Civ.App., 148 S.W.2d 865, error dismissed, judgment correct.

Sufficiency of citation

In absence of showing that interested parties were not notified, it is presumed probate court made findings of fact to give jurisdiction to vacate former decree appointing administrator.—Capwell v. Knight, 135 A. 699, 48 R.I. 81.

44. Ariz.—In re Perrin's Estate, 86 P.2d 25, 53 Ariz. 127.

Nev.—In re Gill's Estate, 280 P. 321, 52 Nev. 35, 65 A.L.R. 1232.

45. Or.—In re Vilas' Estate, 110 P. 2d 940.

46. Ala.—Mitchell v. Duncan, 10 So 331, 94 Ala. 192.

N.J.—Delany v. Noble, 3 N.J.Eq. 559.

47. Nev.—In re McGill's Estate, 280 P. 321, 52 Nev. 35, 65 A.L.R. 1232.
23 C.J. p 1108 note 42.

48. Cal.—In re Watterson's Estate, 20 P.2d 772, 130 Cal.App. 741.

49. Ala.—Moring v. Lisenby, 4 So.2d 4, 241 Ala. 626.

50. Iowa.—In re Wright's Estate, 230 N.W. 552, 210 Iowa 25.

Okl.—Andrews v. Hooper, 280 P. 424, 138 Okl. 103.

Wis.—In re Reilly's Estate, 243 N.W. 506, 208 Wis. 557.
23 C.J. p 1108 note 43.

Estate ready for distribution

Order denying petition that letters of administration be revoked and that letters be issued to petitioner who had statutory preference thereto will not be disturbed on appeal, where estate was small and was ready for distribution.—In re Esterly's Estate, 34 P.2d 539, 97 Mont. 206.

51. Pa.—Wilkey's Appeal, 108 Pa. 567.

52. N.Y.—Matter of Pye, 43 N.Y.S. 836, 18 App.Div. 309.

53. Colo.—In re Peters' Estate, 215 P. 128, 73 Colo. 271.
23 C.J. p 1108 note 47.

54. Mass.—Cleveland v. Quilty, 128 Mass. 578.

55. Mass.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.
23 C.J. p 1108 note 49.

Public administrator, unsuccessfully seeking removal of administratrix, was entitled to reasonable costs and expenses out of estate.—Hilton v. Hopkins, supra.

Representative not liable

Where defendant was appointed an administrator of deceased person in a county in which deceased did not reside, and, acting in good faith, took charge of deceased's property, and disposed of it according to orders of the court and did not profit by his appointment, he was not liable for court costs and attorney's fees incident to an action by a regularly appointed administrator to set aside his appointment.—Duhaime v. Rowe, 188 N.W. 894, 193 Iowa 1123.

56. N.Y.—In re Sanders' Estate, 227 N.Y.S. 543, 131 Misc. 266.
23 C.J. p 1108 note 50.

57. Ga.—Armstrong v. Boyd, 79 S.E. 780, 140 Ga. 710.

Irrespective of illegality of appointment of administrator nominated by nonresident stepmother of deceased, on his retention as temporary administrator after his appointment was annulled, all legitimate costs and expenses incurred by reason of the proceeding were properly charged to the estate, including fees of clerk of court, publishing notice, premium on administrator's bond, cost of litigation over the appointment and fees of attorney who pro-

However, an administrator has been allowed reasonable costs which were taxed against the petitioners for revocation where they failed to make known the disqualification until administration was practically completed, although they had knowledge of the disqualification at the time of the appointment.[58]

§ 86. —— Powers of Representative pending Proceeding for Revocation

The powers of a representative pending proceedings for revocation of his letters are sometimes regulated by statute.•

Under a statute providing that, pending proceedings for the revocation of probate, the executor must suspend all proceedings relating to the estate except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform by an order of the surrogate, the mere fact that the executor, pending such proceedings, has withdrawn or proposes to withdraw from a savings bank money deposited by the testator, affords no warrant for the interposition of the surrogate to restrain him.[59]

§ 87. —— Effect of Revocation

Revocation of letters testamentary or of administration terminates the authority of the representative and while it does not invalidate acts done in good faith, neither does it relieve him from liability for prior acts.

The revocation of letters testamentary or of administration terminates the authority of the representative,[60] but the revocation of the appointment of an administrator does not ipso facto terminate the right of a coadministrator to act, although the latter was appointed merely on the consent of the removed administrator and had no independent right to be appointed.[61] Acts done in good faith by an executor or administrator in the course of administration remain valid and binding, notwithstanding a subsequent revocation of his letters,[62] and the representative is entitled to be reimbursed for moneys which he has expended and services which he has rendered in good faith pursuant to his appointment, as shown infra §§ 221, 855. On the other hand the revocation does not shield the representative from liability for his previous official acts.[63] On the revocation of his letters the representative may be required to settle his account, as shown infra § 831, and such revocation does not deprive him of his statutory right of appeal from an order settling his accounts, discussed infra § 926.

The clerk of the probate court, whose fees are unpaid, is not prejudiced by the revocation of the letters issued to an administrator when a new administrator is appointed, the clerk's remedy to enforce collection being still open.[64]

§ 88. —— Issuance of New Letters

On revocation of letters testamentary or of administration, the court may grant new letters, sometimes to the same person.

On the revocation of letters of administration the surrogate is authorized to grant new letters to other persons,[65] but if the estate has been settled or partly settled by the former incumbent the new letters should be de bonis non.[66] Where the order revoking letters was void, new letters issued to another person are also void.[67]

Reappointment of original representative. It has been held that when letters testamentary have been revoked there is no authority for issuing new letters to the executor,[68] but it has also been held that the revocation of letters of administration does not disqualify the person removed from being reappointed,[69] provided no other person has been appointed meanwhile.[70]

§ 89. Removal

The court has considerable discretion in determining whether or not an executor or administrator shall be removed and is reluctant to remove where no strong cause therefor exists.

voked the appointment.—Succession of Hair, La.App., 195 So. 43.

58. U.S.—In re Allen's Estate, D.C. D.C., 30 F.Supp. 243.

59. N.Y.—Bray v. Smith, 1 Dem. Surr. 168.

60. N.Y.—Belden v. Belden, 103 N. Y.S. 346, 118 App.Div. 296.
23 C.J. p 1109 note 54.

61. N.Y.—In re McDonald, 105 N.E. 407, 211 N.Y. 272, affirming 145 N.Y.S. 267, 160 App.Div. 86, which reversed 143 N.Y.S. 775, 82 Misc. 135, and rehearing denied 106 N.E. 1035, 212 N.Y. 552.

62. Alaska.—In re Person's Estate, 7 Alaska 489.
Conn.—Di Blasi v. Di Blasi, 159 A. 477, 114 Conn. 539.
Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
23 C.J. p 1085 note 57, p 1109 note 56.

63. N.Y.—Matter of Ablowich, 103 N.Y.S. 699, 118 App.Div. 626.
23 C.J. p 1109 note 58.
Liability of sureties on bond see infra § 957.

64. Ark.—Adamson v. Parker, 85 S. W. 239, 74 Ark. 168.

65. R.I.—Capwell v. Knight, 135 A. 699, 48 R.I. 81.
23 C.J. p 1109 note 62.
Notice
Probate court on revoking appointment of administrator could not appoint new administrator without giving notice by advertisement to interested parties.—Capwell v. Knight, supra.

66. N.Y.—Harrison v. Clark, 87 N. Y. 572.

67. Alaska.—Sylvester v. Willson, 2 Alaska 325.

68. N.Y.—Matter of Dearing, 4 Dem. Surr. 81.
23 C.J. p 1109 note 65.

69. N.Y.—Barber v. Converse, 1 Redf.Surr. 330.
23 C.J. p 1110 note 66.

70. N.Y.—Williams' Case, 18 Abb. Pr. 350, Tuck.Surr. 8.
23 C.J. p 1110 note 67.

An executor or administrator is subject to the jurisdiction of the probate court and may be removed from his office whenever a proper occasion arises,[71] and one of two or more joint executors or administrators may be removed, leaving the others in office without him,[72] but a representative will not be removed except for legal and specific causes.[73] The court is usually invested with considerable discretion in determining whether or not an executor or administrator shall be removed,[74] and is reluctant to remove where no strong cause therefor exists, and it does not clearly appear that retaining the representative in office will jeopardize the interests of the estate.[75]

Since an administrator is appointed by the court whereas an executor is designated by the testator, the court may remove an administrator for a cause which would not justify removal of an executor or a refusal to permit the executor to qualify.[76]

Revocation of letters testamentary or of administration and the distinction between revocation and removal are discussed supra §§ 84-88.

§ 90. —— Grounds for Removal

a. In general
b. Misconduct in general
c. Failure to file inventory, accounts, etc.
d. Insolvency; default as to giving of bond
e. Hostile or adverse interests
f. Miscellaneous grounds not warranting removal

a. In General

Removal is ordinarily proper whenever the representative proves to be incapable of discharging his trust or unsuitable for the office. Statutory grounds for removal of an executor or administrator are usually exclusive.

The removal of an executor or administrator is ordinarily regulated by statute, and a statute specifying the grounds of removal is usually held to preclude a removal on grounds not specified,[77] but there is also authority for the view that such a statute

71. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.
Mont.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.
Neb.—In re McLean's Estate, 295 N. W. 273, 138 Neb. 757.
N.Y.—In re Caggiano's Estate, 23 N. Y.S.2d 47, 260 App.Div. 926, reargument denied 24 N.Y.S.2d 1011, 260 App.Div. 1028.
23 C.J. p 1110 note 69.

72. S.C.—Smith v. Heyward, 105 S.E. 275, 115 S.C. 145.
23 C.J. p 1110 note 70.

73. Md.—Fulford v. Fulford, 137 A. 487, 153 Md. 81.
Miss.—Ricks v. Johnson, 99 So. 142, 134 Miss. 676.
23 C.J. p 1110 notes 71, 72.

74. Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.
Ga.—Stanley v. Spell, 166 S.E. 669, 46 Ga.App. 91.
Iowa.—In re Lininger's Estate, 297 N. W. 310—In re Myers' Estate, 294 N.W. 235, 229 Iowa 170—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103—In re Amick's Estate, 281 N.W. 786, 225 Iowa 829.
N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.
Or.—In re Faulkner's Estate, 65 P.2d 1045, 156 Or. 23.
Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.
Wash.—In re Wolfe's Estate, 57 P.2d 1066, 186 Wash. 216.
Wis.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506.
23 C.J. p 1116 note 29.

Statutes directory
Cal.—In re Calhoun's Estate, 81 P. 2d 605, 27 Cal.App.2d 706—In re Atkins' Estate, 8 P.2d 1052, 121 Cal. App. 251.

75. Iowa.—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103.
N.Y.—In re Rosenberg's Will, 209 N. Y.S. 315, 213 App.Div. 167.
N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.
Or.—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949.
Pa.—In re Glessner's Estate, 22 A.2d 701, 343 Pa. 370—In re Hartman's Estate, 200 A. 49, 331 Pa. 422—In re Hurley's Estate, 169 A. 81, 313 Pa. 53.
23 C.J. p 1116 note 30.

Removal not required
(1) In general.
Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
N.Y.—In re Phelps' Estate, 295 N.Y.S. 840, 162 Misc. 703.
Pa.—In re Scholler's Estate, 55 Montg.Co. 36.

(2) An objection not made until the representative had administered the estate and filed the first and final account was held properly dismissed.—In re Purman's Estate, 5 A. 2d 906, 334 Pa. 238—23 C.J. p 1116 note 30 [e].

(3) The refusal to remove executors, who administered estate in disregard of statutory provisions and who had delayed distribution for seven years, was not a breach of discretion, where seven-year delay was contributed to by heirs' acquiescence in proceedings of executors, and change in executors would merely delay distribution, which was all that remained to be done by executors.—In re Ryan's Estate, 96 P.2d 916, 109 Mont. 340.

76. Ky.—Kuechler v. Rubbathen, 99 S.W.2d 193, 266 Ky. 390.

Real danger of substantial loss
A testator has, as a "property right," the privilege and power to place management of his estate with a selected person as a condition of his bounty, and for a court to remove an executor, there must appear a situation where the estate is in real danger of substantial loss if executor is not removed.—In re Glessner's Estate, 22 A.2d 701, 343 Pa. 370.

77. Ala.—Castleberry v. Hollingsworth, 111 So. 35, 215 Ala. 445.
D.C.—Hawley v. Hawley, 114 F.2d 505, 72 App.D.C. 357.
Mo.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.
N.Y.—In re Shenk's Estate, 211 N.Y. S. 514, 125 Misc. 386.
Wis.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506.
23 C.J. p 1117 note 57.

One cause sufficient
The existence of one of the causes enumerated in the statute is sufficient to authorize removal.—In re Lussem's Estate, 2 N.E.2d 113, 285 Ill. App. 311.

Nothing less than mental or physical disability, rendering an executor incapable of understanding or performing his duties, or dishonesty in money matters, from which it might be inferred that the estate will be put in jeopardy, is sufficient to justify removal, under some statutes.—In re Jung's Will, 199 N.Y.S. 122, 205 App.Div. 37.

does not have this effect or preclude a removal where sufficient reasons therefor exist although not specified by the statute.[78] Removal of an executor or administrator is ordinarily proper whenever from any cause he proves to be incapable of discharging his trust or unsuitable for the office[79] or becomes disqualified on grounds not existing when the letters were issued to him or the appointment made,[80] or such removal becomes advisable for the interest of the estate.[81] The marriage of an executrix or administratrix is sometimes made a ground for her removal,[82] unless her husband consents in writing to her continuance in the office.[83] An offer to resign may constitute cause for removal.[84]

Change of residence or absence from state. It may be proper to remove an executor or administrator who has removed his residence away from the state in which letters were granted,[85] unless his residence outside of the state is only temporary,[86] but, where the appointee was a nonresident at the time when letters were issued to him, his continued nonresidence is not a ground for removal,[87] nor should an executrix, who is the sole beneficiary of the decedent, be removed because she has been absent from the state for the greater part of the year following the issue of letters where she has performed during that time all the statutory duties of her trust, and the year has not yet expired.[88] Remoteness of his residence from the place where the property of the estate is located, he being a resident of the state, is not ground for removal.[89]

Coexecutors and coadministrators. It has been held that an executor will be removed on the application of his coexecutor where he fails to do his part in the management of the estate, and there are constant dissensions between the executors, and it is evident that his continuance in office will prejudice the best interests of the estate,[90] but where

78. N.M.—Koury v. Castillo, 79 P. 293, 13 N.M. 26.

79. D.C.—Bramhall v. Brosnan, 5 F. 2d 270, 55 App.D.C. 309.
Mont.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.
Neb.—In re McLean's Estate, 295 N. W. 273, 138 Neb. 757.
Or.—In re Faulkner's Estate, 65 P. 2d 1045, 156 Or. 23.
Pa.—In re Fleming's Estate, 32 Pa. Dist. & Co. 245, affirmed 5 A.2d 599, 135 Pa.Super. 423.
23 C.J. p 1110 note 73.

Misconduct not necessary

"Unsuitableness" of administrator to act as a fiduciary within statute is sufficient without misconduct supplying cause for removal, and is not restricted to absolute unfitness, but includes an unfitness arising out of the situation of the person in connection with the estate.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

Legal disqualification

Word "unfit," within statute providing for revocation of letters of administration on showing that administrator is unfit for trust, is not limited to physical, mental, or moral conditions, but sufficiently broad to include legal disqualification under will or otherwise.—Bruce v. Fogarty, 186 S.E. 463, 53 Ga.App. 443.

Unsuitableness at time of appointment

(1) An executor or administrator may be removed on proof of unsuitableness, notwithstanding he was equally unsuitable when appointed or qualified.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506—23 C.J. p 1110 note 73 [c].

(2) Under statute, court may remove coexecutor for acts committed after qualification or for acts committed after testator's death before qualification.—In re McCabe's Estate, 171 A. 156, 12 N.J.Misc. 297.

(3) However, it has also been held that removal can be had only for causes arising after appointment.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.

Unsuitableness must exist at time of removal

(1) The question whether a representative is unsuitable is to be determined when the question of removal arises.—In re Zartner's Will, 198 N. W. 363, 183 Wis. 506—23 C.J. p 1110 note 73 [b].

(2) An administrator should not be removed merely on a showing that he was unfit for appointment in the first instance, in the absence of proof that he has been guilty of any improper acts or neglect of duty.—Sayles v. Steere, R.I., 85 A. 929.

(3) Matters occurring prior to the appointment of an administrator and having no connection with the administration cannot furnish grounds for removal.—In re Lipko's Estate, 12 Pa.Dist. & Co. 801—23 C.J. p 1117 note 51.

Statute construed

In construing a statute providing for removal of an executor or administrator who has become of unsound mind, or has been convicted of any felony or other infamous crime, or has absented himself from the state for a specified period or has become an habitual drunkard, or is "in any wise incapable or unsuitable to execute the trust reposed in him," the quoted phrase is complete within itself, and does not, under the principle of ejusdem generis, cover merely causes similar to those enumerated.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.

80. Ga.—Bruce v. Fogarty, 186 S.E. 463, 53 Ga.App. 443.
23 C.J. p 1110 note 74.

81. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.
Ky.—Hancock's Adm'r v. Hancock's Ex'r, 79 S.W.2d 206, 257 Ky. 739.
Mont.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.
Ohio.—In re Jordan's Estate, 30 Ohio N.P.,N.S., 176.
Pa.—In re McGrath's Estate, 20 Pa. Dist. & Co. 121, 49 Montg. Co. 274, reversed on other grounds 179 A. 599, 319 Pa. 309.
23 C.J. p 1111 note 75.

82. Ga.—Bruce v. Fogarty, 186 S. E. 463, 53 Ga.App. 443.
23 C.J. p 1111 note 76.

83. Ind.—Jenkins v. Jenkins, 23 Ind. 79.

84. Minn.—Rumrill v. St. Albans First Nat. Bank, 9 N.W. 731, 28 Minn. 202.

85. Ind.—Ewing v. Ewing, 38 Ind. 390.
23 C.J. p 1112 note 94, p 1103 note 44.

86. N.Y.—Matter of McKnight, 80 N.Y.S. 251, 80 App.Div. 284, affirmed 71 N.E. 1134, 179 N.Y. 522.

87. Wyo.—Hecht v. Carey, 78 P. 705, 13 Wyo. 154, 110 Am.S.R. 981.
23 C.J. p 1113 note 96.

88. N.Y.—In re Magoun, 84 N.Y.S. 940, 41 Misc. 352.

89. Ky.—Rieke v. Rieke, 208 S.W 764, 183 Ky. 131.

90. Fla.—Henderson v. Ewell, 149 So. 372, 111 Fla. 324.
N.J.—In re McCabe's Estate, 171 A. 156, 12 N.J.Misc. 297.

testator appointed three executors, one of whom was his daughter, the refusal of such executors to transact business of the estate in the presence of the daughter's son, who was her personal attorney, was not ground for their removal at the instance of the daughter, in the absence of a showing that the estate was suffering in any manner from their acts;[91] and where interference with a coexecutor in the management of the estate is set up as a ground for removal the petition will be dismissed where it is shown that petitioner is old and self-willed and that the alleged interference was for the best interests of the estate.[92]

b. Misconduct in General

Mismanagement, waste, unfaithfulness, maladministration, negligence, or other misconduct in the administration of the estate is usually ground for removal of an executor or administrator.

A representative may be removed for failure to obey an order of court,[93] and misconduct of the representative is usually ground for removal[94] notwithstanding a claim that his violation of duty has benefited the estate,[95] or the fact that he has made up out of his own funds the loss sustained by the estate,[96] or that the estate will not suffer loss by his continuance in office.[97]

An executor or administrator may be removed because of his neglect or refusal to perform the duties of his office,[98] waste,[99] and, likewise, may be

Pa.—In re Fleming's Estate, 5 A.2d 599, 135 Pa.Super. 423.
23 C.J. p 1115 note 16, p 1110 note 70 [a] (1).

Mere disagreement insufficient

The mere fact that executors or trustees do not or cannot agree as to the administration of their trust is not sufficient ground for the removal of one or all of them and putting the estate into the hands of a receiver, unless the dissension is carried to the extent of causing injury or loss to the estate, actually or reasonably to be apprehended.—Smith v. Heyward, 105 S.E. 275, 115 S.C. 145—23 C.J. p 1110 note 70 [a] (2).

91. N.Y.—Matter of Waterman, 98 N.Y.S. 583, 112 App.Div. 313, appeal dismissed 78 N.E. 1118, 186 N.Y. 534.

92. Pa.—Bucher's Estate, 18 York Leg.Rec. 31.

93. Iowa.—In re Mead's Estate, 197 N.W. 77, 197 Iowa 295.
Tex.—Ferguson v. Ferguson, Com. App., 23 S.W.2d 673, affirming, Civ. App., 11 S.W.2d 214.
23 C.J. p 1115 note 19.

Decree not filed

Where distributee sought an order of distribution and the orphans' court did not make a decree of distribution but entered an order requiring administratrix to "file" a decree of distribution, the orphans' court erred in adjudging the administratrix in "contempt" and removing her as administratrix, for failure to comply with the order, since decree could not be "filed" until it was made.—In re Bradford's Estate, 16 A.2d 268, 128 N.J.Eq. 372.

No willful refusal

Permitting payment of additional installments of attorney's fees after oral prohibition of surrogate did not amount to willful refusal by executors to obey lawful direction of surrogate contained in decree or order, made ground of removal by statute, in view of fact that formal order made subsequent to oral instructions has been obeyed.—In re Shenk's Estate, 211 N.Y.S. 514, 125 Misc. 386.

94. U.S.—Burke v. Canfield, App.D.C., 121 F.2d 877.
N.J.—In re Herrmann's Estate, 22 A.2d 262, 130 N.J.Eq. 273.
N.Y.—In re Caggiano's Estate, 23 N.Y.S.2d 47, 260 App.Div. 926, reargument denied 24 N.Y.S.2d 1011, 260 App Div. 1028—In re Grossman's Will, 294 N.Y.S. 942, 250 App.Div. 503, affirming In re Grossman's Estate, 283 N.Y.S. 323, 157 Misc. 164.
23 C.J. p 1111 note 78.

Misconduct must warrant removal

A representative should not be removed unless guilty of such misconduct as warrants his removal.—In re Phelps' Estate, 295 N.Y.S. 840, 162 Misc. 703.

Friendly to heir

That executor is friendly to an heir or devisee is not ground for removing him where there is no evidence that he let his friendship interfere with his duties.—Scholze v. Scholze, 2 Tenn.App. 80.

95. Mont.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.
23 C.J. p 1111 note 79.

96. N.J.—In re Marsh, 56 A. 886.

97. N.Y.—Matter of Engel, 146 N.Y.S. 793, 83 Misc. 675.

98. Md.—Haas v. Reimers, 10 A.2d 705, 177 Md. 567.
Minn.—Matteson v. McClure, 245 N.W. 382, 187 Minn. 291—In re Lyon's Estate, 221 N.W. 648, 175 Minn. 619.
Or.—Shafford v. Reed, 247 P. 324, 119 Or. 90.
23 C.J. p 1111 note 82.

Removal not authorized

N.J.—In re Hanretty's Estate, 125 A. 563, 96 N.J.Eq. 716, 2 N.J.Misc. 55.

99. Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442.
Neb.—In re McLean's Estate, 295 N.W. 273, 138 Neb. 757.
Pa.—In re Hartman's Estate, 200 A. 49, 331 Pa. 422.
Tex.—Murphey v. Murphey, Civ.App., 131 S.W.2d 158.
23 C.J. p 1111 note 83.

Circumstances not authorizing removal

(1) In general.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.

(2) Executor's refusal to pay taxes on testatrix' personalty and failure to disclose nonpayment to orphans' court, on advice of counsel, on ground of unconstitutionality of tax, was not bad faith or wasting of estate which would warrant executor's removal.—In re Hazeltine's Estate, 182 A. 357, 119 N.J.Eq. 308, reversing 177 A. 108, 13 N.J.Misc. 152, affirmed 187 A. 177, 121 N.J.Eq. 49.

(3) Allowing taxes on decedent's real estate to become defaulted, where the property has been redeemed and the representative surcharged with all penalties and interest paid to effect redemption, was held not to warrant removal.—Pfefferle v. Herr, 71 A. 689, 75 N.J.Eq. 219, 138 Am.S.R. 518, affirmed 79 A. 1119, 77 N.J.Eq. 271.

(4) Alleged misconduct of executors in creating offices in closely held corporation owned by estate and voting to themselves salaries as such officers and directors, in view of fact that amount involved was small and could easily be recovered against executors, did not amount to dishonesty, or justify findings that assets of estate were wasted by executors, justifying their removal from office; and where widow of testator objected to payment of attorneys' bill against corporation, which constituted part of assets of testator's estate, on ground that it was exorbitant, executors should not have compromised claim, but rights of attorneys should have been determined by action at law, with selection of impartial counsel to represent corporation, or by resort to appropriate determination in pro-

removed because of his negligence,[1] unfaithfulness,[2] mismanagement,[3] maladministration,[4] misappropriation of the assets,[5] or want of integrity,[6] or because he has committed or is about to commit a fraud on the estate.[7]

A personal representative may be removed for improprieties with regard to the collection or disposition of the assets,[8] or because of his misconduct respecting the sale of property of the estate,[9] such

ceeding in surrogate's court; but, in view of fact that sum in excess of amounts already paid to attorneys was due, no loss resulted to corporation or to estate, so as to give grounds for removal of executors under statute.—In re Shenk's Estate, 211 N.Y.S. 514, 125 Misc. 386.

1. U.S.—Burke v. Canfield, App.D.C., 121 F.2d 877.
Iowa.—In re Myers' Estate, 294 N. W. 235, 229 Iowa 170.
N.Y.—In re Wagner's Estate, 13 N.Y. S.2d 66, 257 App.Div. 972.
Tex.—Ferguson v. Ferguson, Com. App., 23 S.W.2d 673, affirming, Civ. App., 11 S.W.2d 214.
23 C.J. p 1111 note 84.

More negligence of executor, not resulting in loss to applicant for removal, is not ground for removal.—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949.

Bad faith

Where neglect is cause for removal, bad faith is not an essential factor, but the conduct must have been such as to show him flagrantly derelict.—In re McCabe's Estate, 171 A. 156, 12 N.J.Misc. 297.

Depositing funds

The statute requiring administrators to deposit the funds of the succession in a bank in the parish is mandatory, and noncompliance therewith is ground for dismissal from office.—Boone v. Boone, 92 So. 861, 152 La. 208—23 C.J. p 1111 note 84 [c].

2. D.C.—Bramhall v. Brosnan, 5 F. 2d 270, 55 App.D.C. 309.
Iowa.—In re Myers' Estate, 294 N. W. 235, 229 Iowa 170.
N.Y.—In re O'Keefe's Estate, 3 N.Y. S.2d 877, 254 App.Div. 691, affirmed In re O'Keefe's Will, 18 N.E.2d 696, 279 N.Y. 756.
Okl.—King v. Hepburn, 249 P. 924, 121 Okl. 275, followed in Bowling v. Hepburn, 249 P. 925, 121 Okl. 275.
23 C.J. p 1111 note 85.

3. Ariz.—Barth v. Platt, 78 P.2d 995, 52 Ariz. 33.
Cal.—In re Gainfort's Estate, 79 P. 2d 97, 11 Cal.2d 298—In re Lomasney's Estate, 64 P.2d 1138, 19 Cal. App.2d 223.
Ill.—In re Busby's Estate, 6 N.E.2d 451, 288 Ill.App. 500.
Iowa.—In re Mead's Estate, 197 N.W. 77, 197 Iowa 295.
Minn.—Matteson v. McClure, 245 N. W. 382, 187 Minn. 291.
N.Y.—In re Rosenberg's Will, 2 N.Y. S.2d 300, 165 Misc. 92—In re Israel's Estate, 2 N.Y.S.2d 170, 166 Misc. 156, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1063, reargument denied 12 N.Y.S.2d 782, 257 App.Div. 817.
Pa.—In re Hartman's Estate, 200 A. 49, 331 Pa. 422.
Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.
23 C.J. p 1112 note 86.

Asking for, or taking, fees

(1) An executor or administrator is not guilty of waste or mismanagement merely because he asks for credit for a portion of his fee in an annual account, rather than waiting until the final account is settled to determine the exact amount which will ultimately be due.—In re Sullivan's Estate, 78 P.2d 132, 51 Ariz. 483.

(2) In proceeding to remove administrator, administrator's withdrawal of funds from estate to pay himself attorney's fees, without compliance with statute, was misapplication and mismanagement of property of estate.—Armstrong v. Anderson, Tex.Civ.App., 55 S.W.2d 235.

Opportunity to recover loan

Executrix who loaned corpus of estate to remaindermen without security should be given opportunity to recover or secure moneys loaned before removal.—In re Uzmann's Estate, 258 N.Y.S. 49, 143 Misc. 654.

Deposit in private account

Letters of executor should be revoked, and the executor removed where for considerable time he deposited estate funds in employee's bank account in violation of statute.—In re Kramer's Estate, 217 N.Y.S. 335, 127 Misc. 485, affirmed 222 N.Y.S. 836, 220 App.Div. 816.

An independent executor without bond cannot be removed on the ground of neglect or mismanagement, unless, after being required to do so, he fails to execute a bond.—Perkins v. Wood, 63 Tex. 396—Jerrard v. McKenzie, 61 Tex. 40—Hocker v. Stevens, Tex.Civ.App., 42 S.W.2d 473, error dismissed.

Facts not warranting removal

(1) In general.

N.Y.—In re Ledyard's Estate, 21 N. Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029 and 24 N.Y.S.2d 780, 261 App.Div. 827.
Pa.—In re Glessner's Estate, 22 A.2d 701, 343 Pa. 370.

(2) Refusal of a petition for removal of an administrator for mismanagement was held proper where he was in a position to make good what he owed the estate and removal would serve no useful purpose since he would then be required to file an account de son tort.—In re Levenight's Estate, 95 Pa.Super. 302.

4. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
23 C.J. p 1112 note 87.

5. Minn.—Matteson v. McClure, 245 N.W. 382, 187 Minn. 291.
23 C.J. p 1112 note 88.

6. Utah.—Farnsworth v. Hatch, 151 P. 537, 47 Utah 62.

7. Ariz.—In re Sullivan's Estate, 78 P.2d 132, 51 Ariz. 483.
Ky.—Zinn's Adm'r v. Brown, 10 S.W. 2d 300, 225 Ky. 814.
N.Y.—In re Kessler's Estate, 18 N.Y. S.2d 772, 173 Misc. 716.
23 C.J. p 1112 note 90.

Fraud not shown

(1) In general.

Ky.—Trevathan v. Grogan, 276 S.W. 556, 210 Ky. 694.
Or.—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949.
Wash.—In re Ray's Estate, 254 P. 254, 142 Wash. 620.

(2) Executor may seek counsel's advice and assistance in administration of his trust, and, where he acts in good faith and with reasonable prudence in relying on such advice, he is not chargeable with bad faith nor fraud.—In re Hazeltine's Estate, 182 A. 357, 119 N.J.Eq. 308, reversing 177 A. 108, 13 N.J.Misc. 152, affirmed 187 A. 177, 121 N.J.Eq. 49.

(3) It does not follow, from the fact that the first husband of the respondent in a proceeding to revoke letters of administration is still living, that her allegation of widowhood is a false suggestion of material fact, warranting her removal as administratrix.—In re Martinez's Estate, 181 N.Y.S. 907.

8. U.S.—Burke v. Canfield, App.D. C. 121 F.2d 877.
N.Y.—In re Wagner's Estate, 13 N. Y.S.2d 66, 257 App.Div. 972.
23 C.J. p 1114 note 7.

9. Iowa.—In re Lininger's Estate, 297 N.W. 310.
N.Y.—In re Fulton's Will, 2 N.Y.S. 2d 917, 253 App.Div. 494—In re Wechsler's Estate, 273 N.Y.S. 968, 152 Misc. 564.
Wash.—State v. Superior Court, 252 P. 932, 142 Wash. 300.

Allowing another to appropriate to himself assets of the estate is within the statute.—Burke v. Canfield, App.D.C., 121 F.2d 877.

as making a sale thereof without a court order,[10] or culpably failing to sell or to sell properly.[11] Also such a representative may be removed for failure to prosecute or defend actions,[12] fraudulent or unjust allowance or payment of claims against the estate,[13] failure to complete administration,[14] squandering or embezzling the estate,[15] converting[16] or making improper use of[17] money or property belonging thereto, or making a personal profit out of the office.[18]

The representative may be removed because of his improvidence,[19] incompetency,[20] or dissolute or drunken habits.[21]

c. Failure to File Inventory, Accounts, Etc.

Removal of a representative is proper in case of a failure to file a proper inventory, accounts, etc., but such action is discretionary rather than compulsory.

Removal of an executor or administrator is proper in case of failure to file a proper inventory, accounts, or returns, within the required time or after due citation and order,[22] but such action is discre-

10. Md.—Fleishman v. Kremer, 20 A.2d 169.

Discretion

The statute providing that court "may" revoke his letters, only grants permission to remove an executor if the court's judgment so dictates and the quoted word is not intended to be imperative.—Fleishman v. Kremer, supra.

11. Iowa.—In re Lininger's Estate, 297 N.W. 310.
N.Y.—Parkhill v. American Equitable Corporation, 294 N.Y.S. 259, 250 App.Div. 809.
23 C.J. p 1114 note 10.

Removal not authorized

Iowa.—In re Amick's Estate, 281 N. W. 786, 225 Iowa 829.

12. Mass.—Dunbar v. Kelly, 75 N.E. 740, 189 Mass. 390.
23 C.J. p 1114 note 8.

Necessity of suit

An executor will not be forced to bring action for possession of property held by another in trust for the testator if no necessity to the administration of the estate is proved, the burden of alleging and proving the necessity being on the party seeking to obtain the removal of the executor.—In re Deschamps' Estate, 212 P. 512, 65 Mont. 207.

13. Ala.—Killam v. Costley, 52 Ala. 85.
23 C.J. p 1114 note 9.

14. Me.—Appeal of Senechal, 119 A. 814, 122 Me. 317.
Minn.—In re Lyon's Estate, 221 N. W. 648, 175 Minn. 619.
23 C.J. p 1114 note 11.

Removal denied

A delay in bringing administration of the estate to a conclusion was held not to warrant removal of the representative where his delay had not been due to any collusion with adverse interests and had not resulted in any loss.—Stake v. Stake, 113 A. 591, 138 Md. 51.

15. Minn.—Matteson v. McClure, 245 N.W. 382, 187 Minn. 291.
23 C.J. p 1114 note 12.

16. Tex.—Stewart v. Poinbeouf, Civ. App., 201 S.W. 1025.

17. N.J.—In re Herrmann's Estate, 22 A.2d 262, 130 N.J.Eq. 273.
N.Y.—In re Grossman's Estate, 283 N.Y.S. 323, 157 Misc. 164, affirmed In re Fribourg, 294 N.Y.S. 942, 250 App.Div. 503—In re Brown, 221 N.Y.S. 305, 129 Misc. 293.
23 C.J. p 1114 note 14.

Removal not warranted

(1) In general.—In re Hughes' Estate, 179 A. 577, 319 Pa. 321.

(2) Where administrator de bonis non had given two bonds, disbursements of estate's funds by administrator in an amount less than six hundred dollars, allegedly in furtherance of administrator's private affairs, was insufficient to justify removal of administrator on ground that irreparable loss to the estate was imminent, especially in view of fact that administrator had filed no account in probate court claiming credit for the disbursements nor served notice of claiming such credit.—In re Winters' Estate, 80 P.2d 714, 159 Or. 637.

18. N.Y.—In re Wechsler's Estate, 273 N.Y.S. 968, 152 Misc. 564.
23 C.J. p 1115 note 15.

19. N.Y.—Emerson v. Bowers, 14 Barb. 658.
23 C.J. p 1112 note 91.

20. Md.—Haas v. Reimers, 10 A.2d 705, 177 Md. 567.
Mont.—In re Rinio's Estate, 10 P.2d 322, 93 Mont. 428.
N.Y.—In re Healy's Will, 8 N.Y.S.2d 394, 255 App.Div. 361.
23 C.J. p 1112 note 92.

Physical disability alone is not sufficient to disqualify one from acting as executor so as to justify his removal.—Robinson v. Robinson, 16 A.2d 854, 178 Md. 623.

Failure to preserve memoranda

Estate may be of such magnitude that executor's failure to preserve memoranda from which he can render account may evidence such incompetence as to warrant removal. —Black v. Morgan, 149 So. 845, 227 Ala. 327.

Officers of executor and guardians of minors

That persons who were guardians of estates of minors were trust officers of executor will not require removal of executor.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal. App. 153.

21. Ind.—Gurley v. Butler, 83 Ind. 501.
23 C.J. p 1112 note 93.

22. Ariz.—Barth v. Platt, 78 P.2d 995, 52 Ariz. 33.
Iowa.—In re Myers' Estate, 294 N. W. 235, 229 Iowa 170.
Me.—Appeal of Senechal, 119 A. 814, 122 Me. 317.
Md.—Tublin v. Schockett, 12 A.2d 616, 178 Md. 212—Haas v. Reimers, 10 A.2d 705, 177 Md. 567.
Minn.—Matteson v. McClure, 245 N. W. 382, 187 Minn. 291.
Mont.—In re Rinio's Estate, 19 P. 2d 322, 93 Mont. 428.
N.Y.—In re Merllo's Estate, 273 N.Y. S. 708, 152 Misc. 435.
Okl.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.
Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.
Pa.—In re Davies' Estate, 21 A.2d 517, 146 Pa.Super. 7.
Va.—Nickels' Adm'r v. Horsley, 100 S.E. 831, 126 Va. 54.
23 C.J. p 1113 note 3.

Service of order not necessary

Administrator who willfully refuses, or without good cause neglects, to obey order directing him to account, may have his letters revoked without previous service upon him of a copy of order.—In re Merllo's Estate, 273 N.Y.S. 708, 152 Misc. 435.

Memoranda sufficient

That executor allegedly kept no books of account was not ground for removal, where he kept memoranda from which complete account was stated.—In re Hughes' Estate, 179 A. 577, 319 Pa. 321.

Right to compel delivery not exclusive

Statutes authorizing proceedings to compel delivery to the administrator of property withheld from him does not limit the court's duty to revoke letters of administration because of the failure of the administrator to include in his inventory property in the possession of himself or others. —In re Robison's Estate, 204 P. 321, 59 Utah 431.

tionary rather than compulsory;[22] and it has been held that the mere failure of an administrator to render annual accounts will not justify a summary dismissal where it is not alleged or proved that he disobeyed an order to render his accounts,[24] and that where an executor made and verified a proper inventory within the time allowed by the court, his failure, through accident and inadvertence, to file it until after the time had expired was not sufficient ground for removal.[25] Also omissions from the inventory, not attributable to bad faith, do not warrant removal.[26]

d. Insolvency; Default as to Giving of Bond

A representative may be removed on failure to comply with an order requiring him to give a bond, or on his becoming insolvent.

A prime cause for removal arises when the representative fails seasonably to comply with an order requiring him to give a bond or increase the security previously given,[27] but the fact that a bond given by an executor or administrator is invalid is no ground for his removal, the most that could be required of him being a new bond,[28] and an executor without bond will not be summarily removed or required to give bond in the absence of any mismanagement on his part.[29]

Bankruptcy or insolvency of an executor or administrator is usually considered sufficient to warrant his removal,[30] unless, in the case of an executor, the condition existed and was known to the testator at the time when the will was executed;[31] but it is otherwise of mere poverty[32] or indebtedness to the estate,[33] although it has been considered that, where letters were issued to an executor without requiring him to give bond, and his circumstances are such as not to afford adequate security to legatees and creditors, the proper remedy is by an application for his removal.[34]

e. Hostile or Adverse Interests

An executor or administrator should be removed where his personal interests conflict with his official duties, but a mere hostile feeling towards persons interested in the estate is not ground for removal unless it prevents the management of the estate according to the dictates of prudence.

The representative should be removed where his personal interests conflict with his official duties,[35]

22. Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.
La.—Succession of Porche, 175 So. 670, 187 La. 1069.
N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.
Okl.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.
23 C.J. p 1114 note 4.

Should comply with statute
While administrator should not be removed merely for failure to make report within statutory time, if no harm was done, court should insist on compliance with statutes.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.

Delay by court proceedings
Although a statute requires an executor to return an account within twelve months from the date of his letters, and authorizes the orphans' court to revoke letters for failure to do so, where there is no evidence that the executor intended to wrong any one, or that the petitioning creditors and others interested were injured or prejudiced by failure to render his account by the time prescribed by law, and he declared his willingness to apply the funds in his hands to the payment of the preferred claims for funeral expenses and costs of administration, and to render an account, his delay being explained by court proceedings he had brought to recover a doubtful interest of deceased, it was proper to require executor to render an account, but not to revoke his letters.—Belt v. Hilgeman-Brundige Co., 113 A. 721, 138 Md. 129.

Fault of both sides
Administrator's delay in accounting and settling estate, which was fault of both sides, was not ground for his removal.—Fulford v. Fulford, 137 A. 487, 153 Md. 81.

24. Ala.—Black v. Morgan, 149 So. 845, 227 Ala. 327.
La.—Succession of Carroll, 164 So. 334, 183 La. 538.
23 C.J. p 1114 note 5.

25. Wash.—Clancy v. McElroy, 70 P. 1095, 30 Wash. 567.

26. Iowa.—In re Arduser's Estate, 283 N.W. 879—In re Amick's Estate, 281 N.W. 786, 225 Iowa 829.
Md.—Bates v. Revell, 82 A. 986, 116 Md. 691.
Or.—In re Winters' Estate, 81 P.2d 140, 159 Or. 637.
S.D.—In re Storm's Estate, 250 N. W. 372, 62 S.D. 13.

27. Kan.—In re Dennis' Estate, 68 P.2d 1083, 146 Kan. 121, appeal dismissed Keach v. McDonald, 58 S. Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
23 C.J. p 1115 note 20.

28. Ind.—Barricklow v. Stewart, 68 N.E. 316, 31 Ind.App. 446.

29. Iowa.—Fisher's Estate, 104 N. W. 1023, 128 Iowa 626.

30. La.—Dwight v. Simon, 4 La.Ann. 490.
23 C.J. p 1115 note 23.

31. N.C.—In re Knowles, 62 S.E. 549, 148 N.C. 461.
23 C.J. p 1115 note 24.

32. Ill.—Clark v. Patterson, 73 N. E. 806, 214 Ill. 533, 105 Am.S.R. 127.
23 C.J. p 1115 note 25.

33. N.Y.—In re Power, 166 N.Y.S. 1007.
23 C.J. p 1115 note 25.

34. N.Y.—Matter of Chauncey, 166 N.Y.S. 949, 101 Misc. 275.

35. Ariz.—Barth v. Platt, 78 P.2d 995, 52 Ariz. 33.
Cal.—In re Grafmiller's Estate, 81 P. 2d 181, 27 Cal.App.2d 253.
Ga.—Stanley v. Spell, 166 S.E. 669, 46 Ga.App. 91, citing Corpus Juris.
Iowa.—In re Lininger's Estate, 297 N.W. 310.
Mass.—McCarthy v. Griffin, 12 N.E. 2d 836, 299 Mass. 309—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.
Minn.—In re Betts' Estate, 240 N.W. 904, 185 Minn. 627, reversed in part on other grounds 243 N.W. 58, 185 Minn. 627.
Mo.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.
Mont.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.
Neb.—In re McLean's Estate, 295 N. W. 273, 138 Neb. 757—In re Marconnit's Estate, 227 N.W. 147, 119 Neb. 73.
Or.—In re Faulkner's Estate, 65 P.2d 1045, 1047, 156 Or. 28, citing Corpus Juris—In re Workman's Estate, 49 P.2d 1136, 151 Or. 475.
Pa.—In re Purman's Estate, 5 A.2d 906, 334 Pa. 238.

or even where there is such a hostile feeling between him and the beneficiaries as would or might interfere with the proper management of the estate,[36] but a mere hostile or unfriendly feeling of an administrator toward persons interested in the estate is not ground for his removal, unless it is of such character as to prevent the management of the estate according to the dictates of prudence and the interests of the heirs, devisees, and creditors.[37] However, the fact that the representative is a creditor of the estate has been held not alone sufficient ground for removal.[38]

f. Miscellaneous Grounds Not Warranting Removal

Acts or conduct on the part of an executor or administrator amounting to mere errors or irregularities have been held not to require his removal.

A representative should not be removed because of minor irregularities where no fraud exists and there is no danger of loss to the estate;[39] a refusal to aid heirs outside of the scope of his official duty;[40] delays or omissions which are satisfactorily explained;[41] errors of judgment not amounting to malfeasance;[42] errors in accounts or in the construction of the will, in the absence of willful misconduct, waste, or improper disposition of the assets;[43] making large family allowances under court orders due to a mistake in estimate in value of property of estate;[44] withdrawal of commissions without a court order;[45] an unauthorized investment of a portion of the estate, where such investment was made in good faith and repaid in full, and the representative's accounts were approved at the intermediate accounting;[46] a withdrawal of funds in the hands of the factor of the estate and failure to deposit the same in a bank as money of the estate, where the funds so withdrawn were claimed by the

Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.
Va.—Nickels' Adm'r v. Horsley, 100 S.E. 831, 126 Va. 54.
Wash.—In re Clawson's Estate, 101 P.2d 968, 3 Wash.2d 509.
Wis.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506.
23 C.J. p 1113 note 99.

Remedy to ascertain ownership not exclusive

That the beneficiary under a will could have ownership of note, payable to testator but claimed by executor, ascertained in proceedings under a statute does not preclude him from procuring the executor's removal as one who is unsuitable to execute the trust reposed in him, because of interests conflicting with those of the estate.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.

Conflicting interests of estates

(1) Administrator of estate of husband, on showing that husband's estate might be indebted to wife's estate, should be removed as executor of wife's estate.—Warden v. Hoover's Adm'r, 283 S.W. 444, 214 Ky. 370.

(2) Conflict of interest of administrator representing two estates, where controversy existed between heirs of two estates, was not ground for removal.—Castleberry v. Hollingsworth, 111 So. 35, 215 Ala. 445.

Adverse interest not shown

(1) Where trustee under trust agreement with testator designating executor's wife and sister as beneficiaries brought action for declaratory judgment against executor, beneficiaries, and creditors, executor's assuming neutrality therein and refusing, on advice of counsel, to comply with creditors' demand that executor attack validity of trust agreement, did not show such adverse interest or bad faith as to justify removal of executor, whose refusal simply prevented estate from being charged with costs and attorneys' fees if defense was unsuccessful.—Hancock's Adm'r v. Hancock's Ex'r, 79 S.W.2d 206, 257 Ky. 739.

(2) The fact that executor was a joint debtor with the estate on a mortgage obligation did not create an adverse interest warranting his removal, the estate being protected by the executor's bond in the event he should become obligated to the estate for contribution and should fail to account for his debt.—In re Fiebig's Estate, 22 N.E.2d 288, 61 Ohio App. 40.

Removal not warranted

Mont.—In re Dolenty, 161 P. 524, 53 Mont. 33.
23 C.J. p 1117 note 49.

36. Pa.—In re Fleming's Estate, 5 A.2d 599, 135 Pa.Super. 423.
23 C.J. p 1113 note 1.

37. Ky.—Hancock's Adm'r v. Hancock's Ex'r, 79 S.W.2d 206, 257 Ky. 739.
23 C.J. p 1113 note 2.

Where loss will result

That estate will suffer substantial loss or be placed at disadvantage by executor's conduct, such as refusal to comply with creditors' demand to participate in litigation, may justify executor's removal.—Hancock's Adm'r v. Hancock's Ex'r, supra.

38. Iowa.—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103.
23 C.J. p 1117 note 50.

39. Cal.—In re Atkins' Estate, 8 P. 2d 1052, 121 Cal.App. 251.
N.J.—In re McCabe's Estate, 171 A. 156, 12 N.J.Misc. 297.

40. Mass.—Richards v. Sweetland, 6 Cush. 324.

41. Md.—Fulford v. Fulford, 137 A. 487, 153 Md. 81.
Neb.—In re Fuller's Estate, 247 N. W. 415, 124 Neb. 591.
23 C.J. p 1116 note 32.

42. Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
Pa.—In re Roots' Estate, 119 A. 473, 275 Pa. 366.
23 C.J. p 1116 note 33.

Amount of attorney's fees

Honest opinion of executor that attorney had rendered services for estate entitling him to payment of larger amount than had been allowed by probate court would not constitute statutory ground justifying revocation of letters testamentary.—In re Lussem's Estate, 2 N.E.2d 113, 285 Ill.App. 311.

43. U.S.—Tallman v. Ladd, C.C.A. W.Va., 5 F.2d 582.
S.C.—Witherspoon v. Watts, 18 S. C. 396.

44. Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.

45. N.Y.—In re Israel's Estate, 2 N.Y.S.2d 170, 166 Misc. 156, affirmed 12 N.Y.S.2d 240, 256 App. Div. 1063, reargument denied 12 N.Y.S.2d 782, 257 App.Div. 817.

Consent of sole distributee

Retaining a certain compensation, with the consent of the sole distributee and without fraud on the part of the representative, although no application for the allowance was made to the court has been held not ground for removal.—Jones v. Harbaugh, 48 A. 827, 93 Md. 269.

46. N.Y.—Matter of Burr, 104 N.Y. S. 29, 118 App.Div. 482, reversing 96 N.Y.S. 225, 48 Misc. 56.

administrator as his own;[47] the making of an application for leave to sell property, which was denied;[48] payment of claims of heirs against the estate[49] even though the amount paid was exaggerated or even fictitious;[50] or the making of payment without an order of court[51] especially where the payments are made to discharge the estate from legal charges.[52] Neither should a representative be removed because of failure to pay a claim against the estate,[53] failure to appear before a referee to whom objections to his accounts have been referred,[54] or the inability of petitioners for his removal to procure service on him of a citation for removal.[55]

A statute expressly conferring on a creditor the right on the refusal of an administrator to bring suit to recover real property alleged to have been conveyed in fraud of creditors to bring it in the name of the administrator is broad enough to include a case where an administratrix claims title to real property deeded to her and decedent, her husband, as tenants by the entirety, and, a creditor having a remedy thereunder, decedent's wife should not be removed to secure the appointment of an administrator to act in the creditor's interests.[56] In the absence of bad faith by an administrator, a mere claim by a distributee that intestate owned a half interest in personalty in the administrator's possession is not ground for the administrator's removal, where the value of such property has been ascertained and evidence thereof preserved, and the administrator has given a solvent bond sufficient to cover the value of intestate's property, including that in the administrator's possession.[57] The institution of a suit to partition the lands of a decedent who died testate, being in no sense a contest of the will, affords no grounds for the removal of an administrator with the will annexed during its pendency,[58] and an executor will not be removed because he had improperly sought to nullify a provision of the will where removal would thwart the wishes of the testator.[59] Heirs who are appointed as administrators should not be removed on the ground that property of the succession was not entered on the inventory, unless it is shown that they secreted property of the succession, or in bad faith withheld property from the inventory.[60]

§ 91. —— Proceedings

a. Who may apply and time for application
b. Nature and form of proceedings
c. Jurisdiction
d. Parties; citation or notice
e. Pleading
f. Evidence
g. Hearing
h. Order or decree
i. Setting aside order
j. Review
k. Costs
l. Renewal of motion

a. Who May Apply and Time for Application

While a court may remove an executor or administrator on its own motion or on suggestion of amicus curiæ, an application can ordinarily be made only by a person interested in the estate.

While an executor or administrator may sometimes be removed by the court on its own motion,[61] or on the suggestion of an amicus curiæ,[62] an application for such removal can, as a general rule, be made only by a person interested in the estate.[63] Conversely, application may be made by any person interested,[64] and any person interested in-

47. La.—Hansell v. Hickox, 46 So. 784, 121 La. 721.

48. La.—Hansell v. Hickox, supra.

49. N.J.—Pfefferle v. Herr, 71 A. 689, 75 N.J.Eq. 219, 138 Am.S.R. 518, affirmed 79 A. 1119, 77 N.J.Eq. 271.
23 C.J. p 1117 note 41.

50. La.—Hansell v. Hickox, 46 So. 784, 121 La. 721.
23 C.J. p 1117 note 42.

51. Or.—Latourette v. Nickell, 187 P. 621, 95 Or. 323.
Wash.—In re Ray's Estate, 254 P. 254, 142 Wash. 620.
23 C.J. p 1117 note 43.

52. La.—Hansell v. Hickox, 46 So. 784, 121 La. 721.

53. Ga.—Zipperer v. La Roche, 90 S.E. 40, 145 Ga. 329.
R.I.—Lewis v. Douglas, 93 A. 961.

54. N.Y.—Matter of Chauncey, 166 N.Y.S. 949, 101 Misc. 275.

55. N.Y.—Matter of Chauncey, supra.

56. Mich.—McFarlan v. McFarlan, 119 N.W. 1108, 155 Mich. 652.

57. N.C.—Morgan v. Morgan, 72 S.E. 206, 156 N.C. 169.

58. Mo.—Stevens v. Larwill, 84 S.W. 113, 110 Mo.App. 140.

59. Mo.—Hanssen v. Karbe, 115 S.W.2d 109, 234 Mo.App. 663, transferred, see, Sup., 106 S.W.2d 415.

60. La.—Hansell v. Hickox, 46 So. 784, 121 La. 721.

61. N.J.—In re McCabe's Estate, 4 A.2d 2, 125 N.J.Eq. 278.
23 C.J. p 1117 note 59.

62. Ala.—Ashurst v. Union Bank, etc., Co., 76 So. 917, 200 Ala. 559.

63. Ark.—Brinkley v. Allen, 143 S.W.2d 187, 189, 200 Ark. 1147, quoting **Corpus Juris.**
Tex.—Greer v. Boykins' Estate, Civ. App., 82 S.W.2d 698.
23 C.J. p 1118 note 61.

64. N.J.—In re Herrmann's Estate, 22 A.2d 262, 130 N.J.Eq. 273.
23 C.J. p 1118 note 62.

While a guardian may petition for removal of executors under some statutes it is incumbent on him to prove that his ward was a person interested in the estate as required by statute.—Fowler v. Ball, 141 N.E. 64, 82 Ind.App. 167.

Vested remainder subject to contingencies

A person having a vested remainder under a will subject to being divested on the happening of contingencies mentioned in the will was held an interested person who could maintain a petition for removal of

cludes such persons as the widow of decedent,[65] an heir or distributee,[66] a legatee or devisee,[67] or a creditor of the estate.[68] It has also been held that an application for removal may also be made by a coexecutor or administrator[69] or a surety on the representative's bond,[70] and that, independent of treaty provisions, a consular agent has a right to be heard on his petition to procure the removal of administrators claimed to be conspiring to despoil the estate of a citizen of the country represented by such agent, or to have been improvidently appointed.[71] A person who might otherwise be entitled to insist on removal of an executor may by his conduct become estopped to do so.[72]

Time for application. An application for the removal of an executor or administrator must be made within a reasonable time, or in some jurisdictions within a time fixed by statute, and an application made later will not be effective.[73]

b. Nature and Form of Proceedings

While proceedings for removal of an executor or administrator are not summary proceedings, removal cannot be demanded by way of opposition or indirect procedure.

A proceeding to remove an executor or administrator is not one to punish him, but is a proceeding for the protection of the estate.[74] Although it is not a summary proceeding,[75] it has been said that the court may proceed in a summary manner.[76] While it has been held a special proceeding which can be brought only under the statute,[77] it has also been held to be a proceeding in rem[78] and to be brought by ordinary suit.[79] An application to the clerk of the superior court to remove an administrator has been held to be not a civil action or special proceeding, but an application for the exercise of statutory power.[80]

Removal cannot be demanded by way of opposition or indirect procedure, but it must be by direct

the representative.—In re Herrmann's Estate, 22 A.2d 262, 130 N.J.Eq. 273.

65. Mich.—White v. Spaulding, 14 N.W. 684, 50 Mich. 22.
23 C.J. p 1118 note 63.

66. La.—Hebert v. Hebert, App., 187 So. 317.
23 C.J. p 1118 note 64.

Heir excluded in will
An heir at law to whom no part of the estate was given by decedent's will, but who was entitled as such heir to contest the will, was not a person interested in the estate.—Fowler v. Ball, 141 N.E. 64, 82 Ind.App. 167.

67. Tex.—Armstrong v. Anderson, Civ.App., 55 S.W.2d 235.
23 C.J. p 1118 note 65.

Interest assigned in trust
Sole devisee, notwithstanding she was married and had assigned her interest in testator's estate in trust, could sue for removal of administrator.—Armstrong v. Anderson, supra.

68. Or.—Knight v. Hamakar, 67 P. 107, 40 Or. 424.
23 C.J. p 1118 note 66.

Where claim not adjudicated or allowed
Creditor whose claim against decedent's estate has not been adjudicated and allowed cannot obtain removal of executor for failure to pay claim within time previously limited by county court's order.—In re Fuller's Estate, 247 N.W. 415, 124 Neb. 591.

69. Ala.—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 489.
23 C.J. p 1118 note 67.

In New York
(1) It has been held that an administrator was not entitled to institute proceedings to remove his coadministrator, as he was not a person interested in the estate under one provision of the statute and none of the acts or neglects alleged came within the purview of the other provision enumerating causes for which the court on its own motion may remove a fiduciary.—In re Cohen's Estate, 264 N.Y.S. 19, 147 Misc. 330, 570.

(2) However, in an earlier case, an executor was removed on the application of his coexecutor where he failed to do his part in the management of the estate and it was evident that his continuance in office would prejudice the best interests of the estate.—In re Wheaton, 74 N.Y. S. 938, 37 Misc. 184.

(3) The executors of a deceased coexecutor cannot apply for the removal of the surviving executor from office.—Shook v. Shook, 19 Barb. 653.

70. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.
23 C.J. p 1118 note 68.

71. Ala.—Carpigiani v. Hall, 55 So. 248, 172 Ala. 287, Ann.Cas.1913D 651.

72. Md.—Jones v. Harbaugh, 48 A. 827, 93 Md. 269.
23 C.J. p 1118 note 70.

No estoppel
(1) In general.—Armstrong v. Anderson, Tex.Civ.App., 55 S.W.2d 235.

(2) Heir was not estopped by her petition for appointment of administrator from subsequently petitioning for his removal.—Kachelman v. Kachelman's Estate, 33 P.2d 947, 140 Kan. 115.

(3) And, a fortiori, one heir, not joining another heir in requesting appointment of administrator, is not estopped to ask his removal.—In re Rinio's Estate, 19 P.2d 322, 93 Mont. 428.

73. Ala.—Black v. Morgan, 149 So. 845, 227 Ala. 327.
21 C.J. p 1119 note 78.

74. N.Y.—Metropolitan Trust Co. v. Stallo, 152 N.Y.S. 183, 166 App.Div. 639.
N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.

75. Iowa.—In re Mann's Estate, 225 N.W. 261, 208 Iowa 1193.
La.—Succession of Porche, 175 So. 670, 187 La. 1069—Succession of Esteves, 162 So. 576, 182 La. 717.

Plenary rather than summary
Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.

76. N.J.—In re Konigsberg's Estate, 4 A.2d 524, 125 N.J.Eq. 216.

77. Ind.—State v. Chambers, 185 N. E. 436, 204 Ind. 658.

78. Mo.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.

79. La.—Succession of Porche, 175 So. 670, 187 La. 1069—Succession of Esteves, 162 So. 576, 182 La. 717.

Except in clear case of emergency, executor or administrator may be removed only after formation of issue as in ordinary civil actions.—State v. Johnston, 185 N.E. 278, 204 Ind. 563.

Action at law
It is a probate action, and hence an action at law.—In re Jenkins' Estate, 205 N.W. 772, 201 Iowa 423.

80. N.C.—In re Battle, 74 S.E. 23, 158 N.C. 388.

proceedings against the incumbent of the office;[81] but it has been held that, where an administrator files his final account, and asks to be discharged, and the court removes him for sufficient cause, although not in a proceeding instituted directly for that purpose, the decree will not be disturbed.[82] Where the statute prescribes the steps necessary to be taken to remove an executor or administrator, the statutory requirements must be complied with,[83] and an order of removal not predicated on such compliance is unauthorized and ineffectual.[84] It is irregular to engraft on a proceeding to appoint an administrator an entirely separate proceeding to remove an administrator previously appointed.[85]

c. Jurisdiction

Jurisdiction for the removal of an executor or administrator usually belongs to the probate court.

Jurisdiction for the removal of an executor or administrator usually belongs to the probate court by which he was appointed or qualified and in which the administration of the estate is pending,[86] and jurisdiction to remove is not lost by ordering the representative to file a final report.[87] In general chancery has no power to remove an executor, although in a suitable case it has restrained him from acting and taken the estate out of his hands, placing it in the hands of a receiver,[88] and it has been said that, even if a court of chancery has power to re-

81. Iowa.—In re Mann's Estate, 225 N.W. 261, 208 Iowa 1193.
La.—Hebert v. Hebert, App., 187 So. 317.
Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.
Mo.—Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.
N.Y.—In re Merllo's Estate, 273 N. Y.S. 708, 152 Misc. 435.
23 C.J. p 1119 note 72.

Proposed remedy no defense

A proceeding for removal of respondent as decedent's administratrix, on theory that petitioner was decedent's surviving widow and that a divorce from petitioner was void because court was without jurisdiction in divorce proceedings, could not be defeated on ground that petitioner's remedy was by suit in equity to set aside divorce decree.—In re Waters' Estate, Utah, 113 P. 2d 1038.

82. Or.—In re Partridge, 51 P. 82, 31 Or. 297.

Order by appellate court

(1) On appeal from order of probate court approving, over objection, final account of executor who had been cited to make inventory and accounting, district court had jurisdiction, on disapproval of accounting and finding that, by reason of his personal interest in affairs to be adjudicated, executor was not suitable person to administer estate, to order probate court to remove executor and appoint some suitable person as executor de bonis non with instructions to bring action against former executor.—In re Woodworth's Estate, 67 P.2d 553, 145 Kan. 870.

(2) An order of the superior court, revoking letters of administration after hearing in a proceeding to compel the administrator to render his past-due account, was within court's jurisdiction.—In re Bond's Estate, 225 P. 450, 193 Cal. 482.

83. Ill.—In re Graney's Will, 245 Ill.App. 407.
Iowa.—In re Collicott's Estate, 283 N.W. 869—In re Mann's Estate, 225 N.W 261, 208 Iowa 1193.
Tex.—Hocker v. Stevens, Civ.App., 42 S.W.2d 473, error dismissed.
23 C.J. p 1119 note 74.

84. Ill.—Horn v. White, 127 Ill.App. 222, affirmed 79 N.E. 629, 224 Ill. 238, 115 Am.S.R. 155.

85. N.Y.—Matter of Hill, 151 N.Y.S. 791, 166 App.Div. 303, affirmed 109 N.E. 1078, 215 N.Y. 694.

86. Ill.—In re Klock's Estate, 282 Ill.App. 245.
23 C.J. p 1119 note 79.

Not removable by grand jury

Administrator is not public officer subject to removal by grand jury as provided by statute.—King v. Hepburn, 249 P. 924, 121 Okl. 275, followed in Bowling v. Hepburn, 249 P. 925, 121 Okl. 275.

Questions not within jurisdiction

Whether testatrix in her lifetime had been fraudulently induced by executrix to convert bank deposit into joint account of testatrix and executrix, and whether testatrix had satisfied certain obligations of executrix which constituted an indebtedness of executrix to estate for which she should account, were questions which could only be determined by suit in equity, and were not within jurisdiction of county court in a proceeding for removal of the executrix and for appointment of an administrator with the will annexed.—In re Elder's Estate, 83 P. 2d 477, 160 Or. 111, 119 A.L.R. 802.

Failure to hear evidence

While the failure to hear evidence on a petition for removal is irregular, such failure was held not to go to the question of jurisdiction.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

Validity of agreement

In proceedings for removal of a widow as administratrix on the ground that she had waived all rights in her husband's estate by an antenuptial agreement, it was held, that the probate court was without jurisdiction to pass on the widow's contention that such agreement was obtained from her by fraudulent misrepresentations as to the value of her husband's property.—In re Klock's Estate, 282 Ill.App. 245.

In Georgia

(1) Under will appointing person to serve as executrix only as long as she remained widow, court of ordinary was held to have jurisdiction of petition to revoke letters testamentary on ground that executrix was no longer qualified under will after her remarriage following her qualification as executrix; and proceeding for revocation of letters testamentary on ground that widow had remarried was held not to involve construction of will so as to exceed jurisdiction of ordinary, notwithstanding will further provided that in event of widow's remarriage it was testator's will that judge of probate court for designated county of another state should take charge of estate.—Bruce v. Fogarty, 186 S. E. 463, 53 Ga.App. 443.

(2) Relief in a suit to require executor to give bond or be removed as executor would be grantable by the superior court in an equity case only.—Hicks v. Atlanta Trust Co., 200 S.E. 301, 187 Ga. 314.

(3) On a petition praying for the removal of both of a grantor's executors and for the appointment of a receiver to execute the will, the superior court of the county of the residence of either executor had jurisdiction.—Brown v. Wilcox, 94 S. E. 993, 147 Ga. 546.

In North Carolina the clerk exercises functions of removal.—Edwards v. Cobb, 95 N.C. 4.

87. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

88. Tenn.—Rutledge v. Garrison, 7 Tenn.App. 75.
23 C.J. p 1119 note 80.

Executor having duties as trustee

Where the powers and duties of an executor having duties as a trustee are so intermingled that the re-

move an executor or administrator, only an extreme case will justify its exercise.[89]

d. Parties; Citation or Notice

A proceeding for the removal of an executor or administrator should be brought against him personally and due service of citation should be made on him.

A proceeding for the removal of an executor or administrator should be brought against him personally and not in his representative capacity,[90] and it has been held that an application for the removal of an administrator cannot be made by a guardian of infant heirs or distributees in his own name, but the proceeding should be in the name of the infants by their guardian or next friend,[91] although there is also authority for a contrary view.[92]

In proceedings for removal of administrators, the appointees were no longer parties to the proceedings after their resignations were tendered and accepted.[93]

Citation or notice. Due service of citation should be made on the party complained of, or such other precaution taken as the court may order so as to give the latter due notice and a fair opportunity to make defense,[94] and so the court has no power to remove an executor on a citation to prepare and settle his accounts without giving him any notice of the intention to remove him,[95] except in an emergency, which should be clear and imperative.[96] Notice may, however, be waived by a voluntary appearance,[97] or by filing a resignation, even though the resignation is subsequently withdrawn.[98] Where the record is silent on the subject, it will be presumed that a publication of notice of petition for the removal of defendant as administrator was founded on a proper affidavit of defendant's nonresidency.[99] Publication of citation for the removal of an administrator need not appear on the face of the judgment of the ordinary removing the administrator.[1]

e. Pleading

While strict rules of pleading are not applied, a petition for the removal of an executor or administrator should show that the applicant is entitled to such relief and that the court has jurisdiction to grant it.

There should be a petition[2] showing that the court has jurisdiction of the cause of complaint and power to grant the relief which is sought in the manner and form prayed for,[3] and that the applicant has a real and existing interest in the decedent's estate,[4] and alleging some one or more of the statu-

moval of the executor would operate as a removal of the trustee, the county court would be powerless to remove the executor because of his duties as trustee, and therefore resort must be had to a court of equity.—Brinkerhoff v. Huntley, 223 Ill.App. 591.

89. Ala.—Kidd v. Bates, 27 So. 491, 124 Ala. 670—Randle v. Carter, 62 Ala. 95.

90. Ga.—Bruce v. Dunn, 184 S.E. 361, 362, 52 Ga.App. 758, citing **Corpus Juris.**

91. Ala.—Blackman v. Davis, 42 Ala. 184.

92. La.—McComas v. Ronquillo, 4 La.Ann. 123.
23 C.J. p 1119 note 84.

93. Tex.—Slay v. Davidson, Civ. App., 88 S.W.2d 650, error refused.

94. D.C.—Brosnan v. Brosnan, 289 F. 547, 53 App.D.C. 149.
La.—Succession of Porche, 175 So. 670, 187 La. 1069—Succession of Esteves, 162 So. 576, 182 La. 717
Md.—Fulford v. Fulford, 137 A. 487, 153 Md. 81.
N.Y.—In re Merlo's Estate, 273 N.Y. S. 708, 152 Misc. 435.
N.C.—Edwards v. McLawhorn, 11 S.E.2d 562, 218 N.C. 543.
Wash.—In re Fellin's Estate, 185 P. 604, 108 Wash. 626.
23 C.J. p 1119 note 85.

Notice not necessary

Order of removal of administrator held not in excess of court's jurisdiction because of lack of citation of administrator, where situation arising from administrator's application for letters testamentary on contested will called for removal of administrator.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 150, 209 Cal. 360.

Representative held without notice

Administrator held without notice of and not represented by counsel on hearing of petition for removal by guardian ad litem, when attorneys, because of possible conflict between claim and interest of heirs, had informed court they did not appear for him.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

95. Ill.—Hanifan v. Needles, 108 Ill. 403, affirming 11 Ill.App. 403.

96. Ind.—State v. Johnston, 185 N.E. 278, 204 Ind. 563.

97. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.
23 C.J. p 1120 note 87.

98. Wash.—In re Dietrich, 81 P. 1061, 39 Wash. 520.

99. Ind.—Crabb v. Atwood, 10 Ind. 331.

1. Ga.—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.

2. La.—Succession of Porche, 175 So. 670, 187 La. 1069—Succession of Esteves, 162 So. 576, 182 La. 717.
23 C.J. p 1120 note 91.

Contemplates future handling of estate

A proper petition for removal of an administrator contemplates action incident to future handling of the estate and future accounting as to past transactions, and does not attempt to invalidate previous handling of the estate; and the correctness of an order appointing administrator for estate of deceased after death of executrix, and approving report filed on behalf of executrix, cannot be raised by petition for removal of administrator.—In re Collicott's Estate, 283 N.W. 869, 226 Iowa 106.

3. Ga.—Beecher v. Carter 5 S.E.2d 648, 189 Ga. 234
Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.
Pa.—Cohen's Appeal, 2 Watts 175.

4. Ala.—Boutwell v. Drinkard, 160 So. 349, 230 Ala. 212.
Utah.—In re Waters' Estate, 113 P. 2d 1038.
23 C.J. p 1120 note 93.

Demurrer

While the failure of the complaint to show that applicant has an interest in decedent's estate may be challenged by demurrer, the failure to demur or plead such fact by way of answer was held not a waiver of the right to defend on such ground.

tory causes for the removal of the representative,[5] and asking that he be removed.[6] Strict rules of pleading are not to be applied to petitions of this character,[7] and a complaint is sufficient where it informs the representative of its nature and scope,[8] and makes it to appear, by fair and reasonable intendment, that the representative is conducting himself in a manner prejudicial to those who are beneficially interested in the estate.[9] Where the inventory of the estate showed no assets, a representation of insolvency is unnecessary in a proceeding by a creditor for removal of the administrator.[10] The petition may be required to be verified,[11] and if one person signs the name of another to the petition he must show his authority for doing so.[12]

An answer and other pleadings necessary to form an issue may be filed,[13] but allegations therein which are immaterial or not responsive to the petition will be stricken out.[14] It has been held that demurrers and exceptions have no place in such procedure and need not be considered.[15]

Issues and proof. General rules as to issues, proof, and variance apply in proceedings for the removal of an executor or administrator.[16] A petition for removal alleging that the administrator "has wasted and mismanaged the estate" is sufficient to allow proof of any waste or mismanagement.[17]

f. Evidence

General rules of evidence ordinarily are applicable in proceedings for the removal of an executor or administrator.

—Fowler v. Ball, 141 N.E. 64, 82 Ind. App. 167.

5. Ill.—In re Graney's Will, 245 Ill. App. 407.
Tex.—Armstrong v. Anderson, Civ. App., 55 S.W.2d 235.
23 C.J. p 1120 note 94.

Petition held sufficient

(1) In general.
Ariz.—In re Sullivan's Estate, 78 P. 2d 132, 51 Ariz. 483.
Colo.—Koshir v. Snedec, 259 P. 4, 82 Colo. 245.
Ga.—Edwards v. Gabrels, 148 S.E. 913, 168 Ga. 738.
La.—Hebert v. Hebert, App., 187 So. 317.

(2) On general demurrer.
Iowa.—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103.
Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.

Mere conclusions insufficient
Or.—Latourette v. Nickell, 187 P. 621, 95 Or. 323.

Considered in its entirety
Application, as amended, for removal of administrator, was required to be considered in its entirety.—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103.

6. Iowa.—In re Collicott's Estate, 283 N.W. 869, 226 Iowa 106.
23 C.J. p 1120 note 95.

7. Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.
R.I.—Kenyon v. Hart, 96 A. 529, 38 R.I. 524.

Formal petition not necessary
Ariz.—Barth v. Platt, 78 P.2d 995, 52 Ariz. 33.

Considered as amended
Petition to remove executor and trustee for refusal to inventory land may be considered amended to pray for inventory and removal for unfaithfulness after hearing.—State v. Superior Court, 252 P. 932, 142 Wash. 300.

8. Mont.—In re Blackburn, 137 P. 381, 48 Mont. 179.

9. Conn.—Treat's Appeal, 40 Conn. 288.

10. Me.—McCluskey's Appeal, 100 A. 977, 116 Me. 212.

11. Pa.—Moore's Estate, 19 Pa.Dist. 109.
23 C.J. p 1120 note 1.

12. Mich.—White v. Spaulding, 14 N.W. 684, 50 Mich. 22.

13. Ind.—State v. Johnston, 185 N. E. 278, 204 Ind. 563.
Md.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.
N.C.—Edwards v. McLawhorn, 11 S. E.2d 562, 218 N.C. 543.
23 C.J. p 1120 note 3.

Court may require answer
Md.—Tublin v. Schockett, 12 A.2d 616, 178 Md. 212.

Withdrawal of answer
On application for removal of administrator, where administrator filed a resistance to the application, trial court did not err in permitting administrator to withdraw his answer and substitute therefor a motion and demurrer.—In re Arduser's Estate, 283 N.W. 879, 226 Iowa 103.

Order not decision on merits
An order of the court striking an answer to the petition seeking removal of representative, on the ground that the court did not have jurisdiction to pass on the validity of an antenuptial agreement involved, was not an adjudication as to the validity of such agreement.—In re Klock's Estate, 282 Ill.App. 245.

14. Or.—Knight v. Hamakar, 67 P. 107, 40 Or. 424.
23 C.J. p 1121 note 4.

15. Md.—Fleishman v. Kremer, 20 A.2d 169—Tublin v. Schockett, 12 A.2d 616, 178 Md. 212—Kerby v. Peters, 190 A. 511, 172 Md. 1.

16. **Questions not considered**
(1) The question whether an executor without letters testamentary, acting in a private capacity, had overreached the widow of the testator in securing a lease of the property of a corporation, most of the stock of which was owned by the testator, and all of which the widow had secured after his death, cannot be raised in a proceeding by one of the legatees to remove the executor.—In re Hooper, 135 P. 813, 76 Wash. 72.

(2) Where the executor spent money in making alterations to a building owned by decedent, whether the cost thereof should be charged to the principal or income is a question for the accounting, rather than a question involved in a proceeding to remove the executor.—In re Power, 166 N.Y.S. 1007.

(3) In a proceeding by a creditor to have decedent's widow removed as administratrix to permit the appointment of one who would act in the interest of the creditor in attempting to recover real property deeded to decedent and his wife as tenants by the entirety, and claimed by the administratrix to have been conveyed in fraud of creditors, the questions of the validity of the deed, involving the effect of laches of the creditor, limitations, and the bona fides of the transaction between decedent and his wife were not properly determinable, but should be raised in an equitable action to set aside the deed.—McFarlan v. McFarlan, 119 N. W. 1108, 155 Mich. 652.

(4) Questions of husband's fraud in procuring divorce decree and invalidity of his second marriage cannot be determined in divorced wife's proceeding for removal of second wife as administratrix of deceased husband's estate.—In re Faulkner's Estate, 65 P.2d 1045, 156 Or. 23.

17. Colo.—Miller v. Hider, 47 P. 406, 9 Colo.App. 50.

The person seeking the removal of an executor or administrator must establish the existence of the facts relied on for such removal,[18] and any proper evidence which tends to establish or refute the charges relied on is admissible.[19] The general rules as to the sufficiency of evidence govern in such proceedings.[20]

g. Hearing

Before an executor or administrator is removed he must be accorded a hearing and the court must have some fact legally before it in order to justify a removal.

Before an executor or administrator is removed he must be accorded a hearing,[21] and where the facts alleged are denied by the administrator the court is not required to make an order of suspension until the truth of the allegations has been established,[22] and in a proper case the hearing may be continued.[23] The trial or hearing should be a distinct and separate proceeding from the settlement of his accounts.[24] While the proceedings are informal[25] and it has been held that the action of the court in proceeding to the merits without disposing of a demurrer was not improper where demurrers and exceptions have no place in such procedure,[26] it has also been held that a demurrer to a petition to remove should be passed on before hearing the cause on its merits and allowing an appeal.[27] How-

18. Iowa.—In re Smith's Estate, 271 N.W. 888, 223 Iowa 172.
N.Y.—In re Britsch's Estate, 219 N. Y.S. 124, 128 Misc. 219.
23 C.J. p 1121 note 9.

Matter not necessary to be proved
In a proceeding under a statute to remove an executor on the ground that he is unsuitable to execute the trust because of his claim to ownership of note payable to testator, it was not necessary to show that the estate was the owner of the note, but merely that there was a real and substantial controversy as to the ownership, and that there was reasonable and probable cause to believe that the note belonged to the estate.—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125.

19. Ala.—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 489.
23 C.J. p 1121 note 10.

Petition for removal is not evidence
D.C.—Brosnan v. Brosnan, 289 F. 547, 53 App.D.C. 149.
Iowa.—In re Bagnola, 154 N.W. 461, 160 N.W. 228, 178 Iowa 757.

20. Wash.—In re Fick's Estate, 190 P. 1008, 111 Wash. 318.
23 C.J. p 1121 note 12.

Evidence held sufficient
(1) To negative misconduct.—In re Giese's Estate, 255 N.W. 474, 64 N.D. 636.

(2) To show justification of request for removal.—In re Sherman's Estate, 56 P.2d 230, 5 Cal.2d 730.

Evidence held sufficient to warrant removal
(1) In general.
Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360—In re Grafmiller's Estate, 81 P.2d 181, 27 Cal. App.2d 253.
Md.—Tsaraclis v. Characklis, 3 A.2d 725, 176 Md. 28.
Mass.—Comstock v. Bowles, 3 N.E. 2d 817, 295 Mass. 250.
N.J.—In re McCabe's Estate, 4 A.2d 2, 125 N.J.Eq. 278.
Okl.—Batchelder v. Knecttle, 66 P.2d 919, 179 Okl. 484.
Or.—In re Elder's Estate, 83 P.2d 477, 160 Or. 111, 119 A.L.R. 802—In re Faulkner's Estate, 65 P.2d 1045, 156 Or. 23.
Wash.—In re Fick's Estate, 190 P. 1008, 111 Wash. 318.

(2) On ground of incompetency.
Miss.—Hancock v. Reedy, 180 So. 81, 181 Miss. 830.
N.Y.—In re Rodgers' Estate, 264 N. Y.S. 624, 147 Misc. 344.

(3) On ground of bad faith and abuse of trust.—Appeal of Schimmel, 4 A.2d 382, 125 N.J.Eq. 88, affirming In re Roeben's Will, 197 A. 253, 123 N.J.Eq. 313.

(4) On ground of mismanagement.—In re Wolfe's Estate, 57 P.2d 1066, 186 Wash. 216.

Evidence held insufficient to warrant removal
Cal.—In re Cornaz' Estate, 65 P.2d 784, 8 Cal.2d 347—In re Sherman's Estate, 56 P.2d 230, 5 Cal.2d 730.
Ill.—In re Lussem's Estate, 2 N.E. 2d 113, 285 Ill.App. 311.
Ohio.—In re Throckmorton's Estate, App., 36 N.E.2d 792.
Or.—In re Winters' Estate, 81 P.2d 140, 159 Or. 637—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949.
Pa.—In re Hurley's Estate, 169 A. 81, 313 Pa. 53.

21. D.C.—Brosnan v. Brosnan, 289 F. 547, 53 App.D.C. 149.
Iowa.—In re Donlon's Estate, 206 N. W. 674, 201 Iowa 1021.
Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1—Fulford v. Fulford, 137 A. 487, 153 Md. 81.
N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.
23 C.J. p 1121 note 13.

Removal on interlocutory hearing erroneous
Where executor was solvent and had given ample security, removal on interlocutory hearing was held erroneous.—Clements v. Fletcher, 118 S.E. 201, 155 Ga. 802.

Separate hearings
Contention that trial court's order denying separate petitions for removal of executors was inadvertently made because of statement that petitions would be heard separately cannot prevail, where petitions were heard together and submitted for decision.—In re Bauer's Estate, 248 P. 507, 199 Cal. 98.

Voluntary absence
Administrator, voluntarily absenting himself from hearing on petition for removal, cannot complain that he never had day in court.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

22. Cal.—In re Healy, 70 P. 455, 66 P. 175, 137 Cal. 474.

23. Absence of counsel
Continuance of hearing of proceedings for removal of dative testamentary executor of succession until adjournment of state legislature, of which executor's chief counsel was a member, held proper.—Succession of Morrison, 170 So. 783, 185 La. 746.

Discretion
Grant of delay of fourteen days for dative testamentary executor of succession to prepare defense and answer to rule seeking his removal held not abuse of discretion.—Succession of Morrison, supra.

24. Alaska.—In re McIntire, 1 Alaska 73.

25. Md.—Tublin v. Schockett, 12 A. 2d 616, 178 Md. 212.

Technical defenses disfavored
In dealing with charges affecting administrators and executors, courts should be intolerant of technical defenses which would permit such officials to avoid a full and candid disclosure of the manner in which they have discharged their duties.—Tublin v. Schockett, supra.

26. Md.—Fleishman v. Kremer, 20 A.2d 169.

27. Alaska.—In re McIntire, 1 Alaska 73.

ever, the representative may waive his right to object to the form and the time of trial of the proceeding.[28]

Every case for the removal of an executor or administrator should be decided in accordance with the particular facts involved,[29] and it has been held that the issues are to be tried by the court and the administrator is not entitled to demand a jury,[30] but there is also authority for the view that the question whether he is an unsuitable person to be continued in office is for the jury.[31] The court must have some fact legally before it in order to justify a removal,[32] and a reference may be ordered to obtain needed information on questions of fact involved,[33] but where the representative admits and attempts to excuse the matters because of which his removal is asked the court may properly determine the case without evidence on behalf of the applicant,[34] and it is proper to refuse to appoint an examiner to take testimony.[35] A motion for a nonsuit admits the facts which the testimony tends to establish and presents a legal question,[36] and where there is evidence in support of the petition it is error to grant the motion notwithstanding the court might not have felt justified in making findings on such evidence in favor of the petitioners.[37] Dismissal of the petition is proper when it discloses that petitioner was seeking to renew objections to an account which it was too late to raise by exception or appeal.[38] A statement of surety's counsel that the surety would not insist on administrator's removal was held not to operate as a dismissal of a petition for removal.[39]

Determination of a representative's right to share as a distributee is unauthorized in a proceeding to remove him as the estate is not represented.[40] Although the court is without power to adjudicate title to property[41] as between the representative and the estate,[42] or where the decedent's grantee is not a party,[43] it may determine whether property should be inventoried and so direct an inventory,[44] but where an accounting proceeding is also pending a charge that the representatives illegally paid commissions to themselves will be reserved for the accounting proceeding.[45] However, the fact that evidence showing unsuitability also bears on the representative's right to property of the deceased is not cause for withholding an order of removal until adjudication of the issue of his right to such property.[46]

It is sometimes required that the court should make findings of fact supported by the evidence in harmony with the petition, and make its conclusions

28. La.—Succession of Carroll, 164 So. 334, 183 La. 538.

29. Or.—In re Elder's Estate, 83 P. 2d 477, 160 Or. 111, 119 A.L.R. 802.

Matters not considered

Wishes of executor who resigns or has been removed for cause, and who has no beneficial interest in the estate, are immaterial and cannot be considered in proceeding for removal of coexecutor or in selection of successor of executor removed.—In re Sherman's Estate, 56 P.2d 230, 5 Cal.2d 730.

Family situation considered

The district court in exercising its discretion in determining whether technical violation of the law by an administrator should be allowed to bring about his removal could properly take into account the family situation which colored and would have continued to color the entire proceedings.—Burke v. Canfield, App.D. C., 121 F.2d 877.

Fraud in appointment

Under statute providing for removal of administrators where their letters have been procured by false pretenses, probate court, on application for removal of widow as administratrix, might well have considered that, in obtaining letters, she stated under oath that value of estate did not exceed five thousand dollars, and was accordingly required to give bond only for ten thousand dollars, but later asserted under oath that value of estate was at least one million five hundred thousand dollars.—In re Klock's Estate, 282 Ill.App. 245.

Consideration of second petition

Guardian ad litem's petition for removal, of which administrator had no notice, properly considered for some purposes in connection with prior petition of surety on administrator's bond.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

30. Cal.—In re Doyle, Myr.Prob. p 68.

31. R.I.—Capwell v. Murphy, 43 A. 32, 21 R.I. 262.
23 C.J. p 1121 note 17.

Issues should be so framed as to permit the jury to give single answers to each question.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.

32. N.J.—In re Konigsberg's Estate, 4 A.2d 524, 125 N.J.Eq. 216.

Public administrator's petition

In the absence of evidence that the representative was not capable and suitable, a public administrator's petition for removal of the representative is required to be dismissed.—Hilton v. Hopkins, 175 N.E. 162, 275 Mass. 59.

33. N.Y.—Matter of Hale, 61 N.Y.S. 596, 45 App.Div. 573.
23 C.J. p 1122 note 21.

34. Ind.—McFadden v. Ross, 93 Ind. 134.
23 C.J. p 1122 note 18.

35. Pa.—In re Miller's Estate, 107 A. 684, 264 Pa. 310.

36. Utah.—In re Robison's Estate, 204 P. 321, 59 Utah 431.

37. Utah.—In re Robison's Estate, supra.

38. Pa.—In re Osterling's Estate, 10 A.2d 17, 337 Pa. 225, certiorari denied Osterling v. Commonwealth Trust Co. of Pittsburgh, 60 S.Ct. 892, four cases, 309 U.S. 689, 84 L. Ed. 1032.

39. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

40. N.C.—In re Banks' Estate, 196 S.E. 351, 213 N.C. 382.

41. Wash.—State v. Superior Court, 252 P. 932, 142 Wash. 300.

42. Ind.—State v. Chambers, 185 N. E. 436, 204 Ind. 658.

43. Wash.—State v. Superior Court, 252 P. 932, 142 Wash. 300.

44. Wash.—State v. Superior Court, supra.

45. N.Y.—In re Rosenberg's Will, 2 N.Y.S.2d 300, 165 Misc. 92.

46. Ala.—Kelen v. Brewer, 124 So. 247, 220 Ala. 175.

of law on the facts so found,[47] and where the evidence was sufficient to support a finding of mismanagement and neglect a further unsupported finding of fraud did not affect the other grounds on which the order of removal properly rested.[48]

h. Order or Decree

An order removing a representative may require him to account within a designated time. The order may be in the alternative, but must be supported by the evidence and findings.

While it has been said that the only judgment which a court can render in proceedings to remove an executor or administrator is one either removing or refusing to remove him,[49] the court, on removing the representative, may also order him to account within a designated time.[50] The judgment must be within the issues[51] and supported by the evidence and findings,[52] must be signed by the judge,[53] and is self-executing.[54]

The intent to remove must be apparent,[55] but, where the petition for removal of an administrator alleged facts showing that the administrator had been dilatory, an order of removal should not be disturbed merely because it recites that, under the evidence, the administrator was interested in the estate, and that there had been a controversy between the administrator and the heirs.[56] A decree removing an executor for failure to comply with a decree of the court must adjudicate or recite either that the refusal to comply was willful or that the failure or neglect so to do was without cause.[57] The fact that a judgment refusing to remove an administrator is informal furnishes no ground for dismissing an appeal therefrom, where it shows that the application to remove was finally determined and the motion denied.[58] An order of the probate court removing an executor, made, not at a regular term, but at a special term to which the cause had not been adjourned or appointed, is void.[59]

Alternative decree. Where the ground of removal is failure to comply with a decree of the court, the decree may properly be in the alternative, requiring the representative to comply with the former decree, or, in default of such compliance, removing him,[60] and where the representatives have exceeded their powers, but acted in good faith, their removal may be denied on condition that they execute a bond and proceed to account for their acts.[61]

Res judicata. A judgment or order in proceedings for removal of an executor or administrator has been held not res judicata of the question of his liability to the estate,[62] notwithstanding the same line of evidence may be presented,[63] and, where a judgment sustaining demurrers to allegations of

47. Cal.—In re Pendell's Estate, 14 P.2d 506, 216 Cal. 384.
23 C.J. p 1122 note 19.

48. Cal.—In re Bell, 67 P. 123, 135 Cal. 194.

49. Ind.—Williams v. Tobias, 37 Ind. 345.

Award of increase

In a suit to remove substituted executors and to recover for a devastavit, a portion of a decree, finding that there had been an increase instead of a devastavit and awarding the same to the beneficiaries for life under the will, was not within the issues.—Tuckerman v. Currier, 129 P. 210, 54 Colo. 25, Ann.Cas.1914C 599.

50. Ala.—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 429.

Time allowed; coexecutors

That there were remaining executors was held not to render erroneous order requiring removed executor to file accounts and vouchers for final settlement within one month thereafter, and the fact that final settlement was required within less than twelve months from grant of letters was held not to render erroneous such order.—Lindsey v. Lindsey, supra.

51. Ind.—State v. Chambers, 185 N. E. 436, 204 Ind. 658.

Adjudication not binding

Where the court is without power to adjudicate the title to property in a removal proceeding, such adjudication of title in favor of the estate as against the representative is outside the issues and not binding on the representative in his individual capacity.—State v. Chambers, supra.

52. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.

Recitals held sufficient

Cal.—In re Exterstein's Estate, 38 P. 2d 151, 2 Cal.2d 13.

53. Ky.—Kentucky-Tennessee Light & Power Co. v. Priest's Adm'r, 127 S.W.2d 616, 277 Ky. 700.

Relation back

A judge's unsigned orders entered in court order book showing removal of first administrator and appointment of second administrator became effectual from the beginning on being signed by judge in second administrator's action for death of deceased.—Kentucky-Tennessee Light & Power Co. v. Priest's Adm'r, supra.

54. Cal.—Hibernia Savings & Loan Soc. v. Belcher, 48 P.2d 681, 4 Cal. 2d 268.

55. Ky.—Karn v. Seaton, 62 S.W. 737, 23 Ky.L. 101.
23 C.J. p 1122 note 24.

56. Iowa.—Willson v. Polk County Dist. Ct., 147 N.W. 766, 166 Iowa 352.

57. N.Y.—Matter of Hayes, 158 N.Y. S. 527, 172 App Div. 680.

58. Ky.—Hilton v. Hilton, 107 S.W. 736, 32 Ky.L. 1082.

59. Ala.—Boynton v. Nelson, 46 Ala. 501.

60. N.Y.—Matter of Hayes, 158 N.Y. S. 527, 172 App.Div. 680.

61. N.Y.—In re Rosenberg's Will, 2 N.Y.S.2d 300, 165 Misc. 92.

62. Ala.—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 489.

Adjudication not in judgment entry

Where right of deceased's widow to use of mansion house of the deceased beyond the year allowed by the law was considered by probate court on exceptions to account of widow as administratrix and on motion by heirs for widow's removal as administratrix, but it did not appear that any judgment entry of probate court directly adjudicated widow's right, widow's defense of "res judicata" or "estoppel by judgment," in suit by heirs to recover reasonable value of use of mansion house of deceased beyond the year allowed by law, could not be sustained.—Hodapp v. Hodapp, Ohio App., 37 N.E.2d 101.

63. Ala.—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 489.

mismanagement in proceeding to remove was affirmed on the ground that plaintiff had an adequate remedy at law, such judgment was held not res judicata against a subsequent suit for an accounting and settlement.[64]

i. Setting Aside Order

A motion to set aside an order removing an executor or administrator must comply with applicable statutory provisions, and will be determined according to the facts existing when such order was made.

A motion to vacate an order removing an executor or administrator must comply with applicable statutory provisions,[65] and must set forth grounds for relief,[66] as an order of removal will not be set aside in the absence of a showing of prejudice to the administrator or executor.[67] The court can set aside an order of removal at the same term,[68] and such order may be entered of record at a subsequent term nunc pro tunc.[69]

On an application to set aside an order removing an administrator, the propriety of the order of removal must be determined according to the facts existing and presented to the court when such order was made, and not according to facts presented on the application to set it aside.[70] An order removing an executor without notice under a petition asking only an accounting will be vacated on motion.[71]

After an order setting aside an order of removal, the parties are restored to the same status occupied prior to the order of removal.[72]

Where order final and conclusive. Where an order denying removal becomes final and conclusive on failure to appeal therefrom, it cannot be revoked on the ground that it was entered through inadvertence.[73]

j. Review

The rules applicable to appeals in civil actions generally are applicable to appeals from orders removing or refusing to remove an executor or administrator.

While appeals generally in probate proceedings have been treated in Appeal and Error § 146 et seq, as a general rule, anyone aggrieved may appeal from the decree of the court making or refusing to make the removal,[74] although a few cases have denied the right to appeal from an order refusing to remove.[75] In accordance with general rules, there must be a compliance with applicable statutory

64. Ga.—First Nat. Bank v. Williams, 8 S.E.2d 562, 62 Ga.App. 203, certiorari dismissed 13 S.E.2d 361, 191 Ga. 611.

65. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

Motion insufficient

A valid order of removal will not be set aside where the motions to vacate after the term contained none of the statutory grounds, and the facts relied on as a defense are not shown.—In re Donlon's Estate, supra.

66. Fla.—Lewis State Bank v. Baker, 171 So. 319, 126 Fla. 477.

67. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

68. Ky.—Seitz' Ex'r v. Seitz, 58 S.W.2d 635, 248 Ky. 503.

69. Ky.—Seitz' Ex'r v. Seitz, supra.

70. Ala.—Ashurst v. Union Bank & Trust Co., 76 So. 917, 200 Ala. 559.

71. N.Y.—In re Rawson's Estate, 200 N.Y.S. 447, 120 Misc. 713.

72. Ky.—Seitz' Ex'r v. Seitz, 58 S.W.2d 635, 248 Ky. 503.

73. Cal.—In re Exterstein's Estate, 38 P.2d 151, 2 Cal.2d 13.

74. Cal.—Bauer v. Willis, 233 P. 342, 195 Cal. 375.
D.C.—Perry v. Wilson, 48 F.2d 1021, 60 App.D.C. 109.
Ind.—Union Savings & Trust Co. v. Eddingfield, 134 N.E. 497, 73 Ind. App. 286.
Kan.—In re Woodworth's Estate, 67 P.2d 553, 145 Kan. 870.
Md.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.
Mo.—In re Bennett's Estate, App., 249 S.W. 685.
N.C.—Edwards v. McLawhorn, 11 S.E.2d 562, 218 N.C. 543—In re Wright's Estate, 158 S.E. 192, 200 N.C. 620.
23 C.J. p 1122 note 33—15 C.J. p 1022 note 85 [a] (1)—3 C.J. p 570 note 44 [b] (8), p 571 note 45 [a] (1).

Removal in indirect proceeding

That order removing executors was not germane to, nor authorized in, proceeding for reduction of executor's compensation, does not preclude appeal therefrom.—In re Mann's Estate, 225 N.W. 261, 208 Iowa 1193.

Motion in arrest

Order suspending executor and appointing administrator pendente lite was appealable as "final judgment," although motion in arrest was not passed on.—In re Roff's Estate, 50 S.W.2d 156, 226 Mo.App. 1203, transferred, see Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113.

Certiorari not only remedy

Under some statutes, an appeal lies to the superior court from an order of the court of ordinary dismissing a petition to remove an administrator and revoke his letters of administration, certiorari not being the only remedy.—Wells v. Chambers, 111 S.E. 677, 28 Ga.App. 429.

Supersedeas, review, or prohibition

Where the lower court acted within its jurisdiction, its order cannot be successfully assailed by application for writ of supersedeas, review, or prohibition.—In re Bond's Estate, 225 P. 450, 193 Cal. 482.

Reappointment in vacation

That purported reappointment of executor after will was sustained in contest proceedings was made in vacation did not prevent appeal by executor from subsequent order removing him.—In re Pierron's Estate, Mo.App., 39 S.W.2d 458.

Approval of bond

District court's approval of bond, tendered by executor appealing from probate court order of removal for failure to give bond, did not affect rights of executor.—In re Dennis' Estate, 68 P.2d 1083, 146 Kan. 121, appeal dismissed Keach v. McDonald, 58 S.Ct. 147, 302 U.S. 647, 82 L.Ed. 502.

Orders not appealable

(1) Order requiring executor to give bond within fixed time, removing him if he failed to do so and directing him to make final settlement is not appealable.—Gordy v. King, 154 So. 525, 228 Ala. 532.

(2) Refusal of permission to amend a petition to remove an administrator has been held discretionary and not appealable.—Appler v. Merryman, 47 A. 1026, 91 Md. 706.

75. Cal.—In re Moore, 9 P. 315, 68 Cal. 394.
N.Y.—Rogers v. Hosack, 18 Wend. 319.
3 C.J. p 571 note 47 [b] (2), (4).

provisions.[76] Thus, the appeal must be taken within the time allowed by statute,[77] and proper notices must be served.[78]

Questions not raised in lower court. Where a question was not raised in the lower court, it has been held that it could not be considered in the appellate court,[79] and where no exception was taken in the court below by an administrator to an order removing him, he must be deemed on appeal by him to have acquiesced therein.[80]

Parties. The county judge and county clerk are not proper parties to an appeal from an order removing an administrator,[81] and on appeal from an order directing an administrator to file a new bond, and removing him from his office for failure to do so, the estate, being uninterested, is not a proper party.[82]

Record. The evidence offered to the court below ought to be shown on the record,[83] and a finding of the court, raised only by an affidavit of counsel, was held not reviewable in the absence of a complete record.[84] However, under a statute providing that in proceedings for the removal of an administrator the petition and answer must be in writing, a record on appeal is properly authenticated, although the petition, answer, and order are not incorporated in the bill of exceptions, where the same are in the record certified to by the clerk.[85]

Effect of appeal. The authority of a representative is suspended, pending the appeal,[86] and he is not authorized to proceed with the administration,[87] even though he has given an appeal bond;[88] but he is merely suspended from office and no general administrator can be appointed in his stead, but a special one only.[89] However, while it has also been held that a representative was without authority to act until he perfected an appeal from the order removing him,[90] it has been held under some statutes that where appellant does nothing to stay the order pending the appeal, the lower court can appoint a new representative,[91] and such order appointing a new representative is valid until the order removing the prior representative is reversed.[92] On the other hand there can be no suspensive appeal from a judgment refusing to remove an executor.[93]

An appeal bond is sometimes required on appeal from an order removing an administrator,[94] and such bond must comply with applicable statutory provisions.[95] However, the failure to file a proper bond on time may be waived.[96]

Hearing on appeal. In some jurisdictions, an appeal from a proceeding for the removal of an executor or administrator is heard on matters of law and legal inference,[97] and under some statutes, the proceedings in the appellate court are handled as a trial de novo,[98] and where the appellate court, on

76. Ohio.—In re Hornyak's Estate, 14 N.E.2d 5, 133 Ohio St. 416, reversing, App., 31 N.E.2d 145.

77. D.C.—Perry v. Wilson, 48 F.2d 1021, 60 App.D.C. 109.
23 C.J. p 1123 note 36.

78. **Person not a party**
Minor residuary legatee's guardian, not party to proceeding for reduction of executor's compensation, need not be served with notice of appeal from order therein removing executors, although prayed by him in a pending proceeding.—In re Mann's Estate, 225 N.W. 261, 208 Iowa 1193.

79. Cal.—In re Bauer's Estate, 248 P. 507, 199 Cal. 98.
Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.

80. Ind.—Ex parte Simpson, 55 Ind. 415.
23 C.J. p 1123 note 37.

81. Ill.—Witter v. Witter, 65 Ill.App. 335.

82. Ind.—Moore v. Bankers' Surety Co., 73 N.E. 607, 34 Ind.App. 633.

83. Ala.—Flora v. Mennice, 12 Ala. 836.
Iowa.—In re Moore, 72 N.W. 674, 103 Iowa 474.

84. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

85. Cal.—In re Healy's Estate, 66 P. 175, 6 Cal.Unrep.Cas. 780, reversed on other grounds 70 P. 455, 137 Cal. 474.

86. La.—Succession of Esteves, 163 So. 99, 183 La. 274.
Nev.—In re Pedroli's Estate, 221 P. 241, 47 Nev. 313, 31 A.L.R. 841, rehearing denied 224 P. 807, 47 Nev. 313, 31 A.L.R. 841.
23 C.J. p 1123 note 42.

Notice insufficient
Notice of appeal, filed by administrator, from order of removal directing him to turn over assets to another administrator, no appeal bond or undertaking being filed, was insufficient, under the statute to stay execution of such order, and application for supersedeas, and prohibition, should be denied.—In re Bond's Estate, 225 P. 450, 193 Cal. 482.

87. Ga.—Walker v. Maddox-Rucker Banking Co., 23 S.E. 897, 97 Ga. 386.

88. Ga.—Walker v. Maddox-Rucker Banking Co., supra.

89. N.J.—In re Marsh's Estate, Prerog., 55 A. 299.
23 C.J. p 1123 note 45.

90. Tex.—Felton v. Birchfield, Civ. App., 110 S.W.2d 1022, error dismissed.

91. Iowa.—In re Mann's Estate, 251 N.W. 83, 217 Iowa 1134.

92. Iowa.—In re Mann's Estate, supra.

93. La.—Platz's Succession, 47 So. 119, 122 La. 14.
N.J.—In re Marsh's Estate, Prerog., 55 A. 299.
23 C.J. p 1123 note 48.

94. Ohio.—In re Hornyak's Estate, 14 N.E.2d 5, 133 Ohio St. 416, reversing, App., 31 N.E.2d 145.
23 C.J. p 1123 note 49.

95. Tex.—Felton v. Birchfield, Civ. App., 110 S.W.2d 1022, error dismissed.

96. Ill.—Repole's Estate v. Arkema, 5 N.E.2d 614, 287 Ill.App. 633.

97. N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.

98. Ill.—Repole's Estate v. Arkema, 5 N.E.2d 614, 287 Ill.App. 633.
Kan.—In re Dennis' Estate, 68 P.2d 1083, 146 Kan. 121, appeal dismissed Keach v. McDonald, 58 S.Ct. 147, 302 U.S. 647, 82 L.Ed. 502.
Mo.—In re Pierron's Estate, App., 39 S.W.2d 458.

Reference to take testimony
Under a statute providing that when an appeal is taken on the facts the appellate court has the same power to decide questions of fact

appeal from the probate court on petition to remove an administrator, refused requested findings, and failed to make any findings of its own motion, there was a mistrial.[99] The judge, in his discretion, may direct issues of fact to be tried to a jury,[1] and under some statutes, the discretion the law vests in the ordinary is to be exercised by the jury on appeal.[2] While the appellate court will consider matters necessary to a determination of the appeal,[3] and may review all matters duly contested in the lower court,[4] the appellate court has been held not to have any general jurisdiction over the estate,[5] but obtains jurisdiction only of the question or issue originally presented to the lower court.[6]

Questions which could be determined only in a suit in equity, and were not within the jurisdiction of the lower court, are not within the jurisdiction of the appellate court on appeal.[7] Whether a finding and order constituted an adjudication of a representative's personal liability to the estate need not be discussed in the absence of a formal judgment against the representative,[8] and the court will not pass on questions where the persons interested therein are not parties.[9]

Presumptions. The usual presumptions will be indulged on appeals from proceedings for the removal of an executor or administrator.[10]

Disposition of cause. An appellate court is disinclined to interfere with the action taken by the probate court in the matter of the removal of an executor or administrator unless positive error or gross abuse of discretion is shown;[11] and the findings of the lower court have been held binding on the appellate court where they are supported by the evidence,[12] for, although the appellate court has a duty to examine evidence and decide the case on its own judgment, it will not reverse the decree unless plainly wrong where it rests on observation of wit-

which the surrogate had, and it may, in its discretion, receive further testimony or documentary evidence and appoint a referee, where, on appeal from an order for the removal of an executor on the ground that he was indebted to the estate in large amount, which he did not include in the inventory, the executor claimed that this question was not litigated and that he had in fact paid the indebtedness, the cause will be referred to take testimony on that question.—Matter of Burr, 101 N.Y.S. 776, 116 App.Div. 518.

99. Minn.—Boston First Nat. Bank v. Towle, 137 N.W. 291, 118 Minn. 514.

1. N.C.—In re Battle, 74 S.E. 23, 158 N.C. 388.

2. Ga.—Stanley v. Spell, 166 S.E. 669, 146 Ga.App. 91.

Question for jury

In proceeding to remove administrator for failure to file correct inventory and appraisement and because administrator's personal interests conflicted with those of estate, administrator's fitness was held for jury, notwithstanding controversy between heirs and administrator regarding whether certain property was administrator's or part of estate.—Stanley v. Spell, supra.

3. Cal.—In re Sherman's Estate, 56 P.2d 230, 5 Cal.2d 730.

Order removing coexecutor

Where proceedings by executrix for removal of executor had become final by court's order removing executor, such order would be considered on appeal from order removing executrix in same proceeding, as supporting executrix' action as matter of law.—In re Sherman's Estate, supra.

4. U.S.—Tallman v. Ladd, C.C.A.W. Va., 5 F.2d 582.

5. Ill.—In re Graney's Will, 245 Ill. App. 407.

Accounting

Where the probate court overruled an application to remove relator as administrator and to appoint L, on appeal the circuit court had jurisdiction to remove relator and appoint L, instead of merely reversing the probate court's judgment, but it had no authority to require an accounting and fix the administrator's bond as ordered by mandate of the court of appeals.—State ex rel. Burns v. Woolfolk, 262 S.W. 346, 303 Mo. 589.

6. Tex.—Coombes v. Bush, 15 S.W.2d 602, 118 Tex. 386.

No more power than lower court

On appeal from county court's refusal to remove administratrix, circuit court has no more power of removal than county court had.—In re Graney's Will, 245 Ill.App. 407.

Inquiry not extended

On appeal from a decree removing an administrator for failure to bring suit to set aside an alleged fraudulent conveyance of deceased, the inquiry should not be extended further than to determine whether there was reasonable ground for belief that the conveyance was fraudulent.—McCluskey's Appeal, 100 A. 977, 116 Me. 212.

7. Or.—In re Elder's Estate, 83 P.2d 477, 160 Or. 111, 119 A.L.R. 802.

8. Iowa.—In re Donlon's Estate, 206 N.W. 674, 201 Iowa 1021.

9. Md.—Tsaraclis v. Characklis, 3 A.2d 725, 176 Md. 28.

10. **Evidence to support findings**

The appellate court will presume that the lower court's findings were based on sufficient evidence where they are not questioned on that ground.—Barth v. Platt, 78 P.2d 995, 52 Ariz. 33.

11. Colo.—In re Smith's Estate, 255 P. 985, 81 Colo. 411.

Fla.—Henderson v. Ewell, 149 So. 372, 111 Fla. 324, citing **Corpus Juris.**

Ind.—Haughey v. Haughey, 127 N.E. 454, 73 Ind.App. 318.

Iowa.—In re Lininger's Estate, 297 N.W. 310—In re Myers' Estate, 294 N.W. 235, 229 Iowa 170.

N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.

Ohio.—In re Fiebig's Estate, 22 N.E. 2d 288, 61 Ohio App. 40.

Okl.—Batchelder v. Knecttle, 66 P.2d 919, 179 Okl. 484.

Or.—In re Faulkner's Estate, 65 P.2d 1045, 156 Or. 23.

Pa.—In re Fleming's Estate, 5 A.2d 599, 135 Pa.Super. 423.

Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.

Wash.—In re Wood's Estate, 100 P. 2d 397, 3 Wash.2d 308—In re Wolfe's Estate, 57 P.2d 1066, 186 Wash. 216.

23 C.J. p 1124 note 54.

12. Pa.—In re Fleming's Estate, 5 A.2d 599, 135 Pa.Super. 423.

Consistent with evidence

On appeal to prerogative court from decree of orphans' court removing coexecutrix on ground of bad faith and abuse of trust, great weight would be given to findings of fact by orphans' court judge, but prerogative court had power and duty to ascertain, by full investigation and analysis of evidence what the facts were, and whether general finding was consistent therewith.—Appeal of Schimmel, 4 A.2d 382, 125 N.J.Eq. 88, affirming In re Roeben's Will, 197 A. 253, 123 N.J.Eq. 313.

nesses who have testified orally.[13] Although, where the lower court has erroneously removed an executor on one ground, the appellate court cannot, on error, sustain the order because it is shown by the evidence to be justified on other grounds,[14] ordinarily the court will not reverse because of error not prejudicial to the complaining party,[15] nor because of invited error,[16] and the failure of the lower court to find facts is immaterial where on such facts as might have been found the appellate court could find no abuse of discretion.[17] Also, where there is serious doubt whether appointment of a new representative will be of any value because administration is almost completed, the appellate court will not reverse an order refusing to remove the representative.[18]

It has been held that the appellate court may remand the proceeding or retain it for such orders as it deems best.[19]

k. Costs

Costs are ordinarily regulated by statute, and in determining the question of making an allowance to a representative for expenses in successfully contesting a proceeding to remove him the question is whether his conduct was such as reasonably to justify the institution of the proceeding.

The right to costs in proceedings to remove an executor or administrator is ordinarily regulated by statute, and general rules are applied in determining the right thereto.[20] The costs of proceedings to remove should not be allowed against the estate when the application is made by persons having no right to apply,[21] and, when the charges on which removal is asked are not sustained, costs should not be allowed to both parties against the estate.[22] A representative has been personally charged with the costs of proceedings to remove him when it was apparent that he was not a fit person to be executor or administrator,[23] but it has been held improp-

13. Mass.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

14. Md.—Kerby v. Peters, 190 A. 511, 172 Md. 1.
23 C.J. p 1124 note 55.

Removal of administratrix of class first entitled to appointment in proceeding by decedent's heirs could not be upheld on ground proceeding was one for appointment of coadministrators, where administratrix' letters had not been properly revoked, since appointment of coadministrators could only be made with consent of person first entitled, and, where a class is first entitled, one selected by court is person first entitled.—Kerby v. Peters, supra.

15. Kan.—Kachelman v. Kachelman's Estate, 33 P.2d 947, 140 Kan. 115.
N.J.—In re Roeben's Will, 197 A. 253, 123 N.J.Eq. 313, affirmed Appeal of Schimmel, 4 A.2d 382, 125 N.J.Eq. 88.
Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.

Admission of evidence
Court will not reverse judgment in case tried by court removing defendant as administrator, because of admission of inadmissible evidence consisting of plaintiff's exceptions and objections urged by plaintiff to accounts of defendant, where there was evidence supporting judgment.—Ferguson v. Ferguson, Tex.Civ.App., 11 S.W.2d 214, affirmed, Com.App., 23 S.W.2d 673.

16. Utah.—In re Bogert's Estate, 290 P. 947, 76 Utah 566.

Theory in lower court
Where the parties unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected on appeal.—In re McCabe's Estate, 4 A.2d 2, 125 N.J.Eq. 278.

17. N.C.—Jones v. Palmer, 2 S.E.2d 850, 215 N.C. 696.

18. N.C.—Jones v. Palmer, supra.

19. N.C.—In re Wright's Estate, 158 S.E. 192, 200 N.C. 620.

Appointing receiver
Superior court judge's order appointing receiver to settle estate under judge's supervision after affirming clerk's order removing executors was held not error, as a proceeding before clerk to remove executors, consolidated, without objection with action to construe family agreement, may be regarded as motion in civil action for purpose of superior judge's jurisdiction on appeal.—In re Wright's Estate, supra.

Appointing substitute
(1) The appellate court may remove the representative and substitute another in his place.
Mo.—State ex rel. Burns v. Woolfolk, 262 S.W. 346, 303 Mo. 589.
W.Va.—Tramel v. Stafford, 83 S.E. 299, 75 W.Va. 98.

(2) In an early case it was held that the appellate court does not acquire jurisdiction to appoint or remove, but if a removal is necessary, it must, after determining the question presented by the record, issue a procedendo to the probate court requiring it to appoint some proper person to administer the estate.—Pearce v. Lovinier, 71 N.C. 248.

20. Wis.—In re Leonard's Will, 230 N.W. 715, 202 Wis. 17, 83 A.L.R. 712.

Remaindermen were held not entitled under statute to attorney's fees and expenditures incurred in suit for removal of executor.—In re Leonard's Will, supra.

Apportioning costs
In equity suit to require executor to give bond or be removed as executor, trial judge did not abuse discretion in taxing auditor's fee partly against plaintiffs.—Hicks v. Atlanta Trust Co., 200 S.E. 301, 187 Ga. 314.

Petitioning coexecutor
Where an executor joined with beneficiaries of the will in petitioning for the removal of the other executor, it was improper to award a counsel fee to the petitioning executor, on denial of the petition, even though the petition was reasonably founded, the petitioning executor's prosecution of the petition in such case being a duty imposed on him as executor, for which he could not charge or be allowed compensation, and the statute being applicable only to cases of settlement of account, and not to such litigation.—Hauser v. Hauser, 114 A. 244, 92 N.J.Eq. 615.

Costs on appeal
The allowance by prerogative court of counsel fees on appeal to that court from decree of orphans' court removing executrixes from their office and ordering that letters of substitutionary administration on the estate be granted to a third person was unauthorized.—In re McCabe's Estate, 4 A.2d 2, 125 N.J.Eq. 278.

21. N.Y.—Shook v. Shook, 19 Barb. 653.

22. N.Y.—Matter of Engelbrecht, 44 N.Y.S. 551, 15 App.Div. 541.

23. U.S.—Burke v. Canfield, App.D. C., 121 F.2d 877.
N.Y.—Matter of Stanton, 2 N.Y.S. 342, 1 Conn.Surr. 108.

Attempt to purchase property
Where executrix and her sister were equally interested in net amount

er to settle costs on an executor where the court found no justification for removing him, notwithstanding it also found reasonable cause for instituting the proceeding.[24] Where proceedings to remove an executor or administrator are successfully resisted, the court in some jurisdictions may allow reasonable counsel fees to the representative out of the estate,[25] and, in determining the question of making an allowance to an administrator for costs and expenses in contesting a proceeding to remove him, the question is whether his conduct was such as reasonably to justify the institution of the proceeding.[26]

1. Renewal of Motion

The doctrine of res judicata has been held not to have strict application to proceedings to remove an executor or administrator.

It has been held that a petition for the removal of an administrator is merely a motion, which may be renewed on the same state of facts by leave of court, the doctrine of res judicata not having strict application.[27] On mandamus to require trial of a proceeding to remove a representative, a former removal proceeding set up in bar would be ignored, where the grounds thereof did not sufficiently appear.[28]

§ 92. —— Operation and Effect

After removal, an administrator or executor has no right to do anything further with respect to administration of the estate except to settle his accounts and turn over the property of the estate to his successor.

The removal of an executor or administrator deprives him of the right to do anything further with respect to the administration or settlement of the estate.[29] He should settle his accounts in court and turn over the estate in suitable condition to his successor or to the court without delay, and the court has jurisdiction to compel him to do so.[30] Even though the removed representative has a claim against the estate, he cannot retain the amount thereof where it does not then appear that the estate is clearly solvent.[31]

On the removal of a residuary legatee from the office of executor, the title to the property of the testator undisposed of reverts to the estate, and becomes vested in the administrator de bonis non.[32]

A judgment rendered against a representative after his removal cannot bind the estate or have any validity as evidencing the existence of a claim against the estate,[33] but it will bind the representative personally notwithstanding his removal.[34]

Removal of one of several representatives. The statutes sometimes permit the court, in case of removal of one of several representatives, to determine, according as it deems necessary, whether a successor to the removed representative shall be appointed or the remaining representative shall be permitted to complete the administration alone.[35] In the absence of a provision for substitution in the will, it has been held that the coexecutor must com-

to be distributed in the estate and executrix' attempted purchase of farm justified her removal and appointment of an administrator with will annexed, costs in proceeding for removal of executrix were taxed to executrix in her individual capacity. —In re Lininger's Estate, Iowa, 297 N.W. 310.

24. N.J.—Hauser v. Hauser, 114 A. 244, 92 N.J.Eq. 615.

25. Colo.—Tuckerman v. Currier, 129 P. 210, 54 Colo. 25, Ann.Cas. 1914C 599.
Md.—Bates v. Revell, 82 A. 986, 116 Md. 691.
N.Y.—Matter of Boyer, 105 N.Y.S. 857, 54 Misc. 182.

26. Ind.—Scott v. Smith, 85 N.E. 774, 171 Ind. 453.
Tex.—Ogden v. Shropshire & Adkins, Civ.App., 37 S.W.2d 249, error refused.

Good faith immaterial

Where executrix asserted ownership of testatrix' bank account, executrix was no longer in proper position to administer estate and it was then her duty to resign, and the expense which she incurred in resisting removal proceedings was not for benefit of estate, but in the furtherance of her personal interests so that she was not entitled to an allowance thereof on final accounting, notwithstanding county court improperly refused to remove executrix, and her alleged good faith in asserting ownership of testatrix' bank account and in resisting removal as executrix was immaterial.—In re Elder's Estate, 101 P.2d 412, 164 Or. 347.

27. Me.—McCluskey's Appeal, 100 A. 977, 116 Me. 212.
Conclusiveness as to other matters see supra, subdivision h of this section.

In sustaining conclusion denying removal, appellate court would not make findings of fact and conclusions of law effective for any other purpose than appeal and they do not constitute res judicata in any future proceeding.—Jones v. Palmer, 2 S.E. 2d 850, 215 N.C. 696.

28. Wash.—State v. Superior Court, 252 P. 932, 142 Wash. 300.

29. Mass.—Burns v. Hovey, 136 N.E. 246, 242 Mass. 363.
Mo.—Williams v. People's Bank of Springfield, App., 257 S.W. 192.
Nev.—In re Pedroli's Estate, 221 P. 241, 47 Nev. 313, 31 A.L.R. 841, rehearing denied 224 P. 807, 47 Nev. 313, 31 A.L.R. 841.
Tex.—Felton v. Birchfield, Civ.App., 110 S.W.2d 1022, error dismissed—Richardson v. McCloskey, Civ.App., 261 S.W. 801, reversed on other grounds, Com.App., 276 S.W. 680.
23 C.J. p 1125 note 64.

30. Mass.—Burns v. Hovey, 136 N.E. 246, 242 Mass. 363.
Mo.—Williams v. People's Bank of Springfield, App., 257 S.W. 192.
23 C.J. p 1125 note 65.

31. N.J.—Middleton v. Carter, 68 A. 763, 73 N.J.Eq. 624, affirmed 71 A. 1134, 74 N.J.Eq. 853.

32. Mich.—Lafferty v. People's Sav. Bank, 43 N.W. 34, 76 Mich. 35.

33. Mass.—Troy Nat. Bank v. Stanton, 116 Mass. 435.
23 C.J. p 1125 note 68.

34. Ala.—Gibbs v. Hodge, 65 Ala. 366.

35. Utah.—Farnsworth v. Hatch, 151 P. 537, 47 Utah 62.
23 C.J. p 1125 note 70.

plete administration on removal of one of the executors.[36]

§ 93. —— Collateral Attack on Removal

An order removing an executor or administrator cannot be collaterally attacked.

An order of removal cannot be collaterally attacked,[37] and this has been held to be true even though the decree states a reason for the discharge which is not a cause therefor under the statute.[38]

§ 94. —— Proceedings for Reinstatement

A representative will not be reinstated where the evidence is insufficient to show that removal did not result from his own negligence.

Where an administrator was removed without notice for failure to file an inventory, and at a subsequent term the administrator petitioned for reinstatement, alleging that the inventory had been found in the clerk's office, but the evidence failed to show that, on a motion for reinstatement, he had shown such fact to the court, or on appeal to the district court had proved that the inventory had been filed in time, this was held insufficient to show that the removal of the administrator did not result from his own negligence, either from failing to file the inventory or to present the facts to the court sufficiently to prevent the judgment complained of.[39]

III. ASSETS

§ 95. What Are Assets in General

"Assets" is a term used to designate such property of a decedent's estate as may be charged with the obligations which his representative must discharge.

The word "assets," is used to designate such property belonging to the estate of a deceased person as may rightfully be charged with the obligations which his executor or administrator is bound to discharge.[40]

The term "bona notabilia" means notable goods or property worthy of notice, or of sufficient value to be accounted for.[41]

§ 96. Legal and Equitable Assets Distinguished

Legal assets of an estate are those which a creditor can reach in a court of law, while equitable assets are those which a creditor can subject to his claim only by resorting to a court of equity. The distinction is rarely enforced.

A distinction has been drawn, particularly in the English law of administration, between legal and equitable assets of an estate, legal assets being those which a creditor may subject to his claim in a court of law, and equitable assets being those which a creditor can subject to his claim only by resorting to a court of equity.[42] The point of the distinction was that with regard to the legal assets certain rules of preference or priority among creditors were clearly established, but equity disapproved of those rules and ranked all debts alike, whether founded in specialty or simple contract, and hence the distinction between legal and equitable assets was important in determining rights of creditors among themselves.[43] In the United States, however, the distinction between legal and equitable assets is rarely enforced, the old rules of priority among creditors having been altered by suitable enactments and general rules providing the order in which creditors shall be entitled to share in all assets of the estate regardless of whether they might be strictly termed legal or equitable.[44]

§ 97. Personal Property in General

Personal property owned by decedent at the time of his death goes primarily to his personal representative as assets.

The personalty of deceased goes primarily to the executor or administrator as assets rather than to the

36. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.

37. Ill.—Frothingham v. Petty, 64 N.E. 270, 197 Ill. 418.
23 C.J. p 1125 note 71.

38. Minn.—Simpson v. Cook, 24 Minn. 180.

39. Tex.—Ruenbuhl v. Heffron, Civ. App., 38 S.W. 1028.

40. U.S.—Tapp v. Stuart, D.C.Okl., 6 F.Supp. 577, 578, quoting Corpus Juris.
Okl.—In re Carter's Estate, 240 P. 727, 113 Okl. 182—Sandlin v. Barker, 218 P. 519, 95 Okl. 113.
23 C.J. p 1126 note 74—5 C.J. p 825 note 34-p 826 note 38.
"Estate" defined see supra § 3.
Property subject to administration see supra § 8.
"Assets in hand" for which an executor or other trustee is chargeable are property which come to the executor or trustee at once for the purpose of satisfying claims against him as such.—Bragdon v. Smith, 12 A.2d 665, 136 Me. 474.

41. Ga.—Neal v. Boykin, 64 S.E. 480, 132 Ga. 400.
Necessity for administration of small estates see supra § 5.

42. Tenn.—Agee v. Saunders, 157 S.W. 64, 127 Tenn. 680, 46 L.R.A., N.S., 788.
23 C.J. p 1126 note 77—36 C.J. p 976 note 89—5 C.J. p 825 note 34 [d] (2).

43. U.S.—Backhouse v. Patton, Va., 5 Pet. 160, 8 L.Ed. 82.
23 C.J. p 1127 note 78.

44. Mo.—Titterington v. Hooker, 58 Mo. 593.
23 C.J. p 1127 note 79.
Classification and priorities of debts see infra §§ 458–461.

heir,[45] and this has been held to be true even though there are no debts,[46] and even though one claiming the personalty is the sole distributee.[47] The personal assets to which the administrator becomes entitled consist only of property which was owned by decedent or to which he had a right of action, either legal or equitable, in his lifetime and at his death.[48]

Enumeration of assets. The executor or administrator becomes entitled to all corporeal personal property or things in possession and visible and tangible,[49] such as cash,[50] household provisions, if of appreciable value,[51] furniture,[52] personal effects,[53] wearing apparel, where no rights of husband, widow, or children are involved,[54] jewelry,[55] and standing timber specifically reserved in a bill of sale.[56]

The representative also becomes entitled to incorporeal or intangible property, whether evidenced by any written instrument or not,[57] such as corporate stock,[58] municipal or other corporate securi-

45. U.S.—Small v. Frick, D.C.S.C., 40 F.Supp. 778.
Ala.—Stramler v. Holman, 173 So. 377, 234 Ala. 36—Awbrey v. Estes, 112 So. 529, 216 Ala. 66.
Ind.—Smith v. Massie, 179 N.E. 20, 93 Ind.App. 582.
Miss.—Gidden v. Gidden, 167 So. 785, 176 Miss. 98.
Mo.—Wass v. Hammontree, 77 S.W. 2d 1006, 1010, citing **Corpus Juris.**
N.Y.—In re Van Zandt's Estate, 255 N.Y.S. 359, 142 Misc. 663.
N.C.—Linker v. Linker, 196 S.E. 329, 213 N.C. 351—Price v. Askins, 194 S.E. 284, 212 N.C. 583.
Okl.—State ex rel. Reirdon v. Marshall County Court, 81 P.2d 488, 183 Okl. 274.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727—Strader v. Metropolitan Life Ins. Co., 105 S.E. 74, 128 Va. 238.
Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 988, 180 Wash. 347, quoting **Corpus Juris.**
23 C.J. p 1127 note 80.
Right of heirs to personalty on death of deceased see Descent and Distribution §§ 67, 69.

46. Iowa.—Coon v. Luce, 205 N.W. 647.
23 C.J. p 1127 note 81.

47. Mass.—S. S. Pierce Co. v. Fiske, 129 N.E. 609, 237 Mass. 39.
Mo.—Adey v. Adey, 58 Mo.App. 408.

48. U.S.—Kevan v. John Hancock Mut. Life Ins. Co., D.C.Mo., 3 F. Supp. 288.
Ky.—King v. Kitchen's Ex'rs, 118 S. W.2d 144, 274 Ky. 157.
Mo.—Supreme Council R. A. v. Kacer, 69 S.W. 671, 96 Mo.App. 93.
Ohio.—Skehan v. Larkin, 179 N.E. 425, 41 Ohio App. 85.
23 C.J. p 1128 note 87 [d], p 1131 note 23 [f].

Personal property held part of estate

(1) Interest of tenant in common.—Smith v. Durkee, 254 P. 207, 121 Or. 86.

(2) Other property.—Werkman v. Harms, 232 Ill.App. 20.

Personal property held not part of estate

(1) Interest in club property, where by-law provided member's interest vested in corporation when ceasing to be member.—In re Columbia Club, 92 Pa.Super. 198.

(2) Money pledged to protect estate.—Ryan v. Stagg, 298 P. 353, 89 Mont. 390.

(3) Undisbursed balance of building loan as against mechanics' lien claimants.—Smith v. Anglo-California Trust Co., 271 P. 898, 205 Cal. 496.

(4) Other property.
Ill.—Werkman v. Harms, 232 Ill. App. 20.
Mich.—Fletcher v. Fletcher, 182 N. W. 1, 214 Mich. 12.
Minn.—In re Alms' Estate, 190 N.W. 253, 153 Minn. 256.
N.Y.—In re Mildeberger's Will, 204 N.Y.S. 881, 122 Misc. 743, affirmed 209 N.Y.S. 649, 212 App.Div. 727.
Or.—In re Edwards' Estate, 14 P.2d 274, 140 Or. 431.

Condition of property

An article which is in existence and owned by a testator at the time of his death is received by the successor to its title in the same condition as that in which it existed at time of the death.—In re Hilpert's Estate, 300 N.Y.S. 886, 165 Misc. 430.

Legal papers in possession of attorney

On death of attorney, papers as to which no proceeding was pending at time of attorney's death and which were found in attorney's files should be delivered to former clients by executrix of attorney.—In re Trybom's Estate, 6 N.Y.S.2d 29, 168 Misc. 484.

49. Ill.—Phœbe v. Jay, 1 Ill. 268.
23 C.J. p 1128 notes 87, 97.

Ability to secure possession

"All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them."—In re Freling's Estate, 230 N.W. 443, 445, 119 Neb. 605.

Property not annexed as fixture

Where a tramroad was constructed on land under an agreement by which the material in the road did not become a fixture, such material on the death of the owner of the land and on the failure of the owner of the tramroad to remove the same under circumstances working a forfeiture passed to his administrator, and not to his heirs.—Lane v. Bell Lumber Co., 115 S.E. 207, 122 S. C. 140.

50. Me.—Hawes v. Williams, 43 A. 101, 92 Me. 483.
23 C.J. p 1128 note 88.

On collection, money belonging to intestate's estate becomes part thereof.—Guttery v. Kilgore, 172 So. 627, 233 Ala. 514.

51. N.H.—Griswold v. Chandler, 5 N.H. 492.
23 C.J. p 1128 note 90.

52. N.Y.—In re Lichtblau, 261 N.Y. S. 863, 146 Misc. 278.

53. Md.—Mitchell v. Frederick, 170 A. 733, 166 Md. 42, 92 A.L.R. 1412.

Effects of deceased person subject to military law will be turned over to widow or legal representative.—Sturgeon v. U. S., 60 Ct.Cl. 91.

54. Pa.—Steen's Estate, 1 Pa.Co. 473.
23 C.J. p 1128 note 92.

55. Ind.—Coffinberry v. Madden, 66 N.E. 64, 30 Ind.App. 360, 96 Am. S.R. 349.
Md.—Snively v. Beavans, 1 Md. 208.
23 C.J. p 1128 note 93.

56. Pa.—McClintock's Appeal, 71 Pa. 365.

57. Mo.—Wass v. Hammontree, 77 S.W.2d 1006, 1010, citing **Corpus Juris.**
23 C.J. p 1128 note 99.

58. Ark.—Rutherford v. Casey, 77 S.W.2d 58, 190 Ark. 79.
Ga.—Shingler v. Shingler, 192 S.E. 824, 184 Ga. 671.
Ky.—Fischer v. Lange, 228 S.W. 684, 190 Ky. 699.
Mich.—Bohnsack v. Detroit Trust Co., 290 N.W. 367, 292 Mich. 167.
N.Y.—Bailey v. Hollister, 26 N.Y. 112—In re Schirmer's Will, 248 N. Y.S. 497, 231 App.Div. 625.
23 C.J. p 1128 note 1.

Properties of corporation

(1) "Even though . . . substantially the entire stock of a corporation was owned by the intestate at his death, only such stock, and not the properties of the corporation, passed to his estate, especially where . . . the corporation owed

ties,[59] the good will of a business, with the books, addresses, etc., incident thereto,[60] a seat in a stock exchange,[61] trade secrets,[62] and patent rights[63] or copyrights.[64]

On the other hand, a liquor license has been held not an asset of the estate of the deceased licensee;[65] nor are private letters received by decedent assets of his estate.[66]

§ 98. Income, Increase, and Accretions

Personal assets of a decedent's estate include any income, increase, accretions, and accessions of and to the personalty owned by deceased in his lifetime.

Personal assets are not necessarily restricted to personalty which deceased owned in his lifetime, but embrace also the proper and just earnings, income, increase, accretions, and accessions of and to those assets, even after the death of decedent.[67]

§ 99. Legacies and Distributive Shares

Where a legatee or distributee dies before receiving payment, the legacy or distributive share ordinarily goes to his executor or administrator.

A legacy due one under a will without restriction, or the share of a residuary legatee or distributee in an unsettled estate, goes, on his death before receiving payment, to his executor or administrator, as the proper representative to collect and receive the fund, irrespective of the persons who may finally inherit;[68] and the same is true as to any portion of a legacy or distributive share remaining unpaid at the death of the heir or legatee.[69]

Where, however, there are no creditors of the heir, legatee, or distributee, and no claim of husband or widow to adjust, a payment directly to his next of kin is valid, for this accomplishes by a more direct method the same result as though payment had been made to the administrator and the fund distributed by him to those entitled.[70] Where a legatee predeceases the testator, but a lapse of the legacy is prevented by substitutionary provisions in the will[71] or by preventative statutes,[72] the legacy goes to the person or persons designated by the testator or by the statute, and not to the executor or administrator of the legatee; and where a legatee is given merely a life interest, with remainder to his

debts."—Shingler v. Shingler, 192 S. E. 824, 825, 184 Ga. 671.

(2) Where corporation was substantially owned by decedent, its affairs and property are to be administered as assets of decedent's estate.—Central Farmers' Trust Co. v. Pinkham, 146 So. 563, 108 Fla. 355.

(3) As between decedent's estate and its distributees and creditors, the assets of a corporation preponderantly owned by decedent are those of his estate for all administrative purposes.—In re Abramowitz' Estate, 9 N.Y.S.2d 846, 170 Misc. 68.

(4) For the purposes of estate administration where wholly owned corporations are involved, there exists what is in effect an assignment to the executor by corporation of all its assets, and wholly owned corporation is merged into the estate and has to be accounted for as if its assets were in form as well as in substance estate assets.—In re Browning's Estate, 16 N.Y.S.2d 841, 172 Misc. 1088.

59. S.C.—Chapman v. Charleston, 9 S.E. 591, 30 S.C. 549, 3 L.R.A. 311.

60. Mo.—Magee v. Pope, 112 S.W. 2d 891, 234 Mo.App. 191.
23 C.J. p 1129 note 7—28 C.J. p 737 note 68.

Good will of purely personal business carried on by decedent terminates at his death and is not deemed an asset of his estate.
N.Y.—In re Leserman's Estate, 260 N.Y.S. 188, 145 Misc. 387.
Pa.—In re Baer's Estate, 38 Pa.Dist. & Co. 409, 56 Montg.Co. 286, 54 York.Leg.Rec. 127.

Illegal business has no good will which can pass to administrator as an asset.—Gouy Shong v. Chew Shee, 150 N.E. 225, 254 Mass. 366.

61. N.Y.—Matter of Grant, 116 N.Y. S. 767, 1152, 132 App.Div. 739.
23 C.J. p 1128 note 3.

62. Mass.—Peabody v. Norfolk, 98 Mass. 452, 96 Am.D. 664.
23 C.J. p 1129 note 8.

63. U.S.—Bradley v. Dull, C.C.Pa., 19 F. 913.
23 C.J. p 1129 note 9.

64. Tenn.—Oliver v. Morgan, 10 Heisk. 322.

65. Mich.—Hartingh v. Bay Cir. Judge, 142 N.W. 585, 176 Mich. 289, Ann.Cas.1915B 520.
33 C.J. p 533 note 21.
Nature of rights conferred by liquor license see the C.J.S. title Intoxicating Liquors §§ 109–114, also 33 C.J. p 532 note 14 et seq.

66. N.Y.—In re Ryan's Estate, 188 N.Y.S. 387, 115 Misc. 472.
23 C.J. p 1128 note 87 [c].

67. U.S.—Globe Indemnity Co. v. Bruce, C.C.A.Okl., 81 F.2d 143, reversing, D.C., Bruce v. Globe Indemnity Co., 9 F.Supp. 761, certiorari denied 56 S.Ct. 591, two cases, 297 U.S. 716, 80 L.Ed. 1001.
Minn.—In re Butler's Estate, 284 N. W. 889, 205 Minn. 60.
Mo.—In re Holmes' Estate, 40 S.W. 2d 616, 619, 328 Mo. 148, citing **Corpus Juris.**
23 C.J. p 1129 note 16.

68. Mass.—Richardson v. Warfield, 148 N.E. 141, 252 Mass. 518.
N.J.—Hedden v. Hedden, 162 A. 114, 10 N.J.Misc. 1047.
N.Y.—In re Schwarzmann's Estate, 21 N.Y.S.2d 912, 174 Misc. 834—In re Link's Will, 17 N.Y.S.2d 634, 173 Misc. 217—In re Trent's Estate, 288 N.Y.S. 928, 159 Misc. 822—In re Hoole's Estate, 282 N.Y.S. 657, 156 Misc. 821.
Ohio.—Layman v. Claus, 153 N.E. 756, 22 Ohio App. 55.
Or.—In re McLeod's Estate, 82 P.2d 884, 159 Or. 687.
W.Va.—Kennedy's Adm'r v. Kennedy, 125 S.E. 337, 97 W.Va. 491.
23 C.J. p 1129 note 17.
Effect of death of distributee on disposition of share see Descent and Distribution § 67.

If legacy is contingent it will fail on the death of the legatee prior to the happening of the contingency.—Marsh v. Wheeler, 2 Edw., N.Y., 156.

69. N.Y.—In re McGowan's Estate, 26 N.Y.S.2d 981, 176 Misc. 189.
23 C.J. p 1130 note 18.

70. Miss.—Maxwell v. Craft, 32 Miss. 307.
23 C.J. p 1130 note 19.

71. N.J.—Brokaw v. Hudson, 27 N. J.Eq. 135.
Lapse of legacies see the C.J.S. title Wills §§ 1197–1222, also 69 C. J. p 1051 note 48 et seq.

72. N.J.—Canfield v. Canfield, 50 A. 471, 62 N.J.Eq. 578—Suydam v. Voorhees, 43 A. 4, 58 N.J.Eq. 157.

heirs, the principal of the fund is not assets of the life tenant's estate.[73]

§ 100. Debts and Rights of Action

The personal representative ordinarily takes as assets all debts and rights of action, including rights of action connected with realty which have accrued prior to decedent's death and claims against the government which are founded on obligations or rights recognized by law.

All debts, claims, rights, choses in action, and surviving rights of action of decedent, of every kind, reducible to money, vest in the executor or administrator, to be collected or sued on or transferred for the benefit of the estate,[74] so that, in the absence of some default, fraud, or refusal to act on the part of the personal representative, an heir ordinarily cannot sue on rights of action belonging to the estate.[75]

The representative thus becomes entitled to sums due under contracts,[76] to notes or bonds,[77] and to bank deposits,[78] and, likewise, becomes entitled

73. R.I.—Thayer v. Fairchild, 56 A. 773, 25 R.I. 509.

74. Ala.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.
Ark.—Turner v. Vaughan, 238 S.W. 1059, 152 Ark. 475.
Cal.—Hall v. Alexander, 64 P.2d 767, 18 Cal.App.2d 660.
Colo.—In re Grigsby's Estate, 56 P. 2d 1318, 98 Colo. 489.
Ind.—Pond v. Newgent, 176 N.E. 17, 96 Ind.App. 468.
Ky.—Moore's Adm'r v. Wagers' Adm'r, 48 S.W.2d 15, 243 Ky. 351.
Minn.—Boeck v. Johnson, 201 N.W. 311, 161 Minn. 248.
Mo.—Wass v. Hammontree, 77 S.W. 2d 1006, 1010, quoting **Corpus Juris.**
N.Y.—In re Duggan's Will, 262 N.Y. S. 512, 146 Misc. 596.
Ohio.—Du Vall v. Faulkner, 149 N.E. 868, 113 Ohio St. 543.
Wis.—In re Lake's Estate, 253 N.W. 174, 214 Wis. 474.
Wyo.—Tuttle v. Short, 288 P. 524, 42 Wyo. 1, 70 A.L.R. 106.
23 C.J. p 1130 note 23, p 1129 note 6, p 1128 note 1 [a]—24 C.J. p 206 note 88.

Cause of action for personal covenant broken during lifetime of decedent.—Mott v. Mott, 11 Barb., N. Y., 127.

Claim for reimbursement of decedent as surety
Ill.—Harris v. Harris, 92 Ill.App. 455.

Claim under guarantee
Mass.—Plummer v. Emery, 77 N.E. 690, 191 Mass. 183—Walsh v. Packard, 42 N.E. 577, 165 Mass. 189, 52 Am.S.R. 508, 40 L.R.A. 321.
N.J.—Weiss v. Sullivan, 109 A. 344, 94 N.J.Law 191.

Debt due from heir, devisee, legatee, or creditor
Ky.—Green v. Green, 14 S.W. 836, 12 Ky.L. 585.
23 C.J. p 1130 note 23 [c].

Right of action on recognizance
Pa.—Pauley v. Pauley, 7 Watts 159.

Right of action under marriage settlement
Ky.—Brunk v. Means, 11 B.Mon. 214—Mitchel v. Mitchel, 4 B.Mon. 380, 41 Am.D. 237.

Right of election in vendor, on default of the purchaser, to sue for the price or avoid the contract.—Oakes v. Killilan, 95 N.W. 511, 1 Neb., Unoff., 55.

Right to accounting
Ariz.—Kinealy v. O'Reilly, 236 P. 716, 28 Ariz. 246.
23 C.J. p 1130 note 23 [b].

Right to vendor's lien
Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623.
Wis.—Evans v. Enloe, 34 N.W. 918, 36 N.W. 22, 70 Wis. 345.

Right to earnings or services of infant
(1) Right to recover for loss of services of minor prior to father's death and for expenses because of defendant's wrongful injury of such minor is asset of estate.—Esstman v. United Rys. Co. of St. Louis, Mo. App., 220 S.W. 508.

(2) Right to infant's earnings prior to father's death is in personal representative, and mother's emancipation of infant after father's death could not estop representative from making claim therefor.—Potter v. Davidson, 20 P.2d 409, 143 Or. 101, rehearing denied 21 P.2d 785, 143 Or. 101.

Right to enforce stockholders' liability
Okl.—Keaton v. Shiflett, 63 P.2d 102, 178 Okl. 587.

Right to recover for hospital and medical services furnished deceased employee.—Texas Employers' Ins. Ass'n v. Herron, Tex.Civ.App., 29 S. W.2d 524, error dismissed.

Valuable right of injunction of which equity takes cognizance.—Peabody v. Norfolk, 98 Mass. 452, 96 Am.D. 664.

75. Cal.—Holland v. Kelly, 171 P. 421, 177 Cal. 507.
Right of heirs to enforce choses in action of decedent see Descent and Distribution § 85 d.

76. N.C.—Avery v. Guy, 162 S.E. 217, 202 N.C. 152.
23 C.J. p 1131 note 24.

Balances due on accounts
N.C.—Mayo v. Dawson, 76 S.E. 241, 160 N.C. 76.

Claim for interest due at time of decedent's death.—Sweigart v. Frey, 8 Serg. & R., Pa., 299.

Claim against fraternal association for sick benefits accruing during the lifetime of decedent.—Continental Casualty Co. v. Maxwell, 127 Ill. App. 19.

Right of action for value of support to which decedent was entitled as part of the consideration for a deed, but which was not furnished. —Bryson v. Briggs, 104 S.W. 982, 32 Ky.L. 159.

Right to indemnity under insurance policy
Ill.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N.E. 2d 748, 303 Ill.App. 139.
Or.—In re Vilas' Estate, 110 P.2d 940.

Right to sue indemnity insurer after obtaining judgment against insured.—Bias v. Ohio Farmers Indemnity Co., 81 P.2d 1057, 28 Cal.App.2d 14—Pigg v. International Indemnity Co., 261 P. 486, 86 Cal.App. 671.

Necessity of performance of conditions precedent
A claim for money based on a contract dependent on the performance of conditions precedent is not an asset of the estate where there has been no performance or offer to perform.—Matthews v. Manhattan Life Ins. Co., 189 S.E. 858, 55 Ga.App. 204.

77. Ark.—Rutherford v. Casey, 77 S.W.2d 58, 190 Ark. 79.
Fla.—Corlett v. May, 171 So. 517, 126 Fla. 506.
Ill.—Feeney v. Runyan, 147 N.E. 114, 316 Ill. 246.
La.—Martin v. Himel, 140 So. 478, 174 La. 281.
Mass.—Goodfellow v. Farnham, 132 N.E. 363, 239 Mass. 590.
Pa.—In re Gingerich's Estate, 51 York Leg.Rec. 189.
23 C.J. p 1128 note 4—24 C.J. p 202 note 63 [a].

78. Cal.—People v. McEnerney, 297 P. 568, 112 Cal.App. 609.
Ill.—Werkman v. Harms, 232 Ill.App. 20.
Miss.—Godwin v. Godwin, 107 So. 13, 141 Miss. 633.
Mo.—Elberta Peach & Land Co. v. Chicago Bonding & Surety Co., 215 S.W. 20, 279 Mo. 535.

to judgments,[79] arrears of wages or salary,[80] and to dividends on corporate stock due and payable before decedent's death,[81] or even when declared and payable after such death.[82]

The representative also becomes invested with the general rights of action pertaining to personal property,[83] including a right of action to recover personal property,[84] or for injuries to such property;[85] a cause of action for personal injuries,[86] or the damages recovered in such an action,[87] which is revived on plaintiff's death;[88] and a right of action for damages for deceit.[89]

Rights of action connected with realty. With regard to rights of action relating to or arising out of real property, such as for a breach of covenants relating thereto, for a trespass on or other injury to the real estate, or for damages for the condemnation of, or injury to, the land in the exercise of the right of eminent domain, the governing consideration is whether the injury accrued and the right of action became complete before the death of the owner.[90] Rights of action accruing before the death of the owner go to the personal representative as assets;[91] but where the injury occurred or the right of action accrued subsequent to such death, the claim vests in the heirs who were at the time the owners of the property,[92] and even though the mon-

N.Y.—In re Manning's Estate, 278 N.Y.S. 303, 244 App.Div. 9, affirmed Dunbar & Sullivan Dredging Co. v. Fidelity & Deposit Co. of Maryland, 198 N.E. 560, 268 N.Y. 690—In re Hoffman's Estate, 25 N.Y.S.2d 339, 175 Misc. 607—In re Caraher's Estate, 245 N.Y.S. 305, 138 Misc. 10.

Ohio.—Waltbillig v. Burke, 17 Ohio App. 444.

Pa.—Mauser v. Mauser, 192 A. 137, 326 Pa. 257—In re Schweitzer's Estate, 49 Dauph.Co. 286—In re Throne's Estate, 49 Dauph.Co. 251.

23 C.J. p 1128 note 89, p 1131 note 25.

Check paid after death

Claimant of amount of check, given by decedent and paid by bank after decedent's death, must return amount and file claim against estate. —In re Ehlers' Estate, 231 N.Y.S. 16, 132 Misc. 910.

Amount paid to bank for unused drafts

Or.—Gellert v. Bank of California, National Ass'n, 214 P. 377, 107 Or. 162.

Indebtedness to bank

The deposit is not an asset where the amount is less than a debt owed by decedent to the bank.—Backer v. City Bank & Trust Co., 180 S.E. 604, 180 Ga. 672—Westbrook v. Westbrook, 187 S.E. 682, 54 Ga.App. 278.

79. Colo.—Bright v. Schmitt, 231 P. 159, 76 Colo. 329.

Conn.—Ives v. Beecher, 52 A. 746, 75 Conn. 153.

Mo.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.

23 C.J. p 1131 note 38.

Judgment obtained by heirs

Judgment given in an action to recover property of the estate brought and successfully prosecuted by the heirs after the administrator's refusal to sue is part of the assets of the estate.—Bem v. Shoemaker, 74 N.W. 239, 10 S.D. 453.

Right to revive judgment after it becomes dormant is in the administrator.—Armstrong v. Harper, 102 S.E. 463, 25 Ga.App. 71.

80. Mass.—Loring v. Cunningham, 9 Cush. 87.

23 C.J. p 1131 note 27.

Uncollected fees

Tenn.—Stewart v. Taylor, 9 Lea 352.

Claim for services rendered by decedent in his lifetime.—Lappin v. Mumford, 14 Kan. 9.

81. Conn.—Welles v. Cowles, 4 Conn. 182, 10 Am.D. 115.

Ga.—People's Nat. Bank v. Cleveland, 44 S.E. 20, 117 Ga. 908.

Derivative right

Any right of administrators of life tenant's son in undistributed earnings of corporation, on ground that earnings passed under life tenant's will to son, was derivative and could rise no higher than right of life tenant thereto during her lifetime.—Green v. Philadelphia Inquirer Co., 196 A. 32, 329 Pa. 169.

82. U.S.—Sanborn v. Commissioner of Internal Revenue, C.C.A., 88 F. 2d 134, certiorari denied 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

Va.—Hampton Roads Fire & Marine Ins. Co. v. Coburn Motor Car Co., 164 S.E. 723, 158 Va. 675, 84 A.L.R. 731.

23 C.J. p 1131 note 31.

83. Iowa.—Brandenburg v. Carmichael, 185 N.W. 486, 192 Iowa 694.

24 C.J. p 206 note 89.

84. Iowa.—Brandenburg v. Carmichael, supra.

23 C.J. p 1131 note 32.

Right of action to set aside transfer of property

Ky.—Baker v. McDonald, 215 S.W. 292, 185 Ky. 470.

Ohio.—Skehan v. Larkin, 179 N.E. 425, 41 Ohio App. 85.

85. Iowa.—Brandenburg v. Carmichael, 185 N.W. 486, 192 Iowa 694.

Miss.—General Motors Acceptance Corporation v. New Orleans & G. N. R. Co., 125 So. 541, 156 Miss. 122.

Mo.—Smith v. Denny, 37 Mo. 20.

Nature of injury

The legislature, when using the words "trespass committed on the estate" in statute providing that executors and administrators may maintain actions for "trespass committed on the estate" of the deceased during his lifetime, contemplated a direct damage or injury to physical property of the estate and not consequential loss which might result to the estate from trespass to the person in his lifetime.—Boyd v. Sibold, 109 P.2d 535, 7 Wash.2d 279.

86. Okl.—Okmulgee Gas Co. v. Kelly, 232 P. 428, 105 Okl. 189.

Claim for death of decedent see infra § 102.

87. Cal.—Blackwell v. American Film Co., 209 P. 999, 189 Cal. 689.

N.Y.—In re Fortunoff's Estate, 3 N.Y.S.2d 549, 167 Misc. 119—In re Von Kauffmann's Estate, 3 N.Y.S. 2d 486, 167 Misc. 83.

Amount received on settlement of such an action is assets.—Taylor's Estate, 36 A. 230, 179 Pa. 254.

88. Okl.—St. Louis & S. F. R. Co., v. Goode, 142 P. 1185, 42 Okl. 784, L.R.A.1915E 1141.

23 C.J. p 1131 note 47.

89. Mass.—Marvel v. Cobb, 86 N.E. 360, 200 Mass. 293.

90. Tenn.—Griffith v. Nashville, C. & St. L. Ry. 246 S.W. 532, 147 Tenn. 224.

23 C.J. p 1135 note 75.

91. Ohio.—Baughman v. Hower, 10 N.E.2d 176, 56 Ohio App. 162.

Tenn.—Griffith v. Nashville, C. & St. L. Ry., 246 S.W. 532, 147 Tenn. 224.

23 C.J. p 1135 note 76.

Right of action to set aside conveyance of a tract of land and a mortgage of another tract induced by fraud goes to the personal representative.—Marvel v. Cobb, 86 N.E. 360, 200 Mass. 293.

92. Tenn.—Griffith v. Nashville, C. & St. L. Ry., 246 S.W. 532, 147 Tenn. 224.

23 C.J. p 1135 note 77.

ey is paid to the personal representative in such case, it is paid for the use of the heirs, and cannot be treated as assets of the estate.[93]

Claims against government. A claim against the government is an asset of the estate of claimant, and passes to his executor or administrator to be applied in satisfaction of his debts, like any other claim existing in favor of the estate, if it is founded on a contract obligation or other right which the law recognizes,[94] and this has been held to be true even though the act of congress recognizing the claim directed payment to decedent or his heirs.[95] Where an appropriation is specifically made to the administrator of the estate of the person whose claim is thereby recognized, the amount appropriated constitutes assets of the estate,[96] and it has also been held that money appropriated to the "legal representatives" of a person goes to his administrator and not to his heirs.[97]

On the other hand, if a claim is founded on a voluntary donation made by the government as a reward for past services, however meritorious, or as compensation for any loss or injury for which the government was not liable, it is not assets which can be applied to the debts of the person entitled, but generally belongs to his widow and children;[98] and a fortiori the same is true of an appropriation made directly to the heirs of one who is deceased at the time when such appropriation is made.[99]

§ 101. —— Debts Due from Representative

Debts due from the executor or administrator are assets of the decedent's estate.

At common law the appointment of one's debtor as executor was held to extinguish the debt, unless a contrary intent was manifest in the will,[1] and the rule was applied even where such executor died before probate or was one of several joint debtors.[2] In equity, however, the effect of the appointment of a debtor to the office of executor was that the debt due from the debtor executor was considered to have been paid by him to himself and on this supposition the rule was established in equity that the executor was accountable for the amount of his debt as assets.[3]

In the United States the rule is well settled that, where a testator appoints his debtor as executor, this does not release the debt[4] unless such an intention is declared in the will,[5] but that debts owing from executors stand upon the same footing with debts due decedent's estate from other sources and are to be regarded as assets,[6] and that if a debt is secured the security is not discharged.[7] An administrator who is indebted to his intestate must account for the debt, and even at common law his appointment, not being through the act and favor of his creditor, does not appear to have extinguished his debt.[8]

93. Ind.—Hankins v. Kimball, 57 Ind. 42.

94. U.S.—Briggs v. Walker, 19 S. Ct. 1, 171 U.S. 466, 43 L.Ed. 243, affirming 43 S.W. 479, 102 Ky. 359, 19 Ky.L. 1490.
23 C.J. p 1136 note 80.

Pensions and arrears of pay or bounties

(1) Pensions or arrears of pay or bounties due at the time of a person's death ordinarily are assets of the estate.
Mass.—Slade v. Slade, 11 Cush. 466 —Foot v. Knowles, 4 Metc. 386.
Pa.—Maitland v. Grissinger, 1 Woodw. 294.
23 C.J. p 1136 note 80 [b], [c].

(2) It is otherwise, however, under statutes so providing, or where by statute the pension or arrears are payable to decedent's widow.
U.S.—Donnelly v. U. S., 17 Ct.Cl. 105.
Ky.—Cooper v. Cooper, 5 Ky.Op. 212.

95. N.J.—Price v. Forrest, 35 A. 1075, 54 N.J.Eq. 669, affirmed 37 A. 1117.
23 C.J. p 1136 note 81.

96. Miss.—Nutt v. Forsythe, 36 So. 247, 84 Miss. 211.

97. U.S.—Thompson v. U. S., 20 Ct. Cl. 276.

98. Pa.—Gillan v. Gillan, 55 Pa. 430.
23 C.J. p 1136 note 84.

99. U.S.—Emerson v. Hall, La., 13 Pet. 409, 10 L.Ed. 223.
La.—Mulledy's Succession, 18 So. 633, 47 La.Ann. 1580.

1. Cal.—In re Jones' Estate, 2 P. 2d 483, 115 Cal.App. 664.
Iowa.—In re Parker's Estate, 179 N. W. 525, 189 Iowa 1131.
Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
Wyo.—State v. Allen, 294 P. 681, 42 Wyo. 296.
23 C.J. p 1132 note 56—8 C.J. p 579 note 56.

Reasons for rule

"Various reasons were assigned for this rule. By some it was said that the appointment suspended the right of action, and being once suspended by the voluntary act of the creditor, it was gone forever. By others it was said that the appointment was regarded as a specific legacy to the debtor for the express purpose of discharging the debt."—Glens Falls Indemnity Co. v. Wall, 177 S.E. 901, 902, 163 Va. 635.

2. Ky.—Mitchell v. Rice, 6 J.J. Marsh. 623.
23 C.J. p 1132 note 56.

3. Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
Wyo.—State v. Allen, 294 P. 681, 684, 42 Wyo. 296, citing **Corpus Juris.**
23 C.J. p 1132 note 57.

4. Iowa.—In re Parker's Estate, 179 N.W. 525, 189 Iowa 1131.
Va.—Glens Falls Indemnity Co. v. Wall, 177 S.E. 901, 163 Va. 635.
23 C.J. p 1132 note 58.

5. N.Y.—In re Snell's Estate, 17 N. Y.S.2d 510, 173 Misc. 282.
23 C.J. p 1132 note 59.

6. Iowa.—In re Parker's Estate, 179 N.W. 525, 189 Iowa 1131.
Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
Ohio.—In re Fiebig's Estate, 22 N. E.2d 288, 61 Ohio App. 40.
23 C.J. p 1132 note 60.
Collection of debts due from representative see infra § 182.

7. Me.—Stewart v. Hurd, 78 A. 838, 107 Me. 457, 32 L.R.A.,N.S., 671, Ann.Cas.1912D 662.
23 C.J. p 1132 note 61.

8. N.Y.—In re Phetteplace's Estate, 6 N.Y.S.2d 845.
Va.—Glens Falls Indemnity Co. v. Wall, 177 S.E. 901, 163 Va. 635.
23 C.J. p 1133 note 62.

It is sometimes said that when a debtor becomes executor or administrator of the estate of his creditor the debt is extinguished at law,[9] but the amount of the debt becomes at once assets in his hands,[10] even though it is not included in the inventory or accounts,[11] and the representative is chargeable with the amount thereof[12] as cash,[13] regardless, in some jurisdictions,[14] but not in others,[15] of his insolvency at the time of his acceptance or thereafter, as under such circumstances equity will raise a trust[16] or presume that the debt is paid.[17]

However, while the debt must be treated as money in the executor's hands for the purpose of administration, it will not for all purposes stand on the same footing as though he had actually received so much money.[18] Thus, if the representative is wholly unable to pay the money in pursuance of an order or decree of the surrogate, on account of his insolvency, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other debtor;[19] and it is also clear that an executor unable to pay his own debt, and thus unable to comply with the decree of the surrogate charging him with it as so much money in his hands, would not be guilty of embezzling the money and could not be convicted of crime as he could be if he embezzled money or property which actually came into his hands.[20] Further, it has been held that an executor who includes in his inventory a claim of the estate against himself, stating its nature, does not thereby admit the indebtedness or waive any defenses which he may have.[21]

9. Ala.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.
Cal.—In re Jones' Estate, 2 P.2d 483, 115 Cal.App. 664.
Mass.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315—King v. Murray, 190 N.E. 526, 286 Mass. 492.
Wis.—In re Stubbs' Will, 250 N.W. 845, 213 Wis. 439.
23 C.J. p 1133 note 63.

10. Ala.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.
Mass.—King v. Murray, 190 N.E. 526, 286 Mass. 492.
Ohio.—U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Jones, 153 N. E. 281, 22 Ohio App. 345.
Tex.—American Surety Co. of New York v. Norton, Com.App., 238 S. W. 1111.
Vt.—Scott v. Bradford Nat. Bank, 179 A. 149, 107 Vt. 226.
Wis.—In re Howey's Estate, 256 N. W. 620, 216 Wis. 94.
23 C.J. p 1133 note 64.

11. Wis.—Robinson v. Hodgkin, 74 N.W. 791, 99 Wis. 327.
23 C.J. p 1134 note 65.

12. Mass.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315.
Wis.—In re Hoya's Will, 180 N.W. 940, 173 Wis. 196.

Authorities reviewed

Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

13. Cal.—In re Azevedo's Estate, 62 P.2d 1058, 17 Cal.App.2d 710—In re Jones' Estate, 2 P.2d 483, 115 Cal. App. 664.
Iowa.—In re Christensen's Estate, 296 N.W. 198, 229 Iowa 1162—In re Windhorst's Estate, 288 N.W. 892, 227 Iowa 808.
Kan.—In re Edgington's Estate, 61 P.2d 873, 144 Kan. 478.
Mass.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315—King v. Murray, 190 N.E. 526, 286 Mass. 492.
Mont.—In re Rodgers' Estate, 217 P. 678, 68 Mont. 46.
N.Y.—In re Purcell's Will, 26 N.Y.S. 2d 353.
Ohio.—U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Jones, 153 N. E. 281, 22 Ohio App. 345.
Tex.—American Surety Co. of New York v. Norton, Com.App., 238 S. W. 1111.
Vt.—Scott v. Bradford Nat. Bank, 179 A. 149, 107 Vt. 226.
Wis.—In re Howey's Estate, 256 N. W. 620, 216 Wis. 94—In re Stubbs' Will, 250 N.W. 845, 213 Wis. 439.
23 C.J. p 1134 note 66.

Credit for payments on account

Executor is entitled to credit on account for payments made on his personal debt to decedent while acting as executor, even if statute providing that executor is liable for debt to decedent as for money in his hands be susceptible of construction that such debt is always chargeable to executor as money in hand.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

Representative personally possessed of assets

Executors and administrators are alike liable in representative capacities for amount of personal indebtedness to decedent, as for money in their hands, under Rev.Codes 1921 § 10133, where they are, or were, personally possessed of assets, from proceeds of which they could have realized cash for which liable.—In re Connolly's Estate, supra.

14. Kan.—In re Edgington's Estate, 61 P.2d 873, 144 Kan. 478.
Mass.—King v. Murray, 190 N.E. 526, 286 Mass. 492.
Tex.—American Surety Co. of New York v. Norton, Com.App., 238 S. W. 1111.
Wis.—In re Howey's Estate, 256 N. W. 620, 216 Wis. 94—In re Stubbs' Will, 250 N.W. 845, 213 Wis. 439.
23 C.J. p 1133 note 64 [j], p 1134 notes 66 [b], 68 [a].

15. Cal.—In re Azevedo's Estate, 62 P.2d 1058, 17 Cal.App.2d 710.
Iowa.—In re Christensen's Estate, 296 N.W. 198, 229 Iowa 1162—In re Windhorst's Estate, 288 N.W. 892, 227 Iowa 808.
Mont.—In re Connolly's Estate, 257 P. 418, 79 Mont. 445.
N.Y.—Matter of Georgi, 47 N.Y.S. 1061, 21 Misc. 419.
Va.—Glens Falls Indemnity Co. v. Wall, 177 S.E. 901, 163 Va. 635.
Wyo.—State v. Allen, 294 P. 681, 42 Wyo. 296.

Necessity of diligence in collection

Executor is liable, to same extent as administrator at common law, for his own debt to decedent, but is not liable therefor, as for money in hand, where not guilty of neglect and able to turn over all estate received, including such cash as he could recover with due diligence on his own and all other debts.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

16. S.C.—Porter v. Cheesborough, 6 S.C.Eq. 275.
23 C.J. p 1134 note 67.

Trust does not extend to property with which payment might be made. —Edisto Nat. Bank of Orangeburg, S. C., v. Bryant, C.C.A.S.C., 72 F.2d 917.

17. Ala.—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578.
23 C.J. p 1134 note 68.

18. Ill.—Wachsmuth v. Penn Mut. L. Ins. Co., 147 Ill.App. 510, affirmed 89 N.E. 787, 241 Ill. 409, 132 Am.S.R. 226, 26 L.R.A.,N.S., 411.
23 C.J. p 1134 note 69.

19. Cal.—Matter of Walker, 57 P. 991, 125 Cal. 242, 73 Am.S.R. 40.
23 C.J. p 1135 note 70.

20. N.Y.—Baucus v. Stover, 89 N.Y. 1, reversing 24 Hun 109.

21. Wis.—Lynch v. Divan, 29 N.W. 213, 66 Wis. 490, 492.
23 C.J. p 1135 note 72.

A debt of a firm of which the personal representative is a member is usually considered as assets in his hands,[22] although this has been denied.[23]

§ 102. —— Claim for Death of Decedent

A right of action for the death of a decedent or the recovery in such an action is a part of the assets of a decedent's estate under some statutes, but under other statutes the claim or recovery is not an asset of the estate except for limited and particular purposes.

The question as to whether a right of action for the death of a decedent or the recovery in such an action is an asset of decedent's estate is determined by the provisions of the applicable statutes, under some of which the right of action or the recovery is a part of the estate.[24] Under other statutes the right of action or the recovery is not an asset of the estate,[25] except for the limited purpose of collection and distribution,[26] or unless an action for personal injuries had been commenced by the decedent himself,[27] but belongs to those persons designated as beneficiaries by the statute.[28]

22. N.Y.—Matter of Ablowich, 103 N.Y.S. 699, 118 App.Div. 626.
23 C.J. p 1135 note 73.

23. Ohio.—James v. West, 65 N.E. 156, 67 Ohio St. 28.

24. Ky.—Berg v. Berg's Adm'r, 48 S.W. 432, 105 Ky. 80, 20 Ky.L. 1083—Givens v. Kentucky Cent. R. Co., 12 S.W. 257, 11 Ky.L. 452.
5 C.J. p 825 note 34 [c] (5).

Recovery specifically for benefit of estate becomes part of assets of estate.—Adams v. Shell, 33 S.W.2d 1107, 182 Ark. 959.

Applying Alaska statute
Cal.—McManus v. Red Salmon Canning Co., 173 P. 1112, 37 Cal.App. 133.

Applying Kentucky statute
U.S.—Maysville Street Railroad & Transfer Co. v. Marvin, C.C.A.Ky., 59 F. 91.

25. U.S.—In re Butler, D.C.Va., 20 F.Supp. 995.
Ala.—McWhorter Transfer Co. v. Peek, 167 So. 291, 232 Ala. 143—Louisville & N. R. Co. v. Echols, 105 So. 651, 213 Ala. 490.
Cal.—In re Riccomi's Estate, 197 P. 97, 185 Cal. 458, 14 A.L.R. 509.
Ga.—Cooper v. Cooper, 119 S.E. 335, 30 Ga.App. 710.
Ind.—Fink v. Peden, 17 N.E.2d 95, 214 Ind. 584—Messenger v. Messenger, 17 N.E.2d 488, 106 Ind.App. 127—Chicago, I. & L. Ry. Co. v. Hemstock, 4 N.E.2d 677, 102 Ind. App. 654, followed in 5 N.E.2d 1010, 103 Ind.App. 705—Indianapolis & Cincinnati Traction Co. v. Thompson, 134 N.E. 514, 81 Ind.App. 498.
Kan.—Cudney v. United Power & Light Corporation, 51 P.2d 28, 142 Kan. 613, 101 A.L.R. 835.
Ky.—Caruthers v. Cox, 14 S.W. 599, 12 Ky.L. 567.
Me.—Danforth v. Emmons, 126 A. 821, 124 Me. 156.
Minn.—Masek v. Hedlund, 202 N.W. 732, 162 Minn. 291—Turner v. Minneapolis St. Ry. Co., 190 N.W. 986, 153 Minn. 509.
Nev.—In re Troyer's Estate, 227 P. 1008, 48 Nev. 72.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114—Ghilain v. Couture, 146 A. 395, 84 N.H. 48, 65 A.L.R. 553.
N.J.—Capraro v. Propati, 13 A.2d 318, 127 N.J.Eq. 419, reversing 8 A.2d 52, 126 N.J.Eq. 67.
N.Y.—Central New York Coach Lines v. Syracuse Herald Co., 13 N.E.2d 598, 277 N.Y. 110, reversing 291 N.Y.S. 247, 249 App.Div. 692—Davis v. New York Cent. & H. R. R. Co., 135 N.E. 277, 233 N.Y. 242, reversing 167 N.Y.S. 868, 181 App.Div. 228—In re Ehret's Estate, 288 N.Y.S. 122, 247 App.Div. 456, affirming 285 N.Y.S. 570, 158 Misc. 308—In re McHugh's Estate, 234 N.Y.S. 541, 226 App.Div. 153—In re Marinano's Estate, 286 N.Y.S. 811, 158 Misc. 825—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.
Okl.—Baltimore American Ins. Co. of New York v. Cannon, 73 P.2d 167, 181 Okl. 244.
Pa.—McFadden v. May, 189 A. 483, 325 Pa. 145—In re Sibilia's Estate, 124 A. 137, 279 Pa. 459, dismissing appeal 82 Pa.Super. 67.
S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.
S.D.—Campbell v. Duncan, 242 N.W. 916, 60 S.D. 38.
Tenn.—Cummins v. Woody, 152 S.W. 2d 246, 177 Tenn. 636—Haynes v. Walker, 76 S.W. 902, 111 Tenn. 106—Cunningham v. Hutcherson, 14 Tenn.App. 173.
Tex.—Texas Employers' Ins. Ass'n v. Herron, Civ.App., 29 S.W.2d 524.
Wis.—In re Arneberg's Estate, 200 N.W. 557, 184 Wis. 570.
Wyo.—Tuttle v. Short, 288 P. 524, 42 Wyo. 1, 70 A.L.R. 106.
5 C.J. p 825 note 34 [c] (1), (4).

Applying New Jersey statute
U.S.—Riley v. Lukens Dredging & Contracting Corporation, D.C.Md., 4 F.Supp. 144.

Recovery specifically for beneficiaries does not become part of assets of decedent's estate.—Adams v. Shell, 33 S.W.2d 1107, 182 Ark. 959.

Application of rule harsh and unjust
A claim for medical and nursing services rendered to decedent after an automobile accident in an effort to save or prolong his life is properly payable by the administrator out of the damages recovered, where no other fund was available, the court ruling that, "while it is true that the recovery is not subject to the payment of the debts of the deceased, and that the damages are exclusively for the benefit of the next of kin, the application here of such rule would be both harsh and unjust."—In re Procopio's Estate, 267 N.Y.S. 908, 909, 149 Misc. 347.

26. U.S.—Harrison v. Love, C.C.A. Mich., 81 F.2d 115.
Ala.—Hampton v. Roberson, 163 So. 644, 231 Ala. 55—Fischer v. Pope, 155 So. 579, 229 Ala. 170—Drummond v. Drummond, 102 So. 112, 212 Ala. 242—Kuykendall v. Edmondson, 87 So. 882, 205 Ala. 265—Hines v. Seibels, 86 So. 43, 204 Ala. 382—Newell v. Bushard, 85 So. 274, 204 Ala. 73—Griswold v. Griswold, 20 So. 437, 111 Ala. 572—South & North Alabama R. Co. v. Sullivan, 59 Ala. 272—Louisville & N. R. Co. v. Perkins, 56 So. 105, 1 Ala.App. 376.
Mich.—Findlay v. Chicago & Grand Trunk Ry. Co., 64 N.W. 732, 106 Mich. 700.
5 C.J. p 825 note 34 [c] (2), (3).
"The proceeds of the recovery . . . are not a part of the estate of the deceased in the sense that resort may be had thereto to satisfy claims of creditors."—In re Venneman's Estate, 282 N.W. 180, 184, 286 Mich. 368.
Action for wrongful death by personal representative or by administrator ad prosequendum see Death § 58.

27. N.H.—Niemi v. Boston & M. R. R., 173 A. 361, 87 N.H. 1, affirmed 175 A. 245, 87 N.H. 1.

28. Ala.—McWhorter Transfer Co. v. Peek, 167 So. 291, 232 Ala. 143.
Ind.—Fink v. Peden, 17 N.E.2d 95, 214 Ind. 584—Indianapolis & Cincinnati Traction Co. v. Thompson, 134 N.E. 514, 81 Ind.App. 498.
Kan.—Cudney v. United Power & Light Corporation, 51 P.2d 28, 142 Kan. 613, 101 A.L.R. 835.
Me.—Danforth v. Emmons, 126 A. 821, 124 Me. 156.
Minn.—Masek v. Hedlund, 202 N.W. 732, 162 Minn. 291—Turner v. Minneapolis St. Ry. Co., 190 N.W. 986, 153 Minn. 509.

§ 103. Real Property and Interests Therein

Unless otherwise provided by statute, real property and interests therein ordinarily are not, on the death of the owner, assets of the estate.

Real estate and interests therein ordinarily vest at once, on the death of the owner, in his heirs, see Descent and Distribution § 66, or devisees, see the C.J.S. title Wills § 1099, also 69 C.J. p 1150 notes 80-86; such property usually does not, in a primary sense, become assets of decedent's estate in the hands of his personal representatives.[29]

However, under the conditions and for the purposes prescribed by statute, as where the personal property is insufficient to pay the debts of decedent's estate, his real property and interests therein may be regarded as assets to which his personal representatives may resort.[30] Under some statutes one's

Nev.—In re Troyer's Estate, 227 P. 1008, 48 Nev. 72.
N.J.—Capraro v. Propati, 13 A.2d 318, 127 N.J.Eq. 419, reversing 8 A. 2d 52, 126 N.J.Eq. 67.
N.Y.—In re Marinano's Estate, 286 N.Y.S. 811, 158 Misc. 825.
Pa.—McFadden v. May, 189 A. 483, 325 Pa. 145—In re Sibilia's Estate, 124 A. 137, 279 Pa. 459, dismissing appeal 82 Pa.Super. 67.
S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 487.
Tex.—Texas Employers' Ins. Ass'n v. Herron, Civ.App., 29 S.W.2d 524.
Beneficiaries of cause of action for wrongful death or of recovery therein see Death § 33.

29. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3—Abbott v. Welch, D. C.Mass., 31 F.Supp. 369.
Ala.—Bedsole v. Tiller, 181 So. 286, 236 Ala. 101—Awbrey v. Estes, 112 So. 529, 216 Ala. 66.
Ariz.—Stephens v. Comstock-Dexter Mines, 97 P.2d 202, 54 Ariz. 519.
Ark.—Jones v. Patton, 234 S.W. 28, 150 Ark. 275.
Cal.—In re De Barry's Estate, 111 P. 2d 728, 43 Cal.App.2d 715—In re Izedorio's Estate, 280 P. 171, 100 Cal.App. 469.
Conn.—Bowen v. Morgillo, 14 A.2d 724, 127 Conn. 161—Hewitt v. Sanborn, 130 A. 472, 103 Conn. 352.
Ga.—Zeagler v. Zeagler, 9 S.E.2d 263, 190 Ga. 220—Smith v. Fischer, 184 S.E. 406, 52 Ga.App. 598.
Ill.—Dixon v. Nefstead, 2 N.E.2d 135, 285 Ill.App. 463.
Ind.—Condo v. Barbour, 200 N.E. 76, 101 Ind.App. 483.
Iowa.—In re Shwertley's Estate, 293 N.W. 445, 228 Iowa 1209—In re Hager's Estate, 235 N.W. 563, 212 Iowa 851.
Ky.—Russell v. Hogan, 140 S.W.2d 615, 282 Ky. 764.
Me.—Bragdon v. Smith, 12 A.2d 665, 136 Me. 474—Averill v. Cone, 149 A. 297, 128 Me. 546, 129 Me. 9.
Mass.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365—Cook v. Howe, 182 N.E. 581, 280 Mass. 325—Commonwealth v. O'Connell, 174 N.E. 665, 274 Mass. 315—Richardson v. Warfield, 148 N.E. 141, 252 Mass. 518.
Mich.—Diel v. Diel, 298 N.W. 478, 298 Mich. 127--Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 87 A.L.R. 840—Windoes v. Colwell, 225 N.W. 573, 247 Mich. 372.
Minn.—Kietzer v. Nelson, 196 N.W. 641, 157 Minn. 463.
Miss.—Gidden v. Gidden, 167 So. 785, 176 Miss. 98.
Mo.—De Hatre v. Ruenpohl, 108 S.W. 2d 357, 341 Mo. 749, transferred, see, App., 123 S.W.2d 243—Lanphere v. Affeld, 99 S.W.2d 36—Wass v. Hammontree, 77 S.W.2d 1006—Anderson v. Taylor, 227 S.W. 84—Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340—First State Bank of Philipsburg v. Mussigbrod, 271 P. 695, 83 Mont. 68.
N.H.—Ruel v. Hardy, 6 A.2d 753, 90 N.H. 240.
N.J.—Seddon v. Pickard, 137 A. 541, 101 N.J.Eq. 241.
N.Y.—In re Cunniff's Estate, 4 N.E. 2d 946, 272 N.Y. 89, reversing 286 N.Y.S. 870, 246 App.Div. 352, reversing 282 N.Y.S. 675, 156 Misc. 596—Windsor Trust Co. v. Waterbury, 145 N.Y.S. 794, 160 App.Div. 571, affirmed 107 N.E. 1087, 213 N.Y. 686—In re Reilly's Will, 24 N.Y.S. 2d 213, 175 Misc. 597—In re Willer's Estate, 12 N.Y.S.3d 867, 171 Misc. 582—In re Rosenblatt's Estate, 3 N.Y.S.2d 619, 167 Misc. 258—In re Merrill's Estate, 300 N.Y.S. 671, 165 Misc. 161—In re Baker's Estate, 298 N.Y.S. 261, 164 Misc. 92—In re Ryan's Estate, 291 N.Y.S. 668, 161 Misc. 313—In re Engel's Estate, 250 N.Y.S. 648, 140 Misc. 276.
N.C.—Linker v. Linker, 196 S.E. 329, 213 N.C. 351—Parker v. Porter, 179 S.E. 28, 208 N.C. 31.
N.D.—Aberle v. Merkel, 291 N.W. 913, 70 N.D. 89.
Ohio.—Bickley v. Citizens Sav. Bank & Trust Co., App., 34 N.E.2d 262—Dillman v. Warner, 6 N.E.2d 757, 54 Ohio App. 170—Nolan v. Kroll, 174 N.E. 750, 37 Ohio App. 350.
Okl.—Russell v. Davison, 89 P.2d 352, 184 Okl. 606, 121 A.L.R. 1063—Seal v. Banes, 35 P.2d 704, 168 Okl. 550.
Or.—In re Ohlsen's Estate, 75 P.2d 6, 158 Or. 197.
Pa.—Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567, 305 Pa. 583, 81 A.L.R. 660—In re Kelley's Estate, 146 A. 260, 297 Pa. 17—In re Von Storch's Estate, 117 A. 88, 273 Pa. 383—In re Harlackers' Estate, 54 York Leg.Rec. 74.
S.C.—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.
S.D.—Federal Land Bank of Omaha v. Fjerestad, 285 N.W. 298, 66 S. D. 429.
Tenn.—Edwards v. McCall, 10 Tenn. App. 276.
Tex.—Gannaway v. Barrera, Civ.App., 74 S.W.2d 717, reversed on other grounds Barrera v. Gannaway, 105 S.W.2d 876, 130 Tex. 142—Roberts v. Carlisle, Civ.App., 4 S.W.2d 144, error dismissed—Russell v. Adams, Civ.App., 293 S.W. 264, affirmed, Com.App., 299 S.W. 889.
Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
Va.—Bruce v. Farrar, 158 S.E. 856, 156 Va. 542, 75 A.L.R. 872—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
Wis.—Neelen v. Holzhauer, 214 N.W. 497, 193 Wis. 196, 53 A.L.R. 359—Hill v. True, 80 N.W. 462, 104 Wis. 294.
23 C.J. p 998 note 32, p 1136 note 87.

Effect of invalid instrument

Invalid instrument whereby decedent conditionally promises to pay certain sum does not affect the operation of the text rule as regards devised realty.—Frame v. Whitaker, 36 S.W.2d 149, 120 Tex. 53, reversing, Civ.App., 7 S.W.2d 140.

Squatter's interest

Ga.—Holton v. Holton, 25 S.E. 468, 99 Ga. 250.
23 C.J. p 1137 note 88 [b].

30. U.S.—Bank of Hamburg v. Tri-State Savings & Loan Ass'n, C.C.A. Ark., 69 F.2d 436—Tussing v. Central Trust Co., D.C.Mich., 34 F.2d 312—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3—Abbott v. Welch, D.C. Mass., 31 F.Supp. 369—In re Buxton's Estate, D.C.Ill., 14 F.Supp. 616.
Ala.—Forman v. McAnear, 121 So. 538, 219 Ala. 157—Boyte v. Perkins, 99 So. 652, 211 Ala. 130—Turk v. Turk, 89 So. 457, 206 Ala. 312.
Ariz.—Stephens v. Comstock-Dexter Mines, 97 P.2d 202, 54 Ariz. 519.
Ark.—Deaner v. Gwaltney, 108 S.W. 2d 600, 194 Ark. 332—Mayo v. Bank of Marvell, 65 S.W.2d 549, 188 Ark. 330.

real estate is regarded as assets to be administered by his executor or administrator quite like personalty.[31] It has been held that land which is conveyed to "the estate of" a person stated in the deed to be deceased is assets of the estate.[32]

§ 104. —— Proceeds of Sale

The proceeds of the sale of real estate, which by conversion at time of the owner's death is to be deemed personalty, constitute assets of decedent's estate in the hands of his personal representatives. In the absence of such conversion, whether proceeds from the sale of decedent's property are assets of the estate depends on the character of such property, as realty or personalty, at the time of the decedent's death.

In a suitable case of conversion from real to personal property, as where a fund is derived from the rightful sale, after decedent's death, of land whose title had vested in decedent,[33] where a sale by the executor of such land is confirmed by all the decedent's heirs,[34] where surplus proceeds are derived from land sold for taxes[35] or under execution,[36] or where one dies having a vested interest in the proceeds of land previously sold,[37] the particular fund or surplus proceeds should be considered personalty, and the representative, not the heir, is entitled thereto.[38] However, in general, as far as executors or administrators are concerned, and except for such conversion, the character of property, whether as real or personal, is that impressed on it

Cal.—In re Izedorio's Estate, 280 P. 171, 100 Cal.App. 469.
Conn.—Bowen v. Morgillo, 14 A.2d 724, 127 Conn. 161—Hewitt v. Sanborn, 130 A. 472, 103 Conn. 352.
Ga.—Zeagler v. Zeagler, 9 S.E.2d 263, 190 Ga. 220—Whatley v. Musselwhite, 5 S.E.2d 227, 189 Ga. 91—Smith v. Fischer, 184 S.E. 406, 52 Ga.App. 598.
Ind.—Coats v. Veedersburg State Bank, 38 N.E.2d 243—Globe Mercantile Co. v. Perkeypile, 125 N.E. 29, 189 Ind. 31—Condo v. Barbour, 200 N.E. 76, 101 Ind.App. 483.
Iowa.—In re Schwertley's Estate, 293 N.W. 445, 228 Iowa 1209—In re Jackson's Estate, 280 N.W. 563, 225 Iowa 359.
Mich.—Diel v. Diel, 298 N.W. 478, 298 Mich. 127—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 87 A.L.R. 840.
Miss.—Gidden v. Gidden, 167 So. 785, 176 Miss. 98.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
N.Y.—In re Cunniff's Estate, 4 N.E.2d 946, 272 N.Y. 89, reversing 286 N.Y.S. 870, 246 App.Div. 352, reversing 282 N.Y.S. 675, 156 Misc. 596—Genesee Valley Trust Co. v. Newborn, 6 N.Y.S.2d 498, 168 Misc. 703—In re Rosenblatt's Estate, 3 N.Y.S.2d 619, 167 Misc. 258—In re Baker's Estate, 298 N.Y.S. 261, 164 Misc. 92—In re Mould's Estate, 185 N.Y.S. 250, 113 Misc. 602, affirmed In re Mould, 187 N.Y.S. 355, 195 App.Div. 822—In re Ledyard's Estate, 21 N.Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029, and 24 N.Y.S.2d 780, 261 App.Div. 827—In re Bingham's Estate, 17 N.Y.S.2d 981.
N.D.—Aberle v. Merkel, 291 N.W. 913, 70 N.D. 89.
Okl.—In re Hibdon's Estate, 228 P. 154, 102 Okl. 145.
23 C.J. p 1137 note 88—5 C.J. p 825 note 84 [a] (7).
Real property as available for payment of claims against estate see infra § 479.
Sales under order of court see infra §§ 536–666.

Income of trust fund invested in real estate for decedent's benefit should be treated as assets going to the executor.—Fassitt's Estate, 2 Wkly.N.C., Pa., 571.

Distinction between realty and proceeds thereof as assets

(1) Under some of the statutes the real property itself becomes assets in the hands of the executor or administrator for the payment of debts.—Tate v. Norton, Ark., 94 U.S. 746, 24 L.Ed. 222—23 C.J. p 1137 note 88 [c] (1).

(2) According to some authorities, however, it is not the land itself, but the proceeds thereof, when sold to pay debts, which constitute the assets.—Linker v. Linker, 196 S.E. 329, 213 N.C. 351—23 C.J. p 1137 note 88 [c] (2).

(3) Proceeds of realty as assets see infra § 104.

Strict construction

Such statutes are in derogation of the common law and must be strictly construed.—Coats v. Veedersburg State Bank, Ind., 38 N.E.2d 243.

31. U.S.—Robinson v. Georgia Sav. Bank & Trust Co., C.C.A.Ga., 106 F.2d 944.
Fla.—Jones v. Federal Farm Mortg. Corporation, 182 So. 226, 132 Fla. 807.
Ga.—Peck v. Watson, 142 S.E. 450, 165 Ga. 853, 57 A.L.R. 560.
Ind.—Globe Mercantile Co. v. Perkeypile, 125 N.E. 29, 189 Ind. 31.
N.Y.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.
Okl.—Bryan v. Seiffert, 94 P.2d 526, 185 Okl. 496—Nolan v. Mathis, 295 P. 801, 147 Okl. 155.
23 C.J. p 1138 note 90.
Property subject to administration see supra § 4.

Stating California rule

N.Y.—In re Van Zandt's Estate, 255 N.Y.S. 859, 142 Misc. 663.

32. Tex.—McKee v. Ellis, Civ.App., 83 S.W. 880.
23 C.J. p 1138 note 91.

33. N.Y.—In re McKinney's Estate, 24 N.Y.S.2d 906, 175 Misc. 377—In re Maguire's Estate, 291 N.Y.S. 753, 161 Misc. 219, affirmed 296 N.Y.S. 528, 251 App.Div. 337, motion granted In re Maguire's Will, 298 N.Y.S. 1008, 252 App.Div. 752, affirmed 13 N.E.2d 458, 277 N.Y. 527.
S.C.—Pinson v. Pinson, 148 S.E. 211, 150 S.C. 368.
23 C.J. p 1138 note 93.

Proceeds of land in another state

N.Y.—Spafford v. Stafford, 28 N.Y.S. 2d 523.
23 C.J. p 1138 note 93 [a].

34. Mass.—Grout v. Hapgood, 13 Pick. 159.

35. U.S.—Chaplin v. U. S., 19 Ct.Cl. 424.

36. Pa.—Weimer v. Karch, 26 A. 432, 153 Pa. 385.
23 C.J. p 1138 note 96.

37. N.Y.—In re McKinney's Estate, 24 N.Y.S.2d 906, 175 Misc. 377.
N.C.—Place v. Place, 174 S.E. 747, 206 N.C. 676.
R.I.—Capwell v. Spencer, 137 A. 699, 48 R.I. 401.
23 C.J. p 1138 note 97.

Proceeds in possession of decedent

On death with proceeds of sale of land in possession of decedent, such proceeds constitute assets of his estate subject to power of his personal representatives.—Place v. Place, 174 S.E. 747, 206 N.C. 676.

38. N.Y.—In re McKinney's Estate, 24 N.Y.S.2d 906, 175 Misc. 377.
N.C.—Place v. Place, 174 S.E. 747, 206 N.C. 676.
23 C.J. p 1139 note 98.
Descent and distribution of property equitably converted see Conversion § 40.
Disposition of proceeds of sale under order of court see infra §§ 655–660.
Surplus proceeds from sale of mortgaged property see infra § 110 b.

at the death of decedent and does not change by any subsequent technical conversion in the course of administration.[39] Accordingly, where property in the form of realty at the time of the death of the owner is subsequently sold, proceeds of such sale are not assets in the hands of decedent's personal representatives.[40] Where land belonging to the estate of a decedent is sold on foreclosure of vendor's lien notes, any excess of proceeds over the notes goes to the heir at law.[41]

Where a person having an interest in realty institutes proceedings for its partition, on his death the proceeds of the sale are regarded as assets of such person's estate in the hands of his personal representatives,[42] and the character of such proceeds as assets is not affected by the fact that a check representing them is delivered to the decedent's widow and her attorney.[43] If the real estate of a decedent is sold under an order of court for partition among the heirs, the proceeds are not assets in the hands of the administrator for the payment of debts, unless they are made so by order of the court,[44] although as to the heirs the share of each becomes personalty.[45]

The proceeds of a void sale are not assets in the hands of the personal representatives of the vendor.[46]

Property purchased with proceeds. Where all the heirs of a decedent consent to the sale of his real estate, property purchased with the proceeds does not constitute assets of decedent's estate.[47]

§ 105. —— Rents and Profits, Etc.

a. In general
b. Effect of insolvency of estate
c. Rents collected by representative
d. Effect of testamentary provision
e. Effect of insufficiency of personalty
f. Effect of statutes

a. In General

Rents, profits, and income of real property accruing prior to the death of the owner are assets in the hands of his personal representative, but rents and profits accruing after the owner's death ordinarily are not assets of the estate.

The rents, profits, and income of a decedent's real property accruing before his death vest in the personal representative as assets.[48] However, subject to certain exceptions and statutory modifications discussed in the following subdivisions of this section, rents, profits, and income of realty accruing after his death are not assets, but vest in the heir or devisee,[49] even though the rent was expressly reserved to the lessor, his executors, administrators,

39. Cal.—In re Izedorio's Estate, 280 P. 171, 100 Cal.App. 469.
Miss.—Wright v. Wright, 134 So. 197, 160 Miss. 235.
N.Y.—Spafford v. Stafford, 28 N.Y.S. 2d 523—In re Phetteplace's Estate, 6 N.Y.S.2d 845.
23 C.J. p 1139 note 99.

40. N.Y.—In re Phetteplace's Estate, supra.

41. Ky.—Dodd v. Hewitt, 69 S.W. 955, 24 Ky.L. 708.

42. Iowa.—Albright v. Moeckley, 237 N.W. 309.
Under statute
Okl.—Bryan v. Seiffert, 94 P.2d 526, 185 Okl. 496.

43. Iowa.—Albright v. Moeckley, 237 N.W. 309.

44. Miss.—Johnston v. Union Bank, 37 Miss. 526.
Ill.—Smith v. Smith, 50 N.E. 1083, 174 Ill. 52, 43 L.R.A. 403.

45. Mo.—State v. Harper, 54 Mo. App. 286.
23 C.J. p 1139 note 3.

46. Ala.—Pettit v. Pettit, 32 Ala. 288.
23 C.J. p 1138 note 93 [g].

47. Ariz.—Faulkner v. Faulkner, 303 P. 560, 23 Ariz. 313.

48. Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
Ky.—Greenway's Adm'r v. Greenway, 98 S.W.2d 283, 266 Ky. 114—Gibson's Adm'r v. Gibson, 43 S.W. 2d 343, 241 Ky. 74.
Or.—In re Banfield's Estate, 299 P. 323, 137 Or. 256, rehearing denied 3 P.2d 116, 137 Or. 256.
Tex.—Russell v. Adams, Civ.App., 293 S.W. 264, affirmed, Com.App., 299 S.W. 889.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
23 C.J. p 1139 notes 4, 5 [1].
Rents of realty as property available for payment of claims see infra § 480.
Life estate in part of land
Where husband had life estate in one third of land and his second wife owned storehouse thereon, husband's estate was entitled to one third of ground rent until his death and remaindermen to balance of ground rent, and surviving wife to rent from storehouse.—Baker's Adm'x v. Combs, 284 S.W. 101, 215 Ky. 5.
Mortgaged property
(1) Where a mortgagor dies after a receiver to collect rents has been appointed in suit to foreclose the mortgage, that part of rents collected by such receiver for the period between the expiration of the redemption period and the death of the mortgagor, and prior to the execution of a deed, became a part of the assets of his estate.—Clark v. Hall, 24 N.E.2d 394, 303 Ill.App. 1.
(2) Mortgaged property as assets of mortgagor's estate see infra § 110.
Royalties
Amounts due as royalties for minerals mined from the lands of an Indian at the time of his death are assets of his estate.—Kendall v. Ewert, Okl., 42 S.Ct. 444, 259 U.S. 139, 66 L.Ed. 862, reversing, C.C.A., 264 F. 1021.

49. Ark.—Mayo v. Bank of Marvell, 65 S.W.2d 549, 188 Ark. 330.
Ga.—Zeagler v. Zeagler, 9 S.E.2d 263, 190 Ga. 220—Hoyt v. Ware, 118 S.E. 734, 156 Ga. 98—Sterchi Bros. Stores v. Mitchell, 176 S.E. 537, 49 Ga.App. 826—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728—Murray v. Cazier, 53 N.E. 476, 23 Ind.App. 600, rehearing denied 55 N.E. 880, 23 Ind.App. 600.
Kan.—Firmin v. Crawford, 36 P.2d 970, 971, 140 Kan. 370, citing **Corpus Juris.**
Ky.—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74—Bourne's Ex'r v. Edwards, 2 S.W.2d 1063, 223 Ky. 35.
Mass.—Jaques v. Gould, 4 Cush. 384.
N.J.—Joselson v. Joselson, 172 A.

and assigns;[50] and the fact that the land was sold to pay debts does not deprive the heirs or devisees of their right to rents which accrued between the time of decedent's death and the time of the sale.[51] It follows that the personal representative cannot release the tenant from rent accruing after decedent's death in consideration of his giving up possession.[52]

Effect of particular lease provisions. The application of the principle that rents, accruing after the death of the lessor, go to his heirs and not to his personal representatives is not affected by the fact that the lease covers and provides for the use of personal property in connection with the real estate.[53]

b. Effect of Insolvency of Estate

Rents and profits of realty accruing after the death of the owner ordinarily are not assets although the estate is insolvent.

The rule that the rents and profits of real estate accruing after the death of the owner are not assets, but belong to the devisees or heirs at law, see supra subdivision a of this section, is usually held to apply, although the estate is insolvent and the rents have come into the hands of the executor or administrator, unless he has received them under an agreement with the heirs or devisees that they should be assets to save the real estate from sale, or for the advantage of all persons interested, or unless the will gave him the rents to be administered as assets.[54] However, there is authority for the contrary view.[55]

c. Rents Collected by Representative

Rents of real estate accruing after the death of the owner ordinarily are not assets of the estate although the personal representative has possession of them.

The rule that rents of real estate accruing after the owner's death are not assets of his estate, see supra subdivision a of this section, generally is not affected by the mere fact that they have come into the hands of the executor or administrator,[56] even though the land is subsequently sold for the payment of debts.[57] There are cases, however, to the effect that if the executor or administrator actually collects rents accruing after the decedent's death he is responsible for them as assets.[58]

d. Effect of Testamentary Provision

Pursuant to testamentary provisions, rents and profits of real estate accruing after the death of the owner may become assets in the hands of his personal representative.

The testator may by his will prevent the application of the usual rule stated in subdivision a of this section with respect to rents and profits of realty accruing after his death,[59] and where the executor or administrator is empowered to rent the decedent's lands for the convenience and on behalf of all concerned, while the estate is being settled, the rents collected are deemed assets for the pay-

812, 814, 116 N.J.Eq. 180, quoting **Corpus Juris.**
N.C.—Carr v. Carr, 180 S.E. 82, 208 N.C. 246.
Pa.—In re Graham's Estate, 23 A.2d 235, 147 Pa.Super. 57—In re Alexander's Estate, 34 Pa.Dist. & Co. 169—In re Downes' Estate, 27 Del. Co. 319—Hogsett v. Lutrario, 87 Pittsb.L.J. 73, 2 Fay.L.J. 1.
S.C.—Burkhalter v. Townsend, 158 S.E. 221, 160 S.C. 134—Staton v. Guillebeaux, 116 S.E. 443, 123 S.C. 363, 31 A.L.R. 1.
Tex.—Russell v. Adams, Civ.App., 293 S.W. 264, affirmed, Com.App., 299 S.W. 889.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
23 C.J. p 1139 note 5.
Right of heirs to rents, profits, etc., of realty see Descent and Distribution § 70.

Mortgaged property

(1) Rents which accrue on mortgaged property after a mortgagor's death are not assets of his estate in the hands of his personal representative.—Wathen v. Glass, 54 Miss. 382.

(2) Mortgaged property as assets see infra § 110.

50. N.Y.—Fay v. Holloran, 35 Barb. 295.
51. N.J.—Bittle v. Clement, 54 A. 138.
23 C.J. p 1140 note 7.
52. Pa.—Winkle v. Meany, 30 Pa. Super. 339.
53. N.Y.—Marshall v. Moseley, 21 N.Y. 280.
23 C.J. p 1140 note 9.
54. N.J.—Joselson v. Joselson, 172 A. 812, 814, 116 N.J.Eq. 180, quoting **Corpus Juris.**
Tenn.—Stephens v. Mason, 1 Tenn. App. 246.
23 C.J. p 1140 note 10.
55. N.C.—Shell v. West, 41 S.E. 65, 130 N.C. 171.
23 C.J. p 1141 note 11.
56. N.J.—Joselson v. Joselson, 172 A. 812, 814, 116 N.J.Eq. 180, quoting **Corpus Juris.**
Pa.—In re Alexander's Estate, 34 Pa.Dist. & Co. 169.
23 C.J. p 1141 note 13.

Status and liability of representative

(1) A personal representative collecting rents which accrued after the death of decedent holds them as agent for the persons entitled thereto.
N.Y.—Armstrong v. Armstrong, 185 N.Y.S. 853.
Pa.—In re Alexander's Estate, 34 Pa. Dist. & Co. 169.

(2) He is liable in assumpsit to the true owner of such rent.—Whitaker v. Shuman, 161 Ill.App. 568.

57. Me.—Kimball v. Sumner, 62 Me. 305.
Mass.—Towle v. Swasey, 106 Mass. 100.
58. U.S.—Boyce v. Grundy, Tenn., 9 Pet. 275, 9 L.Ed. 127.
23 C.J. p 1141 note 12.
59. N.J.—Joselson v. Joselson, 172 A. 812, 116 N.J.Eq. 180.
23 C.J. p 1141 note 16.

Equitable conversion

(1) Where the will works an equitable conversion of the real estate, the rents and profits of the land become legal assets in the hands of the personal representative.
Mass.—Bayley v. Sloper's Ex'rs, 160 N.E. 275, 263 Mass. 534.
N.Y.—Stagg v. Jackson, 1 N.Y. 206, How.App.Cas. 561, 4 How.Pr. 294.

(2) Conversion of realty into personalty by will see Conversion §§ 15–29.

ment of debts.[60] Particular testamentary provisions have, however, been held not to render certain rents or royalties assets in the hands of testators' personal representatives.[61]

e. Effect of Insufficiency of Personalty

Rents of realty accruing after the owner's death may constitute assets of his estate where the personalty is insufficient to pay debts.

The rule that rents of real estate accruing after the owner's death are not assets in the hands of his personal representatives, see supra subdivision a of this section, may not apply where the personalty is insufficient to pay the debts of the estate,[62] particularly where the representative is ordered to rent land for the purpose of paying the debts of deceased.[63]

f. Effect of Statutes

Under statutes in some jurisdictions rents of real estate accruing subsequent to the owner's death are assets in the hands of his personal representative.

Under statute in some jurisdictions the general rule stated in subdivision a of this section has been changed by making rents and profits of land accruing after the death of the owner assets in the hands of the personal representative for the payment of debts.[64] However, statutes providing that land of a deceased person shall remain liable for the payment of his debts[65] and statutes providing for apportionment of rents under certain conditions[66] have been held not to affect the general rule as to rents accruing subsequent to the owner's death. Under some statutes the rents which constitute assets of the estate are limited to those accruing within a certain period of time after the death of decedent.[67]

§ 106. —— Crops and Products

Natural products of the soil, when not severed at the time of the owner's death, are not assets of his estate. In the absence of a specific devise of the land on which crops are growing, they are assets in the hands of the personal representative of the owner of such land, but crops planted subsequent to the death of the decedent ordinarily are not assets of his estate.

Natural products of the soil not sown or planted by decedent, such as clover, grass, fruit, and the like, when not severed from the soil at the time of decedent's death, go to the devisee or heir, see Descent and Distribution § 70; and the C.J.S. title Wills § 772, also 69 C.J. p 387 note 72, and are not assets in the hands of decedent's personal representatives.[68]

Fructus industriales. It is well established that growing and unharvested crops on the land of a decedent at the time of his death, such as are raised annually or periodically by labor and planting, go to the personal representative as assets rather than to the heir at law where the land is not specifically devised.[69] Where, however, there is a devise of the land, the authorities are not uniform, some holding

60. Cal.—Washington v. Black, 23 P. 300, 88 Cal. 290.
23 C.J. p 1141 note 17.

61. Mass.—Brown v. Baron, 87 N.E. 772, 162 Mass. 56, 44 Am.S.R. 331.
Miss.—Gordon v. James, 39 So. 18, 86 Miss. 719, 1 L.R.A.,N.S., 461.
23 C.J. p 1139 note 4 [g], p 1141 note 16 [c].

Royalties disposed of by will
A testamentary direction to an executor as to certain royalties does not operate to make other royalties, which have been otherwise disposed of by will, assets of decedent's estate in the hands of such executor.—Goosling v. Pinson, 248 S.W. 248, 198 Ky. 57.

62. Ala.—Johnson v. Moxley, 113 So. 651, 22 Ala.App. 1, reversed on other grounds 113 So. 656, 216 Ala. 466.
N.Y.—In re Baker's Estate, 298 N.Y. S. 261, 164 Misc. 92.
Pa.—In re Shibe's Estate, 41 Pa. Dist. & Co. 315.
23 C.J. p 1141 note 19.

63. N.C.—Shell v. West, 41 S.E. 65, 130 N.C. 171.
23 C.J. p 1141 note 19.

64. Ala.—Johnson v. Moxley, 113 So. 651, 22 Ala.App. 1, reversed on other grounds 113 So. 656, 216 Ala. 466.
Mont.—In re Bradfield's Estate, 221 P. 531, 69 Mont. 247.
N.Y.—In re Baker's Estate, 298 N.Y. S. 261, 164 Misc. 92.
Okl.—In re Gentry's Estate, 13 P.2d 156, 158 Okl. 196—Nolan v. Mathis, 295 P. 801, 147 Okl. 155.
Pa.—In re Shilee's Estate, 41 Pa. Dist. & Co. 315.
Tex.—Jones v. Gibbs, 130 S.W.2d 265, 133 Tex. 627, affirming, Civ.App., 103 S.W.2d 1011, motion overruled 131 S.W.2d 957, 133 Tex. 627.
23 C.J. p 1141 note 20.

Mortgaged property
(1) Rents from mortgaged property accruing subsequent to death of mortgagor may for the limited purpose prescribed by statute constitute assets of his estate.—Clark v. Hall, 24 N.E.2d 394, 303 Ill.App. 1.

(2) Mortgaged property as assets of mortgagor's estate see infra § 110.

Necessity for bringing rents into administration
Rents of decedent's realty are not assets of his estate for payment of debts unless brought into administration under the section of the Fiduciaries Act requiring the orphans' court, on creditor's application, to direct executor or administrator to collect such rents for creditor's benefit when decedent's personal estate appears insufficient to pay his debts.—In re Graham's Estate, 23 A.2d 235, 147 Pa.Super. 57.

65. N.J.—Paletz v. Camden Safe Deposit & Trust Co., 157 A. 456, 109 N.J.Eq. 344.

66. Ky.—Rand v. Hill, 8 Bush 66.
23 C.J. p 1141 note 20 [a].

67. Miss.—Wright v. Wright, 134 So. 197, 160 Miss. 235.
Vt.—Allen v. Tarbell's Estate, 26 A. 76, 65 Vt. 150—Dunbar v. Dunbar, 3 Vt. 472.
23 C.J. p 1141 note 21.

68. Ala.—Eubank v. Clark, 78 Ala. 73.
Mo.—Blum v. Frost, App., 116 S.W. 2d 541.
23 C.J. p 1141 note 22.

69. U.S.—In re Buchanan, D.C.Pa., 24 F.2d 553.
Ala.—Adams v. Adams, 140 So. 438, 224 Ala. 346.
Tenn.—Langford v. Hudson, 241 S. W. 393, 146 Tenn. 309.
23 C.J. p 1142 note 23.

that in such case the crops go with the land to the devisee unless the will provides otherwise,[70] and others asserting that notwithstanding the devise the crops go to the personal representative,[71] which latter rule is sometimes established by statute.[72]

Where a purchaser had established his homestead on land, on which he had given notes for the purchase price, secured by a vendor's lien, and died without having paid all the notes, the purchaser's administrator was not entitled to treat the proceeds of crops raised on the homestead subsequent to the vendee's death, and turned over to him by the widow as assets of the estate instead of applying them on the lien notes of which he was the holder;[73] and as against a donee of the notes after maturity the widow was entitled to a credit on the notes for the amount realized by the administrator from the sale of crops turned over to him by the widow.[74]

Time of death or severance as determining element. Under some statutes the time of decedent's death or of severance of the crops determines whether or not the crops go to the personal representative as assets.[75] Under other statutes providing that crops shall pass to the personal representative, it is immaterial whether such crops are severed at the time of decedent's death.[76]

Crops or products severed before death of decedent. Crops and products of whatever character, actually severed before the death of decedent, go to the representative.[77]

Crops planted after death of decedent. As a rule crops planted after decedent's death are not assets of his estate in the hands of his personal representatives, but belong to the heir or devisee,[78] although it has been held that crops planted on leased premises after the death of a lessee but during the life of the lease belong to the estate of the lessee unless they are exempt.[79]

§ 107. —— Mortgages

On the death of a mortgagee of real estate, the unforeclosed mortgage passes to his executor or administrator.

An unforeclosed mortgage of real property passes to the executor or administrator of the mortgagee like the money right evidenced by bond or note which it was given to secure,[80] and the money received by the personal representative of an equitable mortgagee, in redemption of the mortgage, should be charged by the probate court to the representative and ordered distributed as personal estate.[81] If an executor takes a conveyance of mortgaged land in satisfaction of the mortgage debt, it has been held that the land is personalty in his hands, being a substitute for the mortgage,[82] and, where title to mortgaged realty is acquired by the personal representative of the mortgagee by foreclosure, constituting a mere salvage operation, such land remains personalty in the hands of the representative.[83]

Where a mortgage is foreclosed before the death of the mortgagee, and title to the mortgaged property thus becomes vested absolutely in him, such property, like any other real property of a decedent, goes to his heirs or devisees,[84] and, if the mortgage

Growing crops as real or personal property see Crops § 1.

70. Mo.—Blum v. Frost, App., 116 S.W.2d 541.
Tenn.—Langford v. Hudson, 241 S.W. 393, 146 Tenn. 309.
23 C.J. p 1142 note 24.

71. Kan.—In re Blakely's Estate, 224 P. 65, 115 Kan. 644.
23 C.J. p 1142 note 25.

72. Kan.—Kessler v. Heberling, 213 P. 639, 113 Kan. 571.
23 C.J. p 1142 note 26.

73. Tex.—McCord v. Hames, 85 S.W. 504, 38 Tex.Civ.App. 239.

74. Tex.—McCord v. Hames, supra.

75. S.C.—Berry v. Berry, 33 S.E. 363, 55 S.C. 303.
23 C.J. p 1142 note 29.

Crop not planted

A statute providing that crops ungathered at the death of decedent shall pass to his administrator does not apply where no crop had been planted.—Carr v. Carr, 180 S.E. 82, 208 N.C. 246.

76. Kan.—Kessler v. Heberling, 213 P. 639, 113 Kan. 571.

77. Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
Ohio.—Edwards v. Rainier, 17 Ohio St. 897.

78. La.—Maxwell-Yerger Co. v. Rogan, 51 So. 48, 125 La. 1.
23 C.J. p 1142 note 31.

79. Iowa.—In re Ring, 109 N.W. 710, 132 Iowa 216.
23 C.J. p 1142 note 32.

80. U.S.—Collins v. Tweedale, C.C.A. N.J., 76 F.2d 63.
Ala.—Dodson v. Protective Life Ins. Co., 181 So. 492, 236 Ala. 111—Webb v. Sprott, 144 So. 569, 225 Ala. 600—Gilchrist v. Gilchrist, 137 So. 406, 409, 223 Ala. 562, citing **Corpus Juris.**
Conn.—Bowen v. Morgillo, 14 A.2d 724, 127 Conn. 161.
Fla.—Corlett v. May, 171 So. 517, 126 Fla. 506.
Mo.—Wakefield v. Dinger, 135 S.W. 2d 17, 234 Mo.App. 407, transferred, see, Sup., 130 S.W.2d 490.
N.J.—McSpirit's Estate, 68 A. 755, 73 N.J.Eq. 613.
N.Y.—In re Phetteplace's Estate, 6 N.Y.S.2d 845.
Pa.—Eldredge v. Eldredge, 194 A. 306, 128 Pa.Super. 284.
23 C.J. p 1142 note 34.
Collection of secured claims by personal representative see infra § 173.
Mortgaged property of decedent as assets of estate see infra § 110.
Personal representatives of mortgagee as persons entitled to foreclose mortgage see the C.J.S. title Mortgages §§ 513, 526, also 41 C.J. p 885 note 96, p 897 note 63, 23 C.J. p 1143 note 37.

81. Me.—Hawes v. Williams, 43 A. 101, 92 Me. 483.

82. Iowa.—Langfitt v. Langfitt, 273 N.W. 93, 96, 223 Iowa 702, quoting **Corpus Juris.**
N.Y.—Yonkers Sav. Bank v. Kinsley, 28 N.Y.S. 925, 78 Hun 186.

83. N.Y.—In re Valionis' Estate, 26 N.Y.S.2d 540, 176 Misc. 110.

84. N.J.—Osborne v. Tunis, 25 N.J. Law 633.

is transferred to the owner of the fee to be held as a muniment of title, it belongs, on his death, to his heirs or devisees, and not to his personal representatives.[85]

§ 108. —— Leaseholds

The interest of a decedent in a leasehold estate constitutes an asset in the hands of his personal representative.

Except as the rule may be modified by statute,[86] the interest of a decedent in a leasehold estate is an asset in the hands of his personal representative.[87] The interest of the lessee in a lease for the life of another is an asset in the hands of the personal representative of the life tenant.[88] Similarly, the interest of a decedent in an agreement for a lease for two lives, of which his own was one, is an asset in the hands of his personal representative.[89] A lease for years is not a freehold interest, but merely a chattel real, and it, therefore, vests in the executor or administrator of the lessee.[90] The interest of a tenant in a tenancy from month to month likewise vests in the personal representative of such tenant.[91]

The rule that the interest of a decedent lessee vests in his personal representatives is also true as regards rights incidental to, or given by, the lease, such as a privilege of renewal[92] or an unexercised option to purchase the demised premises.[93]

It has been considered that as the rent is a first charge on the profits of the land, only what remains after deducting sufficient for the payment of the rent can be regarded as assets of the estate,[94] but there is also authority for the view that the probate court has no right to direct the application of sums realized from the use of the property to liquidate arrears of rent in preference to other debts of the estate, unless it is clearly shown that the interests of the estate demand such action.[95]

§ 109. —— Interests in Public Land

A preëmption or homestead right with occupancy is not an asset of a decedent's estate, although a mere right to possession or a land claim is an asset of the estate.

A preëmption or homestead right with occupancy, or a land patent as usually expressed, is not an asset in the hands of personal representatives but is treated as real estate and descends to the heirs,[96] but a mere right to enjoy possession or a land claim is treated as personalty, and as such goes to the representative.[97]

The claim of a squatter on public land, and his improvements made on the land during his occupancy, are not assets.[98]

§ 110. —— Mortgaged Property

a. In general
b. Surplus proceeds of sale

85. N.Y.—Browne v. Perris, 7 N.Y. S. 172, 23 Abb.N.Cas. 226.

86. Colo.—McKee v. Howe, 31 P. 115, 17 Colo. 538.
23 C.J. p 1144 note 46, p 1151 note 18.

87. Del.—Monbar, Inc. v. Monaghan, 162 A. 50, 18 Del.Ch. 395.
Md.—Mitchell v. Frederick, 170 A. 733, 166 Md. 42, 92 A.L.R. 1412.
23 C.J. p 1143 note 45.
Exempt property as assets of estate see infra § 115.

88. Ky.—Clore v. Nichols, 251 S.W. 846, 199 Ky. 581.
23 C.J. p 1143 note 45 [b], p 1151 note 16.

Assignee of life tenant
The assignee of a lessee for life holds an estate pur autre vie which is a freehold during the assignee's life but on his death a chattel real and assets in the hands of his administrator.—Mosher v. Yost, 33 Barb., N.Y., 277.

89. N.Y.—Stiles v. Burch, 5 Paige 132.

90. Kan.—Olson v. Frazer, 118 P.2d 505, 154 Kan. 310.
N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.
N.Y.—Goldberg v. Himlyn, 201 N.Y. S. 837, 121 Misc. 580.
Ohio.—Mills v. Connor, 135 N.E. 616, 104 Ohio St. 409.
Pa.—Fortunato v. Shenango Limestone Co., 123 A. 482, 278 Pa. 499—In re Wacker's Estate, 37 Pa.Dist. & Co. 330, 29 Del.Co. 144.
23 C.J. p 1143 note 45.

91. N.J.—Levigton v. Tuly, 10 A.2d 641, 126 N.J.Eq. 552.
Pa.—Fortunato v. Shenango Limestone Co., 123 A. 482, 278 Pa. 499.

92. N.M.—Hart v. Walker, 52 P.2d 123, 40 N.M. 1.
23 C.J. p 1144 note 48.

93. N.J.—McCormick v. Stephany, 41 A. 840, 57 N.J.Eq. 257.
N.Y.—Walker v. Bradley, 153 N.Y.S. 686, 89 Misc. 516.

94. Ohio.—Becker v. Walworth, 12 N.E. 1, 45 Ohio St. 169.
Pa.—Mickle v. Miles, 1 Grant 320.

95. N.Y.—Harris v. Meyer, 3 Redf. Surr. 450.

96. Cal.—In re Izedorio's Estate, 280 P. 171, 100 Cal.App. 469.
23 C.J. p 1144 note 52.

In Texas
(1) The personal representatives have considerable power with respect to land certificates and the like belonging to decedent.—Pace v. Eoff, Com.App., 48 S.W.2d 956, modifying Eoff v. Pace, Civ.App., 25 S.W.2d 264—23 C.J. p 1144 note 52 [g] (1), (2).

(2) A homestead preëmpted by decedent is treated as an asset of his estate in the hands of his personal representative notwithstanding decedent's right in the land is patented to his heirs after his death.—Holland v. Swilley, Civ.App., 278 S.W. 238, certiorari denied Dent v. Swilley, 48 S.Ct. 34, 275 U.S. 492, 72 L. Ed. 390.

(3) Other cases see 23 C.J. p 1144 note 52 [g] (3)–(5).

97. U.S.—O'Connell v. Pinnacle Gold Mines Co., C.C.Wash., 131 F. 106, affirmed 140 F. 854, 72 C.C.A. 645, 4 L.R.A.,N.S., 919.
23 C.J. p 1144 note 53.

Right to refund of taxes
Right to refund of taxes paid by deceased entryman is in administrator not heirs, not being right to land.—Casey v. Butte County, 217 N.W. 508, 52 S.D. 334.

98. Ga.—Holton v. Holton, 25 S.E. 468, 99 Ga. 250.
23 C.J. p 1145 note 54.

a. In General

The interest of a mortgagor of real estate is not an asset of his estate, except to the extent necessary to pay debts.

Where the owner of real estate encumbered by a mortgage dies, the land descends to his heirs or devisees, subject to the special encumbrance, or in other words the equity of redemption vests in them,[99] although it may, in case of insufficiency of personalty, become assets for payment of debts in the hands of the executor or administrator;[1] and it has been held that the duty of the personal representative to pay the debts and prepare the estate for distribution necessarily indicates him as the proper party to maintain a bill to redeem property mortgaged by his decedent.[2]

Rents from mortgaged property as assets of mortgagor's estate are discussed supra § 105.

b. Surplus Proceeds of Sale

If a mortgage is foreclosed during the mortgagor's lifetime, any surplus proceeds are personalty which, on the mortgagor's death, go to his personal representative.

If a mortgage is foreclosed during the lifetime of the mortgagor, any surplus proceeds of sale are personalty and go to the personal representative of the mortgagor as such,[3] but, where the equity of redemption has passed to the heirs or devisees of the mortgagor, the right to any surplus proceeds of sale goes with it, and, in case of a subsequent foreclosure and sale, it is usually held that such surplus proceeds belong to the heirs or devisees, and not to the personal representative of the mortgagor,[4] even though the mortgage provided that the surplus should be paid to the mortgagor, his executors or administrators,[5] unless the condition of the estate is such that it is necessary to resort to the realty for the payment of debts.[6] It has been held, however, that where, after the death of the grantor in a deed absolute on its face but intended to secure a debt, the grantee conveyed the premises, the money received by him above the amount of the mortgage debt was money had and received for the use of the estate of the grantor, and he was liable to account for the same at the suit of the grantor's administrator,[7] and that, if a power of sale, executed after the mortgagor's death, provides that the surplus of the proceeds, after payment of the debts and expenses, shall be paid to the mortgagor or his assigns, his executor may maintain an action therefor, although the mortgagor by his will devised the land to others.[8] Further, it has been held that, where a deed of trust is executed to secure a debt and subsequent to the grantor's death the deed is foreclosed, the surplus proceeds in the hands of the trustee go to the grantor's personal representatives.[9]

Money realized by the personal representative of the mortgagor on sale of mortgaged property subsequent to the death of the mortgagor does not become assets of his estate until the debt secured by the mortgage is fully paid.[10]

§ 111. —— Real Estate Purchased by Executor or Administrator

Real estate purchased by an executor or administrator with the funds or for the benefit of the estate is personal assets in his hands.

Real estate purchased by an executor or administrator with the funds or for the benefit of the estate is personal assets in his hands.[11] However, where an administrator purchases lands from the heirs of his intestate, it cannot be regarded in a court of law as assets in his hands.[12]

§ 112. —— Other Interests in Real Property

Various interests in real property other than those discussed in prior sections have been held to constitute, or not to constitute, assets of decedent's estate in the hands of his personal representative.

Interests in real property other than those treated supra §§ 103–111 have been held to constitute[13]

99. Mass.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.
Miss.—Wright v. Wright, 134 So. 197, 199, 160 Miss. 235, citing **Corpus Juris.**
28 C.J. p 1146 note 72.

1. Mass.—Dudley v. Dudley, 15 N.E. 2d 212, 300 Mass. 270, 117 A.L.R. 1365—Horton v. Robinson, 98 N.E. 681, 212 Mass. 248.

2. Vt.—Merriam v. Barton, 14 Vt. 501.

3. Ill.—Nielsen v. Gail, 217 Ill.App. 190.
23 C.J. p 1146 note 75.

4. Ala.—Turner v. Williams, 180 So. 95, 99, 235 Ala. 502, citing **Corpus Juris**—Roy v. Roy, 172 So. 253.
Miss.—Wright v. Wright, 134 So. 197, 199, 160 Miss. 235, citing **Corpus Juris.**
Mo.—Arrowood v. Delaney's Estate, App., 295 S.W. 522.
N.C.—Lipsitz v. Smith, 100 S.E. 247, 178 N.C. 98.
23 C.J. p 1146 note 76.

5. N.Y.—Dunning v. Ocean Nat. Bank, 61 N.Y. 497, 19 Am.R. 293.

6. Hawaii.—Whitney v. Ross, 17 Hawaii 453.
Miss.—Wright v. Wright, 134 So. 197, 160 Miss. 235.
23 C.J. p 1146 note 78.

7. Conn.—Sheldon v. Bradley, 37 Conn. 324.

8. Mass.—Varnum v. Meserve, 8 Allen 158.

9. Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

10. Okl.—Dawkins v. People's Bank & Trust Co., 38 P.2d 1, 169 Okl. 541.

11. Cal.—Schade v. Stewart, 272 P. 567, 205 Cal. 658.
23 C.J. p 1147 note 84.

12. Ala.—Coster v. Brack, 19 Ala. 210.

13. **Contract for exchange of property**
Under statute, where a party to a contract for exchange of lands dies prior to the time fixed for execution

or not to constitute[14] assets in the hands of the personal representatives of decedent.

Contracts for sale. Where the vendor in a contract for the sale of land dies before the payment of the purchase money and the execution of the conveyance, his personal representatives and not his heirs will be entitled to receive the purchase money,[15] unless a contrary intent is shown by the contract itself,[16] or by the will of the vendor.[17] The executor or administrator will be entitled to enforce the contract and to hold the proceeds of any unpaid balance thereof, whether as assets of the estate or in trust for heirs or devisees, according as the terms of sale may justify.[18] It has even been held that where the executors have canceled the contract of sale for default of the purchaser and regained title, they may sell and convey such realty, and account for the proceeds as personalty.[19] However, it has been asserted that where the contract of sale is void or cannot be enforced the land descends to the vendor's heirs on his death;[20] and that the legal title which remains in the vendor where a lien is reserved in his deed to secure the purchase money descends to his heirs.[21]

Where time is of the essence of a contract for the sale of realty and the entire title remains in the vendor until performance, on his death the contract is not personal property to be inventoried and administered as such by his personal representative.[22]

Where the owner of land dies after making a contract to sell the land, a rescission of the contract after the owner's death has the effect of reconverting the proceeds of the sale into land which does not constitute assets of decedent's estate in the hands of his personal representative.[23]

Contracts for purchase. Where the purchaser of land pays for it but dies before taking a deed, the land, on a suitable conveyance thereof, belongs beneficially to his heirs or devisees;[24] and a bond or contract for the conveyance of land passes on the purchaser's death to his heirs or devisees rather than to his executor or administrator.[25] It has been held that the purchase money paid on an agreement for the sale of land is in equity considered as land, and if the contract is vacated after the death of the purchaser it goes to the heir, who is the proper person to sue therefor,[26] but this has also been denied.[27] The personal representative may sue for a mere right to acquire an interest in land, or for breach of condition during the obligee's lifetime, with failure to make title.[28]

A right to enforce a lien for taxes paid on an

of conveyances, his interest under such contract constitutes assets of his estate in the hands of his personal representative.—Boeck v. Johnson, 201 N.W. 311, 161 Minn. 248.

14. Chattels deposited in realty

Where chattels have been deposited in the soil, they pass with the real property to the heirs or devisees.—Burdick v. Chesebrough, 88 N.Y.S. 13, 94 App.Div. 532—23 C.J. p 1146 note 71.

Interest of tenant in common

The interest of a tenant in common in realty does not constitute assets of his estate in the hands of his personal representatives.—Watkins v. Merrihew's Estate, 131 A. 794, 99 Vt. 294.

15. Cal.—In re Reid's Estate, 79 P.2d 451, 26 Cal.App.2d 362.
Ill.—Hayne v. Fenton, 151 N.E. 877, 321 Ill. 442.
Mich.—In re McBride's Estate, 235 N.W. 166, 253 Mich. 305.
Miss.—Howell v. Hill, 48 So. 177, 94 Miss. 566.
N.Y.—Persico v. Guernsey, 220 N.Y.S. 689, 129 Misc. 190, affirmed 225 N.Y.S. 890, 222 App.Div. 719.
Ohio.—Berndt v. Lusher, 178 N.E. 14, 40 Ohio App. 172.
23 C.J. p 1145 note 55.

Vendor's interest as personalty

Vendor's interest under executory contract for sale of land should be treated as "personalty" for purpose of administration.—In re Ellermann's Estate, 35 P.2d 763, 179 Wash. 15—In re Field's Estate, 252 P. 534, 141 Wash. 526.

16. Ind.—Stevens v. Flannagan, 30 N.E. 898, 131 Ind. 122.
23 C.J. p 1145 note 56.

17. Ohio.—Rugg v. Larimore, 27 Ohio N.P.,N.S., 96.
23 C.J. p 1145 note 57.

18. Ill.—Butman v. Butman, 72 N.E. 821, 213 Ill. 104.
23 C.J. p 1145 note 58.
Enforcement of specific performance or recovery of purchase money see infra § 267.

19. N.C.—McMillan v. Reeves, 9 S.E. 449, 102 N.C. 550.
23 C.J. p 1145 note 59.

20. U.S.—McKay v. Carrington, C.C.Ohio, 16 F.Cas.No.8,841, 1 McLean 50.

21. Tex.—McCord v. Hames, 85 S.W. 504, 38 Tex.Civ.App. 239.

22. Kan.—Pickens v. Campbell, 179 P. 343, 104 Kan. 425.

23. Pa.—Leiper v. Irvine, 26 Pa. 54.
23 C.J. p 1138 note 97 [f].

24. Neb.—Cutler v. Meeker, 99 N.W. 514, 71 Neb. 732, 8 Ann.Cas. 951.
23 C.J. p 1145 note 63.
Option to purchase leased premises as assets of estate see the C.J.S. title Landlord and Tenant § 85, also 35 C.J. p 1044 notes 29 [a], [b], 30 [a].

25. N.Y.—Persico v. Guernsey, 220 N.Y.S. 689, 129 Misc. 190, affirmed 225 N.Y.S. 890, 222 App.Div. 719.
23 C.J. p 1145 note 64.

Certificates

(1) The text rule has been applied to interests represented by purchasers' certificates at execution sales.—Potts v. Davenport, 79 Ill. 455.

(2) Such rule has also been applied to tax certificates.—Madler v. Kersten, 175 N.W. 779, 170 Wis. 424.

(3) However a purchaser's interest in certificate of purchase at execution sale has been held to pass to his personal representative.—Palmer v. Riddle, 54 N.E. 227, 180 Ill. 461.

(4) Moreover a sheriff's certificate of sale under foreclosure by advertisement has been held to be assets in the hands of the personal representative of decedent in whose name such certificate is issued.—Boschker v. Van Beek, 122 N.W. 338, 19 N.D. 104—Winterberg v. Van de Vorste, 112 N.W. 866, 19 N.D. 417.

26. N.C.—Young v. Young, 81 N.C. 91—Tate v. Conner, 17 N.C. 224.

27. Ala.—Castleberry v. Pierce, 5 Stew. & P. 150, 24 Am.D. 774.
Ky.—Laufler v. Ashley, 6 Ky.L. 748.
23 C.J. p 1146 note 66.

28. Mich.—Gustin v. Bay City Union

invalid sale, given by statute to "the grantee, his heirs and assigns," belongs to the purchaser's heirs and not to his personal representatives.[29] A covenant to convey land is not an asset in the hands of the personal representative of the covenantee.[30]

Buildings or improvements. Where the decedent has begun erecting an expensive dwelling house for his personal residence, the personal representative may in his discretion and for the best interests of the estate stop such work and treat materials purchased and furnished as personal assets to be disposed of accordingly.[31] While improvements put upon land ordinarily become part of the realty, the owner of erections upon land of another may, by agreement with the owner of the land, provide otherwise, so that on the death of either party equity shall provide due reimbursement as for personal property.[32]

Property as to which power of sale given. It is held in some cases that an authority given by will to an executor to sell land, unless accompanied by the right to receive the rents and profits, vests no estate in the executor, but the lands descend to the heirs or pass to the devisees subject to the execution of the power;[33] but there is also authority for the view that, where a testator authorizes or directs his executors to sell his real estate for certain purposes, the legal title to that real estate vests in the executors on the death of the testator.[34]

Where decedent gives his personal representative power to sell real estate, the proceeds of the sale made in the exercise of such power constitute assets of decedent's estate in the hands of the personal representative.[35]

Dower interest or widow's share. Where the wife survives her husband, and thus becomes entitled to her dower or corresponding interest in his real and personal estate, but dies before it is set off to her, the right to recover, if surviving her death at all, see Abatement and Revival § 149, passes to her executor or administrator and not to her heirs or next of kin.[36] Where, however, the statute gives to the widow a distributive share of her husband's lands, which she takes in fee simple, the realty to which she has thus acquired title, like any other realty, descends to her heirs or devisees and is not assets in the hands of her personal representative.[37]

§ 113. Interests in Partnerships

Ordinarily the personal representative, and not the heirs of a deceased partner, succeeds to his unliquidated interest in the partnership; legal title to the firm's assets is not an asset in the hands of such representative who takes merely an equitable interest in the distribution of any remaining surplus.

Before the liquidation of a partnership its effects are considered personalty, not realty, although invested in land; and it is usually considered when a partner dies, that his personal representative, not his heir, succeeds to his unliquidated interest therein;[38] but the legal title to property belonging to the copartnership vests in the surviving partner or partners, see the C.J.S. title Partnership § 275, also 47 C.J. p 1044 note 52–p 1045 note 60, and not in the deceased partner's personal representative,[39] who

School-Dist., 54 N.W. 156, 94 Mich. 502, 34 Am.S.R. 361.
23 C.J. p 1146 note 67.

29. Ind.—Stephenson v. Martin, 84 Ind. 160.

30. N.C.—Thrower v. McIntire, 20 N. C. 359, 34 Am.D. 382.

31. Ohio.—Gray v. Hawkins, 8 Ohio St. 449, 72 Am.D. 600.

32. Mass.—Washburn v. Sproat, 16 Mass. 449.
Mo.—Brown v. Turner, 20 S.W. 660, 113 Mo. 27.

33. U.S.—Robinson v. Georgia Sav. Bank & Trust Co., C.C.A.Ga., 106 F.2d 944.
Del.—Brennan v. Wilmington Trust Co., 126 A. 42, 2 W.W.Harr. 482.
Ind.—French v. French, 108 N.E. 786, 58 Ind.App. 621.
Mass.—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39.
N.Y.—In re Powers' Estate, 199 N. Y.S. 96, 205 App.Div. 49.
23 C.J. p 1147 note 82.
Sale under testamentary authority see infra §§ 274–296.

Failure of executor to exercise power does not divest the title of the devisees.—Boland v. Tiernay, 91 N.W. 836, 118 Iowa 59.

34. Neb.—Arlington State Bank v. Paulsen, 78 N.W. 303, 57 Neb. 717.
Pa.—Dundas' Appeal, 64 Pa. 325.

35. N.Y.—In re Powers' Estate, 199 N.Y.S. 96, 205 App.Div. 49.
Proceeds of sale of realty as assets generally see supra § 104.

36. Pa.—Paul v. Paul, 86 Pa. 270.
23 C.J. p 1148 note 43.

37. Iowa.—Oslund v. Peterson, 160 N.W. 899.

38. Nev.—Bengoa v. Reinhart, 297 P. 506, 509, 53 Nev. 241, citing **Corpus Juris.**
Okl.—Lyons v. Lyons, 76 P.2d 892, 893, 182 Okl. 113, citing **Corpus Juris.**
Wis.—Mattson v. Wagstad, 206 N.W. 865, 188 Wis. 566.
23 C.J. p 1147 note 87.

39. U.S.—New York Life Ins. Co. v. Hageman, C.C.A.Ill., 80 F.2d 446.
Cal.—De Coe v. Johnson, 202 P. 362, 54 Cal.App. 592.
Ill.—In re McCormick's Estate, 2 N. E.2d 967, 286 Ill.App. 90.
Mich.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.
Nev.—Bengoa v. Reinhart, 297 P. 506, 509, 53 Nev. 241, citing **Corpus Juris.**
N.J.—Thomsen v. Riedel, 176 A. 701, 114 N.J.Law 379.
Okl.—Lyons v. Lyons, 76 P.2d 892, 893, 182 Okl. 113, citing **Corpus Juris.**
Pa.—In re Cassel's Estate, 18 Leh.L.J. 123.
Tex.—Turner v. Wilcox, Civ.App., 146 S.W.2d 264—Johnston v. Winn, Civ. App., 105 S.W.2d 398, error dismissed.
23 C.J. p 1147 note 88.

Bond

Under a statute providing that the surviving partner may be required to give a bond for the due administration of the partnership effects and that if he fails to do so the administrator of the deceased partner will be entitled to take possession of the

takes merely an equitable interest in the distribution of any surplus remaining after payment of partnership debts,[40] having no interest in the firm assets but only the right to an accounting.[41] The representatives of the deceased partner have, however, a lien on all firm property to the extent of the deceased partner's share.[42] On the settlement of the partnership the interest of a deceased partner goes to his personal representative as an asset of decedent's estate.[43]

Subject to the rules stated, the courts have held that particular interests constitute assets in the hands of the personal representatives of a deceased partner.[44]

§ 114. Proceeds of Insurance Policies

The question whether the proceeds of insurance policies constitute assets in the hands of personal representatives is determined largely by the type of policy considered, and the law peculiarly applicable thereto is discussed in appropriate places elsewhere in this work. Whether such proceeds constitute assets when derived from accident policies see the C. J.S. title Insurance § 1182, also 1 C.J. p 407 notes 43, 44; fire insurance policies see the C.J.S. title Insurance § 1149, also 26 C.J. p 444 notes 1, 2; industrial insurance policies see the C.J.S. title Insurance § 1187, also 31 C.J. p 971 note 31–p 972 note 48; life insurance policies see the C.J.S. title Insurance §§ 1156, 1157, 1165, 1166, 1170, also 37 C.J. p 565 note 63–p 566 note 76, p 566 notes 80, 90, p 569 note 67, p 570 notes 76, 77, p 571 note 91, p 573 note 43–p 575 note 80; mutual benefit insurance certificates or policies see the C.J.S. title Insurance § 1591, also 45 C.J. p 247 note 96.

Proceeds of war risk insurance policies as assets of decedent's estates see Army and Navy § 85.

Death benefits attaching to membership in trade unions are discussed in the C.J.S. title Trade Unions § 38, also 63 C.J. p 693 notes 62, 63.

§ 115. Exempt Property

Unless otherwise provided by statute, exempt property is assets in the hands of the personal representative of the deceased debtor.

On the death of a debtor, property which would have been set apart for him under his exemption had he lived remains a part of his estate and goes, in the absence of any statute providing otherwise, to his executor or administrator;[45] but under stat-

entire partnership effects, a notice by the administrator of the deceased partner requiring a bond from the surviving partner is sufficient to divest the property of the survivor without a citation from the court.—James v. Dixon, 21 Mo. 538.

40. U.S.—Bahr v. Commissioner of Internal Revenue, C.C.A.Tex., 119 F.2d 371.
Mich.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.
Nev.—Bengoa v. Reinhart, 297 P. 506, 53 Nev. 241.
N.Y.—People ex rel. Whitney v. Loughman, 234 N.Y.S. 349, 226 App.Div. 108, affirmed 168 N.E. 421, 251 N.Y. 544—In re Ducker's Estate, 263 N.Y.S. 217, 146 Misc. 899—In re Prince's Will, 252 N.Y.S. 908, 141 Misc. 600, reversed on other grounds 262 N.Y.S. 785, 238 App. Div. 855.

Interest subject to sale
Under statute this interest is subject to sale by the personal representative.—Currie v. Landes, 202 P. 893, 55 Cal.App. 73.

41. U.S.—Gugenheim v. Helvering, C.C.A., 117 F.2d 469, certiorari denied Guggenheim's Estate v. Commissioner of Internal Revenue, 62 S.Ct. 66.
Nev.—Bengoa v. Reinhart, 297 P. 506, 53 Nev. 241.
N.Y.—In re Martiniano's Estate, 15 N. Y.S.2d 285, 172 Misc. 376.
Okl.—Lyons v. Lyons, 76 P.2d 892, 182 Okl. 113.
Wis.—Mattson v. Wagstad, 206 N.W. 865, 188 Wis. 566.

42. N.Y.—Hooley v. Gieve, 9 Abb.N. Cas. 8.

43. Colo.—Heuschel v. Wagner, 215 P. 476, 73 Colo. 327.

44. **Equity of partner in contract to purchase**
Where, at time of partner's death, partnership had contract to purchase lands on which payments were made, and balance was paid by new partnership and title taken to land, deceased partner's estate is entitled to interest equal to deceased partner's equity therein.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.

Good will
Interest of deceased partner in good will of business may be an asset of his estate.—Cummings v. Russell, 155 N.E. 641, 258 Mass. 502.

Profits
(1) Representatives of deceased partner are entitled to share in net profits earned by surviving partner while liquidating business.—Murdock v. Murdock, 150 A. 599, 300 Pa. 280.

(2) Deceased partner's administratrix, on electing to take value of deceased's interest in property of partnership of contractors, could recover deceased's share of profits on contracts under execution at date of deceased's death only to extent profits were earned before death.—Belding v. Belding, 192 N.E. 917, 358 Ill. 216, reversing 272 Ill.App. 196.

45. Cal.—Pachett v. Webber, 245 P. 422, 198 Cal. 440.
23 C.J. p 1149 note 1.

Homestead property may constitute assets of decedent's estate.
Ark.—Huffstedler v. Kibler, 54 S.W. 210, 67 Ark. 239.
Cal.—Patchett v. Webber, 245 P. 422, 198 Cal. 440.

Pension money
(1) Money which has been paid over to a pensioner is assets of his estate in the hands of his personal representatives notwithstanding statute exempting money due, or to become due, to a pensioner.—Appanoose County v. Carson, 229 N.W. 152, 210 Iowa 801.

(2) Homestead exemption statute is inapplicable to exemption of pension money in hands of administrator of pensioner's estate against claims of creditors.—Appanoose County v. Carson, supra.

(3) Statute exempting pension from execution does not exempt pension money in hands of administrator of pensioner's estate against claims of creditors.—Appanoose County v. Carson, supra.

(4) Pension money of deceased widow of Civil War veteran constitutes assets of her estate liable for payment of debts notwithstanding an exemption statute.—In re Stevens' Estate, 24 N.Y.S.2d 786, 261 App.Div. 48.

utes in some jurisdictions certain property, or funds, or property up to a certain value, is not considered assets, but goes to the widow or children or other person entitled thereto free from the decedent's debts,[46] and under a statute specifically exempting certain funds from payment of the obligations of decedent it has been held that such funds simply pass into the hands of the estate for the purpose of distribution to the beneficiaries.[47] To the extent that property exceeds in value the sum specified by the exemption statutes, it may constitute assets in the hands of the personal representative.[48]

Property which is exempt at the time of the owner's death may become an asset of his estate when the person entitled to the benefit of the exemption renounces his right thereto.[49]

§ 116. Foreign Assets

Generally the assets of a decedent's estate, as far as his personal representatives are concerned, are limited to property within the state or country granting administration, although foreign assets coming into their hands constitute assets of the estate.

In general the granting of administration is limited to property within the state or country of the grant so far as the authority conferred is concerned;[50] but the domiciliary representative should hold accountable, as far as he reasonably may, those who receive or hold such foreign assets,[51] while if he himself receives such property it becomes assets in his hands which must be accounted for as such.[52] An executor or administrator qualifying in the state of the domicile of the testator has title ul-

(5) Statutes exempting pension money from liability for debts do not render real estate purchased with pension money exempt from payments of pensioner's debts after his death. —In re Stevens' Estate, supra.

Property of husband; individual property of widow

Tools and household goods of a deceased husband may be regarded as part of the general assets of his estate, subject to the right of the widow to retain such items as belonged to her individually at the time of his death.—In re David's Estate, 288 N.W. 418, 227 Iowa 352.

46. Ala.—Childs v. Thompson, 104 So. 287, 20 Ala.App. 594.
Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.
N.D.—Bertsch v. Clooten, 200 N.W. 904, 51 N.D. 733.
Okl.—McPosey v. Sisters of the Sorrowful Mother, 57 P.2d 617, 177 Okl. 52.
5 C.J. p 825 note 34 [a] (9), 35 [a]—23 C.J. p 1149 note 2.

Homestead

(1) Homestead property does not constitute assets of decedent's estate.
U.S.—Pfister v. Johnson, D.C.Okl., 13 F.Supp. 662.
Fla.—Wain v. Howard, 196 So. 210, 142 Fla. 736—Spitzer v. Branning, 184 So. 770, 135 Fla. 49—Hedick v. Hedick, 21 So. 101, 38 Fla. 252.
Neb.—U. S. Fidelity & Guaranty Co. v. Bates, 296 N.W. 560—Dillon v. Dillon, 171 N.W. 917, 103 Neb. 322—Judson v. Creighton, 128 N.W. 651, 88 Neb. 37.
Okl.—Ringer v. Byrne, 80 P.2d 212, 183 Okl. 46—Kimberlin v. Anthony, 254 P. 1, 124 Okl. 170—Pioneer Mortgage Co. v. Carter, 202 P. 513, 84 Okl. 85.
Tex.—Pace v. Eoff, Com.App., 48 S.W. 2d 956, modifying Eoff v. Pace, Civ. App., 25 S.W.2d 264—Padalecki v. Dreibrodt, Civ.App., 129 S.W.2d 481, error dismissed, judgment correct—Equitable Building & Loan Ass'n v. Jones, Civ.App., 36 S.W.2d 252—Greene v. Cass County State Bank, Civ.App., 7 S.W.2d 620—Cline v. Niblo, Civ.App., 286 S.W. 298, reversed on other grounds, Com.App., 292 S.W. 178, modified on other grounds 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916—Henry v. Brown, Civ. App., 279 S.W. 541—Allen v. Ramey, Civ.App., 226 S.W. 489.
Wis.—Curtis v. Gillie, 300 N.W. 911, 239 Wis. 207.

(2) To the extent to which a lease is exempt as a homestead it does not go to the personal representative. —In re Ring, 109 N.W. 710, 132 Iowa 216.

Pension money; adjusted service compensation

(1) Under statute, pension money may not constitute assets of the estate of a deceased pensioner.—National Home for Disabled Volunteer Soldiers, Danville, Ill., v. Wood, Ill., 57 S.Ct. 137, 299 U.S. 211, 81 L.Ed. 130, affirming, C.C.A., 81 F.2d 963, modifying, D.C., Wood v. National Home for Disabled Soldiers, Danville, Ill., 9 F.Supp. 403, certiorari granted National Home for Disabled Volunteer Soldiers, Danville, Ill. v. Wood, 57 S.Ct. 10, 299 U.S. 523, 81 L.Ed. 385—Durack v. National Home for Disabled Volunteer Soldiers, D.C.Me., 38 F.2d 112, affirmed, C.C.A., 44 F.2d 516—23 C.J. p 1149 note 2 [c].

(2) Money placed in special deposit account of branch treasurer of soldiers' home for disbursement to pensioners is "pension money" within the meaning of such statute.—Durack v. National Home for Disabled Volunteer Soldiers, supra.

(3) Adjusted service compensation of a World War veteran may not, under statute, constitute assets of his estate.
Kan.—In re Oman, 222 P. 111, 115 Kan. 232.

Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.
Pa.—In re Schmuckli's Estate, 17 A. 2d 876, 341 Pa. 36.

Solvency of estate

The application of the text rule is not affected by the solvency or insolvency of the decedent's estate.
Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.
Tex.—Henry v. Brown, Civ.App., 279 S.W. 541.

Wages

Neb.—Dobney v. Chicago & N. W. Ry. Co., 235 N.W. 585, 120 Neb. 824.

"Wearing apparel"

"Wearing apparel," which is not to be deemed assets of decedent under an exemption statute, is not confined to clothing, but includes articles of ornamentation such as watch and chain.—In re Carter's Estate, 240 P. 727, 113 Okl. 182.

47. Iowa.—In re Galloway's Estate, 269 N.W. 7, 222 Iowa 159.

48. **Evidence held sufficient** to show value in excess of that prescribed by statute.—Columbia Trust Co. v. Anglum, 225 P. 1089, 63 Utah 353.

49. Okl.—In re Butler's Estate, 73 P.2d 417, 181 Okl. 301.

50. Conn.—Bankers' Trust Co. of New York v. Greims, 147 A. 290, 110 Conn. 36, 66 A.L.R. 726.
N.H.—Dupont v. Moore, 166 A. 417, 86 N.H. 254.
22 C.J. p 1148 note 91.
Foreign and ancillary administration see infra §§ 988–1015.

Situs of debt

Tex.—Saner-Ragley Lumber Co. v. Spivey, Com.App., 238 S.W. 912, reversing, Civ.App., 230 S.W. 878.
23 C.J. p 1148 note 91 [a].

51. Mass.—Hutchins v. State Bank, 12 Metc. 421.
23 C.J. p 1148 note 93.

52. Cal.—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.
Wis.—In re Pfister's Estate, 255 N.W.

timately to the assets, wherever they may be situated, subject, however, to the satisfaction of local creditors and claimants,[53] and he should consider all the chattels of his decedent wheresoever situated as assets, if by reasonable diligence he may pursue and possess himself of them.[54]

§ 117. Ownership of Property

Only property which decedent owned at the time of his death may constitute assets of his estate; an executor or administrator cannot claim a greater interest in property than the decedent had.

As a general rule, only such property as a decedent owned at the time of his death may constitute assets of his estate.[55] Debts or claims can be assets only where decedent was the creditor or claimant at the time of his death;[56] but an obligation really owned by decedent is an asset of his estate,

911, 216 Wis. 42, rehearing denied 256 N.W. 245, 216 Wis. 42.
23 C.J. p 1148 note 94.

53. Ky.—Compton's Adm'r v. Borderland Coal Co., 201 S.W. 20, 179 Ky. 695, L.R.A.1918D 666.
Md.—York v. Maryland Trust Co., 133 A. 128, 131, 150 Md. 354, 46 A.L.R. 231, quoting **Corpus Juris.**
23 C.J. p 1148 note 95.
Stock of foreign corporation may be administered by the domiciliary representative where there is no ancillary administration.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal. App. 153.

54. Md.—York v. Maryland Trust Co., 133 A. 128, 131, 150 Md. 354, 46 A.L.R. 231, quoting **Corpus Juris.**
23 C.J. p 1148 note 96.

55. Ark.—Pool v. Gordon, 221 S.W. 453, 144 Ark. 105.
Cal.—In re Olmstead's Estate, 15 P. 2d 495, 216 Cal. 585—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 814, 106 Fla. 46, citing **Corpus Juris.**
Iowa.—In re Lewis' Estate, 298 N. W. 842, 230 Iowa 694.
La.—Boykin v. Boykin, 4 La.App. 210.
Minn.—Engelking v. First State Bank of Northome, 209 N.W. 307, 167 Minn. 486.
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
Mo.—Cunningham v. Kinnerk, 74 S. W.2d 1107, 1113, 230 Mo.App. 749, citing **Corpus Juris.**
N.Y.—In re Kornder's Estate, 6 N. Y.S.2d 324, 168 Misc. 553—In re Guarneri's Will, 268 N.Y.S. 244, 149 Misc. 759—In re Tiebor's Estate, 3 N.Y.S.2d 40.
Pa.—In re Logan's Estate, 74 Pa.Super. 82—In re Rahauser's Estate, 52 York Leg.Rec. 37.
Tex.—Markward v. Murrah, 156 S. W.2d 971, 138 A.L.R. 242, affirming, Civ.App., 136 S.W.2d 649, and reversing 136 S.W.2d 652 and 136 S.W.2d 656—Coggin Nat. Bank v. Smith, Civ.App., 63 S.W.2d 252.
Utah.—In re Rogers' Estate, 284 P. 992, 75 Utah 290.
23 C.J. p 1149 note 3—5 C.J. p 825 note 34 [d] (3).

Property accruing after death see infra § 126.

Surviving wife's business
Administrator of deceased husband as representative of creditors has no rights in property of surviving wife engaged in business.—Chase v. Chase, 171 N.E. 651, 271 Mass. 485.

Property acquired during coverture
(1) In absence of wife's written assent, personalty acquired by her during coverture cannot become the property of her husband even though he purports to reduce the property to his own possession, and, having never been his property, cannot be part of his estate.—Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

(2) Bonus from sale of oil and gas lease on property not acquired by joint industry during coverture is not itself property so acquired within meaning of distribution statute.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.

Workmen's compensation award
Lump sum award of compensation paid attorney for injured party became part of latter's estate on his death.—Bannat v. Zulley, 243 Ill. App. 497.

Absence of formal conveyance
Where a testator directed that his debts and funeral expenses be paid, and that his property be sold, and the proceeds paid over to, or invested for, his widow, and the land was not sold, but the widow remained in possession thereof after having agreed with the executor in writing to assume the debts and discharge him from liability, such land was part of the widow's estate, and subject to her debts at her death, notwithstanding the failure of the executor formally to convey it to her.—Logan v. Bean, 87 S.W. 1110, 120 Ky. 712, 27 Ky.L. 1081.

Asset not reduced to possession
Where wife died intestate and without issue in 1912, leaving bank deposit, and husband who was appointed administrator died in 1917, beneficial interest in bank deposit passed to next of kin of husband on his death, even though he had not reduced bank deposit to possession during his lifetime.—Hennessey v. Meehan, 191 A. 515, 58 R.I. 104.

Payment to widow merely for distribution
Widow, under antenuptial agreement creating trust guaranteeing to her a stated income per month and requiring her to account for income received in excess of that amount, was not entitled, during administration of the husband's estate, to receive income in excess of amount guaranteed merely for purpose of permitting her to make distribution to parties entitled to it, nor was she entitled to receive it as administratrix to await orders of court.—Cannon v. Birmingham Trust & Savings Co., 102 So. 453, 212 Ala. 316.

56. N.Y.—Conlon v. Union Dime Sav. Bank, 186 N.Y.S. 303, 195 App.Div. 509.
23 C.J. p 1150 note 6.
Debts and rights of action generally see supra §§ 100–102.
A recovery by the personal representative becomes assets of the decedent's estate.
Ala.—American Life Ins. Co. of Alabama v. Carlton, 184 So. 171, 236 Ala. 609.
Okl.—Baltimore American Ins. Co. of New York v. Cannon, 73 P.2d 167, 181 Okl. 244.

Claims acquired in discharging obligations
Claims acquired by executors in properly administering estate as incident to discharge of testator's obligations are enforceable by executors.—In re Jarvis' Estate, 285 N. Y.S. 285, 158 Misc. 255.

Contribution from joint debtors
A mortgage obligation upon which deceased was a cosigner was a primary debt of deceased's estate properly listed in the schedule of debts filed by executor, and if the estate satisfied the debt it would be entitled to contribution from the joint debtors, which contribution would be an asset of the estate.—In re Fiebig's Estate, 22 N.E.2d 288, 61 Ohio App. 40.

Note and contract in favor of husband and wife
On death of wife, husband was entitled to promissory note payable to husband or wife and to annuity contract in favor of husband and wife, or survivor.—Holmes v. Vigue, 173 A. 816, 133 Me. 50.

although it nominally runs to another.[57] An executor or administrator cannot claim a greater interest in property than decedent had;[58] he takes the property subject to such charges, liens, claims, and obligations on it as existed at the time of decedent's death.[59]

Decedent's interest in collateral which he had posted as security is an asset of his estate.[60]

Joint bank account

(1) Entire bank account, changed from joint account to decedent's name only before his death, belonged to estate.—In re Gallagher's Estate, 262 N.Y.S. 381, 146 Misc. 112.

(2) Where a husband deposited in a bank money belonging to himself, in the name of his wife, with the understanding that all or any of it might be withdrawn either by himself or by the wife and both the husband and the wife died without withdrawing the money, the title to such money vested jointly in the estates of the husband and wife.—First Nat. Bank v. Sanders, 122 S.E. 341, 31 Ga.App. 789.

Drafts

Where drafts were purchased for the purpose of making gifts to the respective payees, but before the intention was carried out the purchaser died and the drafts passed into the hands of her executrix, the drafts, as between the bank selling the drafts and the decedent's estate, must be deemed to be the property of the estate, it being legally impossible to carry out the deceased's intentions by giving to the payees.—Gellert v. Bank of California, National Ass'n, 214 P. 377, 107 Or. 162.

57. Kan.—Hanrion v. Hanrion, 84 P. 381, 73 Kan. 25, 117 Am.S.R. 453.
23 C.J. p 1150 note 7.

Account in another's name

(1) Funds which mother deposited in bank to daughter's credit, and which daughter used for mother's support and maintenance, were property of mother, in absence of showing that deposit was intended as gift.—In re Turner's Estate, 266 N.Y.S. 435, 148 Misc. 142.

(2) Payment of bank deposits in wife's name to surviving husband is valid as against wife's administrator, where funds belonged to husband, but were deposited in wife's name for convenience, though each drew checks on bank.—Wasson v. Lillard, 74 S.W.2d 637, 189 Ark. 546.

(3) Where A and B opened a savings account by depositing money in the name of B, there being no evidence as to whom the money belonged, and the signature card authorized the bank to pay the money on a check signed by B and countersigned by A, or on a check signed "B by A," and later A withdrew the money by check payable to his order, signed "B by A," and deposited it in another name, the money was the property of A, and his executor is entitled to it as part of his estate.—Dempsey v. Brighton Bank & Trust Co., 14 Ohio App. 170.

58. Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.
Mich.—Ripley v. Lucas, 255 N.W. 356, 267 Mich. 682.
Ohio.—Hodapp v. Hodapp, App., 37 N.E.2d 101—Wagner v. Blanchard, 178 N.E. 846, 40 Ohio App. 553.
Pa.—Krewson v. Sawyer, 109 A. 798, 266 Pa. 284.

Superior right outstanding

An administrator is not entitled to hold property to which others have a superior right.—Flaks, Inc. v. De Berry, 79 P.2d 825, 53 Wyo. 203, 116 A.L.R. 1191.

Property wrongfully acquired or withheld

(1) Where decedent obtained money from one bank by fraud, and deposited it in another bank, money on deposit in decedent's name in second bank at time of decedent's death was held to belong to defrauded bank.—In re Accles' Estate, 275 N.Y.S. 430, 153 Misc. 421, affirmed 281 N.Y.S. 973, 245 App.Div. 743.

(2) An administrator in possession of property conveyed to his intestate in fraud of creditors stands in the shoes of the deceased vendee, taking only what his intestate rightfully held at his death.—Flaks, Inc. v. De Berry, 79 P.2d 825, 53 Wyo. 203, 116 A.L.R. 1191.

(3) Where an officer of the court without authority withholds personal property of the estate, his estate may not retain any part of the funds withheld.—In re De Barry's Estate, 111 P.2d 728, 43 Cal.App.2d 715.

59. Cal.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.
Iowa.—In re Lewis' Estate, 298 N.W. 842, 230 Iowa 694.
N.Y.—In re Guarneri's Will, 268 N.Y.S. 244, 149 Misc. 759.

Property in decedent's name as security

Where title to property purchased by son with aid of loan from father was taken in father's name for his protection and stood in his name at time of his death although loan had been repaid, administrator of father's estate was not owner and was not entitled to rents and profits from property.—Hyland v. Tousley, 275 N.W. 340, 67 N.D. 612.

Conditional sale

Under contract providing that title should not pass until drafts were paid, title was in seller, who could, on default, retake merchandise from buyer's administrators.—National Bank of Arkansas v. Interstate Packing Co., 299 S.W. 34, 175 Ark. 341.

Deed as mortgage

Where deed absolute in form is made to secure debt, and the grantee dies, the grantor has a right as against the administrator to reconveyance of the property on payment of the debt.—Paulk v. Dorminey, 115 S.E. 488, 154 Ga. 785.

Payment by third person of charge on property

Where, after death of husband, wife paid note which she had executed in consideration of extension of husband's preëxisting indebtedness to payee, land on which husband had executed mortgage to secure note became part of husband's estate and subject to claims against estate.—Strelitz v. First Wisconsin Nat. Bank of Milwaukee, 264 N.W. 649, 220 Wis. 443.

Proceeds greater than claim

Where claimant was entitled to preferred claim against estate of pledgor for proceeds of sale of pledged merchandise, claim would be allowed as preferred claim only in sum claimant in proof of claim filed with administratrix demanded, although proceeds of sale of pledged merchandise exceeded demand.—In re Petrosemolo's Estate, 273 N.Y.S. 718, 152 Misc. 419.

Levy after death

Where landlord, after tenant's death, distrained automobile acquired by tenant under bailment lease, bailor's subsequently replevining automobile did not eliminate rights of tenant's estate.—Studebaker Sales Co. of Pittsburgh v. Nehaus, 158 A. 283, 103 Pa.Super. 114.

60. Colo.—Colorado Nat. Bank v. McCue, 249 P. 3, 80 Colo. 55.
Mo.—Studer v. Harlan, 109 S.W.2d 687, 233 Mo.App. 811—Hornsby v. Knorpp, 232 S.W. 776, 207 Mo.App. 302.

Possession of collateral

(1) Executor is not entitled to recover note pledged by testator as collateral security under agreement giving pledgee power of sale without first discharging obligation due pledgee.—Hamilton v. First Nat. Bank, 168 N.E. 774, 33 Ohio App. 100.

(2) The possessor of a policy of insurance on the life of a decedent may not be required to turn it over to decedent's executor if the policy was delivered as collateral security for a debt which the executor has not offered to discharge.—In re Pot-

§ 118. —— Property Held in Fiduciary Capacity

Property which a decedent held as a fiduciary is not part of his estate.

Property which a decedent held as trustee or in any other fiduciary capacity does not at his death properly constitute part of his estate;[61] title to the property may pass to decedent's heirs or personal representatives, but it does so clothed with the fiduciary obligation.[62] Such property cannot be charged with the debts of decedent,[63] or with the expense of administering the estate.[64] The fact that the fiduciary treated the property as his own does not alter the rule;[65] so decedent's wrongful act in selling trust property does not make the proceeds of the sale part of his estate.[66]

The rule that property of which decedent was trustee is not part of his estate applies where he is trustee of a trust which he established;[67] thus a bank account which decedent established in his name as trustee[68] or custodian[69] for another is not part of decedent's estate, unless he effectively revoked such trust before his death.[70] However, such a bank account trust is subject to the claims of decedent's creditors and is liable for funeral and administrative expenses to the extent that the assets of the estate are insufficient to pay such claims.[71]

The rule that property held by decedent in trust does not constitute assets of the estate does not release the executor or administrator from his duty to maintain the right of the estate to such property until it has been finally judicially determined that it is not the property of the estate;[72] the personal representative is entitled to hold the trust property un-

ochinak's Estate, 25 Pa.Dist. & Co. 282.

Application of collateral to other accounts

Brokers authorized to apply collateral in customer's margin account on claims against other accounts are entitled to proceeds thereof as against administrator of customer's estate.—In re Thomas' Estate, 257 N.Y.S. 336, 235 App.Div. 455.

61. U.S.—Matern v. Commissioner of Internal Revenue, C.C.A., 61 F.2d 663—Bolmer v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., D.C.Ky., 11 F.Supp. 560.
Ga.—Napier v. Mitchell, 187 S.E. 639, 183 Ga. 93.
Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 814, 106 Fla. 46, citing **Corpus Juris.**
Iowa.—In re Richardson, 100 N.W. 797, 138 Iowa 668.
N.Y.—Hawthorne v. Smith, 7 N.E.2d 139, 273 N.Y. 291, reversing 289 N.Y.S. 749, 248 App.Div. 612, affirming 289 N.Y.S. 804, 159 Misc. 709—In re Huselton's Estate, 237 N.Y.S. 531, 135 Misc. 56—In re Sommer's Estate, 12 N.Y.S.2d 47.
Pa.—In re Garrow's Estate, 49 Dauph.Co. 174.
23 C.J. p 1150 note 9.

Account in decedent's name as administrator

Plaintiff's decedent became vested with legal ownership of money in bank left by his wife, who died without descendants, and, having obtained possession thereof through administration before his death, he was the absolute owner in possession of the entire fund, all debts of his wife having been paid, the form of the deposit, credited to the wife's estate in the name of the widower as her administrator, not changing the fact of its exclusive ownership in him at the time of his decease.—Conlon v. Union Dime Sav. Bank, 186 N.Y.S. 303, 195 App.Div. 509.

Check intended as assignment

Where a depositor shortly before his death signed and delivered a check intended as an assignment of the deposit to the payee in payment of a debt, if the apparent title to the deposit was in the drawer's estate, it was held by the estate as trust property.—Dunlap v. Commercial Nat. Bank of Los Angeles, 195 P. 688, 50 Cal.App. 476.

Money which an agent receives in the course of his agency and keeps separate and distinct is not part of the agent's estate.—In re Oglesby's Estate, 215 Ill.App. 94.

Fund commingled but traceable

Where insured's check for insurance premiums was deposited by insurance broker, to whom insurance companies intrusted insurance policies for collection and remission of premiums, in his personal bank account on day before his death, and fund on deposit at his death exceeded proceeds of check, so that trust fund was clearly traced and identified, it should be paid over to such companies.—In re Sommer's Estate, 12 N.Y.S.2d 47.

62. U.S.—Matern v. Commissioner of Internal Revenue, C.C.A., 61 F. 2d 663.

63. U.S.—Bolmer v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., D.C.Ky., 11 F.Supp. 560.
Property available for payment of claims see infra § 478.

64. U.S.—Bolmer v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., supra.

65. U.S.—Bolmer v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., supra.
N.Y.—In re Petrosemolo's Estate, 273 N.Y.S. 718, 152 Misc. 419.

66. Mo.—Clay v. Walker, App., 6 S. W.2d 961.

Where administratrix sold merchandise delivered to decedent as agent, principal was entitled to preference as to proceeds of sale.—In re Petrosemolo's Estate, 273 N.Y.S. 718, 152 Misc. 419.

67. N.Y.—In re Sweeney's Estate, 279 N.Y.S. 927, 155 Misc. 461.

68. N.Y.—Malary v. National Sav. Bank of Albany, 286 N.Y.S. 693, 247 App.Div. 850—In re Yarme's Estate, 266 N.Y.S. 93, 148 Misc. 457, affirmed 273 N.Y.S. 403, 242 App.Div. 693—In re Brazil's Estate, 224 N.Y.S. 308, 130 Misc. 299.
23 C.J. p 1151 note 9 [h].

69. Pa.—In re Fitzgibbon's Estate, 116 A. 289, 272 Pa. 345.

70. N.Y.—In re Richardson's Estate, 235 N.Y.S. 747, 134 Misc. 174.

Revocation by incompetent's committee

Where deceased, prior to his incompetency, had established a tentative trust of a bank account, his committee could not revoke such trust and did not make the account part of the estate of the deceased by withdrawing the account and mingling the fund with the committee's other moneys.—In re Rasmussen's Estate, 264 N.Y.S. 231, 147 Misc. 564.

71. N.Y.—In re Reich's Estate, 262 N.Y.S. 623, 146 Misc. 616.

72. Cal.—Elizalde v. Murphy, 103 P. 904, 11 Cal.App. 32.

Decedent as committee for incompetent

On the other hand, it has been held that the personal representative of a decedent who was a committee for an incompetent is without authority to receive the property of the incompetent which was in the committee's possession at the time of his death.—Bolmer v. U. S. Fidelity

til a new trustee is appointed,[73] and should settle the account of the trust.[74]

Where the trust property has been dissipated or cannot be traced and identified, the beneficiary of the trust has only the rights of a general creditor against the estate,[75] unless, as discussed in § 461 infra, he is given a preference by statute.

Decedent as settlor of trust. The fact that decedent was the settlor of a trust does not of itself give his personal representatives any interest in the trust.[76]

§ 119. —— Estates for Life or Years

Property in which decedent had a life estate cannot constitute assets of his estate; but an estate pur autre vie or for years may do so.

Obviously property in which decedent had only a life estate cannot go to his personal representatives as assets, since the estate terminates on decedent's death.[77]

An estate pur autre vie[78] or an estate for years[79] may be an asset of the estate.

§ 120. —— Reversions or Remainders

A decedent's interest in reversion or remainder is an asset of his estate.

A decedent's interest in reversion or remainder in property is an asset of his estate.[80]

§ 121. —— Property Subject to Power of Appointment

Property subject to a decedent's power of appointment is not properly part of his estate, although it may be subject to the claims of his creditors.

Property subject to a decedent's power of appointment is not properly part of his estate,[81] whether

& Guaranty Co. of Baltimore, Md., D.C.Ky., 11 F.Supp. 560.

73. Ky.—Boyd v. Immegart, 91 S. W. 1132, 29 Ky.L. 20.

74. N.Y.—Boone v. Citizens' Sav. Bank, 84 N.Y. 83, 38 Am.R. 498.
23 C.J. p 1151 note 10.

75. N.Y.—In re Petrosemolo's Estate, 273 N.Y.S. 718, 152 Misc. 419 —In re Sommer's Estate, 12 N.Y. S.2d 47.
23 C.J. p 1151 note 12—24 C.J. p 427 note 16.

Bank account assumed to be trust money

Where decedent holds money in trust and amount of decedent's bank deposit is greater than trust fund, amount on deposit will, in absence of showing to contrary, be presumed to be money held in trust.—Armstrong v. Schoenborn, 20 P.2d 79, 130 Cal.App. 501.

76. Cal.—Shaw v. Johnson, 59 P.2d 876, 15 Cal.App.2d 599.
Iowa.—Baadtle v. Walgenbach, 171 N.W. 146, 185 Iowa 773.
N.Y.—Casey v. Casey, 146 N.Y.S. 348, 161 App.Div. 427.

Trust created by assent of decedent

Where a soldier on admission to a soldiers' home expressly assented to the regulations of the home, which required the payment of pension money to the treasurer of the home, to be held for the soldier's use during life, and on his death intestate to be paid to enumerated relatives, and he paid his pension money to the treasurer, his administrator could not recover the money in the hands of the treasurer, because of the trust created by the soldier's assent.—Treadway v. Veterans' Home, 111 P. 111, 14 Cal.App. 75.

77. N.Y.—In re Ehlers' Estate, 231 N.Y.S. 16, 132 Misc. 910.
23 C.J. p 1151 note 15.

What remains after life estate is ended is no part of life tenant's estate.—Nott v. Heitman Trust Co., 2 N.E.2d 143, 285 Ill.App. 450.

Power to invade principal

(1) Where testator bequeathed widow life estate in his personal property, with right to use principal, widow's estate was accountable to trust residuary estate for whatever remained of principal.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44.

(2) Property, not used for comfort and support of life tenant, as permitted by will, was subject to administration at death of life tenant, to subject it to satisfaction of debts incurred, to furnish support and comfort to life tenant, or to determine that there were no such debts, and executrix of life tenant was entitled to possession.—Porter v. Wheeler, 230 P. 640, 131 Wash. 482.

Power of sale

Property devised to life tenant with power of sale, which he attempted to convey by deed of gift, held not assets of his estate subject to his debts.—Merchants' Trust Co. v. Russell, 157 N.E. 338, 260 Mass. 162.

78. Ky.—Clore v. Nichols, 251 S.W. 846, 199 Ky. 581.
23 C.J. p 1151 note 16.

79. U.S.—Broadwell v. Banks, C.C. Mo., 134 F. 470.
23 C.J. p 1151 note 17.
Leaseholds generally see supra § 108.

80. Cal.—In re Hamon's Estate, 29 P.2d 326, 136 Cal.App. 517.
Mass.—Old Colony Trust Co. v. Clarke, 195 N.E. 758, 291 Mass. 17 —Sewall v. Elder, 181 N.E. 720, 279 Mass. 473.
Mo.—Cunningham v. Kinnerk, 74 S. W.2d 1107, 230 Mo.App. 749.
N.Y.—In re Hoole's Estate, 282 N.Y. S. 657, 156 Misc. 821—In re Croner's Will, 208 N.Y.S. 798, 124 Misc. 846.
Pa.—In re Koch's Estate, 17 Lehigh Co.L.J. 281.
Wash.—Johnson v. Redfield, 272 P. 55, 149 Wash. 618.
23 C.J. p 1152 note 19.

81. U.S.—U. S. v. Field, Ct.Cl., 41 S. Ct. 256, 255 U.S. 257, 65 L.Ed. 617, 18 A.L.R. 1461.
Ill.—Riggs v. Barrett, 32 N.E.2d 382, 308 Ill.App. 549—Riggs v. Barrett, 32 N.E.2d 392, 308 Ill.App. 671.
Md.—Pope v. Safe Deposit & Trust Co., 161 A. 404, 163 Md. 239.
N.J.—Seward v. Kaufman, 180 A. 857, 119 N.J.Eq. 44.
Interest of donee of power in property see the C.J.S. title Powers § 31, also 49 C.J. p 1276 notes 15–20.

Decedent as donor and donee of power

Where a testator created a trust during his lifetime, reserving a power of appointment, the situation is the same as though the power had been created by a third party.—City Bank Farmers Trust Co. v. Green, 289 N.Y.S. 473, 160 Misc. 370.

Accrued income on life estate

Where a testator had a life interest in a trust and a power of appointment as to the remainder, and directed in his will that the corpus and accrued income be paid to a named person, the accrued income, but not the corpus, was part of his estate.—In re Howald's Trust, 29 N.E.2d 575, 65 Ohio App. 191.

Absence of direction as to fund

Where beneficiary of testamentary trust having an unlimited power of appointment dealt with appointive fund and individual estate separately and did not direct that appointive fund be turned over to her executors for distribution, property passing un-

or not the power is exercised.[82] If there is no appointment, the property goes according to the disposition of the donor of the power; if there be an appointment to volunteers, then, subject to whatever charge creditors may have against it, it goes, not to the heirs or legatees of the donee, but to his appointees.[83]

Where the creditors of decedent have rights against the property, it is treated as an equitable rather than a legal asset of the estate,[84] and, in the absence of statute, passes to the executor not by virtue of his office, but as a matter of convenience, and because he represents the rights of the creditors.[85]

§ 122. —— Equitable Estates or Interests

Equitable estates or interests owned by a decedent are generally part of his estate.

Generally, equitable interests owned by a decedent in property are recoverable for his estate by his personal representative.[86]

The right of a spouse to the usufruct of his deceased spouse's share of their community property ceases on his death or remarriage, and so is not part of his estate.[87] Similarly a decedent's interest as beneficiary for life of a trust is not an asset of his estate,[88] except that decedent's personal representatives are entitled to such income as accrued up to the time of decedent's death and remains in the trustee's hands;[89] but a trust estate pur autre vie passes to the beneficiary's personal representatives.[90]

Where decedent was the life beneficiary of a trust and was entitled to as much of the principal as he requested, his representatives were not enti-

der power was distributable directly to appointees.—In re Rolston's Estate, 10 N.Y.S.2d 660, 170 Misc. 548.

Knowledge of appointee

That trustee was ignorant of persons to be designated in testatrix' will as beneficiaries of trust was held immaterial in determining whether trustee or executors under testatrix' will should distribute trust fund.—Syracuse Trust Co. v. Fuller, 252 N.Y.S. 90, 140 Misc. 918.

82. U.S.—U. S. v. Field, Ct.Cl., 41 S.Ct. 256, 255 U.S. 257, 65 L.Ed. 617, 18 A.L.R. 1461.
N.J.—Seward v. Kaufman, 180 A. 857, 119 N.J.Eq. 44.

83. U.S.—U. S. v. Field, Ct.Cl., 41 S.Ct. 256, 255 U.S. 257, 65 L.Ed. 617, 18 A.L.R. 1461.
N.J.—Seward v. Kaufman, 180 A. 857, 119 N.J.Eq. 44.
N.Y.—In re Rolston's Estate, 10 N.Y.S.2d 660, 170 Misc. 548—In re Beaumont's Estate, 263 N.Y.S. 426, 147 Misc. 118.
Pa.—In re Shoch's Estate, 41 Pa.Dist. & Co. 698—In re Harris' Estate, 34 Pa.Dist. & Co. 378.

Effect of appointment in will

The fact that the appointment is made in decedent's will does not mean that the property passes through his estate.
Ill.—Riggs v. Barrett, 32 N.E.2d 382, 308 Ill.App. 549—Riggs v. Barrett, 32 N.E.2d 392, 308 Ill.App. 671.
N.Y.—City Bank Farmers Trust Co. v. Green, 289 N.Y.S. 473, 160 Misc. 370.

84. U.S.—U. S. v. Field, Ct.Cl., 41 S. Ct. 256, 255 U.S. 257, 65 L.Ed. 617, 18 A.L.R. 1461.
Ga.—Patterson Co. v. Lawrence, 10 S.E. 355, 83 Ga. 703, 7 L.R.A. 143.
Mass.—Clapp v. Ingraham, 126 Mass. 200.
N.J.—Seward v. Kaufman, 180 A. 857, 119 N.J.Eq. 44.

Equitable doctrine

(1) The doctrine that, where a general power of appointment is exercised in favor of a volunteer, the subject matter of the power will be treated as an asset of the estate in so far as creditors are concerned is a purely equitable doctrine, and at law the property is not an asset of the estate.—Shattuck v. Burrage, 118 N. E. 889, 229 Mass. 448—49 C.J. p 1277 notes 30, 31.

(2) Rights of creditors of donee of power see the C.J.S. title Powers § 32, also 49 C.J. p 1276 note 21—p 1277 note 31.

85. U.S.—U. S. v. Field, Ct.Cl., 41 S. Ct. 256, 255 U.S. 257, 65 L.Ed. 617, 18 A.L.R. 1461.
N.J.—Seward v. Kaufman, 180 A. 857, 119 N.J.Eq. 44.
N.Y.—In re Rolston's Estate, 10 N.Y. S.2d 660, 170 Misc. 548.
23 C.J. p 1152 note 22.

86. Wash.—Johnson v. Redfield, 272 P. 55, 149 Wash. 618.
23 C.J. p 1152 note 23.

Interest on failure of trust

The beneficial interest, in event of failure of express trust, is not a mere equity, but is an "equitable estate" which vests in settlor's successors as of the date of settlor's death.—Pedrick v. Guarantee Trust Co., 197 A. 909, 123 N.J.Eq. 395.

Decedent's money deposited in another's name

Where moneys of decedent were deposited in an account in the name of another in trust for decedent merely as a matter of convenience, the account is part of decedent's estate. —In re Milton's Estate, 265 N.Y.S. 735, 148 Misc. 315—In re McLaughlin's Estate, 265 N.Y.S. 332, 148 Misc. 113.

Public welfare fund

Where county delivered money to overseer of poor to be expended for benefit of blind person, unexpended portion of benefit belonged to county and did not become part of blind person's estate.—In re Hugus' Estate, 213 N.W. 239, 203 Iowa 607.

87. U.S.—Milburn v. Proctor Trust Co., D.C.La., 32 F.Supp. 635.

88. Ill.—Chicago Title & Trust Co. v. Colby, 17 N.E.2d 350, 297 Ill. App. 176.

89. N.Y.—In re Arnould's Estate, 29 N.Y.S.2d 386, 176 Misc. 793—In re Douglas' Will, 26 N.Y.S.2d 387, 176 Misc. 24—City Bank Farmers Trust Co. v. Green, 289 N.Y.S. 473, 160 Misc. 370—Guaranty Trust Co. of New York v. International Trust Co., 258 N.Y.S. 465, 144 Misc. 127.
Ohio.—In re Howard's Trust, 29 N.E. 2d 575, 65 Ohio App. 191.
Pa.—In re Mitchell's Estate, 35 Pa. Dist. & Co. 67.
Tenn.—Tramell v. Tramell, 35 S.W.2d 574, 162 Tenn. 1, denying rehearing 32 S.W.2d 1025, 162 Tenn. 1.

Representative's rights as those of decedent

If trustees under testamentary trust created for benefit of testator's widow failed to obey testator's directions with regard to making payments from trust fund for widow's benefit, after widow's death widow's representatives had same right to claim amount unpaid as widow would have had if living and a party to proceeding wherein trustees filed accounting and sought construction of testamentary provisions under which they were acting.—In re Tod's Estate, 23 N.Y.S.2d 48, 175 Misc. 222, modified on other grounds 23 N.Y.S.2d 270, 260 App.Div. 627.

90. N.Y.—City Bank Farmers Trust Co. v. Green, 289 N.Y.S. 473, 160 Misc. 370—In re Byles' Estate, 282 N.Y.S. 905, 157 Misc. 46.

tled to that part of the principal which decedent had requested but not received at the time of death, in the absence of a showing that he had maintained himself out of his personal estate or by incurring obligations;[91] however, where a beneficiary who was entitled to invade the corpus of the trust for his support left debts arising out of his maintenance, his personal representatives were entitled to recover such sum from the trust.[92]

§ 123. —— Property Disposed of by Decedent in General

Property which a decedent bona fide and regularly transferred during his lifetime is not part of his estate, nor may gifts causa mortis be recovered for purposes other than payment of his debts. A personal representative may attack a transfer by decedent as having been fraudulently obtained.

Property bona fide and regularly transferred to others by decedent during his lifetime with mutual intent that the title should pass, whether by way of sale or gift, does not vest in the executor or administrator.[93] Conversely, since legal transfer implies parting with dominion over the thing, any professed transfer during one's lifetime which left the possession, control, and power to revoke in the transferor keeps his title virtually undivested, so that at his decease the chattel must be administered as assets.[94]

Gift causa mortis. While a gift causa mortis cannot be sustained to the prejudice of creditors, and can be recovered by the personal representative to the extent needed for the payment of the donor's debts,[95] the personal representative has no claim on

91. N.Y.—In re Garrett's Will, 10 N.Y.S.2d 904, 256 App.Div. 1034, reargument denied 12 N.Y.S.2d 774, 257 App.Div. 919, and affirmed 27 N.E.2d 281, 283 N.Y. 562.

92. Tenn.—Robertson v. Brown, 13 Tenn.App. 211.

93. Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.

Ill.—Hartley v. Hartley, 7 N.E.2d 906, 290 Ill.App. 92.

Iowa.—In re Van Hauen's Estate, 294 N.W. 901, 229 Iowa 852.

Md.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.

Miss.—Howell v. Ott, 180 So. 52, 182 Miss. 252, suggestion of error overruled, 181 So. 740, 182 Miss. 252.

N.Y.—Malary v. National Sav. Bank of Albany, 286 N.Y.S. 693, 247 App. Div. 850—In re Kislyk's Estate, 1 N.Y.S.2d 386, 164 Misc. 287—In re Doyle's Estate, 279 N.Y.S. 601, 155 Misc. 88—In re Bednowitz' Estate, 274 N.Y.S. 120, 152 Misc. 765—In re Yarme's Estate, 266 N.Y.S. 93, 148 Misc. 457, affirmed 273 N.Y.S. 403, 242 App.Div. 693.

N.D.—Roach v. McKee, 265 N.W. 264, 66 N.D. 304.

23 C.J. p 1152 note 26.

Check

If a check given shortly before the drawer's death was intended as an assignment of the deposit to the payee, the debt due from the bank never became a part of the estate and the drawer's administrator had no right to it, or any part of it.—Dunlap v. Commercial Nat. Bank of Los Angeles, 195 P. 688, 50 Cal.App. 476.

Conveyance of land subject to sale contract

Where vendor conveyed land subject to sale contract, fact that he did not specifically assign contract to purchaser did not constitute unpaid purchase money personal property belonging to vendor's estate, since the legal effect of the deed was to transfer the right to the purchase money to the grantee.—Lancey v. Traubel, 247 Ill.App. 265.

Self-correcting error

Land conveyed by deed containing self-correcting error in lifetime of testatrix is not part of estate at time of her death.—Chestang v. Bower, 140 So. 537, 224 Ala. 469.

Conveyance of mortgagor's interest

Where mortgagor, after executing deed of trust with power of sale, conveyed his interest in land to wife so as to make it her separate property, power of sale in deed of trust was not revoked by mortgagor's death, and his administrator would have no claim or interest in property.—Estrada v. Reed, Tex.Civ.App., 98 S.W.2d 1042, error refused.

Allotment by Civilian Conservation Corps enrollee

Administratrix of Civilian Conservation Corps enrollee could not recover allotment made from enrollee's compensation to person with whom he had lived, since enrollee had no right to or interest in proceeds of such allotment.—In re Becker's Estate, 8 N.Y.S.2d 562, 169 Misc. 723.

Noncompliance with conditions of transfer

Where a mother gave a certain deposit to her son to hold, to pay over the same to her and her creditors from time to time during her life, and to pay her funeral expenses and erect a tablet at her grave, with the provision that the remainder should belong to him if he executed the trust, and if he did not, the remainder should become a part of her estate, the executors could claim any residue if the conditions of the trust had not been complied with.—Peirce v. Woodbury, 60 A. 424, 100 Me. 1.

94. Ohio.—In re Matthes' Estate, 35 N.E.2d 864, 67 Ohio App. 77.

Wash.—Sievers v. Sievers, 119 P.2d 668.

23 C.J. p 1153 note 27.

Property ineffectively transferred

is part of decedent's estate.—Cline v. Cline, 284 S.W. 1110, 215 Ky. 492.

Bank account in another's name

The balance remaining at time of decedent's death in a savings account which decedent had opened in the name of a church building fund was part of decedent's estate and could not be claimed by church where decedent had directed bank to honor only withdrawals made by herself, and there was no evidence that account represented church funds or that it was a trust fund or a gift.—In re Matthes' Estate, 35 N.E.2d 864, 67 Ohio App. 77.

Failure of purpose for which trust was modified

Where a decedent established an insurance trust for his family, reserving the power to modify or revoke the trust, and thereafter, as collateral security for a debt, named a creditor as beneficiary of the face amount of the debt, the estate, and not the other beneficiaries of the trust, was entitled to the face amount of the debt out of the insurance, where the creditor was satisfied out of other collateral he held; in such case the estate, where insolvent, is entitled to interest to the date of the decedent's death only.—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068.

95. U.S.—Railey v. Railey, D.C.D.C., 30 F.Supp. 121.

Miss.—Yates' Estate v. Alabama-Mississippi Conference Ass'n of Seventh-Day Adventists, 176 So. 534, 179 Miss. 642—Johnson v. Grice, 106 So. 271, 140 Miss. 562.

Pa.—In re Elliott's Estate, 173 A. 880, 113 Pa.Super. 350.

it for ordinary purposes of administration or distribution.[96]

Where part of a fund was absolutely transferred by decedent, the other portion not so transferred may be recovered by his personal representative after his death.[97]

A deed delivered after decedent's death does not affect the rights of creditors as to the realty thereby transferred.[98]

Attack on transfer. An administrator or executor may attack a transfer made by decedent on the ground that decedent was incompetent,[99] or that it was obtained from decedent by fraud or undue influence;[1] and he may contest the validity of an alleged gift.[2] In an action to enjoin the sale of property inventoried as belonging to the succession of a decedent, the administrator may allege and show the simulated character of plaintiff's title.[3]

§ 124. —— Property Fraudulently Conveyed

Generally a conveyance by a decedent which was fraudulent as to creditors can be set aside, but only to the extent necessary to pay the decedent's debts; the jurisdictions differ as to whether the personal representative, or only creditors, may sue for this purpose.

The death of the grantor or donor in a sale, transfer, or gift which is fraudulent as to creditors does not have the effect of barring their rights, but the sale or gift may be avoided.[4] However, it is gener-

W.Va.—E. M. Meadows Funeral Home v. Hinton, 195 S.E. 346, 119 W.Va. 609.
Wis.—Hoks v. Wollenberg, 243 N.W. 219, 209 Wis. 276, rehearing denied 245 N.W. 128, 209 Wis. 276.
23 C.J. p 1153 note 29.

96. U.S.—Railey v. Railey, D.C.D.C., 30 F.Supp. 121.
Tenn.—McAdoo v. Dickson, 136 S.W. 2d 518, 175 Tenn. 598, 126 A.L.R. 1345.
Wis.—Hoks v. Wollenberg, 243 N.W. 219, 209 Wis. 276, rehearing denied 245 N.W. 128, 209 Wis. 276.
23 C.J. p 1153 note 28.

Where only a symbolic delivery had been made of a safe-deposit box, and the box was in the actual custody and control of the administrators, Orphans' court had control of the property and had jurisdiction over tax due commonwealth arising from transfer.—In re Elliott's Estate, 173 A. 880, 113 Pa.Super. 350.

97. Cal.—Beals v. Crowley, 59 Cal. 665.
N.Y.—In re Conklin, 20 N.Y.S. 59, 2 Conn.Surr. 176.

98. N.Y.—Rosseau v. Bleau, 30 N.E. 52, 131 N.Y. 177, 27 Am.S.R. 578.

Direction for conveyance after death
Where deceased gave quitclaim deed as security, but after payment of debt instructed grantee to hold title and convey to deceased's daughter after his death, and grantee did so, lots were part of estate subject to deceased's debts.—Parkinson v. Guilloz, 231 N.W. 89, 250 Mich. 637.

99. Kan.—Wollard v. Home State Bank, 247 P. 868, 121 Kan. 474, error dismissed and certiorari denied Conley v. Wollard, 47 S.Ct. 572, 273 U.S. 674, 71 L.Ed. 834.

However, as to realty there are decisions to the contrary, under the view discussed infra §§ 252, 253, that title does not pass to the representative.
Mich.—Angel v. Waligora, 295 N.W. 592, 296 Mich. 142.
N.C.—Hoke v. First Sec. Trust Co., 178 S.E. 109, 207 N.C. 604.

1. Cal.—Carlson v. Lantz, 280 P. 531, 208 Cal. 134.
Ga.—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899.
N.J.—Christian v. Canfield, 155 A. 788, 108 N.J.Eq. 547.
Wash.—Storey v. Gaisford, 240 P. 9, 136 Wash. 378.
23 C.J. p 1153 note 33.

Requirement of special circumstances; necessity of fund to pay debts
(1) An executor may not sue to set aside the testator's deed for fraud, undue influence, or insufficiency of the description, except under special circumstances, as where such right is derived from the will, or where it is necessary to provide a fund for the payment of debts.—Speed v. Perry, 83 S.E. 176, 167 N.C. 122.

(2) Ordinarily, the heir or beneficiary is the only one who can maintain an action to set aside a voidable conveyance made by a decedent during his lifetime, but the administrator may have the right where necessary to sell the realty to pay debts.—Reed v. Brown, 19 N.E.2d 1015, 215 Ind. 417.

Same right as decedent had
(1) If decedent prior to his death was vested with right to maintain suit to set aside trust instrument executed by the decedent, decedent's heirs and administrators could prosecute such a suit.—Ragsdale v. Prather, Tex.Civ.App., 132 S.W.2d 625, error refused.

(2) Stockholder who sold stock to representatives of directors of corporation, and who obtained about the market price for the stock, could not have rescinded the transaction for fraud, and her administrator after her death could not recover from the directors or their representatives for breach of a fiduciary duty, especially where stockholder made no complaint about the transaction during her lifetime.—Fischer v. Guaranty Trust Co., 18 N.Y.S.2d 328, 259 App. Div. 176, reargument denied In re Barnes' Estate, 20 N.Y.S.2d 409, 259 App.Div. 888, and affirmed 34 N.E.2d 379, 285 N.Y. 679.

Fraud by decedent's guardian
The administrator of the estate of a deceased lunatic may maintain an action for the benefit of a creditor of the estate who has established his claim, to set aside fraudulent conveyances whereby the lunatic's guardian obtained title to his ward's land.—Horton v. Jones, 204 P. 1001, 110 Kan. 540.

2. N.C.—Kiff v. Weaver, 94 N.C. 274, 55 Am.R. 601.

3. La.—Grant's Succession, 23 La. Ann. 741.

4. Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.
N.Y.—In re St. John's Estate, 296 N.Y.S. 613, 163 Misc. 17.—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867.
Pa.—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U. S. 680, 78 L.Ed. 1068.
Wis.—Massey v. Richmond, 242 N.W. 507, 208 Wis. 239.
23 C.J. p 1153 note 37.

Equitable asset for payment of debts
Wis.—Scholl v. Adams, 239 N.W. 452, 206 Wis. 174.

Personal representative has only the rights of decedent as to setting aside fraudulent transfer.—Martin v. Martin, 138 S.W.2d 509, 282 Ky. 411—Fyffe's Adm'r v. Lyon, 118 S.W.2d 745, 274 Ky. 399.

Title taken in name of another
Where decedent paid for property, but caused the title to be taken in the name of another person, in fraud of creditors, such property may be recovered by the executor or administrator.—Beith v. Porter, 78 N.W. 336, 119 Mich. 365, 75 Am.S.R. 402.

ally held that a fraudulent transfer can be set aside only where otherwise there is, or will be, a deficiency of assets,[5] and then only to the extent necessary to pay debts,[6] for if the gift or transfer was good as against decedent, it is good as against his heirs, distributees, legatees, or devisees, even though it may be fraudulent as to creditors, and hence the donee or transferee is entitled to what remains after the demands of creditors and the expenses of administration are paid,[7] property fraudulently transferred by a decedent not being part of his estate;[8] and if the creditors of the estate all waive their right to impeach a conveyance or transfer by the decedent no cause for setting it aside appears.[9] These rules have been applied where the conveyance was made without the intent to transfer any beneficial interest;[10] but it has been held that where decedent made a transfer without such intent, and solely for the purpose of defrauding creditors the transfer can be set aside for the benefit of his heirs and distributees.[11]

If the transferee or donee relinquishes or fails to assert his own claim, the property should be treated as belonging to the estate of decedent,[12] and the same is true where the property remains in the possession of the grantor until his death.[13]

Action for money had and received, wrongful taking, etc. Not only direct proceedings to set aside by bill in equity may be justified, but also actions in assumpsit against the transferee as for money had and received or tortwise as for a wrongful taking, etc.[14]

Representative not liable for allowing donee to take. It is not a devastavit for a personal representative to deliver to the donee, or suffer the donee to take, property conveyed by decedent in his lifetime, although it turns out that the conveyance was fraudulent.[15]

Right of personal representative to sue. In a number of jurisdictions, either by virtue of statutory enactment or on the theory that for this purpose the executor or administrator represents the creditors, it is held that the personal representative may sue to avoid a conveyance or transfer by decedent on the ground that it was fraudulent as against creditors,[16] although creditors may be re-

Proceeds of insurance policy

Where insured, while insolvent, fraudulently transferred his property to his children without fair consideration and substituted them as beneficiaries of life policy in place of his estate, policy was part of estate at time of his death and was to be accounted for as such, notwithstanding, because of outstanding loans, surrender value of policy was little or nothing at time of change of beneficiaries, and children paid premiums thereafter, since payments were not made in good faith.—McCarthy v. Griffin, 12 N.E.2d 836, 299 Mass. 309.

Obligation for maintenance of insane wife

Where laborer who was past the age for gainful employment conveyed to his daughter without consideration his entire life savings, knowing of his existing and continuing obligation to the state for the maintenance of his insane wife, the conveyance was void as in fraud of creditors and could be treated as void by laborer's administrator to whom title passed after laborer's death, and property transferred or its value was recoverable by administrator in a discovery proceeding.—In re O'Sullivan's Estate, 18 N.Y.S.2d 439, 173 Misc. 554.

Under the laws of Missouri lands fraudulently conveyed form no part of the estate of deceased grantors, and the probate court has no jurisdiction to order them sold for the payment of debts.—Byrd v. Hall, Mo., 196 F. 762, 117 C.C.A. 568, followed in Sugg v. Eskew, Mo., 196 F. 767, 117 C.C.A. 577.

5. Ind.—Morgan v. Catherwood, 167 N.E. 618, 95 Ind.App. 266.
Neb.—Goodman-Buckley Trust Co. v. Poulos, 248 N.W. 64, 124 Neb. 697.
23 C.J. p 1154 note 38.

6. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
Idaho.—Berryman v. Dore, 277 P. 565, 47 Idaho 582.
Pa.—In re Metzgar's Estate, 22 Erie Co. 281, 54 York Leg.Rec. 197.
23 C.J. p 1154 note 39.
Right to surplus after satisfying claims of creditors generally see the C.J.S. title Fraudulent Conveyances § 458, also 27 C.J. p 862 note 28.

Existence of debts at time of conveyance

In the case of a conveyance by decedent in fraud of creditors, it is necessary, to entitle an administrator to have the conveyance set aside and realty sold for the payment of debts, to show debts existing at the time of the conveyance so as to show that there were creditors defrauded by the conveyance.—Reed v. Brown, 19 N.E.2d 1015, 215 Ind. 417.

7. Cal.—Anderson v. Nelson, 256 P. 294, 83 Cal.App. 1.
Colo.—Southworth v. Huffaker, 246 P. 261, 79 Colo. 364.
Ky.—Martin v. Martin, 138 S.W.2d 509, 282 Ky. 411.
N.J.—Schwalber v. Ehman, 49 A. 1085, 62 N.J.Eq. 314.
Wis.—Gilbert v. Stockman, 51 N.W. 1076, 52 N.W. 1045, 81 Wis. 602, 29 Am.S.R. 922.
23 C.J. p 1155 note 40.

8. Tex.—Markward v. Murrah, 156 S.W.2d 971, 138 A.L.R. 242, affirming 136 S.W.2d 649, and reversing 136 S.W.2d 652 and 136 S.W.2d 656—John Hancock Mut. Life Ins. Co. v. Morse, 124 S.W.2d 330, 132 Tex. 534, reversing First Nat. Bank v. John Hancock Mut. Life Ins. Co., Civ.App., 101 S.W.2d 1062.

9. Miss.—Winn v. Barnett, 31 Miss. 653—Snodgrass v. Andrews, 30 Miss. 472, 64 Am.D. 169.

10. Ky.—Martin v. Martin, 138 S.W. 2d 509, 282 Ky. 411—Fyffe's Adm'r v. Lyon, 118 S.W.2d 745, 274 Ky. 399.

11. Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.

Under statute

Ark.—Ives v. Ives, 9 S.W.2d 1062, 177 Ark. 1060.

12. Ky.—Warren v. Hall, 6 Dana 450.
Tenn.—Sharp v. Caldwell, 7 Humphr. 415.

13. Ohio.—Kilbourne v. Fay, 29 Ohio St. 264, 23 Am.R. 741.
23 C.J. p 1155 note 43.

14. Mass.—Millen v. Kavanaugh, 167 N.E. 291, 268 Mass. 73—Parker v. Simpson, 62 N.E. 401, 180 Mass. 334.
23 C.J. p 1155 note 47.

15. Tenn.—Greenlee v. Hays, 1 Overt. 300.

16. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
Colo.—Regan v. Turner, 193 P. 557, 69 Colo. 194.
Idaho.—Berryman v. Dore, 277 P. 565, 566, 47 Idaho 582, citing Corpus Juris.

garded as not limited to the remedy through estate administration;[17] but in other jurisdictions the courts, proceeding on the theory that the personal representative has no greater rights with respect to property so conveyed than decedent himself had, hold that the personal representative cannot sue to avoid such a conveyance,[18] only as is discussed infra § 694, the decedent's creditors, and those in privity with them, having such right.

§ 125. —— Evidence as to Ownership

General rules have been applied as to the burden of proof, and the admissibility and weight and sufficiency of evidence, on the issue of ownership of property claimed to be assets of a decedent's estate; and presumptions such as that of ownership in the possessor of property have been indulged.

General rules of evidence have been applied as to the burden of proof,[19] and, likewise, general rules

Ind.—Morgan v. Catherwood, 167 N.E. 618, 95 Ind.App. 266.
Iowa.—Howell v. Howell, 232 N.W. 816, 211 Iowa 70.
Ky.—Combs v. Roark, 267 S.W. 210, 206 Ky. 454.
Me.—Averill v. Cone, 149 A. 297, 129 Me. 9.
Neb.—Goodman-Buckley Trust Co. v. Poulos, 248 N.W. 64, 124 Neb. 697.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
N.J.—Borg v. McCroskery, 184 A. 187, 120 N.J.Eq. 80.
N.Y.—In re Kenney's Estate, 11 N.Y.S.2d 685, 171 Misc. 87—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App.Div. 847—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867—Stoudt v. Guaranty Trust Co. of New York, 271 N.Y.S. 409, 150 Misc. 675, affirming 269 N.Y.S. 997, 241 App.Div. 711.
Pa.—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068—Swartz v. Bachman, 110 A. 260, 267 Pa. 185.
Wis.—Massey v. Richmond, 242 N.W. 507, 208 Wis. 239—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.
23 C.J. p 1155 note 48.

Creditors, not decedent, represented
In suit to set aside fraudulent conveyance by decedent, administrator represents the creditors and not decedent.—Morgan v. Catherwood, 167 N.E. 618, 95 Ind.App. 266.

Creditors need not have reduced their claims to judgment to warrant such action.—Howell v. Howell, 232 N.W. 816, 211 Iowa 70.

Security
Although the representative of a decedent's estate may sue to set aside a conveyance as fraudulent as to creditors, he is not bound to do so unless furnished security.—Lind v. O. N. Johnson Co., 282 N.W. 661, 204 Minn. 30, 119 A.L.R. 940.

Rule limited to realty
Ark.—Matlock v. Bledsoe, 90 S.W. 848, 77 Ark. 60.

Construction with other statutes
A statute authorizing executor or administrator to treat as void and resist any act done or agreement made in fraud of rights of any "creditor" would be construed in connection with definitions of "creditor" and "debt" contained in statute relating to fraudulent conveyances and in statute relating to surrogate's court.—In re St. John's Estate, 296 N.Y.S. 613, 163 Misc. 17.

Authorization by surrogate
Surrogate has power to direct estate representative to maintain action to recover property alleged to have been transferred by decedent in fraud of creditors.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.

License to sell
Under statute authorizing administrator to bring an action for the possession of land fraudulently conveyed by decedent when the administrator is licensed to sell the land, an administrator, who has not obtained a license to sell real estate has no standing to maintain a bill to set aside conveyances as made in fraud of creditors.—Pevey v. McGrath, 137 N.E 589, 243 Mass. 451.

Decedent victim of fraud
Under statute authorizing disaffirmance of fraudulent acts by executors and others, executor is not bound to bring action where decedent was victim of fraud.—In re Collins' Estate, 284 N.Y.S. 692, 157 Misc. 790.

Surrogate's court held to have jurisdiction of proceeding by creditor administrator to recover property alleged to have been fraudulently transferred by decedent, as against contention that individual action under Debtor and Creditor Law was sole remedy of creditors.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.

A fraternal organization, which paid money to deceased for her support in reliance on her false and fraudulent representations that she had no money and pursuant to her agreement to transfer all her property to organization, was a "creditor" of deceased within statute authorizing executor or administrator to treat as void and resist any act done or agreement made in fraud of rights of any creditor, as respects right of administratrix to recover for benefit of organization money in savings account standing in deceased's name in trust for third persons.—In re St. John's Estate, 296 N.Y.S. 613, 163 Misc. 17.

Decedent's widow as administratrix could sue decedent's son-in-law to set aside decedent's gift to son-in-law for daughter and son-in-law, to prevent widow from receiving inheritance.—Norris v. Bradshaw, 18 P. 2d 467, 92 Colo. 34.

17. N.Y.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.
23 C.J. p 1155 note 48 [k].

Right of representative prior and exclusive under statute.—Rummens v. Guaranty Trust Co., 92 P.2d 228, 199 Wash. 337.

18. Ala.—Trotten v. Brown, 167 So. 310, 232 Ala. 147.
Ga.—Arteaga v. Arteaga, 151 S.E. 5, 169 Ga. 595.
Ill.—Sifford v. Cutler, 91 N.E. 428, 244 Ill. 234, 135 Am.S.R. 326, 18 Ann.Cas. 36.—Cicero Trust & Savings Bank v. Schermann, 252 Ill. App. 449.
Mo.—State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968, affirming in part and reversing in part, App., 262 S.W. 433.
Tex.—John Hancock Mut. Life Ins. Co. v. Morse, 124 S.W.2d 330, 132 Tex. 534, reversing First Nat. Bank v. John Hancock Mut. Life Ins. Co., Civ.App., 101 S.W.2d 1062.
23 C.J. p 1156 note 49.

19. Mich.—McKinney v. Kalamazoo-City Sav. Bank, 221 N.W. 156, 244 Mich. 246.
Miss.—Lindeman's Estate v. Herbert, 193 So. 790, 188 Miss. 842.

Burden of proof is on representative to prove ownership in decedent.
Mich.—Detroit Trust Co. v. Struggles, 286 N.W. 844, 289 Mich. 595.
Mo.—Wolf v. Wuelling, 130 S.W.2d 671, 233 Mo.App. 1144.
N.C.—Jones v. Waldroup, 7 S.E.2d 366, 217 N.C. 178.
Pa.—Robinson v. Painter, 23 West. Co.L.J. 111.

No evidence as to possession
In suit involving title to intestate's property claimed by wife of intestate's son, where evidence was silent as to possession of property, administrator had burden of proving ownership.—Bentley v. Bentley, 188 S.E. 912, 54 Ga.App. 713.

Gift or loan
An executor claiming title and right to possession of stock certifi-

of evidence have been applied as to admissibility[20] | and weight and sufficiency[21] of evidence, on the is-

cates had burden of proving that stock was delivered as a loan and that decedent did not make a gift of stock.—Detroit Trust Co. v. Struggles, 286 N.W. 844, 289 Mich. 595.

Identity of property

In an action against a bank to recover a deposit, where the administrator of an estate was substituted as defendant, and claimed the deposit as the proceeds of an account which had belonged to his intestate, the burden was on the administrator to prove the identity of the funds withdrawn from his intestate's account with those deposited in the account in controversy.—Hayes v. Claessens, 137 N. E. 313, 234 N.Y. 230, modifying 196 N.Y.S. 312, 202 App.Div. 762.

Discovery proceeding

(1) In discovery proceeding where respondent makes no answer admitting possession and claiming title, burden is on administrator to prove prima facie title and right to immediate possession in representative capacity of property involved.—In re Donnelly's Estate, 283 N.Y.S. 609, 157 Misc. 319.

(2) In executor's discovery proceeding to recover testator's securities, defended on ground that testator had assigned securities before his death, burden of showing delivery of assignment was on respondent, notwithstanding incredibility of testimony showing nondelivery.—In re Kiamie's Will, 5 N.Y.S.2d 786, 168 Misc. 260, affirmed In re Kiamie's Estate, 15 N.Y.S.2d 725, 258 App. Div. 784, reargument denied 16 N.Y.S. 2d 532, 258 App.Div. 866.

Joint account

(1) In executor's action against savings and loan company to recover balance remaining in joint and survivorship account of which his decedent was one of two joint owners, executor had burden of proving ownership of entire account in his decedent at time of her death and in doing so was required to prove that surviving joint owner had surrendered her interest in the account.—Falk v. Security Savings & Loan Co., 7 N.E.2d 668, 54 Ohio App. 395.

(2) Where owner of joint savings account in bank which was taken over for liquidation placed proceeds of dividend checks in safe deposit box, deceased owner's executrix had the burden of proving that such proceeds were part of estate and not property of coöwner.—In re Culhane's Estate, 5 A.2d 377, 334 Pa. 124, affirming 2 A.2d 567, 132 Pa.Super. 339.

Burden on adverse claimant

(1) Decedent's daughter, when sued by administrator to recover assets withheld, had burden to show her own good faith and general fairness as to items of deceased which came into her possession when deceased was suffering from age, physical incapacity, and mental impairment.—Finch v. McCrimmon, 52 P.2d 1150, 98 Colo. 56.

(2) In administrator's suit to recover property allegedly belonging to intestate's estate, where defendant admitted receiving money from intestate, defendant had burden of accounting for retention of money and was required to produce evidence justifying retention to avoid judgment against her.—Nolty's Adm'r v. Fultz, 88 S.W.2d 35, 261 Ky. 516.

(3) Where it was admitted that ring originally belonged to one decedent, persons claiming it through another decedent by way of gift and bequest, respectively, had burden of proving that second decedent had acquired valid title to ring, and person claiming ring as gift had burden of also showing valid gift.—In re Hagan's Estate, 283 N.Y.S. 605, 157 Misc. 378.

(4) One suing administrator cum testamento annexo for conversion of bonds deposited by plaintiff with testatrix in her lifetime had burden of proving that testatrix died in possession thereof and that defendant administrator came into possession of bonds after testatrix' death and converted bonds.—Baude v. Chemical Bank & Trust Co., 178 A. 799, 115 N.J.Law 120.

Creditor's suit

Creditor seeking to have property declared trust estate, subject to payment of debts, has burden of showing that property or proceeds belonged to deceased debtor.—Coggin Nat. Bank v. Smith, Tex.Civ.App., 63 S.W. 2d 252.

Burden of going forward

In an action between plaintiff, to whom deceased had transferred her deposits in a savings bank, etc., and the administrator of deceased, the deposit having been transferred to the joint account of plaintiff and deceased, plaintiff's introduction of a bank book, showing that the deposit stood to her credit, makes out a prima facie case; but, on proof that such deposit was derived from a fund formerly standing to the credit of deceased, the burden of going forward with proofs shifted.—Hayes v. Claessens, 179 N.Y.S. 153, 189 App.Div. 449.

20. Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.
Ga.—Bentley v. Bentley, 188 S.E. 912, 54 Ga.App. 713.
S.C.—Quick v. Owens, 15 S.E.2d 837, 198 S.C. 29.
Wash.—Percy v. Miller, 197 P. 638, 115 Wash. 440.
23 C.J. p 1157 note 55.

Executors' failure to sue

Widow suing to determine ownership of indebtedness could testify that executors never sued her for notes payable to deceased husband, evidence showing her possession and refusal of executor's demands.—Husbands v. Fore, Tex.Civ.App., 27 S.W. 2d 610.

Wife's lack of property

Where sole issue was whether specific personal property belonged to testator who had devised it in remainder or was property of his widow and life tenant, there was no error in refusal to exclude evidence that wife never had any property.—Stanford v. Calhoun, 127 S.E. 138, 159 Ga. 867.

21. U.S.—Ferguson v. Wachs, C.C.A. Ill., 96 F.2d 910.
Ala.—Bromberg v. First Nat. Bank, 178 So. 48, 235 Ala. 226.
Ark.—Berry v. Davidson, 133 S.W.2d 442, 199 Ark. 276.
Ga.—Boone v. Loggins, 173 S.E. 715, 178 Ga. 471.
Miss.—Lindeman's Estate v. Herbert, 193 So. 790, 188 Miss. 842.
Mo.—Idle v. Union Nat. Bank of Springfield, App., 156 S.W.2d 941.
Neb.—In re Wecker's Estate, 230 N. W. 111, 119 Neb. 537.
N.J.—Baude v. Chemical Bank & Trust Co., 178 A. 799, 115 N.J.Law 120—Melosh v. Melosh, 12 A.2d 684, 127 N.J.Eq. 261.
N.Y.—Gaines v. Huyler, 184 N.Y.S. 145, 113 Misc. 188.
N.C.—Campbell v. Pearce, 106 S.E. 561, 181 N.C. 494.
Ohio.—Falk v. Security Savings & Loan Co., 7 N.E.2d 668, 54 Ohio App. 395.
Pa.—Hoak v. Unger, 18 A.2d 105, 143 Pa.Super. 389—In re McCarter's Estate, 36 Pa.Dist. & Co. 625—In re McCreery's Estate, 12 Pa.Dist. & Co. 611, 77 Pittsb.Leg.J. 145, 43 York Leg.Rec. 118—Pickel v. Hoffner, 27 North.Co. 166—Robinson v. Painter, 23 West.Co.L.J. 111.
Tex.—Reynolds v. Reynolds, Civ.App., 224 S.W. 382.
Wash.—In re Ward's Estate, 292 P. 737, 159 Wash. 252.
Wyo.—Haywood v. Kukuchka, 95 P. 2d 71, 55 Wyo. 41.
23 C.J. p 1157 note 56.

Evidence held sufficient

(1) To warrant finding that property belonged to decedent.
U.S.—Ferguson v. Wachs, C.C.A.Ill., 96 F.2d 910.
Ark.—Davison v. McCall, 93 S.W.2d 663, 192 Ark. 657.
Colo.—Kritzmanich v. Spehar, 283 P. 547, 86 Colo. 524.
Del.—Rauhut v. Reinhart, Orph., 180 A. 913.
Ga.—Stanford v. Calhoun, 127 S.E. 138, 159 Ga. 867.

sue of ownership of property claimed to constitute | assets of a decedent's estate. Presumptions and in-

Ill.—Wood's Estate v. Tyler, 256 Ill. App. 401.
Iowa.—In re Lorenz's Estate, 179 N. W. 860.
Kan.—Fulton v. Menefee, 68 P.2d 1112, 146 Kan. 150—McCrum v. Whitaker, 61 P.2d 909, 144 Kan. 469.
Ky.—Martin v. Martin, 138 S.W.2d 509, 282 Ky. 411—Voss v. Voss' Adm'x, 215 S.W. 525, 185 Ky. 682.
La.—Succession of Sullivan, App., 142 So. 619—Succession of Wilson v. Lewis, 140 So. 270, 19 La.App. 559—Succession of Breeden, 130 So. 132, 14 La.App. 553.
Mass.—Lowell v. Hudson, 168 N.E. 87, 268 Mass. 574.
Mich.—Detroit Trust Co. v. Struggles, 286 N.W. 844, 289 Mich. 595—Reese v. Collins, 242 N.W. 834, 259 Mich. 48.
N.Y.—In re Wilson's Will, 169 N.E. 122, 252 N.Y. 155, affirming 232 N.Y.S. 919, 225 App.Div. 761, affirming In re Wilson's Estate, 250 N.Y.S. 553, 140 Misc. 10—In re Buckler, 237 N.Y.S. 242, 227 App. Div. 146—In re Schem's Estate, 284 N.Y.S. 274, 157 Misc. 612—In re Baechler's Will, 202 N.Y.S. 485, 121 Misc. 691, affirmed In re Baechler's Estate, 213 N.Y.S. 759, 215 App.Div. 797.
Pa.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re Foster's Estate, 187 A. 399, 324 Pa. 39—In re Fink's Estate, 77 Pa.Super. 267—In re Matter's Estate, 47 Dauph.Co. 106.
S.C.—Quick v. Owens, 15 S.E.2d 837, 198 S.C. 29.
Wyo.—Haywood v. Kukuchka, 95 P. 2d 71, 55 Wyo. 41.

(2) To sustain finding that plaintiff's testator owned notes sued on as receiver of insolvent payee bank and not individually.—Folk v. Felder, 167 S.E. 27, 168 S.C. 103.

(3) To establish that funds remaining in joint bank account are assets of the estate.—In re Sobel's Estate, 22 N.Y.S.2d 732, 175 Misc. 171—In re Darashinsky's Estate, 260 N.Y.S. 289, 145 Misc. 426, affirmed In re Darashinsky, 264 N.Y.S. 939, 239 App.Div. 830.

(4) To warrant finding that property did not belong to decedent.
Kan.—Corson v. Oakley, 27 P.2d 290, 138 Kan. 520—Huycke v. Kramer, 298 P. 787, 133 Kan. 41.
Ky.—Russell v. Hogan, 140 S.W.2d 615, 282 Ky. 764—Melton's Adm'x v. Melton's Adm'r, 28 S.W.2d 35, 234 Ky. 353.
La.—Succession of Coleman, 149 So. 513, 177 La. 898.
N.Y.—In re Pennock's Estate, 14 N. Y.S.2d 131, 172 Misc. 10, reversed on other grounds 20 N.Y.S.2d 811, 260 App.Div. 181, reargument denied 23 N.Y.S.2d 204, 260 App.Div. 847, reversed on other grounds In re Pennock's Will, 35 N.E.2d 177, 285 N.Y. 475—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.
Okl.—In re Wagner's Estate, 62 P. 2d 1186, 178 Okl. 384.
Pa.—In re Gongaware's Estate, 109 A. 276, 265 Pa. 512.
Utah.—In re McLaren's Estate, 106 P.2d 766, 99 Utah 340.
Va.—McNelis v. Colonial-American Nat. Bank, 176 S.E. 176, 163 Va. 284.

(5) To warrant finding that property was owned by personal representative in personal capacity.
U.S.—Pickens v. Merriam, C.C.A.Cal., 274 F. 1, certiorari denied 42 S. Ct. 168, 257 U.S. 656, 66 L.Ed. 419.
Ky.—Rose v. Rose, 152 S.W.2d 603, 287 Ky. 224.
N.Y.—In re Dederick's Estate, 20 N. Y.S.2d 261, 259 App.Div. 918—In re Sobel's Estate, 22 N.Y.S.2d 732, 175 Misc. 171.

(6) To overcome presumption of fraud and undue influence in connection with execution of the joint tenancies which arose from fact that defendant had acted as agent for deceased, and sustained judgment for defendant.—Brown v. MacDougall, 112 P.2d 678, 44 Cal.App.2d 491.

(7) To warrant finding that decedent was competent at the time he transferred property.—Sanders v. Crabtree, 112 P.2d 923, 44 Cal.App.2d 602.

(8) To trace proceeds from real estate held by the entirety to secured notes, so as to give wife an interest in the notes by the entirety.—Schwind v. O'Halloran, 142 S.W.2d 55, 346 Mo. 486.

(9) To overcome presumption of adverse claimant's ownership, arising from declaration on envelope that they belonged to him.—Miller v. Silverman, 224 N.Y.S. 609, 221 App. Div. 697, modified on other grounds 160 N.E. 910, 247 N.Y. 447.

(10) As regards rights of representative of wife predeceasing husband, evidence established that moneys by which certificate of deposit and liberty bond were obtained were joint savings of husband and wife.—Foraker v. Kocks, 180 N.E. 743, 41 Ohio App. 210.

(11) In action to impress funds with trust, evidence sustained finding that decedent, to whom mortgage and note were assigned for collection, receive full cash value thereof, and that fund was in bank account at time of death and came into defendant's possession as executrix.—Armstrong v. Schoenborn, 20 P.2d 79, 130 Cal.App. 501.

(12) In action by executor to quiet title to realty which decedent had conveyed to sister, evidence was held to sustain finding that as between decedent and sister real ownership had not passed to sister.—Ryder v. Young, 50 P.2d 495, 9 Cal.App.2d 495.

Evidence held insufficient

(1) To warrant finding that property belonged to decedent.
Colo.—Finch v. McCrimmon, 52 P.2d 1150, 98 Colo. 56.
Iowa.—In re Van Hauen's Estate, 294 N.W. 901, 229 Iowa 852.
Minn.—Exsted v. Otto, 279 N.W. 559, 202 Minn. 644.
N.Y.—Hayes v. Claessens, 137 N.E. 313, 234 N.Y. 230, modifying 196 N.Y.S. 312, 202 App.Div. 762—In re Gardner's Will, 17 N.Y.S.2d 572, 173 Misc. 202, affirmed 23 N.Y.S.2d 848, 260 App.Div. 886, reargument denied 24 N.Y.S.2d 1012, 260 App. Div. 1028—In re Donnelly's Estate, 283 N.Y.S. 609, 157 Misc. 319—In re Baechler's Will, 202 N.Y. S. 485, 121 Misc. 691, affirmed In re Baechler's Estate, 213 N.Y.S. 759, 215 App.Div. 797.
Or.—Gray v. Wassell, 4 P.2d 625, 138 Or. 274.
Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.
Wash.—In re Uzafovage's Estate, 280 P. 85, 153 Wash. 620.

(2) To establish claim of ownership adverse to estate.
Mich.—McKinney v. Kalamazoo-City Sav. Bank, 221 N.W. 156, 244 Mich. 246.
N.Y.—In re Meyers' Estate, 297 N. Y.S. 605, 163 Misc. 743.

(3) To overcome presumption of ownership arising from possession.
N.J.—Booth v. Iaccarino, 159 A. 682, 110 N.J.Eq. 119.
N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146.
Tex.—Coggin Nat. Bank v. Smith, Civ.App., 63 S.W.2d 252.

(4) To show that savings account in husband's name in trust for deceased wife belonged to decedent.—In re Massey's Will, 257 N.Y.S. 578, 143 Misc. 794.

(5) Husband's statement that diamond brooch was in safety deposit box, which was in wife's exclusive control, was held insufficient to permit representative of estate of wife who predeceased husband to recover brooch from estate of husband.—In re Bowen's Estate, 282 N.Y.S. 290, 156 Misc. 435, affirmed In re Bowen, 286 N.Y.S. 1005, 247 App.Div. 708.

Claim first made after decedent's death

Asserted ownership of deceased's stock by reason of assignment executed by deceased was required to be established by clear and convincing proof where claim of ownership was made for first time after the

ferences generally applicable in civil actions have been applied in determining the issue of ownership.[22]

death of deceased.—In re Douglas' Estate, 7 N.Y.S.2d 870, 169 Misc. 425.

Notice

In action by executor of estate to quiet title to realty which decedent had conveyed to sister and which sister through an escrow arrangement had conveyed to a third party, evidence as to knowledge possessed by escrow agent and actual knowledge possessed by third party was held to support finding that such party had notice that sister was not real owner of property and that third party consequently was not innocent purchaser for value.—Ryder v. Young, 50 P.2d 495, 9 Cal.App.2d 495.

Fraudulent conveyance

Evidence was held to show that alleged transfer of business by decedent to wife was void as without consideration if any instrument of transfer was delivered.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.

Sworn answers, denying husband's ownership of property, failed to meet plaintiff's burden to show title in husband's administrator as against creditors of estate.—Mantle Lamp Co. of America v. Merrill, 113 So. 15, 216 Ala. 170.

Delivery

(1) As against claim of fraudulent conveyance, evidence was held not to show any delivery of instrument transferring business from husband to wife.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.

(2) Unless maker offered countervailing proof, requirement of delivery of note to deceased was satisfied by presumption arising from execution, and from evidence of possession by representatives of estate.—In re Killeen's Estate, 165 A. 34, 310 Pa. 182.

(3) Evidence in executor's proceeding to settle estate was held to show that bank's certificate of deposit in possession of testator's niece was delivered by testator to his nephew, to whose order it was payable, and belonged to latter.—McNelis v. Colonial-American Nat. Bank, 176 S.E. 176, 163 Va. 284.

Good will

Evidence supported findings that business owned and operated by decedent at her death had a good will which was not terminated by decedent's death, even though decedent's sister became sole owner by survivorship of premises on which business was located.—Burke v. Canfield, D.C., 121 F.2d 877.

Question for trial court

Evidence as to whether bill of sale and assignment of bank account by testator to legatee were secured by legatee while testator lacked sufficient capacity to act because of senile dementia, or were secured by fraud or undue influence, and whether legatee obtained testator's gold prior to testator's death unlawfully, was for trial court.—In re Larsen's Estate, 71 P.2d 47, 191 Wash. 257.

Question for jury

In administratrix' action for possession of bank stock, held by defendant claiming to be owner thereof, question whether stock belonged to plaintiff's intestate at time of his death was held for jury under evidence.—Barlow v. Barlow, Tex. Civ.App., 139 S.W.2d 139.

22. Ky.—Terrell v. Flack's Adm'r, 33 S.W.2d 23, 236 Ky. 325.

N.Y.—In re Kiamie's Will, 5 N.Y.S.2d 786, 168 Misc. 260, affirmed In re Kiamie's Estate, 15 N.Y.S.2d 725, 258 App.Div. 784, reargument denied 16 N.Y.S.2d 532, 258 App.Div. 866—Gaines v. Huyler, 184 N.Y.S. 145, 113 Misc. 188.

Undue influence by agent

Ordinarily, a presumption of fraud and undue influence in deceased's execution of joint tenancies with defendant with right of survivor would arise from the fact that defendant had been acting as agent of deceased.—Brown v. MacDougall, 112 P.2d 678, 44 Cal.App.2d 491.

Note payable to decedent

The ownership of a note, payable on its face to decedent, in the absence of indorsement by decedent during his lifetime, was presumed to have continued in decedent to the time of his death and thereupon to have passed to his estate.—Landis v. Landis, 22 A.2d 908, 343 Pa. 252.

Continuance of ownership

(1) Deceased was presumed to have owned property at time of death, where it was conceded to have been owned by him shortly prior thereto, and burden of proving transfer was on one claiming it.—In re Braunfeld's Estate, 288 N.Y.S. 637, 159 Misc. 687, affirmed 293 N.Y.S. 509, 249 App.Div. 805.

(2) The history of testatrix' gold, which appeared to have been given to testatrix by her husband, and of bonds, income of which was collected by testatrix, and conceded ownership thereof by testatrix at one time, placed on testatrix' daughter as claimant burden of establishing by clear and convincing evidence a transfer of title to claimant.—In re Meyers' Estate, 297 N.Y.S. 605, 163 Misc. 743.

(3) Under provisions of Uniform Stock Transfer Act that person to whom certificate of stock was originally issued is person appearing by certificate to be owner thereof until indorsement of certificate to another specified person, presumptive title to shares of decedent's stock, the certificates of which had never been indorsed, remained in decedent until his death.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514.

Gift

(1) Presumptively, a decedent would contradict the testimony of a living witness that during lifetime of decedent he gave away his property, and, if testimony of claimant to the property is incredible, presumption will support finding, which will not be disturbed by an appellate court, against the testimony of claimant.—Bard v. Kent, 95 P.2d 957, 35 Cal.App.2d 434.

(2) There was no presumption of fraud arising from gift from deceased to his wife, where, although note filed as claim against estate bore date prior to date of gift, there was no evidence raising presumption that deceased was at time of gift insolvent or unable to meet his indebtedness.—In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640, affirmed Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354.

Delivery of instrument

The fact that the officers of a corporation issued a new certificate to executors as individuals on their surrender of the certificate held by decedent, assigned in blank prior to his death, does not raise the presumption that the officers made an investigation at that time and learned that deceased had delivered the certificate to the executors before his death.—Gaines v. Huyler, 184 N.Y.S. 145, 113 Misc. 188.

Decedent's statement on property

In replevin against administratrix, that deceased had written on packages in safety deposit box that contents belonged to plaintiff was held evidence of ownership.—Miller v. Silverman, 160 N.E. 910, 247 N.Y. 447, modifying 224 N.Y.S. 609, 221 App.Div. 697.

Property held in fiduciary capacity

Evidence that confidential relation existed between testator and his sister and that note drawn by testator or another and payable to legal holder, with memorandum thereon in testator's handwriting that sister was legal holder, was in testator's possession when he died, created presumption that note was her property held by testator as her agent, and burden of proving contrary rested on executor contesting her right thereto.—McNelis v. Colonial-American Nat. Bank, 176 S.E. 176, 163 Va. 284.

Blanks filled in by claimant

Where plaintiff claimed ownership of deceased's stock by reason of an

The presumption, discussed in the C.J.S. title Property § 17, also 22 C.J. p 126 note 67–p 127 note 79, that one in possession of property is its owner is applicable, and property in the possession of decedent at the time of his death is presumably an asset of his estate.[23] Conversely, property not in the decedent's possession may be presumed not to be an asset;[24] but possession, by one having access to decedent's property, of an asset formerly in decedent's possession raises no presumption of ownership in the possessor.[25]

§ 126. Property Accruing after Death

Property, including causes of action, accruing to a decedent after his death is part of his estate.

Where an executor or administrator receives, by virtue of his representative capacity, property to which decedent became entitled after his death, he holds such property as assets of the estate,[26] and is liable therefor in his representative capacity.[27]

assignment executed by deceased, the presence in the assignment of the name of plaintiff as assignee did not constitute evidence in support of plaintiff's claim, in view of fact that name of assignee was in plaintiff's handwriting.—In re Douglas' Estate, 7 N.Y.S.2d 870, 169 Misc. 425.

23. N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146—Miller v. Silverman, 224 N.Y.S. 609, 221 App. Div. 697, modified on other grounds 160 N.E. 910, 247 N.Y. 447.
Pa.—In re McCarter's Estate, 36 Pa. Dist. & Co. 625.
Tex.—Reynolds v. Reynolds, Civ. App., 224 S.W. 382.
Wyo.—Haywood v. Kukuchka, 95 P. 2d 71, 55 Wyo. 41.
23 C.J. p 1157 note 50.

Prima facie case of ownership is established by decedent's possession. —In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146.

Decedent's possession puts burden of proof on adverse claimant to establish ownership of property.
Ky.—Fisher v. Fisher's Adm'r, 46 S. W.2d 85, 242 Ky. 262.
Tex.—Sloan v. Sloan, Civ.App., 32 S. W.2d 513.

Property in possession of legal representatives
Presumption is that property in possession of legal representatives is property of decedent held for benefit of estate, and that there was delivery to decedent during lifetime.
U.S.—Lybrand v. Allen, C.C.A.S.C., 23 F.2d 391.
Ala.—Mantle Lamp Co. of America v. Merrill, 113 So. 15, 216 Ala. 170.
Ga.—Luttgen v. Andrews, 163 S.E. 892, 174 Ga. 778.
Pa.—In re Killeen's Estate, 165 A. 34, 310 Pa. 182.

Bailment
While the possession of bonds of defendant by decedent raises a presumption of ownership, yet there is no presumption against the contention of defendant that decedent was merely bailee thereof, from the mere fact that this is not shown by entries on defendant's books or by written contract.—Philadelphia Trust Safe-Deposit & Ins. Co. v. Philadelphia & E. R. Co., 35 A. 688, 177 Pa. 38.

Stock certificates
(1) Stock certificates in name of decedent and unindorsed imported ownership in him up to time of his death, and established a prima facie title thereto in his estate.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266.

(2) The fact that stock certificate which was found by temporary administrators of decedent's estate, in decedent's safe deposit box, showed on its face that party other than decedent was registered owner of the stock represented by the certificate, did not rebut conclusively inference that decedent had title or beneficial right to the stock, arising from her possession of the stock.—Bradley v. Roe, 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633, answering certified questions 14 N.Y.S.2d 996, 257 App.Div. 1074, and reversing 13 N.Y.S.2d 693, 257 App.Div. 1005, appeal granted 14 N.Y.S 2d 996, 257 App.Div. 1074.

Property on body
Presumption exists that personalty found on body of murdered person belongs to him.—Booth v. Iaccarino, 159 A. 682, 110 N.J.Eq. 119.

24. Ill.—In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640, affirmed Keshner v. Keshner, 33 N. E 2d 877, 376 Ill. 354.
Pa.—Weaver v. Welsh, 191 A. 3, 325 Pa. 571.
Tex.—Coggin Nat. Bank v. Smith, Civ.App., 63 S.W.2d 252.
23 C.J. p 1157 note 51.

Bank account in name of daughter of decedent is presumed to be daughter's.—Taliaferro v. Reirdon, 99 P. 2d 500, 186 Okl. 607.

25. N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146—In re Kessler's Estate, 18 N.Y.S.2d 772, 173 Misc. 716—In re Douglas' Estate, 7 N.Y.S.2d 870, 169 Misc. 425—In re Cronkrite's Estate, 295 N.Y.S. 211, 162 Misc. 305.

Delivery
As against claim of fraudulent conveyance by decedent to wife, her possession of instrument was not in itself proof of actual delivery to her, since she had access to deceased's papers.—In re Haber's Estate, 270 N.Y.S. 603, 151 Misc. 82.

26. Mass.—Quincy v. Quincy, 46 N. E. 108, 167 Mass. 536.
23 C.J. p 1158 note 58.

Tolls received from a ferry after the death of one of the owners of the exclusive ferry privilege are funds in the hands of his administrator and liable for his debts.—Schonberg's Succession, 28 La.Ann. 137.

Proceeds of law case settled after death
Surviving law partner cannot be directed to turn over net proceeds, collected in cases settled after copartner's death, to administratrix of latter's estate, such money not being property of estate.—In re Lichtblau, 261 N.Y.S. 863, 146 Misc. 278.

Creditors satisfied at time property vested
Personal property bequeathed in remainder to testator's daughter after the death of his wife goes directly to the heirs of the daughter who had died and whose estate had been settled in so far as creditors were concerned before the death of the life tenant, since the title to personal property vests in the administrator merely as trustee for the creditors and heirs.—Bishop v. Groton Sav. Bank, 114 A. 88, 96 Conn. 325.

Property taken in individual names
Where the administratrix of her husband's estate and her two daughters jointly managed the estate, which consisted principally of mortgages on real property, taking the mortgages indifferently in the name of any one or more of them, regardless of the source of the money loaned, mortgages held in the joint names of a deceased daughter and her mother and sister will be considered a part of the father's estate, and the deceased daughter's estate will not be given an undivided interest therein.—Blaine v. Richardson, 193 N.Y.S. 612.

27. U.S.—Newcomb v. Burbank, C. C.N.Y., 146 F. 400.

Money received to pay taxes
The funds contributed by specific devisees for purpose of defraying estate taxes on their shares were not "general estate assets," but were specially "earmarked funds" which were in essence placed in hands of executors, as agents, for a specific

Causes of action accruing after decedent's death, but before letters testamentary or of administration were granted, vest in the executor or administrator upon his appointment.[28]

§ 127. Possession or Control of Property

Ownership, and not possession or control, governs as to whether property is an asset of a decedent's estate.

Personal property which belonged to decedent at the time of his death vests in his executor or administrator as assets, notwithstanding at the time of decedent's death it was in the possession or control of a third person.[29] Conversely, an administrator is not entitled to possession of property of which the decedent died possessed, as against the equitable owner thereof, in the absence of proof that there are creditors whose equitable claims take precedence over that of such equitable owner.[30]

§ 128. Estoppel to Deny That Property Received Is Assets

A personal representative who takes possession of property in his fiduciary capacity is generally estopped to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate. Surrender of property to the representative by the possessor, on demand, does not estop the latter from afterward asserting ownership.

Although in exceptional circumstances an estoppel may be held not to arise,[31] it is generally held that a personal representative who takes possession of property in his fiduciary capacity is estopped to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate.[32] This rule does not preclude the personal representative from claiming as heir or next of kin,[33] or from urging a claim which arose in the ordinary course of business with decedent;[34] but it does bar him from urging a claim which would

purpose, and could not properly be diverted to other uses.—In re Reilly's Will, 24 N.Y.S.2d 213, 175 Misc. 597.

28. Ala.—Reiter-Connolly Mfg. Co. v. Hamlin, 40 So. 280, 144 Ala. 192.
23 C.J. p 1132 note 54.

29. N.Y.—In re Demko's Estate, 210 N.Y.S. 646, 213 App.Div. 460.
Pa.—Keiper v. United Zion Home, 164 A. 367, 108 Pa.Super. 28.
23 C.J. p 1158 note 60.

Taking possession after death
Owner of house in which owner of ring died did not, by taking ring, gain title as against owner's personal representative.—Lowell v. Hudson, 168 N.E. 87, 268 Mass. 574.

Safe-deposit box
That a safe-deposit rental contract between deceased and a bank, which was deceased's executor, provided that on death of either deceased or wife the survivor should be sole renter of box with exclusive right of access thereto and possession of contents did not affect title to contents of box as between executor and deceased's surviving wife.—Security-First Nat. Bank of Los Angeles v. Stack, 90 P.2d 337, 32 Cal. App.2d 586.

30. Neb.—Koslowski v. Newman, 105 N.W. 295, 74 Neb. 704, 3 L.R.A.,N.S., 704.
N.Y.—Bradley v. Roe, 13 N.Y.S.2d 693, 257 App.Div. 1005, appeal granted 14 N.Y.S.2d 996, 257 App. Div. 1074, certified questions answered 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633, and reversed on other grounds 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633—In re Sielcken's Estate, 29 N.Y.S.2d 193, 176 Misc. 709—In re Hackfeld's Estate, 18 N.Y.S.2d 685, 171 Misc. 727, affirmed In re Hackfeld's Will, 19 N.Y.S.2d 144, 259 App.Div. 707, reargument denied 19 N.Y.S.2d 1020, 259 App.Div. 805.

Interest collected
Where decedent made valid assignment of certain mortgages prior to his death, although retaining possession of mortgages, assignees could compel his executrix to account for interest collected on mortgages subsequent to decedent's death.—Henderson v. Hughes, 182 A. 392, 320 Pa. 124.

31. Pa.—Williams' Estate, 11 Pa. Dist. 636.
23 C.J. p 1179 note 78.

Mere physical receipt of property, accompanied by a denial that it belongs to the estate, does not create an estoppel.—In re Belt, 70 P. 74, 29 Wash. 535, 92 Am.S.R. 916—23 C.J. p 1158 note 63.

Claim discovered after death
The fact that a widow qualified as executrix under her husband's will and also as trustee thereunder, and thereafter asked and obtained her statutory widow's allowance for a year's support, does not estop her from thereafter claiming property formerly owned by her husband, under a deed executed by him to her, and discovered by her after his death; nor does the fact that she used estate money to pay taxes on the property bar her from claiming it.—Leighton v. Leighton, 194 N.W. 276, 196 Iowa 1191.

32. U.S.—Bruce v. Globe Indemnity Co., D.C.Okl., 9 F.Supp. 761, reversed on other grounds, C.C.A., Globe Indemnity Co. v. Bruce, 81 F.2d 143, certiorari denied Bruce v. Globe Indemnity Co., 56 S.Ct. 591, two cases, 297 U.S. 716, 80 L.Ed. 1001.
Fla.—Sessions v. Willard, 172 So. 242, 246, 126 Fla. 848, citing **Corpus Juris.**
Ga.—Parnelle v. Cavanaugh, 12 S.E.2d 877, 191 Ga. 464.
N.Y.—In re Bingham's Estate, 17 N.Y.S.2d 981.
23 C.J. p 1158 note 62, p 1178 note 77.

Property not owned at time of death
The rule that an executor after accepting the trust cannot set up title adverse to the trust, does not operate where it is determined that the legal title to land in controversy was not vested in decedent at time of his death.—Crummey v. Crummey, 10 S.E.2d 859, 190 Ga. 774.

Delay in discovering claim
In proceeding wherein execution was levied on land belonging to decedent's estate after plaintiff obtained judgment against defendant, as administrator, and defendant, individually, asserted title to the land by virtue of a deed from decedent and testified that he accepted appointment as decedent's administrator in ignorance of his rights in that he thought that his title had been killed because deed was lost at the time, evidence that defendant had possession of deed at decedent's death and thereafter permitted defendant's uncle to take possession of land as decedent's heir and administrator warranted verdict for plaintiff on ground that defendant was "estopped" from claiming title to land.—Wright v. Thompson, 8 S.E.2d 640, 190 Ga. 173.

33. Ga.—Parnelle v. Cavanaugh, 12 S.E.2d 877, 191 Ga. 464—Crummey v. Crummey, 10 S.E.2d 859, 190 Ga. 774.

34. Ga.—Parnelle v. Cavanaugh, 12 S.E.2d 877, 191 Ga. 464—Crummey v. Crummey, 10 S.E.2d 859, 190 Ga. 774.

exclude from the entire estate the heirs or distributees who would otherwise take.[35]

The fact that the person in possession of property surrenders it on the representative's demand has been held not to estop him from afterward asserting that he is the owner and reclaiming it,[36] although an estoppel may arise where such surrender is followed by long acquiescence in the representative's claim that the property belongs to the estate.[37]

One interested in the estate who acquiesces in the executor's treating certain property as not part of the estate is estopped to claim that it is.[38]

IV. INVENTORY AND APPRAISAL

§ 129. Necessity and Purpose

An executor or administrator is commonly required, on assuming his office, to file an inventory and appraisal of the assets of the estate, as a basis for his accounting and liability.

Under common probate practice, the first duty of an executor or an administrator, after obtaining his credentials, is to prepare and file an inventory of the assets of the estate,[39] and an appraisal of the value of such assets.[40]

The object of an inventory and appraisal is to fix presumptively, although not conclusively, the amount and value of items of property constituting the estate, and their respective totals, as to real and personal property, and to furnish a reasonable basis on which the accounting and liability of the executor or administrator shall proceed.[41]

§ 130. Who Required to Make

Only a duly appointed executor or administrator can be required to file an inventory.

It is the duty of the personal representative, and not of the heirs or legatees, to furnish an inventory and appraisal.[42] Only a duly appointed executor or administrator can be required to file an inventory;[43] an inventory may be required of an administrator de bonis non,[44] or of an executor who takes out

35. Ga.—Parnelle v. Cavanaugh, 12 S.E.2d 877, 191 Ga. 464.

Implied trust

An administratrix after accepting the trust was precluded by statute from setting up equitable title to a tract of land belonging to the estate, through an implied trust arising from fact that the administratrix had furnished to deceased the purchase money for the tract.—Crummey v. Crummey, 10 S.E.2d 859, 190 Ga. 774.

Contract to adopt administrator

Administratrix' petition seeking to enforce against estate an alleged contract by decedent to adopt the administratrix and make will leaving all of decedent's property to her was subject to general demurrer on ground that it was brought not for direction concerning distribution of estate alone, but to accomplish purpose adverse to the interest of the administratrix as such and solely for the purpose of advancing her interest as an individual.—Parnelle v. Cavanaugh, 12 S.E.2d 877, 191 Ga. 464.

36. Mo.—Wells v. Moore, 68 Mo.App. 499.
23 C.J. p 1150 note 4.

37. Pa.—In re Moore, 60 A. 987, 211 Pa. 338.
23 C.J. p 1150 note 5.

38. Pa.—In re Fitzgibbon's Estate, 116 A. 289, 272 Pa. 345.

39. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.
Puerto Rico.—Trinidad v. Trinidad, 19 Puerto Rico 616, 624.
23 C.J. p 1158 note 67.
Dispensing with inventory see infra § 139.
Effect of failure to make inventory see infra § 140.

"Inventory" defined

(1) An inventory is the account of an executor or administrator, to the correctness of which he is sworn, particularly as to all claims against him belonging to the estate.—Lloyd v. Lloyd, 1 Redf.Surr., N.Y., 399.

(2) "Inventory" in orphans' court is statement of assets of decedent's estate.—In re Fulper's Estate, 132 A. 834, 99 N.J.Eq. 293.

English practice see 23 C.J. p 1158 notes 64–66.

40. Ark.—Lambert v. Tucker, 104 S. W. 131, 83 Ark. 416.
Cal.—In re Selma, Myr.Prob. 233.

"Wasting assets"

Live stock and farm implements are "wasting assets" or "property which may be consumed in using," and it was executor's duty, before turning over such property to trustee, to cause it to be appraised, so that value should be known and accounted for to remaindermen or legatees.—In re Hopson's Will, 211 N.Y.S. 128, 213 App.Div. 395.

Will providing for appraisal

Under will of Indian devising land in fee, subject to payment to estate of appraised value less advances by devisee, claim for advances must be established as claim against estate, and land described must be appraised.—In re Fish's Estate, 229 P. 803, 107 Okl. 12.

41. Ariz.—Lowry v. Crandall, 83 P. 2d 1003, 52 Ariz. 501, 120 A.L.R. 271.
N.J.—In re Fulper's Estate, 132 A. 834, 99 N.J.Eq. 293.
Ohio.—Scott v. Mofford, 28 N.E.2d 947, 64 Ohio App. 457.
Tex.—Cartledge v. Billalba, Civ.App., 154 S.W.2d 219, error refused.
23 C.J. p 1159 note 69.

"The inventory is intended to serve both as an information source and as a starting point in future proceedings in the administration of an estate. It has as its object in part the fixation of the value with which presumptively the fiduciary is to be charged. It is designed as well to require the fiduciary to certify the property in his hands and the claims of the deceased against him."—In re Erlanger's Estate, 287 N.Y.S. 263, 265, 159 Misc. 185.

42. Miss.—Turner v. Ellis, 24 Miss. 173.
N.Y.—Mills v. Smith, 36 N.E. 178, 141 N.Y. 256.

43. N.Y.—Mills v. Smith, supra.

Coexecutor may file a separate inventory and account.—In re Foulke's Estate, 5 A.2d 179, 334 Pa. 186.

44. Md.—Brown v. Tydings, 130 A. 337, 149 Md. 22.
23 C.J. p 1159 note 73.

It is good practice for a subsequent administrator to file a new inventory although his predecessor has already filed one.—Brown v. Tydings, supra.

letters testamentary after the death of a coexecutor.[45]

§ 131. Time for Making

An inventory and appraisal should be filed within the time prescribed by the governing statute, but late filing does not render it invalid.

The inventory and appraisal should be made and filed within the time prescribed by the governing statute;[46] and where an inventory is not filed within the time prescribed, the court will order it filed, although the facts on which the order is based are brought to its knowledge by one having no interest in the estate.[47] The time may be extended,[48] and an inventory and appraisement filed after the prescribed time is not invalid.[49]

Where an executor is excused for failure to file an inventory within the prescribed time by reason of his having received no assets in that time, it is his duty to file an inventory within a reasonable time after he first receives assets.[50] Where decedent left a will, an inventory is not required until after probate,[51] and it has been held that a testator may provide by his will that the inventory and appraisal shall not be made until the death of a life tenant.[52]

§ 132. Form and Requisites

The inventory must meet the requirements of the governing statute and give full information as to the quantity and quality of the estate.

The inventory must meet the requirements of the governing statute;[53] it should be specific in its enumeration of such chattels or other property of deceased as the law may require, not needlessly minute, and yet so full as to separate large items of value, and set out by themselves such special classes as chattels real, household furniture, cattle, stock in trade, cash, and securities of the incorporeal sort, such as notes and bonds,[54] so as to give interested parties, including creditors, full information as to the quantity and quality of the estate.[55] It has been required to be in writing,[56] and to be signed by the personal representative[57] and the appraisers,[58] and verified.[59]

Statement of no assets. A statement filed with the register by an administrator that there are no goods has been held equivalent to filing an inventory.[60]

§ 133. Property to Be Included

Although certain exceptions have been recognized, as to which the courts are not in entire accord, as a general rule all property owned by the decedent should be included in the inventory.

The general rule is that it is the duty of the personal representative to include in his inventory all property belonging to, or claimed by, decedent or his estate which has come to the representative's knowledge,[61] whether or not it has actually come into his possession.[62]

The inventory should include property which de-

45. N.Y.—In re Dana, Tuck.Surr. 113.
23 C.J. p 1159 note 76.

46. Ariz.—Lowry v. Crandall, 83 P. 2d 1003, 52 Ariz. 501, 120 A.L.R. 271.
Pa.—In re Rahauser's Estate, 52 York Leg.Rec. 37.
23 C.J. p 1159 note 77.

47. Iowa.—Poole v. Burnham, 68 N. W. 816, 99 Iowa 493.

48. Pa.—Logan's Estate, 1 Pa.Co. 76.
23 C.J. p 1160 note 79.

49. Cal.—Phelan v. Smith, 34 P. 667, 100 Cal. 158.

Statute directory

The statute governing the time within which the inventory and appraisal should be filed is directory, and delay in filing does not invalidate the appraisal or inventory.—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949.

50. Mass.—Forbes v. McHugh, 25 N. E. 622, 152 Mass. 413.

51. Hawaii.—Matter of Gill, 2 Hawaii 681.

52. Pa.—Logan's Estate, 1 Pa.Co. 76.

53. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.

Where statute requires notice of the making of the inventory or appraisal, an inventory or appraisal made without such notice is void.—Salomon v. Heichel, 4 Dem.Surr., N. Y., 176—Scofield's Estate, 1 N.Y. Month.L.Bul. 64.

54. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.
23 C.J. p 1160 note 84.

55. Pa.—In re Rahauser's Estate, 52 York Leg.Rec. 37.

56. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.

57. Va.—Parks v. Rucker, 5 Leigh 149, 32 Va. 149.
23 C.J. p 1160 note 85.

58. La.—Michel v. Michel, 11 La. 149.
23 C.J. p 1160 note 86.

59. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.
23 C.J. p 1160 note 87.

60. Del.—State v. Beckley, 1 Del. 142.

61. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Mo.—In re Van Fossen, App., 13 S. W.2d 1076.
Pa.—In re Rahauser's Estate, 52 York Leg.Rec. 37.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696.
Tex.—Ball v. Cundiff, Civ.App., 127 S.W.2d 502, error dismissed, judgment correct.
23 C.J. p 1160 note 90.

Securities transferred but not delivered

Securities in decedent's safe deposit box should be listed in the inventory although a transfer of ownership is listed thereon without evidence of delivery.—In re Keiser's Estate, 6 Pa.Dist. & Co. 178, 21 Sch. Leg.Rec. 60.

Statutory set-offs

Administrator should include statutory set-offs in inventory, notwithstanding claimed existence of antenuptial contract that would defeat such set-offs.—Keever v. Brown, 172 N.E. 626, 36 Ohio App. 1.

62. Hawaii.—Matter of Gill, 2 Hawaii 681.

cedent's will treats as part of his estate,[63] provisions on hand at the time of decedent's death,[64] wearing apparel of decedent who left only collateral kindred,[65] choses in action, notes, and other claims existing in favor of the estate,[66] debts due from the personal representative[67] whether or not the latter recognizes the claims as valid,[68] the proceeds of insurance, when these have come or should come into the possession of the representative as assets,[69] a judgment in favor of the estate,[70] property the right of possession of which was vested in decedent, although it never came into his actual possession,[71] property transferred by gift causa mortis where delivery by decedent was only symbolic,[72] and property as to which decedent had an equity of redemption.[73] That the property is of no value,[74] or that it was specifically bequeathed,[75] is no ground for not including it in the inventory.

The inventory need not include property which decedent effectively transferred during his lifetime,[76] property in which decedent had only a life estate,[77] property held by the executor as life tenant,[78] property directed by the will not to be inventoried,[79] or a claim for damages for the death of decedent.[80] A payment made by decedent for the benefit of another should not be inventoried where the circumstances attending such payment are such as to raise a presumption that he did not intend to charge it, but intended that it should inure to the benefit of such other person and there is no proof to the contrary;[81] and even if under the will one was seized of a determinable fee in land, whereof his widow is entitled to dower, yet, such fee having determined on his death, the property does not belong to his estate, and therefore should not be included in his administratrix's inventory.[82] Where a surety dies leaving his estate liable for the debt, his claim against the principal for reimbursement should not be inventoried by the administrator until the debt has been actually paid.[83] As an inventory relates to the time of decedent's death, only property of which he was possessed at the time of his death, and not subsequent profits or accretions, need be included in the inventory.[84]

Real estate must, under some statutes, be inventoried,[85] but in the absence of a statute so requiring, it need not be included in the inventory.[86]

Decedent's interest in a partnership should, according to the weight of authority, be listed,[87] although it has also been held that such interest should not be inventoried.[88]

Trust property. It has been held that property held in trust by decedent need not be listed,[89] but

63. La.—Grounx v. Abat, 7 La. 17.

Property sold by decedent

Machinery which testator listed in his will but which he subsequently sold to his executor in cancellation of a debt was not improperly omitted from inventory of his estate.—Hubbard v. Ball, 81 P.2d 73, 59 Idaho 78.

64. N.H.—Griswold v. Chandler, 5 N.H. 492.

65. Pa.—Steen's Estate, 1 Pa.Co. 473.

66. Pa.—In re Burwell's Estate, 91 Pa.Super. 183.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696.
23 C.J. p 1160 note 95.

Debt discharged by bankruptcy

The amount of indebtedness from which deceased's bankrupt son was relieved of liability by bankruptcy discharge was rightfully eliminated from inventory of deceased's estate.—Leach v. Armstrong, Mo.App., 156 S.W.2d 959, transferred, see, Sup., 149 S.W.2d 865.

67. Ohio.—Jones v. Willis, 74 N.E. 166, 72 Ohio St. 189.
23 C.J. p 1161 note 96.

68. Mo.—Wilson v. Ruthrauff, 82 Mo.App. 435.
23 C.J. p 1161 note 97.

69. N.J.—Allen v. Allen, 103 A. 169, 88 N.J.Eq. 575.

70. Or.—In re Conser, 66 P. 607, 40 Or. 138.
23 C.J. p 1161 note 99.

71. S.C.—Orangeburgh Dist. v. Geiger, 3 S.C.L. 484.

72. Pa.—In re Elliott's Estate, 173 A. 880, 113 Pa.Super. 350.

73. Md.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.

74. Mo.—In re Van Fossen, App., 13 S.W.2d 1076.

75. N.Y.—In re Link's Will, 17 N.Y. S.2d 634, 173 Misc. 217.

76. Ill.—In re Haegele's Estate, 30 N.E.2d 148, 307 Ill.App. 383.
Vt.—Trask v. Walker's Estate, 134 A. 853, 100 Vt. 51.
Property disposed of by decedent as or as not assets see supra § 123.

77. Mo.—Dameron v. Lanyon, 138 S.W. 1, 234 Mo. 627, 646.
23 C.J. p 1161 note 7.

Growing crops; offspring of animals

Where wife devised and bequeathed all her property to her husband for life and after his death to their son, on the husband's death inventory of personal property should have included seed and grain produced during the husband's life as well as wheat crop and other annual crops growing at the time of husband's death and offspring of pigs, cows, and horses bequeathed to husband.—In re Specht's Estate, Ohio App., 36 N.E.2d 865.

78. S.C.—Brooks v. Brooks, 12 S.C. 422.
23 C.J. p 1161 note 8.

79. Pa.—Wood's Estate, 7 Pa.Dist. 484.

80. Pa.—Kober's Estate, 17 Pa.Dist. 184.

81. Ohio.—In re Glenn, 23 Ohio Cir. Ct. 397.

82. Mo.—Dameron v. Lanyon, 138 S. W. 1, 234 Mo. 627.

83. Conn.—Andruss v. Doolittle, 11 Conn. 283.

84. Va.—McCall v. Peachy, 3 Munf. 288, 17 Va. 288.
23 C.J. p 1161 note 17.

85. N.M.—Barka v. Hopewell, 219 P. 799, 29 N.M. 166.
Or.—D'Arcy v. Snell, 91 P.2d 537, 162 Or. 351, 122 A.L.R. 928.
23 C.J. p 1161 note 18.

86. Pa.—In re Long's Estate, 17 A. 2d 686, 143 Pa.Super. 176.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696.
23 C.J. p 1161 note 19.

87. Mich.—Loomis v. Armstrong, 29 N.W. 867, 63 Mich. 355, 362.
23 C.J. p 1161 note 2.

88. Pa.—In re Cassel's Estate, 18 Lehigh Co.L.J. 123.
23 C.J. p 1161 note 3.

89. Pa.—Hartman v. Dime Building

that property of which decedent had the record title must be listed although it is equitably owned by another.[90]

Property claimed adversely to the estate by third persons,[91] or even by the representative himself,[92] should be included in the inventory, although it would seem proper to indicate the existence of the adverse claim.[93] However, it has been held sufficient under such circumstances to file a schedule of such property stating that it belongs to the representative;[94] and it has also been held that property in the possession of a third person under a claim of title should be excluded.[95]

Fraudulent transfer. It has been held that the inventory should include property transferred by decedent in fraud of creditors;[96] but there is authority for the view that such property need not be included,[97] unless it was conveyed to the representative himself.[98]

Property exempt from execution should, it has been held, be included in the inventory in order to identify it as part of decedent's property,[99] but there is also authority for the view that such property should not be inventoried.[1]

Property pledged by decedent. Personal property which decedent in his lifetime hypothecated as collateral security should not be included in the inventory and appraisal, thus fixing a liability therefor in the executor or administrator, but the interest of the estate in the property or the proceeds of its sale, if any, on the settlement of the indebtedness, is a proper subject for an additional inventory.[2]

A widow's exemption is not part of decedent's estate, but must be listed in the inventory as belonging to the widow.[3]

Location of property. Although it has been asserted that the inventory should include all the personal property of decedent, even that situated out of the state,[4] it would seem more proper that where letters are granted in different states or countries, the inventory of each executor or administrator should include only the property within the jurisdiction in which his letters are issued, for which property alone he is immediately accountable.[5] It has also been held that the neglect of an executor to inventory a debt founded on a judgment rendered in another state was not a breach of his official duty.[6]

§ 134. Additional or Supplementary Inventory

An additional or supplementary inventory to cover property omitted or subsequently acquired, or to correct an error, may be permitted or required by the court.

Ordinarily, only one inventory need be returned, and for additional property coming to the representative's knowledge or control, charging himself in his accounts is sufficient.[7] However, the court has the power to permit or compel an additional or supplementary inventory for property omitted or subsequently acquired;[8] and a representative who has filed an erroneous inventory has been allowed subsequently to file a second inventory correcting the errors.[9] A supplemental statement describing property omitted from the inventory may be sufficient as an additional inventory, although not filed as such.[10]

§ 135. Making Appraisal

Under the general practice the assets must be appraised by disinterested appraisers appointed by the court at their market value as of the time when received by the representative.

It is generally required not only that there be a

and Loan Ass'n, 89 Pittsb.Leg.J. 273.
Wash.—In re Belt, 70 P. 74, 29 Wash. 535.

90. Conn.—Laudano v. Laudano, 142 A. 407, 108 Conn. 37.

91. Conn.—Searle v. Crampton, 170 A. 480, 118 Conn. 42.
23 C.J. p 1161 note 20.

92. Tenn.—In re Love's Estate, 145 S.W.2d 778, 176 Tenn. 696.
23 C.J. p 1162 note 21.

93. Ill.—Simms v. Guess, 52 Ill.App. 543.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696.

94. Kan.—Hartwig v. Flynn, 100 P. 642, 79 Kan. 595.

95. Philippine.—Arabes v. Urian, 6 Philippine 527.

96. Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.
23 C.J. p 1161 note 13.

97. Or.—Borge v. Traaen, 75 P.2d 939, 158 Or. 454, rehearing denied 76 P.2d 1127, 158 Or. 454.
23 C.J. p 1161 note 11.

98. Conn.—Minor v. Mead, 3 Conn. 289.

99. N.Y.—Crawford v. Nassoy, 65 N. E. 962, 173 N.Y. 163, reversing 67 N.Y.S. 108, 55 App.Div. 433—Matter of Keough, 86 N.Y.S. 807, 42 Misc. 387.

1. Iowa.—In re Holderbaum, 47 N. W. 898, 82 Iowa 69.

2. Pa.—In re Moore, 48 A. 884, 198 Pa. 611.

3. N.Y.—In re Tangerman's Estate, 235 N.Y.S. 213, 226 App.Div. 162.

4. Conn.—Bridgeport Trust Co.'s App., 60 A. 662, 77 Conn. 657.
23 C.J. p 1162 note 26.

5. N.J.—In re Healey's Estate, 134 A. 684, 4 N.J.Misc. 785.
23 C.J. p 1162 note 27.

6. Conn.—Strong v. White, 19 Conn. 238.

7. Mass.—Hooker v. Bancroft, 4 Pick. 50.
23 C.J. p 1162 note 29.

8. Mo.—Chapin's Estate v. Long, 224 S.W. 1012, 205 Mo.App. 414.
N.M.—Barka v. Hopewell, 219 P. 799, 29 N.M. 166.
Pa.—In re Keiser's Estate, 6 Pa.Dist. & Co. 178, 21 Sch.Leg.Rec. 69.
23 C.J. p 1162 note 30.

9. Pa.—In re Bradford, 1 Browne 87.

10. Wash.—Ackerson v. Orchard, 84 P. 1106, 35 P. 605, 7 Wash. 377.

listing of the assets of the estate, but that there be an appraisal of the value of each;[11] but under a statute so providing,[12] or a testamentary provision relieving the executor of the duty,[13] the court may dispense with an appraisal.

Property of the estate should be appraised at its market value,[14] but the surrogate has no power to direct the appraisers as to the manner in which they shall estimate the value.[15] The appraisal should be of the value of the property when received by the representative, and not the value at the time of the decedent's death, since the purpose of the appraisal is to fix the amount with which the representative is to be charged.[16]

Under the practice generally prevailing, the appraisal of the value of the assets with which the representative is to be charged is made by a specified number[17] of appraisers,[18] who are appointed by the court.[19] The appraisers must be disinterested,[20] and must be sworn to the faithful discharge of their duties.[21]

The appraisers are entitled to compensation at the rate fixed by the governing statute.[22]

The result of the appraisement is noted on the inventory blank which accompanies the order, and the schedules filled up, and the document when completed is delivered to the executor or administrator by whom it should be returned to the probate court for record with his own oath that the list is just and perfect.[23] Where an executor disposed of certain property without including it in the inventory, in accordance with the expressed wish of decedent, and, on final settlement, made a supplemental inventory of such property, it was held that the court might determine the value of the property and it was not necessary that it should be appraised like other property of the estate.[24]

§ 136. Proceedings

The proceedings for an appraisal are under the control of the court acting on its own motion or on petition of one interested in the estate, it having, in general, power to hear and determine all controversies with respect thereto.

11. N.Y.—Vogel v. Arbogast, 4 Dem. Surr. 399.
23 C.J. p 1163 note 38.

Debt
Under a statute so providing, a judgment cannot be recovered on a written evidence of debt belonging to the estate unless and until it is included in the appraisal.—Damron v. Allen, 135 S.E. 600, 102 W.Va. 537

12. Ohio.—In re Estate of Mayo, 31 Ohio N.P.,N.S., 394.
Dispensing with inventory see infra § 139.

13. Ga.—Darnell v. Tate, 170 S.E. 63, 177 Ga. 279.

14. N.Y.—Matter of Bodman, 166 N. Y.S. 714, 100 Misc. 390.
23 C.J. p 1163 note 40.

Fair market value; value in money
Under a statute requiring property to be appraised at its fair market value for inheritance tax purposes, and requiring the general appraisers of decedent's property to fix its value in money, the "fair market value" and the "value in money" are practically identical, the value in money being the fair equivalent for the thing valued, and the fair market value the sum for which it could be exchanged in the open market under fair conditions, and the purpose of the valuation not being an element of value in either case.—In re Matthews' Will, 182 N.W. 744, 174 Wis. 220.

Corporate stock
In making appraisal of stock belonging to estate, consideration must be given to asset values of corporation, to possibility of liquidating such values, to course of trade or business in which corporation is engaged, and to current earnings, business trends, capital needs, prospective profits, tax liabilities, and good will.—In re Erlanger's Estate, 287 N. Y.S. 263, 159 Misc. 185.

15. N.Y.—Matter of McCaffrey, 3 N. Y.S 96, 50 Hun 371.

16. N Y—In re Erlanger's Estate, 287 N.Y.S. 263, 159 Misc. 185.

17. Md—Barron v. Smith, 70 A. 225, 107 Md. 317.
23 C.J. p 1162 note 34.

18. R.I—Fairbanks v. Mann, 34 A. 1112, 19 R.I. 499.
23 C.J. p 1162 note 36.

19. Miss.—O'Brien v. Wilson, 33 So. 946, 82 Miss. 93.
23 C.J. p 1162 note 33.

Appointment as often as necessary
Under Surrogate's Court Act, on application of an executor or administrator, surrogate may appoint two disinterested appraisers as often as may be necessary to appraise personalty of the estate.—In re Heimer's Estate, 23 N.Y.S.2d 581, 175 Misc. 412.

20. N.Y.—Matter of McCaffrey, 3 N.Y.S. 96, 50 Hun 371.
23 C.J. p 1162 note 35.

21. Ala.—Horn v. Grayson, 7 Port. 270.
23 C.J. p 1162 note 37.

22. Or.—In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46.
23 C.J. p 1163 note 39.

Court has no discretion as to the amount of the compensation.—In re Megrath's Estate, 253 P. 455, 142 Wash. 324, affirmed 256 P. 503, 142 Wash. 324.

Day's work
Statute allowing appraisers of estates not to exceed five dollars per "day" for services was not intended to permit appraisers to collect plurality of appraisal fees for same day's work or to require appraisers to work from midnight to midnight to perform a day's service.—In re Roher's Estate, 58 P.2d 948, 16 Cal. App.2d 669.

Reasonable fee
(1) The Surrogate's Court Act contemplates that reasonable fees shall be fixed for services actually rendered by appraisers of the personal estate of deceased.—In re Gally's Estate, 3 N.Y.S.2d 967, 254 App. Div. 157.

(2) Appraiser's fees of two thousand five hundred dollars for each of two appraisers, in addition to allowance of claim of five hundred seventeen dollars and fifty cents for services of experts and certified public accountant, for the appraisal of personal property of deceased, of a total gross amount of three hundred fifty-seven thousand, nine hundred two dollars and sixty cents, in making which appraisers spent nineteen days, were excessive by one thousand five hundred dollars.—In re Gally's Estate, supra.

23. N.J.—Dilts v. Stevenson, 17 N. J.Eq. 407.

24. Cal.—Garrity's Estate, 38 P. 628, 41 P. 485, 108 Cal. 463.

The probate court has the power to hear and determine all controversies with respect to the inventory and appraisal;[25] and intervention by a court of equity in such matters is not favored.[26] The court of probate jurisdiction has power to compel the filing of an inventory and appraisal,[27] and to order that particular property be removed from,[28] or added to,[29] the inventory; but it has been held that the inventory or appraisal cannot be attacked directly in a proceeding for that purpose and that issues with respect to them must await the accounting proceedings.[30] The court has the power to direct a reappraisal where the appraisal does not appear to be correct,[31] or where the original appraisal was fraudulent.[32]

The probate court has jurisdiction, in proceedings for an inventory, to determine whether property belongs prima facie to the estate, so that it should be included in the inventory.[33] In some jurisdictions it has the power to determine the ultimate question of ownership of property as between decedent's estate and an adverse claimant;[34] but in others, it does not have such power,[35] unless the question is purely one of law,[36] or the dispute as to ownership is between the estate and the representative in his

25. Pa.—In re Barbey's Estate, 33 Berks Co.L.J. 159.
Tenn.—In re Love's Estate, 145 S.W.2d 778, 176 Tenn. 696.
23 C.J. p 1163 note 45.

Incidental issues
The probate court has jurisdiction to determine the amount of money and property that has come into the administrator's hands, and, in determining that question, to determine all issues necessarily incidental thereto.—In re Roach's Estate, 281 P. 607, 208 Cal. 394.

Ancillary executor
Probate court has power to order correction of ancillary executors' inventory of property of decedent's estate.—Security-First Nat. Bank v. King, 23 P.2d 851, 46 Wyo. 59, 90 A.L.R. 125.

Whether court commissioner had jurisdiction to enter order eliminating amount of deceased's savings bank deposit from inventory of his estate's assets after expiration of time for appeal from order bringing such amount into inventory was for commissioner to determine in first instance.—In re Rabie's Estate, Wash., 90 P.2d 1011.

Cost bond
To assert that property, claimed by administrator in his own right, belongs to decedent's estate, person interested therein must proceed under statute requiring one petitioning for order to inventory property as assets of estate to file bond for costs.—Rosenfield v. Rosenfield, 6 N.E.2d 938, 212 Ind. 120.

Death of administrator does not terminate the court's jurisdiction of an action to compel him to include certain property in the inventory.—Fulford v. Fulford, 137 A. 487, 153 Md. 81.

26. W.Va.—Price v. Laing, 68 S.E. 24, 67 W.Va. 373.
23 C.J. p 1163 note 46.

27. La.—Successions of Kerlec, 99 So. 422, 155 La. 513.
23 C.J. p 1163 note 44.

Statute not invalid
Constitutional provision for separation of executive and judicial functions is not violated by statute empowering court to require personal representative to file inventory.—State v. Rogers, 163 S.E. 416, 111 W.Va. 587.

Waiver of objection to jurisdiction
When a coexecutor filed in the orphans' court a petition to compel the representatives of his deceased coexecutor to file an inventory and render an accounting, and to pay over to petitioner any sum remaining in the hands of deceased coexecutor, any question of jurisdiction was waived by the act of the representatives of the coexecutor in filing the inventory, and it was too late to make the question after petitioner had excepted to the inventory as filed.—Crothers v. Crothers, 88 A. 114, 121 Md. 114.

28. Ind.—Lang v. Snapp, 4 N.E.2d 587, 103 Ind.App. 627.
23 C.J. p 1165 note 67.

Equivalence to action in equity
The petition of legatee of estate to have note stricken from inventory and that it be not charged against his share of estate is equivalent to an action in equity to set aside and cancel the instruments.—In re Flierl's Estate, 274 N.W. 422, 225 Wis. 493.

Remedy by motion to strike or claim against estate
Where deceased husband invested joint funds of spouses in notes and mortgages running to spouses jointly and such items were shown in inventory of husband's estate, wife properly petitioned to strike the items from inventory instead of filing claim for conversion against estate; but where he invested joint funds in note payable to him alone, wife's remedy, on his death, was filing of claim against estate for conversion, by deceased, of her interest in note, not petition to have note stricken from inventory.—In re Abdulah's Estate, 252 N.W. 158, 214 Wis. 336.

29. Ill.—Kepple v. Crabb, 152 Ill. App. 149.
Md.—Fulford v. Fulford, 137 A. 487, 153 Md. 81—Belt v. Hilgeman-Brundige Co., 113 A. 721, 138 Md. 129.
Wyo.—Security-First Nat. Bank v. King, 23 P.2d 851, 856, 46 Wyo. 59, 90 A.L.R. 125, citing **Corpus Juris.**
23 C.J. p 1165 notes 67, 68 [d].

Word "administrator" within statute requiring an administrator to inventory and return assets of the estate in his hands which he has omitted to return in inventory, includes an executor.—Baker v. Forsythe, 16 A.2d 921, 178 Md. 682.

30. N.Y.—In re Erlanger's Estate, 287 N.Y.S. 263, 159 Misc. 185.
23 C.J. p 1165 note 67 [d] (1).

31. Conn.—Callahan v. Peltier, 183 A. 400, 121 Conn. 106.
Defects and amendment or correction generally see infra § 137.

If appraisement was too high executor had his remedy under a statute providing that the register shall have power to order an inventory to be suppressed or to adjudge the same imperfect, and to order another to be made.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.

32. Mont.—In re Walker's Estate, 106 P.2d 341, 111 Mont. 66.

33. Mo.—Gray v. Doubikin, 166 S.W. 1070, 179 Mo.App. 240.
23 C.J. p 1163 note 47.

34. Ohio.—Brown v. Southern Ohio Sav. Bank & Trust Co., 153 N.E. 864, 22 Ohio App. 324.
Wyo.—Security-First Nat. Bank v. King, 23 P.2d 851, 46 Wyo. 59, 90 A.L.R. 125.

35. Cal.—In re Inghilleri's Estate, 81 P.2d 568, 27 Cal.App.2d 664.
Md.—Talbot Packing Corporation v. Wheatley, 190 A. 833, 172 Md. 365—Fulford v. Fulford, 137 A. 487, 153 Md. 81.
Wis.—Central Wisconsin Trust Co. v. Schumacher, 284 N.W. 562.
23 C.J. p 1163 note 48, p 1165 note 67 [e].

36. Pa.—In re Adams' Estate, 12 A.2d 495, 139 Pa.Super. 512.

individual capacity.[37]

Who may bring proceeding; parties. The court, in compelling the filing of an inventory and appraisal, may act of its own motion,[38] or on the petition of one interested in the estate as an heir, devisee, or creditor;[39] persons not interested in the estate cannot apply for the filing of an inventory.[40] A person's status as interested party need not be adjudicated as a preliminary to filing a petition.[41] A petition setting forth facts which, if true, show the petitioner to be interested in the estate is sufficient,[42] even though such facts are disputed, in which case the court may require petitioner to show his interest to its satisfaction.[43] It has been held that a joint executor or administrator who is obstructed by his associates in the performance of his duty to make a true inventory should take proceedings to enforce the making of it.[44]

In a proceeding by a creditor to compel the inventory of property in the possession of a third person, such person is a necessary party to the proceedings.[45]

Time to bring proceeding. The right to require an inventory may generally be enforced at any time before final settlement of the administration accounts,[46] although lapse of time in connection with other circumstances may be sufficient ground for denying the application for an inventory.[47] While the correctness of the inventory can be put in issue at the accounting, the parties need not wait until then to raise the issue.[48] A statute limiting the time within which persons interested in the estate may file exceptions to the inventory does not apply to one claiming ownership of property included in the inventory.[49]

Pleading. In a proceeding to compel a representative to inventory certain property, the petition, interrogatories, and answers thereto constitute the pleadings;[50] and a representative claiming such property must establish his title thereto on the allegations of his pleadings.[51] A petition averring that the inventory made by the administrator was not true, and that certain described property belonging to decedent was not included, and also averring that it is filed by an heir, is sufficient to state a cause of action to require the administrator to include the property.[52] A complaint for an additional inventory, which alleges that a particular description of the notes and credits which it is sought to have included in the additional inventory cannot be obtained because the executor has suppressed and destroyed all evidence concerning them, states a sufficient excuse for not specifically describing the property.[53] In proceedings against an administrator to compel him to include certain claims in his list of debts as administrator, the facts alleged in the answer must be taken as true if the case is submitted on the petition and answer.[54]

Evidence. General rules as to weight and suffi-

37. Cal.—In re Inghilleri's Estate, 81 P.2d 568, 27 Cal.App.2d 664.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696.

38. N.Y.—Thomson v. Thomson, 1 Bradf.Surr. 24.
23 C.J. p 1163 note 53.

39. N.J.—In re Finkenzeller's Estate, 146 A. 656, 105 N.J.Eq. 44, affirmed 151 A. 905, 107 N.J.Eq. 180.
23 C.J. p 1164 note 54.

Child adopted in another state
Child adopted by decree of New York court was "person interested in estate" of deceased parent domiciled within state, as regards right to require administrator to file inventory. —In re Finkenzeller's Estate, 146 A. 656, 105 N.J.Eq. 44, affirmed 151 A. 905, 107 N.J.Eq. 180.

40. N.Y.—In re Zwick's Estate, 252 N.Y.S. 495, 141 Misc. 281.
23 C.J. p 1164 note 56.

41. Mich.—Riebow v. Ensch, 190 N. W. 233, 220 Mich. 450.

Judgment entered after death
against decedent does not establish status as creditor for purpose of compelling executor to file an inventory.—In re Laughlin's Estate, 8 N. Y.S.2d 842, 255 App.Div. 927.

One who has not presented a verified claim to the administrator has no standing as a creditor to compel the filing of an inventory.—In re Konigsberg's Estate, 4 A.2d 524, 125 N.J.Eq. 216.

Admission by administrator
In administration proceedings, a bank receiver could object to inventory although such receiver had no claim on file, where record showed that attorney for administrator stated in open court that the receiver had a valid claim, and objection was not made either in probate court or in district court.—Fletcher v. Weigel, 102 P.2d 1055, 152 Kan. 104.

42. Wash.—In re Martin, 144 P. 42, 82 Wash. 226.
23 C.J. p 1164 note 57.

Prima facie showing
Alleged creditor, to compel administratrix to file inventory, must make prima facie showing of existence of his interest.—In re Zwick's Estate, 252 N.Y.S. 495, 141 Misc. 281.

Failure to attach proof of claim
Petition to compel administratrix to file inventory alleging petitioner is creditor of estate for services, not attaching proof of claim, nor stating base thereof, was held insufficient to show petitioner's interest. —In re Zwick's Estate, supra.

43. N.Y.—Matter of Comins, 41 N. Y.S. 323, 9 App.Div. 492.
23 C.J. p 1164 note 57.

44. N.Y.—Eager v. Roberts, 2 Redf. Surr. 247.

45. La.—Succession of Steidtman, 135 So. 673, 17 La.App. 365.

46. Mo.—Walter v. Ford, 74 Mo. 195, 41 Am.R. 312.

47. N.Y.—In re Zwick's Estate, 252 N.Y.S. 495, 141 Misc. 281.

48. R.I.—Browning v. Liberty, 193 A. 496, 58 R.I. 507.

49. Ohio.—Brown v. Southern Ohio Sav. Bank & Trust Co., 153 N.E. 864, 22 Ohio App. 324.

50. Mo.—Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

51. Mo.—Roethemeier v. Veith, supra.

52. Wash.—In re Martin, 144 P. 42, 82 Wash. 226.

53. Tex.—Moore v. Mertz, 85 S.W. 312, 38 Tex.Civ.App. 283.

54. Md.—Long v. Long, 80 A. 699, 848, 115 Md. 130.

ciency of evidence have been applied in proceedings involving inventory and appraisal.[55] Since the inventory is presumed to be correct, one attacking it has the burden of proof.[56] Where the representative admits receiving certain property from decedent, the burden is on him to establish that it is not property of the estate.[57]

Questions for jury; instructions. In a proceeding to compel the inventory of certain property as assets of the estate, whether there was a gift from decedent to the administrator was held a question for the jury.[58]

Where the issue is submitted to a jury, the court should properly instruct it as to the law.[59]

Review. A final order respecting inventory or appraisal,[60] or an order affecting a substantial right,[61] has been held appealable; an order refusing to compel an inventory is usually reviewable on appeal,[62] although it has been held that there is no authority for a review of an order for an appraisal.[63] On the other hand, certain judgments, orders, or decrees directing the filing of inventories have been held interlocutory and therefore not appealable.[64]

A party not aggrieved by an order with respect to the inventory or appraisal,[65] or a party consenting to such an order,[66] cannot appeal from it. An appeal from an order as to the inventory or appraisal must be taken within the time provided by the statute.[67]

Other holdings with respect to review will be found in the note.[68]

§ 137. Defects and Amendment or Correction

The inventory may be amended or corrected, but an erroneous appraisal which has been filed cannot be corrected, the remedy being by setting it aside.

The probate court may permit an executor or administrator to amend or correct his inventory,[69] particularly where the personal representative made

55. La.—Succession of Vance, 179 So. 72, 189 La. 176.
Mo.—Roethemeier v. Veith, 108 S.W. 2d 346, 341 Mo. 706—Denny v. Brown, 193 S.W. 552—In re Van Fossen, App., 13 S.W.2d 1076.
Wash.—Decker v. Fowler, 92 P.2d 254, 199 Wash. 549, 131 A.L.R. 961—In re Bush's Estate, 81 P.2d 271, 195 Wash. 416.
Wis.—In re Flierl's Estate, 274 N.W. 422, 225 Wis. 493.

Listing of leasehold as valueless held justified, where property was sublet at same rental.—In re Richman's Estate, 253 N.Y.S. 838, 142 Misc. 103.

Appraisal of leaseholds held too low
N.Y.—In re Hall's Estate, 224 N.Y.S. 376, 130 Misc. 313.

56. N.Y.—In re Wilson's Estate, 217 N.Y.S. 518.
Wash.—In re Hamilton's Estate, 45 P.2d 36, 182 Wash. 81.
23 C.J. p 1165 note 70.

Burden not sustained
On executor's petition for order striking from inventory of his wife's estate certain property claimed as his separate property under deed from wife executed one day after husband conveyed his community interest therein to wife, evidence was held to show that deeds were intended to operate only in case of death, and hence husband failed to sustain burden of proving that wife's deed vested title in him.—In re Hamilton's Estate, supra.

57. Mo.—Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

58. Mo.—Roethemeier v. Veith, supra.

59. Mo.—Roethemeier v. Veith, supra.

60. Mont.—In re Higgins, 39 P. 506, 15 Mont. 474, 28 L.R.A. 116.
3 C.J. p 570 note 44 [c].

61. Okl.—Kolb v. Wagner, 252 P. 34, 123 Okl. 142.
3 C.J. p 573 note 48 [d].

62. Wash.—In re Martin's Estate, 144 P. 42, 82 Wash. 226.
23 C.J. p 1165 note 63.

63. N.Y.—Matter of Smith, 58 N.Y. S. 128, 40 App.Div. 480.

64. La.—Zaire v. Bodin, 12 La. 611.
Pa.—In re Tressler, 228 P. 281, 77 A. 461—In re Allen, 20 Pa.Super. 32.

65. Ill.—Mayrand v. Mayrand, 96 Ill.App. 478.
Utah.—In re Picot's Estate, 178 P. 75, 53 Utah 195.

66. Wash.—In re Rabie's Estate, 90 P.2d 1011.

67. Ohio.—In re Knechtges' Estate, 32 N.E.2d 410, 138 Ohio St. 24.

68. Certiorari
In absence of showing that an application was ever presented to county court to require community administrator to present new appraisement, petitioner could not maintain certiorari proceeding to revise inventory and appraisement on ground appraised value of community property was insufficient.—Morris v. Williams, Tex.Civ.App., 92 S.W.2d 541, error refused.

Review on appeal from subsequent order
A court commissioner's order, eliminating amount of deceased's savings bank deposit from inventory of his estate's assets, became final adjudication, where not taken before superior court for revision or appealed from, and is not reviewable by supreme court on appeal from superior court's order setting aside former order.—In re Rabie's Estate, Wash., 90 P.2d 1011.

Parties to appeal
Appeal by corporation from order dismissing its petition for order requiring administrators to turn certain property over to it, was not required to be taken as against creditors who had filed petition to dismiss, where administrators had filed answer, since administrators were "proper and necessary parties" to proceedings, and they represented interests of creditors and of all other persons concerned.—Talbot Packing Corporation v. Wheatley, 190 A. 833, 172 Md. 365.

69. R.I.—Browning v. Liberty, 193 A. 496, 58 R.I. 507.
Tenn.—In re Love's Estate, 145 S. W.2d 778, 783, 176 Tenn. 696, citing **Corpus Juris.**
23 C.J. p 1165 note 68.

As incident to substantial relief
Forced heir cannot obtain amendment of inventories fixed by appraisers, except in suit which has for its object some substantial relief or result, such as reduction of excessive donation or legacy, or determination of disposable portion of estate.—Succession of Vance, 164 So. 792, 183 La. 760.

On appeal from probate court
The superior court had jurisdiction, on appeal from probate court, to grant executor permission to amend his inventory if the circumstances of the case justified such ac-

an honest mistake or an inadvertent omission.[70] However, the court may refuse to permit an amendment where the matter is one that can be more adequately investigated at the accounting.[71]

An erroneous appraisal cannot be corrected after filing, the remedy being to set it aside.[72]

§ 138. Operation and Effect

The inventory and appraisal are prima facie, but not conclusive, evidence of the value and ownership of the items of property included. The listing of property, or failure to list it, does not affect the true title.

The inventory returned by the personal representative is prima facie evidence as to the items included therein and their respective values, and as to the total of the estate comprised within the jurisdiction;[73] but it is not conclusive as to these matters, and may always be explained or shown to be incorrect,[74] where there has been no judicial de-

tion.—Browning v. Liberty, 193 A. 496, 58 R.I. 507.

Relief in equity; reliance on judge

(1) Equity will grant relief to administrator who has, as result of fraud, accident, or mistake, included in his inventory property belonging to himself individually.—Henshaw v. Gunter, 87 S.W.2d 561, 169 Tenn. 305.

(2) Administrator who was induced by county judge to include in inventory notes and stock which were allegedly given by deceased as gifts to administrator, by representation that administrator's rights would be fully protected, was entitled to be relieved in equity from mistake made in including administrator's privately owned property in inventory of assets of estate.—Henshaw v. Gunter, supra.

70. R.I.—Browning v. Liberty, 193 A. 496, 58 R.I. 507.
Tenn.—In re Love's Estate, 145 S.W. 2d 778 176 Tenn. 696.

71. R.I.—Browning v. Liberty, 193 A. 496, 58 R.I. 507.

72. Pa.—Davis' Estate, 5 Kulp 162. 23 C.J. p 1166 note 71.

73. Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Iowa.—In re Manning's Estate, 244 N.W. 860, 861, 215 Iowa 716, citing **Corpus Juris.**
Kan.—In re Park's Estate, 99 P.2d 849, 853, 151 Kan. 447, citing **Corpus Juris.**
Ky.—Williams' Adm'r v. Vonderhaar's Ex'x, 89 S.W.2d 321, 262 Ky. 68.
La.—Succession of Vance, 164 So. 792, 183 La. 760.
Me.—Jones v. Grindal, 117 A. 308, 121 Me. 348.
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
N.Y.—In re Erlanger's Estate, 287 N.Y.S. 263, 159 Misc. 185—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322—In re Wilson's Estate, 217 N.Y.S. 341, 127 Misc. 518.
Pa.—Fague's Estate, 19 Pa.Super. 638.
Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied, Com.App., 283 S.W. 153—Ball v. Cundiff, Civ.App., 127 S.W.2d 502, error dismissed, judgment correct. 23 C.J. p 1166 note 72.

Inventory taken on due notice is prima facie correct.—In re Wilson's Estate, 217 N.Y.S. 341, 127 Misc. 518.

Inventory made for undertaking

(1) Inventories and appraisements filed by administratrix and successor for purpose of fixing amount of their undertaking were held not competent evidence of value of property of estate.—Shafford v. Reed, 247 P. 324, 119 Or. 90.

(2) Appraisement of property of estate, largely for purpose of fixing amount of bonds and determining amount for which executor was accountable, did not fix value of estate in subsequent suit against residuary devisee to enforce trust in property of estate, where it is common knowledge that the value of such property has depreciated.—Platt v. Jones, 38 P.2d 703, 149 Or. 246, modified on other grounds 39 P.2d 955, 149 Or. 246.

Appraisement as evidence of property received

(1) In determining what is received by administrator, court may look to appraisement.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.

(2) Appraisement was no evidence against administrator in regard to accounts due estate, life insurance, and money on hand, because appraisement does not legally deal with money and choses in action, since such items are to be returned by inventory.—Hayes v. National Surety Co., supra.

(3) Widow, as administratrix de bonis non, could not be charged with entire personal property received, but only as to part not exempt, although appraisers did not set exempt property apart.—Hayes v. National Surety Co., supra.

Presumption of regularity

In action against administrator of administrator, apparent defects in appraisement, introduced to show what administrator received, were supplied by operation of presumption that incidental procedural steps which should have been taken were taken.—Hayes v. National Surety Co., supra.

Notice to legatees

Inventories made in succession were prima facie valid and were not invalidated nor rendered subject to annulment because made without notifying some of legatees named in testator's will, where inventories were not binding on legatees.—Succession of Price, 2 So.2d 29, 197 La. 579.

Appointment of counsel for absent heirs

Inventories made in succession were not invalidated by failure to appoint an attorney for absent heirs in absence of any showing of necessity therefor or of any error in the inventories.—Succession of Price, 2 So 2d 29, 197 La. 579.

74. Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Hawaii.—Matter of Gill, 2 Hawaii 681.
La.—Succession of Price, 2 So.2d 29, 197 La. 579—Succession of Vance, 164 So. 792, 183 La. 760—Succession of Williams, 129 So. 801, 171 La. 151
Me.—Jones v. Grindal, 117 A. 308, 121 Me. 348.
Miss.—Hayes v. National Surety Co., 153 So 515, 169 Miss. 676.
Ohio.—Scott v. Mofford, 28 N.E.2d 947, 64 Ohio App. 457.
Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied, Com.App., 283 S.W. 153.
23 C.J. p 1166 note 73.

Ex parte proceeding binding no one

Inventory, being made on an ex parte investigation, binds no one, and it is only when exceptions are filed and jurisdiction of probate court is invoked to inquire into validity of schedule of property that proceeding concerning inventory takes on character of litigation.—Scott v. Mofford, 28 N.E.2d 947, 64 Ohio App. 457.

Effect of absence of attack

(1) Valuation of testator's stock made by sworn disinterested appraisers appointed by orphans' court, offered in evidence at hearing where all parties were represented by counsel, none of whom attempted to show valuation was inaccurate, was binding on parties.—Mercantile Trust Co. of Baltimore v. Schloss, 166 A. 599, 165 Md. 18.

termination of the correctness of the inventory and appraisal.[75] The representative's failure to list property owned by the estate does not affect the title;[76] nor, conversely, is the title to property not owned by the estate affected by its being included in the inventory.[77] However, it has been held ground for abatement of an action by the representative to recover property that the property was not listed in the inventory.[78]

It is said that an inventory is not conclusive either for or against the personal representative,[79] and that he can assert individual ownership of assets included in the inventory.[80] On the other hand, it has been held that the representative is bound by the inventory[81] unless he acted inadvertently or under an honest mistake.[82] Where the representative

(2) Appraisement and inventory of executrix, stating that she had in her hands as executrix certain money as proceeds of check, in absence of evidence to contrary, sustained judgment holding that money was in her hands as executrix, requiring her to account to estate for it.—Williams' Adm'r v. Vonderhaar's Ex'x, 89 S.W.2d 321, 262 Ky. 68.

Collateral attack

An inventory may not be impeached by a collateral attack; the proper method of correcting it is by motion, after notice, in the court where the administration case is pending.—Pennington v. Newman, 129 P. 693, 36 Okl. 594—23 C.J. p 1167 note 74.

Since inventories are not binding on legatees, they are not "estopped" from having any errors therein corrected to conform to the true facts.—Succession of Price, 2 So.2d 29, 197 La. 579.

Impeachment by any interested party

Statutory provision that administrator shall stand charged with appraisement unless he show cause to contrary, does not limit showing to one by administrator himself, but showing may be made by any proper person sought to be charged with administrator's liability.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.

Computation of commissions

In determining whether value of estate is over or under a certain sum for purpose of computing commissions due testamentary trustees, surrogate could inquire into facts and determine value on accounting of executors at time assets were turned over to trustees, and inventory at time of testator's death was not conclusive.—In re Heimer's Estate, 23 N.Y.S.2d 581, 175 Misc. 412.

Estoppel to contest correctness

That plaintiff and one of defendants in suit to effect a partition of community property were present when inventory of their mother's estate was made in which was included items in dispute which were also included in inventory taken in their father's estate by notary public, to which reference was made in pleadings for express purpose of giving complete description of property to be partitioned did not estop them from contesting correctness thereof where matter was never placed at issue.—Jung v. Stewart, 181 So. 867, 190 La. 91.

Recital of instrument

The fact that an executrix in her inventory in setting out the title to certain real property mentioned a paper purporting to be a life lease of the property, bearing a specified date, and signed by the testator, was not a recognition of the validity of the instrument, but only an acknowledgment of the existence of a record purporting to convey the title.—Winter v. Dibble, 95 N.E. 1093, 251 Ill. 200.

75. Ohio.—Scott v. Mofford, 28 N.E. 2d 947, 64 Ohio App. 457.

Mere acceptance of inventory by court is not an adjudication that property listed is owned by estate.—Searle v. Crampton, 170 A. 480, 118 Conn. 42.

Res judicata

A final adjudication that certain inventoried personalty was assets of decedent's estate and lawfully included in the inventory thereof in a proceeding instituted in the probate court by filing exceptions to the inventory, was "res judicata" when properly pleaded as a defense in a subsequent action by the one who in the proceeding in the probate court was exceptor, to engraft a trust for her use and benefit on the same personalty.—Bolles v. Toledo Trust Co., 27 N.E.2d 145, 136 Ohio St. 517, certiorari denied 61 S.Ct. 37, 311 U.S. 673, 85 L.Ed. 433.

76. Ky.—Griffith's Adm'x v. Miller, 149 S.W.2d 11, 285 Ky. 675.
Tex.—Smith v. Allbright, Civ.App., 261 S.W. 461.
23 C.J. p 1165 note 66, p 1168 note 78.

Evidentiary effect

However, the fact that an administrator did not inventory a certain chattel is a strong circumstance in his favor when asserting an individual claim thereto.—Bradshaw v. Mayfield, 18 Tex. 21.

77. Cal.—In re Hovland's Estate, 101 P.2d 500, 38 Cal.App.2d 439.
Tex.—Ball v. Cundiff, Civ.App., 127 S.W.2d 502, error dismissed, judgment correct.
Utah.—Perry v. Perry, 245 P. 695, 67 Utah 45.
23 C.J. p 1167 note 75.

78. Tex.—Ball v. Cundiff, Civ.App., 127 S.W.2d 502, error dismissed, judgment correct.

Suit by heir

If claim against benefit society was not inventoried as asset of deceased's estate, assignment of residue to heirs would not vest them with right to enforce claim against society.—Olah v. First Hungarian Reformed John Calvin Men's and Women's Sick Benefit, Accident Ins. and Church Soc. of Detroit, 238 N.W. 167, 255 Mich. 348.

79. Mass.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315.
Nev.—Friedman v. Goodin, 299 P. 1017, 53 Nev. 324, rehearing denied 5 P.2d 1118, 53 Nev. 324.
23 C.J. p 1167 note 75 [b].

80. Wis.—In re Abddulah's Estate, 252 N.W. 158, 214 Wis. 336—In re Langenbach's Estate, 230 N.W. 141, 201 Wis. 336.
23 C.J. p 1167 note 76.

81. Pa.—King's Estate, 12 Wkly.N.C. 109.
Tenn.—In re Love's Estate, 145 S.W. 2d 778, 176 Tenn. 696—Henshaw v. Gunter, 87 S.W.2d 561, 109 Tenn. 305.

Failure to object to inventory

Where an inventory is filed, signed, and sworn to by one other than administrator, where appraisement is filed, signed, and verified by appraisers, and administrator files no other inventory and appraisement treating property set out as property of estate, and does not move to strike or correct inventory and appraisement for return of another in due form, he is estopped to deny that he came into possession of property as belonging to estate.—United States Fidelity & Guaranty Co. v. Clutter, 179 P. 754, 74 Okl. 254.

Husband's action as binding wife

An inventory and appraisal was not binding on testamentary remainderman, so as to preclude remainderman from claiming that particular personalty not listed therein passed to her as part of the estate, notwithstanding that such inventory and appraisal was signed by remainderman's husband as appraiser.—Haydon v. Weltmer, Fla., 187 So. 772.

82. Tenn.—In re Love's Estate, 145 S.W.2d 778, 176 Tenn. 696.
Wash.—In re Hamilton's Estate, 45 P.2d 36, 182 Wash. 81.

lists an asset and at the same time asserts his ownership, he is not estopped.[83] Since it is the representative's duty to list assets, the paper title to which was in decedent, he is not thereby estopped from asserting his individual ownership;[84] similarly, the representative is not barred from claiming listed property which he and decedent held in joint tenancy where such property must be included in the inventory for tax purposes.[85]

Debts or claims may properly be inventoried as doubtful, desperate, or worthless, where the facts warrant,[86] and an item so inventoried is not prima facie a charge against the representative;[87] but a debt or claim returned at face value without comment will be presumed collected or collectable,[88] although an inventory is only prima facie evidence as to the solvency of persons indebted to the estate,[89] and before an administrator should be charged with notes marked by the appraisers on the inventory as good, there should be some proof of their collection or of negligence with respect to collection.[90] Where the representative inventories a debt owed by him to the estate, this is evidence of the existence of the debt as a valid and enforceable claim.[91]

An inventory filed by an executor is evidence inter alios to show his consent to the will and transmission of title thereunder.[92]

Where an administrator buys property with the effects of his intestate and inventories it in the probate court and the inventory is recorded in that court, such record is notice of the fiduciary character of his title to the property so purchased.[93]

The appraisal of land is not an eviction of those holding by adverse possession or a reduction to possession by the administrator,[94] nor does the mere fact that a rental proportion of certain crops growing on land owned by a devisee has been returned by the executor as part of the personal property show such an invasion of the devisee's rights as entitles him to seek redress in any judicial tribunal.[95]

Where an administrator has filed an inventory and appraisal purporting to be made by him, and makes no attempt to strike it from the files or correct it, he is estopped to object to its reception in evidence against him on the ground that he failed to sign it.[96]

§ 139. Dispensing with Inventory

The court has discretion to dispense with an inventory, but only for good cause, as where no assets have come within the representative's possession or charge. Apart from statute, a testamentary provision that no inventory need be filed should be disregarded.

The court, on good cause shown and in the exercise of its discretion, may dispense with an inventory.[97] An inventory may be dispensed with where all the parties in interest waive it,[98] and an inventory is unnecessary where no assets or estate have come within the representative's possession or charge,[99] although an executor's report that he received personal property from the estate is sufficient to require an inventory.[1] It may be provided by statute that an executor may give bond for the payment of debts and legacies, and thus be relieved from the duty of filing an inventory, where this is authorized by the will[2] or the executor is also the residuary legatee.[3] An inventory and account may also be dispensed with if not applied for until after so long a period that the lapse of time, in conjunction with other circumstances, affords a reasonable presumption that there were no assets or that

83. Tenn.—In re Love's Estate, 145 S.W.2d 778, 176 Tenn. 696.

84. Conn.—Laudano v. Laudano, 142 A. 407, 108 Conn. 37.
Nev.—Friedman v. Goodin, 299 P. 1017, 53 Nev. 324, rehearing denied 5 P.2d 1118, 53 Nev. 324.

85. Wis.—Central Wisconsin Trust Co. v. Schumacher, 284 N.W. 562.

86. N.J.—Black v. Whitall, 9 N.J. Eq. 572, 59 Am.D. 423.
N.C.—Finch v. Ragland, 17 N.C. 137.

87. N.C.—Gay v. Grant, 8 S.E. 99, 106, 101 N.C. 206.
23 C.J. p 1168 note 82.

88. Ky.—Hickman v. Kamp, 3 Bush 205.
23 C.J. p 1168 note 83.

89. N.C.—Grant v. Reese, 94 N.C. 720.
23 C.J. p 1168 note 84.

When administrator is himself debtor, the presumption of solvency is stronger.
Ky.—Hickman v. Kamp, 3 Bush 205.
N.Y.—Lloyd v. Lloyd, 1 Redf.Surr. 399.

90. S.C.—Pettus v. Clawson, 25 S.C. Eq. 92.

91. Colo.—In re Grigsby's Estate, 56 P.2d 1318, 1321, 92 Colo. 489, citing **Corpus Juris.**
23 C.J. p 1168 note 86.

92. Del.—Phillips v. Short, 2 Del. 339.

93. Miss.—Shaw v. Thompson, Sm. & M.Ch. 628.

94. Ga.—Hall v. Armor, 68 Ga. 449.

95. Md.—Spencer v. Ragan, 9 Gill 480.

96. Okl.—U. S. Fidelity & G. Co. v. Clutter, 179 P. 754, 74 Okl. 254.

97. N.Y.—In re Erlanger's Estate, 287 N.Y.S. 263, 159 Misc. 185.
Dispensing with appraisal see supra § 135.

Contract to which all the heirs were parties, and which provided that one of the heirs was to take all the property and pay all the debts, does not operate to dispense with the filing of an inventory.—In re Specht's Estate, Ohio App., 36 N.E.2d 865.

98. N.Y.—Barnes' Estate, 1 N.Y.Civ. Proc. 59.

99. N.Y.—Matter of Lowenthal, 132 N.Y.S. 994, 148 App.Div. 487.
23 C.J. p 1168 note 98.

1. Iowa.—In re Duncanson, 120 N. W. 88, 141 Iowa 564.

2. R.I.—Bowler v. Emery, 70 A. 7, 29 R.I. 310.

3. Mich.—In re Vedder, 81 N.W. 356, 122 Mich. 439.
23 C.J. p 1169 note 2.

the estate has been fully administered;[4] nor is the court required to order an inventory and account where it appears that the estate was duly settled and distributed among the persons entitled without any proceedings in court.[5] An administrator personally entitled to all of the personal property need not file an inventory unless ordered to do so by the court at the instance of an interested party.[6]

On the other hand, the fact that all the personal property or its proceeds have been disposed of in the payment of debts does not render an inventory unnecessary,[7] nor is it sufficient to excuse the filing of an inventory that the representative professes to have a large surplus over all debts and offers to deposit security sufficient to pay any debt which may be established,[8] or that the only asset was the proceeds of an insurance policy.[9] The making of a preliminary inventory to ascertain whether the estate is of sufficient value to authorize the granting of letters of administration does not dispense with the necessity of an inventory by an administrator subsequently appointed.[10]

A testamentary provision that no inventory need be filed should be disregarded by the court,[11] unless such a provision is validated by statute;[12] however, an executor will not be required to file an inventory except as to the personalty, where the will leaves it to his discretion and makes his appraisement final.[13]

§ 140. Effect of Failure to Make

Although failure to file an inventory is a breach of the representative's duty, it does not ordinarily subject him to liability unless damage has resulted.

It appears that a mere failure to return an inventory is not alone sufficient to charge the representative absolutely with assets or debts of decedent, the question being essentially one of culpable negligence or misconduct on his part, occasioning a loss to some person in interest;[14] and it has been held that such failure does not deprive the representative of his rights as such,[15] or as a creditor of the estate,[16] although there is also authority for the view that an administrator who has neglected to return an inventory has no authority over the personal estate.[17] Nevertheless, the failure to file an inventory at the proper time amounts technically to an official delinquency or a breach of the condition of the administration bond,[18] although it will not ordinarily subject the representative to any serious consequences if, on citation, he performs his duty or shows good cause why an inventory should be deferred or dispensed with.[19] A failure to appraise certain property cannot affect the validity of the executor's final account, where it appears that all the property received, or which by reasonable diligence should have been received, has been punctiliously accounted for.[20]

V. AUTHORITY AND DUTIES IN GENERAL

§ 141. General Statement

The rights, powers, and duties of a personal representative are determined by the applicable statutes and will, if any, and include the orderly and speedy administration, liquidation, and settlement of the estate.

4. N.Y.—Leroy v. Bayard, 3 Bradf. Surr. 228.
23 C.J. p 1169 note 3.

5. N.Y.—In re Wagners, 23 N.E. 200, 119 N.Y. 28.

6. N.J.—In re Finkenzeller's Estate, 146 A. 656, 105 N.J.Eq. 44, affirmed 151 A. 905, 107 N.J.Eq. 180.

7. N.Y.—Silverbrandt v. Widmayer, 2 Dem.Surr. 263.
23 C.J. p 1168 note 94.

8. N.Y.—Forsyth v. Burr, 37 Barb. 540.
23 C.J. p 1168 note 95.

9. La.—Succession of Bibbins, App., 152 So. 592.

10. Ind.—Pace v. Oppenheim, 12 Ind. 533.

11. Ala.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.
23 C.J. p 1168 note 92.

Absence of demand
As regards executor's duty to return inventory, executor following testator's directions was not put in default in absence of demand or order for inventory, even in absence of statute.—Black v. Morgan, 149 So. 845, 227 Ala. 327—Parker v. Robertson, 88 So. 418, 205 Ala. 434.

12. Ala.—Black v. Morgan, 149 So. 845, 227 Ala. 327—Wright v. Menefee, 145 So. 315, 226 Ala. 55.

13. N.Y.—Brainerd v. Birdsall, 2 Dem.Surr. 31.
N.C.—In re Morris, 50 S.E. 682, 138 N.C. 259.

14. Tex.—Patten v. Cox, 29 S.W. 182, 9 Tex.Civ.App. 299.
23 C.J. p 1169 note 5.

Nominal damages
A judgment in favor of the administrator and his sureties in an action on his bond will not be reversed because of failure to file inventory required by statute, since damage is merely nominal, there being no assets belonging to estate except cause of action for death.—People ex rel. Rotchford v. Rotchford, 1 N.E.2d 249, 284 Ill.App. 262.

Charge of actual value
The omission of a representative to list an asset of which he has knowledge does not require that he be charged with the face value of the asset, but he may show its actual value.—Moses v. Moses, 50 Ga. 9.

15. Tex.—Ray v. Fowler, Civ.App., 144 S.W.2d 665, error dismissed, judgment correct.
23 C.J. p 1169 note 6.

16. Ill.—Sutton v. Read, 51 N.E. 801, 176 Ill. 69.
23 C.J. p 1169 note 7.

17. N.Y.—Jeroms v. Jeroms, 18 Barb. 24.

18. Or.—In re Manser, 118 P. 1024, 60 Or. 240.
23 C.J. p 1169 note 9.

19. N.J.—Mulford v. Mulford, 53 A. 79.
23 C.J. p 1169 notes 9, 10.

20. Or.—In re Conser, 66 P. 607, 40 Or. 138.

An executor or administrator is a representative of limited authority[21] and of continuing duties.[22] The general and primary duty resting on an executor or administrator is to administer the estate in an orderly and proper manner[23] to the best advantage of all concerned,[24] in the case of a testate estate in accordance with the terms of the will,[25] and to effect a liquidation or settlement thereof[26] as speedily as is reasonably possible.[27] This involves the general duty to bury decedent, collect his effects, preserve them from waste, pay claims against the estate, and distribute the residue, if any, among those entitled, and to do all other things necessary as representative of the personal estate of decedent.[28]

The rights, powers, and duties of an executor or administrator are generally derived from, and controlled by, statutes,[29] in the case of an executor or

21. Cal.—Wilkinson v. Zumvalt, 297 P. 94, 112 Cal.App. 416.
Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt 125, affirming 121 A. 582, 97 Vt. 125.

Powers, duties, and liabilities of:
Administrator de bonis non see infra §§ 1024–1028.
Administrator with will annexed see infra § 1034.
Executor de son tort see infra § 1065.
Independent executor see infra § 1055.
Temporary or special administrator see infra § 1040.

22. Wis.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506.
Duration and termination of authority see supra §§ 78–94.

23. Ala.—Oxford v. Estes, 158 So. 534, 229 Ala. 606.
Cal.—People v. Osgood, 285 P. 753, 104 Cal.App. 133.
Ga.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.
Mich.—In re Charles' Estate, 231 N. W. 123, 250 Mich. 501.

Executor as sole beneficiary
The mere circumstance that executrix was sole beneficiary under will did not render her immune from the orderly and proper administration of decedent's estate.—Zoller v. State Board of Tax Appeals, 11 A.2d 833, 124 N.J.Law 376.

24. N.Y.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.

25. Ala.—Oxford v. Estes, 158 So. 534, 229 Ala. 606.
Md.—Surratt v. Knight, 158 A. 1, 162 Md. 14.
N.C.—McGehee v. McGehee, 130 S.E. 115, 190 N.C. 476.
Wis.—In re Sipchen's Estate, 193 N. W. 385, 180 Wis. 504.
Executing provisions of will see infra § 145.

26. Mass.—Taylor v. Trefrey, 185 N. E. 1, 282 Mass. 555.
N.Y.—In re Kohler, 132 N.E. 114, 231 N.Y. 353, reversing In re Kohler's Will, 183 N.Y.S. 550, 193 App. Div. 8.
Or.—In re Workman's Estate, 68 P. 2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

Determination of questions of policy
Questions of policy arising in settlement of estates of deceased persons are to be determined by fiduciary or fiduciaries selected and designated by a testator in a will and in charge of the administration of property committed to their custody and care.—In re Griffin's Estate, 20 N.Y.S.2d 922.

27. Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Ky.—Grainger's Ex'rs and Trustees v. Pennebaker, 56 S.W.2d 1007, 247 Ky. 324.
Md.—Conner v. Ogle, 4 Md.Ch. 425.
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
Wash.—National Bank of Commerce of Seattle v. Peterson, 38 P.2d 361, 179 Wash. 638.

In light of conditions existing
It is incumbent on administrator to coöperate in speeding up administration of estate, but as trustee his specific duties in that regard are created by particular circumstances of situation in which he finds himself, and are subject to general conditions imposed on him.—State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321.

28. Ala.—Oxford v. Estes, 158 So. 534, 229 Ala. 606.
Fla.—Glidden v. Gutelius, 119 So. 140, 96 Fla. 834, rehearing denied Glidden v. Getulius, 120 So. 1, 96 Fla. 834.
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
N.J.—Caruso v. Caruso, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.
N.Y.—In re Kohler, 132 N.E. 114, 231 N.Y. 353, reversing In re Kohler's Will, 183 N.Y.S. 550, 193 App.Div. 8—In re Sonderling's Will, 279 N. Y.S. 703, 155 Misc. 403—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907—In re Abrahams' Estate, 241 N.Y.S. 212, 136 Misc. 538.
Ohio.—Citizens Nat. Bank Co. v. Andrews, 24 Ohio N.P.,N.S., 361.
Tenn.—Baker v. Baker, 142 S.W.2d 737, 24 Tenn.App. 220.
Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Wash.—Jones v. Peabody, 45 P.2d 915, 182 Wash. 148, 100 A.L.R. 64.
23 C.J. p 1170 note 12.

Other statements
It was duty of administrator to demand and receive estate, to ascertain debts, who were distributees, and report to court for administration.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

Under civil law
La.—Dupuy's Succession, 4 La.Ann. 570.
40 C.J. p 1476 note 3 [a].

29. U.S.—In re Buxton's Estate, D. C.Ill., 14 F.Supp. 616—Kevan v. John Hancock Mut. Life Ins. Co., D. C.Mo., 3 F.Supp. 288.
Ariz.—Gold v. Killeen, 69 P.2d 800, 50 Ariz. 126.
Cal.—Perry v. Superior Court in and for Marin County, 84 P.2d 250, 29 Cal.App.2d 114.
Tex.—Jackson v. Cato, Civ.App., 156 S.W.2d 302, error refused.
Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473.
Wash.—Harden v. State Bank of Goldendale, 203 P. 16, 118 Wash. 234.
23 C.J. p 1170 note 13.

Law controlling
(1) Administrator is representative of jurisdiction which appoints him and has such authority only as is granted by laws of state of appointment.—In re Poulson's Estate, 280 N. Y.S. 350, 155 Misc. 625.

(2) "Personal representative" is only a trustee of decedent's estate, deriving his power and authority to manage and distribute such estate under law of deceased's domicile.—Riggs v. Schneider's Ex'r, 130 S.W. 2d 816, 279 Ky. 361.

(3) Legislature of another state cannot add to, or subtract from, duties of executor appointed pursuant to laws of state.—In re Killough's Estate, 265 N.Y.S. 301, 148 Misc. 73.

Individual and public administrator compared
(1) In all material respects, duties and liabilities of individual administrator or executor and public administrator are the same.—State ex

an administrator with the will annexed, as properly limited or extended by the terms of the will.[30] He has no implied powers beyond those which are necessary to the exercise of the powers which are expressly conferred on him,[31] but, if the will authorizes the executor to do a certain thing to carry out a particular object, a resort to the ordinary and usual methods to accomplish the object comes within the scope of the power given by the will.[32]

An executor whether named in the will or by delegated power has the right to defend in the courts his authority to act.[33]

rel. Russell v. Mueller, 60 S.W.2d 48, 332 Mo. 758, 91 A.L.R. 705.

(2) Public administrators see infra §§ 1050–1053.

Effect of power of attorney

Giving of a power of attorney by distributees authorizing administrator to receive money or property from estate could not modify or change statutory duties or obligations of administrator.—In re Humpfner's Estate, 3 N.Y.S.2d 143, 166 Misc. 672.

30. Cal.—Norris v. Harris, 15 Cal. 226.
Ky.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671—Futrell v. Futrell's Ex'r, 7 S.W.2d 232, 224 Ky. 814.
La.—Succession of Vatter, 186 So. 597, 191 La. 875.
N.Y.—In re Ryan's Will, 241 N.Y.S. 82, 136 Misc. 261.
Tex.—Jackson v. Cato, Civ.App., 156 S.W.2d 302, error refused.
Vt.—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.
23 C.J. p 1170 note 13.

Powers derived from nature of office

An executor's ordinary powers are derived from nature of his office.—In re Wolanski's Estate, 283 N.Y.S. 797, 157 Misc. 470.

Will as source of authority and discretion

U.S.—Beggs v. U. S., Ct.Cl., 27 F. Supp. 599.
N.Y.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.
Or.—Harris v. Craven, 91 P.2d 302, 162 Or. 1.
Source of executor's powers see supra § 22.

Enlargement of powers by will

The will may enlarge the statutory powers of the executor or dispense with the statutory method and restrictions on the exercise of such powers.
Mo.—McCune's Estate v. Daniel, 76 S.W.2d 403.
N.Y.—In re Leonard's Will, 193 N.Y.S. 916, 118 Misc. 598.
Wis.—In re Allis' Estate, 101 N.W. 365, 123 Wis. 223.

Effect of grant of discretion

(1) Provision of will that executor should handle testator's estate in his own way, but for interests of heirs, does not add to, or detract from, executor's duties and responsibilities imposed by law.—In re Marchildon's Estate, 246 N.W. 676, 188 Minn. 38.

(2) Although will gave broadest and fullest discretion to executors, such discretion could not be exercised to frustrate testator's manifest intent.—In re Hall's Estate, 216 N.Y.S. 598, 127 Misc. 238.

(3) Executor's discretionary power under will must not be abused to injury of beneficiaries under trust created by will.—Mountain Park Institute v. Lovill, 153 S.E. 114, 198 N.C. 642.

(4) "The executor . . . should not become a party to any shift or device whereby the will of his testator is collusively avoided, or the intention of the testator is defeated or changed to effect a different disposition of his estate."—Surratt v. Knight, 158 A. 1, 2, 162 Md. 14.

Powers and duties of executor and administrator compared

(1) Although special powers may be given by will to an executor broader in scope than those given administrator, generally the duties of executors and administrators with reference to settlement of estate are substantially the same.—In re Robinson's Will, 261 N.W. 725, 218 Wis. 596.

(2) Executor possesses all powers conferred on administrators by law.—Peck v. Watson, 142 S.E. 450, 165 Ga. 853, 57 A.L.R. 560.

(3) Executor's duties in general are same as those of administrator, except as varied by terms of will.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.

Arbitrary power

Courts do not favor the exercise of an arbitrary power by an executrix unless testator's intention to confer such power is clear.—In re Ellis' Estate, 32 N.E.2d 23, 66 Ohio App. 121.

Powers of executor as executor and trustee

(1) Executor may be given both powers inhering in office and devolving on his successor and strictly personal duties as trustee, independent of his official position, by same will.—Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred see, Sup., 39 S.W.2d 367.

(2) Executors as trustees see the C.J.S. title Trusts §§ 239–243, also 65 C.J. p 639 note 63 et seq.

Estate in, or power over, realty

(1) Executor has only such estate in, or power over, testator's realty as he derives from will.—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643.

(2) Real property and interests therein as assets of estate see supra §§ 103–112.

31. Iowa.—In re Munger, 150 N.W. 447, 168 Iowa 372, Ann.Cas.1917B 213.
Pa.—In re Caskey's Estate, 14 Pa. Dist. & Co. 364, affirmed 155 A. 489, 304 Pa. 208.
Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
"When the powers and duties of an administrator are fixed by statute, there is no inherent right to assume or exercise any power not conferred, or to depart from the procedure outlined."—Perry v. Superior Court in and for Marin County, 84 P.2d 250, 252, 29 Cal.App.2d 114.

Powers strictly construed under the civil law.—Walker's Succession, 32 La.Ann. 321—40 C.J. p 1477 note 20.

Intent of testator

(1) Where will showed testatrix reposed special confidence in executor in working out maximum return for property, scope of executor's powers in that respect should be liberally construed.—In re Lewis, 254 N.Y.S. 703, 142 Misc. 392.

(2) Under will providing that five years should be taken to wind up the estate distributing about one fifth annually among beneficiaries if partition among beneficiaries could not be effected by executor, it must have been intention of testator to invest executor with all of powers necessarily incident to a proper discharge of trust imposed.—Henderson v. Stanley, Tex.Civ.App., 150 S.W.2d 152, reversed on other grounds, Stanley v. Henderson, Com.App., 162 S.W.2d 95.

Representative who acquires property in private capacity may convey such property to the estate which he represents.—Wolf v. Wuelling, 130 S.W.2d 671, 233 Mo.App. 1144.

32. Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W. 2d 740.

33. Mich.—Brown v. Just, 77 N.W. 263, 118 Mich. 678.

§ 142. Representative Capacity

An executor or administrator acts in a representative capacity and occupies a position of trust with respect to those interested in the estate.

An executor or an administrator acts in a representative capacity,[34] representing and acting for all parties and all interests in the estate.[35] It is said that he occupies a double role,[36] being not only the personal representative of decedent,[37] but also, to a very great extent, the representative of the

34. Ariz.—Gold v. Killeen, 69 P.2d 800, 50 Ariz. 126.
Iowa.—Federal Land Bank of Omaha, Neb. v. Bonnett, 284 N.W. 105, 226 Iowa 126—Packer v. Overton, 203 N.W. 307, 200 Iowa 620—Ryan v. Hutchinson, 143 N.W. 433, 161 Iowa 575.
Vt.—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Wash.—Harden v. State Bank of Goldendale, 203 P. 16, 118 Wash. 234.

Legal title is represented by the administrator.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.
Assets of decedent's estate see supra §§ 95–128.

35. Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Idaho.—Wiesenthal v. Goff, 120 P.2d 248.
Iowa.—In re Lewis' Estate, 298 N.W. 842, 230 Iowa 694—Packer v. Overton, 203 N.W. 307, 200 Iowa 620.
La.—Succession of Patterson, 175 So. 820, 188 La. 113—Williams v. Campbell, App., 185 So. 683.

36. Idaho.—Berryman v. Dore, 277 P. 565, 47 Idaho 582.

37. U.S.—Fox Film Corporation v. Knowles, N.Y., 43 S.Ct. 365, 261 U.S. 326, 67 L.Ed. 680, reversing, C.C.A., 279 F. 1018, affirming, D. C., 274 F. 731 and 275 F. 582—Penn v. Robertson, C.C.A.N.C., 115 F.2d 167, 176, citing **Corpus Juris, and** affirming, D.C., 29 F.Supp. 386.
Ark.—Quinn v. Driver, 136 S.W.2d 1015, 199 Ark. 1058.
Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.
Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639—Berryman v. Dore, 277 P. 565, 47 Idaho 582.
Iowa.—Leach v. Farmers' Sav. Bank of Hamburg, 213 N.W. 414, 415, 205 Iowa 114, 56 A.L.R. 801, citing **Corpus Juris,** and followed in Leach v. Grinnell Sav. Bank of Grinnell, 213 N.W. 417, and rehearing denied and modified on other grounds 217 N.W. 437, 205 Iowa 114, 56 A.L.R. 801.
Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.
Md.—Surratt v. Knight, 158 A. 1, 162 Md. 14.
Miss.—Stone v. Townsend, 1 So.2d 237, 190 Miss. 547.
N.Y.—In re Hess' Will, 198 N.Y.S. 573, 574, 120 Misc. 372, citing **Corpus Juris.**
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.
Wis.—In re Asby's Will, 287 N.W. 734, 232 Wis. 481, 126 A.L.R. 151.
23 C.J. p 1170 note 15.

Fiction of identity

Executor or administrator acts in representative capacity, and by fiction of identity is the person of the testator to whom all interested parties must look.—Packer v. Overton, 203 N.W. 307, 200 Iowa 620.

Extent of representation generally

(1) Administrator stands in intestate's shoes for all purposes, unless expressly excepted by law.—Agricultural Finance Corporation v. Bates, 155 S.E. 32, 171 Ga. 230, answers to certified questions conformed to 155 S.E. 533, 42 Ga.App. 255.

(2) His representative character extends only so far as is necessary to wind up decedent's business.—Steele v. Knox, 10 Ala. 608.

(3) After taking possession of the estate unconditionally, he is subject to all obligations and entitled to all rights of deceased.
La.—First Nat. Bank v. Lagrone, 117 So. 741, 166 La. 626.
Pa.—In re Thacher's Estate, 166 A. 873, 311 Pa. 278.

(4) Administrator stands in right of decedent, not his creditors.—Bedsole v. Tiller, 181 So. 286, 236 Ala. 101.

(5) Executor does not represent creditors, but represents testator, and has no more right to recover property fraudulently conveyed than testator would have had.—First Nat. Bank v. Love, 167 So. 703, 232 Ala. 327.

(6) The powers of personal representative to act with relation to his decedent are confined to such matters as concern the interest of decedent.—Murray v. Physical Culture Hotel, 16 N.Y.S.2d 978, 258 App.Div. 334, affirmed 17 N.Y.S.2d 862, 258 App.Div. 334.

(7) Executors as personal representatives of decedent have power to act for him in determining, in accordance with law, what constitutes assets of the estate.—Penn v. Robertson, C.C.A.N.C., 115 F.2d 167, affirming, D.C., 29 F.Supp. 386.

(8) Administrator has the same property in goods of the intestate as decedent himself had, and the same remedies to recover the goods or to prevent their unlawful appropriation by others.—McNair v. Howle, 116 S. E. 279, 123 S.C. 252.

(9) Administrator and heir of mortgagor seeking to enjoin foreclosure of chattel mortgage, stands in right of mortgagor.—Gilfillan's Adm'r v. Bixby, 139 A. 250, 100 Vt. 468.

(10) Generally he has no greater rights than deceased would have if living.
Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.
Ga.—Whitworth v. Wofford, 73 Ga. 259.
Mass.—Goodhue v. State St. Trust Co., 165 N.E. 701, 267 Mass. 28.

(11) However, it is no novelty for an executor to be given rights which the testator could not have exercised when he lived.—Fox Film Corporation v. Knowles, N.Y., 43 S.Ct. 365, 261 U.S. 326, 67 L.Ed. 680, reversing, C.C.A., 279 F. 1018, affirming, D.C., 274 F. 731 and 275 F. 582.

(12) Right of executor to renew copyright although author died more than year prior to expiration of original, see Copyright and Literary Property § 79 c note 98.

Administrative representative

Ga.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.
N.Y.—Flegenheimer v. Brogan, 30 N. E.2d 591, 284 N.Y. 268, 132 A.L.R. 613, affirming 19 N.Y.S.2d 343, 259 App.Div. 347, appeal granted 20 N.Y.S.2d 670, 259 App.Div. 914, answering certified questions 20 N.Y.S.2d 670, 259 App.Div. 914.

To carry out testator's intent

Ga.—Bearden v. Longino, 190 S.E. 12, 183 Ga. 819.
Wis.—In re Asby's Will, 287 N.W. 734, 232 Wis. 481, 126 A.L.R. 151.

Decedent's acts as binding on representative

(1) As representative of decedent, the executor or administrator is bound by acts of decedent.—Levy v. New York Life Ins. Co., 265 N.Y.S. 377, 238 App.Div. 711, affirmed 195 N.E. 204, 266 N.Y. 570.

(2) Hence, insured's executors are bound by acts of insured in designating beneficiaries and by his waiver of policy provision for change of beneficiary.—Levy v. New York Life Ins. Co., supra.

Imputation of knowledge

In action by administrator of mortgagor against mortgagee to recover excess which consideration recited in mortgagor's deed to mortgagee in foreclosure by agreement bore to actual mortgage indebted-

creditors,[38] and of the heirs, legatees, or distributees.[39]

ness, status and right of administrator was that of mortgagor so that administrator was charged with knowledge of mortgagor.—Pruett v. First Nat. Bank, 157 So. 846, 229 Ala. 441.

Releasing decedent's rights in estate of another

Release by legatee's administrator of rights in estate of testator relieved executor's estate and principal of testator's estate from paying interest found due legatee by commissioner.—Denny v. Searles, 143 S. E. 484, 150 Va. 701.

Under modern civil law the executor is considered to be the agent of the testator and not of the heirs.—Criado v. Martinez, 25 Puerto Rico 308.

38. Ala.—Durden v. Neighbors, 168 So. 887, 889, 232 Ala. 496, quoting **Corpus Juris.**
Ark.—Crider v. Simmons, 96 S.W.2d 471, 192 Ark. 1075.
Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762.
Colo.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.
Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.
Idaho.—Berryman v. Dore, 277 P. 565, 47 Idaho 582.
Ill.—Olsen v. Hartford Accident & Indemnity Co., 13 N.E.2d 159, 368 Ill. 194, reversing In re Glauner's Estate, 7 N.E.2d 86, 289 Ill.App. 245.
Iowa.—Leach v. Farmers' Sav. Bank of Hamburg, 213 N.W. 414, 415, 205 Iowa 114, 56 A.L.R. 801, citing **Corpus Juris,** and followed in Leach v. Grinnell Sav. Bank of Grinnell, 213 N.W. 417, and rehearing denied and modified on other grounds 217 N.W. 437, 205 Iowa 114, 56 A.L.R. 801.
Kan.—Richards v. Tiernan, 91 P.2d 22, 150 Kan. 116.
Ky.—Watts' Adm'r v. Smith, 63 S. W.2d 796, 250 Ky. 617, 91 A.L.R. 1206—Whitlow's Adm'r v. Saunders' Adm'r, 36 S.W.2d 659, 237 Ky. 842.
La.—Williams v. Campbell, App., 185 So. 683.
N.Y.—In re Hess' Will, 198 N.Y.S. 573, 575, 120 Misc. 372, citing **Corpus Juris.**
23 C.J. p 1170 note 16.
Representation with respect to right to set aside fraudulent conveyance by decedent see supra § 124.
Right to appeal on behalf of claimant whose claim was disallowed by court see infra § 433.

Primarily represents creditors
U.S.—Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank, C.C.A. Ohio, 173 F. 390.
Ala.—Steele v. First Nat. Bank, 171 So. 353, 233 Ala. 246.
Ariz.—Faulkner v. Faulkner, 203 P. 560, 23 Ariz. 313.
Conn.—Hewitt v. Sanborn, 130 A. 472, 103 Conn. 352.
La.—Succession of Steidtman, 135 So. 673, 17 La.App. 365.
Miss.—Stone v. Townsend, 1 So.2d 237, 190 Miss. 547.
N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

Assets as pledge of creditors
La.—Superior Oil Co. v. Baltar, 160 So. 626, 181 La. 908.

Assignee for benefit of creditors compared

An administrator occupies a status similar to an assignee in a general assignment for the benefit of creditors, whether he is named in the will for that purpose or by appointment of the court.—Bedsole v. Tiller, 181 So. 286, 236 Ala. 101.

Where only asset exempt from debts

Ordinarily, administratrix of a succession represents creditors of deceased, but where the only asset of estate is life policy made payable to administratrix or executor of deceased, administratrix with respect to collection of proceeds of policy can only represent heirs because proceeds of policy are exempt from payment of debts of succession.—Foote v. Sun Life Assur. Co. of Canada, La. App., 173 So. 477.

Succession accepted under benefit of inventory

Where a succession is accepted under benefit of inventory, as it must be for a minor heir, see Descent and Distribution § 64, it must be administered and liquidated for the benefit of creditors primarily, even though the beneficiary heir himself is the administrator, and the rights of the beneficiary heir are only residuary.—Kelley v. Kelley, 3 So.2d 641, 198 La. 338.

Special and general creditors

Administratrix was bound to protect not alone general creditors or existing creditors but also the interests of the holder of purchase-money chattel mortgage who claimed a superior right to property.—In re Lewis' Estate, 298 N.W. 842, 230 Iowa 694.

39. Ala.—Durden v. Neighbors, 168 So. 887, 232 Ala. 496—Young v. Wall, 110 So. 135, 215 Ala. 131.
Ark.—Crider v. Simmons, 96 S.W.2d 471, 192 Ark. 1075.
Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.
Ga.—Dyar v. Dyar, 128 S.E. 582, 160 Ga. 469.
Kan.—Richards v. Tiernan, 91 P.2d 22, 150 Kan. 116.
La.—Williams v. Campbell, App., 185 So. 683.
N.Y.—In re Hess' Will, 198 N.Y.S. 573, 575, 120 Misc. 372, citing **Corpus Juris.**
23 C.J. p 1170 note 17.

Secondarily represents beneficiaries
U.S.—Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank, C.C. A.Ohio, 173 F. 390.
Ala.—Steele v. First Nat. Bank, 171 So. 353, 233 Ala. 246.
Ariz.—Faulkner v. Faulkner, 203 P. 560, 23 Ariz. 313.
Conn.—Hewitt v. Sanborn, 130 A. 472, 103 Conn. 352.
Miss.—Stone v. Townsend, 1 So.2d 237, 190 Miss. 547.
N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.

Representative as agent of heirs and legatees

"It is true, in a certain sense, that an administrator is the agent of the heirs and the legatees, but his agency is representative rather than personal. The appointment obtains, in some instances, irrespective of the wishes of the heirs. He is responsible to them for any act without his authority. But, acting within his authority and in accordance with law, he may legally perform acts against the express wishes of the heirs. His rights as administrator cannot be revoked without the consent of the courts. He holds in custodia legis the estate coming into his hands as administrator. Therefore, in the strict sense of the word, he is not the agent of the heirs, but is rather the agent of the probate court, whose orders, generally speaking, he must obey."—Rollins v. Shaner, 292 S.W. 419, 421, 316 Mo. 953.

Representation where conflict of interest

(1) Where there are rival claimants to corpus of testator's estate, executrix cannot represent either side.—In re Thompson's Estate, 287 P. 21, 156 Wash. 486.

(2) Administrator may not represent the personal interests of claimant at the expense of the estate to the detriment of the heirs.—Ekdahl v. Wessman, 14 A.2d 757, 127 Conn. 141, 129 A.L.R. 920.

Acts of representative as binding beneficiaries

(1) As nominated executor and propounder of will was legal party to conduct litigation involved in caveat, testator's widow was bound by his consent that judge other than trial judge should receive verdict.—Dyar v. Dyar, 128 S.E. 582, 160 Ga. 469.

(2) Where executor gratuitously undertook to represent beneficiary in settlement of estate, beneficiary was bound by what executor did in settlement as to third persons.—Young v. Wall, 110 So. 135, 215 Ala. 131.

The executor or administrator occupies a position of trust in connection with the estate[40] with respect to all those who are interested in the estate.[41] The executor or administrator, occupying

Representation in litigable controversy

In litigable controversy between administrator and heirs, administrator does not represent heirs.—In re Barlow's Estate, 257 N.W. 71, 127 Neb. 810.

Heirship proceeding

(1) An administrator should assume an entirely neutral attitude in a proceeding to determine heirs at law of estate for which he is administrator.—Love v. Wilson, 75 P.2d 876, 181 Okl. 558.

(2) Administrator as adverse party to claimants in heirship proceeding see Descent and Distribution § 80 note 4.

With respect to realty

(1) Administrator does not represent heirs when title to land is involved, unless land is needed to pay debts.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.

(2) In absence of order of court, what administrator does in relation to decedent's real estate he does as agent for heirs.—In re Huff's Estate, 150 A. 98, 300 Pa. 64.

(3) Administrator acting in representative capacity in managing real estate is merely agent of heirs, who alone can call on him to account.—Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567, 305 Pa. 583, 81 A.L.R. 660.

(4) Real property and interests therein as assets of estate see supra §§ 103–112.

Heirs of solvent testate estate

Executors of solvent succession cannot champion heirs' rights.—Succession of McBurney, 111 So. 86, 162 La. 758.

40. U.S.—Bruun v. Hanson, C.C.A. Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, and conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279.
Ala.—Bedsole v. Tiller, 181 So. 286, 236 Ala. 101.
Cal.—Landis v. First Nat. Bank, 66 P.2d 730, 20 Cal.App.2d 198.
Fla.—Grant v. Amiker, 162 So. 712, 120 Fla. 356.
Ky.—Riggs v. Schneider's Ex'r, 130 S.W.2d 816, 279 Ky. 361.
Neb.—In re Rhea's Estate, 253 N.W. 876, 126 Neb. 571.
N.C.—Miller v. Miller, 157 S.E. 604, 200 N.C. 458.
Wis.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.
Executors and Administrators as trustees see the C.J.S. title Trusts §§ 239–245, also 65 C.J. p 639 note 62—p 644 note 40.
Representative purchasing at sale under order of court as trustee see infra § 599.

Fiduciary relation of peculiar significance

Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 356, 52 Idaho 639—Flynn v. Driscoll, 223 P. 524, 527, 38 Idaho 545, 34 A.L.R. 352.

Express trustee

An administrator or executor is an "express trustee" by virtue of his order of appointment and bond taken by the court for faithful performance of his trust.—Jackson v. Dobbs, 290 S.W. 402, 154 Tenn. 602.

Representative as public officer

(1) An executor or administrator is not a public officer in the legal meaning of the term, but is a mere trustee acting in private capacity for private persons.—Ramsay v. Van Meter, 133 N.E. 193, 300 Ill. 193.

(2) However, he is deemed an officer appointed to settle decedent's estate.—Glidden v. Rines, 128 A. 4, 124 Me. 286.

(3) As officer of court see infra § 147.

(4) Executor and administrator defined see supra § 3.

(5) Public administrators see infra §§ 1050–1053.

Purpose of trust

(1) Administrator is primarily a "trustee" of decedent for the purpose of handling his estate and paying his debts.—Stone v. Townsend, 1 So. 2d 237, 190 Miss. 547.

(2) Executor, in equity is mere trustee charged with performance of will.—In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14, reversed on other grounds Grossman, In re, 254 N.Y.S. 1012, 234 App.Div. 890, affirmed 182 N.E. 177, 259 N.Y. 553.

Personalty and realty distinguished

Deceased's personal representative holds personal assets in trust, first for creditors, and secondarily for distributees, but representative's position as to realty is antagonistic to heirs, because representative must protect creditors.—Fleming v. Kirkland, 146 So. 384, 226 Ala. 222.

In prosecution of claims

Administrator is primarily representative of estate, in prosecution of claims against it.—Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Property of estate held in trust by representative

Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.
N.Y.—Furguson v. Glover, 170 N.Y.S. 141, 103 Misc. 341,
Tex.—First Nat. Bank v. Douglas, Civ.App., 7 S.W.2d 148, affirmed Douglas v. First Nat. Bank, 40 S.W.2d 801, 120 Tex. 631.

41. U.S.—Grimes v. Grimes, D.C. Nev., 52 F.2d 171—Diamond v. Cannolly, Idaho, 251 F. 234, 163 C.C.A. 390, reversed on other grounds 276 F. 87, certiorari denied Connolly v. Diamond, 42 S.Ct. 169, 257 U.S. 656, 66 L.Ed. 420, and certiorari denied 39 S.Ct. 7, 248 U.S. 561, 63 L.Ed. 422.
Ala.—Wood v. Amos, 183 So. 639, 640, 236 Ala. 477, quoting **Corpus Juris**—Durden v. Neighbors, 168 So. 887, 888, 232 Ala. 496, quoting **Corpus Juris**—Amos v. Toolen, 168 So. 687, 692, 232 Ala. 587, quoting **Corpus Juris.**
Ariz.—In re Sullivan's Estate, 78 P. 2d 132, 137, 51 Ariz. 483, citing **Corpus Juris.**
Ark.—Francis v. Turner, 67 S.W.2d 211, 212, 188 Ark. 158, citing **Corpus Juris.**
Cal.—Landis v. First Nat. Bank, 66 P.2d 730, 20 Cal.App.2d 198.
Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561—City Nat. Bank v. City of Bridgeport, 147 A. 181, 185, 109 Conn. 529, citing **Corpus Juris.**
Fla.—Grant v. Amiker, 162 So. 712, 120 Fla. 356.
Idaho.—Wiesenthal v. Goff, 120 P.2d 248—Schneeberger v. Frazer, 213 P. 568, 36 Idaho 737.
Ill.—Olsen v. Hartford Accident & Indemnity Co., 13 N.E.2d 159, 368 Ill. 194, reversing In re Glauner's Estate, 7 N.E.2d 86, 289 Ill.App. 245—Christensen v. Christensen, 158 N.E. 706, 327 Ill. 448.
Ind.—Barnett v. Kumler, 190 N.E. 364, 98 Ind.App. 635.
Iowa.—In re Willenbrock's Estate, 290 N.W. 502, 228 Iowa 234—Goodman v. Bauer, 281 N.W. 448, 225 Iowa 1086—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.
Mass.—Flynn v. Colbert, 146 N.E. 784, 251 Mass. 489.
Mich.—Reconstruction Finance Corporation v. Lee, 287 N.W. 757, 290 Mich. 328—In re Abramovitz' Estate, 270 N.W. 294, 278 Mich. 271.
Mo.—Rawlings v. Rawlings, 58 S.W. 2d 735, 738, 332 Mo. 503, quoting **Corpus Juris,** and reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred, see, Sup., 39 S.W.2d 367—State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321—Harrison Machine Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.
Neb.—Meade v. Vande Voorde, 299 N.W. 175, 177, 139 Neb. 827, citing **Corpus Juris.**

such position of trust in connection with the estate, is a trustee in the broadest sense,[42] although not in

N.J.—In re Messler's Estate, 1 A.2d 322, 16 N.J.Misc. 434.
N.M.—Woodson v. Raynolds, 76 P. 2d 34, 42 N.M. 161.
N.Y.—In re Chisholm's Estate, 30 N. Y.S.2d 870, 177 Misc. 423—In re Baldwin's Will, 284 N.Y.S. 761, 157 Misc. 538—In re Schorer's Estate, 277 N.Y.S. 677, 154 Misc. 198, affirmed 289 N.Y.S. 911, 248 App.Div. 666, affirmed 5 N.E.2d 806, 272 N. Y. 247—In re Hess' Will, 198 N.Y. S. 573, 120 Misc. 372.
Or.—In re Workman's Estate, 68 P. 2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333—Matthews v. Taylor, 20 P.2d 806, 142 Or. 483—Wells v. Wood, 263 P. 54, 56, 125 Or. 38, citing **Corpus Juris.**
Pa.—In re Davies' Estate, 21 A.2d 517, 146 Pa.Super. 7.
S.D.—Langan Realty Co. v. Dixon, 191 N.W. 444, 46 S.D. 170.
Tenn.—Baker v. Baker, 142 S.W.2d 737, 24 Tenn.App. 220.
Tex.—Kreis v. Kreis, Civ.App., 57 S.W.2d 1107, error dismissed.
Wis.—In re Robinson's Will, 261 N. W. 725, 218 Wis. 596.
23 C.J. p 1170 note 18.

As to heirs, distributees, legatees, or devisees

U.S.—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279—Hewitt v. Hewitt, C.C.A.Cal., 17 F.2d 716.
Ala.—Young v. Wall, 110 So. 135, 215 Ala. 131.
Ariz.—In re Sullivan's Estate, 78 P. 2d 132, 51 Ariz. 483.
Cal.—In re Clary's Estate, 264 P. 242, 203 Cal. 335—In re Bryan's Estate, 277 P. 1068, 99 Cal.App. 113.
Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Ga.—Morris v. Johnstone, 158 S.E. 308, 172 Ga. 598—Peck v. Watson, 142 S.E. 450, 165 Ga. 853, 57 A.L.R. 560.
Mich.—In re DeBancourt's Estate, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.
Mo.—Nord v. Nord, App., 91 S.W.2d 223.
Neb.—In re Rhea's Estate, 253 N.W. 876, 126 Neb. 571.
S.C.—Witherspoon v. Stogner, 189 S.E. 758, 182 S.C. 413.

As to creditors

(1) Generally.

Ariz.—In re Sullivan's Estate, 78 P. 2d 132, 51 Ariz. 483.
Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.

(2) To extent of their debts.

Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
N.Y.—In re Bates' Estate, 4 N.Y.S.2d 444, 167 Misc. 641, reversed on other grounds In re Bate's Will, 8 N. Y.S.2d 548, 255 App.Div. 615, reargument denied 11 N.Y.S.2d 416, 256 App.Div. 669, motion denied 22 N.E.2d 487, 281 N.Y. 664—In re Baldwin's Will, 284 N.Y.S. 761, 157 Misc. 538.

(3) Estate fiduciary is primarily a "trustee" for creditors, except as to obligations for administration and funeral expenses.—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867.

(4) An administrator or executor sustains trust relation to the creditors especially if estate is insolvent. —Reconstruction Finance Corporation v. Lee, 287 N.W. 757, 290 Mich. 328.

Estate is trust fund for payment of debts.

Colo.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.
Idaho.—Madison v. Buhl, 8 P.2d 271, 51 Idaho 564.
Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.
N.Y.—Bankers' Surety Co. v. Meyer, 98 N.E. 399, 205 N.Y. 219, Ann. Cas.1913D 1218—In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14, reversed on other grounds In re Grossman, 254 N.Y.S. 1012, 234 App.Div. 890, affirmed 182 N.E. 177, 259 N.Y. 553.

Utmost fairness or good faith is required of administrator or executor in administering the trust and in dealing with those whom he purports to represent.

Ark.—Crider v. Simmons, 96 S.W.2d 471, 192 Ark. 1075.
Cal.—Purinton v. Dyson, 65 P.2d 777, 8 Cal.2d 322, 113 A.L.R. 1230.
Colo.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.
Ga.—Morris v. Johnstone, 158 S.E. 308, 172 Ga. 598.
Mass.—MacDonald v. MacDonald, 197 N.E. 3, 291 Mass. 299—Flynn v. Colbert, 146 N.E. 784, 251 Mass. 489—Taylor v. Jones, 136 N.E. 382, 242 Mass. 210, certiorari denied Jones v. Taylor, 43 S.Ct. 99, 260 U.S. 742, 67 L.Ed. 491—Colburn v. Hodgdon, 135 N.E. 107, 241 Mass. 183.
N.M.—Woodson v. Raynolds, 76 P.2d 34, 42 N.M. 161.
Ohio.—In re Chambers' Estate, App., 36 N.E.2d 175, appeal dismissed 24 N.E.2d 601, 136 Ohio St. 202.
Tenn.—Baker v. Baker, 142 S.W.2d 737, 24 Tenn.App. 220.
Vt.—In re Walker's Estate, 137 A. 321, 100 Vt. 366.

Duty to advise

Trust company acting as administrator of estate stood in fiduciary relationship to testator's widow and sole distributee and was under duty to advise her in all matters concerning probable financial outcome of its settlement.—Ohio Merchants' Trust Co. v. Conrad, 181 N.E. 274, 42 Ohio App. 150.

Duty of disclosure

Executor is bound to disclose material facts within his knowledge whenever beneficiary's interest is to be affected by transaction with executor, concealment by executor being fraudulent in law and furnishing basis for equitable relief.—Baker v. Baker, 142 S.W.2d 737, 24 Tenn. App. 220.

Impartial role

In seeking construction of will, executor assumes impartial role between devisees or other parties at interest.—Bearden v. Longino, 190 S. E. 12, 183 Ga. 819.

Executor as legatee

(1) Executor-trustee under will, who took residuary estate as legatee, was clothed with power to conserve the residuary estate but was under a first duty to beneficiaries of special bequests.—Woods v. Chrissinger, 173 So. 57, 233 Ala. 575.

(2) Testator's widow, who was sole residuary legatee and executrix, was obliged, as executrix, to deal fairly with other persons interested in estate and to take no advantage for herself to detriment of others.—In re Lawrence's Estate, 295 N.Y. S. 930, 162 Misc. 802.

It is fraud in law for an administrator to take for his own benefit a position in which his interest will conflict with his duty.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.

Interests of all must be protected

Mo.—Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

Search for sole heir

Administrator occupied position of trust with respect to only heir and next of kin of intestate, so as to be required to put forth every reasonable effort to discover him.—Welch v. Flory, 200 N.E. 900, 294 Mass. 138, 106 A.L.R. 813.

Representative's attorney occupies same fiduciary relation to the estate and heirs as does the representative. —Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, and conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602.

42. U.S.—Chase Nat. Bank of New York v. Sayles, C.C.A.R.I., 11 F.2d 948, 48 A.L.R. 207, reversing, D.C., 6 F.2d 403, and certiorari denied Sayles v. Chase Nat. Bank of City of New York, 47 S.Ct. 99, 273 U.S. 708, 71 L.Ed. 851.
Ala.—Keith & Wilkinson v. Forsythe, 151 So. 60, 227 Ala. 555.
Cal.—Los Angeles County v. Morrison, 101 P.2d 470, 471, 15 Cal.2d

the general acceptation of the term,[43] the trusteeship existing only with respect to the property or assets which come into his custody or control under color of his office.[44]

Guardianship of decedent's children. The executor or administrator is not, as such, the guardian of decedent's minor children,[45] nor has he any concern with the support and education of the children.[46]

§ 143. Proof and Defense of Will

For a consideration of the duty of an executor to probate the will, see the C.J.S. title Wills § 311, also 68 C.J. p 879 notes 92–96 and 23 C.J. p 1171 note 23; of the right of an executor to offer the will for probate, see the C.J.S. title Wills § 315, also 68 C.J. p 888 note 44, and 23 C.J. p 1171 note 22; of the right and duty of the executor to defend the will generally, see the C.J.S. title Wills § 324, also 68 C.J. p 908 note 23–81; and of the right and duty of the executor to defend the will in a will contest, see the C.J.S. title Wills § 331, also 68 C.J. p 935 notes 65–69 and 23 C.J. p 1171 notes 24–26. Allowances to the executor for expenditures incurred in probating the will or in a contest of the will are considered infra § 225.

Examine Pocket Parts for later cases.

§ 144. Burial of Decedent

An executor or administrator is under a duty to have decedent's remains buried in a suitable manner.

One of the first duties of an executor or administrator is to attend to the decent and proper interment of the remains of his decedent,[47] in a manner suitable to his estate and station in life,[48] and, as discussed infra § 230, a reasonable and judicious expenditure for this purpose will always be approved.

§ 145. Executing Provisions of Will

An executor ordinarily must execute the will in accordance with its valid terms and provisions.

An executor is charged with knowledge of the provisions of the will under which he was nominated,[49] and it is his duty faithfully to execute the will[50] in accordance with its terms and its provi-

368, 129 A.L.R. 443, citing **Corpus Juris.**
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Fla.—Voorhies v. Blood, 171 So. 658, 126 Fla. 710.
Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 356, 52 Idaho 639, citing **Corpus Juris.**
N.Y.—In re Hess' Will, 198 N.Y.S. 573, 120 Misc. 372.
23 C.J. p 1171 note 19.

43. Cal.—Los Angeles County v. Morrison, 101 P.2d 470, 471, 15 Cal. 2d 368, 129 A.L.R. 443, citing **Corpus Juris.**
Mich.—Reconstruction Finance Corporation v. Lee, 287 N.W. 757, 758, 290 Mich. 328, quoting **Corpus Juris.**
N.Y.—In re Hess' Will, 198 N.Y.S. 573, 574, 120 Misc. 372, citing **Corpus Juris.**
23 C.J. p 1171 note 20.

Duties of representative and trustee distinguished

(1) Duties of "executor" or "administrator" and those of "trustee" are distinct.—Caruso v. Caruso, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds 148 A. 882, 106 N.J. Eq. 130.

(2) Functions of an "executor" and a "trustee" are in some respects technically different, but in many respects are the same, function of an executor being generally that of a trustee.—Voorhies v. Blood, 171 So. 658, 126 Fla. 710.

(3) " 'The general duties of an executor are to collect the effects of the deceased, pay the claims against his estate, and distribute the residue to those entitled. . . . A trustee is a person in whom some estate, interest or power, in or affecting property is vested for the benefit of another.' "—Los Angeles County v. Morrison, 101 P.2d 470, 471, 15 Cal. 2d 368, 129 A.L.R. 443.

(4) Powers, duties, and liabilities of executors as trustees see the C. J.S. title Trusts § 255, also 65 C.J. p 665 notes 17–26.

One person as executor and trustee

(1) When persons are named as executors by a will, and are given the management of a trust fund, they may act in the capacity both of executors and trustees at the same time, although there is a distinction between their rights and duties, as such.—Wechsler v. Drey, 197 N.Y.S. 453, 203 App.Div. 692.

(2) Relative to whether a will not recognizing with any accuracy the distinction between duties and authority of executors and trustees, and in terms giving certain authority to the trustees, who were the same persons as the executors, intended the executors to have the authority, the language is to be considered with reference to the duties to be performed, and not as if used in its technical meaning.—In re Kohler, 132 N. E. 114, 231 N.Y. 353, reversing In re Kohler's Will, 183 N.Y.S. 550, 193 App.Div. 8.

44. Mo.—Buder v. Brand, 265 S.W. 989, 305 Mo. 321.

45. Ark.—Menifee v. Ball, 7 Ark. 520.
Ill.—Kelley v. Helmkamp, 40 Ill.App. 35.

46. Ark.—Alcorn v. Alcorn, 35 S.W. 2d 1027, 183 Ark. 342.

47. Mass.—McCoy v. Inhabitants of Town of Natick, 129 N.E. 381, 237 Mass. 99.
Pa.—In re Miller's Estate, 50 Dauph. Co. 156.
23 C.J. p 1171 note 27.
Rights and duties with respect to dead bodies generally see Dead Bodies 25 C.J.S. p 1016.

48. Mass.—McCoy v. Inhabitants of Town of Natick, 129 N.E. 381, 237 Mass. 99.
Pa.—In re Miller's Estate, 50 Dauph. Co. 156.
23 C.J. p 1171 note 28.

49. S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.

50. Ala.—Wright v. Menefee, 145 So. 315, 226 Ala. 55.
La.—Walker's Succession, 32 La.Ann. 321.
Md.—Surratt v. Knight, 158 A. 1, 162 Md. 14.
N.Y.—In re Cronise's Estate, 6 N.Y. S.2d 392, 167 Misc. 310—In re Israel's Estate, 2 N.Y.S.2d 170, 166 Misc. 156, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1063, reargument denied 12 N.Y.S.2d 782, 257 App.Div. 817—In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14, reversed on other grounds In re Grossman, 254 N.Y.S. 1012, 234 App.Div. 890, affirmed 182 N.E. 177, 259 N.Y. 553.

sions,[51] although any testamentary provisions which purport to extend an executor's powers beyond those conferred by law must be disregarded.[52]

A testator's wishes and directions, not precatory merely, as set forth in the will, must be followed, if possible, in all particulars,[53] unless they are contrary to law,[54] unless some appropriate tribunal properly authorizes the executor to swerve aside,[55] or unless, it is sometimes held, an agreement of all persons interested in the estate raises an estoppel.[56] The executor's duty to dispose of the estate according to the will is not affected by the fact that, as beneficiary, he claims the right to spend the principal.[57]

Setting up trust and executing provisions. When directed by the will, the executor is under a duty to set up a trust fund.[58] Where trusts are raised by the will, but no trustee is appointed by the testator,

Or.—Harris v. Craven, 91 P.2d 302, 162 Or. 1.

Puerto Rico.—Criado v. Martinez, 25 Puerto Rico 308.

"While an executor is not primarily interested in whether a beneficiary shall receive a greater or a lesser share of an estate, he is interested, as the chosen representative of the testator, in seeing that her will is carried into effect."—In re Asby's Will, 287 N.W. 734, 738, 232 Wis. 481, 126 A.L.R. 151.

"Execute" and "execution" defined

(1) As used in reference to the act of the executor in carrying out the provisions of a will, the terms "execute" and "execution" mean the settlement of the estate under the provisions of law for the settlement of the estates of deceased persons, and the distribution of the property to the beneficiaries.—Lambert v. Harvey, 100 Ill. 338, 341—23 C.J. p 280 note 62.

(2) "Execution" is not synonymous with "probating."—In re Lamb, 80 N.W. 1081, 122 Mich. 239, 241.

Effect of statute validating wills

(1) Statute validating wills exempting executors from filing inventory or making settlement does not lessen executor's obligation faithfully to execute will.—Wright v. Menefee, 145 So. 315, 226 Ala. 55.

(2) Dispensing with inventory see supra § 139.

51. Iowa.—Baurer v. Myers, 278 N. W. 302, 224 Iowa 854.
La.—Succession of Vatter, 186 So. 597, 191 La. 875.
Md.—Surratt v. Knight, 158 A. 1, 162 Md. 14.
N.J.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333.
Tex.—Johnson v. Coit, Civ.App., 48 S.W.2d 397.
Wis.—In re Asby's Will, 287 N.W. 734, 232 Wis. 481, 126 A.L.R. 151—In re Sipchen's Estate, 193 N.W. 385, 180 Wis. 504.

Must carry out intent of testator

Ohio.—Fair v. Fair, 187 N.E. 727, 46 Ohio App. 51.

52. **Provisions inconsistent with law need not be given effect.**—Schloss v. Schloss, 159 A. 745, 162 Md. 346.

Regulation of powers by statute see supra § 141.

53. Ind.—Abbott v. Appleton, 159 N. E. 167, 86 Ind.App. 607.
Iowa.—Packer v. Overton, 203 N.W. 307, 200 Iowa 620.
Kan.—Jordan v. Young, 84 P.2d 970, 148 Kan. 829.
Ky.—Patterson's Executor v. Dean, 44 S.W.2d 565, 568, 241 Ky. 671, citing **Corpus Juris.**
Mich.—Mackenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563.
N.J.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333.
N.Y.—In re Kohler, 132 N.E. 114, 231 N.Y. 353, reversing In re Kohler's Will, 183 N.Y.S. 550, 193 App. Div. 8—Champion v. Williams, 12 N.Y.S. 697, 59 Hun 618, 36 N.Y.St. 706.
Tex.—John Hancock Mut. L. Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740, 743, quoting **Corpus Juris**—Johnson v. Coit, Civ.App., 48 S.W.2d 397.
23 C.J. p 1173 note 37.

Unambiguous will

Neb.—Kenfield v. Dudek, 283 N.W. 209, 135 Neb. 574—In re Nelson's Estate, 272 N.W. 219, 132 Neb. 376.

Executor bound by directions of will

Ill.—State Bank of Chicago v. Gross, 176 N.E. 739, 344 Ill. 512, 75 A.L.R. 172.

Denying validity of claim directed to be paid

An administrator with will annexed may not deny the validity of claim which the will expressly directs to be paid.—Jordan v. Young, 84 P.2d 970, 148 Kan. 829.

Effect of direction to pay claim on operation of statute of limitations see infra § 382.

Publication of manuscript

Under will directing publication of testator's uncopyrighted religious manuscript which stated that executor might be required to make changes in manuscript, executor by assumption of office assumed duty of expunging defamatory passages of manuscript and of publication of remainder of manuscript as it was left by testator.—In re Payne's Estate, 290 N.Y.S. 407, 160 Misc. 224.

Removal of remains of relative

Testator's request for removal of remains of relative from cemetery must be carried out as soon as funds are available.—In re Hackett's Estate, 224 N.Y.S. 435, 130 Misc. 339.

Selection of attorney

A direction to an executor to appoint or employ a specified person as attorney is not binding on him.—Hughes v. Hiscox, 174 N.Y.S. 564, 105 Misc. 521—23 C.J. p 1173 note 37 [h].

Wishes of beneficiary

Executor may properly respect wishes of living beneficiary.—In re Pinney's Estate, 294 N.Y.S. 29, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, affirmed 15 N.E. 2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.

54. Md.—Surratt v. Knight, 158 A. 1, 162 Md. 14.
Puerto Rico.—Criado v. Martinez, 25 Puerto Rico 308.

Publication of libel

Executor is not obliged to incur liability of publishing libelous matter under direction of will.—In re Payne's Estate, 290 N.Y.S. 407, 160 Misc. 224.

55. N.J.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333—Covenhoven v. Executors of Covenhaven, 1 N.J. Law 210.
Supervision and guidance of courts see infra § 147.

56. N.Y.—In re Pinney's Estate, 294 N.Y.S. 29, 44, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N. E.2d 851, 278 N.Y. 704.

57. Conn.—Reed v. Reed, 68 A. 849, 80 Conn. 401.

58. Mich.—Mackenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563.
Executors as trustees see the C.J.S. title Trusts §§ 239–243, also 65 C. J. p 639 note 63 et seq.

Segregation from date of testator's death

Under will directing creation of five trusts in varying pecuniary amounts, for infant beneficiaries, executors were required to segregate, from date of testator's death, the share of income in cash for benefi

the law charges the executor with the duty of carrying out the trust until the court appoints some other trustee; and consequently the executor may retain funds in his hands for that purpose and otherwise prepare to fulfill the trust.[59]

§ 146. Delegation of Powers

Ordinarily a personal representative cannot delegate his authority or duty, but he may employ or permit others to perform tasks which he cannot reasonably be expected to perform personally.

Ordinarily, an executor or administrator cannot delegate his authority or duty[60] and thus avoid any of the liabilities or escape any of the duties imposed on him by law,[61] even though the person to whom such delegation is attempted is one in whom the testator placed great confidence.[62]

The representative is not required, however, personally to perform every act which may be necessary or proper in the execution of his trust.[63] He may properly permit others to perform tasks which he cannot reasonably be expected personally to perform.[64] Thus, when necessary, he may employ and pay agents of his own, such as professional counsel, collectors, bookkeepers, etc., who respond to him alone for their acts, and for whose acts he as principal must answer.[65] Nevertheless, since an executor is unable to contract with himself as president of a company, he cannot as executor give a valid power of attorney to the company.[66]

Ratification. An executor may ratify a contract made by his attorney or agent so as to bind himself,[67] but he cannot ratify an act which he himself had no authority to do.[68]

§ 147. Supervision and Guidance of Courts

a. In general
b. Exercise of jurisdiction

a. In General

The courts have supervisory jurisdiction over executors and administrators.

An executor or administrator is frequently regarded as a creature or officer of the court.[69] He is subject to the direction, supervision, and control of the court[70] until the estate is closed and he is

of beneficiaries.—In re Israel's Estate, 2 N.Y.S.2d 170, 166 Misc. 156, affirmed 12 N.Y.S.2d 240, 256 App Div. 1063, reargument denied 12 N.Y.S.2d 782, 257 App.Div. 817.

59. Mass.—Haskell v. Hill, 47 N.E. 586, 169 Mass. 124.
23 C.J. p 1173 note 40.

60. Cal.—Wilkinson v. Zumwalt, 297 P. 94, 112 Cal.App. 416.
N.Y.—In re Guggino's Estate, 4 N.Y.S.2d 400, 166 Misc. 426.
23 C.J. p 1173 note 41.
Right to grant proxy to vote corporate stock see Corporations § 550 d.

Duty to apply income
N.Y.—In re Quinlan's Estate, 264 N.Y.S. 257, 147 Misc. 483.

Discretionary powers conferred by will may not be delegated.—Fite v. Brevoort, Civ.App., 90 S.W.2d 913, reversed on other grounds First Nat. Bank v. Fite, 115 S.W.2d 1105, 131 Tex. 523.

Duty as trustee
(1) Ordinarily, trust confided to executor for purpose collateral to that of mere administration of estate is personal to such appointee and cannot be exercised by any other person.—State ex rel. and to Use of Bremer v. Schulte, Mo.App., 90 S.W.2d 1078.

(2) Executors and administrators as trustees see the C.J.S. title Trusts §§ 239–243, also 65 C.J. p 639 note 63 et seq.

61. Mont.—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
23 C.J. p 1173 note 41.

Liability for acts of agents
Executor is responsible for acts of agents pertaining to administration of estate.—In re Istocin's Estate, 190 A. 382, 126 Pa.Super. 158—In re Bernhard's Estate, 17 Leh.L.J., Pa., 310—In re Waelly's Trust Fund, 85 Pa.L.J. 702.

62. Mich.—Cheever v. Ellis, 96 N.W. 1067, 134 Mich. 645.

63. N.Y.—In re Whipple's Estate, 19 N.Y.S.2d 105.

64. N.Y.—In re Whipple's Estate, supra.

Limited right of delegation
Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

Ministerial or mechanical acts
Tex.—Fite v. Brevoort, Civ.App., 90 S.W.2d 913, reversed on other grounds, First Nat. Bank v. Fite, 115 S.W.2d 1105, 131 Tex. 523—Rice v. Conwill, 80 S.W. 393, 35 Tex.Civ.App. 341, 342.

65. Md.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.
23 C.J. p 1174 note 43.

66. N.Y.—Matter of Bensel, 124 N.Y.S. 726, 68 Misc. 70.

67. N.Y.—Newton v. Bronson, 13 N.Y. 587, 67 Am.D. 89.
Tex.—Dyer v. Winston, 77 S.W. 227, 33 Tex.Civ.App. 412.
23 C.J. p 1174 note 45.

68. Tex.—Rice v. Conwill, 80 S.W. 393, 35 Tex.Civ.App. 341.

69. U.S.—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279.
Colo.—People v. Cartwright, 63 P.2d 454, 99 Colo. 437.
Ind.—Department of Financial Institutions v. Kaufman, 30 N.E.2d 978.
Mo.—Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.
Neb.—In re Rhea's Estate, 253 N.W. 876, 126 Neb. 571.
S.C.—McNair v. Howle, 116 S.E. 279, 123 S.C. 252.
Wash.—In re Maher's Estate, 79 P.2d 984, 195 Wash. 126, 117 A.L.R. 91.
"Executor" and "administrator" defined see supra § 3.

As quasi-court officer
Executor is quasi-court officer owing duty to stand in testator's place and administer estate as directed by court.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.

70. Cal.—In re De Barry's Estate, 111 P.2d 728, 43 Cal.App.2d 715—In re Maddalena's Estate, 108 P.2d 17, 42 Cal.App.2d 12.
Colo.—People v. Cartwright, 63 P.2d 454, 99 Colo. 437.
Ga.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.
Ill.—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill.App. 272.
Me.—Moore v. Emery, 18 A.2d 781.
Mo.—State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo. App. 870.
Neb.—In re Rhea's Estate, 253 N.W. 876, 126 Neb. 571.
N.Y.—In re Adler's Estate, 299 N.Y.S. 542, 164 Misc. 544—In re Baldwin's

finally discharged.[71] It is the duty of the court to supervise and control the actions of the representative;[72] the court must see to it that the representative discharges his duty faithfully and diligently,[73] that he acts in accord with law, equity, and good conscience,[74] and that there is no loss or spoliation of the estate with either good or ill intent.[75]

Will, 284 N.Y.S. 761, 157 Misc. 536—In re Enright's Estate, 267 N.Y.S. 483, 149 Misc. 353.
N.C.—London v. Pelchenan, 151 S.E. 189, 198 N.C. 225.
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing, 65 P.2d 1395, 156 Or. 333.
Tex.—Fryckberg v. Scott, Civ.App., 218 S.W. 21, error refused.
Wash.—Harden v. State Bank of Goldendale, 203 P. 16, 118 Wash. 234.
Wis.—In re Zartner's Will, 198 N.W. 363, 183 Wis. 506—In re Sipchen's Estate, 193 N.W. 385, 180 Wis. 504.
23 C.J. p 1175 note 48.
Jurisdiction of court with respect to investments see infra § 206.

Discretionary power

Probate courts are vested with large discretionary power to control executors and administrators in administration of estates.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333—In re Faulkner's Estate, 65 P.2d 1045, 156 Or. 23.

Approval or disapproval of acts

(1) Executor or administrator can act only with consent and approval of court.—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553.

(2) Probate court is the tribunal to approve or disapprove if administrators neglect to procure authorization to perform acts.—In re Maddalena's Estate, 108 P.2d 17, 42 Cal.App.2d 12.

Acts on behalf of corporation

(1) Surrogate has jurisdiction to inquire into conduct of executors as directors of domestic corporation, stock in which is estate's only property, and hold them liable for injury to estate.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

(2) Where all stock in corporation was owned by decedent and passed to his fiduciaries, court has power to order fiduciaries to take corporate action to extent necessary to adjust respective rights of remaindermen and of income beneficiaries, and to compel observance of state's public policy against income accumulations, as by directing fiduciaries to pay corporate debts out of capital assets only, or to transfer sums paid to estate out of corporate income from estate's capital account to income accounts.—In re Adler's Estate, 299 N.Y.S. 542, 164 Misc. 544.

Dilatory administration

Court has power to make all necessary orders looking to final settlement of estate, if administrator is dilatory.—Hopkins v. Crews, 124 So. 202, 220 Ala. 149.

Nonresident administrator

Administrator of state, although individually nonresident, cannot claim that courts of state have no jurisdiction over him, at least as to property within state.—Faughnan v. Bashlor, 136 S.E. 545, 163 Ga. 525.

Substitution of receiver

Executors, having so conducted themselves in the execution of their trust as to necessitate a court of equity through a receiver to take the estate from their possession and control, may not assert the right to exercise any power conferred on them by the will; but equity, having properly obtained jurisdiction over all interested parties of the estate, is authorized to dispose of it as in fairness and good conscience the facts and circumstances demand, notwithstanding Rev.St. arts 3358, 3374, as to execution of directions in will and power of sale thereby given executors.—Richardson v. McCloskey, Tex.Civ.App., 261 S.W. 801, on other grounds, Com.App., 276 S.W. 680.

Report to court

An administrator must report his proceedings to court, and after court approves his act it adopts it as its own, and it becomes a judicial act.—Rodebeck v. Richardson, 144 N.E. 41, 83 Ind.App. 186.

Restraining action by representative

An action being prosecuted in another state by administratrix, appointed in Iowa, for wrongful death in Iowa of her intestate, in contravention of the public policy declared by Acts 37th Gen.Assem. c 293, may, by the district court sitting in probate, be required to be dismissed by such court's order to the administratrix, the court not being deprived of its jurisdiction thus to control the administratrix by Federal Employers' Liability Act, § 6, as amended.—In re Spoo's Estate, 183 N.W. 580, 191 Iowa 1134.
Jurisdiction in death actions see Death §§ 50, 51.

Executor in individual capacity

The surrogate's court possesses no jurisdiction over an executor in his individual capacity.—In re Sullivan's Estate, 6 N.Y.S.2d 783, 169 Misc. 16, affirmed 8 N.Y.S.2d 533, 255 App.Div. 1008.

71. Colo.—People v. Cartwright, 63 P.2d 454, 99 Colo. 437.

72. Ark.—Thomason v. Phillips, 90 S.W.2d 228, 192 Ark. 107.
S.C.—Hunter v. Boykin, 10 S.E.2d 152, 195 S.C. 23.

Charitable gifts

Where discretionary powers are given an executor to determine the object of charitable testamentary gifts, the powers should be exercised under the direction of the court after reference to the master, especially where the fund, after the powers have been exercised, is to pass out of the jurisdiction of the court.—Pell v. Mercer, 14 R.I. 412.

Violation of duty cannot be approved or ratified by the court.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.

73. Ill.—In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537, modified on other grounds Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248.
Mo.—State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo. App. 870.
N.Y.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.
Pa.—In re Brown's Estate, 135 A. 112, 287 Pa. 499.

Conflicting interest of representative

Where personal representative has apparent interest adverse to natural or selected recipients of testator's bounty, active duty devolves on surrogate to see that such conflicting interest is not validated except on such demonstration as is required of others.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.

Parties to application to compel performance of duty

Application to county court to require executor or other person subject to jurisdiction of court to perform duty imposed on him by statute or by court under authority of statute can be made only by party to proceedings.—First Nat. Bank & Trust Co. v. Stonehouse, 269 N.W. 51, 67 N.D. 11.

74. N.Y.—In re Enright's Estate, 267 N.Y.S. 483, 149 Misc. 353.

75. Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
Neb.—In re Love's Estate, 286 N.W. 381, 136 Neb. 458.
N.Y.—In re Lanza's Estate, 266 N.Y.S. 710, 149 Misc. 95.
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

Guarding interests of minor

Courts should see to it that estates which undergo administration are carefully guarded and preserved,

The supervisory power of the courts over executors and administrators is derived from the jurisdiction of courts of equity in cases of trusts arising in the settlement of estates,[76] and may be exercised by courts of probate only when it is expressly or by necessary implication conferred on them by statute.[77]

b. Exercise of Jurisdiction

(1) In general
(2) Requests for instructions

(1) In General

The supervisory jurisdiction of courts over executors and administrators is exercised with restraint and according to the circumstances of the particular case.

The jurisdiction of the courts to supervise and direct executors and administrators has long been exercised,[78] and may be invoked by a creditor.[79] It is said that the extent and limits of the court's supervisory control are not clearly fixed,[80] but depend on the circumstances of the particular case.[81]

The court will not ordinarily usurp the representative's function of administering the estate to the best advantage of all concerned;[82] and, except in cases of abuse,[83] it will not ordinarily interfere with the discretionary powers conferred on the executor by the will.[84]

A court ordinarily has no power to limit the authority of the representative whose duties and powers are fixed by law;[85] nor has it power ordinarily to violate the provisions of a valid will,[86] although it may relieve an executor from his duty to carry out the provisions of the will if the best interest of the estate is served thereby.[87]

especially where the interests of minor heirs are affected.—In re Love's Estate, 286 N.W. 381, 136 Neb. 458.

76. Mass.—Treadwell v. Cordis, 5 Gray 341.
N.Y.—Horton v. Cantwell, 15 N.E. 546, 108 N.Y. 255.
Jurisdiction of equity over administration of estates see Equity, § 61.

77. Cal.—In re Welch, 42 P. 1089, 110 Cal. 605.
23 C.J. p 1175 note 53.
Jurisdiction of probate courts see Courts §§ 298–304.

78. N.C.—Tayloe v. Bond, 45 N.C. 5.

79. La.—Ford v. Kittredge, 26 La. Ann. 190.

80. Ala.—Clay v. Gurley, 62 Ala. 14.

81. Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

After payment of debts
Where construction of a will or disposition of an estate after all debts have been paid is involved, probate judge must give directions on petition.—In re Workman's Estate, supra.

82. N.Y.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.

83. N.C.—Mountain Park Institute v. Lovill, 153 S.E. 114, 198 N.C. 642.
23 C.J. p 1176 note 56 [a] (2).

What constitutes abuse
The rule that, where executors are given unlimited discretion, the court will not usually interfere is subject to many exceptions, and, although merely convincing the court that time for sale or partition is at hand, is not sufficient for complaining legatee to prevail, actual fraud on the part of the executors need not be shown, and, if executors refrain from conversion and partition bona fide, but for a reason which is not in the interests of the beneficiaries, the court may control their judgment.—Canda v. Canda, Ch., 113 A. 503, affirmed 112 A. 727, 92 N.J. Eq. 423, 13 A.L.R. 1029.

Provision in will denying review by courts
(1) Although a will directed that appraisement and distribution by the executors could not be questioned or reviewed by the courts, any party in interest may procure such review.—Nixon v. Nixon, 109 N.E. 294, 268 Ill. 524.

(2) A testamentary provision that the decision of the executors "shall be final and conclusive" on all matters in the will is insufficient to prevent a review by the court.—Reilly's Estate, 6 North.Co. 385.

84. Ill.—Cannon v. Garrett, 268 Ill. App. 18.
N.J.—Canda v. Canda, Ch., 113 A. 503, affirmed 112 A. 727, 92 N.J.Eq. 423, 13 A.L.R. 1029.
N.Y.—In re Martin's Will, 281 N.Y. S. 163, 245 App.Div. 120, reversed on other grounds 199 N.E. 491, 269 N.Y. 305.
Ohio.—In re Ellis' Estate, 32 N.E.2d 23, 66 Ohio App. 121.
23 C.J. p 1176 note 56 [a] (1), (3).
"The court may interfere only in case the executor has proceeded from selfish, corrupt, or improper motives."—In re DeBancourt's Estate, 272 N. W. 891, 895, 279 Mich. 518, 110 A.L.R. 1346.

In absence of fraud court cannot interfere with executors within discretion given by will.—In re Johnson's Estate, 266 N.Y.S. 215, 148 Misc. 738.

Undue interference
Decree requiring executor to confer with life tenant and to investigate available investments, and providing for notice and hearing for guidance of executor, unduly hampered executor's discretion.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.

Burden of proof
Where executor is vested by will with discretion, burden is on legatee, who wishes court to interfere to prove and establish that executor has proceeded from selfish, corrupt, or improper motives.—In re DeBancourt's Estate, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.

85. Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.
Tex.—Ragsdale v. Prather, Civ.App., 132 S.W.2d 625, error refused.

86. Tex.—Johnson v. Coit, Civ.App., 48 S.W.2d 397.

Performance of duties contrary to will
Court cannot direct executors to perform their duties in manner contrary to will, although all parties concerned are in court competent to and do consent.—Holden v. Morgan, 169 A. 546, 115 N.J.Eq. 59.

87. N.Y.—In re Casper's Estate, 18 N.Y.S.2d 82, 259 App.Div. 56, reversing In re Casper's Will, 292 N. Y.S. 415, 161 Misc. 461.

Power cautiously exercised
N.Y.—In re Casper's Estate, supra.

Mistake in will
Power of court to relieve executors of the duty of compliance with will should be invoked when it develops that error in the will, if confirmed, will result not only in the destruction of a substantial part of the testamentary provision for disposition of the estate, but in unjust enrichment of one claiming a benefaction unintended.—In re Casper's Estate, supra.

To prevent financial loss
Where the intervention and exer-

The direction of the court properly obtained will protect the representative in his acts done pursuant thereto,[88] but the court cannot confer powers which are denied by law.[89]

The propriety of past conduct of the representative should not be passed on until the termination of the trust or an accounting.[90] It cannot be raised on a petition for instructions.[91]

(2) Requests for Instructions

The representative of a decedent's estate may apply to the court for direction and guidance when he is reasonably in doubt as to the extent of his duties or the manner in which to proceed.

As a rule the courts will not of their own motion interfere with advice and directions in the details of management of decedent's estate, but will rather review the representative's whole course of conduct, should a contest arise, on his due accounting and settlement.[92]

An executor or administrator has the right to apply to the courts for direction and guidance in the performance of the duties of his office or trust, when he is in doubt as to the extent of his powers and duties or as to the proper manner in which to proceed,[93] especially, and statutes sometimes so provide, in the case of a will the provisions of which

cise of the equitable powers of the court are required to prevent financial loss and destruction of a decedent's estate, being administered under his will, the court may modify the terms of the trust to such an extent as may be found necessary to prevent loss and destruction of the estate property.—In re Listman's Estate, 197 P. 596, 57 Utah 471.

88. N.H.—Bisson v. Gosselin, 6 A.2d 766, 90 N.H. 273.
23 C.J. p 1175 note 54.
"Executors were entitled to heed the advice of the judges of the court wherein the estate was pending."—State ex rel. Rosenbrock v. Wilson, 14 N.E.2d 319, 106 Ind.App. 357.

89. Miss.—Alexander v. Herring, 55 So. 360, 99 Miss. 427.

90. N.J.—Tierney v. Tierney, Ch., 38 A. 971.
23 C.J. p 1176 note 63.

91. Del.—Security Trust Co. v. Bulcroft, 187 A. 13, 21 Del.Ch. 242.

92. Mich.—Vernor v. Coville, 20 N. W. 75, 54 Mich. 281.
23 C.J. p 1176 note 56.

93. Cal.—In re Mautner's Estate, 101 P.2d 518, 519, 38 Cal.App.2d 523, citing **Corpus Juris.**
Ky.—Patterson's Ex'r v. Dean, 44 S. W.2d 565, 241 Ky. 671.
Mass.—MacDonald v. MacDonald, 197 N.E. 3, 291 Mass. 299—Putnam v. Collamor, 109 Mass. 509.
N.Y.—In re Foster's Estate, 19 N.Y. S.2d 349, 173 Misc. 1024.
N.C.—In re Mizzelle's Estate, 196 S.E. 364, 213 N.C. 367—London v. Pelchenan, 151 S.E. 189, 198 N.C. 225—First Security Trust Co. v. Lentz, 145 S.E. 776, 196 N.C. 398—Daniel v. Bass, 136 S.E. 733, 193 N.C. 294.
Or.—In re Workman's Estate, 68 P. 2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.
Tenn.—Commerce Union Bank v. Gillespie, 156 S.W.2d 425.
Wis.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.
23 C.J. p 1174 note 47—21 C.J. p 180 note 18.

Instructions as to distribution of estate see infra § 482.

Purpose of bill

Bills for direction and advice are maintainable only by fiduciaries such as executors, with regard to questions necessarily arising in the administration of their trusts, and are designed to furnish protection to the fiduciaries in the discharge of their duties and to facilitate the execution of trusts.—Bisson v. Gosselin, 6 A.2d 766, 90 N.H. 273.

Nature of proceeding

Proceeding to procure surrogate's advice is independent of probate proceeding, and should be subsequently brought under statute in course of administration by executor holding letters testamentary.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.

Proceeding as equitable

Where the proceeding instituted by an administrator was in the nature of an application to the court for direction, and was an attempt specifically to enforce, as against the widow, the provisions of an alleged antenuptial contract, the proceeding was in the nature of specific performance, and relief could only be granted by a court of equity.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.

Premature request

Administrator's request for instructions as to investments and payments after death of testatrix' surviving father, to whom will directed annual payment of stated sum, was properly denied as premature.—Casey v. Genter, 176 N.E. 782, 276 Mass. 165.

Procedure

(1) An executor, desiring to obtain the instructions of the court, should bring a bill in equity, and not a petition.—Gibbons v. Shepard, 125 Mass. 541.

(2) In suit by executors for advice, considerable latitude may properly be allowed in giving scope to questions propounded, where to do so places no unfair burden on the parties and they have not been in any way misled as to the issues to be presented to the court.—First Nat. Bank & Trust Co. v. Baker, 1 A.2d 283, 124 Conn. 577, 118 A.L.R. 339.

(3) Facts relied on by either party as aid to interpretation of will must be incorporated in record to obtain consideration by court of chancery.—Equitable Trust Co. v. Pyle, Del.Ch., 2 A.2d 81.

(4) Where bill failed to allege existence of facts on which opinion of court was desired, instructions could not be rendered based upon statements of fact in brief of trustees and executors, since case does not gather its facts from the briefs.—Equitable Trust Co. v. Pyle, supra.

(5) Weight of testimony was for probate judge on executor's petition for instructions.—Ferguson v. South Dartmouth Cemetery Ass'n, 163 N.E. 877, 265 Mass. 285.

Costs

(1) Costs in such proceedings are usually in the discretion of the court.—In re Miller's Estate, 4 N.Y.S.2d 671, 167 Misc. 721.

(2) Where opposition interposed to application of temporary administrators for instructions bordered on the vexatious, the cost of the application was awarded against the opposing party.—In re Miller's Estate, supra.

(3) On report by judge of probate of questions of law presented by executors of will, allowance of costs and expenses as between solicitor and client was in probate court's discretion.—Smith v. Livermore, 10 N.E.2d 117, 298 Mass. 223.

(4) On executor's petition for instructions, there being real controversy, probate court did not abuse discretion in allowing costs to unsuccessful legatee, payable from estate.—First Nat. Bank v. Perkins Institute for the Blind, 176 N.E. 532, 275 Mass. 498.

Review

(1) The denial of a petition by an administrator for leave to expend

are ambiguous or doubtful or difficult to construe,[94] provided, however, the question involved is not one which should properly be submitted in another proceeding.[95]

The right to apply for advice is held to exist only so far as is necessary to guide the representative in the administration of the estate,[96] and where instructions are asked by the representative, it is not obligatory on the court to give them, but whether it will advise or direct is a matter of discretion.[97] If the representative's duty is clear, the court will not entertain a petition for instructions,[98] nor will it do so where there is no uncertainty or doubt as to the meaning of the will.[99] Instructions concerning matters calling for administrative or business judgment will not ordinarily be given,[1] unless the circumstances are unusual and peculiar, making it unsafe for the representative to proceed in the ordinary business way,[2] and it is sometimes said that only where unusual or peculiar circumstances exist will the court give advice concerning questions arising during the period of administration.[3] The court will not take the place of counsel to act as general legal adviser to the administrator,[4] nor will it con-

funds of the estate for the erection of a monument cannot be reviewed except for an abuse of discretion.—In re Gray's Estate, 91 N.E. 745, 46 Ind.App. 24.

(2) On appeal from decree instructing executors as to will heard by supreme judicial court on a transcript of the evidence and a report of the material facts, supreme judicial court was under duty to examine the evidence and come to its own conclusions, but it would not set aside findings of trial judge unless they were shown to be plainly wrong.—Adams v. Adams, 33 N.E.2d 314, 308 Mass. 584.

(3) If appellant believed that report of material facts was not sufficiently full, he should have requested trial judge to amplify his findings.—Adams v. Adams, supra.

Executor as trustee

(1) Where three of four executors were also trustees under trust deed, suit was properly brought in equity for instructions as to fund chargeable with federal estate tax imposed on the property passing under the trust deed, as the trustees could not at law sue themselves.—Bemis v. Converse, 140 N.E. 686, 246 Mass. 131.

(2) In suit by executors, three of whom were also trustees under trust deed, for instructions as to fund chargeable with federal estate tax imposed on the trust property, they properly presented conflicting contentions made in their different capacities through different counsel, and joined as defendants the various beneficiaries, thus permitting them to set up their own contentions.—Bemis v. Converse, supra.

Change in amount of trust fund

Proceeding to put amount in trust fund to furnish legatee annuity bequeathed by will, where securities provided by testator had depreciated to an extent whereby the income therefrom was insufficient to pay annuity, was properly brought by administrator with the will annexed of testator by asking for instructions in the premises so that he might safely proceed.—In re Burton's Will, 281 N.Y.S. 579, 156 Misc. 175.

Representative not to take sides

Representative petitioning for construction of residuary clause of will has no interest other than to be duly advised and instructed and has no right to seek particular construction among conflicting positions which might be taken.—Bisson v. Gosselin, 6 A.2d 766, 90 N.H. 273.

94. Cal.—In re Mautner's Estate, 101 P.2d 518, 38 Cal.App.2d 523.
Ga.—Moss v. Youngblood, 200 S.E. 689, 187 Ga. 188—Goree v. Georgia Industrial Home, 200 S.E. 684, 187 Ga. 368—Morris v. Morris, 195 S. E. 734, 185 Ga. 533—Mobley v. Personious, 157 S.E. 294, 172 Ga. 261.
Right of representative to construction of will see the C.J.S. title Wills § 1083, also 69 C.J. p 872 note 85-p 873 note 95.

Executor legatee

Under statute providing that, in cases of difficulty in construing wills, representative may ask directions of the court, an executor may bring petition for construction of will notwithstanding executor may be a legatee under will.—Watts v. Finley, 1 S. E 2d 723, 187 Ga. 629.

Cross petition proper

Ga.—Jones v. Nisbet, 142 S.E. 164, 165 Ga. 826.

95. Bill for instructions treated otherwise

(1) Bill by executor for direction as to right to bonds in possession of testator's niece could be sustained as bill to compel restoration or set aside gift.—McConnel v. Stryker, 147 A. 44, 104 N.J. 610.

(2) In such case, the executor's pleadings seeking direction of court should be amended before decree to show claim for restoration of property.—McConnel v. Stryker, supra.

(3) In executor's suit for directions as to bonds in possession of testator's niece, counsel for other legatees could object to testimony, where the proceeding is treated as one for the restoration of property.—McConnel v. Stryker, supra.

96. N.J.—Brunyate v. Chandler, 132 A. 517, 99 N.J.Eq. 67.
21 C.J. p 130 note 20.

Estates or powers of legatees

Where will gave residue of estate to wife with conditions if she should remarry, the wife, who was also the executrix, could not maintain proceedings in her fiduciary capacity for instructions as to the estates and powers intended to be vested in the legatees of the residue.—Wallace v. Brown, 3 A.2d 95, 89 N.H. 561.

97. N.J.—Brown v. Brown, 65 A. 739, 72 N.J.Eq. 667, 670.
23 C.J. p 1176 note 59.

98. Ga.—Kaiser v. Kaiser, 173 S.E. 688, 178 Ga. 355.

99. N.J.—Holden v. Morgan, 169 A. 546, 115 N.J.Eq. 59.

1. N.Y.—In re Griffin's Estate, 20 N. Y.S.2d 922—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76—In re Weissman's Will, 250 N.Y.S. 500, 140 Misc. 360.
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

Matters of discretion

The court will not give advice as to matters involving discretion of the representative where legal considerations are not present.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.

Testator's intention from will that executor should conduct business affairs of estate must be respected.—In re Weissman's Will, 250 N.Y.S. 500, 140 Misc. 360.

2. N.Y.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.
Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

3. N.Y.—In re Griffin's Estate, 20 N. Y.S.2d 922.

4. Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.
23 C.J. p 1176 note 58.

Matter of procedure

In action by surviving wife to recover amount of bank deposit which was in name of husband or wife at

sider abstract or moot questions,[5] and it has been said that such application for instructions ought not to be favored, except where great interests are involved and a decision in the ordinary course of litigation would be attended with great inconvenience, delay, and expense.[6]

Duty of representative to request instructions. Sometimes it is the duty of the representative to seek direction and guidance from the court,[7] and he should apply if he is in doubt as to his duties or the policy to follow,[8] particularly if the security of the estate is affected thereby.[9] However, he is not always obliged to seek the assistance of the court,[10] and is not usually chargeable with mismanagement for acting without an order of court, if his act caused no injury or was such as the court would have ordered done.[11]

Instructions on application of legatee. The court will not give instructions to an executor or administrator merely on the application of a legatee or the personal representative of a legatee.[12]

§ 148. Submission to Arbitration or Reference

The representative may ordinarily agree to submit claims in favor of or against the estate to arbitration or reference.

The personal representative has, as a rule, the right to agree to submit to an arbitration[13] or reference[14] as to claims in favor of[15] or against, see infra §§ 442, 443, the estate, but some of the earlier cases, although admitting this power, held that the representative became liable as for waste if the estate was eventually injured by the award.[16]

§ 149. Confession of Judgment

In a proper case the representative may confess judgment for a debt contracted or obligation incurred by the decedent.

While a confession of judgment by an executor or administrator has been regarded with disfavor, and has resulted in a charge against him de bonis propriis,[17] there is authority for the view that in a proper case the representative may confess judgment for a debt contracted or obligation incurred by decedent with the effect of binding the estate,[18]

time of husband's death, expediency of lodging objection to wife's testimony relative to transactions, between herself and husband, was for determination of administrator who had duty to bear in mind that he represented interests of husband's next of kin.—Redmond v. Farthing, 9 S.E.2d 405, 217 N.C. 678.

5. Cal.—Gillette v. Gillett, 10 P.2d 760, 761, 122 Cal.App. 640, quoting **Corpus Juris.**
Del.—Equitable Trust Co. v. Pyle, Ch., 2 A.2d 81.
21 C.J. p 130 note 22.

Existing facts as necessary
Court will not answer questions in bill for instructions by executors unless facts are shown to have actually arisen making questions ones of present exigency.—Equitable Trust Co. v. Pyle, supra.

Present duties
(1) Instructions to executors can be obtained only as to present duties.—Swift v. Crocker, 159 N.E. 919, 262 Mass. 321—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39—Murray v. Roman Catholic Home for Orphans, 122 N.E. 557, 232 Mass. 384—Hall v. Cogswell, 67 N.E. 644, 183 Mass. 521.

(2) Executor will not be instructed as to charitable trust in home, where life tenant was living and had not released right to occupy home.—Swift v. Crocker, supra.

6. Conn.—Crosby v. Mason, 32 Conn. 482.
Ga.—De Vane v. De Vane, 102 S.E. 145, 149 Ga. 783.
23 C.J. p 1176 note 60.

7. Wis.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.

Rights as to income
Executors were bound to obtain chancellor's advice as to life tenants' rights to income during administration period without unreasonable delay, where there was doubt as to such rights.—Grainger's Ex'rs and Trustees v. Pennebaker, 56 S.W.2d 1007, 247 Ky. 324.

8. Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341.
Me.—Moore v. Emery, 18 A.2d 781.

9. Or.—In re Workman's Estate, 68 P.2d 479, 156 Or. 333, denying rehearing 65 P.2d 1395, 156 Or. 333.

10. Pa.—In re Stahl, 11 York.Leg. Rec. 105.

11. Miss.—Henry v. Henderson, 33 So. 960, 81 Miss. 743, 63 L.R.A. 616.
23 C.J. p 1176 note 62.

12. Del.—Miller v. Cooch, 5 Del.Ch. 161.

13. Del.—Lank v. Kinder, 4 Del. 457.
23 C.J. p 1176 note 65.

Basis of right
Right is based on power to prosecute or defend suits.—Kendall v. Bates, 35 Me. 357—23 C.J. p 1177 note 68 [a].

14. Me.—Kendal v. Bates, 35 Me. 357.
Vt.—Boynton v. Boynton, 10 Vt. 107.
23 C.J. p 1177 note 66.

15. Iowa.—In re Scholes, 152 N.W. 3, 170 Iowa 93.

16. Mass.—Bean v. Farnam, 6 Pick. 269.
23 C.J. p 1177 note 69.

17. N.C.—Hall v. Craige, 65 N.C. 51, 68 N.C. 305.
23 C.J. p 1177 note 70.

18. Cal.—Hollyfield v. Geibel, 66 P. 2d 755, 20 Cal.App.2d 142.
Pa.—O'Hara v. Manley, 12 A.2d 820, 140 Pa.Super. 39.
23 C.J. p 1177 note 71—24 C.J. p 878 note 71.
Judgment by confession or default see infra § 794.

Power under will
(1) Generally.—Miller v. Ege, 8 Pa. 352.

(2) Under will authorizing executrix to sell and convey land "by warranty deed or otherwise," to discharge liens or for other purposes, executrix had power, in a proceeding instituted with her sanction and approval, in which she entered appearance for infant devisees, to agree to the entry of what amounted to a consent decree approving foreclosure sale and the execution of a commissioner's deed to purchaser at such sale.—Wirtz v. Gordon, 184 So. 798, 187 Miss. 866, reinstated, 192 So. 29, 187 Miss. 866, certiorari denied Gordon v. Wirtz, 60 S.Ct. 616, 309 U.S. 630, 84 L.Ed. 988.

(3) A request by mortgagor's executrix, as defendant in foreclosure

or in the absence of statutory restriction, by confessing judgment in favor of a creditor, give him a preference over other creditors of the same class.[19]

Where, however, executors confess judgment for a debt of their testator, on a miscalculation of the amount of the assets in their hands, and with a full understanding of their personal liability in case of a deficiency of assets, they will not be relieved in equity against the judgment after it appears that the assets are insufficient to satisfy it.[20]

§ 150. Estoppel

A representative of a decedent's estate in his official capacity is bound by the laws of estoppel, although his official acts ordinarily will not estop him as an individual and his individual acts usually do not estop him in his official capacity.

An executor or administrator, in his capacity as such, is as much bound by the laws of estoppel as though he were acting in his individual capacity.[21] However, unauthorized acts of the representative cannot bind the estate or give rise to an estoppel against it;[22] and except where his acts as a representative and as an individual are so closely connected and associated that it is impossible to distinguish his actions in one capacity from the other,[23] or where his acts as a representative have resulted or will result in his individual profit,[24] acts of an executor or administrator in his representative capacity will not bind or estop him in his individual capacity,[25] and conversely, except where the estoppel is based on, and can be supported by, equities against the estate,[26] his acts as an individual cannot operate as an estoppel against him in his representative capacity.[27]

The laws of estoppel may also operate in favor

proceeding, that the foreclosure sale be confirmed and commissioner's deed be executed, had the same legal efficacy as if executrix had been a petitioner instead of a defendant, asking for a decree sanctioning a sale authorized under the will.—Wirtz v. Gordon, supra.

19. U.S.—Wilson v. Wilson, C.C.D.C., 30 F.Cas.No.17,848, 1 Cranch C.C. 255.
23 C.J. p 1177 note 72.

20. Va.—Freelands v. Royall, 2 Hen. & M. 575, 12 Va. 575.

21. Ark.—Franklin Fire Ins. Co. v. Holmes, 69 S.W.2d 281, 188 Ark. 1053.
Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.
Ga.—Vick v. Georgia Power Co., 174 S.E. 713, 178 Ga. 869.
Kan.—Wilson v. Stephenson, 53 P. 2d 874, 143 Kan. 91.
Neb.—Blochowitz v. Blochowitz, 266 N.W. 644, 130 Neb. 789.
Wash.—National Grocery Co. v. Kotzebue Fur & Trading Co., 100 P.2d 408, 414, 3 Wash.2d 288, citing **Corpus Juris.**
23 C.J. p 1178 note 74.

Estoppel:
Of representative by acts of decedent see Estoppel § 132.
To assert ownership of property against estate see supra § 128.

Circumstances raising estoppel
Mo.—Nord v. Nord, App., 91 S.W.2d 223.
N.J.—Basen v. Clinton Trust Co., 181 A. 67, 115 N.J.Law 546, reversing 177 A. 675, 13 N.J.Misc. 252.
N.Y.—Weitling v. Sorenson, 5 N.Y.S. 2d 79, 254 App.Div. 539—In re Gavey's Estate, 263 N.Y.S. 784, 147 Misc. 332.
N.C.—Citizens' Bank v. Grove, 162 S. E. 204, 202 N.C. 143.
Tenn.—Gibson v. Parkey, 217 S.W. 647, 142 Tenn. 99.
Tex.—Second Nat. Bank v. Ford, 123 S.W.2d 867, 132 Tex. 448, reversing Ford v. Second Nat. Bank, Civ. App., 100 S.W.2d 1112.
Wash.—National Grocery Co. v. Kotzebue Fur & Trading Co., 100 P.2d 408, 3 Wash 2d 288.
23 C.J. p 1178 note 74 [a].

Circumstances not raising estoppel
Ky.—Ford's Adm'x v. Bank of Hartford, 63 S.W.2d 967, 250 Ky. 793.
Miss.—Donald v. Hattiesburg Building & Loan Ass'n, 158 So. 482, 171 Miss. 763.
Okl.—Dikeman v. Graymountain, 51 P.2d 529, 175 Okl. 83.
Pa.—In re Curtis' Estate, 31 D. & C. 267, affirmed 3 A.2d 980, 134 Pa. Super. 364, affirmed 6 A.2d 283, 335 Pa. 414
Tex.—Pottinger v. Southwestern Life Ins. Co., Civ.App., 138 S.W.2d 645.
Wis.—Central Wisconsin Trust Co. v. Shumacher, 284 N.W. 562, 230 Wis. 591.
23 C.J. p 1178 note 74 [b].

Estate may be estopped by acts, conduct, or omissions of executor or administrator in his representative capacity.
Tex.—Baber v. Houston Nat. Exch. Bank, Civ.App., 218 S.W. 156, error refused.
Wash.—National Grocery Co. v. Kotzebue Fur & Trading Co., 100 P.2d 408, 3 Wash.2d 288.

Violation of duty is essential element
Tex.—Pottinger v. Southwestern Life Ins. Co., Civ.App., 138 S.W.2d 645.

22. Cal.—Lyon v. Goss, App., 115 P.2d 886—Gray v. Magee, 292 P. 157, 108 Cal.App. 570.

Admission of discharged representative is not binding on estate.—Ewing v. Tanner, 193 S.E. 243, 184 Ga. 773.

Sanction of court as necessary
Declaration or promise by executor is not binding on estate until it is sanctioned by proper court.—First Trust Co. of Lincoln v. Cornell, 206 N.W. 749, 114 Neb. 126.

23. Va.—Thomasson v. Walker, 190 S.E. 309, 168 Va. 247, 110 A.L.R. 593.

24. W.Va.—Yokum v. Yokum, 157 S. E. 579, 110 W.Va. 221.

Representative estopped as heir or legatee
Ark.—Edmondson v. Boyd, 120 S.W. 2d 561, 196 Ark. 954.
N.H.—Phinney v. Cheshire County Sav. Bank, 16 A.2d 363, 91 N.H. 184.

25. Va.—Thomasson v. Walker, 190 S.E. 309, 168 Va. 247, 110 A.L.R. 593.
21 C.J. p 1184 note 65.

26. Cal.—Lyon v. Goss., App., 115 P. 2d 886.

27. Ala.—Mazer v. City Nat. Bank of Tuscaloosa, 146 So. 885, 886, 25 Ala.App. 372, citing **Corpus Juris.**
Cal.—Lyon v. Goss, App., 115 P.2d 886.
Ga.—White v. Roper, 167 S.E. 177, 176 Ga. 180.
Neb.—State ex rel. Sorensen v. Citizens' State Bank of Wahoo, 254 N.W. 402, 405, 126 Neb. 756, citing **Corpus Juris**—First Trust Co. of Lincoln v. Cornell, 206 N.W. 749, 114 Neb. 126.
Tenn.—King v. Richardson, 7 Tenn. App. 535.
Va.—Thomasson v. Walker, 190 S. E. 309, 168 Va. 247, 110 A.L.R. 593.
21 C.J. p 1184 note 64.

Executor's agent acting independently
Ala.—Mazer v. City Nat. Bank of Tuscaloosa, 146 So. 885, 25 Ala. App. 372.

of an executor or administrator against other persons.[28]

§ 151. Powers before Qualification

a. In general
b. Relation back of letters

a. In General

The representative ordinarily cannot exercise his powers freely until he has qualified, although he is usually permitted to take such steps as are necessary to prevent dissipation of the estate.

Although the executor has been, and in some jurisdictions still is, somewhat favored in this respect,[29] in many jurisdictions, sometimes by reason of statute, neither executor nor administrator is entitled to exercise power freely as such until he has been duly qualified by giving bond or otherwise, as local statute may direct.[30] However, notwithstanding the representative's want of authority to receive assets before appointment, his taking possession of the estate and dealing therewith for purposes of immediate protection, custody, and management is somewhat favored in practice, and to some extent has sometimes been authorized by statute,[31] and for whatever assets he thus receives he is chargeable in his representative capacity when his appointment becomes completed.[32]

For acts which the representative could not properly do after qualifying he may be held personally liable for performing before qualifying.[33] One who undertakes to discharge and settle accounts of the estate before he is appointed and duly qualified as executor or administrator does so without legal authority and at his peril, and will after his appointment be held responsible for his acts.[34]

One who, before he was appointed executor of an estate, promised for the purposes of an amicable settlement of all questions as to the probate and validity of a certain will that he would, when appointed as executor, make certain payments to the heirs and distributees was bound individually by the agreement when, as a result of the contract, he became executor.[35]

Power to sue and be sued. While it has been said that at common law an executor named in a will could maintain an action in behalf of the es-

Neb.—First Trust Co. of Lincoln v. Cornell, 206 N.W. 749, 114 Neb. 126.

28. U.S.—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, and conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602.
Colo.—London Option Gold Mining Co. v. Dempsey, 66 P.2d 327, 100 Colo. 156.
23 C.J. p 1179 note 79.

Heirs, devisees, or distributees may be estopped by their own acts
Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.
Iowa.—In re Olson's Estate, 219 N.W. 401, 206 Iowa 706.
23 C.J. p 1179 note 79 [a].

Elements of estoppel lacking
U.S.—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, and conformed to, D.C., Hanson v. Bruun, 30 F. Supp. 602.

29. N.Y.—Denton v. Sanford, 9 N.E. 490, 103 N.Y. 607.
23 C.J. p 1179 note 80.

At common law an executor could at once proceed to do those things which appertained to his office, without waiting for the court's confirmation of his appointment by the will.
N.Y.—Dodd v. Anderson, 115 N.Y.S. 688, 131 App.Div. 224, affirming 112 N.Y.S. 414.
Va.—Harris v. Citizens' Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

30. Iowa.—Gardner v. Beck, 189 N. W. 962, 195 Iowa 62.
La.—Succession of Brierre, 135 So. 762, 19 La.App. 400, affirmed 140 So. 488, 174 La. 314.
Mich.—Wagner v. La Croix' Estate, 286 N.W. 182, 289 Mich. 126—Nelson v. Scofield, 189 N.W. 185, 219 Mich. 595.
N.Y.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.
Pa.—Lowrie v. Dollar Savings & Trust Co., 109 A. 607, 266 Pa. 135.
Va.—Harris v. Citizens' Bank & Trust Co., 200 S.E. 652, 172 Va. 111.
23 C.J. p 1179 note 81.

Tutor
La.—Succession of Brierre, 135 So. 762, 19 La.App. 400, affirmed 140 So. 488, 174 La. 314.

Estate not bound by acts done by representative prior to qualification.
Iowa.—Gardner v. Beck, 189 N.W. 962, 195 Iowa 62.
Mich.—Wagner v. La Croix' Estate, 286 N.W. 182, 289 Mich. 126.
Tex.—Crow v. Day, Civ.App., 96 S. W.2d 100.

Appointment of agent inoperative.—Mobley v. Mobley, 131 A. 770, 149 Md. 401.

Rights and duties of an executor do not begin until after the death of the testator on the grant of letters testamentary.—In re Brown's Estate, 200 A. 940, 131 Pa.Super. 463.

31. N.Y.—Boyer v. Marshall, 5 N. Y.St. 431.
Pa.—Leber v. Kauffelt, 5 Watts & S. 440.
Va.—Harris v. Citizens' Bank & Trust Co., 200 S.E. 652, 172 Va. 111.
23 C.J. p 1180 note 82.

Acts favorable to estate
Under a statute authorizing nominated executor to interfere with estate to the extent necessary for its preservation, executors who exercised valuable rights to subscribe for stock before issuance of letters executory, instead of allowing such rights to be lost, acted for best interests of estate.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

Imperative matters
The testamentary appointment of one competent to act as executor makes him a representative of the estate in matters in which he is merely passive and authorizes him to act in matters of an imperative nature.—Beckman v. Owens, 5 A.2d 626, 135 Pa.Super. 404, followed in Pennsylvania Trust Co. of Scranton v. Owens, 5 A.2d 628, 135 Pa.Super. 409.

32. Ind.—Alerding v. Allison, 83 N. E. 1006, 170 Ind. 252, 269, 127 Am. S.R. 363, affirming, App., 82 N.E. 934.
23 C.J. p 1180 note 82.

33. Mich.—Wagner v. La Croix' Estate, 286 N.W. 182, 289 Mich. 126.

34. Mass.—Alvord v. Marsh, 12 Allen 603.
23 C.J. p 1180 note 84.

35. Nev.—Painter v. Kaiser, 76 P. 747, 27 Nev. 421, 103 Am.S.R. 772, 65 L.R.A. 672, followed in Esden v. Kaiser, 76 P. 1134, 27 Nev. 432.

tate before probate,[36] as a general rule neither an executor nor an administrator can sue or be sued, either at law or in equity, until he has been duly qualified.[37] However, it is held in some cases that an executor may commence an action and proceed with it to the point where profert of letters testamentary is necessary,[38] and in some jurisdictions it is even held more generally that one nominated by will to be executor may before probate and grant of letters, maintain a bill in chancery to protect the estate from dissipation.[39]

Where the cause of action is founded on actual possession of the executor and accrued to him rather than the testator, the executor may sue thereon prior to probate of the will.[40] It has also been held that in a proceeding to revive a judgment plaintiff is entitled to a writ of scire facias against the persons named as executors in the will of the judgment debtor, although no letters have been issued to them.[41]

b. Relation Back of Letters

On issuance of letters, they relate back to the date of the decedent's death and validate proper or necessary acts of the representative done in the interim.

When letters testamentary or of administration are issued they relate back to the time of decedent's death[42] and validate the acts of the representative done in the interim[43] which are otherwise lawful and proper[44] or necessary to the proper administration of the estate,[45] the doctrine being controlled to some extent by the equities in the case.[46] However, such validation or ratification applies only to acts which might properly have been done by a personal representative and the estate ought not to be bound or prejudiced by wrongful or injurious acts performed before one's appointment.[47]

36. N.J.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J Eq. 333.
N.Y.—Blood v. Waszak, 265 N.Y.S 752, 147 Misc. 729.

37. Ill.—Wheeler v. Chicago Title & Trust Co., 75 N.E. 455, 217 Ill. 128.
N.Y.—Blood v. Waszak, 265 N.Y.S. 752, 147 Misc. 729.
23 C.J. p 1180 note 86.

Before probate of will
N.Y.—Blood v. Waszak, supra.

Writ of attachment improper
N Y —Blood v. Waszak, supra.

38. N.H.—Strong v. Perkins, 3 N. H. 517.
23 C.J. p 1180 note 87.

39. N.J.—First Camden Nat Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333.

Effect of appointment of temporary administrator
Where administrator pendente lite had been appointed pending suit contesting probate of will, danger to estate is not imminent, and preliminary injunction would not be granted in suit by persons nominated as executors of decedent's will to enjoin diversion of funds bequeathed in trust for public charitable purposes as part of an alleged scheme to settle the will contest suit.—First Camden Nat. Bank & Trust Co. v. Wilentz, supra.

40. Mass.—Rand v. Hubbard, 4 Metc. 252.
Tenn.—Baldwin v. Buford, 4 Yerg. 16.
23 C.J. p 1180 note 88.

41. Pa.—Hauck v. Gundaker, 21 Pa. Co. 12.

42. Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159—In re Swartz' Estate, 218 Ill.App. 449.
Mass.—Maskas v. North American Accident Ins. Co., 181 N.E. 750, 279 Mass. 523.
Pa.—In re Purman's Estate, 5 A.2d 906, 334 Pa. 238.
Vt —Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100.
Wyo - Delfelder v. Poston, 293 P. 354, 42 Wyo. 176
23 C.J. p 1181 note 90.
As affecting vesting of title to personal property see supra § 299.
Effect of issuance of letters to executor de son tort see infra § 1067.

Service of process on nominated executor
Relation back doctrine ratifies service of summons on nominated executor before his qualification where statute of limitations operates from time of death of decedent and nominated executor failed to qualify until limitations had almost run —Beckman v Owens, 5 A.2d 626, 135 Pa Super. 404, followed in Pennsylvania Trust Co. of Scranton v. Owens, 5 A.2d 628, 135 Pa.Super. 409.

43. Ala.—McAleer v. Cawthon, 112 So. 251, 253, 215 Ala. 674, quoting **Corpus Juris.**
Cal.—In re Machado's Estate, 199 P. 505, 186 Cal. 246.
Ky —Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74.
Mass.—Maskas v. North American Accident Ins. Co., 181 N.E. 750, 279 Mass. 523.
Wyo —Delfelder v. Poston, 293 P. 354, 42 Wyo. 176.
23 C J. p 1181 note 90.

Notice
(1) Notice to intestate's wife intended as notice to estate was, on her appointment as administratrix, sufficient to bind estate.—Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100.

(2) Notice of dishonor of note to an executor of indorser's estate before he has qualified is sufficient.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

(3) Where bank was holder of note, was named executor of indorser's estate, intended to qualify as executor, but before qualifying made indorsement waiving protest on note, failure of bank as holder to give notice of dishonor did not defeat bank's right as executor to credit for amount used to take up note.—Harris v. Citizens Bank & Trust Co., supra.

Payment of claims
Cal.—In re Machado's Estate, 199 P. 505, 186 Cal. 246—In re Card's Estate, 222 P. 145, 64 Cal.App. 268.

Subsequent probate validates prior acts of executor objected to as premature.—In re Schuster's Estate, 281 P. 38, 35 Ariz. 457.

44. Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.

45. Pa.—In re Purman's Estate, 5 A.2d 906, 334 Pa. 238.

46. Mich.—Nelson v. Scofield, 189 N. W. 185, 219 Mich. 595.

Equities not shown
Where it is not shown how a conveyance, executed by a deceased vendor's administratrix prior to her appointment, would affect the equities of his estate, the rule that the authority of an administratrix relates back to her intestate's death and validates the deed will not be applied.—Nelson v. Scofield, supra.

47. Ala.—McAleer v. Cawthon, 112 So 251, 253, 215 Ala. 674, quoting **Corpus Juris.**
23 C.J. p 1182 note 91.

Contract requiring court approval
Mich.—Wagner v. La Croix' Estate, 286 N.W. 182, 289 Mich. 126.

The relation back of title cannot make wrongful the intervening possession of the heirs.[48]

§ 152. Powers pending Appeal from Appointment or Probate

The powers of an executor or administrator ordinarily are suspended during the pendency of an appeal from an order admitting the will to probate or appointing an administrator or during the pendency of an action to test the validity of the will.

An appeal from an order admitting a will to probate or appointing an administrator, or the pendency of a will contest or an action to set aside a will, suspends the powers of the representative for the time being,[49] unless under statutory provisions the general appointee is kept in office on a pendente lite footing,[50] but it does not wholly vacate the appointment, and if the appeal is discontinued, or the contest finally terminated by a decision sustaining the letters issued, the representative is restored to full powers, which relate back as though there had been no contest.[51] Acts of the representative during the pendency of the appeal which would otherwise be lawful may bind the estate as to persons not having notice of the appeal.[52]

It has been held that in case of a contest as to the validity of a will the representative is not relieved from his duties except as far as rights under the will are concerned,[53] although if letters have not been issued to the executor, or if they have been suspended by the appointment of an administrator pendente lite, the executor has no authority to represent the estate.[54] If the will is set aside, acts done by the nominated executor in good faith prior to the contest are valid and binding.[55]

VI. DISCOVERY OF ASSETS

§ 153. Nature and Form of Remedy

In addition to discovery in equity or under statutory provisions governing discovery generally, many jurisdictions provide for a summary proceeding for the discovery of assets of a decedent's estate. Such a proceeding is generally deemed to be not strictly one at law or in equity, but a special proceeding.

It is well settled that, where an executor or administrator is embarrassed in the performance of

Institution of suit

That executor named in will obtained letters after commencing suit in behalf of estate will not prevent dismissal of suit for want of capacity to sue.—Blood v. Waszak, 265 N.Y.S. 752, 147 Misc. 729.

Unauthorized family allowance

On final accounting, court properly refused to allow administrator credit for a sum paid to the widow of deceased by him prior to his appointment as administrator, and long before any family allowance was authorized, and properly relegated the claimant to other remedies.—In re Machado's Estate, 199 P. 505, 186 Cal. 246.

48. Ill.—Hardy v. Wallis, 103 Ill. App. 141.
Or.—Casto v. Murray, 81 P. 388, 883, 47 Or. 57.

49. Cal.—Security-First Nat. Bank v. Superior Court in and for Los Angeles County, 280 P. 995, 100 Cal.App. 702.
Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 180 Ga. 500, 99 A.L.R. 854.
Ky.—Louisville Trust Co. v. Fidelity & Columbia Trust Co., 272 S.W. 759, 209 Ky. 289.
Mo.—State ex rel. Barlow v. Holtcamp, 14 S.W.2d 646, 322 Mo. 258—McCrary v. Michael, 109 S.W.2d 50, 233 Mo.App. 797.
23 C.J. p 1182 note 93.

Power to take over assets

Cal.—Security-First Nat. Bank v. Superior Court in and for Los Angeles County, 280 P. 995, 100 Cal. App. 702.

Effect on jurisdiction of court

Probate court, having assumed jurisdiction over decedent's estate by ordering executor to rent realty, subsequent will contest did not oust it of jurisdiction.—Seibert v. Harden, 8 S.W.2d 905, 319 Mo. 1105.

Compromise of claim

Mo.—Wilkerson v. Hunt, App., 245 S.W. 615.

Control of real estate

Mo.—Seibert v. Harden, 8 S.W.2d 905, 319 Mo. 1105.

Appeal from order revoking probate

Pending appeal from order revoking probate of will, executrix cannot discharge functions of her office as executrix.—State v. Tazwell, 283 P. 745, 132 Or. 122.

50. U.S.—Bradford v. Boundinot, C. C.Pa., 3 F.Cas.No.1,765, 3 Wash.C. C. 122.
23 C.J. p 1182 note 94.

51. Me.—Hathorn v. Eaton, 70 Me. 219.
23 C.J. p 1182 note 95.

Contract for sale or lease

Under will giving executor and trustee power to sell and lease real estate belonging to testatrix, suspension of that power for the time being, pending a contest of the will, did not preclude him from agreeing for sale or lease of property, contingent on the validity of the will being established, where contracting purchaser knew of the contest, and a judgment upholding will leaves him clothed with all the power and authority conferred as and from the date of his appointment.—Bernheim v. Stark, 9 Ohio App. 40.

52. Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 180 Ga. 500, 99 A.L.R. 854.
Effect of revocation of letters see supra § 87.

Withdrawal of deposit

Where administratrix had intestate's bank deposit transferred to her account as administratrix before entry of appeal from order appointing her administratrix, and bank, without actual notice of appeal, allowed administratrix to check money out while appeal was pending, although appeal resulted in supplanting of administratrix by another as administrator, administrator could not recover amount of deposit from bank.—Shadburn Banking Co. v. Streetman, supra.

53. Ill.—In re Crumbaker's Estate, 217 Ill.App. 411.
23 C.J. p 1182 note 96.

Duty to follow appeal

Ill.—In re Crumbaker's Estate, 217 Ill.App. 411.

54. N.J.—Brown v. Ryder, 7 A. 568, 42 N.J.Eq. 356.
23 C.J. p 1182 note 97.

55. Ky.—Douglas' Adm'r v. Douglas' Ex'r, 48 S.W.2d 11, 243 Ky. 321—Jones' Ex'r v. Jones, 14 B.Mon. 373.
Validity of acts of representative generally see supra § 72.

his duty with regard to the collection of the assets of the estate by reason of his lack of knowledge of their existence or whereabouts, he may maintain a bill for a discovery against any person who, he has reason to believe, has in his possession or under his control any assets belonging to the estate,[56] provided the grounds for proceeding in equity are present;[57] and this jurisdiction of equity has been held to be not superseded by statutes providing a remedy in the court of probate jurisdiction for the same purpose.[58]

At common law, if an administrator claimed a portion of the property alleged by creditors to belong to the estate, and if the claim was adverse to that of the creditors, they might resort to equity.[59]

Statutory proceedings. In proper cases the representative of an estate seeking to discover assets thereof may resort to statutory proceedings for discovery generally,[60] which are treated in Discovery § 20 et seq.

As appears infra § 159, in many jurisdictions, in order to aid the collection of assets, executors and administrators are authorized by statute to maintain summary proceedings in the probate court to obtain a disclosure by persons supposed to have in their possession or to have concealed property of decedent or to have embezzled funds belonging to him. The procedure must be in compliance with the statute.[61] Generally proceedings of this kind are to be deemed special proceedings.[62] Discovery proceedings in which title to property may be tried and determined have been said to be neither at law nor in equity;[63] they bear the equitable aspects of a bill of discovery,[64] while in so far as they provide for a trial for the determination of property rights they are actions at law.[65] However, it has also been said, without reference to the dual nature of the proceeding, that it constitutes an action at law,[66] and is in no sense equitable in nature.[67]

Where summary proceedings for discovery were available, it was held that an administrator could not obtain discovery of assets in his action to cancel intestate's deed.[68]

The proceeding under a statute providing for the entry of a judgment for the value of effects found to have been embezzled, concealed, or conveyed away by defendant, plus a penalty, is deemed quasi-criminal.[69]

§ 154. Right to Institute Proceedings

The persons by and against whom discovery proceedings may be brought are determined by the governing statutes. The proceedings should be justified by reasonable grounds for inquiry; and they will not lie where the facts sought to be discovered, or the property itself, is in petitioner's possession.

The right to institute summary discovery proceedings is generally extended to certain classes of persons and fiduciaries, such as executors, administrators, and guardians.[70] Under some statutes any per-

56. Wis.—Eisentraut v. Cornelius, 115 N.W. 142, 134 Wis. 532, 126 Am.S.R. 1027.
23 C.J. p 1182 note 99.
Against decedent's agent
A bill will lie against the general agent of decedent for an account of his transactions with his principal. —Simmons v. Simmons, 33 Gratt. 451, 74 Va. 451.

57. Fla.—Roe v. Roe, 117 So. 108, 95 Fla. 488.
Where no adequate remedy at law is available to the representative, a bill in equity for discovery and relief is proper.—Schrafft v. Wolters, 48 A. 782, 61 N.J.Eq. 467.

58. R.I.—Starkweather v. Williams, 41 A. 1003, 21 R.I. 55.
23 C.J. p 1183 note 1.

59. Fla.—Hollingsworth v. Arcadia Citrus Growers Ass'n, 165 So. 369, 375, 122 Fla. 90, citing **Corpus Juris.**
Mich.—McFarlan v. McFarlan, 119 N. W. 1108, 155 Mich. 652.

60. S.C.—Floyd v. Victory Sav. Bank, 189 S.E. 462, 182 S.C. 357.

61. Ill.—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182.

62. Ill.—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.
N.Y.—Spreen's Estate, 1 N.Y.Civ. Proc. 375.
Ohio.—Halloran v. Merritt, 192 N.E. 542, 48 Ohio App. 135.
Not a "suit"
The statutory proceeding to discover concealed assets of an estate is not a "suit."—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176.

63. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.

64. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 367 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.
23 C.J. p 1183 note 6.
Equitable rules apply to proceedings for discovery of concealed assets of estate.—Wood's Estate v. Tyler, 256 Ill.App. 401.

65. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.

66. Mo.—State ex rel. and to Use of Clay County State Bank v. Waltner, 145 S.W.2d 152, 346 Mo. 1138—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferring, see, App., 47 S.W.2d 121.

67. N.Y.—In re Hagan's Estate, 283 N.Y.S 605, 157 Misc. 378.

68. Mo.—Kadlowski v. Schwan, 44 S.W 2d 639.

69. Ohio.—Goodrich v. Anderson, 26 N.E 2d 1016, 136 Ohio St. 509.

70. Ill.—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176—Bates v. Lutz, 220 Ill.App. 54.
N.Y.—In re Lichtblau, 228 N.Y.S. 239, 131 Misc. 826.
23 C.J. p 1183 note 7.
Failure of coexecutor to join
An executor had the power to initiate a discovery proceeding against one who in his opinion had property of the estate and refused to deliver it, although a coexecutor did not join in the petition.—In re Rutherford's Estate, 293 N.Y.S. 515, 161 Misc. 622.
A trustee which was formerly an executor of the estate cannot institute proceedings against its cotrus-

son interested in the estate may maintain such proceedings,[71] and it has been held that a creditor may do so[72] and that the court may proceed on its own information.[73] The consent of neither the court nor creditors is necessary to authorize an executor to apply for a mandamus to compel a corporation, in which decedent owned stock, and its president, to permit him to examine its books to ascertain the value of the stock.[74]

The existence of reasonable grounds for inquiry justifies such proceedings.[75] Under at least one statute, in order to invoke the proceeding there must be some reasonable predicate for the belief that respondent has concealed or wrongfully taken or disposed of the property;[76] under another statute it is sufficient if it reasonably appears that he may possess some knowledge concerning the property, and it is not necessary that he be or have been in possession thereof.[77]

Since, as appears infra § 159, it is a fundamental purpose of these statutes to provide for discovery as an aid to the recovery of possession of the property of the estate, it has been held that the remedy does not reach a case where the representative has gained dominion and the only question is whether he has exercised his dominion rightfully;[78] neither will the proceedings lie where the petitioner is in possession of the facts sought to be discovered.[79] Where the administrator would, on acquiring possession of the property, hold it solely for respondent's benefit, the proceedings are not favored.[80] An estate cannot be estopped from bringing discovery proceedings by the fact that the representative participated in the unlawful transaction by which the property is wrongfully withheld;[81] nor can it be estopped by such a claim where there is no showing of knowledge on the part of the representative of respondent's wrongful intentions.[82] The fact that the administrator could maintain a plenary action of replevin is no bar to a summary proceeding in the probate court for discovery and for an order requiring the delivery of personal property of the estate or its proceeds or value.[83]

The persons against whom the remedy may be invoked are determined by the local statutes.[84]

tee, formerly its coexecutor, under a statute limiting the class of fiduciaries who may institute such proceedings to executors, administrators, temporary administrators, and guardians.—In re Sheldon's Estate, 9 N.Y.S.2d 307, 169 Misc. 901.

71. Ill.—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176.
23 C.J. p 1183 note 8.

Administrator de bonis non is such a person.—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.

Special administrator, having duty to collect decedent's personal property, is person "interested in estate," and one of two such administrators may file complaint to discover and obtain possession of assets fraudulently received, concealed, or embezzled, since either of two or more executors or administrators, without consent or knowledge of other, may properly take possession of property belonging to estate.—Talbot v. Bush, 146 N.E. 223, 251 Mass. 27.

72. Ill.—Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.

73. Colo.—Hughes v. People, 5 Colo. 436.

74. N.J.—Feick v. Hill Bread Co., 103 A. 813, 91 N.J.Law 486.

75. N.Y.—Matter of Gick, 98 N.Y.S. 299, 49 Misc. 32, affirmed 98 N.Y.S. 961, 113 App.Div. 16, 37 N.Y.Civ.Proc. 98—Mead v. Sommers, 2 Dem.Surr. 296.

76. Ariz.—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz. 467.

77. N.Y.—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273.

78. N.Y.—In re Heinze, 120 N.E. 63, 224 N.Y. 1—In re Erlanger's Estate, 265 N.Y.S. 393, 148 Misc. 339—In re Ehrlich's Estate, 215 N.Y.S. 141, 126 Misc. 673.

79. Ariz.—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz. 467.
23 C.J. p 1184 note 30 [b].

80. N.Y.—In re Razoux' Estate, 277 N.Y.S. 457, 154 Misc. 477, affirming 276 N.Y.S. 782, 154 Misc. 128.

81. N.Y.—In re Gauthier's Estate, 257 N.Y.S. 532, 143 Misc. 788.

82. N.Y.—In re Browning's Estate, 22 N.Y.S.2d 652, 175 Misc. 107, affirmed In re Browning's Will, 24 N.Y.S.2d 1001, 260 App.Div. 1013, appeal denied, 25 N.Y.S.2d 793, 261 App.Div. 805, reargument denied 25 N.Y.S.2d 797, 261 App.Div. 817.

83. N.Y.—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

84. In California, although under the statute the court would not have such power as to strangers, an attorney for estate and legatees were "interested parties" and as recipients of assets of the estate without judicial authorization were amenable to orders of the probate court requiring repayment to the estate of moneys improperly distributed and withheld.—In re De Barry's Estate, 111 P.2d 728, 43 Cal.App.2d 715.

In Massachusetts a statute providing for disclosure by persons suspected of having fraudulently received, concealed, embezzled, or conveyed property of decedent does not impose on any other person a duty to disclose to a beneficiary knowledge of the whereabouts of assets.—Kaplan v. Suher, 150 N.E. 9, 254 Mass. 180, 42 A.L.R. 1142.

In New York

(1) A discovery proceeding should be directed only against persons who have possession, control, knowledge or information concerning property or the proceeds or value thereof which should be delivered or paid to the petitioner or included in an inventory of appraisal.—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283.

(2) The proceedings are not limited to parties to the probate proceedings.—In re Everitt's Estate, 259 N.Y.S. 81, 144 Misc. 102.

(3) Where petition in executor's discovery proceedings and affidavit in opposition to individual's motion to vacate discovery order showed that individual was executor's agent with respect to executor's real estate holdings, and individual had acted as agent for properties held in deceased's name, an order for discovery of moneys of deceased's estate was proper with respect to individual.—In re Browning's Estate, 30 N.Y.S.2d 606, 262 App.Div. 489, affirming 30 N.Y.S.2d 604, 263 App.Div. 718.

Against executor or administrator see infra § 155.
Parties see infra § 160.

§ 155. Proceedings against Executor or Administrator

Summary proceedings for discovery may sometimes be invoked against a personal representative. In a proper case a discovery proceeding may be continued against the representative of a respondent who dies during its pendency.

The summary process for discovery given by local codes may sometimes be invoked, as under the specific provisions of statutes, against the personal representative himself, if he be suspected of embezzlement, conversion, or withholding;[85] and a bill for discovery in equity may be brought against a representative of an estate in a proper case.[86]

Of respondent. Under a statute providing both for discovery and for a determination of title, on the arising of such issue an action may be revived and continued against the personal representative of a respondent who dies after petitioner's prima facie case is completed;[87] but if it has not reached that stage, and the proceeding is still one for discovery only, the fact that respondent may have possessed pertinent information does not subject his executor to the proceedings, there being no inference that he is similarly informed.[88]

§ 156. Time for Proceedings

Where summary discovery proceedings are not deemed equitable, the doctrine of laches ordinarily has no application.

Where summary proceedings for discovery are not deemed to be equitable in nature, the doctrine of laches ordinarily has no application.[89] Even a lapse of thirty years has been held not to bar proceedings for the discovery of assets.[90]

§ 157. Jurisdiction and Venue

The extent of a probate court's jurisdiction in discovery proceedings is regulated by statute; jurisdiction once acquired is retained until the proceeding has been finally disposed of or discontinued.

The extent of a probate court's jurisdiction in discovery proceedings is governed by statute,[91] and, in so far as it affects the scope of the inquiry and the relief that may be granted, is considered infra §§ 158, 159. A probate court once acquiring jurisdiction retains it until the proceeding has been finally disposed of or regularly discontinued.[92] For purposes of determining whether the probate court has jurisdiction of a discovery proceeding, the petitioner's application must be accepted as true.[93] Where the probate court lacks jurisdiction to determine purely equitable issues as to certain property, the fact that a suit is brought in another court to determine such issues does not divest the probate court of its jurisdiction to determine title to other property involved in discovery proceedings.[94]

Where a creditors' bill shows that the estate is solvent and the assets superabundant, the mere pretext of the need of discovery will not give equitable

85. Ill.—In re Hinkston's Estate, 3 N.E.2d 161, 284 Ill.App. 642.
Mo.—Schnur v. Dunker, App., 38 S.W.2d 282—In re Skelly's Estate, App., 223 S.W. 690—State ex rel. Lamm v. Lamm, App., 216 S.W. 332.
23 C.J. p 1184 note 14.
Proceedings:
By third persons claiming ownership of assets in hands of representative see infra § 176.
To compel administrator to inventory property see supra § 136.

86. N.J.—Child v. Wherry, 192 A. 731, 122 N.J.Eq. 61.

Bill by judgment creditor
Equity may take jurisdiction to compel a discovery of assets by an administrator where an execution on a judgment by a creditor of decedent is returned "no property found," and no inventory of the estate has been returned.—Pilkington v. Gaunt, 5 Dana, Ky., 410.

87. N.Y.—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078.

Issue
Where proceeding to discover property of deceased allegedly withheld is continued after death of original respondent against original respondent's executor, the issue for trial will determine whether estate of respondent is possessed of identifiable securities belonging to estate of deceased and will establish whether deceased respondent appropriated identifiable securities during his life time making his estate liable to estate of deceased for proceeds thereof.—In re Courtade's Estate, 16 N.Y.S. 2d 974, 172 Misc. 1078.

88. N.Y.—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273.

89. N.Y.—In re Hagan's Estate, 283 N.Y.S. 605, 157 Misc. 378.

No laches shown
(1) Generally.—In re Kiamie's Will, 5 N.Y.S.2d 786, 168 Misc. 260, affirmed In re Kiamie's Estate, 15 N.Y.S.2d 725, 258 App.Div. 784, reargument denied 16 N.Y.S.2d 532, 258 App.Div. 866.

(2) Where deceased died July 22, 1935, letters testamentary were issued on Nov. 2, 1935, and discovery order against her attorney was issued on April 1, 1936, there was no delay requiring dismissal of discovery proceeding.—In re Rutherford's Estate, 293 N.Y.S. 515, 161 Misc. 622.

90. Me.—O'Dee v. McCrate, 7 Me. 467.

91. N.Y.—In re Brennan's Estate, 221 N.Y.S. 162, 129 Misc. 283.

Exclusive jurisdiction
Mo.—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580—State Bank of Willow Springs v. Lillibridge, App., 262 S.W. 433, affirmed in part and reversed on other grounds in part 293 S.W. 116, 316 Mo. 968.

Estoppel to question jurisdiction
Where a party objects to the account of the executor and files his pleading, appears, give his testimony, and demands judgment in his favor on his claim to retain moneys of the estate for services, he cannot question the jurisdiction of the court to pass on such issues when the issues are decided against him.—In re De Barry's Estate, 111 P.2d 728, 43 Cal. App.2d 715.

92. N.Y.—Spreen's Estate, 1 N.Y. Civ.Proc. 375.
23 C.J. p 1183 note 5.

93. N.Y.—In re Lusher's Estate, 287 N.Y.S. 1000, 159 Misc. 387.

94. Mo.—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580.

jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative, to the injury of plaintiff.[95]

Jurisdiction of the person is acquired by proper service of citation or by respondent's voluntary appearance.[96] Proceedings may commonly be brought against one within the same general jurisdiction, although a resident of a different county,[97] and an application to compel a foreign temporary administrator of a resident decedent to disclose information necessary to enable the domestic administrator to prepare his inventory has been granted.[98]

§ 158. Property or Claims as to Which Proceeding Proper

In some jurisdictions, the discovery proceeding is applicable not only where recovery of specific property in the hands of respondent is sought, but also as a means of recovering the proceeds or value of such property as has been disposed of; but respondent's obligation must have arisen from a wrongful possession of property owned by decedent or his estate, and the remedy is not available as a means of collecting a debt or enforcing a claim purely in personam, nor does it ordinarily relate to realty.

As appears in § 159 infra, the probate court has the power, in a number of jurisdictions, to order the restitution of property wrongfully taken or withheld from the estate and, in some instances, to determine who has title to the property. In some of these jurisdictions, particularly Illinois, Missouri, and New York, the remedy was formerly limited to cases looking toward the recovery of money or specific personal property capable of delivery and amenable to an order that it be delivered,[99] so that where the money had been spent, or mixed with other moneys,[1] or the property disposed of,[2] the proceeding would not lie and the court was without jurisdiction to entertain it. By virtue of statutory amendments, however, not only is the proceeding now available with respect to specific money or property, but, if such property has been diverted or disposed of, the court may direct payment of the proceeds or value thereof,[3] and, at least in New York, may even impress a trust on the proceeds, or

95. W.Va.—Hale v. White, 35 S.E. 884, 47 W.Va. 700.

96. N.Y.—In re Pickard's Estate, 257 N.Y.S. 587, 143 Misc. 497, affirmed 259 N.Y.S. 964, 236 App.Div. 774.

97. Tex.—Pierpont v. Threlkeld, 13 Tex. 244.

98. N.Y.—Matter of O'Brien, 69 N.Y.S. 1022, 34 Misc. 436.
23 C.J. p 1184 note 19.

99. Mo.—Williams v. Williams, 129 S.W. 454, 145 Mo.App. 382.
N.Y.—In re Hyams' Estate, 142 N.E. 589, 237 N.Y. 211, modifying 198 N.Y.S. 922, 205 App.Div. 893, 199 N.Y.S. 928, 206 App.Div. 670—Matter of Heinze, 120 N.E. 63, 224 N.Y. 1—In re Booth's Will, 213 N.Y.S. 684, 215 App.Div. 516—In re Cofer's Estate, 200 N.Y.S. 906, 121 Misc. 292—In re Appel's Estate, 187 N.Y.S. 829, 115 Misc. 118—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528—In re Soule's Estate, 187 N.Y.S. 828—In re Denham's Estate, 182 N.Y.S. 90.

1. N.Y.—In re Hyams' Estate, 142 N.E. 589, 237 N.Y. 211, modifying 198 N.Y.S. 922, 205 App.Div. 893, 199 N.Y.S. 928, 206 App.Div. 670—Matter of Heinze, 120 N.E. 63, 224 N.Y. 1—In re Soule's Estate, 187 N.Y.S. 828.

The mere pledge of securities belonging to intestate's estate cannot defeat a direction, in discovery proceeding by an administrator to deliver them, especially where evidence showed that the pledgor continued to receive the dividends thereon, and that the certificates were not indorsed to pledgee.—In re Cofer's Estate, 200 N.Y.S. 906, 121 Misc. 292.

2. Ill.—People v. Ft. Dearborn Trust & Savings Bank of Chicago, 232 Ill.App. 109.

3. Ill.—Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230, reversing In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—Martin v. Martin, 48 N.E. 694, 170 Ill. 18, reversing 68 Ill.App. 169—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182—In re Vinces' Estate, 267 Ill.App. 483—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.
Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Newell v. Kern, App., 218 S.W. 443.
N.Y.—In re Wilson's Will, 169 N.E. 122, 252 N.Y. 155, affirming 232 N.Y.S. 919, 225 App.Div. 761, which affirmed Wilson's Estate, In re, 250 N.Y.S. 553, 140 Misc. 10—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308—In re Rutherford's Estate, 293 N.Y.S. 515, 161 Misc. 622—In re Kirschenbaum's Estate, 244 N.Y.S. 143, 137 Misc. 549.

Meaning of "proceeds or value"
Under statute providing that, if estate property has been diverted or disposed of, the surrogate's court might enter decree directing payment of the "proceeds or value" of the property or might impress a trust on the proceeds or make any determination which a court of equity might decree in following trust property or funds, the disjunctive "or" between the words "proceeds" and "value" indicated legislative intent to differentiate between the two words.—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81.

Assets diverted by executrix' surety
Administratrix was entitled to have her surety deliver over stock purchased from assets of estate, without prior accounting by administratrix to determine liability on bond.—In re Kirschenbaum's Estate, 244 N.Y.S. 143, 137 Misc. 549.

Moneys paid out on forged check
Surrogate's court had jurisdiction to enforce trust company's obligation to repay to estate moneys paid out on forged indorsement of payee's name on checks drawn by administrators.—In re Welton's Estate, 253 N.Y.S. 128, 141 Misc. 674.

Graft
(1) The surrogate's court had jurisdiction of a proceeding to collect amount allegedly owing estate by one who, while an employee and officer of a corporation owned by deceased in his lifetime and by his estate after death, had secured secret commissions and gratuities from a third person doing business with deceased.—In re Browning's Estate, 15 N.Y.S.2d 864, 172 Misc. 647.

(2) It also has jurisdiction of discovery proceeding to recover amount paid by respondent as bribe to employee of deceased and of the estate, as against contention that action for damages or for recovery of the amount paid as graft would lie only in court of general jurisdiction.

make any determination which a court of equity might decree in following trust funds or property.[4] The basis of the proceeding is still specific property, but the test of whether it will lie is not whether the person charged still has possession, but whether his obligation arises from a possession without right or title; if the genesis of the obligation is predicated on such possession, the proceeding will lie, but if it is based merely on a general claim against respondent, purely in personam, it will not.[5] Thus,

—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308.

No general equity jurisdiction is conferred on the court merely by virtue of such a statute.

Ill.—In re Miller's Estate, 35 N.E.2d 811, 311 Ill.App. 280.

Mo.—In re Main's Estate, App., 152 S.W.2d 696, transferred, see, Sup., 146 S.W.2d 597.

4. N.Y.—In re Wilson's Will, 169 N.E. 122, 252 N.Y. 155, affirming 232 N.Y.S. 919, 225 App.Div. 761, which affirmed Wilson's Estate, In re, 250 N.Y.S. 553, 140 Misc. 10—In re Hammer's Estate, 261 N.Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—In re Brazil's Will, 220 N.Y.S. 331, 219 App.Div. 594, reversing In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288—In re Nutrizio's Estate, 206 N.Y.S. 706, 211 App.Div. 8—In re Rosenthal's Estate, 25 N.Y.S.2d 72, 175 Misc. 771, affirmed 27 N.Y.S.2d 994, 262 App.Div. 706, appeal denied 29 N.Y.S.2d 506, 262 App.Div. 833—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351—In re Hopkins' Estate, 293 N.Y.S. 786, 161 Misc. 680—In re Luksin's Estate, 290 N.Y.S. 932, 160 Misc. 926—In re Lusher's Estate, 287 N.Y.S. 1000, 159 Misc. 387—In re Kinnear's Estate, 267 N.Y.S. 61, 148 Misc. 892, affirmed In re Kinnear's Will, 271 N.Y.S. 1093, 241 App.Div. 893, affirmed In re Kinnear's Estate, 193 N.E. 426, 265 N.Y. 645—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107—In re Dobkin's Estate, 260 N.Y.S. 909, 145 Misc. 703—In re Weeks' Estate, 256 N.Y.S. 387, 142 Misc. 752—In re Robinson's Estate, 227 N.Y.S. 296, 131 Misc. 21—In re Akin's Estate, 223 N.Y.S. 812, 129 Misc. 840, affirmed 224 N.Y.S. 743, 222 App.Div. 710, affirmed 161 N.E. 471, 248 N.Y. 202—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283—In re Fraley's Estate, 221 N.Y.S. 461, 129 Misc. 803.

Every claim to estate's property embraced

In view of this extension of the power of the surrogate's court in discovery proceedings, and the extension of its equitable powers generally, it is frequently said that the court now has jurisdiction to determine and dispose of every claim to property which should be delivered to the representative.—In re Wilson's Estate, 169 N.E. 122, 252 N.Y. 155, affirming 232 N.Y.S. 919, 225 App.Div. 761, which affirmed Wilson's Estate, In re, 250 N.Y.S. 553, 140 Misc. 10—In re Akin's Estate, 161 N.E. 471, 248 N.Y. 202, affirming 224 N.Y.S. 743, 222 App.Div. 710, which affirmed 223 N.Y.S. 812, 129 Misc. 840—In re Thomas' Estate, 257 N.Y.S. 336, 235 App.Div. 455—In re Grossman's Estate, 251 N.Y.S. 670, 233 App.Div. 887, reversing 236 N.Y.S. 630, 134 Misc 724—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81—In re Accles' Estate, 275 N.Y.S. 430, 153 Misc. 421, affirmed 281 N.Y.S. 973, 245 App.Div. 743—In re Kinnear's Estate, 267 N.Y.S. 61, 148 Misc. 892, affirmed In re Kinnear's Will, 271 N.Y.S. 1093, 241 App.Div. 893, affirmed In re Kinnear's Estate, 193 N.E. 426, 265 N.Y. 645—In re Dobkin's Estate, 260 N.Y.S. 909, 145 Misc. 703—In re Pickard's Estate, 257 N.Y.S. 587, 143 Misc. 497, affirmed 259 N.Y.S. 964, 236 App.Div. 774—In re Dickman's Estate, 254 N.Y.S. 302, 142 Misc. 207—In re Pickard's Estate, 250 N.Y.S. 738, 140 Misc. 541.

Other interests not involved

Where only the alleged wrongdoer and the alleged sufferer by his wrong are before the court, the jurisdiction of the surrogate's court exercised for the protection of a person defrauded by the misappropriation of property belonging to an estate of a decedent is broad, and relief will be molded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner.—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81.

Tracing trust-impressed property

The wife of a deceased attorney who allegedly commingled, with his own securities and money the securities and proceeds from securities held by him in trust for decedent, would stand in no better position, as transferee of the trust-impressed securities who gave no consideration therefor, than the attorney who commingled the securities; recovery of the proceeds of the securities could be had on a constructive rather than an actual tracing of the securities, by a showing of continuity of relationship between the funds which the attorney received net out of the property of the decedent and the securities which in part reached the attorney's wife.—In re Rubin's Estate, supra.

Issues determinable

(1) Surrogate's court has jurisdiction to determine in discovery proceeding ownership of savings bank book claimed by administrator and by respondent under decedent's agreement to leave her property, with certain exceptions, to respondent.—In re Razoux' Estate, 276 N.Y.S. 782, 154 Misc. 128, affirmed 277 N.Y.S. 457, 154 Misc. 477.

(2) Surrogate's court had jurisdiction in proceeding for discovery of estate's assets, although proceeding involved issue of making of contract concerning mutual wills.—In re Rosenblath's Estate, 257 N.Y.S. 856, 143 Misc. 640.

5. Ill.—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182.

N.Y.—In re Hammer's Estate, 261 N.Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—In re Browning's Estate, 22 N.Y.S.2d 652, 175 Misc. 107, affirmed In re Browning's Will, 24 N.Y.S.2d 1001, 260 App.Div. 1013, appeal denied 25 N.Y.S.2d 793, 261 App.Div. 805, reargument denied 25 N.Y.S.2d 797, 261 App.Div. 817—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351—In re Ostrow's Estate, 295 N.Y.S. 610, 162 Misc. 783—In re Luskin's Estate, 290 N.Y.S. 932, 160 Misc. 926—In re Lusher's Estate, 287 N.Y.S. 1000, 159 Misc. 387—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107.

Constructive trust

Alleged loan by administratrix to third person of moneys belonging to estate, amounting to devastavit, held to constitute third person constructive trustee liable to account for diversion in discovery proceedings.—In re Gauthier's Estate, 257 N.Y.S. 532, 143 Misc. 788.

Using money to pay decedent's debt

That deceased was indebted to third person was not justification for payment to such third person by attorney of funds received by him for deceased prior to her death, as third person should have filed claim with executors; hence proceedings against attorney were proper.—In re Rutherford's Estate, 293 N.Y.S. 515, 161 Misc. 622.

Proceeding against insurance policy beneficiary

Discovery proceeding cannot be maintained against beneficiary in

in these as in other jurisdictions where the discovery proceeding is narrower in scope, it is uniformly held that it is not applicable as a mode of collecting a debt[6] or enforcing a liability for converting property of the estate[7] or a contractual obligation;[8] it cannot be used as a substitute for an examination before trial[9] or for the purpose of discovering evidence which could be used only in another action or proceeding;[10] however, in this connection should be noted the statements in § 159 infra, regarding the restriction of the proceeding, in some jurisdictions, to inquiry as to assets. Of course, where it appears that respondent has title to, or rightful possession of, the property, no relief is warranted;[11] nor will

policy on deceased's life to recover proceeds thereof although there was arrangement that beneficiary would use proceeds in some specified way, as this would merely give rise to right in personam against her.—In re Sichel's Estate, 293 N.Y.S. 559, 162 Misc. 2.

Money distributed to persons interested

Where respondent no longer has possession of money withdrawn from decedent's savings bank account, he having distributed it to petitioner and others interested in the estate, no decree directing its delivery, or other relief, can be made.—In re Degenhardt's Estate, 206 N.Y.S. 220, 123 Misc. 762.

Property bought from decedent

Where respondent repurchased property which he had previously sold to decedent, and subsequently sold it, the proceeds of such sale could not be recovered in discovery proceedings although respondent had not paid decedent the purchase price.—In re Bawer's Estate, 230 N.Y.S. 567, 132 Misc. 568, affirmed 235 N.Y.S. 772, 226 App.Div. 866.

6. Ill.—Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230, reversing In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43—Hansen v. Schwartz, 178 N.E. 246, 345 Ill. 609—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, rereversing In re Nelson's Estate, 254 Ill.App. 484—Sullivan v. Arcola State Bank of Arcola, 145 N.E. 167, 314 Ill. 40—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182—In re Vinces' Estate, 267 Ill.App. 483—People ex rel. Olsen v. Templeman, 265 Ill.App. 369—In re Chalifoux's Estate, 230 Ill.App. 199, reversed on other grounds Runyan v. Williams, 146 N.E. 497, 315 Ill. 628.

Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

N.Y.—In re Jastrzewski's Estate, 300 N.Y.S. 145, 252 App.Div. 384—In re Arduini's Estate, 276 N.Y.S. 90, 243 App.Div. 10—In re Hammer's Estate, 261 N.Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—In re Thomas' Estate, 257 N.Y.S. 330, 235 App.Div. 450—In re Brazil's Will, 220 N.Y.S. 331, 219 App.Div. 594, reversing In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351—In re Thoms' Estate, 300 N.Y.S. 872, 165 Misc. 398—In re Hopkins' Estate, 293 N.Y.S. 786, 161 Misc. 680—In re Sichel's Estate, 293 N.Y.S. 559, 162 Misc. 2—In re Luksin's Estate, 290 N.Y.S. 932, 160 Misc. 926—In re Lusher's Estate, 287 N.Y.S. 1000, 159 Misc. 387—In re Epstein's Estate, 265 N.Y.S. 419, 148 Misc. 341—In re Lichtblau, 261 N.Y.S. 863, 146 Misc. 278—In re Faulkner's Will, 236 N.Y.S. 237, 134 Misc. 507—In re Bawer's Estate, 230 N.Y.S. 567, 132 Misc. 568, affirmed 235 N.Y.S. 772, 226 App.Div. 866—In re Seamen's Estate, 199 N.Y.S. 794, 120 Misc. 531—In re Appel's Estate, 187 N.Y.S. 829, 115 Misc. 118—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528—In re Schmitt's Will, 22 N.Y.S.2d 958—In re Denham's Estate, 182 N.Y.S. 90.

Ohio.—Goodrich v. Anderson, 26 N.E.2d 1016, 136 Ohio St. 509.

Okl.—Farmers' Bank & Trust Co. v. Sheffler, 186 P. 479, 78 Okl. 44.

23 C.J. p 1185 note 36.

7. Kan.—Humbarger v. Humbarger, 83 P. 1095, 72 Kan. 412, 115 Am.S.R. 204.

Okl.—Farmers' Bank & Trust Co. v. Sheffler, 186 P. 479, 78 Okl. 44.

8. N.Y.—In re Jastrzewski's Estate, 300 N.Y.S. 145, 252 App.Div. 384—In re Thomas' Estate, 257 N.Y.S. 330, 235 App.Div. 450—In re Thoms' Estate, 300 N.Y.S. 872, 165 Misc. 398—In re Epstein's Estate, 265 N.Y.S. 419, 148 Misc. 341—In re Campbell's Estate, 260 N.Y.S. 285, 145 Misc. 389—In re Schmitt's Will, 22 N.Y.S.2d 958.

Attempted enforcement by respondent

Where respondent attempts to resist recovery of property of decedent through discovery proceedings by asserting the existence of a contract with decedent, the sufficiency of evidence to establish such an agreement cannot be determined by the surrogate in the discovery proceedings.—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

Rights under trust inter vivos

N.Y.—In re Ihmsen's Estate, 294 N.Y.S. 120, 161 Misc. 789, reversed on other grounds 3 N.Y.S.2d 125, 253 App.Div. 472.

9. N.Y.—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351.

10. N.Y.—In re Chapin's Estate, supra—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107—In re Brown's Estate, 253 N.Y.S. 329, 141 Misc. 805—In re Ehrlich's Estate, 215 N.Y.S. 141, 126 Misc. 673—In re Ryan's Estate, 188 N.Y.S. 387, 115 Misc. 472—In re Appel's Estate, 187 N.Y.S. 829, 115 Misc. 118—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528—In re Soule's Estate, 187 N.Y.S. 828—In re Denham's Estate, 182 N.Y.S. 90.

Witnesses to earlier wills

Inquiry proceedings in surrogate's court could not be used by executor to discover names of witnesses to wills of an earlier date than the will probated, for use in supreme court in action based on alleged agreement between plaintiff and testatrix to make a will in favor of plaintiff.—In re Rhode's Estate, 10 N.Y.S.2d 828, 170 Misc. 596.

11. Ill.—Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230, reversing In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43.

N.Y.—Donnelly v. Congdon, 280 N.Y.S. 273, 244 App.Div. 595—In re Lichtblau, 261 N.Y.S. 863, 146 Misc. 278—In re Hooper's Estate, 261 N.Y.S. 585, 146 Misc. 151.

Gift

(1) In discovery proceeding, administratrix was not entitled to recover from respondent shares of stock which he acquired from a third person who had previously acquired stock by valid gift from deceased.—In re Wrone's Estate, 31 N.Y.S.2d 193, 177 Misc. 541.

(2) Delivery of bond and mortgage to agent of mortgagor effectuated intent to make gift of debt to mortgagor, and property could not be recovered in discovery proceedings from agent holding same as trustee for donee.—In re Ehlers' Estate, 231 N.Y.S. 16, 132 Misc. 910.

Existence of trust

In proceeding to discover assets, probate court was without jurisdiction to determine whether a bond which testatrix gave to respondent was given in trust for third person.—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580.

any relief be granted where the property in question was taken by someone other than respondent.[12]

Under former provisions in some states the property must have belonged to decedent in his lifetime.[13] Under more recent provisions, however, there is no such limitation, and, while the proceedings thereunder will certainly lie if deceased had ownership during his lifetime,[14] it is sufficient[15] and, of course, necessary[16] that the estate be enti-

Acquisition by fraud

(1) An executor could not, by discovery process, reach fund which testator knowingly transferred to legatee shortly before his death, on ground that legatee had fraudulently induced testator to make transfer, where there was no proof of fraud in transfer of title, since sole issue in discovery proceeding is one of title.—In re Landau's Estate, 298 N.Y.S. 150, 163 Misc. 894.

(2) On the other hand, it has been held that the surrogate's court had jurisdiction of executor's proceeding for discovery of property which deceased had turned over to respondent to invest, although settlement had been made between respondent and deceased before her death, where settlement was allegedly procured by fraud and undue influence.—In re Lusher's Estate, 287 N.Y.S. 1000, 159 Misc. 387.

Transfer in fraud of creditors

Where it is shown or conceded that a note was voluntarily assigned by decedent, and the sole controversy is whether deceased's assignment was in fraud of creditors, court held without jurisdiction, since proceeding to attack conveyance as fraudulent can be brought only by creditors.—In re Knott's Estate, Mo.App., 65 S.W.2d 1069.

12. N.Y.—In re Brogan's Estate, 300 N.Y.S. 447, 165 Misc. 111.

Wholly owned corporation

Where petition in executor's discovery proceedings alleged that respondent corporation was wholly owned and controlled by respondent individual, but there was no attempt to pierce veil of corporate entity, and petition alleged that not only corporation, but also individual, paid moneys to executor's agent in violation of penal law, individual and corporation were to be deemed to have had and received moneys belonging to executor, and discovery order was proper with respect to individual and corporation.—In re Browning's Estate, 30 N.Y.S.2d 606, 262 App.Div. 489, affirming 30 N.Y.S. 2d 604, 263 App.Div. 718.

13. Ill.—Johnson v. Nelson, 173 N. E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—Sullivan v. Arcola State Bank of Arcola, 145 N.E. 167, 314 Ill. 40.

Property bought with proceeds of decedent's property

Under the former statute, the court has no jurisdiction to determine the title or the right to the possession of property not owned by deceased in his lifetime, but purchased with the proceeds of the sale of property so owned.—In re Hyams' Estate, 142 N.E. 589, 237 N.Y. 211, modifying 198 N.Y.S. 922, 205 App. Div. 893, 199 N.Y.S. 928, 206 App.Div. 670.

Collections made for estate

Collections made by an attorney under employment of the administrator could not be recovered by discovery proceedings, since the money had not belonged to deceased in his lifetime.—Dinsmoor v. Bressler, 45 N.E. 1086, 164 Ill. 211.

14. Ill.—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—In re Swartz's Estate, 218 Ill.App. 449.

Bribe

One who bribed employee of decedent and of decedent's estate to procure contracts for work and materials had no legal right to receive or retain so much of the payment to him under the contract as equalled amount of the bribe, and it must be assumed that the contract price was londed by the amount of the bribe, which constituted money belonging to decedent's estate, so that the executor could recover such amount from the briber.—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308.

Proceeds of lawsuit

Surrogate's court held to have jurisdiction of discovery proceedings by personal representative of estate of deceased against attorney of deceased, relative to proceeds of action for personal injuries to deceased, which had been collected by attorney, since money reached attorney's possession as money of a client held in trust.—In re Ostrow's Estate, 295 N.Y.S. 610, 162 Misc. 783.

15. Ill.—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—In re Vinces' Estate, 267 Ill.App. 483.

N.Y.—In re Akin's Estate, 161 N.E. 471, 248 N.Y. 202, affirming 224 N.Y.S. 743, 222 App.Div. 710, affirming 223 N.Y.S. 812, 129 Misc. 840—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308—In re Rosenthal's Estate, 25 N.Y.S.2d 72, 175 Misc. 771, affirmed 27 N.Y.S.2d 994, 262 App.Div. 706, appeal denied 29 N.Y.S.2d 506, 262 App.Div. 833—In re Lowe's Estate, 265 N. Y.S. 420, 148 Misc. 107—In re Kirschenbaum's Estate, 244 N.Y.S. 143, 137 Misc. 549.

Graft

Where executor's petition for discovery alleged that corporation corrupted an agent of the estate, procured funds of the estate in ostensible payment for coal delivered to property of the estate, and paid graft to agent in consideration of his approval of sales and graft intended to influence his actions with relation to sales and deliveries, graft remained the money of the estate when in the hands of corporation and its president, and could be recovered in discovery proceedings.—In re Browning's Estate, 30 N.Y.S.2d 604, 177 Misc. 328, affirmed 30 N.Y.S.2d 606, 262 App.Div. 489, appeal denied 31 N.Y.S.2d 1019, 263 App.Div. 718.

Property parted with by representative

Formerly, at a time when the statute applied only to property "belonging to any deceased person," it was held that the scope of the statute was to enable the personal representative of deceased to obtain possession of the property belonging to deceased at the time of his death, and that if at any time after the personal representative obtains possession he loses or parts with the possession he must bring his appropriate action at law to regain it.—Mohlke v. People, 117 Ill.App. 595.

16. Ill.—Dawdy v. Strickland, 37 N. E.2d 817, 378 Ill. 230, reversing In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43.

N.Y.—In re Sichel's Estate, 293 N.Y. S. 559, 162 Misc. 2.

Property alleged to belong to representative

The surrogate's court had no jurisdiction of a proceeding for discovery in which an adjudication was sought that certain shares of stock were the property of decedent's executor and that issuance of a certificate be directed.—In re Schmitt's Will, 22 N.Y.S.2d 958.

Money stolen by decedent

Administrator could not by discovery proceeding recover money allegedly stolen by decedent from his employer and deposited in various bank accounts in name of decedent and his wife, since such moneys were not claimed to be property of estate but of decedent's employer, whose rights lay in supreme court as credi-

tled to the property sought to be recovered, or to its proceeds or value.

Types of property generally. Summary proceedings are available for the discovery, and, where the court has such jurisdiction, for the recovery, of personal property generally,[17] including such things as books, papers, and documents,[18] legal instruments[19] such as bonds and mortgages,[20] securities,[21] and property or money placed on deposit in the hands of a third person.[22] The proceeding does not ordinarily relate to real estate[23] or to equitable interests or estates.[24] The surplus proceeds on a foreclosure sale under a deed of trust can be recovered from the trustee regardless of any indebtedness of the executor personally to the trustee.[25]

Bank accounts and deposits. The proceeding will not lie to facilitate or effect the recovery of a bank deposit where the relation of debtor and creditor exists,[26] but, if a bank account or deposit is but the avails or proceeds of specific property belonging to the estate which the representatives had a right to recover, the proceeding will lie;[27] and it is within the court's power to pass on the ownership of a bank account, as between the estate and a third person,[28] and to order the delivery of the indicia of ownership thereof.[29]

Proceeds of insurance policy. Discovery proceedings will lie to determine title to the proceeds of a life insurance policy,[30] or to determine whether an insurer has funds belonging to the estate and to

tor of decedent.—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107.

Property held by discharged executors as trustees

Bonds purchased by bank and another with assets turned over to themselves as trustees after settling of their accounts as executors were not "additional securities" acquired by executors, but purchase constituted "reinvestment of trust funds" by trustees, as respects surrogate's court's jurisdiction of discovery proceeding by bank.—In re Sheldon's Estate, 9 N.Y.S.2d 307, 169 Misc. 901.

Burial plot

Proceeding by administratrix for an order to discover personalty belonging to decedent and directing its delivery to administratrix was required to be dismissed in so far as it related to a burial plot of decedent, in view of fact that administratrix, as such, possessed no rights therein.—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

Property of corporation wholly owned by deceased

An executor seeking to discover money and property withheld from estate was not entitled to discovery of relations between defendants and a corporation, all of whose stock was owned by testator, since surrogate's court is not the proper forum in which to bring proceedings to force an accounting by defendants of their relations with such corporation.—In re Browning's Will, 17 N.Y.S.2d 557, 258 App.Div. 621, appeal denied In re Browning's Estate, 18 N.Y.S.2d 1003, 259 App.Div. 704, and appeal dismissed 27 N.E.2d 210, 282 N.Y. 804.

Contra In re Browning's Estate, 16 N.Y.S.2d 841, 172 Misc. 1088.

17. Ill.—In re Miller's Estate, 35 N.E.2d 811, 311 Ill.App. 280.

Property described in sealed instrument

N.Y.—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

18. Ill.—In re Miller's Estate, 35 N.E.2d 811, 311 Ill.App. 280.

Okl.—Bank of Hartshorne v. Davis, 62 P.2d 1261, 178 Okl. 336—Shaw v. Davis, 62 P.2d 1259, 178 Okl. 334.

23 C.J. p 1184 notes 21, 22.

19. Ill.—In re Miller's Estate, 35 N.E.2d 811, 311 Ill.App. 280.

20. Ill.—In re Vinces' Estate, 267 Ill.App. 483.

Okl.—Bank of Hartshorne v. Davis, 62 P.2d 1261, 178 Okl. 336—Shaw v. Davis, 62 P.2d 1259, 178 Okl. 334.

21. Ill.—Hansen v. Schwartz, 178 N.E. 246, 345 Ill. 609.

N.Y.—In re Comfort's Estate, 253 N.Y.S. 796, 234 App.Div. 19—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81.

22. Ill.—Mulvihill v. White, 89 Ill. App. 88.

N.Y.—Matter of Richardson, 66 N.Y.S. 94, 31 Misc. 666.

23. Ill.—In re Miller's Estate, 35 N.E.2d 811, 311 Ill.App. 280.

N.Y.—In re Poth's Will, 279 N.Y.S. 95, 155 Misc. 116, affirmed 283 N.Y.S. 428, 246 App.Div. 522—In re Cofer's Estate, 200 N.Y.S. 906, 121 Misc. 292.

23 C.J. p 1184 note 25.

Incidental determination of ownership

Surrogate's court in discovery proceeding by administratrix to recover rent withheld by respondent had jurisdiction to determine issue of ownership of real property where that issue was incidental to determination of ownership of rents collected.—In re Poth's Will, 279 N.Y.S. 95, 155 Misc. 116, affirmed 283 N.Y.S. 428, 246 App.Div. 522.

Executor without power over realty

Where nothing in the will gave the executrix any power over real estate, and where all of the devisees were not before the court on her application to compel testatrix's surviving husband to deliver certain property to her, the delivery of certain deeds to real estate referred to in petition would not be ordered.—In re Leonard's Estate, 185 N.Y.S. 243, 113 Misc. 205.

24. N.J.—In re Dubois, Prerog., 97 A. 728.

25. Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

26. N.Y.—In re Grossman, 182 N.E. 177, 259 N.Y. 553, affirming 254 N.Y.S. 1012, 234 App.Div. 890, which reversed In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14—In re Hammer's Estate, 261 N.Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—In re Brazil's Will, 220 N.Y.S. 331, 219 App.Div. 594, reversing In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273—In re Faulkner's Will, 236 N.Y.S. 237, 134 Misc. 507.

27. N.Y.—In re Hammer's Estate, 261 N.Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—In re Hopkins' Estate, 293 N.Y.S. 786, 161 Misc. 680.

28. N.Y.—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

29. N.Y.—In re Vaughan's Estate, 260 N.Y.S. 197, 145 Misc. 332—In re Lewis' Estate, 205 N.Y.S. 365, 123 Misc. 115—In re Adler's Estate, 177 N.Y.S. 820, 107 Misc. 574, affirmed 180 N.Y.S. 840, 191 App. Div. 40.

30. N.Y.—In re Meguin's Will, 291 N.Y.S. 87, 249 App.Div. 634.

compel payment thereof if it has.[31] Insurance moneys received by a respondent for account of an estate are recoverable,[32] but the court cannot compel a beneficiary legally entitled to the proceeds of a policy to deliver such proceeds to the estate.[33]

§ 159. Scope of Inquiry and Relief

Some discovery statutes provide only for discovery of property belonging to the estate; others provide also for compelling restitution to the estate of any such property found to be in respondent's possession; and some even provide, in addition, for a trial of title where an issue of title is raised and for a decree in accordance with the result thereof. In the absence of statutory authorization, a court cannot, in discovery proceedings, compel restitution or grant recovery of property, or try and determine a genuine issue as to the title thereto, or the right of possession thereof.

The various types of statutes providing for summary discovery proceedings in the administration of decedents' estates have in common the fact that they are intended to, and do, furnish an expedient, summary method of discovering, as an aid to its recovery, personal property of deceased which is or has been concealed, embezzled, converted, transferred, or otherwise withheld.[34] Some statutes are designed to enable the representatives of an estate to discover property wrongfully taken or withheld from the estate only as preliminary to a proper action for its recovery,[35] and the court is given no power or jurisdiction beyond compelling an examination for the purpose of discovery.[36] Under other statutes the court is authorized to go beyond the mere discovery of property of the estate and may compel restitution, or grant recovery, of any such property found to be in respondent's possession,[37]

31. N.Y.—In re Howley's Estate, 231 N.Y.S. 95, 133 Misc. 84.

Payment of proceeds to third person

Surrogate's court was without jurisdiction in discovery proceeding to direct delivery of life policy or its proceeds by insurer to administratrix of estate of insured, where payment had already been made by insurer under facility of payment clause to woman who swore she was insured's widow and surrendered policy, since no assets of estate were in insurer's hands and the only question involved was whether or not the insurer had breached the contract of insurance by paying to the wrong person.—In re Thoms' Estate, 300 N.Y.S. 872, 165 Misc. 398.

32. N.Y.—In re Rosenthal's Estate, 25 N.Y.S.2d 72, 175 Misc. 771, affirmed 27 N.Y.S.2d 994, 262 App. Div. 706, appeal denied 29 N.Y.S. 2d 506, 262 App.Div. 833.

33. N.Y.—In re Hooper's Estate, 261 N.Y.S. 585, 146 Misc. 151.

34. Ariz.—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz. 467.
Ill.—Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230, reversing 32 N.E. 2d 660, 309 Ill.App. 43—Wilson v. Prochnow, 194 N.E. 246, 359 Ill. 148—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849—Sullivan v. Arcola State Bank of Arcola, 145 N.E. 167, 314 Ill. 40—In re Halaska's Estate, 30 N.E. 2d 119, 307 Ill.App. 176—Bates v. Lutz, 220 Ill.App. 54.
Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597.
Mont.—Baker v. Hanson, 231 P. 902, 72 Mont. 22.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
N.J.—Heyer v. Sullivan, 102 A. 248, 88 N.J.Eq. 165, affirmed 103 A. 1052, 88 N.J.Eq. 695.
N.Y.—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Accles' Estate, 275 N.Y.S 430, 153 Misc. 421, affirmed 281 N.Y.S. 973, 245 App.Div. 743—In re Lichtblau, 228 N.Y.S. 239, 131 Misc. 826—In re Glasgow's Estate, 201 N.Y.S. 541, 121 Misc. 613, modified on other grounds 205 N.Y.S. 559, 209 App.Div. 884—In re Appel's Estate, 187 N.Y.S. 829, 115 Misc. 118—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528—In re Leins' Estate, 12 N.Y.S.2d 399—In re Soule's Estate, 187 N.Y.S. 828—In re Denham's Estate, 182 N.Y.S. 90.
Ohio.—Goodrich v. Anderson, 26 N.E. 2d 1016, 136 Ohio St. 509—Losee v. Krieger, 153 N.E. 857, 22 Ohio App. 395.
Okl.—Bank of Hartshorne v. Davis, 62 P.2d 1261, 178 Okl. 336—Shaw v. Davis, 62 P.2d 1259, 178 Okl. 334—In re Cline's Estate, 38 P.2d 30, 169 Okl. 565—Farmers' Bank & Trust Co. v. Sheffler, 186 P. 479, 78 Okl. 44.
Utah.—Hampshire v. Woolley, 269 P. 135, 72 Utah 106.
Wash.—State ex rel. Brown v. Long, 41 P.2d 396, 180 Wash. 602—State v. Superior Court of King County, 245 P. 764, 139 Wash. 102.
Wis.—In re Krauss' Estate, 250 N. W. 388, 212 Wis. 561—In re Schaefer's Estate, 207 N.W. 690, 189 Wis. 395.
23 C.J. p 1183 note 3, p 1184 note 30.

35. Ariz.—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz. 467.
Colo.—Vick Roy v. Morgan, 160 P. 1030, 62 Colo. 122.
Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597.
Mont.—Baker v. Hanson, 231 P. 902, 72 Mont. 22.
N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.
Okl.—Bank of Hartshorne v. Davis, 62 P.2d 1261, 178 Okl. 336—Shaw v. Davis, 62 P.2d 1259, 178 Okl. 334—In re Cline's Estate, 38 P.2d 30, 169 Okl. 565—Farmers' Bank & Trust Co. v. Sheffler, 186 P. 479, 78 Okl. 44.
Wis.—In re Schaefer's Estate, 207 N. W. 690, 189 Wis. 395—Saddington v. Hewitt, 35 N.W. 552, 70 Wis. 240.

36. Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597—Martin v. Clapp, 99 Mass 470—Selectmen of Boston v. Boylston, 4 Mass. 318.
Mont.—Baker v. Hanson, 231 P. 902, 72 Mont. 22.
Neb.—In re Bloedorn's Estate, 280 N.W. 908, 135 Neb. 261.
Okl.—In re Cline's Estate, 38 P.2d 30, 169 Okl. 565.
Wash.—State v. Superior Court of King County, 245 P. 764, 139 Wash. 102.
Wis.—In re Krauss' Estate, 250 N. W. 388, 212 Wis. 561—In re Schaefer's Estate, 207 N.W. 690, 189 Wis. 395.

Ordering inspection of respondent's property

Where persons alleged by administrator to be wrongfully withholding personal property of estate were examined under statute, court was held unauthorized to compel such persons to permit witnesses to inspect property at their home, or to display property elsewhere for such inspection.—State ex rel. Brown v. Long, 41 P.2d 396, 180 Wash. 602.

37. Ill.—Dawdy v. Strickland, 37 N. E.2d 817, 378 Ill. 230, reversing 32 N.E.2d 660, 309 Ill.App. 43—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—Sullivan v. Arcola State Bank of Arcola, 145 N.E. 167, 314 Ill. 40—Urban v. Hynes, 1 N.E.2d 885,

or, under a narrower statute, to have been concealed by him.[38] Unless the statute under which the proceedings are had grants such power, the court cannot compel restitution or grant recovery of the property.[39] The power to order delivery of the property has been held not to change the fundamental inquisitorial nature of the proceeding.[40]

Under still another group of statutes, the court is authorized not only to examine respondent and to compel restitution or grant recovery of the property but may also, in a proper case, try and determine any issue of title or right of possession that properly arises respecting the property involved, and may decree accordingly.[41] Where the remedy is as

285 Ill.App. 182—Bates v. Lutz, 220 Ill.App. 54.

Iowa.—In re Hoffman's Estate, 289 N.W. 720, 227 Iowa 973—Findley v. Jordan, 268 N.W. 515, 222 Iowa 46—In re Brown's Estate, 235 N. W. 754, 212 Iowa 1295—Rickman v. Stanton, 32 Iowa 134.

Kan.—In re Mahanna's Estate, 299 P. 602, 133 Kan. 254.

Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferring, see App., 47 S.W.2d 121—Morley v. Prendiville, 295 S.W. 563, 316 Mo. 1094.

Nev.—Ward v. Daniels, 269 P. 913, 51 Nev. 135.

N.J.—In re Fay's Estate, 20 A.2d 57, 129 N.J.Eq. 473—Heyer v. Sullivan, 102 A. 248, 88 N.J.Eq. 165, affirmed 103 A. 1052, 88 N.J.Eq. 595.

N.Y.—In re Brazil's Will, 220 N.Y. S. 331, 219 App.Div. 594, reversing In re Brazil's Estate, 216 N.Y. S. 430, 127 Misc. 288—In re Browning's Estate, 30 N.Y.S.2d 604, 177 Misc. 328, affirmed 30 N.Y.S.2d 606, 262 App.Div. 489, appeal denied 31 N.Y.S.2d 1019, 263 App.Div. 718—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81—In re Thoms' Estate, 300 N. Y.S. 872, 165 Misc. 398—In re Sichel's Estate, 293 N.Y.S. 559, 162 Misc. 2—In re Accles' Estate, 275 N.Y.S. 430, 153 Misc. 421—In re Arthur's Estate, 265 N.Y.S. 668, 148 Misc. 269—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107—In re Brown's Estate, 253 N.Y.S. 329, 141 Misc. 805—In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14, reversed on other grounds Grossman, In re, 234 N.Y.S. 1012, 234 App.Div. 890, affirmed 182 N.E. 177, 259 N.Y. 553—In re Lichtblau, 228 N.Y.S. 239, 131 Misc. 826—In re Fraley's Estate, 221 N.Y.S. 461, 129 Misc. 803—In re Ryan's Estate, 188 N.Y.S. 387, 115 Misc. 472—In re Appel's Estate, 187 N.Y. S. 829, 115 Misc. 118—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Soule's Estate, 187 N.Y.S. 828.

Ohio.—Goodrich v. Anderson, 26 N.E. 2d 1016, 136 Ohio St. 509—Losee v. Krieger, 153 N.E. 857, 22 Ohio App. 395.

Utah.—Hampshire v. Woolley, 269 P. 135, 72 Utah 106.

23 C.J. p 1186 note 39.

Purpose of statutes, providing for citation of person, alleged by executor to have converted decedent's property, to appear and be examined on oath in probate court, and authorizing such court to order him to pay value of property and commit him to jail on refusal to do so, is to provide summary method for recovery of decedent's property from party retaining possession thereof or embezzling it.—Wilson v. Prochnow, 194 N.E. 246, 359 Ill. 148.

Provision held valid

Ill.—Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.

Person intrusted with assets

Under a statute providing that the probate court may require an accounting of any person who has been intrusted with assets of the estate, such a person, being found in possession of such assets, is amenable to the orders of the court with respect thereto.—In re De Barry's Estate, 111 P.2d 728, 43 Cal.App.2d 715.

Set-off of money disbursed for estate

In discovery proceeding, deceased's father could not be compelled to pay estate assets over to administratrix without receiving benefit of set-off for considerably greater disbursement made by him for the account of the estate, where father's acts were substantially those of administratrix' authorized agent.—In re Christie's Estate, 4 N.Y.S.2d 484, 167 Misc. 484.

38. Md.—Hopper v. Hopkins, 160 A. 166, 162 Md. 448.

Necessity of "concealment"

Pledgees' holding of assets of deceased person's estate as collateral to loan was held not "concealment" within statute providing for order of delivery to administrator; hence court was without jurisdiction to make such order.—Hopper v. Hopkins, supra.

39. Cal.—Koerber v. Superior Court in and for City and County of San Francisco, 206 P. 496, 57 Cal.App. 31.

Ind.—Montgomery v. Montgomery, 140 N.E. 917, 81 Ind.App. 1.

Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597.

Neb.—In re Bloedorn's Estate, 280 N.W. 908, 135 Neb. 261.

N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

Okl.—In re Cline's Estate, 38 P.2d 30, 169 Okl. 565.

Wash.—State ex rel. Brown v. Long, 41 P.2d 396, 180 Wash. 602—State v. Superior Court of King County, 245 P. 764, 139 Wash. 102.

Wis.—In re Krauss' Estate, 250 N. W. 388, 212 Wis. 561—In re Schaefer's Estate, 207 N.W. 690, 189 Wis. 395.

23 C.J. p 1185 note 32.

40. Iowa.—In re Brown's Estate, 235 N.W. 754, 212 Iowa 1295.

41. Ill.—Dawdy v. Strickland, 37 N. E.2d 817, 378 Ill. 230, reversing 32 N.E.2d 660, 309 Ill.App. 43—Keshner v. Keshner, 33 N.E.2d 877, 367 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A. L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484—In re Vinces' Estate, 267 Ill.App. 483.

Mo.—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferring, see, App., 47 S.W.2d 121—Morley v. Prendiville, 295 S. W. 563, 316 Mo. 1094—Eans v. Eans, 79 Mo. 53.

N.Y.—In re Wilson's Estate, 169 N. E. 122, 252 N.Y. 155, affirming 232 N.Y.S. 919, 225 App.Div. 761, which affirmed 250 N.Y.S. 553, 140 Misc. 10—In re Akin's Estate, 161 N.E. 471, 248 N.Y. 202, affirming 224 N. Y.S. 743, 222 App.Div. 710, affirming 223 N.Y.S. 812, 129 Misc. 840—In re Pierson's Estate, 16 N.Y.S.2d 369, 258 App.Div. 911—In re Heim's Estate, 8 N.Y.S.2d 574, 255 App.Div. 1007, affirming 3 N.Y.S.2d 134, 166 Misc. 931—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146—In re Brazil's Will, 220 N.Y.S. 331, 219 App. Div. 594, reversing In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288—In re Ort's Estate, 217 N.Y.S. 46, 217 App.Div. 422—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107—In re Everitt's Estate, 259 N.Y.S. 81, 144 Misc. 102—In re Weeks' Estate, 256 N.Y.S. 387, 142 Misc. 752—In re Gallagher's Estate, 241 N. Y.S. 759, 137 Misc. 564—In re Ehlers' Estate, 231 N.Y.S. 16, 132 Misc. 910—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718—In re Davis' Estate,

broad as this, it really consists of two parts, namely, the discovery, or purely inquisitorial, part, and the trial of title part, which has been likened to replevin;[42] but, despite this dual nature of the remedy, the proceeding has been said still to be fundamentally inquisitorial,[43] its aim being a discovery which will bring decedent's assets within the executor's dominion.[44] Ordinarily, a discovery proceeding under such a statute will embrace both the inquisition and the trial of title,[45] and the replevin phase of the proceeding must await the demonstration, on the inquisition, of respondent's possession or dealing with the property;[46] but this dual aspect is not invariable, and there may be an inquisition without a trial, as where the inquisition produces no facts warranting a trial, or where no answer asserting title is interposed,[47] and there may be a trial of title without a prior inquisition,[48] as where respondent admits possession and asserts a claim of title.[49]

In the absence of statutory authorization, the probate court cannot, in discovery proceedings, try and determine a genuine issue as to the title to, or right to possession of, property.[50] Under a statute pro-

220 N.Y.S. 204, 128 Misc. 622, affirmed 226 N.Y.S. 797, 222 App. Div. 846—In re Seaman's Estate, 199 N.Y.S. 794, 120 Misc. 531—In re Leonard's Estate, 185 N.Y.S. 243, 113 Misc. 205.

23 C.J. p 1186 notes 38, 39.

Power to impress trust on property disposed of see supra § 158.

Necessity of real issue of title

It is not sufficient to confer jurisdiction to submit discovery proceeding to jury that question of title may arise in courts, but it must be shown to be present, and representative of estate must point to specific property and allege title thereto.—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107.

Conflicting claims of other persons

The jurisdiction of the surrogate's court to try title is limited to a determination of title as between the personal representative and the withholding party; it has no jurisdiction to determine a controversy between a withholder of the property sought and a third person, even if the personal representative also lays claim to the same property.—In re Brennan's Estate, 221 N.Y.S 462, 129 Misc. 283—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—Matter of Silverman, 151 N.Y.S. 382, 87 Misc. 571.

Going back of title

If it appears that respondent received title from decedent, the court will not try any issue that may be raised as to whether the transfer had been fraudulently induced, the sole issue being one of title.—In re Landau's Estate, 298 N.Y.S. 150, 163 Misc. 894.

Order to execute instruments

Surrogate's court in discovery proceeding by administratrix to recover rent should, on determining that respondent held record title to land in question in trust for decedent, direct respondent to execute assignment of lease and conveyance to decedent's representative.—In re Poth's Will, 279 N.Y.S. 95, 155 Misc. 116, affirmed 283 N.Y.S. 428, 246 App.Div. 522.

42. N.Y.—In re Nutrizio's Estate, 206 N.Y.S. 706, 211 App.Div. 8—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078—In re Hilliard's Estate, 15 N.Y.S. 2d 96, 172 Misc. 273—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Sichel's Estate, 293 N.Y.S. 559, 162 Misc. 2—In re Hagan's Estate, 283 N.Y.S. 605, 157 Misc. 378.

43. N.Y.—Matter of Heinze, 120 N. E. 63, 224 N.Y. 1—In re Nutrizio's Estate, 206 N.Y.S. 706, 211 App. Div. 8—In re Browning's Estate, 30 N.Y.S 2d 604, 177 Misc. 328, affirmed 30 N.Y.S.2d 606, 262 App. Div. 489, appeal denied 31 N.Y.S.2d 1019, 263 App.Div. 718—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Brown's Estate, 253 N.Y.S. 329, 141 Misc. 805—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528.

A fundamental purpose of the proceeding is "that of permitting an inquisition by the deceased's representative in respect to the facts, ownership, and right to possession of the estate to any property within the knowledge or control of another."—In re Kevill's Estate, 2 N.Y.S. 2d 191, 194, 166 Misc. 230.

44. N.Y.—Matter of Heinze, 160 N. E. 63, 224 N.Y. 1—In re Ehrlich's Estate, 215 N.Y.S. 141, 126 Misc. 673—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528.

45. N.Y.—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

Determination of title as matter of right

Administratrix had right to secure determination in discovery proceeding, concerning whether respondent possessed certain property which should be delivered to the administratrix in her fiduciary capacity where a prior examination of respondent, directed pursuant to Surrogate's Court Act, did not result in an adjudication of verity of opposing positions of the parties.—In re Rosen, supra.

46. N.Y.—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230.

47. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 367 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.

N.Y.—In re Hilliard's Estate, 15 N. Y.S.2d 96, 172 Misc. 273—In re Reilly's Estate, 182 N.Y.S. 221, 111 Misc. 66.

Answer as essential to trial see infra § 161.

48. N.Y.—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

49. N.Y.—In re Mangene's Estate, 16 N.Y.S.2d 94, 258 App.Div. 814—In re Comfort's Estate, 253 N. Y.S. 796, 234 App.Div. 19—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

50. Ariz.—Kay v. Kay, 89 P.2d 496, 499, 53 Ariz. 336, citing **Corpus Juris**—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz 467.

Cal.—In re Escolle's Estate, 25 P.2d 860, 134 Cal.App 473—Koerber v. Superior Court in and for City and County of San Francisco, 206 P. 496, 57 Cal.App. 31.

Ill.—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill. App. 484—Sullivan v. Arcola State Bank of Arcola, 145 N.E. 167, 314 Ill. 40—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182—People v. Ft. Dearborn Trust & Savings Bank of Chicago, 232 Ill.App. 109—Bates v. Lutz, 220 Ill.App. 54.

Contra Wahl v. Jacobs, 146 Ill.App. 71.

Iowa.—In re Enright's Estate, 276 N. W. 839, 224 Iowa 603—Findley v. Jordan, 268 N.W. 515, 222 Iowa 46—In re Brown's Estate, 235 N.W. 754, 212 Iowa 1295.

Kan.—In re Mahannah's Estate, 299 P. 602, 133 Kan. 254.

Md.—Hopper v. Hopkins, 160 A. 166, 162 Md. 448.

Mont.—Baker v. Hanson, 231 P. 902, 72 Mont. 22—State v. District Court of Fifth Judicial Dist. in and for Jefferson County, 162 P. 1053, 53 Mont. 210.

viding for the determination by the court as to whether or not defendant had concealed or embezzled property and for the entry of a judgment against him if he had, the court, on finding defendant not guilty of embezzlement or concealment, has no authority to determine any other issues,[51] such as whether a claimed gift inter vivos was or was not valid.[52] Even if it is found, in a proceeding under such a statute, that defendant had concealed or embezzled money, the representative cannot recover the specific money, the only judgment provided for being a money judgment.[53]

Under a statute like that formerly obtaining in New York, under which the court lacked power to try title, the interposition of an answer asserting title put an end to the proceeding,[54] but under a later New York statute and similar statutes in other jurisdictions, despite the court's lack of power to try title, the mere fact that the person sought to be examined claims ownership of the property involved does not preclude an examination of such person,[55] and the court may proceed therewith until it finds that there is a substantial basis for such claim and that a genuine issue exists.[56] If the court cannot try title, the mere fact that respondent files an answer claiming ownership does not invest the court with jurisdiction to do so.[57]

§ 160. Parties, and Process or Notice

In a summary proceeding for discovery, the only necessary parties are those who have knowledge or information as to the property. A citation or summons is the usual process in such proceedings.

In a summary proceeding for discovery of assets of a decedent's estate, it has been held that the only necessary parties are those who have knowledge or information as to property that should be inventoried by, or delivered to, the representative.[58] Where the proceeding is brought by someone other

Nev.—Ward v. Daniels, 269 P. 913, 51 Nev. 125.
N.J.—Heyer v. Sullivan, 102 A. 248, 88 N.J.Eq. 165, affirmed 103 A. 1052, 88 N.J.Eq. 595.
Okl.—Farmers' Bank & Trust Co. v. Sheffler, 186 P. 479, 78 Okl. 44.
Pa.—In re McGovern's Estate, 186 A. 89, 322 Pa. 379.
Utah.—Hampshire v. Woolley, 269 P. 135, 72 Utah 106.
Wash.—State ex rel. Brown v. Long, 41 P.2d 396, 180 Wash. 602—State v. Superior Court of King County, 245 P. 764, 139 Wash. 102.
23 C.J. p 1185 notes 32, 34, 35.

"The court or judge is not to try any issue of fact as to whether such person cited to appear is in the wrongful possession of property of the estate, but only to determine whether there is such an issue, and, if there is not and the title is conceded to be in the estate, the order [for delivery] should be entered. . . . But if it develops in the examination that the title to the property is in dispute, or that there is some controversy as to whether the estate is entitled thereto, then the administrator or executor must be relegated to procedure usually resorted to in order to adjudicate such issues."—In re Hoffman's Estate, 289 N.W. 720, 721, 227 Iowa 973—In re Brown's Estate, 235 N.W. 754, 756, 212 Iowa 1295—Barto v. Harrison, 116 N.W. 317, 319, 138 Iowa 413.

In proceeding against administrator

An administrator cannot be compelled to litigate in summary proceedings against him the question whether he had discharged a debt due from him to the estate.—Wilson v. Ruthrauff, 82 Mo.App. 435.

Claim based on unenforceable gift

Where defendant in discovery proceeding admitted that decedent was the owner of property in her possession but refused to surrender the property because of decedent's alleged voluntary, but unfulfilled, oral promise to devise the property to defendant by will, orphans' court had the power under discovery statute to direct defendant to turn over to decedent's administratrix the property in defendant's possession.—In re Fay's Estate, 20 A.2d 57, 129 N.J. Eq. 473.

51. Ohio.—Goodrich v. Anderson, 26 N.E.2d 1016, 136 Ohio St. 509.

52. Ohio.—Goodrich v. Anderson, supra—Halloran v. Merritt, 192 N. E. 542, 48 Ohio App. 135.

53. Ohio.—Lindquist v. Hayes, 153 N.E. 297, 22 Ohio App. 141.

54. N.Y.—Matter of Akin, 161 N.E. 471, 248 N.Y. 202, affirming 224 N. Y.S. 743, 222 App.Div. 710, affirming 223 N.Y.S. 812, 129 Misc. 840—In re Walker's Will, 32 N.E. 633, 136 N.Y. 20—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283—In re Davis' Estate, 220 N.Y.S. 204, 128 Misc. 622, affirmed 226 N. Y.S. 797, 222 App.Div. 846—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—In re Basch, 33 N.Y.S. 424, 24 N.Y.Civ.Proc. 264.

Assertion of rightful possession

Where the answer alleged that the property had been left to him by decedent to use as he saw fit in business enterprises and transactions, that he had paid to petitioner and other distributees all of such property, and that petitioner had acquiesced in such conduct over a period of eleven years, the application for discovery was properly denied.—Matter of Cunard, 6 N.Y.S. 883, 2 Conn.Surr. 16, affirmed 4 Silv.Sup. 409, 7 N.Y.S. 553.

55. N.Y.—Gick v. Stumpf, 98 N.Y.S. 961, 113 App.Div. 16, 37 N.Y.Civ. Proc. 98, affirming 98 N.Y.S. 299, 49 Misc. 32.
23 C.J. p 1185 note 33.

56. Iowa.—In re Hoffman's Estate, 289 N.W. 720, 227 Iowa 973—In re Enright's Estate, 276 N.W. 839, 224 Iowa 603—In re Brown's Estate, 235 N.W. 754, 212 Iowa 1295—Barto v. Harrison, 116 N.W. 317, 138 Iowa 413.
N.Y.—Matter of Akin, 161 N.E. 471, 248 N.Y. 202, affirming 224 N.Y.S. 743, 222 App.Div. 710, affirming 223 N.Y.S. 812, 129 Misc. 840—In re Brazil's Will, 220 N.Y.S. 331, 219 App.Div. 594, reversing In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283—In re Miller's Estate, 183 N.Y.S. 536, 112 Misc. 287—Gick v. Stumpf, 98 N.Y.S. 299, 49 Misc. 32, affirmed 98 N.Y.S. 961, 113 App.Div. 16.
23 C.J. p 1185 note 33.

Basis shown through improper evidence

Respondent's testimony that she held decedent's personalty as gift was held properly in record for consideration by trial court so as to justify it in refusing order for delivery of property, where, although the testimony was improper, no ruling was obtained on objection thereto.—Ward v. Daniels, 269 P. 913, 51 Nev. 125.

57. Cal.—Koerber v. Superior Court in and for City and County of San Francisco, 206 P. 496, 57 Cal.App. 31.

58. N.Y.—In re Videgaray, 170 N. Y.S. 874, 184 App.Div. 381, affirming 168 N.Y.S. 586.
23 C.J. p 1186 note 42.
Persons against whom remedy may be invoked see supra § 154.

than the executor, the latter is not a necessary party.[59] In an administrator's proceeding to recover possession of property from one who is executor of another estate which claims an interest in the property, such other estate is a necessary party.[60] The beneficiary of a tentative trust created by a savings bank deposit cannot be deprived of his rights therein through discovery proceedings by the executrix to which the beneficiary was not a party.[61] A bill filed against an executrix to discover assets not included in the inventory is not demurrable or subject to dismissal because the executrix was made a party in her individual capacity.[62] In a bill of discovery by one administrator against another, distributees of their decedents are ordinarily not necessary parties.[63] A legatee cannot, except under special circumstances, join, in a suit against the personal representative for discovery and relief, an alleged debtor of the estate from whom the representative has allegedly failed to collect assets of the estate.[64]

Intervention. Where the probate court sends an issue to a court of law for trial by jury, the latter court has been held to be without power to permit intervention of another party.[65]

Substitution. In a jurisdiction in which the proceeding is only inquisitional in nature until it appears that respondent is in possession of assets, after which it becomes one in the nature of replevin, see supra § 159, where respondent dies while the proceedings are still in the first or inquisitional stage, his personal representative cannot be substituted for him so as to require him to make discovery of facts alleged to be within the original respondent's knowledge;[66] but the rule is otherwise where the death occurs after the inquisitional stage has shown prima facie possession of assets and the proceedings have entered the replevin stage.[67]

Process or notice. Where the probate code makes no provision as to the mode of notice in discovery proceedings, a general statute requiring notice to be given by citation unless otherwise provided applies.[68] Proper citation or summons should issue and all subsequent proceedings must await its return,[69] but irregularities are waived by a general appearance and the filing of an answer to the merits.[70] The issuance of a subpœna duces tecum returnable at the same time as the order in discovery has been held proper.[71]

§ 161. Pleading

To obtain discovery or other relief in summary proceedings, an application must be filed setting forth the essential facts. An answer may be filed, the sufficiency and effect of which depends on the local statutes; and the filing of a reply or a bill of particulars may be directed. In at least one state the pleadings consist of interrogatories and the answers thereto.

Application; objections. In order to obtain discovery for a decedent's estate by summary proceedings an application must be filed.[72] The motion[73] or petition[74] must set forth facts showing that property of the estate came into the possession of re-

Creditors are not necessary or proper parties.—In re Accles' Estate, 275 N.Y.S. 430, 153 Misc. 421, affirmed 281 N.Y.S. 973, 245 App.Div. 743.

Coadministrator

(1) An order for examination on the petition of an administrator may be set aside for the failure to join a coadministrator as a party, where both had qualified and each had filed a separate inventory.—In re Slingerhead, 36 Hun, N.Y., 575.

(2) The nonjoinder of one of two special administrators does not prevent the other from bringing the proceedings.—Talbot v. Bush, 146 N. E. 223, 251 Mass. 27.

59. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill. App. 176.

60. Ill.—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609.

61. N.Y.—In re Faulkner's Will, 236 N.Y.S. 237, 134 Misc. 507.

62. Md.—Linthicum v. Polk, 48 A. 342, 93 Md. 84.

63. W.Va.—Wiant v. Lynch, 140 S.E. 487, 104 W.Va. 507.

64. Va.—Beaty v. Downing, 31 S.E. 612, 96 Va. 451.

65. N.Y.—In re Pardee's Estate, 257 N.Y.S. 593, 235 App.Div. 492.

66. N.Y.—In re Hilliard's Estate, 15 N.Y.S.2d 96, 172 Misc. 273.

67. N.Y.—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078.

68. Wyo.—State v. District Court of Eighth Judicial Dist., in and for Fremont County, 227 P. 378, 31 Wyo. 413, 35 A.L.R. 1082.

69. N.Y.—In re Videgaray, 168 N. Y.S. 586, affirmed 170 N.Y.S. 874, 184 App.Div. 381.
23 C.J. p 1186 note 46.

70. N.Y.—Matter of McGuire, 94 N. Y.S. 97, 106 App.Div. 131.

71. N.Y.—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308.

72. Wyo.—State v. District Court of Eighth Judicial Dist., in and for Fremont County, 227 P. 378, 31 Wyo. 413, 35 A.L.R. 1082.

73. Fla.—Hawkins v. Perry, 1 So.2d 620, 146 Fla. 766.

74. N.Y.—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107.

Form of petition
Wis.—Saddington v. Hewitt, 35 N.W. 552, 70 Wis. 240.

Petition held sufficient

(1) Petition alleging that stock "formerly belonging to" decedent should be delivered to temporary administrator or included in inventory or appraisal, and that stock was loaned by decedent to respondent for temporary use as collateral for personal loans and was never returned, although demand was made, sufficiently alleged decedent's ownership of stock.—In re Chapin's Estate, 3 N.Y.S.2d 936, 167 Misc. 351.

(2) Petition alleging that petitioner believes himself entitled to the funds either individually or as administrator is sufficient, since such an allegation comprises the allegation that the funds may belong to the administrator as such.—In re Smith's Estate, 5 N.Y.S.2d 886.

Petition held insufficient

Petition seeking to discover decedent's funds and certain personalty alleged to be in widow's possession or control held insufficient as to

spondent, or, where the statute so requires, that respondent has in his possession or knowledge deeds or other writings evidencing title to the property in question.[75] However, at least where the statute so provides, an affidavit on information and belief is sufficient,[76] and such allegations are liberally regarded.[77] For the purpose of passing on the sufficiency of the application, the facts alleged in the petition must be taken as true.[78]

Where a bill for discovery is brought under general statutes or rules, general rules as to the sufficiency of the pleadings are applicable.[79]

After the filing of the application, the person cited should be given a reasonable time in which to file objections.[80]

Objections to the affidavit should be urged by defendant before submitting himself to a trial, since otherwise he is assumed to waive all defects;[81] and it has been held that where respondent has interposed an answer, after the overruling of a motion to quash the petition, he must be deemed to have waived any question as to the sufficiency of the affidavit to the petition.[82]

The affidavit may be amended where petitioner finds himself misinformed, and any order subsequently made can refer only to the amended affidavit.[83]

Answer generally. In a summary proceeding for discovery, an answer may be filed;[84] if the answer denies knowledge or possession of the property, respondent is subject to examination.[85] The interposition of an answer which alleges that respondent has title to, or right to possession of, the property, and which is sufficient to raise such issue, transforms the proceeding from a mere inquiry to a trial of title,[86] and the proceeding does not otherwise be-

funds for failure to point out particular money in widow's possession owned by decedent.—In re Lowe's Estate, 265 N.Y.S. 420, 148 Misc. 107.

Concealment

Under a statute requiring allegation of concealment, a petition is insufficient which, while charging concealment, shows by other allegations that there is no concealment.—Hopper v. Hopkins, 160 A. 166, 162 Md. 448.

Criminality

The fact that a statute provides for a penalty where respondent is found guilty does not, in some cases, require an allegation of criminality in a petition stating a cause of action under another statute which does not provide for a penalty.—Losee v. Krieger, 153 N.E. 857, 22 Ohio App. 395.

75. Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 89 P. 62, 35 Mont. 318.
23 C.J. p 1187 note 51.

76. Ill.—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.

77. Mo.—Tygard v. Falor, 63 S.W. 672, 163 Mo. 234.
23 C.J. p 1186 note 49.

78. N.Y.—In re Browning's Estate, 27 N.Y.S.2d 318, 176 Misc. 308.

79. **Pleadings held sufficient**

Pleadings, affidavit, and exhibits showing that bank, to which testator had assigned life policies to secure debts, and trustee, to whom testator directed bank to pay balance for specific purpose, failed to account for proceeds and to turn over to executrix mortgages and notes allegedly paid out of proceeds, held to warrant granting of bill of discovery to executrix permitting examination of bank's and trustee's records.—Floyd v. Victory Sav. Bank, 189 S.E. 462, 182 S.C. 357.

Showing of necessity for discovery required

A bill for discovery and relief in equity against the personal representative to charge in his hands the personal estate must show a necessity for the discovery, due to indispensability of the evidence sought and inability to obtain it otherwise.—Price v. Laing, 68 S.E. 24, 67 W. Va. 373.

80. Wyo.—State v. District Court of Eighth Judicial Dist., in and for Fremont County, 227 P. 378, 31 Wyo. 413, 35 A.L.R. 1082.

81. Ill.—Wade v. Pritchard, 69 Ill. 279—In re Welch, 186 Ill.App. 290.

Failure to show interest of petitioners

An objection that the court was without jurisdiction in citation proceedings instituted by administrators de bonis non to collect assets converted by respondent, a former attorney for the estate, because the affidavit failed to show in what way the administrators de bonis non were interested in the estate, was waived by respondent submitting his account and contesting the matter.—People ex rel. Olsen v. Templeman, 265 Ill. App. 369.

82. Ill.—Mohlke v. People, 117 Ill. App. 595.

83. Ill.—Blair v. Bennett, 24 N.E. 969, 134 Ill. 78.

84. N.Y.—In re Basch, 33 N.Y.S. 434, 24 N.Y.Civ.Proc. 264.
23 C.J. p 1187 note 55.

What constitutes answer

In view of the statutory requirement that all pleadings must be in writing and verified, the fact that respondent in proceeding by administratrix for discovery of property alleged to be withheld was permitted without objection to offer testimony concerning property involved did not constitute a sufficient "answer" within statute.—In re Arthur's Estate, 265 N.Y.S. 668, 148 Misc. 269.

Order to file answer denied

Pa.—In re Montgomery's Estate, 89 Pittsb.Leg.J. 295.

Response erroneously stricken

A verified response filed by respondent and setting forth all the information to which the petitioner was entitled, and facts requiring dismissal of the petition in that there was no concealment, but a claim of title out of the estate, was erroneously stricken.—First Nat. Bank v. Superior Court in and for Apache County, 27 P.2d 525, 42 Ariz. 467.

An unsworn denial of the truth of a sworn allegation in the petition entitles respondent to no relief.—In re Ferrari's Ex'rs, 236 N.Y.S. 406, 134 Misc. 728.

Denial as conclusion

As respects the issues raised, where an answer admitted that decedent gave respondent moneys then in a safe-deposit box in a bank and directed that it be withdrawn and divided with decedent's other children, a denial in the answer that respondent had ever had possession of cash belonging to the estate was a mere conclusion.—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176.

85. N.Y.—In re Brown's Estate, 253 N.Y.S. 329, 141 Misc. 605.

86. N.Y.—In re Comfort's Estate, 253 N.Y.S. 796, 234 App.Div. 19—In re Nutrizio's Estate, 206 N.Y.S. 706, 211 App.Div. 8—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433—In re Degenhardt's Estate, 206 N.Y.S. 230, 123 Misc. 762—In re Car-

come a trial;[87] but despite respondent's default or failure to raise such issue the court is still required to proceed with the inquisition to determine whether the estate is, at least prima facie, entitled to possession,[88] and is not deprived of its power to order delivery of any property found on such inquisition to belong to the estate.[89] Where a discovery proceeding is continued after the death of the original respondent against his executor, the latter may interpose the defense that he finds none of the demanded property among his decedent's possessions reaching the hands of the fiduciary as such.[90]

Amendment or withdrawal of answer. In the absence of statutory provision permitting the amendment of an answer in discovery proceedings as of right, the grant or rejection of an application for leave to withdraw an answer has been held to rest in the court's discretion.[91] In a jurisdiction where an appeal from the final order of the probate court requires a trial de novo the petition may be amended on appeal.[92]

Demurrer. A purely technical demurrer to a bill for discovery in a probate court should be overruled.[93]

Reply or replication. The court may be empowered in discovery proceedings to direct the filing of a reply to an answer alleging title.[94] Where, in a proceeding against an administrator for discovery and an accounting of alleged concealed assets, defendant answered interrogatories submitted, complainants were entitled to reply to such answers to define more clearly and shorten the issues.[95] A second petition has been held sufficient to form an issue without a formal replication, although petitioner should have been permitted to file a replication offered after the second petition was filed.[96]

Bill of particulars. If the petition in discovery proceedings is sufficient to warrant the order of examination, no bill of particulars may be required of

ney's Estate, 196 N.Y.S. 105, 119 Misc. 104, affirmed 199 N.Y.S. 914, 206 App.Div. 734—In re Crook's Estate, 190 N.Y.S. 285.

87. N.Y.—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283.

Issue raised

Answer to petition for discovery and delivery of personalty, denying generally petitioner's right to possession and decedent's ownership, raised issue of title within jurisdiction of surrogate's court.—In re Buckler, 227 N.Y.S. 133, 131 Misc 172.

No issue raised

(1) Answer alleging decedent's intestacy as respects bonds sought to be recovered in discovery proceeding held to raise no issue of title.—In re Brennan's Estate, 221 N.Y.S. 462, 129 Misc. 283.

(2) Where the answer contained no claim of title, but merely denied that respondents were in possession of any property belonging to decedent's estate, and the estate's ownership thereof, the proceeding stands as one of inquiry or discovery, and must proceed as such, unless respondents voluntarily ask to amend their answer.—In re Carney's Estate, 196 N.Y.S. 105, 119 Misc. 104, affirmed 199 N.Y.S. 914.

88. N.Y.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333—In re Arthur's Estate, 265 N.Y.S. 668, 148 Misc. 269—In re Massey's Will, 257 N.Y.S. 578, 143 Misc. 794—In re Reilly's Estate, 182 N.Y.S. 221, 111 Misc. 66.

Failure to raise issue equivalent to general denial

N.Y.—In re Farrell's Estate, 30 N.Y.S.2d 742, 177 Misc. 389—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333—In re Donnelly's Estate, 283 N.Y.S. 609, 157 Misc. 319.

Distinction criticized

"The attempted distinction between an 'inquiry' and a 'trial' appears to be rather one of nomenclature than of substance. In either situation the ultimate purpose of the proceeding is to determine whether or not respondent has in his possession any property or the proceeds of any property, title, and right to possession of which is vested in the representative. . . . In both cases the result of the proceeding . . . will be a determination, which will be binding and conclusive upon the parties, as to whether or not a concrete recovery by the petitioner from the respondent is permissible."—In re Kevill's Estate, 2 N.Y.S.2d 191, 193, 166 Misc. 230.

Raising issue as to part of property

Where respondent asserted title in himself to portion of property and interposed a denial of possession of portion of property, respondent was subjected to examination to test validity of his denial of receipt of property not claimed by him to be his own.—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078.

89. N.Y.—In re Akin's Estate, 161 N.E. 471, 248 N.Y. 202, affirming 224 N.Y.S. 743, 222 App.Div. 710, which affirmed 223 N.Y.S. 812, 129 Misc. 840—In re Jarmakowski's Estate, 8 N.Y.S.2d 35, 169 Misc. 463—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Weeks' Estate, 256 N.Y.S. 387, 142 Misc. 752.

Great precaution should be used in directing delivery of property in proceeding to discover decedent's property where there has been inquiry only and not trial.—In re Arthur's Estate, 265 N.Y.S. 668, 148 Misc. 269.

90. N.Y.—In re Courtade's Estate, 16 N.Y.S.2d 974, 172 Misc. 1078.

91. N.Y.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.

Considerations affecting discretion

Where respondent's answer admitted receipt of money from decedent as a gift, and no mistake, omission, irregularity, or defect was asserted, the attempted retraction of the sworn admission raised a strong inference that the pleader was actuated solely by ulterior motives subversive of the ends of justice, which inference should be adequately negatived before the court should permit itself to be made a party thereto; and, apart from these considerations, the respondent should not be permitted to withdraw the answer where the ultimate result, if application to withdraw were granted, would be to leave respondents in same position which they occupied.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.

92. Ill.—In re Wright's Estate, 25 N.E.2d 909, 304 Ill.App. 87.

93. Pa.—Markle's Estate, 4 Pa.Dist. 348.

94. N.Y.—In re Unger's Estate, 16 N.Y.S.2d 609, 172 Misc. 952, affirmed 19 N.Y.S.2d 28, 259 App.Div. 823.

95. Mo.—In re Clinton, 123 S.W. 1, 223 Mo. 371.

96. Md.—Long v. Long, 80 A. 699, 848, 115 Md. 130.

the petitioner,[97] although a bill of particulars may be demandable from the respondent in amplification of his affirmative answer;[98] and it has been held, without reference to the right of a respondent to a bill of particulars, that a demand therefor before the filing of a reply ordered by the court was premature.[99]

The interrogatories and the answers thereto in a summary proceeding to discover and recover assets of the estate constitute, in at least one jurisdiction, the pleadings in the cause and make up the issues to be tried,[1] and, as appears infra § 162, are not ordinarily to be considered as evidence. If the answers raise a general issue there can be no judgment on the pleadings,[2] but if the answers do not raise any issues judgment on the pleadings is proper.[3] The original affidavit and the answer thereto are not part of the pleadings, and the filing of a general denial in answer to the original affidavit raises no issue to be tried.[4]

§ 162. Evidence

The representative has the burden of proving prima facie that respondent has property belonging to the estate, and the respondent has the burden of supporting his claim to property which is admitted or shown to have belonged to decedent. General rules govern the admissibility, and the weight and sufficiency, of the evidence.

A representative seeking discovery of assets has the burden in the first instance of showing prima facie that the respondent has property belonging to the estate or information concerning such property.[5] If it is proved or admitted that the property claimed belonged to decedent, a presumption arises that a condition once shown to exist continues,[6] and the burden shifts to respondent to support his claim[7] by showing divestiture of such former ownership;[8] thus, if respondent claims title by gift, the burden is on him to prove a gift.[9] Where, because

97. N.Y.—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230.

98. N.Y.—In re Kevill's Estate, supra.

Before examination of representatives

Where a person asserts, as the basis of her claims against the estate, transactions in which she personally participated, and the representatives of the estate demand a bill of particulars, the court may validly require the furnishing of such bill in advance of the completion of an examination of the representatives sought by claimant.—In re Leary's Estate, 24 N.Y.S.2d 79, 175 Misc. 253.

99. N.Y.—In re Unger's Estate, 16 N.Y.S.2d 609, 172 Misc. 952, affirmed 19 N.Y.S.2d 28, 259 App.Div. 823.

1. Mo.—In re Decker's Estate, 152 S.W.2d 104—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred, see, App., 47 S.W.2d 121—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835—Starks v. Lincoln, 291 S.W. 132, 316 Mo. 483—Maynard v. McClellan, App., 156 S.W.2d 770—Newell v. Edom, App., 242 S.W. 701.

2. Mo.—Maynard v. McClellan, App., 156 S.W.2d 770.

Failure to answer numerically is no ground for judgment on the pleadings where the answer raises general issues, in the absence of a statute requiring interrogatories to be numerically answered.—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Alleging ultimate facts is sufficient to raise issues; the evidence in support of such facts need not be set forth in the answers.—Maynard v. McClellan, Mo.App., 156 S.W.2d 770.

3. Mo.—Maynard v. McClellan, supra.

4. Mo.—Maynard v. McClellan, supra.

5. N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146—In re Farrell's Estate, 30 N.Y.S.2d 742, 177 Misc. 389—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333—In re Massey's Will, 257 N.Y.S. 578, 143 Misc. 794—In re Bates' Estate, 21 N.Y.S.2d 306, affirmed In re Bates' Will, 20 N.Y.S.2d 1012, 259 App.Div. 968, reargument denied In re Bates' Estate, 21 N.Y.S.2d 393, 259 App.Div. 986. 23 C.J. p 1187 note 60.

Action for money conveyed away; fraudulent intent

Where defendant, sued for conveying away money of decedent, admits withdrawal of money from bank, administratrix, to establish prima facie case, need only prove that money belonged to decedent, and no fraudulent or criminal intent need be shown.—Lindquist v. Hayes, 153 N.E. 297, 22 Ohio App. 141.

6. N.Y.—In re Canfield's Estate, 163 N.Y.S. 191, 176 App.Div. 554—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.

7. Mo.—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835—In re Vall Fossen, App., 13 S.W.2d 1076.
N.Y.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.
23 C.J. p 1187 note 61.

Quality and quantum of proof

In action to discover assets of estate, where prima facie case is made against defendants claiming property alleged to belong to estate, burden is on them to establish their ownership by proof which is clear, full, unequivocal, and convincing to the judicial mind.—In re Martin's Estate, 266 S.W. 750, 219 Mo.App. 51.

Burden is on respondent to prove:

(1) That property received from a former executor and residuary legatee was not needed for debts, taxes, or administration expenses.—In re Hammond's Estate, 190 N.Y.S. 886, 198 App.Div. 634.

(2) Administrator of wife's estate claiming right to withhold portion of proceeds of wife's land on theory of repayment of money expended when improving such land held required to prove that there was consideration for money received by him.—Roethemeier v. Veith, 69 S.W. 2d 930, 334 Mo. 1030.

Proof of delivery by decedent to respondent has been held sufficient to shift the burden of going forward to the petitioner.—In re Buckler, 227 N.Y.S. 133, 131 Misc. 172.

8. N.Y.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.

9. Mo.—Spencer v. Barlow, 5 S.W. 2d 28, 319 Mo. 835—Kunst v. Walker, App., 43 S.W.2d 886—In re Vall Fossen, App., 13 S.W.2d 1076—Cremer v. May, 8 S.W.2d 110, 223 Mo.App. 57—Roelofson v. Whitten, App., 249 S.W. 688—Newell v. Edom, App., 242 S.W. 701.
N.Y.—In re Housman's Estate, 121 N.E. 357, 224 N.Y. 525—In re Canfield's Estate, 163 N.Y.S. 191, 176 App.Div. 554—In re Booth's Will, 213 N.Y.S. 684, 215 App.Div. 516—In re Cofer's Estate, 200 N.Y.S. 906, 121 Misc. 292—In re Humphrey's Estate, 183 N.Y.S. 133.
Contra In re Tipple, 194 N.Y.S. 571, 118 Misc. 430.
"No inference of the making of a gift will be indulged."—In re Hos-

of the relations between the parties, the doctrine of constructive fraud attaches to a transaction under which respondent claims title to the property, respondent must show that deceased fully understood his act and that there was no undue influence.[10]

Admissibility. The usual rules of evidence govern with respect to admissibility of evidence in discovery proceedings.[11]

In Missouri, where the interrogatories and the answers thereto constitute the pleadings, they are not to be considered as evidence except in so far as they contain admissions against interest.[12]

Weight and sufficiency. The usual rules of evidence govern with respect to the weight and sufficiency of the evidence offered or adduced.[13] The burden of proof is not sustained where the evidence

san's Estate, 294 N.Y.S. 516, 521, 162 Misc. 333.

10. N.Y.—In re Gallagher's Estate, 241 N.Y.S. 759, 137 Misc. 564.

11. Tenn.—Hill v. Fly, Ch.A., 52 S. W. 731.

Evidence held admissible

(1) Generally.

N.Y.—In re Neidhart's Estate, 291 N. Y.S. 596, 249 App.Div. 654.

Wash.—In re Ward's Estate, 292 P. 737, 159 Wash. 252.

(2) Testimony showing that decedent in making deposit did not intend to create joint tenancy with respondent.—In re Porianda's Estate, 176 N.E. 826, 256 N.Y. 423, reversing 244 N.Y.S. 915, 230 App.Div. 788, which affirmed 237 N.Y.S. 715, 135 Misc. 389.

(3) Testimony of defendant regarding deceased's mental condition when going to live with her.—In re Ward's Estate, supra.

(4) Evidence that defendant had appropriated and withheld property belonging to decedent's estate.—Losee v. Krieger, 153 N.E. 857, 22 Ohio App. 395.

(5) Evidence that decedent was incapacitated from transacting business at time of disposing of some of her estate.—Losee v. Krieger, supra

Evidence held inadmissible

(1) In action under statute by administrator against maker of notes to discover concealed or embezzled assets of the estate, evidence as to mental incapacity of deceased to make alleged gift of notes to maker was properly excluded as immaterial, since the sole issue was whether any assets had been concealed or embezzled, and no money judgment on the notes could be had.—Goodrich v. Anderson, 26 N.E.2d 1016, 136 Ohio St. 509.

(2) Under the same statute, evidence that decedent was insolvent at time of gift was properly excluded.—In re Raymond's Estate, 34 N. E.2d 821, 66 Ohio App. 428.

12. Mo.—Starks v. Lincoln, 291 S. W. 132, 316 Mo. 483—Newell v. Edom, App., 242 S.W. 701.

13. **Test of prima facie case**

Where respondent filed answer denying knowledge or information sufficient to form belief, although administratrix could not rely on default in pleading as an admission of truth of allegations of her petition so as to entitle her to judgment without proof, she was entitled to the same favorable construction that the general rule on a motion for nonsuit concedes to party having the affirmative; thus, in proceeding for discovery and delivery of trust deposit to administratrix as property of intestate, wherein respondent bank put in an answer denying any knowledge or information sufficient to form belief and neither bank nor special guardian for incompetent trustee offered any evidence, test in determining whether administratrix made out "prima facie case" was whether evidence was such as to afford possible basis for reasonable inference that there was an intention to create a trust for the intestate as beneficiary rather than merely to set up the appearance of one for convenience or personal benefit of the trustee herself.—In re Farrell's Estate, 30 N.Y.S.2d 742, 177 Misc. 389.

Statements in brief unsubstantiated by record cannot be relied on as evidence.—In re Razoux' Estate, 277 N.Y.S. 457, 154 Misc. 477, affirming 276 N.Y.S. 782, 154 Misc. 128.

Evidence held sufficient

(1) Generally.

Ill.—See Maple v. Lawhun, 200 Ill. App. 258.

La.—Saur v. Saur, 82 So. 885, 145 La. 767.

N.Y.—In re Heffernan's Estate, 15 N.Y.S.2d 937, 258 App.Div. 813—In re Burke's Estate, 30 N.Y.S.2d 427, 177 Misc. 303.

(2) To establish particular facts.

Ill.—Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230, reversing In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43.

N.Y.—In re Wrone's Estate, 31 N.Y. S.2d 191, 177 Misc. 541—In re Di Crocco's Estate, 12 N.Y.S.2d 276, 170 Misc. 826.

(3) To justify finding that no valid gift of the property had been made by decedent.—In re Walsh's Estate, 257 N.Y.S. 529, 143 Misc. 748, affirmed 262 N.Y.S. 974, 238 App.Div. 832, affirmed 189 N.E. 731, 263 N.Y. 629.

(4) To make a prima facie case for the representative.—In re Cole's Estate, 10 N.Y.S.2d 49, 256 App.Div. 290—In re Farrell's Estate, 30 N.Y. S.2d 742, 177 Misc. 389—In re Courtade's Estate, 18 N.Y.S.2d 615, 173 Misc. 726—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81.

(5) To show substantial controversy as to title.—In re Hoffman's Estate, 289 N.W. 720, 227 Iowa 973.

(6) To support a finding that there was a completed sale of personalty to decedent's son.—Sexton v. Sexton, 243 S.W. 315, 295 Mo. 134, transferred, see, App., 224 S.W. 47.

(7) To support findings generally.

Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Davis v. Rossi, 34 S.W.2d 8, 326 Mo. 911—Roelofson v. Whitten, App., 249 S.W. 688.

Wash.—In re Ward's Estate, 292 P. 737, 159 Wash. 252.

(8) To sustain finding that relationship professed by joint bank account executed in form prescribed by statute was not in reality a joint tenancy and that survivor should pay to executor, funds withdrawn by her during lifetime of deceased. —In re Juedel's Will, 19 N.E.2d 671, 280 N.Y. 37, reversing 7 N.Y.S.2d 602, 255 App.Div. 863.

(9) To sustain order, decree, or judgment.

Ill.—In re Cohen's Estate, 6 N.E.2d 296, 288 Ill.App. 620.

N.Y.—In re McGonigal's Estate, 28 N.Y.S.2d 863, 262 App.Div. 903—In re Crofut's Will, 18 N.Y.S.2d 37, 259 App.Div. 757—In re Bradford's Estate, 300 N.Y.S. 92, 165 Misc. 520.

Ohio.—In re Raymond's Estate, 34 N.E.2d 821, 66 Ohio App. 428.

(10) To sustain a verdict.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Denny v. Brown, Mo., 193 S. W. 552.

Evidence held insufficient

(1) Generally.—In re Strickland's Estate, 32 N.E.2d 660, 309 Ill.App. 43, reversed on other grounds Dawdy v. Strickland, 37 N.E.2d 817, 378 Ill. 230—McKey v. Liberty Bank of Chicago, 2 N.E.2d 574, 284 Ill.App. 650.

(2) To show title in estate, where evidence showed that decedent surrendered property to defendant during lifetime.—In re Buckler, 227 N. Y.S. 133, 131 Misc. 172.

permits inferences consistent with liability on the one hand and no cause of action on the other.[14] An admission in an answer that respondent received money as a gift negatives any inference that he received it in payment of an obligation or by way of a loan,[15] and even if such answer be withdrawn the petitioner could establish a prima facie case and rebut any such inferences by introducing the withdrawn answer.[16] Where a family relationship existed between decedent and respondents, the mere fact of possession by respondents proves nothing in derogation of decedent's ownership.[17]

§ 163. Hearing and Examination

Unless the statute otherwise provides, whether the respondent shall be examined is within the court's discretion; under some statutes written interrogatories and answers are required, but others permit oral examination. Where there is a jury trial, it must be conducted in accordance with applicable statutes and rules of practice.

Where the statutory provision is not mandatory, it is held to be within the discretion of the court whether or not the person against whom discovery proceedings are brought shall be examined.[18] Respondent is the court's witness in the sense that it is the court that calls and examines him, although it does so through attorneys.[19] A person cited for examination has the right to counsel.[20] Under an order for the examination of a bank and its cashier to discover assets of deceased, it is proper to examine as a witness the vice president and director of the bank, but not witnesses unconnected with the bank.[21] Attachment and imprisonment are compulsory means sometimes sanctioned by statute, where respondent fails inexcusably to appear and submit himself, or refuses to answer questions lawfully propounded to him.[22]

The interrogatories and answers may be required to be in writing,[23] and in such case the person cited cannot be compelled to submit to an oral examination;[24] but the court may be given the right to allow the person cited to be examined under oath and may believe and act on his uncontradicted statements.[25] The distributees of the estate cannot file interrogatories to the person cited where the executor or administrator fails to do so.[26]

Where, by the interposition of an answer raising an issue of title, the proceeding has become a trial, respondent is entitled to a jury,[27] and the trial must be conducted in accordance with applicable statutes and rules of practice;[28] but, where no answer is

(3) To show valid gift.
Mo.—Newell v. Edom, App., 242 S. W. 701.
N.Y.—In re Cofer's Estate, 200 N. Y.S. 906, 121 Misc. 292.

(4) To support findings or establish particular facts.
Mo.—Chandler v. Hedrick, 173 S.W. 93, 187 Mo.App. 664.
N.Y.—In re Thomas' Estate, 257 N. Y.S. 330, 235 App.Div. 450—In re Di Crocco's Estate, 12 N.Y.S.2d 276, 170 Misc. 826.

(5) To sustain burden of tracing bonds of decedent to the possession of the widow.—In re Davison's Estate, 35 N.E.2d 696, 311 Ill.App. 294.

(6) To sustain claim that property was transferred under contract to pay for maintenance and care in absence of evidence of such agreement. —In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

(7) To sustain order, decree, or judgment.—In re Rice's Will, 18 N. Y.S.2d 77, 258 App.Div. 1075, affirmed 30 N.E.2d 606, 284 N.Y. 661—In re Davison's Estate, 300 N.Y.S. 143, 252 App.Div. 924—In re Bradford's Estate, 300 N.Y.S. 92, 165 Misc. 520.

14. N.Y.—In re Massey's Will, 257 N.Y.S. 578, 142 Misc. 794.

15. N.Y.—In re Hossan's Estate, 294 N.Y.S. 516, 162 Misc. 333.

16. N.Y.—In re Hossan's Estate, supra.

17. N.Y.—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

18. Ill.—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176.
Wyo.—State v. District Court of Eighth Judicial Dist., in and for Fremont County, 227 P. 378, 31 Wyo. 413, 35 A.L.R. 1082.
23 C.J. p 1187 note 66.

Mental capacity
The fact that respondent is a cripple and paralytic, his mental capacity being thereby affected, does not relieve him of the obligation to submit to examination.—In re Rosen, 17 N.Y.S.2d 794, 173 Misc. 433.

19. Ill.—In re Halaska's Estate, 30 N.E.2d 119, 307 Ill.App. 176.

20. Mass.—Martin v. Clapp, 99 Mass. 470.

21. Iowa.—In re Barrett, 149 N.W. 247, 167 Iowa 218.

22. Ark.—Welsh v. Lloyd, 5 Ark. 367.

23. Wash.—Main v. Hadfield, 84 P. 12, 41 Wash. 504.
23 C.J. p 1187 note 68.

24. Mich.—Palmer v. Peck, 50 N.W. 1086, 90 Mich. 1.

25. Ill.—Kraher v. Launtz, 90 Ill. App. 496.

26. Mo.—Brotherton v. Spence, 52 Mo.App. 664.

27. N.Y.—In re Nutrisio's Estate, 206 N.Y.S. 706, 211 App.Div. 8.

28. **Conduct of counsel**
In discovery proceeding, appeal of attorney for claimant to money in hands of public administrator, asking jury to give the money to claimant because no kin of deceased were known and the estate was being administered by the public administrator, justified granting of a new trial. —In re Golden's Estate, 2 N.Y.S.2d 222, 166 Misc. 656.

Credibility of witnesses by reason of their possible interest in outcome was held for jury's determination in discovery proceeding by executor.—In re Walsh's Estate, 257 N.Y.S. 529, 143 Misc. 748, affirmed 262 N.Y.S. 974, 238 App.Div. 832, affirmed 189 N.E. 731, 263 N.Y. 629.

Evidence held to require submission of case or issue to jury.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835—Morley v. Prendiville, 295 S.W. 563, 316 Mo. 1094—In re Geel's Estate, Mo.App., 143 S. W.2d 327—Owens' Estate v. Owens, Mo.App., 107 S.W.2d 150—Schnur v. Dunker, Mo.App., 38 S.W.2d 282—In re Van Fossen, Mo.App., 13 S.W.2d 1076—Cremer v. May, 8 S.W.2d 110, 223 Mo.App. 57—Newell v. Flesh, Mo. App., 255 S.W. 957—In re Skelly's Estate, Mo.App., 223 S.W. 690—Newell v. Kern, Mo.App., 218 S.W. 443.

Instructions
(1) Instructions basing right of plaintiffs to recover on decedent's lack of intention to relinquish ownership of property and defendant's failure to assert title until after decedent's death were held proper.—

interposed, the surrogate acts in a judicial capacity and must determine whether or not the facts adduced on the inquiry warrant the relief prayed.[29] In the absence of an affirmative answer entitling respondent to a trial of title, petitioner is not entitled to a preliminary examination, since the discovery sought is in itself substantially an examination before trial.[30]

Under a statute providing for no trial of title in the discovery proceeding, the testimony of respondent on the examination must be taken as true for the purpose of determining whether or not an issue of title exists, and the administrator cannot impeach such testimony.[31]

§ 164. Dismissal

Discovery proceedings should be dismissed where the situation is not within the scope of the statutory proceedings, or where the court cannot decide whether or not the estate has title.

Where it appears that the situation is not within the scope of the statutory proceedings for discovery, as where there is a mere indebtedness, the proceedings should be dismissed.[32] An admission of possession of the property, with a claim of right or title, also justifies dismissal, where such a situation is regarded as ending the jurisdiction of the court;[33] and the same action is proper where the court is unable to decide whether or not the property belongs to the estate.[34] Where a trial of title is conditioned on the interposition of an answer raising an issue of title, and a failure to answer has the same effect as a general denial, a motion to dismiss the proceeding at the close of the petitioner's case, in the absence of an answer, is equivalent to a demurrer to the evidence.[35] Where the court finds in the executor's favor after his examination under oath, he is entitled to an immediate dismissal without further examination of himself or other witnesses.[36] The presumption of ownership arising from possession may warrant a dismissal.[37]

On a motion to dismiss the petition for insufficiency, the facts alleged therein must be taken as true.[38]

Effect. The dismissal of one citation under a statute providing for the issuance of a citation to any person who is believed to have knowledge of the existence or location of assets does not preclude the issuance of a subsequent one.[39] The dismissal, without prejudice, of a petition filed in the probate court alleging that an administratrix had failed to inventory real and personal property described is not res judicata of a subsequent petition for discovery of assets against the administratrix.[40]

§ 165. Judgment or Order and Enforcement Thereof

The judgment, order, or decree, should conform to

Kunst v. Walker, Mo.App., 43 S.W.2d 886.

(2) Where note, which defendant contended decedent intended as gift, was in decedent's possession at death, there was no gift inter vivos, and instruction on that subject was unauthorized.—Thompson v. Bratcher, Mo.App., 8 S.W.2d 1027.

(3) Evidence in administrator's action to discover assets of decedent's estate was held sufficient to justify instruction to find for plaintiff if defendant owned certain property at time of decedent's death and wrongfully withheld and concealed it or any part thereof.—Owens' Estate v. Owens, Mo.App., 107 S.W.2d 150.

(4) In proceedings against an executor to recover assets alleged to have been withheld, where the executor claimed that such property was given to him by his testator, an instruction that, if decedent gave it during his lifetime to the executor, he was not required to inventory it was as favorable to defendant as the facts authorized.—Tygard v. Falor, 63 S.W. 672, 163 Mo. 234.

(5) Defendant's requested instruction that burden of proof was on plaintiff to rebut presumption that defendant owned property in his possession was properly refused, burden of evidence, rather than proof, being involved; and defendant's requested instruction that he was presumed to be owner of property in his possession was properly refused, proper instruction being that jury had right to find from facts and circumstances in evidence that defendant owned such property.—Owens' Estate v. Owens, supra.

(6) Instruction placing burden of proof on plaintiff to establish facts necessary to verdict was held prejudicial error.—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Directing verdict

Where defendant admitted that the property had belonged to deceased and claimed title by virtue of a gift from deceased, which the evidence failed to establish, refusal to direct a verdict for plaintiff was error.—Newell v. Edom, Mo.App., 242 S.W. 701.

Finding as to value held to comply with instructions

Mo.—In re Van Fossen, App., 13 S.W.2d 1076.

29. N.Y.—In re Massey's Will, 257 N.Y.S. 578, 143 Misc. 794.

30. N.Y.—In re Kevill's Estate, 2 N.Y.S.2d 191, 166 Misc. 230.

31. Iowa.—Findley v. Jordan, 268 N.W. 515, 222 Iowa 46—Smyth v. Smyth, 24 Iowa 491.

32. Ill.—Urban v. Hynes, 1 N.E.2d 885, 285 Ill.App. 182.
N.Y.—In re Erlanger's Estate, 265 N.Y.S. 393, 148 Misc. 339.
23 C.J. p 1187 note 77.

33. N.Y.—In re Basch, 33 N.Y.S. 424, 24 N.Y.Civ.Proc. 264.
23 C.J. p 1187 note 77.
Scope of inquiry see supra § 159.

34. N.Y.—Matter of Haniman, 100 N.Y.S. 481, 50 Misc. 245.
Wis.—Saddington v. Hewitt, 35 N.W. 552, 70 Wis. 240.

35. N.Y.—In re Donnelly's Estate, 283 N.Y.S. 609, 157 Misc. 319.

36. Mo.—In re Stuart, 67 Mo.App. 61.

37. N.Y.—Matter of Kellogg, 131 N.Y.S. 203, 72 Misc. 303.
23 C.J. p 1188 note 82.

38. N.Y.—In re Browning's Estate, 30 N.Y.S.2d 604, 177 Misc. 328, affirmed 30 N.Y.S.2d 606, 262 App.Div. 489, appeal denied 31 N.Y.S.2d 1019, 263 App.Div. 718.

39. Ill.—Murphy v. McMahon, 131 Ill.App. 384.

40. Mich.—Mitchell v. Bay Prob. Judge, 119 N.W. 916, 155 Mich. 550.

the evidence; its effect depends on the statute, the circumstances of the particular case, and the parties that were before the court. Under some statutes the judgment or order may be enforced by contempt proceedings.

An order directing examination into matters, knowledge of which is not essential to the recovery of property of the estate, is to that extent erroneous.[41] The judgment, order, or decree should conform to the evidence;[42] where the evidence is insufficient to warrant a finding of title to particular property, the court will make no order with respect thereto.[43] Where the probate court has the requisite authority to make an order in discovery, it need not set forth in the order the facts on which its right to make it in the particular case depended.[44]

A judgment rendered against respondent should be in favor of the executor or administrator,[45] unless there is no representative or the proceeding is against the representative, in which case the judgment should be in favor of the state.[46] Judgment may be for the return of the property or, in the alternative, the payment of its value.[47]

Interest should be required to be paid on funds improperly withdrawn from an estate.[48]

Time for examination. An order granting a bill of discovery should fix a time limit for making the examination and inspection.[49]

Modification, vacation, and resettlement. A final decree which merely determined respondent's liability and the amount thereof, but did not include a direction ordering payment, could not be resettled to include such a direction where the surrogate's decision included no such direction and the executor acquiesced in, accepted, and ratified the final decree.[50] Where a motion to vacate an order of inquiry is made solely on the face of the petition, the allegations of the petition must be taken as true.[51]

Operation and effect. It has been held that an order for delivery of the property to the administrator is an affirmative finding that the person in possession has no claim to the property and is final and conclusive, if not appealed from,[52] but that a judgment in a proceeding for concealing and embezzling property of the estate, general in form and finding for defendants, is not a determination of rights of property.[53] A determination that delivery of a bond and mortgage to respondent was intended as a gift is not binding on the named mortgagee where he was not a party to the proceeding;[54] similarly, a finding that certain property was a gift from decedent to respondent does not prevent the personal representative from pursuing any right he may have individually as a pledgor of the property.[55] Under a statute providing only for disclosure and not for any judgment or order, the finding in the probate court that respondent had property of the estate is not conclusive in a subsequent action to recover its value where the value of such property is unliquidated;[56] but, where the court has authority to direct the delivery of the assets, the citation and order to that effect are certainly prima facie evidence in a subsequent action by the administrator for the value of the assets.[57]

Enforcement. Under appropriate statutory provisions, the judgment or order of the court may be enforced by execution or by proceedings in contempt;[58] and commitment may be made mandatory unless the surrogate finds that respondent is unable to pay the sum required to be paid or to endure imprisonment,[59] in which case the surrogate has dis-

41. N.Y.—In re Browning's Will, 17 N.Y.S.2d 557, 258 App.Div. 621, appeal denied In re Browning's Estate, 18 N.Y.S.2d 1003, 259 App.Div. 704, and appeal dismissed 27 N.E. 2d 210, 282 N.Y. 804.

42. N.Y.—In re Tipple, 194 N.Y.S. 571, 118 Misc. 430.

Inadvertent failure to offer evidence
Will inadvertently not offered in evidence in discovery proceeding, but marked for identification, will be deemed to have been received and marked in evidence.—In re Post's Estate, 229 N.Y.S. 799, 132 Misc. 209, affirmed 231 N.Y.S. 859, 224 App.Div. 830.

43. N.Y.—In re Leonard's Estate, 185 N.Y.S. 243, 113 Misc. 205.

44. N.J.—The Ordinary of New Jersey v. Webb, 170 A. 672, 112 N.J. Law 395.

45. Ohio.—Leonard v. State, 20 Ohio Cir.Ct.,N.S., 340, 3 Ohio App. 313.

46. Ohio.—Leonard v. State, supra.

47. Iowa.—In re Sweet's Estate, 277 N.W. 712, 224 Iowa 589.

48. Mo.—Newell v. Kern, App., 218 S.W. 443.
N.Y.—In re Adolph's Estate, 2 N.Y.S. 2d 751, 254 App.Div. 570, 576.

49. S.C.—Floyd v. Victory Sav. Bank, 189 S.E. 462, 182 S.C. 357.

50. N.Y.—In re Dobkin's Estate, 281 N.Y.S. 106, 245 App.Div. 102.

51. N.Y.—In re Browning's Estate, 30 N.Y.S.2d 606, 262 App.Div. 489, affirming 30 N.Y.S.2d 604, 263 App. Div. 718.

52. Iowa.—Barto v. Harrison, 116 N. W. 317, 138 Iowa 413.
N.Y.—In re Kevill's Estate, 2 N.Y.S. 2d 191, 166 Misc. 230.

53. Kan.—Leyerly v. Leyerly, 124 P. 405, 87 Kan. 307.

54. N.Y.—In re Ehlers' Estate, 231 N.Y.S. 16, 132 Misc. 910.

55. N.Y.—In re Davison's Estate, 300 N.Y.S. 143, 252 App.Div. 924.

56. Mont.—Baker v. Hanson, 231 P. 902, 72 Mont. 22.

57. S.D.—Bright v. Ecker, 68 N.W. 326, 9 S.D. 192.

58. Ill.—Keshner v. Keshner, 33 N. E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.
23 C.J. p 1188 note 92.

Unambiguous order required
In order to be enforceable by incarceration, the order must be without ambiguity.—In re Battista's Estate, 26 N.Y.S.2d 694, 176 Misc. 85.

59. N.Y.—In re Black's Estate, 28 N.Y.S.2d 130, 261 App.Div. 791.

cretion to refuse incarceration.[60] Service of a certified copy of a decree determining the ownership of decedent's bank deposits is sufficient to permit the executor to receive the deposits, although the bank was not a party.[61]

§ 166. Review and Costs

In some states, but not others, an appeal from discovery proceedings will lie; where an appeal is proper, it is governed by applicable statutes and rules of court and the general principles of review. Costs may be in the probate court's discretion.

From discovery proceedings by an executor or administrator, an appeal will usually lie as in other cases,[62] although in some states the right to appeal has been denied.[63] Statutory provisions and court rules respecting appeals must be complied with;[64] as appears in the note, the functions and powers of the appellate court vary in the several states in accordance with the statutory provisions.[65]

Scope of review; determination. A finding of fact on conflicting evidence will not be disturbed on review;[66] and a judgment will not be reversed for harmless error.[67] The court will not pass on the validity of a provision which the order appealed from does not actually contain.[68] On an appeal from an order overruling a demurrer to the evidence, the appellate court must assume that the jury made the most favorable findings for appellee that they had a right to make under the evidence.[69]

60. N.Y.—In re Lent's Will, 287 N.Y.S. 848, 159 Misc. 411.

The burden of proving that respondent could not pay money directed by surrogate to be paid to administrator of estate or endure imprisonment was on respondent; and where record showed that respondent after notice that estate claimed fund deliberately withdrew it and converted it for purpose of cheating and defrauding estate, rendering ineffective decree that fund be paid to administrator, mere word of defendant that she could not comply with terms of decree was not conclusive as to whether defendant should be punished for contempt.—In re Black's Estate, 28 N.Y.S.2d 130, 261 App.Div. 791.

61. N.Y.—In re Peno's Estate, 221 N.Y.S. 205, 128 Misc. 718.

62. Ill.—In re Stahl's Estate, 10 N.E.2d 849, 291 Ill.App. 616.
23 C.J. p 1188 note 93.

Who may appeal

An appeal from a judgment of the county court to the circuit court in a discovery proceeding may be taken by any one of several respondents aggrieved.—Mundy's Estate v. Mundy, 230 Ill.App. 266.

63. Mich.—Palmer v. Peck, 50 N.W. 1086, 90 Mich. 1.
Mont.—In re Roberts, 135 P. 909, 48 Mont. 40.

Order denying petition

Mich.—Mitchell v. Bay Probate Ct., 119 N.W. 916, 155 Mich. 550.

Order overruling motion to quash citation

County court's order, issued in exercise of its probate jurisdiction, overruling motion to quash citation requiring former administrator and another to appear and show cause why certain property should not be delivered to present administrator, was held not "order affecting a substantial right" which would authorize appeal to district court prior to final disposition of cause in county court.—Shaw v. Davis, 62 P.2d 1259, 178 Okl 334, followed in Bank of Hartshorne v. Davis, 62 P.2d 1261, 178 Okl. 336.

64. Ill.—In re Stuart's Estate, 17 N.E.2d 268, 297 Ill.App. 635—In re Stahl's Estate, 10 N.E.2d 849, 291 Ill.App. 616.

Preservation of evidence

Where a party seeks to attack an order requiring him to pay over to an estate assets thereof converted by him, it devolves on him rather than on the administrators to preserve the evidence on which the order is based.—People ex rel. Olsen v. Templeman, 265 Ill.App. 369.

Appeal bond

(1) The right of an aggrieved respondent to appeal is not affected by the fact that other respondents have not signed the appeal bond; the appeal bond should be approved by the county court and not by the clerk, but appellant must be given a reasonable time to remedy such defect.—Mundy's Estate v. Mundy, 230 Ill. App. 266.

(2) The perfecting of an appeal from a decree of the surrogate's court directing a person other than the representative to pay a sum of money to the estate does not stay execution, in the absence of an order to such effect, unless appellant files an undertaking to pay such sum if unsuccessful.—In re Wex' Estate, 27 N.Y.S.2d 355, 176 Misc. 365.

65. In Illinois

(1) An appeal by executrices from an order of the probate court finding that a certain bank account belonged to decedent's estate, and requiring that it be inventoried, required a trial de novo in the circuit court under statute.—In re Stahl's Estate, 10 N.E.2d 849, 291 Ill.App. 616.

(2) If demanded, such a trial is before a jury.—In re Vinces' Estate, 267 Ill.App. 483.

(3) Where executrix appealed from an order of the probate court finding that bank account belonged to decedent's estate and should be inventoried, an order dismissing appeal and remanding cause, where questions of fact were presented, was erroneous, since matter was required to be tried de novo.—In re Stahl's Estate, supra.

(4) Circuit court has no jurisdiction to try or dismiss an appeal from county court in a proceeding for discovery of assets of an estate, where there is no transcript from the county court.—Mundy's Estate v. Mundy, 230 Ill.App. 266.

In New York

(1) The appellate court has power to decide all questions of fact as could the surrogate and may modify or change the decree as justice requires.—In re Tangerman's Estate, 235 N.Y.S. 213, 226 App.Div. 162.

(2) It has been held, however, that, where the surrogate has not passed on the facts, the appellate court may decline to do so, although the appeal is on the facts as well as on the law.—In re Grossman's Estate, 251 N.Y.S. 670, 233 App.Div. 887, reversing 236 N.Y.S. 630, 134 Misc. 724.

(3) In executrix' proceeding to establish right to life insurance policies claimed to have been assigned, whether assignee's interest was that of owner or of holder for collateral was held question to be remanded for determination by surrogate.—In re Walsh's Estate, 288 N.Y.S. 865, 248 App.Div. 673, amended on other grounds 290 N.Y.S. 743, 248 App.Div. 812.

66. Ill.—Mohlke v. People, 117 Ill. App. 595.

67. Mo.—Kunst v. Walker, App., 43 S.W.2d 886.
N.Y.—In re Foster's Will, 279 N.Y.S. 537, 244 App.Div. 808.

68. Ill.—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609.

69. Mo.—Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Where a trial by jury has been had as in an action at law, and no declarations of law are asked or given and no procedural errors assigned, the judgment must be affirmed if there is substantial evidence supporting any correct legal theory.[70] Where the admission of evidence constitutes reversible error, an appellate court having power to pass on the facts and the law and having a composite record sufficient to enable it to determine the issues need not remit the case for further hearing.[71]

In a proper case, an order granting a bill of discovery may be modified on appeal.[72]

Costs in proceedings of the character under discussion are sometimes in the discretion of the probate court.[73]

VII. COLLECTION OF ASSETS

§ 167. Authority and Duty in General

An executor or administrator has the primary duty to collect the assets of the estate, and he must take into his custody all personal chattels and collect all debts or claims due the estate. He is required to proceed promptly, and he is bound to exercise that degree of diligence which an ordinarily prudent man would exercise in the management of his own affairs.

It is a primary duty of the executor or administrator, to the performance of which his authority of course extends, to collect the assets of the estate[74] for the benefit both of the creditors and of the next of kin or legatees,[75] irrespective of the absence of directions in the will,[76] and irrespective of the validity or invalidity of the directions contained in the will for the distribution of income or the ultimate distribution of the principal.[77] He cannot give away any asset of value,[78] and the gift of a claim without the consent of the beneficiaries is void,[79] but he may abandon worthless assets of the estate.[80] In general he has the right to and should take into

70. Mo.—Sexton v. Sexton, 243 S.W. 315, 295 Mo. 134, transferred, see, App., 224 S.W. 47.

71. N.Y.—In re Christie's Estate, 4 N.Y.S.2d 484, 167 Misc. 484.

72. S.C.—Floyd v. Victory Sav. Bank, 189 S.E. 462, 182 S.C. 357.

73. N.Y.—De Lamater v. McCaskie, 5 Dem.Surr. 8.
23 C.J. p 1189 note 96.

74. U.S.—Safe Deposit & Trust Co. of Baltimore v. Tait, D.C.Md., 54 F.2d 383.
Hawaii.—In re Branco's Estate, 27 Hawaii 655.
La.—Succession of Wilson v. Lewis, 140 So. 270, 19 La.App. 559.
Mass.—Millen v. Kavanaugh, 167 N.E. 291, 268 Mass. 73.
Miss.—Abernathy v. Savage, 132 So. 553, 159 Miss. 506.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
N.J.—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329—Travers v. Reid, 182 A. 908, 909, 119 N.J.Eq. 416, citing **Corpus Juris**—Tichenor v. Mechanics & Metals Nat. Bank of City of New York, 125 A. 323, 96 N.J.Eq. 560.
N.Y.—In re Sullivan's Estate, 30 N.Y.S.2d 954, 177 Misc. 570 reversed on other grounds 34 N.Y.S.2d 503, 264 App.Div. 65—In re Lange's Estate, 16 N.Y.S.2d 312, 172 Misc. 437—In re Espenscheid's Estate, 250 N.Y.S. 556, 140 Misc. 53.
Ohio.—In re Tredway, 163 N.E. 223, 29 Ohio App. 265.
Pa.—In re Shelley's Estate, 134 A. 468, 287 Pa. 105, modification refused 135 A. 740, 288 Pa. 11.
Tex.—Mewhinney Mercantile Co. v. Goodnight, Civ.App., 135 S.W.2d 230.
23 C.J. p 1189 note 97.

Partnership assets
Personal representative of surviving partner who did not settle partnership interests of his two deceased partners was charged with adjusting unadjusted partnership affairs and of reducing all partnership assets to possession.—New York Life Ins. Co v. Hageman, C.C.A.Ill., 80 F.2d 446.

Unauthorized loan of estate funds
An executor who made unauthorized loan of estate funds, and his successor, had legal obligation to collect the funds from borrower.—Palmer v. Elco Realty Co., 8 N.Y.S.2d 908.

Collection of profits
If the executors carry on testator's business, it is their duty to receive and obtain the profits thereof until instructed by a court of competent jurisdiction as to the distribution thereof.—In re Hiscox, 120 N.Y.S. 308, 135 App.Div. 848, appeal dismissed 94 N.E. 1094, 200 N.Y. 584.

75. Mich.—Jensen v. Gamble, 157 N.W. 440, 191 Mich. 233.
N.Y.—In re Kenney's Estate, 11 N.Y.S.2d 685, 171 Misc. 87.
23 C.J. p 1189 note 98.

Taking possession before attachment of creditors' lien
Where executor has assets of estate which are subject to debts in his possession as executor, creditors of estate are not entitled to object because assets were placed in hands of executor before they had elected to subject them to prior lien before transfer.—First Nat. Bank v. Love, 167 So. 703, 232 Ala. 327.

76. Md.—Sharp v. State, 109 A. 454, 135 Md. 551.

77. N.Y.—In re Hiscox, 120 N.Y.S. 308, 135 App.Div. 848, appeal dismissed 94 N.E. 1094, 200 N.Y. 584.

78. Wash.—Morris v. Sherman, 38 P.2d 1012, 180 Wash. 45.
Release of claims and liens is considered infra § 181.

79. Iowa.—Flynn v. Chicago Great Western R. Co., 141 N.W. 401, 159 Iowa 571, 45 L.R.A.,N.S., 1098.

80. N.Y.—In re Weissman's Will, 250 N.Y.S. 500, 140 Misc. 360.

Withdrawal of valueless suit
An administrator is justified in consenting to the withdrawal of a valueless suit which was begun by the deceased.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.

Disclaimer of right to possession
Administrator's disclaimer of right to possession for three years of undivided third of farm, because of mortgagee's failure to joint administrator in foreclosure proceeding, was not void as abandonment of asset of estate, where under the circumstances right to possession was an extremely doubtful asset.—Morris v. Sherman, 38 P.2d 1012, 180 Wash. 45.

Determination of worthlessness of property
Whether property of estate is worthless and should be abandoned is question for executor's determination, and not for court.—In re Weissman's Will, 250 N.Y.S. 500, 140 Misc. 360.

his possession or custody all personal chattels,[81] even those specifically bequeathed[82] and in the possession of distributees, if needed for the administration of the estate, see infra § 171; and he must proceed to collect all debts or claims due the estate,[83] including judgments,[84] notes,[85] and bank deposits.[86] Ordinarily, the powers of an executor in collecting the debts are just as broad as those of deceased.[87] Money or property received by others should be accounted for by them to the personal

81. U.S.—U. S. v. Boshart, C.C.A. Cal., 91 F.2d 264, 112 A.L.R. 52.
Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.
Md.—State, for Use of Czyzowicz, v. Brown, 183 A. 256, 170 Md. 97.
Mo.—Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo. App. 593.
N.Y.—In re Sullivan's Estate, 30 N. Y.S.2d 954, 177 Misc. 570 reversed on other grounds 34 N.Y.S.2d 503, 264 App.Div. 65—In re Geller's Estate, 4 N.Y.S.2d 467, 167 Misc. 578.
Tex.—Canfield v. Newman, Civ.App., 265 S.W. 1052.
23 C.J. p 1189 note 1.

Notes
Tex.—Mewhinney Mercantile Co. v. Goodnight, Civ.App., 135 S.W.2d 230.

Securities
Mo.—Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo. App. 593.

82. N.Y.—In re Link's Will, 17 N. Y.S 2d 634, 173 Misc. 217.
23 C.J. p 1190 note 2.

Possession subject to husband's statutory right
Under statutes which provide that a surviving husband takes legal title to the household property not exceeding a certain sum, where the evidence does not enable a determination whether the property does or does not exceed that value, the executrix, after its removal on a claim of right, should have an opportunity to examine the property and include it in the inventory.—In re Leonard's Estate, 185 N.Y.S. 243, 113 Misc. 205.

83. Ark.—Acker v. Watkins, 100 S. W.2d 78, 193 Ark. 192.
Cal.—Wortley v. Wood-Callahan Oil Co., 112 P.2d 226, 17 Cal.2d 762—Dixon v. Norman, 220 P. 321, 64 Cal.App. 21.
Conn.—Metzger v. Klanko, 120 A. 591, 98 Conn. 764.
Del.—Williams v. Floyd, 112 A. 377, 12 Del.Ch. 256.
Fla.—Mills v. Hamilton, 163 So. 857, 121 Fla. 435.
Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N. E.2d 796, 300 Ill.App. 537—Bakalar v. Stinar, 271 Ill.App. 503—Bannat v. Zulley, 243 Ill.App. 497.
Ky.—Griffith's Adm'x v. Miller, 149 S.W.2d 11, 285 Ky. 675—Belcher v. Belcher's Adm'r, 13 S.W.2d 1019, 227 Ky. 665.
Me.—McGowan v. Schlosberg, 187 A. 727, 134 Me. 456.
N.J.—In re Kraeuter's Estate, 4 A.2d 383, 125 N.J.Eq. 120, affirmed 11 A.2d 28, 127 N.J.Eq. 19.
N.M.—In re Sheley's Estate, 298 P. 942, 35 N.M. 358.
N.Y.—In re Fantl's Estate, 292 N.Y. S. 653, 249 App.Div. 392—In re Kessler's Estate, 18 N.Y.S.2d 772, 173 Misc. 716—In re Adams' Estate, 267 N.Y.S. 910, 149 Misc. 289.
Tex.—Adams v. Bankers' Life Co., Com.App., 36 S.W.2d 182, affirming, Westbrook v. Adams, Civ.App., 17 S.W.2d 116—Canfield v. Newman, Civ.App., 265 S.W. 1052—Ætna Life Ins. Co. v. Osborne, Civ. App., 224 S.W. 815, error refused.
Wis.—Grover v. Grover, 222 N.W. 228, 197 Wis. 347, citing **Corpus Juris.**
23 C.J. p 1190 note 3.

Filing claim against another estate
Administrator holding claim against another estate has duty of filing it as provided by statute.—Pollock v. Cantlin, 253 Ill.App. 229.

Unpaid balance of award for employee's death
Where beneficiary died before receiving entire award for employee's death, exclusive duty of beneficiary's administrator was to collect balance unpaid.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

Abandonment of claim for injuries
Abandonment by administrators of an action for injuries pending at time of decedent's death, in order to institute new action for death and put money received in nuisance settlement of both actions beyond reach of decedent's creditors, amounted to a devastavit for which administrators may be held liable to creditors.—In re Fortunoff's Estate, 3 N.Y.S. 2d 549, 167 Misc. 119.

Proceeds from land transferred as security
Where grantee of deed given by decedent to secure loan sold land, it was administratrix's duty to collect assets of estate resulting from such sale, since equitable title was in decedent.—Baumann v. Mangold, 168 N.E. 217, 32 Ohio App. 419.

Withdrawal of building and loan stock
An executor has the right to withdraw "paid-up stock" in mutual building association which constitutes a debt owing decedent.—Dimitry v. Shreveport Mut. Bldg. Ass'n, 120 So. 581, 167 La. 875.

84. Iowa.—Jensen v. Murphy, 202 N.W. 232, 199 Iowa 524.
Ohio.—In re Jordan's Estate, 30 Ohio N.P., N.S., 176.

Judgment against joint tort-feasors
Where a wrongful death claim against joint tort-feasors has been reduced to judgment, it is the duty of the administrator to proceed at once to collect the judgment from either or both defendants with as little expense to the estate as possible.—In re Jordan's Estate, supra.

85. Ill.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Cunningham, 9 N.E.2d 664, 291 Ill. App. 180.
Mo.—Studer v. Harlan, 109 S.W.2d 687, 233 Mo.App. 811.
Ohio.—In re Tredway, 163 N.E. 223, 29 Ohio App. 265.

Filling in blanks
(1) The executors of decedent, who held a note with the payee blank, as holders had the right to fill in the blank and make the note payable either to themselves as executors, with consequent right to bring suit in their names, or by making it payable to decedent, thus accomplishing the same purpose differently.—Finley v. Rose, 224 S.W. 1059, 189 Ky. 359.

(2) Where the rights of the joint makers were not prejudiced by the delay of seven years on the part of the executors of the holder of the note in filling in the deceased holder's name as payee, the executors' recovery on the note is not barred. —Finley v. Rose, supra.

86. Minn.—In re Ness' Estate, 230 N W. 272, 180 Minn. 97.
N.Y.—In re Manning's Estate, 278 N.Y.S. 303, 244 App.Div. 9, affirmed Dunbar & Sullivan Dredging Co. v. Fidelity & Deposit Co. of Maryland, 198 N.E. 560, 268 N.Y. 690.

87. Ala.—Webb v. Sprott, 144 So. 569, 225 Ala. 600.

Withdrawal of funds from home for aged
Where an aged person dies within the probationary period for which he is admitted to a home for the aged, his executor may exercise his right to withdraw the fund deposited after allowances for expenses.—Christenson v. Board of Charities of Illinois Conference of Ev Lutheran Augustana Synod, 253 Ill.App. 380.

Power to accelerate maturity of notes
An executor or administrator may exercise an option to declare an entire series of notes due on default in the payment of the principal or the interest of any one of them.
Ala.—Webb v. Sprott, 144 So. 569, 225 Ala. 600.

representative,[88] but the representative cannot recover property which was given by decedent in express payment for services.[89] An executor is not entitled to an accounting by a person who has collected money for decedent during his lifetime where decedent never intended that there should be an accounting, in the absence of proof of fraud, undue influence, or mental incapacity,[90] but the mere fact that decedent did not desire a formal accounting by a person who had general supervision of his affairs does not relieve such person from the duty of paying the balance in his hands to the estate.[91] An administrator is without authority to question the validity of a donation where a statute gives the right only to forced heirs or their heirs or assigns.[92]

The duty to collect precedes the duty to pay the debts of the estate[93] and continues until the estate is settled or the personal representative is discharged,[94] but after all the debts and specific legacies have been paid or there are sufficient funds on hand to pay them, the executor, before presenting his final account and petitioning for distribution, is not required to pursue and collect all assets of a partnership of which decedent was a member.[95]

The personal interest of the representative in assets does not affect his right to collect or recover them.[96] The fact that an administrator in his individual capacity prior to appointment misled the widow of decedent in paying out funds of the estate, does not prevent him from collecting as administrator the amount she owes the estate.[97]

Where an executor claims property listed as assets of the estate, he has the duty to disclose his conflicting personal claims to the court.[98]

Time for collection and diligence. A personal representative is required to proceed promptly with the collection of debts,[99] or at least before the statute of limitations has run,[1] to make reasonable ef-

Tex.—Duenkel v. Amarillo Bank & Trust Co., Civ.App., 222 S.W. 670, error refused.

Payment of corporation's debts by partnership

If deceased partners had desired to borrow money and pay debts of corporation in which they owned practically equal interest, without liability of corporation to such partners, such transaction should not be opened up by executor and trustee under partners' wills, in absence of well-grounded contention of cestui que trust or creditors of partnership. —Caheen v. First Nat. Bank, 159 So. 815, 230 Ala. 105.

88. Cal.—In re Conkey's Estate, 96 P.2d 383, 35 Cal.App.2d 581.
La.—In re Buller's Estates, 188 So. 728, 192 La. 644.
23 C.J. p 1190 note 4.

Money withdrawn from joint account

Where a joint bank account with his grandson was established by decedent for his own convenience and no title was intended to be in the grandson, the latter was held liable to his grandfather's estate for moneys withdrawn and transferred to his personal account during the grandfather's life.—In re Darashinsky's Estate, 260 N.Y.S. 289, 145 Misc. 426, affirmed In re Darashinsky, 264 N.Y.S. 939, 239 App.Div. 830.

Funds withdrawn by creditor

That son was mother's creditor did not justify his withdrawal from bank, after mother's death, of funds deposited to her credit, and the executor has the right to the possession of the funds.—Succession of Wilson v. Lewis, 140 So. 270, 19 La. App. 559.

Accounting for profits from business

Where the court orders the widow to turn over the business of decedent to the administrator and account for the profits received since his death, her advances to the business before the husband's death and payments to decedent's children and grandchildren after his death are not to be considered in the accounting but must be presented as claims on decedent's estate and as matters for adjustment in the probate court.—Union Trust Co. v. Marsh, 236 N.W. 816, 254 Mich. 402.

Person selling property to pay debts

Where a person charged with the duty of selling property and paying debts of decedent only paid a portion of such debts, his administrator was entitled to recover the remainder of the proceeds of the sale.—In re Armstrong, 182 Ill.App. 482.

89. W.Va.—Archer v. Stewart, 142 S.E. 68, 105 W.Va. 263.

90. Mo.—Haid v. Prendiville, 238 S. W. 452, 292 Mo. 552.

91. Mass.—Chamberlain v. Henry, 160 N.E. 317, 263 Mass. 63.

92. La.—Connolly v. Cardno, 133 So. 449, 16 La.App. 363.

93. Pa.—France's Estate, 16 Wkly. N.C. 350.

94. Ky.—Griffith's Adm'x v. Miller, 149 S.W.2d 11, 285 Ky. 675.
Md.—Sharp v. State, 109 A. 454, 135 Md. 551.
23 C.J. p 1190 note 6.

Income derivable from assets

Until time for distribution, executor must collect all income derivable from assets of estate, realty as well as personalty.—In re McKeogh's Will, 271 N.Y.S. 362, 151 Misc. 327, affirmed In re Alexander's Will, 281 N.Y.S. 1011, 245 App.Div. 750.

95. Okl.—In re Dixon's Estate, 97 P.2d 559, 186 Okl. 308.

96. N.Y.—Halsted v. McChesney, 2 Abb.Dec. 310, 2 Keyes 92, affirming 50 Barb. 34.
S.C.—Trimmier v. Thomson, 10 S.C. 164.

Bond on which administrator is obligor

An administrator is entitled to possession of a bond in which he is obligor.—Halsted v. McChesney, 2 Abb. Dec., N.Y., 310, 2 Keyes 92, affirming 50 Barb. 34.

97. Ala.—Wommock v. Davis, 153 So. 611, 228 Ala. 362.

98. U.S.—Ferguson v. Wachs, C.C. A.Ill., 96 F.2d 910.
Cal.—In re Conkey's Estate, 96 P.2d 383, 35 Cal.App.2d 581.

Assumption of position adverse to estate

Coexecutrix claiming corporate stock allegedly belonging to deceased's estate could not relieve herself of duty to disclose facts to probate court by openly assuming a position adverse to the interest of the estate by claiming ownership of the stock.—Ferguson v. Wachs, C.C.A. Ill., 96 F.2d 910.

99. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
N.C.—State v. Cohoon, 174 S.E. 91, 206 N.C. 388.
23 C.J. p 1191 note 14.

1. Ga.—Musselwhite v. Ricks, 189 S.E. 597, 55 Ga.App. 58.
Md.—In re Hunter's Estate, 185 A. 327, 170 Md. 513.
Pa.—In re Shelley's Estate, 134 A. 468, 287 Pa. 105, modification refused 135 A. 740, 288 Pa. 11.

forts to collect,[2] and to report collections promptly as they are made.[3] No definite time is prescribed within which collections must be made, but the general rule is that reasonable time will be allowed,[4] and one year is usually regarded as a sufficient time.[5] An executor or administrator is bound to exercise that diligence in the collection of assets which an ordinarily prudent man would exercise in the management of his own affairs,[6] and he is held to the utmost good faith.[7] Due diligence depends on many facts and circumstances[8] not the least of which is the financial condition of the debtor.[9] Assets for the payments of legacies are not to be collected until the happening of a certain event when so provided by the will.[10]

§ 168. Attempting Collection by Suit

An executor or administrator has the right to sue on debts or claims due the estate, and it is his duty to sue where there is a fair chance to realize something by that course; but acting in good faith, with reasonable judgment and sound discretion, he may determine whether or not enforcement of claims by litigation is wise.

An executor or administrator has, of course, the right to sue on debts due to, or claims of, his decedent or the estate,[11] and acting in good faith, with reasonable judgment and sound discretion, he may determine whether or not enforcement of claims by litigation is wise.[12] He is not bound to attempt the collection of bad debts or to sue on doubtful claims at the undue risk or waste of the estate or of his private means,[13] at least without being indemnified for the costs and expenses of suit,[14] but it is his duty to sue where there is a fair chance to realize something by that course,[15] particularly where parties interested in the estate demand this and indemnify him for any expense which may be incurred.[16]

As to the time of suing the personal representative has a fair discretion and is not obliged to sue a debtor immediately at the peril of being chargeable with the amount of the debt.[17] An executor cannot maintain a suit for that part of the estate which is given to the widow by a statutory exemption,[18] and the rule applies whether the total estate exceeds or is less than the amount of the exemption.[19]

§ 169. Proceedings for Recovery of Assets

a. In general
b. Who may institute proceedings and parties thereto
c. Evidence
d. Hearing and determination
e. Judgment or order and enforcement thereof
f. Appeal or review

a. In General

The representative has the right within statutory limitations to institute and maintain such proceedings as may be necessary for the recovery of the assets of the estate. He may proceed in equity if necessary and may

2. Ky.—May v. Walter, 149 S.W. 1014, 149 Ky. 749.
23 C.J. p 1191 note 15.

Active vigilance
Personal representatives must exercise active vigilance in collection of assets belonging to estate.—In re Belcher's Estate, 221 N.Y.S. 711, 129 Misc. 218.

3. Ark.—Dyer v. Jacoway, 6 S.W. 902, 50 Ark. 217.
23 C.J. p 1191 note 16.

4. Ala.—Phillips v. First Nat. Bank, 94 So. 801, 803, 208 Ala. 589, citing **Corpus Juris.**
N.Y.—In re Lazar's Estate, 247 N.Y.S. 230, 139 Misc. 261.
23 C.J. p 1191 note 17.

5. Ala.—Phillips v. First Nat. Bank, 94 So. 801, 803, 208 Ala. 589, citing **Corpus Juris.**
Pa.—Merkel's Estate, 18 A. 931, 131 Pa. 584.
S.C.—Lowman v. Lowman, 48 S.E. 536, 69 S.C. 543.

6. Hawaii.—In re Branco's Estate, 27 Hawaii 655.
N.J.—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329.

7. N.J.—In re Brueck's Estate, supra.

8. Hawaii.—In re Branco's Estate, 27 Hawaii 655.

9. Hawaii.—In re Branco's Estate, supra.

10. Pa.—In re Daly's Estate, 25 Pa. Dist. & Co. 671.

11. Ala.—Webb v. Sprott, 144 So. 569, 225 Ala. 600.
La.—Davidson v. Davidson, App., 199 So. 447.
Mo.—Gorg v. Rutherford, App., 81 S.W.2d 585—State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo. App. 713.
23 C.J. p 1191 note 19.

12. N.Y.—In re Fantl's Estate, 292 N.Y.S. 653, 249 App.Div. 392.
23 C.J. p 1191 note 21.

13. N.Y.—In re Fantl's Estate, supra.
23 C.J. p 1191 note 22.

Obligations paid as surety
An executrix, paying obligations and notes on which decedent was surety, must make such efforts as the law requires to realize the debts from the principals, but is not required to incur cost and expenses in such efforts if the principals are clearly insolvent.—Tolly v. Champion, 229 S.W. 90, 191 Ky. 114.

14. N.J.—Smith v. Jones, 104 A. 386, 89 N.J.Eq 502.
23 C.J. p 1192 note 23.

15. Cal.—Mitchell v. Mitchell, 188 P. 585, 46 Cal.App. 37
Colo.—Swartz v. Rosenkrans, 240 P 333, 78 Colo. 167
Ga.—Spence v. Phillips, 158 S.E. 797, 172 Ga. 782—Sansom v. Cornelison, 155 S.E. 764, 171 Ga 427.
La.—Davidson v. Davidson, App., 199 So. 447.
Me.—McGowan v. Schlosberg, 187 A. 727, 134 Me. 456.
Tex.—Canfield v. Newman, Civ.App., 265 S.W. 1052.
23 C.J. p 1192 note 24.

16. Me.—McCluskey's Appeal, 100 A. 977, 116 Me. 212.
23 C.J. p 1192 note 25.

17. S.C.—Orr v. Orr, 13 S.E. 467, 34 S.C. 275.
23 C.J. p 1192 note 26.

18. Ala.—Phillips v. First Nat. Bank, 94 So. 801, 208 Ala. 589.

19. Ala.—Phillips v. First Nat. Bank, supra.

Institute proceedings in the probate court in accordance with statutory provisions.

The representative has necessarily the right to institute and maintain such proceedings as may be necessary for the recovery of the assets of the estate,[20] but where a statute prescribes the remedy the proceedings are to be instituted under that statute.[21] The executor or administrator is not confined to a common law action but may resort to equity in a proper case,[22] as where the remedy at law is inadequate,[23] or where a breach of a fiduciary relationship is involved;[24] and under some statutes a certain jurisdiction in these matters is given to the probate courts.[25] Ordinarily, a summary proceeding is not the proper remedy for the recovery of assets,[26] and the mere fact that the administration is in equity does not per se place the assets in custodia legis so as to warrant contempt proceedings against persons who, before an adjudication of their rights, have possession of assets of the estate.[27] Under statutes in some states summary proceedings may be had for recovering assets withheld, concealed, or embezzled,[28] but such statutes have been held to be applicable only where the person brought before the court has actual possession of, or control over, the property alleged to be embezzled or concealed,[29] and to be limited to property remaining unchanged and in specie.[30] To establish his right to recover assets, it has been held that the administrator must show that recovery is necessary to the due administration of the estate.[31] The administrator's legal title to personal property is sufficient to support an action for possession against persons having no interest, but insufficient to support an action against persons entitled to subject the property to claims against the distributees.[32] That the administrator of an absent person presumptively dead institutes proceedings to recover the estate from the guardian for the determination of any question that might be raised contrary to the legal presumption of death does not invalidate the proceedings.[33] A bill by an administrator to compel the delivery of chattels, notes, bonds, etc., belonging to the estate, is not a bill for discovery, and can be sustained without first citing defendant in the probate court for examination.[34] A demand is not necessary before the institution of a suit by an administrator to recover personal property of decedent held by a transferee under color of title by gift,[35] or to recover money from a person whose receipt thereof was wrongful ab initio.[36] Although property is in the possession of the executor by agreement, the trial court may determine ownership to the property in an action by the executor against claimant.[37]

To be entitled to maintain a proceeding as authorized by statute to recover assets claimed to have been transferred by decedent with intent to defraud creditors, the administrator must establish a deficiency of assets to meet the debts of deceased, and the existence of creditors who would be defrauded

20. D.C.—Hurd v. Cramer, 40 App. D.C. 349, certiorari denied Cramer v. Hurd, 33 S.Ct. 1051, 229 U.S. 623, 57 L.Ed. 1356.
La.—Davidson v. Davidson, App., 199 So. 447.
23 C.J. p 1192 note 28.

Impounding property
Where controversy existed between purported assignee of deceased's stock and deceased's executor as to ownership of stock and it was not shown in what respect purported assignee's interest would be prejudiced by impounding the stock certificate until issue was determined, the circumstances required the impounding of the stock certificate.—In re Douglas' Estate, 7 N.Y.S.2d 870, 169 Misc. 425.

21. Wash.—State v. Superior Court of King County, 245 P. 764, 139 Wash. 102.

22. Cal.—Reay v. Reay, 275 P. 533, 97 Cal.App. 264.
Fla.—Roe v. Roe, 117 So. 108, 95 Fla. 488.
Ky.—Leigh v. Everheart, 4 T.B.Mon. 379, 16 Am.D. 160.
Mass.—Baker v. Langley, 141 N.E. 671, 247 Mass. 127.
N.J.—Valden v. Edson, 98 A. 635, 85 N.J.Eq. 65.

Answer as affecting nature of action
A denial in the answer that decedent had any right, title, or interest to the property does not change the equitable cause of action to a legal one.—Reay v. Reay, 275 P. 533, 97 Cal.App. 264.

23. Fla.—Roe v. Roe, 117 So. 108, 95 Fla. 488.
Mass.—Mitchell v. Weaver, 136 N.E. 166, 242 Mass. 331.

24. Cal.—Reay v. Reay, 275 P. 533, 97 Cal.App. 264.
Mo.—Allen v. Van Horn, 10 S.W.2d 969, 222 Mo.App. 930.

25. Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597—Coffey v. Rady, 166 N.E. 833, 267 Mass. 301—Mitchell v. Weaver, 136 N.E. 166, 242 Mass. 331.
Mo.—Hoehn v. Struttmann, 71 Mo. App. 399.
23 C.J. p 1190 note 11.

26. Ala.—Ex parte Wadsworth, 117 So. 178, 217 Ala. 567.
Ill.—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill. App. 484.

27. Ala.—Ex parte Wadsworth, 117 So. 178, 217 Ala. 567.

28. Ill.—Johnson v. Nelson, 173 N.E. 77, 341 Ill. 119, 88 A.L.R. 849, reversing In re Nelson's Estate, 254 Ill.App. 484.
23 C.J. p 1192 note 29.

29. Mo.—Howell v. Howell, 87 Mo. 124—Dameron v. Dameron, 19 Mo. 317.
N.Y.—In re Heinze, 120 N.E. 63, 224 N.Y. 1, affirming 167 N.Y.S. 1104, 181 App.Div. 915.

30. Ill.—Dinsmoor v. Bressler, 45 N.E. 1086, 164 Ill. 211.
23 C.J. p 1193 note 31.

31. N.Y.—In re Tangerman's Estate, 235 N.Y.S. 213, 226 App.Div. 162—Toch v. Toch, 30 N.Y.S. 1003, 81 Hun 410.

32. S.D.—Thomas v. Morristown State Bank, 221 N.W. 257, 53 S.D. 499.

33. N.Y.—Chamblee v. Security Nat. Bank, 188 S.E. 632, 211 N.C. 48.

34. Me.—Farnsworth v. Whiting, 72 A. 314, 104 Me. 488.

35. Cal.—Knight v. Tripp, 49 P. 838, 5 Cal.Unrep.Cas. 735.

36. N.Y.—Marshall v. DeCordova, 50 N.Y.S. 294, 26 App.Div. 615.

37. Ohio.—Russ v. Wilson, 160 N.E. 735, 27 Ohio App. 34.

by the transfer.[38] A determination whether a deficiency exists requires an adjudication of the validity of claims, and the mere fact that unallowed claims have been filed affords no basis for assuming indebtedness to the extent of the filed claim.[39]

Proceedings for the discovery of assets are considered supra §§ 153–166. Actions by and against representatives are considered infra §§ 688–826.

Venue. A proceeding by a personal representative to recover possession of land of his decedent has been held to be properly brought in the county in which the representative qualified, even though the land was situated, and the person in possession thereof resided, in another county.[40]

Defenses. Openness and notoriety of possession under a claim of title is not of itself a defense unless such claim is of a valid title and is made in good faith.[41] Neither is it any defense to a proceeding brought by an administrator to recover assets of the estate in the hands of defendant, or for the conversion thereof, that plaintiff has in his individual capacity been guilty of wrongdoing.[42] In a proceeding by an administrator to recover land of his decedent, an averment by defendant that such land "is held and claimed by her as her own, and was so held and claimed by her prior to the institution of this action" is not a sufficient averment of either title or ownership to constitute a defense or to divest the court of jurisdiction.[43]

Proceedings in orphans' court in Pennsylvania. The powers of the orphans' court in Pennsylvania to assist the representative to acquire control of property rightfully belonging to the estate can only be invoked within the restricted statutory jurisdiction of the court.[44] The orphans' court cannot assert jurisdiction over property which is not within its control or which was not actually or presumptively in the possession of decedent at the time of his death if the possessor holds under a claim of right, asserts ownership, and is not a fiduciary,[45] and under these circumstances the representative must seek his remedy by action at law or in equity.[46] The orphans' court cannot determine the validity of a disputed debt to the estate.[47] The court has power to determine the jurisdictional fact of possession of the property at the time of decedent's death,[48] and if the property is presumptively

38. Wis.—Mann v. Grinwald, 233 N. W. 582, 203 Wis. 27.

Right to sue generally see supra § 124.

Suit for benefit of wife asserting no claim

Administrator could not recover for benefit of wife assets fraudulently transferred by deceased, where wife made no claim of transfer to defeat her claim nor requested administrator to sue.—Mann v. Grinwald, supra.

39. Wis.—Mann v. Grinwald, supra.

40. Ky.—DeHaven v. DeHaven, 46 S.W. 215, 47 S.W. 597, 104 Ky. 41, 20 Ky.L. 663.

41. Mo.—Gordon v. Eans, 4 S.W. 112, 11 S.W. 64, 97 Mo. 587.

42. N.Y.—Lawyers' Surety Co. v. Reinach, 51 N.Y.S. 162, 23 Misc. 242, affirmed 54 N.Y.S. 205, 25 Misc. 150.

43. Ky.—DeHaven v. DeHaven, 46 S.W. 215, 47 S.W. 597, 104 Ky. 41, 20 Ky.L. 663.

44. Pa.—In re Brown's Estate, 22 A. 2d 821, 343 Pa. 230—In re McGovern's Estate, 186 A. 89, 322 Pa. 379—In re Smith's Estate, 15 A.2d 523, 141 Pa.Super. 571.

45. Pa.—In re Patterson's Estate, 19 A.2d 165, 341 Pa. 177—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re McGovern's Estate, 186 A. 89, 322 Pa. 379—In re Smith's Estate, 15 A.2d 523, 141 Pa.Super. 571—In re Hartsell's Estate, 173 A. 842, 114 Pa.Super. 190—In re Berkey's Estate, 156 A. 568, 102 Pa Super. 306—Pickel v. Hoffner, 27 North.Co. 166.

Jury's determination of ownership of other property

A verdict of the jury in the court of common pleas which is determinative of the ownership of certain property submitted as an issue cannot permit the orphans' court to exercise jurisdiction of other property not in possession of decedent at the time of his death.—In re McGovern's Estate, 186 A. 89, 322 Pa. 379.

Recovery of property claimed as gift

In proceedings involving question whether testator had made a gift causa mortis of a certificate of deposit to his niece who nursed him until his death and to whom testator executed and acknowledged a power of attorney, evidence established a substantial dispute in good faith concerning title to certificate requiring submission of the case to a jury, and the orphans' court was without power to proceed to a final determination of the matter for failure to submit the issue to a jury in the common pleas or to one impaneled by it under statute.—In re Moyer's Estate, 19 A.2d 467, 341 Pa. 402.

Joint bank account

(1) Orphans' court was without jurisdiction to order payment by bank of deposit made by decedent to one who was claiming as surviving joint tenant, since disputed account was no part of decedent's estate and was never in possession or control of his legal representative.—In re Smith's Estate, 15 A.2d 523, 141 Pa. Super. 571.

(2) The appearance of the bank by counsel, admitting that it had the sum in its hands payable to such person as the court might direct, could not confer jurisdiction on the court.—In re Smith's Estate, supra.

Certification of issue to court of common pleas

Pa.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514.

46. Pa.—In re Keyser's Estate, supra—In re McGovern's Estate, 186 A. 89, 322 Pa. 379.

Necessity for submission to jury

The submission of a case to a jury on the disclosure of a substantial dispute of title to personalty is not merely a matter of formal procedure unrelated to the question of jurisdiction of the orphans' court, but it is a procedure prerequisite to the final settlement of the issue of ownership, and until it is taken, the orphans' court is without jurisdiction in the case.—In re Moyer's Estate, 19 A.2d 467, 341 Pa. 402.

47. Pa.—In re Brown's Estate, 22 A. 2d 821, 343 Pa. 230—In re McGovern's Estate, 186 A. 89, 322 Pa. 379.

48. Pa.—In re Moyer's Estate, 19 A. 2d 467, 341 Pa. 402—In re Keyser's Estate, 198 A. 125, 329 Pa. 514.

Presumption as to possession

Evidence that certificate of deposit which was allegedly the subject of a gift causa mortis had been in testa-

decedent's, the orphans' court has jurisdiction to determine whether denial of ownership is made in good faith and whether a substantial dispute as to ownership exists.[49] The orphans' court may assume jurisdiction to order property to be restored to the administrator if the property was in possession of decedent at the time of his death and no substantial dispute as to ownership exists.[50]

The jurisdiction of the orphans' court to determine questions of title is considered in the title Courts § 303 b.

b. Who May Institute Proceedings and Parties Thereto

As a general rule, the representative is the proper person to proceed for the recovery of assets, but the beneficiary may prosecute claims where the representative cannot or will not act, or where he obstructs the natural course which the law establishes for the transmission of the estate to the heir.

As a general rule, the personal representative is the proper person to proceed for the recovery of assets of the estate,[51] but the beneficiary may prosecute claims where the personal representative cannot or will not act,[52] or where the personal representative himself, by collusion with the debtor, or otherwise, obstructs the natural course which the law establishes for the transmission of the estate to the heir.[53] In a bill for an accounting and to set aside conveyances in fraud of decedent, the fraudulent grantees may be joined as defendants.[54] Where, on an administrator's application in the probate court to recover rent notes and a lease of certain premises, the order of the court directed that he should dispose of such notes as belonged to his intestate's estate, but made no reference to the interest of certain nonresident defendants as heirs of such intestate, the latter were not parties to such proceeding through the administrator, under a statute providing that if there is no heir or devisee present and competent to take possession of decedent's real estate, the administrator may do so, and demand and receive all rents and profits for the benefit of the persons entitled thereto.[55]

Parties in actions relating to personalty, see infra § 738; in actions relating to land, see infra § 741.

c. Evidence

Ordinarily, the burden of proof to show ownership is

tor's possession until a few weeks before his death, that it remained payable to his order and was never endorsed to alleged donee and had never been presented to bank for payment by alleged donee and that alleged donee was at time of alleged transfer the holder of a broad power of attorney authorizing her to take testator's personalty into her custody created a "prima facie presumption" that certificate was within testator's possession at the time of his death, and hence the orphans' court was justified in concluding that it had jurisdiction over the subject matter of the controversy.—In re Moyer's Estate, 19 A.2d 467, 341 Pa. 402.

49. Pa.—In re Brown's Estate, 22 A. 2d 821, 343 Pa. 230—In re Hartzell's Estate, 173 A. 842, 114 Pa. Super. 190—In re Gallagher's Estate, 167 A. 476, 109 Pa.Super. 304—In re Montgomery's Estate, 89 Pittsb.Leg.J. 295—In re Schweitzer's Estate, 49 Dauph.Co. 286.

Effect of mere denial of ownership

A mere denial of the ownership of decedent unsupported by evidence is not sufficient to show a substantial dispute.—In re Brown's Estate, 22 A. 2d 821, 343 Pa. 230.

Propriety of citation on possessor to show cause

Where personal property is in the possession of one, title of which is claimed by the personal representative of deceased person, it is proper to petition the orphans' court for a citation on the one having possession of the personal property to show cause why same should not be turned over to the estate of decedent.—Pickel v. Hoffner, 27 North.Co., Pa., 166.

50. Pa.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re Gallagher's Estate, 167 A. 476, 109 Pa. Super. 304—In re Tekane's Estate, 28 North.Co. 137—Herstine's Estate, 29 Pa.Co. 481—In re Schweitzer's Estate, 49 Dauph.Co. 286.

Right to perfect set-off by taking property

Although a creditor may set off his claim against his indebtedness to the estate, the right of set-off must have been perfected before the death of decedent and may not be perfected by taking over property which was in the possession of decedent at the time of his death.—In re Tekane's Estate, 28 North.Co., Pa., 137.

51. Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623.
Ill.—Balch v. English, 247 Ill.App. 429.
Minn.—Weis v. Kundert, 215 N.W. 176, 172 Minn. 274.
N.M.—In re Sheley's Estate, 298 P. 942, 35 N.M. 358.
N.Y.—McQuaide v. Perot, 119 N.E. 230, 223 N.Y. 75, affirming 167 N.Y. S. 1112, 180 App.Div. 932.
Pa.—Coulter v. Rowe, 108 A. 717, 265 Pa. 386.
Va.—Strader v. Metropolitan Life Ins. Co., 105 S.E. 74, 128 Va. 238.
28 C.J. p 1193 note 32.

Enforcement of right to contribution

Neither a residuary legatee of deceased nor his guardian can maintain an action to enforce the estate's right of contribution growing out of a cosuretyship; but the right must be exercised by estate's personal representative, although estate is fully administered, and although the legatee is the sole legatee.—Wilson v. Brice, 99 S.E. 385, 23 Ga.App. 734.

52. N.J.—Vaiden v. Edson, 98 A. 635, 85 N.J.Eq. 65, affirmed 95 A. 980, 85 N.J.Eq. 184.
Ohio.—Ex parte Bevan, 184 N.E. 393, 126 Ohio St. 126, affirmed and appeal dismissed Bevan v. Krieger, 53 S.Ct. 661, 289 U.S. 459, 77 L.Ed. 1316.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 809, 47 R.I. 47, quoting **Corpus Juris.**
23 C.J. p 1193 note 33.

53. Cal.—Landis v. First Nat. Bank of Lamanda Park, 66 P.2d 730, 734, 20 Cal.App.2d 198, quoting **Corpus Juris.**
Kan.—Brothers v. Adams, 107 P.2d 757, 765, 152 Kan. 675, citing **Corpus Juris.**
Va.—Jeffries v. Antonsanti, 128 S.E. 510, 142 Va. 218.
23 C.J. p 1193 note 34.

54. Ala.—Sharp v. Shannon, 118 So. 173, 218 Ala. 170.

55. Iowa.—Milburn v. East, 102 N. W. 1116, 128 Iowa 101.

on the representative. Letters testamentary are prima facie evidence of the death of the person on whose estate they are issued, and they are conclusive in the absence of contrary evidence for the purpose of enabling the representative to recover the assets. General rules as to admissibility and sufficiency of evidence apply.

Ordinarily, the burden of proof is on the representative to show that the property in the possession of another belonged to decedent,[56] but the burden to prove a gift of property in decedent's possession at the time of his death is on the one claiming the gift from decedent.[57] There is no presumption that the children of decedent have in their possession property belonging to the estate, and hence there is no burden on them to disprove such possession.[58] Where it is established that money was received by defendant under circumstances imputing notice to him of its origin, the burden is on him to show that such payments had been made as absolve him from accounting to the estate for its property which he has wrongfully received.[59] In proceedings brought by an executor or administrator touching the collection and settlement of the estate, letters testamentary are prima facie evidence of the death of the person on whose estate they are issued,[60] and they are conclusive, in the absence of any evidence to the contrary, for the purpose of enabling the representative to recover the assets.[61]

Relevant evidence is admissible,[62] and it will be held sufficient or insufficient to support a verdict or for other purposes,[63] in accordance with the usual rules of evidence.

d. Hearing and Determination

Only matters properly presented can be passed on and only such orders as are within the court's jurisdiction can be made. Assets owing the estate are properly ordered to be turned over to the representative, but the representative is not entitled to recovery where title or right of possession is not established.

Only matters properly presented to the court can be passed on,[64] and the court can make only such orders as are within its jurisdiction.[65] Assets owing to the estate are properly ordered to be turned over to the representative,[66] but the representative is not entitled to a judgment or order for recovery of property or assets where title or right of possession in the estate of decedent is not established,[67]

56. Minn.—Byron v. Popham, 218 N. W. 163, 174 Minn. 61.
N.Y.—Matter of Canfield, 163 N.Y.S. 191, 176 App.Div. 554.

57. Pa.—In re Franklin's Estate, 46 Dauph.Co. 251.

58. Kan.—Kerr v. Kerr, 116 P. 880, 85 Kan. 460.

59. N.Y.—Marshall v. DeCordova, 50 N.Y.S. 294, 26 App.Div. 615.

60. Ala.—Smith v. Smith, 103 So. 557, 212 Ala. 522.
Miss.—Cock v. Abernathy, 28 So. 18, 77 Miss. 872.

61. Or.—Brown v. Truax, 115 P. 597, 58 Or. 572.
17 C.J. p 1177 note 50.

62. Ga.—Hunt v. Harris, 99 S.E. 884, 149 Ga. 225.
Mo.—Allen v. Van Horn, 10 S.W.2d 969, 222 Mo.App. 930.
23 C.J. p 1194 note 51.

63. Cal.—Raddatz v. Myers, 276 P. 1069, 98 Cal.App. 349.
Del.—McGovern v. O'Donnell, 102 A. 183, 7 Boyce 16.
Mass.—McDonald v. MacNeil, 15 N. E.2d 460, 300 Mass. 350.
Minn.—Byron v. Popham, 218 N.W. 163, 174 Minn. 61.

64. Pa.—In re Matter's Estate, 47 Dauph.Co. 106.

65. Mo.—Hoehn v. Struttmann, 71 Mo.App. 399.
N.M.—In re Sheley's Estate, 298 P. 942, 35 N.M. 358.
Pa.—In re McGovern's Estate, 186 A. 89, 322 Pa. 379—In re Smith's Estate, 15 A.2d 523, 141 Pa.Super. 571.

Existence of indebtedness owed by distributee

In the absence of statutory authorization, the probate court cannot adjudicate the existence of any indebtedness owed to the estate by a distributee beyond the amount of the distributee's share in the estate.—In re Sheley's Estate, 298 P. 942, 35 N. M. 358.

66. Mass.—Coffey v. Rady, 166 N. E. 833, 267 Mass. 301.
N.Y.—In re Darashinsky's Estate, 260 N.Y.S. 289, 145 Misc. 426, affirmed In re Darashinsky, 264 N.Y. S. 939, 239 App.Div. 830.

Money accepted to persuade decedent

Decedent's son, accepting money from oil company's agent for persuading decedent to grant such company right of way over her land, without knowledge of decedent of whom son was agent by power of attorney, was properly ordered to return amount received to succession. —In re Buller's Estates, 188 So. 728, 192 La. 644.

Effect of previous fraud on court

That administratrix of deceased owner of stock certificate, in obtaining permission of court to sell stock, failed to disclose that she had previously transferred stock, did not bar her from recovering stock from defendant to whom it had been transferred with notice of defective title, where court's knowledge of facts would have had little bearing, if any, on its judgment, which added nothing to plaintiff's right as administratrix to recover stock certificate. —Escat v. Leaman, La.App., 181 So. 621.

67. Cal.—Raddatz v. Myers, 276 P. 1069, 98 Cal.App. 349.
Ga.—Stringfield v. Stringfield, 85 S. E. 754, 143 Ga. 557.
23 C.J. p 1191 note 12.

Withdrawal from account with decedent's permission

A judgment will not be rendered against defendant for amounts withdrawn from a bank account with decedent's permission and for his benefit.—Succession of Sharpe, 103 So. 443, 158 La. 61.

Relinquishment of right by decedent

Where in a proceeding by an administrator for the discovery and delivery of assets, the evidence showed that decedent had received certain property under the will of her husband which gave her an estate for life, and that the person in possession of the property had filed a claim against the estate, and claimant, the administratrix, and the remaindermen, agreed on a settlement whereby the administratrix was to have the estate for life, and the remainder at her death was to be divided between the remaindermen and claimant, and claimant bought out the interest of the remaindermen, and the testatrix had disposed of some of the property and turned over to claimant, against whom the proceeding was brought, and her brother, all the assets she had received from the husband's estate, and it did not appear that there were any creditors to whom she was indebted, the application for the pos-

or where defendant has not been given the opportunity to file appropriate pleadings.[68] In a suit by an executor on a receipt given by defendant for notes which on their face were payable to plaintiff's testator, judgment for the restoration of the claims, and such sums as defendant received on them since the date of the receipt, and an order of reference to ascertain the amount, with interest, were held proper.[69]

e. Judgment or Order and Enforcement Thereof

The judgment should specify with certainty the property to be turned over. An order of the probate court is prima facie evidence of the right of recovery and is controlling under statutes so providing. An order may be enforced by commitment if so provided by statute.

The judgment should specify with certainty the property to be turned over.[70] An order of the probate court requiring the delivery of property to the administrator is prima facie evidence of his right to recover it,[71] particularly under statutes expressly so providing.[72] An order of the probate court under a statute authorizing it to make such orders as may be required for the speedy collection of debts is controlling.[73] A judgment by default should be vacated where sufficient facts are shown to excuse the default and sufficient merits are shown to require a hearing on the merits in the furtherance of justice.[74] A decree for the representative in a proceeding to set aside an assignment by decedent on the grounds of undue influence implies a finding that the assignment was obtained by undue influence.[75]

An order for the surrender of property may be enforced by a commitment to jail until compliance if so provided by statute.[76]

f. Appeal or Review

The appellate court will not set aside the findings of the probate court unless unsupported by the evidence or plainly wrong.

The appellate court will not set aside the findings of the probate court unless they are unsupported by the evidence or plainly wrong.[77]

§ 170. —— Damages for Conversion

One who embezzles, alienates, or converts the property of decedent may be liable for double the value of the property taken under statutes expressly so providing, but some bad faith or wrongful conduct on the part of defendant is necessary to subject him to such penalty.

One who embezzles, alienates, or converts to his own use the property of decedent before the appointment of an executor or administrator is liable for double the value of the property under a statute expressly so providing,[78] but some bad faith or wrongful conduct on the part of defendant is necessary to subject him to such penalty,[79] and the term "alienate" as used in the statute signifies a wrongful transfer to another.[80]

Conversion generally. A proceeding by the administrator of a donee of stock transferred on the corporation's books but never delivered, for damages for the donor's conversion of the stock, is a legal and not an equitable proceeding.[81]

session of the property was denied.—Matter of Haniman, 100 N.Y.S. 481, 50 Misc. 245.

68. Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597.

69. N.C.—Knight v. Killebrew, 86 N.C. 400.

70. Ill.—Mahoney v. People, 98 Ill. App. 241.

71. N.D.—Johnson v. Rutherford, 147 N.W. 390, 28 N.D. 87.

72. S.D.—Bright v. Ecker, 69 N.W. 824, 9 S.D. 449.

73. Mo.—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

74. N.Y.—In re Dinsmore's Estate, 16 N.Y.S.2d 721, 258 App.Div. 923.

75. Mass.—McDonald v. MacNeil, 15 N.E.2d 460, 300 Mass. 350.

76. Ill.—Martin v. Martin, 48 N.E. 694, 170 Ill. 418, reversing 68 Ill. App. 169.

77. Mass.—McDonald v. MacNeil, 15 N.E.2d 460, 300 Mass. 350.

Finding of orphans' court

A finding of fact by the orphans' court when supported by competent evidence is binding on the supreme court.—In re Chapple's Estate, 2 A.2d 719, 332 Pa. 168, 121 A.L.R. 422.

Right to appeal

(1) Where the same person was appointed receiver of absentee and executor, surety on his bond as receiver could appeal from probate court's decree ordering receiver to distribute the assets to himself as executor.—Hibbard v. Ætna Casualty & Surety Co., 16 N.E.2d 241, 301 Mass. 442.

(2) A surety on the bond of an absentee's receiver could not complain of alleged error in findings concerning date of absentee's death, as basis for probate court's decree of distribution ordering receiver to pay assets over to himself as absentee's executor, in absence of showing of bad faith or lack of sound judgment or diligence on part of receiver.—Hibbard v. Ætna Casualty & Surety Co., supra.

78. Minn.—Owens v. Owens, 292 N.W. 89, 207 Minn. 489.

Okl.—Aultman & Taylor Machinery Co. v. Fuss, 207 P. 308, 86 Okl. 168. 23 C.J. p 1194 note 60.

Purpose of statute

The apparent purpose of statute providing that if any person embezzles, alienates, or converts to his own use any of the personal estate of deceased or ward before appointment of a representative, such person shall be liable for double the value of the property so embezzled, alienated, or converted, is to give to those persons subsequently declared legal owners of decedent's estate a remedy against persons attempting to deprive them of their heritage and to double the damages recoverable because of the likelihood that wrongdoer can in such cases successfully conceal his malfeasance.—Owens v. Owens, 292 N.W. 89, 207 Minn. 489.

79. N.D.—Clausen v. Miller, 249 N.W. 791, 63 N.D. 778.

Okl.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231. 23 C.J. p 1194 note 61.

80. Okl.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231—Aultman & Taylor Machinery Co. v. Fuss, 207 P. 308, 86 Okl. 168.

81. Ill.—Chicago Title & Trust Co. v. Ward, 168 N.E. 319, 332 Ill. 126.

The sum for which a person who converts property of decedent is liable is diminished by the value of property which has been accepted by the administrator as a pro tanto reparation for the property converted.[82]

§ 171. Possession or Transfer by Heirs or Distributees

The executor or administrator has the right and the duty to recover possession of the assets from those who are beneficially interested in the estate if needed for the purposes of administration, but in the absence of such need he has no obligation to recover possession of property rightfully in the hands of beneficiaries of the estate.

The executor or administrator has the right and the duty to recover possession of the assets even from those who are beneficially interested in the estate[83] or their alienees,[84] where the money or property in question is needed for the payment of debts.[85] If property rightfully in the hands of the persons beneficially interested is not needed for duly administering the estate, the representative has no obligation to recover possession of it,[86] and the court will not permit him to prevail in a suit to do so,[87] in accordance with the principle that the law never requires a vain or useless thing,[88] and if there are no debts of the estate the representative's right to recover is limited by the rights of the remaining beneficiaries.[89] Beneficiaries may, by consent or agreement, estop themselves from asserting that another beneficiary wrongfully withholds assets of the estate,[90] and if by reason of an agreement the beneficiaries are precluded from recovering the assets the representative, in the absence of creditors, is likewise precluded.[91] Funds of the estate in the hands of a third person which have been expended in accordance with an agreement with all the beneficiaries cannot be recovered by the representative,[92] and a gift of personalty by the sole beneficiary will not be disturbed,[93] if the assets are not required for the payment of debts or other administration expenses. While the sale of personal property by the widow or the residuary beneficiary may be disturbed and the assets or their value pursued by the executor or administrator, when needful to settle debts of the estate, intervention by him is not favored where no need therefor is shown.[94] Money applied by a widow for the payment of legitimate claims against the estate before the appointment of the administrator cannot be recovered from the widow.[95]

82. Conn.—Storrs v. Robinson, 51 A. 135, 74 Conn. 443.

Exchange of bonds for original bonds

Where certain bonds belonging to an estate were exchanged by intestate's husband for other bonds, which latter bonds were delivered to the administrator and retained by him with knowledge of the transaction and without any effort to return them, an assumption that the latter bonds were accepted by the administrator as a pro tanto reparation for the conversion of the original bonds was justified, and in estimating the damages for the conversion the value of the substituted bonds should be considered.—Storrs v. Robinson, supra.

83. La.—Davidson v. Davidson, App., 199 So. 447.
Mich.—Sylvester v. Button, 173 N. W. 502, 207 Mich. 24.
N.M.—In re Sheley's Estate, 298 P. 942, 35 N.M. 358.
N.Y.—In re Link's Will, 17 N.Y.S. 2d 634, 173 Misc. 217.
W.Va.—Sayre v. Whetherholt, 107 S. E. 293, 88 W.Va. 542.
Wis.—Grover v. Grover, 222 N.W. 228, 197 Wis. 347.
23 C.J. p 1194 note 62.

Accountability for securities

Decedent's son who was in possession of securities with his father's consent was held not liable to administrator for conversion of securities, but liable as father's agent to account to estate for principal and interest received or lost.—Pusch v. Pusch, 228 N.W. 476, 200 Wis. 347.

Avoidance of multiplicity of suits

On the ground of avoidance of multiplicity of suits, it is proper to include in an administrator's bill for an adjudication of his right to a fund deposited in a bank to the credit of intestate's heirs, demands against the husband and administrator of a deceased heir for other sums of money alleged to be parts of the estate, the right to which is dependent on substantially the same evidence as that determining the right to the deposit.—Sayre v. Whetherholt, 107 S.E. 293, 88 W.Va. 542.

84. Wash.—Devereaux v. Anderson, 264 P. 422, 146 Wash. 657.
23 C.J. p 1194 note 63.

85. Ala.—Watson v. Hamilton, 98 So. 784, 210 Ala. 577.
Mich.—Sylvester v. Button, 173 N. W. 502, 207 Mich. 24.
Wash.—Devereaux v. Anderson, 264 P. 422, 146 Wash. 657.
23 C.J. p 1194 note 64.

86. N.Y.—In re Cronise's Estate, 6 N.Y.S.2d 392, 167 Misc. 310.

87. Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623—Watson v. Hamilton, 101 So. 609, 211 Ala. 688—Kennedy v. Davis, 55 So. 104, 171 Ala. 609.
Neb.—Tyrrell v. Judson, 199 N.W. 714, 112 Neb. 393.
Vt.—Scott v. Bradford Nat. Bank, 179 A. 149, 107 Vt. 226.
23 C.J. p 1194 note 65.

Costs of suit as debt

Costs incurred by administratrix in prosecuting suit for money had and received are not debt of decedent, but liability of estate, and show no necessity for recovery of money by administratrix from distributee to whom it equitably belongs.—Watson v. Hamilton, 101 So. 609, 211 Ala. 688.

88. Vt.—Scott v. Bradford Nat. Bank, 179 A 149, 107 Vt 226.

89. Neb.—Blochowitz v. Blochowitz, 266 N.W. 644, 130 Neb. 789.

90. Mo.—Maynard v. McClellan, App., 156 S.W.2d 770.

91. Iowa—In re Van Hauen's Estate, 294 N.W. 901, 229 Iowa 852.
Kan.—Richards v. Tiernan, 91 P.2d 22, 150 Kan. 116.
Mo.—Maynard v. McClellan, App., 156 S.W.2d 770.

92. Mo.—Adamack v. Herman, App., 33 S.W.2d 135—Bell v. Farmers' & Traders' Bank, 174 S.W. 196, 188 Mo.App. 383.

93. N.Y—In re Hammond's Estate, 190 N.Y.S. 886, 198 App.Div. 634.

94. Ga.—Reid v. Butt, 25 Ga. 28.
Iowa.—Wilmington v. Sutton, 6 Iowa 44.
Pa.—Walworth v. Abel, 52 Pa. 370.

95. Hawaii.—Wilcox v. Morton, 28 Hawaii 203.

§ 172. Payments to Heirs or Distributees

A person who pays a debt due the estate to a lawful heir or distributee does not thereby discharge his liability but the transaction will not be readily disturbed where no need appears for holding such person again liable.

A person who pays a debt due to decedent or delivers assets of the estate to the lawful heir or distributee does not thereby discharge his liability to the personal representative[96] unless such payment has been ratified by the representative;[97] but the transaction will not readily be set aside or disturbed where no need appears for procuring such assets or holding such person again liable for the debt for the purposes of administration.[98]

§ 173. Secured Claims

An executor or administrator has authority to appropriate and enforce security given to the decedent.

An executor or administrator has authority to appropriate security given to decedent.[99] A representative who carelessly or dishonestly parts with security to a debtor of the estate renders himself liable for all ensuing loss to the estate.[1] The right of a representative to release a lien is considered infra § 181 c.

An executor or administrator may exercise all the rights of decedent mortgagee in collecting a debt secured by mortgage.[2] If the mortgage is paid off by the mortgagor, it is the executor or administrator of the mortgagee, and not his heirs or devisees, who should receive payment and acknowledge satisfaction.[3] A payment made under an unauthorized agreement with the mortgagee's agent which is ratified by the administrator of the mortgagee must be credited on the mortgage debt.[4]

An administrator as an execution bidder may offer as large a credit on a judgment as his judgment dictates,[5] but he has no authority to offer more for the property than the amount of the judgment.[6]

An executor owes no duty to sell property pledged to secure a debt after the debt has been paid.[7]

Foreclosure of mortgages. An executor or administrator may foreclose a mortgage by peaceable entry and possession or otherwise, just as his decedent might have done, wherever this becomes needful for realizing on the secured debt or claim.[8] He must foreclose the mortgage if necessary,[9] but he is allowed the reasonable discretion of an ordinarily prudent man in the matter,[10] although he is chargeable with negligence if any loss is sustained in consequence of his failure to foreclose, or his delay until the mortgaged property has so depreciated that the full amount of the debt secured cannot be realized.[11] Further, the executor or administrator is the proper person to receive the proceeds of foreclosure.[12] Where, after an administrator had obtained a decree foreclosing a mortgage given by his intestate's widow on her interest in the estate, such interest was sold under a probate order and the sale duly confirmed, it was held that such sale did not operate as a payment of the mortgage debt, but merely transferred the estate's security from her interest as heir in the "land" of the estate to her interest in the proceeds of the sale.[13] Where decedent has made a causa mortis gift of the mortgage to the mortgagor, the executor, in the absence of unsatisfied debts, is without power to foreclose the mortgage.[14]

Payment of prior mortgage. It has been held that an administrator has no right to pay off a prior mortgage in order to let in a junior mortgage held

96. Ky.—Bryson v. Biggs, 104 S.W. 982, 32 Ky.L. 159.
Ohio.—Du Vall v. Faulkner, 149 N.E. 868, 113 Ohio St. 543.
23 C.J. p 1194 note 68.

97. W.Va.—Ruby v. Chesapeake & O. R. Co., 8 W.Va. 269.

98. Iowa.—Molendorp v. Sibley First Nat. Bank, 166 N.W. 733, 183 Iowa 174.
23 C.J. p 1195 note 70.

99. Iowa.—Jensen v. Murphy, 202 N.W. 232, 199 Iowa 524.

1. Mo.—Booker v. Armstrong, 4 S.W. 724, 93 Mo. 49.
23 C.J. p 1195 note 74.

2. Ala.—Webb v. Sprott, 144 So. 569, 225 Ala. 600.

3. Mass.—Cutler v. Haven, 8 Pick. 490.
N.Y.—Van Buren v. Olmstead, 5 Paige 9.
Pa.—Craig v. Blau, 136 A. 860, 288 Pa. 547—Briggs v. Briggs, 19 A. 677, 134 Pa. 514—Trotter v. Shippen, 2 Pa. 358—In re White's Estate, 41 Pa.Co. 663, reversed on other grounds 94 A. 470, 249 Pa. 115.
23 C.J. p 1143 note 35.
Person designated by administrator
Payment to the party designated as present owner of the mortgage by administrator of mortgagee will relieve mortgagor from subsequent liability.—Reynolds v. Smith, 23 N.W. 727, 57 Mich. 194.

4. S.C.—Hodge v. De Laine, 135 S.E. 357, 137 S.C. 337.

5. Iowa.—Jensen v. Murphy, 202 N.W. 232, 199 Iowa 524.

6. Iowa.—Jensen v. Murphy, supra.

7. Mont.—In re Connolly's Estate, 257 P. 418, 79 Mont. 445.

8. N.C.—Scott v. Blades Lumber Co., 56 S.E. 548, 144 N.C. 44.
23 C.J. p 1195 note 71.

9. Ohio.—In re Tredway, 163 N.E. 223, 29 Ohio App. 265.
23 C.J. p 1143 note 37.

10. N.J.—Van Houten v. Stevenson, 77 A. 612, 74 N.J.Eq. 1.
23 C.J. p 1195 note 72.

11. Mo.—Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

12. Iowa.—Langfitt v. Langfitt, 273 N.W. 93, 96, 223 Iowa 702, quoting **Corpus Juris.**
Mass.—Richardson v. Hildreth, 8 Cush. 225.

13. Cal.—In re Angle, 82 P. 668, 148 Cal. 102.

14. Wis.—Hoks v. Wollenberg, 243 N.W. 219, 209 Wis. 276, rehearing denied 245 N.W. 128, 209 Wis. 276.

by the estate and, if he does so, he is answerable for any ensuing loss.[15]

§ 174. Interest on Debts

Interest due on debts is to be collected and the representative is liable for any interest which he has or should have collected.

Interest-bearing debts due the estate are to be collected, with the usual observance of due diligence and good faith, with interest as well as principal.[16] The representative is liable for any interest which he has or should have collected on debts due the estate.[17]

§ 175. Foreign Assets

The general executor or administrator is bound to take due measures for the collection of foreign assets.

The general executor or administrator is bound to take due measures for the collection of foreign demands due the estate and other foreign assets.[18] The representative may realize on such a claim by selling and transferring it to a third person,[19] and wherever the general representative may enforce by domestic suit the payment of a debt due from a foreign debtor by means of the voucher or document of title he holds, or because the debtor may be locally reached by process without resorting to the courts where such debtor is domiciled, such suit by him will be locally upheld.[20]

Collection of assets by ancillary and foreign domiciliary representatives is considered infra § 1000.

§ 176. Property Claimed by Third Persons

The court will require property belonging to a third person which is held by the representative to be returned to the owner. Under statutory provisions, a surrogate's court may try claims of third parties to specific personal property in the possession of the estate representative, providing the claimant is entitled to unqualified and immediate possession.

Where property belonging to a third person is held by the representative, the court will require such property to be returned to the owner subject to whatever claims or liens are lawfully asserted against the property by other persons.[21] So where an administrator collects the proceeds of a life insurance policy, he must give the entire proceeds to the person entitled thereto and cannot subtract administrative expenses therefrom.[22] As to property found among the assets and prima facie part of the estate, the representative should assert title so far as may be proper;[23] but with respect to litigating the title of his decedent to property claimed by third persons, the usual rule of honest and prudent discretion applies.[24] Actions against a representative for conversion or detention of property are considered infra § 716.

In New York, under the Surrogate's Court Act § 206 a, Laws 1934 chapter 539, the surrogate's court may try claims of third parties to property in the possession of the estate representative.[25] The proceeding under the statute is in effect an action in

15. Cal.—Tompkins v. Weeks, 26 Cal. 50.

16. N.Y.—In re Stulman's Will, 26 N.Y.S. 197, 146 Misc. 861.
23 C.J. p 1195 note 78.

Interest from corporations controlled by testator

Executors were held required to collect interest on moneys owed testator by corporations in which he owned the controlling interest.—In re Stulman's Will, supra.

17. Mo.—Stong v. Wilkson, 14 Mo. 116.
N.Y.—Stephens' Estate, 2 N.Y.S. 36.
23 C.J. p 1195 note 79.

18. Pa.—Shinn's Estate, 30 A. 1026, 1030, 166 Pa. 121, 45 Am.S.R. 656.
23 C.J. p 1195 note 81.

19. N.J.—Matter of Cape May & D. B. Nav. Co., 16 A. 191, 51 N.J.Law 78.

Principle supporting rule

This has been held on the principle that letters granted at the domicile of decedent vest in the executor or administrator by operation of law the entire personal estate, wherever situate, and the title so derived will be recognized by comity in the courts of another state.—Matter of Cape May & D. B. Nav. Co., supra.

20. Ala.—Equitable Life Assur. Soc. v. Vogel, 76 Ala. 441, 52 Am.R. 344.
Ky.—Barnes v. Brashear, 2 B.Mon. 380.
Me.—Saunders v. Weston, 74 Me. 85.

21. Ga.—Napier v. Mitchell, 187 S. E. 639, 183 Ga. 93.
Mich.—Peoples State Bank v. Pelgrim, 291 N.W. 37, 292 Mich. 639.
23 C.J. p 1196 note 88.

Jurisdiction of orphans' court in Pennsylvania

Where personal property is in the possession of an administratrix, the orphans' court has jurisdiction to determine its ownership as between the administratrix and adverse claimant.—In re Fornera's Estate, 1 Fay.L.J. 78, affirmed 11 A.2d 512, 139 Pa.Super. 252.

22. Mo.—State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., App., 150 S.W.2d 581.

Jurisdiction of court sitting in probate

(1) District court sitting in probate had jurisdiction to determine whether administrators should turn over proceeds of life policy to one who claimed to be entitled thereto by reason of assignment from decedent.—In re McLaren's Estate, 106 P.2d 766, 99 Utah 340.

(2) Where administrator petitioned district court sitting in probate for authority to turn over proceeds of policy on life of decedent to one claiming as assignee, and heirs of deceased filed objections putting in issue validity of purported assignment, and objection was raised by heirs challenging jurisdiction of district court sitting in probate to hear controversy, proceeding to hear controversy without further objection, after consultation with court, was a "waiver" of heirs' objection to the hearing.—In re McLaren's Estate, supra.

23. Utah.—In re Picot's Estate, 178 P. 75, 53 Utah 195.
23 C.J. p 1196 note 86.

24. S.C.—Chappell v. Brown, 19 S. C.L. 528.

25. N.Y.—In re Gordon's Estate, 30 N.Y.S.2d 515, 262 App.Div. 1014—In re Weinstein's Estate, 28 N.Y. S.2d 137, 176 Misc. 592—In re

replevin,[26] and it is similar to the statutory proceeding by a personal representative for the discovery of property withheld except that it makes no provision for any inquisition.[27] The statute is merely a codification of the authority previously exercised by the surrogate to compel fiduciaries to do justice to all men in respect of the affairs of their decedents,[28] and it is procedural and retroactive in operation.[29] The remedy contemplated by the statute is available only when claimant is entitled to unqualified and immediate possession[30] of specific personalty.[31] The petitioner has the burden of proving his title and right to possession.[32] Issues of fact which cannot be determined on the papers submitted must be resolved on a hearing.[33] The court may make such decree as justice requires,[34] and where the defense by the administrator is vexatious the petitioner is entitled to costs.[35]

§ 177. Receiving Payment

A bona fide payment to the executor or administrator of a debt due the estate is in general a legal discharge to the debtor even though the appointment is voidable or void, and a payment to anyone but the representative is, as a general rule, a mispayment.

The bona fide payment of a debt due the estate to the executor or administrator is in general a legal discharge to the debtor,[36] even though the appoint-

Klein's Estate, 11 N.Y.S.2d 339, 170 Misc. 859—In re Sweeney's Estate, 279 N.Y.S. 927, 155 Misc. 461—In re Hayes' Estate, 275 N.Y.S. 468, 153 Misc. 234—In re Pedrette's Estate, 274 N.Y.S. 607, 153 Misc. 106.

Purpose of statute

The purpose of provision in Surrogate's Court Act relating to proceeding to compel delivery of specific personal property by executor was not to transform surrogate's court into a general equitable tribunal but to supply the machinery whereby property in hands of fiduciary on which estate had no rightful claim and which unquestionably belonged to third person could expeditiously be delivered to third person.—In re Jacobs' Will, 28 N.Y.S.2d 296, 176 Misc. 639, affirmed in part and reversed in part on other grounds 31 N.Y.S.2d 536, 263 App.Div. 829.

Evaluation of effect of statute

Although purpose of introducers of statute to compel delivery of specific personalty or value thereof by an administratrix is not legally available in proceeding involving its interpretation, proximity in point of time of court decision and date of enactment, identical subject matter treated, and circumstance that result attained on facts of case was exactly ratified and confirmed by enactment, could be considered in evaluation of effect of statute.—In re Mathesen's Estate, 292 N.Y.S. 147, 161 Misc. 367.

26. N.Y.—In re Abend's Estate, 29 N.Y.S.2d 13, 176 Misc. 717.

27. N.Y.—In re Abend's Estate, supra.

28. N.Y.—In re Jacobs' Will, 28 N.Y.S.2d 296, 176 Misc. 639, affirmed in part and reversed in part on other grounds 31 N.Y.S.2d 536, 263 App.Div. 829—In re Kenney's Estate, 11 N.Y.S.2d 685, 171 Misc. 87—In re Klein's Estate, 11 N.Y.S.2d 339, 170 Misc. 859—In re Mathesen's Estate, 292 N.Y.S. 147, 161 Misc. 367—In re Hayes' Estate, 275 N.Y.S. 468, 153 Misc. 234.

29. N.Y.—In re Hayes' Estate, supra.

30. N.Y.—In re Jacobs' Will, 28 N.Y.S.2d 296, 176 Misc. 639, affirmed in part and reversed in part on other grounds 31 N.Y.S.2d 536, 263 App.Div. 829—In re Kenney's Estate, 11 N.Y.S.2d 685, 171 Misc. 87.

Effect of limitations on possible claim

That a possible claim against the estate might have been barred by applicable statutes of limitation did not permit the maintenance of proceedings to compel administratrix to deliver savings bank books standing in name of deceased "in trust for" claimant where the funds were subject to other claims and tax obligations.—In re Kenney's Estate, 11 N.Y.S.2d 685, 171 Misc. 87.

Fulfillment of stipulation predicating recovery

Where the right to recovery is based on an agreement by the administrator to deliver the property after it has been "legally released upon proper proceedings taken, such as estate tax proceedings and otherwise," a proceeding to recover the property before the stipulated proceedings have been had is premature.—In re Kenney's Estate, supra.

31. N.Y.—In re Mathesen's Estate, 292 N.Y.S. 147, 161 Misc. 367.

Test of applicability of statute

Where subject matter of statutory proceeding to compel delivery of specific personalty or value thereof by an administratrix is an article or fund which, if given to person in will would constitute him a specific legatee, party may obtain order directing fiduciary to deliver the article or fund on proper showing of ownership and right to immediate possession.—In re Mathesen's Estate, supra.

Money from general assets of estate

Party to whom deceased expressed orally and by written document desire that certain sum be paid could not maintain proceeding to require administratrix to deliver such sum to him where no specific fund was sought, but merely payment of sum from general assets of estate.—In re Mathesen's Estate, supra.

Money held in trust

Under statute authorizing proceeding to compel delivery of specific personalty by an executor, an executor could not be directed to pay over to person claiming money allegedly held in trust by deceased for petitioner a sum in excess of that standing to deceased's credit in savings account, although claimant was not thereby precluded from making claim against estate for balance allegedly due.—In re Polito, 4 N.Y.S.2d 769, 254 App.Div. 806.

32. N.Y.—In re Jacobs' Will, 28 N.Y.S.2d 296, 176 Misc. 639, affirmed in part and reversed in part on other grounds 31 N.Y.S.2d 536, 263 App.Div. 829.

33. N.Y.—In re Hayes' Estate, 275 N.Y.S. 468, 153 Misc. 234.

34. N.Y.—In re Hickmott's Estate, 4 N.Y.S.2d 457, 166 Misc. 536, affirmed 10 N.Y.S.2d 918, 256 App. Div. 1017—In re Glen's Estate, 284 N.Y.S. 685, 157 Misc. 753, reversed on other grounds In re Glen, 288 N.Y.S. 24, 247 App.Div. 518, affirmed In re Glen's Estate, 4 N.E. 2d 433, 272 N.Y. 530, reargument denied 5 N.E.2d 371, 272 N.Y. 640.

Payment of loan prerequisite to return of security

Where a third person's securities hypothecated to secure a loan were redeemed by decedent, such person is entitled to the securities only after payment or tender of the amount of the loan to the estate.—In re Hilliard's Estate, 278 N.Y.S. 675, 154 Misc. 872.

35. N.Y.—In re Klein's Estate, 11 N.Y.S.2d 339, 170 Misc. 859.

36. U.S.—U. S. v. Wilson, C.C.A. Wash., 85 F.2d 444—In re Byrne, C.C.A.N.Y., 32 F.2d 189, certiorari denied Mohr v. Bielaski, 50 S.Ct. 17, 280 U.S. 557, 74 L.Ed. 612.
Ariz.—Smith v. Normart, 75 P.2d 38, 51 Ariz. 134, 114 A.L.R. 1456.

ment of the representative is voidable[37] or perhaps void,[38] or the representative is insolvent,[39] and the representative must account for the amount.[40] On the other hand a payment of assets to any one but the personal representative is, as a general rule, a mispayment,[41] but after all debts have been paid and all the remaining funds are ordered by the court to be transferred to a trustee, a payment to the trustee discharges the debt although the executor has not been formally discharged.[42] A check payable to bearer and given to the depositary for the executor is a valid payment to the executor.[43] Payment of a joint note to the surviving payee who subsequently is appointed executor of deceased payee discharges the liability of the maker to the estate.[44]

Where the same person is representative of both debtor and creditor estate, he may, out of funds in his hands belonging to the one, pay a debt due him as representative of the other.[45]

Payment to an administrator of an absentee who is not in fact dead is considered supra § 16.

Claims against the United States may be received by the personal representative of claimant at any place designated by the government for payment,[46] but the representative is liable to account therefor only to the court from which he received his appointment.[47]

§ 178. —— Medium of Payment

Payment to the representative must usually be in lawful money, or a legal tender currency, in the absence of any contrary direction in the will of the decedent or the instrument evidencing the debt.

Payment to the personal representative must usually be in lawful money, or a legal tender currency, in the absence of any contrary direction in the will of the deceased creditor or the instrument evidencing the debt.[48] It has been held that the executor or administrator, instead of receiving payment in money, may in the exercise of good faith and due prudence settle with the debtor by accepting other security or property or by novating or extending the claim,[49] but there are also authorities in which the right to accept other property in payment, except perhaps under authority of the probate court, is de-

Ky.—Harmon v. Ross' Admr., 3 Ky. Op. 266.
23 C.J. p 1196 note 89.

Payment of legacy

Where a testator bequeathed and devised property to his partner on his paying seven thousand dollars to the testator's wife, who died before the testator, and gave the residuary estate to the wife, as the residuary estate must be distributed as intestate's property, the payments may for convenience be made to the administrator cum testamento annexo for distribution with the residue among the heirs, they being numerous.—Huard v. Hegarty, 119 A. 609, 122 Me. 206.

37. U.S.—Kane v. Paul, D.C., 14 Pet. 33, 10 L.Ed. 311.
N.C.—London v. Wilmington & W. R. Co., 88 N.C. 584.

38. U.S.—Kane v. Paul, D.C., 14 Pet. 33, 10 L.Ed. 341.
N.C.—London v. Wilmington & W. R. Co., 88 N.C. 584—Hyman v. Gaskins, 27 N.C. 267.

39. Miss.—Riley v. Moseley, 44 Miss. 37.

40. Ala.—Sloan v. McKinney, 19 Ala. 115.
Mo.—Chouteau v. Hill, 2 Mo. 177.
Tex.—Roan v. Raymond, 15 Tex. 78.
23 C.J. p 1196 note 93.

41. Pa.—Eisenbise v. Eisenbise, 4 Watts 134.

Payment of negotiable instrument

Only an administrator in possession of negotiable instrument belonging to deceased, or administrator's transferee, is entitled to payment of instrument.—Smith v. Normart, 75 P.2d 38, 51 Ariz. 134, 114 A.L.R. 1456.

Payment to third person by order of administrator

Payments of annual rentals for extensions of time for removal of timber by grantees in timber deed to mortgagee of land by order or direction of administrator of deceased grantor's estate in partial payment of mortgagee's claim against estate for taxes paid were not acceptance by administrator of claim or property in payment of debt, or sale of estate's property, but in legal effect payments of rentals to administrator and effectual to extend time for removal of timber, although not authorized by probate court order.—Jones v. Gibbs, 130 S.W.2d 265, 133 Tex. 627, affirming Com.App., 103 S.W.2d 1011, motion overruled 131 S.W.2d 957, 133 Tex. 627.

42. Pa.—Northern Trust Co. v. Travelers Ins. Co. of Hartford, Conn., 196 A. 497, 329 Pa. 17.
Payment to heirs or distributees is considered supra § 172.

43. Ill.—Kuhlmeyer v. Butz, 215 Ill. App. 414.

Payable to widow or bearer

That a mortgagor, in paying interest on the mortgage, makes the check payable to the mortgagee's widow, or bearer, governed by the fact that the income of the estate had been left to the widow for life, does not invalidate the check as a payment to the executors, who under the will were to receive the payment as they had debts and expenses to pay from the estate.—Kuhlmeyer v. Butz, supra.

44. Ga.—Mathews v. De Foor, 158 S.E. 7, 172 Ga. 318.

45. Va.—Green v. Thompson, 5 S.E. 507, 84 Va. 376—Caskie v. Harrison, 76 Va. 85.

46. U.S.—Vaughan v. Northrup, D. C., 15 Pet. 1, 10 L.Ed. 639.
Va.—Davis v. Chapman, 1 S.E. 472, 83 Va. 67, 5 Am.S.R. 251.

47. U.S.—Vaughan v. Northrup, D. C., 15 Pet. 1, 10 L.Ed. 639

48. Ill.—Means v. Harrison, 2 N.E. 64, 114 Ill. 248.
N.C.—Poston v. Jones, 29 S.E. 951, 122 N.C. 536.
23 C.J. p 1196 note 98.

49. Ga.—Adams v. Reid, 56 Ga. 214.
Ind.—Hancock v. Morgan, 34 Ind. 524.
23 C.J. p 1196 note 1.

Authority to take mortgaged land

Evidence and agreed statement of facts that a will making defendants executors, without bond with power to sell, and testimony, by an executor that he was authorized to act in the transaction as such, and that whatever he did was satisfactory to the estate, is sufficient to sustain the trial court's conclusion that the executor was authorized to make a contract to take the mortgaged property in full satisfaction of the judgment.—Lobit v. Marcoulides, Tex. Civ.App., 225 S.W. 757, error refused.

nied,[50] or considered as doubtful.[51]

Acceptance of depreciated currency. The executor or administrator will not be upheld in receiving payment in depreciated currency,[52] unless the circumstances show that he acted in good faith and with due prudence for the best interest of the estate.[53] Thus in regard to Confederate money, it has been held that, when the representative might have collected the assets in good money before or after the Civil War and failed to do so, he cannot discharge the balance found due from him by payment in Confederate treasury notes,[54] but when he acted in good faith he is not responsible for the loss of funds received by him in Confederate money or notes which at the time he was obliged to accept,[55] and the measure of his accountability is the actual value at the time of the collection, and not the face value, of such money.[56]

Payments received in gold at premium. That a representative who receives payment in gold at a time when it is at a premium is chargeable with such premium has been both asserted[57] and denied.[58]

§ 179. —— Extension of Time for Payment

The right of a representative to extend the time for payment of a debt due the decedent has been both affirmed and denied.

It has been held that the representative may extend the time for payment of a debt due his decedent,[59] but this has also been denied;[60] and any extension, where the debtor is solvent at the time when the debt is due, is held to be at the risk of the personal representative.[61] In the absence of statute the court has no power to authorize an agreement to extend the time for payment.[62]

§ 180. —— Application of Payments

In case the debtor has not exercised his prior right, the executor or administrator may exercise the right to apply the payment to whichever debt he desires. If neither of the parties has made any application of the payment, the law will apply it to the items of indebtedness which are oldest or least secure.

Where an executor or administrator receives money from a person who is indebted to the estate, he may, in case the debtor has not exercised his prior right, avail himself of the power to apply the payment,[63] but he must make the application to debts that are held in the same right as that in which he received the money; that is to say, when he receives the money in his fiduciary capacity he must apply it to the extinguishment of debts due the estate and cannot apply it to a debt due to him personally.[64] It has even been held that, where he has claims against the same person both in his individual and in his representative capacity, and cannot collect both, he must apply money received from the debtor in payment of the claim due to the estate in preference to his individual debt.[65] A debtor, on whom the administrator draws an order to pay a certain sum to be credited on a particular debt, has no right without the administrator's consent to change the order so as to make such payment on a different debt, and in case of his paying the order the law will apply it to the debt designated by the administrator.[66] In case neither of the parties has made any application of the payment, the law will apply it to the items of indebtedness to the estate which are oldest or least secure.[67] A debtor cannot be required to see to the proper application of payments which he makes to the representative.[68]

50. Ohio.—In re Tredway, 163 N.E. 223, 29 Ohio App. 265.
23 C.J. p 1197 note 2.

Acceptance of mortgaged land
An administrator cannot accept a conveyance of land in satisfaction of a mortgage thereon, and if he wrongfully does so, he cannot properly credit himself with the money expended in furtherance of the transaction, nor can he list the real estate in his account as a part of the funds of the estate.—In re Tredway, supra.

51. Iowa.—Allison v. Graham, 24 N.W. 597, 67 Iowa 68.

52. Va.—Patteson v. Bondurant, 30 Gratt. 94, 71 Va. 94—Hannah v. Boyd, 25 Gratt. 692, 66 Va. 692—Myrick v. Adams, 4 Munf. 366, 18 Va. 366.

53. S.C.—Chick v. Farr, 10 S.E. 176, 390, 31 S.C. 463.
23 C.J. p 1197 note 6.

54. U.S.—Horn v. Lockhart, Ala., 17 Wall. 570, 21 L.Ed. 657, affirming, C.C., 15 F.Cas.No.8,445, 1 Woods 628.

55. S.C.—Chick v. Farr, 10 S.E. 176, 390, 31 S.C. 463,
23 C.J. p 1197 note 8.

56. Ala.—Anderson v. Wynne, 62 Ala. 329.
Miss.—Williams v. Campbell, 46 Miss. 57.
23 C.J. p 1197 note 9.

57. S.C.—Ex parte Glenn, 20 S.C. 64.
23 C.J. p 1197 note 10.

58. N.Y.—Matter of Shipman, 31 N.Y.S. 571, 82 Hun 108.

59. S.C.—Campbell v. Linder, 27 S.E. 648, 50 S.C. 169.
23 C.J. p 1197 note 12.

60. Tex.—Duenkel v. Amarillo Bank & Trust Co., Civ.App., 222 S.W. 670, error refused.
23 C.J. p 1197 note 13.

61. Pa.—In re Gardner, 49 A. 346, 199 Pa. 524.

62. Conn.—In re Marks' Estate, 163 A. 600, 116 Conn. 58.

63. Pa.—In re White, 13 Pa.Super. 201.

64. Ala.—Kirkman v. Benham, 28 Ala. 501.
23 C.J. p 1198 note 17.

65. Pa.—Evan's Estate, 1 Pa.Super. 37.

66. N.C.—Long v. Miller, 93 N.C. 233.

67. Pa.—In re White, 13 Pa.Super. 201.

68. Pa.—Becker's Estate, 13 Phila. 378—Wanner v. Roth, 1 Woodw. 13.

§ 181. Compromise or Release of Claims and Liens

a. Compromise of claims
b. Release of claims
c. Release of lien

a. Compromise of Claims

(1) In general
(2) Order or sanction of court
(3) Effect
(4) Enforcement
(5) Attack on and setting aside

(1) In General

In the absence of a statutory prohibition or limitation in letters testamentary an executor or administrator has the right to compromise any demand of decedent provided he acts honestly and with discretion. The claim must be disputed or doubtful and the compromise must be supported by consideration.

In the absence of a statutory prohibition an executor or administrator, as incidental to the power to sue and collect, has the right to compromise any demand of decedent,[69] provided he acts honestly and within the range of a reasonable discretion for the true interests of the estate,[70] unless limited by his letters of administration.[71] Nevertheless the responsibility is a perilous one,[72] and at common law the compromise or release of a debt or claim due the estate was regarded as a waste on the part of the personal representative if it resulted in a loss to the estate.[73] In modern times, however, the universal test is whether, in compromising, the representative acted with due prudence; if he did he is protected,[74] even though it seems probable that the settlement was not the best that could have been made,[75] while, if he has been guilty of negligence, improvidence, or fraud in accepting less than the full amount due, he is chargeable with the loss.[76] In general it is only nonassenting parties in beneficial interest who can pursue the representative for an improper release or compromise.[77] To be a subject of compromise the claim must be disputed or doubtful.[78] The compromise must be supported by consideration,[79] and the mere receipt of less than the amount admitted to be due is insufficient.[80] In accordance with the rules pertaining to contracts generally, an offer to compromise a claim may be withdrawn at any time before acceptance.[81] The fact that a compromise of claims for death and for conscious suffering fails to designate the portion of the total sum paid to be allocated in settlement of each claim does not render the compromise invalid.[82] Where the widow and children are entitled to the proceeds in a claim for decedent's death, the

69. U.S.—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901.
Fla.—Evans v. Tucker, 135 So. 305, 309, 101 Fla. 688, 85 A.L.R. 170, citing **Corpus Juris.**
Mass.—O'Rourke v. Sullivan, 35 N.E.2d 259, 309 Mass. 424—Wallin v. Smolensky, 20 N.E.2d 406, 303 Mass. 39.
Mo.—Scott v. Crider, 272 S.W. 1010; Crider v. Crider, App., 272 S.W. 1013.
N.Y.—In re Leopold's Estate, 181 N.E. 570, 259 N.Y. 274, 85 A.L.R. 197, reversing 253 N.Y.S. 354, 233 App. Div. 412—In re George's Estate, 9 N.Y.S.2d 533, 256 App.Div. 270, motion denied In re George's Will, 12 N.Y.S.2d 356, 256 App.Div. 1101—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295—In re Ledyard's Estate, 21 N.Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029, and 24 N.Y.S.2d 780, 261 App.Div. 827.
Or.—Nunner v. Erickson, 51 P.2d 839, 151 Or. 575.
Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
Wash.—Hansen v. Stimson Mill Co., 81 P.2d 855, 195 Wash. 621.
23 C.J. p 1198 note 23.

Settlement for improper possession of property
Administrator and not widow is the proper party to settle with person who has taken improper possession of property of estate.—Brewer v. King, 237 N.W. 508, 212 Iowa 665.

Claim for wrongful death
U.S.—Doten v. Southern Ry. Co., D.C.Tenn., 32 F.Supp. 901.
Wash.—Hansen v. Stimson Mill Co., 81 P.2d 855, 195 Wash. 621.

70. Or.—Nunner v. Erickson, 51 P.2d 839, 151 Or. 575.
23 C.J. p 1199 note 24.

71. N.Y.—Price v. Maryland Casualty Co., 294 N.Y.S. 448, 162 Misc. 363.

Rights limited to prosecution of action
Judgment obtained against motorist by administrator of estate of deceased guest could not be satisfied by instrument executed by administrator's attorney, where letters of administration limited administrator to prosecution of such action and restrained him from settling action or enforcing any judgment obtained.—Price v. Maryland Casualty Co., supra.

72. Conn.—Johnson's Appeal, 42 A. 662, 71 Conn. 590.
N.H.—Wyman's Appeal, 13 N.H. 18.
N.Y.—In re Quinn, 9 N.Y.S. 550.

73. N.Y.—De Diemar v. Van Wagenen, 7 Johns. 404.

74. Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
23 C.J. p 1199 note 27.

75. Iowa.—Jenkins v. Shields, 47 Iowa 708.

76. Mass.—O'Rourke v. Sullivan, 35 N.E.2d 259, 309 Mass. 424.
23 C.J. p 1199 note 29.

77. La.—Delabigarre v. New Orleans Second Municipality, 3 La.Ann. 230.
N.C.—Jones v. Jones, 24 S.E. 774, 118 N.C. 440.
Pa.—Black's Appeal, 25 Pa. 238.

78. Ga.—Pate v. Newsome, 147 S.E. 44, 167 Ga. 867.

79. Wis.—Cable v. Smith, 227 N.W. 266, 200 Wis. 288.

Consideration held sufficient
Mass.—Wallin v. Smolensky, 20 N.E. 2d 406, 303 Mass. 39.
Neb.—Pickens v. Pickens, 181 N.W. 154, 105 Neb. 498.

80. Mo.—Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversing, App., 73 S.W.2d 288.
Or.—Yates v. Cockerham, 67 P.2d 269, 156 Or. 245.

81. Mo.—Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversing, App., 73 S.W.2d 288.

82. Mass.—O'Rourke v. Sullivan, 35 N.E.2d 259, 309 Mass. 424.

widow may settle for her share without qualifying as administratrix of the estate.[83]

Agreement to refund overpayment. An administrator is without power to make an agreement to refund an overpayment which would not otherwise be recoverable.[84]

(2) Order or Sanction of Court

As a general rule the power of a representative to compromise debts due the estate is not dependent upon the previous sanction of the court unless this is required by statute, but he obtains a more complete immunity from personal liability by securing judicial sanction before the compromise. The debtor has no standing to petition the court to approve a compromise. An order approving a compromise or settlement is in the discretion of the court, but the court cannot arbitrarily withhold its authorization or approval.

In accordance with statutory provisions in a number of jurisdictions, the probate court or other court with jurisdiction of decedents' estates is clothed with jurisdiction to authorize compromises of claims in favor of the estate by executors or administrators,[85] and under such statutes claims may be compromised by the personal representative with the consent or authorization of the court.[86] As a general rule, the power of the representative to compromise debts due the estate which he represents is not dependent on the previous sanction of the court,[87] unless, as is sometimes the case, this is required by statute,[88] but he obtains a more complete immunity from personal liability by thus securing in advance a judicial sanction of the compromise which he proposes to make,[89] although the order does not furnish an absolute protection since any party interested in the final settlement of the estate may show that the debt or claim was fraudulently or negligently compromised.[90] Where the representative acts without such sanction, the burden is on him, if interested parties object, to show that he has acted judiciously and for the benefit of the estate,[91] the court may disapprove the compromise on account-

83. Ind.—Fink v. Peden, 17 N.E.2d 95, 214 Ind. 584.

84. Mo.—Wilkins v. Bell's Estate, App., 261 S.W. 927.

85. U.S.—Jenkins v. Southern Pac. Co., D.C.Cal., 17 F.Supp. 820, reversed on other grounds, C.C.A., Jenkins v. Pullman Co., 96 F.2d 405, certiorari granted Pullman Co. v. Jenkins, 59 S.Ct. 83, 305 U.S. 583, 83 L.Ed. 368, affirmed 59 S.Ct. 347, 305 U.S. 534, 83 L.Ed. 334.
Cal.—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—Mazza v. Austin, 76 P.2d 533, 25 Cal.App.2d 85.
Colo.—In re Shultz' Estate, 85 P.2d 736, 103 Colo. 184.
Md.—Blum v. Fox, 197 A. 117, 173 Md. 527.
23 C.J. p 1200 note 35.

Construction of statute

A statute authorizing orphans' court to authorize executor, administrator, or guardian to compromise claim in favor of estate of decedent or ward is remedial, and should not be narrowed by construction.—Blum v. Fox, 197 A. 117, 173 Md. 527.

Agreement not constituting compromise of debt

(1) Agreement, whereby administratrix of unpaid deceased seller permitted buyer to keep mules until fall of the year and then pay for them, was held not compromise of debt requiring probate court's authority.—Lee v. Wagner, 47 S.W.2d 33, 185 Ark. 374.

(2) Agreement of executors for extension of mortgage belonging in part to estate was held not within statute providing that probate court may authorize fiduciary to "compromise" doubtful claims.—In re Marks' Estate, 163 A. 600, 116 Conn. 58.

86. Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.
Ky.—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396.
Mich.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.
Miss.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

87. U.S.—Second Nat. Bank v. Woodworth, C.C.A.Mich., 66 F.2d 170, affirming, D.C., 54 F.2d 672.
Ark.—Wunderlich v. Bowen, 100 S.W.2d 80, 193 Ark. 284.
Conn.—In re Marks' Estate, 163 A. 600, 116 Conn. 58.
Fla.—Evans v. Tucker, 135 So. 305, 101 Fla. 688, 85 A.L.R. 170.
Ill.—Ringel v. Pearson, 28 N.E.2d 576, 306 Ill.App. 285.
N.Y.—In re Corbin's Estate, 236 N.Y.S. 653, 227 App.Div. 87—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.
Or.—Nunner v. Erickson, 51 P.2d 839, 151 Or. 575.
Wash.—Hansen v. Stimson Mill Co., 81 P.2d 855, 195 Wash. 621.
23 C.J. p 1199 note 32.

88. Cal.—See v. Joughin, 64 P.2d 149, 18 Cal.App.2d 414.
Ga.—Pate v. Newsome, 147 S.E. 44, 167 Ga. 867.
Ind.—Travelers Ins. Co. v. Eviston, App., 37 N.E.2d 310.
Minn.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.
Miss.—Keanum v. Southern Ry. Co., 119 So. 301, 151 Miss. 784.
Mo.—Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversing, App., 73 S.W.2d 288.
Tex.—Scott v. Taylor, Civ.App., 294 S.W. 227—Duenkel v. Amarillo Bank & Trust Co., Civ.App., 222 S.W. 670, error refused.
23 C.J. p 1199 note 33.

After suit filed to settle estate

(1) After a suit has been filed to settle an estate the chancellor directs the administration and the personal representative cannot compromise a claim without the approval of the court.—Crum's Adm'r v. Crum, 92 S.W.2d 63, 263 Ky. 219—Hudson's Adm'x v. Collins, 38 S.W.2d 975, 239 Ky. 131—Dees' Adm'r v. Dees' Ex'rs, 13 S.W.2d 1025, 227 Ky. 670—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396.

(2) The approval of the court in which the suit is pending is necessary, and so the approval of the county court is ineffectual where the suit is pending in the circuit court.—Dees' Adm'r v. Dees' Ex'rs, supra—Trevathan's Ex'r v. Dees' Ex'rs, supra.

Reliance on oral promises

Mortgagor was held not entitled to recover from deceased mortgagee's estate for expenditures made in improving mortgaged premises and in settling lien created by purchaser, on ground that expenditures were made in reliance on oral promises of agent of executrix and attorney of estate.—See v. Joughin, 64 P.2d 149, 18 Cal. App.2d 414.

89. Fla.—Evans v. Tucker, 135 So. 305, 101 Fla. 688, 85 A.L.R. 170.
23 C.J. p 1200 note 36.

90. N.Y.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.

91. Ark.—Wunderlich v. Bowen, 100 S.W.2d 80, 193 Ark. 284.
Conn.—In re Marks' Estate, 163 A. 600, 116 Conn. 58.
Fla.—Evans v. Tucker, 135 So. 305,

ing,[92] and if he has not acted wisely he is liable for the loss.[93] An order authorizing an executor to compromise a contested claim due the estate will not relieve the executor from liability for his previous negligence in bringing about the state of affairs rendering the compromise necessary.[94] A payment for the purpose of effecting a settlement contrary to the court's order is improper.[95]

A statute providing that the court may authorize a compromise is permissive and not mandatory;[96] the court cannot require the executors to compromise a claim,[97] but, on the other hand, it is not required to pass on every application of an executor to approve a compromise.[98] Under such a statute the court may approve a compromise with a debtor who is also an executor of the estate,[99] but its authority does not extend to an approval of a compromise of the liability of the executor on his account to the creditors and beneficiaries of the estate.[1] Where all the statutory distributees are adults an application for approval of a compromise for the wrongful death of decedent is unnecessary.[2]

An administrator who is limited by his letters of administration to the prosecution of an action and who desires to compromise the action should apply to the court which issued the letters for a removal of the limitation,[3] but a judgment entered in a superior court for an amount agreed on by the parties is valid and does not subject the administrator to contempt of court for violation of the letters of administration from the inferior court.[4]

Who entitled to order. The court may properly approve a settlement by those who are entitled to the proceeds of the debt.[5] Under statutes authorizing a compromise on a petition by the executor or administrator, a debtor is not permitted to petition the court for an order to compromise the debt,[6] and the executor or administrator, to be permitted to do so, must be qualified.[7] The court has no power to authorize settlement for wrongful death by one who has no interest in the claim and who has been appointed administratrix by a false representation that she was decedent's wife.[8]

Notice. Notice to persons interested in the estate is not necessary to the entry of an order consenting to a compromise when not required by statute.[9] A notice by posting as directed by the court is sufficient.[10]

Hearing and determination. The order approving the compromise or settlement is in the discretion of the court[11] and it will not be disturbed in the absence of an abuse of discretion,[12] but the court

309, 101 Fla. 688, 85 A.L.R. 170, citing **Corpus Juris.**
Ky.—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396.
Mass.—O'Rourke v. Sullivan, 35 N.E.2d 259, 309 Mass. 424.
23 C.J. p 1200 note 34.

92. N.Y.—In re Corbin's Estate, 236 N.Y.S. 653, 227 App.Div. 87.

93. Ark.—Wunderlich v. Bowen, 100 S.W.2d 80, 193 Ark. 284.
Ky.—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396.
Mass.—O'Rourke v. Sullivan, 35 N.E. 2d 250, 309 Mass. 424.

94. Ga.—Fraley v. Thomas, 25 S.E. 446, 98 Ga. 375.

95. N.Y.—In re Kirshbaum's Estate, 282 N.Y.S. 194, 156 Misc. 600.

96. Cal.—Mazza v. Austin, 76 P.2d 533, 25 Cal.App.2d 85.
N.Y.—In re Balfe's Will, 20 N.Y.S.2d 474, 174 Misc. 279, denying motion 274 N.Y.S. 284, 152 Misc. 739, modified on other grounds 280 N.Y.S. 128, 245 App.Div. 22, affirmed Application of De Mott, 27 N.Y.S.2d 472, 261 App.Div. 996, appeal denied In re Balfe's Estate, 28 N.Y.S.2d 153, 262 App.Div. 746.

Power sparingly exercised
Authorization to sell testator's bond and mortgage at a discount is sparingly exercised by surrogate, and only in exceptional cases.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.

97. Cal.—Mazza v. Austin, 76 P.2d 533, 25 Cal.App.2d 85.
N.Y.—In re Corbin's Estate, 236 N.Y.S. 653, 227 App.Div. 87.

Compromise by temporary administratrix
Surrogate does not have power to direct executors to petition for approval of compromise made by temporary administratrix.—In re Corbin's Estate, supra.

98. N.Y.—In re Daly's Estate, 273 N.Y.S. 276, 152 Misc. 210.

99. N.Y.—In re Purcell's Will, 26 N.Y.S.2d 353.

1. Cal.—In re Richards' Estate, 109 P.2d 923, 17 Cal.2d 259.
Iowa.—In re McElfresh's Estate, 254 N.W. 84, 218 Iowa 97.

Depositor's agreement after closing of executor bank
Order authorizing executor national bank to execute depositor's agreement in behalf of estate after bank had closed and reopened after receiving waivers from depositors was held erroneous in so far as it failed to preserve to heirs right to lien on securities held by executor, or right of action to recover amount due them, and all rights existing under federal laws.—In re McElfresh's Estate, supra.

2. N.Y.—In re Fortunoff's Estate, 3 N.Y.S.2d 549, 167 Misc. 119.

3. N.Y.—Amo v. Leonard, 30 N.Y.S. 2d 183, 262 App.Div. 467.

4. N.Y.—Amo v. Leonard, supra.

5. Ky.—Bourne's Ex'r v. Edwards, 2 S.W.2d 1053, 223 Ky. 35.

6. Cal.—Mazza v. Austin, 76 P.2d 533, 25 Cal.App.2d 85.

7. N.Y.—In re Coleman's Estate, 269 N.Y.S. 617, 150 Misc. 76.

Application in probate proceeding
Request for authorization to sell testator's bond and mortgage at discount, or to compromise future payments thereon, held premature when made in probate proceeding.—In re Coleman's Estate, supra.

8. S.C.—Ellenberg v. Arthur, 183 S.E. 306, 178 S.C. 490, 103 A.L.R. 437.

9. Minn.—In re Stampka's Estate, 210 N.W. 85, 168 Minn. 283.

10. Iowa.—In re Fleming's Estate, 293 N.W. 511, 228 Iowa 1137.

11. Cal.—In re McAllister's Estate, 25 P.2d 507, 134 Cal.App. 349.

Capability and understanding of administrators
Whether administrators were capable and appreciated effect of settlement they negotiated for death was for chancery court's determination when appointing them and when approving settlement.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

12. Cal.—In re McAllister's Estate, 25 P.2d 507, 134 Cal.App. 349.

Reason for rule
The law favors amicable settle-

cannot arbitrarily withhold its authorization or approval.[13] The court may review the discretion of the executor or administrator but cannot substitute its own discretion.[14] Ordinarily a proposed compromise will be approved when apparently for the best interests of the estate[15] and it will be disapproved where the estate is not benefited thereby.[16] An order approving a settlement is in effect a judgment that the settlement is fair and just.[17] In passing on a proposed compromise settlement for decedent's death the court will assume that the compromise represents valid and enforceable obligations.[18] On approval of a compromise the court may require hearings as to how the sum received shall be allocated between distributees and creditors.[19] The court cannot determine matters outside the authority given by the statute.[20]

(3) Effect

A valid compromise is binding on both parties and on all interested persons represented by the executor or administrator. A compromise without the proper court authorization required by statute is ineffective and it is not binding.

A valid compromise or settlement is binding on both parties.[21] In the absence of fraud it is binding on all interested persons represented by the executor or administrator,[22] and bars a subsequent claim by the heirs or distributee represented.[23] A compromise without the proper court authorization required by statute is ineffective,[24] and it is not binding,[25] but where the court's authorization is not required the compromise is binding without court sanction although the executor or administrator made an error in judgment.[26] A compromise and settlement made with the administrator appointed in the state where the decedent resided at the time of his death is binding on the administrator appointed in the state of the residence of the debtors if the laws of the former state authorized such compromise and settlement.[27] A settlement between the sole beneficiary and the party charged is binding on the administrator thereafter appointed.[28] Under a statute authorizing an executor or administrator to compound with a debtor for a debt, due with the approbation of the probate court, a compromise by the administrator, with the approval of the probate court, of a suit brought by creditors of a decedent to set aside certain mortgages executed by the decedent, does not bar a subsequent suit by heirs of the decedent against the same defendant involving transfers of other property by the decedent.[29] The settlement of a claim on a note with the payee's

ment of controversies and prevention of litigation, and exercise, in a fair manner, of statutory power to effect compromises of claims threatening to involve estates in litigation by subordinate tribunal not fully equipped to determine their precise legal merits, should be upheld, in absence of evidence of positive error or injustice.—Blum v. Fox, 197 A. 117, 173 Md. 527.

Awarding proceeds to persons without right thereto

Chancellor's approval of administrator's unauthorized compromise agreement with relatives of deceased to pay them their part of proceeds of war risk insurance would be abuse of chancellor's discretion, where relatives to whom payment was promised had no legal right to any of proceeds.—Crum's Adm'r v. Crum, 92 S.W.2d 63, 263 Ky. 219.

13. Minn.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

14. N.Y.—In re Leopold's Estate, 181 N.E. 570, 259 N.Y. 274, 85 A.L.R. 197, reversing 253 N.Y.S. 354, 233 App.Div. 412.
23 C.J. p 1199 note 32 [a].

15. N.Y.—In re Lessig's Estate, 1 N.Y.S.2d 566, 165 Misc. 706—In re Hilpert's Estate, 300 N.Y.S. 886, 165 Misc. 430.

Settlement for claim held adequate

Miss.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

N.Y.—In re Mangan's Estate, 294 N.Y.S. 974, 162 Misc. 495.

16. N.Y.—In re Gentry's Estate, 252 N.Y.S. 723, 141 Misc. 249.

17. Mich.—McMann v. General Accident Assur. Corporation, 267 N.W. 601, 276 Mich. 108.

18. N.Y.—In re Fortunoff's Estate, 3 N.Y.S.2d 549, 167 Misc. 119.

19. N.Y.—In re Fortunoff's Estate, supra.

20. N.Y.—In re Stewart's Estate, 14 N.Y.S.2d 25, 171 Misc. 816.

Validity of separation agreement

On application for approval of a proposed compromise agreement between executors and a so-called arbitration committee, surrogate's court could not determine validity of separation agreement involving contractual rights and liabilities.—In re Stewart's Estate, supra.

21. Tex.—Leff v. Adams, Civ.App., 289 S.W. 102.

22. Ala.—McCraw v. Cooper, 118 So. 333, 218 Ala. 186.
Iowa.—In re Fleming's Estate, 293 N.W. 511, 228 Iowa 1137.
Miss.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

23. U.S.—Jenkins v. Southern Pac. Co., D.C.Cal., 17 F.Supp. 820, reversed on other grounds, C.C.A., Jenkins v. Pullman Co., 96 F.2d 405, certiorari granted Pullman Co. v. Jenkins, 59 S.Ct. 83, 305 U.S. 583, 83 L.Ed. 368, affirmed 59 S.Ct. 347, 305 U.S. 534, 83 L.Ed. 334.
Miss.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

24. Ga.—Price v. Nehi, Inc., 174 S.E. 722, 49 Ga.App. 196.
Ky.—Dees' Adm'r v. Dees' Ex'rs, 13 S.W.2d 1025, 227 Ky. 670.

25. Ky.—Crum's Adm'r v. Crum, 92 S.W.2d 63, 263 Ky. 219—Dees' Adm'r v. Dees' Ex'rs, 13 S.W.2d 1025, 227 Ky. 670.
Mo.—Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversing, App., 73 S.W.2d 288.

Right to return of security

Claimant's settlement with executors being void because of lack of the proper court authorization, claimant cannot demand return of securities held by executors to secure them in settlement.—Dees' Adm'r v. Dees' Ex'rs, 13 S.W.2d 1025, 227 Ky. 670.

26. Ark.—Wunderlich v. Bowen, 100 S.W.2d 80, 193 Ark. 284.
Mass.—O'Rourke v. Sullivan, 35 N.E.2d 250, 309 Mass. 424.

27. Kan.—Jasper v. Thomas, 257 P. 714, 124 Kan. 163.

28. Ala.—Hampton v. Roberson, 163 So. 644.

29. Vt.—Marsh v. Marsh, 63 A. 159, 78 Vt. 399.

heirs does not affect the right of the payee's administrator to collect the sum due.[30]

(4) Enforcement

The court should enforce a compromise agreement unless a refusal is justified by a proper exercise of discretion or by the presence of equitable considerations.

The court should comply with an application to enforce a compromise agreement unless a denial is justified by a proper exercise of discretion or by the presence of equitable considerations.[31] A court of equity will not aid in carrying into effect the composition or release of claims by a fiduciary, unless the party praying it makes disclosure sufficient to convince the court that no fraud or mistake existed.[32]

(5) Attack on and Setting Aside

A compromise or settlement can be set aside only for bad faith, mistake, or fraud, and only in a direct attack. Averments of fraud do not show the compromise to be void but at most voidable, and one who asserts fraud has the burden of proving it. The administrator cannot avail himself of any situation or technical defect for which he was responsible.

A compromise or settlement made by the executor or administrator can be set aside only for bad faith, mistake, or fraud,[33] and it cannot be set aside in a collateral attack.[34] A collusive settlement is not binding on the estate or the distributees or creditors, although the representative had no purpose to favor the debtor,[35] and where the administrator, in fraud of the rights of the beneficiaries of a decedent's estate, and in collusion with the adverse party, has settled a claim for the negligent death of decedent, so as to defeat the action of the beneficiaries, the settlement can be opened at the instance of the latter and the original case tried on its merits.[36] Where the compromise was authorized by the court, relief must be sought by a bill in equity.[37]

Averments of fraud do not show the compromise to be void but at most show it to be voidable,[38] and one who asserts fraud has the burden of proving it.[39] The fact that the amount received in a compromise is small is not a badge of fraud where the claim was doubtful.[40] The withholding of information as to matters of law where the negotiations are being conducted by attorneys does not amount to fraud justifying setting the compromise aside.[41]

In seeking to set aside a settlement the administrator is not entitled to avail himself of any situation or technical defect for which he was responsible.[42] Where a claim has been compromised, and the approval of the court obtained, and the amount agreed on paid over to the representative, the latter cannot, without paying back at least such an amount as was in excess of the admitted indebtedness, maintain a suit to recover from a party indebted to the estate another amount which he insists represents the true amount of the indebtedness to the estate of his intestate, although such repre-

30. Ky.—Bryson v. Biggs, 104 S.W. 982, 32 Ky.L. 159.

Crediting amount due heirs

The settlement may be ignored until the figures for final distribution are made up, when judgment against the debtor may be credited the net amount found to be due the heirs. —Bryson v. Biggs, supra.

31. N.Y.—In re Carstens' Will, 289 N.Y.S. 161, 248 App.Div. 820, motion denied 4 N.E.2d 252, 272 N.Y. 503, affirmed 5 N.E.2d 382, 272 N.Y. 662.

32. Ala.—Cleere v. Cleere, 3 So. 107, 82 Ala. 581, 60 Am.R. 750.
Va.—Clay v. Williams, 2 Munf. 105, 16 Va. 105, 5 Am.D. 453.

33. Ky.—Leftwich v. Louisville & N. R. Co., 46 S.W.2d 483, 242 Ky. 353.
N.Y.—In re Leopold's Estate, 181 N.E. 570, 259 N.Y. 274, 85 A.L.R. 197, reversing 253 N.Y.S. 354, 233 App. Div. 412.
23 C.J. p 1200 note 41.

Materiality of error in judgment

Where devisees under deceased's will moved to set aside probate court order approving a settlement of controversies between administrator of deceased's estate and others on ground that the settlement was obtained by fraud, the question was not whether there was an error of judgment in approving the settlement, but whether the settlement was fraudulent as to the devisees.—In re Fleming's Estate, 293 N.W. 511, 228 Iowa 1137.

No right to compromise claim

A husband who, as administrator of wife's estate, compromised wife's claim against third person's estate for discharge of his individual mortgage, could not avoid accord and satisfaction on ground that he had no right to compromise claim in such manner in absence of showing that he was guilty of fraud or breach of trust.—Wallin v. Smolensky, 20 N.E.2d 406, 303 Mass. 39.

Compromise and judgment for same amount

Where a compromise was approved by the court in its probate capacity and a judgment rendered for the same amount in an action tried before the court in the exercise of its general jurisdiction, a setting aside of the compromise would not aid the petitioner since the judgment would still be in effect, and it was held that the court properly refused to set aside the compromise.—In re Hannerkam's Estate, 77 P.2d 814, 51 Ariz. 447.

34. Mass.—O'Rourke v. Sullivan, 35 N.E.2d 259, 309 Mass. 424.
Mich.—McMann v. General Accident Assur. Corporation, 267 N.W. 601, 276 Mich. 108.

35. Ky.—New Bell Jellico Coal Co. v. Stewart, 159 S.W. 962, 155 Ky. 415.

36. Ky.—Leach v. Owensboro City R. Co., 125 S.W. 708, 137 Ky. 292.

37. Iowa.—Henry County v. Taylor, 36 Iowa 259.

38. Miss.—Rowe v. Fair, 128 So. 87, 157 Miss. 326.

39. Mass.—Wallin v. Smolensky, 20 N.E.2d 406, 303 Mass. 39.

Fraud, collusion, or breach of trust not established

Iowa.—In re Fleming's Estate, 293 N.W. 511, 228 Iowa 1137.

40. Ky.—Leftwich v. Louisville & N. R. Co., 46 S.W.2d 483, 242 Ky. 353.

41. Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

42. Colo.—In re Shultz' Estate, 85 P.2d 736, 103 Colo. 184.

sentative was induced to execute the compromise agreement by the fraudulent representations of the debtor as to the true amount of his indebtedness to the estate.[43] The probate court's judgment in overruling a motion to set aside a compromise will be affirmed when supported by substantial evidence.[44]

b. Release of Claims

As a general rule the representative has power to release a claim in favor of the estate provided he acts in good faith and on a sufficient consideration.

As a general rule the representative acting in good faith and on a sufficient consideration has power to release a claim in favor of the estate,[45] and his action is final if not challenged by an interested party.[46] On the other hand, if he does not act in good faith and on a sufficient consideration paid to the estate he has no authority to release a claim,[47] even though the deceased intended to do so,[48] and he may render himself liable as for a devastavit by so doing.[49] An administrator is not guilty of a devastavit by merely joining pro forma with a nonresident administrator in the release of a claim.[50] Where the administrator executes a release but neglects to do so in his capacity as administrator it will be presumed that he intended to execute the release in that capacity.[51] One who seeks to set aside a release as invalid must show that it was invalid under the laws of the state governing the transaction.[52]

c. Release of Lien

The representative may validly release a lien for adequate consideration where no fraud, collusion, or waste of assets is shown.

The representative may validly release a lien for adequate consideration where no fraud, collusion, or waste of assets is shown,[53] but he has no authority to do so for no consideration or for an inadequate consideration[54] unless authorization has been given by the terms of the will.[55] Together with the beneficiaries he may release a lien where the assets of the estate are sufficient to satisfy any claims of creditors.[56] An executor may, when authorized by statute, release a mortgage on payment of the secured debt,[57] and no court order authorizing the release is necessary.[58]

Collection of secured claims is considered supra § 173.

§ 182. Debts Due from Representative

The representative must, if solvent or able to pay,

43. Ga.—Hillyer v. Robinson, 71 S.E. 790, 136 Ga. 516.

44. Iowa.—In re Fleming's Estate, 293 N.W. 511, 228 Wis. 1137.

45. Pa.—In re Arbuckle's Estate, 188 A. 758, 324 Pa. 501.
23 C.J. p 1201 notes 47–49.

46. Pa.—In re Arbuckle's Estate, supra.

47. Fla.—Penn Mut. Life Ins. Co. v. Roberts, 162 So. 881, 120 Fla. 392.
Wash.—Morris v. Sherman, 38 P.2d 1012, 180 Wash. 45.

Power to relieve trustee from trust
An administrator has no power to relieve an involuntary trustee of money belonging to the estate from his trust relation to the estate.—Modesto First Nat. Bank v. Wakefield, 83 P. 1076, 148 Cal. 558.

Consent to payment to legatees
Where testator's executors, administrators, and assigns were beneficiaries of life policies and testator made certain bequests without expressly disposing of proceeds of policies, insurance company, paying proceeds of policies to legatees with executor's consent under mistaken belief that legatees were entitled thereto, was held not thereby to discharge its obligation to pay proceeds of policies to executor.—Penn Mut. Life Ins. Co. v. Roberts, 162 So. 881, 120 Fla. 392.

48. Ariz.—Maine v. Clack, 33 P.2d 283, 43 Ariz. 492.

49. Ark.—Caldwell v. McVicar, 12 Ark. 746.
N.C.—Jones v. Jones, 24 S.E. 774, 118 N.C. 440.

50. Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

51. U.S.—Sun Life Assur. Co. of Canada v. Casanova, Puerto Rico, 260 F. 449, 171 C.C.A. 275.

52. Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

53. Ind.—McCleary v. Chipman, 68 N.E. 320, 32 Ind.App. 489.
Mich.—Reynolds v. Smith, 23 N.W. 727, 57 Mich. 194.
Tex.—Thomas v. First Nat. Bank, 127 S.W. 844, 60 Tex.Civ.App. 133—Thomas v. Matthews, 112 S.W. 120, 51 Tex.Civ.App. 304.
23 C.J. p 1201 note 52.

54. Ariz.—Maine v. Clack, 33 P.2d 283, 43 Ariz. 492.
Tex.—Dealy v. Shepherd, 116 S.W. 638, 54 Tex.Civ.App. 80.
Va.—Stuart's Ex'rs v. Abbott, 9 Gratt. 252, 50 Va. 252.
23 C.J. p 1201 note 53.

55. Puerto Rico.—Crehore v. Registrar of Property, 22 Puerto Rico 30.

Forced heirs
If there are forced heirs it has been held that the executor alone cannot cancel the mortgage although he may have been so authorized by the testator.—Acuña v. Registrar of San Juan, 28 Puerto Rico 392.

Discretionary power
A clause in the will which provides that the executors may cancel a mortgage leaves the cancellation of the mortgage entirely discretionary with the executors.—Moss v. Lane, 23 A. 481, 50 N.J.Eq. 295.

56. W.Va.—Rust v. Commercial Coal & Coke Co., 115 S.E. 406, 92 W.Va. 457.

57. Conn.—Treadwell v. Brooks, 50 Conn. 262.
Ill.—Citizens' Nat. Bank v. Dayton, 4 N.E. 492, 116 Ill. 257.
Ind.—Connecticut Mut. L. Ins. Co. v. Talbot, 14 N.E. 586, 113 Ind. 373, 3 Am.S.R. 655.
Iowa.—Steffy v. Schultz, 246 N.W. 907, 215 Iowa 831.

Necessity for filing certificate of appointment
A release of a mortgage by the executor or administrator of the mortgagee of record not being accompanied, as required by statute by a certificate of the probate court as to the appointment of the executor or administrator, and that at the date of the release he was acting as such executor or administrator under its authority, is invalid.—Bullock v. Kendall, 104 P. 568, 80 Kan. 791.

58. Iowa.—Steffy v. Schultz, 246 N.W. 907, 215 Iowa 831.

account for his own debt to the estate. No bar of limitations should operate as long as he is accountable but if the debt is barred before he takes office he is not chargeable with it. The running of interest is not stopped by the inventory of the debt but the money must be actually paid or the amount shown to be actually in the hands of the representative as payment.

The duty of the personal representative to collect debts due the estate of his decedent is not changed by the fact that he is the debtor;[59] but he must, if solvent or able to pay, pay the debt and account for the amount thereof as assets;[60] and the security given for the debt is not discharged until payment.[61] No bar of limitations should operate in favor of the representative as long as he remains accountable for the general assets of the estate,[62] but where the debt is barred before the executor takes office he is not chargeable with the debt.[63] The representative is not debarred from showing that the claim against him is unfounded or unjust,[64] or has been paid;[65] and it is usually held that he may return the debt as uncollectable when the facts warrant this,[66] although the contrary view has been asserted.[67] The probate court must charge the executor with the debts which he owes the estate irrespective of the fact that they may have been omitted from the account and of the method by which the indebtedness is brought to the court's notice.[68] Where debts due from the representative are secured, the court has no jurisdiction to approve a change in security to the detriment of one class of beneficiaries.[69] Payments by the executor on a mortgage of decedent to a third person will not be credited as payments on the executor's debt to the estate.[70]

A debt due from a representative as an asset of the estate is considered supra § 101.

Interest. An interest bearing debt due by the representative to the estate follows the rule of similar debts due from others; and the fact that the debt is inventoried does not stop the running of interest per se, but only the fact that the debt is paid or its amount shown to be actually in the hands of the representative as such.[71] Where the debt bears interest until maturity, the representative is not re-

59. Cal.—In Azevedo's Estate, 62 P. 2d 1058, 17 Cal.App.2d 710.
Kan.—In re Edgington's Estate, 61 P.2d 873, 144 Kan. 478.
Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.
N.J.—In re Kraeuter's Estate, 4 A. 2d 383, 125 N.J.Eq. 120, affirmed 11 A.2d 28, 127 N.J.Eq. 19.
Pa.—In re Weaver's Estate, 174 A. 905, 114 Pa.Super. 439.
S.C.—Beckwith v. McAlister, 162 S. E. 623, 165 S.C. 1.
Wis.—In re Stubb's Will, 250 N.W. 845, 213 Wis. 439.
23 C.J. p 1202 note 56.

60. U.S.—Edisto Nat. Bank of Orangeburg, S. C. v. Bryant, C.C.A. S.C., 72 F.2d 917.
Hawaii.—In re Branco's Estate, 27 Hawaii 655, 662, citing **Corpus Juris.**
Iowa.—In re Christensen's Estate, 296 N.W. 198, 229 Iowa 1162—In re Bourne's Estate, 232 N.W. 169, 210 Iowa 883.
Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.
N.Y.—In re McCabe's Estate, 27 N. Y.S.2d 127, 176 Misc. 286.
Pa.—In re Weaver's Estate, 174 A. 905, 114 Pa.Super. 439.
23 C.J. p 1202 note 57.

Misappropriation before decedent's death

The executor must pay back money which he misappropriated from funds of the decedent before his death.—In re Hyde's Estate, 266 N. Y.S. 871, 149 Misc. 391.

61. N.Y.—Soverhill v. Suydam, 59 N.Y. 140.
23 C.J. p 1202 note 59.

62. Cal.—In re King's Estate, 121 P.2d 716.
23 C.J. p 1202 note 58.

Liability for breach of duty

Where a trust company negligently made an improvement and improper investment for a client, who died before the cause of action therefor against the trust company was barred by the six year statute of limitations, and before expiration of the year limited by St.1919 § 4234, for his executor to sue on such cause of action, the trust company itself became executor, it breached its duty in qualifying as executor and thereafter failing to take any proceedings to enforce or collect the claimant's claim for its own negligent investment before the same should be barred, and for such breach of duty a new and independent cause of action arose against the trust company in favor of the client.—Wisconsin Trust Co. v. Cousins, 179 N.W. 801, 172 Wis. 486.

63. Cal.—In re Azevedo's Estate, 62 P.2d 1058, 17 Cal.App.2d 710.
Wis.—In re Hoya's Will, 180 N.W. 940, 173 Wis. 196.

64. Ky.—Webster v. Webster, 13 Ky.Op. 545.
23 C.J. p 1202 note 60.

65. N.J.—Tichenor v. Tichenor, 17 A. 631, 45 N.J.Eq. 303.
23 C.J. p 1202 note 61.

Offsets

In action to surcharge settlement of executors, one of whom was also agent of deceased, where agent had paid taxes for deceased, he should be credited with amount paid on note owed by him to deceased.—Taylor v. Taylor's Ex'rs, 277 S.W. 278, 211 Ky. 309.

66. Iowa.—In re Christensen's Estate, 296 N.W. 198, 229 Iowa 1162.
Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.
23 C.J. p 1203 note 62.

Liability to extent of ability to pay

An administrator who at the time of his appointment was indebted to decedent whose estate he had undertaken to administer is liable to the estate on the debt owed by him to the extent of his ability to pay the same at any time during his administration.—In re Windhorst's Estate, 288 N.W. 892, 227 Iowa 808.

67. Mass.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315.
23 C.J. p 1203 note 63.

68. Cal.—In re Clary's Estate, 264 P. 242, 203 Cal. 335.

69. S.C.—Beckwith v. McAlister, 162 S.E. 623, 165 S.C. 1.

70. N.Y.—In re Soper's Estate, 231 N.Y.S. 333, 224 App.Div. 431.

71. Cal.—In re King's Estate, 121 P.2d 716.
Iowa.—In re Sheeler's Estate, 284 N. W. 799.
Miss.—McDowell v. Minor, 160 So. 389, 390, 174 Miss. 848, quoting **Corpus Juris.**
23 C J. p 1203 notes 64, 65.

Period for computing interest

(1) Interest on administrator's personal debt to estate was held properly charged only to date decree ordered amount paid, where shortly thereafter amount was reported in

lieved from interest by crediting the debt to the estate as collected before maturity.[72]

§ 183. Failure to Collect Assets

a. In general
b. Extent of liability

a. In General

Whether the personal representative is liable for the loss resulting to the estate if any debts are not collected depends on whether he has acted in good faith and with the prudence and diligence which the law requires.

If any debts or assets are not collected, the question of the liability of the personal representative for the loss resulting to the estate depends on his conduct in the premises. If he has acted in good faith, and with the prudence and diligence which the law requires, and has been guilty of no mismanagement, he is not liable,[73] but if, on the other hand, a failure to make collections resulted from his bad faith or neglect in the performance of his duties, he is personally liable for the amounts so lost.[74] Wherever assets come to the possession or knowledge of the personal representative, he becomes liable to account for the same satisfactorily or else stand chargeable in the probate court with their full value,[75] but it is otherwise where he has had no knowledge of the property or the existence of the

final account as ready for distribution, although amount was not in administrator's hands on date of such decree.—McDowell v. Minor, 160 So. 389, 174 Miss. 848.

(2) On restatement of final account of administrator who was also personally indebted to estate, interest at rate of six per cent was allowed on amount found due from date of decedent's death to date of trial court's decree directing that a lesser amount be paid, and from date of trial court's decree to decree rendered on appeal on unacknowledged and unreported balance.—McDowell v. Minor, supra.

72. Ill.—Clifford v. Davis, 22 Ill. App. 316.

73. Iowa.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.
Md.—Frank v. Wareheim, 7 A.2d 186, 177 Md. 43—In re Hunter's Estate, 185 A. 327, 170 Md. 513.
Mass.—Argus v. Kokkorou, 32 N.E. 2d 211, 308 Mass. 315.
N.J.—Appeal of Schlosser, 181 A. 640, 119 N.J.Eq. 201, affirmed 182 A. 636, 119 N.J.Eq. 488—Kick v. McCauley, 178 A. 637, 118 N.J.Eq. 252.
N.Y.—In re Blochle's Will, 2 N.Y.S. 2d 115, 253 App.Div. 904—In re Fantl's Estate, 292 N.Y.S. 653, 249 App.Div. 392—In re Kunz' Estate, 249 N.Y.S. 446, 139 Misc. 869.
Ohio.—In re Butler's Estate, 28 N.E. 2d 186, 137 Ohio St. 96.
23 C.J. p 1203 note 67, p 1205 note 74.

Commissions due from another estate

Account of executor was not objectionable because of failure to account for collection of commissions due testator as an executor of another estate, where during period covered by the executor's account there had been no intermediate account in the other's estate.—In re Ledyard's Estate, 21 N.Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029, and 24 N.Y.S.2d 780, 261 App.Div. 827.

Collection by executor as attorney for debtor

(1) An executor should not be charged with the difference between what he received from a debtor of the estate and what he would have received from such debtor in the exercise of due diligence, where such executor as attorney for the debtor after suit collected a sum of money out of which he paid the estate a considerable sum with the permission of the debtor, but paid the balance to the debtor, and there was no merit in a contention that he should have advised his coexecutors to consult counsel with a view to securing the debtor's money for the benefit of the estate.—O'Shea v. Hurley, 142 N.E. 919, 248 Mass. 191.

(2) However, where the executor was also attorney for a second estate and collected money for such estate, having previously agreed with administrator to apply collections to debt due by the second estate to the estate of which attorney was executor, he was held chargeable as executor with the amount collected.—Quillian v. Tuck, Ga.App., 17 S.E.2d 921.

74. Ark.—Acker v. Watkins, 100 S. W.2d 78, 193 Ark. 192.
Cal.—Dixon v. Norman, 220 P. 321, 64 Cal.App. 21.
Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
Ky.—McCallister's Adm'r v. Stanley, 218 S.W. 237, 186 Ky. 836.
Md.—In re Hunter's Estate, 185 A. 327, 170 Md. 513.
N.Y.—In re Onorato's Will, 26 N.Y. S.2d 648, 261 App.Div. 997—In re Fantl's Estate, 292 N.Y.S. 653, 249 App.Div. 392—In re McCabe's Estate, 27 N.Y.S.2d 127, 176 Misc. 286—In re Chandler's Will, 26 N.Y.S. 2d 280, 175 Misc. 1029—In re Kessler's Estate, 18 N.Y.S.2d 772, 173 Misc. 716—In re Link's Will, 17 N.Y.S.2d 634, 173 Misc. 217—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867—In re Adams' Estate, 267 N.Y.S. 910, 149 Misc. 289.
23 C.J. p 1204 note 68.

Property fraudulently transferred by decedent

Statutory grant to estate fiduciary of cause of action for recovery of property fraudulently transferred by decedent vests in fiduciary chose in action with respect to which creditors may call fiduciary to account in tribunal of appointment in same manner as creditors may seek surcharge against fiduciary for other misconduct or wrongful dealing with any other asset within his authority, since fiduciary is primarily a "trustee" for creditors.—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867.

Effect of pledge of estate property

Executrix was obligated to account for jewelry which belonged to the estate but which had been distributed outside the estate, irrespective of alleged fact that brooch thus received by executrix had been pawned by her husband.—In re Kessler's Estate, 18 N.Y.S.2d 772, 173 Misc. 716.

Desire of deceased incompetent as excusing failure

The failure of a trust company, which had acted both as conservator and executor of estate of incompetent deceased, to collect amounts due estate from a company in which deceased was the principal stockholder, was not justified on ground that deceased incompetent had expressed desire that company's debts all be paid even if it took his own securities and assets to pay them, and that such was to be done to exclusion of the large debt company owed deceased incompetent.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill. App. 537.

75. Pa.—Frederick's Estate, 54 Pa. Super. 535.
23 C.J. p 1190 note 8.

debt,[76] or the evidences of debt never came into his possession.[77] Loss through failure to take possession of assets before knowledge of his appointment[78] or before qualification as executor[79] is not chargeable against the executor. An executor cannot be held liable for failing to collect assets which do not belong to the estate,[80] uncollectable debts,[81] or foreign assets which he cannot collect on his domestic appointment,[82] or for failure to collect assets where no loss results to the estate.[83] As a general rule gross negligence is necessary to impose individual liability for failure to collect,[84] and the representative has been held not liable where the loss resulted from a mistake,[85] or where the representative acted in good faith and under advice of counsel.[86]

An executor's failure to pay a note executed by himself in favor of the testator is not a fraudulent misapplication of funds of the estate.[87]

Loss resulting from delay. If a personal representative does not proceed promptly with the collection of debts, and in the meantime they become uncollectable by reason of the insolvency of the debtors, the running of limitations, or other supervening cause, he is chargeable with negligence which renders him individually liable for the amount of the debts so lost,[88] unless he can show some valid reason for his delay or failure to act.[89] An executor cannot be held liable for negligently permit-

76. N.Y.—In re Farley's Estate, 206 N.Y.S. 29, 123 Misc. 564.
23 C.J. p 1205 note 75, p 1190 note 9.

77. N.Y.—Matter of Walton, 98 N. Y.S. 42, 112 App.Div. 176.

78. Pa.—In re Celenza's Estate, 18 Pa.Dist. & Co. 357.

79. N.Y.—In re Kunz' Estate, 249 N.Y.S. 446, 139 Misc. 869.

80. Pa.—In re Sheridan's Estate, 160 A. 714, 307 Pa. 161.

Joint account with right of survivorship

Savings bank account in names of decedent and claimant, either or survivor to draw, was joint account with right of survivorship, and administrator could not be surcharged for failure to recover deposit.—In re Hanrette's Estate, 252 N.Y.S. 424, 140 Misc. 832.

Deposit offset by note

An executor cannot be held liable for failure to collect a certificate of deposit which was offset by a note by the deceased depositor held by the bank.—Merritt v. Peterson, 222 N.W. 853, 208 Iowa 672.

81. Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.

82. Cal.—In re May's Estate, 297 P. 955, 112 Cal.App. 673.

Foreign assets claimed by another estate

California court could not punish California executor of estate for failure to collect foreign assets, where whatever interest or profit there might be from foreign company was claimed by another estate pending in foreign country.—In re May's Estate, supra.

83. Cal.—Prussing v. Prussing, 96 P.2d 128, 35 Cal.App.2d 508.
N.Y.—In re Kessler's Estate, 18 N.Y. S.2d 772, 173 Misc. 716.

Timber proceeds received by life tenant

Executor could not be surcharged with proceeds received by life tenant from sale of timber, especially where it did not appear that sale of timber diminished value of estate.—Appeal of Schlosser, 181 A. 640, 119 N.J.Eq. 201, affirmed 182 A. 636, 119 N.J.Eq. 488.

Notes returned to maker

An accounting administratrix was improperly surcharged with notes found in intestate's possession and returned by administratrix under advice of counsel to the maker, who claimed that he had paid the notes, in view of the fact that recovery might still be had on the notes, although they had since been destroyed, and in view of an order requiring her to sue the maker or to give the complaining parties the right to do so in her name as administratrix.—In re Gongaware's Estate, 109 A. 276, 265 Pa. 512.

Noncollection of debt still good

An executor should not, except under extraordinary circumstances, be charged with a good debt which he has not actually collected simply because by the use of reasonable diligence he could have collected it before.—Anderson v. Piercy, 20 W.Va. 282.

84. W.Va.—Harris v. Orr, 33 S.E. 257, 46 W.Va. 261, 76 Am.S.R. 815.
23 C.J. p 1205 note 80.

Representative held guilty of gross neglect

Cal.—Dixon v. Norman, 220 P. 321, 64 Cal.App. 21.
Ky.—McCallister's Adm'r v. Stanley, 218 S.W. 237, 186 Ky. 836.

85. Pa.—King v. Morrison, 1 Penr. & W. 188.

86. N.J.—In re Sharp, 48 A. 327, 61 N.J.Eq. 601.
23 C.J. p 1205 note 78.

Neglect of administrator's attorney

Administrator was held not liable to heir for failure to bring death action until right was barred by limitation, where failure was caused by neglect of administrator's attorney and administrator recovered judgment against attorney for negligence, which was unsatisfied because of attorney's insolvency.—People ex rel. Rotchford v. Rotchford, 1 N.E. 2d 249, 284 Ill.App. 262.

87. N.C.—Culbreth v. Smith, 32 S.E. 714, 124 N.C. 289.

88. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
Cal.—Dixon v. Norman, 220 P. 321, 64 Cal.App. 21.
Kan.—Wilson v. Stephenson, 53 P. 2d 874, 877, 143 Kan. 91, quoting **Corpus Juris.**
Md.—Frank v. Wareheim, 7 A.2d 186, 177 Md. 43—In re Hunter's Estate, 185 A. 327, 170 Md. 513.
23 C.J. p 1205 note 71.

Indulging debtor as testator had done

Administrator of goods not administered with will annexed is liable for failure to collect a debt due the estate which became barred by limitation, although will provided that operation of business should be done by executors just in manner as near as practical as testator operated his business and notwithstanding testator indulged debtor for a long time.—Musselwhite v. Ricks, 189 S.E. 597, 55 Ga.App. 58.

89. Ill.—People ex rel. Rotchford v. Rotchford, 1 N.E.2d 249, 284 Ill. App. 262.
23 C.J. p 1205 note 72.

Transfer of note to guardian and beneficiary

Where an administrator received, as part of the assets, a promissory note which he permitted to run after maturity, later transferring it to the guardian of the residuary legatee, which guardian, on settlement, turned the note over to the ward in whose hands it became barred by limitations without any offer to return the note to the administrator, the latter was held not liable for the loss.—Matter of Krisfeldt, 97 N.Y.S. 877, 49 Misc. 26.

ting the statute of limitations to run against a right of action in the absence of a showing that a loss resulted to the estate.[90]

b. Extent of Liability

Where the loss occurs through the representative's want of due diligence he should be charged with the amount he should have received as of the time he should have received it, and he may be charged with interest on the debt.

Where an executor or administrator was not culpably careless or dishonest, he is chargeable in his accounts for what he actually collects, aside from any prior estimate,[91] but where loss occurs through his want of due diligence he should be charged with the amount he should have received, and as of the time when he should have received it had he used due diligence.[92] The charge should, however, be limited to the actual loss and cannot be made a penalty for mismanagement.[93] An executor or administrator may be charged with interest on the debt which he failed to collect,[94] but he will not be charged with compound interest if he has not been guilty of willful misconduct or gross delinquency.[95]

VIII. CUSTODY AND MANAGEMENT OF ESTATE

A. IN GENERAL

§ 184. Duties and Liabilities of Representative in General

An executor or administrator is under a duty to take custody of the estate and administer it in such a manner as to preserve and protect the property for ultimate distribution. In the discharge of such duty he is held to the highest degree of good faith and is required to exercise that degree of care and diligence which prudent persons ordinarily exercise, under like circumstances, in their own personal affairs.

The powers and duties of an executor or administrator in respect of the custody and management of the estate are dependent on the terms of the will and the applicable statutes.[96] In general, it is the duty of an executor or administrator to take custody of the estate and to administer it in such a manner as to preserve and protect the property therein for ultimate distribution to the proper persons.[97] In the discharge of such duty he is regard-

90. Cal.—Prussing v. Prussing, 96 P.2d 128, 35 Cal.App.2d 508.

91. La.—Henderson's Succession, 24 La.Ann. 435.
Va.—Fauber v. Gentry, 15 S.E. 899, 89 Va. 312.

92. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
23 C.J. p 1206 note 86.

93. Pa.—Landis' Estate, 4 Phila. 349.

94. N.Y.—In re Onorato's Will, 26 N.Y.S.2d 648, 261 App.Div. 997.
23 C.J. p 1206 note 88.

Interest on own debt to estate

An executor is chargeable with interest on his own debt to the estate which he fails to pay.—Argus v. Kokkorou, 32 N.E.2d 211, 308 Mass. 315.

95. Mass.—Argus v. Kokkorou, supra.
23 C.J. p 1206 note 88.

96. Ga.—Peck v. Watson, 142 S.E. 450, 165 Ga. 653, 57 A.L.R. 560.
Ind.—State ex rel. Department of Financial Institutions v. Kaufman, 30 N.E.2d 978.
Iowa.—Leach v. Farmers' Sav. Bank of Hamburg, 213 N.W. 414, 205 Iowa 114, 56 A.L.R. 801, followed in Leach v. Grinnell Sav. Bank of Grinnell, 213 N.W. 417, rehearing denied and modified on other grounds 217 N.W. 437, 205 Iowa 114, 56 A.L.R. 801.
N.Y.—In re Moss' Will, 243 N.Y.S. 751, 137 Misc. 449.
Ohio.—Beck v. Schmidt, 176 N.E. 595, 38 Ohio App. 476.
Tex.—Loewenstein v. Watts, Civ. App., 119 S.W.2d 176, affirmed 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, error refused.
Authority and duties in general see supra § 141.
Source of executor's authority see supra § 22.

Trust confided to executor or administrator is defined by the letters testamentary or of administration constituting the commission under which he acts, the mode in which his trust is to be performed being prescribed by the court in accordance with the local statute.—Gibbons v. Riley, Md., 7 Gill 81—24 C.J. p 49, note 94.

Purpose of statute limiting powers and immunities

New York statute imposing limitations on powers and immunities of executors and testamentary trustees was intended to protect testators and the objects of their bounty from untoward effects of ingeniously contrived clauses, the full legal consequences of which are seldom appreciated at the time of the execution of the wills containing them.—In re Ascher's Estate, 26 N.Y.S.2d 1000, 175 Misc. 943.

97. U.S.—Owen v. Paramount Productions, D.C.Cal., 41 F.Supp. 557.
Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Cal.—In re King's Estate, 121 P.2d 716.
Colo.—In re Huling's Estate, 99 P.2d 194, 105 Colo. 475.
Idaho.—Wiesenthal v. Goff, 120 P.2d 248.
Ky.—Ashabraner's Ex'r v. Owens, 103 S.W.2d 283, 267 Ky. 728.
Me.—Appeal of Crockett, 154 A. 180, 130 Me. 135.
Md.—State, for Use of Czyzowicz v. Brown, 183 A. 256, 170 Md. 97.
Mass.—Bearse v. Styler, 34 N.E.2d 672, 309 Mass. 288—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250—Bratt v. Cox, 195 N.E. 787, 290 Mass. 553.
Mont.—In re Baxter's Estate, 22 P.2d 182, 94 Mont. 257—In re Kelley's Estate, 5 P.2d 559, 91 Mont. 98—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
N.Y.—In re Von Kleist's Will, 193 N.E. 256, 265 N.Y. 422, reversing 270 N.Y.S. 435, 240 App.Div. 436, which modified In re Von Kleist's Estate, 263 N.Y.S. 888, 147 Misc. 416—In re Ebbets' Will, 267 N.Y.S. 268, 149 Misc. 260—In re Rodgers' Estate, 264 N.Y.S. 624, 147 Misc. 344—In re Lewis, 254 N.Y.S. 703, 142 Misc. 892.
Okl.—Seal v. Banes, 35 P.2d 704, 168 Okl. 550—Campbell v. Campbell, 251 P. 502, 120 Okl. 294.

ed as a fiduciary occupying a position of trust and confidence, and is held to the highest degree of good faith.[98] He is required to exercise that degree of care and diligence which careful and prudent persons ordinarily exercise under like circumstances in their own personal affairs,[99] and for failure to ex-

Or.—Platt v. Jones, 38 P.2d 703, 149 Or. 246, modified on other grounds 39 P.2d 955, 149 Or. 246.

Tex.—Adams v. Bankers' Life Co., Com.App., 36 S.W.2d 182, affirming, Westbrook v. Adams, Civ.App., 17 S.W.2d 116—Hamilton v. Hamilton, Civ.App., 42 S.W.2d 814, error refused—Morrell v. Hamlett, Civ. App., 24 S.W.2d 531, error refused.

Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

Wash.—Thompson v. Weimer, 95 P. 2d 772, 1 Wash.2d 145.

Authority and duty to make distribution see infra § 482.

Obligations of administrator and trustee as identical

The obligations of both administratrix and trustee to take appropriate steps for conservation of assets committed to their care are identical.—In re Valionis' Estate, 26 N.Y.S.2d 540, 176 Misc. 110.

Realization of estate

Primarily the power and duty of executors is to realize the estate for the purpose of paying debts and for distribution, and any act of administration which tends to the easy and better realization of the estate is prima facie within their power, since the power to realize implies the proper means of realization.—Peck v. Watson, 142 S.E. 450, 165 Ga. 853, 57 A.L.R. 560.

Authority and duty to collect assets see supra § 167.

Liquidation and conservation

(1) Executors and administrators are under a duty to liquidate and to conserve the assets of the estate, and they should not sacrifice them for inadequate prices.

N.Y.—In re Israel's Estate, 26 N.Y. S.2d 656, 176 Misc. 120—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

Pa.—In re Bernhard's Estate, 17 Leh. Co.L.J. 310—In re Waelly's Trust Fund, 85 Pittsb.Leg.J. 702.

(2) What constitutes a reasonable time within which to liquidate the assets depends on the circumstances of each case.—In re Lazar's Estate, 247 N.Y.S. 230, 139 Misc. 261.

Resisting invalid claims

(1) It is the duty of an executor or administrator to protect the estate from all invalid or unenforceable claims or demands.

Iowa.—Federal Land Bank of Omaha, Neb., v. Bonnett, 284 N.W. 105.

Ky.—Whitlow's Adm'r v. Saunders' Adm'r, 36 S.W.2d 659, 237 Ky. 842.

Mich.—In re Svitojus' Estate, 295 N. W. 543, 296 Mich. 19.

Mo.—Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

(2) Duty of representative to contest claims generally see infra § 439.

Insuring and maintaining property

An administrator must keep estate property insured, maintain upkeep, and pay administration expenses.—In re Winter's Estate, 297 N.W. 497, 297 Mich. 294.

Administrator of deceased partner

The administrator of the estate of a deceased partner has nothing to do with his interest therein, except to look after it so far as to see that no waste or fraud is committed in its management until the surviving partner has settled up the partnership, paid its debts, and turned over to the administrator his share of what is left.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.

98. U.S.—Strates v. Dimotsis, C.C. A.Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427—Grimes v. Grimes, D. C.Nev., 52 F.2d 171.

Ga.—Morris v. Johnstone, 158 S.E. 308, 312, 172 Ga. 598, citing **Corpus Juris.**

Idaho.—Uyeda v. Diefendorf, 34 P. 2d 65, 66, 54 Idaho 614, citing **Corpus Juris**—In re Fleshman's Estate, 5 P.2d 727, 51 Idaho 312.

Ill.—In re Nonnast's Estate, 21 N. E.2d 796, 300 Ill.App. 537, modified on other grounds Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248.

Ind.—Barnett v. Kumler, 190 N.E. 364, 98 Ind.App. 635.

Me.—Appeal of Crockett, 154 A. 180, 130 Me. 135.

Mass.—Bearse v. Styler, 34 N.E.2d 672, 309 Mass. 288—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.

Minn.—In re Baker's Estate, 294 N. W. 222, 208 Minn. 379—In re Janke's Estate, 258 N.W. 311, 193 Minn. 201.

Mont.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.

Neb.—Carden v. McGuirk, 196 N.W. 698, 111 Neb. 350.

N.J.—In re Westhall's Estate, 5 A. 2d 757.

N.Y.—In re Humpfner's Estate, 296 N.Y.S. 593, 163 Misc. 91—In re Stutzer's Estate, 279 N.Y.S. 221, 155 Misc. 301—In re Wax' Estate, 268 N.Y.S. 355, 149 Misc. 851—In re Taft's Will, 260 N.Y.S. 294, 145 Misc. 435, affirming 259 N.Y.S. 887, which modified 256 N.Y.S. 732, 143 Misc. 387—In re Brown, 221 N.Y. S. 305, 129 Misc. 293.

Ohio.—Morris v. Mull, 144 N.E. 436, 110 Ohio St. 623, 39 A.L.R. 323—Williams v. Williams, 5 N.E.2d 956, 54 Ohio App. 13.

Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.

Wash.—In re Johnson's Estate, 60 P. 2d 271, 187 Wash. 552, 106 A.L.R. 217.

24 C.J.p 48 notes 89, 90.

Representative as fiduciary generally see supra § 142.

Strictest accountability

Executors and administrators are held to strictest accountability for their dealings.—Strates v. Dimotsis, C.C.A.Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427.

Undivided loyalty

There is no exception to rule that representative of estate should give it his undivided loyalty.—In re Carmody's Estate, 235 N.Y.S. 78, 134 Misc. 11.

Administrator-beneficiary

One who is both administrator and beneficiary of estate must make full disclosure of estate property and of information regarding estate to all interested in estate, but need not give advice as to matters involving his and their conflicting interests, nor make concessions respecting good faith controversies as to parties' rights.—In re Blodgett's Estate, 70 P.2d 742, 93 Utah 1.

Executor-trustees acting as directors of testator's personal holding company function under rigid restrictions on their use of corporation's income, in view of their fiduciary status and public policy.—In re Adler's Estate, 299 N.Y.S. 542, 164 Misc. 544.

Attorney for personal representatives of a decedent charged with the duty of administering the estate stands in the same trust relationship to the beneficiary as the personal representatives.—Bar Association of San Francisco v. Cantrell, 193 P. 598, 49 Cal.App. 468.

Collusion

(1) As applied to decedent's estates, "collusion" has been defined as any intermeddling with the executor or the assets of the testator, by which the executor is guilty of a violation of his duty.—Murray v. Blatchford, 1 Wend., N.Y., 583, 623, 19 Am.D. 537.

(2) The phrase, "collusion with the administrator," implies, ex vi termini, the presence of some one with whom the administrator could collude.—Belt v. Blackburn, 28 Md. 227, 235.

99. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.

Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343.

ercise such care is liable in damages,[1] although it is sometimes said that the prudence, care, and judgment of fiduciaries ordinarily capable under like circumstances furnish the standard by which the conduct of an executor or administrator is to be judged.[2] An executor or administrator is not, however, a guarantor or insurer of the safety of the estate, nor is he expected to be infallible,[3] and if, while acting in good faith, he exercises the required degree of care and diligence in the performance of his duties, he may not generally be held responsible for losses resulting from mistakes or errors in judgment.[4]

Ark.—Harper v. Betts, 8 S.W.2d 464, 177 Ark. 977, 60 A.L.R. 484.
Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.
Fla.—Hart v. Savary, 152 So. 705, 114 Fla. 41.
Ill.—People ex rel. Rotchford v. Rotchford, 1 N.E.2d 249, 284 Ill. App. 262.
Iowa.—In re Smith's Estate, 289 N. W. 694, 228 Iowa 47—In re Rorick's Estate, 253 N.W. 916, 218 Iowa 107—In re Enfield's Estate, 251 N.W. 637, 217 Iowa 273.
Ky.—Citizens' Nat. Bank v. Brewer, 69 S.W.2d 745, 253 Ky. 630—Melheiser v. Central Trust Co. of Owensboro, 36 S.W.2d 377, 237 Ky. 757—Barth v. Fidelity & Columbia Trust Co., 224 S.W. 351, 188 Ky. 788.
Minn.—In re Baker's Estate, 294 N. W. 222, 208 Minn. 379.
Miss.—New York Indemnity Co. v. Myers, 138 So. 334, 161 Miss. 784.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
N.Y.—In re Cuddeback's Estate, 6 N. Y.S.2d 493, 168 Misc. 698—In re Schmutz' Estate, 288 N.Y.S. 98, 159 Misc. 454—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc. 330—In re Yund's Estate, 274 N.Y.S. 831, 152 Misc. 785—In re Lanza's Estate, 266 N. Y.S. 710, 149 Misc. 95—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N.Y.S. 976, 246 App.Div. 604—In re Lewis, 254 N.Y.S. 703, 142 Misc. 392—In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684.
Ohio.—Morris v. Mull, 144 N.E. 436, 110 Ohio St. 623, 39 A.L.R. 323.
Or.—In re Mannix' Estate, 29 P.2d 364, 146 Or. 187.
S.D.—In re Peterson's Estate, 234 N.W. 923, 924, 58 S.D. 76, citing **Corpus Juris.**
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 657, 172 Va. 111, citing **Corpus Juris.**
24 C.J. p 48 note 92.

Reasonable or due diligence

Mont.—Montgomery v. Gilbert, 108 P. 2d 616, 111 Mont. 250.
N.J.—In re Westfield Trust Co., 176 A. 101, 117 N.J.Eq. 429, reversing 172 A. 212, 115 N.J.Eq. 611.
N.C.—Marshall v. Kemp, 130 S.E. 193, 190 N.C. 491.
24 C.J. p 48 note 90.

Corporate executors

(1) Unless otherwise prescribed by statute, corporate executor is subject to no greater liability than that which devolved on individual executor.—In re Baker's Estate, 292 N.Y.S. 122, 249 App.Div. 265—Matter of People's Trust Co., 155 N.Y. S. 639, 169 App.Div. 699.

(2) However, a corporate executor which was first a temporary administrator of an estate is chargeable with notice of facts which came to its attention as temporary administrator.—In re Pinney's Estate, 282 N.Y.S. 680, 156 Misc. 844, reversed on other grounds 294 N.Y.S. 29, 250 App.Div. 60, affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.

1. Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.
Ky.—Citizens' Nat. Bank v. Brewer, 69 S.W.3d 745, 253 Ky. 630—Melheiser v. Central Trust Co. of Owensboro, 36 S.W.2d 377, 237 Ky. 757—Barth v. Fidelity & Columbia Trust Co., 224 S.W. 351, 188 Ky. 788.
Mo.—In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.
Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
N.C.—Marshall v. Kemp, 130 S.E. 193, 190 N.C. 491.
Or.—In re Mannix' Estate, 29 P.2d 364, 146 Or. 187.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.

Necessity for wrongful intent

(1) A trustee, including a testamentary trustee and executor, must use care and diligence in the discharge of his functions, and he is liable for his failure to do so even when no wrongful intent appears.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.

(2) An administrator's plea of ignorance of facts did not constitute an excuse or defense for his neglect of duty with respect to estate.—In re Bingham's Estate, 17 N.Y.S.2d 981.

Ignorance of law

Every man is presumed to know the law, and administrators who are in fact ignorant of the law and act on their blind judgments without consulting attorneys allowed them at expense of the estate must bear the consequences of their actions.—Ross v. Beacham, D.C.S.C., 33 F. Supp. 3.

Extent of liability

An estate fiduciary is responsible only for his acts or neglects in the administration of the assets which belong to deceased.—In re Sullivan's Estate, 6 N.Y.S.2d 783, 169 Misc. 16, affirmed 8 N.Y.S.2d 533, 255 App.Div. 1008.

2. Ill.—In re Busby's Estate, 6 N. E.2d 451, 288 Ill.App. 500.
N.Y.—In re Lazar's Estate, 247 N.Y. S. 230, 139 Misc. 261.
Or.—In re Stewart's Estate, 28 P. 2d 642, 145 Or. 460, 91 A.L.R. 818. 24 C.J. p 48 note 92.

Economic depression as affecting duty

"No moratorium, because of the depression, has been declared by the courts on the due performance of their fiduciary duty by executors."—In re Busby's Estate, 6 N.E.2d 451, 459, 288 Ill.App. 500.

3. Ill.—In re Wesley's Estate, 279 Ill.App. 349.
Iowa.—In re Smith's Estate, 289 N. W. 694, 228 Iowa 47—In re Rorick's Estate, 253 N.W. 916, 218 Iowa 107—In re Enfield's Estate, 251 N.W. 637, 217 Iowa 273—In re Workman's Estate, 196 N.W. 35, 36, 196 Iowa 1108, citing **Corpus Juris.**
Minn.—In re Baker's Estate, 294 N. W. 222, 208 Minn. 379.
Miss.—New York Indemnity Co. v. Myers, 138 So. 334, 161 Miss. 784.
Mont.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.
N.J.—Appeal of Corn Exchange Nat. Bank & Trust Co., 156 A. 455, 109 N.J.Eq. 169.
N.Y.—In re Cuddeback's Estate, 6 N.Y.S.2d 493, 168 Misc. 698—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc. 330—In re Carpenter's Estate, 276 N. Y.S. 754, 154 Misc. 143.
N.C.—Stroud v. Stroud, 175 S.E. 131, 206 N.C. 668—Thigpen v. Farmers' Banking & Trust Co. of Tarboro, 165 S.E. 720, 203 N.C. 291—Marshall v. Kemp, 130 S.E. 193, 190 N.C. 491.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.
24 C.J. p 48 note 91.

4. Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341.
Ill.—In re Busby's Estate, 6 N.E.2d 451, 288 Ill.App. 500—In re Wesley's Estate, 279 Ill.App. 349.

An administrator or executor must administer or settle the estate with reference to the situation of the assets at the time of the death of decedent.[5] His acts must be judged according to the facts and circumstances which existed at the time of his action.[6]

It is the policy of the courts to sustain, if possible, an irregular act of an executor or administrator where it is done in good faith and without detriment to the estate.[7] Mere negligence in the performance of his duties subjects the representative to no liability when no loss to the estate has resulted.[8]

Liability for assets received. A personal representative is liable and accountable to the estate for all assets which have come into his hands.[9] The accountability is for each individual asset of the estate as a separate unit;[10] as to each such unit, he owes certain well defined duties of prudent care and management, for the breach of which he will be held responsible.[11]

An executor has been held authorized, on the verbal order of the county judge, to pay over to him any moneys in his hands belonging to the estate or legatees thereof, after which the judge will be liable on his bond for the proper disbursement thereof, such payment discharging the executor from all further liability for the moneys so paid over.[12]

Limiting liability. Unless otherwise provided by statute,[13] a testator may, by the terms of his will, limit the liability of his executor.[14] Such a limitation, however, does not relieve the executor from all responsibility,[15] and he is still required to act in good faith and with ordinary care.[16]

Law governing. So far as the corpus of the estate is concerned, a personal representative's title, rights, and responsibilities are controlled by the law

Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
Miss.—New York Indemnity Co. v. Myers, 138 So. 334, 161 Miss. 784.
Mo.—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.
N.J.—Willson v. Tripp, 199 A. 581, 124 N.J.Eq. 45—In re Hazeltine's Estate, 182 A. 357, 119 N.J.Eq. 308, reversing 177 A. 108, 13 N.J.Misc. 152, affirmed 187 A. 177, 121 N.J. Eq. 49—Liberty Title & Trust Co. v. Stevens, 171 A. 531, 115 N.J.Eq. 506, affirmed 176 A. 167, 117 N.J. Eq. 404—People's Nat. Bank & Trust Co. of Pemberton v. Bichler, 172 A. 207, 115 N.J.Eq. 617—Appeal of Corn Exchange Nat. Bank & Trust Co., 156 A. 455, 109 N.J.Eq. 169.
N.Y.—In re Cuddeback's Estate, 6 N.Y.S.2d 493, 168 Misc. 698—In re Yund's Estate, 274 N.Y.S. 831, 152 Misc. 785—In re Junkerfeld's Estate, 269 N.Y.S. 514, 150 Misc. 436, appeal dismissed 272 N.Y.S. 919, 242 App.Div. 708, reversed on other grounds 279 N.Y.S. 481, 244 App.Div. 260, motion denied 291 N.Y.S. 159, 248 App.Div. 886—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N. Y.S. 976, 246 App.Div. 604—In re Lazar's Estate, 247 N.Y.S. 230, 139 Misc. 261—In re Carmody's Estate, 235 N.Y.S. 78, 134 Misc. 11—In re Demmerle's Ex'rs, 225 N.Y.S. 190, 130 Misc. 684.
N.C.—Thigpen v. Farmers' Banking & Trust Co. of Tarboro, 165 S.E. 720, 203 N.C. 291.
Pa.—In re Hughes' Estate, 87 Pittsb. Leg.J. 1.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.
Wis.—Shupe v. Jenks, 218 N.W. 375, 195 Wis. 334.

Court order as necessary for protection

If administrator's acts are in pursuance of, and in accordance with, law, he need not necessarily secure court order to protect him.—In re Kelley's Estate, 5 P.2d 559, 91 Mont. 98.

5. Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
Tex.—John Hancock Mut. Life Ins. Co. v. Morse, Com.App., 124 S.W.2d 330, reversing First Nat. Bank v. John Hancock Mut. Life Ins. Co., Civ.App., 101 S.W.2d 1062.

6. Ill.—In re Busby's Estate, 6 N. E.2d 451, 288 Ill.App. 500.
N.Y.—In re Wechsler's Estate, 13 N. Y.S.2d 940, 171 Misc. 738—In re Cuddeback's Estate, 6 N.Y.S.2d 493, 168 Misc. 698—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N.Y. S. 976, 246 App.Div. 604.
Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.
Pa.—Hall's Estate, 8 Pa.Dist. 8—In re Cassel's Estate, 18 Lehigh Co.L.J. 123.

Executor's relations with testator

and provisions of will must be taken into consideration.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.

7. Mont.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.
R.I.—Rhode Isand Hospital Trust Co. v. Sherman, 159 A. 740, 52 R. I. 207—Duffy v. McHale, 35 A. 36, 35 R.I. 16.

Recital in petition as indicating fraud

A recital in a petition for probate of a will regarding value of property does not necessarily indicate fraud on part of executor in management of estate.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.

8. Mont.—Montgomery v. Gilbert, supra.
24 C.J. p 49 note 95.
Liability for loss or depreciation of assets see infra §§ 247–249.

9. Ky.—Thomason v. Thomason, 1 Metc. 51.
Md.—Bauernschmidt v. Bauernschmidt, 60 A. 437, 101 Md. 148.
24 C.J. p 52 note 20.

10. N.Y.—In re Pratt's Will, 16 N.Y. S.2d 75, 172 Misc. 756.

11. N.Y.—In re Pratt's Will, supra.

12. Iowa.—Doogan v. Elliott, 43 Iowa 342.

13. **Scope of statute**

The scope of Decedent Estate L. § 125, imposing limitations on powers and immunities of executors and testamentary trustees, was intended to apply to wills of persons dying after effective date thereof, after which no clause in any will purporting to effect a partial or total exoneration of liability of a testamentary fiduciary is effective, but every such fiduciary is held to standard of conduct and responsibility imposed by statute or judicial decision for protection of all beneficiaries of estate.—In re Ascher's Estate, 26 N. Y.S.2d 1000, 175 Misc. 943.

14. N.Y.—In re Mann's Will, 296 N. Y.S. 71, 251 App.Div. 739.

15. Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.
24 C.J. p 48 note 90 [e].

16. Va.—Koteen v. Bickers, supra.

existing at the time of the transfer of the estate to him.[17]

§ 185. Custody of Assets, Books, and Papers

The personal representative is entitled to the custody of the assets, books, and papers of the estate.

The personal representative is entitled to the custody of the assets of decedent,[18] and he should not be required to surrender the estate committed to him before a distribution is ordered, unless for grave reasons.[19] Since an administrator is an officer of the court, see supra § 147, his custody of the property of the estate is deemed to be the custody of the court.[20]

Books and papers. The representative is entitled to the custody of the books and papers of the estate,[21] but he must allow persons interested to inspect the deeds and other documents relating to lands devised, for which purpose the court may require him to produce them.[22] Whether an executor or administrator should allow persons contesting the will of deceased to examine his diaries or other private papers may depend on the contents of the papers and the use that could be made of them.[23]

§ 186. Keeping Accounts

Executors and administrators should keep separate books of accounts of the estate.

Executors and administrators should keep separate books of accounts of the estate,[24] and if they fail to keep their accounts properly they will be held to a strict liability.[25]

§ 187. Deposits

An executor or administrator may generally deposit the funds of the estate temporarily in a reputable bank, and if due care is used in selecting the depositary he will not be held responsible for a loss resulting from the subsequent failure of the bank.

In the absence of any statutory or testamentary direction, it is a matter requiring the exercise of sound judgment and discretion on the part of the personal representative of an estate to determine whether its funds should be kept on his person or deposited in a bank or other safe place.[26] Generally it is proper for the executor or administrator,

17. Wis.—Norris v. Cary, 237 N.W. 113, 205 Wis. 626, modified on other grounds 238 N.W. 415, 205 Wis. 626.

18. Cal.—Prudential Petroleum Co. v. Peck, 22 P.2d 559, 132 Cal.App. 4.
Iowa.—In re Sweet's Estate, 277 N. W. 712, 224 Iowa 589.
N.Y.—Thorburn v. Wende, 267 N.Y. S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52—In re Link's Will, 17 N.Y.S.2d 634, 173 Misc. 217.
Pa.—In re Curran's Estate, 167 A. 597, 312 Pa. 416.
Wis.—Pietraszwicz v. Pietraszwicz, 181 N.W. 722, 173 Wis. 523.
24 C.J. p 49 note 96.

Exclusive possession
An executor is entitled to exclusive possession of all funds recovered for purposes of administration. —Cain v. Church, Tex.Civ.App., 131 S.W.2d 400.

After assets of an estate have been recovered in an equity suit and reduced to possession, they are equitably appropriated to the uses of the estate.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.

Testamentary and dative testamentary executors
A testamentary executor who is given seizin of all the property may administer all the property, but neither a testamentary executor nor a dative testamentary executor can require seizin or possession when the same is not conferred by the will. —Succession of Patterson, 175 So. 820, 188 La. 113.

Where an executor, whose letters have been revoked, has in his possession cash and securities not derived from the sale of realty, and the infant heirs and widow are without means of support, it is improper to deny a motion by the administratrix to compel the executor to turn over assets to her, on the ground that the executor has been ordered to account; but he should be ordered to deliver a portion to the administratrix, and to retain the remainder, including the proceeds of real estate, for which the heirs may compel him to account.—In re Clark, 179 N.Y.S. 145, 189 App.Div. 771.

19. Ill.—Irwin v. Sample, 72 N.E. 687, 213 Ill. 160.
24 C.J. p 49 note 97.

20. Wash.—In re Maher's Estate, 79 P.2d 984, 195 Wash. 126, 117 A.L. R. 91.

21. Va.—Neece v. Neece, 51 S.E. 739, 104 Va. 343.
24 C.J. p 49 note 98.

Private letters written by the residuary legatee to deceased should not, however, be directed to be turned over to the temporary administrator, but are better left to remain where they are under the control of the writer.—In re Ryan's Estate, 188 N. Y.S. 387, 115 Misc. 472.

22. Pa.—In re Tompkin, 6 Kulp 99.
Va.—Neece v. Neece, 51 S.E. 739, 104 Va. 343.

23. **Absolute duty**
Administrators, general or special, are under no official obligation to comply with requests for an opportunity to examine private papers of deceased, without regard to the character of the writings or the circumstances of the case.—Sargent v. Sanborn, 25 A. 541, 66 N.H. 30.

24. La.—Mandeville v. Arnoult, 9 Rob. 447.
Accounting and settlement generally see infra §§ 827–943.

Representative of two estates
One who was representative of her mother's estate and also of the estate of her brother occupied two distinct positions, and could not, at least in her representative capacities, cast into a hotchpot expenditures or obligations created or suffered by her in the proceedings involving the two estates so as to defeat recovery of attorney fees.—Shapiro v. Larson, 289 N.W. 48, 206 Minn. 440.

Several beneficiaries
Separate accounts for each beneficiary are unnecessary, where it appears by the will that a testator intended that his family should be kept together and his children educated and supported out of the same fund. —Wood v. Lee, 5 T.B.Mon., Ky., 50.

25. Va.—Kee v. Kee, 2 Gratt. 116, 43 Va. 116.

26. Ark.—Harper v. Betts, 8 S.W.2d 464, 177 Ark. 977, 60 A.L.R. 484.
Mo.—Williams v. People's Bank of Springfield, App., 257 S.W. 192.

for the purpose of safely keeping the funds of the estate during administration, to deposit them temporarily in a reputable bank,[27] and under some statutes the representative is required[28] or the court is empowered to order him[29] to do so. If the funds are so deposited and due care is used in selecting the depositary, the representative is not necessarily responsible for a loss resulting from the subsequent failure of the bank,[30] the test being whether he has exercised such care as men of common prudence ordinarily exercise in their own affairs.[31]

The personal representative is liable, however,

Construction of testamentary direction

Where will provided that testator's widow should be maintained in comfort during remainder of her life, direction in will to executors to deposit money in bank until minor heir attains age of twenty one years was intended to apply only in case widow died before minor heir attained that age.—In re Long's Estate, 17 A.2d 686, 143 Pa.Super. 176.

27. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317—Jolly v. Richardson, 161 So. 814, 230 Ala. 548—King v. Porter, 160 So. 101, 230 Ala. 112.
Ark.—Harper v. Betts, 8 S.W.2d 464, 177 Ark. 977, 60 A.L.R. 484.
Fla.—Hart v. Savary, 152 So. 705, 114 Fla. 41.
Iowa.—In re Olson's Estate, 219 N. W. 401, 403, 206 Iowa 706, citing **Corpus Juris**—Leach v. Beazley, 207 N.W. 374, 201 Iowa 337—In re Workman's Estate, 196 N.W. 35, 36, 196 Iowa 1108, citing **Corpus Juris.**
Mich.—In re Culhane's Estate, 256 N.W. 807, 269 Mich. 68.
Neb.—Bank of Crab Orchard v. Meyers, 231 N.W. 513, 120 Neb. 84.
N.Y.—In re Kruger's Estate, 249 N. Y.S. 772, 139 Misc. 907.
Okl.—In re Horseman's Estate, 29 P.2d 589, 167 Okl. 355.
R.I.—Knagenhjelm v. Rhode Island Hospital Trust Co., 114 A. 5, 43 R.I. 559.
S.D.—Jones v. O'Brien, 235 N.W. 654, 656, 58 S.D. 213, quoting **Corpus Juris.**
24 C.J. p 50 note 4.

Necessity of court order

Unless the statute requires it, a court order is unnecessary to authorize such a deposit.
Md.—Fay v. Fay, 193 A. 674, 172 Md. 570.
Ohio.—In re Estate of Smith, 32 Ohio N.P., N.S., 260.

Passing title

In a proper case an executor may so deposit the funds of the estate as to pass title to the bank and create the relationship of debtor and creditor.—In re Grossman, 254 N.Y. S. 1012, 234 App.Div. 890, reversing In re Forrest's Estate, 249 N.Y.S. 766, 140 Misc. 14, affirmed 182 N.E. 177, 259 N.Y. 553—In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907.

Personal interest in depositary

It is improper for an administrator to deposit the estate funds in a loan company in which he is an interested party, and if he does so he should be held liable to pay to the estate the amount of the deposit, together with legal interest on such amount from the date the deposit was made.—In re Sargent's Estate, 276 Ill.App. 312.

What constitutes reasonable temporary deposit depends on particular facts and reasonable necessities of each fund and its due administration.—King v. Porter, 160 So. 101, 230 Ala. 112.

28. La.—Boone v. Boone, 92 So. 861, 152 La. 208.
24 C.J. p 50 note 5.

Deposit outside appointing court's jurisdiction

A deposit of the funds of the succession in a bank outside the jurisdiction of the court appointing an administrator is neither a substantial compliance with such a statute nor an excuse for its violation.—Boone v. Boone, supra.

Liability for statutory penalty

Where the succession of a decedent was indebted to a company which furnished the money to pay its debts and a dividend was declared by such company in order that a drawing account might be created for the widow, with the express understanding that other shareholders should not withdraw any part of the dividend from the business which stood in need of all the funds it could obtain, the executor was not liable for the statutory penalty for failure to deposit the dividend in a bank on theory it was money coming into his hands for the succession.—Succession of Manion, 86 So. 667, 148 La. 98.

29. N.Y.—In re Seaman's Estate, 199 N.Y.S. 794, 120 Misc. 531.
24 C.J. p 50 note 6.

General equity power

Surrogate's power under general equity jurisdiction to control acts of representatives of estates appointed by him includes right to require deposit of funds in bank or trust company subject to court's control.—In re Wendel's Estate, 290 N.Y.S. 228, 160 Misc. 662.

When power arises

The power granted to orphans' court by statute to select a depositary does not arise until court directs administrator to bring into court funds of the estate.—Fay v. Fay, 193 A. 674, 172 Md. 570.

30. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317—Jolly v. Richardson, 161 So. 814, 230 Ala. 548.
Ark.—Harper v. Betts, 8 S.W.2d 464, 466, 177 Ark. 977, 60 A.L.R. 484, quoting **Corpus Juris.**
Fla.—Hart v. Savary, 152 So. 705, 114 Fla. 41, citing **Corpus Juris.**
Ill.—In re Wesley's Estate, 279 Ill. App. 349.
Iowa.—In re David's Estate, 288 N. W. 418, 227 Iowa 352—In re Olson's Estate, 219 N.W. 401, 206 Iowa 706—Bookhart v. Younglove, 218 N.W. 533, 207 Iowa 800—In re Workman's Estate, 196 N.W. 35, 36, 196 Iowa 1108, citing **Corpus Juris.**
Ky.—Eaker v. Husbands, 92 S.W.2d 43, 263 Ky. 283.
Mich.—In re French's Estate, 255 N. W. 335, 267 Mich. 168.
Mont.—In re Mullen's Estate, 33 P. 2d 270, 97 Mont. 144—State v. Kearns, 257 P. 1002, 79 Mont. 299—In re Connolly's Estates, 257 P. 418, 79 Mont. 445.
Neb.—Bank of Crab Orchard v. Myers, 231 N.W. 513, 120 Neb. 84.
N.Y.—In re Kruger's Estate, 252 N. Y.S. 688, 141 Misc. 475.
N.C.—Martin v. McPherson, 185 S.E. 761, 210 N.C. 194.
Pa.—In re Roderick's Estate, 3 Fay. L.J. 93.
24 C.J. p 50 note 7.

Continuance of decedent's account does not of itself constitute negligence rendering a personal representative liable on subsequent failure of the depository bank.—In re Connolly's Estates, 257 P. 418, 79 Mont. 445—24 C.J. p 50 note 7 [a].

Provision in bond as affecting liability

Provision in bond giving surety joint control over administrator's deposit account, where right of joint control was never exercised, did not render administrator or surety liable as guarantors for loss of deposit.—Jones v. O'Brien, 235 N.W. 654, 58 S.D. 213.

31. Ark.—Harper v. Betts, 8 S.W.2d 464, 466, 177 Ark. 977, 60 A.L.R. 484, quoting **Corpus Juris.**
Fla.—Hart v. Savary, 152 So. 705, 114 Fla. 41, citing **Corpus Juris.**
Iowa.—In re Stone's Assignment, 264 N.W. 604, 606, 220 Iowa 1341, citing **Corpus Juris**—In re Workman's Estate, 196 N.W. 35, 36, 196 Iowa 1108, citing **Corpus Juris.**
Md.—Fay v. Fay, 193 A. 674, 172 Md. 570.

where he fails to exercise due diligence and good faith,[32] as, for example, where he deposits the funds of the estate, or permits them to remain, in a bank which he knows, or by the exercise of reasonable diligence might have known, to be insolvent or unsafe.[33] He may also incur liability for loss in case of the bank's failure where the deposit is needlessly made[34] or is left too long for a prudent course of administration,[35] or where he lends for a fixed time to a bank instead of making a deposit subject to withdrawal at pleasure or lending as payable on demand.[36]

Deposit in another state. While a deposit in a bank in another state is not necessarily culpable waste or negligence,[37] it has been said that the sound rule is that administration funds must be at all times kept within the state of administration,[38] and a representative who takes the funds outside of the state does so at the risk of being held responsible for the safety of the funds.[39]

Designation of deposit. The representative should make the deposit with a designation of his fiduciary capacity,[40] and if the deposit is made in his individual name, without any designation of the trust, he is liable for any loss which results from such disposition of the funds,[41] regardless of any question of negligence or intention in making the deposit in such form,[42] and it is not material that he had at the time no money of his own deposited in the bank,[43] or that he informed the bank, at the time of

Neb.—Bank of Crab Orchard v. Meyers, 231 N.W. 513, 120 Neb. 84.
Okl.—In re Horseman's Estate, 29 P. 2d 589, 167 Okl. 355.
24 C.J. p 50 note 8.

32. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
Mich.—In re Culhane's Estate, 256 N. W. 807, 269 Mich. 68.
Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.
Okl.—In re Horseman's Estate, 29 P. 2d 589, 167 Okl. 355.
Or.—In re Schluer's Estate, 261 P. 685, 123 Or. 234.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.

Neglect in presenting claims to receiver

Administrator should be charged with sum lost by decedent's estate through his neglect to present or delay in presenting claims to receiver of closed bank in which funds of estate were deposited.—In re Mullen's Estate, 33 P.2d 270, 97 Mont. 144.

33. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
Ky.—Greenway's Adm'r v. Greenway, 98 S.W.2d 283, 266 Ky. 114.
Mich.—In re Culhane's Estate, 256 N.W. 807, 269 Mich. 68.
24 C.J. p 51 note 9.

Representative as officer of bank

(1) The text rule is particularly applicable where the executor or administrator is an executive officer in active charge or heavily interested in the bank in which he deposits the funds of the estate.
Iowa.—In re Foster's Estate, 256 N. W. 744, 218 Iowa 1202—In re Rorick's Estate, 253 N.W. 916, 218 Iowa 107—In re Enfield's Estate, 251 N.W. 637, 217 Iowa 273.
Kan.—Woodbury v. Schofield, 292 P. 802, 131 Kan. 432.
Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.
Or.—In re Schluer's Estate, 261 P. 685, 123 Or. 234.
24 C.J. p 51 note 9 [a].

(2) In such a case knowledge of the bank's financial condition is imputed to him as a matter of law.—In re Rorick's Estate, supra—In re Enfield's Estate, supra.

(3) Such knowledge will not, however, be imputed to a bank director who, having only a small interest in the bank did not have actual control of its assets or disbursements and took no active part in its management.—In re Smith's Estate, 289 N.W. 694, 228 Iowa 47.

(4) An administrator who was cashier and general manager of insolvent bank wherein estate funds were deposited cannot escape liability for loss of funds on ground that he had no right to create preference by withdrawal thereof where he might otherwise have freed himself from all responsibility by securing an order of court for the deposit of such funds.—In re Foster's Estate, 256 N.W. 744, 218 Iowa 1202.

34. Conn.—Guthrie v. Wheeler, 51 Conn. 207.
24 C.J. p 51 note 15.

35. N.Y.—In re Donohue, 151 N.Y. S. 1094, 88 Misc. 359.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.
24 C.J. p 51 notes 15–16.

After time for distribution

If an executor or administrator deposits money of the estate in a bank and allows it to remain on deposit after the time when it should have been distributed, and the money is lost by the failure of the bank, he is liable for the loss.—Woodley v. Holley, 16 S.E. 419, 111 N.C. 380—24 C.J. p 51 note 16.

Duty to withdraw on order of court

Special administrator, ordered to deposit funds in another bank, must do so, even though withdrawal would cause closing of bank of original deposit.—In re Kendrick's Estate, 243 N.W. 168, 214 Iowa 873.

36. Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.
S.D.—Jones v. O'Brien, 235 N.W. 654, 656, 58 S.D. 213, quoting **Corpus Juris.**
24 C.J. p 51 note 15.

Nature of permanent deposit

Permanent deposit in bank by personal representative is in nature of loan or investment made on mere personal security.—Jones v. O'Brien, 235 N.W. 654, 58 S.D. 213.

Deposit on time certificate; custom and practice

A deposit on a time certificate will not render a personal representative liable where by virtue of the existent custom and practice he believed, and was justified in believing, that the certificate which he took, regardless of its form, would be paid whenever demand was made, and where it does not appear that the fact that the certificate was payable at a fixed future time instead of upon demand in any way contributed to the loss of the money.—Jones v. O'Brien, supra.

37. N.C.—Moore v. Eure, 7 S.E. 471, 101 N.C. 11, 9 Am.S.R. 17.
24 C.J. p 50 note 7 [b].

38. N.Y.—In re Poulson's Estate, 280 N.Y.S. 350, 155 Misc. 625.

39. N.Y.—In re Poulson's Estate, supra.

40. Ala.—Jolly v. Richardson, 161 So. 814, 230 Ala. 548—King v. Porter, 160 So. 101, 230 Ala. 112.
24 C.J. p 51 note 10.

41. Ala.—Jolly v. Richardson, 161 So. 814, 230 Ala. 548.
Ill.—In re Gunderson's Estate, 279 Ill.App. 168, 171, citing **Corpus Juris.**
24 C.J. p 51 note 11.

42. Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.
24 C.J. p 51 note 12.

43. Cal.—Arguello's Estate, 31 P. 937, 97 Cal. 196.
N.C.—Summers v. Reynolds, 95 N.C. 404.

the deposit, that the funds belonged to the estate.[44] However, a mere defect in designating his fiduciary capacity will not render a representative personally liable where the deposit has at all times been recognized as belonging to the estate and where the bank is chargeable with knowledge of the trust fund nature of the deposit.[45]

Bank executors. Generally, when a bank is named as executor or administrator under a statute authorizing it to act as such, it may, to the same extent that it could deposit and retain the funds of the estate in another bank, deposit such funds with itself and retain them in the usual and customary manner.[46] However, it has been stated that estate funds must be deposited in a banking institution other than one acting as executor or coexecutor of the estate.[47]

Commercial or savings account. In determining whether a personal representative should deposit the funds of the estate in a commercial account or a savings account various factors must be considered.[48] Under ordinary circumstances,[49] as, for example, where the funds are to be in his hands for a very short time or where practically all of the funds will be required for the immediate needs of administration,[50] deposit in a commercial account subject to check is proper. On the other hand, where there is a substantial sum in excess of the immediate requirements and such sum is to be held over a period of time which will permit the accrual of interest on a savings bank deposit, he should deposit the funds in a savings account rather than in a noninterest-bearing commercial account.[51]

In this connection it should be noted that the deposit of money in a bank at interest temporarily pending the closing of administration is usually held not to be an investment within the meaning of statutes limiting or prohibiting investments by executors or administrators.[52]

Consent of beneficiaries. The consent of the beneficiaries to a deposit will relieve the personal representative from liability to them for a loss resulting therefrom.[53]

44. Mo.—In re Horner, 66 Mo.App. 531.

45. Mich.—In re French's Estate, 255 N.W. 335, 267 Mich. 168.

Failure to designate estate

The fact that deposits made by a representative as administrator did not designate the estate to which the funds belonged did not render the representative personally liable on failure of the bank, where it appeared that before the bank closed the name of the estate was designated on the books of the bank and where it also appeared that the name of the estate appeared on the only checks drawn against the deposits.—Jolly v. Richardson, 161 So. 814, 230 Ala. 548.

46. Ala.—Robinson v. Williams, 159 So. 239, 229 Ala. 692.

Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.

R.I.—Knagenhjelm v. Rhode Island Hospital Trust Co., 114 A. 5, 43 R. I. 559.

Retaining necessary expense money

Bank, as executor of estate, had right to keep on hand funds necessary to defray current expenses of estate and preferred claims.—Ex parte Michie, 165 S.E. 359, 167 S.C. 1.

Commingling with other funds

(1) Act permitting bank trustees to deposit funds of estate in own savings department and mingle funds is not unconstitutional as discriminating in favor of bank trustees, and a bank acting as executor may deposit funds of estate in own savings department as general deposit commingled with other funds.—In re Smith's Estate, 297 P. 927, 112 Cal. App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.

(2) Statute requiring bank to keep property received in trust does not require identical money to be kept in specie.—Leach v. Farmers' Sav. Bank of Hamburg, 213 N.W. 414, 205 Iowa 114, 56 A.L.R. 801, followed in Leach v. Grinnell Sav. Bank of Grinnell, 213 N.W. 417. Rehearing denied and modified on other grounds 217 N.W. 437, 205 Iowa 114, 56 A.L.R. 801.

47. Pa.—In re Trust Companies, 9 Pa.Dist. & Co. 702.

48. Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.

49. N.Y.—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237.

Administrator unauthorized to invest funds of estate must hold collections or deposits in cash or subject to check.—Glidden v. Getulius, 120 So. 1, 96 Fla. 834, denying rehearing Glidden v. Gutelius, 119 So. 140, 96 Fla. 834.

50. Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal. App. 767.

51. Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.

S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.

24 C.J. p 50 notes 4 [a], 7 [d] (1).

52. Ohio.—In re Estate of Smith, 32 Ohio N.P., N.S., 260.

S.C.—Brannon v. Woodward, 178 S. E. 249, 175 S.C. 1.

S.D.—Jones v. O'Brien, 235 N.W. 654, 58 S.D. 213.

Investment and loans by representative see infra §§ 205–208.

53. Iowa.—In re Olson's Estate, 219 N.W. 401, 403, 206 Iowa 706, citing **Corpus Juris.**

24 C.J. p 51 note 17.

Inducing change in banks

Beneficiaries who persuade an executor to withdraw the funds of the estate from one bank and deposit them in another bank cannot complain of any loss resulting from their own direction.—In re Olson's Estate, 219 N.W. 401, 206 Iowa 706.

Serving without compensation as showing consent

The fact that an administrator under an arrangement with the heirs agreed to serve practically without compensation does not show a tacit agreement that he might deposit and retain the estate funds in a bank of which he was cashier and general manager.—In re Enfield's Estate, 251 N.W. 637, 217 Iowa 273.

§ 188. Gifts

The executor or administrator has no right to give away any assets of the estate.

The executor or administrator has no right to give away any assets of the estate even though of trifling value, nor will the law give effect to such transfer.[54] Where an unauthorized gift is made, it may be recovered from the donee or the executor.[55]

Where title to property is transferred to an estate for a specific purpose and with no intention to make a gift to the estate, the executors become trustees thereof for the beneficial owner.[56]

§ 189. Performance of Decedent's Obligations

Personal representatives are bound by the outstanding covenant or contract obligations of their decedents except where the obligation is personal in its nature or is terminated by decedent's death or is otherwise discharged.

With respect to personalty, no person is individually responsible for the obligations of a decedent as a matter of law.[57] In their representative capacity, however, executors and administrators are bound by all the covenant or contract obligations of their decedents,[58] except such as are personal in their nature and of which personal performance by the decedent is of the essence,[59] or such as are terminated by decedent's death,[60] or are otherwise discharged.[61] Where the personal representative neglects or refuses to carry out the contract of his decedent, the other party has the usual remedies, as in electing to treat it as rescinded and claiming damages,[62] or applying to the court for an order of com-

54. Ga.—Stokes v. Martin, 107 S.E. 552, 27 Ga.App. 138.
N.Y.—In re De Lano's Estate, 252 N.Y.S. 361, 140 Misc. 748.
24 C.J. p 90 note 28.

55. N.Y.—In re De Lano's Estate, supra.

Crediting gift against claim presented
Voluntary contribution made by executors of deceased stockholder to bank at instance of banking department should be credited on claim presented against estate for statutory assessment.—In re De Lano's Estate, supra.

56. Joint bank account erroneously transferred
Where donee of joint bank account was erroneously advised by counsel for executors of donor's will that he would have to transfer account to estate to assert his rights and donee had no intention of making gift to estate, executors of estate became trustees of account for donee with implied obligation to retransfer account to donee as beneficial owner.—Goldston v. Randolph, 199 N.E. 896, 293 Mass. 253, 103 A.L.R. 1117.

57. U.S.—In re Gorday Garment Co., D.C.Or., 2 F.Supp. 162, affirmed, C.C.A., Crocker v. Kay, 62 F.2d 391, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L.Ed. 988.
Liability of heirs and distributees for debts of ancestor see Descent and Distribution §§ 116–136.

58. U.S.—Seward v. South Florida Securities, C.C.A.Fla., 96 F.2d 964, 966, citing **Corpus Juris.**
Cal.—Gunther v. Thompson, 296 P. 611, 211 Cal. 631—In re Burke's Estate, 244 P. 340, 342, 198 Cal. 163, 44 A.L.R. 1341, quoting **Corpus Juris**—In re Cheda's Estate, 209 P. 70, 58 Cal.App. 433.
Ill.—Bolender v. Pearce, 238 Ill.App. 137.
Mass.—Cutler v. United Shoe Machinery Corporation, 174 N.E. 507, 274 Mass. 341.
N.J.—Capron v. Luchars, 160 A. 83, 110 N.J.Eq. 338, affirmed 164 A. 447, 112 N.J.Eq. 373.
N.C.—Burch v. J. D. Bush & Co., 106 S.E. 489, 181 N.C. 125.
Okl.—Goldberg v. Waddington, 15 P. 2d 25, 159 Okl. 223.
Or.—Shea v. Graves, 19 P.2d 406, 142 Or. 503.
Pa.—Tait v. Lane, 87 Pittsb.Leg.J. 504, 2 Fay.L.J. 287.
S.D.—Gilbert v. Hanson, 205 N.W. 704, 49 S.D. 10.
Tex.—Neyland v. Brammer, Civ.App., 73 S.W.2d 884, 888, citing **Corpus Juris,** error dismissed.
Wash.—In re Murphy's Estate, 71 P.2d 6, 12, 191 Wash. 180, quoting **Corpus Juris.**
Wis.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 648.
24 C.J. p 53 note 30.

Presumption as to intention
Parties to contract are presumed to intend to bind their personal representatives.—Buccini v. Paterno Const. Co., 170 N.E. 910, 253 N.Y. 256, reversing 237 N.Y.S. 736, 228 App.Div. 604—24 C.J. p 53 note 30.

Agreement to take back business
Where decedent, in selling dry goods business, agreed to take back business if buyer should become dissatisfied, decedent's administrators, who entered into agreement with buyer to take back goods at agreed inventory price, and to pay buyer's debt to bank, could not escape liability to bank's receiver in suit on contract, on ground that expenses in selling goods reduced amount in hand so that it was insufficient to pay bank and that probate court had not authorized contract, since taking back at inventory price was pursuant to decedent's agreement and needed no court authority.—Seward v. South Florida Securities, C.C.A.Fla., 96 F. 2d 964.

Executing proper assignment
Where deceased made a gift of government bonds, and assignment was sufficient to pass title, but not to satisfy regulation of the treasury department, the court, on declaring the gift valid, may require the administrator to execute a proper assignment, not to complete the gift, but to facilitate payment and collection of interest and principal.—In re Stockham's Estate, 186 N.W. 650, 193 Iowa 823, 23 A.L.R. 765.

Compensation for performing obligation
Administrator was not entitled to compensation for executing necessary papers for deceased's employer to obtain letters patent, where services rendered were required by the terms of the contract and compensation therefor had been paid to decedent.—Cutler v. United Shoe Machinery Corporation, 174 N.E. 507, 274 Mass. 341.

59. U.S.—Ellerson v. Grove, C.C.A. N.C., 44 F.2d 493.
N.C.—Burch v. J. D. Bush & Co., 106 S.E. 489, 181 N.C. 125.
Tenn.—Ridges v. Williams, 15 Tenn. App. 197.
Wash.—In re Murphy's Estate, 71 P.2d 6, 12, 191 Wash. 180, quoting **Corpus Juris.**
24 C.J. p 54 note 31.

60. Cal.—In re McPhee, 104 P. 455, 156 Cal. 335, Ann.Cas.1913E 899.
Tenn.—Ridges v. Williams, 15 Tenn. App. 197.

61. N.H.—Reynolds v. Chase, 177 A. 291, 87 N.H. 227.

62. Mass.—Mills v. Smith, 78 N.E. 765, 193 Mass. 11, 6 L.R.A.,N.S., 865.
24 C.J. p 54 note 34.

Recovering proceeds of wrongful sale
Where administrators of buyer un-

pliance;[63] but the other party will not be entitled to such relief unless he has established a contract and breach thereof on the part of decedent or his representative.[64]

The executor or administrator has the right to carry out the contracts of his decedent[65] and to enforce the fulfillment of obligations to his decedent where likely to prove beneficial to the estate.[66] If a contract of decedent carries with it an option to accept or reject, the exercise of such option passes properly to the personal representative.[67] However, the representative acquires no greater rights under the contract than those of his decedent;[68] and he is not empowered to make anew or enlarge a contract for his decedent, to ratify his void transac-

der conditional sales contract sold goods after default, their acts amounted to conversion, and seller was entitled to proceeds.—National Bank of Arkansas v. Interstate Packing Co., 299 S.W. 34, 175 Ark. 341.

63. Power of court to direct payment

Under the Surrogate's Court Act, surrogate's court has power to direct executors to make payments when and as necessary for performance of agreements between deceased mortgagee.—In re Campbell's Estate, 1 N.Y.S.2d 726, 165 Misc. 808.

Form of decree

In second mortgagee's proceeding for order for payment by executors of stockholder of corporate mortgagor of such sums as were necessary to fulfill stockholder's guaranty of carrying charges and general operating expenses of mortgaged apartment building if gross income of corporation was insufficient to meet such charges and expenses, decree would generally direct payment as prayed for directly to first mortgagee, with provision for proceedings for further direction on showing of current need for payment and current lack of rents available therefor.—In re Campbell's Estate, supra.

64. N.Y.—Citizens Nat. Bank & Trust Co. of Fulton v. First Trust & Deposit Co. of Syracuse, N. Y., 281 N.Y.S. 138, 245 App.Div. 240.

Absence of demand as excusing nonperformance

Patentee's failure to demand that executrix perform testator's agreement to make advances for expenses did not excuse her nonperformance thereof, in absence of contract provision for demand.—Allen v. Hawley, 260 N.Y.S. 568, 237 App.Div. 139.

Showing right to earnest money

To place purchaser or executrix of his estate in default and establish vendors' claim to earnest money, deposited in escrow for payment to vendors on conveyance of land to purchaser, vendors must show tender of sufficient deed to purchaser or executrix.—Mitchell v. Aimo, 12 P.2d 1063, 124 Cal.App. 508.

65. U.S.—Franklin Sav. Bank of Franklin, N. H., v. Garot, C.C.A. Ark., 69 F.2d 487.
Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341.
24 C.J. p 54 note 35.

Building contract, made by decedent in his lifetime, may be completed by his personal representative. —Shea v. Graves, 19 P.2d 406, 142 Or. 503—24 C.J. p 53 note 30 [c] (1).

Executing corrected conveyance

Where decedent, if he had lived, could have been compelled to reform contract containing wrong description of real property and make conveyance as reformed, conveyance by executrix on order of county court authorizing conveyance as corrected should not be declared void as requiring first obtaining of decree of reformation in court of equity, since same result was accomplished without court proceeding.—Gilbert v. Hanson, 205 N.W. 701, 49 S.D. 10.

Effect of refusal to accept performance by representative

Where the personal representatives of a deceased contractor in good faith offer to complete his contract, and the other parties refuse to accept it, and decline to permit the personal representatives to proceed, they are relieved from further performance and are entitled to an accounting and recovery as upon a quantum meruit.—Burch v. J. D. Bush & Co., 106 S.E. 489, 181 N.C. 125.

Contracts of personal nature

"When the personal representative can fairly and sufficiently exeeute all that the deceased could have done, he may do so and perform the contract. If the contract entered into by a deceased is of a personal character requiring qualities peculiar to him, as his personal taste or skill, the personal representative is not at liberty to undertake its execution. As to contracts not of a personal nature the administrator may be directed by the Probate Court to perform them or he may upon his own responsibility and risk undertake to do so for the benefit of the estate." —Mecartney v. Carbine, 108 Ill.App. 282, 285.

66. Cal.—Wallace v. Privett, 247 P. 906, 198 Cal. 746.
Ill.—Christenson v. Board of Charities of Illinois Conference of Ev. Lutheran Augustana Synod, 253 Ill.App. 380.
N.Y.—Buccini v. Paterno Const. Co., 170 N.E. 910, 253 N.Y. 256, reversing 237 N.Y.S. 736, 228 App.Div. 604.
Tex.—Winningham v. Dyo, Com. App., 48 S.W.2d 600, reversing Dyo v. Winningham, Civ.App., 30 S.W. 2d 381, rehearing denied 31 S.W.2d 1093.
24 C.J. p 54 note 37.

Arbitration

Where a personal contract containing a provision for arbitration at the choice of either of the parties was terminated by the death of one of the contractors, his executrix was entitled to arbitration on the question of the value of the benefits conferred, notwithstanding a provision in the contract that payments were to be made at the rate of a certain per cent of the value of the work installed as the work progressed.—Buccini v. Paterno Const. Co., 170 N.E. 910, 253 N.Y. 256, reversing 237 N.Y.S. 736, 228 App.Div. 604.

Repurchase of stock

Where the persons from whom decedent had purchased stock agreed to buy back such stock at a fixed price on demand to be made within a certain time, such agreement could be enforced by decedent's administrator and, as long as the demand was made within the time fixed, the fact that an order of court to sell the stock was not obtained until after that time was no defense.—Hedgepeth v. Union Trust Co., 144 N.E. 142, 194 Ind. 616.

Forfeiture; notice of intention to enforce

Delays granted by seller of stock in the payment of interest on the balance of the purchase price made it incumbent on his executors to give notice to the buyer, before resorting to forfeiture, that they would require prompt payment of the interest.—In re Cheda's Estate, 209 P. 70, 58 Cal.App. 433.

67. Ill.—Christenson v. Board of Charities of Illinois Conference of Ev. Lutheran Augustana Synod, 253 Ill.App. 380.
24 C.J. p 55 note 38.

68. Representatives not bona fide purchasers or purchasers for value

Iowa.—Crescent Chevrolet Co. v. Lewis, 300 N.W. 260, 230 Iowa 1074.
Tex.—Edelbrock v. Farmer, Civ.App., 43 S.W.2d 456, reversed on other grounds Farmer v. Edelbrock, Com. App., 66 S.W.2d 664.

tions, or to waive defenses to which he is entitled by law.[69]

The personal representative may avoid his decedent's contract or covenant on the usual grounds of incapacity, illegality, or fraud,[70] or suspend performance where the other party is bound to proceed first;[71] and in some instances an executory contract inequitable in its consequences to the estate may be avoided or compromised,[72] or an onerous obligation may by its own terms admit sometimes of a legal or equitable rescission by the personal representative.[73]

Where the personal representative performs the contract or covenant of his decedent and completes the transaction, the estate will be held bound for any loss sustained thereby, and will be entitled to any profit realized in consequence.[74]

As between the representative and the beneficiaries of the estate the former may in his discretion, as a general rule, perform or rescind any personal contract of decedent as may be for the best interests of the estate,[75] unless the matter is regulated by statute.[76] However, a personal representative is under a duty to see that his own private interests are not taken care of at the expense of the estate or its beneficiaries.[77]

§ 190. Exoneration of Estate from Liability

An executor or administrator may take steps to exonerate the estate from a liability to which it might otherwise be subject.

An executor or administrator may take steps to exonerate the estate from a liability to which it might otherwise be subject.[78]

§ 191. Persons Acting in Different Capacities

One who is executor or administrator may also act in another capacity concerning the estate, in which case the due sequence of the trusts varies with his present status.

One who is executor or administrator may also act in another capacity concerning the estate, in which case the due sequence of the trusts varies with his present status.[79] Thus if an executor is also a devisee or residuary legatee, or an administrator is next of kin to the decedent, and he enters generally into possession of the property, he is usually held to do so in his representative capacity.[80] If one is executor or administrator and also guardian of a beneficiary he holds the estate first of all as executor or administrator, and does not hold anything as guardian which is not separated from the assets of the estate or placed properly to his account as guardian.[81] If an executor is also the designat-

69. Mich.—Smith v. Brennan, 28 N. W. 892, 62 Mich. 349, 4 Am.S.R. 867.
24 C.J. p 55 note 39.

70. U.S.—Penn v. Robertson, C.C.A. N.C., 115 F.2d 167, affirming, D.C., 29 F.Supp. 386.
24 C.J. p 55 note 40.

Infants' contracts

(1) Subject to certain exceptions, infants' contracts may be disaffirmed by their personal representatives without making or offering restitution.
Cal.—Tracy v. Gaudin, 285 P. 720, 104 Cal.App. 158.
N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J.Eq. 203.
24 C.J. p 55 note 40 [a].

(2) Filing of answer by infant's administrator to bill for interpleader and asserting claim to certificates of deposit in controversy is sufficient disaffirmance of any transfer of them by infant.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., supra.

71. Ky.—Shultz v. Johnson, 6 B. Mon. 497.

72. Ill.—Jessup v. Jessup, 102 Ill. 480.
Pa.—Billings v. Billings, 42 Leg.Int. 132.

73. N.Y.—Maher v. Garry, 37 N.Y.S. 605, 15 Misc. 359, affirmed 38 N.Y.S. 436, 3 App.Div. 480.
Pa.—Dougherty v. Stephenson, 20 Pa. 210.

74. Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341.
24 C.J. p 55 note 46.

75. Ohio.—Gray v. Hawkins, 8 Ohio St. 449, 72 Am.D. 600.
24 C.J. p 55 note 44.

76. Ill.—Smith v. Wilmington Coal Mining & Mfg. Co., 83 Ill. 498.
24 C.J. p 55 note 45.

77. Pa.—In re Herman's Estate, 90 Pa.Super. 512.

78. Mass.—Browne v. Bixby, 76 N. E. 454, 190 Mass. 69, 5 Ann.Cas. 642.
24 C.J. p 55 note 47.

Compelling payment of debt

Administratrix of estate of intestate, who permitted pledge of his property to trust company by another as security for loans to latter, could compel borrower in equity to pay debt secured, if financially able, and thus release property from pledge.—Killoren v. Hernan, 20 N. E.2d 946, 303 Mass. 93.

Maintaining bill to exonerate pledged property

Administratrix of estate of intestate, whose securities were pledged as security for loans to another, may maintain bill to exonerate from lien of pledge such securities or amount thereof not required to pay note for loan, made before intestate's death, after applying beneficiary's collateral in satisfaction thereof; the right to exoneration in such case cannot be limited or curtailed because of loan made after intestate's death.—Killoren v. Hernan, supra.

79. Tex.—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, 560, error refused, quoting **Corpus Juris.**
24 C.J. p 52 notes 23–28.
Duty of person acting in different capacities to account see infra § 832.

Creditor-executor

Decedent, in nominating creditor as executor, must be deemed to have contemplated nominee's compliance with well-known legal principles.—U. S. Nat. Bank & Trust Co. of Kenosha, Wis., v. Sullivan, C.C.A. Wis., 69 F.2d 412.

80. Va.—Blakey v. Newby, 6 Munf. 64, 20 Va. 64.
24 C.J. p 52 note 24.

Award of balance of estate should be made to administrators, for distribution, even though they were also sole heirs.—In re Holman's Estate, 156 A. 608, 102 Pa.Super. 198.

81. Tex.—Loden v. Burgess, Civ. App., 74 S.W.2d 304, 307, quoting **Corpus Juris.**
24 C.J. p 52 note 25.

ed trustee under a will he comes into possession as executor, and his election afterward to hold as trustee must be manifested by some plain and unequivocal act.[82]

When the functions of the executor or administrator as such have ceased, he holds whatever balance there may be in his hands in his other capacity, whether as trustee, guardian, legatee, distributee, or otherwise.[83] However, there is authority that where two or more fiduciary functions coexist at the same time and no point of time is fixed in the testamentary intention at which one function should end and the other begin, the duty of the executor continues.[84]

In case of the representative's misappropriation or default the loss should be sustained in what was then his true character.[85]

§ 192. Rights of Creditors

Creditors may resort to a court of equity to preserve the estate when the personal representative fails to perform his duty.

Creditors may resort to a court of equity to preserve the property and assets of the estate and subject the same to the payment of debts against it when the personal representative fails to perform his duty in the premises.[86]

B. ENGAGING OR CONTINUING IN BUSINESS

§ 193. General Rule

An executor or administrator ordinarily may not engage in business with the funds of the estate, and if he does so he is chargeable with all losses incurred and profits made.

Subject to certain limitations and exceptions discussed infra §§ 194–197, as a general rule an executor or administrator is not justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys and trading lies outside the scope of administrative functions.[87] This is

82. Mo.—State ex rel. and to Use of Bremer v. Schulte, App., 90 S.W.2d 1078.
24 C.J. p 52 note 26.
Executors as trustees see the C.J.S. title Trusts §§ 239–243, also 65 C.J. p 639 note 63 et seq.

How change shown

(1) The change of property from the executor to himself as trustee may be shown by any authoritative and notorious act.—Springfield Nat. Bank of Springfield v. Couse, 192 N.E. 529, 288 Mass. 262—24 C.J. p 52 note 26 [b].

(2) Settlement of account as prerequisite to change of capacity from executor to trustee see infra § 832.

83. Ill.—Wylie v. Bushnell, 115 N.E. 618, 277 Ill. 484.
Md.—Zimmerman v. Coblentz, 185 A. 342, 170 Md. 468.
24 C.J. p 52 note 27.

Necessity of formal order of transfer

(1) Where an executor-trustee has performed practically all of the duties incumbent on him as executor, no formal order of transfer from executor to trustee is necessary to clothe him with all the powers and functions of a trustee.—Brinkerhoff v. Huntley, 223 Ill.App. 591.

(2) It has also been held that, without an order of court, no mere voluntary act or purpose on the part of an executor-trustee can transfer the estate property from himself as executor to himself as trustee.—Wapello County Sav. Bank v. Keokuk County, 229 N.W. 721, 209 Iowa 1127.

84. N.Y.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

85. Cal.—In re Baxter's Estate, 99 P.2d 276, 279, 15 Cal.2d 166, quoting **Corpus Juris.**
Md.—Zimmerman v. Coblentz, 185 A. 342, 170 Md. 468.
Mo.—State ex rel. and to Use of Bremer v. Schulte, App., 90 S.W. 2d 1078.
24 C.J. p 52 note 28.

86. W.Va.—Buskirk Bros. v. Peck, 50 S.E. 432, 57 W.Va. 360.
Allowance and payment of claims generally see infra §§ 367–481.
Rights of action by creditors or others interested in estate see infra § 694.

87. U.S.—Refling v. Burnet, C.C.A., 47 F.2d 859, 861, quoting **Corpus Juris.**
Ala.—Johnson Dry Goods Co. v. Drake, 121 So. 402, 219 Ala. 140.
Cal.—In re King's Estate, 121 P.2d 716—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341—In re Allen's Estate, 108 P.2d 973, 42 Cal.App.2d 346—In re Ward's Estate, 15 P.2d 901, 127 Cal.App. 347—Riedy v. Bidwell, 233 P. 995, 70 Cal.App. 552.
Conn.—State ex rel. Raskin v. Schachat, 180 A. 502, 120 Conn. 337—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Fla.—Conant v. Blount, 192 So. 481, 141 Fla. 27.
Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225
Mich.—Marshall Field & Co. v. Himelstein, 236 N.W. 181, 253 Mich. 355.
Miss.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.
Mo.—Metzger v. Metzger, App., 153 S.W.2d 118, 121, citing **Corpus Juris,** and transferred, see, Sup., 145 S.W.2d 380.
Mont.—In re Jennings' Estate, 241 P. 648, 652, 74 Mont. 449, citing **Corpus Juris.**
N.Y.—Philco Radio & Television Corporation of New York v. Damsky, 294 N.Y.S. 776, 250 App.Div. 485—Helme v. Buckelew, 181 N.Y.S. 104, 191 App.Div. 59, reversed on other grounds 128 N.E. 216, 229 N.Y. 363—In re Damsky's Estate, 23 N.Y.S.2d 897, 175 Misc. 460—In re Davison's Will, 17 N.Y.S.2d 790, 173 Misc. 323—In re Damsky's Estate, 298 N.Y.S 937, 164 Misc. 381—In re Bramer's Estate, 273 N.Y.S. 790, 151 Misc. 786—In re Ebbets' Estate, 267 N.Y.S. 268, 149 Misc. 260—In re Stulman's Will, 263 N.Y.S. 197, 146 Misc. 861—In re Kahn's Estate, 251 N.Y.S. 23, 140 Misc. 532—In re Robbins' Will, 237 N.Y.S. 409, 135 Misc. 220—In re Glass' Estate, 235 N.Y.S. 299, 134 Misc. 291.
Or.—In re Steeby's Estate, 20 P.2d 1080, 1083, 143 Or. 501, citing **Corpus Juris**—Shea v. Graves, 19 P. 2d 406, 410, 142 Or. 503, citing **Corpus Juris**—Multorpor Co. v.

true even though the property is of such a character that it can be used to better advantage in that way.[88] So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits which he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or at their election take all the profits which the representative has made by such unauthorized use of the funds of the estate.[89] This rule has been carried out to the extent of holding execu-

Reed, 260 P. 203, 122 Or. 605, 55 A.L.R. 504.
Pa.—In re Nagle's Estate, 156 A. 309, 305 Pa. 36—In re Istocin's Estate, 190 A. 382, 126 Pa.Super. 158.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
W.Va.—Thurmond v. Guyan Valley Coal Co., 102 S.E. 221, 85 W.Va. 501.
Wis.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.
24 C.J. p 55 note 48.

Breach of trust

Administratrix committed serious breach of trust by the continuance of decedent's business.—In re Tietje, D.C.N.Y., 263 F. 917.

That sheriff was in possession of testator's business at time of testator's death should have been warning to creditors against permitting executrix to continue business for nearly year after testator's death, creditors' remedy being by removal or restraining order.—In re Seigrist's Estate, 262 N.Y.S. 629, 146 Misc. 236.

Duty to liquidate

(1) Executor should insist that testator's business be sold or liquidated as soon as reasonably possible after testator's death.—In re Kinreich's Estate, 244 N.Y.S. 357, 137 Misc. 735.

(2) However, where testator acquired interest in corporation engaged in marketing equity in realty and partnership engaged in marketing mortgages, and became personally liable on indorsement on notes of such concerns, testator died, and depression resulted in failure of such concerns and revealed for first time the irresponsibility of others interested therein, executor was not liable to estate for failure to bring about liquidation and enforce contribution before depression.—In re Strasenburgh's Estate, 300 N.Y.S. 1016, 164 Misc. 445.

What constitutes doing business

(1) Mere execution of trust by executor in ordinary way of gathering in, administering upon, and distributing assets does not constitute doing of business.—Ames v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 853.

(2) Executors' agreement for extension of time for payment of mortgage belonging in part to estate did not require authorization of court of probate as "continuance of existing business of testator."—In re Marks' Estate, 163 A. 600, 116 Conn. 58.

88. La.—Sparrow's Succession, 2 So. 501, 39 La.Ann. 696.
24 C.J. p 56 note 49.

89. Alaska.—National Surety Co. v. Matheson's Estate, 7 Alaska 582.
Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341—Riedy v. Bidwell, 233 P. 995, 70 Cal.App. 552.
Idaho.—Schneeberger v. Frazer, 213 P. 568, 36 Idaho 737.
Miss.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.
Mo.—Metzger v. Metzger, App., 153 S.W.2d 118, 121, citing **Corpus Juris**, and transferred, see, Sup., 145 S.W.2d 380.
Mont.—In re Astibia's Estate, 46 P. 2d 712, 100 Mont. 224—In re Jennings' Estate, 241 P. 648, 652, 74 Mont. 449, citing **Corpus Juris.**
N.J.—Kick v. McCauley, 178 A. 637, 118 N.J.Eq. 252.
N.Y.—In re Kinreich's Estate, 244 N.Y.S. 357, 137 Misc. 735.
Or.—Shea v. Graves, 19 P.2d 406, 410, 142 Or. 503, citing **Corpus Juris**—Shafford v. Reed, 247 P. 324, 119 Or. 90.
Pa.—In re Nagle's Estate, 156 A. 309, 305 Pa. 36.
24 C.J. p 56 note 50.

Election by heirs

When an executor continues the testator's business without authority, the heirs may elect to take the profits, if any, or they may insist on a return of the capital and interest.
N.M.—In re McMillan's Estate, 33 P. 2d 369, 374, 38 N.M. 347, citing **Corpus Juris.**
Or.—In re Steeby's Estate, 20 P.2d 1080, 1083, 143 Or. 501, citing **Corpus Juris.**
24 C.J. p 56 note 50 [e].

Neglect of business

(1) Executor continuing deceased's furnished room business was chargeable with result of his neglect thereof.—In re Rodgers' Estate, 264 N.Y.S. 624, 147 Misc. 344.

(2) Where executor neglected duties in maintaining testatrix' furnished room business, but entire property was finally leased to some one in like business, executor was chargeable with difference between rent fixed by such lease and net operating profits for preceding year, but entitled to credit for nonhousekeeping expenses, and was not chargeable with testatrix' weekly earnings in such business.—In re Rodgers' Estate, supra.

(3) Tentative rental surcharge made against accounts of executor charged with neglect of duty was solely for benefit of general legatees, not for benefit of residuary legatees who participated in, and were beneficiaries of, executor's alleged nonfeasance and misfeasance, or for benefit of their mortgagee.—In re Rodgers' Estate, supra.

Debts of estate at time of death

Executrix, continuing testator's business without authority, resulting in losing practically all assets of estate, was surchargeable with valid debts of estate at time of testator's death.—In re Seigrist's Estate, 262 N.Y.S. 629, 146 Misc. 236.

Stock control of corporation

Where deceased's complete stock control of corporation passed to executor, executor's possession of right to receive dividends, to vote, and to receive all of net assets of corporation on dissolution after payment of obligations of corporation was fiduciary, and he was answerable to creditors of corporation and distributees of estate for his conduct in respect to corporation.—In re Steinberg's Estate, 274 N.Y.S. 914, 153 Misc. 339.

Authorized deductions

(1) Where administratrix undertook to carry on business of deceased on her own initiative, payments made out of gross receipts for rent due landlord and water rent, both of which were due at death of tenant, and refund of insurance premiums would be credited against apparent loss from the business.—In re McClatchey's Estate, 11 N.Y.S.2d 266, 170 Misc. 696.

(2) Administratrix was not entitled to credit for portion of license fee where it was not shown that any license fee had been prepaid for a period which extended beyond date of sale.—In re McClatchey's Estate, supra.

(3) Balance remaining after authorized deductions was surcharged to administratrix for purpose of computing amount payable to objecting creditor, which amount was required to be paid by administratrix out of her own resources and

tors who carried on the business of testator, and, without an order of court, sold goods on time without security, responsible for a loss therefrom, although the total profits from their sales exceeded the losses on such unsecured debts.[90] Beneficiaries under a will are also entitled to offset their claim to a fair rental value of premises connected with a business continued by the executor without authority against payments made by him for the benefit of the estate by continuing the business.[91]

The accountability of the representative with respect to profits extends only to the actual net profits made during the period in which he carried on the business,[92] and it has been held that in estimating the net profits only profits resulting from the employment of testator's estate should be considered, making allowance for the business skill and credit of the executor in conducting the business.[93] However, since the representative cannot deal with the property to his own advantage, he is not entitled to a salary for his own services to be deducted from the gross receipts;[94] and one who pays to himself an excessive salary and bonuses is liable to account to the distributees of the estate.[95]

Speculative accounts of decedent should be settled by the personal representative within a reasonable time,[96] and the representative is not excused from liability by the fact that he acted in good faith and with ordinary prudence in carrying the account.[97]

§ 194. Limitations of Rule

The general rule that an executor or administrator has no authority to continue the operation of the decedent's business is subject to some limitations, as where such operation is necessary for the protection of the estate or is authorized by statute or order of the court.

Good discretion may require some latitude in closing out decedent's business, and this a probate court will duly consider when passing on the representative's accounts.[98] Statutes sometimes authorize an executor or administrator to carry on the business if it is not necessary that it should be sold at once for the payment of debts,[99] although under such statutes the personal representative acts at his peril if he continues the business without authority from the court.[1] The personal representative may be justified in continuing the business so far as is necessary for the purpose of winding up the same and converting the assets into money[2] or carrying out

not out of estate assets.—In re McClatchey's Estate, supra.

90. Ill.—Peterman v. U. S. Rubber Co., 77 N.E. 1108, 221 Ill. 581, modifying 119 Ill.App. 610.

91. N.J.—Gilligan v. Daly, 80 A. 994, 79 N.J.Eq. 36.

92. N.Y.—Matter of Peck, 80 N.Y.S. 76, 79 App.Div. 296, affirmed 69 N.E. 1129, 177 N.Y. 538—In re Suess, 75 N.Y.S. 938, 37 Misc. 459.
24 C.J. p 56 note 53.

Expenses

Where a decedent's personal representative is surcharged with the income derived from the operation of a business, he is entitled to credit for the expenses thereof.—In re Desiderio's Estate, 35 Pa.Dist. & Co. 450.

93. N.J.—Gilligan v. Daly, 80 A. 994, 79 N.J.Eq. 36.

94. N.Y.—Matter of Peck, 80 N.Y.S. 76, 79 App.Div. 296, affirmed 69 N.E. 1129, 177 N.Y. 538—In re Kahn's Estate, 251 N.Y.S. 23, 140 Misc. 533.

95. D.C.—Bramhall v. Brosnan, 5 F.2d 270, 55 App.D.C. 309.
"In administering estates of decedents, operation of a mercantile business should not be made alluring to the administrator by the allowance of salaries or exorbitant commissions."—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.

96. Conn.—Matthews v. Sheehan, 57 A. 694, 76 Conn. 654, 100 Am.S.R. 1017.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
24 C.J. p 57 note 56.

97. Conn.—Matthews v. Sheehan, 57 A. 694, 76 Conn. 654, 100 Am.S.R. 1017.

98. N.Y.—In re Leserman's Estate, 260 N.Y.S. 188, 145 Misc. 387.
Or.—In re Steeby's Estate, 20 P.2d 1080, 1083, 143 Or. 501, citing **Corpus Juris**—Shea v. Graves, 19 P. 2d 406, 410, 142 Or. 503, citing **Corpus Juris.**
Pa.—See RKO Radio Pictures, Inc. v. Meeker, 18 Lehigh Co.L.J. 358, 10 Som.Leg.J. 1.
Wash.—In re Elvigen's Estate, 71 P. 2d 672, 675, 191 Wash. 614, citing **Corpus Juris.**
24 C.J. p 57 note 58.

Management of corporate realty

Executors of estate holding all stock of corporation properly arranged for management of its realty and collection of rent due it, but executors' aggregate expenditure therefor, including executrix' compensation for such services, should not exceed statutory percentage of rents collected.—In re Schlesinger's Estate, 256 N.Y.S. 381, 143 Misc. 275.

Disbursement held reasonable

N.Y.—In re Schlesinger's Estate, supra.

Acts of employee

(1) Intestate's son, managing his store after intestate's death in accordance with intestate's parol wish and agreement of heirs, was merely agent of intestate's administratrix, who was bound by his acts within apparent scope of his authority.—In re Ennis' Estate, 165 P. 119, 96 Wash. 352.

(2) Administrator's non-negligent appointment of intestate's son as manager of intestate's tailoring establishment did not make administrator liable for son's mismanagement.—Dallas Tailors' Supply Co. v. Goen, Tex.Civ.App., 25 S.W.2d 224, error refused.

Preferring creditors in conduct of business

Administratrix continuing business of intestate after his death could not conduct it so as to prefer any of intestate's general creditors.—Horton v. Eagle Indemnity Ins. Co., 171 A. 322, 86 N.H. 472.

99. Idaho.—In re Fleshman's Estate, 5 P.2d 727, 728, 51 Idaho 312, citing **Corpus Juris.**
24 C.J. p 57 note 59.

"Current year" during which, by statute, executor may continue testator's business refers to calendar year and not to arbitrary business year.—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248.

1. Tex.—Scott v. Taylor, Civ.App., 294 S.W. 227.

2. Or.—In re Steeby's Estate, 20 P. 2d 1080, 1083, 143 Or. 501, citing

existing contracts of decedent,[3] or when necessary for the preservation of the estate,[4] and the law does not contemplate that he should sacrifice the interests of the estate in order to bring it to a close.[5] An administrator is not chargeable with a loss incurred during his operation of decedent's business where a greater loss would have resulted from closing it.[6] In agricultural states a temporary management of a plantation by the personal representative of the deceased owner, under judicial supervision for the benefit of all concerned, is sometimes permitted,[7] in order that crops commenced by decedent may be completed for the benefit of the estate;[8] and a personal representative who finds a commodity on hand may lawfully, acting in good faith, put it in a condition in which it is usual to sell it, or in which under the circumstances it can best be sold.[9]

The general rule is also subject to some limitations where the executor is the residuary legatee[10] or the business has been specifically bequeathed to him;[11] and the consent of all persons interested may authorize the personal representative to carry on the business in good faith so as fairly to be allowed for all assets so consumed,[12] but the burden lies on the personal representative to show such consent on a full understanding of all the circumstances.[13]

A statute authorizing any person interested in an estate to obtain an order of the court controlling the action of the personal representative carrying on a business belonging to the estate imposes a duty on such person to apply for an order.[14]

Unlawful business. An administrator carrying on an unlawful business of decedent is not chargeable with fees received therefrom.[15]

Authority from court. It has been held that the court of probate jurisdiction has no inherent authority to order the personal representative to continue decedent's business.[16] However, it is sometimes provided by statute that the probate court may authorize the personal representative, when good cause therefor is shown, to carry on such business for a limited time,[17] and statutes giving the court com-

Corpus Juris—Shea v. Graves, 19 P.2d 406, 410, 142 Or. 503, citing **Corpus Juris.**
Tex.—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, error refused.
24 C.J. p 57 note 60.

2. Or.—In re Steeby's Estate, 20 P. 2d 1080, 1083, 143 Or. 501, citing **Corpus Juris**—Shea v. Graves, 19 P.2d 406, 410, 142 Or. 503, citing **Corpus Juris.**
24 C.J. p 57 note 61.
Duty to complete contracts of decedent see supra § 189.

4. Cal.—In re King's Estate, 121 P. 2d 716.
Liability for expenses incurred
(1) Although an administrator is required by statute to obtain specific authority to carry on the business of a decedent, if the administrator acts in good faith and as a cautious and prudent man would act under similar circumstances, he will not be held personally liable for expenses incurred by management undertaken without prior specific authority, although his operations prove to be a detriment to the estate.—In re Maddalena's Estate, 108 P.2d 17, 42 Cal.App.2d 12.
(2) Liability for debts when continuance of business unauthorized generally see infra § 196 b.

5. Or.—In re Bethels' Estate, 226 P. 427, 121 Or. 178.

6. Mass.—Gladstone v. Bank of Commerce & Trust Co., 183 N.E. 262, 281 Mass. 177.

7. Mont.—In re Jennings' Estate, 241 P. 648, 651, 74 Mont. 449, citing **Corpus Juris.**
S.C.—Glenn v. Worthy, 168 S.E. 705, 169 S.C. 263.
24 C.J. p 57 note 62.
Limitation on power of court
The ordinary has no authority to authorize an administrator to incur an indebtedness on account of the estate which he represents for the operation of a farm belonging to the estate beyond the calendar year in which the administrator qualified; and the statute giving an administrator authority to make an advance to a minor heir out of the assets of the estate could not be relied on as authorizing the incurring of such an indebtedness.—Harris v. O'Quinn, Ga. App., 17 S.E.2d 758.
Advancements to produce crop held properly allowed
Ga.—Evans v. Carroll, 144 S.E. 912, 167 Ga. 68.

8. Mont.—In re Jennings' Estate, 241 P. 148, 151, 74 Mont. 449, citing **Corpus Juris.**
24 C.J. p 57 note 63.

9. Cal.—In re Fernandez, 51 P. 351, 119 Cal. 579.
24 C.J. p 58 note 64.

10. N.Y.—In re Mullon, 39 N.E. 321, 145 N.Y. 98, affirming 26 N.Y.S. 683, 74 Hun 358.
Wash.—In re Ennis, 165 P. 119, 96 Wash. 352.
24 C.J. p 58 note 65.

11. N.Y.—Matter of Van Houten, 46 N.Y.S. 190, 18 App.Div. 301.
24 C.J. p 58 note 66.

12. Fla.—Conant v. Blount, 192 So. 481, 141 Fla. 27.
Mo.—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.
N.Y.—Philco Radio & Television Corporation of New York v. Damsky, 294 N.Y.S. 776, 250 App.Div. 485.
Or.—In re Steeby's Estate, 20 P.2d 1080, 143 Or. 501—Shafford v. Reed, 247 P. 324, 119 Or. 90.
24 C.J. p 58 note 67.
Consent or estoppel
U.S.—Augustus v. New Amsterdam Casualty Co. of Baltimore, C.C.A. Ill., 100 F.2d 581, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.
Consent may be implied from conduct
Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

13. N.Y.—In re Kinreich's Estate, 244 N.Y.S. 357, 137 Misc. 735.
Evidence insufficient to show consent
Vt.—Skelley v. Skelley, 92 A. 234, 88 Vt. 254.
Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

14. Tex.—Scott v. Taylor, Civ.App., 294 S.W. 227.

15. Mass.—Gouy Shong v. Chew Shee, 150 N.E. 225, 254 Mass. 366.

16. S.C.—Glenn v. Worthy, 168 S. E. 705, 169 S.C. 263.
24 C.J. p 58 note 68.

17. Conn.—State ex rel. Raskin v. Schachat, 180 A. 502, 120 Conn. 337—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602.
Mass.—Mooers v. Greene, 174 N.E. 340, 274 Mass. 243.
24 C.J. p 58 note 69.

plete authority in the settlement of estates have been held to confer jurisdiction to direct the continuance of the business of decedent pending administration proceedings.[18]

As incidental to authority from the court, a personal representative may employ the ordinary means which are necessary and proper to effectuate the express power,[19] but he has no authority to keep up the family establishment and support the family at the expense of the estate.[20] An order made on the consent of all the heirs authorizing the administrator to sell a stock of goods at private sale does not authorize the continuance of decedent's business to the extent of replenishing the stock of goods on hand.[21]

§ 195. —— Testamentary Directions

When authorized by the will the executor may carry on the decedent's business and if he acts in good faith and with ordinary prudence he is not accountable for losses.

Where authority to carry on decedent's business is plainly[22] conferred on an executor by the will, he may lawfully exercise the power so conferred,[23] but

Purpose of statute is largely to add to the assets of the estate, directly or indirectly, through operation of business, and to permit business of a decedent to be continued under direction of the court, for such benefits as might accrue to all concerned, thereby relieving administrator of personal liability therefor, but not to give to those advancing credit on the business a preference over other creditors who may have contributed to assets in hands of administrator.—In re Allen's Estate, 108 P.2d 973, 42 Cal.App.2d 346.

Jurisdiction

District court has jurisdiction of administratrix' application for authority to continue business under lease to deceased, and lessor procuring denial of administratrix' application for authority to continue business cannot deny court's jurisdiction or assert that order was discretionary.—In re Grooms' Estate, 216 N. W. 78, 204 Iowa 746.

Dispensing with equity proceeding by beneficiary

Statute affords plain, complete, and adequate means by which curator appointed by county judge may apply to circuit court for authority to conduct going business of deceased, so that resort to equity by beneficiary of estate was unnecessary.—Anderson v. Spencer, 149 So. 658, 111 Fla. 760.

Notice of application

(1) Order granting executor's application to continue testatrix' business was unauthorized, where manner in which notice of application should be given to persons interested in estate was not ordered by court.—In re Ward's Estate, 15 P.2d 901, 127 Cal.App. 347.

(2) Order directing administratrix to continue decedent's private banking business was not void because made without notice to creditors.—In re Harsh's Estate, 218 N.W. 537, 207 Iowa 84.

Determination of validity of order

Validity of order directing administratrix to continue decedent's business must be determined in view of business as it appeared from apparently complete records.—In re Harsh's Estate, 218 N.W. 537, 207 Iowa 84.

Limitation as to scope of business

Order directing administratrix to continue decedent's private banking business was not void because not limiting continuance to winding up of decedent's affairs.—In re Harsh's Estate, 218 N.W. 537, 207 Iowa 84.

Order made during pendency of equity suit for accounting

Order continuing operation by executors of deceased's business during pendency of equity cause for accounting and receivership was not error, where executors were making monthly reports to judge, gave bond, and successfully handled business.—Wingate v. Mach, 157 So. 421, 117 Fla. 104.

Order contrary to testator's intention

Where to follow terms of will by not operating farm beyond certain period would result in permanent impairment and partial destruction of estate, court could authorize executor or trustee to operate farm for another year.—Low v. First Nat. Bank & Trust Co. of Vicksburg, 138 So. 586, 162 Miss. 53, 80 A.L.R. 112.

Liability of executors for loss

Where will gave executors power to sell land, but authorized demise thereof until sale, executors could not be surcharged with the apparent loss resulting from farming operation where they acted reasonably, in good faith, according to best judgment, and under court's authorization in operating farm, while endeavoring to make sale at satisfactory price.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

18. Wis.—Laabs v. City of Milwaukee, 294 N.W. 1, 236 Wis. 192, rehearing denied 294 N.W. 814, 236 Wis. 192.
Wyo.—In re Austin's Estate, 261 P. 130, 37 Wyo. 313.

19. Ala.—Hinson v. Williamson, 74 Ala. 180.
24 C.J. p 58 note 70.

Claim under void order

Order allowing executrix to continue testator's business and allowing her one hundred fifty dollars per month as for bookkeeping is void, where statute authorizing such expenditures was not effective until after issuance of order, and executrix' claim was properly disallowed, where, during period executrix conducted business, allowance amounted to one thousand one hundred seventy-five dollars, and profits were only fifty-seven dollars, executrix did not, in fact, act as bookkeeper, and there were substantial claims against estate on which nothing had been paid.—In re Larzelere's Estate, 41 P.2d 362, 4 Cal.App.2d 488.

20. Ala.—Hinson v. Williamson, 74 Ala. 180.

21. Wash.—In re Ennis, 165 P. 119, 96 Wash. 352.

22. N.Y.—In re Gorra's Will, 236 N. Y.S. 709, 135 Misc. 93—Gould v. Gould, 213 N.Y.S. 286, 126 Misc. 54.
24 C.J. p 58 note 73, p 59 note 74.

Will held not to grant authority

Ga.—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248.
24 C.J. p 58 note 73 [a], [b].

23. U.S.—Holt v. Daniel Sons & Palmer Co., C.C.A.Ga., 8 F.2d 700, certiorari denied 46 S.Ct. 208, 270 U.S. 642, 70 L.Ed. 776.
Cal.—In re King's Estate, 121 P.2d 716—In re Guglielmi's Estate, 31 P.2d 1078, 138 Cal.App. 80—In re Ward's Estate, 15 P.2d 901, 904, 127 Cal.App. 347, citing **Corpus Juris.**
Conn.—State ex rel. Raskin v. Schachat, 180 A. 502, 120 Conn. 337—Hewitt v. Beattie, 138 A. 795, 799, 106 Conn. 602, citing **Corpus Juris.**
Fla.—Conant v. Blount, 192 So. 481, 141 Fla. 27.
Ga.—Clark v. Tennessee Chemical Co., 145 S.E. 73, 75, 167 Ga. 248, citing **Corpus Juris.**
Idaho.—In re Fleshman's Estate, 5 P.2d 727, 728, 51 Idaho 312, citing **Corpus Juris.**
N.Y.—In re Maas' Will, 12 N.Y.S.2d 159, 257 App.Div. 134—Philco Radio & Television Corporation of New York v. Damsky, 294 N.Y.S.

such authority is subject to strict construction,[24] and the executor will be limited to the precise terms of the testamentary authorization,[25] the burden being on the one exercising the power to demonstrate that his acts are within the terms of the will.[26] An executor who has carried on a testator's business in obedience to the direction of the will, and has acted in good faith and with ordinary prudence in conducting the same, is not accountable for losses,[27] but if losses are sustained through his fault, negligence, or imprudence, he is liable therefor.[28]

Where the executor is empowered by the terms of the will to carry on the testator's business, the business is to be conducted in the usual manner unless otherwise directed or limited,[29] and in the absence of directions in the will the power is limited to using funds invested in the business at the time of the testator's death.[30] Creditors not consenting

776, 250 App.Div. 485—In re Doelger's Estate, 299 N.Y.S. 565, 164 Misc. 590, reversed on other grounds 4 N.Y.S.2d 334, 254 App. Div. 178, affirmed In re Doelger's Will, 18 N.E.2d 42, 279 N.Y. 646—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.

Pa.—In re Sulzer's Estate, 185 A. 793, 323 Pa. 1.

Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

24 C.J. p 59 note 75.

Direction to incorporate business

Where will directed executors to incorporate testator's business and distribute the stock to beneficiaries in specified manner, the death of a beneficiary before the incorporation of the business did not preclude executors from proceeding with the corporation. However, under a testamentary provision that it was testator's desire that his business be carried on, "but in such way if possible as will not interfere with the immediate settlement of my estate," directing executors to incorporate the business, and authorizing them in case it should become impracticable for any reason to form such corporation to make any other arrangement they may think best, the executors could not for a period of two years delay the incorporation of the business in the expectation that the federal Excess Profits Tax Law would be repealed or changed, and the tax thereby avoided, but exhausted the powers conferred on them by continuing the business during such period as a partnership, since such delay interfered with the "immediate settlement" of the estate, in violation of the will.—In re Scott's Estate, 124 A. 270, 280 Pa. 9.

24. N.Y.—In re Davison's Will, 17 N.Y.S.2d 790, 173 Misc. 323.

Particular wills construed

(1) To authorize executors to dispose of stock in corporations before death of life tenant specified in will as period for liquidating business and to require them to sell at the most favorable terms obtainable if they deemed such course for best interests of estate, regardless of whether shares were demonstrated to be wasting asset, but not to compel them to give testator's son preferential right to purchase.—In re Stulman's Will, 263 N.Y.S. 197, 146 Misc. 861.

(2) To authorize sale for part cash and part credit secured by mortgage.—Southwick v. Jones, 60 P.2d 774, 177 Okl. 409.

(3) Not to authorize interference with the officers and directors of the corporations in which testator was a majority stockholder, or the entering on the conduct of any other business than that owned and conducted by testator individually at the time of his death.—In re Kohler, 132 N.E. 114, 231 N.Y. 353, reversing In re Kohler's Will, 183 N. Y.S. 550, 193 App.Div. 8.

(4) Not to bind executors by direction that a named person be retained and employed at a stated salary.—Hughes v. Hiscox, 181 N.Y.S. 395, 110 Misc. 141.

(5) Not to intend that farm property should be operated by executor or trustee beyond year following testator's death.—Low v. First Nat. Bank & Trust Co. of Vicksburg, 138 So. 586, 162 Miss. 53, 80 A.L.R. 112.

(6) Not to require accumulated and undivided profits to remain in the business.—Dean v. Dean, 11 N. W. 239, 54 Wis. 23.

25. N.Y.—In re Davison's Will, 17 N.Y.S.2d 790, 173 Misc. 323.

24 C.J. p 59 note 75 [c].

26. N.Y.—In re Stulman's Will, 263 N.Y.S. 197, 146 Misc. 861.

27. U.S.—Holt v. Daniel Sons & Palmer Co., C.C.A.Ga., 8 F.2d 700, certiorari denied 46 S.Ct. 208, 270 U.S. 642, 70 L.Ed. 776.

Ark.—Clifford v. McAlester Fuel Co., 240 S.W. 722, 153 Ark. 276.

Cal.—In re Guglielmi's Estate, 31 P. 2d 1078, 138 Cal.App. 80—In re Ward's Estate, 15 P.2d 901, 127 Cal.App. 347.

Fla.—Conant v. Blount, 192 So. 481, 141 Fla. 27—First Trust & Savings Bank v. Henderson, 136 So. 370, 101 Fla. 1437.

Ga.—Central Hanover Bank & Trust Co. v. Wheeler, 173 S.E. 431, 178 Ga. 498—Clark v. Tennessee Chemical Co., 145 S.E. 73, 75, 167 Ga. 248, citing **Corpus Juris.**

N.Y.—In re Farrell's Estate, 272 N. Y.S. 852, 152 Misc. 118—In re Robbins' Will, 237 N.Y.S. 409, 135 Misc. 220—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.

Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

24 C.J. p 59 note 77.

Errors of judgment

An executrix, who under the will was authorized to continue testator's business as long as it was deemed for the best interests of the estate, was accountable only for good faith in the exercise of the discretion vested in her, and was not responsible for errors of judgment.—In re Friedlander, 178 N.Y.S. 50, 189 App. Div. 90.

28. N.Y.—In re Doelger's Estate, 299 N.Y.S. 565, 164 Misc. 590, reversed on other grounds 4 N.Y.S. 2d 334, 254 App.Div. 178, affirmed In re Doelger's Will, 18 N.E.2d 42, 279 N.Y. 646—In re Stulman's Will, 263 N.Y.S. 197, 146 Misc. 861.

Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

29. N.Y.—In re Gorra's Will, 236 N. Y.S. 709, 135 Misc. 93.

Pledge of stock to carry on business

Tenn.—Brown v. Aydlett, 12 Tenn. App. 568.

30. N.Y.—In re Kohler's Will, 183 N.Y.S. 550, 193 App.Div. 8, reversed on other grounds 132 N.E. 114, 231 N.Y. 353.

Tenn.—Brown v. Aydlett, 12 Tenn. App. 568.

Tex.—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, 124, citing **Corpus Juris,** error dismissed—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, 560, quoting **Corpus Juris,** error refused.

24 C.J. p 61 note 85.

Liability of general assets of estate for debts contracted in carrying on business see infra § 196.

Accounts receivable

(1) Fund which executor may employ in continuing testator's business as authorized by will embraces testator's general property employed in business, including accounts receivable.—In re Gorra's Will, 236 N. Y.S. 709, 135 Misc. 93.

(2) Will directing executors to transfer to corporation all assets of decedent's cash grocery business was held not to include, in "assets of

to the continuation of the business are not bound by testamentary provisions for its continuation;[31] such testamentary provisions will not be allowed to interfere with the rights of existing creditors to have the assets of the estate applied to their debts.[32]

§ 196. Liability for Debts

a. In general
b. Where continuance of business unauthorized

a. In General

Generally the executor or administrator authorized to carry on the business of the decedent is personally liable for all debts incurred therein unless the parties agree to look to the funds of the estate exclusively; but assets of the estate invested in the business at the time of the death of the decedent may be made liable therefor, and in a proper case, the creditor may resort to such assets. An executor or administrator is not personally liable on contracts made while the business was operated by a legatee for his own benefit.

Where the personal representative is authorized to carry on the business of decedent, the circumstances of the particular case may be such as to make it proper to charge the debts incurred in the conduct of the business against the estate and not against the representative individually,[33] but the general rule is that the representative is personally liable for all debts contracted in rightfully carrying on the business,[34] unless he exacts an agreement from the person with whom he deals to look to the funds of the estate exclusively,[35] although, as shown infra § 238, he has a right to be indemnified out of the estate.

It has been held, however, that the creditor may resort to the estate in a proper proceeding for payment of his claim.[36] Thus, in a proper case the creditor may be subrogated to the representative's right of indemnity,[37] and it has been held that he may maintain a suit in equity to charge the estate

business," debits against himself and his brother, employed in such business, for merchandise.—In re Bruns' Estate, 258 N.Y.S. 57, 143 Misc. 696.

31. Wis.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.

32. N.Y.—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.

33. N.C.—C. L. Hardy & Co. v. Turnage, 168 S.E. 823, 204 N.C. 538.
Pa.—In re Nagle's Estate, 156 A. 309, 305 Pa. 36.
24 C.J. p 59 note 78.

Acquiescence of creditors

Administratrix, who continued decedent's nursery business with acquiescence of creditors for three years under court order authorizing nursery contracts to be carried out, was not liable to creditors for alleged waste, where such business operations resulted in losses.—Hicks v. Purvis, 182 S.E. 151, 208 N.C. 657.

Carrying out contract of deceased

(1) Unless contracting individually, administrators of employer who, after his death, carry out employment contract with clerk, are not individually liable for salary.—Hall v. Durham Loan & Trust Co., 158 S.E. 388, 200 N.C. 734.

(2) Performance of decedent's obligations generally see supra § 189.

Claim as expenses of administration

Claims for goods sold on credit to decedent's business while operated by the representative under order of court were not "expenses of administration," either under statute authorizing the making of an order authorizing an administrator to continue the business of decedent, or under statute giving the order in which debts, expenses, and charges against an estate are to be paid.—In re Allen's Estate, 108 P.2d 973, 42 Cal.App.2d 346.

Equitable considerations

Obligations incurred by executors in carrying on testator's business are proper charges against estate only if equitably payable out of assets, and where executors were not guilty of misconduct or gross negligence in carrying on testator's business, obligations were payable from assets.—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602.

Implied power to incur debts

Executor empowered to carry on farming operations has implied limited power to incur debts on credit of estate for needful supplies.—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248.

Lien or preference

Although the effect of the statute authorizing the making of an order to permit decedent's personal representative to continue his business is to enlarge the powers of the representative of the estate and to make claims arising under such circumstances a charge against the estate, rather than one against the administrator, no lien or preference is created thereby.—In re Allen's Estate, 108 P.2d 973, 42 Cal.App.2d 346.

To render judgment against representative payable from assets of estate, creditor must show that obligation on which judgment was based arose out of transactions of executrix in representative capacity, in carrying on decedent's business.—In re Bucks' Estate, 170 A. 373, 112 Pa.Super. 193.

34. Ark.—Beneux v. Brown Shoe Co., 87 S.W.2d 28, 191 Ark. 579.
Conn.—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602.
Fla.—State Bank of Orlando & Trust Co. v. Cummer Lumber Co., 141 So. 602, 105 Fla. 522.
N.Y.—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.
24 C.J. p 60 note 79.

Ordinarily enforceable only against representative individually

N.Y.—In re Gorra's Will, supra.

Knowledge of authority and insolvency of estate

Person selling tea to executors carrying on business of estate under authority of probate court was not estopped to assert claim for price of tea against executors by knowledge that business was being carried on by executors under decree of probate court, of the unsound financial condition of business, or the insolvency of estate owning business, in the absence of evidence that executors were induced to continue to operate business or purchase tea by fraud, misrepresentation, or other unfair conduct of seller, delivery of tea sold on personal credit of executors for use in operation of the business of the estate being sufficient consideration for executors' implied promise to pay.—Anglo-American Direct Tea Trading Co. v. Seward, 2 N.E.2d 448, 294 Mass. 349.

35. Ill.—Miller v. Didshiem, 95 Ill. App. 321.

36. Mass.—Anglo-American Direct Tea Trading Co. v. Seward, 2 N.E.2d 448, 294 Mass. 349.

37. Mo.—M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co. 72 Mo.App. 514.
24 C.J. p 60 note 82.

where the executor is insolvent.[38]

Where executors under the will of a testator, who had been conducting a mercantile and manufacturing business on borrowed capital, not being authorized by the will to carry on the business, but carrying it on by agreement of all parties interested for the purpose of preserving the business as a going concern, in good faith borrowed money from the mother of one of the executors to use in the business, the son under authority from the other executors signing the note in the name under which the testator conducted the business by himself "as executor," and the money was used in discharging debts of the business and later the executors sold the business to a purchaser who agreed to assume and pay all debts incurred by the executors in carrying on the business, it was held that the lender could maintain a suit in equity to recover the amount of the loan from the purchaser.[39]

What assets liable. At common law, where the representative is authorized to carry on the business, only such assets of the estate as are invested in the business at the time of decedent's death can be considered as trade assets, and in the absence of some clear authority in the will the other property of the estate cannot be made liable for debts contracted by the representative in carrying on the business.[40] Nevertheless, where adequate authority is given by the will, a representative may bind the general assets by a purchase of goods on credit for the business.[41] Further, by virtue of statutory provisions authorizing the personal representative to carry on a business belonging to the estate, debts incurred in the conduct of the business may become a charge on the general assets of the estate,[42] but under such statutes the general assets are not subject to a charge incurred in the operation of the business of a corporation whose stock was owned solely by decedent.[43]

Where heirs and general creditors consent to the continuance of the business, the estoppel resulting therefrom relates only to the liability of trade assets, and there is no estoppel to deny the liability of general assets for debts incurred in carrying on such business.[44] Bad debts and losses, and the expense of replacing old articles with new, are properly charged against the profits and not against the capital.[45]

Where business carried on by legatee. Where testator bequeathes his business to a third person, who carries it on for his own benefit, the executor is not personally liable on contracts made in the course of the business, in the absence of any acts on his part raising an estoppel.[46]

b. Where Continuance of Business Unauthorized

Where the executor or administrator acts without authority in employing the assets of the estate in business, he is personally liable for all debts incurred in the course of the business, and the creditor cannot look to the estate.

Where an executor or administrator acts without authority in employing the assets of the estate in business, all debts contracted in the course of such business are the personal debts of the representative, and the creditor cannot hold the estate,[47] nor,

38. N.Y.—In re Damsky's Estate, 23 N.Y.S.2d 897, 175 Misc. 460—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.
24 C.J. p 60 note 83.

39. Mass.—Howe v. Richardson, 71 N.E. 543, 186 Mass. 259.

40. N.Y.—In re Kohler's Will, 183 N.Y.S. 550, 193 App.Div. 8, reversed on other grounds 132 N.E. 114, 231 N.Y. 353.
Tex.—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, 124, error dismissed, citing Corpus Juris—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, 560, error refused, quoting Corpus Juris.
24 C.J. p 61 note 85.

Separation of devise from business trust

Where testator devised farm to daughter and created business trust to carry on quarry business, under terms of will devise was definitely separated from business trust, and farm could not be made subject to claims arising from operation of the quarry business under the will, and devisee of farm or successors were not estopped from asserting that farm was not subject to business debts arising after testator's death from operation of business trust, by reason of fact that devisee knew of continuance of quarry business and expected profits therefrom, since devisee said or did nothing to induce executors to proceed with business, or by reason of fact that taxes on farm were paid by executors, since such taxes could be recovered from devisee's executor.—Hewitt v. Sanborn, 130 A. 472, 103 Conn. 352.

41. N.Y.—Philco Radio & Television Corporation of New York v. Damsky, 294 N.Y.S. 776, 250 App.Div. 485.
24 C.J. p 61 note 86.

"Full power" to conduct business

Where executor is given "full power" to conduct the business in which testator was engaged, he may carry on all of testator's business interests, and in so doing is not limited to capital invested in the business.—Furst v. Armstrong, 51 A. 996, 202 Pa. 348, 90 Am.S.R. 653—24 C.J. p 61 note 87.

42. Tex.—Hake v. Dilworth, Civ. App., 96 S.W.2d 121, error dismissed.

43. Only corporate assets chargeable
Tex.—Hake v. Dilworth, supra.

44. Wash.—In re Ennis, 165 P. 119, 96 Wash. 352.

45. N.Y.—In re Jones, 37 Hun 430, affirmed 9 N.E. 493, 103 N.Y. 621, 57 Am.R. 775.

46. Mass.—American Tube Works v. Tucker, 70 N.E. 59, 185 Mass. 236.
Pa.—Fleming v. Fleming, 54 A. 473, 204 Pa. 648.

47. Ala.—Johnson Dry Goods Co. v. Drake, 121 So. 402, 219 Ala. 140.
Ga.—Tennessee Chemical Co. v. Jones, 154 S.E. 791, 171 Ga. 150—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248.
Ill.—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.

as shown infra § 238, can the representative look to the estate for reimbursement.

Where the business has been carried on without any authorization of law, heirs who joined therein, although acting in the best of faith, will be charged with knowledge of the want of capacity of the administrator, and cannot thereafter assert their claims for contributions of money or services, either against the general assets of the estate, in preference to the claims of original creditors, or against the assets thus embarked in the business, in the absence of a showing that the business was conducted at a profit and that the services rendered and the money advanced inured to the benefit of that part of the estate so embarked in the business.[48] However, where an administrator continues the business in good faith, at a profit, a subsequent administrator de bonis non will not be permitted to deny the validity of claims presented by sons and heirs of decedent on account of services rendered and money advanced in connection with the business, and which resulted in increasing that part of the estate.[49]

§ 197. Partnership

The personal representative of a deceased partner has no right to continue in the partnership business unless authorized to do so by will or partnership contract.

Ordinarily, as shown in the C.J.S. title Partnership § 337, also 47 C.J. p 1111 note 66, the death of a partner terminates the partnership, and the personal representative of decedent has, as a rule, no more right to continue in a business in which decedent was a partner than he has to continue a business of which decedent was the sole proprietor.[50] The executor of deceased copartner may, however, continue in the business where the will directs him to do so;[51] or, as shown in the C.J.S. title Partnership § 294, also 47 C.J. p 1069 note 94–p 1070 note 16, the liability of deceased copartner, as well as his interest in the profits of the concern, may by the copartnership contract be continued beyond his death. The effect of such a contract must naturally be to bind the estate of deceased partner in the hands of his executor or administrator without compelling such representative to become a partner personally.[52] Where there are no valid provisions by will or contract for further continuing a partnership, either the surviving partner or partners, or else, if necessary the personal representative of decedent, should see that the business is duly wound up and adjusted.[53] A settlement of partnership affairs made with the surviving partners by the personal representative of deceased partner is binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the representative presumably liable.[54]

La.—Succession of Huxen, 88 So. 687, 149 La. 61.
Mich.—Marshall Field & Co. v. Himelstein, 235 N.W. 181, 253 Mich. 355.
N.Y.—Helme v. Buckelew, 181 N.Y.S. 104, 191 App.Div. 59, reversed on other grounds 128 N.E. 216, 229 N.Y. 363—In re Seigrist's Estate, 262 N.Y.S. 629, 146 Misc. 236—In re Glass' Estate, 235 N.Y.S. 299, 134 Misc. 291.
Or.—Shea v. Graves, 19 P.2d 406, 411, 142 Or. 503, citing **Corpus Juris**—Multorpor Co. v. Reed, 260 P. 203, 122 Or. 605, 55 A.L.R. 504—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 228, 104 Or. 323, quoting **Corpus Juris.**
24 C.J. p 61 note 90.

Chattel mortgage, given by administrators as security for price of merchandise and groceries, sold to them while conducting decedent's business was not enforceable against estate.—In re Bramer's Estate, 273 N.Y.S. 790, 151 Misc. 786.

48. Ohio.—Rembold v. White, 28 Ohio Cir.Ct. 427.

49. Ohio.—Rembold v. White, supra.
Administrators de bonis non see infra §§ 1016–1030.

50. Colo.—Goodknight v. Harper, 225 P. 215, 75 Colo. 141.
24 C.J. p 62 note 95.

51. Pa.—Laughlin v. Lorenz, 48 Pa. 275, 86 Am.D. 592.
24 C.J. p 62 note 96.

52. La.—Hart v. Anker, 38 La.Ann. 341.
Pa.—McArdle v. West Philadelphia Title & Trust Co., 7 Pa.Super. 328, 42 Wkly.N.C. 238.
24 C.J. p 62 notes 97, 98.

53. Colo.—Goodknight v. Harper, 225 P. 215, 75 Colo. 141.
24 C.J. p 62 note 99.

Lien on partnership assets
Administrator of deceased partner in interest of widow was entitled to have partner's lien impressed on partnership assets for widow's protection.—Fleming v. Fleming, 230 N.W. 359, 211 Iowa 1251.

Jurisdiction of court
(1) Surrogate's court on presentation of claim by surviving partner against estate of deceased partner had jurisdiction to order liquidation of partnership assets.—Raymond v. Davis' Estate, 161 N.E. 421, 248 N.Y. 67, reversing 221 N.Y.S. 675, 220 App. Div. 480, motion denied 161 N.E. 189, 247 N.Y. 577.

(2) Fact that partnership assets were appraised solely by representative of surviving partner and sold to another firm of which surviving partner was member did not prevent surrogate from directing liquidation, on surviving partner's claim against estate of deceased partner.—In re Winter's Estate, 248 N.Y.S. 104, 231 App.Div. 519, reversing 242 N.Y.S. 490, 136 Misc. 69.

Statutory provision for accounting
The purpose of the statute relating to accounting by a surviving partner with executor or administrator of deceased partner in probate proceeding was to secure an orderly settlement of partnership affairs with respect to insuring an accounting with all the heirs entitled thereto and with respect to the rights of the creditors of the estate. The statute has no application after a final decree of distribution in the estate of deceased partner, when the remedy is by an appropriate proceeding in equity.—State ex rel. Reirdon v. Marshall County Court, 81 P.2d 488, 183 Okl. 274.

54. N.Y.—Sage v. Woodin, 66 N.Y. 578.
24 C.J. p 62 note 1.

The rules stated supra §§ 193–196, with reference to the result of the personal representative engaging in business or continuing decedent's business, apply where the personal representative has participated in the business of a partnership of which decedent was a member during his lifetime, whether he has been duly empowered to do so,[55] or has done so in violation of the general rule forbidding an executor or administrator to engage in business with the funds of the estate.[56] Where the executor of deceased partner in a banking business allowed testator's capital to remain in the business, and permitted credits to be entered in his pass book as executor for a share of the profits of the business, this was held not to render him personally liable as a partner.[57]

C. CONTRACTS IN GENERAL

§ 198. In General

Subject to certain exceptions, as a general rule contracts of an executor or administrator, although made for the benefit of the estate, are, if made on an independent consideration moving between the promisee and the representative as promisor, the personal contracts of the representative and do not bind the estate.

It is well settled as a general rule that the contracts of an executor or administrator, although made in the interest and for the benefit of the estate he represents, are, if made on a new and independent consideration moving between the promisee and the representative as promisor, the personal contracts of the executor or administrator and do not bind the estate.[58] Hence, the executor or admin-

55. Pa.—In re Mustin, 41 A. 618, 188 Pa. 544.
24 C.J. p 63 note 3.

56. Pa.—In re Maloney, 32 A. 958, 233 Pa. 614.
24 C.J. p 63 note 4.

57. Pa.—Tisch v. Rockafellow, 68 A. 805, 209 Pa. 419.

58. Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410—Dugand v. Magnus, 290 P. 309, 107 Cal.App. 243—Cremer v. Littlejohn, 268 P. 486, 92 Cal.App. 521—Southern Pac. Co. v. Swanson, 238 P. 736, 73 Cal. App. 229—Riedy v. Bidwell, 233 P. 995, 996, 70 Cal.App. 552, citing **Corpus Juris.**

Del.—Smolka v. James T. Chandler & Son, 20 A.2d 131, 134 A.L.R. 629, affirming James T. Chandler & Son v. Smolka, 13 A.2d 427, 1 Terry 415.

D.C.—Consolidated Realty Corporation v. Dunlop, 114 F.2d 16, 72 App. D.C. 273.

Fla.—Evans v. Tucker, 135 So. 305, 101 Fla. 688, 85 A.L.R. 170.

Ga.—Wright v. Morris, 177 S.E. 265, 50 Ga.App. 196.

Ill.—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211—Sheets v. Security First Mortg. Co., 12 N.E.2d 324, 293 Ill.App. 222—Marsh v. Steininger, 225 Ill.App. 114.

Iowa.—Yoss v. Sampson, 269 N.W. 22—Young Men's Christian Ass'n v. Caward, 239 N.W. 41, 213 Iowa 408.

Ky.—Walker v. Reichert, 72 S.W.2d 423, 254 Ky. 759.

Me.—Trundy v. Fournier, 166 A. 57, 132 Me. 486—Call v. Garland, 125 A. 225, 124 Me. 27.

Md.—Dingle v. Shaab, 20 A.2d 149.

Mass.—Wood v. Comins, 21 N.E.2d 977, 303 Mass. 367, 123 A.L.R. 464—Anglo-American Direct Tea Trading Co. v. Seward, 2 N.E.2d 448, 294 Mass. 349.

Minn.—Pittsburgh Coal Co. of Wisconsin v. Will, 296 N.W. 178—Glencoe Ditching Co. v. Martin, 181 N.W. 103, 148 Minn. 176.

Miss.—Daniel v. Hodge, 187 So. 544—Reedy v. Allen, 179 So. 569, 181 Miss. 471—Alexander v. Hancock, 171 So. 544, 177 Miss. 590.

N.H.—True W. Jones Brewing Co. v. Flaherty, 120 A. 432, 80 N.H. 571.

N.J.—In re Foster's Estate, 176 A. 156, 158, 13 N.J.Misc. 36, citing **Corpus Juris.**

N.Y.—In re Schummers' Will, 206 N. Y.S. 113, 210 App.Div. 296, affirmed In re Schummer's Estate, 154 N.E. 600, 243 N.Y. 548—Helme v. Buckelew, 181 N.Y.S. 104, 191 App.Div. 59, reversed on other grounds 128 N.E. 216, 229 N.Y. 363—Chisholm v. National City Bank of New York, 26 N.Y.S.2d 978, 176 Misc. 208—In re Amico's Estate, 24 N.Y.S.2d 772, 175 Misc. 656—In re Damsky's Estate, 23 N.Y.S.2d 897, 175 Misc. 460—Durand v. Lipman, 1 N.Y.S.2d 468, 165 Misc. 615—Hellawell v. Garrett Busch & Son, 285 N.Y.S. 717, 157 Misc. 805, modified on other grounds 290 N. Y.S. 143, 248 App.Div. 737—In re Daufkirch's Estate, 261 N.Y.S. 69, 145 Misc. 396—Goodridge v. McLaughlin, 24 N.Y.S.2d 743—Katz Bros. Paint Corporation v. Berkeley, 20 N.Y.S.2d 734—Williams v. Bratter, 188 N.Y.S. 380.

N.C.—Bessire & Co. v. Ward, 183 S. E. 534, 209 N.C. 266—Bessire & Co. v. Ward, 175 S.E. 208, 206 N. C. 858—Snipes v. Monds, 129 S. E. 413, 190 N.C. 190.

Ohio.—Wood v. Kline, App., 38 N.E. 2d 327.

Okl.—Vaughn v. Jones, 66 P.2d 504, 179 Okl. 545, citing **Corpus Juris.**

Or.—Shea v. Graves, 19 P.2d 406, 142 Or. 503.

Tex.—Kuteman v. Stone, Civ.App., 150 S.W.2d 102—Kemper v. Geo. W. Owens Lumber & Loan Co., Civ.App., 12 S.W.2d 659, error refused.

Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.

Wash.—Judy v. Guaranty Trust Co., 59 P.2d 745, 746, 186 Wash. 637, citing **Corpus Juris.**

W.Va.—Bank of Gauley v. Osenton, 114 S.E. 435, 92 W.Va. 1—Thurmond v. Guyan Valley Coal Co., 102 S.E. 221, 85 W.Va. 501.

24 C.J. p 63 notes 6, 7.

Performance of decedent's obligations see supra § 189.

Agreement not to enforce note

Executor's personal agreement that payment of note payable to estate should not be demanded for three years under certain circumstances was not binding on, or ratified by, estate.—Prall v. Woodbridge Ceramic Corporation, 153 A. 115, 9 N.J. Misc. 109.

Breach of contract

An estate cannot be held liable for breach of a contract entered into by the executor or administrator.

Ariz.—Stockmen's State Bank v. Merchants' & Stockgrowers' Bank, 197 P. 888, 22 Ariz. 354.

Cal.—Sterrett v. Barker, 51 P. 695, 119 Cal. 492.

Heirs of deceased stockholder are not personally liable on stockholders' agreement signed by administratrix.—Quinn v. Murphy, 25 S.W.2d 429, 161 Ark. 260.

Liability determined in accounting

One contracting with executor may rely on contract, but propriety of charge and liability of estate therefor must be determined in accounting of executor.—Philco Radio & Television Corporation of New York v.

istrator ordinarily cannot make any agreement enlarging the liability of the estate in his hands, or creating against it a debt, charge, or lien enforceable at the suit of the person with whom he contracts, since the immediate liability incurred is a personal one on his part.[59] If the contract was one which he had no right to make, all the more is it he who must respond for it and not the estate;[60] nor will the fact that his promise is expressed to be "as executor" or "as administrator" change his individual liability with regard to it or amount to more than surplusage.[61] An express stipulation in a contract made by an executor or administrator that he shall not be personally liable thereon will, however, be given effect,[62] and any contract which the personal representative makes relating to the estate will at all events inure to the advantage of its beneficiaries, subject to the due payment of creditors of the estate.[63] Persons dealing with executors or administrators are charged with knowledge of the limitations placed by law on their powers,[64] and their

Damsky, 294 N.Y.S. 776, 250 App. Div. 485—24 C.J. p 63 note 7 [a].

Contract held not to prejudice estate or heirs

Cal.—In re Barreiro's Estate, 13 P. 2d 1017, 125 Cal.App. 153.

After filing of suit to settle estate, chancellor directs administration, and it is not competent for personal representatives to enter into contracts by which jurisdiction and control of court over estate might be ousted or rights of other litigants or claimants changed or postponed without authorization from court.—Crum's Adm'r v. Crum, 92 S.W.2d 63, 263 Ky. 219.

Executor's pledge not to withdraw funds on deposit in bank until certain time was not binding on beneficiary of estate entitled thereto, nor was beneficiary's acceptance of executor's check covering such funds, and her issuance of receipt releasing him "from all liability by reason of delay or refusal to honor checks drawn against the deposit of such funds," a waiver of her right to question validity of pledge, so that tender of payment of mortgage debt to bank, made by check on such funds, was good, particularly where kept good until after time when pledge expired, which was prior to commencement of foreclosure suit.—Enterprise Bank v. Rice, 128 S.E. 872, 132 S.C. 158.

Agreement to pay taxes on estate

Agreement by deceased mortgagee's executors with purchaser of mortgaged realty to pay federal and state taxes on mortgagee's estate was binding as providing against contingency that realty might be taxed as personalty on theory that it was proceeds of original bond and mortgage, but purchaser was not entitled to recover damages for breach of agreement where provision limited purchaser to option of withholding payments on mortgage.—Bendan Holding Corporation v. Rodner, 273 N.Y.S. 481, 242 App.Div. 233.

Supersedeas bond

(1) A representative's execution of a supersedeas bond creates no privity between the sureties and the estate, and the sureties' payment of the judgment on affirmance gives them no right of action against the estate.—Maybury v. Grady, 67 Ala. 147.

(2) Other cases see 24 C.J. p 63 note 7 [c].

Surety bond

Ohio.—St. Paul Mercury Indemnity Co. of St. Paul v. Stockum, App., 36 N.E.2d 487.

59. U.S.—Soper v. Pointer, C.C.A. Ala., 67 F.2d 676.

Cal.—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341—Dugand v. Magnus, 290 P. 309, 107 Cal.App. 243.

D.C.—Consolidated Realty Corporation v. Dunlop, 114 F.2d 16, 72 App.D.C. 273.

Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211—In re Way's Estate, 242 Ill.App. 459.

La.—Succession of Williams, 7 La. App. 465.

N.J.—Trust Co. of New Jersey v. Bream, 167 A. 163, 11 N.J.Misc. 569.

N.Y.—In re Gorra's Will, 236 N.Y.S. 709, 135 Misc. 93.

24 C.J. p 64 note 8.

60. Ariz.—Tootle-Campbell Dry Goods Co. v. Knott, 29 P.2d 1056, 43 Ariz. 210.

Ark.—Ramey-Milburn Co. v. Ford, 226 S.W. 132, 146 Ark. 563.

Conn.—State ex rel. Raskin v. Schachat, 180 A. 502, 120 Conn. 337.

Iowa.—Ilten & Taege v. Pfister, 211 N.W. 407, 202 Iowa 833.

Or.—Shea v. Graves, 19 P.2d 406, 142 Or. 503.

24 C.J. p 64 note 9.

Agreement of prospective executrix of estate with defendant, whereby defendant was to collect certain moneys belonging to estate, and to hold it in trust, and to pay it over to whoever became legal representative of estate, thus making defendant voluntary trustee, irrespective of whether authorized, was a lawful contract between the parties as individuals.—England v. Winslow, 237 P. 542, 196 Cal. 260.

61. Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410—Henderson v. Riggles, 294 P. 31, 110 Cal.App. 320.

Fla.—State Bank of Orlando & Trust Co. v. Cummer Lumber Co., 141 So. 602, 105 Fla. 522.

Ill.—Marsh v. Steiniger, 225 Ill.App. 114.

Iowa.—Young Men's Christian Ass'n v. Caward, 239 N.W. 41, 213 Iowa 408.

Mass.—Grueby v. Chase Harris Forbes Corporation, 197 N.E. 624, 292 Mass. 156, 100 A.L.R. 1014.

N.J.—Trust Co. of New Jersey v. Bream, 167 A. 163, 11 N.J.Misc. 569.

N.Y.—Durand v. Lipman, 1 N.Y.S.2d 468, 165 Misc. 615.

24 C.J. p 64 note 10.

Charge to executor as "trustee"

Minn.—Pittsburgh Coal Co. of Wisconsin v. Will, 296 N.W. 178.

Statute held not to affect liability

Mass.—Anglo-American Direct Tea Trading Co. v. Seward, 2 N.E.2d 448, 294 Mass. 349.

62. Me.—Call v. Garland, 125 A. 225, 124 Me. 27.

Minn.—Pittsburgh Coal Co. of Wisconsin v. Will, 296 N.W. 178.

N.H.—True W. Jones Brewing Co. v. Flaherty, 120 A. 432, 80 N.H. 571.

N.J.—In re Foster's Estate, 176 A. 156, 158, 13 N.J.Misc. 36, citing **Corpus Juris.**

N.C.—Bessire & Co. v. Ward, 183 S. E. 534, 209 N.C. 266.

Okl.—Vaughn v. Jones, 66 P.2d 504, 179 Okl. 545, citing **Corpus Juris.**

Tex.—Beggs v. Fite, 106 S.W.2d 1039, 130 Tex. 46, affirming Beggs v. Brooker, Civ.App., 79 S.W.2d 642.

Wash.—Judy v. Guaranty Trust Co., 59 P.2d 745, 746, 186 Wash. 637, citing **Corpus Juris.**

24 C.J. p 65 note 11.

63. Iowa.—Stewart v. Chadwick, 8 Iowa 463.

Tex.—Shearon v. Henderson, 38 Tex. 245.

64. Miss.—Donald v. Hattiesburg Building & Loan Ass'n, 158 So. 482, 171 Miss. 763.

N.J.—S. Hekemian & Co. v. Rivara, 3 A.2d 165, 121 N.J.Law 418, affirmed 6 A.2d 392, 122 N.J.Law 523.

N.Y.—In re Bramer's Estate, 273 N. Y.S. 790, 151 Misc. 786.

contracts are subject to such legal limitations.[65]

The general rule is subject to exceptions,[66] and the estate may be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty without a promise to do just what he has promised to do.[67] So debts incurred for the incidental charges of the due course of administration have been held obligatory on the estate,[68] and an executor may sometimes create debts against the estate for expenses incurred in complying with the directions of the will,[69] and the necessities of the case may sometimes be such as to permit of the representative binding the estate by his contract made for its benefit,[70] or he may sometimes bind the estate by his contract made with the sanction of the probate court.[71] Power may also be given to an executor by the will to bind the estate by contract,[72] and statutes sometimes give to the representative certain powers in this respect,[73] but it has been held that, even though executors and testamentary trustees are authorized by the will to make repairs on buildings devised to them in trust, they are not liable in their representative capacity on a contract for such repairs,[74] and an authorization in the will to the executors to do all that the testator might do personally does not authorize their making any addition to a debt due by the estate.[75]

Debtors who bought goods from the administrator and obtained the benefit of their contracts with him cannot question the validity thereof.[76]

§ 199. Services

Subject to certain exceptions, the personal representative and not the estate is directly liable to one, such as an attorney, employed by him to perform services.

The personal representative and not the estate is as a rule directly liable to one whom he employs incidentally in the discharge of his trust, as for selling, custody of, or suitable work on the assets, or clerical or other services in managing the property and the like.[77]

S.D.—Baird v. Barnes, 235 N.W. 122, 58 S.D. 128, modifying Baird v. Mall, 232 N.W. 47, 57 S.D. 309.

Inference of performance of duty in representative capacity

One dealing in good faith with administrator of an estate may reasonably infer that fiduciary is acting in a representative capacity in performance of duty, in absence of knowledge to the contrary or of circumstances indicating fraud.—Federal Land Bank of Omaha v. Worley, 282 N.W. 476, 135 Neb. 493.

65. Ky.—Erdman's Adm'r v. Erdman's Adm'r, 21 S.W.2d 258, 231 Ky. 219.

66. N.Y.—O'Brien v. Jackson, 60 N. E. 238, 167 N.Y. 31.
24 C.J. p 65 note 13.

67. Kan.—Brown v. Evans, 15 Kan. 88.

68. N.Y.—Matter of Smith, 97 N.Y. S. 171, 111 App.Div. 23, 35 N.Y.Civ. Proc. 314, 18 N.Y.Ann.Cas. 55.
24 C.J. p 65 note 15.

69. Ark.—Clifford v. McAlester Fuel Co., 240 S.W. 722, 153 Ark. 276.
24 C.J. p 65 note 16.

70. Tex.—Murrell v. Wright, 15 S. W. 156, 78 Tex. 519.
24 C.J. p 65 note 17.

Extension of existing obligation

Executors' execution of agreement extending time for payment of overdue bond and mortgage executed by deceased, which was an existing obligation of the estate, did not make executors personally liable for payment of bond and mortgage.—City Bank Farmers Trust Co. v. Frankenfelder, 1 N.Y.S.2d 357, 166 Misc. 63.

71. Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
24 C.J. p 65 note 18.

72. Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410.
Ga.—Charles Broadway Rouss, Inc., v. First Nat. Bank, 178 S.E. 732, 180 Ga. 244.
24 C.J. p 65 note 19.

Will giving executor same power as testator exercised authorized executor to buy property with funds of estate as testator could have done.—Lowden v. Eskedor, 151 S.E. 385, 169 Ga. 672.

73. Tex.—Reinstein v. Smith, 65 Tex. 247.
24 C.J. p 65 note 20.

Insolvent representative

Under statute, only insolvent personal representative can bind estate so as to confer on another cause of action against estate.—Turley v. Hazelwood, 174 So. 616, 234 Ala. 186.

74. N.Y.—O'Brien v. Jackson, 60 N.E. 238, 167 N.Y. 31, reversing 58 N. Y.S. 1044, 42 App.Div. 171.

75. Md.—Turk v. Grossman, 17 A.2d 122.

76. Or.—Shea v. Graves, 19 P.2d 406, 142 Or. 503.

77. Ala.—Bromberg v. Hoffman, 92 So. 114, 207 Ala. 144.
Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410—Henderson v. Riggles, 294 P. 31, 110 Cal.App. 326.
Ky.—Walker v. Reichert, 72 S.W.2d 428, 254 Ky. 759.
Miss.—Daniel v. Hodge, 187 So. 544.
N.H.—E. A. Strout Farm Agency v. Worthen, 122 A. 327, 81 N.H. 95.
N.Y.—Gibbs v. Lefferts, 190 N.Y.S. 581, 198 App.Div. 270—In re Musil's Estate, 6 N.Y.S.2d 175, 168 Misc. 529—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791.
Ohio.—Wood v. Kline, 38 N.E.2d 327.
R.I.—Probate Court of City of Providence v. New York Casualty Co., 8 A.2d 867, 63 R.I. 328.
S.C.—Dahlberg v. Brown, 16 S.E.2d 284, 198 S.C. 1.
Tex.—Mitchell v. Teague, Civ.App., 233 S.W. 1040.
24 C.J. p 66 note 21—9 C.J. p 587 note 2 [b].
Reimbursement of representative see infra § 234.

Broker's commission

(1) Prior to the enactment of the statute, an executor or administrator could not bind the estate by a contract for a broker's commission on the sale of real property.—In re Mitchell's Estate, Cal., 123 P.2d 503—24 C.J. p 66 note 21 [e].

(2) Under the statute authorizing the personal representative to bind the estate by such contract, the fact that the contract does not expressly provide for a commission and that such commission should be paid out of the proceeds of the sale does not preclude recovery thereof, the statute being mandatory only in so far as it imposes a limitation on the source of the payment of the commission.—In re Mitchell's Estate, supra.

Contra Wilson v. Fleming, 289 P. 658, 106 Cal.App. 542.

(3) Procuring of purchaser, to whom sale was confirmed without execution of deed and mortgage, was

Where, however, services are rendered under an employment or agreement by which the person rendering them has confined himself to the estate or the personal representative administering it as his debtor, he will not be at liberty afterward to resort to the personal representative individually;[78] and it has been held that under a statute authorizing an administrator to carry on the business, and under an order expressly authorizing a temporary administrator to conduct a mercantile business by buying and selling merchandise so that the stock should not deteriorate, the administrator had authority to employ an agent to purchase goods for the business, and to bind the estate for compensation for the agent.[79] Further, the estate may be liable where the representative is insolvent,[80] or has removed from the jurisdiction,[81] or the claim is for the care of live stock.[82] A personal representative is not liable personally for services rendered to the estate without his consent,[83] and the estate cannot be charged therefor de bonis testatoris.[84] Where services have been performed without the executor's assent, before his appointment, and under a contract with another executor named in the will, or with a special administrator, the executor is not liable either personally or in his representative capacity.[85]

The estate may be liable under contracts of the executor which he was authorized by the will to make.[86] Where the will imposed a legal obligation on executors to employ a named person in their conduct of testator's business, it was not requisite to liability of the estate that the executors should make a new contract of employment with such person.[87]

Services of attorney. The rule that debts contracted by the personal representative are obligatory on him as individual obligations and do not primarily bind the estate applies to the fees of attorneys and counsel employed by him in the course of administration. The executor or administrator makes himself personally liable to such attorney or counsel,[88] and, as shown infra § 223, reimburses

not "actual sale" entitling broker to commission.—Wilson v. Fleming, supra.

(4) Until court exercises discretion as to terms of sale by executrices, and amount payable before deed passes, there is no "actual sale" entitling broker to commission.—Wilson v. Fleming, supra.

(5) Broker attacking order providing for payment of commission on contingency could not recover without having commission fixed by court.—Wilson v. Fleming, supra.

(6) Court, in considering benefit to estate from sale by executrices, must consider any commissions to be paid.—Wilson v. Fleming, supra.

(7) Alleged fraud of executrices, resulting in proper order as to payment of commissions to broker, did not harm broker.—Wilson v. Fleming, supra.

(8) Where administratrix signed brokerage contract individually and not as administratrix, but signed receipt on purchaser's deposit in her capacity as administratrix, she was not personally liable to brokers for commission on court's refusal to approve sale, not having waived protection of statute.—Caine v. Polkinghorn, 201 P. 936, 54 Cal.App. 387.

Duty to ascertain authority

Real estate agent employed by executors to sell deceased's realty, with knowledge that he was dealing with deceased's representatives, had duty of ascertaining authority of executors to dispose of decedent's realty, and letter written by executors' attorneys authorizing real estate agent to sell land was insufficient evidence of agency to bind estate, in absence of proof of executors' authority.—Harris v. Cabarrus Bank & Trust Co., 172 S.E. 325, 205 N.C. 526.

Ratification by representative of act of third person

Defendant B authorized plaintiff stockbrokers to sell certain stock owned by an estate, of which B was not an executor. B was without authority to make such contract. This transaction was not known to the executors, who had not procured requisite authority from the court to sell the stock. Plaintiffs sold the stock and demanded it from B, who then communicated with another defendant, who was one of the executors, and she authorized him to tell plaintiffs that their attorney said he would obtain an order of court for transfer of the stock; but this was not done. It was held that such action by the executrix did not bind her personally, nor was it a ratification by the executors, especially in view of the statute which requires concurrence of a majority of executors to bind the estate.—Montague v. Storrow, C.C.A.Wis., 290 F. 912.

78. Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410.
N.Y.—In re Crowley's Will, 4 N.Y.S.2d 885, 167 Misc. 840.
24 C.J. p 66 note 22.

79. Tex.—Altgelt v. Oliver, Civ. App., 86 S.W. 28.

80. Or.—In re Murray, 107 P. 19, 56 Or. 132.

81. Or.—In re Murray, supra.

82. Or.—In re Murray, supra.

83. Mass.—Tomlinson v. Flanagan, 190 N.E. 785, 287 Mass. 38.

84. Mass.—Tomlinson v. Flanagan, supra.

85. Mass.—Luscomb v. Bullard, 5 Gray 403, 66 Am.D. 374.

86. N.C.—Meares v. Williamson, 184 S.E. 41, 209 N.C. 448.

87. N.Y.—Hughes v. Hiscox, 174 N.Y.S. 564, 105 Misc. 521.

88. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Ark.—Gilleylen v. Hallman, 216 S.W. 15, 141 Ark. 52.
Cal.—Title Insurance & Trust Co. v. Gould, 191 P. 556, 47 Cal.App. 533.
Ill.—Coyle v. Velie Motors Corporation, 27 N.E.2d 60, 305 Ill.App. 135.—Rubinkam v. MacArthur, 23 N.E.2d 348, 302 Ill.App. 71.
Md.—Frick v. Denison, 81 A. 597, 116 Md. 296.
Mass.—Eaton v. Walker, 138 N.E. 798, 244 Mass. 23.
Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545.
Miss.—Hutton v. Gwin, 195 So. 486, 188 Miss. 763—Reedy v. Allen, 179 So. 569, 181 Miss. 471.
N.J.—In re Foster's Estate, 176 A. 156, 13 N.J.Misc. 36.
N.Y.—In re Schrauth's Will, 292 N.Y.S. 925, 249 App.Div. 847—In re Jaffe's Will, 300 N.Y.S. 1045, 165 Misc. 407—In re Merrill's Estate, 300 N.Y.S. 1142, 165 Misc. 295—In re Nebensahl's Estate, 294 N.Y.S. 553, 162 Misc. 366—In re Woolfson's Will, 287 N.Y.S. 12, 158 Misc. 928—In re Young's Estate, 282 N.Y.S. 772, 156 Misc. 795, 801—In re Wilson's Estate, 265 N.Y.S. 672, 147 Misc. 542—In re Fullam's Estate, 181 N.Y.S. 677, 111 Misc. 514.
Ohio.—Lambert v. Thrasher, App., 32 N.E.2d 440—Dicken v. Strasburger, 166 N.E. 143, 31 Ohio App. 18.

himself in his accounts subject to the court's allowance, although it has been said that good faith requires an attorney who intends to hold an executor or administrator personally liable for his fee to inform him of that fact at the time the services of the attorney are sought.[89]

Statutes or local practice come sometimes in aid of an attorney's recovery of recompense or costs by way of allowance out of a particular fund collected, where the suit itself was duly authorized, although this may not necessarily give an attorney the full recompense to which the representative had bound himself personally;[90] and it seems that the representative may also make a special agreement that the attorney employed to render services beneficial to the estate shall look to the estate alone for recompense.[91] An attorney employed by a personal representative is sometimes allowed compensation directly from the estate where the personal representative is insolvent,[92] and the statutes sometimes authorize an executor to bind the estate for the payment to attorneys of a reasonable compensation for services which are necessary in the course of administration.[93] It has also been held that an executor may bind the estate by the employment of counsel to defend the will when this is contested.[94] Under a will giving the executor full power to employ persons necessary to manage the estate, an obligation incurred in employing counsel is a charge against the estate, and not a personal charge against the executor.[95]

§ 200. Funeral Expenses, Tombstones, Etc.

An executor or administrator who has ordered the funeral of, or a tombstone for, his decedent has been held liable therefor in his personal, as distinguished from his representative, capacity.

Generally, funeral expenses, the cost of tombstones, and the like, are, as shown infra §§ 384, 385, charges against the estate, which the representative must pay out of the assets and for which he is liable in his representative capacity. However, the general rule, stated supra § 198, denying the power of the representative to bind the estate by his contracts, has been applied so as to hold the executor or administrator who has ordered the funeral of, or a tombstone for, his decedent liable only personally and not in his representative capacity,[96] unless he has stipulated against personal liability,[97] or the circumstances are such as clearly to show that the credit of the estate was accepted and to raise the implication of a promise by the estate to pay.[98]

The estate is not liable on an express promise by

Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.
S.D.—In re Sachs' Estate, 297 N.W. 793.
Tex.—Morton's Estate v. Ferguson, Civ.App., 45 S.W.2d 419, 420, citing **Corpus Juris.**
Wis.—Juergens v. Ritter, 279 N.W. 51, 227 Wis. 480.
6 C.J. p 734 notes 3, 4—24 C.J. p 66 note 26.

Services performed prior to attorney's death

An administratrix' employment of attorney to probate estate created an implied contract to pay attorney the reasonable value of services performed by attorney prior to his death.—Summ v. Superior Court in and for Yolo County, 84 P.2d 152, 29 Cal.App.2d 303.

Probate court not bound by contract which was made without court's authorization.—In re De Barry's Estate, 111 P.2d 728, 43 Cal. App.2d 715.

Statutory right to name attorney

Statute, providing that when firm or corporation be named as administrator or executor certain persons shall name attorney who shall represent the estate, is inapplicable where personal representative is individual, and does not make his attorney the attorney for the estate.—In re Arneberg's Estate, 200 N.W. 557, 184 Wis. 570.

89. Ill.—Rubinkam v. MacArthur, 23 N.E.2d 348, 302 Ill.App. 71.

90. N.Y.—In re Proffen's Estate, 24 N.Y.S.2d 889, 175 Misc. 447—In re Marinano's Estate, 286 N.Y.S. 811, 158 Misc. 825—In re Liell's Estate, 265 N.Y.S. 730, 148 Misc. 279.
24 C.J. p 67 note 27.

Agreement held inequitable and unenforceable

N.Y.—In re Healy's Estate, 4 N.Y.S. 2d 650, 167 Misc. 768.

Vested interest in fund

Administratrix could not contract with attorney so as to vest attorney with vested interest in fund secured on claims owing estate and preclude same from becoming asset of estate when paid into hands of administratrix.—Turner v. Moore, Mo.App., 57 S.W.2d 770.

91. Cal.—Chapman v. Pitcher, 276 P. 1003, 207 Cal. 63.
24 C.J. p 68 note 28.

92. Wis.—In re Arneberg's Estate, 200 N.W. 557, 184 Wis. 570.

24 C.J. p 68 note 29, p 310 note 52 [a], [b].

93. Mich.—Jackson v. Leech, 71 N. W. 846, 113 Mich. 391.
N.Y.—In re Woolfson's Will, 287 N.Y. S. 12, 158 Misc. 928.

Necessity for services and reasonableness of fees are questions for the court, not for representatives of the estate.—Morton's Estate v. Ferguson, Tex.Civ.App., 45 S.W.2d 419, error refused.

94. Ky.—McMillen's Ex'rs v. McElroy, 217 S.W. 927, 186 Ky. 644.
La.—Fenner v. McCan, 21 So. 768, 49 La.Ann. 600.
Okl.—In re Wah-kon-tah-he-ump-ah's Estate, 261 P. 973, 128 Okl. 179.

95. Miss.—Gwin v. Fountain, 126 So. 18, 159 Miss. 619, suggestion of error sustained on other grounds 132 So. 559, 159 Miss. 619.

96. Cal.—Seitz v. Engert, 56 P.2d 1242, 13 Cal.App.2d 302.
Del.—Smolka v. James T. Chandler & Son, 20 A.2d 131, 134 A.L.R. 629, affirming James T. Chandler & Son v. Smolka, 13 A.2d 427, 1 Terry 415.
Me.—Call v. Garland, 125 A. 225, 124 Me. 27.
Pa.—In re Bower's Estate, 75 Pa. Super. 203.
24 C.J. p 68 note 33.
Right to be reimbursed from estate see infra § 230.

97. Del.—Smolka v. James T. Chandler & Son, 20 A.2d 131, 134 A.L.R. 629, affirming James T. Chandler & Son v. Smolka, 13 A.2d 427, 1 Terry 415.

98. Del.—Smolka v. James T. Chandler & Son, supra.

the executor to pay for funeral expenses where one would not be implied by law, or on one different from that which would be implied.[99]

§ 201. Payment of Decedent's Debts

An executor or administrator may bind the estate, and, under some circumstances, himself, individually, by a promise to pay a debt of decedent.

An executor or administrator may bind the estate by a promise to pay the debt which is a just and clear liability of the estate,[1] and a promise to pay a debt of decedent in consideration of assets is a promise in his representative capacity and will support a judgment de bonis testatoris or de bonis decedentis.[2] His authority in this respect is limited, however, to the amount of assets in his hands, and he can in no case bind the heir or devisee;[3] while with respect to himself, as he is not bound to pay the debts beyond the assets which he receives, he is not presumed to intend binding himself for payments in a more extensive sense, and hence even his unequivocal promise, written or oral, to pay a debt of his decedent, does not make him personally liable therefor unless it is founded on some sufficient consideration other than the existence of the debt.[4] Nevertheless, in various instances, such as extension, forbearance by the creditor, or a substitution of securities, the executor or administrator may make himself personally liable by his direct promise to pay, as for a new and sufficient consideration,[5] and it has been considered that his direct promise may bind him absolutely if the debt of the decedent was already barred by limitations.[6]

§ 202. Borrowing Money

An executor or administrator, as such, has no inherent authority to borrow money; and loans to the representative which are not authorized by statute, will, or order of court do not bind the estate.

An executor or administrator, as such, has no inherent authority to borrow money, and loans to the representative do not constitute valid claims against the estate or entitle the lender to interest thereon, although the representative may make himself personally liable;[7] and the rule in this respect is not changed by the fact that the money was borrowed for the benefit of the estate,[8] although under such circumstances, as shown in the C.J.S. title Subroga-

99. Mass.—Durkin v. Langley, 46 N. E. 119, 167 Mass. 577—Hapgood v. Houghton, 10 Pick. 154.

1. Ariz.—Sturges v. Sturges, 50 P. 2d 886, 46 Ariz. 331.
Mass.—Hapgood v. Houghton, 10 Pick. 154, 19 Am.D. 238.
24 C.J. p 68 note 37.
Performance of decedent's obligations generally see supra § 189.
Promises by executors and administrators as within statute of frauds see the C.J.S. title Frauds, Statute of §§ 8–11, also 27 C.J. p 128 note 68 et seq.

2. U.S.—Adams v. Whiting, D.C., 1 F.Cas.No.69, 2 Cranch C.C. 132.
24 C.J. p 68 note 38.

3. Ky.—Grotenkemper v. Bryson, 79 Ky. 353.
N.Y.—Jenkins v. Phillips, 58 N.Y.S. 788, 41 App.Div. 389.
Liability of heirs for debts of ancestor see Descent and Distribution §§ 116–138.

4. Minn.—Germania Bank v. Michaud, 65 N.W. 70, 62 Minn. 459, 54 Am.S.R. 653, 30 L.R.A. 286.
24 C.J. p 68 note 40.

5. Mass.—Wilton v. Eaton, 127 Mass. 174.
24 C.J. p 68 note 41.

6. S.C.—McGrath v. Barnes, 13 S.C. 328, 36 Am.R. 687.
24 C.J. p 69 note 42.

7. U.S.—Herbert v. Sullivan, D.C.N. H., 37 F.Supp. 468.
Ala.—Grist v. Carswell, 165 So. 102, 231 Ala. 442—First Nat. Bank v. De Jernett, 159 So. 73, 75, 229 Ala. 564, citing **Corpus Juris.**
Ark.—Reed v. Futrall, 115 S.W.2d 542, 545, 195 Ark. 1044, quoting **Corpus Juris.**
Cal.—In re Montijo's Estate, 72 P. 2d 178, 23 Cal.App.2d 54.
Conn.—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602.
Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Taunton v. Taylor, 141 S.E. 511, 37 Ga.App. 695.
Ky.—Hardwick v. Cotterill, 299 S. W. 958, 959, 221 Ky. 783, quoting **Corpus Juris.**
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
N.J.—Kaufman v. Trust Co. of New Jersey, 17 A.2d 790, 128 N.J.Eq. 602, reversed on other grounds 22 A.2d 279, 130 N.J.Eq. 346.
N.Y.—In re Witkind's Estate, 4 N. Y.S.2d 933, 167 Misc. 885—Stark v. National City Bank of New York, 291 N.Y.S. 884, 161 Misc. 51, modified on other grounds 1 N.Y.S. 738, 253 App.Div. 801, motion granted 3 N.Y.S.2d 898, 254 App.Div. 558, reversed on other grounds 16 N.E.2d 376, 278 N.Y. 388, 123 A.L.R. 99.
Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, 408, citing **Corpus Juris,** error dismissed.
Vt.—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Wash.—Sandberg v. Denman, 24 P. 2d 452, 174 Wash. 142, citing **Corpus Juris.**
W.Va.—Yokum v. Yokum, 157 S.E. 579, 110 W.Va. 221.
Wis.—In re Pfister's Estate, 255 N. W. 911, 216 Wis. 42, rehearing denied 256 N.W. 245, 216 Wis. 42.
24 C.J. p 69 note 44.
Mortgage of realty see infra § 298.
Pledge or mortgage of personalty see infra § 303.

8. Ark.—Reed v. Futrall, 115 S.W.2d 542, 545, 195 Ark. 1044, quoting **Corpus Juris.**
Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Wynne v. Mixon, 176 S.E. 637, 179 Ga. 637—Carter v. Davis, 164 S.E. 264, 174 Ga. 824—O'Kelly v. McGinnis, 81 S.E. 197, 141 Ga. 379.
Ky.—Hardwick v. Cotterill, 299 S.W. 958, 959, 221 Ky. 783, quoting **Corpus Juris.**
Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, 408, citing **Corpus Juris,** error dismissed.
Vt.—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Validity of agreement authorizing administrator to carry on business does not affect his ability to borrow money for estate or right of widow to give money thereto.—Taunton v. Taylor, 141 S.E. 511, 37 Ga. App. 695.
Acts binding on estate
In so far as the acts of executors and trustees, in substituting their obligations for those of the testator and in borrowing money to meet testator's obligations and their own given in substitution for his, had for their purpose the canceling of testator's indebtedness, they were

tion § 10, also 24 C.J. p 71 note 70, there may be a right of subrogation.

It has been said that the probate court is without power to confer on the personal representative the authority to borrow;[9] nevertheless, the exercise of such power has been upheld[10] where the money was borrowed for the purpose of paying debts of decedent.[11]

Power to borrow money on lien security may be given by will,[12] and statutes sometimes sanction borrowing with the creation of a lien, although usually on due investigation and a previous order from the court.[13] Furthermore, it has been held that the power may be conferred by stipulation of the interested parties.[14]

Where a loan was made under circumstances rendering the estate liable therefor, the lender is not required, as a condition of preserving his rights against the estate, to see to the application of the money lent.[15]

Borrowing outside of state. Where the personal representative may borrow money for the benefit of the estate, it has been held that he may procure such money beyond the border of the state in which his letters were granted.[16]

binding on the estate and the beneficiaries.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.

9. Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed.

Ex parte order

A probate court has no power to make ex parte order authorizing executor to borrow money.—Brownfield v. McFadden, 68 P.2d 993, 21 Cal. App.2d 208.

In New York the court will not direct executors concerning the borrowing of money and the pledging of the estate's securities, as the arrangement for a final settlement is a matter entirely invested in executors.—In re Schmutz' Estate, 288 N. Y.S. 98, 159 Misc. 454—In re Hanna's Estate, 196 N.Y.S. 160, 119 Misc. 285.

10. **Court of equity** may render decree authorizing executor or administrator, on proper bill and proof, after due notice to interested parties, to borrow money and to pledge as security property of estate subject to administration, but decree marks limit of power and gives notice to lender of extent of authority conferred.—First Nat. Bank v. De Jernett, 159 So. 73, 229 Ala. 564.

11. Tex.—Dallas Joint Stock Land Bank of Dallas v. Forsyth, 109 S. W.2d 1046, 130 Tex. 563, modifying Forsyth v. Dallas Joint Stock Land Bank, Civ.App., 81 S.W.2d 1103, rehearing denied Dallas Joint Stock Land Bank of Dallas v. Forsyth, 112 S.W.2d 173, 130 Tex. 563.

Collateral attack

Whether order of probate court, approving loan for payment of testator's debts, was subject to collateral attack by devisee, depended on whether probate court had power to hear and determine validity of claim for payment of which loan was obtained, since, if claim was utterly void, court had no power to hear and determine its validity, and order was void and subject to collateral attack, but, if court had right of decision, then order, although erroneous, was not void and not subject to collateral attack.—Dallas Joint Stock Land Bank of Dallas v. Forsyth, supra.

Power to authorize renewal or extension

The probate court had power to authorize renewal or extension of indebtedness of estates by administrators or executors pursuant to court orders by borrowing money to pay indebtedness which was due, even prior to enactment of statute providing that an executor or administrator may on application and order, authorizing such, renew or extend any obligation owing by or owing to estate.—Loewenstein v. Watts, 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910, affirming, Civ.App., 119 S.W.2d 176—Martin v. Dial, Com. App., 57 S.W.2d 75, 89 A.L.R. 571, reversing Dial v. Martin, Civ.App., 37 S.W.2d 166.

12. Ga.—Central Hanover Bank & Trust Co. v. Wheeler, 173 S.E. 431, 178 Ga. 498.

24 C.J. p 69 note 47.

Testamentary power to mortgage land see infra § 298.

Approval of court

Where executor was directed by will to "use" revenues of the estate for certain purposes, loans could be made only with probate court's approval.—In re Fleshman's Estate, 5 P.2d 727, 51 Idaho 312.

Will conferring authority

(1) Where will devised property to executors with directions to use income for benefit of testator's widow and, if necessary, to sell lands to provide widow comfortable support, executors could borrow reasonable sums for purpose of maintaining property in such manner as to yield fair income to meet widow's requirements.—New Martinsville Bank v. Burlingame, 178 S.E. 690, 116 W. Va. 122.

(2) Other cases see 24 C.J. p 69 note 47 [a].

Will not conferring authority

(1) Provision in will empowering executor to invest, reinvest, and keep assets of estate invested in mortgages on realty, and in such stock and bonds as one of the executors might deem to be to the best advantage, did not accord an executor the right to borrow money and pledge the assets of the estate as security therefor.—Kaufman v. Trust Co. of New Jersey, 17 A.2d 790, 128 N.J.Eq. 602, reversed on other grounds 22 A.2d 279, 130 N.J.Eq. 346.

(2) Other case.—McMillan v. Cox, 34 S.E. 341, 109 Ga. 42.

"Temporary loan" authorized by will is determined by circumstances under which made, and ordinarily is understood as not exceeding one year.—Yokum v. Yokum, 157 S.E. 579, 110 W.Va. 221.

13. Idaho.—In re Fleshman's Estate, 5 P.2d 727, 728, 51 Idaho 312, citing **Corpus Juris.**

Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.

24 C.J. p 69 note 48.

Statutory power to mortgage land see infra § 298.

Purpose of borrowing

(1) "Obligation," as used in statute empowering executors and administrators to borrow money to pay "obligations" secured by liens on realty, included all liabilities whether created by contract or law, and taxes on land are "obligations secured by lien" within statute.—Rose v. W. B. Worthen Co., 53 S.W.2d 15, 186 Ark. 205, 85 A.L.R. 212.

(2) The statute does not authorize expenditures for any purpose other than to pay debts personally due by decedent.—Reed v. Futrall, 115 S.W. 2d 542, 195 Ark. 1044.

Statutes should be rigidly followed

Mont.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.

14. Or.—In re Baker's Estate, 67 P. 2d 185, 156 Or. 256.

15. N.J.—Goodell v. Munroe, 97 A. 152, 86 N.J.Eq. 18.

16. Ala.—Farmers' & Merchants' Bank v. Sanford, 43 So. 226, 150 Ala. 195.

§ 203. Bills and Notes

An executor or administrator is without inherent authority to impose liability on the estate by giving or indorsing a note or accepting a bill of exchange.

An executor or administrator has no inherent authority to render the estate liable by giving or indorsing a promissory note or accepting a bill of exchange,[17] nor is such authority deducible from an express power to sell and reinvest the assets;[18] but the executor or administrator is personally liable on such an instrument, as maker, indorser, or acceptor, as the case may be,[19] unless it is expressly stipulated that he shall not be individually liable,[20] or unless he is able to show that, as his individual contract, the note was without consideration, and the payee agreed to look only to the estate for payment.[21]

It is usually considered that the rule imposing personal liability on the representative is not affected by the fact that the note or acceptance is given for a debt of decedent,[22] or for money borrowed for the estate,[23] or that the note is given as a renewal of a note executed by decedent.[24] It has been held that the personal liability of the representative is not affected by the fact that he signs as "executor" or "administrator"[25] and designates by name the es-

17. U.S.—Soper v. Pointer, C.C.A. Ala., 67 F.2d 676.
Ala.—First Nat. Bank v. De Jernett, 159 So. 73, 75, 229 Ala. 564, citing **Corpus Juris.**
Del.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. 197.
Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Carter v. Davis, 164 S.E. 264, 174 Ga. 824.
Ky.—State Nat. Bank of Frankfort v. Thompson, 126 S.W.2d 412, 277 Ky. 527.
N.J.—Trust Co. of New Jersey v. Bream, 167 A. 163, 164, 11 N.J. Misc. 569, citing **Corpus Juris.**
Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, 408, error dismissed, citing **Corpus Juris**—State Nat. Bank of Bonham v. Hester, Civ.App., 1 S.W.2d 915, error dismissed.
Wash.—Sandberg v. Denman, 24 P. 2d 452, 174 Wash. 142, citing **Corpus Juris.**
24 C.J. p 70 note 51.

Executors cannot waive notice of protest on a note made by their testatrix, or by any act create a liability against the estate which does not already exist.—Matter of Mandelbaum, 141 N.Y.S. 319, 80 Misc. 475, affirmed 144 N.Y.S. 1128, 159 App. Div. 909.

Effect of Negotiable Instruments Law

Uniform Negotiable Instrument Law does not change common-law rule that executor cannot bind his decedent's estate by making negotiable instruments.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. Del., 197.

18. U.S.—Boggs v. Wann, C.C.Ohio, 58 F. 681.

19. U.S.—Soper v. Pointer, C.C.A. Ala., 67 F.2d 676.
Del.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. 197.
Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Reed v. Gormley, 196 S.E. 921, 57 Ga.App. 821.
Miss.—Orgill Bros. v. Perry, 128 So. 755, 157 Miss. 543.
N.J.—Trust Co. of New Jersey v. Bream, 167 A. 163, 164, 11 N.J. Misc. 569, citing **Corpus Juris.**
N.Y.—In re Balcone's Estate, 260 N. Y.S. 547, 145 Misc. 499.
R.I.—Ryan v. Hebert, 124 A. 657, 46 R.I. 47.
Tex.—First State Bank & Trust Co. of Rio Grande City v. Ramirez, Com.App., 126 S.W.2d 16, reversing Ramirez v. First State Bank & Trust Co., Civ.App., 92 S.W.2d 523—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed—State Nat. Bank of Bonham v. Hester, Civ.App., 1 S.W.2d 915, error dismissed.
24 C.J. p 70 note 53.
Reimbursement out of assets of estate see infra § 217.

Cancellation of personal note

(1) Executrix being bound by waiver of demand and notice over signature of her deceased husband, under whose will she was sole legatee, as accommodation indorser of note, no fraud was practiced on her by payee trust company's officer in inducing her to assume personal liability for note by advice that she was liable thereon as executrix, and she was not entitled to cancellation of her personal note for amount of note signed by her deceased husband even if payee trust company's official did not act fairly and honestly in dealing with and advising her at time of her execution of note, in absence of finding that his fraud led to her disadvantage, particularly in view of enhancement of her interest in decedent's estate by payee's loss of right to proceed against it on original note.—Record v. Rochester Trust Co., 192 A. 177, 89 N.H. 1, 110 A.L.R. 1218.

(2) Beneficiaries' statement that revocation proceeding would be brought against executor did not constitute "duress," so as to entitle executor to cancellation of notes and conveyance given by him to secure repayment of moneys improperly paid out to executor's wife.—In re Ludlam's Estate, 285 N.Y.S. 597, 158 Misc. 283.

Liability in assumpsit

Administrators, to whom money was advanced by bank to pay valid claims against the estate, and who gave their notes as administrators, as evidence of the indebtedness, would be personally liable to bank in assumpsit on an implied contract as for money had and received, if they were not liable on notes.—Sherman v. El Paso Nat. Bank, Tex.Civ. App., 100 S.W.2d 402, error dismissed.

20. Md.—R. D. Johnson Milling Co. v. Brown, 196 A. 100, 173 Md. 366.
Mich.—Manufacturers' Finance Corporation v. Andary's Estate, 256 N.W. 601, 269 Mich. 1.
24 C.J. p 70 note 54.

Indorsement under special agreement
Tex.—Wade v. Wade, 36 Tex. 529.

21. Mo.—Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am.R. 215.

22. Mass.—Browne v. Fairhall, 100 N.E. 556, 213 Mass. 290, 45 L.R.A., N.S., 349.
24 C.J. p 71 note 56.

23. Ga.—Carter v. Davis, 164 S.E. 264, 174 Ga. 824.

24. Miss.—Yerger v. Foote, 48 Miss. 62.

However, it has been held that note executed on behalf of estate by executrix in lieu of note of same amount and to same party executed by decedent prior to his death, and which was listed by executrix as valid obligation of estate, was enforceable against executrix and heirs of decedent, since it was merely acknowledgment of old debt.—First Nat. Bank v. Rubenstein, La.App., 164 So. 480.

Consent of creditor

An executor may, in the exercise of a reasonable discretion, the creditor consenting, postpone payment of testator's negotiable note and renew such note to afford opportunity to pay it out of the assets of the estate.—First Nat. Bank of Salem v. Jacobs, 102 S.E. 491, 85 W.Va. 653.

25. U.S.—Soper v. Pointer, C.C.A. Ala., 67 F.2d 676.
Mich.—Manufacturers' Finance Corporation v. Andary's Estate, 256 N.W. 601, 269 Mich. 1.
N.J.—Trust Co. of New Jersey v.

tate which he represents,[26] or that the promise in the body of the note is made as executor or administrator;[27] but the provision of the Negotiable Instruments Law that, where an instrument contains words indicating that it was signed in a representative capacity, the party so signing is not personally liable on the instrument if he was duly authorized, has been applied,[28] although such provision was not intended to exempt from personal liability an administrator who, as such, executes a note without authority.[29] In determining whether the representative is personally liable on a bill or note, the transaction is to be scrutinized in the light of the actual circumstances,[30] and the form of the note is not conclusive.[31] No personal liability is created where an administrator pursuant to the decree of distribution indorses a note taken in the course of administration and delivers it to the heirs.[32]

It has been held that the probate court is without power to confer authority on the representative to execute bills or notes.[33] Statutes sometimes permit of borrowing on note, usually with the assent of the probate court,[34] and on a note executed under such circumstances the representative is not personally liable.[35] Power to bind the estate by giving a note may be conferred also by the terms of the will.[36]

§ 204. Guaranty or Suretyship

An executor or administrator cannot bind the estate by a promise by way of guaranty or suretyship, but by the undertaking he charges himself personally.

The usual rights and liabilities of guaranty or suretyship are protected and enforced in the case of decedent's assets;[37] but the executor or administrator cannot directly bind the estate by his own new promise by way of guaranty or suretyship, although the transaction be one affecting decedent's own promise and liability, but by his undertaking he charges himself primarily and personally.[38] Where

Bream, 167 A. 163, 164, 11 N.J. Misc. 569, citing **Corpus Juris.**

N.Y.—In re Balcone's Estate, 260 N. Y.S. 547, 145 Misc. 499.

Tex.—State Nat. Bank of Bonham v. Hester, Civ.App., 1 S.W.2d 915, error dismissed.

24 C.J. p 71 note 57.

26. U.S.—Soper v. Pointer, C.C.A. Ala., 67 F.2d 676.

24 C.J. p 71 note 58.

27. Tenn.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

Tex.—Gregory v. Leigh, 33 Tex. 813.

Contra Steele v. McDowell, 17 Miss. 193.

28. Ga.—Wright v. Morris, 177 S.E. 365, 50 Ga.App. 196.

N.Y.—Hellawell v. Garrett Busch & Son, 285 N.Y.S. 717, 157 Misc. 805.

W.Va.—First Nat. Bank of Salem v. Jacobs, 102 S.E. 491, 85 W.Va. 653.

29. Tex.—State Nat. Bank of Bonham v. Hester, Civ.App., 1 S.W. 2d 915, error dismissed.

30. N.Y.—In re Balcone's Estate, 260 N.Y.S. 547, 145 Misc. 499.

31. N.Y.—In re Balcone's Estate, supra.

32. Neb.—Carter v. Carrell, 247 N. W. 348.

Indorsement in payment of legacy

Where a note payable to "Henry M. F. ———, executor," was indorsed by the executor in a similar form and delivered with other money to a legatee as payment of a legacy, and the legatee signed a receipt releasing the executor from all claims, it was held that, in view of the fact that the note was a part of the trust estate, that no part of the consideration went to the executor, and that this was known by the legatee, unless other facts showed that the executor had promised to pay the note, this was sufficient evidence that the indorsement was not intended to create a personal liability.—Wolff v. Flateau, 200 N.Y.S. 646, 206 App.Div. 134.

33. Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed.

Power of court to authorize borrowing of money by representative generally see supra § 202.

Ex parte order

A probate court has no power to make ex parte order authorizing executor to execute promissory note.—Brownfield v. McFadden, 68 P.2d 993, 21 Cal.App.2d 208.

Estoppel

That superior court authorized administrator to borrow money and bind estate by note and mortgage did not estop administrator from subsequently attacking validity of transaction, notwithstanding all heirs at law joined in application to superior court, where all debts were not paid and legal duties of administration were uncompleted.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.

Order of court based on insufficient showing of facts

A probate court order, authorizing renewal and extension of notes secured by mortgage on realty conveyed by deed mistakenly reciting that grantee assumed payment of notes, pursuant to administrator's petition showing merely that deceased grantee was owner of realty subject to mortgage indebtedness and not informing court that notes were not grantee's obligations and that he did not assume payment thereof, did not authorize administrator to give notes validity as debts of grantee's estate, so that successor administrator de bonis non with will annexed was not liable for amount of deficiency resulting from mortgage foreclosure sale.—Consolidated Realty Corporation v. Dunlop, 114 F.2d 16, 72 App.D.C. 273.

34. Del.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. 197.

24 C.J. p 71 note 63.

35. Wis.—Wisconsin Trust Co. v. Chapman, 99 N.W. 341, 121 Wis. 479, 105 Am.S.R. 1032.

24 C.J. p 71 note 64.

36. Del.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. 197.

Ga.—Central Hanover Bank & Trust Co. v. Wheeler, 173 S.E. 431, 178 Ga. 498.

24 C.J. p 71 note 65.

37. Ind.—Stewart v. Davis, 18 Ind. 74.

24 C.J. p 71 note 67.

38. Mo.—International Store Co. v. Barnes, 3 S.W.2d 1039.

24 C.J. p 71 note 68.

Indemnity

Where an executor was authorized to carry on testator's business as a cabinet maker and builder, but not to become a member of a building trades employers' association, or to pledge the estate's assets for such purpose, and the executor's agent in managing the business, being a member of such association, obtained a bond to qualify as such member, applying for the bond in the name under which the business was carried on, and agreeing to indemnify the surety against liability, the estate cannot be compelled to indemnify the surety, it not appearing that the estate derived advantage from the agent's membership in the association.—Farrelly v. Schaettler, 106 N.Y.S. 445, 121 App.Div. 678.

an estate was not liable on a guaranty agreement executed by decedent, the administratrix could not, by acquiescence and recognition, create such liability.[39]

D. INVESTMENTS AND LOANS

§ 205. Right or Duty to Invest

Unless directed or authorized by statute, or by the will or the necessities of the case, an executor or administrator ordinarily is under no duty and possesses no right to invest funds belonging to the estate.

Although it has been said that an executor or administrator owes the duty, pending distribution, to use usual prudent means to make the estate productive of income,[40] as a general rule, the duty of an executor or administrator is confined to collecting and paying out or distributing the assets of the estate,[41] and it is no part of his duty to invest funds belonging to the estate.[42] This duty may, however, be imposed on him by will[43] or by statute,[44] or a duty to invest may sometimes arise from the necessities of the case, where there is considerable and unavoidable delay in settling up the estate and making final distribution.[45]

Right to invest. A personal representative is empowered to invest estate funds where authorized by statute,[46] or by the will,[47] or where there is an ex-

39. N.Y.—Metropolitan Trust Co. v. Truax, 139 N.Y.S. 181, 154 App.Div. 442, appeal denied 101 N.E. 1110, 207 N.Y. 750.

40. N.Y.—In re Ayvasian's Estate, 275 N.Y.S. 123, 153 Misc. 467—In re Taft's Will, 260 N.Y.S. 294, 145 Misc. 435, affirming 259 N.Y.S. 887, modifying 256 N.Y.S. 732, 143 Misc. 387.

24 C.J. p 75 note 86.

"The balance of assets remaining in the hands of an administrator after payment of debts should be paid to those interested, or put out at interest for their benefit."—In re Jula's Estate, 130 A. 733, 735, 3 N.J. Misc. 976.

Duty to deposit funds in interest-bearing accounts see supra § 187.

41. Cal.—Brenham v. Story, 39 Cal. 179.

N.Y.—Matter of McDowell, 163 N.Y.S. 164, 97 Misc. 306, reversed on other grounds 164 N.Y.S. 1024, 178 App.Div. 243.

Allowance and payment of claims see infra §§ 367–481.

Collection of assets see supra §§ 167–183.

Distribution of estate see infra §§ 482–535.

42. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 578, 582, citing **Corpus Juris.**

Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal.App. 767.

Md.—Dingle v. Shaab, 20 A.2d 149.

Minn.—In re Marchildon's Estate, 246 N.W. 676, 188 Minn. 38.

N.Y.—In re Schroder's Will, 29 N.Y.S.2d 754, 176 Misc. 1024—Stark v. National City Bank of New York, 291 N.Y.S. 884, 161 Misc. 51, modified on other grounds 1 N.Y.S.2d 728, 253 App.Div. 801, motion granted 3 N.Y.S.2d 893, 254 App.Div. 558, reversed on other grounds 16 N.E.2d 376, 278 N.Y. 388, 123 A.L.R. 99—In re Guenard's Estate, 266 N.Y.S. 770, 149 Misc. 182—In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907.

Pa.—In re McTague's Estate, 56 Montg.Co. 385.

24 C.J. p 72 note 72.

Investment of own share in estate

Where administratrix was decedent's widow and entitled to one third of estate as such, she was entitled to invest or loan out her own share in the estate as she pleased and at her own risk; but she was without right to make unauthorized loans or investment of shares of the estate belonging to children, her duty as representative of estate being to earmark funds of shares belonging to children for their benefit and to see that each child received proper share.—In re Luksin's Estate, 290 N.Y.S. 932, 160 Misc. 926.

Purchase of annuity

Husband's executors on allowance of monthly alimony to wife, should set aside or invest sufficient funds, but purchase of annuity was improper.—In re Mesmer's Estate, 270 P. 732, 94 Cal.App. 97.

43. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 578, 582, citing **Corpus Juris.**

Ky.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.

N.Y.—In re McManamy's Estate, 15 N.Y.S.2d 270, 172 Misc. 392—In re Israel's Estate, 2 N.Y.S.2d 170, 166 Misc. 156, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1063, reargument denied 12 N.Y.S.2d 782, 257 App.Div. 817.

Va.—Ætna Casualty & Surety Co. of Hartford, Conn., v. Landis, 180 S.E. 155, 164 Va. 270.

24 C.J. p 72 note 73.

Duty to execute provisions of will see supra § 145.

Investment not required by will

N.Y.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

44. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 578, 582, citing **Corpus Juris.**

Cal.—In re Smith's Estate, 297 P. 927, 112 Cal.App. 680, followed in In re Brenhart's Estate, 297 P. 931, 112 Cal.App. 766, and In re Slingsby's Estate, 297 P. 931, 112 Cal. App. 767.

N.D.—Zievor v. Tice, 255 N.W. 470, 473, 64 N.D. 626, quoting **Corpus Juris.**

24 C.J. p 72 note 74.

45. Ill.—Quigley v. Quigley, 18 N.E.2d 186, 370 Ill. 151.

N.Y.—In re Ayvazian's Estate, 275 N.Y.S. 123, 153 Misc. 467.

N.D.—Zievor v. Tice, 255 N.W. 470, 473, 64 N.D. 626, quoting **Corpus Juris.**

24 C.J. p 72 note 75.

46. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 578.

N.Y.—In re Flint's Will, 266 N.Y.S. 392, 148 Misc. 474, reversed on other grounds 269 N.Y.S. 470, 240 App. Div. 217, affirmed In re Central Hanover Bank & Trust Co., 195 N.E. 221, 266 N.Y. 607.

Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

47. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F. 2d 578.

N.Y.—City Bank Farmers Trust Co. v. Evans, 5 N.Y.S.2d 406, 255 App. Div. 135, reargument denied In re Sterling's Estate, 11 N.Y.S.2d 223, 256 App.Div. 967—In re Wilmerding's Will, 238 N.Y.S. 375, 135 Misc. 674.

Pa.—Ferguson v. Weaver, 5 Pa.Dist. & Co. 573, 39 Lanc.L.Rev. 21, 37 York.Leg.Rec. 166.

Wash.—In re Krueger's Estate, 39 P. 2d 381, 180 Wash. 165—In re McDonald's Estate, 188 P. 523, 110 Wash. 366.

Exchange of stock

The executor under will directing it as trustee to keep trust estate

tended administration;[48] and the reason for such power in an executor or administrator is even stronger where the situation is more that of a change in securities for the protection of the estate than of an investment.[49]

§ 206. Duties and Liabilities with Respect to Investments

In making investments of the funds of the estate, the representative acts as a trustee, and his duties and liabilities are governed by the same rules as apply to other trustees.

In making investments of the funds of the estate, the representative acts as trustee rather than as executor or administrator,[50] and his duties and liabilities with respect to such investments are governed by the same rules as apply to other trustees.[51] If the will contains directions as to the investments to be made these must be followed;[52] but the executor has a reasonable time in which to make the investment.[53] In the absence of express contrary authorization in the will, the funds of the estate may be placed only in securities which diligent and prudent men of discretion would purchase,[54] and which, in addition, are authorized for trust investment by the pertinent statutes of the state.[55] Furthermore,

invested, and giving it power to sell, lease, or otherwise dispose of property, had authority to exchange bank stock comprising a portion of estate for stock in new bank formed as result of a consolidation.—Glass v. Crossman, 286 N.W. 184, 289 Mich. 130.

"Securities"

Where testatrix authorized executors to reinvest in such "securities" as they might deem advisable, although not legal investments under statute, word "securities" would be deemed to include stock, both preferred and common.—Fidelity Union Trust Co. v. Lowy, 196 A. 369, 123 N. J.Eq. 90.

"Desire" of testator

A recital that it was testator's "desire" that all moneys derived from his estate should be invested in certain securities was an expression of a desire, and authorized investment in such securities, but was not mandatory.—In re Scott's Will, 204 N.Y.S. 478.

Will held not to authorize investment

N.Y.—In re Davison's Ex'rs, 236 N. Y.S. 437, 134 Misc. 769, affirmed In re Banker's Trust Co., 245 N.Y.S. 731, 134 Misc. 769.

24 C.J. p 72 note 73 [c].

Administrator with will annexed

A will authorizing executors to make investments does not authorize administrators with the will annexed to reinvest.—Whitlow v. Patterson, 112 S.W.2d 35, 195 Ark. 173.

48. U.S.—Adams v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 578.

49. U.S.—Adams v. Commissioner of Internal Revenue, supra.

Time for reinvestment

Notwithstanding a long time had elapsed since testator's death, executors were entitled to further reasonable time to dispose of nontrustee securities and reinvest proceeds in legal securities in view of continued depressed market conditions.—In re Wainwright's Will, 284 N.Y.S. 578, 157 Misc. 531, modified on other grounds 289 N.Y.S. 510, 248 App.Div. 336, motion granted 291 N.Y.S. 180, 248 App.Div. 891.

Protection of investment

Executor and administratrix holding guaranteed mortgage certificates were permitted to protect investments by agreeing with issuing companies, financially embarrassed, to reduction of interest and extension of time and to release guarantor from guaranty to pay certificates in full, the agreement to contain provision that release should be void on appointment of receiver, or on taking over of guarantors by superintendent of insurance.—In re Cameron's Estate, 265 N.Y.S. 328, 147 Misc. 424.

50. Ala.—Amos v. Toolen, 168 So. 687, 692, 232 Ala. 587, citing **Corpus Juris.**

24 C.J. p 72 note 76.

Note taken by executor as such

Where executors have the advantage of a note given by a corporation carrying interest at intervals of six months, this note, although taken by the executors as such, must be regarded as their own individually under a finding charging them with the value thereof.—In re Fry, 140 N.Y.S. 592, 79 Misc. 180.

51. Ala.—Amos v. Toolen, 168 So. 687, 692, 232 Ala. 587, citing **Corpus Juris.**

Duties and liabilities of trustee with respect to investment of trust funds generally see the C.J.S. title Trusts §§ 320–337, also 65 C.J. p 795 note 77–p 824 note 54.

52. Ala.—Amos v. Toolen, supra.

N.Y.—In re McManamy's Estate, 15 N.Y.S.2d 270, 172 Misc. 392.

Particular wills construed

(1) A will authorizing investment of moneys derived from estate, stating testator's preference to be South American states and countries and cities, "and last the laws of the state of New York," was clearly intended to mean investments authorized by laws of the state of New York.—In re Scott's Will, 204 N.Y.S. 478.

(2) A clause in will prohibiting executors from investing in securities in which named trust company or its affiliates were interested did not prohibit executors from purchasing securities merely because named trust company or its affiliates held, or were transfer agents or registrars for, similar securities.—In re Herb's Estate, 296 N.Y.S. 491, 163 Misc. 441.

Right to compel compliance with will

When executor violated testator's instructions by changing investment without cause from deposit in bank designated by testator to deposit in another bank, such violation gave beneficiaries right in equity without waiting for actual loss to compel executor to make investment in accordance with instructions of testator.—Ætna Casualty & Surety Co. of Hartford, Conn., v. Landis, 180 S.E. 155, 164 Va. 270.

Direction to invest in productive real estate is not satisfied by buying vacant lots and erecting buildings thereon.—Holcombe v. Coryell, 10 N. J.Eq. 392.

Insufficiency of assets

Where testator directed executrix and trustee to invest certain specific sums in common stocks and provided that the balance of the trust fund might be invested in legal securities only, but after the payment of debts and other expenses the balance remaining was not sufficient to make all the investments directed, the amount to be invested in each security would be reduced proportionately. —In re Ascher's Estate, 26 N.Y.S.2d 1000, 175 Misc. 943.

53. Ky.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.

54. Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

N.J.—Macy v. Mercantile Trust Co., 59 A. 586, 68 N.J.Eq. 235.

N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

55. Ariz.—In re Sullivan's Estate, 78 P.2d 132, 51 Ariz. 483.

N.Y.—Broderick v. Aaron, 272 N.Y.S. 219, 151 Misc. 516, affirmed 277 N.Y.S. 499, 243 App.Div. 594, af-

in the absence of testamentary authorization, the representative is not permitted to increase unauthorized holdings which have come to him from the testator.[56]

The representative is entitled to apply to the court for advice and directions with respect to investments,[57] and the sanction of the court for any investment, procured before the investment is made, will, in the absence of fraud in procuring such sanction, protect the representative.[58]

Where the representative acts on his own judgment he is held to absolute good faith[59] and is required to exercise such prudence and good judgment as prudent persons ordinarily exercise in making investments of their own funds,[60] the first essential thing to consider being the safety of the principal, even though it may sacrifice income;[61] and if he has done this he is not responsible for a resulting loss.[62] On the other hand, he is liable for all losses

firmed 198 N.E. 11, 268 N.Y. 411, reargument denied 198 N.E. 547, 268 N.Y. 665—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

Ohio.—In re Trusteeship of Couden, 9 Ohio App. 207.

Okl.—In re Brown's Estate, 62 P.2d 643, 178 Okl. 306.

S.D.—Jones v. O'Brien, 235 N.W. 654, 58 S.D. 213.

Va.—Counts v. Counts, 181 S.E. 437, 165 Va. 61.

Power of representative to purchase realty with personalty of estate see infra § 268.

Purpose of statute governing investments by executor or administrator, holding trust funds for investment, is to protect, safeguard, and prevent dissipation through improvident investment of property held by individuals and corporations which is not their own and to which duty to account attaches.—In re Michaelson, 296 N.Y.S. 119, 162 Misc. 847.

Investment in "nonlegals" held authorized by will

N.Y.—In re Stutzer's Estate, 279 N.Y.S. 221, 155 Misc. 301.

Pa.—In re Greenawalt's Estate, 21 A.2d 890, 343 Pa. 413.

Investment held not illegal

Pa.—In re Curran's Estate, 167 A. 597, 312 Pa. 416.

56. N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

57. N.D.—Zievor v. Tice, 255 N.W. 470, 64 N.D. 626.

Supervision and guidance of court generally see supra § 147.

Validity of order

Where testator devised estate to adopted son and five brothers, son disappeared and executor was appointed trustee for the son, and judgment creditor of son levied on son's interest in the estate, whereupon executor obtained order authorizing investment of estate's funds for purchase of son's interest at execution sale, order was not void as exceeding court's jurisdiction, since court has general authority to order funds to be invested; and executor could not claim order was void on ground that no notice of hearing of the petition had been given, since the executor's notice as such and individually sufficed as notice in his capacity as trustee. Any objection to the particular manner of exercising the court's power must be taken advantage of by direct appeal and not by collateral attack.—In re Pierce's Estate, 81 P.2d 1037, 28 Cal.App.2d 8.

58. Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

N.D.—In re Giese's Estate, 255 N.W. 474, 64 N.D. 636.

59. N.Y.—In re Hurlbut's Ex'r, 206 N.Y.S. 448, 210 App.Div. 456—In re Curley's Will, 272 N.Y.S. 489, 151 Misc. 664, modified on other grounds 280 N.Y.S. 80, 245 App. Div. 255, affirmed 199 N.E. 665, 269 N.Y. 548.

Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.

60. N.Y.—In re Ascher's Estate, 26 N.Y.S.2d 1000, 175 Misc. 943—In re Curley's Will, 272 N.Y.S. 489, 151 Misc. 664, modified on other grounds 280 N.Y.S. 80, 245 App.Div. 255, affirmed 199 N.E. 665, 269 N.Y. 548.

Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.

Pa.—In re Greenawalt's Estate, 48 Dauph.Co. 222, affirmed 21 A.2d 890, 313 Pa. 413.

S.C.—Blankenship v. Zimmerman, 199 S.E. 527, 188 S.E. 413.

Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

New, speculative, or hazardous securities

Under will authorizing executor to invest in securities other than those required by law, he is not authorized to invest in new, speculative, or hazardous securities.—In re Hurlbut's Ex'r, 206 N.Y.S. 448, 210 App. Div. 456.

Agreement altering duty

Where remaindermen, as beneficiaries under testator's will, were owners of stock held by estate and entitled to receive stock, remaindermen could, by agreement with surviving coexecutor, alter what would otherwise have been coexecutor's duty with respect to selling stock.—In re Greenawalt's Estate, 21 A.2d 890, 343 Pa. 413.

Supervision of court

(1) Even though a will created a trust by providing that executor was authorized to make land loans and pay interest therefrom to a named legatee during her life, the court was not deprived of jurisdiction to compel him to exercise good faith and judgment in loaning the money, nor unduly to prolong settlement of estate.—In re Bradfield's Estate, 221 P. 531, 69 Mont. 247.

(2) One dealing with executor, or administrator as such, must take notice of court's authority to control such dealings as are within its jurisdiction, and, if executor's acts are not authorized, must be prepared to immediately place estate in status quo.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

Purchase of annuity

An executor who was required to purchase an annuity pursuant to the terms of decedent's will was required as part of his duties to select the company from which the annuity would be purchased, and was required to make the selection with the diligence and prudence required of all the acts of every fiduciary. He was required to consider the factor of cost, but was also required to give rigid scrutiny to the reliability of the company. He could not discharge his obligation by merely purchasing from lowest bidder or accepting the figure of a widely recognized insurer without general inquiry.—In re McManamy's Estate, 15 N.Y.S.2d 270, 172 Misc. 392.

61. Pa.—In re Brown's Estate, 135 A. 112, 287 Pa. 499.

62. Cal.—In re Guglielmi's Estate, 31 P.2d 1078, 138 Cal.App. 80.

N.Y.—In re Stutzer's Estate, 279 N.Y.S. 221, 155 Misc. 301—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.

Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

Pa.—In re Greenawalt's Estate, 21 A.2d 890, 343 Pa. 413.

Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

Wash.—In re Krueger's Estate, 39 P.2d 381, 180 Wash. 165.

In New Jersey

(1) Where evidence was insufficient to show that executrix who purchased a second mortgage was

resulting from lack of good faith, prudence, or diligence.[63]

Investments in property in another state. The investments of an executor or administrator usually should be limited to property or securities located in the state in which he is appointed,[64] but he is not absolutely prohibited from investing in property in another state.[65]

§ 207. Liability for Investing without Authority

An executor or administrator is liable for all losses resulting from unauthorized or improper investments of estate funds, and if any profit results, it belongs, at the election of those interested, to the estate. Legatees may be estopped to assert liability against the representative.

An executor or administrator is liable for all losses resulting from unauthorized or improper investments of estate funds,[66] although he cannot be compelled to refund the entire fund expended as long as the securities purchased have any value.[67] If any unauthorized or improper investment or use of the funds of the estate results in a profit, such profit belongs, at the election of those interested, to the estate.[68] The beneficiaries may elect to charge the

defrauded by representations that it was a first mortgage, it was said that an executrix, ordinarily, is not responsible for poor investments, if made in good faith and honest belief in their value.—Federal Land Bank of Springfield, Mass. v. Young, 133 A. 537, 99 N.J.Eq. 607.

(3) However, where a testator vested his executors with power to invest in improved and productive real estate or in sound productive securities as they might deem best, the executors were not exonerated on investing money in stocks which depreciated and thereby caused a loss to the estate, as the authority conferred did not merely bind them to the exercise of good faith and reasonable judgment.—Brown v. Brown, 65 A. 739, 72 N.J.Eq. 667.

Mere delay or nonaction of administrator as regards selling stock and reinvesting proceeds, where there is no evidence disclosing surrounding circumstances, does not show actionable negligence, since negligence is never presumed.—Stuber v. Snyder's Committee, 87 S.W.2d 614, 261 Ky. 338.

63. Mass.—Brigham v. Morgan, 69 N.E. 418, 185 Mass. 27.
Mich.—Cheever v. Ellis, 96 N.W. 1067, 134 Mich. 645.
N.Y.—In re Ayvazian's Estate, 275 N.Y.S. 123, 153 Misc. 467—In re Flint's Will, 266 N.Y.S. 392, 148 Misc. 474, reversed on other grounds 269 N.Y.S. 470, 240 App. Div. 217, affirmed In re Central Hanover Bank & Trust Co., 195 N. E. 221, 266 N.Y. 607.
Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421.
S.C.—Hutchison v. Daniel, 171 S.E. 13, 170 S.C. 459.
Liability for investing without authority see infra § 207.

Acting on advice of trust company
That executor, given discretion to invest, invested funds on advice of trust company having splendid financial standing could not excuse him for making improvident investments in untried and speculative securities, especially where trust company was financially interested in sale of securities.—In re Hurlbut's Ex'r, 206 N.Y.S. 448, 210 App.Div. 456.

Retention of funds
Without a specific approval by the court, the retention by an administrator, for his own use, of funds set aside to secure payment of annuities could not be treated as an investment of the funds which would relieve the administrator from liability therefor as such.—Ellyson v. Lord, 99 N.W. 582, 124 Iowa 125.

Passive executors
(1) Passive executors, who intrusted the entire active management of the estate to the accounting executor, are jointly liable for losses incurred by injudicious investments.—In re McDowell, 163 N.Y.S. 164, 97 Misc. 306, reversed on other grounds 164 N.Y.S. 1024, 178 App.Div. 243.

(2) Surcharge with respect to loss from securities carried on marginal account because of sales and purchases by executor should be restricted to executor having exclusive control and direction of investments without knowledge of other.—In re Disbrow's Estate, 261 N.Y.S. 635, 145 Misc. 584.

64. N.Y.—In re Clark's Will, 1 N.Y. S.2d 629, 165 Misc. 801.

65. Kan.—Wilcox v. Hollar, 222 P. 758, 115 Kan. 27.
N.J.—Macy v. Mercantile Trust Co., 59 A. 586, 68 N.J.Eq. 235.

66. Alaska.—Rosburg v. Burns, 6 Alaska 436.
Cal.—In re Guglielmi's Estate, 31 P. 2d 1078, 138 Cal.App. 80.
Ga.—Paulk v. Roberts, 155 S.E. 55, 42 Ga.App. 79.
Md.—Bacon v. Howard, 20 Md. 191.
Minn.—In re Marchildon's Estate, 246 N.W. 676, 188 Minn. 38.
Miss.—Walton v. Walton's Estate, 109 So. 707, 143 Miss. 686.
Mont.—In re Connolly's Estate, 257 P. 418, 79 Mont. 445.
N.J.—In re Ahrend's Estate, 130 A. 219, 3 N.J.Misc. 746, appeal dismissed In re Ahrend, 132 A. 758, 99 N.J.Eq. 328.
N.Y.—Villard v. Villard, 114 N.E. 789, 219 N.Y. 482—Broderick v. Aaron, 272 N.Y.S. 219, 151 Misc. 516, affirmed 277 N.Y.S. 499, 243 App.Div. 594, affirmed 198 N.E. 11, 268 N.Y. 411, reargument denied 198 N.E. 547, 268 N.Y. 665—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.
Okl.—In re Brown's Estate, 62 P.2d 643, 178 Okl. 306.
W.Va.—Groves' Estate v. Groves, 198 S.E. 142, 120 W.Va. 373.
Wis.—In re Leonard's Will, 230 N. W. 715, 202 Wis. 17, 83 A.L.R. 712.
Liability for loss resulting from lack of good faith, prudence, or diligence see supra § 206.

Difference between amounts collected and invested
Executors loaning estate funds without court order are chargeable with difference between amounts collected and invested.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

Where same persons were named executors and trustees, executors who improperly invested estate's funds in long-term securities could, in accounting proceeding, treat amounts invested as paid in cash to themselves as trustees, leaving question of propriety of investments to be determined on settlement of trustees' accounts.—In re Guenard's Estate, 266 N.Y.S. 770, 149 Misc. 182.

Unauthorized loan as estate asset
Debt arising from executor's loan of estate funds without court order, required by statute, was estate asset, for which executor's personal liability for cash invested could not be substituted, although court could withhold approval of executor's acts and direct immediate collection of debt due or removal of executor.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.

67. N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

68. Miss.—Meyer v. Meyer, 64 So. 420, 106 Miss. 638.
N.Y.—Villard v. Villard, 114 N.E. 789, 219 N.Y. 482.

representative with the fund used or to accept the investment with all its accretions of value.[69] Where the investment is repudiated and the representative charged personally, the fund invested, as an offset to such a charge, will virtually belong to him.[70]

Legatees or devisees may be estopped to assert liability against the representative for losses resulting from unauthorized or improper investments,[71] as where the investment was made at their express request.[72]

§ 208. Loans

An executor or administrator who, without authority, lends money belonging to the estate, does so at his own risk, and is personally liable for any resulting loss.

Loans made under due authority as an investment are discussed supra §§ 205, 206. Aside from such loans, an executor or administrator who lends to other persons the money or assets in his hands does so at his own individual risk and may be held personally liable as for conversion or to make good a resulting loss.[73] However, it has been held that the executor or administrator may in a proper case lend or advance to a distributee on the security of his interest,[74] or in the exercise of due prudence lend to a failing debtor of the estate for the sake of getting security which could not be otherwise obtained,[75] Further, it has been held that the representative may, for the purpose of preserving the value of the estate, lend to a company in which the estate holds stock,[76] although it has been held that the probate court has no power to authorize such a loan,[77] and that a loan of this character is, in the absence of a testamentary provision, unauthorized,[78] even though made by the executor in good faith and in an effort to follow decedent's wishes.[79]

Although the borrower, where the loan was unauthorized, will not be treated as a trustee in invitum, and held to an accounting at the instance of the cestui que trust,[80] any impropriety in the making of a loan by an executor or administrator cannot relieve the borrower of his obligations to the lender with respect to the loan,[81] and for whatever the representative may receive from the borrower he is duly accountable to the estate,[82] and entitled to credit accordingly.[83] Where all parties are chargeable with knowledge of the illegality of unsecured loans, the loans must be repaid or secured.[84] Where a testator before his death was a special partner of a certain person and by his will directed his executors to allow such person to retain as a loan to him the amount contributed by testator to the capital of the firm, such person could not be compelled to give security for the loan.[85]

69. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 199 S.E. 733, 736, 214 N.C. 478, citing **Corpus Juris.**
24 C.J. p 72 note 78.

70. Ala.—Harwood v. Harper, 54 Ala. 659.
24 C.J. p 73 note 79.

71. Kan.—Wilcox v. Hollar, 222 P. 758, 115 Kan. 27.
N.Y.—Villard v. Villard, 114 N.E. 789, 219 N.Y. 482—In re Burr, 96 N.Y.S. 225, 48 Misc. 56, 5 Mills Surr. 67, reversed on other grounds 104 N.Y.S. 29, 118 App.Div. 482.

72. N.Y.—Villard v. Villard, 114 N.E. 789, 219 N.Y. 482.

73. Ala.—Wilson v. Stevens, 29 So. 678, 129 Ala. 630, 87 Am.S.R. 86.
Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.
Ark.—Boyd v. Duncan, 12 S.W.2d 395, 178 Ark. 772.
Ill.—In re Wesley's Estate, 279 Ill. App. 349.
Minn.—In re Marchildon's Estate, 246 N.W. 676, 188 Minn. 38.
Mo.—White v. Hughes, App., 88 S.W. 2d 268.
Mont.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
N.Y.—In re Luksin's Estate, 290 N.Y.S. 932, 160 Misc. 926—In re De Lano's Estate, 252 N.Y.S. 361, 140 Misc. 748.
N.C.—State v. Cohoon, 174 S.E. 91, 206 N.C. 388.
S.C.—Hutchison v. Daniel, 171 S.E. 13, 170 S.C. 459.
S.D.—First Nat. Bank v. Selmser Fuel & Grain Co., 227 N.W. 62, 55 S.D. 586.
24 C.J. p 89 note 21.
Unauthorized loan of estate funds as waste see infra § 243.

74. N.C.—Moye v. Petway, 76 N.C. 327.
24 C.J. p 90 note 22.
Advances and disbursements by representative generally see infra § 491.

Loan to contingent remainderman
Under Personal Property Law § 21, the executor cannot loan the fund of a life estate to a contingent remainderman.—Hodgman v. Cobb, 195 N.Y.S. 428, 202 App.Div. 259.

75. N.C.—Torrence v. Davidson, 92 N.C. 437, 53 Am.R. 419.

76. Ariz.—In re Sullivan's Estate, 78 P.2d 132, 51 Ariz. 483.

77. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.

78. Ill.—Nonnast v. Northern Trust Co., supra.

N.Y.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.

79. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.

80. Ala.—Wilson v. Stevens, 29 So. 678, 129 Ala. 630, 87 Am.S.R. 86.

81. Pa.—Abbott v. Reeves, 49 Pa. 494, 88 Am.D. 510.
24 C.J. p 90 note 24.

Recovery against receiver
Executors, loaning money to corporation in violation of law, may recover against receiver sum paid for taxes and traceable to real property. —East Side Packing Co. v. Fahy Market, C.C.A.N.Y., 24 F.2d 644.

Recovery by estate
Amount paid into bank by executors of deceased stockholder could be recovered by estate if payment was loan.—In re De Lano's Estate, 252 N.Y.S. 361, 140 Misc. 748.

82. N.Y.—In re Luksin's Estate, 290 N.Y.S. 932, 160 Misc. 926.
24 C.J. p 90 note 25.

83. Pa.—In re Donnelly, 92 A. 306, 246 Pa. 308.

84. N.Y.—In re Usmann's Estate, 253 N.Y.S. 49, 143 Misc. 654.

85. N.Y.—Denike v. Harris, 84 N.Y. 89, reversing 23 Hun 213.

E. INTEREST ON FUNDS OF ESTATE

§ 209. In General

In the absence of statute or special circumstances, a personal representative ordinarily is chargeable with interest only if he has received it.

At one time executors and administrators were not chargeable in any event with interest on the funds of the estate in their hands,[86] but this rule has long since been abrogated, and it is now well settled that such charge may be made.[87] Interest is not usually chargeable as a matter of course,[88] but may be charged if the circumstances of the particular case require it,[89] the matter being within the discretion of the court.[90]

On general principles the personal representative is bound to render an account of all interest or profit actually received by him out of the assets of the estate.[91] However, except as statutes may otherwise prescribe,[92] where no interest was actually received by the representative, he is not chargeable with interest unless there are special circumstances to warrant such a charge,[93] which circumstances are considered infra §§ 210–215.

§ 210. Propriety of Charge as Affected by Particular Circumstances

A personal representative will be held liable for interest only where it would be equitable to do so.

An executor or administrator will not be charged with interest if it would be inequitable to do so under the circumstances.[94] Whether the executor has profited by his transactions is a matter to be taken into consideration.[95]

An improper charge of interest on a specific item cannot be justified by showing that interest might have been chargeable on some other items.[96]

§ 211. —— Failure to Invest or Deposit

The court in its discretion may charge an executor or administrator with interest if he has kept the estate funds idle when with due diligence he could have made them income producing.

An executor or administrator who fails to invest or deposit funds of the estate so as to make them income producing, when he might or should have done so in the exercise of ordinary care and dili-

86. S.C.—Darrel v. Eden, 3 S.C.Eq. 241, 242, 4 Am.D. 613.
24 C.J. p 73 note 80.

87. Mass.—Gallagher v. Phinney, 187 N.E. 612, 284 Mass. 255.
Miss.—Russell v. Russell, 144 So. 542, 544, 164 Miss. 335, citing **Corpus Juris**, and followed in 144 So. 544.
24 C.J. p 73 notes 81, 83 [a].
Interest on legacies or distributive shares see infra § 508.

88. Mass.—O'Shea v. Barry, 147 N. E. 845, 252 Mass. 510.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.

89. Utah.—In re Listman's Estate, supra.

90. S.C.—Bell v. Mackey, 3 S.E.2d 816, 191 S.C. 105—Glenn v. Worthy, 168 S.E. 705, 169 S.C. 263.

91. Mont.—In re Eakins' Estate, 208 P. 956, 64 Mont. 84.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 910, 128 Or. 317, quoting **Corpus Juris**, and rehearing denied 274 P. 505, 128 Or. 317.
Wis.—In re Gehring's Will, 192 N. W. 36, 38, 179 Wis. 589, citing **Corpus Juris.**
24 C.J. p 73 note 82.

Interest received or collectable

Where an executor had possession of the bonds of a certain corporation and accounted for interest thereon up to a certain date only, although the corporation paid the interest on the bonds for six years more, a charge of six years' interest is proper, whether the executor received it or by ordinary diligence could have received it.—Matter of Fry, 140 N.Y.S. 592, 79 Misc. 180.

92. Ala.—King v. Cabiness, 12 Ala. 598.
24 C.J. p 73 note 83 [b], p 74 note 84.

Trust company as executor

Under statute requiring trust company to allow interest on money held by it as executor, trust company was liable for interest on estate funds deposited in trust company, since Federal Reserve Board's regulation prohibiting payment of interest on any demand deposit was not intended to forbid interest on estate or trust funds where state law requires state bank or trust company to pay interest; and the company cannot avoid payment of interest by depositing funds in a bank other than its own.—In re Ledyard's Estate, 21 N.Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029 and 24 N.Y.S.2d 780, 261 App.Div. 827.

93. Ark.—Alcorn v. Alcorn, 35 S.W. 2d 1027, 183 Ark. 342—Triplett v. Chipman, 240 S.W. 23, 153 Ark. 12.
Mo.—In re Wenzel's Estate, 263 S. W. 110, affirming, App., In re Wenzel, 243 S.W. 395.
Mont.—In re Eakins' Estate, 208 P. 956, 64 Mont. 84.
N.Y.—In re Carpenter's Estate, 276 N.Y.S. 754, 154 Misc. 143.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
N.D.—Crabtree v. Kelly, 260 N.W. 262, 65 N.D. 501.
Tex.—Schulz v. Garmany, Com.App., 293 S.W. 165, reversing Garmany v. Schulz, Civ.App., 285 S.W. 911.
Wis.—In re Gehring's Will, 192 N. W. 36, 38, 179 Wis. 589, citing **Corpus Juris.**
24 C.J. p 73 note 83.
"An executor or administrator is not chargeable with interest on the money of the estate in his hands, unless he has received interest thereon or put it to some profitable use or unreasonably detained it."—O'Shea v. Barry, 147 N.E. 845, 846, 252 Mass. 510.

94. Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

Questions of doubt

An executor or administrator should not be so charged where questions of doubt have prevented him from lending or paying out the estate moneys.—Fitchard v. Hirschberg's Estate, supra—24 C.J. p 75 note 87 [1].

95. Iowa.—Irwin v. Keokuk Sav. Bank & Trust Co., 255 N.W. 671, 218 Iowa 477.

96. Ky.—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.

gence, may be charged with interest thereon,[97] especially if he has been wanting in good faith[98] or has failed to comply with an order of the court directing such investment.[99]

However, there is no inflexible rule requiring such a charge,[1] and in cases where the executor or administrator has not actually received interest or used the funds of the estate for his own purposes, and has merely permitted them to lie idle when they might have been productively employed for the benefit of the estate, it is a matter of discretion with the court, on consideration of all the circumstances of the case, whether interest shall be charged.[2] The important question is whether he has exercised good faith and due diligence as custodian of the particular fund;[3] and in the absence of any governing statute, the courts are not inclined to charge a personal representative whose conduct has been honest and not unreasonable, and who has made no personal use of the fund, where the circumstances justified him in not actively investing or placing it at interest, and even where he was merely inert in failing to do so.[4]

A reasonable period is sometimes allowed within which to invest; and no interest is chargeable for failure to invest during such period,[5] but at the expiration thereof liability becomes fixed,[6] unless the representative shows a good excuse for further delay.[7]

§ 212. —— Improper Use of Funds

An executor or administrator who wrongfully appropriates or commingles estate funds may be charged interest thereon. Such a charge may be proper against a financial institution which, acting as a representative, places estate funds in its own depository.

As a general rule, an executor or administrator

97. Mich.—In re Grover's Estate, 206 N.W. 988, 990, 233 Mich. 467, citing **Corpus Juris.**
N.Y.—In re Kruger's Estate, 249 N.Y.S. 772, 139 Misc. 907—In re Eddy's Estate, 235 N.Y.S. 455, 134 Misc. 112—In re Katz's Estate, 215 N.Y.S. 775, 127 Misc. 16, affirmed 220 N.Y.S. 874, 219 App.Div. 783.
Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.
S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.
24 C.J. p 75 note 87, p 83 note 53.
Right or duty to:
Invest see supra § 205.
Deposit see supra § 187.

Personal profit
Personal representative who has failed to invest may be charged with interest whether or not he has derived profit from such failure.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.

Onus is on representative to show the existence of such circumstances as would justify a departure from the rule of the text.—Ross v. Beacham, supra.

Possibility of demand for legacy
That legatees were at a distance, and might have called for money when it was not in hand, will not exempt administrator from payment of interest for failure to invest.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976—24 C.J. p 75 note 87 [e].

98. Miss.—Russell v. Russell, 144 So. 542, 164 Miss. 335, followed in 144 So. 544.
24 C.J. p 75 note 87.

Advice of counsel
The fact that failure to invest was on advice of counsel will not exempt the representative from liability where the representative has not acted in good faith.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976.

99. Ohio.—In re Marker's Estate, 27 N.E.2d 1019, 137 Ohio St. 89.
Utah.—In re Listman's Estate, 197 P. 596, 57 Utah 471.
24 C.J. p 75 note 87 [a] (2).

1. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.

Deposit pursuant to court order
(1) Interest is not chargeable on money deposited in bank without interest by order of court.—Springer v. Oliver, 21 Ga. 517.

(2) Claim by the executor that he was ordered by the court not to invest cannot avail him if he produces no proof of such an order.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

2. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.
Wash.—In re Brown's Estate, 224 P. 678, 129 Wash. 84.
24 C.J. p 76 note 90.

3. Va.—Cavendish v. Fleming, 3 Munf. 198, 17 Va. 198.
24 C.J. p 76 note 91.

Acts of "prudent man"
"The inquiry is whether, in view of the facts and circumstances, a prudent man, dealing with his own funds, for his own interest, would have retained the money unproductive."—Fitchard v. Hirschberg's Estate, 272 P. 906, 911, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317—24 C.J. p 80 note 19 [f].

4. Iowa.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.
N.D.—Crabtree v. Kelly, 260 N.W. 262, 65 N.D. 501.
S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.
Wash.—In re Brown's Estate, 224 P. 678, 129 Wash. 84.
24 C.J. p 76 note 92.

Wartime conditions
Where the representative lived during war in the midst of active hostilities where nearly all business was suspended, he is not readily chargeable for interest not actually received by him.—Brent v. Clevinger, 78 Va. 12.

Prohibition of interest on demand deposits
Where statutes prohibit the payment of interest on demand deposits, the personal representative cannot be charged with interest on sums so deposited by him and maintained for a reasonable time.—In re Sonderling's Will, 279 N.Y.S. 703, 155 Misc. 403.

Conduct of business
(1) An executor who conducts a going business of decedent should not be charged with interest on amounts kept by him in a noninterest-bearing checking account, where the amounts were so kept in accordance with prudent business practice.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.

(2) Where there was no evidence as to how much executor would have earned by way of interest, nor of how much should have been carried in commercial account in order to operate business of estate, refusal to charge executor with interest on such amount was approved.—In re Finn's Estate, 275 N.W. 215, 281 Mich. 478.

5. N.Y.—In re Sonderling's Will, 279 N.Y.S. 703, 155 Misc. 403.

6. Ga.—Tippin v. Perry, 50 S.E. 35, 122 Ga. 120.
24 C.J. p 76 note 88.

7. N.Y.—Lent v. Howard, 89 N.Y. 169—Dunscomb v. Dunscomb, 1 Johns.Ch. 508, 7 Am.D. 504.

who appropriates money of the estate to his own use is properly charged with interest thereon;[8] and the imposition of such a charge is mandatory under some statutory provisions.[9] The general rule is especially applicable where the representative has actually received interest on the moneys of the estate used by him, and in such case he is chargeable at least to the extent of the amount earned;[10] but it is not essential to the representative's liability for interest that he should have derived any benefit from the use of the funds,[11] nor is his liability affected by the fact that he was at all times able[12] and ready[13] to pay over the money if demanded.

An executor or administrator is not accountable for interest where any possible benefit derived from the use of the funds is wholly indirect and incidental,[14] or where the particular use is authorized by statute;[15] the representative is not liable for interest where in good faith and, as a matter of convenience, he takes title to some of the estate assets in his own name individually.[16]

Commingling of funds. Mingling trust moneys with those which the fiduciary owns as an individual is usually regarded as so reprehensible that the executor or administrator who blends the funds of the estate with his own or uses the same in his business is chargeable with interest during the whole time of such mingling and indiscriminate use,[17] even though the will postponed the time of distribution of the estate and did not direct an investment of the funds meanwhile,[18] or the use was during a protracted litigation as to the right to the funds,[19] or it is not shown that he was actuated by any wrongful intent.[20] Nevertheless, it has been held that the mere fact of mingling estate funds, without any use being made thereof, does not justify charging the personal representative with interest.[21]

Representative interested in depositary. A personal representative is not ordinarily chargeable with interest on estate funds merely because they were deposited in a bank of which he was a stockholder or officer, or in which he was otherwise financially interested.[22] Nevertheless, there may be circumstances which will warrant a charge of interest on moneys so deposited.[23]

Where a bank or trust company, which is acting as representative of an estate, deposits estate funds with itself and lends them out at interest in the same manner as other deposits, it is properly charged with interest.[24] However, it has been held that where the executor is a bank, a mere routine

8. Ala.—First Nat. Bank v. Weaver, 142 So. 420, 422, 225 Ala. 160, 88 A. L.R. 201, citing **Corpus Juris**—Boyte v. Perkins, 99 So. 652, 211 Ala. 130.
Miss.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824—Russell v. Russell, 144 So. 542, 544, 164 Miss. 335, citing **Corpus Juris**, and followed in 144 So. 544—Reeves v. Reeves, 128 So. 330, 157 Miss. 448.
Mont.—In re Eakins' Estate, 208 P. 956, 64 Mont. 84.
N.J.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976.
N.Y.—In re Eddy's Estate, 235 N.Y. S. 455, 134 Misc. 112.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
Okl.—Reed v. Charles Broadway Rouse, Inc., 50 P.2d 1097, 1099, 174 Okl. 522, citing **Corpus Juris**.
Tex.—Richardson v. McCloskey, Civ. App., 261 S.W. 801, reversed on other grounds, Com.App., 276 S. W. 680.
24 C.J. p 77 note 93.

9. Mo.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

10. Ala.—First Nat. Bank v. Weaver, 142 So. 420, 225 Ala. 160, 88 A. L.R. 201.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.

11. Cal.—In re Hilliard, 23 P. 393, 83 Cal. 423.
24 C.J. p 78 note 99.

12. Cal.—In re Clark, 53 Cal. 355.

13. Miss.—Kerr v. Laird, 27 Miss. 544.

14. Ala.—First Nat. Bank v. Weaver, 142 So. 420, 225 Ala. 160, 88 A. L.R. 201.

15. Ala.—First Nat. Bank v. Weaver, supra.

16. Ky.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.

17. Mont.—In re Rodgers' Estate, 217 P. 678, 68 Mont. 46.
24 C.J. p 77 note 94.

18. Iowa.—In re Young, 66 N.W. 163, 97 Iowa 218.

19. Ky.—Grigsby v. Wilkinson, 9 Bush 91.

20. Cal.—In re Stott, 52 Cal. 403.
Mo.—Wolfort v. Reilly, 34 S.W. 347, 133 Mo. 463.

21. Cal.—In re Burnett's Estate, 109 P.2d 26, 42 Cal.App.2d 427—In re Mallory's Estate, 278 P. 433, 99 Cal.App. 96.
24 C.J. p 77 note 94 [k].

22. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
Iowa.—In re Evans' Estate, 232 N. W. 72, 212 Iowa 1.
N.D.—Crabtree v. Kelly, 260 N.W. 262, 65 N.D. 501.
24 C.J. p 77 note 94 [d] (1), (2), (6).

Absence of revenue from deposit
Where estate funds deposited in a national bank of which the executor was chief owner brought no revenue to the bank or to the executor, and were always on hand for payment to those entitled thereto, the executor and trustee would not be charged with interest thereon.—Matter of Sexton, 115 N.Y.S. 973, 61 Misc. 569.

23. Mich.—In re Brewster, 71 N.W. 1085, 113 Mich. 561.
24 C.J. p 77 note 94 [d] (3)-(5).

Transfer resulting in loss
Where an executor withdrew cash of an estate from a bank in which it earned four per cent, and deposited it at two per cent in a bank of which he was president, he was held liable for the interest it would have earned if it had been left in the first bank.—In re Eckert's Estate, 117 A. 40, 93 N.J.Eq. 598.

24. Conn.—Hayward v. Plant, 119 A. 341, 98 Conn. 374.
Mo.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
24 C.J. p 77 note 94 [c].

Circumstances affecting liability
(1) Delay in making final settlement caused by suit to construe will does not affect such liability; nor is a trust company relieved from such liability by heirs' failure to

deposit of the estate moneys in its own bank is not such a use as to render it liable for interest,[25] at least in the absence of negligence or insolvency of the bank, or the use of the funds to provide a necessary cash reserve, or other facts of a similar nature.[26]

Proof of use of funds. A mere suspicion that the representative has used funds of the estate is not sufficient to justify a charge of interest against him;[27] but it is sufficient if there is strong presumptive evidence of such use,[28] if such use can reasonably be inferred from the facts,[29] or if a claim that the money was so used is not denied.[30] Of course there can be no charge of interest against the personal representative where the proof shows that his use of the estate funds was not in fact improper.[31]

Option as to interest or profits. The distributees or other beneficiaries of the estate may elect to charge the personal representative either with interest during the whole period, or with the profits actually accruing from his misapplication if these can be ascertained.[32]

§ 213. —— Delay in Settling Estate

An unreasonable delay in settling the estate or a delay which extends beyond the period prescribed by statute, may render the representative liable for interest.

The mere fact of delay in closing up an estate does not of itself justify a charge of interest against the personal representative.[33] The representative should not be charged with interest not actually received where the delay was not unreasonable under the circumstances of the case,[34] or was not due to any culpable neglect or misconduct on his part, but was otherwise occasioned, as by some needful judicial preliminaries, the sickness or absence of the judge, litigation, or interference among rival claimants to the fund, the nonascertainment of those actually entitled, the fact that the person entitled could not be found, or similar causes, and he has not used or made any profit on the funds in his hands.[35] However, where there has been long and culpable delay by the representative in accounting or in settling the estate and distributing the residue, interest is chargeable[36] after a reasonable time has

have result of suit to construe will certified to probate court.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

(2) The fact that the bank acting as administrator has two departments, a trust department and a commercial department, and that the money is used in the commercial department, does not excuse it from liability for interest.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.

(3) Trust company does not escape liability on the ground that it had ample funds on hand at all times to meet the demands of creditors and legatees.—Enright v. Sedalia Trust Co., supra.

(4) Bank, as depositary, could not notify itself, as administrator of depositor's estate, that it would no longer pay interest on deposit.—In re Orrantia's Estate, 285 P. 266, 36 Ariz. 311.

Earnings above interest

The financial institution is entitled to the earnings of the deposit over and above the market price of such a deposit.—Hayward v. Plant, 119 A. 341, 98 Conn. 374.

25. Ala.—First Nat. Bank v. Weaver, 142 So. 420, 422, 225 Ala. 160, 88 A.L.R. 201.

Implied authority of testator

"The nomination of the bank as executor in the will indicates implied authority on the part of the testator that the funds may be so deposited without penalty."—First Nat. Bank v. Weaver, supra.

Statutory authority

A statute authorizing national banks to act as executors, and prescribing that trust funds shall not be used by such a bank unless it sets aside certain securities, inferentially authorizes its use of such funds on compliance with the statute.—First Nat. Bank v. Weaver, supra.

26. Ala.—First Nat. Bank v. Weaver, supra.

27. N.C.—Grant v. Edwards, 93 N. C. 488.

24 C.J. p 77 note 94 [1] (3).

28. Pa.—Armstrong v. Walker, 25 A. 53, 150 Pa. 585.

24 C.J. p 78 note 4.

29. Mo.—Camp v. Camp, 74 Mo. 192.

24 C.J. p 78 note 5.

30. Okl.—Reed v. Charles Broadway Rouse, Inc., 50 P.2d 1097, 174 Okl. 522.

24 C.J. p 78 note 6.

31. Ky.—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.

32. N.Y.—Matter of Peck, 80 N.Y. S. 76, 79 App.Div. 296, affirmed 69 N.E. 1129, 177 N.Y. 538.

24 C.J. p 78 note 7.

33. Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

Who may complain

A residuary legatee cannot surcharge an executor with interest on a specific legacy for delay in its payment, where the specific legatee has made no claim for interest.—In re Constable's Estate, 149 A. 743, 299 Pa. 509.

34. Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

24 C.J. p 81 note 22.

Tender of payment

Executrix, who promptly tendered to legatees proceeds of land sold, was not chargeable with interest, tender being conditioned only on execution of receipts.—Schulz v. Garmany, Tex.Com.App., 293 S.W. 165, reversing Garmany v. Schulz, Civ. App., 285 S.W. 911.

35. Mass.—O'Shea v. Barry, 147 N. E. 845, 252 Mass. 510.

N.Y.—In re Maybury's Estate, 20 N.Y.S.2d 498, 174 Misc. 246.

24 C.J. p 81 note 23.

Will contest

Delay of an executor caused by a contest of the will does not justify the charging of interest.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.

36. Miss.—Russell v. Russell, 144 So. 542, 544, 164 Miss. 335, citing **Corpus Juris**, and followed in 144 So. 544.

Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

24 C.J. p 80 note 19.

Interest on legacies or distributive shares see infra § 508.

Reason for rule

Under such circumstances, it is presumed that the representative made use of the funds of the estate. Mass.—Wyman v. Hubbard, 13 Mass. 232.

elapsed,[37] and a demand for settlement is not essential to render him liable.[38]

What constitutes unreasonable delay so as to render the personal representative liable for interest depends on the facts and circumstances,[39] such as the conditions existing during the time allowed for settling the estate.[40]

The representative is not chargeable with interest for delay occasioned by the failure of the distributees or legatees to call for moneys retained by him,[41] although he is liable if he has had the money in his hands for a long time and has not kept it ready for distribution.[42]

Period prescribed by statute. A definite time is allowed in some jurisdictions for the settlement of estates, and within this time an executor or administrator is not generally chargeable with interest, unless he has actually made it, or has used the money for his own purposes,[43] or unless there was no necessity for retaining the fund for the entire period,[44] as, for example, where the estate was settled during the period and nothing remained for the personal representative to do except to pay out the money.[45] However, after the lapse of such period he is liable, at least prima facie, for interest on all moneys which are or should be in his hands,[46] and can relieve himself only by showing an application of the money to the exigencies of the estate.[47]

During settlement of accounts. If no negligence or improper conduct is imputable to the executor or administrator, interest will not be charged for the time that the account is before the accounting officer in process of settlement,[48] or while exceptions to the account are pending;[49] but if the exceptions are pending for a long time, and the executor or administrator allows the funds to remain unproductive without asking the advice of the court, he should be charged with interest during such time.[50]

Delay in paying debts. The personal representative is chargeable with interest paid by him on an obligation of the estate where he improperly delays in paying off the indebtedness although having sufficient moneys on hand with which to do so.[51]

§ 214. —— Reservation for Contingencies

The personal representative may keep a reasonable sum on hand to meet contingencies, without becoming liable for interest, although if the retention of such funds appears unnecessary he should apply to the court for instructions.

An executor or administrator is not liable to pay interest on a reasonable sum retained in his hands or on deposit to meet expenses and pay judgments recovered against the estate, or to abide the contingencies of some litigation concerning the assets and the title of parties claimant;[52] but it must ap-

Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

37. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
Ky.—Farber's Ex'r v. Farber, 148 S.W.2d 732, 285 Ky. 596.
Mass.—Spilios v. Papps, 197 N.E. 512, 292 Mass. 145.
24 C.J. p 80 note 19.

38. Ill.—Haskins v. Martin, 103 Ill. App. 115.

39. Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.
24 C.J. p 80 note 19 [f].

Delay caused by trivial appeal

Where an appeal from an order of distribution has been held to be trivial, a delay in making settlement would be unreasonable, and an executor should be charged with interest during the time that intervened between the order appealed from and the date distribution was made.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

40. Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

41. N.Y.—Burtis v. Dodge, 1 Barb. Ch. 77.
24 C.J. p 81 notes 23 [c], 24.

42. N.J.—Salisbury v. Colt, 27 N.J. Eq. 492.
Pa.—Kline's Estate, 8 Lanc.L.Rev. 356.
24 C.J. p 81 note 25.

43. Ky.—Commonwealth v. Campbell, 43 S.W.2d 994, 241 Ky. 349.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
24 C.J. p 81 note 27.

44. Ky.—Greenway's Adm'r v. Greenway, 98 S.W.2d 283, 266 Ky. 114.
24 C.J. p 81 note 27 [a].

45. Ky.—Bemiss v. Widows' & Orphans' Home of Christian Church of Kentucky, 230 S.W. 310, 191 Ky. 316.

46. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
Ky.—Commonwealth v. Campbell, 43 S.W.2d 994, 241 Ky. 349.
24 C.J. p 82 note 28.

One year

Ordinarily, executor having funds in his possession is chargeable with interest at least from one year after testator's death.—Irwin v. Keokuk Sav. Bank & Trust Co., 255 N.W. 671, 218 Iowa 477.

47. Miss.—Anderson v. Gregg, 44 Miss. 170.
24 C.J. p 82 note 29.

Avoidance of loss to estate

Interest at the legal rate was not charged where any attempt to wind up the estate at the end of the statutory period would have resulted in loss and sacrifice.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.

Delay caused by court order

A delay beyond the statutory period does not warrant a surcharge for interest where the delay was caused by a court order postponing a sale of assets.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

48. Pa.—Merkel's Estate, 18 A. 931, 131 Pa. 584.

49. Pa.—Hoopes v. Brinton, 8 Watts 73.
24 C.J. p 83 note 47 [a].

50. Pa.—Bruner's Appeal, 57 Pa. 46.
24 C.J. p 83 note 40.

51. N.Y.—In re Rogers' Estate, 258 N.Y.S. 534, 143 Misc. 834.
Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.
24 C.J. p 80 note 19 [c].

52. Ala.—McCraw v. Cooper, 118 So. 383, 218 Ala. 186.

pear that the funds were actually kept in hand for the purposes in question.[53]

In case the representative finds himself with funds not needed for the purposes mentioned, he should, to avoid liability for interest, report that fact to the court and apply for an order of distribution or for leave to pay the money into court, or for instructions in the premises,[54] and circumstances may arise where, not having procured the protection of the probate court, he may make himself chargeable for interest which the fund would fairly have earned had he dealt prudently with the assets.[55]

The necessity for keeping funds on hand must in any case be determined on consideration of the particular facts involved,[56] and the burden of proving the necessity of so retaining them is on the representative.[57]

§ 215. —— Other Circumstances

a. Loss of assets
b. Personal debts and claims of representative
c. Estoppel, waiver, and laches
d. Miscellaneous circumstances

a. Loss of Assets

The representative may be charged interest on estate funds wrongfully lost through his improper investments, disbursements, failure to collect debts, or the like.

It is generally held that if funds of the estate are lost through the fault of the executor or administrator, either by failure to collect debts or by improper disbursements or investments, he is chargeable with interest on the amount lost, as well as with the principal sum;[58] but the rule is not absolute, and in a number of cases it has been held that interest is not chargeable on funds which have been lost by the executor or administrator.[59]

Failure to collect interest. An executor or administrator is chargeable with interest accruing to the estate which should have been collected by him, but which he failed to collect,[60] unless it is made to appear that the interest could not have been collected by the use of reasonable diligence.[61]

b. Personal Debts and Claims of Representative

An executor or administrator may be required to pay interest on debts owed by him to the estate, on funds withheld by him under an improper claim, and on commissions which he has prematurely withdrawn.

An executor or administrator who is indebted to the estate is chargeable with interest on his indebtedness.[62]

A retention of funds which the personal representative owns in his individual capacity,[63] or as to

Ky.—Taylor v. Taylor's Ex'rs, 277 S.W. 278, 211 Ky. 309.
Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.
24 C.J. p 82 note 30.

Unreasonable amount
If the representative keeps on hand more than is reasonably sufficient for current purposes, he is chargeable with interest on the excess.—Frost v. Denman, 2 A. 926, 41 N.J. Eq. 47—24 C.J. p 82 note 30 [e].

53. D.C.—McIntire v. McIntire, 14 App.D.C. 337, affirmed 24 S.Ct. 196, 192 U.S. 116, 48 L.Ed. 369.
24 C.J. p 82 note 31.

Private use of funds
An executor retaining funds of the estate to indemnify him for a possible future loss is chargeable with the legal rate of interest from the date of the final settlement of the estate, if he uses the funds in his private business.—Ulrici v. Boeckeler, 72 Mo.App. 661.

54. Cal.—Walls v. Walker, 37 Cal. 424, 99 Am.D. 290.
24 C.J. p 82 note 32.

55. Md.—Monteith v. Baltimore Poor Improvement Assoc., 21 Md. 426.
24 C.J. p 82 note 33.

56. Iowa.—In re Gloyd, 61 N.W. 975, 93 Iowa 303.
24 C.J. p 83 note 36.

57. S.C.—Burnside v. Robertson, 6 S.E. 843, 28 S.C. 583.
24 C.J. p 83 note 37.

58. Ky.—Farmers' Bank & Trust Co., 228 S.W. 691, 190 Ky. 762.
Mont.—In re Astibia's Estate, 46 P. 2d 712, 100 Mont. 224.
Pa.—In re Long's Estate, 17 A.2d 686, 143 Pa.Super. 176.
24 C.J. p 79 note 13.

59. U.S.—Pulliam v. Pulliam, C.C. Tenn., 10 F. 53.
24 C.J. p 79 note 14.

Good faith
(1) Where the executor acted in good faith his liability may be limited to the amount lost without interest.—Wyckoff v. Van Siclen, 3 Dem.Surr., N.Y., 75.

(2) Where the executor had no money of the estate, and was compelled to borrow at times to meet the expenses of administration, he should not be held to pay interest on amounts charged to him by reason of his neglecting to collect assets, if he acted honestly and in good faith, and it is not shown that the assets would have realized any interest had he collected them.—In re Hall, 41 A. 508, 70 Vt. 453.

Unliquidated item
An executor was not liable for statutory interest on an amount surcharged against it for failure to present claim of estate against company, where such amount was not a liquidated item.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.

60. Miss.—Owens v. Owens, 37 So. 149, 84 Miss. 673.
24 C.J. p 79 note 10.

61. Cal.—Moore's Estate, 13 P. 880, 72 Cal. 335.
24 C.J. p 79 note 11.

62. Va.—Cannon v. Searles, 143 S.E. 495, 150 Va. 738.
24 C.J. p 79 note 9, p 77 note 93 [a], p 81 note 27 [b].

Estate indebted to representative
Where an executor has a valid claim against the estate for an amount in excess of his indebtedness, it is error to charge him with interest on his debt without allowing him interest on his claim.—In re Sutton, 49 A. 775, 200 Pa. 158.

63. Pa.—In re Dutton's Estate, 151 A. 697, 301 Pa. 94.

which he asserts a fair claim of right,[64] will not render him liable for interest. However, it has been held proper to charge a personal representative with interest on the amount of a claim improperly paid to himself,[65] or retained by him under a claim which has no substantial basis and which is subsequently decided against him.[66]

Premature withdrawal of commissions. It has been held that, where the representative withdraws money from the estate for his commissions before settlement or the due allowance of commissions, he is chargeable with interest thereon,[67] although he acted in good faith and under advice of counsel;[68] but there is also authority for the view that interest should not be charged on commissions prematurely withdrawn,[69] at least where the action of the representative in this respect was authorized or consented to by the persons beneficially interested in the estate.[70]

c. Estoppel, Waiver, and Laches

The right to have a representative charged with interest may be lost by estoppel, waiver, or laches on the part of the persons interested in the estate.

A claim for interest based on an improper act or omission of the personal representative may be barred by laches or estoppel,[71] or may be waived.[72] Heirs have been held not estopped to claim interest on funds used by the executor by their failure to make such claim until after the final settlement,[73] nor by the fact that without full knowledge of the circumstances they signed receipts in full for their shares.[74]

d. Miscellaneous Circumstances

Interest may be charged against a representative guilty of misconduct; and it may also be charged on moneys not properly accounted for, or representing a balance due the estate. Various circumstances in addition to those discussed in prior sections have been held not to warrant a charge of interest against an executor or administrator.

In addition to the circumstances discussed supra this section and §§ 210–214, interest may be charged against a personal representative by reason of other circumstances.[75] Misconduct of a representative may warrant charging him with interest.[76] It has also been held proper to charge the representative with interest on moneys received by him but not accounted for,[77] on the balance found to be due the estate on a settlement,[78] on money improperly withdrawn from the estate for payment over to a third

64. Mich.—Hall v. Grovier, 25 Mich. 428.
24 C.J. p 83 note 52 [a].

65. Miss.—Cole v. Leake, 27 Miss. 767.
24 C.J. p 83 note 42.

66. S.C.—Howard v. Schmidt, 9 S. C.Eq. 452.

67. U.S.—Commissioner of Internal Revenue v. Cadwalader, C.C.A., 88 F.2d 274, certiorari denied Cadwalader v. Commissioner of Internal Revenue, 57 S.Ct. 940, 301 U.S. 706, 81 L.Ed. 1360.
Ala.—McCraw v. Cooper, 118 So. 833, 218 Ala. 186.
N.Y.—In re Bates' Estate, 4 N.Y.S.2d 444, 167 Misc. 641, reversed on other grounds In re Bates' Will, 8 N.Y.S.2d 548, 255 App.Div. 615, reargument denied 11 N.Y.S.2d 416, 256 App.Div. 69, motion denied 22 N.E.2d 487, 281 N.Y. 664.
Ohio.—In re Russell's Estate, 21 N. E.2d 604, 60 Ohio App. 385.
24 C.J. p 80 note 15.

Basis of rule

Administrator who takes commissions before allowed by court occupies position of borrower.—In re Jula's Estate, 130 A. 733, 3 N.J. Misc. 976.

68. N.Y.—Wheelwright v. Rhoades, 28 Hun 57, 11 Abb.N.Cas. 382.
24 C.J. p 80 note 16.

69. Cal.—In re Carter, 64 P. 123, 64 P. 484, 132 Cal. 113.
Pa.—In re Parker, 64 Pa. 307.

70. N.Y.—Matter of Ross, 68 N.Y. S. 373, 33 Misc. 163.
24 C.J. p 80 note 18.

71. Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
S.C.—Bell v. Mackey, 3 S.E.2d 816, 191 S.C. 105.

72. Iowa.—Tucker v. Stewart, 97 N. W. 148, 121 Iowa 714, withdrawing opinion 86 N.W. 371.
24 C.J. p 73 note 83 [h].

Failure to object

If executors collect rent under the belief that they are entitled to do so, and do not use it for their own benefit, they are not chargeable with interest for a failure to turn it over to the devisee entitled thereto, where the latter did not object to their collection of such rent.—Cusick v. Langan, 157 Ill.App. 472.

73. Mo.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

74. Mo.—Enright v. Sedalia Trust Co., supra.

75. **Improper investment**

A personal representative is properly charged with interest on an improper investment, notwithstanding such investment yielded no interest.—Lockhart v. Horn, C.C.Ala., 15 F.Cas.No.8,446, 3 Woods 542.

76. S.C.—Lazenby v. Mackey, 14 S. E.2d 12, 196 S.C. 507.
24 C.J. p 83 note 41.

Renewal of loan without court order

Where an executor, without order of court, took in his own name new notes and mortgages for the amount of old ones with accrued interest, he was liable as for a loan of the entire sum and was chargeable with interest thereon.—In re Richmond, 99 P. 554, 9 Cal.App. 402.

77. Ky.—Taylor v. Taylor's Ex'rs, 277 S.W. 278, 211 Ky. 309.
Md.—Tsaraclis v. Characklis, 3 A.2d 725, 176 Md. 28.

Admission of receipt; consent decree

Where a legatee has charged an administrator with the receipt of certain cash which he omitted from his inventory, and a consent decree is rendered providing that the administrator shall be charged with interest on the money if it is found that he received it, the administrator should be charged with interest on the money while it was in his possession, where he admits its receipt, even though he disbursed the money to certain special legatees.—McIntire v. McIntire, 14 App.D.C. 337, affirmed 24 S.Ct. 196, 192 U.S. 116, 48 L.Ed. 369.

78. Pa.—In re Brinton, 10 Pa. 408.
24 C.J. p 83 note 43.

Excess credit

It is proper to surcharge an executor with interest on the excess credit taken by him on his account in connection with the distribution of certain household goods.—In re Constable's Estate, 149 A. 743, 299 Pa. 509.

person,[79] on money negligently left in the hands of a debtor for an undue length of time,[80] on a sum which he improperly failed to put into his account and hold as an identified fund,[81] and on assets of which a widow or heir took profitable possession long before receiving letters of appointment.[82]

In addition to the circumstances treated supra this section and §§ 210–214, various other circumstances have been held not to warrant a charge of interest against a personal representative.[83] Interest should not be charged against a representative who manages the estate honestly and well for mere neglect to render an account;[84] he should not be charged absolutely for interest on money in his hands, if it is in dispute to whom he should pay it, and no negligence or bad faith is to be imputed to him;[85] and no interest should be charged on small balances where neither default in payment nor misconduct appears,[86] or on funds withdrawn from a bank in good faith although without a prior order of the court.[87]

Interest is not chargeable on sums paid for counsel fees prior to their allowance if the amount paid is subsequently approved by the court;[88] and it has also been held that no interest should be charged on counsel fees improperly paid by the executor, and for which he is refused credit in his account, where the payment was made in good faith.[89]

Interest should not be charged on collections of trifling amount as compared with anticipated outlay,[90] nor should unearned interest be charged on a distribution earlier than the regular time.[91]

§ 216. Rate, Time, and Computation of Interest

a. Rate
b. Time
c. Computation

a. Rate

The rate of interest for which a personal representative is liable depends on the the amount which the estate funds earned or should have earned. The legal rate or the interest rate paid by banks is frequently considered proper.

In general the personal representative, if liable for interest, is liable simply for the current interest that may be fairly obtained, or else for the interest he has actually made;[92] but the circumstances of each

79. Cal.—In re Scott, 83 P. 85, 1 Cal.App. 740.
24 C.J. p 83 notes 44, 49.

Overpayments to creditors of estate
N.Y.—Matter of Philp, 61 N.Y.S. 241, 29 Misc. 263.
24 C.J. p 83 note 46.

80. Miss.—Owens v. Owens, 37 So. 149, 84 Miss. 673.
24 C.J. p 83 note 45.

81. U.S.—McIntire v. McIntire, 24 S.Ct. 196, 192 U.S. 116, 48 L.Ed. 369, affirming 20 App.D.C. 134.

82. N.Y.—Wilkes v. Rogers, 6 Johns. 566.

83. **Order of payment of debts**
Where two debts of the estate bear interest at different rates and the personal representative first pays off the debt bearing the lower interest rate, he is not chargeable with the difference in interest lost to the estate if the surrounding circumstances show that he has exercised reasonable business judgment as to the order of payment.—In re Barreiro's Estate, 13 P.2d 1017, 125 Cal.App. 153.

Income applied to beneficiary's use
(1) Executor-trustees would not be charged with interest where beneficiaries had had benefit of interest from investments made.—In re Adler's Estate, 299 N.Y.S. 542, 164 Misc. 544.

(2) Where testator's will gave his wife the income of his property for life, and the executor invested moneys earned by the estate, the income therefrom being paid to the widow, she was not entitled to charge the executor with interest on the sum invested.—Matter of Chapman, 66 N.Y.S. 235, 32 Misc. 187.

Property delivered to legatee
Executor is not chargeable with interest on the value of personal property which he delivered to the legatee, although he borrowed money with which to pay debts.—Matter of Oosterhoudt, 38 N.Y.S. 179, 15 Misc. 566—24 C.J. p 84 note 68.

Chattels retained in specie
Interest should not be charged on the value of chattels retained in specie, where they were not of a perishable nature and a sale thereof was not required by the terms of the will or necessary for the payment of debts and legacies.—Greeno v. Greeno, 23 Hun, N.Y., 478.

84. Ga.—Binion v. Miller, 27 Ga. 78.

85. Va.—Dilliard v. Tomlinson, 1 Munf. 183, 15 Va. 183.

86. N.Y.—Matter of Butler, 9 N.Y.S. 641, 1 Conn. Surr. 58.
Va.—Wood v. Garnett, 6 Leigh 271, 33 Va. 271.

87. Neb.—In re Hunter's Estate, 262 N.W. 41, 129 Neb. 529.

Banks in critical condition
Administrator should not be charged with loss of interest occasioned by his converting stock into money, depositing money in bank, and then withdrawing money and placing it in safety deposit box without prior sanction of court, where, at time, banks were in critical condition and administrator acted in good faith.—In re Hunter's Estate, supra.

88. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.

89. Pa.—In re Clauser, 84 Pa. 51.

90. Ala.—Eubank v. Clark, 78 Ala. 73.
Ky.—Petty v. Taylor, 5 Dana 598.

91. Ky.—Thrasher v. Lewis, 13 Ky. L. 926.

92. Ky.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.
24 C.J. p 85 note 93, p 80 note 19 [h], p 82 note 30 [e].

Court order as to investment
An executor who failed to invest estate funds in bonds, as directed by the court, was chargeable with the interest which such bonds would have earned.—In re Listman's Estate, 197 P. 596, 57 Utah 471—24 C.J. p 85 note 93 [c].

Dividends
Executors who bought stock on recommendation of reputable bankers and brokers were required to account only to extent of interest received by way of dividends and not for legal interest.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.

Debt to estate
An executrix will not be charged with a higher rate of interest on money borrowed from deceased than the current rate prevailing when the loan was made.—In re Catanach's Estate, 117 A. 178, 273 Pa. 368.

case should be considered in determining the rate to be charged,[93] the matter being one which rests in the discretion of the court.[94] It is frequently regarded as proper to charge the representative with the legal rate of interest[95] or the rate allowed by banks on interest-bearing accounts.[96]

Where the representative has merely neglected to make the fund productive, the court may not visit him with a heavy penalty, while if he has used the money for his own purposes, or has otherwise misconducted himself in the use of it, a higher rate of interest may be imposed.[97] Indeed in some states the rate in case of misconduct is fixed so high as to amount practically to a penalty.[98] A statute which provides a minimum rate of interest payable on trust funds does not prevent a higher rate being charged against a trust company acting as an executor.[99]

b. Time

(1) Time from which interest runs

(2) Time to which interest runs

93. N.Y.—In re Mayer's Estate, 229 N.Y.S. 638, 132 Misc. 384.
24 C.J. p 86 note 94, p 79 note 13 [a].

Particular rates charged in view of circumstances

(1) Three per cent.
Ill.—In re Crumbaker's Estate, 217 Ill.App. 411.
N.Y.—Ellis v. Kelsey, 150 N.E. 148, 241 N.Y. 374, modifying 210 N.Y.S. 846, 214 App.Div. 784, and motion granted 152 N.E. 399, 242 N.Y. 495.

(2) Four per cent.
Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.
N.J.—Melosh v. Melosh, 6 A.2d 472, 125 N.J.Eq. 486.
R.I.—Knagenhjelm v. Rhode Island Hospital Trust Co., 114 A. 5, 43 R.I. 559.

(3) Five per cent.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.

(4) Six per cent.
Iowa.—In re Sheeler's Estate, 284 N.W. 799, 226 Iowa 650—In re Mowrey's Estate, 232 N.W. 82, 210 Iowa 923.
Kan.—Vincent v. Werner, 88 P.2d 687, 140 Kan. 599.
Miss.—Russell v. Russell, 144 So. 542, 164 Miss. 335, followed in 144 So. 544.
Mo.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.
N.J.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
Ohio.—In re Chambers' Estate, 36 N.E.2d 175, appeal dismissed 24 N.E.2d 601, 136 Ohio St. 202.
Or.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
Tex.—Cartledge v. Billalba, Civ.App., 154 S.W.2d 219, error refused.
Va.—McCready v. Lyon, 187 S.E. 442, 167 Va. 103.

(5) Eight per cent.—In re Brooks' Estate, 80 P.2d 1065, 83 Utah 506.

94. U.S.—Harrison v. Perea, N.M., 18 S.Ct. 129, 168 U.S. 311, 42 L.Ed. 478.
24 C.J. p 86 note 95.

95. Ill.—Nonnast v. Northern Trust Co., 29 N.E.2d 251, 374 Ill. 248, modifying In re Nonnast's Estate, 21 N.E.2d 796, 300 Ill.App. 537.
Iowa.—In re Mowrey's Estate, 232 N.W. 82, 86, 210 Iowa 923, citing **Corpus Juris.**
La.—Succession of Crouch, 8 La.App. 86.
Mont.—In re Astibia's Estate, 46 P.2d 712, 100 Mont. 224—In re Rodgers' Estate, 217 P. 678, 68 Mont. 46.
N.Y.—In re Bandler's Estate, 15 N.Y.S.2d 307, 172 Misc. 433—In re Taft's Will, 259 N.Y.S. 887, 144 Misc. 896, modifying 256 N.Y.S. 732, 143 Misc. 387, and affirmed 260 N.Y.S. 294, 145 Misc. 435—In re Harned's Will, 250 N.Y.S. 380, 140 Misc. 151, affirmed 254 N.Y.S. 939, 234 App.Div. 796—In re Mayer's Estate, 229 N.Y.S. 638, 132 Misc. 384.
Or.—Weinke v. Majeske, 97 P.2d 179, 163 Or. 483.
S.C.—Lazenby v. Mackey, 14 S.E.2d 12, 196 S.C. 507.
Utah.—In re Brooks' Estate, 80 P.2d 1065, 83 Utah 506.
24 C.J. p 86 note 96, p 79 note 10 [a].

Highest legal rate

A representative who misapplies estate funds or uses them for his own benefit is chargeable with the highest legal rate of interest.
N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.
Tex.—Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 122, reversing Armstrong v. Anderson, Civ.App., 91 S.W.2d 775, and rehearing denied Anderson v. Armstrong, 132 S.W.2d 393, 132 Tex. 122.
24 C.J. p 86 note 97 [a].

Administrators with will annexed were held liable at legal rate of interest from date of their qualification to date of decree, but for prior period only to extent of interest actually received by them.—In re Harned's Will, 250 N.Y.S. 380, 140 Misc. 151, affirmed 254 N.Y.S. 939, 234 App.Div. 796.

96. Ariz.—In re Arrantia's Estate, 285 P. 266, 36 Ariz. 311.
Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.
Mich.—In re Grover's Estate, 206 N.W. 988, 233 Mich. 467.
N.J.—In re Eckert's Estate, 117 A. 40, 93 N.J.Eq. 598.
N.Y.—Ellis v. Kelsey, 150 N.E. 148, 241 N.Y. 374, modifying 210 N.Y.S. 846, 214 App.Div. 784, and motion granted 152 N.E. 399, 242 N.Y. 495—In re Eddy's Estate, 235 N.Y.S. 455, 134 Misc. 112—In re Katz' Estate, 215 N.Y.S. 775, 127 Misc. 16, affirmed 220 N.Y.S. 874, 219 App.Div. 783.
Ohio.—In re Marker's Estate, 27 N.E.2d 1019, 137 Ohio St. 89.
S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.
24 C.J. p 85 note 93 [a].

"No greater rate of interest should be charged, however, unless the administrator has been guilty of misconduct."—In re Eddy's Estate, 235 N.Y.S. 455, 460, 134 Misc. 112.

Financial institution, acting as executor, is chargeable for interest on estate funds deposited with it at the rate paid by it to other depositors, and not at the legal rate of interest.—In re Haigh's Estate, 232 N.Y.S. 322, 133 Misc. 240—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684—24 C.J. p 85 note 93 [g].

Higher rate obtainable

Where executrix deposited estate funds in a bank and secured three per cent interest, which was as much as an investment in government bonds as authorized by statute would have yielded, it was error to penalize her for an additional two per cent, on the theory that, in failing to obtain five per cent, she did not exercise the highest degree of business judgment.—In re Gehring's Will, 192 N.W. 36, 179 Wis. 539.

97. N.Y.—King v. Talbot, 40 N.Y. 76.
24 C.J. p 86 note 97.

98. La.—Succession of Crouch, 8 La. App. 86.
24 C.J. p 87 note 98.

99. Mo.—Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

(1) Time from Which Interest Runs

The time from which a personal representative will be charged with interest depends on the circumstances.

The time from which an executor or administrator will be charged with interest must depend to a large extent on the circumstances of the particular case.[1] A reasonable time to collect and apply money or to render accounts should be allowed before interest is charged,[2] and interest should not, as a rule, be required from the representative before he actually receives the fund,[3] unless interest comes to his hands.[4] Where the representative is ordered to pay over certain moneys, interest runs from the date specified in the order.[5]

A representative who has improperly withdrawn funds from the estate or has applied estate funds to his own use and profit, may be charged with interest from the time he withdrew or received the funds[6] or even from the time of decedent's death.[7] A representative who has transferred estate moneys from an interest-bearing deposit to a noninterest-bearing one, may be charged from the date of the change.[8] A charge of interest from the time of the receipt of a fund is sometimes proper, particularly in cases of neglect or misconduct.[9]

(2) Time to Which Interest Runs

The time to which interest against an executor or administrator is computed depends on the circumstances.

The time to which interest against a personal representative is computed depends on the circumstances.[10] An executor who keeps money of the

1. Ky.—Farmers' Bank & Trust Co. v. Stanley, 228 S.W. 691, 190 Ky. 762.
Mont.—In re Astibia's Estate, 46 P.2d 712, 100 Mont. 224.
24 C.J. p 84 note 74, p 75 note 87 [i], p 79 notes 9 [c], 13 [b], p 81 note 27 [b].

Date of sale
Executor, subject to surcharge for proceeds of sales of decedent's property, was liable for interest from date of sale.—In re Hyde's Estate, 266 N.Y.S. 871, 149 Misc. 291.

Reduction of attorney's fee
Where allowance for attorney's fees was reduced on appeal, executor who had paid fees before appeal was liable for interest on amount of reduction only from time that court signed order reducing fee.—In re Ferguson's Estate, 3 A.2d 439, 124 N.J. Eq. 573, affirmed 11 A.2d 107, 127 N. J.Eq. 14.

Date of demand
An administratrix who collected deceased's war risk insurance occupied relation of a trustee, and was chargeable with interest on fund at least from date of its demand by the beneficiary.—Mills v. Baird, Tex.Civ. App., 147 S.W.2d 312. Error refused.

Date when liability became fixed
Where a representative has failed to prosecute a cause of action within the statutory period, interest on the amount of his liability for such failure is allowable from the date when the right against the representative for breach of duty became fixed.—Wisconsin Trust Co. v. Cousins, 179 N.W. 801, 172 Wis. 486.

Date of report
(1) When a suit for an accounting has been brought and a balance against the executor or administrator is found by the master, interest should be charged on such balance only from the date of the master's report, where it appears that the executor or administrator acted in good faith, but had misapprehended his duty as to the matters with respect to which he was found chargeable.—Norman v. Storer, C.C.N.Y., 18 F.Cas. No.10,301, 1 Blatchf. 593.

(2) It is proper to charge interest from the date of an auditor's report. —Brown v. Parks, 9 S.E.2d 897, 190 Ga. 540.

Where a will is set aside and a bill is thereafter filed against the person who was acting as executor, for an accounting as to the funds in his hands, he is liable for interest, at least from the time when the bill for the accounting was filed.—Wood v. Nelson, 10 B.Mon., Ky., 229.

Testamentary provisions
Under a will giving testator's widow the net income of the estate until his son reached his majority, after which the income should be divided equally between them, the executors are not chargeable with interest on the amount of the principal paid over to the widow before the majority of the son; but after the son's majority they must pay one half of the interest to him.—Matter of Wagner, 117 N.Y.S. 53, 132 App.Div. 306.

2. N.J.—Wyckoff v. O'Neill, 67 A. 32, 72 N.J.Eq. 880.
24 C.J. p 84 note 75, p 82 note 28 [a].
Delay in settling estate see supra § 213.

3. S.C.—Davis v. Wright, 20 S.C.L. 560.
24 C.J. p 84 note 76.

4. Va.—McCall v. Peachy, 8 Munf. 288, 17 Va. 288.

5. Ky.—Farber's Ex'r v. Farber, 148 S.W.2d 732, 285 Ky. 596—Greenway's Adm'r v. Greenway, 98 S.W. 2d 283, 266 Ky. 114.

Date of filing of bill
Md.—Scrivener's Adm'r v. Scrivener's Ex'rs, 1 Harr. & J. 743.

6. Cal.—In re Scott, 83 P. 85, 1 Cal. App. 740.
Mont.—In re Eakins' Estate, 208 P. 956, 64 Mont. 84.
Ohio.—In re Chambers' Estate, App., 36 N.E.2d 175, appeal dismissed 24 N.E.2d 601, 136 Ohio St. 202—In re Russell's Estate, 21 N.E.2d 604, 60 Ohio App. 385.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
Tex.—Anderson v. Armstrong, 120 S. W.2d 444, 132 Tex. 122, reversing Armstrong v. Anderson, Civ.App., 91 S.W.2d 775, and rehearing denied Anderson v. Armstrong, 132 S.W.2d 393, 132 Tex. 122.
24 C.J. p 85 note 81, p 77 note 94 [f].

Conversion
An administrator who converts money or property of the estate is liable for interest from the date of conversion.—Weinke v. Majeske, 97 P.2d 179, 163 Or. 483.

7. Mont.—In re Rodgers' Estate, 217 P. 678, 68 Mont. 46.
24 C.J. p 85 note 82.

8. N.Y.—In re Eddy's Estate, 235 N. Y.S. 455, 134 Misc. 112.
Failure to invest see supra § 211.

9. Mass.—Spilios v. Papps, 197 N.E. 512, 292 Mass. 145.
N.Y.—In re Clift's Estate, 239 N.Y.S. 375, 135 Misc. 417.
24 C.J. p 85 note 83.

Money collected as agent
Where the representative collected money during the lifetime of decedent as his agent and fails to account for it, he is properly charged with interest from the date of the collection.—Hill v. Fly, Tenn.Ch., 52 S.W. 731.

10. **To death of life tenant**
Va.—McCready v. Lyon, 187 S.E. 442, 167 Va. 103.

To set off widow's allowance
Administratrix was not chargeable with interest on bonds after bonds were set off to her for her widow's allowance, since she then owned the

estate in his hands uninvested is chargeable with interest up to the filing of his report or account,[11] or even up to the decree of final settlement.[12] If the assets were invested at interest, interest is chargeable to the date of the final decree, although the executors charge themselves with the principal in their account.[13]

Where a representative improperly withdraws funds from the estate, interest runs until repayment of the funds.[14] If the executor or administrator was indebted to decedent, the rule that such debt is to be considered assets in his hands does not operate to stop the running of interest, but he is chargeable with interest until actual payment to the estate.[15] In the case of a personal representative who has made an illegal investment or profit, it has been held proper to charge interest to the date of the filing of his account.[16] Where commissions have been withdrawn in anticipation of their subsequent allowance, interest runs to the date of the allowance.[17]

Exceptions to account. The liability of a representative for interest is not necessarily suspended for the period during which exceptions to his accounts are pending.[18]

c. Computation

(1) In general

(2) Compound interest

(1) In General

Interest charged against a personal representative is usually computed on the basis of annual balances. Such balances or other principal sum used as the basis of computation must be correctly ascertained.

In computing interest charges against a personal representative it is necessary properly to determine the amount of the principal on which the interest is to be charged.[19] The usual practice is to treat funds received during the current year as unproductive until its close, and to regard all expenditures, including compensation and commissions in the course of the year, as made before the balance is struck, and on the balance so struck to calculate the interest in such way as to avoid compounding it.[20] Where the annual balances are too small to have been put at interest, and the executor has received no credit or profit from them, interest will be charged only on the accumulated balances.[21] In charging an executor or administrator with interest on funds in his hands at a final settlement, his commission or recompense, or if he is a distributee his distributive share, should be deducted before a balance is struck and interest finally computed against him.[22]

Where no account is rendered as to funds which

bonds.—In re Paulson's Estate, 266 N.W. 563, 221 Iowa 706.

To time of appraisal of assets

On the settlement of the accounts of an administrator after his death, he was properly charged with the face of a mortgage which he collected, and interest only to the time of the appraisal of the assets of the estate, the presumption being, in the absence of proof, that past-due debts of the estate were promptly collected, so that interest was not chargeable against him after the appraisal.—Knapp v. Jessup, 109 N.W. 666, 146 Mich. 348, 7 L.R.A.,N.S., 617.

11. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
Ariz.—In re Orrantia's Estate, 285 P. 266, 36 Ariz. 311.
Pa.—Mayberry's Appeal, 33 Pa. 258, affirming Robinson's Estate, 2 Phila. 340.

12. N.Y.—In re Eddy's Estate, 235 N.Y.S. 455, 134 Misc. 112.

13. Pa.—Gable's Appeal, 36 Pa. 395, 40 Pa. 231—Pyle's Estate, 2 Chest. Co. 569.

14. Cal.—In re Scott, 83 P. 85, 1 Cal.App. 740.
N.Y.—In re Bandler's Estate, 15 N.Y.S.2d 307, 172 Misc. 432—In re Stewart's Will, 9 N.Y.S.2d 315, 169 Misc. 917.

15. N.Y.—In re Davis, 75 N.Y.S. 493, 37 Misc. 326.
24 C.J. p 85 note 91.

Satisfaction of judgment

Where an administrator who is also a distributee satisfies a judgment against himself, he is not chargeable thereafter with interest on the amount of such judgment.—Palmer's Estate, 2 Del.Co., Pa., 180.

16. Pa.—In re Long's Estate, 17 A. 2d 686, 143 Pa.Super. 176.

17. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
Ohio.—In re Russell's Estate, 21 N.E. 2d 604, 60 Ohio App. 385.

18. Mich.—Galloway v. McPherson, 43 N.W. 449, 76 Mich. 318.
Pa.—Yundt's Appeal, 13 Pa. 575, 53 Am.D. 496.
24 C.J. p 83 note 47.

19. **Presumptions**

The appraisement is presumed to be correct in determining the amount on which interest should be charged.—Matter of Myers, 11 N.Y.S. 543, 58 Hun 173.

Income collected

Where the estate consists of income-producing securities or choses in action which the personal representative retains in kind, his liability for interest charges for delay in settling the estate should be based on the income collected by him and not on the corpus of the estate.—Farber's Ex'r v. Farber, 148 S.W.2d 732, 285 Ky. 596.

20. S.C.—Nicholson v. Whitlock, 35 S.E. 412, 57 S.C. 36.
Va.—McCready v. Lyon, 187 S.E. 442, 167 Va. 103.
24 C.J. p 87 note 3.

Where disbursements exceed receipts in a particular year the amount on which the administrator is to be charged interest is determined by adding to the balance in his hands the receipts for that year and deducting from the result the amount of the disbursements during the year.—Hutchison v. Daniel, 171 S.E. 13, 170 S.C. 459—Tucker v. Richards, 36 S.E. 3, 58 S.C. 22.

21. Va.—Wood v. Garnett, 6 Leigh 271, 33 Va. 271.
24 C.J. p 87 note 7.

22. Ky.—Miller v. Simpson, 2 S.W. 171, 8 Ky.L. 518.
24 C.J. p 87 note 1.

Deductions after computing interest

Where an executor's account showed that for more than thirty years there was in his hands a balance for which he should account to the legatees, less the expense of accounting, such expense should be deducted after and not before computing interest.—In re Barcalow, 36 N.J.Eq. 611.

should have been placed at interest, either as to their disposition or as to what was actually received, the representative should be charged, as nearly as the sum can be ascertained, with all he might have made or received in the honest exercise of due diligence and exertion, periodical computation being made, less the proper deductions.[23]

Where the personal representative has paid interest on the funds used by him, he will be allowed credit to the extent of the amount paid.[24] If a financial institution acting as representative has made a profit on estate funds deposited with it, it may deduct from the gross profits so made a proportionate share of its banking expenses, and credit to the estate only the balance.[25]

(2) Compound Interest

Compound interest is rarely charged against a personal representative unless for willful or gross delinquency, or unless such interest has been received by the representative. If allowed, such interest is usually compounded annually.

If compound interest has been received by the representative he must, of course, account for it;[26] but otherwise compound interest is rarely charged against an executor or administrator by way of penalty, unless something more appears than ordinary neglect of duty.[27] Where there has been a willful breach of trust, or gross delinquency, or where the representative has mingled the trust funds with his own or used the same for his own benefit, a charge of compound interest may be proper,[28] even though the representative was always ready to respond for the funds on demand.[29] Delay in accounting for such a period as to amount to gross neglect of duty has been held to justify such a charge against the delinquent executor or administrator,[30] and a failure to invest in accordance with the directions of the will for the purpose of accumulation may also authorize a charge of compound interest against the executor.[31]

In settling the account of a deceased personal representative, compound interest will be charged only to the date of his death and simple interest thereafter, irrespective of the length of time during which the account was in process of settlement, if the delay was not due to his management of the estate.[32]

In computing compound interest it has been held proper to add to the principal interest which accrued during the time when simple interest only was chargeable, thus forming a new principal on which to start the calculation of compound interest.[33] Ordinarily the computation is made with annual rests,[34] but this is a matter to be determined according to the circumstances of each case,[35] and if the method of making annual rests is not adequate in any case, as where the amounts are large and easy of investment, rests will be made semi-annually.[36]

Setting off interest against claim for compensation

Where the interest charges and the amount due for compensation are approximately the same, the interest may be set off against the claim for compensation.—Commonwealth v. Campbell, 43 S.W.2d 994, 241 Ky. 349.

23. Ga.—Tippin v. Perry, 50 S.E. 35, 122 Ga. 120.
24 C.J. p 87 note 2.

24. Miss.—Owens v. Owens, 37 So. 149, 84 Miss. 673.

25. Conn.—Hayward v. Plant, 119 A. 341, 98 Conn. 374.

26. S.C.—Edmonds v. Crenshaw, 5 S. C.Eq. 224.
24 C.J. p 87 note 9.

27. N.J.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976.
Va.—Cannon v. Searles, 143 S.E. 495, 150 Va. 738.
24 C.J. p 87 note 10.
"Where it is not affirmatively shown that an executor used an estate for his own profit he will not be penalized by charging him with compound interest."—Melosh v. Melosh, 6 A.2d 472, 125 N.J.Eq. 486.

Excusable delay

Refusal to charge administratrix with compound interest after first year of administration was not erroneous, where record failed to show estate could have been closed within such time.—In re Doud's Estate, 284 P. 705, 103 Cal.App. 414.

28. Iowa.—In re Sheeler's Estate, 284 N.W. 799, 226 Iowa 650.
Kan.—Vincent v. Werner, 38 P.2d 687, 140 Kan. 599.
Miss.—Russell v. Russell, 144 So. 542, 164 Miss. 335, followed in 144 So. 544.
24 C.J. p 88 note 11.

Obligation to reinvest income

Where a bank acting as administrator retained dividends collected on corporate stock, and issued interest-bearing certificates of deposit therefor, it was under obligation to deposit at interest the sums received on such certificates, so that it may be charged with compound interest on the dividends received.—Knagenhjelm v. Rhode Island Hospital Trust Co., 114 A. 5, 43 R.I. 559.

Possible profits of representative

Where information is lacking as to the possible profits made by a representative who withdraws funds for personal use, he may be charged compound interest.—Brown v. Tydings, 130 A. 337, 146 Md. 22.

29. Cal.—In re Clark, 53 Cal. 355.
24 C.J. p 89 note 12.

30. Cal.—In re Hilliard, 23 P. 393, 83 Cal. 423.
24 C.J. p 89 note 13.

31. N.J.—Voorhees v. Stoothoff, 11 N.J.Law 145.
24 C.J. p 89 note 14.

32. Vt.—Walworth v. Bartholomew, 56 A. 101, 76 Vt. 1.

33. Ga.—Tippin v. Perry, 50 S.E. 35, 122 Ga. 120.
24 C.J. p 89 note 16.

34. Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.
Iowa.—In re Sheeler's Estate, 284 N. W. 799, 226 Iowa 650—In re Mowrey's Estate, 232 N.W. 82, 210 Iowa 923.
24 C.J. p 89 note 17, p 86 note 96 [f].

35. Ga.—Fall v. Simmons, 6 Ga. 265.
Ky.—Johnson v. Beauchamp, 5 Dana 70.

36. R.I.—Knagenhjelm v. Rhode Island Hospital Trust Co., 114 A. 5, 43 R.I. 559.
24 C.J. p 89 note 19.

F. EXPENDITURES

1. In General

§ 217. Right to Credit for Expenditures in General

a. In general
b. Sanction of court

a. In General

A personal representative is entitled to credit in his accounts for expenses necessarily and properly incurred by him in the administration of the estate.

From the very nature of his office, it is the duty of an executor or administrator to pay the legitimate expenses of administration to the extent that the estate is solvent.[37] Accordingly, he is authorized to use the funds of the estate for expenditures necessary to its proper administration,[38] and is entitled to credit in his accounts for expenses necessarily and properly incurred by him in good faith, in transacting with reasonable care and diligence the business of his trust, on due proof of the particular items of expense claimed.[39] The practical situation is usually that the executor or administrator makes himself liable de bonis propriis to others by incurring expense, but that he may reimburse himself under appropriate circumstances out of the assets of the estate.[40]

37. Md.—State, for Use of Czyzowicz, v. Brown, 183 A. 256, 170 Md. 97.

"Administrative expenses" defined

(1) An obligation created by the legal act of the representative in the administration of the estate is an administrative expense.—In re Williams' Estate, 257 N.Y.S. 859, 143 Misc. 527.

(2) In surrogate's court practice, the term "testamentary expenses" connotes the customary disbursements attendant on the ordinary administration of an estate.—In re Walbridge's Will, 9 N.Y.S.2d 907, 170 Misc. 127.

Nature of "administrative expenses"

"Costs attendant upon the administration are debts of the decedent only in the sense of constituting a necessary incident to the post-mortuary disposition of his property."—In re Thurber's Estate, 142 N.E. 493, 494, 311 Ill. 211.

38. Ark.—Gosnell v. Garner, 132 S.W.2d 187, 198 Ark. 989.
N.Y.—In re Fewer's Estate, 31 N.Y.S.2d 810, 177 Misc. 788—In re Amico's Estate, 24 N.Y.S.2d 772, 175 Misc. 656.
24 C.J. p 90 note 29.

39. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900—Hill v. Zanone, 43 S.W.2d 238, 184 Ark. 594—James v. Echols, 39 S.W.2d 290, 183 Ark. 826.
Del.—In re Walker's Estate, 122 A. 192, 13 Del.Ch. 439.
Ill.—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.
Iowa.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
Mont.—In re McLure's Estate, 3 P.2d 1056, 90 Mont. 502.
N.J.—In re Linn's Estate, 199 A. 396, 124 N.J.Eq. 65—In re Foster's Estate, 176 A. 156, 18 N.J.Misc. 36, N.Y.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296, affirmed In re Schummer's Estate, 154 N.E. 600, 243 N.Y.S. 548—In re Cluskey's Estate, 7 N.Y.S.2d 400, 169 Misc. 264—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235—In re Roosevelt's Estate, 228 N.Y.S. 323, 131 Misc. 800.
N.D.—Hoffman v. Ness, 300 N.W. 428—Danielson v. Pritz, 231 N.W. 550, 59 N.D. 548—Priewe v. Priewe, 182 N.W. 697, 47 N.D. 482.
Or.—In re Stewart's Estate, 28 P.2d 642, 646, 145 Or. 460, 91 A.L.R. 818, quoting **Corpus Juris**—In re Prince's Estate, 246 P. 713, 118 Or. 210.
Pa.—In re Matter's Estate, 49 Dauph. Co. 437.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351—Norris v. Eckerman, 286 N.W. 324, 66 S.D. 519.
Wash.—Farley v. Davis, 116 P.2d 263.
24 C.J. p 90 notes 29 [b], 30.

Proper mode of meeting legitimate expenses of administration is for the representative to make the necessary disbursements for which he will be allowed credit in his accounts.—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.

Source of authority to allow

The probate court derives its authority to award costs and expenses to executors and administrators out of the funds of the estate from the statutes, and not from its general probate jurisdiction.—Stover v. Durfee, 189 N.W. 14, 219 Mich. 566.

40. N.Y.—Hellawell v. Garrett Busch & Son, 295 N.Y.S. 717, 157 Misc. 805, modified on other grounds 290 N.Y.S. 143, 248 App.Div. 737.
N.D.—Hoffman v. Ness, 300 N.W. 428.
24 C.J. p 90 note 31.
Contracts of representative as creating personal liability generally see supra § 198.

Theory of payment

(1) In the making of estate disbursements, an executor or administrator, in theory, is deemed to make payment primarily from his own funds, for which, in so far as legally permissible, he will be reimbursed on his accounting.—In re Fewer's Estate, 31 N.Y.S.2d 810, 177 Misc. 788—In re Amico's Estate, 24 N.Y.S.2d 772, 175 Misc. 656—In re Damsky's Estate, 23 N.Y.S.2d 897, 175 Misc. 460.

(2) This theory is not altered by a statute authorizing a fiduciary to pay proper expenses of administration from estate funds, since such statute merely authorizes borrowing by estate fiduciary at his peril, subject to possible future determination that such borrowing constitutes a devastavit.—In re Fewer's Estate, supra.

Borrowing money

Although an executor or administrator borrowing money for the benefit of the estate is bound out of his own property in the first instance, see § 202 supra, he is entitled to be reimbursed out of the assets of the estate where the obligation was honestly and properly incurred for the benefit of the estate.
N.Y.—In re Murphy's Will, 210 N.Y.S. 531, 213 App.Div. 319.
N.D.—Hoffman v. Ness, 300 N.W. 428.

Giving promissory notes

Although, as shown supra § 203, an executor or administrator giving a promissory note is bound out of his own property in the first instance, he may reimburse himself out of the assets where the consideration was just and beneficial to

Whether or not particular expenditures should be allowed depends largely on the facts in the particular case[41] and is a question of law for the court and not a question of fact for the jury.[42]

Requisites for allowance. In order to entitle a personal representative to credit in his account for expenses incurred by him, the expenses must have been incurred in good faith,[43] with reasonable prudence,[44] and for the benefit of the estate;[45] and they must have been reasonably necessary, see § 219 infra, and not the result of the representative's wrongful act, see § 220 infra. No credit will be allowed until the income of the estate has been accounted for[46] and the amount claimed as an expense has been actually paid, see § 218 infra; and credit will be denied where an allowance thereof would be inequitable and unjust under the facts in the particular case.[47]

Amount of expenditure. A personal representative is entitled to credit in his account for an administration expense only to the extent that it is reasonable in amount,[48] and what is a reasonable amount in any particular case is a matter resting largely within the discretion of the court.[49]

b. Sanction of Court

Previous sanction of the court being unnecessary, expenses properly incurred without such sanction may be allowed.

Although it is not necessary, in order to entitle a personal representative to credit for a proper expenditure, that he should have obtained the approval and sanction of the court before making the expenditure,[50] it is the better practice to do so.[51]

Effect of previous sanction or approval. While a representative is generally entitled to credit for expenditures made by the order of or with the approval and sanction of the court,[52] even though the court was indiscreet in making the order pursuant to which he acted,[53] yet, a mere ex parte order authorizing him to incur expenses is permissive only and tends to show good faith on his part, but does not finally determine the propriety of the expenses;[54] and the fact that the representative has expended money on the faith of an order of the court making an allowance for certain expenses of course does not preclude the court from annulling such order on evidence that the petition on which it was made did not fully and truly state the facts.[55]

§ 218. Necessity of Actual Payment

As a rule an allowance should not be made to a representative for an administration expense until it has been actually paid.

Credit for an administration expense should not as a rule be allowed to the executor or administrator on his accounting in court, until or unless the

the estate and the obligation was honestly incurred.—Peter v. Beverly, D.C., 10 Pet. 532, 9 L.Ed. 522—24 C.J. p 71 notes 61, 62.

41. N.Y.—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.
N.D.—Hoffman v. Ness, 300 N.W. 428.

42. Ill.—Hapke v. People, 29 Ill. App. 546.

43. Del.—In re Walker's Estate, 122 A. 192, 13 Del.Ch. 439.
N.Y.—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.
S.D.—In re Peterson's Estate, 234 N.W. 923, 58 S.D. 76.
24 C.J. p 90 note 30.

44. S.D.—In re Peterson's Estate, supra.
24 C.J. p 90 note 30.

45. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.
N.J.—In re Oliver's Estate, 129 A. 434, 3 N.J.Misc. 453.
N.Y.—In re Damsky's Estate, 23 N.Y.S.2d 897, 175 Misc. 460.
Wash.—In re Krueger's Estate, 119 P.2d 312.
24 C.J. p 90 note 30.

46. Okl.—Billings v. Sims, 79 P.2d 594, 182 Okl. 643.

47. Ala.—Hale v. Cox, 200 So. 772, 240 Ala. 622.

48. La.—Succession of Aronson, 123 So. 608, 168 La. 887.
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
N.J.—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449.
Pa.—In re Matter's Estate, 49 Dauph. Co. 437.
W.Va.—Senter v. Toler, 114 S.E. 806, 92 W.Va. 437.

49. Iowa.—In re Sarbaugh's Estate, 1 N.W.2d 105, 231 Iowa 320.
Pa.—In re Huff's Estate, 150 A. 98, 300 Pa. 64.

50. Cal.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430—In re Burke's Estate, 244 P. 340, 198 Cal. 163, 44 A.L.R. 1341—Estate of Smith, 50 P. 701, 118 Cal. 462.
N.D.—Hoffman v. Ness, 300 N.W. 428.
Okl.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.
Or.—In re Stewart's Estate, 28 P.2d 642, 646, 145 Or. 460, 91 A.L.R. 818, citing **Corpus Juris.**
24 C.J. p 91 note 33.

51. Cal.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499.

52. Mont.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.
24 C.J. p 91 note 35.
If executor, acting reasonably and in good faith, disburses money pursuant to an order of the court which it had jurisdiction to make, he is protected in so doing, and so long as he acts reasonably, he is not obliged to anticipate an appeal and delay proceedings until the time thereof shall have expired.—In re Turnock's Estate, 300 N.W. 155, 238 Wis. 438—Cowie v. Strohmeyer, 136 N.W. 956, 150 Wis. 401.
Order of record required
For an administrator to justify expenditures as having been under an order of the court, such orders must appear of record.—Goodknight v. Harper, 225 P. 215, 75 Colo. 141.

53. Nev.—In re Milienovich, 5 Nev. 161.
24 C.J. p 91 note 36.

54. Cal.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430—Estate of Smith, 50 P. 701, 118 Cal. 462.

55. Ind.—Watkins v. Romine, 7 N.E. 193, 106 Ind. 378.

amount has been actually paid,[56] and where partial payment only has been made, credit will be allowed as to that part only.[57]

§ 219. Improper or Unnecessary Expenditures

A personal representative will not be allowed credit for improper or unnecessary expenditures made by him.

As a general rule the representative will not be allowed credit for improper or unnecessary payments or expenditures made by him,[58] especially in the case of needless and extravagant outlays over a small and simple estate,[59] and although disbursements which ultimately prove to have been unnecessary may be sometimes allowed if made in good faith and under a reasonable belief of their necessity,[60] the representative must show some just explanation before he can legally claim their allowance.[61]

§ 220. Expenses Caused by Misconduct or Unauthorized Acts

A personal representative is not entitled to credit for expenditures necessitated by his own misconduct or wrongful acts.

Positive misconduct on the part of the representative bars any claim by him against the estate for reimbursement of his expenses caused thereby,[62] nor will he be allowed credit for expenditures which became necessary by reason of his own negligence[63] or which were made in the course of, or resulted from, acts done by him without authority.[64] Nevertheless, those interested in the estate cannot accept the profits of an improper investment without assuming the incidental outlays.[65]

§ 221. Representative Improperly Appointed

A personal representative, acting in good faith under a voidable order of appointment, is entitled to credit for expenditures properly made in connection with the administration.

An executor or administrator, acting in good faith under a voidable order of appointment, is entitled to credit or reimbursement for expenditures properly made in connection with the administration;[66] but where the order of appointment is void[67] or was procured by fraud on the part of the representative[68] an allowance for expenses will be denied.

§ 222. Interest on Expenditures

A personal representative should be allowed interest on advances of money properly made by him to the estate.

Under due circumstances the advance of money to the estate by an executor or administrator will not only be justified but commended, so as to entitle

56. N.Y.—Matter of Van Nostrand, 24 N.Y.S. 850, 3 Misc. 396, Pow. Surr. 495.
24 C.J. p 91 notes 39, 41.
Necessity of actual payment of counsel fee to warrant allowance therefor see infra § 223.

57. N.Y.—Matter of White, 15 N.Y. St. 729, 6 Dem.Surr. 375.

58. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Ark.—Gosnell v. Garner, 132 S.W.2d 187, 198 Ark. 989.
Colo.—Goodknight v. Harper, 225 P. 215, 75 Colo. 141.
Del.—In re Walker's Estate, 122 A. 192, 13 Del.Ch. 439.
Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.
Iowa.—In re Eschweiler's Estate, 209 N.W. 273, 202 Iowa 259.
Ky.—Oster's Ex'r v. Ohlman, 219 S.W. 187, 187 Ky. 341.
La.—Succession of Aronson, 123 So. 603, 168 La. 887.
N.J.—In re Ahrend, 132 A. 758, 99 N.J.Eq. 328, dismissing appeal In re Ahrend's Estate, 130 A. 219, 3 N.J.Misc. 746—In re Oliver's Estate, 129 A. 434, 3 N.J.Misc. 453.
N.Y.—In re Damsky's Estate, 23 N.Y.S.2d 997, 175 Misc. 460—In re Phillips' Estate, 258 N.Y.S. 638, 143 Misc. 824.
Pa.—Appeal of McGlinsey, 14 Serg. & R. 64—In re Matter's Estate, 49 Dauph.Co. 437.
Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.
Wash.—In re Krueger's Estate, 119 P.2d 312.
24 C.J. p 91 note 43.

Diversion of estate assets
The use of estate funds for improper or unnecessary expenditures amounts to a diversion of estate assets which the representative must repair.—In re Amico's Estate, 24 N.Y.S.2d 772, 175 Misc. 656—In re Rosenberg's Estate, 6 N.Y.S.2d 1009, 169 Misc. 92.

Determination of legality, propriety, and necessity of expenditure of estate funds by an administrator may be made by him in first instance, but such evaluation is at his peril and may be rendered tortious from its inception by a subsequent decision of surrogate disallowing disbursement on judicial settlement of his accounts.—In re Rosenberg's Estate, supra.

59. La.—Succession of Aronson, 123 So. 603, 168 La. 887.
24 C.J. p 91 note 44.

60. Conn.—Robbins v. Wolcott, 27 Conn. 234.
N.J.—In re Linn's Estate, 199 A. 896, 124 N.J.Eq. 65.

61. Conn.—Robbins v. Wolcott, 27 Conn. 234.

62. N.Y.—In re Hyde's Estate, 266 N.Y.S. 871, 149 Misc. 291.
24 C.J. p 91 note 48.
Litigation caused by representative's fault or misconduct see infra § 226.

63. Wis.—Mackin v. Hobbs, 105 N.W. 305, 126 Wis. 216.
24 C.J. p 91 note 49.

64. Nev.—In re Delaney's Estate, 171 P. 383, 41 Nev. 384, L.R.A. 1918D 1022.
24 C.J. p 92 note 50.

65. N.Y.—Wheelwright v. Rhoades, 28 Hun 57.

66. Cal.—In re Clark's Estate, 92 P.2d 505, 33 Cal.App.2d 523.
N.Y.—In re Staiger's Will, 164 N.E. 33, 249 N.Y. 229, modifying 229 N.Y.S. 523, 224 App.Div. 31.
Okl.—In re Green's Estate, 251 P. 1003, 114 Okl. 283.
Pa.—In re Moore's Estate, 20 Pa. Dist. & Co. 183.
24 C.J. p 92 note 52; 33 C.J. p 1109 note 57.

67. **Good faith immaterial**
If the order of appointment is void, the estate cannot be charged with the moneys expended even in good faith and without fraud.—In re Green's Estate, 251 P. 1003, 114 Okl. 283.

68. La.—Morere's Succession, 3 La. A., Orleans, 155.

him to a fair allowance of interest thereon;[69] but such a charge will be viewed with caution and the circumstances scrutinized, and where no necessity existed justifying such advance, or where the advantage claimed did not actually exist, interest may be disallowed.[70]

2. Particular Expenditures

§ 223. Counsel Fees and Costs

a. Counsel fees
b. Costs and other expenses of litigation

a. Counsel Fees

(1) In general
(2) Where representative is an attorney
(3) Approval of court

(1) In General

Subject to the general requirements of good faith and reasonable prudence, a personal representative may employ an attorney and is entitled to credit in his account or indemnity from the estate for the reasonable charges of counsel for necessary services rendered in good faith for the benefit of the estate.

Subject to the general requirements of good faith and reasonable prudence,[71] an executor or administrator may employ an attorney for advice and assistance with reference to the management of the estate,[72] the performance of legal services which the representative cannot himself perform,[73] and the prosecution or defense of actions or suits on behalf of or against the estate,[74] and is entitled to credit in his account or indemnity from the estate for the reasonable charges of counsel,[75] provided the services for which the charge is made were rea-

69. Cal.—In re Carpenter's Estate, 80 P. 1072, 146 Cal. 661.
Mont.—In re Kelley's Estate, 5 P.2d 559, 560, 91 Mont. 98, citing **Corpus Juris.**
Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.
24 C.J. p 114 note 36.

Where executor borrowed money for payment of taxes without court order, he was entitled to allowance for interest paid thereon.—In re Kelley's Estate, 5 P.2d 559, 91 Mont. 98.

70. Cal.—In re Carpenter's Estate, 80 P. 1072, 146 Cal. 661.
N.Y.—In re Murphy's Will, 210 N.Y.S. 531, 213 App.Div. 319.
24 C.J. p 114 note 37.

71. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Requirements of good faith and reasonable prudence generally see supra § 184.

A representative is bound to employ no less diligence and prudence in incurring counsel fees than prudent men generally employ in their own like affairs.
Ga.—Kimball v. Casey, 151 S.E. 372, 169 Ga. 631.
S.D.—In re Peterson's Estate, 234 N.W. 923, 58 S.D. 76.

72. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Cal.—Highfield v. Bozio, 207 P. 242, 188 Cal. 727.
Colo.—In re Macky's Estate, 191 P. 106, 68 Colo. 556.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Ga.—Kimball v. Casey, 151 S.E. 372, 169 Ga. 631—Clements v. Fletcher, 129 S.E. 846, 161 Ga. 21.
Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 220 Minn. 5.
N.J.—In re Foster's Estate, 176 A. 156, 13 N.J.Misc. 36, citing **Corpus Juris.**
N.Y.—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.
24 C.J. p 97 note 15.

Testamentary authority
Will giving executor power to employ persons necessary to manage trust estate included power to employ counsel.—Gwin v. Fountain, 126 So. 18, 159 Miss. 619, suggestion of error sustained 132 So. 559, 159 Miss. 619.

Statutory right
The right of a personal representative to employ an attorney at the expense of the estate is in some jurisdictions strictly statutory.—Owen v. Stoner, 114 So. 613, 148 Miss. 397.

73. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Wis.—In re Willing's Estate, 209 N.W. 602, 190 Wis. 406.
24 C.J. p 98 note 16.
Services which representative should perform see infra § 226 e.

74. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Ky.—Greenway v. Irvine's Ex'r., 28 S.W.2d 760, 234 Ky. 597.
Pa.—In re Kennedy's Estate, 194 A. 901, 328 Pa. 193.
24 C.J. p 98 note 17.
"Parties intrusted with the administration of an estate may employ counsel to defend any action brought against them, the decision of which might adversely affect the estate, or may employ counsel to institute proceedings for the benefit of the estate, provided there was reasonable ground for instituting or defending the proceeding."—Knapp v. Knapp, 134 A. 24, 25, 151 Md. 126.

75. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317—Dent v. Foy, 107 So. 210, 214 Ala. 243.
Ariz.—In re Miller's Estate, 92 P.2d 335, 54 Ariz. 58.
Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Cal.—Title Insurance & Trust Co. v. Gould, 191 P. 556, 47 Cal.App. 533.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Ga.—Clements v. Fletcher, 129 S.E. 846, 161 Ga. 21.
Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
Ill.—Rubinkam v. MacArthur, 23 N.E.2d 348, 302 Ill.App. 71—In re Mertz' Estate, 246 Ill.App. 283.
Iowa.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
Kan.—Medill v. McIntire, 16 P.2d 952, 953, 136 Kan. 594, quoting **Corpus Juris.**
Ky.—Hamilton v. Nunn, 57 S.W.2d 655, 247 Ky. 715—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.
Md.—Mayor and City Council of Baltimore v. Link, 197 A. 801, 174 Md. 111—Knapp v. Knapp, 131 A. 329, 149 Md. 263.
Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 220 Minn. 5.
Miss.—Clarksdale Hospital v. Wallis, 193 So. 627, 187 Miss. 834—Reedy v. Allen, 179 So. 569, 181 Miss. 471—Owen v. Stoner, 114 So. 613, 148 Miss. 397.

sonably necessary,[76] and were rendered in good faith,[77] in the proper administration of the estate,[78] and for its benefit.[79] Where the services are rendered in connection with litigation it is not necessary, to entitle the representative to an allowance for counsel fees, that he should have been successful in the litigation which he undertook, but he is entitled thereto regardless of whether he succeeds

Mo.—In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.
Mont.—In re Connolly's Estate, 235 P. 408, 75 Mont. 35.
Neb.—In re Moore's Estate, 225 N. W. 705, 118 Neb. 568.
N.J.—In re Foster's Estate, 176 A. 156, 158, 13 N.J.Misc. 36, citing **Corpus Juris.**
N.M.—Perez v. Gil's Estate, 222 P. 907, 29 N.M. 313, 35 A.L.R. 43, amended mandate recalled 240 P. 999, 31 N.M. 105.
N.Y.—In re Gilman's Adm'x, 167 N. E. 437, 251 N.Y. 265, reversing 232 N.Y.S. 754, 225 App.Div. 774—In re Moore's Estate, 28 N.Y.S.2d 1003, 262 App.Div. 904—In re Cluskey's Estate, 7 N.Y.S.2d 400, 169 Misc. 264—In re Wilson's Estate, 265 N.Y.S. 672, 147 Misc. 542—In re Dimond's Estate, 247 N.Y.S. 221, 138 Misc. 648.
N.C.—Parsons v. Leak, 167 S.E. 563, 204 N.C. 86.
Okl.—In re Wah-kon-tah-he-ump-ah's Estate, 261 P. 973, 128 Okl. 179.
Or.—Hull v. Heimrich, 3 P.2d 758, 138 Or. 117, rehearing denied 6 P. 2d 41, 138 Or. 117—In re Chandler's Estate, 297 P. 841, 136 Or. 128—In re Prince's Estate, 246 P. 713, 118 Or. 210.
Pa.—In re Kennedy's Estate, 194 A. 901, 328 Pa. 193—In re Peck's Estate, 33 Berks Co.L.J. 245—Bair v. Newgeon, 29 Del.Co. 548.
R.I.—McAlear v. McAlear, 4 A.2d 252, 62 R.I. 158.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351—In re Sachs' Estate, 297 N.W. 793.
Tenn.—McAdoo v. Dickson, 136 S. W.2d 518, 175 Tenn. 598, 126 A.L.R. 1345.
Tex.—Huff v. Huff, Civ.App., 98 S.W. 2d 442, 445, quoting **Corpus Juris,** and reversed on other grounds 124 S.W.2d 327, 132 Tex. 540—Jarvis v. Drew, Civ.App., 215 S.W. 970, error refused.
24 C.J. p 98 note 18.

Counsel fees on accounting and settlement see infra § 940.

Counsel fees as "expenses of administration"

Reasonable attorney's fees necessarily incurred for services to the estate are allowable as "expenses of administration."

Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Ky.—Greenway v. Irvine's Ex'r, 28 S.W.2d 760, 234 Ky. 597.
Mich.—In re Pritchard's Estate, 238 N.W. 270, 255 Mich. 545.
Mo.—In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.
N.Y.—In re Feifer's Estate, 270 N.Y. S. 905, 151 Misc. 54.
Tex.—Pendleton v. Hare, Com.App., 231 S.W. 334, reversing Hare v. Pendleton, Civ.App., 214 S.W. 948—Armstrong v. Anderson, Civ.App., 55 S.W.2d 235—Morton's Estate v. Ferguson, Civ.App., 45 S.W.2d 419, error refused.
24 C.J. p 98 note 18.

Statutory requirements must be complied with in order to make charge for attorney's fees allowable and payable out of funds of estate.—Armstrong v. Anderson, Tex.Civ.App., 55 S.W.2d 235.

Allowance not precluded by statute

Rev.Codes 1921 § 9786, does not prevent executors from receiving credit for amount paid for proper attorney's fees, but merely gives proceeding by which attorney, unable to agree with executor as to amount, can have fees fixed, so as to hold estate liable.—In re Connolly's Estate, 235 P. 408, 75 Mont. 35.

To warrant an allowance for counsel fees the representative must show:

(1) That services were actually rendered.—Whittemore v. Coleman, 144 Ill.App. 109, affirmed 88 N.E. 228, 239 Ill. 450.

(2) What such services were.—Matter of O'Hara, 100 N.Y.S. 635, 50 Misc. 495—24 C.J. p 100 note 33.

Services rendered in another state

Where executor also administering assets in another state, in final report stated necessity of employing attorney to assist in both states, allowance of compensation for services rendered in other state was proper.—In re Prince's Estate, 246 P. 713, 118 Or. 210.

Defective probate proceedings

Probate proceeding held of value to estate as respects allowance for attorneys' fees, although defective for reason that facts in relation to heirs or lack of heirs of decedent were not properly set forth in petition.—In re Owen's Estate, 259 N.Y. S. 892, 144 Misc. 688.

Bill of costs

Under some circumstances remuneration for services of executors' attorneys should be sought through the medium of a bill of costs.—In re Burroughs' Estate, 278 N.Y.S. 997.

Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
Ky.—Hamilton v. Nunn, 57 S.W.2d 655, 247 Ky. 715—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.
Mich.—Becht v. Miller, 273 N.W. 294, 279 Mich. 629.
Miss.—Clarksdale Hospital v. Wallis, 193 So. 627, 187 Miss. 834.
Mont.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.
N.J.—In re Foster's Estate, 176 A. 156, 13 N.J.Misc. 36.
N.M.—Perez v. Gil's Estate, 222 P. 907, 29 N.M. 313, 35 A.L.R. 43, amended mandate recalled 240 P. 999, 31 N.M. 105.
N.Y.—In re Owen's Estate, 259 N.Y. S. 892, 144 Misc. 688.
N.C.—Parsons v. Leak, 167 S.E. 563, 204 N.C. 86.
Okl.—In re Wah-kon-tah-he-ump-ah's Estate, 261 P. 973, 128 Okl. 179.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351.
Tex.—Morton's Estate v. Ferguson, Civ.App., 45 S.W.2d 419, error refused—Richardson v. McCloskey, Civ.App., 261 S.W. 801, reversed on other grounds, Com.App., 276 S. W. 680.
Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.
24 C.J. p 98 note 18, p 100 note 34.

77. Ariz.—In re Miller's Estate, 92 P.2d 335, 54 Ariz. 58.
Miss.—Clarksdale Hospital v. Wallis, 193 So. 627, 187 Miss. 834—Reedy v. Allen, 179 So. 569, 181 Miss. 471—Owen v. Stoner, 114 So. 613, 148 Miss. 397.
Tenn.—McAdoo v. Dickson, 136 S.W. 2d 518, 175 Tenn. 598, 126 A.L.R. 1345.

78. Miss.—Reedy v. Allen, 179 So. 569, 181 Miss. 471—Owen v. Stoner, 114 So. 613, 148 Miss. 397.
Tex.—Ogden v. Shropshire & Adkins, Civ.App., 37 S.W.2d 249, error refused.

79. Alaska.—In re Underwood's Estate, 6 Alaska 673.
Ariz.—In re Miller's Estate, 92 P.2d 335, 54 Ariz. 58.
Mont.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.
R.I.—McAlear v. McAlear, 4 A.2d 252, 62 R.I. 158.
24 C.J. p 105 note 8.

76. Ariz.—In re Miller's Estate, 92 P.2d 335, 54 Ariz. 58.

or fails,[80] provided the litigation was proper,[81] related to property of, or claims in favor of or against, the estate,[82] was undertaken and conducted in good faith,[83] and with reasonable prudence,[84] for the benefit of the estate,[85] and was reasonably necessary,[86] either because the rights concerned were complicated and conflicting,[87] or because the questions involved in the dispute were such that there might reasonably be an honest and sincere difference of opinion as to the proper solution thereof.[88]

The circumstances of each particular case govern in determining whether or not an allowance should be made.[89]

Personal liability of representative and effect thereof. As has been seen in § 199 supra, the estate is not primarily liable for legal services rendered for the benefit of the estate at the request of the personal representative, but the representative is personally liable with the right, as has been stated above, of reimbursement for reasonable expenditures. From this it follows that an allowance for counsel fees, in the absence of contrary statute, is made to the representative as such and not to the attorney,[90] and the fees are not paid from the assets

80. Ala.—Dent v. Foy, 107 So. 210, 214 Ala. 243—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Kan.—Medill v. McIntire, 16 P.2d 952, 953, 136 Kan. 594, quoting **Corpus Juris.**
Mass.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.
N.Y.—In re Guggino's Estate, 4 N.Y.S.2d 400, 166 Misc. 426—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.
Tex.—Huff v. Huff, Civ.App., 98 S.W.2d 442, 445, quoting **Corpus Juris,** and reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.
24 C.J. p 99 note 19.

The true test as to whether a representative has properly employed an attorney to bring an action in behalf of the estate does not depend on whether the suit resulted favorably or unfavorably, but whether a prudent man in the existing circumstances would have judged it necessary and proper to employ counsel for the purpose.—Huff v. Huff, Civ. App., 98 S.W.2d 442, reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.

81. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
24 C.J. p 105 note 12.

82. Cal.—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.
Tex.—Huff v. Huff, Civ.App., 98 S.W.2d 442, 445, quoting **Corpus Juris,** and reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.
24 C.J. p 99 note 20.

83. Ala.—Dent v. Foy, 107 So. 210, 214 Ala. 243—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
N.Y.—In re Guggino's Estate, 4 N.Y.S.2d 400, 166 Misc. 426—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351—In re Sachs' Estate, 297 N.W. 793.
Tex.—Huff v. Huff, Civ.App., 98 S.W. 2d 442, 445, quoting **Corpus Juris,** and reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.
Wis.—In re Asby's Will, 287 N.W. 734, 232 Wis. 481, 126 A.L.R. 151.
24 C.J. p 99 note 21.

If the litigation was collusive no credit for attorney's fees will be allowed.—In re Paine's Estate, 174 So. 430, 128 Fla. 151.

Bad faith not shown
Utah.—In re Burt's Estate, 198 P. 1108, 58 Utah 353.

84. S.D.—In re Engebretson's Estate, 1 N.W.2d 351—In re Sachs' Estate, 297 N.W. 793.
24 C.J. p 99 note 22.

An allowance for counsel fees may be refused

(1) Where the litigation was unnecessarily protracted.—Phillips v. Phillips, 7 Ky.L. 679.

(2) Where a proceeding instituted by the representative has been allowed to fail for lack of reasonable diligence in prosecuting it.—Clark v. Guard, 73 Ala. 456.

(3) Where the representative abandons litigation instituted by him without good cause.—In re Pease, 85 P. 149, 149 Cal. 167.

(4) Where the action should not have been brought by the representative in his fiduciary capacity.—Thompson v. Thompson, 65 S.W. 457, 23 Ky.L. 1535.

(5) Where the representative's contentions were groundless.—Rowe v. Dyess, Tex.Com.App., 213 S.W. 234.
24 C.J. p 106 note 18.

85. Mo.—In re Flynn's Estate, App., 142 S.W.2d 1069.
Mont.—In re Springer's Estate, 255 P. 1058, 1063, 79 Mont. 256, citing **Corpus Juris.**
N.Y.—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459—In re Rogers' Estate, 258 N.Y.S. 534, 143 Misc. 834.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351—In re Sachs' Estate, 297 N.W. 793.
Tex.—Ogden v. Shropshire & Adkins, Civ.App., 37 S.W.2d 249, error refused.
24 C.J. p 99 note 23.

86. Ala.—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151.
Iowa.—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
Mich.—In re Grover's Estate, 206 N.W. 988, 233 Mich. 467.
N.M.—In re McMillan's Estate, 33 P.2d 369, 38 N.M. 347.
N.Y.—In re Guggino's Estate, 4 N.Y.S.2d 400, 166 Misc. 426—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459.
24 C.J. p 99 note 24, p 105 note 13.

No allowance will be made for attorney's fees incurred in instituting an unnecessary:

(1) Accounting proceeding.—In re Murray's Estate, 272 N.Y.S. 90, 151 Misc. 7.

(2) Transfer tax proceeding.—In re Murray's Estate, 270 N.Y.S. 321, 241 App.Div. 761, affirming 151 Misc. 10, 271 N.Y.S. 910—In re Murray's Estate, 272 N.Y.S. 90, 151 Misc. 7.

87. Kan.—Medill v. McIntire, 16 P. 2d 952, 953, 133 Kan. 594, quoting **Corpus Juris.**
24 C.J. p 99 note 25.

88. Kan.—Medill v. McIntire, supra, quoting **Corpus Juris.**
24 C.J. p 99 note 26.

89. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126.
Ohio.—Weir v. Weir, 28 Ohio Cir.Ct. 199.

90. Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 204 Minn. 5—State ex rel. Nordin v. Probate Court, 273 N.W. 636, 200 Minn. 167.

Allowance must be made on request of representative and not on the direct petition of the attorney himself.—Hutton v. Gwin, 195 So. 486, 188 Miss. 763.

Attorneys have no rights superior to those of executor with respect to award of counsel fees from estate.—Wilson v. Veazey, 30 F.2d 310, 58 App.D.C. 301.

of the estate by virtue of the contract of employment between the attorney and representative but are allowed as expenses of administration.[91] Accordingly the fact that attorneys representing the personal representative also represented certain creditors and agreed to release the personal representative from all liability for their services, except as to such sum as the court might thereafter allow against the estate on their account, does not constitute a reason for disallowing the claim for such services.[92]

Defective appointment. An executor or administrator is entitled to credit for the reasonable charges of counsel even though his appointment is subsequently revoked where his appointment was not void ab initio but only voidable.[93]

Employment of attorney prior to appointment. In some jurisdictions one named as an executor in a will is authorized by statute to employ counsel at the expense of the estate before he qualifies[94] and before the will is probated[95] if such employment is reasonably necessary to preserve the estate.

An attorney other than the one designated by the will may be employed by the executor.[96]

Nonresident counsel should not be employed by the representative where it results in unnecessary expense to the estate.[97]

Attorney indebted to estate. Before paying an attorney for services rendered, the representative should ordinarily deduct debts, if any, owed by the attorney to the estate.[98]

Necessity of actual payment. A personal representative may not be allowed attorney's fees where he shows neither actual payment of such fees nor liability incurred therefor.[99] Indeed in some jurisdictions it has been held that credit for counsel fees should not as a rule be allowed to the representative until or unless the fees have been actually paid;[1] but in other jurisdictions it has been held that the representative is entitled to have the amount of his attorney's fee determined before he has paid him anything.[2]

Consent of persons beneficially interested. The consent or instance of the heirs, distributees, or others beneficially interested in the estate may be adduced to justify expenses incurred by the personal representative in engaging counsel.[3]

91. Fla.—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Mich.—Becht v. Miller, 273 N.W. 294, 279 Mich. 629.
S.D.—In re Engebretson's Estate, 1 N.W.2d 351.

Proper practice calls for the allowance of an attorney's claim for his fee in representing an administrator against the administrator personally and not against the estate, and for the administrator to pay the fee and take credit therefor in his final account; and an order finding that administrator's attorney rendered services to the administrator and the estate, the reasonable value thereof, that administrator was sole beneficiary, and ordering allowance of fee against administrator personally and against the estate, followed such practice.—People, for Use of Stough, v. Danforth, 12 N.E.2d 227, 293 Ill.App. 280.

92. Iowa.—In re Blackman, 120 N. W. 664, 143 Iowa 553.
24 C.J. p 99 note 29.

93. **Revocation by subsequent will**
The appointment as executor, of the executor named in will, before a subsequent will was filed for probate, in absence of showing of bad faith of executor, was not void ab initio but was voidable only, being subject to revocation on admission of the subsequent will to probate and hence executor was entitled to attorney's fees.—In re Clark's Estate, 92 P.2d 505, 33 Cal.App.2d 523.

94. **Revocation because of representative's infancy**
N.Y.—Carow v. Mowatt, 2 Edw. 57.
24 C.J. p 98 note 18 [b].

94. Okl.—In re Wah-kon-tah-heump-ah's Estate, 261 P. 973, 128 Okl. 179.

95. Colo.—In re Macky's Estate, 191 P. 106, 68 Colo. 556.

96. **This is so because** the executor is responsible for the misconduct, negligence, or want of skill of the attorney.
Cal.—Highfield v. Bozio, 207 P. 242, 188 Cal. 727—Estate of Ogier, 35 P. 900, 101 Cal. 381, 40 Am.S.R. 61.
N.Y.—Matter of Caldwell, 80 N.E. 663, 188 N.Y. 115.

Rule not changed by statute
Amendment to Code Civ.Proc. § 1616, providing that an attorney for an administrator or executor on notice to the interested parties may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands, does not prevent the executor of an estate from employing an attorney other than the one designated in the will.—Highfield v. Bozio, 207 P. 242, 188 Cal. 727.

97. N.J.—In re Megargee's Estate, 175 A. 803, 117 N.J.Eq. 347.
N.Y.—In re Liell's Estate, 265 N.Y. S. 730, 148 Misc. 279.

98. **Liability of representative**
(1) The representative will be liable for any damage sustained by the estate as a result of a failure to deduct the indebtedness.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.
(2) No damage to estate shown.—In re Witkind's Estate, supra.

99. Miss.—Owen v. Stoner, 114 So. 613, 148 Miss. 397.

1. Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 168 P. 522, 54 Mont. 172.
24 C.J. p 100 note 35.

Probate court cannot adjudicate questions of necessity of legal services and reasonableness of fees, on application for attorney's fees made before payment thereof by representative.—Armstrong v. Anderson, Civ. App., 91 S.W.2d 775, reversed on other grounds Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 Tex. 393, 132 Tex. 122.

In Alabama
(1) The text rule has been followed.—Bates v. Vary, 40 Ala. 421.
(2) But it has also been held that actual payment is not necessary to an allowance in all cases.—John v. Sharpe, 41 So. 635, 148 Ala. 665—24 C.J. p 91 note 41 [a].

2. Cal.—Dudley's Estate, 55 P. 397, 123 Cal. 256.
Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
Miss.—Brown v. Franklin, 145 So. 752, 166 Miss. 899.

3. N.Y.—Matter of Hauxhurst, 37 N.Y.S. 613, 76 Hun 38.
24 C.J. p 100 note 41.

(2) Where Representative Is an Attorney

A representative who is himself an attorney may properly employ at the expense of the estate another attorney, if necessary. Where he acts as his own attorney the authorities differ as to whether he may be allowed credit for his services as such.

A personal representative who is himself an attorney may properly employ, at the expense of the estate, another attorney to assist him in the settlement of the estate provided such employment is necessary.[4]

Services of representative as attorney. In many jurisdictions the view prevails that an executor or administrator cannot be allowed credit for his services to the estate as an attorney,[5] or even for attorney's fees incurred by him and paid to a firm of lawyers of which he is a member where his membership entitles him to a share in such fees;[6] but in other jurisdictions an executor or administrator who performs legal services for the estate is held entitled to an allowance therefor by way of extra compensation,[7] unless, in the case of an executor, his compensation as executor and attorney is fixed by the will.[8]

4. Wash.—Jones v. Peabody, 45 P.2d 915, 182 Wash. 148, 100 A.L.R. 64—In re Evans' Estate, 244 P. 260, 138 Wash. 101.
24 C.J. p 109 note 42.

Performance of ordinary legal services

(1) An executor or administrator who is himself a practicing lawyer is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding.—In re Parker's Estate, 251 P. 907, 200 Cal. 132, 49 A.L.R. 1025—In re Graham's Estate, 201 P. 456, 187 Cal. 222, 18 A.L.R. 631.

(2) But it has been held that "an administrator who is also a lawyer is required to exercise his professional skill to conduct the business of the estate himself, without extra compensation, and without legal assistance, unless a necessity is shown for the employment of such assistance."—Needham v. Needham, 200 P. 346, 348, 34 Idaho 193.

Necessity of employment

A denial of the necessity of the employment of an attorney cannot be made to rest on the mere fact that the required services are in the line of the administrator's profession or business.—In re Graham's Estate, 201 P. 456, 187 Cal. 222, 18 A.L.R. 631.

Will obligating executor to perform legal services

Although an executor who is himself a lawyer is obligated under the terms of the will to render his professional services, he still has authority to employ assistant counsel if the circumstances make it necessary.
Okl.—In re Wah-kon-tah-he-ump-ah's Estate, 261 P. 973, 128 Okl. 179.
Pa.—In re Peck's Estate, 33 Berks Co. 245.

5. Cal.—In re Parker's Estate, 251 P. 907, 200 Cal. 132, 49 A.L.R. 1025.
Miss.—Owen v. Stoner, 114 So. 613, 614, 148 Miss. 397, citing Corpus Juris.
24 C.J. p 108 note 38.

"The rule is grounded on the principle that the administrator in selecting himself to perform the duties of an attorney for the estate would become his own employer, and would be under temptation of self-interest which might lead him to act contrary to the duties of his trust."—In re Lankershim's Estate, 58 P.2d 1282, 1284, 6 Cal.2d 568.

Estoppel to raise objection

Parties interested in the estate may be estopped by their acts and conduct to contend that since an attorney was one of the personal representatives he could not receive compensation for legal services.—In re Lankershim's Estate, supra.

In Tennessee

(1) The text rule now prevails.—Holding v. Allen, 266 S.W. 772, 150 Tenn. 669, 36 A.L.R. 743.

(2) But formerly the contrary had been held.—Fulton v. Davidson, 3 Heisk. 614, followed in Lovewell v. Schoolfield, Tenn., 217 F. 689, 133 C.C.A. 449, and criticized and limited State v. Butler, 15 Lea 104.

(3) Accordingly a public administrator is not entitled to compensation as an attorney in addition to his commission.—Loague v. Brennan, 9 S.W. 693, 86 Tenn. 634.

6. Cal.—In re Parker's Estate, 251 P. 907, 200 Cal. 132, 49 A.L.R. 1025.
24 C.J. p 108 note 39.

Agreement not to share in fee

A personal representative may be allowed credit for fees paid a law firm of which he is a member if it was agreed between him and his partners that he is not to share in such fees.—In re Parker's Estate, supra—24 C.J. p 108 note 39 [a].

Presumption

In the absence of contrary evidence, an executor or administrator, employing a law firm of which he is member, is presumed to share in the fees.
Cal.—In re Parker's Estate, supra.
Idaho.—Needham v. Needham, 200 P. 346, 34 Idaho 193.

7. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
Pa.—In re Dickel's Estate, 32 Pa. Dist. & Co. 44—In re Phillips' Estate, 21 Pa.Dist. & Co. 464.
Va.—Robertson v. Gillenwaters, 7 S.E. 371, 85 Va. 116.
24 C.J. p 108 note 40.

In New York

(1) It was formerly held that personal representatives were not entitled to compensations for legal services in connection with the administration of the estate.—In re Hallock's Estate, 212 N.Y.S. 82, 214 App. Div. 323—24 C.J. p 108 note 40 [b] (1).

(2) But under the statute now in force, Surrogate's Court Act § 285, a personal representative who is an attorney may receive compensation for legal services rendered in connection with his official duties.—In re Hallock's Estate, 212 N.Y.S. 82, 214 App.Div. 323—In re Israel's Estate, 26 N.Y.S.2d 656, 176 Misc. 120—In re Fisher's Will, 287 N.Y.S. 252, 159 Misc. 190.
24 C.J. p 108 note 40 [b].

Extraordinary legal services

(1) When a lawyer voluntarily becomes administrator or executor, although he exercises professional skill in the conduct of the estate, he does not thereby entitle himself to extra compensation.—Jones v. Peabody, 45 P.2d 915, 182 Wash. 148, 100 A.L.R. 64—Noble v. Whitten, 80 P. 451, 38 Wash. 262—In re Young, 30 P. 643, 4 Wash. 534.

(2) But he may recover for necessary or extraordinary legal services performed by him.—Jones v. Peabody, supra.

Good faith in making charge required

Claim of executor for attorney's fees for services rendered by himself as an attorney in connection with lease executed for estate was properly rejected, where executor did not consider services of sufficient moment to entitle him to fee until his claim for double compensation was rejected.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

8. **Terms of will binding**

An executor under a will, by accepting the trust, is bound by the terms of the will fixing his compensation and is properly surcharged

(3) Approval of Court

A representative need not secure permission of the court before employing counsel nor need he secure judicial approval before paying counsel fees. He proceeds at his own risk, however, if he does not first obtain such approval.

It is not necessary that attorney's fees paid by an executor or administrator should have been fixed or approved by the court before payment in order to entitle him to credit therefor;[9] but, aside from a sanction previously given, the probate court may in its just discretion allow a credit for professional services reasonably and honestly employed.[10] Indeed it has been held that a disbursement made by the representative to an attorney to protect the estate in litigation pursuant to authority granted by the court of probate, should, on final accounting, be allowed, although the reviewing tribunal might not have authorized the disbursement had its judgment been invoked in the first instance.[11] Nevertheless an administrator who pays attorney's fees without an order of court does so at his own risk;[12] and the same is true where he pays the fees under a void order[13] or before the order becomes final and conclusive.[14]

Conclusiveness of order of allowance. While orders for the allowance and payment of counsel fees may be binding, under certain circumstances, on parties beneficially interested in the estate,[15] unless the orders were procured by fraud,[16] ex parte orders for the allowance and payment of counsel fees are not res judicata, and the fees may be contested on the settlement of the final account of the representative.[17]

Approving employment of counsel. While the court has authority to make an order authorizing a representative to employ counsel and provide that the fees shall be fixed at a future time on the completion of the services,[18] it is not essential that the representative should procure the permission of the court before employing counsel.[19]

b. Costs and Other Expenses of Litigation

While a personal representative, as a rule, is individually responsible for costs recovered against him, he is entitled to credit in his account or reimbursement from the estate for all costs and other expenses of litigation necessarily incurred by him in good faith for the benefit of the estate.

While a personal representative, unless relieved by statute from such liability,[20] is individually responsible, as a rule, for costs recovered against him,[21] he is entitled to credit in his account or reimbursement from the estate for all costs and other expenses of litigation properly incurred by him as

for additional fees paid to himself for professional services.—In re Constable's Estate, 149 A. 743, 299 Pa. 509.

9. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
N.J.—In re Chamberlain's Estate, 156 A. 42, 9 N.J.Misc. 809.
N.Y.—In re Norton's Will, 249 N.Y.S. 293, 139 Misc. 715, affirmed 253 N.Y.S. 909, 234 App.Div. 814.
24 C.J. p 100 note 36.

10. N.J.—In re Chamberlain's Estate, 156 A. 42, 9 N.J.Misc. 809.
24 C.J. p 100 note 37.

Source of power

(1) In exercise of chancery powers, or by express statute, court may make allowance for attorney's fees as reasonable expenses incurred by personal representative.—In re Howell's Will, 168 S.E. 671, 204 N.C. 437.

(2) Article of Surrogate's Court Act dealing with costs, fees, and commissions and compensation of executors, administrators, guardians, and trustees vests ample power in surrogate's court to allow compensation for legal services as are required to be performed for executor.—In re Richardson's Will, 293 N.Y.S. 758, 250 App.Div. 199.

11. Ill.—Mayer v. Schneider, 122 Ill.App. 48.

12. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
N.J.—In re Megargee's Estate, 175 A. 808, 117 N.J.Eq. 347—In re Chamberlain's Estate, 156 A. 42, 9 N.J.Misc. 809.
N.Y.—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791—In re Norton's Will, 249 N.Y.S. 293, 139 Misc. 715, affirmed 253 N.Y.S. 909, 234 App.Div. 814.
24 C.J. p 100 note 39.

13. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.

14. **Before time for appeal has expired**

Where executor, in compliance with court's order, paid counsel fee before statutory time for appeal from order elapsed, executor was required to supply the deficiency resulting from reduction of attorney's fee on appeal.—In re Ferguson's Estate, 3 A.2d 439, 124 N.J.Eq. 573, affirmed 11 A.2d 107, 127 N.J.Eq. 14.

15. Ga.—Kimball v. Casey, 151 S.E. 372, 169 Ga. 631.

Conclusiveness of recitals in order

Ga.—Kimball v. Casey, supra.

16. **Fraud not shown**

Ga.—Kimball v. Casey, supra.

17. Okl.—In re White's Estate, 62 P.2d 1074, 175 Okl. 439.

18. Cal.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499—In re McDonald's Estate, 99 P.2d 1115, 37 Cal.App.2d 521.

No fees can be fixed prior to the rendition of the services.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499—In re McDonald's Estate, 99 P.2d 1115, 37 Cal.App.2d 521.

19. Cal.—Ludwig v. Superior Court in and for Los Angeles County, 19 P.2d 984, 217 Cal. 499.

Approval of contract not required

Contract by administrator employing attorney, if made with due care, would be binding with or without order of ordinary.—Kimball v. Casey, 151 S.E. 372, 169 Ga. 631.

20. Ind.—Bruning v. Golden, 64 N.E. 657, 159 Ind. 199.

21. Md.—Martin v. Staubs, 120 A. 836, 142 Md. 268.
Tex.—Huff v. Huff, Civ.App., 98 S.W.2d 442, reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.
24 C.J. p 99 note 30.

Insolvent estate

Order directing executor personally to pay court stenographer for copies of testimony is unauthorized where estate is without funds.—In re Bauman's Estate, 258 N.Y.S. 403, 236 App.Div. 137.

the representative of the estate,[22] even though he is unsuccessful in the litigation.[23] To be entitled to this allowance, however, it must appear that the litigation was undertaken and conducted in good faith,[24] and with reasonable prudence,[25] for the benefit of the estate,[26] and was reasonably necessary.[27]

§ 224. —— Employment by Cofiduciaries

As a general rule cofiduciaries should be represented by the same, rather than separate, counsel.

Although circumstances may arise in the particular case justifying each of several coexecutors or coadministrators in employing separate counsel, if the cost to the estate is not duplicated thereby,[28] as a general rule they should all be represented by the same attorney,[29] the act of the majority governing in his selection.[30]

An attorney for one of two executors, who collected money belonging to the estate, is entitled thereto, as against the coexecutor, where he had performed services for the estate, on the request of one of the executors, in excess of the amount collected, and had claimed a lien on the sum collected, and thereafter the executor at whose request he had rendered his services agreed that he should retain it and apply it on account of such services.[31]

§ 225. —— Charges in Particular Matters

a. Probate or contest of will
b. Procuring appointment or qualification
c. Collection and protection of assets
d. Resisting claims against estate
e. Procuring direction of court
f. Miscellaneous matters

a. Probate or Contest of Will

The authorities differ as to the right of a personal representative, or one named as executor in a will, to an allowance out of the estate for expenses incurred in propounding the will for probate or in resisting an attack on its validity.

While it has been held in some jurisdictions that a person named as executor in a will is not entitled as a general rule to an allowance out of the estate for counsel fees and other expenses incurred by him in propounding the will for probate,[32] especially

22. Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.
Md.—Knapp v. Knapp, 131 A. 329, 149 Md. 263.
N.Y.—In re Levine's Estate, 274 N.Y.S. 610, 153 Misc. 109.
24 C.J. p 98 note 18, p 99 note 30.
Expenses of settlement see infra § 940.

Particular costs or expenses allowed
(1) Expense incurred in employing expert witnesses.—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
(2) Cost of procuring copy of record of litigation.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.
(3) Cost of procuring bill of exceptions and printing record and briefs on appeal.—In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Improper expense items
Mich.—Becht v. Miller, 273 N.W. 294, 279 Mich. 629.

23. Ala.—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
24 C.J. p 99 note 19.

24. Ala.—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
24 C.J. p 99 note 21.

25. Neb.—In re Bullion, 128 N.W. 32, 87 Neb. 700, 31 L.R.A.,N.S., 350.
24 C.J. p 99 note 22.

Where it is manifest that an appeal is doomed to failure as a matter of law according to well settled principles, there can be no charge against the estate for the expenses of the appeal.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

Just cause for litigation required
A statute providing that costs awarded against an administrator shall be allowed in his account unless proceeding was prosecuted or resisted without just cause controls in determining whether an administrator shall be allowed to credit his account for the costs awarded against him notwithstanding statute in pari materia, providing, without express qualification, that costs taxed against an administrator shall be allowed in administration account. —In re Brace's Estate, 196 A. 742, 109 Vt. 360.

26. Mo.—In re Flynn's Estate, App., 142 S.W.2d 1069.
24 C.J. p 99 note 23.

27. Ala.—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Mass.—Comstock v. Bowles, 3 N.E. 2d 817, 295 Mass. 250.
N.Y.—In re Kaiser's Estate, 7 N.Y.S. 2d 907, 255 App.Div. 472, reargument denied Kaiser v. Kaiser, 8 N.Y.S.2d 672, 255 App.Div. 964.
24 C.J. p 99 notes 24-26.

28. Pa.—In re Foulke's Estate, 5 A. 2d 179, 334 Pa. 186—In re Diament's Estate, 29 Del.Co. 255.
24 C.J. p 100 note 43.
Amount allowable where several attorneys are employed see infra § 227.

The mere fact that one of two cofiduciaries is an attorney does not necessarily preclude the other from employing counsel to assist him in the performance of his duties.—McAlear v. McAlear, 4 A.2d 252, 62 R.I. 158.

29. N.Y.—In re Fraser, 150 N.Y.S. 774, 165 App.Div. 441.
24 C.J. p 100 note 42.

30. Pa.—McDaniel's Estate, 9 Pa.Co. 232.

Concurrence in selection of counsel
Where court did not direct one of executors to employ counsel, expense could not be chargeable to estate where majority of executors did not concur.—In re Dennett's Will, 227 N.W. 280, 200 Wis. 84.

31. N.Y.—Arkenburgh v. Arkenburgh, 59 N.Y.S. 612, 27 Misc. 760.

32. In Maryland an executor named in a will defending it against a caveat filed before probate is not entitled to counsel fees.—Horton v. Horton, 149 A. 552, 158 Md. 626—24 C.J. p 100 note 45, p 101 note 47 [h].

In Michigan
(1) The executor of an unprobated will is not as a rule entitled to an allowance out of the estate for expenses incurred by him incident to the probate of the will.—In re Grover's Estate, 206 N.W. 988, 233 Mich. 467—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455—Stover v. Durfee, 189 N.W. 14, 219 Mich. 566.
(2) Exceptional cases, however, may arise where such expenses might well be considered for the benefit of the estate and therefore allowable. —In re Grover's Estate, supra—Stover v. Durfee, supra.
(3) And under a recent statute one named as executor in a will may,

where the will is denied probate,[33] the rule prevailing in the majority of jurisdictions is that he may be allowed his reasonable expenses, including attorney's fees, even though he is met with a will contest[34] and the will is denied probate,[35] provided he acted in good faith[36] and with reasonable prudence[37] and did not engage in unnecessary litigation,[38] the will was not procured by his undue influ-

subject to the approval of the judge of probate, employ counsel at the expense of the estate to assist in securing the admission of the will to probate when a notice of contest is filed.—In re Grover's Estate, supra.

(4) Under this statute the power to authorize such employment requires action by the "probate court" and a record to be made thereof.—Freeman v. Hulbert, supra.

33. Md.—Tilghman v. France, 59 A. 277, 99 Md. 616.
Minn.—Minnesota Loan & Trust Co. v. Pettit, 175 N.W. 540, 144 Minn. 244, 7 L.R.A. 1496—Kelly v. Kennedy, 158 N.W. 395, 133 Minn. 278, L.R.A.1917A 448, Ann.Cas.1918D 164.
24 C.J. p 101 note 46 [d], p 102 note 48 [b].

Attempt to probate in solemn form

(1) If a will is not previously admitted to probate in common form, and letters testamentary have not been granted thereon, compensation for counsel fees incurred by an executor in an unsuccessful attempt to probate a putative will in solemn form will not be allowed.—Young v. Freeman, 113 S.E. 204, 153 Ga. 827.

(2) The fact that the instrument propounded cannot, for any reason, be propounded in common form does not alter the rule.—Irwin v. Peek, 155 S.E. 515, 171 Ga. 375, reversing 150 S.E. 363, 40 Ga.App. 624, vacated 156 S.E. 44, 42 Ga.App. 270.

34. Neb.—In re Charles' Estate, 243 N.W. 847, 123 Neb. 630.
Tenn.—Smith v. Haire, 181 S.W. 161, 133 Tenn. 343, Ann.Cas.1916D 529.
Tex.—Huff v. Huff, 124 S.W.2d 327, 132 Tex. 540, reversing, Civ.App., 98 S.W.2d 442—McCannon v. McCannon, Civ.App., 2 S.W.2d 942, writ dismissed.
Wash.—In re Vaughn's Estate, 270 P. 1030, 1031, 149 Wash. 291, citing Corpus Juris.
24 C.J. p 100 note 45, p 101 note 47.

Rule adopted by statute

Statute allowing executor, presenting will for probate in good faith, reasonable expenses and attorney's fees out of estate, held not unconstitutional.—Williams v. Hankins, 245 P. 483, 79 Colo. 237.

Discretion of court

Whether an allowance should be made is a matter resting largely within the discretion of the court.—In re Silva's Estate, 84 P.2d 59, 29 Cal.App.2d 52.

Where named executor is an attorney

If necessary, one named as executor in a will and offering it for probate may employ counsel to assist in resisting will contest, although he is attorney obligated under will to render professional services.—In re Wahkon-tah-he-ump-ah's Estate, 261 P. 973, 128 Okl. 179.

Where will established

(1) Where the executor has acted in good faith in employing an attorney in proceedings to probate the will, and the will is established, the estate is chargeable with the expense of reasonable attorney's fees thus necessarily incurred.—Pendleton v. Hare, Tex.Com.App., 231 S.W. 334, reversing Hare v. Pendleton, Civ. App., 214 S.W. 948.

(2) On accounting by an executrix, the court did not err in allowing against the estate, counsel fees for opposing a contest of the will and procuring the probate thereof, in view of Rev.L. §§ 5859 and 5861, making it the duty of the executor to probate the will or to file a renunciation thereof, and in view of the fact that the person who employed the counsel to procure the probating of the will was the executrix and was the sole beneficiary thereunder and prevailed in the contest.—In re Hegarty's Estate, 222 P. 793, 47 Nev. 369.

Only proper expenses allowable

Only such expenses are allowed as are reasonable and proper under the circumstances.—Huff v. Huff, Civ. App., 98 S.W.2d 442, reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.

Nature of proceeding

Proceeding in which executor filed will for probate, caveat was filed, and validity of will was tried and determined, was a will contest in which executor may be allowed attorney fees.—Williams v. Hankins, 245 P. 483, 79 Colo. 237.

Method of making allowance

Amount to be awarded for expenses and attorney's fees of one presenting will for probate as executor should be assessed on evidence by referee, court, or jury, and judgment should not be given at once for amount claimed.—Williams v. Hankins, supra.

35. Ala.—Mitchell v. Parker, 151 So. 842, 227 Ala. 676.
Tenn.—Smith v. Haire, 181 S.W. 161, 133 Tenn. 343, Ann.Cas.1916D 529.
Tex.—Huff v. Huff, 124 S.W.2d 327, 132 Tex. 540, reversing, Civ.App., 98 S.W.2d 442—McCannon v. McCannon, Civ.App., 2 S.W.2d 942, writ dismissed.
24 C.J. p 101 note 46, p 103 note 48.

In New York

(1) Formerly it was held that an executor named in a purported will was not entitled to his disbursements where the will offered by him was refused probate.—Dodd v. Anderson, 90 N.E. 1137, 197 N.Y. 466, 27 L.R.A., N.S., 336, 18 Ann.Cas. 738, reversing 115 N.Y.S. 688, 131 App.Div. 224, affirming 112 N.Y.S. 414.

(2) But under the statute later in force, Surrogate's Court Act § 278, he may, whether successful or not, in the discretion of the surrogate, be awarded all necessary disbursements made by him and all expenses incurred in the attempt to sustain in good faith the will offered by him for probate.—In re Staiger's Will, 164 N.E. 33, 249 N.Y. 229, modifying 229 N.Y.S. 523, 224 App.Div. 31.

(3) The statute applies where he attempts to sustain a lost will.—In re Staiger's Will, supra.

(4) And it applies even though his attempt to sustain the will involves the contesting of another will.—In re Reimers' Will, 185 N.E. 403, 261 N. Y. 337, modifying 261 N.Y.S. 100, 237 App.Div. 343, and motion denied 188 N.E. 23, 262 N.Y. 468.

36. D.C.—Wilson v. Veazey, 30 F.2d 310, 58 App.D.C. 301.
Neb.—In re Charles' Estate, 243 N.W. 847, 123 Neb. 630.
Tenn.—Smith v. Haire, 181 S.W. 161, 133 Tenn. 343, Ann.Cas.1916D 529.
Tex.—Huff v. Huff, 124 S.W.2d 327, 132 Tex. 540, reversing, Civ.App., 98 S.W.2d 442—McCannon v. McCannon, Civ.App., 2 S.W.2d 942, writ dismissed.

Good faith will be imputed to executor who attempts to probate will but is unsuccessful, in absence of contrary showing.—Mitchell v. Parker, 151 So. 842, 227 Ala. 676.

Bad faith not shown

Ky.—Douglas' Adm'r v. Douglas' Ex'r, 48 S.W.2d 11, 243 Ky. 321.

37. Tex.—Huff v. Huff, Civ.App., 98 S.W.2d 442, reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.

38. **Unnecessary will contest**

Where distribution of testator's property under will was the same that would have resulted if there had been no will, defense of will contest was not "necessary" within terms of statute governing authority of executrix, and hence denial of allowance to executrix and her attorneys for services rendered in defending the contest was not an abuse of discretion.—In re Silva's Estate, 84 P.2d 59, 29 Cal.App.2d 52.

ence,[39] and it would not be inequitable or unjust to allow the expenses out of the estate.[40]

Defending will admitted to probate. Where, after the will has been duly probated, suits are brought to revoke such probate or to test the validity of the will, the executor is generally entitled to receive from the estate his necessary expenditures in defending in good faith such attack[41] even though his defense is unsuccessful,[42] provided he did not engage in unnecessary litigation.[43] Accordingly a person named as executor in a will which has been admitted to probate is entitled to be reimbursed his counsel fees and expenses in opposing the probate of another paper subsequently propounded as a will,[44] even though the latter paper is established as the will and admitted to probate,[45] provided he acted in good faith.[46]

39. D.C.—Wilson v. Veazey, 30 F.2d 310, 58 App.D.C. 301.

Allowance denied

Where a person named as executor in will was found to have exercised undue influence on testatrix and probate of will was denied, and costs taxed against executor by final judgment, executor could not, in subsequent proceeding, be allowed payment out of estate for court costs and reasonable attorneys' fees, particularly where he did not submit to jury issue of his good faith in offering will for probate.—Huff v. Huff, 124 S.W.2d 327, 132 Tex. 540, reversing, Civ.App., 98 S.W.2d 442.

40. Ala.—Mitchell v. Parker, 151 So. 842, 227 Ala. 676.
Neb.—In re Charles' Estate, 243 N. W. 847, 123 Neb. 630.

41. Ala.—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.
Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.
Kan.—Medill v. McIntire, 16 P.2d 952, 136 Kan. 594.
Md.—Parker v. Leighton, 102 A. 552, 131 Md. 407.
Mich.—In re Grover's Estate, 206 N. W. 988, 233 Mich. 467.
N.Y.—Senter v. Petheram, 118 N.Y.S. 347, 64 Misc. 294.
Or.—In re Shepherd's Estate, 49 P. 2d 448, 152 Or. 15, modified on other grounds 41 P.2d 444, 152 Or. 15.
24 C.J. p 100 note 45 [a], p 101 note 47.

Rules distinguished

Rules governing the allowance of expenses and attorney's fees in proceedings to have a will admitted to probate do not necessarily govern where the action is to set aside a will already probated.—In re Engels' Will, 230 N.W. 519, 210 Iowa 36.

Contest withdrawn

Expenses in preparing for defense of will contest may be allowed, even though the contest is withdrawn before trial.—In re Peek's Will, 227 N. Y.S. 682, 131 Misc. 495.

Insolvent estate

Executors had authority, and it was their duty, to employ attorney to defend will against contest filed after probate, where estate then appeared to be solvent, and court properly allowed reasonable attorney's fee, although, when claim for attorney's fee was filed and allowed, estate had become insolvent.—In re Sullivan's Estate, 74 P.2d 346, 51 Ariz. 55.

In Pennsylvania

(1) A personal representative who becomes a party to an issue devisavit vel non must look to those who authorized him to engage therein and cannot charge his expenses to the estate he represents unless the latter is benefited by the proceeding.—In re Lowe's Estate, 192 A. 405, 326 Pa. 375, 111 A.L.R. 518—In re Arnold's Estate, 97 A. 415, 252 Pa. 298—Sheetz's Appeal, 100 Pa. 197—Yerkes' Appeal, 99 Pa. 401—In re Scott, 9 Watts & S. 98—Mumper's Appeal, 3 Watts & S. 441—Geddis' Appeal, 9 Watts 284—Alexander's Estate, 13 Pa. Dist. 459—24 C.J. p 100 note 45 [h], p 101 note 47 [e], p 102 note 48.

(2) Nor can counsel fees be allowed the executor for services in seeking to uphold specific bequests in the will.—In re Lowe's Estate, 192 A. 405, 326 Pa 375, 111 A.L.R. 518.

(3) The general rule that an executor will not be allowed counsel fees and costs in a contest to sustain a will by which he was appointed does not apply, however, where the executor is also a trustee, under a will which establishes a spendthrift trust.—In re Lowe's Estate, 192 A. 405, 326 Pa. 375, 111 A.L.R. 518—In re Waller's Estate, 62 Pa.Super. 332, affirming 24 Pa.Dist. 85—Hoffman's Estate, 19 Pa.Super. 70.

42. Ala.—Hale v. Cox, 200 So. 772, 240 Ala. 622.
Kan.—Medill v. McIntire, 16 P.2d 952, 136 Kan. 594.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126—Parker v. Leighton, 102 A. 552, 131 Md. 407.
Or.—In re Shepherd's Estate, 49 P. 2d 448, 152 Or. 15, modified on other grounds 41 P.2d 444, 152 Or. 15.
Va.—Koteen v. Bickars, 177 S.E. 904, 163 Va. 676—Butt v. Murden, 152 S.E. 330, 154 Va. 10, 69 A.L.R. 1048.

Evidence of bad faith

Although jury on issues submitted under caveat to will previously admitted to probate found that it was not executed according to law, that its terms were not known to deceased, and that he was not of sound and disposing memory, it was held that, as subscribing witnesses testified to due execution of will, etc., those nominated as executors who secured its probate cannot be denied credit for expenditures, etc., on theory that they were guilty of bad faith in probating the instrument.—Parker v. Leighton, 102 A. 552, 131 Md. 407.

Attempt to probate in solemn form

Where an executor under a will probated in common form is called upon by heirs to probate it in solemn form, he is entitled to an allowance from the estate for reasonable attorney's fees, although the will may be refused probate.—Irwin v. Peek, 155 S.E. 515, 171 Ga. 375, reversing 150 S.E. 863, 40 Ga.App. 624, vacated 156 S.E. 44, 42 Ga.App. 270—Young v. Freeman, 113 S.E. 204, 153 Ga. 827—Davison v. Sibley, 79 S.E. 855, 140 Ga. 707.

Contrary view

Minn.—Minnesota Loan & Trust Co. v. Pettit, 175 N.W. 540, 144 Minn. 244, 7 A.L.R. 1496—Kelly v. Kennedy, 158 N.W. 395, 133 Minn. 278, L.R.A.1917A 448, Ann.Cas.1918D 164.
24 C.J. p 101 note 47 [g], p 102 note 48.

43. Unnecessary appeal

Where an order admitting a will to probate was made on nine days' notice although the statute required ten days' notice and was therefore entered without jurisdiction, an appeal from an order setting aside the order of probate was without excuse, and no allowance of attorney fees for services on such appeal will be made.—In re Hegarty's Estate, 222 P. 793, 47 Nev. 369.

44. Wash.—In re Jolly's Estate, 101 P.2d 995, 1000, 3 Wash.2d 615, 128 A.L.R. 993, quoting Corpus Juris.
24 C.J. p 102 note 49.

45. Wash.—In re Jolly's Estate, supra, quoting Corpus Juris.
24 C.J. p 102 note 50.

Reason for rule

"Since duty and the law require an executor to defend in such a situation, he should not be required to defend at his peril."—In re Jolly's Estate, 101 P.2d 995, 1000, 3 Wash. 2d 615, 128 A.L.R. 993.

46. Wash.—In re Jolly's Estate, supra.

Allowance denied

Expenses incurred by executor in

Effect of personal interest. While the mere fact that an executor is personally interested in sustaining the will, as where he is a beneficiary thereunder, does not necessarily preclude him from receiving an allowance out of the estate for reasonable attorney's fees and other expenses incurred in defending the will against attack,[47] nevertheless this is a factor which the court may consider in determining his right to an allowance,[48] and where it appears that he acted in his individual capacity rather than in his representative capacity he is properly required to bear the expenses incurred without reimbursement from the estate.[49]

Contest primarily between beneficiaries. In most cases a will contest presents merely a question between persons who take the estate if the will is established and those who will take it under the law of descent and distribution, if not established. In such cases the executor should leave these interested parties to conduct the litigation at their own expense and to abide its results without imposing substantial charges against the estate.[50] So, where the contest is in effect between devisees or legatees only and the estate is not otherwise interested therein, an allowance to the executor for attorney's fees incurred in sustaining the efforts of such devisees or legatees as are personally interested in carrying out[51] or defeating[52] the terms of the will may be denied.

Opposition to will by administrator. It has been held that an administrator who opposes the probate of a paper offered as the last will of the decedent cannot, although contesting honestly, be allowed reimbursement for the costs, expenses, and counsel fees for which he has made himself liable, especially in case the will becomes established,[53] but there is also authority for the contrary view.[54]

Time of allowance. An allowance for expenses in preparing for the defense of a will contest cannot be made in advance of the hearing of the contest on the merits,[55] and in advance of such hearing the court cannot approve a contract binding the estate for a reasonable attorney's fee.[56]

b. Procuring Appointment or Qualification

The authorities are in conflict as to the right of a representative to reimbursement for expenses incurred in procuring his appointment or qualification in the probate court.

endeavoring to sustain will under which he had been appointed but which had been revoked and a subsequent will executed are not chargeable against estate where executor did not honestly believe that instrument under which he was appointed was decedent's last will.—In re Carlson's Estate, 68 P.2d 119, 156 Or. 597.

47. Colo.—Williams v. Hankins, 245 P. 483, 79 Colo. 237.
Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.
N.Y.—Matter of Blair, 59 N.Y.S. 1090, 28 Misc. 611, 1 Mills Surr. 238, modified on other grounds 63 N.Y.S. 678, 49 App.Div. 417.
Or.—In re Shepherd's Estate, 49 P.2d 448, 152 Or. 15, modified on other grounds 41 P.2d 444, 152 Or. 15.
24 C.J. p 101 note 46 [c].
Effect of personal interest generally see infra subdivision d of this section.

That daughter of nominated executor was principal beneficiary under will was not such a personal interest as to affect his right to an allowance for expenses incurred in defending the will against attack.—Douglas' Adm'r v. Douglas' Ex'r, 48 S.W.2d 11, 248 Ky. 321.

48. Or.—In re Carlson's Estate, 68 P.2d 119, 156 Or. 597.
Tex.—Ware v. Barfield, Civ.App., 54 S.W.2d 1105.
24 C.J. p 108 notes 36 [c], 37 [a].

49. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Ky.—Slaughter's Ex'r v. Caldwell, 287 S.W. 720, 216 Ky. 261.
24 C.J. p 107 note 30.

Attorney's fees are not ordinarily allowed to one named as executor in a will in an unsuccessful attempt to probate the will where he has a personal interest in securing its probate or where he is a legatee under the will.—In re Charles' Estate, 243 N.W. 847, 123 Neb. 630.

Legatees consenting to employment of counsel
That executor employed additional counsel to defend will contest with consent of portion of legatees does not fix character of employment as personal.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.

50. Mich.—Stover v. Durfee, 189 N.W. 14, 219 Mich. 566.
Neb.—In re Charles' Estate, 243 N.W. 847, 123 Neb. 630.
Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676—Butt v. Murden, 152 S.E. 330, 154 Va. 10, 69 A.L.R. 1048.

Statutory regulations
Under statute providing that fees may be allowed in the probate "and execution of will of deceased persons," executor had right to employ attorneys to defend the will in contest between heirs and was entitled to allowance for attorneys' fees to be paid from the estate, as against contention that validity of will was only a dispute among heirs, and executor was not a necessary party to the contest and therefore not entitled to attorneys' fees.—Quinn v. Driver, 136 S.W.2d 1015, 199 Ark. 1058.

51. Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.
24 C.J. p 101 note 47 [1].

Charging expenses to beneficiary
Where a will contest was conducted by the executor mainly in the interest of a particular beneficiary under the will, it has been regarded as proper to allow the attorneys' fees incurred and paid by the executor as a charge on the share of such beneficiary rather than as a charge on the general estate.—In re Smith, 146 N.W. 836, 165 Iowa 614.

52. **Raising issue of ademption**
Expenses incurred by an executor in unsuccessfully assailing the will by raising an issue of ademption are not a proper expenditure by him as executor, and in the absence of evidence of an express agreement on the part of the legatees to reimburse him for the costs the estate is not liable therefor.—Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

53. Iowa.—In re Dalton, 168 N.W. 332, 183 Iowa 1013.
24 C.J. p 102 note 52.

54. Ala.—Bradley v. Andress, 30 Ala. 80.

55. Tex.—Ware v. Barfield, Civ.App., 54 S.W.2d 1105.
24 C.J. p 100 note 45 [c].

56. Tex.—Ware v. Barfield, supra.

While it has been held that an executor or administrator is entitled to reimbursement for the just and reasonable expenses incurred in procuring his appointment or qualification in the probate court,[57] there is also considerable authority for the view that such an allowance should not be made,[58] and a denial of such an allowance is unquestionably proper where the appointment was improperly procured over the objection of those having a superior right to the appointment[59] or by falsely representing that the appointee was entitled to administer.[60] So also expenses incurred in a controversy between executors, one opposing the qualification of the others, are not proper charges against the estate.[61]

c. Collection and Protection of Assets

A representative is entitled to an allowance of counsel fees and other expenses necessarily incurred in collecting or protecting the estate assets.

A personal representative is justified in employing an attorney, when necessary, to assist him in collecting or protecting the assets of the estate.[62] Accordingly he is entitled to attorney's fees paid in an action necessary to collect debts or assets of the estate,[63] and counsel fees and costs necessarily incurred in asserting or defending title to assets are properly allowed.[64]

d. Resisting Claims against Estate

A personal representative is generally entitled to an allowance of counsel fees and other expenses incurred in resisting claims against the estate.

An executor or administrator is entitled to an allowance of counsel fees and other expenses incurred in resisting claims against the estate,[65] and in any particular case his right is determined by whether or not he acted in good faith and with reasonable prudence, rather than by his success or failure in the litigation.[66]

Claims based on contract to make will. As a general rule a personal representative is entitled to an allowance for reasonable attorney's fees and other expenses incurred in resisting a claim against the estate for the specific performance of an alleged contract of decedent to make a will in favor of claimants or for damages for the breach of such contract,[67] although such an allowance has been denied in some instances.[68]

57. Ky.—Hamilton v. Nunn, 57 S.W. 2d 655, 247 Ky. 715.
24 C.J. p 102 note 55.

In Maryland

(1) A person having an exclusive right to administer an estate is entitled to an allowance for counsel fees incurred in the defense of such right.—Horton v. Horton, 149 A. 552, 158 Md. 626—Ex parte Young, 8 Gill 285.

(2) But an administratrix having no exclusive right to administer is not entitled to counsel fees in defending letters of administration which were ultimately revoked because prematurely issued.—Horton v. Horton, supra.

(3) One appointed as administratrix is not entitled to an allowance for expenses incurred in resisting the claims of others who had the same legal right to administration as the appointee had.—Horton v. Horton, supra.

58. Tex.—Rowe v. Dyess, Com.App., 213 S.W. 234.
24 C.J. p 102 note 56.

Failure to maintain appointment

Counsel fees for services rendered in an unsuccessful effort to maintain a representative's appointment are not chargeable against the estate.—Succession of Marcour, La.App., 173 So. 587.

59. "Where a personal representative has been appointed by the court over the objections of those having a superior right to the appointment, or to designate the appointee, and which appointed representative was never designated by the decedent in any manner or form, or by any other person having the remotest connection with the estate to be administered, and where such appointee incurs expenses in an endeavor to sustain his apparently arbitrary nomination by the appointing authority, he should not be allowed his counsel fees incurred in endeavoring to hold on to his appointment; and especially should that be true when the representative seeking the allowance qualified at a time when the order nominating him was suspended by a pending motion to set it aside."—Louisville Trust Co. v. Fidelity & Columbia Trust Co., 272 S.W. 759, 762, 209 Ky. 289.

60. Ala.—Hall v. Santangelo, 60 So. 168, 178 Ala. 447.

61. Nev.—In re Millenovich, 5 Nev. 161.

62. Colo.—In re Macky's Estate, 191 P. 106, 68 Colo. 556.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.

Employment of attorneys to collect insurance on life of intestate for contingent fee held valid, if administrator used due care.—Kimball v. Casey, 151 S.E. 372, 169 Ga. 631.

63. Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.
24 C.J. p 102 note 58.

64. Ill.—Corney v. Corney, 257 Ill. App. 13—Havill v. Newton, 202 Ill. App. 15.
24 C.J. p 102 note 59.

Unnecessary costs

An allowance to the administrator of ninety-eight dollars and twenty-five cents in replevin for a cow worth only forty dollars, representing the costs in the suit before the justice and on appeal, was improper, except as to the sum of seventeen dollars, representing the cost before the justice, the duty of the administrator not requiring him to bring an appeal.—Martin v. Staubs, 120 A. 836, 142 Md. 268.

65. Ark.—Triplett v. Chipman, 240 S.W. 23, 153 Ark. 12.
Mich.—In re Grover's Estate, 206 N. W. 988, 233 Mich. 467.
N.Y.—In re Dutcher's Estate, 295 N. Y.S. 643, 251 App.Div. 184.
Pa.—In re Kennedy's Estate, 194 A. 901, 902, 328 Pa. 193, citing **Corpus Juris.**
24 C.J. p 102 note 60.

66. Mo.—In re Carlin's Estate, 47 S. W.2d 213, 215, 226 Mo.App. 622, citing **Corpus Juris.**
N.Y.—In re Collins' Estate, 286 N.Y. S. 506, 158 Misc. 798.
24 C.J. p 102 note 61.

67. Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.
N.Y.—In re Dutcher's Estate, 295 N. Y.S. 643, 251 App.Div. 184.

68. Unsuccessful resistance

An administrator who defends an action for specific performance of a contract, alleged to have been made by his decedent, to will plaintiff all the residue of decedent's estate, in consideration of care and service for the rest of her life, after payment of

e. Procuring Direction of Court

Where his rights and duties are left in reasonable doubt, a representative may be entitled to an allowance of counsel fees and other expenses incurred in procuring judicial direction.

Executors and administrators may take the opinion of the court or procure its advice, aid, protection, or sanction at the expense of the estate, in cases where their rights and duties are left in reasonable doubt; and in similar proceedings commenced by others to which they are made parties their reasonable counsel fees and expenses will be allowed.[69] Nevertheless reimbursement may be denied where a judicial direction is sought needlessly or in bad faith or with needless accumulation of expense.[70]

f. Miscellaneous Matters

A personal representative has been held entitled, or not entitled, to an allowance for counsel fees and other expenses of litigation incurred in various particular matters other than those which have been specifically considered in the preceding subdivisions of this section.

An executor or administrator is not entitled to credit in his account for counsel fees paid by him for services rendered in contesting a proper charge against him;[71] but he is entitled to credit for reasonable counsel fees and other expenses incurred in resisting improper charges,[72] opposition to his proper official acts,[73] or improper attacks on his accounts, see § 940 infra. The representative may be allowed for his counsel fees and costs in probate proceedings in the line of his duty,[74] an appeal justly taken,[75] continuing in good faith a suit begun by his decedent,[76] defending an action by the widow to set aside her consent to the will,[77] foreclosing a mortgage,[78] or enforcing notes or contracts running to himself for the benefit of the estate,[79] or in a suit properly brought by an administrator de bonis non for a settlement of the estate,[80] or criminal proceedings against an impostor or one personating an heir, when proper for the protection of the estate.[81] Expenses incurred in preparation for expected litigation will be allowed, although the dispute results in a compromise,[82] as will also the costs of setting aside a sale of decedent's real estate where a subsequent sale realizes more than the first.[83] Where an executrix' contention that the will gave her, as life tenant, the right to dispose of the principal as far as she deemed necessary for her support, has been sustained after litigation, she may charge her reasonable cost of the litigation against the principal;[84] and where the nominated executor in good faith appeals from an order of the court rejecting the will it is proper for him to bring a suit in equity to prevent a threatened distribution of the estate by the administrator, and he is entitled to be reimbursed for the costs thereof, although he does not succeed on his appeal.[85] Reasonable and necessary traveling expenses of the attorney have also been allowed.[86]

all debts and costs, in a case in which the only heir at law is represented by counsel and actively contests the action, cannot, if unsuccessful in defending the action, charge the estate with attorney's fees and expenses of litigation incurred in the contest.—Foltz v. Boone, 140 N.E. 761, 107 Ohio St. 562.

69. Mass.—Dudley v. Sanborn, 34 N. E. 181, 159 Mass. 185.
24 C.J. p 103 note 62.

Construction of will

Attorney's fees for services in obtaining a construction of the will may be allowed.

Ga.—Adams v. Bishop, 151 S.E. 377, 169 Ga. 762.
Ill.—Giger v. Bishop, 135 Ill.App. 448, reversed on other grounds 83 N.E. 289, 231 Ill. 472.
Wis.—In re Asby's Will, 287 N.W. 734, 232 Wis. 481, 126 A.L.R. 151.

70. Tex.—Ogden v. Shropshire & Adkins, Civ.App., 37 S.W.2d 249, error refused.
24 C.J. p 103 note 63.

71. Ala.—Noble v. Jackson, 31 So. 450, 132 Ala. 280.
Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.
Ga.—Clements v. Fletcher, 129 S.E. 846, 161 Ga. 21.
Tex.—Richardson v. McCloskey, Civ. App., 261 S.W. 801, reversed on other grounds, 276 S.W. 680.
24 C.J. p 103 note 64.

72. Ala.—McKenzie v. Jensen, 101 So. 755, 212 Ala. 92.
Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.
Ga.—Clements v. Fletcher, 129 S.E. 846, 161 Ga. 21.
N.Y.—Ellis v. Kelsey, 150 N.E. 148, 241 N.Y. 374, modifying 210 N.Y.S. 846, 214 App.Div. 784, and motion granted 152 N.E. 399, 242 N.Y. 495—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.
24 C.J. p 103 note 65.

73. Ga.—Rudolph v. Underwood, 16 S.E. 55, 88 Ga. 664.
Ky.—Miller v. Simpson, 2 S.W. 171, 8 Ky.L. 516.

74. Ala.—Williamson v. Mason, 23 Ala. 488.
24 C.J. p 103 note 69.

Defending exceptions to sale

Administrators are generally entitled to an allowance for reasonable counsel fees in defending exceptions to ratification of sale of leasehold property made under authority of orphans' court.—Knapp v. Knapp, 134 A. 24, 151 Md. 126.

75. Mo.—In re Carlin's Estate, 47 S. W.2d 213, 226 Mo.App. 622.
24 C.J. p 103 note 70.

76. N.C.—Clapp v. Coble, 21 N.C. 177.

77. Kan.—In re Rightmire's Estate, 242 P. 138, 120 Kan. 95.

78. Cal.—In re Miner, 46 Cal. 564.
Pa.—In re Long's Estate, 17 A.2d 686, 143 Pa.Super. 176.

79. Tenn.—Brown v. Dortch, 12 Heisk. 740—Abingdon v. Tyler, 6 Coldw. 502.

80. Ky.—Seibert v. Bloomfield, 63 S. W. 534, 23 Ky.L. 646.

81. Ala.—Gerald v. Bunkley, 17 Ala. 170.

82. Pa.—In re Semple, 28 Pittsb.Leg. J. 431.

83. Pa.—Ennis' Estate, 2 Del.Co. 498.

84. Conn.—Reed v. Reed, 68 A. 849, 80 Conn. 401.

85. Ky.—Phillips v. Phillips, 7 Ky. L. 679.

86. Cal.—Moore's Estate, 13 P. 880, 72 Cal. 335—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.

On the other hand, the representative should not be allowed for counsel fees and costs in proceedings undertaken merely to vindicate the good name of decedent,[87] litigation with reference to real estate not in his charge,[88] resisting payment of a bill for reasonable funeral expenses,[89] or attempting to enforce a contract by which the widow agrees to take a child's share in lieu of dower, the contract having been set aside as fraudulent.[90] No allowance should be made for a payment merely as a retainer,[91] for attendance of counsel at sales of land by the executor when no necessity therefor is shown,[92] or for the services of an attorney in the management of the estate while the representative was enjoined from transacting the business of the estate,[93] or in procuring evidence in actions brought against the estate,[94] or in acting as a director of a corporation wholly owned by deceased.[95] The expense incurred by a representative in seeking to recover excessive compensation for his services is not a proper charge against the estate;[96] and the counsel fees and expenses of an executor in attending a reference for distribution when there was a contest with the legatees have been disallowed.[97] Where an executor appeals from an order of the probate court making an allowance for the support of a widow, and brings error to an order dismissing the appeal, he is liable personally for the costs in both courts.[98]

Prosecution of slayer; death actions. An executor has been allowed credit for money expended in procuring the arrest, and conducting the prosecution, of a person who killed decedent,[99] although the weight of authority is against such an allowance,[1] and generally the assets of the estate cannot be used to defray the cost of a suit for the wrongful death of decedent.[2]

Removal of representative. Generally a representative is entitled to an allowance for counsel fees and other expenses incurred in resisting an unsuccessful attempt to remove him.[3] Where the attempt is successful, however, he is not entitled as a rule to an allowance,[4] unless it appears that he acted in good faith in his resistance.[5]

Counsel fees paid by one executor in endeavoring unsuccessfully to remove his coexecutor will not be allowed out of the estate.[6]

§ 226. —— Grounds for Refusing Allowance

a. In general
b. Expenses caused by representative's fault or misconduct
c. Litigation for benefit of particular persons
d. Personal benefit of representative
e. Services which representative should perform

a. In General

Various matters have been held to constitute, or not to constitute, sufficient grounds for refusing the representative an allowance for counsel fees and other expenses of litigation.

As has been seen supra § 223, a personal representative is not entitled to an allowance for coun-

87. S.C.—Woodard v. Woodard, 15 S. E. 355, 36 S.C. 118, 16 L.R.A. 743.

88. Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Fla.—Brickell v. McCaskill, 106 So. 470, 90 Fla. 441.
Mo.—Gump's Estate v. Jacobs, 292 S. W. 81, 222 Mo.App. 545.
Okl.—In re White's Estate, 52 P.2d 1074, 175 Okl. 439.
24 C.J. p 103 note 82.

If the needs of the estate do not require the income or proceeds of the real estate, the administrator would have no authority to bind the estate for counsel's services in attending condemnation proceedings.—In re Brown's Estate, 177 N.W. 969, 210 Mich. 595.

Circumstances authorizing allowance
In suit for settlement of an estate, where heirs had agreed as to distribution of realty, administrator was allowed a credit for sum paid as costs in suit for partitioning the land, where to observe the technicalities of the law and refuse the allowance would create circuity and additional expenses to the parties.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.

89. N.Y.—Matter of Huntley, 35 N. Y.S. 113, 13 Misc. 375, 25 N.Y.Civ. Proc. 78.

90. Ky.—Corbett v. Johnson, 6 Ky. L. 596.

91. N.Y.—Matter of Collyer, 9 N.Y. S. 297, 1 Conn.Surr. 546.
Tenn.—Pate v. Maples, Ch.A., 43 S. W. 740.

92. Pa.—McGregor's Estate, 18 A. 902, 131 Pa. 359.

93. N.Y.—Matter of O'Brien, 25 N.Y. S. 704, 5 Misc. 136, affirmed 29 N. Y.S. 1147, which was affirmed 40 N.E. 18, 145 N.Y. 379.

94. N.Y.—Matter of Collyer, 9 N.Y.S. 297, 1 Conn.Surr. 546.

95. Or.—In re Steeby's Estate, 20 P. 2d 1080, 143 Or. 501.

96. Colo.—Goodknight v. Harper, 225 P. 215, 75 Colo. 141.
Mo.—Gump's Estate v. Jacobs, 292 S.W. 81, 222 Mo.App. 545.

97. Pa.—Heister's Appeal, 7 Pa. 455.

98. Mich.—Koch v. Koch, 80 N.W. 641, 121 Mich. 667.

99. Tenn.—Killebrew v. Murphy, 3 Heisk. 546.

1. Ky.—Commonwealth v. Campbell, 43 S.W.2d 994, 241 Ky. 349.
Tex.—Jackson v. Fielder, Civ.App., 7 S.W.2d 170, affirmed, Com.App., 15 S.W.2d 557.
24 C.J. p 103 note 94.

2. N.H.—Ghilain v. Couture, 146 A. 395, 84 N.H. 48, 65 A.L.R. 553—Davis v. Herbert, 97 A. 879, 78 N.H. 179.

3. N.Y.—Matter of Higgins, 142 N.Y. S. 1029, 80 Misc. 609.
24 C.J. p 103 note 68.

4. Mass.—Comstock v. Bowles, 3 N. E.2d 817, 295 Mass. 250.
24 C.J. p 103 note 68 [a].

5. **Presumption of good faith**
In the absence of a finding of bad faith, the expenses of a contest to prevent the removal of an administrator may be allowed in his final accounting made after such removal. —In re Jones, 24 N.Y.Wkly.Dig. 333.

6. N.Y.—Matter of Archer, 100 N.Y. S. 1095, 51 Misc. 260.

sel fees and other expenses of litigation where such expenses were unnecessary or were not incurred with reasonable prudence, in good faith, and for the benefit of the estate. So also an allowance for counsel fees may be refused where the advice of counsel was asked and inexcusably disregarded by the representative;[7] where the services of counsel were rendered wholly in opposition to the estate,[8] or were not in aid of any duty owed by the representative to the estate;[9] where the attorney had agreed to make no further charge for his services,[10] or it was understood that his fee would be paid otherwise and not by the estate;[11] where the representative exceeded his powers in acting with reference to the matter as to which the fees are claimed,[12] or has been guilty of mismanaging the estate;[13] where the charges paid or incurred by the personal representative were illegal;[14] or, in a proper case, where only a small balance remains in the estate.[15] A charge for an attorney's services in attempting to rectify his own neglect in failing to interpose a proper plea has been disallowed;[16] and an administrator cannot charge the estate with expenses incurred in advising with counsel with respect to interests and demands antagonistic to the claims of the heirs, when he knows that such counsel is representing the antagonistic interests.[17]

On the other hand, it is not necessarily a sufficient ground for refusing an allowance for attorney's fees that the representative failed to take advantage of a technical defense against the attorney,[18] that the services were rendered under a champertous retainer,[19] or that the attorney was also employed by one of the heirs, devisees, or legatees.[20]

b. Expenses Caused by Representative's Fault or Misconduct

No allowance will be made for counsel fees and other similar expenses necessitated by the representative's own fault or misconduct.

A personal representative is not entitled to credit in his account for counsel fees paid by him for services necessitated by his own fault or misconduct.[21] Accordingly he is not entitled to any allowance or credit for his fees, costs, or other expenses in a litigation made necessary by his own negligence, misconduct, or maladministration,[22] but negligence

7. Ala.—Munden v. Bailey, 70 Ala. 63.

8. Ga.—Reynolds v. Dorsey, 15 S.E. 2d 779.

9. Cal.—In re Murphey's Estate, 62 P.2d 374, 7 Cal.2d 712.

10. Cal.—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.

11. N.Y.—In re Stephens, 2 N.Y.S. 36, reversed on other grounds 21 N. E. 687, 113 N.Y. 547.

Payment by beneficiary

Where an attorney is already bound by contract with one interested in the estate to perform the services for which the representative subsequently paid him, the representative is not entitled to reimbursement for the fees paid, since their payment by the representative was unnecessary.—In re Peterson's Estate, 234 N.W. 923, 58 S.D. 76.

12. Ill.—In re Wincox, 57 N.E. 1073, 186 Ill. 445, affirming 85 Ill.App. 613.

13. Ill.—In re Sargent's Estate, 276 Ill.App. 312.
N.J.—In re Frey, 67 A. 192, 73 N.J. Eq. 346.
N.Y.—In re McIlwaine's Estate, 8 N. Y.S.2d 1, 255 App.Div. 978, appeal granted 9 N.Y.S.2d 583, 256 App. Div. 819, affirmed 21 N.E.2d 615, 280 N.Y. 775, reargument denied 22 N.E.2d 763, 281 N.Y. 668.
Wis.—In re Roebken's Will, 283 N.W. 815, 230 Wis. 215.

Failure to file reports

Where an executor did not apply to the county court for advice in the management of the estate, and for more than eight years made no report of his dealings, although required by statute to account semi-annually, it was held that the court properly denied him any attorney's fees.—In re Roach, 92 P. 118, 50 Or. 179.

Mismanagement held not to preclude allowance

(1) Even though the representative has mismanaged the estate, an allowance for reasonable attorney's fees necessarily incurred for services to the estate should be allowed where the element of mismanagement may be taken care of by denying the representative compensation.—In re Paine's Estate, 174 So. 430, 128 Fla. 151.

(2) Where executor's wrong in taking secret profit from handling of estate could be remedied by decree against him, fees for services of executor's attorney could be allowed in executor's accounting.—Spilios v. Papps, 192 N.E. 155, 288 Mass. 23.

(3) Administrator's irregularities in managing estate held not to preclude an allowance for counsel fees where no loss resulted to the estate from the irregularities.—In re Fotheringham's Estate, 281 P. 337, 154 Wash. 130.

14. Iowa.—In re Sawyer, 100 N.W. 484, 124 Iowa 485.
24 C.J. p 105 note 11.

15. N.Y.—In re Stein's Estate, 289 N.Y.S. 226, 248 App.Div. 823.

16. N.J.—In re Flaacke, Prerog., 64 A. 1020, affirmed 73 A. 1117, 72 N. J.Eq. 944.
N.Y.—Matter of Collyer, 9 N.Y.S. 297, 1 Conn.Surr. 546.

17. Mont.—In re Davis, 78 P. 704, 31 Mont. 421.

18. N.Y.—In re Gilman's Adm'x, 167 N.E. 437, 251 N.Y. 265, reversing 232 N.Y.S. 754, 225 App.Div. 774.

19. **Payment not unreasonable or unnecessary**

Payments by administratrix to attorney should not be condemned as "unreasonable" or "unnecessary," within statute, because services were rendered under champertous retainer. —In re Gilman's Adm'x, supra.

20. **Contingent fee contract**

The fact that a sole legatee and devisee had entered into a contingent fee contract with attorneys to represent her and collect her claims under the will was no ground for disallowance of a credit in the account of testator's personal representative of a reasonable attorneys' fee paid to the same attorneys for services rendered in the administration of the estate.—In re Rothgiber's Estate, Ohio App., 31 N.E.2d 687.

21. N.J.—Appeal of Larrabee, 130 A. 195, 98 N.J.Eq. 655.

22. Ga.—Clements v. Fletcher, 129 S.E. 846, 161 Ga. 21.
Hawaii.—In re Estate of Lee Chuck, 33 Hawaii 445.
N.Y.—In re Forbes' Estate, 210 N. Y.S. 218, 213 App.Div. 338.
24 C.J. p 106 note 25.

which did not cause the litigation will not prevent the allowance of sums paid as counsel fees.[23]

c. Litigation for Benefit of Particular Persons

Expenses attending litigation for the benefit of particular heirs, legatees, or other persons should not be allowed out of the general estate.

The costs, fees, and expenses attending a litigation for the benefit of particular heirs, legatees, next of kin, or other persons should be allowed, if at all, as against their own particular funds or interests, proportionately or wholly, as the case may be, rather than out of the general estate;[24] and a fortiori an executor or administrator who expends money for attorney's fees or costs for the benefit of persons whose interests are antagonistic to the estate is not entitled to recover against the estate for such advances.[25]

d. Personal Benefit of Representative

A personal representative cannot be allowed, as against the estate, the costs and expenses of litigation or the employment of counsel for his own individual benefit.

An executor or administrator cannot be allowed, as against the estate, the costs and expenses of litigation or the employment of counsel for his own individual benefit.[26] Such is the rule where the fiduciary has a special interest as legatee, devisee, heir, or

Unauthorized investment

(1) Attorney's and abstract fees in foreclosure of land mortgage on unauthorized investment of funds by executor cannot be allowed.—In re Bradfield's Estate, 221 P. 531, 69 Mont. 247.

(2) But where no loss resulted from an improper investment by executors, who loaned money belonging to estate on a judgment note, executors would not be charged with the sheriff's costs on the execution issued in order to collect the note.—In re Long's Estate, 17 A.2d 686, 143 Pa.Super. 176.

23. Mass.—Forward v. Forward, 6 Allen 494.

24. Md.—Mayor and City Council of Baltimore v. Link, 197 A. 801, 174 Md. 111.
Miss.—Clarksdale Hospital v. Wallis, 193 So. 627, 187 Miss. 834.
N.Y.—In re Dutcher's Estate, 295 N.Y.S. 643, 251 App.Div. 184—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459.
Utah.—Sharp v. Seventh Judicial Dist. Court of State of Utah, 17 P.2d 261, 81 Utah 236.
24 C.J. p 106 note 27.

Attorneys' fees incurred by such persons in opposition to the interests of the estate should not be allowed out of the assets of the estate.—Trautz v. Lemp, 72 S.W.2d 104, 334 Mo. 1085.

Necessity of engaging in litigation

Executor, who, together with residuary legatee, was made party to proceeding seeking determination that objector was entitled to entire estate under contract, is not entitled to credit for legal services, including expenses of appeal, beyond time when executor ascertained that legatee was represented by independent counsel and was vigorously defending proceeding, since further resistance by executor was no longer necessary, and services rendered thereafter were for legatee's benefit.—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459.

25. Neb.—McDowell v. Sutton First Nat. Bank, 102 N.W. 615, 73 Neb. 307.

26. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Cal.—In re Fulton's Estate, 73 P.2d 664, 23 Cal.App.2d 563.
Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442.
Ky.—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396—Goode v. Reynolds, 271 S.W. 600, 208 Ky. 441, 63 A.L.R. 631—Shields v. Shields, 234 S.W. 7, 192 Ky. 555.
Mont.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.
N.Y.—In re Frame's Estate, 284 N.Y.S. 153, 245 App.Div. 675—In re Farrell's Estate, 272 N.Y.S. 852, 152 Misc. 118—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
Ohio.—Huston v. King, 7 Ohio Dec. (Reprint) 575, 3 Cinc.L.Bul. 1142.
Or.—In re Elder's Estate, 101 P.2d 412, 164 Or. 347.
Pa.—In re Foulke's Estate, 5 A.2d 179, 334 Pa. 186—In re Wood's Estate, 115 A. 865, 272 Pa. 8.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186.
Tex.—Pottinger v. Southwestern Life Ins. Co., Civ.App., 138 S.W.2d 645—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, error dismissed—Ogden v. Shropshire & Adkins, Civ.App., 37 S.W.2d 249, error refused—Richardson v. McCloskey, Civ.App., 261 S.W. 801, reversed on other grounds, Com.App., 276 S.W. 680.
24 C.J. p 107 notes 29, 31.

The representative is not entitled to an allowance from the estate for the services of an attorney:

(1) In defending on appeal orders granting the personal representative, as the widow of deceased, support money and exempt property.—In re McClellan's Estate, 183 N.W. 398, 192 Iowa 384, petition overruled 184 N.W. 749, 192 Iowa 384.

(2) In defending a partition proceeding in which the executor in his individual capacity was made a party.—In re Banfield's Estate, 299 P. 323, 137 Or. 256, rehearing denied 3 P.2d 116, 137 Or. 256.

(3) In contesting on behalf of the personal representative as an individual an application to surcharge his accounts.—In re Dennett's Will, 227 N.W. 280, 200 Wis. 84.

(4) In seeking to establish the representative's individual claim of a copartnership interest in the decedent's business.—In re Rosenberg's Will, 2 N.Y.S.2d 300, 165 Misc. 92.

(5) In attempting to open an assessment of inheritance taxes in order to discharge the representative from a liability arising from his own misconduct.—In re Flaacke, (Prerog.) 64 A. 1020, affirmed 73 A. 1117, 72 N.J.Eq. 944.

Where an administrator paid claims against his intestate's estate and took assignments thereof in the name of another for his benefit, but it did not appear that the administrator's private funds were used for such purpose, the estate was not interested in the classification of such claims, and hence the cost of litigation carried on by the administrator with reference to such classification, apparently in his individual interest, should be paid by him personally, and not from the funds of the estate.—Felsenthal v. Kline, 73 N.E. 428, 214 Ill. 121.

Retaining property

A decedent's estate cannot be charged with the expenses of the executor in the employment of counsel to oppose a motion by the executrix to compel him to deliver to her personal property of the estate in his hands on which he claimed commissions.—Matter of Whitney, 136 N.Y.S. 633, 75 Misc. 610.

Question of fact

Whether litigation by a personal representative may be said to be solely for his own individual benefit or for that of the estate is a question of fact.—In re Dutcher's Estate, 295 N.Y.S. 643, 251 App.Div. 184.

distributee, to protect which he contests against others,[27] or where he asserts against the estate his personal claims against decedent.[28] So also the expense incurred by an executor in a suit against him for the recovery of real estate in his possession in his capacity as an individual is not an expenditure required by him as executor, and the estate is not liable therefor.[29] The mere fact that a representative may personally profit from litigation does not necessarily affect his right to counsel fees out of the estate.[30] Thus the mere fact that he is beneficially interested in the estate is not sufficient to defeat his right to an allowance for expenses incurred in defending against claims asserted against the estate.[31]

Apportionment of costs and expenses of litigation as between representative and estate may sometimes be proper, as where a matter in litigation concerns the representative both personally and officially.[32]

e. Services Which Representative Should Perform

No allowance can be made to a personal representative for payments made to his attorneys for work which he, in contemplation of law, was bound to do himself.

No allowance can be made to an executor or administrator for payments made to his attorneys for work which he, in contemplation of law, was bound to do himself, and, if he chooses to employ attorneys to do such work, he must pay them himself.[33]

§ 227. —— Amount of Allowance

To entitle a personal representative to credit for counsel fees and other expenses of litigation, his expenditures must be reasonable in their amounts.

In order to entitle an executor or administrator to credit for counsel fees and other expenses of litigation, his expenditures must be reasonable,[34]

27. Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
Md.—Dalrymple v. Gamble, 11 A. 718, 68 Md. 156.
N.Y.—In re Payne's Will, 31 N.Y.S. 2d 452, 177 Misc. 594.
Or.—In re Shepherd's Estate, 49 P. 2d 448, 152 Or. 15, modifying 41 P.2d 444, 152 Or. 15.
Tex.—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, error dismissed.
24 C.J. p 107 note 30.
Defending will contest see supra § 225 a.

The representative is not entitled to an allowance from the estate for the services of an attorney:

(1) In seeking to obtain a construction of the will favorable to the executor in his individual capacity. —Goode v. Reynolds, 271 S.W. 600, 208 Ky. 441, 63 A.L.R. 631—Shields v. Shields, 234 S.W. 7, 192 Ky. 555 —Shields v. Shields, 226 S.W. 392, 190 Ky. 109.

(2) In defending the interests of the executrix as beneficiary under the will against a claim asserted by a third person to all the property of the estate.—In re Thompson's Estate, 287 P. 21, 156 Wash. 486.

(3) In proceedings to repudiate a settlement agreement made by the executrix, as sole beneficiary under the will, with the testator's children. —In re Shierman's Estate, 292 N.W. 606, 138 Neb. 221.

(4) In opposing on behalf of the executrix as beneficiary under the will a petition for a widow's allowance.—In re Nolan's Estate, 108 P. 2d 391, 56 Ariz. 366.

28. Idaho.—In re Peterson's Estate, 220 P. 1086, 38 Idaho 195.
La.—Succession of Vatter, 188 So. 732, 192 La. 657.
24 C.J. p 107 note 31.

29. Mo.—Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

30. N.Y.—In re Van Volkenburgh's Estate, 247 N.Y.S. 831, 139 Misc. 437.

31. Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.
Tex.—Huff v. Huff, Civ.App., 98 S. W.2d 442, 445, quoting **Corpus Juris**, and reversed on other grounds 124 S.W.2d 327, 132 Tex. 540.
24 C.J. p 107 note 35.

32. N.Y.—In re Farrell's Estate, 272 N.Y.S. 852, 152 Misc. 118.
24 C.J. p 108 notes 36, 37.

33. N.J.—In re Megargee's Estate, 175 A. 808, 117 N.J.Eq. 347.
N.Y.—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237—In re Smith's Estate, 276 N.Y.S. 564, 154 Misc. 53—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688—In re Brodbeck's Estate, 206 N.Y.S. 142, 123 Misc. 743.
Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.
24 C.J. p 109 note 41.

Extraordinary expenses

A claim by an administrator for expenses incurred in collecting a claim due the estate must be rejected, in the absence of a showing that the expenses were extraordinary.—Pennebaker v. Williams, 120 S.W. 321, 123 S.W. 672, 136 Ky. 120.

Rule applied to public administrators

N.Y.—In re Murray's Estate, 271 N. Y.S. 910, 151 Misc. 10, affirmed 270 N.Y.S. 321, 241 App.Div. 761—In re Murray's Estate, 272 N.Y.S. 90, 151 Misc. 7.

What constitutes executorial duties

"What any layman could perform or was capable of performing would be strictly executorial duties."—In re Hallock's Estate, 212 N.Y.S. 82, 83, 214 App.Div. 323—In re Owen's Estate, 259 N.Y.S. 892, 897, 144 Misc. 688.

Allowance has been denied for the services of an attorney:

(1) In making up the accounts of the representative.—Appeal of Larrabee, 130 A. 195, 98 N.J.Eq. 655.

(2) In studying the stock market to enable an advantageous sale of shares of stock of the estate.—In re Parker's Estate, 251 P. 907, 200 Cal. 132, 49 A.L.R. 1025.

(3) In making inventory, distributing furniture, and drafting receipts.—In re Pritchard's Estate, 238 N.W. 270, 255 Mich. 545.

(4) In collecting the income of the estate.—In re Guenard's Estate, 266 N.Y.S. 770, 149 Misc. 182.

An executor, who is an attorney, is not at liberty to take advantage of his dual capacity to charge as attorney for services which as an executor he is required to perform.—In re Hallock's Estate, 212 N.Y.S. 82, 214 App.Div. 323—In re Fisher's Will, 287 N.Y.S. 252, 159 Misc. 190.

34. Ala.—Walsh v. Walsh, 164 So. 822, 231 Ala. 305.
Ariz.—Busenbark v. Smith, 97 P.2d 533, 55 Ariz. 1—In re O'Reilly's Estate, 231 P. 916, 27 Ariz. 222.
Fla.—In re Paine's Estate, 174 So. 430, 128 Fla. 151.
Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.
N.Y.—In re Murray's Estate, 271 N. Y.S. 910, 151 Misc. 10, affirmed 270 N.Y.S. 321, 241 App.Div. 761—In re Lieli's Estate, 265 N.Y.S. 730, 148 Misc. 279.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186.
Tex.—Huff v. Huff, Civ.App., 98 S. W.2d 442, reversed on other grounds 124 S.W.2d 327, 132 Tex. 540—Morton's Estate v. Ferguson,

and what is a reasonable amount in any particular case is, in the absence of statute, a matter resting largely within the discretion of the court,[35] which should not be governed absolutely by the opinion of professional men,[36] the charges made by counsel,[37] or the contract of employment,[38] but should exercise its own fair judgment and fix the amount allowable with reference to the labor, skill, and care required, the experience and standing of counsel, the value of the estate, the advantages gained or sought by the services or litigation, the good faith and reasonable prudence shown by the representative who claims the allowance, and other pertinent facts,[39] so as to prevent, on the one hand, excessive charges, and, on the other hand, inadequate allowances.[40] Beyond this no general rule can be laid down, but reference is made in the notes to a number of illustrative cases in which particular amounts have been held rea-

Civ.App., 45 S.W.2d 419, error refused.
Wash.—In re Perry's Estate, 12 P. 2d 595, 168 Wash. 428.
Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.
24 C.J. p 104 note 95, p 105 note 11.

35. Ala.—Stumpf v. Wiles, 179 So. 201, 235 Ala. 317.
Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366—Busenbark v. Smith, 97 P.2d 533, 55 Ariz. 1—In re O'Reilly's Estate, 231 P. 916, 27 Ariz. 222.
Cal.—In re Machado's Estate, 199 P. 505, 186 Cal. 246.
Colo.—In re Cheney's Estate, 85 P.2d 729, 103 Colo. 319.
Ill.—In re Larkins' Will, 2 N.E.2d 580, 285 Ill.App. 596.
Iowa.—In re Lipp's Estate, 227 N.W. 913, 209 Iowa 409—In re Chesmore's Estate, 189 N.W. 770, 194 Iowa 300.
Md.—Mayor and City Council of Baltimore v. Link, 197 A. 801, 174 Md. 111.
Miss.—King v. Wade, 166 So. 327, 175 Miss. 72—Brown v. Franklin, 145 So. 752, 166 Miss. 899.
Mo.—Hewitt v. Duncan's Estate, App., 43 S.W.2d 87, 90, quoting **Corpus Juris.**
Neb.—In re Moore's Estate, 225 N.W. 705, 118 Neb. 568.
N.Y.—In re Nebenzahl's Estate, 294 N.Y.S. 553, 162 Misc. 366.
Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.
Pa.—In re Huff's Estate, 150 A. 98, 300 Pa. 64—In re Wood's Estate, 115 A. 865, 272 Pa. 8.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186.
Wash.—In re Krueger's Estate, 119 P.2d 312—In re Jolly's Estate, 101 P.2d 995, 3 Wash.2d 615, 128 A.L.R. 993—In re Fotheringham's Estate, 281 P. 337, 154 Wash. 130—In re Brown's Estate, 224 P. 678, 129 Wash 84.
24 C.J. p 104 note 96.

36. La.—Succession of Williams, 101 So. 113, 156 La. 704.
Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186.
Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.
24 C.J. p 104 note 97.

Admissibility of evidence
In determining what is reasonable fee for counsel for personal representative, evidence of customary compensation for similar services is admissible.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126.
S.C.—Ex parte Robinson, 12 S.E.2d 701, 196 S.C. 186.

37. N.Y.—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.
24 C.J. p 104 note 97.

That an excessive fee has been paid by the executor in good faith prior to the court's approval of such claim does not justify the court in ratifying it.—In re O'Reilly's Estate, 231 P. 916, 27 Ariz. 222.

38. **Contract not controlling**
Notwithstanding an agreement between a personal representative and his counsel as to the amount of counsel's fees, the court, in the exercise of its discretion, will allow only what it deems a reasonable fee, if the agreed fee appears disproportionate to the service required and performed.
Ariz.—In re O'Reilly's Estate, supra.
N.Y.—In re Gilman's Adm'x, 167 N. E. 437, 251 N.Y. 265, reversing 232 N.Y.S. 754, 225 App.Div. 774—In re Meng, 125 N.E. 508, 227 N.Y. 264, reversing 176 N.Y.S. 290, 188 App. Div. 69, which affirmed 159 N.Y.S. 535, 96 Misc. 126, and reargument denied 126 N.E. 914, 227 N.Y. 669—In re Lane's Estate, 264 N.Y.S. 438, 147 Misc. 138, modified on other grounds 265 N.Y.S. 1037, 240 App. Div. 768.
N.C.—In re Howell's Will, 168 S.E. 671, 204 N.C. 437.
24 C.J. p 104 notes 96 [b], 97.

39. Ariz.—Busenbark v. Smith, 97 P.2d 533, 55 Ariz. 1—In re O'Reilly's Estate, 231 P. 916, 27 Ariz. 222.
La.—Succession of Williams, 101 So. 113, 156 La. 704.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126—Martin v. Staubs, 120 A. 836, 142 Md. 268.
Miss.—Brown v. Franklin, 145 So. 752, 166 Miss. 899.
Mo.—In re Frans' Estate, 145 S.W. 2d 400, 346 Mo. 1149—Hewitt v. Duncan's Estate, App., 43 S.W.2d 87, 90, quoting **Corpus Juris.**
Neb.—In re Moore's Estate, 225 N. W. 705, 118 Neb. 568.
N.Y.—Hubbard v. Hubbard, 274 N.Y. S. 564, 242 App.Div. 749—In re Epstein's Estate, 27 N.Y.S.2d 872, 176 Misc. 494—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791—In re Mildeberger's Will, 204 N. Y.S. 881, 122 Misc. 743, affirmed 209 N.Y.S. 649, 212 App.Div. 727, affirmed In re Martin, 150 N.E. 540, 241 N.Y. 528—In re Maier, 183 N. Y.S. 686, 112 Misc. 676—In re Moore's Estate, 8 N.Y.S.2d 268.
Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.
Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.
24 C.J. p 104 note 97.

Estate should be given benefit of doubts in determining reasonable value of attorney's services.—In re Moore's Estate, 225 N.W. 705, 118 Neb. 568.

The dominant idea in fixing the fee to be allowed is the value of the services rendered.—Succession of Vatter, 188 So. 732, 192 La. 657—Peltier v. Thibodaux, 144 So. 903, 175 La. 1026.

The number of hours expended by the attorney in labor for the estate is one of the least important factors to consider.—In re Kentana's Estate, 10 N.Y.S.2d 811, 170 Misc. 663.

Taxable costs as measure
Value of attorney's services is not necessarily measured by large taxable costs in executor's action.—Hubbard v. Hubbard, 274 N.Y.S. 564, 242 App.Div. 749.

An amount greater than that claimed by the attorney and placed on the reprsentative's account cannot be allowed.—Succession of Crouch, 8 La.App. 86.

Evidence
Statement filed in probate court of attorney's services to estate, although competent as admission against interest, does not prevent consideration of additional services. Dicken v. Strasburger, 166 N.E. 143, 31 Ohio App. 18.

40. N.Y.—In re Mildeberger's Will, 204 N.Y.S. 881, 122 Misc. 743, affirmed 209 N.Y.S. 649, 212 App.Div. 727, affirmed In re Martin, 150 N. E. 540, 241 N.Y. 528.

sonable,[41] inadequate,[42] or excessive.[43]

That the services were rendered for a contingent

41. Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366—Busenbark v. Smith, 97 P.2d 533, 55 Ariz. 1.
Cal.—In re Byrne, 54 P. 957, 122 Cal. 260.
Colo.—In re Cheney's Estate, 85 P.2d 729, 103 Colo. 319.
Iowa.—In re Sarbaugh's Estate, 1 N.W.2d 105, 231 Iowa 320—Brown's Estate v. Hoge, 199 N.W. 320, 198 Iowa 373.
La.—Succession of Williams, 101 So. 113, 156 La. 704.
Mich.—In re Grover's Estate, 206 N.W. 988, 233 Mich. 467.
Miss.—King v. Wade, 166 So. 327, 175 Miss. 72.
N.Y.—In re Merrill's Estate, 300 N.Y.S. 1142, 165 Misc. 295—In re Klein's Estate, 295 N.Y.S. 197, 162 Misc. 589—In re Murray's Estate, 271 N.Y.S. 910, 151 Misc. 10, affirmed 270 N.Y.S. 321, 241 App.Div. 761—In re Mildeberger's Will, 204 N.Y.S. 881, 122 Misc. 743, affirmed 209 N.Y.S. 649, 212 App.Div. 727, affirmed In re Martin, 150 N.E. 540, 241 N.Y. 528.
Or.—In re McDermid's Estate, 222 P. 295, 109 Or. 633.
Pa.—In re Sparks' Estate, 193 A. 449, 127 Pa.Super. 364, adopted 196 A. 48, 328 Pa. 384—In re Mendenhall's Estate, 97 Pa.Super. 582—In re Alexander's Estate, 19 Erie Co.L.J. 494—In re Shimer's Estate, 18 Lehigh Co.L.J. 77—In re Hughes' Estate, 87 Pittsb.Leg.J. 1.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
Wash.—In re Krueger's Estate, 119 P.2d 312.
24 C.J. p 104 note 98.

Particular amounts held reasonable

(1) $100.
Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.
N.Y.—In re Feifer's Estate, 270 N.Y.S. 905, 151 Misc. 54.
Wash.—Matson v. Wilhelmson, 88 P.2d 412, 198 Wash. 311.

(2) $150.
Ark.—Triplett v. Chipman, 240 S.W. 23, 153 Ark. 12.
Pa.—In re Wood's Estate, 115 A. 865, 272 Pa. 8.

(3) $200.
N.J.—In re Linn's Estate, 199 A. 396, 124 N.J.Eq. 65.
Or.—In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46.

(4) $250.
Cal.—In re Clark's Estate, 92 P.2d 505, 33 Cal.App.2d 523.
N.Y.—In re Kirschbaum's Estate, 299 N.Y.S. 996, 252 App.Div. 872.

(5) $270.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.

(6) $300.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126.
N.Y.—In re Kitching's Will, 253 N.Y.S. 112, 141 Misc. 704—In re Eddy's Estate, 235 N.Y.S. 455, 134 Misc. 112.

(7) $350.—In re Mangan's Estate, 294 N.Y.S. 974, 162 Misc. 495.

(8) $375.—In re Liell's Estate, 265 N.Y.S. 730, 148 Misc. 279.

(9) $500.
Ala.—Brake v. Graham, 106 So. 188, 214 Ala. 10—Elmore v. Cunninghame, 93 So. 814, 208 Ala. 15.
N.Y.—In re McClatchey's Estate, 11 N.Y.S.2d 266, 170 Misc. 696—In re Moore's Estate, 8 N.Y.S.2d 268.
Or.—In re Neil's Estate, 242 P. 820, 117 Or. 76.

(10) $700.—In re Walker's Estate, 122 A. 192, 13 Del.Ch. 439.

(11) $750.—Brown v. Franklin, 145 So. 752, 166 Miss. 899.

(12) $1,000.
Ky.—Douglas' Adm'r v. Douglas' Ex'r, 48 S.W.2d 11, 243 Ky. 321.
N.Y.—In re Hallock's Estate, 212 N.Y.S. 82, 214 App.Div. 323—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.
Pa.—In re Sparks' Estate, 193 A. 449, 127 Pa.Super. 364, adopted 196 A. 48, 328 Pa. 384.
Wash.—In re Mundt Estates, 14 P.2d 59, 169 Wash. 593.

(13) $1,200.
Md.—Knapp v. Knapp, 134 A. 24, 151 Md. 126.
N.Y.—In re Epstein's Estate, 27 N.Y.S.2d 872, 176 Misc. 494.

(14) $1,500.
Minn.—In re Fitzgerald's Estate, 285 N.W. 285, 205 Minn. 57.
N.Y.—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791.

(15) $2,000.
N.Y.—In re Zeller's Estate, 12 N.Y.S.2d 497.
Pa.—In re Foulke's Estate, 5 A.2d 179, 334 Pa. 186—In re McHugh's Estate, 57 Montg.Co. 299.

(16) $2,500.
N.Y.—In re Burcham's Estate, 27 N.Y.S.2d 814, 262 App.Div. 773—In re Kentana's Estate, 10 N.Y.S.2d 811, 170 Misc. 663—In re Nebenzahl's Estate, 294 N.Y.S. 553, 162 Misc. 366.
Wash.—In re Bradley's Estate, 52 P.2d 333, 184 Wash. 642.

(17) $3,000.
Mich.—In re Finn's Estate, 275 N.W. 215, 281 Mich. 478.
Pa.—In re McCalla's Estate, 33 Pa.Dist. & Co. 643.
Wash.—In re Perry's Estate, 12 P.2d 595, 168 Wash. 428.

(18) $5,000.—In re Larkins' Will, 2 N.E.2d 580, 285 Ill.App. 596.

(19) $7,500.
N.Y.—In re Maier, 183 N.Y.S. 686, 112 Misc. 676.
Pa.—In re Eckels' Estate, 37 Pa.Dist. & Co. 383, 56 Montg.Co. 120, 88 Pittsb.Leg.J. 321.

(20) $10,000.
La.—Succession of Vatter, 188 So. 732, 192 La. 657.
Pa.—In re Kennedy's Estate, 194 A. 901, 328 Pa. 193.
Wash.—In re Hart's Estate, 286 P. 650, 156 Wash. 255.

(21) $20,000.—In re Franz' Estate, 145 S.W.2d 400, 346 Mo. 1149.

(22) $40,000.
Neb.—In re Moore's Estate, 225 N.W. 705, 118 Neb. 568.
Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.

(23) $80,000.—In re Potts' Estate, 205 N.Y.S. 797, 123 Misc. 346, affirmed 209 N.Y.S. 655, 213 App.Div. 59, appeal dismissed 150 N.E. 533, 241 N.Y 510, and affirmed 150 N.E. 568, 241 N.Y. 593.

Five per cent of gross assets

The reasonable compensation of counsel for conduct of uncomplicated estate of moderate size will ordinarily approximate between five per cent of gross assets and a single executor's commission, but if serious complications are encountered or services rendered necessarily extend over period considerably longer than that customarily required for settlement of usual estate, figure must be varied.—In re Kentana's Estate, 10 N.Y.S.2d 811, 170 Misc. 663.

42. Ill.—In re Larkins' Will, 2 N.E 2d 580, 285 Ill.App. 596.
24 C.J. p 104 note 99.

43. La.—Succession of Aronson, 123 So. 608, 168 La. 887—Succession of Williams, 101 So. 113, 156 La. 704.
Md.—Martin v. Staubs, 120 A. 836, 142 Md. 268.
N.Y.—In re Mangan's Estate, 294 N.Y.S. 974, 162 Misc. 495—In re Pagnotta's Estate, 292 N.Y.S. 327, 161 Misc. 415—In re Murray's Estate, 272 N.Y.S. 90, 151 Misc. 7—In re Liell's Estate, 265 N.Y.S. 730, 148 Misc. 279—In re Zeller's Estate, 12 N.Y.S.2d 497.
24 C.J. p 104 note 1.

Particular amounts held excessive

(1) $150.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.

(2) $300.—Triplett v. Chipman, 240 S.W. 23, 153 Ark. 12.

(3) $500.—In re Kirschbaum's Estate, 299 N.Y.S. 996, 252 App.Div. 872.

(4) $1000.—In re Huff's Estate, 150 A. 98, 300 Pa. 64.

(5) $3,000.—Shields v. Shields, 234 S.W. 7, 192 Ky. 555.

fee may be considered in fixing the fee to be allowed,[44] and the allowance may be made more liberal because of that fact.[45]

The number of attorneys employed is not a determining factor in fixing the fee to be allowed.[46] Indeed, where more than one attorney is unnecessarily[47] employed by the representative, no more can be allowed for such attorneys' services than would amount to reasonable compensation if only one were employed,[48] and in such case the single reasonable compensation allowed must be divided among the several attorneys rendering services.[49] So, where cofiduciaries are each represented by independent counsel, the aggregate amount allowed as counsel fees should not exceed what would be allowed if only one counsel represented the fiduciaries.[50]

Excessive fee retained by attorney. A representative has been held entitled to credit for the entire amount of an excessive fee retained by a firm of attorneys from funds collected by them, where the representative sought to recover a part of such fee from the attorneys, but was unsuccessful mainly because of their pecuniary irresponsibility.[51]

Nonlegal services. Charges made by an attorney for services not of a legal character,[52] such as services which are strictly clerical,[53] cannot be allowed for at the rates charged for strictly legal services.

A testamentary limitation as to the amount which may be paid for legal services is not generally binding on the executor.[54]

Statutes fixing amount of allowance. In a number of jurisdictions the exact amount, or the maximum amount, which may be allowed as counsel fees is fixed by statute, and no greater amount may be allowed[55] except where the statute authorizes an in-

(6) $4,000.
N.Y.—In re Nebenzahl's Estate, 294 N.Y.S. 553, 162 Misc. 366.
Wash.—In re Bradley's Estate, 52 P. 2d 333, 184 Wash. 642.

(7) $5,000.
N.Y.—In re Burcham's Estate, 27 N.Y.S.2d 814, 262 App.Div. 773.
Wash.—In re Perry's Estate, 12 P.2d 595, 168 Wash. 428.

(8) $6,000.—Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975, 221 Ky. 396.

(9) $15,000.—Succession of Vatter, 188 So. 732, 192 La. 657.

(10) $26,000.—In re Sparks' Estate, 193 A. 449, 127 Pa.Super. 364, adopted 196 A. 48, 328 Pa. 384.

44. Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.

45. Ohio.—In re Ullman, 31 Ohio Cir.Ct. 370.
24 C.J. p 105 note 2.

46. Ky.—Miller v. Keown, 195 S.W. 430, 176 Ky. 117.

47. Or.—Muldrick v. Galbraith, 49 P. 886, 31 Or. 86.
24 C.J. p 105 note 4.

Where different attorneys have been necessarily employed to perform separate parts of the service demanded, the fees would be proportionally greater than if the entire service was rendered by the same attorney.—Muldrick v. Galbraith, supra.

48. Ky.—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.
N.Y.—In re Epstein's Estate, 27 N.Y.S.2d 872, 176 Misc. 494—In re Kentana's Estate, 10 N.Y.S.2d 811, 170 Misc. 663—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237.
24 C.J. p 105 note 4.

One fee only should be allowed attorneys for services rendered executor during same period.—In re Prince's Estate, 246 P. 713, 118 Or. 210.

49. N.Y.—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237.

Deducting amount allowed to other attorneys
Amount allowed other attorneys for services to executor, which should have been performed by claimant, should be deducted from fee allowed as reasonable.—In re Prince's Estate, 246 P. 713, 118 Or 210.

Apportionment of fees
On an issue as to the amount allowable to an administrator out of trust funds for the payment of attorney's fees, the court was not required to pass on the merits of the respective claims of the attorneys for services, or to apportion the amount awarded.—In re Davis, 104 P. 521, 39 Mont. 433.

50. Ky.—Hamilton v. Nunn, 57 S.W. 2d 655, 247 Ky. 715.
Pa.—In re McCalla's Estate, 33 Pa. Dist. & Co. 643.

51. N.J.—In re Slater, 102 A. 384, 88 N.J.Eq. 296.
24 C.J. p 105 note 7.

52. **Services of attorney in arranging burial** of decedent cannot be charged for at the rate charged for legal services.—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.

53. N.Y.—In re Scher's Estate, 264 N.Y.S. 579, 147 Misc. 791—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.

54. N.Y.—In re Olney's Estate, 7 N.Y.S.2d 89, 255 App.Div. 195, appeal dismissed 22 N.E.2d 252, 281 N.Y. 98.
Pa.—See In re Alderfer's Estate, 56 Montg.Co. 172.

This is so because executors may incur a personal liability for the conduct of their lawyers.—In re Olney's Estate, 7 N.Y.S 2d 89, 255 App. Div. 195, appeal dismissed 22 N.E. 2d 252, 281 N.Y. 98.

55. **Allowance based on value of estate**
Where the amount allowable as a fee for ordinary services of counsel is fixed by statute on the basis of the amount of estate accounted for by the representative, profits made by the representative in operating decedent's business should be considered in fixing the allowance, but an allowance based on an inventory valuation of the estate is improper where the main estate assets are sold for less than half their appraised value.—In re Allen's Estate, 108 P.2d 973, 42 Cal.App.2d 346.

Retroactive operation of statute
Statute fixing amount to be allowed for ordinary services rendered by counsel held applicable to services rendered before its enactment, where allowance was made thereafter.—In re McClellan's Estate, 183 N.W. 398, 192 Iowa 384, petition overruled 184 N.W. 749, 192 Iowa 384.

Statute held inapplicable
A statute fixing the maximum amount allowable as administrator's fees has no application to attorney's fees.—In re Cheney's Estate, 85 P.2d 729, 103 Colo. 319.

Allowance held proper
Under a statute limiting the amount allowable for counsel fees to that allowed as compensation to the representative except in case of actual litigation, a counsel fee which is not in excess of the amount permitted the representative as compen-

creased allowance for extraordinary services rendered by counsel.[56]

Under a statute fixing the maximum amount to be allowed the representative, of course, is not entitled to the full amount permitted by the statute where the actual fees incurred and paid are less.[57]

Waiver. The objection that a fee paid by a representative is excessive may be waived by parties interested in the estate by failing properly to present the objection.[58]

§ 228. —— Fund Out of Which Allowance Made

An allowance for counsel fees and costs can be made only out of money belonging to the estate.

Allowances to an administrator for attorney's fees and costs are made for the protection of the estate[59] and can be allowed only out of money belonging thereto.[60] Testamentary directions with respect to the funds out of which such expenses should be paid must be given their legal effect.[61]

§ 229. Expenses of Last Illness

Generally a personal representative is entitled to

sation may properly be allowed, even though it is in excess of the amount actually charged by the representative for his services.—In re Reed's Estate, 259 P. 815, 37 Wyo. 107, 55 A.L.R. 941.

56. Allowance not mandatory

Even though the attorney may have performed some extraordinary services, the court may in its sound discretion disallow a claim for extra compensation if the sum otherwise allowed appears to be reasonable compensation.—In re Fulton's Estate, 73 P.2d 664, 23 Cal.App.2d 563.

In the absence of allegation and proof respecting extraordinary services no allowance therefor can be made.—In re Murphy's Estate, 228 N.W. 658, 209 Iowa 679.

Matters to be considered in allowing extra compensation.

Cal.—In re Fulton's Estate, 73 P.2d 664, 23 Cal.App.2d 563.

Iowa.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.

What constitute extraordinary services

The mere fact that the attorney represented the estate on an appeal from an order of the probate court does not as a matter of law show that he had rendered extraordinary services within the statute entitling him to additional compensation.—In re McClellan's Estate, 183 N.W. 398, 192 Iowa 384, petition overruled 184 N.W. 749, 192 Iowa 384.

Amount of allowance

(1) Under a statute authorizing an extra allowance for extraordinary services of counsel, such an allowance is not limited in amount to the sum allowable to the representative.—In re Pringle's Estate, 67 P.2d 204, 51 Wyo. 352, 110 A.L.R. 937.

(2) The amount of an allowance for extraordinary services depends on the facts of each particular case.—In re Jewe's Will, 208 N.W. 723, 201 Iowa 1154.

(3) Extra allowance held reasonable in amount.—In re Fulton's Estate, 73 P.2d 664, 23 Cal.App.2d 563.

57. Cal.—In re Goodrich, 93 P. 121, 6 Cal.App. 730.

58. Surcharge limited to objector's interest

If the surrogate deemed excessive the amount paid by an administratrix to her attorney, the surcharge should not exceed the amount represented by the only objecting interests.—In re Dempsy's Estate, 21 N.Y.S.2d 8, 259 App.Div. 1083.

59. Miss.—Young v. Roach, 61 S.W. 984, 105 Miss. 6.

60. Tenn.—McAdoo v. Dickson, 136 S.W.2d 518, 175 Tenn. 598, 126 A.L.R. 1345.

24 C.J. p 109 note 44.

Allowance out of particular funds

(1) Where, in a suit by an administratrix to foreclose a mortgage, the chancery court, without notice and in violation of the statute, ordered the sale price transferred to the circuit court in which a judgment had been recovered against a former administrator, the administratrix is not precluded by such order made without notice from deducting from the fund amounts advanced by her for court costs.—Parker v. Baker, 114 S.W.2d 23, 195 Ark. 761.

(2) Where insured had pledged life policy to secure debt exceeding amount of policy made payable to insured's estate, administratrix of insured's estate was not entitled to judgment for costs of administration of insured's succession from proceeds of policy notwithstanding proceeds of policy constituted only asset of insured's estate.—Foote v. Sun Life Assur. Co. of Canada, La. App., 173 So. 477.

(3) Where an executor brought a suit to test the validity of a bequest and the bequest was upheld, he was not entitled to costs and counsel fees out of the proceeds of the sale of the property bequeathed.—Stevens v. Stevens, 37 N.J.Eq. 3.

(4) Where an action by an executor to determine the rights of defendants to share in a certain fund in his hands was determined in favor of defendants, the executor was not entitled to deduct counsel fees from the fund before distribution, where there was a sufficient estate left in his hands for that purpose.—Briggs v. Walker, 43 S.W. 479, 102 Ky. 359, 19 Ky.L. 1490.

(5) Where a will was admitted to probate, and one of the heirs was appointed executor, and by undue means an election by the widow to take under the will was procured, but on suit brought by her was afterward set aside, the costs and attorney's fees incurred by the executor in defending the action could not be paid out of the estate until after the widow obtained her share.—Sill v. Sill, 1 P. 556, 31 Kan. 248.

(6) Where, on partition of realty for purposes of distribution, the court ordered one portion thereof sold, the executor who made the sale had no authority to pay attorney's fees, except so far as the court might order them to be paid out of the proceeds of the sale.—Snyder's Appeal, 54 Pa. 67.

(7) In a case where a substituted trustee, accounting for the acts of a prior deceased trustee, was also executor to that trustee, the court divided between the estates a bill of his attorneys for services which were beneficial to both estates.—Matter of Rowe, 86 N.Y.S. 253, 42 Misc. 172, 4 Mills Surr. 131.

(8) Expenses incurred by executors and trustees in successfully defending legacies made under power of appointment from certain taxes must be paid from residue, under general rule that expenses of administration are so payable, although incurred largely with reference to certain legacies.—Dexter v. Jackson, 140 N.E. 267, 245 Mass. 333.

61. Mass.—Hampden Trust Co. v. Leary, 72 N.E. 88, 186 Mass. 577.

24 C.J. p 109 note 51.

credit for payment of reasonable and proper expenses of the last illness of the decedent.

Generally a personal representative is entitled to credit for payment of reasonable and proper expenses of the last illness of the decedent.[62]

§ 230. Funeral Expenses, Tombstones, Etc.

a. In general
b. Tombstones and monuments
c. Burial lots
d. Mourning apparel for family
e. Amount of expenditure

a. In General

A personal representative is entitled to credit in his account for payment of reasonable and proper funeral expenses of the decedent.

A personal representative is entitled to credit in his account for the payment of reasonable and proper funeral expenses of decedent,[63] even though the estate is insolvent;[64] and an executor is, of course, to be allowed expenditures for the funeral or other similar expenses which are expressly authorized by the will, especially where the estate is solvent;[65] but where a beneficial association of which decedent

62. Cal.—In re Doud's Estate, 284 P. 705, 103 Cal.App. 414.
Ky.—Fitzpatrick's Adm'r v. Fitzpatrick, 155 S.W.2d 463, 288 Ky. 53—Tolly v. Champion, 229 S.W. 90, 191 Ky. 114.
Pa.—In re Eckels' Estate, 37 Pa.Dist. & Co. 383, 56 Montg.Co. 120, 88 Pittsb.Leg.J. 321.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
24 C.J. p 92 note 54.

Question for court
The ultimate decision as to the propriety and reasonableness of amount paid for expenses attending deceased's last illness rests with the probate judge.—Frost v. Grigaliunos, 170 N.E. 384, 270 Mass. 455.

Expenditure held excessive
N.Y.—Matter of Ogden, 83 N.Y.S. 977, 41 Misc. 158.

The surviving husband being liable therefor, the personal representative of the deceased wife generally will not be allowed credit for the expenses of her last illness where the husband is solvent.
N.J.—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449.
Pa.—In re Mitchell's Estate, 79 Pa. Super. 208—In re Greenhouse's Estate, 57 Montg.Co. 360—In re Werkheiser's Estate, 27 North.Co. 204.

Decedent's widow, prior to the appointment of a personal representative, is authorized to make reasonable expenditure of decedent's money to defray expenses of his last illness.—Wommock v. Davis, 153 So. 611, 228 Ala. 362.

63. Ala.—Garrett v. Snowden, 145 So. 493, 495, 226 Ala. 30, 87 A.L.R. 216, citing **Corpus Juris.**
Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
Miss.—Ridgeway v. Jones, 87 So. 461, 125 Miss. 22.
N.J.—In re Holmes' Estate, 1 A.2d 42, 43, citing **Corpus Juris**—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329.
N.Y.—In re Fewer's Estate, 31 N.Y.S.2d 310, 177 Misc. 788—Blaine v. Richardson, 193 N.Y.S. 612.
N.C.—In re Bost's Estate, 190 S.E. 756, 757, 211 N.C. 440, citing **Corpus Juris**—Gregory v. Hooker's Adm'r, 8 N.C. 394, 402, 9 Am.D. 646.
Pa.—Appeal of McGlinsey, 14 Serg. & R. 64.
24 C.J. p 92 notes 58, 59.
Amount of expenditure see infra § 230 e.
Funeral expenses as obligation of estate see infra § 384.
Personal liability of representative for funeral expenses see supra § 200.

Proper items of expense
(1) Cost of religious services at funeral.—Frost v. Grigaliunos, 170 N.E. 384, 270 Mass. 455.

(2) Cost of telegrams sent to decedent's friends and relatives at the time of his death.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.

(3) Expenditures for burial clothing.—In re Estate of Pinheiro, 33 Hawaii 226.

(4) Expenses of a wake.—Oster's Ex'r v. Ohlman, 219 S.W. 187, 187 Ky. 341—24 C.J. p 92 note 58 [c].

(5) Executor's traveling expenses in taking the remains to the place of interment.—Hasler v. Hasler, N.Y., 1 Bradf.Surr. 248.

Improper items of expense
(1) Expenditures for services of clergyman a year after date of decease on unveiling of footstone.—In re May's Estate, 290 N.Y.S. 327, 160 Misc. 497, affirmed 5 N.Y.S.2d 684, 255 App.Div. 31.

(2) Expenditures for publishing cards of thanks in newspapers and mailing them to sympathetic friends.—Oster's Ex'r v. Ohlman, 219 S.W. 187, 187 Ky. 341.

(3) Other items.
N.Y.—In re Feifer's Estate, 270 N.Y.S. 905, 151 Misc. 54.
Pa.—In re Werkheiser's Estate, 27 North.Co. 204.
24 C.J. p 92 note 58.

Expenditures for masses
(1) Have been allowed.—In re Estate of Pinheiro, 33 Hawaii 226.

(2) Have been disallowed.—In re Flynn's Estate, Mo.App., 142 S.W.2d 1069.

Surviving husband primarily liable
(1) Generally the personal representative of a deceased wife's estate will not be allowed credit for funeral expenses where the surviving husband is solvent and primarily liable therefor.
Md.—Pickett's Estate v. Pickett, 158 A. 29, 162 Md. 10.
N.J.—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449—Watt v. Atlantic Safe Deposit Co., 112 A. 186, 92 N.J.Eq. 224.
Pa.—In re Mitchell's Estate, 79 Pa. Super. 208—In re Greenhouse's Estate, 57 Montg.Co. 360—In re Werkheiser's Estate, 27 North.Co. 204.

(2) But where the wife's will directs payment of funeral expenses out of her estate, the surviving husband as administrator is entitled to an allowance of such expenses.
Md.—Pickett's Estate v. Pickett, 158 A. 29, 162 Md. 10.
N.J.—Watt v. Atlantic Safe Deposit Co., supra.

The widow of decedent, prior to the appointment of a representative, is authorized to make reasonable expenditure of decedent's money to defray burial expenses.—Wommock v. Davis, 153 So. 611, 228 Ala. 362.

Funeral expenses of decedent's widow
Payment by administrator of funeral expenses of decedent's widow and mass celebrations directed by her and other items did not entitle him to credit therefor, they being debts either owed by or for the exclusive benefit of the widow.—Fischer v. Lange, 228 S.W. 684, 190 Ky. 699.

64. S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
24 C.J. p 92 note 60.

65. N.Y.—In re Frazer, 92 N.Y. 239.
N.C.—In re Bost's Estate, 190 S.E. 756, 211 N.C. 440.

was a member pays or contributes to the payment of the funeral expenses the executor or administrator is not entitled to credit in his account for the amount so paid or contributed.[66]

b. Tombstones and Monuments

Generally a personal representative should be allowed credit for a reasonable expenditure for a tombstone or monument for decedent.

A reasonable expenditure for a tombstone or monument placed at the grave of decedent is properly classed as a funeral expense,[67] and the personal representative should be allowed credit in his accounts for such expenditure,[68] even though there is no express direction or request in the will for a monument,[69] and notwithstanding the objection of some of the legatees and next of kin, where the expenditure for a tombstone is chargeable against the estate even though the administratrix, as the surviving wife, has received from beneficial associations of which deceased was a member funds for the payment of his funeral expenses in excess of the amount actually expended for his burial.—In re Crider's Estate, 20 Pa.Dist. & Co. 113.

Keeping monument in repair

Reasonable cost of keeping a monument in repair is properly a part of the "funeral expenses."—In re Maverick's Estate, 119 N.Y.S. 914, 135 App.Div. 44, affirmed 92 N.E. 1084, 198 N.Y. 618—24 C.J. p 93 note 63 [b].

Expenditure made by another

Disallowing administrator credit for tombstone decedent's father purchased for decedent without expected reimbursement from decedent's estate is proper.—Ward v. Tatum, 130 So. 898, 222 Ala. 66.

Markers placed at graves of others

Generally a representative will not be allowed credit for the cost of markers or monuments placed at the graves of other members of decedent's family.—Holt v. Holt, 123 S.E. 53, 96 W.Va. 337.

Public library as monument

Executor, without express authority under will, may not erect public library as monument to memory of deceased, and charge expense to estate as part of funeral expense.—In re Bruggemeyer's Estate, 2 P.2d 534, 115 Cal.App. 525.

Bequest for monument

In proceeding for settlement of executors' account, a bequest in testatrix' will for erection of gravestone will be allowed as reasonable funeral expense to extent of cost thereof.—In re Hurwitz' Estate, 28 N.Y.S.2d 792, 176 Misc. 719.

In Louisiana

(1) It has been held that the expenditure of a reasonable sum out of the estate for the purpose of marking decedent's grave is authorized.—Succession of Dunn, 6 La.App. 663.

(2) But it has also been held that a curator has no authority to expend the means of the estate for the erection of a tomb over decedent's grave without the consent of the heir.—Hisem v. Lemel, 19 La. 425.

Gift in will for the erection of a monument or marker on testator's own grave is properly part of his funeral expenses.—In re Hurwitz' Estate, 28 N.Y.S.2d 792, 176 Misc. 719—In re Voorhis' Estate, 27 N.Y.S.2d 818, 176 Misc. 585.

But it has been held that a tombstone or monument to be erected at the grave of decedent is not a necessary item of funeral expense.—In re Earnest's Estate, 88 P.2d 1048, 149 Kan. 636, 121 A.L.R. 1098.

Amount of expenditure see infra § 230 e.

Personal liability of representative on contract for tombstone see supra § 200.

Approval of court

A statute providing that the expenditure for a tombstone shall be subject to approval of the court, is intended as a check on the acts of a personal representative and to make him conform to what, under the circumstances, in the opinion of the court, seem to be just and reasonable, and the statute vests in the court a discretion which is to be exercised in the light of all the circumstances.—In re Poole's Will, 293 N.W. 918, 235 Wis. 625.

Power of court

Even though the statute authorizes the probate court to allow an administrator any reasonable sum for a tombstone for decedent, the court is without jurisdiction, in advance of the settlement of the estate, to entertain an application to fix a sum for that purpose and order the administrator, if the monument is not procured by the widow or next of kin, to erect such monument and charge the expense to the estate.—In re Ferguson, 89 N.E. 1070, 81 Ohio St. 58.

Effect of receipt of death benefits

The reasonable cost of erecting a

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66. Pa.—In re Crider's Estate, 20 Pa.Dist. & Co. 113.
24 C.J. p 92 note 61.

67. Ark.—Galloway v. Sewell, 258 S.W. 655, 162 Ark. 627.
Cal.—Seitz v. Engert, 56 P.2d 1242, 13 Cal.App.2d 302.
Ind.—Pease v. Christman, 64 N.E. 90, 91, 158 Ind. 642.
N.Y.—Ferrin v. Myrick, 41 N.Y. 315—In re Ryshpan's Estate, 7 N.Y.S.2d 711, 169 Misc. 368—In re Melzak's Estate, 275 N.Y.S. 607, 153 Misc. 600—Laird v. Arnold, 3 N.Y. St. 376, 42 Hun 136.
Pa.—Griffiths' Estate, 1 Lack.Leg.N. 311.
Tex.—Richardson v. McCloskey, Com. App., 276 S.W. 680, reversing Civ. App., 261 S.W. 801.
Wis.—In re Borchardt's Will, 200 N. W. 461, 184 Wis. 561.
24 C.J. p 93 note 63.

68. Ala.—Garrett v. Snowden, 145 So. 493, 495, 226 Ala. 30, 87 A.L.R. 216, citing **Corpus Juris.**
Ariz.—In re Nolan's Estate, 108 P.2d 391, 56 Ariz. 366.
Ark.—Galloway v. Sewell, 258 S.W. 655, 657, 162 Ark. 627, citing **Corpus Juris.**
Cal.—In re Bruggemeyer's Estate, 2 P.2d 534, 115 Cal.App. 525.
Del.—Boyer v. Cole, 143 A. 489, 490, 16 Del.Ch. 445, citing **Corpus Juris.**
Ky.—Fitzpatrick's Adm'r v. Fitzpatrick, 156 S.W.2d 463, 283 Ky. 53.
Me.—Call v. Garland, 125 A. 225, 124 Me. 27.
Miss.—Ridgeway v. Jones, 87 So. 461, 125 Miss. 22.
Mo.—In re Flynn's Estate, App., 142 S.W.2d 1069.
N.J.—In re Holmes' Estate, 1 A.2d 42, 43, citing **Corpus Juris.**
N.Y.—In re Melzak's Estate, 275 N. Y.S. 607, 153 Misc. 600.
N.C.—In re Bost's Estate, 190 S.E. 756, 757, 211 N.C. 440, citing **Corpus Juris.**
Pa.—In re Mitchell's Estate, 79 Pa. Super. 208—In re Geer's Estate, 20 Erie Co. 397—In re Meyer's Estate, 18 Phila. 42, 43 Leg.Int. 108—Appeal of McGlinsey, 14 Serg. & R. 64—Griffiths' Estate, 1 Lack.Leg. N. 311.
Tex.—Richardson v. McCloskey, Com. App., 276 S.W. 680, 683, citing **Corpus Juris,** and reversing, Civ. App., 261 S.W. 801.
W.Va.—Holt v. Holt, 123 S.E. 53, 96 W.Va. 337.
Wis.—In re Borchardt's Will, 200 N. W. 461, 184 Wis. 561.
24 C.J. p 93 note 63.

69. Cal.—Seitz v. Engert, 56 P.2d 1242, 13 Cal.App.2d 302.

penditure has been approved by the majority of those beneficially interested.[70] A moderate expenditure for a tombstone is sometimes allowed, even though the estate is insolvent,[71] although there is also authority for the view that an allowance is improper under such circumstances.[72]

Provision by decedent in his lifetime. A personal representative cannot be allowed the expense of procuring a monument where deceased in his lifetime provided one himself.[73]

Family mausoleum. Generally a personal representative is not entitled to be allowed credit for expenditures for the erection of a family mausoleum,[74] unless such expenditures are authorized by the will.[75]

c. Burial Lots

Generally a personal representative should be allowed the cost of a suitable burial lot in which to inter decedent and in some instances he may also be allowed the cost of perpetual care of the lot.

Generally a personal representative should be allowed the cost of a suitable burial lot in which to inter decedent,[76] and it has been held that an administratrix should be allowed the sum paid for a grave for decedent even though the lot was taken in her own name personally.[77] A representative, however, cannot be allowed the expense of procuring a burial lot, where decedent in his lifetime provided one himself.[78]

The cost of improving and enclosing a burial lot should not, it has been held, be allowed where objection thereto is made;[79] but it has also been held that, where the will directs the executors to erect and maintain a fence around a cemetery and charges all expenses directed by it on lands devised, the executors can maintain a suit in equity against the devisees of the land or their assigns for the expenses of erecting such fence.[80]

Upkeep of lot. While a payment for perpetual care of the burial lot is sometimes authorized by statute,[81] or may be authorized by the terms of the will,[82] it has been held that in the absence of such statutory authorization or testamentary sanction, a personal representative may not expend any portion of the estate for the upkeep of decedent's grave,[83] although there is also authority to the contrary.[84]

70. Pa.—Titlow's Estate, 5 Pa.Dist. 40, 17 Pa.Co. 356—Barclay's Estate, 11 Phila. 123.

71. Del.—Boyer v. Cole, 143 A. 489, 490, 16 Del.Ch. 445, citing **Corpus Juris.**
N.Y.—In re Ryshpan's Estate, 7 N.Y.S.2d 711, 169 Misc. 368.
24 C.J. p 93 note 65.

72. N.H.—Brackett v. Tillotson, 4 N.H. 208.
N.J.—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449.
Pa.—In re Krewson's Estate, 56 Montg.Co. 87.
24 C.J. p 93 note 66.

73. N.Y.—Matter of Woodbury, 81 N.Y.S. 503, 40 Misc. 143.
Rule held inapplicable where representative did not know of provision made by deceased.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445.

74. Consent of all heirs required
Where testator owned a cemetery lot, the purchase and erection of a mausoleum for the burial of the testator and his second family to the exclusion of the children of the first wife, without the consent of all the heirs, could not be made a charge against the estate.—In re Appell, 192 N.Y.S. 136, 199 App.Div. 580.

Mausoleum far removed from decedent's grave
It is proper to deny an administrator's petition for leave to expend funds of the estate in the erection of a mausoleum in honor of decedent's family, on the family burial plot, far removed from decedent's grave.—Jaqua v. Gray, 91 N.E. 745, 46 Ind.App. 24.

75. Power of executrix
Where will provided that all just debts of testatrix be paid, vault of suitable proportions be built to contain bodies of herself and named relatives, and stocks and bonds be used for building vault, executrix had power and duty first to pay testatrix' debts, sell stocks and bonds, and build vault, which in her judgment was suitable.—Andrew's Ex'x v. Spruill, 112 S.W.2d 402, 271 Ky. 516.

76. Mass.—Frost v. Grigaliunos, 170 N.E. 384, 270 Mass. 455.
N.J.—In re Holmes' Estate, 1 A.2d 42.
24 C.J. p 93 note 69.

77. N.J.—Birkholm v. Wardwell, 7 A. 569, 42 N.J.Eq. 337.

Allowance limited to cost of grave
Administratrix should be surcharged with expenditures for burial plot purchased in own name, less price of decedent's grave.—In re Hepner, 206 N.Y.S. 217, 123 Misc. 758.

78. N.Y.—Matter of Woodbury, 81 N.Y.S. 503, 40 Misc. 143.

79. Pa.—In re Meyer's Estate, 18 Phila. 42, 43 Leg.Int. 108.
24 C.J. p 93 note 71.

80. N.J.—Cool v. Higgins, 23 N.J.Eq. 308.

81. N.Y.—In re Maverick's Estate, 119 N.Y.S. 914, 135 App.Div. 44, affirmed 92 N.E. 1084, 198 N.Y. 618—In re Cole's Will, 296 N.Y.S. 512, 163 Misc. 102—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237—In re Myers' Estate, 250 N.Y.S. 660, 140 Misc. 442.
R.I.—Todd v. St. Mary's Church, Portsmouth, 120 A. 577, 45 R.I. 282.

Where statute provides for determination by probate court of the amount which may be paid for perpetual care of deceased's burial lot, the court cannot dismiss a petition to pay a certain sum without fixing a reasonable amount which may be paid.—Hall v. Burgess, 100 A. 1013, 40 R.I. 314.

82. Authority conferred
Will directing executors to expend not more than a certain sum for erection of family mausoleum authorized executors to pay sum for perpetual care and maintenance of mausoleum and burial plot.—In re Myers' Estate, 250 N.Y.S. 660, 140 Misc. 442.

83. Not authorized by statute
A statute authorizing the personal representative to pay the burial expenses of decedent does not authorize him to pay for the perpetual care of the burial lot.—Williams' Adm'r v. Vonderhaar's Ex'x, 89 S.W.2d 321, 262 Ky. 68.

84. Expenditure allowed
No meritorious objection could be made to an expenditure for perpetual care of tomb of testator without heirs in the country, there being

d. Mourning Apparel for Family

The authorities differ as to whether a personal representative is entitled to an allowance for moneys expended for mourning apparel for decedent's family.

It has been held that the executor or administrator is entitled to a moderate allowance for moneys which he has properly expended in obtaining suitable mourning apparel for the widow and children of decedent,[85] even though the estate is insolvent,[86] but in other cases this has been denied.[87]

e. Amount of Expenditure

In the absence of contrary testamentary provision, an expenditure for funeral expenses, tombstone, and the like must be reasonable in amount.

In the absence of contrary testamentary provision, an expenditure for funeral expenses, tombstone, and the like must be reasonable in amount, taking into consideration the value of the estate left by decedent, his solvency or insolvency, and his station in life;[88] and, if the personal representative is desirous of expending a greater sum than is reasonable in the particular case, he should first procure the assent of those entitled to the assets of the estate.[89]

Effect of testamentary direction. As a general rule, the terms of the will are controlling as to the amount which may be expended out of the assets of the estate for funeral expenses, tombstone, and the like, where the will itself contains directions to the executor in this respect.[90] Thus a testamentary di-

neither forced heirs nor creditors to be satisfied.—Succession of Williams, 101 So. 113, 156 La. 704.

85. N.Y.—In re Wachter's Estate, 38 N.Y.S. 941, 16 Misc. 137, 1 Gibb. 552.
24 C.J. p 93 note 75.

86. Pa.—Matter of Wood, 1 Ashm. 314.

87. N.H.—Griswold v. Chandler, 5 N.H. 492.
24 C.J. p 93 note 77.

Not part of funeral expenses
The cost of mourning apparel for the widow is not regarded as a part of the funeral expenses.—Macknet's Ex'rs v. Macknet, 24 N.J.Eq. 277.

88. Cal.—In re Bruggemeyer's Estate, 2 P.2d 534, 115 Cal.App. 525.
Del.—Boyer v. Cole, 143 A. 489, 490, 16 Del.Ch. 445, citing **Corpus Juris.**
Ill.—Little v. Williams, 7 Ill.App. 67.
N.J.—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449.
N.Y.—In re Turk's Will, 221 N.Y. S. 225, 128 Misc. 803, appeal dismissed 226 N.Y.S. 111, 222 App. Div. 724.
Ohio.—In re Throckmorton's Estate, App., 36 N.E.2d 792.
Pa.—In re Colton's Estate, 38 Pa. Dist. & Co. 123, 56 Montg.Co. 76—In re Monroe's Estate, 16 Pa. Dist. & Co. 637.
Tex.—Richardson v. McCloskey, Com. App., 276 S.W. 680, reversing, Civ. App., 261 S.W. 801.
Wis.—In re Borchardt's Will, 200 N. W. 461, 184 Wis. 561.
24 C.J. p 93 note 78.

Discretion of court
What constitutes a reasonable amount in any particular case is a matter resting largely within the discretion of the court.
Miss.—Ridgeway v. Jones, 87 So. 461, 125 Miss. 22.
Wis.—In re Poole's Will, 293 N.W. 918, 235 Wis. 625.

Relative importance of various factors
In determining what is a reasonable amount for funeral expenses, the sum actually expended presents a minimum of importance, the more important consideration being the size of decedent's estate.—In re Cava's Estate, 21 N.Y.S.2d 999, 174 Misc. 750.

Customs of various groups of individuals respecting the nature of funeral ceremonies cannot override the express provisions of law, contained in the Surrogate's Court Act, that no expenditure in excess of an amount which is reasonable in view of all the pertinent circumstances of a given situation is permissible.—In re Cava's Estate, supra.

Expenditures held reasonable
(1) In general.
Colo.—In re Cheney's Estate, 85 P. 2d 729, 103 Colo. 319.
N.Y.—In re Cava's Estate, 21 N.Y.S. 2d 999, 174 Misc. 750—In re Schnirman's Estate, 4 N.Y.S.2d 800, 167 Misc. 809—In re Kingston's Estate, 182 N.Y.S. 528.
Pa.—In re Eckels' Estate, 56 Montg. Co. 120, 38 Pittsb.Leg.J. 321.
24 C.J. p 93 notes 78 [f], [g].

(2) Expenditure for tombstone or monument.
Ariz.—In re Nolan's Estate, 108 P. 2d 391, 56 Ariz. 366.
Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445.

(3) Expenditure for perpetual care of mausoleum and burial plot.
La.—Succession of Williams, 101 So. 113, 156 La. 704.
N.Y.—In re Myers' Estate, 250 N.Y. S. 660, 140 Misc. 442.

Expenditures held excessive
(1) In general.
N.Y.—In re Cava's Estate, 21 N.Y.S. 2d 999, 174 Misc. 750.
Ohio.—In re Throckmorton's Estate, App., 36 N.E.2d 792.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
24 C.J. p 93 note 78 [h].

(2) Expenditure for tombstone or monument.
Ky.—Fitzpatrick's Adm'r v. Fitzpatrick, 155 S.W.2d 463, 288 Ky. 53.
N.Y.—In re Ryshpan's Estate, 7 N.Y. S.2d 711, 169 Misc. 368.
Wis.—In re Poole's Will, 293 N.W. 918, 235 Wis. 625.

(3) Expenditure for burial lot.—In re Weinberg's Estate, 296 N.Y.S. 7, 162 Misc. 867.

(4) Expenditure for casket.—Pinkham v. Central Farmers' Trust Co., 159 So. 289, 118 Fla. 253.

Allocation of amount fixed as reasonable
When the court has fixed the reasonable amount which may be allowed for funeral expenses, the sum thus determined is to be allocated to the various items of funeral expense in the order of their absolute necessity.—In re Ryshpan's Estate, 7 N.Y.S.2d 711, 169 Misc. 368—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295.

89. N.H.—Lund v. Lund, 41 N.H. 355.

90. La.—Succession of Williams, 101 So. 113, 156 La. 704.

Discretion of executor
(1) Where testator sets apart a specified sum for a suitable monument to his memory, he gives to the executors discretion in the selection of the monument, its form and style, with reference to the amount set apart for the purpose.
Cal.—Fancher v. Fancher, 103 P. 206, 156 Cal. 13, 23 L.R.A.,N.S., 944, 19 Ann.Cas. 1157.
Pa.—Bainbridge's Appeal, 97 Pa. 482.

(2) The court cannot rewrite a will to eliminate executor's discretionary power respecting amount of funds to be used to pay for perpetual care of cemetery plot.—In re Gavey's Estate, 263 N.Y.S. 784, 147 Misc. 332.

rection authorizing the executor to expend not more than a fixed sum has the effect of prohibiting the expenditure of a greater sum.[91] Such a direction, however, does not require the executor to expend the entire sum mentioned;[92] and, of course, it does not license him to extravagantly disburse or waste such sum.[93]

§ 231. Payment of Decedent's Debts

Generally a personal representative is entitled to credit for debts of the decedent which he has paid.

An executor or administrator is of course entitled to credit for debts of decedent which he has paid,[94] or for the amount paid out in settling a bona fide claim against the estate, whereby a saving has been effected,[95] but he cannot be allowed for an illegal claim which he paid to avoid family disgrace;[96] and where the assets are insufficient to pay all the demands of one class, and such demands must, under the statute, be paid proportionately, a representative who pays on any one claim more than its just proportion, without an order of court, must make good to the estate the excessive payment.[97]

§ 232. Procuring Bond

The right of a personal representative to charge the estate with expenses incurred by him in procuring a bond depends on the nature of the bond, the facts in the particular case, and the governing statutes, if any.

In some states the statutes allow the expense of procuring a bond for the representative to be charged against the estate,[98] to the extent that the expense is reasonable and necessary,[99] and is not necessitated by the fault of the representative;[1] but

Reasonable amount authorized

Will construed to authorize executor to spend a reasonable amount, rather than the entire residuary estate, for funeral expenses and the erection of a vault or monument.—American Security & Trust Co. v. Unknown Heirs at Law and Next of Kin of Mary Ann Spencer, 82 F.2d 456, 65 App.D.C. 200.

91. N.Y.—In re Burroughs' Estate, 278 N.Y.S. 997, 155 Misc. 237—In re Churchill's Estate, 223 N.Y.S. 846, 130 Misc. 36.
24 C.J. p 94 note 81.

92. N.J.—Canfield v. Canfield, 50 A. 471, 62 N.J.Eq. 578.
24 C.J. p 94 note 82.

Discretion of executor

Where the testator sets apart a specified sum for a suitable monument, the full amount of the fund, or such part as the executor deems fit, may be expended in the erection of a monument.—Fancher v. Fancher, 103 P. 206, 156 Cal. 13, 23 L.R.A.,N.S., 944, 19 Ann.Cas. 1157.

93. **Purchase of monument**

Executrices who were authorized by will to expend a certain sum for a monument could not expend a sum that was not commensurate with value of monument purchased.—In re Gallagher, 196 A. 430, 123 N.J.Eq. 384.

94. Cal.—In re Doud's Estate, 284 P. 705, 103 Cal.App. 414.
Iowa.—Elliott v. Des Moines Nat. Bank, 228 N.W. 274, 209 Iowa 1258.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
24 C.J. p 95 note 91.
Allowance and payment of claims generally see infra §§ 367–481.
Advances by representative to pay claims see infra § 463.

Debt owed to representative

Under Surrogate's Court Act § 212, payment by administratrix of debt owed by decedent to her, without having it proved to, and allowed by, surrogate, is improper, but payment may be ratified if court is satisfied that justice requires ratification.—In re Hepner, 206 N.Y.S. 217, 123 Misc. 758.

Guaranty

Executors of deceased stockholder's estate are entitled to credit on accounting for moneys advanced to corporation by executor to extent of portion applied to reduction of corporation's indebtedness guaranteed by executor and deceased.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.

95. N.Y.—Matter of Wagner, 42 N.Y.S. 797, 40 Misc. 490.

96. Tenn.—Jones v. Ward, 10 Yerg. 160.

97. Mo.—Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.
Insolvent estates generally see infra §§ 667–687.

98. Alaska.—In re Perovich's Estate, 7 Alaska 312.
Ark.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900.
Ky.—Greenway v. Irvine's Ex'r, 28 S.W.2d 760, 234 Ky. 597.
Mont.—In re Springer's Estate, 255 P. 1058, 79 Mont. 256.
Ohio.—St. Paul Mercury Indemnity Co. of St. Paul v. Stockum, App., 36 N.E.2d 487.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
24 C.J. p 112 notes 88, 90.

Statute not retroactive

Cal.—In re Richmond, 99 P. 554, 9 Cal.App. 402.
Ky.—Baker v. Husbands, 92 S.W.2d 43, 263 Ky. 283.
Mo.—In re Buck's Estate, App., 220 S.W. 714.
Tex.—Jackson v. Fielder, Civ.App., 7 S.W.2d 170, affirmed, Com.App., 15 S.W.2d 557.

That administrator is an agent of the surety company issuing the bond does not preclude him from receiving credit for premiums paid thereon.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.

Administrator as both obligor and obligee

Chancery court's allowance of amount of premium on bond in temporary administrator's final account was proper, notwithstanding that bond was executed by temporary administrator to himself as ancillary administrator of estate in another state, where bond was executed by chancery court's direction.—King v. Wade, 166 So. 327, 175 Miss. 72.

Appointment set aside

On settlement of final account of administratrix after reversal of decree of appointment and appointment of new administratrix, administratrix filing account was entitled to credit for yearly premium paid on her bond as administratrix.—Succession of Marcour, La.App., 173 So. 587.

99. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.

Bond in excessive amount

Where for several years an executor has been carrying a bond many times greater than the total estate remaining unadministered, his allowance for premiums should be reduced to the price of a reasonable bond for the sums held by him.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

1. **Delay in closing estate**

(1) Where the settlement of the estate is unduly delayed because of the fault of the representative, he is not entitled to credit in his accounts for extra premiums paid on his bond as a result of such delay.
N.Y.—In re Phillips' Estate, 258 N.Y.S. 638, 143 Misc. 824.
Pa.—In re Van Kirk's Estate, 29 Pa. Dist. & Co. 427.

in the absence of such a statute it is well settled, as a general rule, that the amount paid by the personal representative to a guaranty or indemnity company or to individual bondsmen, in order to procure sureties on his official bond is not chargeable against the estate, in addition to his usual recompense.[2] The representative is, however, properly allowed the expense of a bond given to supersede a judgment rendered against the estate,[3] or a special bond which is necessary in order to collect assets,[4] and it has been held that where, at the instance of legatees, an executrix was ordered by the court to give a bond on pain of discharge, she should be allowed the expense thereof, since, if she had failed to furnish the bond and had been discharged, the substituted administrator would have been obliged to furnish one incurring in all probability the same expense.[5]

Revenue stamp for bond. An allowance of the amount expended in procuring a revenue stamp for the bond has been both granted[6] and refused.[7]

§ 233. Repairs and Improvements

a. Personal property
b. Real property

a. Personal Property

A personal representative may properly be credited with amounts necessarily expended for repairs of personal property while it was in his custody.

An executor or administrator may properly be credited with amounts necessarily expended for repairs of personal property while it was in his custody.[8]

b. Real Property

Ordinarily a personal representative is not authorized to repair or improve the realty of his decedent unless empowered to do so by the will or by statute or unless he is duly invested with the control or management of such property.

Since a personal representative is not ordinarily entitled to the immediate possession and control of his decedent's realty, as is indicated § 257 infra, he is not authorized, as a rule, to make repairs[9] or improvements[10] thereon and subject the estate or those beneficially interested to such expenditures. The power to make necessary repairs or improvements, however, may be conferred on the representative by the will[11] or by statute;[12] and where he is duly invested with the control or management

(2) But where the delay is not due to any willful or fraudulent acts of the representative, he is entitled to credit for the additional expenses incurred in maintaining his bond.—In re Paulson's Estate, 266 N.W. 563, 221 Iowa 706.

2. Ky.—Greenway v. Irvine's Ex'r, 28 S.W.2d 760, 234 Ky. 597.
Mo.—In re Buck's Estate, App., 220 S.W. 714.
24 C.J. p 112 note 89.

3. Ky.—Hays v. Johnson, 99 S.W. 332, 30 Ky.L. 614.

4. Miss.—Davis v. Blumenberg, 65 So. 503, 107 Miss. 432.

5. N.J.—In re Walsh, 74 A. 563, 80 N.J.Eq. 565.

6. Md.—Edelen v. Edelen, 11 Md. 415.

7. Mont.—In re Ford, 74 P. 735, 29 Mont. 283.

8. Ala.—Pearson v. Darrington, 32 Ala. 227—Pinckard v. Pinckard, 24 Ala. 250.

9. Ga.—Evans v. Dickey, 177 S.E. 87, 88, 50 Ga.App. 127, citing **Corpus Juris.**
Ky.—Spalding v. Spalding's Adm'r, 58 S.W.2d 356, 248 Ky. 259—Taylor v. Roulstone, 60 S.W. 867, 22 Ky. L. 1515, rehearing denied 61 S.W. 354.
Pa.—In re Catanach's Estate, 117 A. 178, 273 Pa. 368.
24 C.J. p 95 note 97, p 143 note 29.
Duty of representative to make repairs see infra § 260.

Duties of administration do not necessarily authorize repairing of real estate by the representative.—Boyle v. Nolan, 8 A.2d 358, 123 N.J. Law 365.

10. Ga.—Evans v. Dickey, 177 S.E. 87, 88, 50 Ga.App. 127, citing **Corpus Juris.**
Ky.—Spalding v. Spalding's Adm'r, 58 S.W.2d 356, 248 Ky. 259.
N.Y.—In re Rosenberg's Will, 2 N.Y.S.2d 300, 165 Misc. 92.
Pa.—In re Catanach's Estate, 117 A. 178, 273 Pa. 368—In re McCalla's Estate, 33 Pa.Dist. & Co. 643.
24 C.J. p 95 note 97, p 143 note 29.
Duty of representative to make improvements see infra § 260.

Unauthorized investment
In absence of specific or implied authorization by will, executor may not invest personal estate in realty, and construction of building is considered as investment in realty.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296, affirmed In re Schummer's Estate, 154 N.E. 600, 243 N.Y. 548.

Executor held without authority to use liquid assets of estate for improving real property comprising remainder thereof, without first erecting trust under will giving general legacy in trust.—In re Jacobs' Will, 277 N.Y.S. 131, 154 Misc. 362.

Liability of representative
Where administrator without authority used funds of estate to erect a storehouse which was subsequently burned, in charging him with the amount of the funds thus diverted, with interest, he should be credited with rents collected by distributees before the fire.—Young v. Bowen, 108 S.E. 866, 131 Va. 401.

11. Ga.—Hattaway v. Hodgson Cotton Co., 149 S.E. 568, 169 Ga. 9—Evans v. Dickey, 177 S.E. 87, 88, 50 Ga.App. 127, citing **Corpus Juris.**
N.Y.—In re Lewis, 254 N.Y.S. 703, 142 Misc. 392.
Tex.—Kemper v. Geo. W. Owens Lumber & Loan Co., Civ.App., 12 S.W. 2d 659, error refused.
24 C.J. p 96 note 2, p 143 note 30.

Exercise of power binding on legatees
Provision of will authorizing executrix to mortgage property to make repairs in case buildings were injured by fire authorized executrix to make contract, for repairs necessitated by fire, binding on interest of legatees, although one of legatees was minor.—Kreutz v. Dublin Sash & Door Co., 184 S.E. 908, 53 Ga.App. 50.

Portable brooder houses purchased for executor's personal use cannot be deemed "improvements," within meaning of will authorizing expenditures for improvements.—In re Murphy's Estate, 228 N.W. 658, 209 Iowa 679.

12. Ga.—Evans v. Dickey, 177 S.E. 87, 88, 50 Ga.App. 127, citing **Corpus Juris.**
24 C.J. p 143 note 31.

of the realty, he may be allowed credit for what he has expended in good faith in necessary repairs[13] and improvements,[14] although expenditures and outlays in improvements are less favored, especially where the corresponding enhancement in value seems remote and uncertain, or the personal property is sacrificed for the benefit of the realty.[15]

Even though the representative may not be authorized to make repairs or improvements on realty, yet he may be allowed credit in his account for such expenditures where justice requires an allowance and no injustice results therefrom.[16] Thus where the representative is charged with rents collected from the realty, he is entitled to credit out of the rents for reasonable expenditures made by him in good faith for necessary repairs[17] or improvements.[18]

An executor has been held authorized to make reasonable repairs and improvements on leasehold property occupied by the legatees or parties in interest jointly, where the lease contained a covenant of renewal, and to pay the value of improvements;[19] and it has been held that an administrator who is also a tenant in common as a distributee will be allowed credit not for the cost of improvements put by him on the land, but for the value of such improvements to the premises.[20]

Previous sanction of court. While it is the better practice for a personal representative to procure the permission of the court before proceeding to make a necessary repair or improvement, especially if it is of any considerable magnitude,[21] yet this is not indispensable to the allowance of the expenditures if they are otherwise proper.[22] Until judicial approval is obtained, however, such expenditures cannot be regarded as estate expenditures,[23] and if the representative chooses to make them without first

Power to make repairs extends only to such repairs as are necessary to keep the property in good condition, and does not authorize the making of improvements.—Rice v. Conwill, 80 S.W. 393, 35 Tex.Civ.App. 341—24 C.J. p 144 note 33.

Pending delivery of dower properties

Administrators were entitled to be reimbursed for expenditures for taxes, insurance, and necessary improvements and repairs on the dower properties, between assignment of dower and the date the dower properties were actually delivered to the wife, where such amounts were expended pending an appeal from the decree of the assignment of dower.—Less v. Less, 227 S.W. 763, 147 Ark. 432.

13. Ala.—Miller v. Phillips, 178 So. 531, 235 Ala. 298.
Cal.—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430.
Iowa.—In re Clark's Estate, 212 N.W. 481, 203 Iowa 224.
La.—Succession of Rhodes, 114 So. 107, 164 La. 488.
N.Y.—In re Collins' Estate, 286 N.Y.S. 506, 158 Misc. 798.
Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.
24 C.J. p 96 note 98.

"Until an administrator is directed by the county court to deliver possession of real estate to the heirs, he is entitled to credit in his final accounting for expenditures for repairs and maintenance of real estate."—In re Wagner's Estate, 62 P.2d 1186, 1188, 178 Okl. 384.

When erection of new building considered as repair

Cal.—In re Freud's Estate, 63 P. 1080, 131 Cal. 667, 82 Am.S.R. 407—In re Clos, 42 P. 971, 110 Cal. 494.

Where representative has personally received benefits from the control and possession of the realty commensurate with the amounts expended, he is not entitled to credit therefor.—In re Graff, 82 N.W. 248, 123 Mich. 456—24 C.J. p 96 note 99.

14. Ky.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.

Particular improvements held authorized

(1) Installation of heating plant and electrical fixtures.—In re Baechler's Will, 202 N.Y.S. 485, 121 Misc. 691, affirmed In re Baechler's Estate, 213 N.Y.S. 759, 215 App.Div. 797.

(2) The sinking of an artesian well.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

Payment out of insurance money

Payments by administrator for construction of new house with insurance money received when old house was destroyed by fire were properly approved.—In re Maddalena's Estate, 108 P.2d 17, 42 Cal.App. 2d 12.

15. N.D.—Hoffman v. Ness, 300 N.W. 428.
24 C.J. p 96 note 1.

Circumstances in each particular case govern in determining whether or not an allowance should be made for improvements.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.

16. N.Y.—Matter of Rolph, 9 N.Y.S. 293, 2 Conn.Surr. 191.
24 C.J. p 95 note 97 [d].

Payment held proper

(1) Executor's payment of repairs was held proper, where life tenant was unable to pay charges to maintain realty and the only persons beneficially interested in the estate were also the remaindermen.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.

(2) Payment by executor to purchaser of house belonging to estate for repairs made on house prior to purchase was proper, although not expressly authorized in will, where both executor and purchaser were joint owners, along with other legatees in possession, and there was no contention that repairs were not made or that cost was excessive.—Russell v. Hogan, 140 S.W.2d 615, 282 Ky. 764.

17. Ky.—Spalding v. Spalding's Adm'r, 58 S.W.2d 356, 248 Ky. 259—Taylor v. Roulstone, 60 S.W. 867, 22 Ky.L. 1515, rehearing denied 61 S.W. 354.
Ohio.—Matter of Turpin, Ohio Prob. 124.

18. La.—Henderson's Succession, 24 La.Ann. 435.

19. N.Y.—Ames v. Downing, 1 Bradf.Surr. 321.

20. S.C.—Lewis v. Price, 24 S.C.Eq. 172.
Tex.—Kemper v. Geo. W. Owens Lumber & Loan Co., Civ.App., 12 S.W. 2d 659, 661, error refused, citing **Corpus Juris.**

21. N.D.—Hoffman v. Ness, 300 N.W. 428.
Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.

22. Cal.—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430—In re Maddalena's Estate, 108 P.2d 17, 42 Cal.App.2d 12.
N.D.—Hoffman v. Ness, 300 N.W. 428.
Okl.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.
S.C.—Palmer v. Miller, 15 S.C.Eq. 62, 34 Am.D. 602.
24 C.J. p 96 note 98 [b].

23. N.Y.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296,

obtaining permission of court, he assumes the burden clearly to prove that they were necessary and were made in good faith for the benefit of the estate.[24]

Realty of third persons. In the absence of a contract on decedent's part to make such repairs or improvements, a personal representative is not entitled to credit for expenses incurred in repairing or improving realty belonging to third persons.[25]

Where decedent made contracts in his lifetime for repairs or improvements, the personal representative is entitled to credit for payments made thereon.[26]

The concurrence of persons beneficially interested in the estate may justify expenditures for improvements.[27]

§ 234. Services

A personal representative should be allowed credit for reasonable amounts paid for the services of third persons employed by him to assist in performing his duties where the employment is reasonably necessary and for the benefit of the estate.

An executor or administrator should be allowed credit in his account for amounts paid for the services of agents, clerks, assistants, bookkeepers, and other persons employed by him to assist him in the performance of his duties, where the employment of such persons is reasonably necessary and the employment is bona fide for the benefit of the estate;[28]

affirmed In re Schummer's Estate, 154 N.E. 600, 243 N.Y. 548.

24. Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.

25. N.Y.—In re Bush's Estate, 277 N.Y.S. 325, 243 App.Div. 322.

26. N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.
Performance of decedent's obligations generally see supra § 189.

In Pennsylvania

(1) The text rule has been followed.—Burton's Estate, 16 Pa.Co. 246.

(2) But it has also been held that an executor will be surcharged with improvements made on his decedent's property after her death, even though ordered by decedent during her lifetime, for, assuming that there was a contract to do the work, it was the executor's duty to cancel it.—In re McCalla's Estate, 33 Pa.Dist. & Co. 643.

27. Pa.—In re Catanach's Estate, 117 A. 178, 273 Pa. 368.
24 C.J. p 96 note 5, p 143 note 29 [b].

28. Cal.—Moss v. Boyle, 112 P.2d 657, 44 Cal.App.2d 410—Riedy v. Bidwell, 233 P. 995, 70 Cal.App. 552.
Ill.—In re Thurber's Estate, 142 N.E. 493, 311 Ill. 211.
Mich.—Morris v. Morris, 177 N.W. 266, 210 Mich. 36.
Mo.—Shelton v. McHaney, 119 S.W. 2d 951, 956, 343 Mo. 119, citing Corpus Juris.
N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566—In re Foster's Estate, 176 A. 156, 13 N.J. Misc. 36.
N.C.—Parsons v. Leak, 167 S.E. 563, 204 N.C. 86.
Okl.—Wise v. Cutchall, 41 P.2d 864, 867, 171 Okl. 60, citing Corpus Juris.
24 C.J. p 96 note 10.
Personal liability of representative see supra § 199.
Services as obligations of estate see infra § 386.
Services of attorney see supra §§ 223–228.

Test on the question of compensating agent out of estate is, was it necessary or was it to the best interest of the estate? If it was, expenses thus incurred are allowed; if not, they will be disallowed.—In re Foster's Estate, 176 A. 156, 13 N.J.Misc. 36—24 C.J. p 96 note 10 [a].

Discretion of court

Whether the employment of third persons by a representative is reasonably necessary is a matter resting largely within the discretion of the court.—In re Lampman's Estate, 100 P.2d 488, 15 Cal.2d 212, superseding, App., 92 P.2d 495—In re Boggs' Estate, Cal.App., 90 P.2d 814—24 C.J. p 96 note 10 [j].

Accountants

(1) In a proper case, a representative should be allowed credit for amounts paid to accountants for services rendered him.
Ala.—Birmingham Trust & Savings Co. v. Hightower, 169 So. 878, 233 Ala. 39.
N.Y.—In re Epstein's Estate, 27 N.Y.S.2d 872, 176 Misc. 494.
24 C.J. p 96 note 10 [g].

(2) But he is not chargeable for the costs of accountants employed by the heirs for their own benefit.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.

Appraisers

(1) The estate may be charged for the services of expert appraisers where their services are reasonably necessary.
N.Y.—In re Bush's Estate, 277 N.Y.S. 325, 243 App.Div. 322.
Pa.—In re Matter's Estate, 49 Dauph. Co. 437.

(2) But the cost of an unnecessary appraisement is not chargeable against the estate.
Ky.—Oster's Ex'r v. Ohlman, 219 S.W. 187, 187 Ky. 341.
N.Y.—In re Frank's Estate, 284 N.Y.S. 735, 157 Misc. 746.

Brokers

(1) Broker's commissions for negotiating sales of property of the estate are usually allowed where such expenditures are reasonably necessary and are made in good faith.
Cal.—In re Shaw's Estate, 260 P. 351, 85 Cal.App. 518.
N.J.—In re Foster's Estate, 176 A. 156, 13 N.J.Misc. 36.
Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.
S.C.—Smith v. Peeples, 181 S.E. 653, 177 S.C. 479.
Tex.—Jarvis v. Drew, Civ.App., 215 S.W. 970, error refused.
24 C.J. p 96 note 10 [e].

(2) Credit may be allowed for a broker's commission even though a son of the representative is interested in the company acting as broker and receives a portion of the commission paid.—Taylor v. Taylor, 4 S.W.2d 752, 223 Ky. 799.

(3) Credit for a commission secretly paid to a bank of which the representative was president has been disallowed.—Fitchard v. Hirschberg's Estate, 272 P. 906, 128 Or. 317, rehearing denied 274 P. 505, 128 Or. 317.

(4) That an executor's promise to pay commissions is oral, and hence unenforceable, does not preclude him from receiving credit for the commission paid by him in honoring his oral promise.—Appeal of Schlosser, 182 A. 636, 119 N.J.Eq. 488, affirming 181 A. 640, 119 N.J.Eq. 201.

(5) A firm employed by the representative to collect rentals on the property of the estate is not disqualified from acting as agent in the sale of the property.—Farley v. Davis, Wash., 116 P.2d 263.

Rental collectors

(1) When reasonably necessary a representative may employ an agent to collect rents, and reasonable expenses so incurred for the benefit of

but the estate cannot be charged for services which are not beneficial to,[29] or are not connected with the business of,[30] the estate, or which are necessitated by the improper acts of the representative,[31] or which should have been performed by the representative himself and for which his general recompense ought to be ample remuneration, and which he procured to be performed by others for his own benefit or convenience;[32] nor can the estate be charged for amounts not paid specifically for services to the estate.[33]

Amount of allowance. In order to entitle an executor or administrator to credit for an amount paid for services rendered by others, the amount must be reasonable and such as is usually or customarily paid for such services.[34]

§ 235. Taxes and Assessments

A personal representative is entitled to credit for taxes properly paid by him in the exercise of his official duties.

As it is the duty of a personal representative to preserve the property of the estate by paying taxes chargeable against the estate,[35] he is entitled to credit in his account for taxes and assessments properly paid by him in the exercise of his official duties,[36] and this notwithstanding the fact that there

the estate are proper charges against it.

Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.

Wash.—Farley v. Davis, 116 P.2d 263.

24 C.J. p 96 note 10 [f].

(2) Where, however, the circumstances do not warrant the employment of such an agent, the estate cannot be charged for the services rendered by him.—In re Rodgers' Estate, 264 N.Y.S. 624, 147 Misc. 344.

29. Mich.—Becht v. Miller, 273 N. W. 294, 279 Mich. 629.

N.Y.—In re Walsh's Ex'rs, 214 N.Y.S. 167, 126 Misc. 479.

30. Services connected with realty

Where a personal representative is not authorized to deal with decedent's realty, he is not entitled to credit for amounts expended for janitor services in connection with such realty.—In re Paradis' Estate, 186 A. 672, 134 Me. 333.

31. Failure to keep proper records

The estate cannot be charged for the services of an expert accountant necessitated by the administrator's failure to keep proper records.

Ky.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A.L. R. 697.

Wis.—In re Roebken's Will, 283 N.W. 815, 230 Wis. 215.

32. N.Y.—In re Epstein's Estate, 27 N.Y.S.2d 872, 176 Misc. 494—In re Guenard's Estate, 266 N.Y.S. 770, 149 Misc. 182—In re Rodgers' Estate, 264 N.Y.S. 624, 147 Misc. 344—In re Brodbeck's Estate, 206 N.Y. S. 142, 123 Misc. 743.

24 C.J. p 97 note 11, p 109 note 41.

Will fixing executor's commission

Where the executor, an experienced real estate broker, was given by the terms of the will a fixed commission for selling the real estate, he cannot charge the funds of the estate with a commission which another broker recovered from him for making the sale, because the executor had negligently failed to inform the other broker that he had already begun dealings with the purchaser, and was not authorized to pay the commission.—Mooers v. Shoemaker, 279 F. 1008, 51 App.D.C. 370.

33. Stenographer's salary

An executor is not entitled to credit for proportionate part of stenographer's salary for stenographic work for estate, where stenographer was not paid specifically for services to estate but received regular salary for doing general stenographic work for executor.—In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

34. N.Y.—In re McKee's Estate, 265 N.Y.S. 47, 147 Misc. 889.

Okl.—Wise v. Cutchall, 41 P.2d 864, 171 Okl. 60.

24 C.J. p 97 note 12.

Discretion of court

What is a reasonable amount in any particular case is a matter resting largely within the discretion of the court.—In re Lampman's Estate, 100 P.2d 488, 15 Cal.2d 212, superseding, App., 92 P.2d 495.

Amounts held reasonable and proper

Cal.—In re Boggs' Estate, App., 90 P.2d 814.

N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566.

Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

24 C.J. p 97 note 12 [a].

35. Cal.—Los Angeles County v. Morrison, 101 P.2d 470, 15 Cal.2d 368, 129 A.L.R. 443.

La.—Succession of Rhodes, 114 So. 107, 164 La. 488.

Md.—State, for Use of Czyzowicz, v. Brown, 183 A. 256, 170 Md. 97.

Mich.—Long v. Landman, 76 N.W. 374, 118 Mich. 174.

Mo.—In re Flynn's Estate, App., 142 S.W.2d 1069.

Mont.—In re Kelley's Estate, 5 P.2d 559, 91 Mont. 98.

N.D.—Hoffman v. Ness, 300 N.W. 428.

Wis.—In re Hurley's Will, 213 N.W. 639, 193 Wis. 20.

24 C.J. p 110 note 52.

Nonpayment not excused

Executors who have paid all the funds belonging to the estate to legatees are not thereby excused from paying taxes on the estate which they had neglected to pay while they had funds of the estate in their possession.—In re McMahon, 67 How.Pr., N.Y., 152.

Inability of life tenant to make payment

Executor's payment of taxes is proper, where life tenant was unable to pay charges to maintain realty.—In re Williams' Estate, 232 N. Y.S. 521, 133 Misc. 322.

36. Ala.—Miller v. Phillips, 178 So. 531, 235 Ala. 298.

Cal.—In re O'Connor's Estate, 254 P. 269, 200 Cal. 646.

Ky.—Taylor v. Taylor, 4 S.W.2d 752, 223 Ky. 799—Ward v. Wright, 246 S.W. 123, 197 Ky. 148—Tully v. Champion, 229 S.W. 90, 191 Ky. 114.

La.—Succession of Rhodes, 114 So. 107, 164 La. 488.

Miss.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.

Mo.—National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry, 239 S.W. 519, 293 Mo. 399—In re Flynn's Estate, App., 142 S. W.2d 1069.

N.J.—In re Hazeltine's Estate, 177 A. 108, 111, 13 N.J.Misc. 152, citing **Corpus Juris.**

N.Y.—In re Burton's Estate, 257 N. Y.S. 634, 143 Misc. 440—In re Green's Estate, 226 N.Y.S. 436, 130 Misc. 789.

Pa.—In re Finley's Estate, 163 A. 753, 309 Pa. 200.

Wis.—In re Hurley's Will, 213 N.W. 639, 193 Wis. 20.

24 C.J. p 110 note 52.

Taxes which representative should pay see infra § 380.

Taxes paid before appointment

A representative may be entitled to credit for taxes paid out of his own funds before his appointment. —In re Hansen's Estate, 184 P. 197, 56 Utah 23.

is some technical defect in the assessment,[37] or the law under which the assessment was paid is afterward declared unconstitutional.[38] He is not entitled to credit, however, for expenditures for taxes necessitated by his own misconduct or wrongful act;[39] and, of course, amounts improperly paid as taxes by him will be disallowed,[40] unless, in the furtherance of justice, the circumstances in the particular case require their allowance,[41] as where no prejudice results to those beneficially interested in the estate.[42]

Even where the personal representative has paid out taxes not strictly in the line of his official duty, he may be entitled to be reimbursed by the heirs or devisees benefited thereby.[43]

Penalty and interest. A claim by a personal representative for money paid as a penalty or interest on taxes should be disallowed where the penalty or interest accrued by reason of the representative's neglect or wrongful act.[44]

Approval of court

Credit should be allowed for taxes properly paid by the representative, even though they were paid without first obtaining authority from the court.

Cal.—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430.

Iowa.—In re Clark's Estate, 212 N. W. 481, 203 Iowa 224.

Mont.—In re Kelley's Estate, 5 P.2d 559, 91 Mont. 98.

Working out highway tax

Where an executor works out a highway tax personally instead of paying the money or hiring another person to do the work, he should be allowed therefor in his account.—Lansing v. Lansing, 45 Barb., N.Y., 182, 1 Abb.Pr., N.S., 280, 31 How.Pr. 55.

Executor who pays taxes in his private capacity on notes claimed by him under an incomplete gift from testator, and who subsequently accounts for the notes in his capacity as executor, is entitled to an allowance for the amount paid as taxes.—Kelley v. Kelley, 132 S.W. 1031, 141 Ky. 414.

37. Fla.—Sanderson v. Sanderson, 20 Fla. 292.

N.Y.—Adams v. Monroe County, 49 N.E. 144, 154 N.Y. 619.

38. N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566—Dey v. Chapman, 39 N.J.Eq. 258.

39. **Failure to make distribution**

Taxes paid by an executor on real estate, the distribution of which was delayed by him, should be disallowed because, if the distribution had been made when ordered, property would have been exempt from taxation.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.

Failure to list mortgage interest

Where an administratrix held a claim secured by mortgage against the estate, and failed to list her mortgage interest, which exceeded the value of the property mortgaged, for taxation, but permitted the land to be taxed as though no mortgage existed thereon, she was not entitled to a credit for taxes paid by her as administratrix on the mortgaged real estate, since, had she listed her mortgage interest, there could have been no excess on which the estate would have been taxed.—McDougald v. Boggs, 79 P. 875, 146 Cal. 196.

Failure to have sufficient funds

An executor and trustee was properly surcharged with items of costs on tax liens, where his failure to have estate money to pay the taxes when due resulted from his wrongful payments to distributees.—In re O'Neill's Estate, 109 A. 526, 266 Pa. 9.

40. Iowa.—In re Moe's Estate, 237 N.W. 228, 213 Iowa 95, modified on other grounds and rehearing denied 238 N.W. 718, 213 Iowa 95.

Me.—In re Paradis' Estate, 186 A. 672, 134 Me. 333.

Pa.—In re Buhl's Estate, 150 A. 86, 300 Pa. 29—In re Constable's Estate, 149 A. 743, 299 Pa. 509.

S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.

24 C.J. p 111 note 66.

Where testator did not die seized of all property on which taxes were paid, the executor is not entitled to credit for the payment of taxes, where it is not shown what portion was on the testator's property.—In re Selleck, 19 N.E. 66, 111 N.Y. 284.

Taxes on out of state property

Payment of taxes by an executor on lands in a state where he had not taken out administration, being voluntary and without authority, is like the payment of a debt by any stranger, and furnishes no foundation of a legal claim by him.—Jennison v. Hapgood, 10 Pick., Mass., 77.

Taxes of legatee

Executor whose wife is the residuary legatee under the will is not entitled to credit for sums paid for taxes on his wife's land.—Bean v. Bean, 47 S.E. 232, 135 N.C. 92—24 C. J. p 110 note 64.

41. Pa.—In re Constable's Estate, 149 A. 743, 299 Pa. 509.

Particular circumstances requiring allowance

(1) Where will on its face showed a lot to be part of residuary estate, although subsequently shown to have been covered by specific devise, taxes paid by executor in good faith thereon, under ex parte order of court and without objection, should be allowed.—In re Neil's Estate, 242 P. 820, 117 Or. 76.

(2) An executor will not be surcharged with the amount of an unnecessary stock transfer tax paid on certain estate securities in order to make a speedy sale thereof and to avoid the delay required in securing a tax waiver, where his action in so doing resulted in a profit to the estate.—In re Powel's Estate, 28 Pa. Dist. & Co. 623, 43 Dauph.Co. 325.

(3) Distributee could not require administrator to account for inheritance tax paid in good faith on distributable share, notwithstanding distributable share was appraised at greater amount than actual amount received by distributee.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A.L.R. 697.

(4) Executrix who has paid an inheritance tax to the federal government should not be surcharged to the amount thereof, on it subsequently appearing that the tax was not a proper one, where the sum paid may be recovered.—Matter of Marx, 103 N.Y.S. 416, 117 App.Div. 890, reversing 99 N.Y.S. 334, 49 Misc. 280.

42. **Income tax on rentals**

That executor paid gross income taxes on rentals received by him from devised realty was not prejudicial against devisees, where devisees would otherwise have had to pay taxes.—Cornet v. Guedelhoefer, Ind., 36 N.E.2d 933, mandate modified 37 N.E.2d 681.

43. N.Y.—Matter of Sworthout, 76 N.Y.S. 961, 38 Misc. 56, 3 Mills Surr. 85.

24 C.J. p 110 note 56.

44. Mont.—In re Connolly's Estate, 257 P. 418, 79 Mont. 445.

N.Y.—In re Bandler's Estate, 15 N. Y.S.2d 307, 172 Misc. 433—In re Rodgers' Estate, 264 N.Y.S. 624, 147 Misc. 344—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

Pa.—In re Griffith's Estate, 96 Pa. Super. 242.

24 C.J. p 110 note 62.

Penalty resulting from advice of counsel

Penalty for executor's nonpayment

A reasonable fee of a transfer tax appraiser, which has been paid by the representative, should be allowed as a proper expenditure.[45]

§ 236. Traveling Expenses

A personal representative is entitled to credit in his accounts for reasonable and necessary traveling expenses incurred in performing the duties of his trust.

In the settlement of an executor's or administrator's account, reasonable and necessary traveling expenses incurred in performing the duties of his trust should be allowed;[46] but it is otherwise where the expenses were needlessly or unreasonably incurred,[47] where the representative was put to no actual cost,[48] or where the journey was not connected with the business of the estate,[49] but rather with the representative's own personal business,[50] or that of the heirs.[51] It has also been held that expenses incurred by a special administrator in traveling from another state, in which he resided, for the purpose of procuring his appointment are not allowable in his account,[52] and that expenses incurred by an administrator in travelling from his home to the county where the estate is being administered may, in the discretion of the court, be disallowed.[53]

§ 237. Expenditures for Benefit of Particular Legatees or Distributees

Generally a personal representative is not entitled to credit in his general account for expenditures for the benefit of particular legatees or distributees unless such expenditures are made under order of court or pursuant to statute or directions in the will.

As a general rule, a personal representative is not entitled to credit in his general account of the administration for disbursements made or expenses incurred for the benefit of particular legatees or distributees,[54] or payments or advances to particular

of inheritance tax within statutory period was chargeable against executor, notwithstanding failure to make return thereof was result of advice of counsel, and not negligence. —In re Oakes' Estate, 217 N.Y.S. 638, 127 Misc. 779.

Misconduct or negligence not shown

La.—Succession of Benoit, 199 So. 625, 196 La. 509.

N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566.

N.Y.—In re Phelps' Estate, 295 N. Y.S. 840, 162 Misc. 703.

Pa.—In re Matter's Estate, 49 Dauph. Co. 437.

45. Mo.—In re Flynn's Estate, App., 142 S.W.2d 1069.

N.Y.—Matter of Rook, 164 N.Y.S. 742, 98 Misc. 544.

46. Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.

Cal.—In re Parker's Estate, 200 P. 619, 186 Cal. 668—In re Doud's Estate, 284 P. 705, 103 Cal.App. 414.

Mich.—In re Finn's Estate, 275 N. W. 215, 281 Mich. 478.

N.Y.—In re Rohr's Estate, 260 N. Y.S. 181, 145 Misc. 382.

Or.—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818.

Pa.—In re Matter's Estate, 49 Dauph. Co. 437.

24 C.J. p 112 note 85.

In traveling between his home and office from which the estate's business is administered, the representative is entitled to reimbursement for reasonable traveling expenses but not for lunches and like personal expense.—In re Linn's Estate, 199 A. 396, 124 N.J.Eq. 65.

Allowance held not exorbitant

Iowa.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.

47. Ark.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.

Ky.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A. L.R. 697.

24 C.J. p 112 note 86.

48. N.Y.—Pullman v. Willets, 4 Dem.Surr. 536.

24 C.J. p 112 note 86.

49. Ky.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A.L.R. 697.

24 C.J. p 112 note 86.

50. N.J.—Wyckoff v. O'Neil, 71 A. 388, 71 N.J.Eq. 729.

24 C.J. p 412 note 86.

Where administrator attends political convention on a trip made for the purpose of discovering additional estate assets, he should be allowed only such expenses as were necessarily incurred in performing the duties of his trust.—Souter v. Fly, 33 S.W.2d 408, 182 Ark. 791.

51. Ky.—Purdy v. Purdy, 42 S.W. 89, 19 Ky.L. 823.

24 C.J. p 412 note 86.

52. Cal.—In re Emerson, 167 P. 149, 175 Cal. 724.

53. Okl.—Wise v. Cutchall, 41 P.2d 864, 171 Okl. 60.

54. N.Y.—In re O'Connor's Estate, 293 N.Y.S. 476, 161 Misc. 459.

24 C.J. p 94 note 84.

Maintenance of decedent's family

(1) At common law the maintenance and care of decedent's family form no part of the duty of an executor or administrator, and he has no right to make any expenditures out of the assets of the estate for that purpose.—Miller v. Oil City Iron Works, 45 S.W.2d 36, 184 Ark. 900—Alcorn v. Alcorn, 35 S.W.2d 1027, 183 Ark. 342—24 C.J. p 230 note 88.

(2) Statutory allowance to surviving spouse or children see infra §§ 323–366.

Education and support of children

(1) Strictly speaking an executor or administrator should not make expenditures for the education and maintenance of decedent's infant children and will not be allowed the same in his administration accounts. —Alcorn v. Alcorn, 35 S.W.2d 1027, 183 Ark. 342—24 C.J. p 238 note 83.

(2) Administrator had no right to purchase home for minor children of deceased.—Watkins v. Purnell, 62 S.W.2d 20, 187 Ark. 837.

(3) Administrator's expenditures even for purpose of maintenance and education of minors must be made under direction of court and in conformity with their station in life and value of estate.—Watkins v. Purnell, supra.

(4) However, such expenditures have frequently been allowed where they were reasonable, made in good faith, and suitable to the condition and circumstances of the children, and the estate was sufficient.—Darby v. Darby, 7 S.C.Eq. 451—24 C.J. p 238 note 84.

(5) Such expenditures have been allowed where there was no appointed guardian.—Glover v. Hill, 4 So. 613, 85 Ala. 41—24 C.J. p 238 note 85.

(6) Such expenditures have been allowed where the right to make them was vested in the executor by the will.—In re Van Houten, 3 N. J.Eq. 220, 29 Am.D. 707—24 C.J. p 238 note 86.

Traveling expenses of witness

The surrogate's court has no authority to direct payment of any disbursements from funds of estate to special guardian for unknown distributees for the purpose of bring-

legatees or distributees,[55] beyond the statutory allowance to the widow and children,[56] except where such expenditures or payments are made under order of court or pursuant to statute or directions in the will.[57] As appears infra § 491, however, expenses bona fide and prudently incurred by the representative for the benefit of legatees or distributees may be duly set off against the legacies or distributive shares concerned therein.

§ 238. Miscellaneous Expenditures

a. In general
b. Insurance premiums
c. Interest paid
d. Judgments against representative
e. Redemption of property

a. In General

The general rules have been applied to miscellaneous expenditures of various characters.

In addition to the expenditures considered supra §§ 223-237, a personal representative has been allowed credit for various other expenses such as the cost of advertising and printing done in the course of official duty;[58] money paid for newspapers to perpetuate the evidence of notice on the sale of real estate;[59] the cost of a copy of the inventory;[60] expenses incurred in special transactions which were prudent in protecting assets or settling debts of the estate;[61] the expense of detaining a valuable witness as to a claim asserted against the estate;[62] money paid for automobile hire for appraisers;[63] the expenses of the journey of decedent's wife or near relative for whom decedent sent during his last illness;[64] the expense of maintaining an office used exclusively for the business of the estate;[65] rent paid on an outstanding lease,[66] or, where necessary, for a safety deposit box,[67] or garage,[68] or pasture;[69] reasonable freight[70] and storage[71] charges; money expended for necessary telephone service[72] and for tools, machinery, and hardware purchased for decedent's farm with the approval of the court;[73] the cost of buying out the interest of tenants of decedent where necessary;[74] dues or assessments paid on bank[75] or building and loan[76] stock belonging to the estate; expenses incurred in selling estate property;[77] payments made for the preservation of the real property of the estate;[78] the expenses of ac-

ing a witness from Europe.—In re Koerner's Estate, 10 N.Y.S.2d 482, 170 Misc. 473.

55. N.J.—In re Oliver's Estate, 129 A. 434, 3 N.J.Misc. 453.
24 C.J. p 94 note 85.

56. Ohio.—Watts v. Watts, 38 Ohio St. 480.
Pa.—In re Acor, 29 Leg.Int. 298.
Allowance to surviving spouse or children see infra §§ 323-366.

57. Ark.—Watkins v. Purnell, 62 S.W.2d 20, 187 Ark. 837—Alcorn v. Alcorn, 35 S.W.2d 1027, 183 Ark. 342.
Pa.—In re Crawford's Estate, 16 A.2d 521, 340 Pa. 137.
24 C.J. p 95 note 88.

58. Ala.—Reynolds v. Reynolds, 11 Ala. 1023.
Mass.—Jennison v. Hapgood, 10 Pick. 77.

59. Mass.—Jennison v. Hapgood, supra.

60. Pa.—Nolde's Estate, 27 Pa.Super. 413.

61. N.Y.—Matter of Bielby, 155 N.Y.S. 133, 91 Misc. 353.
24 C.J. p 113 note 8.

Expenses of litigation

Where administratrix purchased mortgaged realty of estate through another person, foreclosed it, bought realty at foreclosure sale and resold it at a higher price, all of which was done for the best interest of the estate, in accounting for profits in excess of amount paid at foreclosure sale, administratrix was entitled to deduct expense of foreclosure sale, in prosecuting an ejectment action and in defending an equity suit in which foreclosure was attacked.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.

62. Pa.—Melville's Estate, 25 Pa.Dist. 5.

63. Ala.—Brake v. Graham, 106 So. 188, 214 Ala. 10.

64. Mass.—Jennison v. Hapgood, 10 Pick. 77.

65. Cal.—In re Ross' Estate, 182 P. 303, 179 Cal. 358.
N.J.—In re Linn's Estate, 199 A. 396, 124 N.J.Eq. 65.
24 C.J. p 113 note 6.

66. N.Y.—Matter of Peck, 80 N.Y.S. 76, 79 App.Div. 296, affirmed 69 N.E. 1129, 177 N.Y. 538.

67. Mass.—Dudley v. Sanborn, 34 N.E. 181, 159 Mass. 135.
24 C.J. p 113 note 7.

Contra

N.J.—Hartson v. Elden, 44 A. 156, 58 N.J.Eq. 478.
24 C.J. p 113 note 7 [b].

68. N.Y.—In re Paine's Estate, 12 N.Y.S.2d 201.

69. N.J.—Huston v. Roe, 81 A. 848, 79 N.J.Eq. 220, modifying 78 A. 162, 78 N.J.Eq. 215.

70. Va.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

71. N.Y.—In re Paine's Estate, 12 N.Y.S.2d 201.
24 C.J. p 113 note 9.

Charges held unreasonable

W.Va.—Senter v. Toler, 114 S.E. 806, 92 W.Va. 437.

72. N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566.

73. Tex.—James v. Craighead, Civ. App., 69 S.W. 241.

74. N.C.—Lambertson v. Vann, 40 S.E. 10, 134 N.C. 108.

75. Iowa.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.

76. Mo.—State v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.
24 C.J. p 113 note 12.

77. Wash.—Farley v. Davis, 116 P. 2d 263.

78. N.Y.—In re Bates' Estate, 4 N.Y.S.2d 444, 167 Misc. 641, reversed on other grounds In re Bate's Will, 8 N.Y.S.2d 548, 255 App.Div. 615, reargument denied 11 N.Y.S.2d 416, 256 App.Div. 669, motion denied 22 N.E.2d 487, 281 N.Y. 664—In re Burton's Estate, 257 N.Y.S. 634, 143 Misc. 440.
24 C.J. p 113 note 13.

Property transferred to corporation

Testator's real property transferred to wholly owned corporation, but after transfer managed in precisely same manner as when title stood in testator's name, could be considered as if title thereto had actually been in testator at time of his death; hence executors were entitled to allowance for payments made for reasonable preservation of such property.—In re Goldberg's Estate, 283 N.Y.S. 72, 157 Misc. 49, affirmed 291

quiring title to land which the executor was obliged to purchase at judicial sale in collecting a debt to the estate;[79] sums advanced for taxes, water rents, expenses of foreclosure, and insurance, on property foreclosed by him for the benefit of the estate;[80] expenses incurred in good faith in taking steps to recover foreign assets;[81] expenses properly incurred in rightfully conducting the business of deceased;[82] and expenses incurred in good faith, with the knowledge of, and without objection from, the heirs at law in securing growing fruit and crops and taking care of stock on decedent's farm.[83] Where an administrator is allowed by the probate court to keep the estate together, he should be allowed credit for the expense which he has necessarily incurred in cultivating the plantation and disposing of the crops,[84] and where an executor is required to account for the acts of his decedent as administratrix of the estate of her deceased husband, such executor is entitled to an allowance for payments made by his decedent to a contestant, who claimed as heir of such deceased husband.[85] An administratrix has also been held entitled to credit in her accounts for amounts paid by her during decedent's lifetime for the support of decedent and his family.[86]

On the other hand, courts have refused to allow the personal representative credit for expenses incurred by him as a volunteer;[87] expenses incurred in continuing without authority the business of deceased, especially where nothing is realized from such continuance;[88] money paid out at the mere verbal request of decedent on his deathbed,[89] or for pew[90] or water[91] rent, or for publishing in a county other than that provided by statute a notice of sale of real estate;[92] expenses incurred on property while in another jurisdiction;[93] money expended for the representative's own individual benefit,[94] or for liquors used at an auction sale of assets;[95] the costs of maintaining decedent's home after the funeral period;[96] money expended in carrying out a void trust,[97] or in connection with insurance policies forming no part of the estate assets;[98] assessments paid on bank stock held by the estate merely

N.Y.S. 999, 249 App.Div. 751, reversed on other grounds 9 N.E.2d 829, 275 N.Y. 186.

Property specifically devised

Where real property had been specifically devised to testator's widow as first charge on estate of testator, but at time of his death the possibility existed that as result of action pending against him such real property might be subject to liability, executor acted properly in considering the real property as part of the estate pending final determination of the action and in obtaining authority from court to make expenditure for upkeep and maintenance of the property.—In re Ledyard's Estate, 21 N.Y.S.2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029, and 24 N.Y.S.2d 780, 261 App.Div. 827.

79. Pa.—Bowler's Estate, 8 Pa.Co. 522.

80. N.Y.—Atlantic Trust Co. v. Powell, 50 N.Y.S. 866, 23 Misc. 289.

81. Tenn.—Bowman v. Carr, 5 Lea 571.

82. Ky.—King v. Kitchen's Ex'rs, 118 S.W.2d 144, 274 Ky. 157.
Mass.—Anglo-American Direct Tea Trading Co. v. Seward, 2 N.E.2d 448, 294 Mass. 349—Mooers v. Greene, 174 N.E. 840, 274 Mass. 243.
N.Y.—Willis v. Sharp, 21 N.E. 705, 113 N.Y. 586, 4 L.R.A. 493, affirming 43 Hun 434—In re Gerra's Will, 236 N.Y.S. 709, 135 Misc. 93.
24 C.J. p 60 note 81.
Continuing business generally see supra §§ 193–197.

Bonuses

In absence of evidence to impugn executors' good faith, bonuses paid by them to employees of testator's business should be allowed as proper payments.—In re Rosenberg's Will, 209 N.Y.S. 315, 213 App.Div. 167.

Reimbursement for personal advancements

Cal.—In re Houston's Estate, 270 P. 939, 205 Cal. 276, 60 A.L.R. 730.

83. Mass.—Edwards v. Ela, 5 Allen 87.
Wash.—Lamb Davis Lumber Co. v. Stowell, 164 P. 593, 96 Wash. 46, L.R.A.1917E 966.

84. Ala.—Hinson v. Williamson, 74 Ala. 180.
24 C.J. p 113 note 19.

85. N.Y.—Matter of Hull, 89 N.Y.S. 939, 97 App.Div. 258.

86. N.Y.—Matter of Brown, 112 N.Y.S. 599, 60 Misc. 35.

87. Ky.—Hamilton v. Nunn, 57 S.W.2d 655, 247 Ky. 715.

Expenditures for benefit of another estate

Where a widow had only a life estate in certain lands of her husband, his administrator de bonis non with the will annexed had no authority to apply the rents accruing after the termination of the life estate or the proceeds of the sale of the land to the widow's debts, her funeral expenses, or a tombstone for her, and such use of the money constituted a misappropriation.—Pierce v. Fulmer, 51 So. 728, 165 Ala. 344.

88. Or.—Shea v. Graves, 19 P.2d 406, 411, 142 Or. 503, citing Corpus Juris.

S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161—Glenn v. Worthy, 168 S.E. 705, 169 S.C. 263.
24 C.J. p 61 note 90.
Continuing business generally see supra §§ 193–197.

Where nothing was lost to estate

while the business was operated, an administrator may be allowed sums expended in operating the business.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.

89. S.C.—Turnipseed v. Sirrine, 38 S.E. 423, 60 S.C. 272.
24 C.J. p 114 note 22.

90. La.—Milmo's Succession, 16 So. 772, 47 La.Ann. 126.

91. N.Y.—In re Burton's Estate, 257 N.Y.S. 634, 143 Misc. 440.

92. Cal.—In re Pease, 85 P. 149, 149 Cal. 167.

93. Miss.—Roberts v. Rogers, 28 Miss. 152, 61 Am.D. 542.

94. **Money paid for telephone service** furnished to representative's home.—In re Walsh's Ex'rs, 214 N.Y.S. 167, 126 Misc. 479.

95. N.H.—Griswold v. Chandler, 5 N.H. 492.

96. Pa.—In re McCalla's Estate, 33 Pa.Dist. & Co. 643.

97. N.Y.—O'Connor v. Gifford, 3 N.Y.S. 207, 6 Dem.Surr. 71, reversed on other grounds 3 N.Y.S. 337, affirmed 22 N.E. 1036, 117 N.Y. 275.

98. La.—Succession of Aronson, 128 So. 608, 168 La. 687.

as collateral;[99] the expense of surveying a line between the property of deceased and that of an adjoining proprietor;[1] the administrator's expenses preliminary to applying for letters;[2] or his time and money expended while endeavoring to effect a private settlement with the heirs.[3]

Buying off contestants. It has been held that an executor has no right to buy off contestants of the will and charge the expense against the estate,[4] but there is also authority for the view that an amount paid to contestants of the will as a compromise in settlement of the will contest is chargeable as part of the expenses of administration.[5]

b. Insurance Premiums

In a proper case a personal representative may be entitled to credit for premiums paid on insurance policies.

The right of a personal representative to credit in his account for premiums paid on insurance policies depends on the facts in the particular case including the character of the policies and the kind of insurance involved.[6] He is not entitled, of course, to credit for the payment of assessments on a policy of insurance in which his decedent had no interest and in which his estate has none;[7] but where, in the exercise of good faith and reasonable prudence, he insures personal property, as assets of the estate, against fire, he is entitled to reimbursement for the premium paid,[8] and while he is usually not entitled to an allowance for premiums paid for insurance on the real property, since that belongs rather to the heirs or devisees,[9] yet where he has direction and control of the property, or reasonably expects that an insufficiency of the personal assets to pay the debts of the estate may render a sale of the real estate necessary, the insurance by him of the buildings may be prudent and an allowance therefor justified.[10] The court may, however, refuse to allow credit for money paid for insurance where the amount paid is so greatly out of proportion to the amount realized by a sale of the property as to indicate that the payment was imprudent and reckless.[11]

Life insurance. An administratrix is not entitled to credit for payments during decedent's lifetime of premiums on life insurance policies of decedent in which she was the beneficiary;[12] but an administrator who has acted in good faith and with reasonable prudence may be allowed credit for amounts paid as premiums on a life insurance policy held as collateral to a note given to decedent, although there was ultimately a loss to the estate.[13]

c. Interest Paid

A personal representative is entitled to credit for interest properly paid by him on obligations of the estate.

As a general rule, an executor or administrator is entitled to credit in his account for interest properly paid by him on obligations of the estate.[14] He is not entitled to credit, however, for payments of

99. Iowa.—In re Moe's Estate, 238 N.W. 718, 213 Iowa 95, modifying and denying rehearing 237 N.W. 228, 213 Iowa 95.

1. Mo.—Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.

2. Cal.—In re Byrne, 54 P. 957, 122 Cal. 260.

3. N.H.—Clarke v. Clay, 31 N.H. 393.

4. Ill.—In re Graves, 89 N.E. 978, 242 Ill. 212.

5. R.I.—In re Cook, 76 A. 356, 30 R.I. 494.

In New York

(1) It was formerly held that an executor had no right to buy off contestants of his decedent's will, and charge the expense against the estate.—Bolles v. Bacon, 3 Dem.Surr. 43.

(2) But under the statutes now in force, an executor is authorized to adjust and compromise any controversy by a person claiming as next of kin.—In re Kenny's Will, 220 N.Y.S. 188, 128 Misc. 553, modified on other grounds 230 N.Y.S. 74, 224 App.Div. 152, affirmed 166 N.E. 337, 250 N.Y. 694.

6. Or.—In re Banfield's Estate, 3 P.2d 116, 137 Or. 256, denying rehearing 299 P. 323, 137 Or. 256.
24 C.J. p 111 note 68 [a].

Public liability insurance

Where lessor had taken out insurance against public liability and his executors and trustees continued to carry the same protection for the lessor's estate, the executors and trustees were entitled to credit for premiums paid on such insurance.—In re Stewart's Will, 9 N.Y.S.2d 315, 169 Misc. 917.

7. Ala.—Pryor v. Davis, 19 So. 440, 109 Ala. 117.

8. S.C.—Nicholson v. Whitlock, 35 S.E. 412, 57 S.C. 36.
24 C.J. p 111 note 69.

9. Miss.—Howell v. Howell, 127 So. 566, 157 Miss. 15.
Or.—In re Banfield's Estate, 299 P. 323, 137 Or. 256, rehearing denied 3 P.2d 116, 137 Or. 256.
Pa.—In re Huff's Estate, 150 A. 98, 300 Pa. 64.
24 C.J. p 111 note 70.

10. La.—Succession of Rhodes, 114 So. 107, 164 La. 488.
Md.—Legge v. Canty, 4 A.2d 465, 467, 176 Md. 283, citing Corpus Juris.
N.Y.—In re Burton's Estate, 257 N.Y.S. 634, 143 Misc. 440.
N.D.—Hoffman v. Ness, 300 N.W. 428.
Tex.—Richardson v. McCloskey, Com.App., 276 S.W. 680, 684, citing Corpus Juris, and reversing, Civ.App., 261 S.W. 801.
24 C.J. p 111 note 71.

Nonresident heirs and devisees

Under statute, administrator, having paid insurance on farm buildings on land while estate was unsettled, and while heirs and devisees were nonresidents of county, was entitled to credit therefor.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.

11. Nev.—In re Nicholson, 1 Nev. 518.

12. N.Y.—Matter of Brown, 112 N.Y.S. 599, 60 Misc. 35.

13. N.C.—Overman v. Lanier, 73 S.E. 192, 157 N.C. 544.

14. N.Y.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.
Interest on expenditures see supra § 222.
Interest on debt secured by mortgage on realty see infra § 268.

Payment to secure extension of notes

Where it is not shown that the personal representative had moneys

interest which became necessary by reason of his own fault or misconduct[15] or which were made in violation of orders of the court.[16]

d. Judgments against Representative

Where a creditor of the estate recovers and collects a judgment against the personal representative, the latter will be allowed credit for the amount thereof if he acted with reasonable prudence and was not guilty of improper conduct.

Where a creditor of the estate has recovered and collected a judgment against the executor or administrator, the representative will be allowed credit in his accounts for the amount thereof, including costs, when it appears that he acted within the rule of reasonable prudence and discretion and was not guilty of negligence, bad faith, or other improper conduct;[17] but it is otherwise where the circumstances indicate bad faith or culpable remissness on the part of the representative.[18]

e. Redemption of Property

A personal representative may be entitled to credit in his account for expenditures made in good faith and with due prudence in redeeming mortgaged or otherwise encumbered property.

Where the personal representative honestly and in the exercise of due prudence and diligence redeems mortgaged or otherwise encumbered property, the value of which is fairly in excess of the mortgage debt, he may be allowed credit for the outlay in his accounts,[19] but outlays because of his own bad judgment or remissness of duty and without benefit to the estate are not thus favored.[20]

G. INDIVIDUAL INTEREST IN TRANSACTIONS

§ 239. In General

An executor or administrator may not acquire individual interests inconsistent with his duties or make a personal profit from his dealings with the property of the estate; but the rule may be relaxed as to transactions in good faith, and beneficial, or not prejudicial, to the estate.

An executor or administrator cannot be allowed to acquire or promote individual interests inconsistent with the representative capacity he sustains for the benefit of the estate, or to make a personal profit out of his dealings with the property of the estate,[21]

in hand sufficient to take up notes of decedent, he is entitled to credit for interest paid to procure the extension of such notes—Hale's Succession, 26 La.Ann. 195.

Usurious interest

(1) Generally a personal representative is not entitled to credit in his account for the payment of usurious interest.—In re Oliver's Estate, 129 A. 434, 3 N.J.Misc. 453.

(2) Where, however, under the terms of a will, the executor had large discretionary powers, the court has allowed him to charge the estate with usurious interest paid in order to prevent the sacrifice of the property.—Coffee v. Ruffin, 4 Coldw., Tenn., 487.

15. Ill.—In re Busby's Estate, 6 N.E.2d 451, 288 Ill.App. 500.

In absence of showing of necessity for loan made to representative, interest thereon will be disallowed.—In re Murphy's Will, 210 N.Y.S. 531, 213 App.Div. 319.

Failure promptly to discharge obligations

Where a personal representative has moneys in hand sufficient to take up the notes of decedent, but fails to do so, he is not entitled to credit for the payment of interest accruing after the notes should have been paid by him.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885—Matter of Estate of Goetschius, 23 N.Y.S. 970, 2 Misc. 278—Willcox v. Smith, N.Y., 26 Barb. 316.

Failure to observe priority of claims

Where an executor received moneys and paid them out on debts of the estate and legacies, he cannot be allowed interest on a preferred claim which remains unpaid in consequence.—Matter of Woods, 106 N.Y.S. 471, 55 Misc. 181—24 C.J. p 111 note 80.

16. Tex.—James v. Craighead, Civ. App., 69 S.W. 241.

17. N.C.—Lambert v. Hobson, 56 N.C. 424.
24 C.J. p 111 note 75.

18. Kan.—Sarbach v. Fidelity & Deposit Co., 160 P. 990, 99 Kan. 29, L.R.A.1917B 1043.
24 C.J. p 111 note 76.

19. Mass.—Horton v. Robinson, 98 N.E. 681, 212 Mass. 248.
24 C.J. p 113 note 97.

20. N.Y.—In re Gill, 92 N.E. 390, 199 N.Y. 155.
24 C.J. p 113 note 98.

21. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 3.
Colo.—Murray v. Stuart, 247 P. 187, 79 Colo. 454.
Ga.—Morris v. Johnstone, 158 S.E. 308, 172 Ga. 598—Haley v. Atlantic Nat. Fire Ins. Co., 106 S.E. 122, 151 Ga. 158.
Ill.—Christensen v. Christensen, 158 N.E. 706, 327 Ill. 448—Pickering v. Hickox, 24 N.E.2d 755, 303 Ill.App. 372.
Kan.—Vincent v. Werner, 38 P.2d 687, 140 Kan. 599.
Md.—Adams v. Hearn, 178 A. 606, 168 Md. 544.
Mass.—Bearse v. Styler, 34 N.E.2d 672, 309 Mass. 288—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250—Spilios v. Papps, 192 N.E. 155, 288 Mass. 23.
Mich.—In re Culhane's Estate, 256 N.W. 807, 269 Mich. 68.
Miss.—Alexander v. Hancock, 171 So. 544, 177 Miss. 590.
N.J.—In re Westhall's Estate, 5 A.2d 757, 125 N.J.Eq. 551.
N.M.—Woodson v. Raynolds, 76 P.2d 34, 42 N.M. 161.
N.Y.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296, affirmed In re Schummers' Estate, 154 N.E. 600, 243 N.Y. 548—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295—In re Humpfner's Estate, 296 N.Y.S. 593, 163 Misc. 91—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461—In re Fisher's Estate, 209 N.Y.S. 300, 124 Misc. 836—In re Phetteplace's Estate, 6 N.Y.S.2d 845—In re Hastings' Will, 4 N.Y.S.2d 100, reversed on other grounds 8 N.Y.S.2d 73, 255 App.Div. 913, affirmed In re Hasting's Estate, 21 N.E.2d 201, 280 N.Y. 694.
Okl.—Warrior v. Stith, 50 P.2d 179, 180, 174 Okl. 150, quoting **Corpus Juris.**
Pa.—In re Istocin's Estate, 190 A. 382, 126 Pa.Super. 158—In re Herman's Estate, 90 Pa.Super. 512.
S.D.—Norris v. Eckerman, 286 N.W.

whether he does so directly or indirectly;[22] and, where the personal interests of an executor or administrator are in conflict with those of the estate, he is under an obligation to protect the estate at all hazards, even to his own personal loss or disadvantage.[23] Transactions in which the representative as an individual deals with himself in his representative capacity are always regarded with suspicion and will be set aside if inequitable;[24] and transactions of a personal representative with himself have been declared void irrespective of fraud or evil effect.[25]

Thus, while his general right to dispose of assets is conceded, the executor or administrator should not speculate with property of the estate for his individual benefit,[26] divert the funds of the estate into business or investment for his own private gain,[27] or sell his own property to the estate;[28] and the representative may not sell the property of the estate for his direct or indirect advantage.[29] The representative cannot settle his own debts to the estate at undue personal advantage to himself,[30]

324, 66 S.D. 513—Robinson v. Roinstad, 180 N.W. 67, 48 S.D. 436.
Tex.—Loewenstein v. Watts, Civ. App., 119 S.W.2d 176, affirmed 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910.
Wash.—Rosenberg v. Rosenberg, 250 P. 947, 141 Wash. 86.
24 C.J. p 114 note 39.

Reason for rule

Public policy treats administrator as trustee, and heirs and others interested in distribution of estate as beneficiaries.—Crider v. Simmons, 96 S.W.2d 471, 192 Ark. 1075.

Liability to account

(1) Administrator who uses funds of estate with which to make profits is bound to account therefor.
Iowa.—In re Johnston's Estate, 201 N.W. 72, 198 Iowa 1372.
N.J.—In re Jula's Estate, 130 A. 733, 3 N.J.Misc. 976.
N.Y.—In re Tallman's Estate, 179 N.Y.S. 656.

(2) Administrator putting personal estate to own use is chargeable with value of use or with actual profits, and, if loss has ensued, he is liable for use in addition to not being entitled to be made whole.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.

(3) Personal profits as charge against representative see infra § 850.

Interest on loans made

Liability of remaindermen, if any, for interest on loan during life beneficiary's lifetime was not enforceable for personal use of executor.—In re Leonard's Will, 230 N.W. 715, 202 Wis. 17, 83 A.L.R. 712.

22. Ark.—Crider v. Simmons, 96 S.W.2d 471, 192 Ark. 1075.
Mich.—In re Culhane's Estate, 256 N.W. 807, 269 Mich. 68.
N.Y.—In re Hastings' Will, 4 N.Y.S.2d 100, reversed on other grounds 8 N.Y.S.2d 73, 255 App.Div. 913, affirmed In re Hasting's Estate, 21 N.E.2d 201, 280 N.Y. 694.

Through agent

Pa.—In re Istocin's Estate, 190 A. 382, 126 Pa.Super. 158.

23. N.Y.—In re Clift's Estate, 237 N.Y.S. 635, 135 Misc. 4, reversed on other grounds 248 N.Y.S. 473, 231 App.Div. 634, motion granted In re Corbett, 177 N.E. 191, 256 N.Y. 680.

Judgments held in both capacities

An administrator who holds a judgment in his own name, and an assigned judgment in the name of his estate against the same land, is in duty bound on selling the land under the judgments to see that it brings the highest price obtainable.—Montgomery v. Black, 86 S.W. 1006, 75 Ark. 184.

24. Ind.—Hancock v. Hancock, 111 N.E. 336, 63 Ind.App. 173.
24 C.J. p 115 note 40.

Presumption of invalidity

As respects the mismanagement of an estate by an attorney as an administrator or personal representative, the presumption of invalidity is complete where the attorney contracts with himself personally.—Louisville Bar Ass'n v. Hubbard, 139 S.W.2d 773, 282 Ky. 734.

25. Ark.—Acker v. Watkins, 134 S.W.2d 523, 199 Ark. 573.

Similarity to contracts of public officers

The law applicable to executors and administrators with reference to transactions with themselves is the same as that applicable to public officers or to contracts affecting public service, in that such contracts are void, irrespective of actual fraud or actual evil effect.—Acker v. Watkins, supra.

26. N.J.—In re Gallagher, 196 A. 430, 123 N.J.Eq. 384.
24 C.J. p 115 note 41.
Acquisition of property of estate by representative see infra §§ 268, 288, 304, 314.

Exercising option

Testator's unexercised option to purchase certain property remained asset of estate, and executor cannot refrain from selling the option or from exercising it in her fiduciary capacity, and then in her individual capacity exercise it to her personal advantage; and the advantage or profits arising from its exercise in her individual capacity must be held as profits accruing to the estate.—Flett v. South Jersey Title & Finance Co., 124 A. 152, 96 N.J.Eq. 344.

Conducting farm as personal business

An estate is not liable for debts incurred by administrator while conducting estate farm as his personal business without authority.—In re Jennings' Estate, 241 P. 655, 74 Mont. 468.

27. S.D.—First Nat. Bank v. Selmser Fuel & Grain Co., 227 N.W. 62, 55 S.D. 586.
24 C.J. p 115 note 42.

Payment of self for services

Administrator operating farm without authority from court, and making unauthorized payments to himself for services rendered and for machinery and implements, was chargeable with payments.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.

"At common law . . . [an] administrator was permitted to use the funds of . . . the estate for his own purposes, being bound only to make a faithful accounting when an accounting became due."—People v. Birket, 254 Ill.App. 96, 103, affirmed 174 N.E. 388, 342 Ill. 333.

28. Kan.—Vincent v. Werner, 38 P. 2d 687, 140 Kan. 599.
La.—Baldwin v. Carleton, 15 La. 394.
N.Y.—In re Baker's Estate, 292 N.Y.S. 122, 249 App.Div. 265.
S.C.—Blankenship v. Zimmerman, 199 S.E. 527, 188 S.C. 413.

Investment in administrator's company

Executors or administrators cannot invest estate's funds in their own property, even though given power to invest; and, where administrators transferred notes and mortgages belonging to mortgage company, of which one administrator was president, to estate, and transferred estate funds to mortgage company in return therefor, administrators would be charged with estate funds transferred to company and credited with value of notes and mortgages.—Whitlow v. Patterson, 112 S.W.2d 35, 195 Ark. 173.

29. Mass.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

30. N.C.—Grant v. Reese, 94 N.C. 720.
24 C.J. p 115 note 44.

take secret fees, commissions, or discounts, from persons with whom he deals as representative,[31] use money of the estate for his individual benefit,[32] purchase for his personal profit an outstanding life estate in real property held by him in trust,[33] sell or pledge assets as special security for, or payment of, his individual debt, or for some individual advantage,[34] or in any other way take for his own benefit a position regarding the estate in which his interest will conflict with his duty.[35] Where an executor has taken title to a note in his own name, he cannot, as against liability to the estate, set off the value of the note or money spent in foreclosing a mortgage securing it.[36]

Extent and limits of rule. Where it is shown that the transaction was in good faith,[37] and promotive of the interests of the estate,[38] the general rule may be relaxed; and in other cases where the

31. Colo.—In re Macky's Estate, 213 P. 131, 73 Colo. 1.
Kan.—Vincent v. Werner, 38 P.2d 687, 140 Kan. 599.
N.Y.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.
24 C.J. p 115 note 45.

Use of rebates to pay for stock

Rebates on regular price for ginning cotton produced on plantation of decedent's estate, made to father of administratrix to whom administratrix had transferred her stock in ginning company under arrangement to credit rebates on price of stock, as stockholder in ginning company, were chargeable to administratrix.—Alexander v. Hancock, 171 So. 544, 177 Miss. 590.

Splitting fee with guardian

Where executor had secret agreement with guardian of infant for division of guardian's compensation, and compensation was actually divided between such executor, his managing clerk, and guardian, such facts were ground for removal of executor and basis of surcharge for amount paid to him and his managing clerk. —In re Wechsler's Estate, 273 N.Y.S. 968, 152 Misc. 564.

Enforcement of commission contract

Administrator's contract for commissions on sale of realty belonging in part to estate being illegal, he cannot maintain action thereon, even though estate had only a one-fourth interest, and other party to contract knew he was dealing with administrator.—Murray v. Stuart, 247 P. 187, 79 Colo. 454.

32. N.Y.—Matter of Meagley, 56 N.Y.S. 503, 39 App.Div. 83.

33. Minn.—In re Robbins, 103 N.W. 217, 94 Minn. 43, 110 Am.S.R. 375.
24 C.J. p 115 note 47.

34. Ala.—Farmers' & Merchants' Bank v. Sanford, 43 So. 226, 150 Ala. 195.
24 C.J. p 115 note 48.

35. Colo.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.
Mich.—In re McClung's Estate, 255 N.W. 199, 200, 267 Mich. 309, citing **Corpus Juris.**
24 C.J. p 115 note 49.
Purchase of claims against estate at discount see infra § 393.

Employment of self

A contract for compensation, to be paid by the administrator of an estate of deceased person for services to be performed by himself and his partner as attorneys in an action to be commenced by them for damages for the wrongful death of decedent, is in violation of the trust reposed in the administrator, and cannot be enforced.—Judy v. Atchison, T. & S. F. Ry. Co., 205 P. 1116, 111 Kan. 46.

Procuring title to be quieted in self

Where title was quieted in an heir who was also the administrator of the estate of the ancestor, through whom by arrangement during his lifetime he claimed title to the land, which was in dispute amongst the remaining heirs, the decree will be set aside on the theory that as administrator he was bound to hold the assets of the estate for the benefit of creditors and parties entitled to a distributive share thereof.—Love v. Phillips, 208 P. 882, 60 Utah 329.

36. Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.

37. Ga.—Waldrop v. Chandler, 118 S.E. 745, 155 Ga. 829.
24 C.J. p 116 note 52.

Full disclosure and approval

Where executor had a selfish interest incompatible with that of estate, but the facts were fully disclosed to court, and guardian of infant in approving the transaction acted on advice of independent counsel, and transaction was approved by the court, it could not thereafter be disaffirmed by the infant.—In re Fiske's Estate, 291 N.W. 289, 207 Minn. 44.

Lease to self

It was no ground for objection to the final account of an administrator that he had applied to be allowed to lease certain land belonging to the estate and had profited personally by the administration, where, under the will and by agreement of the parties, he was entitled to the possession of such property.—In re Adin's Estate, 202 P. 262, 117 Wash. 693.

Purchase of evidence of debt

The fact that executor purchases chose in action, evidencing indebtedness by testator, together with deed to land in which beneficiaries have interest given to secure the debt, is not, without more, evidence of fraud, and, if bona fide, is not void.—Waldrop v. Chandler, 118 S.E. 745, 155 Ga. 829.

Leasing property to estate

Executor and trustee carrying on business of decedent's coal company and acquiring land in own name and leasing same for royalties to company was not guilty of misconduct where decedent's policy was to operate on leased land wherever possible, and royalties were at usual rate.—In re Evans' Estate, 232 N.W. 72, 212 Iowa 1.

Heirs as parties to agreement

Agreement between heirs and administrator and defendant lessee for settlement of rent by deducting from it the administrator's individual indebtedness on store account was held valid, in the absence of estate debts requiring application of rent toward their payment, in view of statute providing that lands are assets for payment of debts.—Campbell v Smith, 268 S.W. 359, 880, 167 Ark. 633.

38. Mass.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.
24 C.J. p 116 note 52.

Receiving fee as attorney

Executor, who by will was authorized to act as his own counsel, and who, as attorney, negotiated loan by estate to third party, which was advantageous to estate, could keep fee paid him by such third party pursuant to contract made in good faith.—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

Advancing money; taking mortgage

Executor or administrator may advance money to estate which he represents, to be used in payment of pressing claims against estate, or in payment of expenses of administration or fees allowed executor, and may mortgage property of estate to himself, without violating statute prohibiting him from being interested in "sale" of property of estate.—Corporation of America v. Bank of America Nat. Trust & Savings Ass'n, 46 P.2d 262, 7 Cal.App.2d 470.

Payment of decedent's debt

Where intestate, to secure indebtedness, pledged trust estate, corpus of which was to be turned over to wife

estate suffered no loss from the acts of the representative, the rule has not been applied.[39] An executor who without authority sells corporate stock belonging to the estate is liable only for the loss then resulting to the estate, and legatees cannot hold him to account as trustee for profits made by him some years subsequently in the repurchase and sale of such stock.[40] The fact that the estate included stock in a corporation in which the executor individually also owned stock does not affect the rights of the executor unless it is shown that by reason of the two holdings he was able to achieve a result, in relation to the corporation, which would have been impossible otherwise;[41] but, where the executor and another were both left stock, the purchase of additional stock by the executor from a third person, so as to give him control of the corporation, was held not a breach of trust.[42]

While a representative cannot take an assignment of a mortgage on his decedent's land and exercise the power of sale therein to foreclose to the injury of the heirs,[43] he may, with his own funds, purchase and take an assignment of a note outstanding against his decedent, and avail himself of any securities held by the creditors, without using them to the prejudice of other creditors or the heirs.[44] While a representative is not entitled to retain assets of the estate at their inventoried value,[45] he may retain assets at a fair rate of valuation of which the appraisement is prima facie proof,[46] although he cannot make a profit by retaining them at a price lower than offered by others and refused by him.[47]

§ 240. Transactions with Heirs, Etc.

Since an executor or administrator stands in a trust relation to the beneficiaries of the estate, he may not profit from transactions with them to their prejudice; but such transactions have been held not void, but voidable.

An administrator stands in a trust relation toward those interested in the estate of the intestate, including the widow and heirs, as far as transactions between him and them are concerned,[48] and equity will not permit a person who is, or is about to become, an administrator to profit from his transactions with the heirs to their prejudice.[49] However, it has also been held that a transaction between an executor or administrator and the persons he represents is not void,[50] but is voidable, provided a want of equity and of fair dealing appears in the trans-

on intestate's death, wife who paid the indebtedness, and was ten months later made administratrix and charged the indebtedness against the estate, could not be surcharged for corpus of trust which she received, on theory that one occupying position of trust cannot deal to her own advantage with trust estate.—In re Zabriskie's Estate, 287 N.Y.S. 249, 159 Misc. 199.

39. Agreement to repurchase stock

An executor may transfer at par, in settlement of a legacy, stock that is worth less than par, and at the same time agree to repurchase the stock later at an advanced price on his personal account.—Weymouth v. Goodwin, 75 A. 61, 105 Me. 510.

Payment of debts

(1) A representative may properly apply the assets of the estate to the payment of a debt of his decedent in its due order, although he is individually liable as decedent's surety.—Rowland v. Cocke, 2 J.J.Marsh., Ky., 79.

(2) Representative may even pay such debt where he, in his individual capacity, is the principal debtor and decedent is the surety.—Shelton v. Carpenter, 60 Ala. 201.

Employment of one executor

Executors' employment of one of themselves to manage realty of and collect rent due corporation, all stock of which was held by estate, was proper.—In re Schlesinger's Estate, 256 N.Y.S. 381, 143 Misc. 275.

Employment by corporation

Representative may accept salary as an officer of a corporation in which the estate is interested merely as a stockholder.—Matter of Brown, 139 N.Y.S. 459, 78 Misc. 342—24 C.J. p 117 note 62.

40. U.S.—Hiller v. Ladd, Or., 85 F. 703, 29 C.C.A. 394.

41. N.Y.—In re Sullivan's Estate, 6 N.Y.S.2d 783, 169 Misc. 16, affirmed 8 N.Y.S.2d 533, 255 App.Div. 1008.

42. Wash.—In re Johnson's Estate, 60 P.2d 271, 187 Wash. 552, 106 A.L.R. 217.

43. N.C.—Morton v. Blades Lumber Co., 56 S.E. 551, 144 N.C. 31.

44. N.C.—Morton v. Blades Lumber Co., supra.

45. Md.—Dennis v. Dennis, 15 Md. 73.
24 C.J. p 117 note 59.

46. N.Y.—Matter of Haug, 106 N.Y.S. 850, 55 Misc. 481.
24 C.J. p 117 note 60.

47. Pa.—Wiley's Appeal, 8 Watts & S. 244.

48. Ala.—Ward v. Tatum, 130 So. 898, 222 Ala. 66.
Ark.—Flowers v. Flowers, 106 S.W. 949, 84 Ark. 557, 120 Am.S.R. 84.
Ill.—Edwards v. Lane, 163 N.E. 460, 331 Ill. 442.

49. Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.
Kan.—Alumbaugh v. Hedges, 265 P. 50, 125 Kan. 449.
Pa.—Mallalieu's Estate, 42 Pa.Super. 101.

Purchase of realty from widow, heir, or devisee see infra § 268.

Purchase of interest of heir or legatee in personalty see infra § 304.

Failure to disclose facts

N.Y.—Palmer v. Taylor, 194 N.Y.S. 146, 201 App.Div. 422.

Fraudulent representations

Releases and assignments of legatees' or devisees' interest in testatrix' estate procured by executor for his personal benefit by fraudulent representations concerning estate were held invalid.—Crowley v. Nixon, 296 P. 376, 132 Kan. 552, rehearing granted 297 P. 1117.

Payment by heir for withdrawing suit

An executor who was authorized by probate court to be appointed as ancillary administrator in foreign state, but who, after commencing proceedings to that end, withdrew suit in consideration of payment to him of money by the heir at law, was properly chargeable in his final account with that money, notwithstanding it would eventually enhance estate devolving on the heir at law.—In re Brown's Estate, 76 P.2d 857, 147 Kan. 395, 116 A.L.R. 1012.

50. Conn.—Schwartz v. Schwartz, 132 A. 461, 104 Conn. 271.

action,[51] and provided the beneficiaries act to avoid the transaction with reasonable promptness.[52] It has been held that an administrator may properly act as an attorney in fact for a beneficiary of the estate.[53]

§ 241. Rights of Person Dealing with Representative

Whether a transaction between a third person and a representative acting for his individual benefit will be sustained against the interest of the estate depends on whether the third person acted with notice of the representative's breach of trust.

Transactions by a representative, such as a sale or pledge of assets, entered into for purposes other than the due discharge of his duty as fiduciary will not be sustained against the interests of the estate, where the person with whom he dealt had notice of his bad faith or breach of trust, and in such case the transaction may be set aside and restitution enforced;[54] and a transferee having reasonable ground for suspecting that there was a conversion is answerable for the assets.[55] On the other hand, a third person who, in dealing with the representative, acted in good faith and without notice of the representative's bad faith, and parted with consideration, will be protected in the transaction.[56]

H. WASTE, CONVERSION, OR EMBEZZLEMENT OF ASSETS

§ 242. Liability and Extent Thereof in General

a. In general
b. Extent of liability

a. In General

An executor or administrator is personally liable for waste, or conversion or similar loss to the estate, in some instances even where the misconduct is that of a third person; and a third person may be liable for the misconduct of the representative, where such third person knowingly acquired the property or participated in the misconduct.

An executor or administrator is personally liable to those who are interested in the estate as heirs, distributees, creditors, or otherwise,[57] for waste,[58] or for conversion,[59] misapplication,[60] or embezzlement[61] of the assets of the estate.

In addition to their remedy against the representative personally for waste or conversion, the beneficiaries of the estate may also maintain an action on his official bond, see § 961 infra, and, as appears below, may hold third persons liable, in a proper case. Where statutes so provide, the representative may be subject to penalties for conversion, embezzlement, and kindred offenses.[62]

Nature of liability. It has been held that the liability of an executor or administrator for waste

51. Conn.—Schwartz v. Schwartz, supra.
N.M.—Woodson v. Raynolds, 76 P.2d 34, 42 N.M. 161.
Evidence held to support finding that administrator did not meet burden of showing that widow's release of her interest in decedent's estate was fairly made and without misrepresentations to widow.—Ward v. Tatum, 130 So. 898, 222 Ala. 66.

52. Conn.—Schwartz v. Schwartz, 132 A. 461, 104 Conn. 271.

53. Alaska.—Dybvik v. Behrends, 8 Alaska 544.
Receipt for share
Administrator, as attorney in fact, may give valid receipt for beneficiary's distributive share of estate.—Dybvik v. Behrends, supra.

54. U.S.—In re Byrne, C.C.A.N.Y., 32 F.2d 189, certiorari denied Mohr v. Bielaski, 50 S.Ct. 17, 280 U.S. 557, 74 L.Ed. 612.
Ky.—Ledford v. Magowan's Adm'r, 22 S.W.2d 122, 123, 231 Ky. 727, quoting **Corpus Juris**—Hardwick v. Cotterill, 299 S.W. 958, 221 Ky. 783.
24 C.J. p 117 note 66.

55. N.Y.—Gottberg v. U. S. National Bank, 30 N.E. 41, 131 N.Y. 595—Randel v. Dyett, 38 Hun 347.

56. Me.—Bailey v. Merchants' Ins. Co., 86 A. 328, 110 Me. 348.
24 C.J. p 117 note 67.

57. N.D.—Macfadden v. Jenkins, 169 N.W. 151, 40 N.D. 422.
24 C.J. p 118 note 68.
One receiving benefits under will to which he would not be entitled in absence of will is not entitled to attack executor's disposition of other property, pursuant to other terms of will, as conversion.—Edsall v. Hutchings, Tex.Civ.App., 143 S.W.2d 700, error refused.
Release by heir, executed to executors, having effect of receipts, which could be avoided for misapprehension of facts and rights, was held not ground for dismissing complaint in suit for conversion.—Squier v. Houghton, 226 N.Y.S. 162, 131 Misc. 129.

58. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
Ga.—Bellah v. Cleghorn, 141 S.E. 311, 165 Ga. 494.
Mich.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563.
N.Y.—In re Fewer's Estate, 31 N.Y.S 2d 810, 177 Misc. 788.
24 C.J. p 118 note 69.
Statute not retroactive
Amendatory statute charging executor with waste through delaying to raise money by collecting debts or selling real or personal estate resulting in lessening of value of estate, and providing that no such liability should arise if one or more of statutory causes for delay existed, was held limited in application to liability arising after its enactment and inapplicable to liabilities of executrix to creditor accruing prior to its enactment.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.

59. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
N.Y.—In re O'Keefe's Estate, 3 N.Y.S.2d 878, 254 App.Div. 692—In re Balcone's Estate, 260 N.Y.S. 547, 145 Misc. 499.
24 C.J. p 118 note 70.

60. N.Y.—Reilly v. Porcher, 61 N.Y.S. 662, 46 App.Div. 290.
24 C.J. p 118 note 71.

61. Ill.—Connor v. Akin, 34 Ill.App. 431.

62. Miss.—State v. Pannell, 34 So. 388.
24 C.J. p 118 note 74.

or conversion is not contractual within the meaning of statutes conferring jurisdiction of actions on contracts express or implied;[63] but the obligation of an executor to an injured legatee, where the executor fails to obey the will as regards disposition of property, has been held to possess all the essentials of a debt.[64]

Liability for acts of others. An executor or administrator may be liable for waste or conversion, even though it is committed by another, where he has acquiesced therein;[65] and, if a representative enters into any arrangement which limits or surrenders his control over property, such act renders him liable in the event of loss, notwithstanding he may otherwise not have been guilty of negligence or bad faith.[66] An executor or administrator is liable for a devastavit committed by his wife during coverture,[67] and, if a devastavit is committed by the husband of an executrix, and she survives him, she is chargeable with the loss suffered by the estate.[68] An executor or administrator is not, however, chargeable with, or responsible for, the acts of his predecessor in office.[69]

Whether an executor or administrator is liable for the embezzlement or other misconduct of an attorney or agent employed by him depends on whether the representative acted within the scope of his powers and with good faith and ordinary prudence;[70] but it has also been held, without reference to good faith or prudence, that a representative is liable for loss or misappropriation of funds by an agent or attorney.[71]

Liability of third persons. Property held by an executor or administrator, being held in trust, may, where misappropriated, be followed by the beneficiaries of the estate into the hands of third persons if it can be traced,[72] at least where such third persons have notice that the disposition by the representative is fraudulent;[73] and a third person will be liable, with the representative, for the loss resulting from a devastavit or conversion, where he participates therein or takes advantage thereof knowingly,[74] but not where he acted in good faith and

63. Pa.—Sidle v. Anderson, 45 Pa. 464—Wilson v. Long, 12 Serg. & R. 58.

64. Utah.—In re Campbell's Estate, 173 P. 688, 53 Utah 487.

65. Ala.—Pearson v. Darrington, 32 Ala. 227.

24 C.J. p 120 note 15.

Liability for acts of coexecutors or coadministrators see infra § 1045.

66. Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.

67. N.H.—Smith v. Jewett, 40 N.H. 513.

24 C.J. p 120 note 16.

68. Pa.—Calhoun's Appeal, 89 Pa. 218.

24 C.J. p 120 note 17.

69. Ark.—Finn v. Hempstead, 24 Ark. 111.

70. Or.—In re Chandler's Estate, 297 P. 841, 136 Or. 128.

Executrix held liable for proceeds converted by attorney where she failed to use ordinary prudence and to give matters personal attention. —In re Chandler's Estate, 297 P. 841, 136 Or. 128.

71. W.Va.—McElhinny v. Minor, 114 S.E. 147, 91 W.Va. 755.

72. Or.—Thorson v. Hooper, 109 P. 388, 57 Or. 75.

24 C.J. p 121 note 45.

Note transferred to surety

Ga.—Carnes v. Jones, Ga.Dec. 170.

Assignment to wife

Where an administrator misappropriates the funds of the estate, and buys therewith mortgages, which are assigned to his wife, equity will, at the suit of the administrator de bonis non, require the administrator and his wife to make restitution.—Sargent v. Wood, 81 N.E. 901, 196 Mass. 1.

Effect of representative's death

(1) A note taken by an administrator for the proceeds of land of his decedent, sold under an order of the orphans' court for the payment of debts, and showing on its face the purpose for which it was given, constitutes a trust fund in the hands of the administrator, and may be followed in the hands of his administratrix or her assignee.—Barwick v. White, 2 Del.Ch. 284.

(2) However, where administrator who had commingled funds of estate with his own dies, and his estate is distributed, those entitled to the commingled funds in the first estate cannot recover from such distributees where they failed to make claim until after distribution.—McComas v. Long, 95 Ind. 549.

73. Ark.—Dyer v. Jacoway, 42 Ark. 186.

Ill.—Elting v. First Nat. Bank, 60 N.E. 1095, 173 Ill. 368.

Innocent purchaser

Where funds are traced into purchase price of property, trust attaches to such money except in hands of innocent purchaser.—McMillan v. McMillan, 119 So. 676, 218 Ala. 559.

74. N.Y.—Stark v. National City Bank of New York, 16 N.E.2d 376, 278 N.Y. 388, 123 A.L.R. 99, reversing 1 N.Y.S.2d 738, 253 App. Div. 801, motion granted 2 N.Y.S. 2d 898, 254 App.Div. 553, modifying 291 N.Y.S. 964, 161 Misc. 51—In re Gauthier's Estate, 257 N.Y. S. 532, 143 Misc. 788.

N.C.—Dancy v. Duncan, 1 S.E. 455, 96 N.C. 111.

Va.—Graff v. Castleman, 5 Rand. 195, 26 Va. 195, 16 Am.D. 741.

Bank receiving benefits

A bank which received some of the fruits of misappropriation by executor, and the officers of which had actual notice of other diversions or at least of a purpose or plan of executor to use the funds of the estate for his private benefit became a party to the misapplication so as to warrant bringing bank into settlement suit as a defendant.—Peoples Nat. Bank v. Guier, 145 S.W.2d 1042, 284 Ky. 702.

Surety as participant

If surety, on bond of administrator of estate of insured, with knowledge or notice that administrator as administrator of estate of beneficiary of life policies, commingled policy proceeds with moneys of estate of insured, participated in wrongful act of administrator in depositing such moneys in bank which later closed, surety would be liable for loss not on theory of being surety on bond, but because of surety's actual participation in wrong as joint tort-feasor.—Boutwell v. Drinkard, 160 So. 349, 230 Ala. 212.

Repayment of improper loan

However, where executor loans funds of estate to firm of which he is a member, and from time to time draws out moneys which are charged to him in account, and on subsequent settlement with firm it is agreed that money so drawn out shall be ap-

without notice.[75] Where the representative's acts were not a violation of his trust, those who aided him in such acts committed no wrong and are not liable for losses which may have resulted.[76]

The effect of the rule that third persons may be liable for waste or conversion is not to limit the obligations of the representative, who remains primarily and individually liable,[77] but to give the beneficiaries of the estate an election to charge the representative for the loss or to pursue their remedy against the third person.[78]

Presumptions as to disposition. Where a representative, having the power of appointment over a certain fund, misappropriates securities of the estate, it will be presumed that he used first the fund over which he had the power of appointment, and the property which he could dispose of by appointment would, to the extent of the misappropriation, be lessened.[79] Similarly, where an executor who was also a devisee had the power to sell the property, and improperly sold part of it without making any provision for the other devisees, the amount realized by the sale will be deemed to have been used to satisfy his claim as devisee, so that he could assert no further claim.[80]

Lien on representative's property. There is no specific lien on the property of the representative to make good his waste or embezzlement.[81]

b. Extent of Liability

In general, the liability of a representative for waste, conversion, or other loss of property through his fault is for the value of the property at the time of the misconduct, plus interest.

The actual value of the assets at the time of their waste, conversion, embezzlement, or misappropriation, computed in lawful money, is usually the measure of the liability of the executor or administrator who was at fault,[82] and in case of conversion the representative may be charged with the highest value which can properly be placed on the property.[83] In general, the representative is liable for interest on the amount misappropriated, wasted, or commingled.[84] It has been held that the limit of liability, in the absence of a showing that the representative made a larger profit, is the return of the principal sum not accounted for with legal in-

plied to payment of loan, devisees are bound by this adjustment, although partners knew that loan was of trust property, and on firm books it was credited to estate.—Sherburne v. Goodwin, 44 N.H. 271.

75. N.Y.—Stark v. National City Bank of New York, 16 N.E.2d 376, 278 N.Y. 388, 123 A.L.R. 99, reversing 1 N.Y.S.2d 738, 253 App. Div. 801, motion granted 3 N.Y.S. 2d 898, 254 App.Div. 558, modifying 291 N.Y.S. 884, 161 Misc. 51.

Duty of third person

The only duty owed to an estate by third persons negotiating with administratrix for exchange of decedent's stock for other stock was to refrain from interference with the assets which they knew or should have known might cause injury to the estate.—Stark v. National City Bank of New York, supra.

Inducing exchange of securities

Where banking corporation, formed to acquire control of predecessor banks, and another bank induced administratrix to exercise stockholders' privilege of exchanging decedent's stock in predecessor banks, which were not sold on the market, for equivalent stock in new corporation, and the new stock decreased in value, banks which induced the exchange were not liable to administratrix for having participated in wasting the estate's assets, in absence of showing of bad faith.—Stark v. National City Bank of New York, supra.

76. Va.—Collins v. Hartford Accident & Indemnity Co., 17 S.E.2d 413, 178 Va. 501, 137 A.L.R. 1046.

Administratrix as life tenant

Where testator's wife in capacity of administratrix cum testamento annexo had right to transfer assets of estate to herself as life tenant without requiring a forthcoming bond and life tenant with power of possession and control was not guilty of the violation of her trust, those who aided her in either of her capacities in which she acted committed no wrong and hence were not liable for losses which occurred primarily because of economic depression.—Collins v. Hartford Accident & Indemnity Co., supra.

77. Ga.—Bellah v. Cleghorn, 141 S. E. 311, 165 Ga. 494.

78. Or.—Thorson v. Hooper, 109 P. 388, 57 Or. 75.
24 C.J. p 121 note 45.

Where assets have been transferred to creditor of the representative, other creditors may elect to avoid such transaction, and hold the creditor liable for assets thus received, or may let the transaction stand and charge the personal representative for a devastavit.—Frank v. Thompson, 16 So. 634, 105 Ala. 211.

79. Pa.—In re Mertens' Estate, 19 Pa.Dist. & Co. 60.

80. Or.—Stanley v. U. S. Nat. Bank of Portland, 224 P. 635, 110 Or. 648.

81. N.Y.—Wilkes v. Harper, 2 Barb. Ch. 338, affirmed 1 N.Y. 586.
24 C.J. p 123 note 62.

82. N.Y.—In re Balcone's Estate, 260 N.Y.S. 547, 145 Misc. 499.
Or.—Weinke v. Majeske, 97 P.2d 179, 163 Or. 483—In re Laberee's Estate, 269 P. 861, 126 Or. 301.
24 C.J. p 122 note 53.

Part interest in vessel

The liability of an executor, on a claim against a vessel in which the testator owned an interest, arising while the vessel was being employed in his own business, has been held to be measured by the extent of the testator's interest.—Hanschell v. Swan, 51 N.Y.S. 42, 23 Misc. 304.

Corporate assets

Fiduciaries are surcharged for waste of corporate assets in which they were gainers, to amount of difference between value of corporation's stock before and after loss.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

83. Pa.—Buck's Estate, 39 A. 821, 185 Pa. 57, 64 Am.S.R. 816.
24 C.J. p 122 note 54.

84. Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.

Under statute providing that fiduciary shall be liable for highest legal rate of interest on surplus money which he neglects to invest or loan, it has been held that beneficiaries of estate are entitled to interest on value of property improperly disposed of.—Arrington v. McDaniel, Tex.Civ.App., 4 S.W.2d 262, modified on other grounds, Com.App., 14 S. W.2d 1009, and certified questions answered 25 S.W.2d 295, 119 Tex. 148.

terest compounded annually.[85]

Where the representative by his misappropriation makes precise ascertainment of the value of the property misappropriated impossible, he will be held accountable in the highest degree.[86] Where decedent and his administrator each owned half the stock of a corporation, the funds of which the administrator misappropriated, the estate was injured, if the corporation was solvent, to the extent of one half of the total of the misappropriations.[87]

Proof that an administrator has converted to his own use a certain sum from the assets of the estate does not, in the absence of an accounting, create any presumption that he has not converted a greater sum.[88]

Conversion of business. In the case of the conversion of a business, the representative is chargeable with the value of the business, interest thereon, and the profits made during the period of conversion;[89] but he is not chargeable with the gross receipts, since he must be allowed the expense of conducting the business.[90] The representative is also chargeable with the value of the good will of the business;[91] and, where an administratrix completely took over a business for her own use, it was held that she would be surcharged with a sum sufficient to pay decedent's creditors.[92]

Penalties. Under statutes to that effect, a representative whose misconduct has caused the loss may be subject to a penalty exceeding the value of the property, as where he is made liable for double its value.[93]

§ 243. Waste

Waste is any mismanagement of the estate of a decedent, or other breach of duty resulting in loss, by an executor or administrator. In a proper case a representative may be restrained from committing waste.

As stated in Corpus Juris, which has been quoted and cited with approval, a waste of assets, or devastavit, is any mismanagement of the estate and effects of a decedent, or any squandering or misapplication of the assets, contrary to the duty imposed on the executor or administrator,[94] and consists of any act, omission, or mismanagement by reason of which the estate suffers loss.[95] In general, the particular method by which the representative has improperly diverted the funds is immaterial.[96]

Various particular acts or omissions by the representative of a deceased have been held to constitute waste,[97] such as using the property of the es-

85. Cal.—In re Elizalde's Estate, 188 P. 560, 182 Cal. 427.

86. N.Y.—In re Hyde's Estate, 266 N.Y.S. 871, 149 Misc. 291.

87. N.Y.—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554.

"Solvency" of corporation, for purpose of valuing its stock in determining liability of stockholder's administrator for misappropriating corporation's funds, was assumed to mean that corporation's assets equal its liabilities.—In re Auditore's Estate, supra.

88. N.Y.—Matter of McCauley, 99 N.Y.S. 238, 49 Misc. 209.

89. N.Y.—In re Suess, 75 N.Y.S. 938, 37 Misc. 459.

90. N.Y.—In re Suess, supra.

91. Computing value of good will

Where decedent had conducted his business for twenty-eight years, and after two years immediately succeeding his death executors formed corporation and took over the business, and carried it on in same premises, and maintained business without changing sign over premises, and, without attempting to ascertain whether business had a good will, appropriated it to their own use, it was held that this should be charged in their accounting with its estimated value, equal to three times the average profit for a single year during the three fiscal years immediately succeeding decedent's death.—Matter of Moore, 127 N.Y.S. 884, 69 Misc. 535, affirmed 130 N.Y.S. 1122, 145 App.Div. 938.

92. Widow taking over saloon

Where widow of licensed saloonkeeper took out letters of administration on her husband's estate, obtained transfer of license to herself, refused large offer for it, became the tenant of the property in place of decedent, retained the other personal property for her own use, and carried on the business as her own, she was surcharged with sum sufficient to pay her husband's creditors.—Brady's Estate, 21 Pa.Super. 397.

93. Cal.—Hochwender v. Carter, 114 P.2d 401, 45 Cal.App.2d 435.
Vt.—Spaulding v. Cook, 48 Vt. 145.

94. Fla.—First Trust & Savings Bank v. Henderson, 136 So. 370, 379, 101 Fla. 1437, citing **Corpus Juris.**
Ky.—Melheiser v. Central Trust Co., 36 S.W.2d 377, 379, 237 Ky. 757, quoting **Corpus Juris.**
Mich.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.
24 C.J. p 118 note 75.

95. Ky.—Melheiser v. Central Trust Co., 36 S.W.2d 377, 379, 237 Ky. 757, quoting **Corpus Juris.**
24 C.J. p 118 note 76.

Failure to perform duty

Any failure of representative to perform his duty which results in loss to estate amounts to devastavit, whether breach of duty is in nature of fraud, conversion, negligence, or maladministration.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563.

Neglected duty to sell land

Under Georgia law a devastavit by a neglected duty by executor to sell land belonging to estate resulting in loss would not authorize residuary legatee to abandon land and recover value of her share in it.—Robinson v. Georgia Sav. Bank & Trust Co., C.C.A.Ga., 106 F.2d 944.

96. N.Y.—In re Fewer's Estate, 31 N.Y.S.2d 810, 177 Misc. 788.

97. Md.—Harford Bank of Bel Air v. Hopper's Estate, 181 A. 751, 169 Md. 314.
Mich.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563.
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676—Walton v. Walton's Estate, 109 So. 707, 143 Miss. 666.
Wis.—Wisconsin Trust Co. v. Cousins, 179 N.W. 801, 172 Wis. 486.

Applying funds to guardianship

One who is at the same time administrator and guardian commits waste by applying funds of the estate to the interests of the guard-

tate for an unauthorized purpose or in an unauthorized manner,[98] or for his own purposes;[99] purchasing property of the estate for himself;[1] selling property for a price lower than that obtainable,[2] or on improper terms, as on credit;[3] transferring assets of the estate without consideration;[4] failure to collect assets[5] or to apply them to debts, in consequence of which failure the land in the hands of an heir or devisee is subjected to the debts;[6] negligently permitting real estate to be sacrificed for the satisfaction of liens which there is sufficient personal estate to discharge;[7] paying debts of an inferior degree with notice that there are outstanding debts entitled to priority,[8] unless sufficient assets are retained to pay the latter;[9] paying in full a debt which has no lien or priority, to the exclusion of others, when the estate is insolvent;[10] paying claims which, by the exercise of proper diligence, the representative might have ascertained to be unjust and illegal;[11] voluntarily paying or assenting to legacies when there are outstanding debts, although the representative is ignorant of them, where the estate proves insufficient to pay creditors in full;[12] paying legacies or distributive shares without requiring refunding bonds, to the prejudice of creditors;[13] or wrongfully using one's power as administrator to get control of the intestate's business at less than its full value, and failing to account for some of the assets of the estate.[14]

On the other hand, where the executor or administrator acts within the scope of his authority, his acts do not constitute waste;[15] and, where the representative employs the assets in good faith to con-

ianship.—Stillman v. Young, 16 Ill. 318.

Disobedience of court order or judgment

(1) Failure to make a payment according to an order of the court constitutes waste.—Rahe v. Jobusch, 197 Ill.App. 200.

(2) Judgment against administrator for money to be paid out of specified assets is conclusive as to application of such assets, and it is waste for him to make any other application of them.—Davies v. Flewellen, 29 Ga. 49.

Failure to plead statute of frauds when available constitutes waste.—Haskell v. Manson, 86 N.E. 937, 200 Mass. 599, 128 Am.S.R. 452.

Redemption of collateral

Paying a debt to redeem collateral known to be worthless when estate is insolvent constitutes waste.—In re Locher's Estate, 67 A. 954, 219 Pa. 46.

Collusive surrender of security for debt due estate constitutes waste.—Donaldson v. West Branch Bank, 1 Pa. 286.

98. Ala.—Amos v. Toolen, 168 So 687, 232 Ala. 587.

Unauthorized investment

Ala.—Amos v. Toolen, supra.

N.Y.—In re Ferrara's Estate, 260 N.Y.S. 758, 145 Misc. 705.

Unauthorized disposition of timber

Tex.—Arrington v. McDaniel, Civ. App., 4 S.W.2d 262, modified on other grounds, Com.App., 14 S.W.2d 1009, and certified questions answered 25 S.W.2d 295, 119 Tex. 148.

24 C.J. p 119 note 77.

Lending money

Ill.—Caruthers v. Caruthers, 99 Ill. App. 402.

N.Y.—Palmer v. Elco Realty Co., 8 N.Y.S.2d 908.

Payment of mortgages

The application of assets to the payment of mortgages without authority constitutes waste.—Matter of Schulz, 57 N.Y.S. 952, 26 Misc. 688.

99. N.Y.—In re Gentry's Estate, 249 N.Y.S. 296, 139 Misc. 759.

24 C.J. p 119 note 88.

Use of fallen timber

Ky.—McCracken v. McCracken, 6 T.B.Mon. 342.

Gift to second wife

Husband's gift to second wife of diamond given by him to deceased first wife was held improper dealing with assets of estate.—In re McNamara's Estate, 245 N.Y.S. 186, 138 Misc. 526.

1. Mass.—Dawes v. Boylston, 9 Mass. 337, 6 Am.D. 72.

2. Pa.—In re Grollman's Estate, 117 A. 348, 273 Pa. 559.

24 C.J. p 119 note 81.

Less than offered by others

Mo.—Johnson v. Johnson, 72 Mo.App. 386.

Permitting execution sale

Permitting property to be sold under execution for less than representative might have sold it for at previous time constitutes waste.—Dawes v. Winship, 5 Pick., Mass., 97 note.

3. Conn.—Foster v. Thomas, 21 Conn. 285.

4. Ind.—Krutz v. Stewart, 76 Ind. 9.

5. Cal.—Sanderson's Estate, 15 P. 753, 74 Cal. 199.

Mass.—Mitchel v. Lunt, 4 Mass. 654.

6. Mass.—Mitchel v. Lunt, supra.

7. Neb.—Patrick v. Patrick, 100 N.W. 939, 72 Neb. 454.

8. N.C.—Moye v. Albritton, 42 N.C. 62.

24 C.J. p 119 note 90.

9. Va.—Braxton v. Winslow, 4 Call 308, 8 Va. 308.

10. Miss.—Gay v. Lemle, 32 Miss. 309.

S.C.—Wulbern v. Timmons, 33 S.E. 568, 55 S.C. 456.

11. Ala.—Teague v. Corbitt, 57 Ala. 529, 539.

24 C.J. p 119 note 93.

12. Ala.—Whitfield v. Woolf, 51 Ala. 202.

24 C.J. p 119 note 98.

13. Ala.—Whitfield v. Woolf, 51 Ala. 202.

Pa.—Swearinger v. Pendleton, 4 Serg. & R. 389.

14. N.Y.—Matter of Feierabend, 77 N.Y.S. 1106, 38 Misc. 524.

15. Ark.—Walker v. Norton, 135 S.W.2d 315, 199 Ark. 593.

Removal of timber

Ark.—Walker v. Norton, supra.

24 C.J. p 119 note 77 [b].

Execution of trust

Under will giving in trust timber rights on designated property "as more fully appears" from deed of designated date, and giving son one fourth of proceeds of timber rights reserved to testator's common estate, executors of will were not responsible as matter of law to assignee of son's interest in timber rights for wrongful diversion of moneys received from testator's assignment of all timber rights prior to his death, which were paid to beneficiaries of trust named in will.—Citizens Bank of Marshall v. Gahagan, 196 S.E. 827, 213 N.C. 511.

Effect of subsequent events

(1) Executor, or administrator with the will annexed, who makes payment of a legacy, does not become guilty of a devastavit because subsequently probate of the will is revoked or the will is adjudged invalid.

Fla.—Le Baron v. Fauntleroy, 2 Fla. 276.

S.C.—Poag v. Carroll, 23 S.C.L. 1.

serve the interests of the estate, he will not be liable if his action does not result beneficially.[16] It has even been held that there can be no devastavit which will sustain an action against an administrator until he has violated an order of the probate court to pay creditors.[17] It has been held not necessarily to be waste that the representative paid interest on obligations of decedent, although he might have avoided such payment;[18] nor is it waste that he failed to put the estate funds out at interest, but kept them in a commercial bank,[19] that he accepted a salary from a corporation in which the estate was the majority stockholder,[20] or that he expended money in a reasonable effort to save property of his intestate situated in another state.[21] Where the administrator permitted a caretaker to use furniture belonging to decedent and the furniture was damaged in an amount less than the costs of properly caring for the furniture otherwise, there was no devastavit.[22]

Evidence. A devastavit will not be presumed,[23] but must be clearly established by the evidence.[24]

Rank of claims for waste. It has been held that a creditor holding a specialty debt due from an intestate and coming against the estate of his administrator, on account of a devastavit, can only take equally with such administrator's simple contract creditors, while his sureties must make up the balance.[25]

Restraining waste. A representative may be restrained from committing waste[26] or ruining the estate by collusion with pretended creditors,[27] provided, however, there is satisfactory proof of such actual misconduct or threatened misconduct as will render the property and estate in his hands in his charge and custody likely to suffer loss and be jeopardized by its further continuance under his control and management.[28]

§ 244. Conversion

An executor or administrator may be guilty of conversion where he uses the assets of the estate for himself, or has them transferred to himself, or otherwise uses or disposes of the property for an unauthorized purpose or in an unauthorized manner.

An executor or administrator may be guilty of conversion where he uses the assets of the estate for his individual purposes or has them transferred to himself as individual owner;[29] applies assets of the estate to the use of a firm of which he is a member,[30] or of a corporation in which he is inter-

(2) Where administrator of national bank's deceased stockholder distributed assets of estate in obedience to order of court having jurisdiction of estate, and without fraud, such distribution was held not devastavit creating personal liability on administrator's part for stockholders' assessment thereafter imposed when bank became insolvent. —Jack v. Forrest, C.C.A.Utah, 71 F.2d 264, certiorari granted Forrest v. Jack, 55 S.Ct. 95, 293 U.S. 542, 79 L.Ed. 647, reversed on other grounds 55 S.Ct. 370, 294 U.S. 158, 79 L.Ed. 829, 96 A.L.R. 1457, rehearing denied 55 S.Ct. 543, 294 U.S. 733, 79 L.Ed. 1262.

16. Ill.—In re Mertz's Estate, 241 Ill.App. 446.

17. U.S.—Tate v. Norton, Ark., 94 U.S. 746, 24 L.Ed. 222.
Ark.—Outlaw v. Yell, 5 Ark. 468.

18. Ky.—Beale v. Barnett, 64 S.W. 838, 23 Ky.L. 1118.
24 C.J. p 120 note 7.

19. N.Y.—In re Chamberlain's Estate, 293 N.Y.S. 253, 161 Misc. 880.

20. N.Y.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

Volume of business

Payment of annual salaries of about five thousand dollars to executors as officers of corporation in which estate owned majority of stock was held not misuse or spoliation and waste of corporate property diminishing value of stock, in view of volume of business transacted.—In re Gerbereux' Will, supra.

21. Pa.—Shinn's Estate, 30 A. 1026, 1030, 166 Pa. 121, 45 Am.S.R. 656.

22. Mont.—In re Williams' Estate, 173 P. 790, 55 Mont. 63.

23. Ala.—Garrow v. Toxey, 54 So. 556, 171 Ala. 644.

24. Ga.—Weaver v. McCullar, 105 S. E. 476, 150 Ga. 820.

Failure to show purpose of checks

Issued is not of itself evidence of waste.—Weaver v. McCullar, supra.

Mere suggestion of devastavit

In an action of debt against an executor merely suggesting a devastavit, the executor is not to be held personally liable, as a devastavit can only be established by establishing the debt against the estate by matter of record, and showing assets admitted by defendant's plea, confession, or default, or found by the verdict of a jury, against a plea of plene administravit generally, and that defendant has wasted such assets.—Ford v. Rouse, 24 S.C.L. 219.

Evidence held not to sustain claim

that diamonds had been given to administratrix as gift.—In re Brodezky's Estate, 224 N.Y.S. 282, 130 Misc. 297.

25. N.Y.—Carow v. Mowatt, 2 Edw. 57.

26. N.J.—Bentley v. Bentley, Ch., 38 A. 286.
24 C.J. p 120 note 26.

27. La.—Overton v. Overton, 10 La. 472.

28. Pa.—Laferty's Estate, 15 Pa.Co. 300, 35 Wkly.N.C. 132.

29. N.Y.—Schneider v. American Telephone & Telegraph Co., 9 N.Y.S. 2d 564, 169 Misc. 939.

Payment of debt

It is conversion for representative to pay his own debt by check signed with name of estate and coexecutor. —Squire v. Ordemann, 87 N.E. 435, 194 N.Y. 394.

Collateral for loan

Representative using property of estate as collateral for loan made by him personally is guilty of conversion.
Mass.—Tingley v. North Middlesex Sav. Bank, 165 N.E. 119, 266 Mass. 337.
N.Y.—In re Balcone's Estate, 260 N. Y.S. 547, 145 Misc. 499.

Corporate stock

Executor or administrator may be guilty of conversion where he has corporate stock belonging to decedent assigned to himself personally and for his own benefit.
Mass.—Holland v. Ball, 78 N.E. 772, 193 Mass. 80.
N.C.—Whitley v. Alexander, 78 N.C. 444.

30. Ga.—Bellah v. Cleghorn, 141 S. E. 311, 165 Ga. 494.
Md.—Miller v. Williamson, 5 Md. 219.

ested;[31] uses the property of the estate for an unauthorized purpose or in an unauthorized manner;[32] sells or disposes of property of the estate without authority;[33] sells property of decedent and purchases it himself;[34] withdraws money which had been deposited in bank to the credit of decedent for a specific purpose, but which decedent had refused to accept;[35] or refuses to allow a domestic servant, to whom the testator has orally given certain articles of personal property, causa mortis, to remove them from the house of the testator.[36] The formation of a corporation by the representative out of a partnership of which decedent was a partner has been held to amount to a conversion of the estate's partnership interest.[37]

On the other hand, particular acts of a representative have been held not to constitute conversion,[38] such as merely asserting ownership of assets rightfully in his possession, although the claim is erroneous;[39] retaining possession of property, in the absence of a demand therefor,[40] unless it is manifest that a demand would have been useless;[41] taking securities in his own name for debts due the estate, where he had no fraudulent intent;[42] using property of the estate where he married decedent's widow and there are infant children of her former marriage;[43] or failing to pay a debt due by him to the estate, which is charged against him in his accounts.[44] Since one having a half interest in notes distributed to heirs under an order of distribution became a tenant in common with the distributees, the mere act of the administrator in turning over the notes to them was not a conversion thereof.[45]

§ 245. Mingling Trust and Personal Funds or Property

In general, an executor or administrator is personally liable for property of the estate which he has mingled with his own or other property so as to render the properties indistinguishable.

An executor or administrator should preserve the funds and property of decedent's estate distinct from his own so that such assets may be known and readily identified;[46] and, if he mingles the trust prop-

31. Loan

Loan of funds to corporation of which executor was secretary was conversion, for which those knowingly participating were liable; and making and indorsing notes covering such funds did not affect obligation to refund such moneys, nor did failure to give indorsers on note notice of dishonor or nonpayment release liability therefor.—First Nat. Bank v. Selmser Fuel & Grain Co., 227 N. W. 62, 55 S.D. 586.

32. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.

Investment contrary to will

Ala.—Amos v. Toolen, supra.

Gratuitous bailment of chattel belonging to estate.—Lawson v. Lay, 24 Ala. 184.

Collecting securities and reinvesting

Where testatrix bequeathed to testamentary trustees personal estate, consisting of bonds and mortgages, which was not necessary to pay debts, the act of the executor in collecting such securities and reinvesting the funds constituted a conversion, and rendered him liable to account for the value of the original assets to the trustees in cash.—Matter of Ryer, 88 N.Y.S. 52, 94 App. Div. 449, affirmed 72 N.E. 1150, 180 N.Y. 532.

Permitting unauthorized use

Administrator's refusal to sell personalty of husband's estate, and permitting use thereof in operation of deceased husband's farm, constituted conversion rendering estate liable to wife for property converted.—Meyers' Adm'r v. Meyers, 50 S.W.2d 81, 244 Ky. 248.

33. Ohio.—In re Howison's Estate, 197 N.E. 333, 49 Ohio App. 421. 24 C.J. p 121 note 31.

Use and sale of automobile

Administrator, who took estate's automobile and used it partly in his private business, and sold it without court order, was chargeable with full purchase price.—In re Laberee's Estate, 269 P. 861, 126 Or. 301.

34. N.C.—Carraway v. Burbank, 12 N.C. 306.

35. Minn.—Reynolds v. St. Paul Trust Co., 53 N.W. 457, 51 Minn. 236.

36. Mass.—Scollard v. Brooks, 49 N. E. 741, 170 Mass. 445.

37. Mich.—Heap v. Heap, 242 N.W. 252, 258 Mich. 250.

By neglect or participation

Administrators causing loss of partnership interest by neglect and active participation in converting partnership into corporation were accountable therefor.—Heap v. Heap, supra.

38. Appropriation of good will

One cannot be surcharged for appropriation of good will of business where business is shown to be one to which good will does not attach. —In re Bandler's Estate, 15 N.Y.S. 2d 307, 172 Misc. 433.

Payment of funeral expenses

A husband's use of property of his wife's estate, before his appointment as her administrator, to pay reasonable funeral expenses for deceased was held not alienation or embezzlement.—In re Wagner's Estate, 62 P.2d 1186, 178 Okl. 384.

Temporary use of property

A representative taking property of the estate into his possession and using it in connection with his own property without an order of court, for part of the time, and declaring that he intended to continue such use until decedent's debts should be paid, when he would give the entire estate to decedent's widow and child, was held not to constitute conversion.—Morgan v. Nelson, 43 Ala. 586.

Permitting widow to retain possession

Executors cannot be held guilty of conversion of household goods in testator's possession because they made inventory and permitted surviving widow to retain possession.—Welch v. Diehl's Estate, Mo.App., 278 S.W. 1057.

39. Ga.—Smith v. Rosser, 37 Ga. 353.

N.Y.—Matter of Niles, 126 N.Y.S. 1066, 142 App.Div. 198.

40. Mich.—Patchel v. Thompson's Estate, 193 N.W. 852, 223 Mich. 361.

41. Mich.—Patchel v. Thompson's Estate, supra.

42. N.C.—Syme v. Badger, 92 N.C. 706.

43. Ala.—Montgomery Branch Bank v. Wade, 13 Ala. 427.

44. N.C.—Culbreth v. Smith, 32 S. E. 714, 124 N.C. 289.

45. Mo.—Deweese v. Yost, 143 S.W. 72, 161 Mo.App. 10.

46. Md.—Harford Bank of Bel Air v. Hopper's Estate, 131 A. 751, 169 Md. 314.

erty with his own or with other property, so that the two are indistinguishable, he becomes personally liable;[47] and it has been held that beneficiaries may at their option elect to hold him accountable as for conversion in doing so.[48] While, in case of loss, the representative is liable without regard to the question whether the loss itself was caused by any fault of his,[49] there is an inclination to respect innocent motive and the absence of intent or opportunity to make an individual profit, where due prudence was exercised under all the circumstances, so as to relieve the representative in such case from strict liability as though for conversion;[50] and it has even been held that mere commingling does not make a representative guilty of misconduct, where he never used any of the funds for his own purpose, and accounted for all of them.[51] Where an executor sells, for a gross sum, goods of which a part belong to him and a part to the estate, money paid to him on account of such sale will be presumed to have been paid on account of the property belonging to the estate.[52]

§ 246. Discharge from Liability

The distribution of the estate does not relieve the representative from liability for a devastavit; but consent to, or concurrence in, a representative's act precludes one from charging it to be a devastavit.

The fact that a representative has distributed the estate of decedent does not relieve him from liability to a creditor who sues him for a devastavit within the period fixed by statute.[53] One who consents to, or concurs in, an act done by a representative cannot charge such act to be a devastavit;[54] but the assent of the guardian ad litem of an infant legatee or distributee will not discharge the representative from liability.[55]

An administratrix who allows her husband to receive and convert to his own use the funds of an infant next of kin is not discharged from liability therefor on the subsequent appointment of the husband as guardian of such infant, but is equally liable with such guardian.[56]

I. LOSS OR DEPRECIATION OF ASSETS

§ 247. Liability and Extent Thereof in General

Executors and administrators are chargeable with the loss or depreciation of the assets of the estate only when such loss has been caused by their bad faith or lack of due diligence or prudence.

Executors and administrators are not insurers, nor will they be chargeable with the loss or depreciation of the assets where they have acted in good faith and with due prudence and diligence in the care and management of the estate,[57] but they are liable for losses which are the consequence of bad

Wash.—In re Snyder's Estate, 209 P. 1074, 122 Wash. 65.
24 C.J. p 121 note 47.

Statutory prohibition

(1) Statutory prohibition against mingling of estate funds is rule of conduct intended to prevent diversion or fraud, which executors are bound to obey and which cannot be weakened or nullified by judicial interpretation.—In re Grossman's Estate, 283 N.Y.S. 323, 157 Misc. 164, affirmed In re Fribourg, 294 N.Y.S. 942, 250 App.Div. 503.

(2) Under statute requiring fiduciaries to keep funds of decedents' estates separate, executors were unauthorized to carry securities of estate in name or custody of a copartnership organized to handle securities possessed by corporate executor in its fiduciary capacity, notwithstanding testatrix' will authorized executors to carry securities in name of executors' nominee.—In re Harris' Estate, 9 N.Y.S.2d 508, 169 Misc. 943.

(3) That executors, who carried securities of estate of decedent in name or custody of copartnership organized to handle securities possessed by corporate executor in its fiduciary capacity, acted in good faith did not authorize the executors' departure from provision of statute requiring funds of decedents' estates to be kept separate by fiduciaries.—In re Harris' Estate, supra.

47. Ala.—Boutwell v. Drinkard, 160 So. 349, 230 Ala. 212.
N.Y.—In re Ferrara's Estate, 260 N.Y.S. 758, 145 Misc. 705.
24 C.J. p 121 note 48.

Effect on personal funds

(1) Administrator having commingled his funds with those of decedent in her existing personal savings account voluntarily impressed his funds with character possessed by moneys already in account.—In re Gentry's Estate, 249 N.Y.S. 296, 139 Misc. 759.

(2) However, it has also been held that doctrine of confusion of goods does not apply so as to cause the representative to forfeit his own property in cases of mingling.—Matter of Mullon, 26 N.Y.S. 683, 74 Hun 358, affirmed 39 N.E. 821, 145 N.Y. 98.

48. Ala.—Henderson v. Henderson, 58 Ala. 582.
24 C.J. p 122 note 49.

49. Neb.—In re Boschulte's Estate, 264 N.W. 881, 130 Neb. 284.
24 C.J. p 122 note 51.

50. N.C.—Whitley v. Alexander, 73 N.C. 444.
24 C.J. p 122 note 50.

51. Wash.—In re Snyder's Estate, 209 P. 1074, 122 Wash. 65.

52. S.C.—Rolain v. Darby, 6 S.C.Eq. 472.

53. Ky.—Herpending v. Daniels, 11 Ky.L. 858.

54. Ga.—Lane v. Tarver, 113 S.E. 452, 153 Ga. 570.
24 C.J. p 120 note 23.

55. Cal.—In re Kennedy, 52 P. 820, 120 Cal. 458.

56. N.Y.—Altman v. Wile, 19 N.Y.S. 500, affirmed 36 N.E. 228, 141 N.Y. 574.

57. U.S.—Ross v. Beacham, D.C.S.C., 33 F.Supp. 8.
Del.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Iowa.—In re Olson's Estate, 219 N.W. 401, 206 Iowa 706.
Ky.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793—Stuber v. Snyder's Committee, 87 S.W.2d 614, 261 Ky. 338—Citizens' Nat.

faith or of the want of due prudence and diligence.[58] Wherever an executor or administrator becomes chargeable, under statute or otherwise, with the entire estate of decedent, these rules apply with respect to real estate.[59]

In avoiding loss or depreciation of assets, the executor or administrator must measure up to a common standard of prudence and proper diligence,[60] exercising that degree of care and discretion which an intelligent person of ordinary judgment would observe in the management of his own affairs;[61] but he is not liable for losses incurred through mere errors of judgment,[62] especially where he is relieved of such liability by a provision in the will.[63]

The circumstances of each case must be considered in determining whether the representative has

Bank v. Brewer, 69 S.W.2d 745, 253 Ky. 630.
La.—Succession of Benoit, 199 So. 625, 196 La. 509.
Mo.—Mississippi Valley Trust Co. v. Taylor, 238 S.W. 558.
Mont.—Montgomery v. Gilbert, 108 P. 2d 616, 111 Mont. 250—In re Astibia's Estate, 46 P.2d 712, 100 Mont. 224—In re Mullen's Estate, 33 P.2d 270, 272, 97 Mont. 144, quoting **Corpus Juris**—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
Nev.—Bengoa v. Reinhart, 297 P. 506, 53 Nev. 241—In re Pedroli's Estate, 221 P. 244, 47 Nev. 322.
N.Y.—In re Witkind's Estate, 4 N.Y. S.2d 933, 167 Misc. 885—In re Strasenburgh's Estate, 300 N.Y.S. 1016, 164 Misc. 445—In re Brown's Estate, 258 N.Y.S. 789, 144 Misc. 48—In re Peek's Will, 227 N.Y.S. 682, 131 Misc. 495—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684—In re Ledyard's Estate, 21 N.Y.S 2d 860, affirmed In re Ledyard's Will, 20 N.Y.S.2d 1006, 259 App.Div. 892, reargument denied 21 N.Y.S.2d 390, 259 App.Div. 1029, and 24 N.Y.S.2d 780, 261 App.Div. 827—In re Easton's Estate, 13 N.Y.S.2d 295.
Okl.—In re Horseman's Estate, 29 P. 2d 589, 167 Okl. 355.
Or.—In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46—Shafford v. Reed, 247 P. 324, 119 Or. 90.
Pa.—In re Jenks' Estate, 19 Pa.Dist. & Co. 479.
Tenn.—State ex rel. Franklin v. Sullivan, 138 S.W.2d 435, 176 Tenn. 107, 127 A.L.R. 1067.
Va.—Buckle v. Marshall, 10 S.E.2d 506, 176 Va. 139.
Wash.—In re McDonald's Estate, 188 P. 523, 110 Wash. 366.
Wis.—In re Langenbach's Estate, 230 N.W. 141, 201 Wis. 336.
24 C.J. p 123 note 66.

58. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.
Alaska.—In re Underwood's Estate, 6 Alaska 673.
Cal.—In re Rindge's Estate, 28 P.2d 705, 136 Cal.App. 263, motion denied 34 P.2d 179, 139 Cal.App. 454—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.
Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Kan.—In re Park's Estate, 99 P.2d 849, 151 Kan. 447.
Ky.—Taylor v. Taylor's Ex'r, 112 S.W.2d 399, 271 Ky. 509—Stuber v. Snyder's Committee, 87 S.W.2d 614, 261 Ky. 338—Carpenter's Adm'r v. Demoisey, 36 S.W.2d 27, 237 Ky. 628.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
Mont.—In re Connolly's Estate, 257 P. 418, 423, 79 Mont. 445, quoting **Corpus Juris**—In re Jennings' Estate, 241 P. 648, 74 Mont. 449—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
Nev.—In re Pedroli's Estate, 221 P. 244, 47 Nev. 322.
N.J.—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329—In re Eckert's Estate, 117 A. 40, 93 N.J.Eq. 598.
N.Y.—In re Auditore's Will, 164 N.E. 242, 249 N.Y. 335, 62 A.L.R. 551, modifying In re Auditore's Adm'x, 229 N.Y.S. 414, 223 App.Div. 654, and motion denied Parascandola v. National Surety Co., 166 N.E. 315, 250 N.Y. 537, 62 A.L.R. 551—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423—In re Witkind's Estate, 4 N.Y.S 2d 933, 167 Misc. 885—In re Disbrow's Estate, 261 N.Y.S. 635, 145 Misc. 584.
Okl.—In re Horseman's Estate, 29 P. 2d 589, 167 Okl. 355.
Pa.—In re Long's Estate, 17 A.2d 686, 143 Pa.Super. 176—In re Istocin's Estate, 190 A. 382, 126 Pa. Super. 158—In re Mellier's Estate, 18 Pa.Dist. & Co. 595, affirmed 167 A. 358, 312 Pa. 157, 92 A.L.R. 430—In re Bernhard's Estate, 17 Lehigh Co.Leg.J. 310—In re Waelly's Trust Fund, 85 Pittsb.Leg.J. 702.
24 C.J. p 124 note 67.

Negligent failure to act may charge the personal representative with liability, since his duty is active, and not passive.—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684—24 C.J. p 125 note 69.

Justification for wrongful conduct

Administrator whose wrongful conduct causes loss to estate cannot justify failure to proceed as required by law and court's order by asserting that he acted in good faith and in manner which he thought was for best interest of estate.—In re Astibia's Estate, 46 P.2d 712, 100 Mont. 224.

No loss shown as resulting from conduct of representative.
Ark.—England Loan Co. v. Campbell, 35 S.W.2d 75, 1006, 183 Ark. 49.
Cal.—In re Kent's Estate, 57 P.2d 901, 6 Cal.2d 154.
Ind.—Security Trust Co. v. Jaqua, 150 N.E. 418, 85 Ind App. 234, rehearing denied 152 N.E. 298, 85 Ind. App. 234.
N.Y.—In re Pinney's Estate, 294 N.Y.S. 29, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, and affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

Corporate executor may be held liable for loss suffered.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

59. Cal.—Wheeler v. Bolton, 28 P. 558, 92 Cal. 159.
24 C.J. p 125 note 71.

Absence of fraud or bad faith

Objections to accounts of executors, on the ground that realty was not sold when it should have been, was properly dismissed, in the absence of any allegation or evidence of bad faith, fraud, embezzlement, or fraudulent transaction, on their part.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

60. N.Y.—In re Drake's Estate, 274 N.Y.S. 198, 152 Misc. 395.

61. Del.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
N.Y.—In re Moore's Estate, 8 N.Y.S. 2d 268.
Or.—In re Mannix' Estate, 29 P.2d 364, 146 Or. 187.

62. N.J.—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566.
N.Y.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461—In re Peek's Will, 227 N.Y.S. 682, 131 Misc. 495.
Or.—In re McDermid's Estate, 222 P. 295, 109 Or. 633.
Pa.—In re Nemon's Estate, 152 A. 555, 301 Pa. 425.

63. N.Y.—In re Brown, 150 N.E. 581, 242 N.Y. 1, 44 A.L.R. 510, reversing In re Brown's Will, 208 N.Y.S. 359, 211 App.Div. 662, affirming 209 N.Y.S. 237, 124 Misc. 473.

acted in good faith and with such prudence and diligence as to relieve him from liability for loss,[64] and it has been held that such a determination must be made by the probate court.[65]

In case funds of the estate become worthless through depreciation of the legal currency, the usual standard of good faith and due diligence should apply;[66] but an executrix is not subject to surcharge for losses incurred as life tenant.[67]

An executor or administrator is prima facie liable only for such assets as come into his possession,[68] and only to those to whom he owes a duty,[69] but he may be charged with the value of property lost through his negligence, although he never had possession of it;[70] and an administrator may be held accountable to the estate for assets wasted or lost through his acts from the time of decedent's death to the time of the issuance of letters.[71]

Extent of liability. The liability of an executor or administrator for the loss of assets is measured by the detriment sustained by the estate,[72] which is the value of the property at the date of the loss.[73] Accordingly, where an executor has been held personally liable for losses from his investments of trust funds on insufficient security, and he has obtained for the estate title to the property taken as security, the legatees must quitclaim to him their claim to such property as a condition precedent to his paying the losses.[74]

§ 248. Cause of Loss or Depreciation

a. In general
b. Failure to sell or delay in selling

a. In General

A personal representative who acts in good faith and with due care is not, as a general rule, personally liable for loss occasioned to the estate by theft, war, fire, or other casualty, or by the misconduct or negligence of his agents or servants.

The effect of war or public authority exercised de facto is that of vis major, and a personal representative who exercises good faith and such due care and diligence as the circumstances exact should not be charged personally for a loss to the estate thereby occasioned.[75] He is not liable for the destruction of property of the estate by fire or other casualty if he took such precautions to avoid it as a prudent man would take in regard to his own property;[76] and he is not generally responsible for the loss resulting from the stealing of property or funds of the estate,[77] unless the theft is attributable to his own negligence.[78]

While the representative has been held liable for loss resulting from the negligence or fault of agents or servants employed by him,[79] and there can be no doubt of such liability where there was concurrent negligence or fault on the part of the representative,[80] the generally accepted view is that the necessity of employing agents or attorneys in the collection of assets involves the risk of loss to the estate by their misconduct, negligence, or nonfeasance,

64. N.Y.—In re Chaves' Estate, 257 N.Y.S. 641, 143 Misc. 868, affirmed 265 N.Y.S. 932, 239 App.Div. 900.
23 C.J. p 124 note 68.

65. N.H.—Dennison v. Lilley, 144 A. 523, 83 N.H. 422.

66. Cal.—Sanderson's Estate, 15 P. 753, 74 Cal. 199.
24 C.J. p 125 note 74.

67. N.Y.—Matter of Miller, 119 N.Y.S. 52, 64 Misc. 232, modified on other grounds 122 N.Y.S. 1136, 138 App.Div. 885.

68. Cal.—Wheeler v. Bolton, 28 P. 558, 92 Cal. 159.
N.J.—Kick v. McCauley, 178 A. 637, 118 N.J.Eq. 252.

69. Cal.—Hurlbert v. Title Insurance & Trust Co., 186 P. 142, 181 Cal. 692.

70. N.H.—Tuttle v. Robinson, 33 N.H. 104.
Liability for failure to collect assets generally see supra § 183.

71. N.Y.—In re McGovern, 118 N.Y.S. 378.

72. N.Y.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.
Pa.—In re Reilly's Estate, 77 Pa. Super. 178—In re Curran's Estate, 18 Pa.Dist. & Co. 103.
Where credit has been allowed for any loss or authorized deduction, the personal representative is not liable to turn over any amounts for which he is entitled to credit.—In re Connolly's Estate, 235 P. 408, 73 Mont. 35.
Loss of corporate assets
Executors are surcharged for losses of corporate assets in which they were gainers to the amount of the difference between value of corporation's stock before and after loss.—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

73. Cal.—Wheeler v. Bolton, 28 P. 558, 92 Cal. 159.

74. Or.—In re Roach, 92 P. 113, 50 Or. 179.

75. Va.—Newton v. Bushong, 22 Gratt. 628, 63 Va. 628, 12 Am.R. 553.
24 C.J. p 125 note 75.

76. Tenn.—Montgomery v. Coldwell, 14 Lea 29.

77. Mo.—State v. Powell, 67 Mo. 395, 29 Am.R. 512.
24 C.J. p 125 note 78.
Notes collectible as lost instruments
An administrator is not, however, entitled to a credit for nonnegotiable notes belonging to the estate which have been destroyed or stolen, for they may still be sued on and collected as lost instruments.—Williams v. Cubage, 36 Ark. 307.

78. Wis.—Black v. Hurlbut, 40 N.W. 673, 73 Wis. 126.
24 C.J. p 125 note 79.

79. N.Y.—In re Beer, 124 N.Y.S. 423.
24 C.J. p 126 note 82.

80. Cal.—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.
24 C.J. p 126 note 83.
Negligent surrender of control to attorney
An executor, negligently surrendering entire control and management of estate to attorney, who converted portion of assets thereof, was responsible for resulting loss, so as to authorize recovery of amount thereof from his estate after his death.—In re Remsen, 7 N.Y.S.2d 350, 255 App.Div. 810, reargument denied 8 N.Y.S.2d 998, 255 App.Div. 974.

and if a loss be sustained from such cause the executor or administrator is not liable if he exercised due prudence in the selection of the agent or attorney and his conduct was not otherwise negligent or improper.[81] There is authority that, when an executor enters into any arrangement with the surety on his bond which surrenders or limits his control over trust funds, he is guarantor of the funds irrespective of his motives, or of whether his surrender of control was the cause of the loss.[82]

Failure to deposit or safeguard. The representative should be held liable for a loss caused by his failure to deposit or safeguard funds or property, as by failure to insure, where he has been lacking in good faith or ordinary prudence, but not otherwise.[83]

b. Failure to Sell or Delay in Selling

(1) In general
(2) Securities

(1) In General

A representative who retains property or assets of the estate instead of selling is not liable for loss or depreciation occurring during such retention, if he acted properly and prudently.

A personal representative who retains property or assets of the estate instead of selling it or them is not, if he acted properly and prudently in so doing, liable for loss or depreciation in value which takes place while such property is retained;[84] but it is otherwise where he acted imprudently or improperly, or exceeded his powers in retaining such property.[85] It has been held that a more liberal view of a representative's discretion in converting decedent's assets into cash will be taken as regards legatees than as regards creditors,[86] and that a representative who has acted in good faith and, by retaining certain assets of the estate, has realized large profits and eventually disposed of a portion for more than the inventoried value of the whole, will not be charged with losses on another portion because of a technical violation of his duty in not disposing of them.[87]

Loss in consequence of the death of live stock in the hands of an executor or administrator, resulting from natural causes, is not chargeable to him, where there was no dereliction of duty on his part in retaining possession of them until they died, instead of selling them.[88] The same rule has been applied to slaves.[89]

(2) Securities

A personal representative is not liable for a depreciation in the value of securities which occurs while they are being retained by him after they could have been sold, unless such retention was in violation of a duty to sell because of their speculative or nonlegal nature, or was, under the particular circumstances, negligent or imprudent.

A personal representative is liable for losses incurred by his refusal or negligent failure to sell securities which are declining in value or which,

81. Cal.—In re Barreiro's Estate, 14 P.2d 786, 794, 125 Cal.App. 752, citing **Corpus Juris.**
N.Y.—In re Smith's Estate, 266 N.Y.S. 666, 148 Misc. 585, affirmed 282 N.Y.S. 845, 246 App.Div. 563.
Pa.—In re O'Reilly's Estate, 11 Pa. Dist. & Co. 549.
24 C.J. p 126 note 84.

Counsel recommended by deceased
Pa.—In re Bender's Estate, 122 A. 283, 278 Pa. 199.
24 C.J. p 126 note 84 [c].

82. Ala.—Law v. Bush, 195 So. 885, 239 Ala. 612.

83. Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 Am.D. 324.
N.H.—Stevens v. Gage, 55 N.H. 175, 20 Am.R. 191.
24 C.J. p 126 note 85.

84. Pa.—In re Jenks' Estate, 19 Pa. Dist. & Co. 479.
24 C.J. p 126 note 86.

Effect of duty to pay debts
"The duty of an executor to pay the testator's debts does not mean that he must sell against his best judgment, nor within . . . any . . . set time."—In re Strasenburgh's Estate, 300 N.Y.S. 1016, 1022, 164 Misc. 445.

Business rendered worthless by legislation
An executor cannot be held liable for loss by reason of depreciation in value of a liquor business which he failed to sell, where it appears that he had acted in good faith and on advice of counsel in trying to realize the highest possible price, and that before he could sell federal legislation rendered the business worthless.—In re Murnaghan's Estate, 107 A. 886, 264 Pa. 520, followed in 107 A. 888, 264 Pa. 523.

Where will gives executor discretion as to the time of sale, and he acts in good faith, he is not chargeable with loss resulting from selling at the time when he did, whether his judgment that such sale could then be made without a sacrifice was or was not reasonable.
Pa.—Harrah's Estate, 15 Pa.Dist. 930.
Va.—Staples v. Staples, 24 Gratt. 225, 65 Va. 225.

85. Pa.—In re Curran's Estate, 18 Pa. Dist. & Co. 103.
24 C.J. p 127 note 87.

Value of stock exchange membership
The basis on which to compute the surcharge of executors for wrongful failure to sell a stock exchange membership within the period of time allowed is the selling price of the membership on the last day of such period.—In re Pinney's Estate, 282 N.Y.S. 680, 156 Misc. 844, reversed on other grounds 294 N.Y.S. 29, 250 App. Div. 60, affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.

Ownership not acquired
Under Georgia law, an executor, even if bound to sell realty devised to testator's grandchildren at any particular time, and even if liable for loss because of want of diligence in effecting sale, did not thereby become owner of land so as to be liable for its value to grandchild of testator.—Robinson v. Georgia Sav. Bank & Trust Co., C.C.A.Ga., 106 F.2d 944.

86. Pa.—Coggin's Appeal, 3 Walk. 426.

87. N.Y.—Matter of Porter, 25 N.Y.S. 822, 5 Misc. 274.

88. N.D.—Hoffman v. Ness, 300 N.W. 428.
24 C.J. p 125 note 80.

89. Ala.—Morgan v. Nelson, 43 Ala. 586.
S.C.—Henry v. Graham, 30 S.C.Eq. 346.

because of their speculative nature, are not proper fiduciary investments,[90] and where there is a duty to sell securities, persons interested in the estate need not demand a sale thereof,[91] since they have a right to assume that the executors are acting legally.[92] In determining the necessity of selling securities, the personal representative is bound by a standard of reasonable care and discreet action,[93] but he need not exhibit greater wisdom and prescience than that shown by reasonable men in the administration of their own affairs;[94] and if his failure to sell or delay in selling was not negligent or imprudent or a violation of his duty, he is not liable for losses thereby incurred.[95]

90. Ill.—In re Busby's Estate, 6 N.E. 2d 451, 288 Ill.App. 500.

N.J.—In re Westfield Trust Co., 172 A. 212, 115 N.J.Eq. 611, reversed on other grounds 176 A. 101, 117 N.J. Eq. 429—People's Nat. Bank & Trust Co. of Pemberton v. Bichler, 172 A. 207, 115 N.J.Eq. 617.

N.Y.—Stark v. National City Bank of New York, 16 N.E.2d 376, 278 N.Y. 386, 123 A.L.R. 99, reversing 1 N.Y.S.2d 738, 253 App.Div. 801, motion granted 3 N.Y.S.2d 898, 254 App.Div. 556, modifying 291 N.Y. S. 884, 161 Misc. 51—In re McIlwaine's Estate, 8 N.Y.S.2d 1, 255 App.Div. 978, affirmed 9 N.Y.S.2d 583, 256 App.Div. 819, affirmed 21 N.E.2d 615, 280 N.Y. 775, reargument denied 22 N.E.2d. 763, 281 N.Y. 668—In re Frame's Estate, 284 N.Y.S. 153, 245 App.Div. 675—In re Junkersfeld's Estate, 279 N.Y.S. 481, 244 App.Div. 260, reversing 269 N.Y.S. 514, 150 Misc. 436, appeal dismissed 272 N.Y.S. 919, 242 App.Div. 708, and motion denied 291 N.Y.S. 159, 248 App.Div. 886—In re Stumpp's Estate, 274 N.Y.S. 466, 153 Misc. 92—In re Drake's Estate, 274 N.Y.S. 198, 152 Misc. 395—In re McKee's Estate, 265 N.Y. S. 47, 147 Misc. 889—In re Booth's Estate, 264 N.Y.S. 773, 147 Misc. 353.

Pa.—In re Stirling's Estate, 21 A.2d 72, 342 Pa. 497—In re Shipley's Estate, 12 A.2d 343, 337 Pa. 571—In re Mellier's Estate, 167 A. 358, 312 Pa. 157, 92 A.L.R. 430, affirming 18 Pa.Dist. & Co. 595.

S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.

Duties and liabilities with respect to investments see supra § 206.

Duty to sell personalty see infra § 308.

Duty toward general and residuary legatees

Executors owe same measure of duty to general and residuary legatees, and, in selling securities of estate, should pursue middle course between immediate sale in depressed market for benefit of general legatees and delayed sale for benefit of residuary legatees.—In re Andrews' Estate, 265 N.Y.S. 386, 239 App.Div. 32.

Direction to sell within stated period

Will directing executors to sell stocks of deceased within a stated period after his death imposed imperative obligation to sell by end of such period, where stocks had ready market.—In re Schinasi's Estate, 274 N. Y.S. 480, 153 Misc. 114.

Inability to settle estate

That certain claims against estate had not been ascertained and that estate could not have been settled did not prevent surcharging executors with losses for failure promptly to sell speculative securities.—In re Stumpp's Estate, 274 N.Y.S. 466, 153 Misc. 92.

Worthless securities should not be sold by a personal representative, and public policy requires that estates owning such securities should bear the loss.—In re Carmody's Estate, 235 N.Y.S. 78, 134 Misc. 11.

91. S.C.—Beacham v. Ross, 2 S.E. 2d 690, 190 S.C. 219.

Duty to protest

Even if attorney for beneficiaries knew that executors were wrongfully retaining nonlegal securities, attorney was not under duty to protest against further retention, as respects right to surcharge executors for failure to dispose of nonlegal securities within a reasonable time.—In re Frame's Estate, 284 N.Y.S. 153, 245 App.Div. 675.

Where primary distributee demands sale of securities while secondary distributees insist that securities be retained in hope of rising market, administrator should offer securities to secondary distributees at sum sufficient to meet primary distributee's claim.—In re Mellier's Estate, 167 A. 358, 312 Pa. 157, 92 A.L.R. 430.

92. N.Y.—In re Frame's Estate, 284 N.Y.S. 153, 245 App.Div. 675.

93. N.Y.—In re McKee's Estate, 265 N.Y.S. 47, 147 Misc. 889—In re Easton's Estate, 13 N.Y.S.2d 295.

94. N.Y.—In re Andrews' Estate, 265 N.Y.S. 386, 239 App.Div. 32—In re McKee's Estate, 265 N.Y.S. 47, 147 Misc. 889—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N.Y.S. 976, 246 App.Div. 604.

Court must view situation prospectively, that is, as it existed at the time the executors had to make their decision, in determining whether executors were negligent in postponing sale of securities.—In re Andrews' Estate, 265 N.Y.S. 386, 239 App.Div. 32—In re Baldwin's Will, 284 N.Y.S. 754, 157 Misc. 692, affirmed 295 N.Y.S. 480, 250 App.Div. 767.

Under statute requiring the court, on application of the executor, to direct the sale of such portion of the personal effects of decedent as are of a perishable nature, or which from any cause would otherwise be "likely to depreciate in value," an executor is not bound, under penalty of personal liability for loss resulting from his failure so to do, to procure a sale of property such as stocks subject to fluctuations in market value and which may or may not depreciate according to such fluctuations, but is only bound to exercise reasonable business prudence in the matter.—In re Fisher, 104 N.W. 1023, 128 Iowa 626.

95. Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.

Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

N.J.—In re Opitz' Estate, 17 A.2d 271, 128 N.J.Eq. 487—In re Westfield Trust Co., 176 A. 101, 117 N.J.Eq. 429, reversing 172 A. 212, 115 N.J. Eq. 611—In re Megargee's Estate, 175 A. 808, 117 N.J.Eq. 347—People's Nat. Bank & Trust Co. of Pemberton v. Bichler, 172 A. 207, 115 N.J.Eq. 617—In re Pettigrew's Estate, 171 A. 152, 115 N.J.Eq. 401, affirmed 174 A. 478, 116 N.J.Eq. 566.

N.Y.—In re Cuddeback's Estate, 6 N. Y.S.2d 493, 168 Misc. 698—In re Baldwin's Will, 284 N.Y.S. 754, 157 Misc. 692, affirmed 295 N.Y.S. 480, 250 App.Div. 767—In re Yund's Estate, 274 N.Y.S. 831, 152 Misc. 785—In re Frame's Estate, 274 N.Y.S. 420, 152 Misc. 475—In re McKee's Estate, 265 N.Y.S. 47, 147 Misc. 889—In re Booth's Estate, 264 N.Y. S. 773, 147 Misc. 353—In re Beadleston's Estate, 262 N.Y.S. 507, 146 Misc. 548—In re Chaves' Estate, 257 N.Y.S. 641, 143 Misc. 868, affirmed 265 N.Y.S. 932, 239 App. Div. 900—In re Winburn's Will, 249 N.Y.S. 758, 140 Misc. 18.

Or.—In re Steeby's Estate, 20 P.2d 1080, 143 Or. 501.

Pa.—In re Gardner's Estate, 185 A. 804, 323 Pa. 229—In re Curran's Estate, 167 A. 597, 312 Pa. 416—In re Brown's Estate, 135 A. 112, 287 Pa. 499—In re Hughes' Estate, 87 Pittsb.Leg.J. 1—In re Greenawalt's Estate, 48 Dauph.Co. 222, affirmed 21 A.2d 890, 343 Pa. 413.

24 C.J. p 126 note 86.

Absence of market for stock

Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

There is authority that a personal representative is not liable for a failure to sell which was due to an honest mistake of judgment,[96] at least where the provisions of the will authorized him to retain the securities;[97] and testamentary provisions may, indeed, protect the executor from being surcharged even for negligence in retaining the securities, unless there is proof of fraud or gross negligence.[98] Even when there is a duty to sell, the representative must be allowed as much time as is reasonable under the circumstances of the particular case;[99] and the court should be lenient toward a representative who, in time of economic distress, holds securities of the estate against a falling market.[1] In determining the prudence of his conduct, the court should keep in mind the distinction between those securities which came to him as part of the estate, and those which have been purchased by him.[2]

Extent of liability. The personal representative is liable for the actual loss to the estate resulting from negligent failure to sell securities;[3] and it

Distinction between executors and trustees

The rule with respect to holding nonlegal securities owned by decedent, which governs executors and other personal representatives with their presumably short-duration trusts, should be more liberal than that governing trustees fixed with the duty of managing an estate during a long period of years.—In re Taylor's Estate, 121 A. 310, 277 Pa. 518, 37 A.L.R. 553.

Losses occurring before executors qualified

Executors cannot be surcharged for a shrinkage in the value of securities which occurred before they were qualified, and before they had the right to ask leave of the court for directions in reference to such securities.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

Security subject to lien

Administratrix dealing in good faith with stable securities is protected against surcharge whether security is owned outright or subject to lien.—In re McKee's Estate, 265 N.Y.S. 47, 147 Misc. 889.

Acquiescence of, and encouragement by, beneficiary

Failure of executors to exercise reasonable care to sell testator's stock did not render executors liable to widow who acquiesced in or actually encouraged retention of securities.—In re Garvin's Will, 177 N.E. 24, 256 N.Y. 518, modifying 242 N.Y.S. 830, 229 App.Div. 803.

Question held for trial court

Under will authorizing executor to retain nonlegal securities held by testator at time of his death, where company in which testator held common stock was consolidated with other companies, and new shares of consolidated company were substituted, whether executor breached its duty in retaining substituted shares, so as to be surcharged for loss thereby resulting, was a question of fact to be determined in the first instance by trial court.—In re Stirling's Estate, 21 A.2d 72, 342 Pa. 497.

96. N.Y.—In re Frame's Estate, 274 N.Y.S. 420, 152 Misc. 475—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N.Y.S. 976, 204 App.Div. 604—In re Disbrow's Estate, 261 N.Y.S. 635, 145 Misc. 584—In re Sprong's Estate, 259 N.Y.S. 77, 144 Misc. 293—In re Easton's Estate, 13 N.Y.S.2d 295.

Courts will deal leniently with such mistakes.—In re Junkersfeld's Estate, 279 N.Y.S. 481, 244 App.Div. 260, reversing 269 N.Y.S. 514, 150 Misc. 436, appeal dismissed 272 N.Y.S. 919, 242 App.Div. 708, motion denied 291 N.Y.S. 159, 248 App.Div. 886.

97. Pa.—In re Stirling's Estate, 21 A.2d 72, 342 Pa. 497—In re Linnard's Estate, 148 A. 912, 299 Pa. 32.

Holding without attention

Where will authorized executor to retain nonlegal securities held by testator at time of his death, authority of executor to retain nonlegal securities would not justify holding without attention.—In re Stirling's Estate, 21 A.2d 72, 342 Pa. 497.

Substitution of securities

Rule held inapplicable to the retention of securities substituted for those left by the testator, in the absence of a showing that the former were substantially equivalent to the latter.—In re Stirling's Estate, supra.

Obligation to pay debts of testator may make executor liable for losses incurred by failure to sell speculative securities, despite testamentary authorization to retain such securities, since claims of creditors have preference over those of legatees.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.

98. N.Y.—In re Winburn's Will, 249 N.Y.S. 758, 140 Misc. 18.

99. N.Y.—In re Junkersfeld's Estate, 269 N.Y.S. 514, 150 Misc. 436, appeal dismissed 272 N.Y.S. 919, 242 App.Div. 708, reversed on other grounds 279 N.Y.S. 481, 244 App. Div. 260, motion denied 291 N.Y.S. 159, 248 App.Div. 886—In re Winburn's Will, 249 N.Y.S. 758, 140 Misc. 18.
Pa.—In re Shipley's Estate, 12 A.2d 343, 337 Pa. 571—In re Brown's Estate, 135 A. 112, 287 Pa. 499.
S.C.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.

"An analysis of the cases leads to the conclusion that with respect to the time element solely executors may not be criticized for waiting from twelve to eighteen months to dispose of estate securities."—In re Cuddeback's Estate, 6 N.Y.S.2d 493 496, 168 Misc. 698.

Maximum time

"Generally speaking, the maximum is 18 months."—In re Frame's Estate, 284 N.Y.S. 153, 163, 245 App. Div. 675.

Market quotations are not the criterion to be used in determining the duty of the personal representative to retain or sell securities, but that duty should be determined by the history of the companies which issued the securities, during a period of years, their dividend records and analysis of their capital structure, competency of management, the number of years of the company's existence, and the nature and future of the particular business.—In re Cuddeback's Estate, 6 N.Y.S.2d 493, 168 Misc. 698.

1. N.Y.—In re Cuddeback's Estate, supra.

2. N.Y.—In re Cuddeback's Estate, supra—In re Kent's Estate, 261 N.Y.S. 698, 146 Misc. 155, affirmed In re Kent's Will, 284 N.Y.S. 976, 246 App.Div. 604.

That testatrix herself had invested in cotton mill stock did not excuse executor for failure to dispose of the stock within a reasonable time for making a conversion.—Beacham v. Ross, 197 S.E. 369, 187 S.C. 398.

3. S.C.—Beacham v. Ross, 2 S.E.2d 690, 190 S.C. 219.

Deduction of estate tax

Payment by executors to infant beneficiary on account of executors' negligence in failing to sell stock is confined to amount infant would have received if stock had been sold in exercise of reasonable care, less proportionate part of estate tax.—In re Garvin's Will, 177 N.E. 24, 256

has been held that his liability is measured by the difference between their inventory value and the amount received by him,[4] or the difference between what the securities would have brought had he exercised his business judgment, and what they actually sold for.[5] There is authority that where the executor has improperly retained securities, of which some have appreciated and others have depreciated in value, the beneficiaries may accept the benefit of the appreciation and still hold the representative liable for the loss on the other securities.[6]

§ 249. Grounds for Relief from Liability

An executor or administrator may be relieved of liability for losses by the fact that he acted with the approval of the heirs or distributees; and the fact that he acted under advice of counsel is in his favor.

Where an executor or administrator has acted in good faith, and his course of conduct has been requested, authorized, or assented to by the heirs or distributees, with knowledge of all the material facts, this may excuse him from any liability to them for resulting losses,[7] even though he has deviated from the line of his duties.[8] Thus, one who consents to the retention, by the personal representative, of securities which should be sold may be precluded from charging the representative for losses resulting from such retention.[9]

Advice of counsel. The fact that a representative acted under advice of counsel, in good faith, is entitled to great weight in his favor,[10] and it has been held to relieve him of liability;[11] but other authorities regard the fact as not, in and of itself, sufficient conclusively to excuse him, as where there is a lack of due care on his part.[12]

J. TORTS

§ 250. In General

A tort committed by an executor or administrator is ordinarily committed by him as an individual, and does not render the estate liable.

The general rule is that an executor or administrator cannot as such commit a tort, but any tort committed by him is committed individually, and renders him as an individual, and not the estate, liable in damages,[13] except where the estate has derived pecuniary advantage from the representative's

N.Y. 518, modifying 242 N.Y.S. 830, 229 App.Div. 803.

Dividends accrued before stock should have been sold

Beneficiary recovering against executors for negligent failure to sell stock is entitled to proportionate part of dividends which accrued before stock should have been sold.—In re Garvin's Will, 177 N.E. 24, 256 N.Y. 518, modifying 242 N.Y.S. 830, 229 App.Div. 803.

Profit received by beneficiary through dividends must be offset against interest payable by executors on account of negligent failure to sell stock, to extent dividends were paid after stock should have been sold.—In re Garvin's Will, 177 N.E. 24, 256 N.Y. 518, modifying 242 N.Y.S. 830, 229 App.Div. 803.

4. N.Y.—In re Frame's Estate, 284 N.Y.S. 153, 245 App.Div. 675.

5. Pa.—In re Brown's Estate, 135 A. 112, 287 Pa. 499.

6. N.Y.—Gillespie v. Brooks, 2 Redf. Surr. 349.

7. Mont.—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
N.Y.—In re Pinney's Estate, 294 N.Y.S. 29, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, and affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.
Pa.—In re Mellier's Estate, 18 Pa. Dist. & Co. 595, affirmed 167 A. 358, 312 Pa. 157, 92 A.L.R. 430.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 657, 172 Va. 111, quoting **Corpus Juris.**
24 C.J. p 127 note 93.

8. Conn.—Matthews v. Sheehan, 57 A. 694, 76 Conn. 654, 100 Am.S.R. 1017.

9. Minn.—Clover v. Peterson, 281 N.W. 275, 203 Minn. 337.
N.Y.—In re Pinney's Estate, 294 N.Y.S. 29, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, and affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704—In re Chaves' Estate, 257 N.Y.S. 641, 143 Misc. 868, affirmed 265 N.Y.S. 932, 239 App.Div. 900.
Pa.—In re Shipley's Estate, 12 A.2d 343, 337 Pa. 571—In re Brown's Estate, 135 A. 112, 287 Pa. 499.
Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

Delay in making objection

General legatees who failed to take steps to require payment of legacies after seven months from issuance of letters could not complain in accounting proceedings of losses resulting from executors' delay for several additional months in liquidating securities.—In re Andrews' Estate, 265 N.Y.S. 386, 239 App.Div. 32.

10. N.J.—King v. Berry, 3 N.J.Eq. 261.
Pa.—In re Stirling's Estate, 21 A.2d 72, 342 Pa. 497.

11. N.Y.—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684.
24 C.J. p 128 note 96.

12. Mont.—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
N.J.—King v. Berry, 3 N.J.Eq. 261.
N.Y.—In re Belcher's Estate, 221 N.Y.S. 711, 129 Misc. 218.

13. Ala.—Esslinger v. Spragins, 183 So. 401, 236 Ala. 508—Owens v. Lackey, 174 So. 231, 232, 234 Ala. 144, citing **Corpus Juris.**
Ariz.—Stockmen's State Bank v. Merchants' & Stockgrowers' Bank, 197 P. 888, 22 Ariz. 354.
Ark.—Digby v. Cook, 142 S.W.2d 228, 200 Ark. 1004.
Cal.—Kagee v. Bencich, 81 P.2d 265, 27 Cal.App.2d 469—Rapaport v. Forer, 66 P.2d 1242, 20 Cal.App.2d 271.
Conn.—Campus v. McElligott, 187 A. 29, 122 Conn. 14.
Ga.—Watson v. Watson, 7 S.E.2d 614, 61 Ga.App. 825, transferred, see 5 S.E.2d 237, 189 Ga. 76—Gallovitch v. Wylly, 184 S.E. 786, 52 Ga.App. 818—Evans v. Dickey, 177 S.E. 87, 50 Ga.App. 127.
N.J.—Boyle v. Nolan, 8 A.2d 358, 123 N.J.Law 365.
N.Y.—Bradley v. Roe, 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633, answering certified questions 14 N.Y.S.2d 996, 257 App.Div. 1074, and reversing 13 N.Y.S.2d 693, 257 App.Div. 1005, appeal granted 14 N.Y.S.2d 996, 257 App.Div. 1074—Kirchner v. Muller, 19 N.E.2d 665, 280

tortious act;[14] and the rule is the same whether the injury results from intentional wrong or negligence.[15] Whether the executor or administrator may have indemnity out of the estate is of no concern to third persons.[16]

Property or money actually received by the estate as assets through the representative's tortious conduct may sometimes be reached by the injured person;[17] and an executor is not personally liable for a tort committed as an incident to the carrying out of express instructions in the will.[18]

The advice of counsel does not impart the quality of legality to an executor's tortious intent and purpose.[19]

§ 251. Fraud

An executor or administrator who practices fraud is answerable personally, and the estate is not liable, although recourse may be had against it if it benefits.

The estate of decedent is not liable for the fraud or false representations of the executor or administrator, as in the sale of property of the estate, but the representative who practices the fraud is answerable personally therefor to the injured person.[20] The executor or administrator in the performance of his duties is, however, bound to act fairly and not fraudulently, and the estate cannot be permitted to derive any unjust or unconscionable advantage from his unauthorized or fraudulent misbehavior;[21] and where it appears that property fraudulently obtained was treated or used as assets of the estate, or that the estate received some benefit from his conduct, recourse may be had accordingly to a corresponding extent.[22] If the fraud is practiced on or at the expense of the estate or those interested therein, the representative must of course respond therefor individually,[23] but dealings between an executor and a legatee are not necessarily fraudulent,[24] although, as appears in § 240 supra, they will be closely scrutinized.

The representative is entitled to the presumption of good faith in the discharge of his duties, and fraud, like any other tort, ought to be proved against him.[25] It has been said that no matter how many

N.Y. 23, modifying 5 N.Y.S.2d 161, 254 App.Div. 302—Chisholm v. National City Bank of New York, 26 N.Y.S.2d 978, 176 Misc. 208.
Or.—Fredenburg v. Horn, 218 P. 939, 108 Or. 672, 30 A.L.R. 1153.
Pa.—Clauson v. Stull, 200 A. 593, 594, 331 Pa. 101, quoting **Corpus Juris**—Prager v. Gordon, 78 Pa.Super. 76, 80.
Tex.—Schepps v. Wilkins, Civ.App., 290 S.W. 909.
Wash.—Fisher v. McNeely, 188 P. 478, 110 Wash. 283, 14 A.L.R. 369.
24 C.J. p 128 note 1.

14. Ga.—Carr v. Tate, 33 S.E. 47, 107 Ga. 237—Evans v. Dickey, 177 S.E. 87, 50 Ga.App. 127—Callaway v. Livingston, 111 S.E. 742, 28 Ga. App. 453.

15. Ga.—Callaway v. Livingston, supra.
24 C.J. p 129 note 3.

16. N.J.—Boyle v. Nolan, 8 A.2d 358, 123 N.J.Law 365.

17. Mo.—Silsby v. Wickersham, 155 S.W. 1094, 171 Mo.App. 128.
24 C.J. p 129 note 4.

Executors were not personally liable where they withdrew a cash credit balance from joint venture account with a brokerage firm in which decedent had an interest, without knowledge of plaintiff's alleged interest in account, and the estate, and not the executors were enriched by the transaction.—Chisholm v. National City Bank of New York, 26 N.Y.S.2d 978, 176 Misc. 208.

Executor held liable
However, it was held that executor who exacted for the estate money to discharge the lien of a judgment owned by the estate, in violation of his agreement to release that judgment if the debtors did not bid at the sale of the mortgaged property, cannot defeat his individual liability for the injury so caused by his plea that he was acting as representative of the estate.—Lobit v. Marcoulides, Tex.Civ.App., 225 S.W. 757, error refused.

18. Tex.—Ewing v. Foley, 280 S.W. 499, 115 Tex. 222, 44 A.L.R. 627—Schepps v. Wilkins, Civ.App., 290 S.W. 909.

Managing building
Executor authorized by will to manage and rent building for benefit of legatees may be liable as executor for injuries resulting from defective condition of rented premises, but is not personally liable unless some duty or right of control over property is vested in him other than as executor.—Dobbs v. Noble, 189 S.E. 694, 55 Ga.App. 201.

19. N.J.—In re Brueck's Estate, 199 A. 61, 124 N.J.Eq. 62, affirming 194 A. 60, 122 N.J.Eq. 329.

20. Conn.—Andrews v. Platt, 58 A. 458, 77 Conn. 63.
24 C.J. p 129 note 5.

21. Ind.—Bright Nat. Bank v. Hanson, 113 N.E. 434, 68 Ind.App. 61.
Tex.—Able v. Chandler, 12 Tex. 88, 62 Am.D. 518.

22. Ind.—Chaney v. Wood, 115 N.E. 333, 63 Ind.App. 687.
24 C.J. p 129 note 7.

23. Kan.—Branner v. Nichols, 59 P. 633, 61 Kan. 356.
24 C.J. p 129 note 8.

Estate not bound by executor's forgery
Executor's transfer of deceased's stock certificates by forging deceased's signature thereon instead of indorsing certificates in representative capacity, and his forgery of deceased's signature to check given in payment, prevented check from constituting payment to estate for stock, since executor was acting in individual capacity.—Egan v. United Gas Improvement Co., 178 A. 683, 319 Pa. 17.

24. Iowa.—Stapleton v. Haight, 113 N.W. 351, 135 Iowa 564.

25. Ky.—Roach v. Ames, 80 Ky. 6.
24 C.J. p 129 note 11.

Fraud not shown
Ark.—Fidelity & Deposit Co. v. Fairfield, 262 S.W. 322, 164 Ark. 498.
Iowa.—In re Lipp's Estate, 227 N.W. 913, 209 Iowa 409.
24 C.J. p 129 note 11 [a].

Fraud and collusion held inferrable
Where plaintiff was the daughter, as well as the administratrix, of decedent, and defendant, who was the widow of that decedent and administratrix of another estate, assented to an amicable action to determine an award on a probated claim against the estate of which she was administratrix, and gave testimony favorable to plaintiff but made no defense to the action, it was held that fraud and collusion in procuring the award would be inferred in an intervention to except to the confirmation of the award.—White v. Penuel, 66 A. 362, 22 Del. 273.

acts of fraud an administrator may have been guilty of, such conduct will not divest him of his contractual rights under a valid mortgage which he has purchased.[26]

K. REAL PROPERTY AND INTERESTS THEREIN.

1. In General

§ 252. Title and Authority in General

a. General rule
b. Effect of testamentary provisions
c. Statutory modifications of rule

a. General Rule

Subject to certain exceptions, as a general rule an executor or administrator has no interest in, title to, or control over the realty of his decedent.

Subject to certain exceptions and modifications discussed in this and the following subdivision of this section, as a general rule an executor or administrator, as such, has no interest in, title to, or control over the realty of his decedent,[27] but the title to all real property of decedent vests in his heirs or devisees, subject to the necessities of administration.[28]

Accordingly an executor or administrator cannot release or give rights in the land,[29] preserve or impair homestead rights,[30] release a right of way over the land,[31] bind the heirs by consenting to a proceeding for laying out a highway over the land,[32] create a lien on the land by erecting buildings thereon,[33] dedicate land to public use,[34] make a statutory plat,[35] ratify a deed executed by decedent when insane,[36] recover the surplus realized at a tax sale, even though he was in possession,[37]

26. Nev.—Guisti v. Guisti, 171 P. 161, 41 Nev. 349.

27. Ark.—Mayo v. Bank of Marvell, 65 S.W.2d 549, 188 Ark. 330.
Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.
Ill.—Rosen v. Hayes, 271 Ill.App. 1—Pech v. Landphere, 238 Ill.App. 567.
Ind.—Coats v. Veedersburg State Bank, 38 N.E.2d 243—Cornet v. Guedelhoefer, 36 N.E.2d 933, mandate modified on other grounds 37 N.E.2d 681—Luke v. Indiana Trust Co., 159 N.E. 769, 86 Ind.App. 717.
Kan.—Lindholm v. Nelson, 264 P. 50, 125 Kan. 223.
La.—Davidson v. American Paper Mfg. Co., 175 So. 753, 188 La. 69, 114 A.L.R. 1044.
Me.—Averill v. Cone, 149 A. 297, 128 Me. 546, 129 Me. 9.
Mass.—Hodgkinson v. Hodgkinson, 183 N.E. 708, 281 Mass. 463.
Mo.—State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321—State ex rel. Hampe v. Ittner, 263 S.W. 158, 304 Mo. 135—In re Dildine's Estate, 239 S.W. 112, 293 Mo. 393.
Mont.—Lamont v. Vinger, 202 P. 769, 61 Mont. 530.
N.H.—Ruel v. Hardy, 6 A.2d 753, 90 N.H. 240.
N.Y.—In re Sharp's Estate, 251 N.Y.S. 15, 140 Misc. 427.
Okl.—Thomas v. Kunkel, 38 P.2d 527, 170 Okl. 100.
Pa.—Hadesty v. Hadesty, 200 A. 6, 331 Pa. 81—In re Huff's Estate, 150 A. 98, 300 Pa. 64—In re Webb's Estate, 29 Del.Co. 200.
Puerto Rico.—Crehore v. Registrar of Property, 22 Puerto Rico 30.
Va.—Neblett v. Smith, 128 S.E. 247, 142 Va. 340.
24 C.J. p 130 note 14.

"An estate as such cannot hold legal title to lands, because it is neither a person nor a legal entity."—Carter v. Wroten, 198 S.E. 13, 16, 187 S.C. 432, 119 A.L.R. 379.
Real property and interests therein as assets of estate see supra §§ 103–112.

Realty acquired in collection of personal assets
An administrator ordinarily has nothing to do with the realty of a decedent, except where realty has been acquired by the administrator in good faith and by exercise of proper diligence in collecting the personal assets in his hands.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.

28. Ark.—Mayo v. Bank of Marvell, 65 S.W.2d 549, 188 Ark. 330.
Iowa.—In re Schwertley's Estate, 293 N.W. 445, 448, 228 Iowa 1209, citing **Corpus Juris.**
24 C.J. p 131 note 15.
Right of heirs to realty of ancestor see Descent and Distribution § 66.
Sale of realty under order of court see infra §§ 548, 549.

Proceeds of sale by devisees
Where testator devised a life estate in realty to his widow, remainder to his three children, and the children joined with the widow in conveyances, and acquiesced in her retention of the proceeds, such proceeds and the property purchased therewith could not be recovered from the widow's executor by an administrator de bonis non of the original estate appointed at the instance of the surviving husband of one of the children who predeceased the widow.—Klemm v. Patten, 195 N.W. 221, 196 Iowa 643.

Payment of debts and legacies
Where bequests by deceased were required to be discharged out of his remaining one third of one half of proceeds realized on sale of leased property after debts of his succession were paid, executor represented sufficient interest in the property to prevent surviving daughters and son-in-law, the other owners, from tendering title to lessees, holding option to purchase, before expiration of lease.—Succession of Gilmore, 117 So. 452, 166 La. 433.

29. Ill.—Hoagland v. Crum, 113 Ill. 365, 55 Am.R. 424.
Me.—Mowe v. Stevens, 61 Me. 592.

30. S.C.—Smith v. Moore, 95 S.E. 351, 109 S.C. 196.

31. Ind.—Hankins v. Kimball, 57 Ind. 42.

32. Cal.—Rush v. McDermott, 50 Cal. 471.

33. Miss.—Weathersby v. Sinclair, 43 Miss. 189.
24 C.J. p 131 note 21.

34. Mo.—Kaime v. Harty, 73 Mo. 316, reversing 4 Mo.App. 357.

Implied dedication or prescription
"Without doubt, an executor may not make an express dedication as to estate lands, but an easement may arise as to estate lands through implied dedication or prescription."—Gray v. Magee, 24 P.2d 948, 951, 133 Cal.App. 653.

35. Mich.—Lothrop v. Board of Public Works, 49 N.W. 924, 41 Mich. 724.

36. Mass.—Brown v. Brown, 95 N.E. 796, 209 Mass. 388.

37. U.S.—Fripp v. U. S., 19 Ct.Cl. 667.

bind the heir by admissions relative to the land or the title thereto,[38] abandon a right of the estate in the location and surveys of public land located under a headright certificate, without express authority from the probate court,[39] or object to a judgment vesting the title to the real estate in decedent's widow, where the court has, on the administrator's petition to sell real estate to pay debts, found that he had no right to sell it.[40]

b. Effect of Testamentary Provisions

The testator may, by his will, give to the executor such interest in or control over realty as he sees proper; but the interest of the executor in this respect is limited by the terms of the will, and a direction to sell the realty generally vests in the executor only a power of sale.

The testator may, by his will, give to his executor such authority and control over real estate as he sees proper,[41] and whether the executor takes title to, or an interest in, the realty under the will is usually a question of the testator's intention.[42] The authority of an executor in this respect is strictly limited by the terms of the will;[43] he takes only such interest in the realty as is given to him expressly or by necessary implication.[44]

It has been held that authority given by will to an executor to rent, lease, manage, or control the real estate by necessary implication vests him with the legal title.[45] The executor takes the title or right of possession where the realty is expressly devised to him for the purpose of being sold,[46] or in trust for other purposes,[47] or where such title is otherwise given to him by the will, either expressly or by necessary implication.[48]

Directions to sell land as naked power of sale. As a general rule, where the testator authorizes or directs the executor to sell the land, this gives him only a naked power of sale, and does not vest in him the title to, or an interest in, the land,[49] wheth-

38. Ill.—Walbridge v. Day, 31 Ill. 379, 83 Am.D. 227.
N.C.—Jacobs v. Locke, 37 N.C. 286.

39. Tex.—Pate v. McLain, Civ.App., 136 S.W. 538.

40. Ind.—Shobe v. Brinson, 47 N.E 625, 148 Ind. 285.

41. Ohio.—Doe ex dem Williams v. Burrows, 1 Ohio Dec., Reprint 218, 4 West.L.J. 527.
Tex.—Highland Park Independent School Dist. v. Thomas, Civ.App., 139 S.W.2d 299.
24 C.J. p 131 note 30.

42. N.J.—Meeker v. Boylan, 28 N.J. Law 274.
Va.—Mosby's Adm'r v. Mosby's Adm'r, 9 Gratt. 584, 60 Va. 584.
W.Va.—Bell's Adm'r v. Humphrey, 8 W.Va. 1.

Right of possession given legatee
Under terms of will testator intended that legatee should have possession of property and after keeping it in repair and paying necessary charges, she was given rents, profits, and income from estate, and no duty rested on executor in relation to property during life of legatee.—Buckman's Trustee v. Ohio Valley Trust Co., 155 S.W.2d 749, 288 Ky. 114, 138 A.L.R. 436.

43. Miss.—Cohea v. Jemison, 10 So. 46, 68 Miss. 510.
24 C.J. p 131 note 31.

44. Ill.—Dell v. Herman, 6 N.E.2d 159, 365 Ill. 261—McCarty v. McCarty, 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137, affirming 270 Ill.App. 37.
Va.—Neblett v. Smith, 128 S.E. 247, 142 Va. 840.
24 C.J. p 131 note 31.

45. N.Y.—Tobias v. Ketchum, 32 N.Y. 319—Brewston v. Striker, 2 N.Y. 19—Killam v. Allen, 52 Barb. 605—Craig v. Craig, 3 Barb.Ch. 76.
Ohio.—Boyd's Lessee v. Talbot, 12 Ohio 212.

Where duties can be discharged under a power the executor does not take an estate by implication.—Onondaga Trust & Deposit Co. v. Price, 87 N.Y. 542—Downing v. Marshall, 23 N.Y. 366, 80 Am.D. 290, 23 How. Pr. 4—Tucker v. Tucker, 5 N.Y. 408, reversing 5 Barb. 99—Martin v. Martin, 43 Barb., N.Y., 172, 28 How.Pr. 385.

46. Ill.—Lockner v. Van Bebber, 5 N.E 2d 460, 364 Ill 636—McCarty v. McCarty, 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137, affirming 270 Ill.App. 37—Goben v. Johnson, 167 N.E. 94, 335 Ill. 395—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643—Pech v. Landphere, 238 Ill.App. 567—In re Robinson's Estate, 214 Ill.App. 262.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
Mass.—Fay v. Fay, 1 Cush. 93.
Miss.—Cady v. Lincoln, 57 So. 213, 100 Miss. 765.
Neb.—In re Secrest's Estate, 191 N. W. 663, 109 Neb. 431.
Tenn.—Rogers v. Marker, 12 Heisk. 645.
24 C.J. p 132 note 39.

Devise to sell and direction to sell distinguished
Power of sale to executor, in which case a naked authority is given, and freehold remains with heir until sale, is distinguished from devise to executor to sell, in which case freehold vests at once in executor, and there is an authority coupled with an interest.—Pope v. Kitchell, 188 N.E. 451, 354 Ill. 248—24 C.J. p 132 note 39 [a].

47. N.Y.—Hubbard v. Housley, 58 N.Y.S. 432, 27 Misc. 276, affirmed 59 N.Y.S. 392, 43 App.Div 129, affirmed 55 N.E. 1096, 160 N.Y. 688.
24 C.J. p 133 note 40.

48. Pa.—Wells v. Sloyer, 1 Clark 516, 3 Pa.L.J. 203.
24 C.J. p 133 note 41.

49. U.S.—Chew v. Hyman, C.C.Ill., 7 F. 7.
Ala.—Robinson v. Allison, 74 Ala. 254—Mitchell v. Spence, 62 Ala. 450.
Cal.—In re Loyd's Estate, 167 P. 157, 175 Cal. 699—Estop v. Armstrong, 27 P. 1091, 91 Cal. 659.
Conn.—Seymour v. Bull, 3 Day 388—Bull v. Bull, 3 Day 384.
Fla.—Simmons v. Spratt, 8 So. 123, 26 Fla. 449, 9 L.R.A. 343.
Ill.—Nadenik v. Nadenik, 24 N.E.2d 346, 372 Ill. 408, affirming 19 N.E.2d 765, 299 Ill.App. 613—Dell v. Herman, 6 N.E.2d 159, 365 Ill. 261—Lockner v. VanBebber, 5 N.E.2d 460, 364 Ill. 636—Goben v. Johnson, 167 N.E. 94, 335 Ill. 395—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643—Moore v. Smith, 19 N.E.2d 223, 298 Ill.App. 417—McCarty v. McCarty, 270 Ill.App. 37, affirmed 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137—Pech v. Landphere, 238 Ill.App. 567.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225—Guyer v. Maynard, 6 Gill & J. 420—Greenough v. Welles, 10 Cush. 571—Fay v. Fay, 1 Cush. 93—Shelton v. Homer, 5 Metc. 462.
Miss.—Cady v. Lincoln, 57 So. 213, 100 Miss. 765.
N.H.—Dexter v. Sullivan, 34 N.H. 478.
N.J.—Moores v. Moores, 41 N.J.Law 440—Snowhill v. Snowhill, 23 N.J.Law 447—Brengel v. O'Toole, 140

er the power be given for the purpose of paying debts[50] or legacies[51] or making distribution.[52] There is, on the other hand, authority for the view that such a direction does impliedly carry the title,[53] at least where this is necessary in order to carry out the provisions of the will.[54]

c. Statutory Modifications of Rule

In some jurisdictions statutes give to the executor or administrator a certain control over the realty of decedent.

In some jurisdictions the statutes give to the executor or administrator a certain control over the land of decedent,[55] usually either for the purpose of preserving it from waste during the course of administration,[56] effecting a division and distribution among those entitled,[57] or subjecting it to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose.[58] However, such grants, being in derogation of the common law, must be strictly construed and the rights of the representative confined to those which are clearly given to him.[59]

A. 28, 102 N.J.Eq. 178, reversed on other grounds 143 A. 361, 103 N.J.Eq. 339—Hopping v. Grey, 89 A. 27, 82 N.J.Eq. 502—Todd v. Wortman, 18 A. 843, 45 N.J.Eq. 723—Romaine v. Hendrickson's Ex'rs., 24 N.J.Eq. 231—Fluke v. Fluke's Ex'rs., 16 N.J.Eq. 478—Gest v. Flock, 2 N.J.Eq. 108.

N.Y.—Whitlock v. Washburn, 17 N.Y.S. 60, 62 Hun 369—Post v. Benchley, 48 Hun 83, dismissed 18 N.E. 480, 110 N.Y. 665—Hetzell v. Barber, 6 Hun 534, modified on other grounds 69 N.Y. 1—Cashman v. Wood, 6 Hun 520—Catton v. Taylor, 42 Barb. 578—Reed v. Underhill, 12 Barb. 113—Safford v. Burke, 223 N.Y.S. 626, 130 Misc. 12—Janssen v. Wemple, 3 Redf. Surr. 229—Scott v. Monell, 1 Redf. Surr. 431.

N.C.—Perkins v. Presnell, 6 S.E. 801, 100 N.C. 220—Jenkins v. Maxwell, 52 N.C. 612—Ferebee v. Proctor, 19 N.C. 439.

Ohio.—Nimmons v. Westfall, 33 Ohio St. 213—Baker v. Alexander, 156 N.E. 223, 24 Ohio App. 117.

R.I.—Stoughton v. Liscomb, 98 A. 183, 39 R.I. 489.

S.C.—Thomson v. Gaillard, 37 S.C.L. 418, 45 Am.D. 778.

Tenn.—Rogers v. Marker, 12 Heisk. 645.

W.Va.—Dunn's Ex'rs v. Renick, 10 S.E. 810, 33 W.Va. 476.

24 C.J. p 132 note 32.

Possession and use of land under power of sale see infra §§ 257, 258.

Power to sell realty under testamentary authority see infra §§ 274–278.

50. N.C.—Floyd v. Herring, 64 N.C. 409.

24 C.J. p 132 note 33.

51. Ind.—Doe v. Lanius, 3 Ind. 441, 56 Am.D. 518.

52. Ill.—McCarty v. McCarty, 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137, affirming 270 Ill.App. 37.

Ind.—Doe v. Lanius, 3 Ind. 441, 56 Am.D. 518.

Mo.—Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, transferred, App., 1 S.W.2d 905, see on retransfer 52 S.W.2d 405.

Power connected with a trust

Where a power is given to an executor to sell land, when in his opinion the sale can be made to good advantage, the proceeds to be distributed to children as they come of age, it is a power connected with a trust, and the executor is entitled to possession of the land, as against the heir on whom the title descended, subject to be divested by the execution of the power.—Dabney v. Manning, 3 Ohio 321, 17 Am.D. 597.

53. In Pennsylvania

(1) A direction in the will to the executors to sell the land breaks the descent and vests the legal estate in them.—Appeal of Dundas, 64 Pa. 325—Shippen v. Clapp, 36 Pa. 89—Shippen's Heirs v. Clapp, 29 Pa. 265—In re Appeal of Brown & Sterrett, 27 Pa. 62—In re Smith's Estate, 4 Phila. 181, 17 Leg.Int. 174.

(2) However, it has also been held that such a direction does not vest the legal estate in the executors.—Cobel v. Cobel, 8 Pa. 342—Tasker's Estate, 14 Pa.Dist. 435—Hallowell's Estate, 9 Pa.Dist. 90—Geisz v. Geisz, 7 Pa.Dist. 615, 21 Pa.Co. 466.

54. Ill.—Wicker v. Ray, 8 N.E. 835, 118 Ill. 472.

Me.—Richardson v. Woodbury, 43 Me. 206.

Ohio.—Knisely v. Young, 15 Ohio Cir.Ct.,N.S., 49.

Va.—Archer v. Sadler, 2 Hen. & M. 370, 12 Va. 370.

24 C.J. p 132 note 37.

Power to sell coupled with active and continuing duty of managing property over which power is to be exercised, making disposition thereof, etc., creates an interest.—Wilson v. Snow, D.C., 33 S.Ct. 487, 228 U.S. 217, 57 L.Ed. 807, 50 L.R.A.,N.S., 604.

55. Ark.—Less v. Less, 227 S.W. 768, 147 Ark. 432.

Iowa.—In re Atkinson, 232 N.W. 640, 210 Iowa 1245.

La.—Boyd's Succession, 12 La.Ann. 611.

Puerto Rico.—Acuna v. San Juan Registrar, 28 Puerto Rico 392.

S.D.—In re Hornstra's Estate, 226 N.W. 740, 55 S.D. 513.

24 C.J. p 133 note 42.

Administrator is charged with trust concerning decedent's interest in realty.—Murray v. Stuart, 247 P. 187, 79 Colo. 454.

Executors are legal owners of estate property

N.Y.—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423.

Administrator as distributee

Administrator, as such, is different legal person from himself as distributee since in his capacity as administrator he is cotenant with no one, but holds temporarily paramount legal title to complete use of real estate, while distributee who is not administrator is not cotenant so far as relates to use of property prior to termination of period of distribution.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.

56. Or.—King v. Boyd, 4 Or. 326.

57. Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.

24 C.J. p 133 note 44.

58. Ala.—Boyte v. Perkins, 99 So. 652, 211 Ala. 130.

Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.

Md.—Luke v. Indiana Trust Co., 159 N.E. 769, 86 Ind.App. 717.

Kan.—Lindholm v. Nelson, 264 P. 50, 125 Kan. 223.

24 C.J. p 133 note 45.

Real property as available for payment of debts see infra § 479.

Sales of realty under order of court for payment of debts see infra §§ 538–542.

59. Ariz.—Butler v. Quinn, 14 P.2d 250, 40 Ariz. 446.

Ind.—Coats v. Veedersburg State Bank, 38 N.E.2d 243.

24 C.J. p 133 note 46.

Letters issued prior to effective date of statute

Where letters of administration were issued to administrator prior to the effective date of statute giving administrator certain control over and right to deal with real estate of an intestate, the rights of administrator were controlled by the law as it existed prior to the enactment of such statute.—In re Carusone, 10 N.Y.S.2d 5, 256 App.Div. 310.

§ 253. Actions Relating to Realty

An executor or administrator ordinarily may not bring an action relating to the realty of the decedent.

From the general rule that an executor or administrator has no title to, interest in, or control over decedent's realty, see supra § 252 a, it follows that he is not ordinarily entitled to bring any action relating thereto.[60] By statute or otherwise, however, an executor or administrator sometimes is authorized to bring such actions.[61]

§ 254. —— For Trespass and Waste

Actions for trespass to realty and waste accruing after the death of his decedent are maintainable by an executor or administrator where he is given the right of possession; but where he has no right of possession he cannot maintain such an action.

Actions for trespass to realty and waste accruing after the death of his decedent are maintainable by an executor or administrator, where he is given the right of possession by the provisions of the will or by statute,[62] but, in the absence of any testamentary or statutory provision giving him such a right of possession, the general rule that the representative has no concern with the realty, see supra § 252 a, precludes the maintenance by him of such an action.[63]

§ 255. —— To Quiet Title

An executor or administrator may bring an action to quiet title to the decedent's realty when he is expressly authorized to do so by statute or when by statute or by the terms of the will he is given the right to possession of, or control over, the property.

Under the general rule that an executor or administrator has no title to, or control over, the realty of his decedent, see supra § 252 a, he ordinarily may not bring an action to quiet, or remove a cloud from, the title to decedent's real estate,[64] at least before he obtains a license to sell,[65] and this rule has been applied to realty situated outside the state.[66] However, an executor or administrator may bring such an action when he is expressly authorized to do so by statute, or when by statute or by the terms of the will he is given the right to possession of, or control over, the realty of decedent.[67]

Expiration of court order

Where probate court's original order authorizing executor to take charge of decedent's real estate pursuant to statute had expired, when second appointment of an administrator pending the contest of decedent's will was made, such administrator acquired no power over decedent's realty under the original order authorizing executor to take charge of same.—State ex rel. Hampe v. Ittner, 263 S.W. 158, 304 Mo. 135.

Lands outside state

Appointment of administrator in Pennsylvania would give no authority over lands outside state.—Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567, 305 Pa. 583, 81 A.L.R. 660.

60. Mich.—Windoes v. Colwell, 225 N.W. 573, 247 Mich. 372.
Mo.—Blum v. Frost, 116 S.W.2d 541, 234 Mo.App. 695.
Okl.—Thomas v. Kunkel, 38 P.2d 527, 170 Okl. 100.
Pa.—Hadesty v. Hadesty, 200 A. 6, 331 Pa. 81.
24 C.J. p 133 note 49.
Action to set aside:
Deed procured by fraud or undue influence see supra § 123.
Fraudulent conveyance by decedent see supra § 124.
Revival of actions relating to realty see Abatement and Revival § 164.
Rights of action:
As assets of estate see supra §§ 100–102.
By representative generally see infra § 692.

61. Ala.—Burt v. Brandon, 159 So. 691, 230 Ala. 85.
Colo.—Fowler v. Badger Irr. Dist., 219 P. 209, 74 Colo. 109.
Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698.

Purpose of statute providing that on the application of any creditor the representative of a decedent's estate shall prosecute all actions necessary to recover property is to protect creditors rather than the estate.—Lind v. O. N. Johnson Co., 282 N.W. 661, 204 Minn. 30, 119 A.L.R. 940.

Recovery for damages to realty ordered sold

(1) Where an order has issued out of probate court directing an executor to sell lands to pay debts, see infra §§ 538–542, he may sue to recover damages for the wrongful destruction of the market value of such premises, where it appears that rights of a creditor will be prejudiced thereby.—Clark v. McClain Fire Brick Co., 125 N.E. 877, 100 Ohio St. 110.

(2) Administrator, ordered to sell testator's real estate, could not sue railroad for destruction of buildings by fire without showing land in present condition would bring a sum insufficient to pay debts.—Pittsburgh, C., C. & St. L. R. Co. v. Verbarg, 166 N.E. 29, 89 Ind.App. 177.

Recovery of money charged against land devised

An action against devisee to recover money charged against the land devised is properly brought by the administrator, as against contention that it should have been brought by the heirs, the liability fixed against the land being a part of the assets of the estate.—Blackburn v. Blackburn, 226 S.W. 535, 147 Ark. 37.

Realty subsequently acquired by representative

Administratrix' title by deed on sale in vendor's foreclosure action supported her suit on supersedeas bond for use and occupation pending appeal.—Tankersley v. Cornett, 14 S.W.2d 1067, 228 Ky. 346.

62. Cal.—Cortelyou v. Baker, 187 P. 417, 182 Cal 168.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
24 C.J. p 134 note 50.
Possession and use of realty by representative see infra §§ 257, 258.

63. Ky.—Nicely v. Howard, 242 S.W. 602, 195 Ky. 327.
24 C.J. p 134 note 51.

64. Ala.—Robinson v. Joplin, 54 Ala. 70.
Ill.—Strong v. Peters, 72 N.E. 369, 212 Ill. 282—Stark v. Brown, 101 Ill. 395—Shoemate v. Lockridge, 53 Ill. 503.
Ind.—Simms v. Gilmore, 135 N.E. 183, 78 Ind.App. 244.
Ky.—York's Ancillary Adm'r v. Bromley, 151 S.W.2d 28, 286 Ky. 533.
Miss.—McCaa v. Russom, 52 Miss. 639.
24 C.J. p 134 note 53.

65. Mass.—Hooker v. Porter, 171 N.E. 713, 271 Mass. 441.

66. Mass.—Hooker v. Porter, supra.

67. Cal.—Pennie v. Hildreth, 22 P. 398, 81 Cal. 127.
Colo.—Galligan v. Thomas S. Hayden Realty Co., 163 P. 395, 62 Colo. 477.

A creditor of an estate cannot bring suit to remove a cloud from the title of land belonging to the estate, except by leave of court, after refusal of the administrator to bring suit.[68]

§ 256. —— For Injuries during Decedent's Lifetime

The executor or administrator is the proper party to sue for damages for an injury to decedent's realty which occurred during his lifetime.

The executor or administrator is, it has been held, the proper party to maintain an action for damages for an injury to decedent's realty which occurred during his lifetime.[69] However, it has been asserted that at common law a cause of action for trespass to realty does not survive the death of the owner, see Abatement and Revival § 132, and that in the absence of statute the executor or administrator may not sue at law for damages occasioned by the trespass.[70]

§ 257. Possession and Use

a. In general
b. Nature of right of possession

a. In General

An executor or administrator may, when authorized by statute or by the terms of the will, take possession of and use lands which belonged to, and were left by, the decedent.

Under statute, in a number of jurisdictions, the personal representative has the right or duty under certain circumstances, such as the insufficiency of the personalty to meet the debts of the estate, or even generally, to take possession of the realty either for the purpose of sale or in order to apply as assets the proceeds realized from its use during the period of administration;[71] also an executor is en-

Idaho.—Cleland v. McLaurin, 232 P. 571, 40 Idaho 371.
La.—Flanagan v. Land Development Co. of Louisiana, 83 So. 39, 145 La. 843.
Miss.—Blake v. Blake, 53 Miss. 182.
N.D.—Magoffin v. Watros, 178 N.W. 134, 45 N.D. 406.
Ohio.—Mitchell v. City of Bridgeport, 30 Ohio C.A. 358.
Pa.—McCully v. McCrary, 112 A. 755, 269 Pa. 581—Sears v. Scranton Trust Co., 77 A. 423, 228 Pa. 126, 20 Ann.Cas. 1145.
S.D.—Berry v. Howard, 127 N.W. 526, 26 S.D. 29, Ann.Cas.1913A 994.
Tex.—Taylor v. San Antonio Joint Stock Land Bank, Civ.App., 101 S.W.2d 868, error granted, reversed on other grounds San Antonio Joint Stock Land Bank v. Taylor, 105 S.W.2d 650, 129 Tex. 335—Graves v. Moon, Civ.App., 92 S.W.2d 290, error refused.
Utah.—Worley v. Peterson, 12 P.2d 579, 80 Utah 27.
Wyo.—Bamforth v. Ihmsen, 204 P. 345, 28 Wyo. 282, rehearing denied 205 P. 1004, 28 Wyo. 282.
24 C.J. p 134 note 52.

Where estate had not been distributed, the executrix had the lawful right to bring action to quiet title.—Rehart v. Klossner, Cal.App., 119 P.2d 145.

Existence of heirs as necessary

Statute authorizing an administrator to bring suit to quiet title for the benefit of heirs, whether known or unknown, gives no authority to an administrator to bring suit to quiet title to property of a decedent where there are no heirs.—Pelton v. Shook, 226 P. 142, 75 Colo. 283.

Where there are no adverse claims, the executor or administrator may not maintain an action to quiet title.—Perry v. Superior Court in and for Marin County, 84 P.2d 250, 29 Cal.App.2d 114.

Vendor's executor holding naked legal title to realty converted into personalty under conveyance contract is proper party to maintain action to quiet title; and that executor was derelict in commencing action to quiet title, and that court did not require him to deliver possession of realty to devisee within statutory time, did not deprive executor of right to maintain action to quiet title.—Kern v. Robertson, 12 P.2d 565, 92 Mont. 283.

68. Mich.—Marshall v. Blass, 46 N.W. 947, 47 N.W. 516, 82 Mich. 518.

69. Md.—Lake Roland Electric R. Co. v. Frick, 37 A. 650, 86 Md. 259.
24 C.J. p 135 note 55.
Rights of action connected with realty accruing before death as assets of estate see supra § 100.

70. Miss.—Thompson v. City of Philadelphia, 177 So. 39, 180 Miss. 190—Conklin v. Alabama & V. Ry. Co., 32 So. 920, 81 Miss. 152.

71. Ala.—Hopkins v. Crews, 124 So. 202, 220 Ala. 149—Layton v. Hamilton, 107 So. 830, 214 Ala. 329—Boyte v. Perkins, 99 So. 652, 211 Ala. 130.
Ark.—Etchison v. Dail, 31 S.W.2d 426, 182 Ark. 350.
Cal.—Reeve v. Jahn, 70 P.2d 610, 9 Cal.2d 244.
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
Mich.—Thompson v. Thompson, 201 N.W. 533, 229 Mich. 526—Chapin v. Chapin, 201 N.W. 530, 229 Mich. 515.
Mo.—Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
N.Y.—In re Purdy, 221 N.Y.S. 468, 129 Misc. 297.
Okl.—Davis v. Morgan, 95 P.2d 856, 186 Okl. 30—Abrams v. Neal, 61 P.2d 1103, 178 Okl. 158—In re Gentry's Estate, 13 P.2d 156, 158 Okl. 196.
Or.—In re Banfield's Estate, 3 P.2d 116, 137 Or. 256, denying rehearing 299 P. 323, 137 Or. 256—In re McDermid's Estate, 222 P. 295, 109 Or. 633—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 443.
S.D.—In re Hornstra's Estate, 226 N.W. 740, 55 S.D. 513.
Tex.—Freeman v. Banks, Civ.App., 91 S.W.2d 1078, error refused—First Nat. Bank v. Douglas, Civ.App., 7 S.W.2d 148, affirmed Douglas v. First Nat. Bank, 40 S.W.2d 801, 120 Tex. 631—Becknal v. Becknal, Civ.App., 296 S.W. 917.
Wis.—Curtis v. Gillie, 300 N.W. 911, 239 Wis. 207.
24 C.J. p 135 note 62.

Effect on rights of heirs

(1) "By our statute, the administrator is clothed with a right to the possession of the realty for the purposes of administration, and that right, when asserted by him, dominates and intercepts the descent of lands to the heir."—Ex parte Stephens, 170 So. 771, 772, 233 Ala. 167.

(2) "If a recognized or statutory necessity exists, the personal representative may intercept the possession of the heir or devisee to the real estate, for the purpose of a due administration of the estate and payment of debts."—Powell v. Labry, 97 So. 707, 709, 210 Ala. 248.

titled to possession of the real estate when the testator has by his will directed or permitted the executor to take possession thereof for any purpose.[72] At common law, and in the absence of the circumstances, if any, contemplated by such statutory or testamentary provisions, the personal representative is not entitled to the possession and use of the real estate of his decedent.[73]

A representative who is authorized by will to sell is entitled to the control and possession of the title deeds if this is necessary to a proper discharge of his duties,[74] although a mere power of sale does not, of itself, give any right of possession or use of the property until the sale.[75] It has been considered that where the executor is also devisee of land of which he is in possession, he must be regarded as holding the land in the capacity of executor until the debts of the decedent are paid.[76]

An order of court is necessary, under some statutes, to authorize the executor or administrator to take possession or control of realty,[77] and such order must be based on the actual existence of the necessity for the representative's taking possession,[78] and on notice to the heirs or devisees.[79] The correctness of the ruling of the court permitting the representative to take possession may be challenged by a devisee.[80] Such an order has been held not a prerequisite to a suit by a personal representative against an heir for the possession of land but, when obtained, is prima facie evidence of the necessity to sell on the ground stated in the application therefor, when service of notice of the application was by publication, and such an order is conclusive evidence when the heir was given personal notice.[81]

To what lands statutes are applicable. Statutes giving the right of possession of lands to the executor or administrator refer only to such lands as are described therein.[82] Thus it has been held that such a statute refers only to such lands as belonged to and were left by decedent,[83] and not to lands bid in by the administrator or executor at a sale under execution or mortgage foreclosure, as to which he has the same right of possession as to personalty;[84] and such a statute does not apply to lands situated in another state.[85]

72. Ga.—Bond v. Curd, 144 S.E. 210, 166 Ga. 717.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
24 C.J. p 135 note 58.

73. Ala.—Layton v. Hamilton, 107 So. 830, 214 Ala. 329—Johnson v. Sandlin, 89 So. 81, 206 Ala. 53.
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Ga.—Hortman v. Vissage, 12 S.E.2d 294, 191 Ga. 446—Hood v. Hood, 150 S.E. 552, 169 Ga. 378—McHenry v. Silas, 140 S.E. 373, 165 Ga. 176—Smith v. Fischer, 184 S.E. 406, 52 Ga.App. 598.
Ill.—McCarty v. McCarty, 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137, affirming 270 Ill.App. 37.
Iowa.—Andrew v. Murtha, 236 N.W. 437—First Nat. Bank v. Murtha, 236 N.W. 433, 212 Iowa 415.
Ky.—Auxier's Ex'x v. Theobald, 75 S.W.2d 39, 255 Ky. 583.
La.—Succession of Boehm, 108 So. 322, 161 La. 162.
Mich.—In re Thompson's Estate, 217 N.W. 889, 241 Mich. 583—Howes v. Barney, 165 N.W. 658, 199 Mich. 569.
Mont.—Rumney v. Skinner, 208 P. 895, 64 Mont. 75.
N.Y.—In re Fitzpatrick's Will, 169 N.E. 110, 252 N.Y. 121, reversing 236 N.Y.S. 113, 227 App.Div. 638, which affirmed 234 N.Y.S. 234, 133 Misc. 772—In re Purdy, 221 N.Y.S. 468, 129 Misc. 297.
Philippine.—Buenaventura v. Ramos, 43 Philippine 704—Malahacan v. Ignacio, 19 Philippine 434—Ilustre v. Frondosa, 17 Philippine 321.
Wis.—Curtis v. Gillie, 300 N.W. 911, 239 Wis. 207—Neelen v. Holzhauer, 214 N.W. 497, 193 Wis. 196, 53 A.L.R. 359.
24 C.J. p 135 note 57, p 136 notes 63, 64.

Until administrator is appointed, he has no right, under statute, to take possession of the realty.—In re Merrill's Estate, 300 N.Y.S. 671, 165 Misc. 161—In re Lindsay's Estate, 18 N.Y.S.2d 800.

74. N.Y.—Mills v. Mead, 7 Hun 36.

75. Ill.—McCarty v. McCarty, 191 N.E. 68, 356 Ill. 559, 94 A.L.R. 1137, affirming 270 Ill.App. 37.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, 37 N.E.2d 728.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
N.J.—Brengel v. O'Toole, 140 A. 28, reversed on other grounds 143 A. 361, 103 N.J.Eq. 339.
24 C.J. p 132 notes 32–35.

76. S.C.—Smith v. Byers, 86 S.E. 481, 102 S.C. 215.

77. N.Y.—In re Purdy, 221 N.Y.S. 468, 129 Misc. 297.
24 C.J. p 136 note 65.

County court was empowered to authorize temporary administrator to take physical possession of all property belonging to estate, as far as surviving wife out of possession is concerned.—Boyle v. Paul, 86 S.W.2d 744, 126 Tex. 242.

78. Mo.—Field v. French's Estate, App., 106 S.W.2d 925.
24 C.J. p 137 note 66.

Order held properly granted
N.Y.—In re Berardini, 213 N.Y.S. 763, 215 App.Div. 833—In re Mould, 187 N.Y.S. 355, 195 App.Div. 822, affirming In re Mould's Estate, 185 N.Y.S. 250, 113 Misc. 602.

79. Miss.—Miles v. Fink, 80 So. 532, 119 Miss. 147.
N.Y.—Matter of Mahnken, 167 N.Y.S. 546, 101 Misc. 175.

80. Mo.—Field v. French's Estate, App., 106 S.W.2d 925.

81. Ga.—Hortman v. Vissage, 12 S.E.2d 294, 191 Ga. 446—Brown v. Glover, 119 S.E. 607, 156 Ga. 640.

82. Tex.—Donald v. Bankers Life Co., Civ.App., 133 S.W.2d 171, error dismissed, judgment correct.

Realty conveyed by deceased
Executor may not take charge of property conveyed by effective deed by deceased, regardless of estate's insolvency.—Dorman v. Ryan, Tex. Civ.App., 293 S.W. 888.

Mortgagee of realty of decedent is entitled to retain possession thereof as long as the indebtedness remains unpaid.—Dallas Joint-Stock Land Bank of Dallas v. Wise, Tex. Civ.App., 40 S.W.2d 931, error refused.

83. Ala.—Patterson v. Weaver, 114 So. 301, 216 Ala. 686.

84. Mich.—Kunzie v. Wixom, 39 Mich. 384.

85. Nev.—Price v. Ward, 58 P. 849, 25 Nev. 203, 46 L.R.A. 459.

b. Nature of Right of Possession

The right of the representative to possess and control realty is temporary and limited to the purposes of administration, ceasing when the estate is settled; and it is subject to control by the court for administration purposes.

Only in a proper case is a personal representative under a duty to exercise his right of possession of the realty,[86] as where it is necessary to do so because the personalty is insufficient to meet the debts and claims;[87] and it is only to the extent that the right is actually exercised that the common-law rights of the statutory distributees in the realty are disturbed or impaired.[88] In many respects, the possessory right of the personal representative is for and on behalf of the heirs, and in harmony with their claims.[89] Until it is exercised, it does not constitute an intervening estate in possession as against the heir,[90] and it ceases when the debts are paid and the estate settled,[91] being temporary and limited to the purposes of administration.[92] It includes the right to receive the rents,[93] and gives the representative a qualified interest in the land,[94] with all the rights and powers ordinarily incident to the right of possession.[95] The right is subject to the rights of the widow and family to dower and homestead;[96] and, as it is purely statutory, it may be taken away after the representative has entered into possession, as well as before.[97]

The possession of the administrator is possession by the court,[98] and is subject to the control of the court for administration purposes.[99]

Relation back of possession. It has been held that when an administrator takes possession of his decedent's real estate such possession relates back to the time of decedent's death.[1]

§ 258. —— Actions to Recover or Protect Possession

By virtue of statute or testamentary direction, a personal representative may be entitled to prosecute or defend actions for recovering possession of decedent's land.

By virtue of the directions of a will, or under statute, an executor or administrator may be temporarily entitled or required to prosecute or defend actions for recovering possession of decedent's land, as a sort of trustee or representative of the heirs or devisees and of the general interests of the estate;[2] but, where no interest in the realty of his decedent is thus vested in him, he has no such authority.[3] As a general rule, the burden is on the personal representative to show, by a preponderance of the evidence, his right to recover,[4] but it has been held that where such representative seeks possession within the period for presenting claims against the estate, the burden of proof as to the necessity of subjecting the lands to administration is on him who takes the position that the representa-

86. N.Y.—In re Baker's Estate, 298 N.Y.S. 261, 164 Misc. 92.

87. N.Y.—In re Willer's Estate, 12 N.Y.S.2d 867, 171 Misc. 582—In re Purdy, 221 N.Y.S. 468, 129 Misc. 297.
Wis.—Hinman v. Hinman, 105 N.W. 788, 126 Wis. 191.
Time for determining necessity
The reasonableness of the length of time consumed by the personal representative in determining the necessity for taking possession of the realty is a question of fact.—In re Baker's Estate, 298 N.Y.S. 261, 164 Misc. 92.

88. N.Y.—In re Merrill's Estate, 300 N.Y.S. 671, 165 Misc. 161.

89. Okl.—Davis v. Morgan, 95 P.2d 856, 186 Okl. 30.

90. Wis.—Hinman v. Hinman, 105 N.W. 788, 126 Wis. 191.
Actual possession, on the part of the personal representative, is necessary in order to exclude an heir or devisee.—Jones v. Billstein, 28 Wis. 221—24 C.J. p 137 note 68.

91. Nev.—McGuire v. Ehrlich, 245 P. 703, 49 Nev. 319.
24 C.J. p 137 note 73.

92. Mont.—In re Deschamps' Estate, 212 P. 512, 65 Mont. 207.
24 C.J. p 137 note 71.

93. Ala.—Griffith v. Rudisill, 37 So. 83, 141 Ala. 200.
Ark.—Menifee v. Menifee, 8 Ark. 9.
Right to collect rents generally see infra § 259.

94. Mich.—Enos v. Sutherland, 11 Mich. 538.
24 C.J. p 137 note 75.

95. La.—Wilson v. Wilson, 31 So. 643, 107 La. 139.
24 C.J. p 137 note 76.

96. Neb.—Cooley v. Jansen, 74 N.W. 391, 54 Neb. 33.
24 C.J. p 137 note 77.

97. Mich.—Campau v. Campau, 25 Mich. 127.

98. Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425, 216 Ind. 231, 134 A.L.R. 1238.

99. Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, supra.
Mont.—In re Clark's Estate, 74 P.2d 401, 105 Mont. 401, 114 A.L.R. 496.

1. Minn.—Noon v. Finnegan, 13 N. W. 197, 29 Minn. 418.

2. Ark.—Etchison v. Dail, 31 S.W. 2d 426, 182 Ark. 350.
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Neb.—In re Freling's Estate, 230 N.W. 443, 119 Neb. 605.
Nev.—McGuire v. Ehrlich, 245 P. 703, 49 Nev. 319.
N.Y.—In re Burstein's Estate, 275 N. Y.S. 601; 153 Misc. 515.
Tex.—Jones v. Gibbs, Civ.App., 103 S.W.2d 1018, reversed on other grounds 130 S.W.2d 274, 133 Tex. 645, motion overruled 131 S.W.2d 957, 133 Tex. 627—Taylor v. San Antonio Joint Stock Land Bank, Civ.App., 101 S.W.2d 868, reversed on other grounds San Antonio Joint Stock Land Bank v. Taylor, 105 S. W.2d 650, 129 Tex. 335—Becknal v. Becknal, Civ.App., 296 S.W. 917.
24 C.J. p 137 note 80.

3. Ill.—Rosen v. Hayes, 271 Ill.App. 1.
24 C.J. p 137 note 81.
Sole test of the representative's right of action is the right of the estate to the possession of the property.—McGuire v. Ehrlich, 245 P. 703, 49 Nev. 319.

4. Ark.—Miller v. Watkins, 272 S.W. 346, 169 Ark. 60.
Ga.—Vick v. Georgia Power Co., 174 S.E. 713, 178 Ga. 869—Brown v. Glover, 119 S.E. 607, 156 Ga. 640.

tive is acting hastily.[5] As against one not an heir, an administrator may maintain an action for the recovery of land belonging to the estate of the deceased, without showing a necessity to administer the land for the purpose of paying debts.[6] An administrator in possession of decedent's realty may invoke the aid of equity to protect his possession against a fraudulent claim thereto by another.[7]

Ejectment or writ of entry. An executor or administrator entitled to temporary possession of his decedent's realty for the purpose of settling the estate may prosecute or defend an action of ejectment or a writ of entry;[8] but where he is not thus entitled to possession, or where the title vests directly in the heirs or devisees, with at most a power of sale in the representative, he has no such authority,[9] and, as an administrator in such case is not the proper party to prosecute an action of ejectment, he cannot maintain an appeal in such an action originally instituted by decedent.[10]

Forcible entry and detainer. An executor or administrator is entitled to maintain an action of forcible entry and detainer where he is entitled to possession of the land,[11] or where decedent had a mere chattel interest therein,[12] but not otherwise.[13]

Pleading, evidence, and trial. General rules governing pleadings,[14] the weight and sufficiency of evidence,[15] and the conduct of trials[16] have been applied in actions by representatives to recover or protect possession of realty.

§ 259. Rents and Profits

a. In general
b. Disposition of rents and profits
c. Liability of representative

a. In General

The personal representative may be empowered or required by testamentary or statutory provision, or by virtue of the consent of the heirs or devisees, to collect rents and profits from realty belonging to the estate, but otherwise he has no authority or duty to do so.

Possession and control of real estate such as will carry the right or duty to collect rents and profits may be given to the personal representative by the will;[17] and under a number of statutes the representative is given the right or duty, under appropriate circumstances, to receive the rents and profits for proper purposes connected with the administration,[18] some of such statutes requiring that an or-

5. Ala.—Powell v. Labry, 97 So. 707, 210 Ala. 248.

6. Ga.—Nixon v. Nixon, 15 S.E.2d 883—Blount v. Dean, 1 S.E.2d 653, 187 Ga. 494—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224.

7. Or.—Butts v. Purdy, 125 P. 313, 127 P. 25, 63 Or. 150.

8. Ark.—Pullen v. Smith, 139 S.W.2d 245, 200 Ark. 420.
24 C.J. p 138 note 83.

9. Mich.—Howes v. Barney, 165 N. W. 658, 199 Mich. 569.
24 C.J. p 138 note 84.

Action of reivindication cannot be brought against a grantee or assignee of the rights of one or more of the heirs by the succession or estate of a deceased person, acting as an entity.—Succession of Garcia v. Hernandez, C.C.A.Puerto Rico, 270 F. 455.

10. Mo.—Whitworth v. Barnes, 165 S.W. 992, 256 Mo. 468.

11. Wash.—Griffith v. James, 158 P. 251, 91 Wash. 607.
24 C.J. p 139 note 86.

12. Tenn.—Winningham v. Crouch, 2 Swan 170.

13. Miss.—McMullen v. Mayo, 16 Miss. 298.
24 C.J. p 139 note 88.

14. **Bill, complaint, or petition held sufficient**
Colo.—Weaver v. Weaver, 60 P.2d 227, 99 Colo. 74.
Ga.—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224.
Bill or petition held insufficient
Ga.—Metropolitan Life Ins. Co. v. Hall, 12 S.E.2d 53, 191 Ga. 294—Denton v. Parsons, 102 S.E. 353, 150 Ga. 70.
Mich.—Dodds v. Purdy, 269 N.W. 613, 277 Mich. 593.
Answer held sufficient
Ga.—Hortman v. Vissage, 12 S.E.2d 294, 191 Ga. 446.

15. **Evidence held sufficient** to support verdict for administrator.—Abrams v. Neal, 61 P.2d 1103, 178 Okl. 158.
Evidence held insufficient
(1) Generally.—Vick v. Georgia Power Co., 174 S.E. 713, 178 Ga. 869.
(2) To sustain verdict for administrator.—Caraker v. Brown, 111 S.E. 51, 152 Ga. 677.
(3) To preclude administratrix from suing for possession of land.—Taylor v. San Antonio Joint Stock Land Bank, Tex.Civ.App., 101 S.W. 2d 868, reversed on other grounds San Antonio Joint Stock Land Bank v. Taylor, 105 S.W.2d 650, 129 Tex. 335.

16. **Question of ownership** of property is one of fact.—McGuire v. Ehrlich, 245 P. 703, 49 Nev. 319.
Verdict held properly directed for plaintiff
Ga.—Milner v. Allgood, 191 S.E. 132, 184 Ga. 288—Paris v. Treadaway, 160 S.E. 797, 173 Ga. 639.

17. U.S.—Wilson v. Anderson, D.C. N.Y., 51 F.2d 268, reversed on other grounds, C.C.A., 60 F.2d 52, certiorari granted Anderson v. Wilson, 53 S.Ct. 123, 287 U.S. 592, 77 L.Ed. 517, affirmed 53 S.Ct. 417, 289 U.S. 20, 77 L.Ed. 1004.
Ill.—Moore v. Smith, 19 N.E.2d 223, 298 Ill.App. 417.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
Iowa.—In re Schofield's Estate, 160 N.W. 910, 178 Iowa 1260.
W.Va.—Peters v. Kanawha Banking & Trust Co., 191 S.E. 581, 118 W. Va. 484.
24 C.J. p 139 note 91.
Rents and profits as assets see supra § 105.
Effect of settlement contract
Although a will imposed a duty on the executors to collect rents and pay them to the widow of the testator, the children of the testator could, with the consent of the widow, be allowed to occupy portions, which would belong to them after the death of the widow, without paying rent, since such a course is the equivalent of payment of the rent by the children to the executors, and by the executors to the widow, and by the widow back to the children.—In re Murphy's Estate, 228 N.W. 658, 209 Iowa 679.

18. Ala.—Boyte v. Perkins, 99 So. 652, 211 Ala. 130.
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E.2d 728.
Mass.—Stone v. Sullivan, 15 N.E.2d 476, 300 Mass. 450, 116 A.L.R. 1223.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.

der of court be obtained authorizing the representative to rent or use the land and apply the rents and profits to the purposes of the administration.[19] Compliance must be had with such statutes,[20] and they should be construed liberally to give effect to the intent with which they were enacted.[21]

At common law, and in the absence of the circumstances or contingencies contemplated by such testamentary or statutory provisions, the personal representative has no authority or duty to collect rents and profits accruing after the death of his decedent, the right thereto being in the heir or devisee of the realty.[22] A mere naked or contingent power to sell does not give the representative a right to the rents and profits, but in such case the heirs or devisees may enter upon the estate and receive all rents and profits until such power is appropriately exercised.[23]

The consent of heirs or devisees may warrant the collection of rents of real estate by the executor,[24] and the receipt of rents and profits of real estate with such consent gives the representative a lawful possession and a good title against all persons except the heirs.[25]

Actions to recover. Where the right to possess or control decedent's land is given by will or local statute, the executor or administrator may recover rent or sue for use and occupation,[26] but he cannot

N.Y.—In re Limberg's Estate, 24 N.E.2d 127, 281 N.Y. 463, reversing 11 N.Y.S.2d 897, 256 App.Div. 1104—In re Bush's Estate, 277 N.Y.S. 325, 243 App.Div. 322.
Pa.—In re Graham's Estate, 23 A.2d 235, 147 Pa.Super. 57—Robinson v. Painter, 23 West.Co.L.J. 111.
24 C.J. p 139 note 92.

Rents held properly collected by administratrix from realty to which she had legal title.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.

Purchaser of heirs' interest in realty pending administration takes realty subject to administrator's right to collect rents and profits.—In re Gentry's Estate, 13 P.2d 156, 158 Okl. 196.

That administrator is usually distributee of decedent's estate, and thus ultimate cotenant with other statutory distributees, and that one cotenant of realty cannot recover rental, or for use and occupation from another, in absence of express contract, does not prevent administrator from performing duty to conserve real estate and make it productive.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.

19. Mo.—Bealey v. Blake, 70 Mo.App. 229.
24 C.J. p 139 note 94.

Where no order was made authorizing executrix to collect rents from specifically devised property and the rents were collected from the premises and taxes were paid by the executrix with the acquiescence of the devisees, the net profit from the rentals belonged to the devisees.—In re Wells' Will, 26 N.Y.S.2d 604.

20. N.Y.—Limberg v. Limberg, 11 N.Y.S.2d 690, 256 App.Div. 721.
Pa.—In re Roderick's Estate, 3 Fay. L.J. 93.
24 C.J. p 139 note 93.

21. Pa.—In re Graham's Estate, 23 A.2d 235, 147 Pa.Super. 57.

22. U.S.—Arrot v. Heiner, C.C.A.Pa., 92 F.2d 773.
Ala.—Johnson v. Moxley, 113 So. 651, 23 Ala.App. 1, reversed on other grounds 113 So. 656, 216 Ala. 466.
Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279—Ellis v. Geer, 137 S.E. 290, 36 Ga.App. 519—Roberts v. Kite, 125 S.E. 719, 33 Ga.App. 91.
Ill.—Pech v. Landphere, 238 Ill.App. 567.
Iowa.—Andrew v. Murtha, 236 N.W. 437—First Nat. Bank v. Murtha, 236 N.W. 433, 212 Iowa 415.
Kan.—Nagle v. Davison, 257 P. 962, 124 Kan. 230.
Ky.—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74—Nicely v. Howard, 242 S.W. 602, 195 Ky. 327.
La.—Succession of Cooney, 158 So. 572, 181 La. 7.
Mass.—Beardsley v. Hall, 197 N.E. 35, 291 Mass. 411, 99 A.L.R. 1129.
Minn.—Bowen v. Willard, 281 N.W. 256, 203 Minn. 289.
Miss.—Fidelity & Deposit Co. v. Doughtry, 179 So. 846, 181 Miss. 586.
N.Y.—In re Schroder's Will, 29 N.Y.S.2d 754, 176 Misc. 1024—In re Merrill's Estate, 300 N.Y.S. 671, 165 Misc. 161—In re Phetteplace's Estate, 6 N.Y.S.2d 845.
Pa.—In re Sullivan's Estate, 86 Pa. Super. 241—In re Mackay's Estate, 25 Pa.Dist. & Co. 544—Yontz v. Yontz, 51 Dauph.Co. 126—In re Webb's Estate, 29 Del.Co. 200—Stoop's Estate, 14 Pittsb.Leg.J.,N.S., 34.
R.I.—Charpentier v. Charpentier, 195 A. 210, 59 R.I. 225.
Wash.—Morris v. Sherman, 38 P.2d 1012, 180 Wash. 45.
Wis.—Curtis v. Gillie, 300 N.W. 911, 239 Wis. 207.
24 C.J. p 139 notes 90, 93.

Loss of rights by creditor
Where deceased mental incompetent's creditor did not bring action within year after decedent's death against executor of his estate to recover amount claimed for board, lodging and nursing furnished decedent, as required by statute to extend lien on decedent's realty for such amount, or file petition in orphans' court for order directing executor to collect rents of decedent's realty for such creditor's benefit until over two years after decedent's death, such court's jurisdiction over realty and creditor's right to look thereto for payment of debt ended.—In re Graham's Estate, 23 A.2d 235, 147 Pa.Super. 57.

Land leased by decedent
It has been held that, where land is rented for a year and the lessor dies intestate within the year, the heirs have no title, merely as heirs, to the rent accruing for that year, but the rent is personalty and the right to collect and distribute it is in the administrator.—Autrey v. Autrey, 20 S.E. 431, 94 Ga. 579, followed in Strickland v. Thornton, 58 S.E. 540, 2 Ga.App. 377—24 C.J. p 140 note 98.

23. Ill.—Pech v. Landphere, 238 Ill. App. 567, citing **Corpus Juris.**
Ind.—Lockridge v. Citizens Trust Co. of Greencastle, App., 37 N.E. 2d 728.
N.J.—Brengel v. O'Toole, 140 A. 28, 102 N.J.Eq. 178, reversed on other grounds 143 A. 361, 103 N.J.Eq. 339.
24 C.J. p 140 note 95.

24. Mass.—Forbes v. Keyes, 78 N.E. 733, 193 Mass. 38, 41.
24 C.J. p 140 note 96.

25. Mass.—Wilson v. Shearer, 9 Metc. 504.

26. Nev.—McGuire v. Ehrlich, 245 P. 703, 49 Nev. 319.
24 C.J. p 140 note 99.

Notice, served on tenant for payment of rent or surrender of premises belonging to deceased, was held not invalid because signed by attorney for administratrix.—McGuire v. Ehrlich, supra.

Action for royalty in mineral lands of deceased should be in the name of his administrator.—Lamp v. Jones, 119 S.E. 676, 94 W.Va. 586.

Remedy of distress
The personal representative of a deceased landlord cannot enforce the remedy of distress for rent due at

do so where no such rightful control exists.[27]

b. Disposition of Rents and Profits

Rents collected by the personal representative from realty belonging to the estate may be applied on obligations of the estate, or for other proper purposes connected with the administration.

Rents collected by the personal representative from realty belonging to the estate should be applied by him for proper purposes of the administration.[28] It is proper to apply rents on the obligations of the estate;[29] and a representative who has collected rents may be protected where, instead of paying them over to the heirs or other distributees, he has under prudent and reasonable circumstances applied them beneficially for the premises, as in keeping down mortgage interest and preventing foreclosure at a sacrifice,[30] for needful labor on the premises,[31] or for keeping the buildings in proper repair.[32] It has been held, however, that an administrator has no authority to apply rents collected to taxes and arrears of ground rent accruing subsequently to the death of decedent.[33] A court has refused to call a widow who was administratrix to account for rents and profits expended in the support of infant children of decedent;[34] and it has been held that under a statute giving executors and administrators possession and control of the real estate not specifically devised during the settlement of the estate, such possession and control were for the benefit of the persons entitled to the real estate, and that rents and profits not needed for the payment of debts went on distribution with the land as incident thereto, and did not go to the residuary legatees.[35]

c. Liability of Representative

(1) In general
(2) In what capacity liable

(1) In General

A personal representative who takes over the possession, control, or use of his decedent's realty must account for the rents and profits which he received or should have received.

An executor or administrator who takes over the possession, control, or use of the real property of his decedent must account for the rents and profits which he received or should have received,[36] although it seems that where he acts diligently and

landlord's death or accruing thereafter.—Staton v. Guillebeaux, 116 S.E. 443, 123 S.C. 363, 31 A.L.R. 1.

27. Ill.—First Nat. Bank & Trust Co. of Evanston v. Simon, 38 N.E. 2d 360, 312 Ill.App. 214.
Ky.—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74—Nicely v. Howard, 242 S.W. 602, 195 Ky. 327.
24 C.J. p 140 note 1.

28. N.J.—In re Roessler's Estate, 160 A. 370, 110 N.J.Eq. 570.
24 C.J. p 139 note 92.

Rents collected from devised land
Although ordinarily rents collected by executor from devised realty go to devisee, order may authorize application of such rents to repairs, taxes, insurance, and mortgage indebtedness on tract from which rents were derived, if such application will not injure devisee's interest.—Commercial Nat. Bank of Charlotte v. Misenheimer, 191 S.E. 14, 211 N.C. 519, 110 A.L.R. 1310.

Question held one of fact
Whether administrator with the will annexed, in collecting rents of real property and disbursing them for the upkeep of the property, was acting for the best interests of the estate, was to be determined as a fact from all the circumstances.—In re Baker's Estate, 298 N.Y.S. 261, 164 Misc. 92.

29. Del.—Loscolzo v. Eggner, 78 A. 607, 23 Del. 260.
24 C.J. p 139 note 92, p 140 note 2.

30. Ala.—Patapsco Guano Co. v. Ballard, 19 So. 777, 107 Ala. 710, 54 Am.S.R. 131.
Ark.—Reynolds v. New Orleans Canal & Banking Co., 30 Ark. 520.

Consent of heirs or devisees to application by administrator of rental money to payment of taxes and mortgages estops them from recovering against him.—Firmin v. Crawford, 36 P.2d 970, 140 Kan. 370.

31. Ark.—Ferguson v. Collins, 8 Ark. 241.

32. La.—Henderson's Succession, 24 La.Ann. 435.
Repairs and improvements generally see infra § 260.

33. Pa.—McManus' Estate, 3 Pa. Dist. 183, 14 Pa.Co. 379.
Payment of taxes and assessments generally see supra § 235.

34. N.Y.—Thompson v. Brown, 4 Johns.Ch. 619.

35. Conn.—Remington v. American Bible Soc., 44 Conn. 512.

36. Ark.—Acker v. Watkins, 100 S.W.2d 78, 193 Ark. 192.
Ga.—Adams v. Bishop, 151 S.E. 377, 169 Ga. 762.
Kan.—Crowley v. Nixon, 296 P. 376, 132 Kan. 552, rehearing granted 297 P. 1117.
Mass.—Beardsley v. Hall, 197 N.E. 35, 291 Mass. 411, 99 A.L.R. 1129.
Miss.—Reeves v. Reeves, 128 So. 330, 157 Miss. 448.
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
N.Y.—In re Ellinger's Estate, 198 N.Y.S. 187, 120 Misc. 276.
Tex.—Morrell v. Hamlett, Civ.App., 24 S.W.2d 531, error refused.
Wis.—In re Hurley's Will, 213 N.W. 639, 193 Wis. 20.
24 C.J. p 140 note 9, p 142 note 22.

Sole heir
Executor held chargeable with rents collected, although he was sole heir.—In re Clark's Estate, 212 N.W. 481, 203 Iowa 224.

Executor's failure to take security for payment of rents for property owned by deceased's estate rendered him liable for uncollected and unsecured rents.—Parrish v. Johnson, Tex. Civ.App., 88 S.W.2d 1066, error refused.

Realty obtained by foreclosure
While administratrix was retaining realty which was deemed personalty because acquired by foreclosure of mortgage, constituting a salvage operation, her obligations in respect of its care and conservation continued as before, and she would be accountable for any net revenue derived from its use, just as if it were the original mortgage.—In re Valionis' Estate, 26 N.Y.S.2d 540, 176 Misc. 110.

Time for charging representative
A personal representative should not be charged by a devisee with rent collected from realty specifically devised, under a bona fide and reasonable belief of its necessity for the payment of debts, until after the period for presentation of claims against an estate has expired.—Powell v. Labry, 97 So. 707, 210 Ala. 248.

honestly with regard to realty in his possession and control he is liable only for such rents and profits as he may have received.[37] Thus a representative who occupies such property for his own purposes,[38] or who negligently fails to rent it,[39] is liable for the value of the rents and profits which should have been received by the estate; but where he has occupied realty merely for the purpose of preserving or protecting it,[40] or in order to benefit the estate in some other manner,[41] without any profit to himself, he is not liable for the rental value of such occupation. Where it is necessary to sell lands for payment of debts, and the representative fails to take proper steps to that end within a reasonable time, he may be held liable for rent.[42] An executor or administrator is not responsible for rents for a time when the real estate was not in his possession or control, unless he has been guilty of some laches or lack of good faith which has resulted in a loss to those entitled to the rents.[43]

Deduction for outlays. Rents or profits to be accounted for by the representative are net, and subject to suitable deductions for his outlays, expenses, and services,[44] although not necessarily for improvements, or for any outlays or expenses inconsistent with an honest and prudent management of the property.[45]

Interest on the value of the rents may sometimes be charged against the representative.[46]

A statute providing a mode for determining the amount due for the use or income of real estate, when the occupation is such as to create a liability therefor, and the disposition of such amount, does not make an executor or administrator liable for the use and occupation of real estate for which he would not otherwise be liable in some form.[47]

(2) In What Capacity Liable

A personal representative lawfully in possession or control of realty is accountable in his representative capacity for rents and profits received; but where his possession or control was without authority, he is held to account therefor only in his individual capacity.

Whether the representative's liability to account for rents and profits is in his representative or his individual capacity depends on the facts of the par-

Pro rata share in upkeep of homestead was properly charged to an executor who administered it as part of the estate of the testator, where such upkeep enabled him to collect the rents of the homestead for his individual benefit.—Reeves v. Reeves, 128 So. 330, 157 Miss. 448.

Life estate charged with expenses

An executor who has permitted land, a life estate in which is charged by the will with the payment of expenses of administration, to pass into the possession of the devisee for life, and suffered him to enjoy the rents and profits thereof for more than twenty years, is justly chargeable with rents and profits to the amount of administration expenses.—Tilton v. Tilton, 41 N.H. 479.

Circumstances relieving executor of charge

(1) Executor was held not chargeable for rents and profits of land for two years after testator's death under will showing intention to give unmarried daughters free use of farm for two years.—Weade v. Weade, 150 S.E. 238, 153 Va. 540.

(2) Where testator at his death owned a house and lot occupied by the executor, whose wife was a residuary legatee, and it was agreed that she should have the house and lot in payment of her legacy, and a deed thereto was executed and delivered to her, and the executor with his family continued to occupy the house, and there was nothing to show that it was not advantageous to the estate to settle the claim of the wife by conveying the property, the executor was held not chargeable with the rental value of the property after the execution and delivery of the deed.—In re Lane, 65 A. 102, 79 Vt. 323.

Evidence held to authorize finding as to rental value of land during occupancy of executor.—Arrington v. McDaniel, Tex.Civ.App., 4 S.W.2d 262, modified on other grounds, Com. App., 14 S.W.2d 1009 and certified questions answered 25 S.W.2d 295, 119 Tex. 148.

37. Fla.—Anderson v. Northrop, 33 So. 419, 44 Fla. 472.
24 C.J. p 143 note 23.

38. Ga.—Adams v. Bishop, 157 S.E. 523, 42 Ga.App. 811, transferred, see 152 S.E. 108, 170 Ga. 238.
Ky.—Preston v. Second Nat. Bank, 63 S.W.2d 774, 250 Ky. 673.
Mass.—McCarthy v. Adams, 160 N.E. 815, 263 Mass. 300.
Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.
24 C.J. p 142 note 22.

Administrator who was tenant in common with deceased cannot occupy land without paying rent.—Kennedy v. Parks, 116 So. 161, 217 Ala. 323.

Executor as heir or devisee

(1) If the personal representative is also an heir or devisee, it will be presumed that he occupied as such, and where such presumption is not rebutted he need not account for the rents.—Beardsley v. Hall, 197 N.E. 35, 291 Mass. 411, 99 A.L.R. 1129.

(2) Where will is declared void because of the undue influence of the executor, he is liable for the rental value of lands which he occupied as devisee under such will.—In re Limberg's Estate, 24 N.E.2d 127, 281 N.Y. 463, reversing 11 N.Y.S.2d 897, 256 App.Div. 1104.

39. La.—Succession of Hawthorne, 104 So. 481, 158 La. 637.

40. Cal.—In re Rindge's Estate, 28 P.2d 705, 136 Cal.App. 263, motion denied 34 P.2d 179, 139 Cal.App. 454.
Pa.—In re Catanach's Estate, 117 A. 178, 273 Pa. 368.

41. Ky.—Baker's Adm'x v. Combs, 284 S.W. 101, 215 Ky. 5.

42. Ala.—Clark v. Knox, 70 Ala. 607, 45 Am.R. 93.

43. Ga.—Lee v. Moore, 139 S.E. 922, 37 Ga.App. 279.
Mich.—Manderano v. Black, 298 N.W. 381, 298 Mich. 1.
24 C.J. p 141 note 10.

44. La.—Succession of Wood, 171 So. 843, 186 La. 181—Succession of Hawthorne, 104 So. 481, 158 La. 637.
24 C.J. p 143 note 24.

45. Ky.—McCracken v. McCracken, 6 T.B.Mon. 342.
23 C.J. p 143 note 25.
Allowance for expenditure for improvements generally see supra § 223.

46. Ala.—Harrison v. Harrison, 39 Ala. 439.
S.C.—Harvin v. Riggs, 9 S.C.Eq. 287.
Interest on funds of estate generally see supra §§ 209–216.

47. Mass.—Almy v. Crapo, 100 Mass. 218.

ticular case.[48] The general rule is that, where the representative is lawfully in possession or control under testamentary or statutory authority, he accounts in his representative capacity for the rents and profits received as assets for the payment of debts or distribution, as the case may be,[49] although negligence in the management of the property may subject him to personal liability,[50] while if he has taken possession or control without authority he is not in his representative capacity chargeable with, or liable to account for, the rents and profits or proceeds received,[51] but is held to account therefor in his individual capacity on the theory that they have been received by him as agent or implied trustee for those entitled to the realty.[52] It is usually considered that, where the representative has received rents and accounted therefor or paid them out in discharge of the debts of his decedent, he is precluded from alleging that they belong to the heir and that he received them without authority, and those entitled to the rents may charge him therewith in his representative capacity as for assets rightfully received;[53] while, if he received them without authority, he is also chargeable in his individual capacity for what he has paid out,[54] the one entitled to the rents has the right to elect in which capacity he shall be charged, and he cannot defeat a recovery against him in his representative capacity on the ground that he is personally liable.[55]

§ 260. Repairs and Improvements

The personal representative may, under testamentary or statutory provisions, have a duty to preserve the realty of the estate, and to keep all structures thereon in proper repair.

Although there is authority that the personal representative has no duty to repair buildings located upon realty belonging to the estate,[56] he may have a duty, under provisions of the will[57] or of statute,[58] to preserve such realty and to keep all structures thereon in proper repair.

§ 261. Mortgaged and Encumbered Property

An executor or administrator has no better title to mortgaged property than his decedent had during his lifetime as respects his right to subject it to claims of creditors.

An executor or administrator has no better title to mortgaged property than his decedent had during his lifetime as respects his right to subject such property to the claims of creditors,[59] although under statutes in some jurisdictions an administrator's consent to a mortgagee's entry on mortgaged property and to assignment of rents is binding on the heirs and next of kin.[60]

§ 262. —— Purchase of Encumbrance by Representative

A representative may not purchase a mortgage on land of the estate, but the mere fact that he takes a transfer to himself has been held not to render the transaction void.

The representative cannot buy for his own benefit a mortgage on the land of the estate;[61] but if he has advanced his own funds to prevent the property from being sacrificed and benefited the estate thereby, the mere fact that he took a transfer of the debt to himself does not render the transaction void,[62] or preclude his being credited with the amount advanced.[63]

48. Tex.—Patrick v. Roach, 27 Tex. 579.

49. Mo.—Dix v. Morris, 66 Mo. 514, affirming 1 Mo.App. 93.
24 C.J. p 141 note 15.

50. Fla.—Eppinger v. Canepa, 20 Fla. 262.

51. D.C.—Shields v. Shields, 101 F. 2d 255, 69 App.D.C. 331.
Ga.—Ellis v. Geer, 187 S.E. 290, 36 Ga.App. 519—Roberts v. Kite, 125 S.E. 719, 33 Ga.App. 91.
24 C.J. p 142 note 17.

52. U.S.—Arrott v. Heiner, C.C.A.Pa., 92 F.2d 773.
D.C.—Shields v. Shields, 101 F.2d 255, 69 App.D.C. 331.
24 C.J. p 142 note 18.

53. Kan.—Kothman v. Markson, 9 P. 218, 34 Kan. 542.
24 C.J. p 142 note 19.

54. Ohio.—Conger v. Atwood, 28 Ohio St. 134, 22 Am.R. 462.

55. Ohio.—Conger v. Atwood, 28 Ohio St. 134, 22 Am.R. 462, following in Arbuckle v. Tracy, 15 Ohio 432.
24 C.J. p 142 note 21.

56. N.J.—Boyle v. Nolan, 8 A.2d 358, 123 N.J.Law 365.
Authority of personal representative to make repairs and improvements see supra § 233.
Disposition of insurance proceeds
A fund received by executor of insured on loss of the house and furniture, and held in trust for the life tenant and the remaindermen under the insured's will, is personalty, and not realty, so that the executor is not required to use it in rebuilding a house on the land.—Millard v. Beaumont, 185 S.W. 547, 194 Mo.App. 69.

57. N.H.—Ladd v. Ladd, 68 A. 462, 74 N.H. 380.
24 C.J. p 143 note 30 [b], [e].

58. La.—Succession of Rhodes, 114 So. 107, 164 La. 488.
N.Y.—In re Collins' Estate, 286 N.Y.S. 506, 158 Misc. 798.
N.D.—Hoffman v. Ness, 300 N.W. 428.
Utah.—In re Hansen's Estate, 184 P. 197, 55 Utah 23.

59. Tex.—Etter v. Tuck, Civ.App., 101 S.W.2d 843.
Rights pass to representatives
On death of purchaser during life of his contract of assumption of payment of mortgage note, his rights pass unimpaired to his heirs and representatives.—Key v. Alamo Nat. Co., Tex.Civ.App., 62 S.W.2d 1002, error dismissed.

60. N.Y.—City Sav. Bank of Brooklyn v. Torro, 300 N.Y.S. 1009, 253 App.Div. 748.

61. N.C.—Morton v. Blades Lumber Co., 56 S.E. 551, 144 N.C. 31.
24 C.J. p 144 note 37.

62. Nev.—Furth v. Wyatt, 30 P. 828, 17 Nev. 180.

63. Cal.—Burnett v. Lyford, 25 P. 855, 93 Cal. 114.
Neb.—In re Herman's Estate, 293 N.W. 353, 138 Neb. 430.
N.Y.—Ellis v. Kelsey, 150 N.E. 148, 241 N.Y. 374, modifying 210 N.Y.

§ 263. —— Discharge of Encumbrance

a. In general
b. In interest of heir or devisee
c. Testamentary directions

a. In General

A representative may discharge an encumbrance on realty of the estate where it is needed for the payment of debts and such realty is worth more than the amount of the encumbrance.

While some cases applying strictly the rule that the representative is not concerned with the realty, as shown supra § 252, deny that he is under any duty or has any right to apply the assets to removing encumbrances from land[64] which is not needed for the payment of debts or for the purposes of administration,[65] in other cases it has been considered proper for the personal representative to protect mortgaged or encumbered real estate by paying interest, or even the principal of the debt,[66] at least when the real estate is needed for the payment of debts and the particular property is worth more than the amount required to relieve it from the encumbrance thereon,[67] or, as it has been expressed, when the discharge of the encumbrance is beneficial to the estate.[68]

In some cases it has been held that the representative can maintain an action to cancel a mortgage purporting to be executed by his decedent, as fraudulent and void,[69] or as having been paid,[70] or to compel an assignment of a mortgage on the realty to prevent foreclosure and thus to save the estate from loss;[71] but the existence of such powers has also been denied.[72] A representative who goes beyond his duty in such matters must bear all losses resulting to the estate,[73] but in the absence of proof that the condition of the estate did not warrant the redemption of encumbered property it will be presumed that the representative acted properly in redeeming.[74]

Mortgage on property given away by decedent during lifetime. Where a mortgage was given by testator on land which during his lifetime he gave

S. 846, 214 App.Div. 784, and motion granted 152 N.E. 399, 242 N.Y. 495.

64. Miss.—Crescent Furniture & Mattress Co. v. Morgan, 173 So. 290, 178 Miss. 824.
N.Y.—In re Collins' Estate, 286 N.Y.S. 506, 158 Misc. 798—In re Disbrow's Estate, 261 N.Y.S. 635, 145 Misc. 584.
S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.
24 C.J. p 144 notes 43, 44, p 111 note 82, p 112 note 83.

Fraud

Administrator, not required to disclose recorded lien and declining to execute deed, was held not guilty of fraud in not applying purchase money to extinguish lien.—Cairo Banking Co. v. Henderson, 137 S.E. 19, 163 Ga. 629.

Discretion of representative

In absence of showing of abuse of discretion or negligence on part of executors in failing to pay mortgage covering realty, matter of payment of mortgage was required to be left to their discretion.—In re Stewart's Will, 9 N.Y.S.2d 315, 169 Misc. 917.

Reimbursement by heirs

A representative making a payment on a mortgage has been held entitled to be reimbursed by the heirs out of the realty.—Matter of Sworthout, 76 N.Y.S. 961, 38 Misc. 56.

65. Me.—Young v. Tarbell, 37 Me. 509.

66. Iowa.—In re Clark's Estate, 212 N.W. 481, 203 Iowa 224.
N.J.—Byrne v. Byrne, 195 A. 848, 123 N.J.Eq. 6, affirmed 1 A.2d 464, 124 N.J.Eq. 273.
Or.—In re Tucker's Estate, 85 P.2d 1025, 160 Or. 362.
Pa.—In re Reed's Estate, 3 A.2d 334, 332 Pa. 588.
24 C.J. p 144 note 40, p 111 note 81.

Credit for amount paid

(1) Where executor renewed mortgage at higher interest rate, but lowest obtainable, he was entitled to credit for interest paid.—In re Hurley's Will, 213 N.W. 639, 193 Wis. 20.

(2) Administrator, paying mortgage covering both separate property of widow and deceased, was entitled to credit only for amount of indebtedness apportionable to estate.—Danielson v. Pritz, 231 N.W. 550, 59 N.D. 548.

(3) Where the property out of which dower was assigned was subject to mortgage and alimony liens, administrators, on assignment of dower, were entitled to alimony and interest on mortgage paid between husband's death and assignment of dower.—Less v. Less, 227 S.W. 763, 147 Ark. 432.

67. Iowa.—Baurer v. Myers, 278 N.W. 302, 224 Iowa 854.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
N.Y.—In re Lange's Estate, 16 N.Y.S.2d 312, 172 Misc. 437—In re Ely's Estate, 275 N.Y.S. 553, 153 Misc. 334—In re Burton's Estate, 257 N.Y.S. 634, 143 Misc. 440.
24 C.J. p 144 note 41.
Right of executor or administrator to redeem from foreclosure see the C.J.S. title Mortgages § 836, also 24 C.J. p 144 note 46, 42 C.J. p 366 notes 33–42.

Abandonment order set aside

Orphans' court had authority to strike out previous order granting administrator leave to abandon mortgaged premises, where court found previous order was inadvertently made, but such decree setting aside prior order should be without prejudice to intervening rights.—In re Huff's Estate, 149 A. 179, 299 Pa. 200.

Redemption from tax sale

The administrator of an estate, the personal property of which is insufficient to pay the debts, by reason whereof he is empowered to subject the real estate of his decedent to the payment of such debts, may redeem the land from a sale thereof for nonpayment of taxes.—Hogan v. Piggott, 56 S.E. 189, 60 W. Va. 541.

68. N.Y.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.
24 C.J. p 144 note 42.

69. N.Y.—West Troy Nat. Bank v. Levy, 28 N.E. 592, 127 N.Y. 649, reversing 2 N.Y.S. 162.
24 C.J. p 145 note 47.

70. Or.—Epping v. Washington Inv. Assoc., 74 P. 923, 44 Or. 116.
24 C.J. p 145 note 48.

71. N.Y.—Mabbett v. Mabbett, 51 N.Y.S. 529, 29 App.Div. 609.

72. Miss.—Nixon v. Seal, 27 So. 875.

73. Ark.—Kyle v. Ribelin, 65 S.W. 2d 46, 186 Ark. 264.
24 C.J. p 145 note 51.

74. Mich.—Goodrich v. Leland, 18 Mich. 110.

to his widow without any valuable consideration, the land covered by the mortgage was the primary fund out of which it should be paid, and the widow, as executrix, could not in the first instance pay it off from the general property of the estate.[75]

Mortgage executed by representative. Assets of the estate may properly be applied in payment of a real estate mortgage legally executed by an executor or administrator for the purpose of raising funds.[76]

Taxes and insurance. The personal representative should not as a general rule pay taxes assessed on real estate after decedent's death, or insurance on buildings, although under particular wills or by virtue of local legislation it may become his duty to do so as shown supra §§ 235, 238.

b. In Interest of Heir or Devisee

An heir or devisee may require the personal representative to exonerate realty from a debt constituting a lien thereon, unless the testator has expressed a contrary intention or there is a statutory provision changing the rule.

The common-law rule that the personalty is the primary fund for payment of decedent's personal debts, to the exoneration of the realty, discussed infra § 479, has been extended so far as to allow the heir or devisee to require the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain and unequivocal terms.[77] The rule relates, however, only to personal debts of decedent; and if he acquired land already subject to a mortgage his representative cannot be required to discharge it[78] unless decedent made the debt his own,[79] a result which is not effected by a mere assumption of the encumbrance by decedent, by means of a covenant in the conveyance to him or some other agreement with the grantor.[80] It is also considered that the rule applies only in favor of the heirs or devisees, and that an alienee of the heir or devisee is not entitled to require the representative to discharge the mortgage.[81]

The common-law rule has been changed by statute in a few jurisdictions so that the person who takes land by descent or devise must satisfy a lien thereon out of his own property without resorting to the representative unless the testator expressly directs that the lien be otherwise paid.[82] The common-law rule should not be applied as between heirs or devisees and creditors, to the prejudice of the latter,[83] nor were the statutes changing the common-law rule meant to affect the rights of creditors,[84] but only to govern the rule of marshaling between the representative and the heirs or devisees.[85]

c. Testamentary Directions

Specific directions in the will must govern the action of the representative with respect to payment of encumbrances on realty.

Where a testator has by his will given specific directions in respect of the course to be pursued with reference to encumbrances upon land, such directions must govern the action of the representative.[86]

§ 264. —— Mortgagee as Administrator

There is authority in favor of and authority against the right of a mortgagee-administrator to exercise a power of sale in the mortgage.

It has been held that where a mortgagee becomes administrator of the mortgagor he is not precluded by his character as administrator from disposing of

75. Cal.—Matter of Well, 94 P. 856, 7 Cal.App. 515.
N.Y.—Hetzel v. Easterly, 89 N.Y.S. 154, 96 App.Div. 517.

76. Cal.—In re Shively, 78 P. 869, 145 Cal. 400.

77. N.Y.—Lamport v. Beeman, 34 Barb. 239.
24 C.J. p 145 note 56.
Liability of heirs or devisees for liens and encumbrances generally see Descent and Distribution § 125 and Wills § 1316, also 69 C.J. p 1220 note 84–p 1224 note 30.

78. N.J.—Monoghan v. Collins, Ch., 71 A. 617.
24 C.J. p 145 note 57.

79. Pa.—Peter's Estate, 16 Pa.Super. 462.
24 C.J. p 146 note 58.

80. N.J.—Mount v. Van Ness, 33 N.J.Eq. 262, affirmed 35 N.J.Eq. 113.
24 C.J. p 146 note 59.

81. N.J.—Keene v. Munn, 16 N.J.Eq. 398.
24 C.J. p 146 note 60.

82. N.J.—In re Staiger's Estate, 144 A. 619, 104 N.J.Eq. 149, reversing 141 A. 453.
24 C.J. p 146 note 61.

83. Mass.—Gibson v. Crehore, 5 Pick. 146.
24 C.J. p 147 note 62.

84. N.Y.—Wright v. Holbrook, 32 N.Y. 587.
24 C.J. p 147 note 63.

85. N.Y.—Roosevelt v. Carpenter, 28 Barb. 426.
24 C.J. p 147 note 64.

86. Ala.—Morgan v. Watkins, 108 So. 561, 214 Ala. 671.
N.Y.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738—In re Strasenburgh's Estate, 300 N.Y.S. 1016, 164 Misc. 445.
Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740, 744, quoting **Corpus Juris.**
24 C.J. p 147 note 65.

Payment in advance of due dates
Payment by executors of certain sums on account of amortization of mortgages upon property constituting an asset of decedent's estate, in advance of due dates required by terms of the mortgages, was not improvident and negligent, where estate at time of the payment was in ample funds and it appeared to the fiduciaries that vigilance and prudence required the payment to be made, and hence executors and trustees could not be surcharged for the payment.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.

his mortgage in any manner he may deem best, and if he sells the property and gives a general warranty he does not thereby prejudice any right of the heirs to redeem, and he is not chargeable as administrator with the proceeds of the sale,[87] but it has also been held that such a mortgagee cannot exercise a power of sale in the mortgage but must pay the mortgage debt out of the personalty.[88]

§ 265. Leaseholds

The performance and protection of the rights and duties with respect to realty held by the estate under a lease devolve upon the personal representative.

Since a lease of lands is a chattel interest going to the representative as assets, discussed supra § 108, it devolves upon the representative to perform the contract and he is liable for a breach of it,[89] while, on the other hand, he may maintain an action on a lease implied in law.[90] He may maintain ejectment with relation to the leased lands,[91] sue for a trespass when he is in possession,[92] or sue the landlord for forcible entry and taking possession on the death of the lessee.[93]

Although the right to renewal of a lease has been held to pass to the administrator of a deceased lessee as shown supra § 108, such right or power cannot be delegated,[94] but it may be waived by him.[95]

Cropping lease. Where a lease provided that the lessor should furnish seed and implements, and the lessee labor, and the crop to be divided in certain proportions, and the lessee died after the crop was grown, but before it was gathered, the representatives of the lessee were entitled to recover on a quantum meruit the amount of the lessee's interest in the crop, less the loss or damage caused by his death.[96]

Sale or surrender of lease. A sale of a lease or the unexpired term as a chattel interest in the representative's hands may be valid, although made without a license from the court,[97] but the representative cannot lawfully surrender the lease and take another lease in his own name.[98] Where the representative sells the unexpired term of the lease, he must account only for the excess beyond the sum required to pay the rents reserved in the original lease.[99]

§ 266. —— Liability for Rent

Where an executor or representative takes possession under a lease to his decedent, he is personally liable for rent, and the lessor has an election to look to the estate alone or to hold the representative personally liable.

After the death of a tenant his estate remains liable for the payment of rent for the remainder of the term of the lease as shown in the C.J.S. title Landlord and Tenant § 523, also 36 C.J. p 370 note 38, and a restriction requiring use solely by lessee was held not to relieve the administrator from paying rent accruing after the tenant's death.[1] Where the representative has not entered or held possession after the death of the lessee, he is liable for rent only in his representative capacity and not personally,[2] and is entitled to credit in his accounts for the rent paid.[3] However, it has been laid down as

87. U.S.—Dexter v. Arnold, C.C.R. I., 7 F.Cas.No.3,855, 3 Mason 284.

88. N.S.—Millard v. Gregoire, 47 N. S. 78.

89. Kan.—Olson v. Frazer, 118 P.2d 505, 154 Kan. 310.
24 C.J. p 147 note 69.

Election of representative
When the lessee of realty under an unexpired lease dies, the leased property comes into the possession of the personal representative, who may keep the property and charge the estate with the performance of the lease, sublet, if permitted by contract or statute, or he may surrender the premises and cancel the lease, subject to damages for breach of contract.—Brown's Ex'r v. U. S. Trust Co., 215 S.W. 815, 185 Ky. 747, 8 A.L.R. 1142.

Credit on rent due
Administratrix of lessee was not entitled to credit on rent due for period of occupancy of premises in amount paid in advance by lessee to be applied on last month's rent in event of full performance of covenants, where administratrix gave notice of termination of tenancy and abandoned premises prior to expiration of term.—James v. Corvin, 51 P.2d 689, 184 Wash. 356.

Right of occupancy
Where lessors availed themselves of acceleration clause of lease and obtained judgment for full amount of unexpired part of lease, such action gave them status of judgment creditors and conferred on succession of lessee right of occupancy of leased premises.—Succession of Israel, La.App., 154 So. 487.

90. N.Y.—Fybush v. Schare, 18 N. Y.S.2d 47.

91. Ind.—Duchane v. Goodtitle, 1 Blackf. 117.
24 C.J. p 147 note 70.

92. Ind.—Cunningham v. Baxley, 96 Ind. 367—Schee v. Wiseman, 79 Ind. 389.

93. Ind.—Smith v. Dodds, 35 Ind. 452.

94. N.Y.—Goldberg v. Himlyn, 201 N.Y.S. 837, 121 Misc. 580.

95. N.M.—Hart v. Walker, 62 P.2d 123, 40 N.M. 1.

96. N.C.—Parker v. Brown, 48 S.E. 657, 136 N.C. 280.

97. Miss.—Dillingham v. Jenkins, 15 Miss. 479.
24 C.J. p 148 note 84.

98. Pa.—Keating v. Condon, 68 Pa. 75.
24 C.J. p 148 note 85.

99. Ohio.—Steward v. Barry, 131 N. E. 492, 102 Ohio St. 129.

1. Mass.—Israel v. Beale, 169 N.E. 777, 270 Mass. 61, 68 A.L.R. 588.
Right to subject goods in hands of administrator to distress is considered in the C.J.S. title Landlord and Tenant § 678, also 36 C. J. p 546 notes 47–58.

2. Mass.—Fessenden v. Gunsenhiser, 179 N.E. 603, 278 Mass. 213.
24 C.J. p 148 note 79.

Possession not shown
Ill.—Smith v. Thorne, 9 N.E.2d 651, 291 Ill.App. 610.

3. N.Y.—In re Donchian's Estate, 217 N.Y.S. 318, 128 Misc. 51.
24 C.J. p 148 note 80.

the rule that the representative who takes possession under a lease to his decedent is also personally liable[4] at least to the extent of the profits of the land,[5] or the reasonable worth of the use of the premises,[6] and in such case the lessor has an election either to look to the estate alone or to hold the representative personally liable.[7] The representative is not relieved from liability for rent by obtaining a purchaser ready to accept an assignment of the lease, but who afterward withdrew because the lessor refused to recognize him as a tenant.[8] Where the term of a lease was unexpired when the lessee died, and his widow as administratrix made all reasonable and proper efforts to sublet the premises, occupying them in the meantime, she was not chargeable in her account with rent during the time of her occupancy.[9]

New lease or renewal. It has been held that an executor cannot bind the estate by acceptance of a lease for a term of years beginning after the death of decedent,[10] and an administrator of a lessee in a lease which provides for renewal only at the option of the lessee, on a valuation of the land only, the improvements belonging to the lessee, and making no provision for compensation therefor if there was no renewal, cannot bind the estate by a renewal, so that he is properly sued personally for the rent on a lease made to him as administrator.[11]

§ 267. Contracts of Decedent

a. In general
b. Actions
c. Conveyance
d. Rescission, revival, or modification

a. In General

In the absence of statutory authority or an order of court, the representative of a decedent cannot as a general rule maintain an action on or perform a contract relating to real property.

While the representative cannot as a general rule maintain an action on or perform a contract or covenant relating to real property of his decedent, since this devolves rather upon heirs or devisees,[12] he may be given ample authority by statute or the express provisions of the will under which he acts to do so,[13] and heirs or devisees may also confer

4. Mass.—Fessenden v. Gunsenhiser, 179 N.E. 603, 278 Mass. 213.
24 C.J. p 147 note 76.

5. Ohio.—Steward v. Barry, 131 N. E. 492, 102 Ohio St. 129.
24 C.J. p 148 note 77.

Sublease

Executors of deceased lessee were held not personally liable to lessor for anything in excess of rents and profits received from subtenant.—Lesser v. Pomin, 39 P.2d 451, 3 Cal. App.2d 117.

6. Mass.—Fessenden v. Gunsenhiser, 179 N.E. 603, 278 Mass. 213.

Promise to pay; reasonable value

A promise of an executrix to pay the rent of premises leased by her testator, pursuant to which she thereafter remained in possession, created relation of landlord and tenant, which continued during possession of executrix; and she is liable for the reasonable value of the use and occupation of the premises, notwithstanding lease did not terminate on death of testator.—Southern Pac. Co. v. Swanson, 238 P. 736, 73 Cal. App. 229.

Rent reserved prima facie evidence

The representative is liable only for the real worth of the premises, and while the rent reserved by the lease is prima facie evidence of the value of the premises and the extent of the representative's liability, it is open to him to show that the premises, during the time for which he is liable, was of less value.—Fessenden v. Gunsenhiser, 179 N.E. 603, 278 Mass. 213—24 C.J. p 148 note 77 [a].

7. Mass.—Fessenden v. Gunsenhiser, supra.
24 C.J. p 148 note 78.

Effect of proceeding against representative

That landlord of deceased tenant proceeded against executrix personally and harshly refused executrix' offer to occupy apartment was held not to avoid liability of estate for rent under deceased tenant's lease. —In re Adams' Estate, 267 N.Y.S. 910, 149 Misc. 289.

8. Mass.—Johnson v. Stone, 102 N. E. 366, 215 Mass. 219, 220.
24 C.J. p 148 note 81.

9. N.Y.—In re Schroeder, 99 N.Y.S. 176, 179, 113 App.Div. 204, 207, affirmed 78 N.E. 1112, 186 N.Y. 537.
24 C.J. p 148 note 83.

10. Ill.—Grace v. Seibert, 85 N.E. 308, 235 Ill. 190, 22 L.R.A.,N.S., 301, reversing 138 Ill.App. 361.
24 C.J. p 147 note 73.

11. N.Y.—Chisholm v. Toplitz, 82 N.Y.S. 1081, 82 App.Div. 346, affirmed 70 N.E. 1096, 178 N.Y. 599.

12. S.C.—Cothran v. Long Cane Lumber Co., 139 S.E. 850, 141 S.C. 337.
24 C.J. p 148 note 86.

Estate as grantee in deed

Vendor's tender to administrator of deceased purchaser's estate of deed executed to estate of decedent was held insufficient as tender, since estate of decedent was not a person who could be a grantee under law of Florida, where the realty was located, or under the law of Michigan.—In re Reason's Estate, 267 N. W. 863, 276 Mich. 376.

Right to assign

The representative has no right to assign the contract of decedent for purchase of land without consent of heirs.—Champion v. Brown, 6 Johns. Ch. 398, 10 Am.D. 343.

Setting contract aside

The representative is not a proper party to set aside a land contract of deceased.—Van Horn v. Herndon, 235 N.W. 201, 253 Mich. 408.

Covenants in warranty deed

Where original vendor of realty under contract of sale subsequently conveyed property to another by warranty deed, subject to rights of original purchaser, covenants in warranty deed would run with land and accrue to benefit of executors of purchaser on payment of note for purchase price and deed by subsequent grantee.—Coral Gables v. Jones, 187 A. 434, 323 Pa. 425.

A covenant to convey land may not be enforced by the administrator.—Thrower v. McIntire, 20 N.C. 359, 34 Am.D. 382.

13. N.Y.—In re Strasenburgh's Estate, 300 N.Y.S. 1016, 164 Misc. 445.
24 C.J. p 149 note 87.

Statute permissive

Under statute providing that executors of persons who have made sale of realty may convey, purchaser could not obtain conveyance

power on him in such matters at least so as to conclude their own rights.[14] The intervention of the probate court is also frequently provided for in such matters; or equity will intervene to carry into practical effect a realty transaction beneficial to the estate.[15] It has been stated that the representatives of a deceased vendee under a land contract become the vendee's assignees by operation of law,[16] and that the representatives may[17] or ought to[18] complete a contract made by decedent. However, even though it is made the duty of executors and administrators to perform valid and uncompleted contracts entered into by testator, they may not expend the estate's funds to do new work which testator was not bound to do.[19] If the executor or administrator carries out decedent's contract he is bound to account for what he received thereunder,[20] while if in completing such contract he takes the title to property he holds such property in trust for the heirs.[21]

b. Actions

(1) In general
(2) Specific performance

(1) In General

The personal representative may sometimes sue to recover purchase money unpaid at death of his deceased vendor or to recover damages for a breach of contract.

The personal representative of the vendor is generally the proper party to enforce a contract or recover purchase money which is unpaid at the death of the vendor,[22] and he may sometimes bring an action to recover the purchase money paid by decedent[23] or damages for the breach of contract.[24] Conversely, he may be sued for the balance due on decedent's contract to purchase realty.[25]

against executrix's will.—Murray v Roberts, 149 A. 113, 158 Md. 521.

14. Ga.—Du Bose v. Ball, 64 Ga. 350.

15. Cal.—In re Bailey's Estate, 109 P.2d 356, 42 Cal.App.2d 509.
Kan.—In re Shike's Estate, 293 P. 392, 131 Kan. 643.
Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
N.Y.—In re Gerhardt's Estate, 24 N.Y.S.2d 595, 261 App.Div. 140, reversing 18 N.Y.S.2d 351, 173 Misc. 585.
Wash.—In re Murphy's Estate, 71 P.2d 6, 191 Wash. 180, reversed on other grounds 75 P.2d 916, 193 Wash. 400, opinion adhered to 81 P.2d 779, 195 Wash. 695.
Wis.—Harris v. Halverson, 211 N.W. 295, 192 Wis. 71.
24 C.J. p 149 note 89.

16. Mich.—In re Jeffers' Estate, 261 N.W. 271, 272 Mich. 127.

Liability for installments

Executors and testamentary trustees of vendee under land contract who inventoried land and collected rents, income, and profits accruing after vendee's death held not liable for installments under land contract in absence of personal assumption of liability.—In re Jeffers' Estate, supra.

17. Cal.—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430.
Ga.—Pate v. Newsome, 147 S.E. 44, 167 Ga. 867.
24 C.J. p 200 note 43.

Completion in own name

Even though the representative completes the purchase in his own name, the purchase may be held to be made for the benefit of the estate where it sufficiently appears from the evidence that this was the intention of the representative.

Cal.—Avila v. Pereira, 52 P. 840, 120 Cal. 589.
Tex.—Coleman v. Florey, Civ.App., 61 S.W. 412.

Allowance of disbursements

Administrator who in good faith took over intestate's land contract and made disbursements by way of principal, interest, taxes, and repairs, was held entitled to proportionate part of disbursements actually due from estate, notwithstanding property purchased by deceased proved of less value than originally supposed or that vendor's title subsequently failed.—In re Fulmer's Estate, 265 P. 920, 203 Cal. 693, 58 A.L.R. 430.

18. Cal.—In re Bailey's Estate, 109 P.2d 356, 42 Cal.App.2d 509.
Wash.—In re Murphy's Estate, 71 P.2d 6, 191 Wash. 180, reversed on other grounds 75 P.2d 916, 193 Wash. 400, opinion adhered to 81 P.2d 779, 195 Wash. 695.

Duty to pay purchase money

(1) On the death of the contract purchaser of realty, the obligation to pay the purchase price devolves upon the personal representative.—In re Reid's Estate, 79 P.2d 451, 26 Cal.App.2d 362.

(2) Executors of deceased purchaser under contract of sale of realty were held liable on note for purchase price in action by subsequent grantee of original vendor subject to conveyance of good title to executors with warranties of original vendor.—Coral Gables v. Jones, 187 A. 434, 323 Pa. 425.

Compliance with conditions

Representatives of purchaser may not have legal title adjudged in them until complying with conditions of executory contract of sale.—Stuart v. Westerheide, 289 P. 721, 144 Okl. 150.

19. Cal.—Matter of Hincheon, 116 P. 47, 159 Cal. 755, 36 L.R.A.,N.S., 303.
24 C.J. p 149 note 90.

20. Mass.—Loring v. Cunningham, 9 Cush. 87.

21. N.Y.—Matter of McMonagle, 124 N.Y.S. 258, 139 App.Div. 398.
24 C.J. p 149 note 92.

22. Minn.—Kehrer v. Seeman, 235 N.W. 386, 182 Minn. 596.
N.Y.—Baker v. Struck, 223 N.Y.S. 613, 130 Misc. 62.
24 C.J. p 149 note 93.
Actions by or against representative of decedent generally see infra §§ 688–826.

23. Pa.—Wise v. Walker, 10 A. 28, 7 Pa.Cas. 87.
24 C.J. p 150 note 98.

24. Me.—Godfrey v. Dwinell, 40 Me. 94.
24 C.J. p 150 note 99.

25. Wis.—Gale v. Best, 20 Wis. 44.

Allowance of claim for purchase money

In an action for purchase money, where the tender of a deed is necessary before the vendor has an absolute right to the purchase money, the county court may allow a claim for such money against the estate of the purchaser, and direct it to be paid on condition that such deed be executed and tendered.—Gale v. Best, supra.

Anticipatory breach by vendor

Where vendor who entered into contract for sale of realty conveyed realty to third person before time for performance had arrived, and decedent or her executrix did not institute action for damages for breach, or alter their position in reliance on repudiation of contract, and vendor subsequently reacquired realty and was ready and willing to

(2) Specific Performance

By virtue of statutory provisions in some jurisdictions, a special proceeding may be instituted in the probate court for specific performance of contracts of a decedent relative to real estate.

In some states the probate court has been given jurisdiction over the specific enforcement of contracts of a decedent relative to real estate,[26] and authorized to empower the personal representative to fulfill a contract to convey real estate made by his decedent in his lifetime.[27] By virtue of these statutes, the representative may petition for specific performance of decedent's contracts[28] and a person to whom a decedent had contracted to convey land may proceed against the personal representative for specific performance.[29] Such statutory proceeding is summary[30] and, while it is incidental to administration,[31] the court can, in an independent proceeding not connected with some other proceeding in the estate, determine the right to specific performance of the contract.[32] Although it has been held similar to, and in practical effect is, an action for specific performance,[33] it is not the ordinary action for specific performance,[34] and the authority of the court is to be exercised in a special manner and not according to the course of the common law.[35] A petition must be filed,[36] and notice must be served[37] on necessary parties,[38] and the burden

perform, vendor could recover from estate overdue installments of contract price with interest, taxes, and penalties paid for decedent's account, and executrix would be required to withhold from distribution sufficient to pay future installments as they should mature.—In re Vaughan's Estate, 282 N.Y.S. 214, 156 Misc. 577, affirmed In re Vaughan's Adm'x, 289 N.Y.S. 825, 248 App.Div. 730.

Action against administrator's grantee

Where conveyance was made under grantee's agreement to support grantor and her daughters, and grantee's administrator sold land under deed expressly made subject to original grantee's contract, original grantor could sue administrator's grantee, who accepted deed, as on promise of support under contract.—Dye v. Dye, 166 S.E. 861, 176 Ga. 72.

26. Ariz.—Joslin v. Stewart, 238 P. 390, 28 Ariz. 585.
N.Y.—In re Gerhardt's Estate, 18 N.Y.S.2d 351, 173 Misc. 585, reversed on other grounds 24 N.Y.S. 2d 595, 261 App.Div. 140.
Pa.—In re Cardon's Estate, 122 A. 234, 278 Pa. 153—In re Mellinger's Estate, 9 Som.Leg.J. 55.
24 C.J. p 150 note 3, p 766 note 82.
Specific performance generally see the C.J.S. title Specific Performance.

27. Utah.—In re Rogers' Estate, 284 P. 992, 75 Utah 290.
24 C.J. p 151 note 4.

Statute held valid

A statute permitting executors and administrators to apply for an order to perform a contract made by deceased has been held within a constitutional provision relating to probate jurisdiction.—Arkansas Valley Trust Co. v. Young, 195 S.W. 36, 128 Ark. 42.

28. N.Y.—Baker v. Struck, 223 N.Y.S. 613, 130 Misc. 62.

29. Colo.—Gavin v. Elliott, 262 P. 923, 83 Colo. 95.
24 C.J. p 150 note 95.

Tender

Since the vendor's personal representative had no power to convey until so authorized by decree, a tender of the purchase money to him before such authorization was not an essential prerequisite to purchaser's right of petition.—In re Werdebach's Estate, 124 A. 268, 280 Pa. 26.

Defenses

It is no defense to a proceeding for specific performance of a contract that deceased was mentally incapacitated where it did not appear that the purchaser had any knowledge thereof and the consideration was fair and adequate.—In re Emig's Estate, 37 Pa.Dist. & Co. 123, 53 York Leg.Rec. 117.

30. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
N.D.—Fox v. Fox, 221 N.W. 889, 57 N.D. 368.

31. N.D.—Fox v. Fox, supra.

32. N.Y.—In re Gerhardt's Estate, 18 N.Y.S.2d 351, 173 Misc. 585, reversed on other grounds 24 N.Y. S.2d 595, 261 App.Div. 140.

33. Cal.—In re Bailey's Estate, 109 P.2d 356, 42 Cal.App.2d 509.

General principles applied

If the approval of the probate court is sought for permission to make a deed where an oral contract is involved, the court must apply the principles applicable to the performance of such contracts as they are applied in courts having jurisdiction to enforce specific performance.—Arkansas Valley Trust Co. v. Young, 195 S.W. 36, 128 Ark. 42.

34. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.

Right must not be doubtful

The statutory proceeding in the probate court for specific performance of a decedent's land contracts is suited to cases of ordinary contracts where there is no real controversy as to the obligations of the respective parties.
Mont.—In re Bank's Estate, supra.
N.D.—Fox v. Fox, 221 N.W. 889, 57 N.D. 368.
Wyo.—Poston v. Delfelder, 270 P. 1068, 39 Wyo. 163, rehearing denied 273 P. 176, 39 Wyo. 163.
24 C.J. p 150 note 3 [e].

35. Ark.—Arkansas Valley Trust Co. v. Young, 195 S.W. 36, 128 Ark. 42.
N.D.—Fox v. Fox, 221 N.W. 889, 57 N.D. 368.

Equity jurisdiction not conferred

N.D.—Fox v. Fox, supra.

36. Utah.—In re Rogers' Estate, 284 P. 992, 75 Utah 290.
24 C.J. p 150 note 3 [b], [c].

Sufficiency of petition

Purchaser's petition against vendor's administrator for specific performance was not insufficient because it failed to allege that purchaser did things not required by contract as alleged.—Gavin v. Elliott, 262 P. 923, 83 Colo. 95.

Affidavit

Purchaser's petition for specific performance held not sufficient as affidavit and lack thereof is ground for reversal.—Gavin v. Elliott, 262 P. 923, 83 Colo. 95.

37. Pa.—In re Cardon's Estate, 122 A. 234, 278 Pa. 153.
24 C.J. p 150 note 3 [i], [n].

38. Pa.—In re Cardon's Estate, 122 A. 234, 278 Pa. 153.

Personal representatives

(1) It has been held that the personal representative of decedent is not a party in interest and no notice need be given to him.—In re Cardon's Estate, supra.

(2) However, it has also been held that an application of vendee or his heirs for order authorizing giving of deed must be made against or through deceased vendor's representative, not against vendor's assignees.—In re Campbell's Estate, 229 N.Y. S. 301, 131 Misc. 912.

Heirs

(1) Heirs at law and heirs presumptive of devisee in case of invalidity of devise were necessary

of proof is on the petitioner.[39] The granting of the petition is within the discretion of the court,[40] and it will order specific performance only in a case falling squarely within the statutory provisions.[41] Thus the court will not decree specific performance unless there is a valid contract of sale[42] in writing,[43] and the other party has complied with its conditions.[44] An appeal will generally lie from the decision of the probate court in such proceedings.[45]

c. Conveyance

Ordinarily the representative has no power to execute conveyances in accordance with bonds for title or other executory contracts on the part of his decedent.

Ordinarily the representative has no power to execute conveyances in accordance with bonds for title or other executory contracts or covenants on the part of his decedent, this duty devolving rather upon the heir or devisee;[46] but such authority may be conferred by the will,[47] or by statute,[48] or order

parties to proceeding by administrator to convey land under deceased's contracts, and failure to make heirs at law of testatrix or heirs of remainderman parties to proceeding by administrator to convey land under deceased's contracts was held fatal to title tendered vendee.—Waxson Realty Corporation v. Rothschild, 174 N.E. 700, 255 N. Y. 332, reversing 241 N.Y.S. 589, 229 App.Div. 302, which reversed 237 N. Y.S. 54, 135 Misc. 124, and reargument denied 243 N.Y.S. 158, 230 App.Div. 704.

(2) While neither judgment in purchaser's statutory proceeding for specific performance by vendor's administrator nor administrator's deed thereunder would bind heirs not in court, heirs might be made parties to proceeding by purchaser for specific performance by vendor's administrator, after reversal.—Gavin v. Elliott, 262 P. 923, 83 Colo. 95.

39. Kan.—In re Shike's Estate, 293 P. 392, 131 Kan. 643.

Good title

Vendor suing to compel specific performance of deceased's contract for exchange of realty has burden of proving he had good merchantable title.—In re Shike's Estate, supra.

40. Kan.—In re Shike's Estate, supra.
Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
Pa.—In re Specht's Estate, 112 A. 92, 268 Pa. 384.

Dismissal without prejudice

Where the right of petitioner to have specific performance is found to be doubtful, the proceeding must be dismissed without prejudice.
Ariz.—Joslin v. Stewart, 238 P. 390, 28 Ariz. 585.
Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
N.D.—Fox v. Fox, 221 N.W. 889, 57 N.D. 868.
Wyo.—Poston v. Delfelder, 270 P. 1068, 39 Wyo. 163, rehearing denied 273 P. 176, 39 Wyo. 163.
24 C.J. p 150 note 8 [e], [g].

Preparedness to perform

Full preparedness at the time of final decree to do his part is sufficient, and where a petitioner, praying for specific performance of decedent's contract for sale of property, avers that he is ready and willing to pay the purchase money, it must be assumed that he is, and will be prepared to take advantage of a decree for specific performance if and when it is entered.—In re Werdebach's Estate, 124 A. 268, 280 Pa. 26.

Gift inter vivos

Probate court on petition for specific performance of decedent's contract to convey could without amendment of petition direct conveyance on theory of gift inter vivos, where evidence was introduced showing completed gift and only deed is necessary to make title marketable.—Wilson v. Fackrell, 34 P.2d 409, 54 Idaho 515.

41. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.

42. N.Y.—In re Gerhardt's Estate, 24 N.Y.S.2d 595, 261 App.Div. 140, reversing 18 N.Y.S.2d 351, 173 Misc. 585.
24 C.J. p 151 note 5, p 150 note 95 [i].

Meeting of minds

Specific performance will not be ordered where there was no meeting of the minds and no agreement to purchase or pay for the property. Wilson v. Fackrell, 34 P.2d 409, 54 Idaho 515.

43. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
Okl.—Cone v. Blair, 257 P. 782, 125 Okl. 270.
Wyo.—Poston v. Delfelder, 270 P. 1068, 39 Wyo. 163, rehearing denied 273 P. 176, 39 Wyo. 163.
24 C.J. p 151 note 5, p 150 note 95 [h].

44. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.
Utah.—In re Rogers' Estate, 284 P. 992, 75 Utah 290.
24 C.J. p 151 note 6.

45. Mont.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.

Not limited to abuse of discretion

Appeal to district court from probate court decree granting specific performance of contract of deceased to convey real estate is not limited to cases of abuse of probate court's discretion.—Wilson v. Fackrell, 34 P.2d 409, 54 Idaho 515.

Burden on appellant

On appeal from dismissal of petition against administrators for specific performance of contract for conveyance, burden was on appellant to show abuse of trial court's discretion.—In re Bank's Estate, 260 P. 128, 80 Mont. 159.

46. U.S.—Selles v. Pagan, C.C.A. Puerto Rico, 8 F.2d 39.
24 C.J. p 151 note 7.

Parol transfer by decedent

Property transferred by parol sale by testator to his brother-in-law during testator's life held properly conveyed by executors of testator's will to transferee for balance of purchase price remaining unpaid.—Bryan v. Bryan, 167 So. 56, 175 Miss. 367.

47. D.C.—Griffith v. Stewart, 31 App. D.C. 29, affirmed 30 S.Ct. 528, 217 U.S. 323, 54 L.Ed. 783, 9 Ann.Cas. 639.
24 C.J. p 152 note 8.

48. N.Y.—In re Gerhardt's Estate 24 N.Y.S.2d 595, 261 App.Div. 140, reversing 18 N.Y.S.2d 351, 173 Misc. 585.
24 C.J. p 152 note 9.

Compliance with statutory provisions

A deed, not accompanied, as required by statute, by a copy of the contract pursuant to which it is executed, is invalid, although reference is made therein to the contract and the parties as required by such statute.—Nelson v. Scofield, 189 N. W. 185, 219 Mich. 595.

Confirmation necessary

Deed of representative pursuant to deceased's contract to convey is ineffective unless confirmed by court on notice to persons interested.—Waxson Realty Corporation v. Rothschild, 241 N.Y.S. 589, 229 App Div. 302, reversing 237 N.Y.S. 54, 135 Misc. 124, and reargument denied 243 N.Y.S. 150, 230 App.Div. 704, reversed on other grounds 174 N.E. 700, 255 N.Y. 332.

Necessity of valid contract

Failure of purchaser from testator to record bond for title rendered conveyance by executor void.—Sears v. Braswell, 149 S.E. 846, 197 N.C. 515.

of court.[49] A deed of an executor or administrator, when the necessary authority to execute the same exists, is admissible in evidence without further proof[50] and has been held to be prima facie evidence of title in the grantee,[51] and relates back to the time of decedent's death as far as regards the capacity of the heirs to take.[52]

Delivery of decedent's deed. It has been held that the representative may deliver a deed executed by decedent in his lifetime on the purchaser's compliance with his part of the contract of sale at the time stipulated,[53] although there is also authority for the contrary view.[54]

d. Rescission, Revival, or Modification

An executor or administrator ordinarily has no authority as such to cancel, waive, rescind, or modify a contract for the sale or purchase of land made by his decedent.

An executor or administrator has ordinarily no authority as such to cancel, waive, rescind, or modify a contract or covenant for the sale or purchase of land made by his decedent,[55] although such a power may be conferred by statute[56] or exercised pursuant to an order of the probate court where the personal property is insufficient to pay the debts;[57] and in some jurisdictions the probate court has, under statute, power to order the rescission of such a contract under other circumstances.[58] Where a purchaser has rightfully abandoned a contract for the conveyance of land, having the right to rescind, such contract is at an end, and cannot be revived by the action of his administrator in treating it as still in force;[59] and where the administratrix of the vendor of a contract for the sale of land elects, on default of the purchaser, to declare the contract forfeited, and the purchaser acquiesces in her election, her act is binding on the estate, and a subsequent administrator cannot revoke it, except for fraud.[60] It has also been held that if decedent had the right under the contract to have the purchase money refunded because he was dissatisfied with the property, such right may be enforced by his personal representative,[61] and that a court of equity will not,

49. Mich.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.
24 C.J. p 152 note 10.

Purchase money paid in full
An executor of the estate of a deceased vendor under a land contract was authorized to execute a deed to the assignee of purchasers named in the contract without any order of probate court if the amount due upon the land contract was paid in full.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.

Collateral attack
Where an administrator's deed was executed under order of court, in fulfillment of decedent's bond for title, a subsequent objection, in trespass to try title, that the deed was invalid for failure to conform to the description of the land contained in the bond, was a collateral attack on the judgment, and unsustainable.—Dutton v. Wright, 85 S.W. 1025, 38 Tex.Civ.App. 372.

Community property
Where the representatives executed a deed as such representatives of community property of decedent and wife, reciting a decree of the probate court empowering such representatives to make title to the grantee according to a contract of deceased, and the receipt by them of the agreed consideration, it was held that, although the decree was void so that the deed was not binding on decedent's heirs, the grantee had the superior title, if decedent had contracted to convey the land to him, and he had paid the purchase money to decedent's legal representatives, of which facts the recitals in the deed as well as the fact that for sixty years thereafter no one claiming under decedent asserted claim to the land, but the grantee continuously asserted claim thereto and paid taxes thereon, were evidence.—Cope v. Blunt, 91 S.W. 615, 38 Tex.Civ.App. 516.

50. Tex.—Hughes v. Wright, Civ. App., 97 S.W. 525, reversed on other grounds 101 S.W. 789, 100 Tex. 511, 123 Am.S.R. 827, 11 L.R.A., N.S., 643.
24 C.J. p 152 note 11.

51. Tex.—Hughes v. Wright, supra.
24 C.J. p 152 note 12.

52. Tex.—Blythe v. Easterling, 20 Tex. 565.

53. Iowa.—Dettmer v. Behrens, 76 N.W. 853, 106 Iowa 585, 68 Am.S.R. 326.
Mass.—Loring v. Cunningham, 9 Cush. 87.

Court order essential
Iowa.—Blain v. Blain, 244 N.W. 827, 215 Iowa 69.

54. N.Y.—In re Malloy's Estate, 1 N.Y.S.2d 184, 253 App.Div. 30, affirmed 17 N.E.2d 108, 278 N.Y. 429.
Pa.—Karmane v. Hoober, 3 Watts & S. 253.

55. Ariz.—Fidelity & Deposit Co. of Maryland v. Meldrum, 50 P.2d 570, 46 Ariz. 295.
Ga.—Pate v. Newsome, 147 S.E. 44, 167 Ga. 867.
N.Y.—In re McKinney's Estate, 24 N.Y.S.2d 906, 175 Misc. 377.
24 C.J. p 152 note 18.

56. N.Y.—In re Smathers' Will, 274 N.Y.S. 717, 153 Misc. 132, stating California rule.

Fraud
Agreement for rescission of purchaser's agreement to assume payment of certain bonds was held not to constitute fraudulent device to deprive bondholders of their right against deceased purchaser's estate, and executors of deceased purchaser's estate were held not guilty of fraud in entering into agreement for rescission of purchaser's agreement to assume payment of certain bonds, where rescission was supported by valuable consideration.—In re Smathers' Will, 274 N.Y.S. 717, 153 Misc. 132.

57. Mich.—Chapoton v. Prentis, 107 N.W. 879, 144 Mich. 283—Hunt v. Thorn, 2 Mich. 213.

58. Kan.—Hamner v. Holmes, 12 Kan. 526.
24 C.J. p 153 note 20.

59. Tex.—Todd v. Caldwell, 10 Tex. 236.

60. Neb.—Oakes v. Gillilan, 95 N. W. 511, 1 Neb.Unoff. 55.

61. Pa.—Fuller v. Dempster, 11 A. 670, 8 Pa.Cas. 546.

Ratification not shown
Purchaser's executor and heirs did not ratify contract for sale of lot after purchaser's death because they had notice of purchaser's mental infirmities, where they had no knowledge that at time of purchase lot had reasonable market value of only two thousand five hundred dollars instead of seven thousand dollars which was paid therefor.—Shaffer v. Security Trust & Savings Bank, 41 P.2d 948, 4 Cal.App.2d 707.

after the lapse of many years, disturb a contract of rescission, on the application of the heirs of the purchaser, where the administrator acted in good faith in making such contract and it might reasonably be considered beneficial to the heirs.[62]

§ 268. Acquisition of Property by Representative

a. In his individual capacity
b. In his representative capacity

a. In His Individual Capacity

(1) In general
(2) Purchase from widow, heir, or devisee
(3) At judicial or execution sale

(1) In General

A representative of a decedent may purchase property to which the estate has no right, but ordinarily he may not purchase property in which the estate is interested.

The office of an executor or administrator does not per se disable him as an individual from buying bona fide with his own money property to which the estate has no right,[63] and the heirs or devisees cannot compel him to give them the benefit of such a purchase, even though decedent in his lifetime had been in negotiation for the purchase of the same property.[64] However, his duty does preclude him from purchasing an outstanding adverse title to land of which his decedent died seized and claiming title to such land for his own benefit,[65] and any title so acquired by him will inure to the benefit of the estate;[66] and generally speaking, where he buys or redeems land with funds of the estate, or procures judgment satisfied from land in right of the estate, or in dereliction of duty abuses the confidence reposed in him by seeking an undue personal advantage in the acquisition of property from the exercise of his representative authority, he will be considered in equity, whatever may have been the formal expression of the conveyance or of notes given for the purchase money, as holding the property in his representative capacity or as a trustee of the estate and those in interest, and his acts will inure to the benefit of those interested therein, at the same time that his rights and title are effective as against others.[67] Also the representative cannot acquire title to any of the assets by adverse holding,[68] or by tax deed.[69]

Where one named as executrix does not qualify or assume to act as such, she cannot be held as a trustee merely because she is made the grantee in a deed conveying land to which the testator held a bond for a deed, no part of the funds of the estate having been used in the purchase of such land.[70] Where a member of a firm owning realty dies, the administrator of the deceased partner may, in his private or individual capacity, purchase the land from the survivor,[71] and it has been held that there is no reason why an administrator appointed in one state should not become the purchaser of land of his decedent situated in another state.[72] Where a deed absolute in form, but intended as a mortgage, runs to the grantee individually, but is made in fact for the benefit of the estate of which she is administratrix, she must, on a bill to redeem, account for the rents and profits as administratrix.[73]

Ratification or acquiescence. Ratification by heirs or other parties in interest, or long acquiescence with full knowledge of the facts, may estop them to object to the acquisition of property of the estate

62. Ohio.—Ludlow v. Cooper, 4 Ohio St. 1.

63. U.S.—Sun Oil Co. v. Blevins, D. C.La., 29 F.Supp. 901, affirmed, C. C.A., Blevins v. Sun Oil Co., 110 F. 2d 566.
Cal.—Prussing v. Prussing, 96 P.2d 128, 35 Cal.App.2d 508.
24 C.J. p 197 note 20.
Acquisition of personalty see infra § 304.

64. Mass.—Gay v. Gay, 5 Allen 181.
Miss.—Glenn v. Thistle, 23 Miss. 42.

65. Vt.—Perkins v. Blood, 36 Vt. 273.
24 C.J. p 197 note 22.

66. Vt.—North v. Barnum, 10 Vt. 220.
24 C.J. p 197 note 23.

67. U.S.—Sun Oil Co. v. Blevins, D. C.La., 29 F.Supp. 901, affirmed, C. C.A., Blevins v. Sun Oil Co., 110 F.2d 566.
Ala.—Powell v. Powell, 80 Ala. 11.
Ga.—Haley v. Atlantic Nat. Fire Ins. Co., 106 S.E. 122, 151 Ga. 158.
Miss.—Belt v. Adams, 87 So. 666, 125 Miss. 387, overruling suggestion of error 86 So. 584, 124 Miss. 194.
N.J.—In re Gallagher, 196 A. 430, 123 N.J.Eq. 384.
S.D.—Robinson v. Roinstad, 180 N. W. 67, 43 S.D. 436.
Tex.—Arrington v. McDaniel, Civ. App., 4 S.W.2d 262, modified on other grounds, Com.App., 14 S.W. 2d 1009, and certified questions answered 25 S.W.2d 295, 119 Tex. 148 —Scott v. Taylor, Civ.App., 294 S. W. 227.
Wis.—In re Hoya's Will, 180 N.W. 940, 173 Wis. 196.
24 C.J. p 197 note 24; p 115 note 41.

Equitable lien
Equitable lien against property purchased by widow while acting as executrix with moneys of estate did not result without showing widow unjustly enriched herself.—Daniell v. Hopkins, 177 N.E. 390, 257 N.Y. 112, 76 A.L.R. 1367, reversing 245 N.Y.S. 818, 231 App.Div. 745.

68. Ga.—Dozier v. McWhorter, 45 S.E. 61, 117 Ga. 786.

69. Okl.—Warrior v. Stith, 50 P.2d 179, 174 Okl. 150.
Wyo.—Hackett v. Linch, 116 P.2d 868.

70. Ill.—Gall v. Stoll, 102 N.E. 225, 259 Ill. 174.

71. Tenn.—Jones v. Sharp, 9 Heisk. 660.

72. Mich.—Sheldon v. Rice, 30 Mich. 296, 18 Am.R. 136.

73. Mass.—Clark v. Seagraves, 71 N.E. 813, 186 Mass. 430.

by the representative, and debar third persons from questioning the transaction.[74]

(2) Purchase from Widow, Heir, or Devisee

A purchase of realty by an executor or administrator from a widow, heir, or devisee is valid where fairly made and with full disclosure on the part of the representative.

It is generally considered that an executor or administrator, acting fairly in the premises, may purchase from an heir or devisee, or from the widow of the decedent, his or her interest in the estate,[75] and although such a purchase is regarded with high disfavor,[76] and will be held invalid if the representative has taken any advantage of his position or been guilty of any fraud or misrepresentation,[77] the judicial disposition is usually to do no more than presume strongly against the validity of such a purchase and require the fiduciary to show affirmatively adequacy of consideration and the general fairness of the transaction,[78] and if the transaction is in good faith and without fraud it may be treated as a similar transaction between strangers would be.[79]

(3) At Judicial or Execution Sale

Ordinarily an executor or administrator cannot purchase land of decedent for himself at a judicial or execution sale.

With reference to an executor or administrator purchasing land of decedent for himself at a judicial or execution sale, the rule is that he shall not be allowed to purchase property which he holds in trust, either directly or indirectly, or to antagonize the interests of the estate he represents by taking an adverse interest,[80] especially where the sale was made in consequence of his default in not paying the debt for which the property was sold, when he had sufficient funds in his hands for that purpose,[81] or where he was guilty of fraud.[82] However, in cases where the representative was not a trustee of the real estate at the time of the purchase, and the

74. Ky.—Prewitt v. Morgan, 119 S. W. 174.
24 C.J. p 198 note 28.

75. U.S.—Wilson v. Day, Idaho, 260 F. 788, 171 C.C.A. 514, affirming D.C., Cardoner v. Day, 253 F. 572.
Ark.—Hastings v. Jackson, 148 S.W. 2d 305, 201 Ark. 1005.
N.C.—Forbes v. Harrison, 107 S.E. 447, 181 N.C. 461.
Okl.—Wiggins v. Wiggins, 55 P.2d 119, 176 Okl. 221—Dees v. Dees, 38 P.2d 508, 169 Okl. 598—Hutson v. McConnell, 281 P. 760, 139 Okl. 240.
Utah.—Norton v. Fuller, 251 P. 29, 68 Utah 524.
24 C.J. p 198 note 30—69 C.J. p 1286 note 13.
Transactions with heirs, etc., generally see supra § 240.

Void or voidable

(1) Transactions between administrator and heir are not void or even voidable for that reason.—Johnson v. Johnson, 206 P. 205, 85 Okl. 274.

(2) Deed by legatees, devisees, or heirs, conveying their share in estate to executrix, was not void, but voidable.—Broaddus v. Broaddus, 130 S. E. 794, 144 Va. 727.
69 C.J. p 1286 note 14.

76. Okl.—Hutson v. McConnell, 281 P. 760, 139 Okl. 240.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
24 C.J. p 198 note 31.

77. U.S.—Diamond v. Connolly, C. C.A.Idaho, 276 F. 87, certiorari denied Connolly v. Diamond, 42 S. Ct. 169, 257 U.S. 656, 66 L.Ed. 420.
Iowa.—Milroy v. Milroy, 181 N.W. 473, 190 Iowa 1215.
Mo.—Presbyterian Orphanage of Missouri v. Fitterling, 114 S.W.2d 1004, 342 Mo. 299.
N.Y.—In re Robertson's Estate, 1 N.Y.S.2d 423, 165 Misc. 710.
24 C.J. p 198 note 32—69 C.J. p 1286 notes 17-20, p 1287 notes 22-24.

Treated as partial distribution

Where administratrix took position that she could treat property belonging to estate of her deceased husband as her own, and refused to give daughter information regarding estate, daughter accepting amount offered by administratrix for daughter's share in estate on advice that otherwise she would receive nothing could treat amount received as partial distribution.—Wiggins v. Wiggins, 55 P.2d 119, 176 Okl. 221.

78. U.S.—Wilson v. Day, Idaho, 260 F. 788, 171 C.C.A. 514, affirming, D.C., Cardoner v. Day, 253 F. 572.
Mo.—Walsh v. Walsh, 226 S.W. 236, 285 Mo. 181.
N.C.—Forbes v. Harrison, 107 S.E. 447, 181 N.C. 461.
Okl.—Wiggins v. Wiggins, 55 P.2d 119, 176 Okl. 221—Johnson v. Johnson, 206 P. 205, 85 Okl. 274.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
24 C.J. p 198 note 33—69 C.J. p 1286 note 15.

Duty to inform

It is the duty of an executor or administrator to fully inform heirs, devisees, or beneficiaries of the value of the property and their interest therein.
Iowa.—Milroy v. Milroy, 181 N.W. 473, 190 Iowa 1215.
N.Y.—In re Robertson's Estate, 1 N.Y.S.2d 423, 165 Misc. 710.
Or.—Matthews v. Taylor, 20 P.2d 806, 142 Or. 483.
Pa.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107.
69 C.J. p 1286 note 16.

79. U.S.—Wilson v. Day, Idaho, 260 F. 788, 171 C.C.A. 514, affirming, D.C., Cardoner v. Day, 253 F. 572.
Ky.—Cornett v. Horn, 266 S.W. 1070, 206 Ky. 139.
Okl.—Dees v. Dees, 38 P.2d 508, 169 Okl. 598—Hutson v. McConnell, 281 P. 760, 139 Okl. 240—Johnson v. Johnson, 206 P. 205, 85 Okl. 274.
Utah.—Norton v. Fuller, 251 P. 29, 68 Utah 524.
Va.—Broaddus v. Broaddus, 130 S.E. 794, 144 Va. 727.
24 C.J. p 199 note 34.

80. Ark.—Montgomery v. Black, 86 S.W. 1006, 75 Ark. 184.
24 C.J. p 199 note 35.

Partition sale

An executor may purchase at a sale in partition proceedings of property which was jointly held by himself and the testator.—Porter v. Depeyster, 18 La. 351.

Valid as to third persons

A sale to an administrator at an execution sale on a judgment obtained by him as administrator, while voidable at the instance of the heirs or distributees of the deceased, is valid as to all others.—Temple v. Bradley Lumber Co., 164 S.W. 769, 112 Ark. 29.

81. Miss.—Belt v. Adams, 87 So. 666, 125 Miss. 387, overruling suggestion of error 86 So. 584, 124 Miss. 194.
24 C.J. p 199 note 36.

82. N.J.—Johns v. Norris, 27 N.J. Eq. 485.

transaction was a fair one, and the sale was not due to any neglect or failure of duty on his part, a purchase by him has been allowed to stand,[83] and a purchase at a sale under an execution in his favor to save his own debt has been upheld.[84] Where the property is purchased at the sale by a third person, who makes the purchase in good faith, there is no reason why the administrator should not subsequently purchase the property from him.[85] Where certain land of a decedent was partitioned among his heirs by the probate court, that set apart to one of the heirs ceased to be the property of the estate, the administrator ceased to have any control thereover, and was not bound to pay the taxes thereon, or do anything to protect the rights of the heir, even though the administration had not been closed; and hence he could purchase the property at a tax sale thereof.[86]

b. In His Representative Capacity

(1) In general
(2) At judicial or execution sale
(3) Sale or mortgage of property acquired

(1) In General

Unless authorized by statute, or by the will, or by a court order, an executor or administrator may not purchase land with personalty of the estate.

An executor or administrator has as a rule no power to buy land with personalty of the estate, unless authorized to do so by the will or by statute or by an order of court;[87] but if he so purchases the property purchased will be considered in equity as part of the estate and as impressed with the character of the purchase money, and an equitable lien of creditors of decedent is sometimes favorably regarded in such a connection.[88] Where executors have a discretion with regard to investment in real property, or where there is a necessity of receiving real estate in payment of a debt, the beneficiaries are bound to accept the property thus acquired.[89] The regularity of proceedings in the probate court under which an administrator was authorized to purchase land in controversy is not subject to collateral attack in an action of trespass to try title by such administrator.[90] Where title is taken in the name of coexecutors, they hold as joint tenants with the right of survivorship and not as tenants in common.[91]

Property taken in payment of debts. Where land is taken by the executor or administrator in payment of a debt due the estate, the land becomes assets in his hands and not property held in his individual right, and it should by way of substitution be subjected by him to the payment of debts and legacies, and to distribution, like personalty.[92]

The heirs cannot disaffirm the purchase of a debtor's realty if the representative acted prudently and for the good of the estate, especially if they delay unduly to proceed in the matter.[93]

(2) At Judicial or Execution Sale

Where it is for the interest of the estate, an execu-

83. Ga.—Gibbs v. Gibbs, 108 S.E. 214, 151 Ga. 745.
Pa.—In re Kelley's Estate, 146 A. 260, 297 Pa. 17.
Va.—Swineford v. Virginia Trust Co., 152 S.E. 350, 154 Va. 751, 77 A.L.R. 1504.
24 C.J. p 199 note 38.

84. Ky.—Jones v. Webb, 59 S.W. 858, 22 Ky.L. 1100.

85. Cal.—Wood v. Long, 186 P. 415, 44 Cal.App. 185.
Miss.—O'Brien v. Wilson, 33 So. 946, 82 Miss. 93.

86. Tex.—Griswold v. Comer, Civ. App., 161 S.W. 423.

87. Ga.—Robinson v. Georgia Sav. Bank & Trust Co., 196 S.E. 395, 185 Ga. 688—Paulk v. Roberts, 155 S.E. 55, 42 Ga.App. 79.
N.Y.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296, affirmed In re Schummers' Estate, 154 N.E. 600, 243 N.Y. 548—In re Trelease, 96 N.Y.S. 318, 49 Misc. 205, 5 Mills Surr. 222, affirmed 100 N.Y.S. 1051, 115 App.Div. 654.
Pa.—Ferguson v. Weaver, 5 Pa.Dist. & Co. 573, 575, 39 Lanc.L.Rev. 21, 37 York Leg.Rec. 166, quoting Corpus Juris.
Vt.—Hall v. Windsor Sav. Bank, 124 A. 593, 97 Vt. 125, affirming 121 A. 582, 97 Vt. 125.
Va.—Counts v. Counts, 181 S.E. 437, 165 Va. 61.
24 C.J. p 200 note 41.

As guardian of minor

Administrator becoming guardian of minor heirs could not justify investment of corpus of estate in realty without court order, used by minors for home, on ground that investment was for minors' maintenance with approval of ordinary, and administrator was held liable to heirs, although acting in good faith with approval of ordinary and though heirs used realty as home.—Paulk v. Roberts, 155 S.E. 55, 42 Ga. App. 79.

Construction of will

Will providing for sale or purchase of property by executor only on assent of one of two named persons, or of a circuit court "judge" of named county in case of incapacity or refusal of either to act, contemplated assent of some circuit court judge rather than that of circuit court of such county, and any circuit court judge of such county could be appointed as a substitute, since substitute advisor was not personal, and appointment of one not a circuit court judge in absence of proof that all judges of such circuit court had refused to act was error.—Gathright's Trustee v. Gaut, 124 S.W.2d 782, 276 Ky. 562, 120 A.L.R. 1403.

88. Ky.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.
Pa.—Ferguson v. Weaver, 5 Pa.Dist. & Co. 573, 575, 39 Lanc.L.Rev. 21, 37 York.Leg.Rec. 166 quoting Corpus Juris.
24 C.J. p 200 note 42.

89. Vt.—Blaisdell v. Stevens, 16 Vt. 179.

90. Tex.—Spikes v. Howard, 111 S.W. 792, 51 Tex.Civ.App. 389.

91. Ill.—Lamotte v. Steidinger, 107 N.E. 850, 266 Ill. 600.

92. Ky.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.
24 C.J. p 201 note 53.

93. Pa.—In re Billington, 8 Rawle 48.

tor has been held justified in purchasing land at a judicial or execution sale.

The general rule is that when it is for the interest of the estate that he should do so, the executor or administrator is justified in purchasing land for the estate at a foreclosure sale under a mortgage belonging to the estate,[94] or an execution sale under a judgment in his favor on some debt due decedent.[95] In such a case the representative may take a deed in his own name and by a deed executed in his own name give a good title to others which the beneficiaries of the estate cannot dispute;[96] but the purchase is presumed to be intended for the benefit of the estate, and requires him to account and turn over the property or its proceeds to the parties who would have been entitled to the mortgage or judgment debt if paid, the premises in his hands taking that character accordingly; and, while he is chargeable with rents and profits later received or justly accruing, he should be reimbursed for his reasonable outlays and for such sum as he actually paid in the purchase.[97] Where an executor, in satisfaction of mortgage debts, accepted conveyances of the encumbered land and also foreclosed mortgages, and, on the sale, took deeds therefor to himself as executor, it was held that he must, as a condition precedent to his discharge and the liberation of his bondsmen, convey the premises to the legatees as tenants in common.[98]

(3) Sale or Mortgage of Property Acquired

The weight of authority supports the right of a representative to sell realty acquired by him in his representative capacity.

It has been asserted that a representative, unless, of course, he has a power of sale under the will, cannot sell, without an order of court, realty acquired by him in his representative capacity;[99] but the weight of authority is in support of the representative's power to sell such realty in his discretion without any order of court,[1] and a power to mortgage property so acquired has also been asserted.[2] Under such circumstances the purchaser is not required to see to the application of the purchase money;[3] but the representative is chargeable therewith, and should appropriate it duly and account for it.[4] A sale by an executor of such property may be set aside when tainted with fraud in which the purchaser participated.[5]

Exchange. Executors who hold realty by virtue of the foreclosure of a mortgage in favor of the estate are not entitled to exchange it for other realty, and, unless the persons entitled to share in that part of the estate consent to or ratify the trade, the executors are liable to account for the value of the realty conveyed to them.[6]

2. Sale in General

§ 269. Power to Sell

In the absence of authority given by will or order of court, except to the extent that he is authorized to do so by statute, an executor or administrator has no power to sell the real estate of his decedent.

In the absence of some power contained in the will, or an order of court, except to the extent that he is authorized to do so by statute, neither an executor nor an administrator has any power whatever to sell the real estate of his decedent,[7] and this

94. Iowa.—Langfitt v. Langfitt, 273 N.W. 93, 223 Iowa 702, 110 A.L.R. 1390.
N.Y.—In re Schmutz' Estate, 288 N.Y.S. 98, 159 Misc. 454.
24 C.J. p 200 note 48.

95. Ga.—Crawford v. Tribble, 69 Ga. 519.
24 C.J. p 200 note 49.

96. Tex.—Bennett v. Kiber, 13 S.W. 220, 76 Tex. 385.
24 C.J. p 200 note 50.

97. Iowa.—Langfitt v. Langfitt, 273 N.W. 93, 223 Iowa 702, 110 A.L.R. 1390.
Ky.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.
Mass.—Dudley v. Dudley, 15 N.E.2d 212, 300 Mass. 270, 117 A.L.R. 1365.
24 C.J. p 200 note 51.

98. Or.—In re Roach, 92 P. 118, 50 Or. 179.

99. Mass.—Thomas v. Le Baron, 10 Metc. 403.
24 C.J. p 201 note 55.

Power under mortgage

Where intestate died owning mortgaged realty, administratrix purchased mortgage through another person, foreclosed it, and bought realty at foreclosure sale, administratrix, as assignee of the mortgage, had power, by virtue of power of sale contained in mortgage, to transfer legal title to the realty to the purchaser at foreclosure sale, notwithstanding administratrix had not obtained license to sell the realty for payment of debts and charges of administration, and the surplus proceeds of the sale became assets in the hands of the administratrix subject to payment of debts and charges of administration to be accounted for by her.—Dudley v. Dudley, 15 N.E. 2d 212, 300 Mass. 270, 117 A.L.R. 1365.

1. Iowa.—Langfitt v. Langfitt, 273 N.W. 93, 223 Iowa 702, 110 A.L.R. 1390.
Ky.—Caudill v. Trimble's Adm'r, 117 S.W.2d 993, 273 Ky. 793.
24 C.J. p 201 note 56.

2. N.Y.—McLean v. Ladd, 21 N.Y.S. 196, 66 Hun 341.
24 C.J. p 201 note 57.

3. U.S.—Long v. O'Fallon, Mo., 19 How. 116, 15 L.Ed. 550.

4. Mass.—Dudley v. Dudley, 15 N.E. 2d 212, 300 Mass. 270, 117 A.L.R. 1365.
24 C.J. p 201 note 59.

5. Tex.—Thomson v. Shackelford, 24 S.W. 980. 6 Tex.Civ.App. 121.
24 C.J. p 201 note 60.

6. N.Y.—Hine v. Hine, 103 N.Y.S. 535, 118 App.Div. 585.
24 C.J. p 201 note 61.

7. Cal.—Lass v. Eliassen, 270 P. 745, 94 Cal.App. 175.
Fla.—First Trust & Savings Bank v.

rule applies to the real estate of an alien decedent.[8] Ordinarily he has no power to convey the real estate to an attorney in payment of attorney's fees, and an approval of such a conveyance by the probate court will not render it valid.[9] Where the executors carry on the decedent's business without authority, their assignee for the benefit of creditors has no authority to sell decedent's real estate.[10]

An unauthorized sale or conveyance may be enjoined at the suit of heirs or devisees;[11] and a deed made by the representative without authority is void,[12] and his conveyance, in such a case, passes his individual interest only,[13] except as it may operate to pass his own interest in the land as heir or devisee.[14] An unauthorized sale cannot affect the rights of other heirs or devisees who seasonably undertake to assert such rights.[15]

Statutory authority; confirmation. Under statutory authority, an executor may sell real property of the estate, without a preliminary order of court, when necessary for certain purposes,[16] such as for the payment of debts,[17] or where it appears that a sale is for the advantage, benefit, and best interests of the estate and those interested therein.[18] Where the statute requires the sale to be reported to and confirmed by the court, the return must be made in the manner, and contain the recitals, required by the statute,[19] and must show on its face that the statutory requirements were complied with.[20] Under such a statute no title passes until the sale is confirmed;[21] but the court is without power to confirm

Henderson, 147 So. 248, 109 Fla. 175.
Ga.—Sheffield v. First Nat. Bank, 121 S.E. 809, 157 Ga. 422—Edwards v. Sands, 102 S.E. 426, 150 Ga. 11.
Ind.—Sipe v. Union Bank & Trust Co., 29 N.E.2d 342, 108 Ind.App. 526.
Ky.—Walker's Trustee v. Walker, 244 S.W. 772, 196 Ky. 346.
Mass.—Hodgkinson v. Hodgkinson, 183 N.E. 708, 281 Mass. 463.
Mich.—Burnham v. Kelley, 300 N.W. 127, 299 Mich. 452—Webber v. Detroit Fidelity & Surety Co., 248 N. W. 576, 578, 263 Mich. 144, citing **Corpus Juris**—Frost v. Atwood, 41 N.W. 96, 73 Mich. 67, 16 Am.S.R. 560.
Okl.—Farmers' Nat. Bank of Ponca City v. Cravens, 219 P. 138, 93 Okl. 58.
Tex.—Ferguson v. Mounts, Civ.App., 281 S.W. 616.
24 C.J. p 153 note 28.

Standing timber is "real estate" within such rule but when severed it becomes personal property.—Burnham v. Kelley, 300 N.W. 127, 299 Mich. 452.

Where decedent leaves no debts to be paid which require a sale of the real estate, the personal representative has no interest in the sale of land or the division of the proceeds.—Belcher v. Belcher's Adm'r, 13 S.W.2d 1019, 227 Ky. 665—Bayne v. Stratton, 115 S.W. 728, 131 Ky. 494.
Sales under:
Order of court see infra §§ 536–666.
Testamentary authority see infra §§ 274–296.

8. Ala.—Mobile Cong. Church v. Morris, 8 Ala. 182.

9. Tex.—Teal v. Terrell, 48 Tex. 491.

10. N.Y.—Matter of Praets, 150 N.Y. S. 221, 87 Misc. 128.

11. Ga.—Beaty v. Stapleton, 35 S.E. 770, 110 Ga. 580.
Pa.—McClane v. McClane, 56 A. 996, 207 Pa. 465.
Wash.—In re Chillson's Estate, 244 P. 244, 138 Wash. 171.
Enjoining administration sale under order of court see infra § 585.

12. Tex.—Berry v. Hindman, 129 S. W. 1181, 61 Tex.Civ.App. 291.
24 C.J. p 154 note 30.

13. Cal.—Morrison v. Bowman, 29 Cal. 337.
24 C.J. p 178 note 80.

14. Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
24 C.J. p 154 note 31.

15. Mass.—Forbes v. Keyes, 78 N. E. 733, 193 Mass. 38.
Tex.—Dial v. Martin, Civ.App., 37 S. W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

16. Cal.—In re Benvenuto's Estate, 191 P. 678, 183 Cal. 382.

Omission of requirement
The effect of an amendment omitting the requirement that a sale of a decedent's property must be on order of court is that a preliminary order is not required to authorize the administrator or executor to negotiate a sale of property for the purposes for which a sale is authorized by the section.—In re Benvenuto's Estate, supra—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.

Statutory amendments prospective only
Cal.—In re Benvenuto's Estate, 191 P. 678, 183 Cal. 382.

17. Cal.—In re George's Estate, 12 P.2d 86, 123 Cal.App. 733.
Miss.—Criscoe v. Adams, 85 So. 119, 123 Miss. 37.
Philippine.—Buenaventura v. Ramos, 43 Philippine 704.
Puerto Rico.—Martinez v. Registrar of Property, 15 Puerto Rico 66.
Under order of court see infra §§ 538–542.

18. Cal.—In re Benvenuto's Estate, 191 P. 678, 183 Cal. 382—In re George's Estate, 12 P.2d 86, 123 Cal.App. 733.

19. Cal.—In re George's Estate, supra.

Notice held sufficient
Cal.—In re George's Estate, supra.

Presumption
In construing notice of statutory sale of real estate, court will indulge presumption that law was complied with.—In re George's Estate, supra.

Requirement that appraisement be made within year does not limit powers or duties of executor selling real estate, but is direct limitation on court's power; and a return is not insufficient because not showing property was sold at ninety per cent of appraised value or that appraisement had been made within year.—In re George's Estate, supra.
Confirmation of sale under:
Order of court see infra §§ 607–612.
Testamentary authority see infra § 286.

20. Cal.—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631—In re George's Estate, 12 P. 2d 86, 123 Cal.App. 733.

21. Cal.—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631—Lass v. Eliassen, 270 P. 745, 94 Cal.App. 175.

Conclusiveness of order of confirmation; collateral attack
(1) Where the record on its face does not show that the order of confirmation is void, it is not subject to collateral attack.—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.

(2) Although neither petition for confirmation nor order confirming sale of testator's realty stated statutory grounds, record did not show on face that order was void, and col-

an alleged sale which is void.[22] The necessity for the sale may be alleged in the return, in the language of the statute;[23] but no allegation or finding of the statutory grounds for a sale is necessary to the jurisdiction of the court.[24] An amended return and petition for confirmation is not fatally defective because incorporating therein some of the necessary allegations by reference to the original return.[25] The question of the propriety of the sale is determined on the hearing of the return and application for confirmation,[26] and if the court's conclusions thereon are supported by the law and the evidence they will not be disturbed on appeal from the order of confirmation.[27]

The state legislatures have from time to time also passed special or private acts authorizing or confirming in particular cases the sale of a decedent's real estate by his personal representative,[28] and such acts have been held constitutional,[29] although not in all instances.[30]

§ 270. Contract of Sale

An unauthorized contract of sale entered into by the representative is not binding on the estate.

An unauthorized contract of sale entered into by the representative is not binding on, and cannot be enforced against, the estate,[31] although the heirs are

lateral attack was precluded.—Wood v. Roach, supra.

(3) Where record is silent respecting statutory grounds for sale of decedent's property, and superior court is exercising its general jurisdiction, nothing will be intended to be out of its jurisdiction except what expressly appears to be so.—Wood v. Roach, supra.

(4) In proceedings involving sales of decedents' property, where superior court acts under its general jurisdiction, existence of facts consistent with validity of judgment is presumed on collateral attack.—Wood v. Roach, supra.

(5) Irregularities in exercise of unquestionable jurisdiction will not invalidate probate sale or administrator's deed to extent of making them vulnerable to collateral attack. —Johnston v. Kitchin, 265 P. 941, 203 Cal. 766—Warden v. Bailey, 24 P.2d 192, 133 Cal.App. 383.

(6) Order confirming administrator's sale, which had become final, is conclusive against purchasers duly notified of proceeding and having opportunity to present objections.—Baldwin v. Stewart, 23 P.2d 283, 218 Cal. 364.

(7) Evidence that realty, purchased by husband with funds from spouses' joint bank account a few days before his death, probated as community property by surviving wife, and sold during course of probate for sum applied to satisfaction of husband's debts, was not actually sold in probate proceedings, but taken by purchaser in his own name without paying consideration and later reconveyed to wife, was properly excluded at hearing on petition for distribution of wife's estate.—In re Harris' Estate, 72 P.2d 873, 9 Cal.2d 649.

(8) Question whether property was free and clear of encumbrances could not be concluded by order confirming administrator's sale.—Baldwin v. Stewart, supra.

(9) An attempt to have it declared that purchaser of land from decedent's estate held land in trust for creditors of purchaser's husband on ground that part of purchase price was paid by husband was not a "collateral attack" on probate order confirming sale.—Krauss v. Strop, Cal.App., 118 P.2d 332.

22. Cal.—Miller v. Superior Court in and for City and County of San Francisco, 258 P. 614, 84 Cal.App. 605.

Property not that of estate

Where alleged sale of property of decedent is but transfer of individual interest of representative in property of estate, court cannot confirm.—Miller v. Superior Court in and for City and County of San Francisco, supra.

23. Cal.—In re George's Estate, 12 P.2d 86, 123 Cal.App. 733.

24. Cal.—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.

General jurisdiction

In confirming sale of decedents' property, superior court exercises its general jurisdiction derived from constitution.—Wood v. Roach, supra.

25. Cal.—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148.

26. Cal.—In re Benvenuto's Estate, 191 P. 678, 183 Cal. 382—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.

Continuance of hearing

The refusal to grant request of new counsel for continuance of hearing on amended return of probate sale and petition for confirmation of sale was not abuse of discretion or denial of due process of law, where request was orally made in open court when cause was called, and superior court rules relating to applications for continuance were not complied with, and notice of change of counsel was not given or explained, and new counsel had general knowledge of matter, and many interested parties were in court and ready to proceed.—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148.

Conduct of counsel as affecting order of confirmation

That counsel discussed proposed form of notice of probate sale in presence of trial judge was insufficient to show that the matter had been prejudged, so as to invalidate order confirming probate sale, where trial judge refused to express any opinion on form of notice to be used. —In re Dargie's Estate, supra.

27. Cal.—In re Kirk's Estate, 80 P. 2d 133, 26 Cal.App.2d 660.

Evidence held insufficient to show that confirmation of probate sale of estate property was an abuse of discretion on ground that the price was too low and that the confirmation constituted an approval of a breach of trust owed by the buyer to the estate.—In re Dargie's Estate, 91 P. 2d 126, 33 Cal.App.2d 148.

28. U.S.—Florentine v. Barton, 2 Wall. 210, 17 L.Ed. 783.
24 C.J. p 155 note 42.

29. U.S.—Leland v. Wilkinson, R.I., 10 Pet. 294, 9 L.Ed. 430.
N.C.—Charlotte Consol. Const. Co. v. Brockenbrough, 121 S.E. 7, 187 N.C. 65.
24 C.J. p 155 note 43, p 544 note 60 [b].

30. Tenn.—Jones v. Perry, 10 Yerg. 59, 30 Am.D. 430.
Wis.—Culbertson v. Coleman, 2 N.W. 124, 47 Wis. 193.
24 C.J. p 155 notes 44, 45.

For speculation

A special act authorizing an administrator to sell merely for purposes of speculation has been held unconstitutional, as in derogation of the rights of the heirs which became vested on the death of the ancestor. —Brenham v. Story, 39 Cal. 179.
As usurpation of judicial function see Constitutional Law § 120.
As violative of vested rights see Constitutional Law § 231.

31. Ind.—Souder v. Rude, 193 N.E. 916, 99 Ind.App. 660.

named in the contract, but it is not signed by them.[32] This rule applies to an option to purchase given by the representative,[33] to a contract to sell and give a conveyance on obtaining permission of the court,[34] or to a contract to obtain a conveyance, under an agreement to sell made by decedent, where the contract was not made on behalf, or with the knowledge, of the heirs.[35] However, such a contract of sale is not necessarily void, as it may bind the representative individually.[36] Where a contract for the sale of the land of a decedent is entered into by the widow and heirs, there is no such mutuality of obligation between the administrator and the purchaser as will entitle the administrator to enforce the contract.[37] An agreement to purchase and to pay a stated sum on receiving a copy of the court's order confirming the sale refers to an order authorizing the sale, as required by statute, where the purchaser is familiar with the court's practice.[38]

§ 271. Status of Purchaser

A purchaser from an executor or administrator, under an authorized sale of property belonging to decedent, generally acquires a good title thereto; and, although the sale is void because made without proper authority, if the purchaser is put in possession by the representative he is not a trespasser.

An authorized sale by an executor or administrator vests a good title to the property in the purchaser,[39] in whom it remains so long as the deed is not set aside.[40] The purchaser takes title free from any right of possession in a tenant, under an unauthorized lease given by the administrator.[41] The purchaser's title, however, may be subject to quarantine and dower rights;[42] and, moreover, a purchaser acquires no title or equitable claim to property as to which the executor or administrator had no title to convey;[43] and where through a mutual mistake property not belonging to the estate is included in the sale the executor or administrator may be required to refund to the purchaser the amount received therefor;[44] but if the purchaser's injury, in this respect, arises from his own negligence, in seeking equity he must do equity by restoring the status quo as nearly as possible.[45] If the conveyance tendered is the only sort of deed the executor, under lawful authority, could execute, there is no infirmity of title to justify a rejection thereof, or to relieve the purchaser of his contract to purchase.[46] Where the land is conveyed by the ad-

La.—Vidrine v. Deshotels, 158 So. 618, 181 La. 50.
Mich.—Webber v. Detroit Fidelity & Surety Co., 248 N.W. 576, 578, 263 Mich. 144, citing **Corpus Juris**—Frost v. Atwood, 41 N.W. 96, 73 Mich. 67, 16 Am.S.R. 560.
N.Y.—Mathewson v. Geer, 197 N.Y.S. 690, 120 Misc. 120, reversed on other grounds 205 N.Y.S. 451, 210 App.Div. 160.
Pa.—Scherr v. Page, 162 A. 317, 107 Pa.Super. 220.
24 C.J. p 154 note 33.

Executrix purchasing real estate at execution sale cannot bind estate by oral or written contract to convey such property.—Merchants' Southwest Transfer & Storage Co. v. Hartford Accident & Indemnity Co., 292 P. 60, 146 Okl. 241.

Sale to firm of which representative a member
A contract made by an executor with a firm of which he himself is a member for the sale of the whole of his testator's real estate, if opposed by any of the cestuis que trust, will not be required to be specifically performed.—Colgate v. Colgate, 23 N.J.Eq. 372.

32. Pa.—Scherr v. Page, 162 A. 317, 107 Pa.Super. 220.

33. N.C.—Hedgecock v. Tate, 85 S.E. 24, 168 N.C. 660, Ann.Cas.1916D 449.
24 C.J. p 154 note 33 [a].

34. N.Y.—Bauman v. Goldthorpe, 113 N.Y.S. 136, 129 App.Div. 19.
24 C.J. p 154 note 33 [b].

35. Ill.—De Proft v. Heydecker, 131 N.E. 114, 297 Ill. 541.

36. Mo.—Millard v. Smith, 95 S.W. 940, 119 Mo.App. 701.
24 C.J. p 154 note 34.

37. Iowa.—Phillips v. Van Schaick, 37 Iowa 229.

38. N.Y.—In re Desotelle's Estate, 258 N.Y.S. 119, 143 Misc. 732.

39. Mo.—Schowe v. Kallmeyer, 20 S.W.2d 26, 323 Mo. 899.
Tex.—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed.
Title and rights of purchaser at sale under:
Order of court see infra §§ 641–645.
Testamentary authority see infra § 293.

40. Tex.—Pegues v. Moss, supra.

41. Ga.—Hansen v. Leath, 103 S.E. 727, 25 Ga.App. 522.

Tenant holding over
Where an administrator without authority rents to a tenant lands belonging to the estate, and afterward, at a regularly authorized administrator's sale, sells the land for the purpose of distribution and payment of debts, the purchaser acquires the lands free from any right of possession in the tenant, who, upon refusal to vacate after demand by the purchaser, will be treated as a tenant holding over and may be dispossessed by summary proceedings.—Hansen v. Leath, supra.
Leasehold interests generally see supra § 265.

42. Mo.—Schowe v. Kallmeyer, 20 S.W.2d 26, 323 Mo. 899.
Quarantine or other occupation or use generally see infra §§ 327–331.

43. Mont.—Stephenson v. Combination Leasing & Development Co., 283 P. 1110, 86 Mont. 322.
N.Y.—Caflisch v. Clymer State Bank, 169 N.E. 286, 252 N.Y. 226, reversing 235 N.Y.S. 735, 226 App.Div. 456.

Title to trust property held by executrix, not having passed to estate by supplemental inventory, attempted conveyance by administrator was wholly ineffective.—Stephenson v. Combination Leasing & Development Co., 283 P. 1110, 86 Mont. 322.

44. Ill.—In re Higinbotham's Estate, 234 Ill.App. 516.
N.Y.—Caflisch v. Clymer State Bank, 169 N.E. 286, 252 N.Y. 226, reversing 235 N.Y.S. 735, 226 App. Div. 456.

45. N.J.—Bohm v. Hansmann, 124 A. 148, 96 N.J.Eq. 73, affirmed 126 A. 923, 96 N.J.Eq. 735.

46. Kan.—Bowlus v. Winters, 233 P. 111, 117 Kan. 726, motion denied 233 P. 1119, 118 Kan. 183.

ministrator in compliance with an option to purchase given by the decedent, and those claiming the proceeds as real estate and those claiming them as personal property both affirm the sale and ask their respective shares of the purchase money, the grantee has a perfect title as against the claim of either.[47] A purchaser under a contract fraudulent in law on the part of the administrator can take no advantage thereunder as against a creditor injured thereby,[48] nor, where the purchaser has had possession of the premises, is he entitled to interest on a certificate of purchase under a prior sheriff's sale, it being presumed that the amount of the interest is offset by the possession.[49]

A purchaser from an executor or administrator is put on notice that he is dealing with a person in a representative capacity and is bound to know the extent of his authority;[50] but, although the sale is void because made without proper authority, yet the purchaser who goes into possession by consent of the administrator is not a trespasser, nor is he wrongfully in possession, and hence he cannot be subjected to a suit, unless he has refused to surrender possession on demand;[51] and the same rule applies where the sale is not completed because some of the heirs refused to convey their share.[52]

§ 272. Liability of Representative for Unauthorized Sale

An executor or administrator is generally liable for the loss resulting from an unauthorized sale of real estate.

An executor or administrator is liable for the loss resulting from an unauthorized sale of real estate.[53] He is bound to show the necessity of the sale and to account for the value of the property, whether such value was realized at the sale or not.[54] Where an infant has been appointed administratrix and has without authority sold real estate of decedent, he may subsequently come into court and disaffirm the contract on the ground of fraud and minority, for the purpose of avoiding personal liability for the unauthorized sale.[55] An administrator, however, who sells estate property without authority is not personally liable to a mechanic's lienor for an unauthorized improvement thereon by the purchaser under contract with the mechanic's lienor, to which the administrator was not a party.[56]

§ 273. Ratification of Unauthorized Sales

An unauthorized sale of real estate is binding on heirs and devisees who ratify it.

An unauthorized sale of real estate by the executor or administrator is binding on the heirs or devisees if it is ratified by them,[57] or by their ancestor,[58] as where without fraud or mistake they receive the proceeds from such sale;[59] and where such heirs are also heirs of the executor, so that if the executor did not account for such proceeds to their ancestors they must have received them through descent from the executor, they cannot assert title to the property without accounting for the proceeds.[60] A minor devisee is not bound by his assent to the executor's sale of real property.[61] An agreement to sell real estate by an administratrix before she had a license from the court to do so is not so against public policy and void as to prevent its ratification after she has obtained a license.[62]

47. Wis.—In re Bisbee's Estate, 187 N.W. 653, 177 Wis. 77.

48. Colo.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343.

49. Colo.—Scholtz v. Hazard, supra.

50. U.S.—Sun Oil Co. v. Blevins, D. C.La., 29 F.Supp. 901, affirmed, C. C.A., Blevins v. Sun Oil Co., 110 F.2d 566—Rafferty v. Mallory, C. C.Ill., 20 F.Cas.No.11,526, 3 Biss. 362.

Representation of agent

A representation by the agent of an executrix negotiating a sale that the title was all right meant only that the estate's title was good, and if it related to the authority of the executrix to make a private sale was only a conclusion, and did not authorize rescission.—Turner v. Peacock, 113 S.E. 585, 153 Ga. 870.

51. Ark.—Burgauer v. Laird, 26 Ark. 256.

52. Wash.—Plebuch v. Barnes, 270 P. 823, 149 Wash. 221.

53. Mich.—Burnham v. Kelley, 300 N.W. 127, 299 Mich. 452—Morton v. Johnston, 83 N.W. 369, 124 Mich. 561.

Liabilities of executor or administrator under sale under:

Order of court see infra §§ 661–666.

Testamentary authority see infra § 296.

54. Ga.—Wellborn v. Rogers, 24 Ga. 558.

S.C.—Wright v. Wright, 7 S.C.Eq. 185.

24 C.J. p 154 note 38.

55. N.Y.—Knox v. Nobel, 28 N.Y.S. 355, 77 Hun 230.

56. Iowa.—Ilten & Taege v. Pfister, 211 N.W. 407, 202 Iowa 833.

57. Iowa.—Ilten & Taege v. Pfister, 211 N.W. 407, 202 Iowa 833.

Va.—Camp Mfg. Co. v. Green, 106 S.E. 394, 129 Va. 360.

Suit to recover proceeds

Where an executor conveys land without authority and receives the proceeds, a devisee who, with knowledge or notice of the substantial facts, brings suit against the executor to recover such proceeds, elects to confirm and ratify the conveyance. —Glynn County Bd. of Education v. Day, 57 S.E. 359, 128 Ga. 156.

58. Va.—Camp Mfg. Co. v. Green, 106 S.E. 394, 129 Va. 360.

59. Va.—Camp Mfg. Co. v. Green, supra.

60. Va.—Camp Mfg. Co. v. Green, supra.

61. Mass.—Bryant v. Lombardi, 159 N.E. 437, 261 Mass. 489.

62. Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473.

3. SALE UNDER TESTAMENTARY AUTHORITY

§ 274. Power to Sell

a. In general
b. Discretionary or mandatory power; compelling exercise
c. Incidental powers

a. In General

An executor may sell the testator's real estate for any lawful purpose to which the testator wishes the proceeds to be applied where such power is, either expressly or impliedly, conferred on him by the will.

An executor may sell his testator's real estate for the payment of debts or for any other lawful purpose to which the testator wishes the proceeds of his real estate to be applied where such power is, either expressly or impliedly, conferred on him by the provisions of the testator's will,[63] and the object or purpose of the power is specified in, or clearly ascertainable from, the will.[64] Such a power of sale cannot be determined on the consent of the beneficiaries,[65] but depends on the testator's intention as ascertained from the language of the whole will,[66] and effect will be given to that intention if it can be done consistently with the rules of law.[67] The power to sell need not be conferred in any particular words or phrases, it being sufficient that the will shows that such was the testator's intent.[68]

It has been said that an executor derives his power to act as such in the transfer of immovable property from a compliance with the law of the place where he attempts to operate under the will and not from the will alone,[69] and that the executor must take out letters testamentary in order lawfully to exercise the power which the testator has thus conferred on him,[70] but where, before issuance of letters testamentary, the executor contracts to sell and deliver a bond for title at a future date, and offers on that date, after receipt of letters testamentary, to perform his obligations and execute such bond, it constitutes a ratification of the original obligation or an acceptance of the buyer's outstanding offer,[71] and the purchaser's refusal to comply with his obligations amounts to a breach.[72] On the other hand, it has been held that the right to sell and convey, under a general power of sale, depends on the will

63. Ga.—Neal v. Patten, 40 Ga. 363.
Hawaii.—In re Beckley's Estate, 31 Hawaii 163.
Ill.—Starr v. Willoughby, 75 N.E 1029, 218 Ill. 485, 2 L.R.A.,N.S., 623—Griffin v. Griffin, 31 N.E. 131, 141 Ill. 373—Hale v. Hale, 17 N. E. 470, 125 Ill. 399—Hamilton v. Hamilton, 98 Ill. 254—Hughes v. Washington, 72 Ill. 84.
Iowa.—In re Wicks' Estate, 222 N. W. 843, 207 Iowa 264.
Ky.—Walker's Trustee v. Walker, 244 S.W. 772, 196 Ky. 346—Marrett v. Babb's Exr., 15 S.W. 4, 91 Ky. 88, 12 Ky.L. 652.
Md.—Carter v. Van Bokkelen, 20 A. 781, 73 Md. 175—Albert v. Albert, 12 A. 11, 68 Md. 352.
Mass.—Iasigi v. Iasigi, 36 N.E. 579, 161 Mass. 75.
Mo.—Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, transferred, App., 1 S.W.2d 205, see on retransfer 52 S.W.2d 405.
Mont.—In re McGovern's Estate, 250 P. 812, 77 Mont. 182.
N.J.—Stumm v. Hackensack Trust Co., 150 A. 674, 106 N.J.Eq. 308—Walker v. Walker, 25 A. 947, 51 N.J.Eq. 84—Booraem v. Wells, 19 N.J.Eq. 87.
N.Y.—Kent v. Shepard, 100 N.Y.S. 597, 115 App.Div. 64, affirmed 80 N.E. 1112, 188 N.Y. 566—Mapes v. Tyler, 43 Barb. 421—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Squires' Will, 216 N.Y.S. 750, 127 Misc. 361—Nichols v. Nichols, 86 N.Y.S. 719, 42 Misc. 381—Alvord v. Sherwood, 47 N.Y. S. 749, 21 Misc. 354.
N.C.—Powell v. Norfolk-Carolina Timber Corporation, 138 S.E. 161, 193 N.C. 794—Wetherell v. Gorman, 73 N.C. 380.
Ohio.—McAvoy v. McCarthy, 10 Ohio N.P., N.S., 606.
Or.—Worley v. Taylor, 28 P. 903, 21 Or. 589, 28 Am.S.R. 771.
Pa.—In re Watts' Estate, 51 A. 588, 202 Pa. 85—In re Rogers' Estate, 39 A. 1109, 185 Pa. 428—Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Leggate, 30 A. 946, 166 Pa. 147, 35 Wkly.N.C. 522—Miller v. Sheaffer, 75 Pa.Super. 584—Krohmer v. Peale, 6 Sch. Reg. 197.
Tenn.—Pinkerton v. Fox, 129 S.W.2d 514, 23 Tenn.App. 159.
Wis.—In re Besley's Estate, 18 Wis. 451.
24 C.J. p 155 note 46.

64. Mo.—Wisker v. Rische, 67 S. W. 218, 167 Mo. 522.
N.Y.—Sweeney v. Warren, 28 N.E. 413, 127 N.Y. 426, 24 Am.S.R. 468.

65. N.Y.—In re Maier's Will, 205 N.Y.S. 156, 123 Misc. 244.

66. Del.—Hackendorn v. Mahan, Ch., 8 A.2d 794.
Ill.—Pope v. Kitchell, 188 N.E. 451, 354 Ill. 248—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643—Heyne v. Scheffauer, 151 N.E. 893, 321 Ill. 266.
Iowa.—In re Doherty's Estate, 271 N.W. 609, 222 Iowa 1352.
Kan.—Tomb v. Bardo, 114 P.2d 320, 153 Kan. 766.
N.Y.—In re Maier's Will, 205 N.Y.S. 156, 123 Misc. 244.
Ohio.—Baker v. Alexander, 156 N.E. 223, 24 Ohio App. 117.
Portion of will applicable to sale of real property must be read as a whole.—In re Harrington's Estate, 248 N.Y.S. 785, 139 Misc. 97.
Power of sale and not devise to executor
Ill.—Pope v. Kitchell, 188 N.E. 451, 354 Ill. 248.

67. Ill.—Heyne v. Scheffauer, 151 N. E. 893, 321 Ill. 266.

68. Ill.—Illinois Christian Missionary Soc. v. American Christian Missionary Soc., 115 N.E. 118, 277 Ill. 193.
Ky.—Walters' Guardian v. Ransdell, 291 S.W. 399, 218 Ky. 267.
N.Y.—Cahill v. Russell, 35 N.E. 664, 140 N.Y. 402, reversing 23 N.Y.S. 18, 68 Hun 540—In re Dzwoniarek's Estate, 258 N.Y.S. 53, 143 Misc. 597—In re Maier's Will, 205 N.Y.S. 156, 123 Misc. 244.
N.C.—Wells v. Williams, 121 S.E. 17, 187 N.C. 134.

69. Ind.—Lucas v. Tucker, 17 Ind. 41.
24 C.J. p 156 note 47.

70. Ohio.—In re Crawford, 21 Ohio Cir.Ct. 554, 11 Ohio Cir.Dec. 605.
24 C.J. p 156 note 48.

71. Ga.—Broadwell v. Kiker, 111 S. E. 62, 28 Ga.App. 279.

72. Ga.—Broadwell v. Kiker, supra.

itself, and not on the issuance of letters testamentary,[73] and that an executor need not fully qualify as such before making a sale, where the legal estate is devised to him merely for the purpose of sale,[74] or where the will shows that it is the testator's desire that the court assume no other control over his estate than to probate his will and record an inventory of the property, and expressly exempts the executors from giving bonds, and authorizes them to sell at their discretion any of testator's land.[75]

An executor's right to sell, under testamentary power, is superior to the right of partition vested in one who has purchased an undivided interest from a devisee;[76] and it is not limited because not coupled with an interest[77] or affected by the pendency of a suit by a creditor for a settlement of the estate;[78] nor is a power of sale for the purpose of paying testator's debts affected by the widow's dissent from the will[79] or by a power given in another part of the will to sell after the death or remarriage of the widow.[80] A power to sell is not inconsistent with a power to manage until a sale can be effected;[81] nor is it abrogated by a further provision directing the interest and rents of the property to be used for a certain purpose.[82] A power to sell and invest the proceeds until the beneficiaries entitled thereto attain their majority is not inconsistent with a prior provision devising a certain part of the remainder of the estate to each of such beneficiaries.[83] A direction to an executor to sell real estate, the proceeds to become part of the residuary estate of the testator, has been held to be ineffectual as a power of sale where the will makes no disposition of the residuary estate,[84] but where real estate is devised to executors in trust to sell and distribute the proceeds among designated beneficiaries, and a share thereof passes to testator's heirs by reason of the invalidity of the devise of that share, the whole property is subject to the exercise of the power of sale, provided a sale is necessary to carry out to the best advantage the valid provisions of the will.[85] A power to sell under a will devising the fee to residuary devisees is a naked power only, and not a power coupled with an interest.[86]

Construction of power. A court of probate jurisdiction may construe a power of sale given to an executor;[87] and the law of the testator's domicile, rather than the law of the state where the land is located, governs in the construction of such a power.[88] A power of sale, should receive a liberal construction in order to effect the true purpose and intent of the testator,[89] and should be construed as granting an unconditional, rather than a limited, power of sale, where both constructions are appropriate.[90]

Injunction. A sale of land, under a will, may be enjoined at the instance of the heirs where the validity of the will is in controversy, and it has been admitted to probate without notice to the heirs and on insufficient testimony,[91] or where the sale is being made without proper authority therefor;[92] and

73. N.Y.—Pollock v. Holley, 22 N.Y.S. 215, 67 Hun 370.

74. Or.—Hogan v. Wyman, 2 Or. 302.
24 C.J. p 156 note 48 [c].

75. Tex.—Dean v. Furrh, 124 S.W. 431, 58 Tex.Civ.App. 495.

Possession sufficient to support action for breach
If possession by purchaser was essential to enforcement by executrix of contract for sale of land made before issuance of letters testamentary, possession granted pursuant to the agreement, and accepted without objection, and retained after refusal to perform agreement, was sufficient, although others had possession of part of building.—Kiker v. Broadwell, 118 S.E. 759, 30 Ga.App. 460.

76. N.J.—Hatt v. Rich, 45 A. 969, 59 N.J.Eq. 492.

77. Ohio.—Jones v. Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cinc.L.Bul. 211.

78. Ky.—Mersman v. Worthington, 72 S.W. 1094, 24 Ky.L. 2115.

79. Ala.—Gaunt v. Tucker, 18 Ala. 27.

80. N.J.—Brown v. Brown, 31 N.J. Eq. 422.

81. N.Y.—Arnold v. Gilbert, 5 Barb. 190, 7 Leg.Obs. 209.

82. Ky.—Betty v. Petrie, 128 S.W. 320, 138 Ky. 426.

For benefit of devisee
Where a will directed a sale of all the real and personal estate of testatrix by the administrator for the benefit of a devisee, a further provision directing the interest and rents of the property to be used for the maintenance and education of the devisee did not abrogate the direction to the administrator to sell, since by the word "rents" the testatrix meant that, so long as the real estate remained unsold, the income arising therefrom, as well as the interest from the proceeds of the personal estate, should be applied to the support and education of the devisee.—Betty v. Petrie, supra.

83. Ark.—Thomason v. Phillips, 99 S.W.2d 230, 193 Ark. 264.

84. N.Y.—Matter of Green, 118 N.Y.S. 747, 63 Misc. 638, 639.
24 C.J. p 156 note 54.

85. N.Y.—Bender v. Paulus, 90 N.E. 994, 197 N.Y. 369, affirming 105 N.Y.S. 240, 118 App.Div. 23.
24 C.J. p 156 note 55, p 165 note 27.

86. Ohio.—Baker v. Alexander, 156 N.E. 223, 24 Ohio App. 117.

87. Md.—Ogle v. Reynolds, 23 A. 137, 75 Md. 145.

88. Miss.—Crusoe v. Butler, 36 Miss. 150.

89. N.Y.—In re Brown's Ex'r, 232 N.Y.S. 204, 133 Misc. 519.
N.C.—Trogden v. Williams, 56 S.E. 865, 144 N.C. 192, 10 L.R.A.,N.S., 867.
24 C.J. p 160 note 81.

90. N.H.—Barnes v. First Baptist Church, 136 A. 266, 82 N.H. 503.

91. N.C.—Galbreath v. Everett, 84 N.C. 546.

92. Pa.—McClane v. McClane, 56 A. 996, 207 Pa. 465.

Where widow was given unlimited right to sell all testator's realty without court order, sale thereof could not be enjoined by son.—Walters v. Walters, 137 S.E. 386, 163 Ga. 884.

a sale for the payment of debts barred by limitation may be enjoined at the instance of grantees of devisees of the land sought to be sold.[93] Creditors of the estate by account cannot enjoin the executor from selling real estate on the ground that he is insolvent, where no waste or mismanagement or attempt thereat is alleged.[94]

b. Discretionary or Mandatory Power; Compelling Exercise

A power of sale may be discretionary, as where its exercise is left to the discretion of the executor; or it may be mandatory, as where an absolute duty to sell is imposed on the executor.

The power of sale may be either discretionary or mandatory.[95] A power to sell is discretionary where the executor is authorized, but not directed, to sell,[96] and the power is not coupled with a trust or with any interest in the donee;[97] that is, the executor is given the power to make a sale but it is left to his discretion as to whether the power shall be exercised.[98] Such a discretionary power creates a personal trust independent of the donee's official character as executor,[99] and it should not be exercised except to serve some good purpose,[1] and it need not be exercised in the absence of necessity;[2] and where a sale would be prejudicial to the interests of a life tenant it should not be exercised unless the sale is necessary to protect the testator's estate.[3] The executor may go into court for direction and guidance in the matter,[4] but unless he does so of his own accord the courts will not as a rule interpose to control him in an honest exercise of a discretion or a power with regard to the sale of decedent's real estate vested in him by the will,[5] unless the circumstances are such that the sale or a refusal to sell amounts to fraud or an abuse of discretion,[6] in which case the court may compel a sale,[7] but it cannot direct that the sale be made by a commissioner or referee unless it is charged or found that the executor is unfit or without capacity to make the sale.[8]

A power to sell is mandatory where it imposes on the executor an absolute duty to sell, leaving him no discretion whatever in the matter,[9] or leaving him discretion merely as to the time and manner of

93. N.Y.—Butler v. Johnson, 18 N.E. 643, 111 N.Y. 204, affirming 41 Hun 206.
24 C.J. p 161 note 84 [d].

94. Ga.—Elam v. Elam, 72 Ga. 162.
24 C.J. p 155 note 46 [c].

95. Mo.—Wisker v. Rische, 67 S.W. 218, 167 Mo. 522.

96. Mass.—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39.
Miss.—Hammett v. Markham, 90 So. 848, 128 Miss. 39.
R.I.—Dyer v. Blair, 6 A.2d 673, 62 R.I. 498.

97. Mass.—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39.

98. Ala.—Owens v. Gachet, 93 So. 509, 207 Ala. 563.
Ga.—Shields v. Whithead, 120 S.E. 631, 156 Ga. 834.
Ill.—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643.
N.Y.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738—In re Barnes' Estate, 181 N.Y.S. 73, 110 Misc. 569.
N.C.—Brown v. Brown, 104 S.E. 389, 180 N.C. 433.
24 C.J. p 162 note 91.

Sale "advised"

Where the will stated "I advise" the executors to sell, the word "advise" does not convey a positive direction to sell, but it leaves it discretionary with the executors whether they will sell.—Brown v. Brown, supra.

99. Mo.—Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred, see, Sup., 89 S.W. 2d 367—Donaldson v. Allen, 81 S.W. 1151, 182 Mo. 626.

1. Pa.—In re Espenship's Estate, 13 Pa.Co. 294.

2. Ala.—Nelson v. Atkins, 109 So. 166, 215 Ala. 76.

3. Pa.—In re Espenship's Estate, 13 Pa.Co. 294.

4. Pa.—Curren's Estate, 11 Phila. 59.
Tenn.—Hinton v. Cole, 3 Humphr. 656.
Control of courts generally see infra § 277.

5. Ala.—Burton v. Jones, 102 So. 807, 809, 212 Ala. 353, citing Corpus Juris.
Ill.—Cannon v. Garrett, 268 Ill.App. 18.
Neb.—Draper v. Eager, 200 N.W. 170, 112 Neb. 611.
N.Y.—Weintraub v. Siegel, 118 N.Y.S. 261, 133 App.Div. 677, 682, reversing 109 N.Y.S. 215, 57 Misc. 246.
Wis.—In re Cullen's Estate, 285 N.W. 759, 231 Wis. 292.
24 C.J. p 162 note 94.

6. Ala.—Burton v. Jones, 102 So. 807, 809, 212 Ala. 353, citing Corpus Juris.
Pa.—In re Severns, 60 A. 494, 211 Pa. 68.
24 C.J. p 162 note 95.

7. Ill.—Cannon v. Garrett, 268 Ill. App. 18.
Mo.—Ganahl v. Ganahl, 19 S.W.2d 898, 323 Mo. 620.

8. N.Y.—Holly v. Gibbons, 68 N.E. 889, 176 N.Y. 520, 98 Am.S.R. 694, motion granted 69 N.E. 731, 177 N.Y. 401, and reversing 74 N.Y.S. 1132, 67 App.Div. 628.
S.C.—American Bible Soc. v. Noble, 32 S.C.Eq. 156.
24 C.J. p 165 notes 29 [e], [f].

9. Ark.—Thomason v. Phillips, 99 S.W.2d 230, 193 Ark. 264.
Ill.—Teater v. Salander, 136 N.E. 873, 305 Ill. 17.
Miss.—Glidewell v. Pannell, 130 So. 288, 158 Miss. 249.
Mo.—Hull v. McCracken, App., 53 S.W.2d 405, transferred, App., 1 S.W.2d 205, see on retransfer 39 S.W.2d 351, 327 Mo. 957.
N.J.—Johnson v. Talman, 134 A. 357, 99 N.J.Eq. 762.
N.Y.—In re Schuster's Will, 27 N.Y.S.2d 413, 175 Misc. 1072—In re Kuhrasch's Will, 207 N.Y.S. 75, 124 Misc. 117.
Wis.—In re Cullen's Estate, 285 N.W. 759, 231 Wis. 292.
24 C.J. p 162 note 92.

Permissive subordinate to positive direction

A will directing executors to convert testator's estate into cash or other property readily divisible in kind imposed duty on them to sell testator's realty, notwithstanding subsequent provision permitting them to retain any form of investment of which he died seized, "having in mind my desires above expressed."—In re Cullen's Estate, supra.

the sale[10] or as to the disposition of the proceeds.[11] A power of sale may also be regarded as mandatory where it is granted for a purpose which cannot be carried out without a sale.[12] A mandatory power to sell on the decease of the wife, who predeceased the testator, takes effect on the death of the testator.[13] In the case of a mandatory direction, it is well settled that if the executor neglects or refuses to sell the court may compel him to do so at the instance of an interested person,[14] and such persons only may be joined as parties who have interests in the property which might be affected.[15]

c. Incidental Powers

A power of sale includes the power to do such acts or make such agreements as may be necessary and proper to make an advantageous sale; but it generally does not include the power to exchange the property for other property.

As incidental to the power of sale, an executor may do such acts or make such agreements as may be necessary and proper to bring about an advantageous sale.[16] Where the title to land, as well as a power of sale, is given to executors, it has been held that they can make an agreement to assign a part to the widow for dower, in consideration of her releasing the residue, which, in the absence of collusion, will bind the heirs as well as creditors;[17] and it has been considered that the executor may also, as incidental to the power of sale, create easements, such as the right to use part of the property as a street, when the most advantageous mode of exercising the power is by dividing the property into building lots.[18] However, a will authorizing executors to sell and convey the coal underlying certain of the testator's lands, with the usual mining privileges, does not give them power to waive or release the right of surface or lateral support.[19] An unrestricted power of sale does not authorize a confession of judgment.[20]

Contracts of sale; options. Where the will directs an executor to sell property with discretion as to terms and conditions, he has power to make a contract of sale and to enforce specific performance thereof,[21] and in such a case a judgment may be entered that defendant specifically perform, and, if he refuse to do so, that the property be sold by a referee, whose deed to the purchaser will convey all the title which the executor could have conveyed under the power in the will.[22] The contract of sale may also be enforced against the executor,[23] and

10. Ky.—Thompson v. Thompson, 87 S.W. 790, 27 Ky.L. 949.
N.Y.—In re Schuster's Will, 27 N.Y.S.2d 413, 175 Misc. 1072—In re Scott's Will, 204 N.Y.S. 478.
24 C.J. p 162 note 92 [b].
Manner of sale generally see infra § 284.
Time of sale generally see infra § 288.

11. Ky.—Muldrow v. Fox, 2 Dana 74.
24 C.J. p 162 note 92 [c].

12. Me.—Cutter v. Burroughs, 61 A. 767, 100 Me. 379.
N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Taft's Will, 259 N.Y.S. 887, 144 Misc. 896, modifying 256 N.Y.S. 732, 143 Misc. 887, and affirmed 260 N.Y.S. 294, 145 Misc. 435—In re Arns' Estate, 259 N.Y.S. 69, 144 Misc. 584.

13. N.Y.—In re Taft's Will, 259 N.Y.S. 887, 144 Misc. 896, modifying 256 N.Y.S. 732, 143 Misc. 887, and affirmed 260 N.Y.S. 294, 145 Misc. 435.

14. Ill.—Cannon v. Garrett, 268 Ill. App. 18.
Mo.—Hull v. McCracken, App., 53 S.W.2d 405, transferred, App., 1 S.W.2d 205, see on retransfer 39 S.W.2d 351, 327 Mo. 957.
Mont.—In re Livingston's Estate, 9 P.2d 159, 91 Mont. 584, 90 A.L.R. 1036.
N.Y.—In re Moose's Will, 272 N.Y.S. 140, 241 App.Div. 329—Safford v. Burke, 223 N.Y.S. 626, 130 Misc. 12.
24 C.J. p 162 note 96.

Demand and refusal

Under will directing property to be sold and divided equally among testator's grandchildren and nephew, one of the grandchildren had no cause of action for sale and division of proceeds, in absence of allegation that demand had been made on executor to sell land and that he had refused to do so.—Harlow v. Riley's Ex'r, 138 S.W.2d 946, 282 Ky. 437.

A decree in a proceeding to compel executors to comply with the terms of a will requiring a sale of land should direct the executors to proceed to sell the real estate and make report to the court of the sale, with the necessary expenses thereof, so that the court may be apprised of their compliance with the decree.—Cannon v. Garrett, 268 Ill.App. 18.

Costs

In a proceeding to compel executors to comply with the terms of a will as to the sale of property and the division of its proceeds, there was no error in decreeing that the costs of the suit be paid out of the proceeds of the sale, there being nothing to show an abuse of discretion by the chancellor.—Cannon v. Garrett, supra.

15. N.Y.—Walbridge v. Brooklyn Trust Co., 128 N.Y.S. 686, 143 App. Div. 502.
24 C.J. p 162 note 96 [d].

16. N.Y.—Simmons v. Crisfield, 90 N.E. 956, 197 N.Y. 365, 26 L.R.A., N.S., 663.
24 C.J. p 163 notes 3, 4.

17. Ky.—Harrow v. Johnson, 3 Metc. 578.

18. N.Y.—Simmons v. Crisfield, 90 N.E. 956, 197 N.Y. 365, 26 L.R.A., N.S., 663.
24 C.J. p 163 note 4.

19. Pa.—Allshouse's Estate, 23 Pa. Super. 146.

20. Pa.—Rosengarten's Estate, 30 Pa.Super. 244.

21. Cal.—Crouse v. Peterson, 62 P. 475, 130 Cal. 169, 80 Am.S.R. 89.
N.J.—Owen v. Riddle, 79 A. 886, 81 N.J.Law 546, Ann.Cas.1912D 45.
24 C.J. p 164 note 7.

Agreement to sell and consummated sale distinguished

Pa.—In re Fritz' Estate, 7 Sch.Reg. 271.

22. N.Y.—Strauss v. Bendheim, 56 N.E. 1007, 162 N.Y. 469, reversing 60 N.Y.S. 398, 44 App.Div. 82, reversing 59 N.Y.S. 1054, 28 Misc. 660.

23. Del.—Leeds v. Sparks, 68 A. 239, 8 Del.Ch. 280.
Ohio.—Coles v. Kearney, 8 Ohio Dec. (Reprint) 733, 9 Cinc.L.Bul. 245.
24 C.J. p 164 note 8.

the fact that the title is encumbered does not relieve him from liability for specific performance of the contract.[24] However, an executor who is empowered to sell cannot give an option on the property.[25]

Exchanges. A mere power to sell given to an executor does not authorize him to exchange the land, either in whole or in part, for other land,[26] and consequently a contract of sale by which the executor agrees to accept other land in part payment, at a stipulated price, is void.[27] Where, however, a testator expressly impresses the character of realty on the proceeds of sale of his real estate during the existence of a life estate given by the will, and expressly confers power on his executor to sell his real estate and with the proceeds purchase other real estate and to continue the transfer and disposition thereof in his discretion, this power authorizes a direct exchange.[28]

§ 275. —— Implied Power

An executor's power to sell real estate may be implied where it is clear from the provisions of the will that the testator intended him to have such power, or the directions of the will are such that a power of sale is necessary in order that they may be properly carried out.

An executor's power to sell real estate need not be expressly given in terms by the will, but it may be implied,[29] when the provisions of the will render it reasonable to do so,[30] that is, when it is clear that the testator intended that his executor should have such power or the directions of the will are such that a power of sale is necessary in order that they may be properly carried out.[31] The courts, however, will not put a strained construction on the language of the will in order to extract such a power from it when the testator's intention to give or the necessity for such a power is not clear.[32] Power to manage and control does not authorize a sale of the land;[33] and the mere fact that a sale would be ben-

24. Ohio.—Jones v. Lewis, 8 Ohio Dec. (Reprint) 268, 7 Cinc.L.Bul. 211.

25. N.C.—Trogden v. Williams, 56 S. E. 865, 144 N.C. 192, 10 L.R.A.,N.S., 867.
Pa.—Moore v. Trainer, 97 A. 462, 252 Pa. 367.
24 C.J. p 164 note 9.

26. N.J.—Tzeses v. Green, 146 A. 593, 105 N.J.Eq. 12.
N.Y.—Bonham v. Coe, 292 N.Y.S. 423, 249 App.Div. 428, affirmed 12 N.E. 2d 566, 276 N.Y. 540—Turco v. Trimboli, 137 N.Y.S. 343, 152 App. Div. 431.
Wash.—Hutchings v. Fanshier, 231 P. 14, 132 Wash. 5.
24 C.J. p 164 note 10.

27. Ky.—Ross v. Barr, 53 S.W. 658, 21 Ky.L. 974.

28. N.Y.—Mayer v. McCune, 59 How. Pr. 78.

29. Ark.—Bacharach v. Spriggs, 292 S.W. 150, 152, 173 Ark. 250, citing **Corpus Juris.**
Hawaii.—In re Beckley's Estate, 31 Hawaii 163.
Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 369—In re Robinson's Estate, 214 Ill.App. 262.
N.Y.—In re Tippett's Will, 13 N. Y.S.2d 971.
S.C.—Allworden v. Lemon, 191 S.E. 215, 219, 183 S.C. 421, quoting **Corpus Juris.**
Tenn.—Pinkerton v. Fox, 129 S.W.2d 514, 23 Tenn.App. 159.
24 C.J. p 157 note 56.

30. Ky.—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.

31. U.S.—Peter v. Beverly, D.C., 10 Pet. 532, 9 L.Ed. 522.
Ala.—Thomas v. Field, 98 So. 474, 210 Ala. 502—Alstork v. Curry, 91 So. 796, 207 Ala. 135.
Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269—Illinois Christian Missionary Soc. v. American Christian Missionary Soc., 115 N.E. 118, 277 Ill. 193.
Ky.—Martin v. Buechel, 218 S.W. 278, 186 Ky. 786.
Md.—Ogle v. Reynolds, 23 A. 137, 75 Md. 145.
Mass.—Heard v. Trull, 54 N.E. 875, 175 Mass. 239.
Mich.—Michigan Trust Co. v. Driver, 259 N.W. 867, 270 Mich. 698—Mandlebaum v. McDonell, 29 Mich. 78, 18 Am.R. 61.
Miss.—Clark v. Hornthal, 47 Miss. 434.
Mo.—Drumheler v. Haff, 23 Mo.App. 161.
Mont.—In re McGovern's Estate, 250 P. 812, 77 Mont. 182.
N.J.—Dunn v. Oram, 10 A.2d 277, 126 N.J.Eq. 515—Schlosstein v. Henry R. Worthington, Ch., 113 A. 610.
N.Y.—Phillips v. Davies, 92 N.Y. 199—In re Hardenbergh's Will, 258 N. Y.S. 651, 144 Misc. 248—In re McEvoy's Estate, 248 N.Y.S. 348, 139 Misc. 349—In re Brown's Ex'r, 232 N.Y.S. 204, 133 Misc. 519—In re Hemstreet's Will, 167 N.Y.S. 1016, 101 Misc. 340.
Ohio.—Weng v. Weng, 27 Ohio N.P., N.S., 403.
Pa.—Ex parte Elliott, 5 Whart. 524, 34 Am.D. 572—Schropp's Ex'r v. Schaeffer, 2 Pa.Dist. 362—Arrott's Estate, 9 Pa.Co. 535.
S.C.—Allworden v. Lemon, 191 S.E. 215, 219, 183 S.C. 421, quoting **Corpus Juris.**
Tenn.—Pinkerton v. Fox, 129 S.W. 2d 514, 23 Tenn.App. 159.
Va.—Harrison v. Harrison's Adm'r, 2 Gratt. 1, 43 Va. 1, 44 Am.D. 365.
Wash.—Webster v. Thorndyke, 39 P. 677, 11 Wash. 390.
24 C.J. p 157 note 57.

Testator's intention must govern in determining whether his executor has implied authority to sell the realty and use the proceeds as directed.—Martin v. Buechel, 218 S.W. 278, 187 Ky. 786.

Power to sell realty has been implied

(1) From authority to sell personal property and to execute conveyances.—In re Hardenbergh's Will, 258 N.Y.S. 651, 144 Misc. 248.

(2) From direction to pay all transfer taxes from residuary estate, where there was no residual personalty.—In re McEvoy's Estate, 248 N.Y.S. 348, 139 Misc. 349.

(3) Other instances of implied power of sale see 24 C.J. p 157 note 57 [a].

The word "proceeds," in a will bequeathing the use and proceeds of real estate, shows an intention to confer power of sale on the executrix who is the sole devisee.—Mockler v. Long, 139 A. 47, 5 N.J.Misc. 937.

32. Ill.—Griffin v. Griffin, 31 N.E. 131, 141 Ill. 373—Hale v. Hale, 17 N.E. 470, 125 Ill. 399.
N.J.—Schlosstein v. Henry R. Worthington, Ch., 113 A. 610.
N.Y.—Downing v. Marshall, 1 Abb. Dec. 525.
N.C.—Wetherell v. Gorman, 73 N. C. 380.
Or.—Worley v. Taylor, 28 P. 903, 21 Or. 589, 28 Am.S.R. 771.
24 C.J. p 158 note 58.

33. Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

eficial to the estate is not sufficient to raise an implied power of sale, where this is not necessary to carry out the provisions of the will.[34]

A power of sale is implied where the residue after the payment of debts is devised to the executor,[35] but not where such residuary devise is to a person other than the executor;[36] and no power of sale can be implied from the mere fact that the bequests under the will exceed the amount of the testator's personalty.[37] A power of sale is implied where land is devised to the executor for purposes naturally devolving upon him[38] or requiring a sale;[39] and it has been considered that the use of terms applicable to personalty particularly and exclusively indicates that all the property is to be converted into personalty and gives an implied power of sale.[40] A power of sale is not implied solely from a general direction to pay debts,[41] and a charge of debts on the realty has been held not, of itself, sufficient to raise an implied power of sale;[42] but where a testator directs the payment of debts and legacies with the proceeds of real estate, or otherwise manifests an intent that the proceeds of his real estate should be so used, the executor takes a power of sale by implication.[43]

A mere direction to distribute or divide an estate consisting in whole or in part of realty is not of itself sufficient to raise an implied power of sale, if a division in kind can be effected,[44] but it is otherwise where a sale is necessary to effect a distribution, or the testator apparently contemplated that a sale should be made for that purpose;[45] and, a fortiori, a will directing that testator's real estate shall be converted into money and that his executor shall distribute his estate among named beneficiaries empowers the executors to sell the real estate.[46] So also a power of sale is implied where the testator blends the proceeds of real estate into one fund with the personalty for the purpose of distribution or accumulation or even where there is no direction to distribute.[47] A devise to an executor with directions to invest and pay over or distribute the

34. Md.—Moale v. Cutting, 59 Md. 510.
N.Y.—Roe v. Vingut, 22 N.E. 933, 117 N.Y. 204, 21 Abb.N.Cas. 404.
24 C.J. p 158 note 59.

35. N.Y.—Coogan v. Ockershausen, 55 N.Y.Super. 286, 18 N.Y.St. 366.
24 C.J. p 158 note 60.

36. N.Y.—Matter of Van Vleck, 66 N.Y.S. 727, 32 Misc. 419.
24 C.J. p 158 note 61.

37. N.Y.—Cahill v. Brennan, 23 N.Y.S. 78, 68 Hun 540.

38. N.C.—Vaughan v. Farmer, 90 N.C. 607.

39. N.J.—Dunn v. Oram, 10 A.2d 277, 126 N.J.Eq. 515.
N.Y.—Stewart v. Hamilton, 37 Hun 19.

40. N.J.—Cook v. Cook, Ch., 47 A. 732.
24 C.J. p 158 note 65.

41. Ga.—Neal v. Patten, 40 Ga. 363.
Vt.—Wetmore & Morse Granite Co. v. Bertoli, 88 A. 898, 87 Vt. 257.
24 C.J. p 158 note 66.

42. N.Y.—In re Fox, 52 N.Y. 530, 11 Am.R. 751, affirming 63 Barb. 157.
24 C.J. p 159 note 69.

43. Md.—Seeger v. Leakin, 25 A. 862, 76 Md. 500—Conkling v. Washington University, 2 Md.Ch. 497.
Mo.—Drumheler v. Haff, 23 Mo.App. 161.
N.J.—Whitehead v. Wilson, 29 N.J. Eq. 396.
N.C.—Miller v. Scott, 116 S.E. 86, 185 N.C. 93, reversing 114 S.E. 820, 184 N.C. 556.
24 C.J. p 159 note 67.

Duty to sell

Where a legacy to care for testatrix' burial lot was charged on specific real property devised, the executor was required to sell the property to pay the legacy or collect the amount from the devisee or his assigns.—In re More's Estate, 146 N.W. 319, 179 Mich. 237.

44. Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269.
Ky.—Allen v. Riedling, 140 S.W.2d 833, 283 Ky. 90—Walker's Trustee v. Walker, 244 S.W. 772, 196 Ky. 346.
Md.—Stein v. Stein, 29 A. 691, 79 Md. 464—Albert v. Albert, 12 A. 11, 68 Md. 352.
N.Y.—Mapes v. Tyler, 43 Barb. 421.
24 C.J. p 159 note 70.

Division in kind favored

In determining whether an executor is vested with an implied power to sell real estate of decedent and whether a sale is necessary in order to carry out the express powers given, the court should keep in mind that the law favors the division of property in kind rather than a sale of it followed by a division of the proceeds.—Walker's Trustee v. Walker, 244 S.W. 772, 196 Ky. 346.

That the executor has not enough money to equalise advancements to the legatees as provided by the will is not sufficient to require a sale of the whole property in order to effectuate an equalization in its division where the property is such that it can be divided in kind.—Walker's Trustee v. Walker, supra.

45. Ga.—Hall v. Ewing, 101 S.E. 807, 149 Ga. 693—Georgia Veneer & Packing Co. v. Stevens, 97 S.E. 524, 148 Ga. 522.
Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269—In re Robinson's Estate, 214 Ill.App. 262.
Kan.—Engstrom v. Anderson, 186 P. 751, 106 Kan. 175.
Ky.—Owens v. Owens' Ex'r, 32 S.W. 2d 731, 236 Ky. 118—Walker's Trustee v. Walker, 244 S.W. 772, 196 Ky. 346—Martin v. Buechel, 218 S.W. 278, 187 Ky. 786.
N.J.—Vanness v. Jacobus, 17 N.J.Eq. 153—Albright v. Taylor, 139 A. 711, 6 N.J.Misc. 1.
N.Y.—In re Chase's Will, 220 N.Y.S. 772, 129 Misc. 1—In re Smith's Estate, 218 N.Y.S. 239, 128 Misc. 96.
N.C.—Dulin v. Dulin, 148 S.E. 175, 197 N.C. 215.
S.C.—Mimms v. Delk, 20 S.E. 91, 42 S.C. 195.
Tex.—Henderson v. Stanley, Civ. App., 150 S.W.2d 152, reversed on other grounds Stanley v. Henderson, Com.App., 162 S.W.2d 95.
24 C.J. p 159 note 71.

46. Ky.—Haggin v. Straus, 146 S.W. 391, 148 Ky. 140, 50 L.R.A.,N.S., 642.
Pa.—In re Dauler, 79 A. 498, 230 Pa. 204.

47. Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269.
Me.—Merrill v. Winchester, 113 A. 261, 120 Me. 203.
N.J.—Dunn v. Oram, 10 A.2d 277, 126 N.J.Eq. 515—McGlynn v. McGlynn, 137 A. 434, 101 N.J.Eq. 66—Hollman v. Tigges, 7 A. 347, 42 N.J.Eq. 127.
N.Y.—In re Brown's Ex'r, 232 N.Y.S. 204, 133 Misc. 519.
Pa.—Ellis v. Commonwealth Trust Co., 10 Pa.Dist. & Co. 144, 30 Dauph.Co. 268.
24 C.J. p 159 note 73.

No distinction between personalty and realty

Executors had implied power to

income or proceeds is generally held to give him implied power to sell real estate so devised in order to carry out the will;[48] but it is always a question of the intention of the testator, and if from the general tenor of the will it appears that it was not intended by such direction to give power to the executor to sell none will be implied.[49] Where there is an express devise of land to persons named in the will, there can be no power of sale in the executor by implication,[50] and even a charge of legacies on land devised beneficially does not give the executor any power of sale.[51] An unexecuted parol agreement to convey land creates against the promisor no debt or liability for the payment of which his executor will have implied power to sell land belonging to the estate.[52]

§ 276. —— Extent of Power; Purpose of Sale

A general power of sale usually gives the executor authority to sell at his discretion, as prudence may dictate, for the purpose of carrying out the provisions of the will. If the power is limited it can be exercised only under the circumstances and for the purposes provided for or contemplated in the will.

It is usually considered that, where executors are given a general power of sale, they may sell at their discretion, as prudence may dictate, during the continuance of the trust.[53] Such a discretionary power, however, is construed with, and strictly limited by, the primary obligations which are inherent in the office of executor,[54] and is to be exercised only in aid of other powers and duties devolving on him[55] in carrying out the testator's intention or purposes, as construed from the provisions of the will,[56] and, when necessary, such power may be exercised for the purpose of providing funds for a judicial final accounting by, and compensation to, the executor.[57] A general power of sale, however, must not be exercised arbitrarily or capriciously,[58] and it cannot be exercised to destroy an essential quality of the

sell testator's realty, where testator made no distinction in will between realty and personalty, did not use the word "devise," did not indicate that realty was to pass in specie by the residuary clause, total amount of bequests far exceeded the value of the personalty, and testator by will anticipated the probability that personalty would be insufficient to pay bequests in full when he provided for proportionate abatement.—Dunn v. Oram, 10 A.2d 277, 126 N.J.Eq. 515.

48. Mass.—Hale v. Hale, 137 Mass. 168—Purdie v. Whitney, 20 Pick. 25.
N.J.—Schlosstein v. Henry R. Worthington, Ch., 113 A. 610.
N.Y.—Morton v. Morton, 8 Barb. 18.
24 C.J. p 159 note 74.

49. N.J.—Cruikshank v. Parker, 26 A. 925, 51 N.J.Eq. 21, reversed on other grounds 29 A. 685, 52 N.J.Eq. 310.
24 C.J. p 160 note 75.

50. Ill.—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643.
Mont.—In re McGovern's Estate, 250 P. 812, 77 Mont. 182.
Ohio.—Baker v. Alexander, 156 N.E. 223, 24 Ohio App. 117.
24 C.J. p 160 note 76.

51. N.Y.—In re Corrato's Will, 10 N.Y.S.2d 315, 170 Misc. 385.
R.I.—Reynolds v. Reynolds, 68 A. 804, 27 R.I. 520.
24 C.J. p 160 note 77.

Power of sale is not implied under a will which devises the realty to the testator's brother subject to a life estate, and, if necessary, to the payment of a deficiency in general legacies.—In re Corrato's Will, 10 N.Y.S.2d 315, 170 Misc. 385.

52. Tex.—Masterson v. Stevens, Civ. App., 37 S.W. 364, affirmed in part and reversed in part on other grounds 39 S.W. 292, 921, 90 Tex. 417.

53. Ala.—Owens v. Gachet, 93 So. 509, 207 Ala. 563.
Ill.—Hamilton v. Hamilton, 98 Ill. 254—Hughes v. Washington, 72 Ill. 84.
Kan.—Simmons v. O'Connell, 232 P. 595, 596, 117 Kan. 471, quoting Corpus Juris.
Mich.—Battelle v. Parks, 2 Mich. 531.
N.Y.—Ferris v. Ferris, 30 N.Y.S. 951, 10 Misc. 317—In re Spencer's Estate, 29 N.Y.S. 1083, 8 Misc. 193.
24 C.J. p 160 note 82.

Provisions giving general and absolute power of sale

(1) "I . . . desire the remainder of my estate to be disposed of in accordance with the judgment and advice of my executor."—In re Watts, 51 A. 588, 202 Pa. 85.

(2) Giving full power and authority to sell and convey any part or all real estate not specifically devised.—In re Felt's Estate, 139 N.E. 545, 235 N.Y. 374, modifying 196 N.Y.S. 925, 203 App.Div. 874.

(3) Power to convey by all proper deeds and instruments.—Hamilton v. Hamilton, 98 Ill. 254.

Discretion as to selling or renting

A provision that the land and houses might be rented out or sold as the executrix might wish gives only a discretion as to selling or renting.—Turner v. Peacock, 113 S.E. 585, 153 Ga. 870.

54. Ill.—Clark v. Clark, 50 N.E. 101, 172 Ill. 355.
N.Y.—In re Curley's Will, 272 N.Y.S. 489, 151 Misc. 664, modified on other grounds 280 N.Y.S. 80, 245 App.Div. 255, affirmed 199 N.E. 665, 269 N.Y. 548.

55. N.J.—Foley v. Devine, 123 A. 248, 95 N.J.Eq. 473.
N.Y.—Jandorf v. Smith, 217 N.Y.S. 145, 217 App.Div. 150.

56. Del.—Hackendorn v. Mahan, Ch., 8 A.2d 794.
Ga.—Calbeck v. Herrington, 152 S.E. 53, 169 Ga. 869.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Neb.—Draper v. Eager, 200 N.W. 170, 112 Neb. 611.
N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Brown's Will, 196 N.Y.S. 905, 119 Misc. 582.
24 C.J. p 160 notes 82 [b], [f].

In determining testatrix' intent and scope of power given to executor to sell if, in any sense, they are uncertain from language of will, surrounding facts and circumstances, including nature and character of property directed to be sold are required to be considered.—Hackendorn v. Mahan, Del.Ch., 8 A.2d 794.

For equal division

Where testatrix, having directed that the residue of her property real and personal should be divided into five equal parts, disposed of fractional shares of parts, authority to her executor to sell and convey any real estate on such terms and conditions as he might deem expedient is an unlimited power of sale, doubtless for the purpose of making division, and the executor is not restricted in the sale of land to a case where the personal estate proves insufficient to pay debts.—Magie v. Kirkpatrick, 112 A. 725, 92 N.J.Eq. 386.

57. N.J.—Foley v. Devine, 123 A. 248, 95 N.J.Eq. 473.

58. N.Y.—Greme v. Parsons, 149 N.Y.S. 577.

estate when there are no debts of the testator to be paid, and no necessity of a sale for the purpose of division among the devisees;[59] nor can it be extended to include holding, rental, or management.[60] A general power to sell to pay debts is not affected by a settlement of controversies between heirs, which settlement provides that it shall not preclude the administering of the estate for such purpose.[61] When a sale is necessary, not only is the executor authorized to make the sale, but it is his duty to do so.[62]

If the power of sale is limited, either expressly or by implication, as determined from the testator's intention, as construed from the will and surrounding circumstances,[63] it can be exercised only under the circumstances, in the manner, and for the purposes provided for or contemplated in the will,[64] such as for the payment of debts[65] and legacies,[66] or for distribution,[67] or, according to the deci-

Or.—Beakey v. Knutson, 174 P. 1149, 177 P. 955, 90 Or. 574.

59. Ga.—Calbeck v. Herrington, 152 S.E. 53, 169 Ga. 869—Thomas v. Owens, 62 S.E. 218, 131 Ga. 248.

Power to sell realty does not exist, where there is more than sufficient personalty to pay debts and funeral and testamentary expenses, and there is no direction to convert realty into cash, although an executor is appointed with full power to sell and convey realty to carry out the terms of the will.—In re Brown's Will, 196 N.Y.S. 905, 119 Misc. 582.

A gift or conveyance of the land for a nominal consideration is not authorized under such a power.—State Highway Board v. Price, 162 S.E. 283, 174 Ga. 143.

60. N.Y.—In re Schroder's Will, 29 N.Y.S.2d 754, 176 Misc. 1024.

61. Ky.—Mersman v. Worthington, 72 S.W. 1094, 24 Ky.L. 2115.
24 C.J. p 155 note 46 [b].

62. Mo.—Diebold v. Diebold, App., 141 S.W.2d 119, transferred, see 133 S.W.2d 401.
Neb.—In re Nelson's Estate, 272 N.W. 219, 132 Neb. 376.

For payment of taxes

Where executor with power to sell is without funds to pay taxes on estate's lands, it is his duty to sell so much of the lands as is necessary to pay taxes due.—Henderson v. Leatherman, 163 So. 310, 120 Fla. 496.

63. N.J.—Foley v. Devine, 123 A. 248, 95 N.J.Eq. 473.

64. Ala.—Burton v. Jones, 102 So. 807, 808, 212 Ala. 353, quoting **Corpus Juris.**
Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 220, 96 Fla. 455, citing **Corpus Juris.**
Ga.—Seidell v. Seidell, 106 S.E. 172, 151 Ga. 223.
Iowa.—In re Wicks' Estate, 222 N.W. 843, 207 Iowa 264.
Ky.—Shrader v. Erickson's Ex'r., 145 S.W.2d 63, 284 Ky. 449—Holland v. Holland's Ex'r and Trustee, 38 S.W.2d 967, 238 Ky. 841.
Me.—Manson v. Moulton, 194 A. 892, 135 Me. 264.
N.J.—Foley v. Devine, 123 A. 248, 95 N.J.Eq. 473.
N.Y.—In re Toplitz's Will, 181 N.Y.S. 483, 191 App.Div. 477, affirming In re Toplitz's Estate, 179 N.Y.S. 876, 109 Misc. 401—In re Reilly's Will, 24 N.Y.S.2d 213, 175 Misc. 597—In re Semenza's Will, 288 N.Y.S. 556, 159 Misc. 487—In re Harrington's Estate, 248 N.Y.S. 785, 139 Misc. 97.
Pa.—In re Paczosa's Estate, 9 Pa. Dist. & Co. 706.
24 C.J. p 161 note 84.

"Any lawful purpose" limited by specific enumeration

Under will authorizing executors to sell specifically devised realty "for any lawful purpose and especially for the purpose of raising money needed for debts, inheritance taxes and expenses of administration," meaning of phrase "any lawful purpose" was limited by specific enumeration following on the principle of "noscitur a sociis," and the executors were not authorized to sell such realty for purpose of setting up a reserve fund equal to a contingent claim against estate of holder of a bond secured by mortgage on realty which had been conveyed by deceased before his death.—In re Reilly's Will, 24 N.Y.S.2d 213, 175 Misc. 597.

Contingent claim

A contingent claim of holder of bond secured by mortgage on realty which had been conveyed by deceased before his death against estate, in which it was asserted that a reserve fund equal to full amount of bond should be set up to protect holder against any deficiency which might result on foreclosure of mortgage, was not a "debt" within accepted connotation of that term as employed in law of decedent estates defining a "debt" as every claim and demand on which a judgment for a sum of money or directing the payment of money, could be recovered in an action.—In re Reilly's Will, supra.

Testator's language regarding converting real estate when general business conditions made it advisable and similar statements do not limit executory discretion in carrying out intention expressed in will.—Ashmore v. Newman, 183 N.E. 1, 350 Ill. 64.
Manner and conduct of sale see infra § 284.

65. Ark.—Fies v. Feist, 224 S.W. 633, 145 Ark. 351.
Fla.—Standard Oil Company v. Mehrtens, 118 So. 216, 96 Fla. 455.
Iowa.—In re Wicks' Estate, 222 N.W. 843, 207 Iowa 264.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Tex.—Mayfield v. Russell, Civ.App., 297 S.W. 915.
24 C.J. p 161 note 84 [e].

Desire that debts be paid

A will, expressing testator's desire that his just debts be paid out of his estate by executor and devising certain tract of land to four persons equally, empowered executor to sell such tract for purpose of paying testator's debts exceeding amount of estate other than such tract.—Masterson v. Wingate, Tex.Civ.App., 151 S.W.2d 956, error refused.

Not power of sale to pay debts

A residuary devise of real estate to an executor, with authority to sell the same without leave of the probate court, to carry out wishes of the testatrix expressed in a memorandum mentioned in the will as to distribution of certain legacies, is not a power of sale to pay debts.—Wells v. Hawes, 122 Mass. 97.

66. Iowa.—In re Wicks' Estate, 222 N.W. 843, 207 Iowa 264.
Ky.—Shrader v. Erickson's Ex'r, 145 S.W.2d 63, 284 Ky. 449.

Effect of statute

Under a statute authorizing a decedent's realty to be sold for the payment of legacies, if the legacies are chargeable on the realty, it may, if necessary, be sold for the payment of such legacies notwithstanding a residuary devise, and, in such case, the executor may be called on to exercise the power of sale given to him in the will.—In re Mould, 187 N.Y.S. 355, 195 App.Div. 822, affirming In re Mould's Estate, 185 N.Y.S. 250, 113 Misc. 602.

67. Tex.—Henderson v. Stanley, Civ.App., 150 S.W.2d 152, error granted.

Sale advised

A will stating that, for equal division, testatrix advised executors to sell the houses she owned, confers on the executors the power to sell the property in order to make

sions on the subject, for reinvestment.[68] Where power is given to sell if necessary for certain purposes, the necessity must appear in order to uphold a sale,[69] even though the sale would be to the advantage of the estate;[70] but, where the power is to sell if, in the opinion of the executor, it is necessary for a particular purpose, the necessity need not be shown.[71] A power of sale for administrative purposes alone cannot be exercised unless such purposes require a sale.[72] Where the testator directed his "executrix" to sell his property and in a subsequent clause appointed his wife executrix, the wife had no power in her individual capacity to sell for her own use.[73] Power to carry on the testator's business and sell his property authorizes a conveyance of land belonging to the estate to secure debts incurred in carrying on the business.[74]

Approval or consent of interested persons is necessary before the power of sale can be exercised, where the will or a statute so provides;[75] and, if the consent of a majority of the persons interested in the estate is required and some are dead, the consent of a majority of the entire original number is still necessary.[76] Until such consent is given the executor should act as trustee in collecting and distributing the rent of the unsold property.[77]

§ 277. —— Control of Courts

A testamentary power of sale ordinarily may be exercised without a court order or license, unless it is required by the will or by statute; but the exercise of such power may be subject to the supervisory control of the probate court.

A testator may lawfully clothe the executor with power to sell real estate without the necessity of

an equal division.—Brown v. Brown, 104 S.E. 889, 180 N.C. 433.

68. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
Fla.—Standard Oil Company v. Mehrtens, 118 So. 216, 96 Fla. 455.
Pa.—In re Greenawalt's Estate, 21 A.2d 890, 343 Pa. 413.

Extent of authority

Under a will authorizing executors to sell realty and any stocks, bonds, securities, or other evidences of indebtedness which testator had at death and to reinvest the same in other realty or in such securities as might be for best interests of estate, the use of the word "authorize" did not manifest an intention by testator to direct executors to do certain things and not to do things not specifically authorized, as regards executors' authority to retain property which testator left and to sell and reinvest in nonlegals.—In re Greenawalt's Estate, supra.

As part of original realty

Clauses of will, authorizing executors to sell realty not specifically devised, reinvest proceeds in other realty, and hold latter in place of that sold, and directing that realty not specifically devised remain unsold and be kept together until deaths of both testator's widow and daughter, to whom he gave life estates therein, but that net income thereof be paid to them monthly, mean that executors could sell realty only for reinvestment and that lands bought with proceeds must be treated as if part of original realty until falling in of life estates.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.

Application of statute

A statute providing that a trustee may invest funds in land by leave of court provided that the investment be advantageous, and no change be made in the course of succession by such change of investment, as regards the heirs or next of kin of the cestui que trust, does not apply to an investment of funds made by an executor under authority of the will to sell certain property and invest the proceeds in other suitable property.—Wilcox v. Hollar, 222 P. 758, 115 Kan. 27.

69. Colo.—Cowell v. South Denver Real Estate Co., 63 P. 991, 16 Colo. App. 108.
24 C.J. p 161 note 85.

Sale not necessary

Where a will, making no disposition of the personal estate, and having no residuary clause, contains the following provision: "I authorize my executor to sell and convey," certain land "for the purpose of discharging all my debts," the direction does not indicate an intention that the personalty shall be relieved from its primary liability for the payment of the debts, and, therefore, the executor cannot sell the land to the widow when they both know that there is more than enough personalty to pay the debts.—Sweeney v. Warren, 28 N.E. 413, 127 N.Y. 426, 24 Am.S.R. 468.

70. Md.—Moale v. Cutting, 59 Md. 510.

71. N.Y.—Roseboom v. Mosher, 2 Den. 61.

72. Ga.—Calbeck v. Herrington, 152 S.E. 53, 169 Ga. 869—Thomas v. Owens, 62 S.E. 218, 131 Ga. 248.

73. Or.—Beakey v. Knutson, 174 P. 1149, 177 P. 955, 90 Or. 574.

74. Ga.—Shropshire v. Kinsey, 147 S.E. 41, 168 Ga. 32.

75. N.J.—Crane v. Bolles, 24 A. 237, 49 N.J.Eq. 373.
Pa.—Drasher v. Lundy, 30 Lus.Leg. Reg. 465.
Puerto Rico.—Criado v. Martinez, 25 Puerto Rico 308.

Widow

(1) Testamentary direction to sell real property and distribute proceeds authorized sale only on securing widow's consent, where will further required that executor secure her consent before making sale.—In re Harrington's Estate, 248 N.Y.S. 785, 139 Misc. 97.

(2) Where the will authorized sale of unremunerative property in the discretion of executor, subject to a provision requiring him to secure consent of the widow, he had power to sell unprofitable land and reinvest proceeds, where she in writing consented thereto.—Shannonhouse v. Fleetwood, 100 S.E. 889, 178 N.C. 417.

Sale on request

Under will giving life estate to testatrix' husband, son, and unmarried daughter, and providing that residue of shares of life tenants on death of survivor should be given to testatrix' married daughters, husband and son, on death of unmarried daughter, are entitled to invade principal of estate for their needs, each to extent of his interest therein at time of such invasion, and hence realty could be sold by executrices on request of husband and son or survivor.—In re Voges' Estate, 277 N.Y.S. 776, 154 Misc. 224.

A statute requiring the consent of the heirs to a sale for the payment of funeral expenses and legacies does not require the intervention of the heirs to a sale for the payment of debts contracted by the testator.—Martinez v. The Registrar of Property, 15 Puerto Rico 66.

76. N.J.—Crane v. Bolles, 24 A. 237, 49 N.J.Eq. 373.

77. N.J.—In re Harrington's Estate, 248 N.Y.S. 785, 139 Misc. 97.

receiving the sanction of the court, as a prerequisite to such a sale;[78] and, ordinarily, where a testamentary power of sale is given to the executor, he may proceed to sell the realty without recourse to the courts for a license or order of court,[79] even though he has sought the aid of the court in other matters connected with the settlement of the estate;[80] but this rule does not apply to a substituted executor who has not the same absolute power to sell as had the original executor.[81] The executor's power to sell without a court order or license is not affected by a statute which requires persons licensed by the probate court to give bond before proceeding to sell,[82] or which requires the sale to be reported to, and ratified by, the probate court,[83] or by a statute which authorizes the interposition of claims where the sale is proceeding under an order of court;[84] and it has been held that, where the will gives power to the executor to sell land in case of a deficiency of assets, he must sell under the power and not under the statute authorizing sales by leave of the probate court,[85] but the fact that a judicial sale is made unnecessarily does not affect the title of the purchaser, if a fair price is realized.[86] A void sale under order of court cannot be supported as an exercise of a power of sale under the will;[87] but the executor may afterward convey the land to the grantee by virtue of a power of sale which, through ignorance of the law, he did not know he possessed when he executed the first instrument.[88]

Where, however, an order of court is required by statute, the executor cannot sell without such order, even though the will authorizes him to sell without the consent of any person or court.[89] So, where the will, although empowering the executor to sell, declares that this power is subject to the assent or an order of court first being had, the executor cannot convey land without the concurrence of the court in, or confirmation by the court of, his contract of sale;[90] and, where a testamentary power of sale is conferred for a particular purpose, it cannot be sold for another purpose without leave of court.[91]

Supervisory control. Although a sale of realty, under testamentary power, does not primarily require an order or confirmation by the probate court, it is subject to the supervisory control of such court, under a statute giving it power to control executors in the management of estates and the disposition of property,[92] or, in a proper case, such control may

78. Kan.—Linn County Bank v. Grisham, 185 P. 54, 105 Kan. 460.

79. U.S.—Brauns v. Ailshie, D.C. Idaho, 5 F.Supp. 388—Woolworth v. Root, C.C.Neb., 40 F. 723, affirmed 14 S.Ct. 136, 150 U.S. 401, 37 L.Ed. 1123.
Ark.—Bacharach v. Spriggs, 292 S. W. 150, 173 Ark. 250.
Cal.—Crystal Pier Co. v. Schneider, 180 P. 948, 40 Cal.App. 379.
Ga.—Wood v. Bowden, 185 S.E. 516, 182 Ga. 329—Walters v. Walters, 137 S.E. 386, 163 Ga. 884—Shields v. Whithead, 120 S.E. 631, 156 Ga. 834—Cooper v. Harper, 106 S.E. 105, 151 Ga. 85.
Idaho.—Jones v. Broadbent, 123 P. 476, 21 Idaho 555.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Mich.—Tracy v. Murray, 12 N.W. 900, 49 Mich. 35.
Mo.—In re Rickenbaugh, 42 Mo.App. 328.
N.H.—Gafney v. Kenison, 10 A. 706, 64 N.H. 354.
N.J.—Randall v. Gray, 83 A. 482, 80 N.J.Eq. 13.
N.Y.—Bologna v. Weiner, 9 N.Y.S. 2d 610.
Tex.—De Zbranikov v. Burnett, 31 S. W. 71, 10 Tex.Civ.App. 442.
24 C.J. p 163 note 98.
Compelling exercise of power see supra § 274.
Effect of testamentary provisions on power of court to order sale see infra § 545.

80. Ky.—Harding v. Weisiger, 109 S.W. 890, 33 Ky.L. 170.
24 C.J. p 163 note 98 [b].

81. N.J.—Randall v. Gray, 83 A. 482, 80 N.J.Eq. 13.
24 C.J. p 163 note 98 [e].

82. Me.—Bradt v. Hodgdon, 48 A. 179, 94 Me. 559.

83. Md.—Lochary v. Corrigan, 103 A. 1006, 132 Md. 371.

84. Ga.—Harwell v. Foster, 28 S.E. 967, 102 Ga. 38.
24 C.J. p 163 note 98 [d].

85. Mo.—Wisker v. Rische, 67 S.W. 218, 167 Mo. 522.
24 C.J. p 163 note 99.

86. Ky.—Buckner v. McEldowney's Ex'r, 132 S.W.2d 330, 280 Ky. 14.

87. Ala.—Snow v. Bray, 73 So. 542, 198 Ala. 398.

88. N.Y.—Pollock v. Holley, 22 N.Y. S. 215, 67 Hun 370.

89. Vt.—Wetmore & Morse Granite Co. v. Bertoli, 88 A. 898, 87 Vt. 257.
24 C.J. p 163 note 98 [f].

90. Colo.—McDermott v. Lindquist, 179 P. 147, 66 Colo. 88.
Ga.—Rowe v. Henderson Naval Stores Co., 85 S.E. 917, 143 Ga. 756.
Ky.—Gathright's Trustee v. Gaut, 124 S.W.2d 782, 276 Ky. 562, 120 A.L. R. 1403.
"Judge"
(1) A will providing for sale of property by executor only on assent of one of named persons, or of a circuit court "judge" of named county in case of incapacity or refusal of either to act, contemplated assent of any circuit court judge, rather than that of circuit court, of such county.—Gathright's Trustee v. Gaut, supra.
(2) One not a circuit court judge cannot be appointed to act in such a case, in absence of proof that all judges of such circuit court had refused to act.—Gathright's Trustee v. Gaut, supra.

91. R.I.—Wood v. Hammond, 17 A. 324, 16 R.I. 98, 18 A. 198.

92. N.Y.—In re Trevor's Will, 196 N.Y.S. 152, 119 Misc. 277.
Pa.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422—In re Orr's Estate, 129 A. 565, 283 Pa. 476—In re Brittain's Estate, 28 Pa.Super. 144—In re Orr's Estate, 5 Pa.Dist. & Co. 499—In re Fritz' Estate, 7 Sch.Reg. 271.
24 C.J. p 162 note 96 [c].
The court's "exercise of due discretion for the preservation of the assets of a decedent is not only permissible, but mandatory, and its supervision over the disposition of realty should be exercised whether the sale be by virtue of an order for the payment of debts or be made by an executor under a power conferred by will."—In re Orr's Estate, 129 A. 565, 566, 283 Pa. 476.

be exercised by a court of equity.[93] Effect cannot be given to a testamentary provision that no part of the estate should be subject to any court of equity, if in order to carry out testamentary provisions as to the sale of real property it is found necessary to invoke the jurisdiction of a court of equity.[94]

§ 278. —— Revocation or Termination

A testamentary power of sale generally continues until it is revoked, or until it is terminated by the accomplishment or cessation of the purpose for which it was granted.

In the absence of revocation, a testamentary power of sale generally continues as long as there remains unfulfilled objects or purposes of the testator in aid of which it was intended that the power should or might be exercised;[95] and whether it extends beyond the period that the executor is to perform his ordinary legal duties in settling the personal estate depends on the intention of the testator as determined from the will.[96]

A power of sale is not revoked by a subsequent contract made by the testator to sell the land,[97] by a codicil substituting other executors for those named in the will,[98] by the subsequent birth of issue not provided for by the will,[99] by the remarriage of the widow and executrix,[1] by the oral assent of the executor to an oral partition of the land between the devisees,[2] by his asking the intervention of the court for the benefit of minor beneficiaries,[3] or by the filing of a caveat to revoke the probate of the will.[4] Neither does the death of the sole beneficiary under a will, before the executor has sold property of the estate to pay the debts, as directed by the will, deprive the executor of that power.[5] An order settling the estate and discharging the executor has been held not to revoke the executor's power of sale;[6] but there is authority to the contrary.[7]

However, if a sale is directed for a specified purpose, the power to sell terminates with the purpose for which it was created,[8] as where the purpose has become unattainable.[9] Where the testator directs realty to be sold by his executor and the proceeds divided, the power becomes inoperative if the beneficiaries under the will elect to take the property as realty and retain it without conversion,[10] provid-

Extent of control

The power of the orphans' court to control the power of sale of real estate vested in executors is limited to cases in which by reason of fraud, accident, or mistake a strong appeal can be made for the exercise of its equitable jurisdiction.—In re Andrews' Estate, 6 Pa.Dist. 24.

A controversy concerning a testamentary power of sale and its exercise by the executors is cognizable in the probate court.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

Setting aside sale see infra § 294.

93. N.Y.—Martin v. Martin, 43 Barb. 172, 28 How.Pr. 385.
Tenn.—Hinton v. Cole, 3 Humphr. 656.

94. Md.—Sharpe v. Ogle, 113 A. 926, 138 Md. 10—Sharpe v. Ogle, 113 A. 340, 138 Md. 10.

95. N.J.—Foley v. Devine, 123 A. 248, 95 N.J.Eq. 473.
N.Y.—Jandorf v. Smith, 217 N.Y.S. 145, 217 App.Div. 150.
Pa.—Crozer v. Green, 148 A. 506, 298 Pa. 438.
S.C.—Allworden v. Lemon, 191 S.E. 215, 183 S.C. 421.

96. Md.—Sharpe v. Ogle, 113 A. 926, 138 Md. 10—Sharpe v. Ogle, 113 A. 340, 138 Md. 10.

The executor may sell after settling the personal estate, where the will provides that executor, who takes a life estate in certain real estate, can sell the same, invest the proceeds, and receive the income therefrom during his life, remainder to his children or on his death without issue then to another for life, and then to revert to testator's estate, so that the proceeds will not go into the general assets of the estate and can in no way affect an early settlement of the personal estate.—Sharpe v. Ogle, 113 A. 926, 138 Md. 10—Sharpe v. Ogle, 113 A. 340, 138 Md. 10.

97. S.C.—Douglass v. Dickson, 45 S.C.L. 417.

98. Tenn.—Bruce v. Goodbar, 58 S.W. 282, 104 Tenn. 638.

99. Ala.—Woodliff v. Dunlap, 65 So. 936, 187 Ala. 255.
24 C.J. p 164 note 16.

1. Tex.—Holman v. Houston Oil Co., Civ.App., 174 S.W. 886.

2. Ala.—Owens v. Gachet, 93 So. 509, 207 Ala. 563.

3. S.C.—Rose v. Thornley, 12 S.E. 11, 33 S.C. 313.

4. Md.—Pacy v. Cosgrove, 77 A. 1114, 113 Md. 315.
24 C.J. p 156 note 48 [b].

5. Tex.—McCown v. Terrell, 29 S.W. 484, 9 Tex.Civ.App. 66.

6. Ill.—Starr v. Willoughby, 75 N.E. 1029, 218 Ill. 485, 2 L.R.A.,N.S., 623.

7. Kan.—Simmons v. O'Connell, 232 P. 595, 117 Kan. 471.

8. N.Y.—Sweeney v. Warren, 28 N.E. 413, 127 N.Y. 426, 24 Am.S.R. 468.
24 C.J. p 164 note 20.

9. Mass.—Bates v. Bates, 134 Mass. 110, 45 Am.R. 305.
N.Y.—Benedict v. Webb, 98 N.Y. 460.
24 C.J. p 164 note 20 [b].

Beneficiary predeceasing testator

Where a mother gave all her property to her executors in trust to pay the income to her son for life, and gave him the power of disposal of the remainder by will, and the son predeceased testatrix, the executors were without power to sell decedent's real property since they never had any interest therein.—In re Toplitz's Will, 181 N.Y.S. 483, 191 App.Div. 477, affirming In re Toplitz's Estate, 179 N.Y.S. 876, 109 Misc. 401.

10. Mo.—Kaufmann v. Kaufmann, 43 S.W.2d 879, 226 Mo.App. 173, transferred, see, Sup., 40 S.W.2d 555.
N.J.—Cranstoun v. Westendorf, 108 A. 776, 91 N.J.Eq. 34—Rogers v. Lippincott, 105 A. 16, 90 N.J.Eq. 70.
N.Y.—Harding v. O'Malley, 236 N.Y.S. 172, 226 App.Div. 586—Safford v. Burke, 223 N.Y.S. 626, 130 Misc. 12—Bettinger v. Montgomery, 210 N.Y.S. 320, 124 Misc. 906.
24 C.J. p 164 note 21.

Partition in lieu of proceeds

Where testatrix, who was seized of an undivided one half of a tract of realty, devised the realty as part of her residuary estate to several persons, one of whom was the owner of the other undivided one half, and she empowered her executor to sell any or all of her realty, and, in suit to which the executor was a party, the tract was partitioned among all owners, and several years thereafter the executor, acting under the power of sale, conveyed part of the tract, the partition was in-

ed all beneficially interested concur.[11] It has been held that a power to sell with the consent of a designated person terminates on the death of such person without having consented,[12] although it is otherwise where it is apparent that the intention of the testator was merely to require the consent of such person if living, and to continue the power after his death,[13] or that the requirement of such consent was subordinate to the principal purpose and intention of the will.[14] A discretionary power conferred on executors jointly has been held to terminate with the death of one of them.[15] A power of sale given to an executor virtute officii ceases on the termination of his duties as executor, and cannot afterward be exercised by him, although he continues to act under the will as trustee.[16] The filing of a bill for partition by a tenant in common suspends the power of sale and, if the partition is ordered, the power to sell is terminated.[17]

§ 279. Who May Exercise Power

Where the testator so directs, a sale of real property is to be made by the executor, and the same is true where testator fails to specify who shall exercise the power of sale as to a sale which is directed or authorized, provided the executor has the duty to see to the application of the proceeds, and the testator has nominated an executor.

It is axiomatic that, where a testator authorizes or directs his executor to sell his real property, the executor is the proper person to make the sale,[18]

consistent with the continuance of the executor's power of sale, and hence the power was thereby cut off, and the executor's deed did not convey marketable title.—Satchwell v. Warner, 14 A.2d 527, 127 N.J.Eq. 544, affirmed, 19 A.2d 830, 129 N.J.Eq. 384.

11. N.J.—Cranstoun v. Westendorf, 108 A. 776, 91 N.J.Eq. 34.
N.Y.—Bettinger v. Montgomery, 210 N.Y.S. 320, 124 Misc. 906.
24 C.J. p 164 note 21 [a].

Where neither of life tenants does anything showing election to extinguish such power, remainderman's conveyance of his interest before termination of life estate does not destroy power of sale.—Bettinger v. Montgomery, supra.

Identity of interests

A power of sale of land vested in an executor cannot be defeated by an election of the heirs at law to reconvert the personalty into realty, except by the unanimous action of the beneficiaries, and then only when their interests in the land as cestuis que trust and heirs at law are identical.—Cranstoun v. Westendorf, 108 A. 776, 91 N.J.Eq. 34.

12. N.Y.—Gulick v. Griswold, 54 N. E. 780, 160 N.Y. 399, affirmed 43 N.Y.S. 443, 14 App.Div. 85.

13. N.Y.—Phillips v. Davies, 92 N. Y. 199.

14. Mo.—Wisker v. Rische, 67 S.W. 218, 167 Mo. 522, 532.
24 C.J. p 165 note 24.

15. Miss.—Ex parte White, 78 So. 949, 118 Miss. 15.
24 C.J. p 165 note 25.

16. Cal.—Goad v. Montgomery, 51 P. 681, 119 Cal. 552, 63 Am.S.R. 145.
24 C.J. p 165 note 26.

17. Ill.—Vierieg v. Krehmke, 127 N.E. 735, 293 Ill. 265.

18. Mass.—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39.
24 C.J. p.165 note 29.

Change of designation

(1) Where the testatrix, who gave the one originally named as executor unlimited power to sell real estate, on the death of such person named new executors, conferring on them all the power and authority of the original executor, the substituted executors had full power of sale.—Magie v. Kirkpatrick, 112 A. 725, 92 N.J.Eq. 386.

(2) Such persons exercise the power in their representative, and not in their individual, capacity.—Magie v. Kirkpatrick, supra.

Husband executor in right of wife

Prior to statutes removing the disability of coverture, where a married woman is executrix of the estate of a third person with power to sell real property, such power could not be exercised by her husband as executor in right of the wife as to property the title to which was in the wife as trustee.—May v. Frazee, 14 Ky. 391, 4 Litt. 391, 14 Am.D. 159.

Substitutionary designee

(1) Where by codicil another person is appointed executor in case the person first appointed predeceases testatrix, and such event occurs, the power of sale given by the will to the person named as executor is held by the substitutionary executor where the codicil expressly ratifies and reaffirms all provisions of the will not in conflict with the codicil.—In re Maier's Will, 205 N.Y.S. 156, 123 Misc. 244.

(2) A testamentary power of sale only to substitutionary executor and executrix, and not to the original nominee, who is given only a life estate, has the effect of preventing exercise of the power of sale by such original nominee.—Ranhofer v. A. C. & H. M. Hall Realty Co., 128 N.Y.S. 230, 143 App.Div. 237.

Nature of power of sale

(1) Whether the power of sale given executors by a will is personal or one attaching to the office depends on the construction of the will.
Mich.—Bennett v. Chapin, 43 N.W. 893, 77 Mich. 526, 7 L.R.A. 377.
Miss.—Clark v. Hornthal, 47 Miss. 434.

(2) Thus, under a will authorizing executors to sell and dispose of real estate at such times and in such manner as they may deem expedient, and for the best interests of all concerned, without license from any court, the proceeds to be equally divided between the testator's children and the issue of any deceased child, the power is attached to the office, and can be exercised by the executors, or the survivor of them, until the purposes for which it was given are effectuated or become impossible of accomplishment.—New England Trust Co. v. Morse, 136 N. E. 835, 243 Mass. 39.

(3) So, executor's absolute, nondiscretionary power under will to sell realty is not personal, but official, and must be exercised during executorship.—Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo. App. 688, transferred, see, Sup., 39 S.W.2d 367.

(4) On the other hand, a clause in a will which reads "If the executors shall at any time find it necessary, or shall deem it for the best interest of my estate, I desire a sale to be made" is construed to imply a personal confidence and trust in the judgment and honesty of the parties named, and to impose a personal power of sale.—Bennett v. Chapin, 43 N.W. 893, 77 Mich. 526, 7 L.R.A. 377.

(5) So a will devising real estate to a beneficiary for life, with gift over to her descendants, and empowering the executor to sell the property and hold the avails in place of the real estate, and appointing a son of testatrix executor, confers on the executor a power of sale, which is purely personal and does not survive the executor.—Hart v.

although, except in some jurisdictions,[19] such power does not continue after discharge from office.[20] Moreover, under statute, if the person appointed to sell refuses to perform the trust or dies before he has completed it, the sale should be made by the executor.[21]

It frequently happens, however, that a testator directs or authorizes a sale without expressly declaring by whom it shall be made, and in such case the rule is that the executor or executrix will take a power of sale by implication if the will imposes the duty to see to the application of the proceeds,[22] but not otherwise.[23] Moreover, in such case of failure of the testator to designate the person to execute the power of sale, a statutory power in the executor to make the sale is deemed official and not personal.[24] However, where a will directing a sale of realty nominates no executor, the general rule is that there is no implied power of sale in anyone, and the only way a sale can legally be made is by an application to the court;[25] but, as stated infra § 1034, in some jurisdictions it is held that the power may be exercised by an administrator with the will annexed, and the mere fact that a testamentary power might, on the death of the executor, be exercised by an administrator with the will annexed, does not deprive the court of jurisdiction to appoint a person to execute the power where no such administrator has been appointed.[26]

§ 280. —— Delegation of Power

While as a general rule a discretionary power of sale given by a will cannot be delegated, the ministerial act of negotiating and consummating the sale may be delegated to an agent. The personal representative may ratify a sale made by an agent.

A discretionary power to sell land given by the will cannot be delegated,[27] but, although there is contrary authority,[28] an agent or attorney in fact, subject to the representative's supervision or approval, may be authorized to negotiate and make sales,[29] and a sale made by such agent or attorney

Shurtleff, 137 N.Y.S. 249, 76 Misc. 615.

(6) However, it has been held that a personal trust, created by will conferring discretionary power of sale, survives final administration of estate and continues until trust purposes are accomplished or donee has had reasonable time to execute trust.—Rawlings v. Rawlings, supra.

Exercise of power by administrator with will annexed see infra § 1034.

Exercise of power by independent executor see infra § 1057.

Exercise of power by one of two or more coexecutors see infra § 1043.

Power of executor to sell as trustee see the C.J.S. title Trusts § 293, also 65 C.J. p 753 notes 12–16.

Who may make sale under order of court see infra § 588.

19. Ill.—Starr v. Willoughby, 75 N. E. 1029, 218 Ill. 485, 2 L.R.A.,N.S., 623.

20. Iowa.—Boland v. Tiernay, 91 N. W. 836, 118 Iowa 59.

Kan.—Simmons v. O'Connell, 232 P. 595, 596, 117 Kan. 471, quoting **Corpus Juris.**

Effect of discharge as executor or executrix on right of devisee to sell real property under testamentary power see the C.J.S. title Wills § 1070, also 69 C.J. p 847 note 38.

Effect of final discharge generally see supra § 79.

21. Mo.—Wisker v. Rische, 67 S. W. 218, 167 Mo. 522, followed in Wisker v. Spring Ave. R. Co., 67 S.W. 1101, 167 Mo. 534.

22. Hawaii.—In re Beckley's Estate, 31 Hawaii 163.

N.J.—Stumm v. Hackensack Trust Co., 150 A. 674, 106 N.J.Eq. 308.

N.Y.—Dominick v. Michael, 6 N.Y. Super. 374.

24 C.J. p 166 note 32—69 C.J. p 846 note 33.

23. N.C.—Broadhurst v. Mewborn, 88 S.E. 628, 171 N.C. 400.

24 C.J. p 166 note 33.

Election by cestui que trust to sell

Where testatrix devised to her son in trust a certain farm, to be held for seven years for the use of her children, providing, however, that the farm might be sold at any time within such period if a majority of the children should elect, the executor had no implied power of sale over such real estate at the request of a majority of the children, but they alone could exercise control over the transfer of the title.—Porterfield v. Porterfield, 37 A. 358, 85 Md. 663.

24. Mo.—Wisker v. Rische, 67 S.W. 218, 167 Mo. 522, followed in Wisker v. Spring Ave. R. Co., 67 S.W. 1101, 167 Mo. 534—Long v. Long, App., 38 S.W.2d 288.

25. Md.—Baumeister v. Silver, 56 A. 825, 98 Md. 418.

24 C.J. p 166 note 35.

26. N.Y.—Faile v. Crawford, 52 N. Y.S. 353, 30 App.Div. 536.

27. U.S.—Pearson v. Jamison, C.C. Ky., 19 F.Cas.No.10,879, 1 McLean 197.

24 C.J. p 166 note 41.

In Georgia

(1) Prior to statute, an executor could not delegate the power to sell real property to another.—Atkinson v. The Central Georgia Agricultural and Manufacturing Co., 58 Ga. 227—Neal v. Patten, 47 Ga. 73—Cheever v. Hora, 22 Ga. 600.

(2) On the other hand, an administrator, having no discretion as to the sale, could delegate power of sale of real property.—Cheever v. Hora, supra.

(3) By statute, either an executor or administrator may sell real property by attorneys in fact.—Webster v. Black, 83 S.E. 941, 142 Ga. 806—Scales v. Chambers, 39 S.E. 396, 113 Ga. 920.

Maxim applicable

The maxim "delegatus non potest delegare" applies.—Newton v. Bronson, 13 N.Y. 587, 67 Am.D. 89.

Delegation of discretionary power of sale by independent executor see infra § 1057.

28. Ky.—May v. Frazee, 4 Litt. 391, 14 Am.D. 159—Colsten's Heirs v. Chaudet, 4 Bush 666.

29. N.Y.—Gates v. Dudgeon, 66 N. E. 116, 173 N.Y. 426, 93 Am.S.R. 608, reversing 76 N.Y.S. 561, 72 App.Div. 562.

24 C.J. p 167 note 42.

In Georgia, even prior to statute, it was held that an executor could delegate the ministerial act of consummating the sale of real property, retaining supervision in himself.—Atkinson v. The Central Georgia Agricultural & Mfg. Co., 58 Ga. 227.

In Tennessee, under Act 1833 c 57, it was held that, where a will directs the sale of real estate to pay debts, the personal representative may delegate the power to sell to attorneys in fact.—Murdock v. Leath, 10 Heisk. 166.

Agent's authority to sell real prop-

may be ratified by the personal representative.[30]

§ 281. What Property May Be Sold

The provisions of the will as reasonably construed determine the property to be sold.

With reference to what property may be sold by the executor the provisions of the will must govern,[31] as reasonably construed.[32] A power to sell and dispose of any of the testator's "securities" does not authorize the executor to sell any land.[33]

A general power of sale given the legal representatives will include realty acquired subsequent to the making of the will, where such is the clear and manifest intention of the testator.[34] Whether a sale of a homestead is authorized by such a general power depends on the testator's intention.[35] Under a power to sell lands executors cannot convey their testator's rights in land of which he died disseized, even to the disseizor.[36] A general power of sale has been held to authorize a sale of lands expressly devised, where such sale accorded with the testator's apparent intention,[37] but, under the decisions of the

erty generally see Agency § 114 b (2).

30. N.Y.—Newton v. Bronson, 13 N. Y. 587, 67 Am.D. 89.
24 C.J. p 167 note 43.

Maxim inapplicable

The reason of the maxim "delegatus non potest delegare" is inapplicable where the executor ratifies the act of an agent in selling real property.—Newton v. Bronson, 13 N.Y. 587, 67 Am.D. 89.

31. Ala.—Harrison v. Harrison, 105 So. 179, 213 Ala. 418.
24 C.J. p 167 note 45.

32. N.Y.—In re Squires' Will, 216 N.Y.S. 750, 127 Misc. 361.

"An examination of the original will shows the scrivener, whoever he was, to have prepared it in a careless and clumsy manner. The attempt to construe the will by recourse to correct rules of English or grammatical construction and punctuation would be futile, where an examination of the original will itself clearly shows the scrivener who prepared the will to have had no knowledge of either."—In re Squires' Will, supra.

Will construed

Provision in will that after death of testator's widow his children shall share equally in the money received from sale of real estate and personal property does not authorize sale of real estate not otherwise disposed of by the will.—Andrews v. Applegate, 79 N.E. 176, 223 Ill. 535, 12 L.R.A.,N.S., 661, 7 Ann.Cas. 126.

33. N.J.—Pratt v. Worrell, 57 A. 450, 66 N.J.Eq. 194.

34. Mo.—Liggat v. Hart, 23 Mo. 127.

35. N.J.—Huyler v. Kingsland, 11 N.J.Eq. 406.
Tex.—Hudson v. Hutchinson, Civ. App., 41 S.W.2d 1013, error refused.

Intention not manifest

Tex.—Hudson v. Hutchinson, supra.

Marriage of widow

Where a widow is devised the use of a homestead during widowhood and, should she remarry, a portion of the proceeds of the estate both real and personal, and the personal representatives are empowered to sell all the estate, including the sale of the homestead after the widow's death, the general power of sale includes the right to sell the homestead after the widow remarries.—Huyler v. Kingsland, 11 N.J.Eq. 406.

Power "to sell lots of land, not including homestead," under the doctrine that an express exclusion is an implied inclusion of that not excluded, includes power to sell all realty other than the homestead, whether town or building lots, even though in other clauses the word "lot" is used in such restricted sense. Barnes v. First Baptist Church, 136 A. 266, 82 N.H. 503.

Power to sell to pay debts

(1) A provision that debts should be paid out of the personal property but if that should be insufficient the executors may sell so much of the realty as may be necessary for that purpose authorizes the sale of a homestead in such contingency.—Willier v. Cummings, 136 N.W. 559, 91 Neb. 571, Ann.Cas.1913D 287.

(2) The reason is that, since under the modern law of administration of estates realty is subject to the payment of debts, the testamentary provision for sale would be meaningless except as applicable to real property, such as a homestead, not usually subject to payment of testator's debts.—Willier v. Cummings, supra.

Real property subject to payment of testator's debts see infra § 479.

Reversionary interest

Where a testator, after devising a life estate in his home to his wife, directed that all his other real estate be sold, and he did not own any other real estate besides the home place, the clause "all my other real estate" referred to the reversionary interest in the home place, and the testator intended that such interest should be sold by his executors.—Wallace v. Phipps, 1 Tenn.Ch.A. 326.

Property or interest subject to sale under order of court see infra §§ 548–552.

36. Mass.—Poor v. Robinson, 10 Mass. 131.

Realty subject to easement

The bed of a lane on tract of land owned by testatrix passed under her will, notwithstanding that she had, either in express terms or by implication, granted rights of way over the lane, and bed of lane was therefore subject to executor's general power of sale of real estate.—Hackendorn v. Mahan, Del.Ch., 8 A.2d 794.

37. Fla.—Butts v. Jammes, 66 So. 1004, 68 Fla. 231.
Ga.—Walters v. Walters, 137 S.E. 386, 163 Ga. 884.
Ky.—Stofer v. Stiltz, 200 S.W. 631, 179 Ky. 399.
Me.—Bradt v. Hodgdon, 48 A. 179, 94 Me. 559.
N.J.—Randolph v. Rafferty, 113 A. 233, 92 N.J.Eq. 428—Bacot v. Wetmore, 17 N.J.Eq. 250.
N.Y.—Conover v. Hoffman, 14 N.Y. Super. 214, 1 Bosw. 214, affirmed 1 Abb.Dec. 429, 15 Abb.Pr. 100.
Pa.—In re Bucher's Estate, 143 A. 181, 293 Pa. 511.

Inconsistency with devise

Power of sale in executors is not necessarily inconsistent with a specific devise.
Iowa.—Ruggles v. Powers, 207 N. W. 116, 201 Iowa 284.
Ky.—Stofer v. Stiltz, 200 S.W. 631, 179 Ky. 399.
N.Y.—Cussack v. Tweedy, 26 N.E. 1033, 126 N.Y. 81, affirming 11 N. Y.S. 16, 56 Hun 617—Kinnier v. Rogers, 42 N.Y. 531, affirming 55 Barb. 85—Crittendon v. Fairchild, 41 N.Y. 289—In re Ring, 163 N.Y. S. 813, 98 Misc. 119—In re Bielby's Estate, 155 N.Y.S. 133, 91 Misc. 353, 15 Mills 164.

Residuary estate

(1) Under a will making specific bequests and devises and then disposing of the residue, a general power to sell all real estate not disposed of by the will is construed to authorize the sale of land devised by the residuary clause.
Iowa.—In re Wicks' Estate, 223 N. W. 843, 207 Iowa 264.
Kan.—Segrist v. Gideon, 41 P.2d 729, 141 Kan. 439.
N.J.—Provost's Ex'r v. Provost, 27 N.J.Eq. 296—Ruderow's Ex'r v. Nield, 27 N.J.Eq. 89, affirmed 28 N.J.Eq. 274.

courts on the subject, not otherwise.[38] A clause authorizing the executors to sell or rent any property which testator possessed at his death applies only to property not specifically devised.[39] A general power of sale will authorize the personal representatives to sell an unused burial lot, unless the lot was expressly purchased to afford a suitable resting place for the testator.[40] Where a will clearly indicates an intention that specific property be held in trust until the happening of a certain contingency, such property is not included in a general power of sale to the executor.[41] A power to sell "any" real property has been held to mean "all,"[42] and authority to sell "all and any part" of testator's realty has been construed to mean "all or any part" of the real estate of which testator died seized, and not to require that if any was sold, all should be sold.[43]

The will may invest the personal representative with discretionary power to determine the property to be sold.[44] Thus, where an executor is empowered by the will to sell any portion of the real estate, he is vested with a discretion to determine what property shall be sold.[45] A power to sell and con-

N.Y.—Skinner v. Quin, 43 N.Y. 99, reversing 49 Barb. 128, 33 How.Pr. 229.

(2) Residuary devisees hold realty falling into the residuary class subject to a general testamentary power of sale.

Ill.—Heyne v. Scheffauer, 151 N.E. 893, 321 Ill. 266.

N.Y.—In re Ring, 163 N.Y.S. 813, 98 Misc. 119.

(3) Real estate devised to testator's children after death of testator's wife under will providing that if not accepted by children within six months from wife's death such property should revert to residue of estate, which was devised in trust, could be sold by executors with written approval of wife in view of clauses in will appointing her as coexecutrix with power to appoint and remove other executors and authorizing executors to sell all of testator's property with wife's written consent and on such terms as she might fix.—Dyer v. Blair, 6 A.2d 673, 62 R.I. 498.

(4) A general power of sale, conferred on executors by will containing provision for gifts in residue which, although not gifts made expressly out of proceeds of sale of land, were gifts immediately to follow division of inclusive residue by executors, authorized executors to sell all real estate, notwithstanding small portion was to satisfy legacies that lapsed and others unforeseen by testator fell into residue, by reason of simultaneous death of himself and wife.—In re Strong's Will, 12 N.Y.S.2d 544, 171 Misc. 445.

(5) Mere fact that part of the residual estate passes as in intestacy rather than by devise does not prevent its sale by executor under a general power of sale.—In re Strong's Will, supra.

38. N.J.—Wright v. Keasbey, 100 A. 172, 87 N.J.Eq. 51.

N.Y.—In re De Forest's Estate, 263 N.Y.S. 135, 147 Misc. 82.

Tex.—In re Chaney's Estate, 86 S.W.2d 709, 130 Tex. 185.

General power of sale for purposes of reinvestment

(1) General power of sale for purposes of reinvestment does not apply to real property specifically devised, where obviously intended, in connection with a testamentary provision, for keeping the estate at large intact pending the majority of a beneficiary.—Harrison v. Harrison, 105 So. 179, 213 Ala. 418.

(2) Will, directing payment to testator's wife and daughter of monthly income from properties in which he gave them life estates, authorizing executors to sell realty not specifically devised and reinvest proceeds in other realty, directing that realty not specifically devised remain unsold and be kept together until both life tenants' deaths, and directing executors to sell entire estate and make distribution on termination of life estates, requires that all of estate not specifically devised be kept in executors' hands until falling in of life estates.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.

Sale of fixtures

A will, devising realty and a store thereon, but also providing for a bequest and devise of "all the rest, residue and remainder of my property of every kind except the store fixtures, which may be sold at public or private sale," etc., must be construed to mean power of sale to sell the residue, exclusive of store fixtures, which fall under the devise of the realty and store.—In re Squires' Will, 216 N.Y.S. 750, 127 Misc. 361.

39. Pa.—Wilkinson v. Chambers, 37 A. 569, 181 Pa. 437.

40. N.Y.—Daniell v. Hopkins, 177 N.E. 390, 257 N.Y. 112, 76 A.L.R. 1367, reversing 245 N.Y.S. 818, 231 App.Div. 745.

Sale or encumbrance of cemetery lots generally see Cemeteries § 27.

41. Ky.—Oehlschlaeger v. Oehlschlaeger's Ex'r, 108 S.W.2d 528, 269 Ky. 596.

42. Ky.—Thomas v. Thomas, 110 S.W. 853, 855, 33 Ky.L. 700.

24 C.J. p 168 note 48.

43. N.Y.—Fortser v. Winfield, 23 N.Y.S. 169, 3 Misc. 435, reversed on other grounds 37 N.E. 111, 142 N.Y. 327.

44. Cal.—Etcheborne v. Auzerais, 45 Cal. 121.

Discretion not abused

A widow cannot complain that under a discretionary power of sale more land was sold than would have been necessary to pay debts, where if her claims had been allowed in full the proceeds would not have been more than was necessary for this purpose.—Harding v. Harding, 152 S.W. 259, 151 Ky. 398.

Homestead

(1) Under a provision that the homestead shall not be sold until necessary, and that it shall be used by wife and children, the executors have authority to sell it if it becomes necessary.—Etcheborne v. Auzerais, 45 Cal. 121.

(2) A will which provided that testator's wife should have her portion of the homestead, and further provided that the sons should have the use of the rest, and, whenever the interest of the estate required, that a portion should be platted, and so many of the lots sold as were necessary to create a fund sufficient to pay from the income the taxes and expenses of platting, did not authorize a sale of any portion of the homestead where it had not been platted.—Petit v. Flint & P. M. R. Co., 72 N.W. 238, 114 Mich. 362.

Power not discretionary

Under will directing executor to sell realty, of which testatrix might die possessed, as soon after her death as in his "discretion" was to the best interest of the estate, the word "discretion" had reference to the time, circumstances, and conditions for making sale, and not to whether executor could exercise discretion of executing power of sale.—Hoffman v. Hoffman, 22 N.E.2d 652, 61 Ohio App. 371.

45. Cal.—Sharp v. Loupe, 52 P. 134, 536, 120 Cal. 89.

24 C.J. p 168 note 53.

vey all the testator's real estate at their discretion is efficient to support a sale by the executors, not only of all the territorial extent of the lands whereof the testator died seized, but also of all his title and interest therein.[46] Where testator authorized his executors in their discretion to sell all of his real estate not specifically devised, except that devised to his wife, no part of which was to be sold without her consent, and also gave to his wife the income of certain buildings for life, or for as long as she should remain unmarried, the power of sale was only a power to sell the remainders in the lands devised for life.[47] Where a will provides that the residue of the estate be divided into eight equal parts and distributed to three beneficiaries, with discretionary power to the executors to sell realty for the purposes of residuary clause, mineral rights can be sold.[48]

If the power given is to sell only certain specified realty, or only a certain part of the realty, the executor cannot sell any of the other realty without an order of court,[49] unless a power of sale with respect thereto can be fairly implied.[50]

§ 282. Notice to Heirs

The executor may have the duty of notifying heirs of his intention to sell realty.

Where a part of a devise to executors in trust with power to sell was void and such part passed to the heir of the testator, the executor, intending to exercise the power, should notify the heir of his intention so to do.[51]

§ 283. Time for Selling

Testamentary directions as to the time at which realty is to be sold should be followed, and if no time is specified by the testator the sale should be made within a reasonable time.

Where the will contains directions as to the time at which the property shall be sold, such directions should be followed;[52] but generally a sale after such time is not improper,[53] although under some

46. N.J.—Hatt v. Rich, 45 A. 969, 59 N.J.Eq. 492.
24 C.J. p 168 note 55.

47. N.J.—Lembeck v. Lembeck, 68 A. 337, 73 N.J.Eq. 427, affirmed 71 A. 240, 74 N.J.Eq. 848.

48. N.Y.—Grigsby v. Hubbard, 216 N.Y.S. 716, 217 App.Div. 337.

49. Ky.—Alexander v. Hendricks, 258 S.W. 81, 84, 201 Ky. 677, quoting **Corpus Juris.**
24 C.J. p 167 note 46.

50. Ky.—Alexander v. Hendricks, supra.
N.Y.—In re Dudek's Estate, 239 N.Y.S. 250, 136 Misc. 43.
R.I.—Dunham v. Randall, 151 A. 193, 51 R.I. 55.
24 C.J. p 168 note 47.

Effect of mistake

Where it appears from the entire will that testator intended to confer power to sell all his real property, but the clause of the will creating the power to sell limited such power to specific real property, other real property owned by testator may be sold by the executor, the limitation to the property specified being due to testator's mistaken belief he did not own such other property.—In re Dudek's Estate, 239 N.Y.S. 250, 136 Misc. 43.

51. N.Y.—Bender v. Paulus, 90 N.E. 994, 197 N.Y. 369, affirming 105 N.Y.S. 240.

52. Ill.—Lockner v. VanBebber, 5 N.E.2d 460, 364 Ill. 636.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Md.—Legge v. Canty, 4 A.2d 465, 468, 176 Md. 283, citing **Corpus Juris.**
N.M.—Sylvanus v. Pruett, 9 P.2d 142, 145, 36 N.M. 112, citing **Corpus Juris.**
Ohio—Aldenderfer v. Spangler, 153 N.E. 517, 22 Ohio App. 123, citing **Corpus Juris.**
24 C.J. p 168 note 60.

Sale during lifetime of annuitant

Where annuities bequeathed to testator's wife were not charged against testator's property, but will provided for reimbursement of executor for amounts so advanced by sale of wife's life estate at her death, executor was not entitled to sell such property during wife's lifetime for payment of annuities.—Ingram v. Ingram, 182 S.E. 132, 208 N.C. 643.

53. N.Y.—In re Scott's Will, 204 N.Y.S. 478.
Pa.—Whalen's Estate, 1 Pa.Dist. & Co. 512.
R.I.—Bailey v. Brown, 9 R.I. 79.
S.C.—Stork v. Merchant, 118 S.E. 530, 125 S.C. 377, 31 A.L.R. 1392.
24 C.J. p 169 note 61.

Effect of time limitation in will

(1) A provision in a will limiting the time within which the sale of real property should be made has been construed to be merely directory.
Mass.—Bayley v. Sloper's Ex'rs, 160 N.E. 275, 263 Mass. 534.
N.J.—Molton v. Sutphin, 57 A. 974, 66 N.J.Eq. 20.
N.Y.—Wild v. Bergen, 16 Hun 127.
Pa.—Rieker's Ex'rs v. Kaetz, 69 Pa. Super. 182, 35 Lanc.L.Rev. 177—In re Snyder's Estate, 27 North. Co. 317.
Tex.—Allred v. Beggs, 84 S.W.2d 223, 125 Tex. 584, affirming Beggs v. Allred, Civ.App., 73 S.W.2d 599.

(2) So such provisions have been held to confer a discretionary power of sale within the periods specified, and a mandatory power thereafter.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107—Fredericks v. Kerr, 68 A. 835, 129 Pa. 365—In re Snyder's Estate, 27 North.Co. 317—Wells v. Sloyer, 3 Pa.L.J. 203.

(3) Thus where decedent died January 9, 1908, and the will provided "my executor hereinafter named shall sell all my real estate as soon after my decease, as to him shall seem meet, not however to exceed three years thereafter . . .," the power of sale could be exercised in 1940.—In re Snyder's Estate, 27 North.Co. 317.

(4) Similarly, a testamentary provision for the sale of real estate within a specified time has been held to impose a duty on the executor to sell within such time, but not to prevent a sale thereafter.—Trudeau v. Collins, R.I., 16 A.2d 346.

Testamentary clause limiting time of administration does not limit the time within which a discretionary power of sale of the personal representative may be exercised.
Mo.—Ganahl v. Ganahl, 19 S.W.2d 898, 323 Mo. 620.
N.Y.—Union Trust Co. of New York v. Cole, 190 N.Y.S. 855, 198 App. Div. 534.

Compelling execution of power

If an executor fails to act pursuant to a direction that he shall sell real estate within a certain time, he may be compelled by a court of equity to sell, even after the lapse of such time.
N.J.—Marsh v. Love, 6 A. 389, 42 N.J.Eq. 112.
N.Y.—Wild v. Bergen, 16 Hun 127.

decisions such a sale has been held to be improper[54] unless authorized by the court.[55] The time for the conversion of property may be extended by the agreement of all persons interested.[56]

If no time for the sale is fixed by the will, it is discretionary with the executor when he will sell,[57] and while this rule is subject to the limitation that it is his duty to sell within a reasonable time,[58] a long lapse of time since the probate of a will does not constitute any objection to the exercise of a

54. Ill.—Pope v. Kitchell, 188 N.E. 451, 354 Ill. 248.
24 C.J. p 169 note 62.

Market condition

Executor's failure to sell testator's land within time stipulated in will, in vain hope that market would improve, is not warranted, where testator stressed element of time in settlement of his estate.—Pope v. Kitchell, supra.

55. N.M.—Sylvanus v. Pruett, 9 P. 2d 142, 36 N.M. 112.

Equity may order sale deferred until it can be done without undue loss to the estate, particularly where testator provides for postponement if necessary.—Trust Co. of New Jersey v. Glunz, 191 A. 795, 121 N.J. Eq. 593, modifying 181 A. 27, 119 N. J.Eq. 73.

Discretion not abused

Court did not abuse discretion in refusing to grant continuance of sale by executor of real estate to permit heirs to advance money or secure additional bidders.—In re George's Estate, 12 P.2d 86, 123 Cal.App. 733.
Time for sale under order of court see infra § 594.

56. Pa.—Harrah's Estate, 7 Pa.Dist. 170, 20 Pa.Co. 606.
24 C.J. p 171 note 72.

57. Ky.—Simpson v. Simpson's Ex'x, 225 S.W. 495, 189 Ky. 536.
Neb.—Bryant v. Fingerlos, 295 N.W. 896, 138 Neb. 867, 132 A.L.R. 1467.
N.Y.—In re Arns' Estate, 259 N.Y. S. 69, 144 Misc. 584—In re Walsh's Will, 207 N.Y.S. 763, 124 Misc. 349.
24 C.J. p 169 note 63.

Sale at inopportune time without necessity is improper.—Calbeck v. Herrington, 152 S.E. 53, 169 Ga. 869.

58. Ill.—Sartain v. Davis, 154 N.E. 101, 323 Ill. 269—Teater v. Salander, 136 N.E. 873, 305 Ill. 17—Vierieg v. Krehmke, 127 N.E. 735, 293 Ill. 265.
Mo.—Hood v. Shively, App., 31 S. W.2d 283—In re Branch, 100 S. W. 516, 123 Mo.App. 573.
Neb.—Bryant v. Fingerlos, 295 N.W. 896, 138 Neb. 867, 132 A.L.R. 1467.
N.Y.—Clayton v. Kingston, 195 N. Y.S. 909, 202 App.Div. 165, reversing 189 N.Y.S. 245, 115 Misc. 631—In re Taft's Will, 259 N.Y.S. 887, 144 Misc. 896, modifying 256 N. Y.S. 732, 143 Misc. 387, and affirmed 260 N.Y.S. 294, 145 Misc. 435—In re Surpless' Estate, 255 N.Y.S. 730, 143 Misc. 48—In re Fairchild's Will, 245 N.Y.S. 617, 138 Misc. 363.
Tex.—Jones v. Hext, Civ.App., 67 S.W.2d 441, error refused.
Wis.—In re Britt's Will, 182 N.W. 738, 174 Wis. 145.
24 C.J. p 169 note 64.

What constitutes reasonable time

A reasonable time within the meaning of the text rule depends on the circumstances of the particular case showing what is to the best interest of the estate.
Ill.—Teater v. Salander, 136 N.E. 873, 305 Ill. 17—Vierieg v. Krehmke, 127 N.E. 735, 293 Ill. 265.
Neb.—Bryant v. Fingerlos, 295 N. W. 896, 138 Neb. 867, 132 A.L.R. 1467.
N.Y.—Clayton v. Kingston, 195 N.Y. S. 909, 202 App.Div. 165, reversing 189 N.Y.S. 245, 115 Misc. 631.
24 C.J. p 169 note 64 [a].

Awaiting improved conditions

(1) Where will directed executor to convert realty into personalty as soon after testator's death as practicable, executor was authorized to delay sale at least a reasonable time until conditions improved, if parties interested did not force early sale.—Parker v. Milam, 61 S.W.2d 674, 166 Tenn. 266.

(2) However, the mere fact that the market is unfavorable does not excuse an indefinite postponement of the sale.—Bryant v. Fingerlos, 295 N.W. 896, 138 Neb. 867, 132 A.L.R. 1467.

(3) Right of executor to exercise power of sale given by will is forfeited, he having delayed for over two years, and his only excuse being that the market was not favorable, and that a tenant in common would not consent to a sale for any amount he could obtain.—Vierieg v. Krehmke, 127 N.E. 735, 293 Ill. 265.

Securing true value

Executor's power, under will, to dispose of testator's realty, should be exercised as speedily as true value of realty could be realized.—In re Rosenberg's Estate, 261 N.Y.S. 640, 145 Misc. 581.

Compelling exercise of power

Where an executor has testamentary power to sell real estate, an action may be brought to compel him to do so.—Jones v. Hext, Tex.Civ. App., 67 S.W.2d 441, 445, citing **Corpus Juris.**

Particular delays considered

(1) Where power of sale resulted in equitable conversion of testator's realty into personalty at time of his death, reasonable time for executrices to sell realty was one year after date of letters testamentary.—In re Schuster's Will, 269 N.Y.S. 546, 150 Misc. 444.

(2) Thus where will empowered executor to sell, lease, or mortgage the real estate and in his discretion to hold it until such time as a fair value could be obtained for it, nine months was not a "reasonable time" to enable the executor to exercise the power given him in the will, in absence of special facts and circumstances, so as to permit maintenance of action at the end of nine months for partition and sale of the property.—Kesterke v. Van Wie, 20 N.Y. S.2d 497, 259 App.Div. 981.

(3) Where testatrix expressly directed that executrix should sell property, pay off bequests, and keep remainder for herself, power of executrix to sell had expired where she refused and neglected to exercise the power for a period of nearly fifteen years.—Bryant v. Fingerlos, 295 N.W. 896, 138 Neb. 867, 132 A. L.R. 1467.

(4) Where a will giving the executrix the use of property until her death or marriage, and providing that if she preferred the premises might be sold and the proceeds divided between her and two others, and that after her death or marriage the premises should be sold and the proceeds divided between such other legatees, also authorized the executrix "to sell my real estate as hereinbefore provided," it gave her no authority to sell the property after occupying it for twenty years before electing to take one third of the proceeds.—In re Britt's Will, 182 N. W. 738, 174 Wis. 145.

Liability of executor in case of delay

(1) Culpable negligence results where executor fails to comply with mandatory power of sale in will within reasonable period.—In re Taft's Will, 259 N.Y.S. 887, 144 Misc. 896, modifying 256 N.Y.S. 732, 143 Misc. 387, and affirmed 260 N. Y.S. 294, 145 Misc. 435.

(2) Executor who is vested with discretion in the sale of real estate is not liable for delaying the sale longer than necessary where he is guilty of no fraud but only of a mistake of judgment.—In re Cunningham, 61 A. 996, 212 Pa. 451—In re Cunningham, 61 A. 993, 212 Pa. 441.

power to sell real estate, if the duty to sell it still exists,[59] although it may, it has been held, enable the heirs or devisees to prevent the execution of the power and take possession of the land and dispose of it as they may deem proper, if they consider that course more to their interest than a sale under the will.[60]

Where an executor is given power to hold and manage realty, or to rent it, or to sell it, he is not required to elect at the outset of his administration which course he will pursue, but, after managing it for a time and renting it for a time, may exercise the power of sale.[61]

If the will directs a sale to be made at a future time, or on the happening of a contingency, it is apparent that the power does not exist until the time arrives or the contingency happens, and if a sale is made prior thereto it is void,[62] unless the will gives authority to the executor, at his discretion, to sell at a time other than that named in the will,[63] although some cases have considered that, where the sale was to be made on the happening of a contingency which was sure to happen, the executor might sell before it actually happened, where the beneficiaries consented.[64] Executors who are directed to sell on the happening of a certain event, are not, however, bound to sell as soon as the event happens, on any terms or for any price that may be offered, but they are to see that the price and terms are reasonable, satisfactory, fair, and adequate and that the property is not sacrificed needlessly for some nominal amount.[65] A testamentary power to sell real property when necessary for the welfare of specified persons must be exercised, if at all, during the life of the persons specified.[66]

It has been held that the executor should not sell while there is a cloud on the title of the land, which affects its value.[67] The power of an executor to sell real estate to distribute the estate cannot be exercised after devisees have conveyed a part of their interests in the estate.[68]

While a probate court will entertain an application for advice and direction as to the time for a sale of real property under testamentary power, the power is sparingly exercised, and only in exceptional cases.[69]

§ 284. Manner and Conduct of Sale

Subject to testamentary directions and to statutory provisions, an executor has discretion as to the manner and conduct of a sale of real property under testamentary power of sale. As a general rule a public sale is required; while this rule has been applied in the case of a gen-

59. U.S.—Reeve v. North Carolina Land & Timber Co., C.C.A Tenn., 141 F. 821, 73 C.C.A. 287, certiorari denied 27 S.Ct. 776, 203 U.S. 588, 51 L.Ed. 329.
24 C.J. p 169 note 65.

Statutory period for administration
(1) Where no time is fixed by the will for exercise of a testamentary power to sell real property, such power must be exercised within the time fixed by statute for administration of the estate.—In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

(2) However, as affecting the right to sell such property, the time of administration may be extended by the court for good reasons.—In re McElevey's Estate, supra.

(3) Widow's objection as mere devisee to sale of realty directed by will to be sold is not a good reason within the rule.—In re McElevey's Estate, supra.

60. Ky.—Muldrow v. Fox, 2 Dana 74.
24 C.J. p 170 note 66.

61. Ky.—Goddard v. Goddard, 170 S.W. 176, 160 Ky. 759.

62. Ala.—Walker's Heirs v. Murphy, 34 Ala. 591.
Ill.—Beatty v. Stanley, 131 N.E. 687, 298 Ill. 444.
N.J.—Courter v. Stagg, 27 N.J.Eq. 305.
N.Y.—Mathewson v. Geer, 197 N.Y.S. 690, 120 Misc. 120, reversed on other grounds 205 N.Y.S. 451, 210 App.Div. 160.
24 C.J. p 170 note 67.

Acceleration
(1) Where testator devised estate to wife for life and named her as executor, and "upon her death" gave his estate to executor to be thereafter appointed in trust to sell and distribute the proceeds, as soon "after her death" as practicable, and widow was released as executrix and conveyed life estate to substituted executor, widow terminated life estate and time for sale by substituted executor, if properly appointed, was accelerated and his power to sell became operative immediately.—Buhring v. National Standard Co., 12 A.2d 632, 127 N.J.Eq. 243.

(2) However, it has been held that where will authorized executor to sell land only after death of widow and to divide proceeds among children, voluntary conveyance of life estate by widow does not accelerate remainders, and hence there is no acceleration of power to sell.—Aldenderfer v. Spangler, 153 N.E. 517, 22 Ohio App. 123.

Circumstances not amounting to valid execution of power
Ga.—Satterfield v. Tate, 64 S.E. 60, 132 Ga. 256.
24 C.J. p 165 note 29 [g].

Fund for education of children
Where a testator devised land to be sold to educate his children, it may be thence inferred that he intended the sale to be made during their minority.—Muldrow v. Fox, 2 Dana, Ky., 74.

63. Pa.—Hanbest v. Grayson, 55 A. 786, 206 Pa. 59, affirming 11 Pa. Dist. 497, 27 Pa.Co 548.
S.C.—Greer v. McBeth, 33 S.C.Eq. 254.

64. N.Y.—Kilpatrick v. Barron, 26 N.E. 925, 125 N.Y 751.
24 C.J. p 170 note 69.

65. N.Y.—Hancox v. Meeker, 95 N. Y. 528.

Reasonable time
Where a will provides for a sale "upon the death" of a life tenant, the sale must be made within a reasonable time after necessary preparation and arrangements.—Cannon v. Garrett, 268 Ill App. 18.

66. Ohio.—McAvoy v. McCarthy, 10 Ohio N.P., N.S., 606.

67. Cal.—In re Ricaud, 57 Cal. 421.
Tenn.—Peck v. Peck, 9 Yerg. 301.

68. N.Y.—Van Norden Trust Co. v. O'Donohue, 106 N.Y.S. 948, 122 App.Div. 51.

69. N.Y.—In re Rosenberg's Estate, 261 N.Y.S. 640, 145 Misc. 581.

Evidence disclosing absolute failure of realty market authorized order directing that sale of testator's realty by executors be suspended until revival of adequate market.—In re Rosenberg's Estate, supra.

eral power of sale, a private sale under such power is permissible.

An executor who is given a power of sale by the will has, as a rule, considerable discretion as to the manner and conduct thereof,[70] but of course any directions given in the will are controlling,[71] and under applicable statutes in the absence of directions in the will the sale must be conducted in all respects as if made under order of court.[72]

The general rule is that a sale of real property by a personal representative under testamentary power of sale must be by public sale.[73] So it is held, in some instances by reason of applicable statutes, that a general or naked testamentary power of sale merely dispenses with the necessity of an order to sell,[74] and does not permit a private sale.[75] However, it is more generally held that where there is a general power of sale without a specification of public sale, a private sale is both permissible and customary,[76] or the sale may be by public auction.[77] The testator may, of course, authorize a private sale by the executor,[78] and such authorization may be either express or by implication;[79] but it has been said that in case of doubt the safe rule is to adhere to the mode of sale prescribed by law.[80] Similarly, the testator may specify that the sale be by public auction.[81] A testamentary power to executors to sell real property at public or private sale has been

70. Wash.—Sharp v. Greene, 62 P. 147, 22 Wash. 677.
24 C.J. p 171 note 77.

What law governs

Where a will by implication authorizes the sale by the executor of land situated in various states, the manner of sale will depend on the laws of the states where the respective parcels of land are situated.—Harris v. Ingalls, 68 A. 34, 74 N.H. 339.

71. Ohio.—Aldenderfer v. Spangler, 153 N.E. 517, 22 Ohio App. 123, citing **Corpus Juris.**
24 C.J. p 171 note 78.

72. Or.—Jones v. Ross, 162 P. 974, 82 Or. 706.
Manner of sale under order of court see infra §§ 593–596.

73. Cal.—Panaud v. Jones, 1 Cal. 488.
Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277.
Pa.—McCreery v. Hamlin, 7 Pa. 87.
24 C.J. p 171 note 80.

74. Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Moore v. Turner, 95 S.E. 965, 148 Ga. 77—Jackson v. Williams, 50 Ga. 553.

75. Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Moore v. Turner, 95 S.E. 965, 148 Ga. 77—Jackson v. Williams, 50 Ga. 553.

76. Cal.—Panaud v. Jones, 1 Cal. 488.
Ky.—Andrew's Ex'x v. Spruill, 112 S.W.2d 402, 271 Ky. 516—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 520.
Miss.—Buckingham v. Wesson, 54 Miss. 526.
Mont.—Goodell v. Sanford, 77 P. 622, 31 Mont. 163.
N.M.—Bull v. Bal, 130 P. 251, 17 N. M. 466.
Pa.—Orne's Estate, 7 Pa.Dist. 337—In re Fritz' Estate, 7 Sch.Reg. 271.
R.I.—Wood v. Hammond, 17 A. 324, 16 A. 198, 16 R.I. 98.

77. Miss.—Jelks v. Barrett, 52 Miss. 315.
R.I.—Wood v. Hammond, 16 R.I. 98, 17 A. 324, 18 A. 198.

78. Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Jackson v. Williams, 50 Ga. 553.
Iowa.—In re Wicks' Estate, 222 N.W. 843, 207 Iowa 264.
N.H.—Gafney v. Kenison, 10 A. 706, 64 N.H. 354.

Validity

A testamentary provision authorizing a sale of realty at public or private sale is valid.—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.

79. Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Jackson v. Williams, 50 Ga. 553.
Pa.—Laubach v. Lerner, 28 North. Co. 33.

Intention of testator to authorize private sale should be plainly and distinctly expressed in the words of the power, or should be found by necessary implication from the language used in conferring such power.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Jackson v. Williams, 50 Ga. 553.

Request for public sale directory

A provision of a will requesting that a sale of land be by public auction does not prevent a private sale where the will also contains a provision authorizing the sale at private sale or public auction.—Industrial Trust Co. v. McLaughlin, 117 A. 428, 44 R.I. 350.

Private sale authorized

(1) Where wife bequeathed husband all her property during his life, with remainder to her children, and provided that husband as executor could, at any time he thought it best for the interest of her family, dispose of her property by replacing other property for their children, executor was authorized to sell at private sale.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277.

(2) Will directing sale of land at widow's death "to best advantage" requires sale by negotiation with same care and judgment as in disposing of one's own property, unless public probate sale seems better under circumstances.—Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo. App. 688, transferred, see, Sup., 39 S. W.2d 867.

(3) A testamentary power of sale to sell at the executor's discretion has been construed to permit a private sale.—Munson v. Cole, 98 Ind. 502.

(4) A power of sale for purposes of investment authorizes a private sale.—Christian Widows' & Orphans' Home v. Harber, Ky.App., 113 S.W. 818.

(5) An executrix, directed by the will of her deceased husband to sell his land as soon as it could be done without sacrifice, who sold it to her son at the highest price she had reason to think could be obtained therefor, without attempting to obtain other bids and without putting it on the market, exercised proper prudence in the management of the estate.—In re Branch, 100 S.W. 516, 123 Mo.App. 573.

Private sale not authorized

(1) Testamentary authority to the executor in the words, "I desire all my lands to be sold . . . upon such terms, as to notice or credit, as my executors may, in their sound discretion, deem best," does not authorize a private sale.—Jackson v. Williams, 50 Ga. 553.

(2) A will providing that personal property should be reduced to cash at public or private sale, and that the land and houses might be rented out or sold as the executrix might wish, did not give the right to make a private sale of the land.—Turner v. Peacock, 113 S.E. 585, 153 Ga. 870.

(3) Authority given an executrix by a will to sell lands without an order of the court does not dispense with the necessity for a public sale. —Turner v. Peacock, supra.

80. Ga.—Turner v. Baird, 125 S.E. 475, 159 Ga. 277—Jackson v. Williams, 50 Ga. 553.

81. Ky.—Tyree v. Williams, 3 Bibb. 365, 6 Am.D. 668.

construed to permit a hybrid combination of public and private sale.[82] Where the personal representative is given power of sale either at public or private sale if the devisees determine that a sale should be made, prior to the determination by the devisees they may call on the personal representative to elect whether the sale will be public or private, and, after such election, the mode elected cannot be changed without affording the devisees an opportunity to change their decision as to whether a sale shall be made.[83]

While a probate court will entertain an application for advice and direction as to the place of a sale of real property under testamentary power, the power is sparingly exercised, and then only in exceptional cases.[84]

Statutes with respect to appraisement, advertisement, notice, and the like are usually held applicable only to sales under judicial license, and not to those made under a power in the will;[85] but in the case of a public sale proper advertisement must be made.[86] Where ground rents are to be sold at public auction, the executor has no obligation, and would be unwise, to advertise his own estimate of the values thereof.[87] Notice has been held not essential to the validity of a sale under testamentary authority.[88]

A general statute requiring a special bond for the sale of decedent's realty under order of court, see infra § 590, has been held not to apply to a sale by an executor under power in the will,[89] and a bond given voluntarily without a statute requiring it imposes no liability,[90] but in some jurisdictions under applicable statutes, an executor selling under testamentary power is required to give bond.[91]

Under some statutes the court may order the sale conducted on the premises.[92]

§ 285. Terms and Conditions

Testamentary directions as to the terms and conditions of a sale of real property under power of sale must be complied with. As a general rule the sale should be for cash.

N.Y.—Pendleton v. Fay, 2 Paige 202. Pa.—McCreery v. Hamlin, 7 Pa. 87.

Substantial compliance

Where testator specifies that the sale under testamentary power be public and the property is advertised for auction sale, the fact that the sale is to a purchaser bidding by letter does not render the sale not one at public auction, substantial compliance with the testamentary requirement being present.—Tyree v. Williams, 3 Bibb., Ky., 365, 6 Am.D. 663.

Effect of statute

An authorization by will of a public sale of testator's interest in farm was not authority, under the Fiduciaries Act, for executor to make a private sale, unless he was authorized by some court of competent jurisdiction empowered in the premises.—Bonebrake v. Koons, 5 A.2d 184, 333 Pa. 443.

82. N.Y.—In re Peek's Will, 227 N. Y.S. 682, 131 Misc. 495.

Arrangement for sale by public advertisement, with sealed bids received by the executor, together with circulation of the printed notice of sale among persons interested in the will, real estate dealers of the neighborhood, and likely prospective purchasers, while novel, is not an improper exercise of power of sale either at public or private sale.—In re Peek's Will, supra.

83. N.J.—Wright v. Wright, 4 N.J. Eq. 28.

84. N.Y.—In re Rosenberg's Estate, 261 N.Y.S. 640, 145 Misc. 581.

85. Ind.—Munson v. Cole, 98 Ind. 502.
24 C.J. p 171 note 82.

Advisory order of sale

Where will authorized executors to convert estate into cash, sale of unadministered assets of testator's estate under order of court is not "judicial sale" so as to require public advertisement where order clearly indicated that sale was to be made by executor in his executorial capacity, and order was merely advisory.—Methodist Episcopal Church South of Louisa v. McAdams, 94 S. W.2d 11, 263 Ky. 833.

General power of sale

Where the powers conferred by a will included the power to settle, adjust, and compromise all debts owing by the testator, and to make settlement with his former partners and each of them, without authority from any court, and to sell and convey either at public or private sale any or all of the testator's real estate on such terms as to the executors should seem best, a sale made by them under such powers, without giving notice of the time, place, and terms of sale, and without including the value of the real estate in the bond given by them when they qualified, did not render the conveyance invalid.—Valentine v. Wysor, 23 N. E. 1076, 123 Ind. 47, 7 L.R.A. 788.

In Utah, in view of Comp.L. 1888 § 4145, providing that a sale under testamentary power could be with or without notice, a will, conferring a naked power of sale without direction as to notice, authorized a sale without notice.—In re Walker's Estate, 23 P. 930, 6 Utah 369.

86. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

Advertisement held sufficient
Md.—Harlan v. Lee, supra.

87. Md.—Harlan v. Lee, supra.

88. Pa.—In re Fritz' Estate, 7 Sch. Reg., 271.
24 C.J. p 171 note 84.

Adverse reactions will be avoided if notice is given.—In re Fritz' Estate, supra.

Sale of leased land to tenant

Where a will recited that testatrix has rented certain real estate for three years, and directed the executor, in case of her death before the expiration of the lease, to collect the rents, and to give the tenant three months' notice before the expiration of his term, and authorized the executor to sell such property, and in another clause testatrix expressed a wish that her estate might be settled as soon as convenient "after sale has been made of my said property," the executors were entitled to sell the land without terminating the tenant's possession, and hence a sale to the tenant without giving the three months' notice was proper.—Hanbest v. Grayson, 55 A. 786, 206 Pa. 59.

89. Me.—Bradt v. Hodgdon, 48 A. 179, 94 Me. 559.
24 C.J. p 171 note 86.

90. Tenn.—Hughlett v. Hughlett, 5 Humphr. 453.

91. Ill.—People v. Huffman, 55 N.E. 981, 182 Ill. 390, reversing 78 Ill. App. 345.
24 C.J. p 171 note 87.

92. Ga.—Shields v. Whitehead, 120 S.E. 631, 156 Ga. 834.

Terms and conditions specified by the testator as limiting the power of sale must be complied with.[93] Furthermore, where the power of sale is specified as being to do that which the testator might do if he were living, the executor has no authority to sell at a price less than that agreed on by the testator under an executory contract of sale.[94] Where the personal representative makes private sales under special contracts, the terms of such contracts are binding.[95] A sale made during the term of a lease executed by the testator must be subject to the rights of the lessee.[96]

A power of sale given to executors by will can only be exercised by a conveyance to an actual, bona fide money purchaser.[97] The executor must act for the best interest of the estate,[98] and he must realize the best price obtainable;[99] the fact that he occupies a fiduciary relation as to a purchaser[1] or that, prior to a better offer, he has contracted to sell the property,[2] cannot justify a violation of these duties. Furthermore, it has been said that it is not only the power, but the duty, of the court having supervisory control over the estate to see that a fair value is received.[3]

The general rule that a mere power of sale gives authority to sell for cash only, stated in the C.J.S. title Powers § 25, also 49 C.J. p 1273 note 55, applies to an executor's sale of realty under testamentary authority,[4] although a provision for the sale of property to provide funds for a specific purpose has been construed to authorize a sale on such terms as the executor might deem reasonable.[5] The safer and more prudent course when exercising a power is to sell for cash or its equivalent;[6] but where the will gives the executor power to sell on credit, he may do so at his discretion,[7] and sales with mort-

93. Mass.—Chapman v. Cloutier, 24 N.E.2d 517, 304 Mass. 621.

Sale subject to encumbrances

A testamentary power of sale to the executrix to sell at a specified price beyond encumbrances requires a sale at the specified price over the amount of all encumbrances, including a mortgage, even though the resulting price would be grossly in excess of the fair value of the property.—Koezly v. Koezly, 65 N.Y.S. 613, 31 Misc. 397.

Sale on noncompliance with conditions

Will authorizing executor to sell or lease testator's undertaking business to testator's two employees, which provided that if employees did not accept testator's offers, undertaking business should be disposed of to best interest of testator's estate, was construable as extending mutual but not several preference to the employees, so that on failure of employee to agree to purchase the property for their joint benefit executor was required to sell the business to highest bidder, regardless of whether that bidder was one of the employees.—Chapman v. Cloutier, 24 N.E.2d 517, 304 Mass. 621.

Terms and conditions of sale under order of court see infra § 697.

94. Ohio.—Pollock v. Pine, 2 Ohio Cir.Ct. 359, 1 Ohio Cir.Dec. 529.

95. S.D.—Hartelt v. Petosky, 228 N. W. 798, 56 S.D. 385.

96. Ark.—Heiseman v. Lowenstein, 169 S.W. 224, 113 Ark. 404, Ann. Cas.1916C 601.

97. Neb.—Arlington State Bank v. Paulsen, 78 N.W. 303, 57 Neb. 717.
24 C.J. p 172 note 91.

98. Md.—Weinstein v. Boyd, 110 A. 506, 136 Md. 227.
N.Y.—In re Bourne's Estate, 143 N. E. 214, 237 N.Y. 341, reversing 200 N.Y.S. 377, 206 App.Div. 762, which modified 195 N.Y.S. 500, 119 Misc. 43.

99. N.Y.—In re Bourne's Estate, 143 N.E. 214, 237 N.Y. 341.
24 C.J. p 172 note 92.

Determination as to best offer

Where offer for property of estate was slightly less than another offer, executors had duty to determine which offer was most acceptable and for best interests of the estate after giving consideration to such factors as status of estate being administered, amount of cash on hand, sufficiency of personalty to pay debts, amount required to pay and satisfy general legacies, ability to find market at satisfactory price for various other pieces of realty comprising the estate, contingent liability of the estate on a bond accompanying mortgage or on a bond clause or covenant contained in the mortgage, and wisdom of conveying to a residuary legatee realty to apply on her legacy during administration of estate.—In re Griffin's Estate, 20 N.Y.S.2d 922.

Discretion of executor

Authority to sell at private sale for the best price procurable necessarily implies a reliance on the discretion of the executor as to what is the best price procurable.—Laubach v. Lerner, Pa., 28 North.Co. 33.

Gift or nominal consideration

Will making testatrix' husband life tenant and executor with power of "sale" does not authorize gift or conveyance on nominal consideration.—State Highway Board v. Price, 162 S.E. 283, 174 Ga. 143.

Price held fair

Fifteen thousand seven hundred dollars held fair price for administratrix' proposed sale of urban property having three rented residences, appraised by real estate agents at fifteen thousand dollars, and, because of change of neighborhood, undesirable either as residence or business property.—Allworden v. Lemon, 191 S.E. 215, 183 S.C. 421.

1. N.Y.—In re Bourne's Estate, 143 N.E. 214, 237 N.Y. 341, reversing 200 N.Y.S. 377, 206 App.Div. 762, which modified 195 N.Y.S. 500, 119 Misc. 43.

2. Md.—Weinstein v. Boyd, 110 A. 506, 136 Md. 227.
Pa.—In re Costello's Estate, 39 Pa. Dist. & Co. 596—In re Barbey's Estate, 33 Berks Co.L.J. 238.

Right to repudiate prior obligation to sell, because of a subsequent better offer, is contingent on obtaining assurances that the second purchaser will complete the purchase, such as requiring a sufficient down payment, or bond.—In re Costello's Estate, 39 Pa.Dist. & Co. 596.

3. Pa.—In re Orr's Estate, 129 A. 565, 283 Pa. 476.

4. N.Y.—Bonham v. Coe, 292 N.Y. S. 423, 249 App.Div. 428, affirmed 12 N.E.2d 566, 276 N.Y. 540.
Wash.—Hutchings v. Fanshier, 231 P. 14, 132 Wash. 5.

5. Ky.—Andrews' Ex'x v. Spruill, 112 S.W.2d 402, 271 Ky. 516.

6. Ill.—Clark v. Clark, 50 N.E. 101, 172 Ill. 355.
24 C.J. p 172 note 93.

7. N.Y.—In re Juilliard's Estate, 191 N.Y.S. 904, 117 Misc. 642.
24 C.J. p 172 note 94.

Extent of power

Power to sell the realty on credit does not authorize the executor to contract for the purchaser's construction of a building on the property sold or for the financing of

gage security on the land itself for deferred payments are sometimes justified, in the exercise of good faith and reasonable prudence.[8] Likewise, where the executor has discretionary power as to the sale and also power to make investments, he may sell realty in part for cash and in part for a lease with privilege of purchase.[9]

A testamentary power to an executor to sell coal underlying testator's lands "with the usual mining privileges" does not authorize a sale of the coal with a waiver and release of the right to surface and lateral support.[10]

§ 286. Confirmation

A sale of real property under testamentary power ordinarily need not be confirmed by a court, but confirmation is sometimes required by statute. An order of confirmation may be revoked or corrected, and is subject to review.

It is sometimes required by statute that a sale of realty under testamentary authority shall be confirmed or ratified by a court,[11] but in the absence of such a requirement confirmation by a court is not necessary,[12] particularly where the executor's power of sale is expressly that of testator,[13] unless necessary to protect wards of the court.[14] However, even though the testator confers power of sale to be exercised without the permission, aid, or intervention of any court, where the power is inadvertently exercised prior to administration proceedings, the court may entertain a petition for ratification by the

such construction.—Spoolan Realty Corporation v. Haebler, 262 N.Y.S. 197, 147 Misc. 9.

Variance from testamentary direction

Executors, authorized by will to sell property and take in payment notes bearing interest at four and one half per cent per annum, could take notes with interest payable semiannually, the determination of such small detail being within their power and in accordance with usual business customs.—In re Juilliard's Estate, 191 N.Y.S. 904, 117 Misc. 642.

Installment payment

A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, has been held to empower the executrix to convey real property to a trustee, who was to hold for a syndicate which was to plat the same, under the terms of which sale the purchase price secured by a lien on the property was made payable in installments.—Goodell v. Sanford, 77 P. 522, 31 Mont. 163.

Notes as purchase money

Where the personal representative, having power under the will to sell at any time, makes a sale before the time of distribution under the will has arrived, notes may be taken in payment for the property.

Ky.—Smith v. Blair, 5 Ky.L. 687.

Tex.—Rogers v. Jones, 35 S.W. 812, 13 Tex.Civ.App. 453.

8. N.J.—Woodrux v. Lounsberry, 5 A. 99, 40 N.J.Eq. 545, affirmed 11 A. 113, 42 N.J.Eq. 699.
24 C.J. p 172 note 95.

Conveyance not under power

A deed executed by the widow, surviving children, and executors of deceased partner, conveying decedent's interest in certain real estate held by the partners in common to the surviving partner, in consideration of his conveying to decedent's sons shares in the real estate which had been set off to them in the division, was not an exercise of a power of sale contained in decedent's will, authorizing his executors to sell his real estate "either for cash or part on bond and mortgage, as they might deem advisable."—Huber v. Case, 87 N.Y.S. 663, 93 App.Div. 479.

9. Ohio.—Bernheim v. Stark, 9 Ohio App. 40, 29 Ohio C.A. 17.

10. Pa.—Allhouse's Estate, 23 Pa. Super. 146.

11. Cal.—In re Robinson, 75 P. 777, 142 Cal. 152—In re Pearson's Estate, 33 P. 451, 98 Cal. 603—Perkins v. Gridley, 50 Cal. 97—In re Flaherty's Estate, 231 P. 591, 69 Cal.App. 429.

Md.—Montgomery v. Williamson, 37 Md. 421.

24 C.J. p 172 note 2.

In Pennsylvania

(1) Where the will fails to designate the person to execute the power of sale, in view of Act Feb. 24, 1834 § 12, providing that in such case the power shall be exercised under the control and direction of the orphans' court, a sale by an executor without order of court may be confirmed by such court.—Appeal of Musselman, 65 Pa. 480.

(2) So the orphans' court may confirm the sale under the act of April 13, 1854, P.L. p 368, providing that, in all cases wherein any of the courts might have authorized any sale or conveyance, such a sale or conveyance made without order of court may be ratified and confirmed.—Donnelly v. Byers, 83 A. 296, 234 Pa. 339.

(3) However, as a general rule, a sale by a personal representative under testamentary power need not be confirmed.—In re Orr's Estate, 5 Pa. Dist. & Co. 499—In re Hanbest's Estate, 15 Pa.Dist. 234—24 C.J. p 173 note 3.

(4) The orphans' court may, in a proper case, confirm the sale.—In re Orr's Estate, supra—In re Hanbest's Estate, supra—24 C.J. p 173 note 3 [e].

In Texas confirmation is necessary only when the sale needed to be authorized by the court.—Smith v. Swan, 22 S.W. 247, 2 Tex.Civ.App. 563, error refused.

Character of sale not affected by statutory requirement of confirmation

A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale is confirmed give to it the incidents of a judicial sale. The purchaser deals with the executor in making the purchase as he would with any other vendor, and his rights and liabilities are governed by the rules applicable to such sales generally. The sale is treated as if made under the power; and the purchaser is required to examine the sufficiency of this power, as he is that of any other power under which a sale may be made.—In re Backesto's Estate, 218 P. 597, 63 Cal.App. 265—24 C.J. p 172 note 2 [a].

Confirmation of sale under order of court see infra §§ 608–612.

12. Iowa.—Feaster v. Fagan, 113 N.W. 479, 135 Iowa 633.
24 C.J. p 173 note 3.
Pennsylvania rule see supra note 11.

13. Ala.—Grist v. Carswell, 165 So. 102, 231 Ala. 412.

14. Ala.—Proctor v. Scharpff, 80 Ala. 227.

Where executor asks instructions of court as to validity and extent of his powers, making infant remainder-men parties, the latter thereupon become wards of the court, and the executor should be required to report to the court, for confirmation, any sale made by him.—Proctor v. Scharpff, supra.

executor at the instance of the purchaser.[15] A purchaser under a contract expressly providing that it is subject to the approval of the court is estopped by contract from denying the right of the court to confirm or disaffirm the contract.[16] Where an executor had authority to sell land for the benefit of certain persons, and purporting to act under the power he did so, but failed to make any return so that there was no confirmation, the beneficiaries having so ratified the sale as to estop them from disputing it, it was held that the court having jurisdiction of the probate proceedings might, because of the estoppel, confirm the sale and direct execution of the conveyance on a compliance with the terms of the contract by the purchaser.[17]

Under statutory provisions, when a proper memorandum of the sale is made, the executors have exercised the power conferred on them by the will, and the sale, in the absence of fraud or irregularity, is binding on the estate, subject to confirmation; and the court must confirm it unless the price bid is disproportionate to the value of the property, and it is made to appear that an increased bid of ten per cent can be obtained.[18]

Objections not sufficient to prevent confirmation. As a sale by an executor passes only such interest as the testator had in the property, as stated infra § 293, it is not a ground of objection to a confirmation of the sale that another person has an interest in the property, nor, when it is within the discretion of the executor whether he will make a sale under the power, that the sale is not for the best interest of the estate or of some particular heir,[19] that the purchaser, as the executor's agent, puffed the price by overbidding, the higher price being beneficial to the objectors, or that the price is inadequate, unless so grossly inadequate as to indicate a lack of reasonable judgment and discretion in the executor, or fraud, misconduct, or mistake.[20]

Nature of proceeding. Where an executor makes a report of the sale of real property under testamentary power of sale, and an objection thereto is filed by interested parties, to which the executor files his answer, the proceeding for confirmation is termed a plenary proceeding.[21]

Jurisdiction. A probate court has been held to have jurisdiction as to a plenary proceeding to obtain confirmation of the executor's sale.[22] However, it has been held that a court of equity has no jurisdiction to confirm a sale by executors under testamentary power.[23]

Parties. Under a will giving an executor power to convey land by deed or otherwise at private sale, it has been held that the devisees are not necessary parties to a proceeding for a decree sanctioning the sale.[24]

Pleadings. While pleadings in the strict sense do not exist in a plenary confirmation proceeding, the report of the executor, objections by interested parties, and the executor's answer correspond to a bill or petition and answer.[25]

Notice of hearing. It has been held that where the sale was made at public auction, the judge must make an order fixing a day for hearing the report, and the clerk must give notice thereof.[26]

Evidence. Objections to confirmation of the sale will be sustained where the executor fails to establish by a clear preponderance of evidence that the sale was fair, in good faith, and for an adequate price.[27]

Framing issues. In the case of a plenary proceeding for confirmation of the executor's report, the parties objecting to confirmation may petition the court to frame issues on the facts in controversy, to be determined by another court.[28] Such petition has the effect of waiving the irregularity that the executor's answer is not under oath.[29] Issues which may be framed include whether ground rents sold by the executor at public sales were ade-

15. Md.—Weinstein v. Boyd, 110 A. 506, 136 Md. 227.

16. Iowa.—In re Wicks' Estate, 222 N.W. 843, 207 Iowa 264.

17. Cal.—In re Walker, 85 P. 310, 149 Cal. 214.

18. Cal.—In re Robinson, 75 P. 777, 142 Cal. 152—In re Pearson's Estate, 33 P. 451, 98 Cal. 603—In re Flaherty's Estate, 231 P. 591, 69 Cal.App. 429.

19. Cal.—In re Wickersham, 73 P. 541, 139 Cal. 652, reversing 70 P. 1076, 71 P. 437, 138 Cal. 355.

20. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

Abuse of discretion

Confirmation of executor's sale of realty at one-twentieth of its net value after deducting unpaid irrigation district assessments and delinquent taxes, was abuse of discretion, notwithstanding realty had been sold for taxes and estate had no funds wherewith to redeem property from tax liens, where executor made no effort to clear title to property as against tax purchaser.—In re White's Estate, 54 P.2d 740, 12 Cal.App.2d 57.

21. Md.—Harlan v. Lee, supra.

22. Md.—Harlan v. Lee, supra.

23. N.C.—Shute v. Austin, 27 S.E. 90, 120 N.C. 440.

24. Miss.—Wirtz v. Gordon, 184 So. 798, 187 Miss. 866, reinstated 192 So. 29, 187 Miss. 866, certiorari denied Gordon v. Wirtz, 60 S.Ct. 616, 309 U.S. 630, 84 L.Ed. 988.

25. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

26. Cal.—Perkins v. Gridley, 50 Cal. 97—In re Durham, 49 Cal. 490.

27. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

28. Md.—Harlan v. Lee, supra.

Orphans' court has the power to grant proper issues in the matter of an executor's sale of realty and ratification of the sale.—Harlan v. Lee, supra.

29. Md.—Harlan v. Lee, supra.

quately advertised, whether the sales were properly conducted, whether the purchaser was acting as an agent of the executor, whether the prices were fair and adequate, whether the sales were to the highest bidders, and the nature of the property or interest sold.[30] The rule that to warrant submission of issues the pleadings must contain allegations which afford a sufficient basis to disclose the affirmation and denial of a material and relevant fact, see Courts § 308 a (2), applies to a plenary proceeding for confirmation of an executor's sale of realty.[31] On the other hand, where the allegations of the pleadings present a question, the issue as to such question should be framed.[32] It is improper to frame an immaterial issue,[33] or one infringing on the province of the court.[34]

Matters considered. In determining whether confirmation of the sale should be refused because of inadequacy of price, the court should consider not only the price, but also the other circumstances which in any proximate way relate to the fairness and propriety of the sale at the time it was made.[35] So it has been held that in considering whether a statutory approval or disapproval of a sale of real property under a testamentary power not naming who shall execute it should be ordered, adequacy of price is not the sole element to be considered.[36]

Judgment or decree. In the case of a plenary confirmation proceeding, the probate court may render a judgment or decree either on the report, objections, and answer, or, if a petition for framing issues has been filed, on the findings in such proceeding.[37] Where the contingency for the exercise of the power of sale exists, and a sale has been made at a fair and reasonable price, it will be confirmed.[38] Where a residuary legatee sought by petition to have the executors account for the rents and profits of real estate which they had sold to a third person, and the executors answered, and the court after settling their account entered a judgment by which their deeds conveying the real estate were adjudged valid, the judgment was not a confirmation of the sale.[39]

Revocation or correction of ratification. Where the order of ratification of a sale, made and reported by executors under authority conferred by the will, has been procured by an honest mistake, the orphans' court has the power of revocation and correction, provided the application is made within a reasonable time.[40] Likewise, where a sale at public auction is confirmed, but no order fixing the day for hearing and no notice of hearing appears, the court, on its own motion, may set aside the confirmation.[41]

Review of confirmation. An order confirming an executor's sale of realty is ordinarily subject to review.[42] However, where, on an application for the confirmation of an executor's sale of real estate, the purchaser filed objections on the ground of want of jurisdiction, and on such objections being overruled the court took testimony on the merits without any answer or other opposition being filed by such purchaser, and refused to confirm the sale, the purchaser is not entitled to a review of such refusal on appeal from an order denying his motion for a new trial.[43] On appeal from such an order, it is the duty of appellant to furnish the return of sale.[44]

§ 287. Who May Purchase

A sale of real property under testamentary power of sale as a general rule may be to any person, but sales to the representative's agent, partner, firm, or attorney are usually not upheld.

30. Md.—Harlan v. Lee, supra.

31. Md.—Harlan v. Lee, supra.

Allegations held not to support issues

Md.—Harlan v. Lee, supra.

Allegation held to support issues

Md.—Harlan v. Lee, supra.

32. Md.—Harlan v. Lee, supra.

33. Md.—Harlan v. Lee, supra.

Issue held immaterial

Where the executor has testamentary power to invest a portion of the estate, and purchases through an agent for such purpose, an issue as to whether the purchaser acted as agent of the executor is immaterial. —Harlan v. Lee, supra.

34. Md.—Harlan v. Lee, supra.

Framing issue as to fair and adequate sales price, so as to permit a categorical affirmative or negative answer, is improper as invading the province of the court, although an issue as to the fair market value of each property or interest sold would not be objectionable.—Harlan v. Lee, supra.

35. Md.—Harlan v. Lee, supra.

36. Pa.—In re Thornton's Estate, 40 Pa.Dist. & Co. 446, 57 Montg. Co. 36.

Race of purchaser

Although the price offered by one prospective purchaser is adequate, the court will order a sale to another at a slightly higher net price, where it is shown that the latter is a negro, that the former is a white person, that the former will likely make the property unavailable to negroes, that decedent was a negro, that the property is presently occupied by negroes and that there is a scarcity of housing for negroes.—In re Thornton's Estate, supra.

37. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

38. N.Y.—In re Collins' Estate, 300 N.Y.S. 1211, 165 Misc. 246.

39. Cal.—In re Richards, 98 P. 528, 154 Cal. 478.

40. Md.—Montgomery v. Williamson, 37 Md. 421.

41. Cal.—In re Durham's Estate, 49 Cal. 490.

42. Cal.—In re Robinson, 75 P. 777, 142 Cal. 152.
24 C.J. p 174 note 16.

43. Cal.—In re Richards, 72 P. 633, 139 Cal. 72.
24 C.J. p 174 note 18.

44. Cal.—In re Robinson, 75 P. 777, 142 Cal. 152.

As a general rule, where an executor is authorized to sell he may sell to any person.[45]

However, a sale by a personal representative to his agent or partner or to a firm of which he is a member cannot be upheld against the objection of the heirs or devisees,[46] especially where there has been bad faith in the transaction.[47]

Likewise, a sale by an executor or administrator to his own attorney is improper for the reason that the sale may be supposed to be made under the influence, if not the pressure, of legal advice and induced by confidential relations which ought to be above suspicion.[48] This is especially true where the representative is illiterate and incompetent for the trust,[49] and in such case the attorney may at the option of the parties in interest be charged as trustee of the property purchased and required to account therefor,[50] without any evidence that the sale was in fact unfair or the price inadequate.[51]

§ 288. —— Executor or Administrator

Subject to numerous limitations, the personal representative cannot purchase at his own sale under testamentary power to sell real property. In the absence of fraud, such purchase is merely voidable.

As an application of the general rule, stated in the C.J.S. title Trusts § 302, also 65 C.J. p 768 note 8, that a trustee cannot purchase from himself or at his own sale,[52] it is well established as a general rule that an executor or administrator cannot become the purchaser at his own sale of the property of his decedent,[53] but there are early cases to the contrary.[54] The rule precludes the representative not only from purchasing outright, but also from being interested in any purchase at a sale by him;[55] neither is it confined in its application to a direct purchase, but an indirect purchase by means of an agent or a third person who is the ostensible purchaser but who really acts for the representative in order to enable him to acquire title may also be avoided.[56]

Limitations of rule. Express authority in the will may, of course, warrant a purchase by the executor.[57] So the rule that an executor cannot purchase at his own sale does not apply to a purchase,

45. Pa.—Mason v. Devenny, 30 Pittsb.Leg.J.,N.S., 216, 14 York.Leg. Rec. 75.
24 C.J. p 174 note 20.

Purchaser child of testator
Where the wife of the testator, as executrix, decided to sell lands for payment of debts pursuant to authority given, the sale is not invalid where the transaction was bona fide, and there were unpaid debts, because it was to one of the sons of the testator.—Simpson v. Simpson's Ex'x, 225 S.W. 495, 189 Ky. 536.

Who may purchase at:
Sale of personalty see infra §§ 313, 314.
Sale under order of court see infra §§ 598, 599.

46. N.J.—Colgate v. Colgate, 23 N. J.Eq. 372.
24 C.J. p 176 note 53.

Sale to executor's wife
Purchase in good faith for full value, and as highest bidder at executor's public sale under testamentary power by executor's wife with own funds, is not infringement of rule against executor's acquiring personal interest in estate.—Cox v. Simmerman, 48 S.W.2d 1078, 243 Ky. 474.

47. N.C.—Summers v. Reynolds, 95 N.C. 404.
Va.—Buckles v. Lafferty, 2 Rob. 292, 41 Va. 292, 40 Am.D. 752.

48. Wis.—O'Dell v. Rogers, 44 Wis. 136.
24 C.J. p 177 note 55.

49. Conn.—Mills v. Mills, 26 Conn. 213.
Wis.—O'Dell v. Rogers, 44 Wis. 136.

50. Wis.—O'Dell v. Rogers, supra.

51. Wis.—O'Dell v. Rogers, supra.

52. Ky.—Naylor v. Thomas, 228 S. W. 9, 190 Ky. 588.
Neb.—Johnson v. Erickson, 194 N.W. 670, 110 Neb. 511.
24 C.J. p 174 note 21.

53. Ky.—Malone's Guardian ad Litem v. Malone, 73 S.W.2d 38, 255 Ky. 210—Davis v. Bush, 249 S.W. 327, 198 Ky. 558—Naylor v. Thomas, 228 S.W. 9, 190 Ky. 588.
Neb.—Johnson v. Erickson, 194 N. W. 670, 110 Neb. 511.
N.J.—Flett v. South Jersey Title & Finance Co., 124 A. 152, 96 N.J.Eq. 244.
Ohio.—Naus v. Vorndran, 156 N.E. 450, 116 Ohio St. 327.
Pa.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107.
Wis.—O'Dell v. Rogers, 44 Wis. 136.
24 C.J. p 174 note 21.

Reason for rule
(1) The rule is founded on the unfairness that is likely to follow on a sale in which the same person is both vendor and purchaser.—Johnson v. Erickson, 194 N.W. 670, 110 Neb. 511.

(2) Thus it is said that to permit an executor to purchase the property from himself would allow him to create in himself an interest opposite to that of the party or parties for whom he acts, and at the same time a conflict between the self-interest and integrity of the fiduciary, thereby furnishing both motive and opportunity for his profiting from his relations to the property, at the expense of those it is his duty to protect.—Naylor v. Thomas, 228 S.W. 9, 190 Ky. 588.

Purchase for estate
Executor, with power of sale and conversion of real estate, cannot purchase outstanding interest in land with funds of estate.—Fidelity Union Trust Co. v. J. R Shanley Estate Co., 167 A. 865, 113 N.J.Eq. 562.

Sale to pay debts
Where an executor is directed in the will to pay debts, and has sufficient funds to do so, he cannot make a sale to himself—Belt v. Adams, 86 So. 584, 124 Miss. 194, suggestion of error overruled 87 So. 666, 125 Miss. 387.

54. Ala.—Brannan v. Oliver, 2 Stew. 47, 19 Am.D. 39.
24 C.J. p 175 note 21 [d].

55. Ky.—Naylor v. Thomas, 228 S. W. 9, 190 Ky. 588.
24 C.J. p 174 note 23.

56. Ky.—Naylor v. Thomas, supra.
Neb.—Johnson v. Erickson, 194 N. W. 670, 110 Neb. 511.
Ohio.—Naus v. Vorndran, 156 N.E. 450, 116 Ohio St. 327.
Pa.—In re Apple's Estate, 31 Pa. Dist. & Co. 445, 52 York Leg.Rec. 18.
24 C.J. p 174 note 24.

57. Ohio.—Naus v. Vorndran, 156 N. E. 450, 116 Ohio St. 327.
Pa.—In re Wallace's Estate, 149 A. 473, 475, 299 Pa. 333, citing **Corpus Juris.**
Wis.—O'Dell v. Rogers, 44 Wis. 136.
24 C.J. p 175 note 25.

Election of executor conclusive
Judgment of deceased partner's ex-

under an option in a lease executed by the testator, by a corporation lessee in which the executor is a stockholder.[58] The executor may obtain leave of court to purchase at his own sale, in which case a purchase by him will give him good title.[59] It has also been asserted that where the representative has a personal interest in the property he may become the purchaser,[60] and a purchase by the representative has also been upheld where the sale was a fair one and a fair price was given for the property.[61] It is within the discretion of the executor at a public sale to bid up the property, in his representative capacity, to the price at which he desires to sell.[62] Where a mortgagee was appointed administrator of the estate of the mortgagor, but did not take possession of the mortgaged premises or take any steps to have them sold for the payment of debts, but foreclosed his mortgage while he was acting as administrator, he had the right to become the purchaser at the foreclosure sale.[63] A person who was nominated as an executor in the will, but has not qualified or acted as such, may purchase the property of the testator at a sale made by the executor or executors who did qualify,[64] or a representative who has resigned or been discharged may become a purchaser at a sale subsequently made by the personal representatives remaining in office, or by his successor.[65] The rule forbidding a purchase by an executor by means of an agent does not apply where the purchase is made for purposes of power of investment for benefit of the beneficiaries.[66] A representative who has sold real property of his decedent may purchase the same for himself from the purchaser at his sale, provided the first sale was real and bona fide and not a mere sham or pretense to enable the representative to acquire title.[67]

Whether sale void or voidable. A purchase by an executor or administrator at his own sale is usually held to be not void but merely voidable at the option of those interested;[68] but where the transaction is tainted with actual fraud, it is void.[69] So, also, where the executors had no power to sell, but under the mistaken belief that they had, sold the real estate, and became the purchasers of a portion of it, it has been held that the sale was void, and

ecutors, authorized by will to sell testator's interest to his son, also an executor, at such price as they deemed just to other heirs, is conclusive.—In re Wallace's Estate, 149 A. 473, 299 Pa. 333.

58. Ky.—Enslen v. Enslen, 199 S.W. 794, 178 Ky. 610.

59. Pa.—In re Apple's Estate, 31 Pa. Dist. & Co. 445, 52 York Leg.Rec. 18.
24 C.J. p 175 note 26.

Effect of statute
Even though a statute, prohibiting an executor from bidding at the sale of his decedent's real estate without obtaining leave of court, applies only to sales for payment of decedent's debts, the executor should obtain leave of court in order to purchase at his own sale regardless of the purpose of the sale.—In re Apple's Estate, 31 Pa.Dist. & Co. 445, 52 York Leg.Rec. 18.

60. Ala.—McLane v. Spence, 6 Ala. 894.
24 C.J. p 175 note 27.

61. Va.—McKey v. Young, 4 Hen. & W. 430, 14 Va. 430.
24 C.J. p 175 note 28.

Price higher than bid at public sale
Where widow and executrix of testator bought his land for price higher than was bid at public sale pursuant to plan of son to pay testator's debts with consent of persons interested in estate, sale vested title free from trust in executrix, although son became insane prior to completion of sale.—Malone's Guardian ad Litem v. Malone, 73 S.W.2d 38, 255 Ky. 210.

62. S.C.—Sherwood v. McLaurin, 88 S.E. 363, 103 S.C. 370.

63. Minn.—Fleming v. McCutcheon, 88 N.W. 433, 85 Minn. 152.

64. N.Y.—Valentine v. Duryea, 37 Hun 427.

65. N.J.—Clark v. Denton, 36 N.J. Eq. 419, affirmed 36 N.J.Eq. 534.

66. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

Interest as trustee
(1) Where will provides that executor should invest one third of estate and pay income thereof to testatrix' daughter and the corpus thereof to daughter's children on death of daughter, interest of executor as trustee in sale of ground rents belonging to estate is not in conflict with the other beneficiaries of the will, but is in common with them, since executor is entitled to an undivided one third of the estate in common until distribution with the other beneficiaries.—Harlan v. Lee, supra.

(2) The executor as trustee is entitled to an opportunity to acquire in severalty any portion of the estate for the use and benefit of the trust.—Harlan v. Lee, supra.

(3) He is required to account for purchase price as executor and to assume personally the whole responsibility of the purchase as long as the purchase is without the sanction of a court of competent jurisdiction as a proper investment of the trust funds.—Harlan v. Lee, supra.

67. Ky.—Enslen v. Enslen, 199 S.W. 794, 178 Ky. 610.
24 C.J. p 175 note 35.

68. Neb.—Johnson v. Erickson, 194 N.W. 670, 110 Neb. 511.
N.Y.—Le Page v. Goldstein, 201 N.Y.S. 158, 121 Misc. 233.
Pa.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107.
24 C.J. p 175 note 36.

Sale by purchaser
(1) Where realty belonging to decedent was conveyed by the executor and executrix to a third person and the next day reconveyed by such person and his wife to the executrix individually, it was a single transaction, and the deed was voidable, under the rule that a conveyance by an executor of land belonging to the estate, made to himself directly or indirectly, is voidable.—Le Page v. Goldstein, 201 N.Y.S. 158, 121 Misc. 233.

(2) Executor's sale of trust property at one half its advertised value and conveyance thereof by purchaser to executor's wife was voidable at option of cestui que trust.—Grist v. Carswell, 165 So. 102, 231 Ala. 442.

Sale to agent
A sale by executor to purchaser as agent of executor in his private capacity is not denounced by the law as fraudulent in fact and is not absolutely void, but is merely voidable on objection by a party in interest.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

69. Conn.—Sheldon v. Woodbridge, 2 Root 473.

could not be enforced against them.[70]

A sale to a near relative of the representative is improper and voidable,[71] especially if the representative has unduly favored such purchaser.[72] However, where the sale is fair and bona fide and for adequate consideration, the sale will be upheld.[73]

Ratification. A purchase by an executor or administrator at his own sale may be ratified by the persons interested.[74] An acquiescence in the sale by the heirs for a long time will create a presumption of ratification,[75] and an heir or legatee who receives the proceeds with knowledge of the facts thereby ratifies the sale or becomes estopped subsequently to attack it.[76]

§ 289. Conveyance

The power given by will to an executor to sell realty includes the power to convey, and a conveyance may be valid although it does not expressly refer to the power.

A will giving the executor power to sell realty carries by necessary implication the power to convey,[77] which authority, it is held, may be delegated.[78]

Form and contents. It is not necessary that the conveyance should set out the existence of circumstances warranting the sale[79] or show that the sale was made in the manner authorized,[80] nor is a deed invalid because of the omission of the word "grant" therefrom, where the words "remise, release and forever quit claim" are used.[81]

The conveyance must be executed in the name of the executor,[82] but the fact that the conveyance is not executed by the executor in his representative capacity will not invalidate it as a proper exercise of the power of sale where it clearly appears from the instrument that he is acting in such capacity.[83] Where one who is executor and trustee under a will has power to sell as executor, a deed signed by him as executor only and not as trustee is sufficient.[84]

Recital of power. Although it is the better practice for a conveyance by an executor pursuant to a power to include a recital of such power,[85] such a recital is not necessary to the validity of the conveyance,[86] provided the instrument shows that the

La.—Tucker v. Benedict, 38 So. 142, 114 La. 203.

70. S.C.—Drayton v. Drayton, 2 S.C.Eq. 250 note.

71. Pa.—In re Schnebly, 94 A. 827, 249 Pa. 208.
24 C.J. p 176 note 50.

72. Mass.—Oberlin College v. Fowler, 10 Allen 545.
Pa.—In re Schnebly, 94 A. 827, 249 Pa. 208.

73. N.J.—Oliphant v. Carr, 142 A. 430, 103 N.J.Eq. 165, affirmed 151 A. 907, 106 N.J.Eq. 283.

74. Pa.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107.
24 C.J. p 176 note 39.

75. U.S.—Hoyt v. Latham, Minn., 12 S.Ct. 568, 143 U.S. 553, 36 L.Ed. 259, reversing 14 F. 433, 4 McCrary 587.
24 C.J. p 176 note 40.

76. Pa.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107.
24 C.J. p 176 note 41.

That executor gave note for purchase price of property of estate did not prevent legatees from contesting alleged sale to himself.—In re Messmore's Estate, supra.

77. Ky.—Melheiser v. Central Trust Co. of Owensboro, 36 S.W.2d 377, 237 Ky. 757—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
N.C.—Powell v. Norfolk-Carolina Timber Corporation, 138 S.E. 161, 193 N.C. 794.
24 C.J. p 177 note 60.

Time for conveyance
Where the power to sell is subject to a time limitation, the executor may execute a conveyance after the time has expired if the sale was consummated within the time limited.—In re Messmore's Estate, 138 A. 81, 290 Pa. 107—24 C.J. p 168 note 60 [d].

"Sale" in will
Where a testator states in his will that he "sells" land to a certain person for a certain sum, he impliedly gives the executors power to convey to such person on payment of the purchase money.—Jones' Ex'rs v. Jones, 13 N.J.Eq. 236.

Conveyance without sale
(1) Under will directing executors to sell certain property subject to life estate of testator's wife, and bequeathing to testator's only child, who, with her mother, were sole heirs at law, money equal to amount of proceeds from auction sale of property which she might purchase thereat, executors and trustees may make direct conveyance to daughter without sale.—Duke v. Allen, 136 A. 15, 48 R.I. 127.

(2) Deed by executors to beneficiaries at agreed value for which grantees were charged as payment on distributive shares was distribution by executors as exercise of power of sale under will.—In re Wagner's Will, 244 N.Y.S. 126, 137 Misc. 504.

78. S.C.—Glenn v. Walker, 100 S.E. 706, 113 S.C. 1.
24 C.J. p 177 note 61.

Presumption of validity of deed
A deed executed under a power of attorney given by an executor authorized by will to sell the property is presumably valid.—Webster v. Black, 83 S.E. 941, 142 Ga. 806.

79. Ala.—Burton v. Jones, 102 So. 807, 212 Ala. 353.
Mass.—Justice v. Soderlund, 114 N.E. 623, 225 Mass. 320.

80. S.C.—Turnipseed v. Hawkins, 12 S.C.L. 272.

Private sale
Warranty deed to land in Georgia by executors of will executed in Tennessee, probated therein, and witnessed according to laws of Georgia, which does not recite advertisement, and where there is no proof that property was advertised and sold by executors at public outcry, will be deemed to have been made in pursuance of private sale.—Chattanooga Iron & Coal Corporation v. Shaw, 122 S.E. 597, 157 Ga. 869.

81. Mass.—Justice v. Soderlund, 114 N.E. 623, 225 Mass. 320.

82. Ala.—Burton v. Jones, 102 So. 807, 212 Ala. 353.

83. Ga.—Terry v. Rodahan, 5 S.E. 38, 79 Ga. 278, 11 Am.S.R. 420.
Miss.—Cohea v. Johnson, 13 So. 40, 69 Miss. 46.
Pa.—Miller v. Meetch, 8 Pa. 417.
24 C.J. p 177 note 69.

84. Ill.—Dime Savings & Trust Co. v. Knapp, 138 N.E. 723, 307 Ill. 432.

85. W.Va.—Smith v. Henning, 10 W.Va. 596.

86. Ala.—Burton v. Jones, 102 So. 807, 212 Ala. 353.

grantor had in view the subject of the power.[87] An intention to exercise the power of sale sufficiently appears where there is some reference to the power in the conveyance,[88] where there is a reference to the subject matter on which the power is to operate,[89] or where the conveyance would have no operation and would be insensible and absurd if it were not intended as an exercise of the power.[90] Thus the deed of an executor who had no estate whatever in the land, but only a power to sell, will be considered an exercise of that power.[91] Where in addition to his power to sell, the executor had an individual interest in the property, whether the deed is an exercise of the power or only a grant of his interest depends on his intent as indicated by the face of the instrument and the circumstances under which it was executed and delivered.[92] In such case, a conveyance made without actual reference to the power has been presumed a deed of his individual interest alone,[93] unless it is executed by him as the representative of the estate.[94]

Warranties or covenants. A power of sale given by the will ordinarily does not authorize an executor to bind the estate by covenants in the deed, including covenants of warranty.[95] Unless the executor specially agrees to give a deed with covenants, he is under no obligation to do so.[96] Moreover, if he gives a deed with covenants, they operate, if at all, only as a personal obligation,[97] although they do not have this effect if the terms of the covenant indicate that he did not intend to bind himself personally.[98]

However, a covenant by an executor, conveying one of two lots, restricting the use to which the retained lot might be put, while not effective to impose liability on the estate as a covenant, may be effective as a grant of an easement.[99] It has also been held that, where on a sale of real estate under a power in the will the executors stipulated that all taxes, assessments, etc., would be allowed out of the purchase money and the property conveyed free from all encumbrances, and several years afterward an unpaid assessment which was a lien on the property was discovered, the purchaser might recover the amount of such assessment from the executors as such.[1]

Seal. A deed by an executor, not under seal and in execution of a power, will be upheld as a contract to convey; and where testator's heirs have received a substantial part of the estate, they cannot defeat the deed because of the absence of the seal.[2]

Construction and effect. In matters of description the usual rules of construction as applied to conveyances apply to a deed of land from an executor or administrator.[3] A covenant by the representative against his own acts does not by implication warrant the title or amount to a covenant that his decedent was seized of the premises.[4] The mere form of a conveyance by an executor under a power in the will may be disregarded and the effect of the conveyance determined by the power.[5]

Presumption of authority. Where the grantor in a conveyance styles himself the executor and possession accompanies the deed, it will be presumed after the lapse of many years that the grantor had authority to make the deed.[6]

A conveyance before the probate of the will has been held good where the will was afterward probated.[7]

W.Va.—Bartlett v. Bartlett, 11 S.E. 732, 34 W.Va. 33.
24 C.J. p 177 note 63.

87. Ala.—Burton v. Jones, 102 So. 807, 212 Ala. 353—Owens v. Gachet, 93 So. 509, 207 Ala. 563.
24 C.J. p 177 note 64.

88. Neb.—Willier v. Cummings, 136 N.W. 559, 91 Neb. 571.

89. Neb.—Willier v. Cummings, supra.

90. Neb.—Willier v. Cummings, supra.
Pa.—In re Messmore's Estate, 138 A. 81, 280 Pa. 107.

91. Pa.—In re Messmore's Estate, supra.
24 C.J. p 178 note 79.

92. Iowa.—Feaster v. Fagan, 113 N.W. 479, 135 Iowa 633.
24 C.J. p 178 note 82.

93. Mo.—Armor v. Frey, 161 S.W. 829, 253 Mo. 447.
24 C.J. p 178 note 81.

94. Ala.—Burton v. Jones, 102 So. 807, 212 Ala. 353.

95. N.Y.—Simmons v. Crisfield, 90 N.E. 956, 197 N.Y. 365, 26 L.R.A., N.S., 663, affirming 108 N.Y.S. 234, 123 App.Div. 201.
Va.—Grantland v. Wight, 5 Munf. 295, 19 Va. 295.
24 C.J. p 177 note 71.

96. N.J.—Randolph v. Rafferty, 113 A. 233, 92 N.J.Eq. 428.
24 C.J. p 177 note 71 [a].

97. Ky.—Ross v. Barr, 53 S.W. 658, 21 Ky.L. 974.
24 C.J. p 177 note 72.

98. U.S.—Thayer v. Wendell, C.C. Mass., 23 F.Cas.No.13,873, 1 Gall. 37.
24 C.J. p 178 note 78.

99. N.Y.—Simmons v. Crisfield, 90 N.E. 956, 197 N.Y. 365, 26 L.R.A., N.S., 663, affirming 108 N.Y.S. 234, 123 App.Div. 201.

1. N.Y.—Alexander v. Greacen, 73 N.Y.S. 1001, 36 Misc. 526, reversing 72 N.Y.S. 1085, 36 Misc. 133.

2. N.C.—Vaught v. Williams, 97 S.E. 737, 177 N.C. 77.

3. N.Y.—Bloomfield v. Ketcham, 95 N.Y. 657.
24 C.J. p 178 note 77.

4. N.Y.—Sandford v. Travers, 20 N.Y.Super. 498, modified on other grounds 40 N.Y. 140.

5. Ga.—Dodge v. Cowart, 62 S.E. 987, 131 Ga. 549.
Pa.—Robeno v. Marlatt, 6 Pa.Co. 251.

6. U.S.—Fronsoe v. Bushnell, Ohio, 251 F. 850, 164 C.C.A. 66.
Lapse of thirty years
S.C.—Maverick v. Austin, 17 S.C.L. 59.

7. Mo.—Wilson v. Wilson, 54 Mo. 213.

The probate court has power to direct the execution of a conveyance on compliance by the purchaser with the terms of his contract, if the administration of the estate is still pending.[8]

The deed is not evidence of ownership by decedent at the time of his death.[9]

§ 290. Payment and Recovery of Purchase Money

a. In general
b. Actions to recover purchase money

a. In General

Executors who sell land under a power granted in the will are authorized to collect the purchase money and on default by the purchaser they may, among other things, resell the property.

Where real property is sold by executors under a power in the will, the executors are authorized to collect and receive the purchase money and enforce any security given for deferred payments,[10] and they do not lose their power as such to receive the money, nor is the purchaser relieved of his duty to pay to them because an unsuccessful effort has been made to secure the payment of the principal sum to the persons ultimately entitled to receive it from the executors.[11] Where the executors have sold realty, it must be presumed that the money paid therefor is in their hands waiting distribution or that the persons entitled thereto have received it.[12]

Resale and recovery of difference in price. Where the purchaser refuses to complete his purchase, the executor usually has a remedy by making a resale and proceeding against the purchaser for the difference in price,[13] but this remedy is not exclusive and does not preclude an action for the purchase money.[14]

b. Actions to Recover Purchase Money

An executor who has sold realty pursuant to a power contained in the will has a right, on the purchaser's default, to sue for the purchase money.

An executor who has sold realty pursuant to a power contained in the will has the right to sue for the purchase money and coerce payment as an incident to his right to receive the same,[15] but where he had no legal right to sell, he cannot maintain an action for the purchase money.[16]

Enforcement of vendor's lien. Under a statute authorizing a person with whom or in whose name a contract is made for the benefit of another to sue thereon, administrators to whom a note for the purchase money of land sold by the estate is made payable can maintain an action to enforce a vendor's lien thereon, although the conveyance was made by the heirs.[17]

Defenses. Fraud in the sale has been held a good defense to an action by the executor for the purchase money.[18] Where the property was sold without any contract as to encumbrances, and conveyed by deed without covenants, the fact that taxes were a lien thereon at the time of the sale, and were paid

8. Cal.—In re Backesto's Estate, 218 P. 597, 63 Cal.App. 265.

9. Tex.—McBride v. Loomis, Com. App., 212 S.W. 480.

10. Ill.—Cannon v. Garrett, 268 Ill. App. 18.
Ky.—Casebolt v. Keel's Adm'r, 43 S. W.2d 523, 241 Ky. 157.
24 C.J. p 179 note 90.

Payment in confederate money

(1) Payment of purchase money or of a bond and mortgage given to secure the same, when due, in Confederate money, may be good and discharge the debt if the payment was made and accepted in good faith.—Glasgow v. Lipse, Va., 6 S. Ct. 757, 117 U.S. 327, 29 L.Ed. 901—24 C.J. p 179 note 96.

(2) An executor or administrator receiving such payment in good faith at a time when Confederate money was the only currency in general circulation in the locality is not liable for the resulting loss.
La.—Womack's Succession, 29 La. Ann. 577.
Va.—Mills v. Mills, 28 Gratt. 442, 69 Va. 442.
24 C.J. p 179 note 97.

Mode of payment where devisee's share conveyed to another devisee

Where devisees, each of an undivided interest in land, conveyed it to their uncle, also a devisee of an undivided interest, and the executor, acting under power, sold the land to the uncle for division of proceeds among all the devisees, the right to the land conveyed by respondents attached to its proceeds, and the uncle became entitled thereto, and the executor was justified in relying on the recorded deed showing the conveyance, and in crediting the uncle on the price with his one-third share as a devisee of the proceeds of sale and seven hundred dollars representing respondents' share.—In re Fagan, 151 N.Y.S. 701, 166 App.Div. 214.

Allowance for defect in title

Where it was discovered after executor's sale of realty that realty was encumbered by right of way, executor could not be surcharged for reduction of purchase price he allowed because of such easement.—Appeal of Schlosser, 181 A. 640, 119 N.J.Eq. 201, affirmed 182 A. 636, 119 N.J.Eq. 488.

11. Pa.—McElroy v. Nucleus Ass'n, 18 A. 1063, 131 Pa. 393.

12. S.C.—Mobley v. Jackson, 90 S. E. 23, 105 S.C. 450.

13. Ala.—Adams v. McMillan, 7 Port. 73.
Cal.—Crouse v. Peterson, 62 P. 475, 615, 130 Cal. 169, 80 Am.S.R. 89.
24 C.J. p 180 note 10.

14. Cal.—Crouse v. Peterson, supra.

15. Cal.—Crouse v. Peterson, 62 P. 475, 615, 130 Cal. 169, 80 Am.S.R. 89.
N.C.—Duer v. Harrill, 9 N.C. 50.

16. Mass.—Richardson v. Crooker, 7 Gray 190.
24 C.J. p 179 note 99.

17. Ky.—McClure v. Bigstaff, 37 S. W. 294, 38 S.W. 431, 18 Ky.L. 601.

18. Del.—Miller v. Baynard, 7 Del. 559, 83 Am.D. 168.
Pa.—Kelly v. Saunders, 85 A. 9, 236 Pa. 593.
24 C.J. p 179 note 2.

by the purchaser to remove the encumbrance thereof, constitutes no defense to an action for the price.[19] Where executors offer real property of their testatrix for sale pursuant to the terms of the will, and a contract for the sale thereof is entered into with a person having no knowledge of the existence of a restrictive agreement, signed by the testatrix, with other property owners, thereby imposing a servitude on the land, the purchaser cannot be compelled specifically to perform the contract.[20]

Counterclaims and credits. In an action on a note given to an executor for the purchase price of property sold by the executor to defendant, an answer that the testator was indebted to defendant in a sum named is not good as a counterclaim,[21] nor can a note for a certain amount executed by one of defendants to the mother of one of the minor legatees, which was not agreed to by the executor and which has never been paid, be allowed as a credit.[22]

Restoration of status quo. Where the purchaser defends on the ground that the executor was without power to sell, the purchaser must offer to restore what he has received,[23] and this involves a duty to account for the profits realized during his possession of the property.[24] Similarly, where an executor's deed was defective, as purporting to convey his own interest only in the property, he having no legal interest in it, but only a naked power to sell, still the purchaser acquired an equitable estate by the deed which he must reconvey or offer to reconvey, before he can make any defense to the payment of notes given for the purchase money.[25] However, it has been held that where the sale itself was invalid, the purchaser is not bound to offer to surrender possession to entitle him to resist the collection of the purchase money.[26]

Estoppel. A purchaser of real estate from executors and trustees, on sale without order of court, after ratification by the orphans' court, when all persons interested appeared, and the fund from the sale has been distributed and a dividend paid creditors, is not entitled to question the validity of the sale in an action on a bond for the price.[27] Beneficiary purchasers under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, are estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.[28]

§ 291. Proceeds

Where realty is sold by an executor pursuant to a power contained in the will, the proceeds should be distributed as the will directs. Such proceeds are subject to the claims of the creditors of the estate, even though the power was not granted for the purpose of paying debts.

Where realty is sold by an executor under a power contained in the will, the beneficiaries of the will ordinarily take the same interest in the proceeds of the sale as they had in the land.[29] Where a power is lawfully exercised for certain specified purposes,

19. Ind.—Boaz v. McChesney, 53 Ind. 193.

20. N.Y.—Scudder v. Watt, 90 N.Y.S. 605, 98 App.Div. 228.
24 C.J. p 179 note 93.

21. Ky.—Dunn v. Carpenter, 10 Ky. L. 494.
Miss.—Mellen v. Boarman, 21 Miss. 100.
24 C.J. p 180 note 4.

22. Tex.—Wright v. Heffner, 57 Tex. 518.

23. Ga.—Keen v. McAfee, 42 S.E. 1022, 116 Ga. 728.
N.Y.—Mathewson v. Geer, 205 N.Y.S. 451, 210 App.Div. 160, reversing 197 N.Y.S. 690, 120 Misc. 120.

24. N.Y.—Mathewson v. Geer, supra.

25. Ill.—Bond v. Ramsey, 89 Ill. 29.
24 C.J. p 180 note 6.

26. Ala.—Fambro v. Gantt, 12 Ala. 298.
Miss.—Washington v. McCaughan, 34 Miss. 304.
24 C.J. p 180 note 7.

27. Pa.—Donnelly v. Byers, 83 A. 296, 234 Pa. 339.

28. Mont.—Goodell v. Sanford, 77 P. 522, 31 Mont. 163.

29. N.J.—Randolph v. Rafferty, 113 A. 233, 92 N.J.Eq. 428.
Pa.—In re Dutton's Estate, 151 A. 697, 301 Pa. 94.

Dower

Testator's widow acquired vested right to money representing value of her dower estate in testator's land when widow as executrix released dower and sold land under testamentary power of sale without having brought action for admeasurement of dower.—In re Stevens' Will, 277 N.Y.S. 459, 154 Misc. 415.

Profit realized on sale

Under New York law, title to farm devised to testatrix' children with a power of sale conferred on executors passed to children on testatrix' death, and executors had a mere power of sale, on exercise of which title passed from children to purchaser, and children took an equivalent estate in proceeds, and hence profit realized on sale belonged to children and was taxable to them to the exclusion of the estate.—Weber v. Commissioner of Internal Revenue, C.C.A., 111 F.2d 766.

Premature sale

Where an executor, having power to sell certain land on the death of testator's widow and divide the proceeds among testator's heirs, sold the same during the widow's life, his void deed did not convert the equitable interest of the legatees in the property, so as to compel them to interplead with the widow's representatives as to their contesting claims on the purchase money paid for such deed.—Pratt v. Worrell, 57 A. 450, 66 N.J.Eq. 194.

Deeds executed by beneficiaries

Where a power of sale of land was never exercised by excutors, but wherever sales were made deeds were excuted by all the heirs, including the executors, and the moneys were received by one of them as representative and agent of the heirs, all persons interested elected to take the

it is the duty of the executor to devote the proceeds to such purposes, and to pay over the surplus to such persons as the testator intended,[30] and if the executor misapplies the proceeds, he is personally liable to the creditors and beneficiaries of the estate.[31]

Duty to account. An executor will be compelled to account in the probate court for the proceeds of real estate sold by him pursuant to the directions of the will,[32] and in a proper case an executor into whose hands proceeds of the sale of realty have come, or are to come, may be required to give security therefor;[33] but where a sale is made by the representative without authority, he cannot be compelled to account in his representative capacity for the proceeds.[34] Where the executor sells lands under a power conferred by the will on him personally, and not as executor, he should not include the proceeds of sale in his executor's account,[35] nor should proceeds received as trustee and not as executor be brought into the administration account.[36] Where executors, having no power as such to sell land, sell the testator's land as agents for the devisees, they cannot be required to account as executors for the proceeds of such sales.[37]

Liability for debts. Where the testator has authorized or directed a sale of land for the payment of debts, the money arising therefrom becomes legal assets for that purpose.[38] Moreover, since a testator cannot, by any power of sale in his will, relieve his land from liability for his debts in case the personalty is insufficient to pay them,[39] it is generally held that the proceeds of a sale under a power may, if necessary, be used to pay debts, even though the power was not granted for that purpose.[40] An executor who has paid out in satisfaction of decedent's debts a sum in excess of the personalty may reimburse himself from the proceeds of a sale of the realty.[41]

It has been held, however, that, where real estate was not converted into personalty by the terms of a will until sale thereof more than two years from the date of testator's death, the proceeds were discharged from liability for decedent's debts.[42] Where

proceeds of the property.—New England Trust Co. v. Morse, 136 N.E. 835, 243 Mass. 39.

Partition during testator's lifetime

Where a mother partitioned a farm between two of her sons, between whom she subsequently divided her estate by will, the fact that one son by judicious management of his share of the farm increased its value, so that it sold subsequently for a much higher price than was brought by the other son's half of the farm when sold to pay debts, was no basis for judgment that the second son, executor of the will and trustee thereunder with his brother, should divide the profits of his own management with his brother and the latter's daughters.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.

30. Pa.—In re Raleigh, 55 A. 1119, 206 Pa. 451.
24 C.J. p 181 note 21.

Trust fund for legatees

On the sale of land by an executor, pursuant to a power to sell it and distribute the proceeds among the legatees, such proceeds become a trust fund in the executor's hands for payment to the legatees of their respective interests.—Turner v. Hine, 248 S.W. 933, 297 Mo. 153.

Pledge of purchase-money notes obtained on sale

Under will devising property in trust and authorizing trustee, if necessary, to sell land to complete education of grandchildren, trustee was authorized to sell land and to take back purchase-money notes and to pledge such notes to secure money to be used for education of such grandchildren.—Lewis v. Keating, 86 S.W.2d 417, 191 Ark. 422.

Distribution prior to sale

Where the will directs the realty to be sold and a specified amount of the proceeds to be distributed in a certain manner, and the realty exceeds such amount in value, but owing to prevailing conditions it would be difficult to obtain an adequate price for the realty, the court, prior to a sale, may order the distribution of such amount from cash on hand.—Parker v. Milam, 61 S.W. 2d 674, 166 Tenn. 266.

31. Ky.—Buckner v. Buckner, 215 S. W. 420, 185 Ky. 540.
24 C.J. p 183 note 51.
Liabilities of executor or administrator see infra § 296.

32. Ky.—Buckner v. Buckner, supra.
24 C.J. p 180 note 13.

Estoppel

(1) Grandchildren of testatrix were estopped, by their receipt and use of money paid them by their uncle, the executor, from the proceeds of a farm, to compel him to account again for the amount.—Buckner v. Buckner, supra.

(2) Executor selling estate property, having accepted piano at three hundred dollars valuation, could not deny it was of that cash value.—Arrington v. McDaniel, Civ.App., 4 S.W.2d 262, modified on other grounds, Com.App., 14 S.W.2d 1009, and certified questions answered 25 S.W.2d 295, 119 Tex. 148.

33. N.Y.—Holmes v. Cock, 2 Barb. Ch. 426.

34. N.Y.—Matter of Hodgman, 42 N.Y.S. 1004, 11 App.Div. 344, affirmed 55 N.E. 1096, 161 N.Y. 627.
24 C.J. p 180 note 15.

35. N.Y.—Matter of Brown, 5 Dem. Surr. 223.

36. Pa.—In re Aston, 5 Whart. 228.

37. Ky.—Offutt v. Divine's Ex'r, 58 S.W. 816, reversing on rehearing 49 S.W. 1065, 20 Ky.L. 1732.
N.Y.—Matter of Hodgman, 42 N.Y.S. 1004, 11 App.Div. 344, affirmed 55 N.E. 1096, 161 N.Y. 627.

38. Ark.—Walker v. Norton, 135 S. W.2d 315, 199 Ark. 593.
24 C.J. p 181 note 22.

Proceeds of sale of homestead

Will directing payment of debts and sale of homestead for purpose of carrying out provisions of will subjected proceeds thereof to payment of debts, where there was practically no nonexempt property.—In re Chase's Estate, 234 N.W. 294, 182 Minn. 271.

39. Ark.—Planters' Mut. Ins. Ass'n v. Harris, 131 S.W. 949, 96 Ark. 222.
24 C.J. p 183 note 47.
Real property as available for payment of debts see infra § 479.

40. Mo.—Doneghy v. Robinson, 210 S.W. 655.
N.Y.—In re Moose's Will, 272 N.Y. S. 140, 142, 241 App.Div. 329, citing Corpus Juris.
24 C.J. p 181 note 23.

41. N.Y.—In re Bolton, 40 N.E. 737, 146 N.Y. 257.

42. Pa.—In re Cooper, 56 A. 67, 206 Pa. 628, 98 Am.S.R. 799.
Conversion of realty into personalty by will see Conversion §§ 15–29.

testator divided his whole estate into two parts, called "personal fund" and "real estate," and it was plainly his intention that the real estate should bear the expense of the conversion thereof into money, equity will charge such expense to the proceeds of such real estate, although there is a general provision in the will for the payment of all debts from the personal fund.[43] While money received from the sale of mortgaged land belonging to an insolvent estate cannot be taken to pay the cost of a settlement suit in which a mortgage lien is enforced, so as to leave an amount insufficient to satisfy the mortgage, if personal property is used in paying insurance, taxes, repairs, and interest on the mortgaged property to an extent exceeding what is taken to pay costs of settlement, including attorney's fee, commissioner's fee, and advertising, the mortgagee cannot complain, especially where he would have been required to pay a large part of such expenses out of the proceeds in case of foreclosure.[44]

In an action to sell certain real estate of decedent and to make distribution of the proceeds arising from the sale, moneys received by the executor from a sale of property under a power of sale in the will cannot be directed to be applied to the payment of the debts of the estate.[45]

Creditor of devisee. Where, after recovery of a judgment against devisees, but before execution sale thereunder the executors exercise their power of sale, the execution purchaser is not entitled to follow the fund in the executor's hands.[46] Where the proceeds are directed to be divided among testator's children, the administrator is entitled to receive the money in preference to a judgment creditor of one of the children.[47]

Sale of another's land. Where an executor by mistake or otherwise has sold land not belonging to his testator the true owner is entitled to the purchase money.[48]

Liability of purchaser as to application of proceeds. The general rule is that, where a purchaser from an executor who sells under a power contained in the will pays over the purchase money in good faith to his vendor, he is under no duty or obligation to see to the proper application or distribution of the money by the vendor;[49] and the validity of the deed of the executor is not impaired by his using the money for a purpose other than that contemplated by the will.[50] The rule is the same even though the sale is for payment of legacies.[51] It has been held, however, that if the debts are specific or scheduled, it becomes the duty of the purchaser to see that the purchase money is applied in satisfaction thereof.[52]

Proceedings for distribution. Equity formerly took exclusive jurisdiction over the proceeds of a sale of real estate under a will as to compelling distribution,[53] but probate courts may be vested by statute with authority over such matters.[54]

§ 292. Nature, Validity, and Effect of Sale

A sale by an executor pursuant to a power granted in the will is not a judicial sale.

A sale by an executor acting under the authority of a power conferred by the will is in no sense judicial in its character.[55] The purchaser deals with the executor as he would with any other vendor,[56] and the relationship is attended with the same incidents and governed by the same rules as apply to vendor and purchaser generally.[57] Thus the purchaser is not required to accept an encumbered title.[58]

43. W.Va.—Mathews v. Tyree, 44 S.E. 526, 53 W.Va. 298.

44. Ky.—Sumrall v. Vanarsdall, 111 S.W. 310, 33 Ky.L. 768.

45. N.Y.—Matter of Gedney, 62 N. Y.S. 1023, 30 Misc. 18.

46. N.Y.—Comrie v. Kleman, 147 N. Y.S. 589, 162 App.Div. 510.
Right of creditors to reach interests of beneficiaries under will see the C.J.S. title Wills §§ 1329–1337, also 69 C.J. p 1242 note 56 et seq.

47. Pa.—Allison v. Wilson, 13 Serg. & R. 330.

48. Pa.—Miller's Appeal, 84 Pa. 391.
24 C.J. p 181 note 29.

49. Ky.—Walters' Guardian v. Ransdell, 291 S.W. 399, 218 Ky. 267—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Pa.—Ferguson v. Weaver, 5 Pa.Dist. & Co. 573, 39 Lanc.L.Rev. 21, 67 York.Leg.Rec. 166—In re Marsh's Estate, 13 Northumb.Leg.J. 300.
24 C.J. p 181 note 30.
Writ of entry by devisee
Executor's failure to account would not authorize writ of entry by devisee against innocent purchaser.—Bryant v. Lombardi, 159 N.E. 437, 261 Mass. 489.

50. Ill.—Whitman v. Fisher, 74 Ill. 147.
Pa.—Cochrane's Estate, 51 A. 989, 202 Pa. 415.
24 C.J. p 182 note 31.

51. Pa.—Cadbury v. Duval, 10 Pa. 265.
24 C.J. p 182 note 35.

52. Mass.—Andrews v. Sparhawk, 13 Pick. 393.

53. Ky.—Monroe v. Wilson, 6 T.B. Mon. 122.
Jurisdiction of proceedings to compel distribution generally see infra § 511.

54. N.Y.—In re Vandervoort, 1 Redf. Surr. 270.
24 C.J. p 182 note 37.

55. Cal.—In re Backesto's Estate, 218 P. 597, 63 Cal.App. 265.
24 C.J. p 182 note 40.
Confirmation by court as affecting nature of sale
The statutory requirement that no title shall pass until the sale be confirmed does not give to it the incidents of a judicial sale.—In re Backesto's Estate, 218 P. 597, 63 Cal. App. 265.

56. Cal.—In re Pearson, 36 P. 934, 102 Cal. 569—In re Backesto's Estate, 218 P. 597, 63 Cal.App. 265.

57. Cal.—In re Backesto's Estate, supra.

58. Cal.—In re Backesto's Estate, supra.

A sale can derive no aid from a power given by the will unless made under the power.[59] Where the will contains a power of sale, but gives no power to mortgage the realty, a conveyance made for the purpose of indirectly subjecting the property to a mortgage is invalid.[60] Where a power of sale is given to an executor, on the happening of a contingency which can only be ascertained by the exercise of judgment and discretion, and the executor in the honest exercise of his judgment determines that such contingency has happened and makes the sale, the sale cannot be invalidated even though it subsequently appears that the executor was mistaken.[61] A sale by an executor pursuant to direction in the will is not invalid because of the invalidity of the testamentary directions as to the disposition of the proceeds.[62] An executor will not be compelled by a decree of the orphans' court to execute a deed for real estate of the testator sold by him, where it appears that some of the devisees agreed with the other devisees that the property should not be struck off below a certain price, and that the crier disregarded this understanding, and sold the property at a lower price to some of the parties to the agreement.[63]

It is not necessary to the validity of an executor's sale under a power in the will to pay the mortgages and legacies that all the facts appear of record.[64]

Estoppel. An estoppel to complain of a sale results from the action of heirs or devisees in joining the executor in a conveyance of the land.[65] Where executors sold real estate under a power in the will, and under a decree settling their accounts the cash received by such sale appeared, it did not estop one interested in the estate, having notice of such accounting, from contesting the validity of the sale, where the account did not set out the facts rendering the sale invalid, and no issue as to its validity was tendered.[66]

Void agreement for sale. An agreement by an executor, for himself and the other executors, to sell certain land of the estate, when the executors perfected title to the property, has been held to be void, as contrary to public policy.[67] Where a conveyance was made and deed executed by executors after the will had been probated, and they were qualified and empowered to convey, it was immaterial that, before their appointment, they had made an unauthorized or void agreement to sell to the same grantee.[68]

Oath of office. The validity of an executor's deed cannot be questioned collaterally on the ground that the executor failed to file the statutory oath of office.[69]

§ 293. Title and Rights of Purchaser

A sale of realty under a proper exercise of the power granted by the will conveys all the title that the testator had, free of the claims of heirs, devisees, and creditors.

After a will is admitted to probate it is the law for the administration of the testator's estate, and a sale or conveyance of realty under a proper exercise of a power conferred thereby transfers all the title that the testator had,[70] and frees the land from any claim by the heirs or devisees,[71] or general cred-

59. Ala.—Alabama Conference M. E Church South v. Price, 42 Ala. 39.
24 C.J. p 183 note 58.

60. N.Y.—Arnoux v. Phyfe, 39 N. Y.S. 973, 6 App.Div. 505, affirmed 54 N.E. 1089, 159 N.Y. 552.
Power to sell realty as conferring power to mortgage see infra § 298.

61. S.C.—State ex rel. Daniel v. Strong, 192 S.E. 671, 185 S.C. 27.

62. U.S.—Peters v. Bowman, D.C. Miss., 19 F.Cas.No.11,029, affirmed 98 U.S. 56, 25 L.Ed. 91.

63. Pa.—Cobleigh's Estate, 23 Pa. Super. 271.

64. Mass.—Justice v. Soderlund, 114 N.E. 623, 225 Mass. 320.

65. Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Estoppel in actions for purchase money see supra § 290 b.

Accepting purchase money and delivering release to executor
By accepting the purchase price of the land on distribution of the estate and delivery of a release to the executor, the legatees and devisees estopped themselves and all persons claiming under them from denying the power of the executor to convey the premises.—Brinkerhoff v. Martin, 28 Pa.Dist. & Co. 227.

66. N.Y.—Weintraub v. Siegel, 109 N.Y.S. 215, 57 Misc. 246.

67. Ga.—Blumenthal v. Cain, 96 S. E. 710, 22 Ga.App. 596.

68. Iowa.—Hunter v. Amish, 145 N. W. 877, 164 Iowa 397.

69. Tex.—Caddell v. Lufkin Land & Lumber Co., Com.App., 255 S.W. 397, affirming, Civ.App., 234 S.W. 138.

70. N.Y.—Midurban Realty Corporation v. F. Dee & L. Realty Corporation, 160 N.E. 380, 247 N.Y. 307, affirming 222 N.Y.S. 601, 220 App. Div. 814—Jandorf v. Smith, 217 N. Y.S. 145, 217 App.Div. 150—Schein v. Erasmus Realty Co., 176 N.Y.S. 648, 107 Misc. 27, affirmed 184 N.Y. S. 840, 194 App.Div. 38.
Pa.—Krohmer v. Peale, 6 Sch.Reg. 197.
Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740, 743, quoting **Corpus Juris.**
24 C.J. p 184 note 65.

71. N.Y.—Harding v. O'Malley, 236 N.Y.S. 172, 226 App.Div. 586—Bologna v. Weiner, 9 N.Y.S.2d 610.
Pa.—In re Kidd's Estate, 141 A. 644, 293 Pa. 21.
24 C.J. p 182 note 42.

Where conveyance is invalid because of a lack of power, the title remains in the heirs or devisees.—Gaines v. City of New Orleans, La., 6 Wall. 642, 18 L.Ed. 950—24 C.J. p 183 note 43.

Lien created by devisee
(1) The execution of power of sale of land by an executor in course of administration and settlement of the estate which created power divests title of devisee or legatee, regardless of lien of a third party on the interest of the devisee.
Del.—Brennan v. Wilmington Trust Co., 126 A. 42, 2 W.W.Harr. 482.
Ga.—Penn v. Mutual Cotton Oil Co., 32 S.E. 17, 106 Ga. 152.

itors,[72] and discharges the land from the lien of debts not of record,[73] or even of a judgment rendered against decedent in his lifetime.[74] However, where a sale is made with the collusion of the purchaser for the purpose of preventing the payment of the debts, the land will remain charged with the debts in the hands of the purchaser.[75]

A purchaser in good faith from an executor who has power to sell gets a title and possession which is good at law, even though the sale is prematurely or indiscreetly made, or the necessity for the exercise of the power has not arisen, or the sale was made for an inadequate consideration, or in violation of the executor's duty, the relief against him, if any can be had, being only in equity and at the instance of the beneficiary whose interests have been prejudiced.[76] However, a sale of land by executors without consideration or outside the scope of the power given them by the will is void as to the immediate grantee and subsequent grantees with notice, at the suit of the estate of the testator and his creditors, or at the suit of prior judgment creditors of the beneficiaries in such estate.[77]

Relation back. Where the executor is authorized to sell but is not given title, the title of a purchaser from the executor relates back to the testator's death.[78]

Rule of caveat emptor. A sale by an executor passes only such interest as testator had in the property,[79] and a purchaser whose deed contains no covenants to cover defects in title takes at his own risk, and unless he can show fraudulent representations on which he relied as an inducement to his purchase, he is without remedy in case the title proves defective or he otherwise gets less than he expected to secure by his purchase;[80] but where the executor assures one about to purchase that he will make him a clear title and the purchase is made accordingly the purchaser is entitled to a title free from encumbrance,[81] and it has also been held that in case of a mistake, where the proceeds of the sale are still within the control of the court, relief may be granted to a purchaser.[82]

Protection as bona fide purchaser. Where one purchases land from an executor as such, he is bound to know whether or not the executor is authorized by the will to make the sale,[83] and if the executor has no such power the purchaser is not an innocent or bona fide purchaser.[84] However, where the executor has power to sell, a purchaser from him acquires good title notwithstanding the bad faith of the executor in making the sale, where he had no knowledge of such bad faith,[85] for the purchaser has a right to presume that the executor is acting in good faith,[86] and is not bound to inquire whether a necessity for the exercise of the power given by the will exists.[87]

(2) A residuary legatee's judgment creditor could not claim that power of sale of realty granted in will merged in title of the legatee and was void, where judgment creditor ignored fact that unpaid debts of estate warranted a sale of the realty under power of sale granted in will. —Bacheldor v. Syrcher, 25 N.Y.S.2d 467, 175 Misc. 845.

Conveyance by beneficiaries

Sale of land under the directions of a will passes a good title, although the persons entitled to the proceeds of the sale have previously conveyed their interests in the land, as such interests are personal and have no connection with the title.
N.J.—Vanderveer v. Conover, 40 N.J. Eq. 161.
N.C.—Orrender v. Call, 7 S.E. 878, 101 N.C. 399.

Child not provided for in will

Under a statute excepting out of a will the interest of any child or children not named or provided for, a sale by an executor under a power in the will, while it transfers to the purchaser all that the executor could lawfully sell, does not affect the interest of such child or children.—Northrop v. Marquam, 18 P. 449, 16 Or. 173.

72. Ky.—Boswell's Ex'x v. Senn's Adm'r, 219 S.W. 803, 187 Ky. 473.
Pa.—Davidson v. Bright, 110 A. 301, 267 Pa. 580.
24 C.J. p 183 notes 44, 49.

Where creditors cannot reach proceeds of sale, as where it is held that the proceeds of a power to sell for the benefit of legatees are not subject to the claims of creditors, the sale does not discharge the claim of the creditors on the land.—Hannum v. Spear, Pa., 2 Dall. 291, 1 L. Ed. 386.

73. Pa.—Cadbury v. Duval, 10 Pa. 265—Connelly's Estate, 3 Del.Co. 402.

74. Ga.—Stallings v. Ivey, 49 Ga. 274.
24 C.J. p 183 note 46.

75. U.S.—Garnett v. Macon, C.C., 10 F.Cas.No.5,245, 2 Brock. 185, 6 Call 308, 10 Va. 308.

76. N.J.—Lindley v. O'Reilly, 15 A. 379, 50 N.J.Law 636, 7 Am.S.R. 802, 1 L.R.A. 79.
24 C.J. p 184 note 66.

77. Neb.—Arlington State Bank v. Paulsen, 78 N.W. 303, 57 Neb. 717.
24 C.J. p 184 note 68.

78. U.S.—Meekins v. Branning Mfg. Co., D.C.N.C., 224 F. 202.

79. Cal.—Wickersham's Estate, 73 P. 541, 139 Cal. 652, reversing 70 P. 1079, 7 Cal.Unrep.Cas. 70.
24 C.J. p 184 note 71.

80. Ga.—Lowden v. Eskedor, 151 S.E. 385, 169 Ga. 672—Turner v. Peacock, 113 S.E. 585, 153 Ga. 870.
24 C.J. p 185 note 72.

81. Pa.—Reiner's Appeal, 12 A. 850.

82. Pa.—Thomas' Estate, 22 Pa. Dist. 373.

83. Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
24 C.J. p 185 note 75.

84. Ky.—Buckner v. Buckner, supra.
24 C.J. p 185 note 76.

85. Kan.—Linn County Bank v. Grisham, 185 P. 54, 105 Kan. 460.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Mass.—Bryant v. Lombardi, 159 N.E. 437, 261 Mass. 489.
24 C.J. p 185 note 78.

86. Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.
Va.—Davis v. Christian, 15 Gratt. 11, 56 Va. 11.

87. Kan.—Linn County Bank v. Grisham, 185 P. 54, 105 Kan. 460.
Ky.—Walters' Guardian v. Ransdell, 291 S.W. 399, 218 Ky. 267—Buckner

A purchaser with notice of a defect in the executor's power to sell is not a bona fide purchaser;[88] and if he has notice that the sale is made for a purpose other than that for which the will empowers the executor to sell, or is otherwise unauthorized, the legal title of the devisees is not divested.[89] The purchaser cannot safely disregard information which he cannot avoid receiving without extraordinary negligence.[90] However, it has been held that where an executor sells land, in excess of the power conferred by the will, to pay debts of the testator, the purchaser is subrogated to the rights of creditors, and can hold possession of the land as security for so much of the money as was paid on the debts.[91]

Where the sale is tainted with fraud and covin between the executor and the purchaser, it is absolutely void and the title to the property remains unchanged.[92]

Representative as bona fide purchaser. Even though a purchase by a representative at a sale by himself or by his corepresentatives pursuant to a power in the will is not set aside, still he is not a bona fide purchaser and is not entitled to protection as such.[93]

Purchaser from representative. Although a purchase by a representative at his own sale is voidable, see supra § 288, a deed from him conveying the property to a bona fide purchaser who pays a valuable consideration will pass title,[94] and after there has been such a conveyance by the representative, the original purchase by him will not be set aside.[95] However, a purchaser with notice takes only such rights as the representative acquired by his purchase.[96]

§ 294. Setting Aside Sale

a. In general
b. Persons entitled to attack sale
c. Proceedings

a. In General

In a proper case a sale of realty by the executor under a power conferred by the will may be set aside.

A sale of real estate by the executor under power conferred by a will which is imperfectly executed will be set aside.[97] A sale may be set aside because it was not adequately advertised and unfairness in the sale resulted from the fact,[98] or where the representative or his close relative was the purchaser.[99] Where a will authorized the executor to sell so much of the real estate as was necessary to pay the debts, and he sold the whole property for a sum more than three times the amount of the debts, it was held proper to set aside the sale as against a purchaser with notice.[1]

A purchaser who is one of the distributees is not entitled to have the sale set aside because the consideration was excessive and was regarded as excessive by the executor.[2]

Fraud. A false representation by the executor or administrator, selling without an order of court, to the effect that the sale is authorized by the will, entitles the purchaser who was thereby misled and induced to buy to a rescission of the contract in equity.[3] A sale may be set aside where it is made to appear that it is tainted with fraud and collusion between the executor and the purchaser by reason

v. Buckner, 215 S.W. 420, 185 Ky. 540.
24 C.J. p 185 note 80.

Sale of more land than necessary
Where executors empowered by will to sell land for payment of debts sold more than enough to pay all the debts of their testator, they were liable to the heirs therefor, but bona fide purchasers could not be affected.—Larue v. Larue, 3 J.J.Marsh., Ky., 156.

88. N.Y.—Brazill v. Weed, 190 N.Y. S. 43, 115 Misc. 546.

89. Ky.—Buckner v. Buckner, 215 S. W. 420, 185 Ky. 540.
24 C.J. p 185 note 82.

90. Ky.—Buckner v. Buckner, supra.
24 C.J. p 185 note 81.

91. S.C.—Mobley v. Jackson, 90 S.E. 23, 105 S.C. 450.

92. Ga.—Wright v. Zeigler, 1 Ga. 324, 44 Am.D. 656.

Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 540.

93. Ga.—Houston. v. Bryan, 1 S.E. 252, 78 Ga. 181, 6 Am.S.R. 252.
Pa.—Bruch v. Lantz, 2 Rawle 392, 21 Am.D. 458.

94. Idaho.—Swinehart v. Turner, 259 P. 3, 44 Idaho 461, citing **Corpus Juris.**
24 C.J. p 176 note 44.

95. Idaho.—Swinehart v. Turner, supra, citing **Corpus Juris.**
24 C.J. p 176 note 45.

96. Miss.—Belt v. Adams, 86 So. 584, 124 Miss. 194, suggestion of error overruled 87 So. 666, 125 Miss. 387.

97. Pa.—Early's Estate, 24 Pa. Dist. 153.
S.C.—Dunlap v. Dunlap, 4 S.C.Eq. 305.

98. N.J.—Owen v. Owen, 102 A. 812, 88 N.J.Eq. 353.

99. Cal.—In re Richards, 98 P. 528, 154 Cal. 478.

N.Y.—In re Fulton's Will, 2 N.Y.S.2d 917, 253 App.Div. 494—In re Segal's Estate, 11 N.Y.S.2d 306, 170 Misc. 673.

Fair sale for full value
Where, at an executor's sale pursuant to a power contained in the will, the executor is, either directly or indirectly, the purchaser, it is immaterial that he paid full value for the land, and that no actual fraud was intended, as such sale may be avoided in a suit by the interested parties.—Johnson v. Erickson, 194 N. W. 670, 110 Neb. 511.

1. Ky.—Tarpy v. Lexington & E. R. Co., 157 S.W. 726, 154 Ky. 345.

2. N.Y.—In re Bourne's Estate, 143 N.E. 214, 237 N.Y. 341, reversing 200 N.Y.S. 377, 206 App.Div. 762, modifying 195 N.Y.S. 500, 119 Misc. 43.

3. Ga.—Lowden v. Eskedor, 151 S.E. 385, 169 Ga. 672.
24 C.J. p 186 note 93.

of which the interests of the estate or of the heirs or devisees have been injuriously affected;[4] and it has been held that the mere fact that in conducting the sale the executor placed himself in antagonism to the interests of the devisees, by collusion with the real purchaser, was sufficient to entitle the devisees to have the sale set aside whether or not they were in fact prejudiced.[5] An heir attacking a sale by an executor empowered by the will to sell real estate devised to him in trust for beneficiaries and divide the proceeds, on the ground that the power of sale had failed as to the share which passed to the heir because of the invalidity of the gift of such share, may also question the sale on the ground of the fraud of the executor.[6]

In some states, jurisdiction of the probate court to set aside an executor's sale for fraud has been denied,[7] this being a matter of which equity takes jurisdiction;[8] but under some statutes the probate court is given this jurisdiction[9] unless the circumstances are such that the estate is no longer interested.[10]

Want or failure of consideration. Mere inadequacy of price is not usually considered a sufficient ground for setting aside a sale by an executor,[11] but it is otherwise where the inadequacy is so gross as to indicate fraud, undue advantage, improvidence, or an abuse of the power conferred.[12] In some states the fact that on a resale a sum at least ten per cent greater than that paid at the first sale, exclusive of the expenses of the resale, can be obtained, is a sufficient ground for setting aside the sale and ordering a resale.[13]

A sale may also be set aside for failure of consideration.[14] The mere fact that an executor received Confederate currency in payment for his testator's land sold by him was held not ground for setting the sale aside if the payment was made and received in good faith.[15]

b. Persons Entitled to Attack Sale

In a proper case, creditors, legatees, distributees, devisees, and heirs may attack a sale of realty made by the executor pursuant to a power contained in the will.

Creditors,[16] legatees,[17] or distributees[18] are in such immediate interest that if the proceeds of an improper, fraudulent, or improvident sale of realty by the executor under a power in the will are insufficient to settle their specific claims in full they may seek redress; but devisees[19] or heirs[20] are usually the persons injuriously affected by an improper sale, and these may proceed by virtue of their several interests, where the sale should be set saide. Even these, however, may be estopped to attack the

4. Neb.—Carden v. McGuirk, 196 N. W. 698, 111 Neb. 350.
24 C.J. p 186 note 94.

Simulated sale
A petition in a suit to coerce the payment of an annuity provided for in a will alleging that a sale had been simulated by the executor in order to defraud complainant of her annuity stated a cause of action as against the defense that a sale had been made pursuant to a power contained in the will.—Hall v. Bushnell, 95 So. 824, 209 Ala. 473.

5. Ky.—Larkin v. Crawford, 5 Ky.L. 326.

6. N.Y.—Bender v. Paulus, 90 N.E. 994, 197 N.Y. 369, affirming 105 N. Y.S. 240, 118 App.Div. 23.

7. N.Y.—Matter of Valentine, 23 N.Y.S. 289, 1 Misc. 491.
Wis.—Hawley v. Tesch, 39 N.W. 483, 72 Wis. 299.

8. N.Y.—Agne v. Schwab, 108 N.Y. S. 487, 123 App.Div. 746.
Wis.—Hawley v. Tesch, 39 N.W. 483, 72 Wis. 299.
24 C.J. p 186 note 87.

9. Pa.—In re Mulholland, 73 A. 932, 224 Pa. 536, 132 Am.S.R. 791.
24 C.J. p 186 note 88.

10. Pa.—Barber's Appeal, 18 A. 394, 126 Pa. 564.

11. N.J.—Owen v. Owen, 102 A. 812, 88 N.J.Eq. 353.
24 C.J. p 186 note 98.

12. Mo.—Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.
Pa.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422—In re Fritz' Estate, 7 Sch.Reg. 271.
24 C.J. p 186 note 99.

Court's discretion
Question of adequacy of price received for estate's property rests within sound discretion of orphans' court, which is not disturbed except for abuse.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422.

Consideration of present value
In determining whether agreement for sale of estate's property should be set aside for inadequacy, court should consider present value.—In re McCullough's Estate, supra.

Denial of specific performance
That residuary legatees, who were real parties in interest, did not appear or demand that more advantageous offer be accepted does not preclude orphans' court from denying specific performance of executor's contract for sale of realty under power in will at inadequate price.—In re Orr's Estate, 129 A. 565, 283 Pa. 476.

13. Cal.—In re Reed, 85 P. 155, 3 Cal.App. 142.
24 C.J. p 186 note 1.

14. W.Va.—White v. Bailey, 64 S.E. 1019, 65 W.Va. 573, 23 L.R.A.,N.S., 232.

15. Ala.—Blount v. Moore, 54 Ala. 360.

16. Vt.—Wetmore & Morse Granite Co. v. Bertoli, 88 A. 898, 87 Vt. 257.
24 C.J. p 187 note 4.

17. Mo.—Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.
24 C.J. p 187 note 5.

Judgment creditor of residuary legatee who was also executor was entitled to an order setting aside sale of realty devised by testatrix to the residuary legatee under evidence disclosing that sale was fictitious, alleged purchaser having no knowledge of proceeding or of the sale.—Bacheldor v. Syrcher, 25 N.Y.S.2d 467, 175 Misc. 845.

18. Ala.—Anderson v. Anderson, 64 Ala. 403.

19. Tex.—Holmes v. Stone, 51 S.W. 518, 21 Tex.Civ.App. 459.
24 C.J. p 187 note 7.

20. Ga.—Hamilton v. Cargile, 56 S. E. 1022, 129 Ga. 762.
24 C.J. p 187 note 8.

sale,[21] and this is the result where they have ratified or acquiesced in the sale, received their respective portions of the purchase money, or otherwise participated knowingly in the benefits of the transaction.[22]

Proceedings by the executor or administrator to set aside a sale may be upheld in a case where he himself is free from fault;[23] but an executor or administrator who becomes a party to improper dealings with the estate or who himself is culpable as to the occasion of setting the sale aside, especially when he receives the proceeds, cannot be heard in equity to impeach the sale of the land or to deny its validity.[24]

Strangers or third persons having no interest in the estate cannot make any attack on the sale.[25]

The remedy of a pretermitted child, with respect to realty conveyed by the executor, is by suit to quiet title or partition or both, and not, in the absence of fraud, by a suit to set aside the conveyance.[26]

c. Proceedings

A sale of realty by an executor under testamentary authority will not be set aside on objections to the final account of the executor. A proceeding to set aside the sale must be brought within the proper time and the general rules as to pleading, parties, and evidence usually apply.

A contention that a sale of real estate by an executor under testamentary authority should be set aside because made for an inadequate sum cannot be considered on objections to his final accounting.[27] Where there is no showing that plaintiff secured any part of the purchase price, the fact that there is no offer to return the price is immaterial,[28] nor is an attempt to secure the removal of the executor a condition precedent to the exercise by creditors of an insolvent estate of their right to set aside an unauthorized sale of realty.[29] A petition to set aside a sale of land which an executor had bought at his own sale will not be dismissed because another beneficiary had filed exceptions to the executor's account for the purpose of surcharging him with the profits of the sale nor because such exceptant had joined in the petition to set aside the sale.[30]

On a proceeding to set aside the sale for inadequacy of price, the court may require the petitioner to file a bond conditioned that the property will bring a higher price at a resale.[31]

Time. An action to set aside the sale may be barred by laches[32] or by the failure to institute the action within the time limited by the governing statute.[33]

Parties. The purchaser[34] as well as the executor must be made a party to proceedings to avoid a sale of real estate made by the executor.[35]

Pleadings. Complainant must make out a case for relief in his pleadings,[36] and a party is bound by the admissions in his pleadings.[37] A submission on the petition and answer admits the allegations of fact in the answer not in conflict with the accompanying exhibits.[38]

Evidence. General rules as to presumptions,[39]

21. Pa.—In re Schnebly, 94 A. 827, 249 Pa. 208.
24 C.J. p 187 note 9.

Conduct not relied on by purchaser
Legatees were not estopped to seek setting aside of sale of estate's property for inadequacy by remarks to third parties not acted on by purchasers.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422.

22. U.S.—Hussey v. U. S., Ct.Cl., 32 S.Ct. 33, 222 U.S. 88, 56 L.Ed. 106.
24 C.J. p 187 note 10.

23. Cal.—In re Richards, 98 P. 528, 154 Cal. 478.
24 C.J. p 187 note 11.

24. Wash.—Davis v. Ford, 45 P. 739, 46 P. 393, 15 Wash. 107.
24 C.J. p 188 note 12.

25. Md.—Boccuti v. Roycroft, 171 A. 35, 166 Md. 542.
24 C.J. p 188 note 13.

That distributees of estate objected to ratification of private sale by administrator did not affect right of party not interested in estate as creditor or distributee to object, where objection of distributees would not justify setting aside sale. —Boccuti v. Roycroft, supra.

26. N.M.—Smith v. Steen, 150 P. 927, 20 N.M. 436.

27. Or.—In re Conser, 66 P. 607, 40 Or. 138.
24 C.J. p 188 note 15.

28. Colo.—Cowell v. South Denver Real Estate Co., 63 P. 991, 16 Colo. App. 108.

29. Vt.—Wetmore & Morse Granite Co. v. Bertoli, 88 A. 898, 87 Vt. 257.

30. Pa.—Brittain's Estate, 28 Pa. Super. 144.
24 C.J. p 188 note 20.

31. Pa.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422—In re Apple's Estate, 31 Pa.Dist. & Co. 445, 52 York Leg.Rec. 18.

32. Neb.—Carden v. McGuirk, 196 N.W. 698, 111 Neb. 350.
Pa.—In re McCullough's Estate, 140 A. 865, 292 Pa. 177, costs retaxed 141 A. 239, 292 Pa. 422.
24 C.J. p 188 note 19.

33. Cal.—Campbell v. Drais, 57 P. 994, 125 Cal. 253.
24 C.J. p 188 note 18.

34. N.Y.—Davidson v. Buchanan, 149 N.Y.S. 640, 164 App.Div. 352.
Pa.—Dundas' Appeal, 64 Pa. 325.
24 C.J. p 188 note 21.

35. Colo.—Cowell v. South Denver Real Estate Co., 63 P. 991, 16 Colo. App. 108.
Pa.—Dundas' Appeal, 64 Pa. 325.
24 C.J. p 188 note 22.

36. Ky.—Simpson v. Simpson's Ex'x, 225 S.W. 495, 189 Ky. 536.
Tex.—Bain v. Coats, Civ.App., 228 S.W. 571, reversed on other grounds, Com.App., 244 S.W. 130.
24 C.J. p 188 note 23.

37. Ala.—Hughes v. Hughes, 6 So. 353, 87 Ala. 652.

38. Md.—Boccuti v. Roycroft, 171 A. 35, 166 Md. 542.

39. **Presumption as to debts of testator**
(1) Presumption is that testator has debts to be paid, in absence of anything to contrary.—Wood v. Bowden, 185 S.E. 516, 182 Ga. 329.

burden of proof,[40] admissibility,[41] and weight and sufficiency[42] of evidence, ordinarily apply in proceedings to set aside a sale of realty by the executor under a power contained in the will. Persons complaining of the exercise of a power of sale to pay debts have the burden of showing that there were no debts when the sale was made.[43]

Judgment and findings. On setting aside a purchase by the representative at his own sale, it is the duty of the court to adjust the equities between the parties.[44] When a representative's sale to himself is set aside by the court the annulment must be complete, it cannot be partial;[45] but a judgment setting aside such a sale affects only those who are before the court when it is rendered.[46] The court may set aside the sale only as to those heirs who seek to have it vacated.[47]

The court can render judgment based on a finding of fraud in the sale although there was no finding of fraud as to the contract pursuant to which the conveyance was made.[48] The failure to find that a sale was necessary did not render erroneous a judgment adjudging the validity of the sale by the executor, where the petition alleged the need of a sale.[49]

Review. Where a will gives the executor a power of sale of land, he has a right of appeal from an order setting aside a sale made under the power.[50]

Resale. Where a sale is set aside, the original purchaser has no standing to question the power of the court to direct a resale.[51]

§ 295. Divested Purchaser's Rights, Remedies, and Liabilities

Where an executor's sale of realty under testamentary authority is set aside, the purchaser is generally entitled to be restored to his former position.

A purchaser of realty from an executor must rely on the covenants in his deed,[52] or on the personal liability of the executor,[53] and cannot usually have relief against the heirs or devisees in case the property is lost to him through a defect of title or a lack of authority to sell in the executor.[54] However, restitution of the purchase money or payments made is favored in equity as far as possible, where an unauthorized sale is set aside, especially if the purchaser has parted with his consideration in good faith,[55] and the estate or the beneficiaries have received benefit therefrom;[56] and where debts of the estate have been paid out of the proceeds of an invalid sale, the divested purchaser is usually held to be entitled to be subrogated to the rights of the creditors and to be indemnified out of the land,[57] although this has been denied.[58]

On the setting aside of a sale by an executor or administrator the purchaser may be called on to account for rents and profits;[59] but he has been allowed reimbursements for necessary expenditures for the preservation of the property[60] and compensation for proper improvements,[61] although interest on the purchase money has been denied.[62] It has been held that where a sale of realty has been set aside because made to the representative's agent, the extent of the interest of the legatees ought to be as-

(2) Where executor advertises and makes sale for purported purpose of paying debts, presumption that there are debts to be paid obtains in favor of innocent purchaser, notwithstanding sale is made five years after testator's death.—Wood v. Bowden, supra.

40. N.Y.—Brazill v. Weed, 190 N.Y.S. 43, 115 Misc. 546.

41. Ga.—Thompson v. Thompson, 121 S.E. 225, 157 Ga. 377.

42. Conn.—Catanzaro v. Catanzaro, 18 A.2d 350, 127 Conn. 478.
Ky.—Buckner v. Buckner, 215 S.W. 420, 185 Ky. 520.
N.J.—Stumm v. Hackensack Trust Co., 150 A. 674, 106 N.J.Eq. 308.
N.Y.—In re Bourne's Estate, 143 N.E. 214, 237 N.Y. 341, reversing 200 N.Y.S. 377, 206 App.Div. 762, modifying 195 N.Y.S. 500, 119 Misc. 43—Brazill v. Weed, 190 N.Y.S. 43, 115 Misc. 546.
Tex.—Fernandez v. Cano, Civ.App., 108 S.W.2d 310, error dismissed—Bain v. Coats, Civ.App., 228 S.W. 571, reversed on other grounds, Com.App., 244 S.W. 130.

43. Tex.—Terrell v. McCown, 43 S.W. 2, 91 Tex. 231, reversing, Civ.App., 40 S.W. 54.

44. Ill.—Stickel v. Crane, 59 N.E. 595, 189 Ill. 211.
24 C.J. p 189 note 29.

45. Ga.—Pirkle v. Cooper, 39 S.E. 289, 113 Ga. 828.

46. Ga.—Pirkle v. Cooper, supra.

47. Ga.—Arnold v. Arnold, 113 S.E. 798, 154 Ga. 195.

48. Tex.—Bain v. Coats, Civ.App., 228 S.W. 571, reversed on other grounds, Com.App., 244 S.W. 130.

49. N.Y.—Bender v. Paulus, 90 N.E. 994, 197 N.Y. 369, affirming 105 N.Y.S. 240, 118 App.Div. 23.

50. Iowa.—In re Bagger, 42 N.W. 639, 78 Iowa 171.

51. Cal.—In re Reed, 85 P. 155, 3 Cal.App. 142.

52. Ky.—Nicholas v. Jones, 3 A.K. Marsh. 385.
Me.—Spring v. Parkman, 12 Me. 127.
24 C.J. p 189 note 33.

53. Tenn.—Frazier v. Tubb, 2 Heisk. 662.
24 C.J. p 189 note 34.

54. Ky.—Nicholas v. Jones, 3 A.K. Marsh. 385.
Tex.—Coy v. Gaye, Civ.App., 84 S.W. 441.

55. Ill.—Stickel v. Crane, 59 N.E. 595, 189 Ill. 211, 219.
24 C.J. p 189 note 36.

56. N.Y.—Carideo v. Austin, 84 N.Y.S. 777, 88 App.Div. 35.
24 C.J. p 189 note 37.

57. Tex.—Loving v. Clark, Civ.App., 228 S.W. 590.
24 C.J. p 189 note 38.

58. N.J.—Hampton v. Nicholson, 23 N.J.Eq. 423.

59. S.C.—Hunter v. Hunter, 41 S.E. 33, 63 S.C. 78, 90 Am.S.R. 663.
24 C.J. p 189 note 40.

60. La.—Wood v. Nichols, 33 La. Ann. 744.
24 C.J. p 190 note 41.

61. La.—Wood v. Nichols, supra.

62. Or.—Layton v. Hogue, 5 Or. 93.
24 C.J. p 190 note 43.

certained by a proper account, so that the purchaser may if he thinks proper remove the interest by paying to them the unsatisfied parts of their legacies.[63]

§ 296. Liabilities of Executor or Administrator

The executor must account for the consideration received on the sale of realty under testamentary authority.

An executor or administrator selling land pursuant to testamentary authority is chargeable with the consideration acknowledged or shown to have been received by him in the transaction,[64] and any profit arising from such a sale beyond his just recompense belongs properly not to the representative personally, but to those beneficially interested in the estate.[65] He is ordinarily to be charged only with what was actually obtained or received by him;[66] and as he is required to exercise, in making the sale, merely such care as a reasonably prudent man would exercise in conducting his own affairs,[67] he is not, in the absence of fraud or negligence, liable for selling at a price less than what might have been obtained.[68] However, he may be surcharged in his account with such price as he ought to have obtained rather than with that which was actually realized, where culpable negligence or misconduct on his part induced a loss,[69] or where he or his close relative was the purchaser,[70] and he must also account for the profits made by a resale of the property to a bona fide purchaser;[71] but he is not chargeable with the value of land bid off by him at his sale, but lost through want of title in the testator.[72] Where the personal representative has improperly become the purchaser at a sale unnecessarily made by him, the heirs or devisees have a remedy in equity against him to compel a reconveyance of the property or a payment of the excess of the value, as ascertained by a second sale, over the price paid.[73]

An agreement by an executor in a contract of sale to buy off the widow's dower right or to pay off encumbrances created by the testator binds, not the estate, but only the executor personally.[74] If the executor makes false representations concerning the land he is to sell he is personally liable;[75] but an executor who sells real estate under a power in the will does not become personally liable in case of a failure of title.[76] Executors who have conveyed, under a power of sale, land of which their testator was in equity a mere trustee are liable as such to the person having the equitable title to such land for the damages sustained by him to the extent of the purchase money.[77] An executor may be held personally liable for loss arising from his failure to sell land as directed in the will.[78]

63. Va.—Buckles v. Lafferty, 2 Rob. 292, 41 Va. 292, 40 Am.D. 752.

64. Ky.—Speed v. Nelson, 8 B.Mon. 499.
24 C.J. p 190 note 46.

65. Pa.—Rosenberger's Appeal, 26 Pa. 67.
24 C.J. p 190 note 47.

66. Ala.—Grist v. Carswell, 165 So. 102, 231 Ala. 442.
24 C.J. p 190 note 48.

67. Va.—Shepherd v. Darling, 91 S.E. 737, 120 Va. 586.
Manner and conduct of sale see supra § 284.

68. Pa.—In re Earle's Estate, 30 Pa. Dist. & Co. 692—In re Fritz' Estate, 7 Sch.Reg. 271.
S.C.—Blackmon v. Blackmon, 101 S.E. 827, 113 S.C. 478.
24 C.J. p 190 note 50.

Where testator directs his executor to sell and convey coal underlying lands, with the usual mining privileges, the executor cannot be surcharged with money which he could have obtained by conveying the coal by a deed containing a waiver and release of the right of the surface and lateral support.—Allshouse's Estate, 23 Pa.Super. 146.

69. N.Y.—Matter of Vandvort, 40 N.Y.S. 791, 8 App.Div. 341.
24 C.J. p 190 note 51.

70. Mich.—In re Rahn's Estate, 216 N.W. 378, 379, 241 Mich. 29, quoting **Corpus Juris.**
N.Y.—In re Segal's Estate, 11 N.Y.S. 2d 306, 170 Misc. 673.
Pa.—Dundas' Appeal, 64 Pa. 325—In re Apple's Estate, 31 Pa.Dist. & Co. 445, 52 York Leg.Rec. 18.
24 C.J. p 176 note 46.

71. Wis.—In re McClear, 132 N.W. 539, 147 Wis. 60.
24 C.J. p 176 note 47.

After sale for fair price

Where an executor pays a full and fair price at a sale of land of the estate, where there was competitive bidding and no evidence to warrant that any advantage was taken or profit acquired by the executor by and through any use or abuse of his trust, such executor cannot be held liable to the estate for the price realized at a subsequent resale, when by the course of events the property had increased in value.—Blackmon v. Blackmon, 101 S.E. 827, 113 S.C. 478.

72. Vt.—Hapgood v. Jennison, 2 Vt. 294.

73. Mass.—Jennison v. Hapgood, 7 Pick. 1, 19 Am.D. 258.

74. N.Y.—Bostwick v. Beach, 31 Hun 343, affirmed 9 N.E. 41, 103 N.Y. 414, 25 N.Y.Wkly.Dig. 98.

75. Mo.—Cory v. Conqueror Trust Co., App., 86 S.W.2d 611.
24 C.J. p 190 note 53.

76. N.C.—Twitty v. Lovelace, 2 S.E. 661, 97 N.C. 54.

77. N.Y.—Wall v. Kellogg, 16 N.Y. 385.

78. N.Y.—Haight v. Brisbin, 3 N.E. 74, 100 N.Y. 219.

Discretionary power of sale

Where general intention of testator was that realty which he devised in trust with remainder in absolute ownership, should be held within trust subject to discretionary and not imperative power of sale, failure of executors and trustees to sell the realty during period covered by accounting could not be made basis of surcharge.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.

Liability for selling mortgaged realty subject to mortgage

(1) Liability of executrices who sold mortgaged realty subject to mortgage must be determined by law in force during their administration.—In re Rogers' Estate, 273 N.Y.S. 1, 241 App.Div. 553, affirming 255 N.Y.S. 745, 142 Misc. 572.

Where the estate loses the benefit of an advantageous sale by the executor's failure to have the purchaser execute a memorandum, the executor is personally liable for the loss.[79]

4. Lease and Mortgage

§ 297. Lease

a. In general
b. Term
c. Recovery of rent
d. Recovery of possession; waste
e. Rights of lessee
f. Duty to rent and liability of representative

a. In General

As a general rule an executor or administrator has no authority to lease his decedent's realty, unless authorized to do so by virtue of testamentary or statutory provisions or an order of court.

As a general rule an executor or administrator is without authority to lease his decedent's land,[80] but such power may exist by virtue of testamentary or statutory provisions or an order of court,[81] or by reason of the terms of a prior lease existing at the time of decedent's death.[82] If such authority is conferred at all it must be strictly pursued,[83] otherwise the rights of heirs, devisees, or other benefici-

(2) Any liability of executrices-legatees to one who some two years later acquired mortgage, subject to which executrices had sold decedent's realty, must be asserted in manner prescribed by statute for pursuing assets of estates into hands of distributees, and not by proceeding to reopen an accounting, reinstate the executrices, and surcharge their account for amount of deficiency judgment obtained against the executrices as such long after their discharge.—In re Rogers' Estate, supra.

79. Ky.—Melheiser v. Central Trust Co. of Owensboro, 36 S.W.2d 377, 237 Ky. 757.

80. Ark.—Bingham v. Rhea, 143 S.W.2d 1087, 201 Ark. 200.
N.Y.—In re Schroder's Will, 29 N.Y.S.2d 754, 176 Misc. 1024.
Ohio.—Swingle v. Staker, 14 Ohio App. 241.
Tenn.—Edwards v. McCall, 10 Tenn. App. 276.
24 C.J. p 190 note 57.

81. U.S.—Globe & Rutgers Fire Ins. Co. v. Rose, C.C.A.Neb., 91 F.2d 635, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
N.Y.—In re Wells' Will, 26 N.Y.S.2d 604.
Tex.—Morrell v. Hamlett, Civ.App., 24 S.W.2d 531, error refused.
24 C.J. p 191 note 58.
Duty to rent realty of decedent see infra subdivision f of this section.

Derivation of power

The power of an executor to lease is derived only from the express terms of the will or the statutes.—In re Fleshman's Estate, 5 P.2d 727, 51 Idaho 312.

Power conferred by will

(1) Will giving testatrix' foster son "revenue" from estate, and giving executor full power to administer estate in son's interest, gave management to executor, and therefore lease by executor was valid.—In re Jensen's Estate, 247 N.W. 392, 216 Iowa 15.

(2) Active executors were authorized by will to bind estate by extending term of mining lease, but not to remit any part of agreed price for such extension.—House v. Moore, Tex.Civ.App., 271 S.W. 244.

(3) Other cases see 24 C.J. p 191 note 58 [a].

Oil and gas lease

(1) Where the will did not confer the power of sale on the executor he was without authority to grant an oil and gas lease, as such a lease conveys an interest in the land itself.—Smith v. Womack, Tex.Civ. App., 231 S.W. 840, dismissed for want of jurisdiction.

(2) Other cases see 24 C.J. p 191 note 58 [f].

Conflict of statutes

Statute providing for renting of real estate by executor or administrator for purpose of paying debts does not conflict with statute relative to management by executor or administrator of neglected real estate needing care and attention until such time as the heirs or legatees appear.—Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.

Signature as representative

Where lease giving lessees right to renew for additional term of one year showed on its face that it was made on behalf of deceased's estate, failure of executor in signing lease to add his official title to signature did not prevent estate from being bound thereby.—Courts v. Golden, 12 N.Y.S.2d 621, 257 App. Div. 31.

Notice of application for order to lease

In jurisdictions where an order of court authorizing the lease is required, an application to lease the real estate must be on notice to those interested in the property.—Martin v. Neal, 25 N.E. 813, 125 Ind. 547.

82. **Lease containing renewal provision**
Wash.—In re Mundt Estates, 14 P.2d 59, 169 Wash. 593.

83. Idaho.—In re Fleshman's Estate, 5 P.2d 727, 728, 51 Idaho 312, citing **Corpus Juris.**
24 C.J. p 191 note 59.

Necessity for approval by court

(1) The statutes authorizing an executor to rent land belonging to estate authorize the renting of land by an executor without an order of the probate court approving the rent contract.—Maddox v. Smart, Tex.Civ. App., 140 S.W.2d 579, error refused.

(2) Where executor was directed to "use" revenues of the estate for certain purposes, leases could be made only with probate court's approval.—In re Fleshman's Estate, 5 P.2d 727, 51 Idaho 312.

Cancellation of contract renting land

The statute providing for approval or disapproval of an executor's report of a contract renting land belonging to estate does not authorize the cancellation of such contract or determination of rental value by probate court as against executor's lessee merely on ground that probate court is of opinion that amount of rent agreed on between executor and lessee is insufficient.—Maddox v. Smart, Tex.Civ.App., 140 S.W.2d 579, error refused.

To whom land may be leased

(1) Lease by executor to own son is illegal.—In re Fleshman's Estate, 5 P.2d 727, 51 Idaho 312.

(2) Administrator's lease of estate's property to partner is improper.—In re Laberee's Estate, 269 P. 861, 126 Or. 301.

Adequacy of rent

Rent of five thousand dollars per year for trust property worth one

aries in such property are not controlled or concluded.[84] The executor is bound by directions given him by the testator,[85] and can lease only in accordance with the conditions prescribed.[86]

A court order permitting the execution of a lease on the petition of an unauthorized person is void and will not support the lease.[87]

A power to sell does not authorize the making of a lease of the property.[88]

The acquiescence of heirs or devisees, or their waiver of their rights, may operate to validate the acts of an executor or administrator in leasing the lands of decedent,[89] but it has been held that the trustees of a residuary estate are not estopped to maintain an action to enjoin the executrix from leasing and collecting rents from residuary real estate by acquiescence in previous acts of the executrix of the same character.[90]

Upholding lease as individual lease. Where a widow and executrix who was also the sole legatee and devisee, except as to two dollars left to testator's children, executed a lease to property styling herself "administratrix and executrix" of the estate, without any order of court, it was held that as the property had become hers under the will, and the lease thus became her individual contract, she could elect to treat the words "administratrix and executrix" as words of personal description, so that the lease should be good as her individual lease.[91]

Where an administrator is also a coheir and codevisee, his lease of the realty without authority is an act in his capacity as a tenant in common with his coheirs and codevisees and not as administrator.[92] An administratrix who executes a lease individually and as administratrix is bound individually as to her interest in the property as much as though she had made a separate lease.[93]

Appointment of receiver to rent land. In a case where a large amount of vacant land formed a part of the estate, it was held proper to appoint a receiver to rent the land, pending an action by the executor to construe the will, to allot dower to the widow, and to settle the estate.[94]

b. Term

Leases of realty by executors and administrators should ordinarily be for short terms and should not extend beyond the time prescribed by statute or by the will,

hundred fifteen thousand dollars, four fifths of which was leased by administrator to lessee, was adequate, where lessee advanced seven years' rent without interest to rebuild building which was destroyed by fire, and invested nineteen thousand dollars in improvements, which made the rent about the average paid in best business block in the city, notwithstanding rents advanced after lease was executed and lessee subleased space at rate in excess of what it was paying.—Carter v. Boone County Trust Co., Mo., 92 S.W.2d 647.

Excuse for laches in applying for leave

Where intestate died on November 28, 1935, administrator was granted letters on November 22, 1937, and administrator filed petition asking for decree to lease intestate's realty on April 17, 1939, administrator's delay was excused by his desire, if possible, to obtain payment of intestate's debts and funeral expenses without instituting any proceeding, and thus save all parties expense.—In re Lindsay's Estate, 18 N.Y.S.2d 800.

84. Iowa.—Cohen v. Hayden, 157 N. W. 217, 180 Iowa 232.
La.—Chighizola v. Le Baron, 21 La. 406.

85. Mass.—Chapman v. Cloutier, 24 N.E.2d 517, 304 Mass. 621.

86. Mass.—Chapman v. Cloutier, supra.

87. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.

Special administrator

Where order appointing bank special administrator was void, lease of estate lands executed by such special administrator was likewise void.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

Persons entitled to make lease

(1) Evidence that executrix who had leased land in which decedent owned undivided interest obtained order for sale of premises to pay debts subject to rights of lessee, that rent was paid to her and to the owners of the other undivided interest, and that no one interested in the land questioned her right to receive the rents, showed that she was in legal possession so as to have authority to make the lease.—Wright v. Zachgo, 271 N.W. 512, 222 Iowa 1368.

(2) Lease by agent for administratrix, with her acquiescence, put tenant in possession of the leased premises under lease from the estate.—Kuhns v. Marvel Paint Stores, 206 N.W. 513, 233 Mich. 108.

88. N.Y.—In re Schroder's Will, 29 N.Y.S.2d 754, 176 Misc. 1024.
24 C.J. p 191 note 62.

89. Cal.—Tide Water Associated Oil Co. v. Curtin, 107 P.2d 945, 950, 41 Cal.App.2d 884, quoting Corpus Juris.
24 C.J. p 191 note 63.

Acceptance of rent

(1) Beneficiary of trust created by will is estopped to deny right of administrator to execute lease whereby seven years' rent was advanced by lessee and used to help rebuild building which had been destroyed by fire, where beneficiary did not object to lease when made and accepted income derived from building from other tenants without objection for seven years.—Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629.

(2) Other cases see 24 C.J. p 191 note 63 [a].

Void or voidable act of representative

The heirs of an estate may ratify not only voidable but also void acts of the administrator including his leasing of land of decedent.—Tide Water Associated Oil Co. v. Curtin, 107 P.2d 945, 41 Cal.App.2d 884.

90. N.Y.—Stevens v. Stevens, 23 N. Y.S. 520, 69 Hun 332.

91. Ark.—Pine Bluff Aerie No. 209 F. O. E., 122 S.W. 655, 91 Ark. 284.

92. N.Y.—Fidelity & Deposit Co. v. Doughtry, 179 So. 846, 181 Misc. 586.

93. Cal.—Tide Water Associated Oil Co. v. Curtin, 107 P.2d 945, 41 Cal.App.2d 884.

94. Ky.—Clay v. Anderson, 132 S. W. 1039, 141 Ky. 455.

although a lease for an unauthorized term may be ratified by the heirs.

Leases of realty by executors or administrators, when authorized, should ordinarily be for short terms,[95] and under some statutes the term of the lease may not extend beyond the time when the debts against the estate have been paid and the estate settled.[96] Under statutes restricting the power to lease to the period allowed for the settlement of an estate, any lease made for a definite term is subject to termination by the final settlement of the estate and discharge of the representative.[97] A statute providing that no executor shall rent the real estate, unless ordered by the probate court to do so for a term not exceeding two years, does not mean that the executor, at the expiration of two years from the date of the order of court, ipso facto loses all control or interest in the land, but only that he may not rent the land for a longer term.[98] A lease for a long period of time may be sustained if it is within the power granted by the will.[99]

A lease for a term longer than the authorized period is voidable rather than void[1] and may be ratified by the heirs.[2]

c. Recovery of Rent

A personal representative's power to lease realty includes the power to receive and collect rent and the tenant cannot dispute the representative's power to lease.

A power in the personal representative to lease carries with it the power to receive and collect rent;[3] and a tenant who takes possession under a lease from the representative[4] and pays rent thereunder[5] cannot dispute the representative's power to make the contract and is liable for the rental agreed on.[6] Where the power to lease exists, an invalid option to purchase given in connection with the lease does not prevent a recovery of the rent.[7] However, a lessee from an administrator without authority to lease the premises is not required to pay rent thereon after he has vacated the premises following a sale thereof on petition of the heirs, even though the sale was not confirmed by the court.[8]

A lessee from an executor cannot purchase judgments against the testator and set them off against the rent unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate.[9]

d. Recovery of Possession; Waste

While the estate remains unsettled the personal representative is the proper party to sue to recover possession of realty leased by him. A representative who has no interest as an individual in the property may sue on covenants in the lease against committing waste.

The personal representative is the proper person to bring an action to recover possession from a tenant holding under a lease of realty from him, while the estate remains unsettled;[10] and the tenant can-

95. Mo.—Lass v. Eisleben, 50 Mo. 122.
Philippine.—Tinton v. Martinez, 5 Philippine 477.

96. U.S.—Globe & Rutgers Fire Ins. Co. v. Rose, C.C.A.Neb., 91 F.2d 635, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.
Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.
Neb.—Jackson v. O'Rorke, 98 N.W. 1068, 71 Neb. 418.

97. Cal.—Doolan v. McCauley, 6 P. 130, 66 Cal. 476.
24 C.J. p 192 note 70.

98. Mo.—Spicer v. Spicer, 155 S.W. 882, 249 Mo. 582, Ann.Cas.1914D 238.

99. Mo.—Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629.

Lease for fifty years

Lease given by administrator for fifty years on property held in trust created by will, providing that income from leased property should be divided between testator's grandchildren, is valid, where lease provided that it was subject to provisions of will and lessees did not claim lease could survive termination of trust.—Carter v. Boone County Trust Co., supra.

1. U.S.—Globe & Rutgers Fire Ins. Co. v. Rose, C.C.A.Neb., 91 F.2d 635, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.
Neb.—Muller v. Harms, 221 N.W. 898, 117 Neb. 657.

2. U.S.—Globe & Rutgers Fire Ins Co. v. Rose, C.C.A.Neb., 91 F.2d 635, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.
Cal.—Tide Water Associated Oil Co v. Curtin, 107 P.2d 945, 41 Cal. App.2d 884.
Neb.—Muller v. Harms, 221 N.W. 898, 117 Neb. 657.

Written ratification

Where the term of the lease exceeds the term fixed by statute, the owner may ratify the act of the representative, but the ratification must be in writing.—King v. Myers, 60 Pa.Super. 345.

3. Conn.—Metzger v. Klanko, 120 A. 591, 98 Conn. 764.
N.Y.—Morse v. Morse, 85 N.Y. 53.
24 C.J. p 192 note 71.

4. Tenn.—Caldwell v. Harris, 4 Humphr. 24.
24 C.J. p 192 note 72.

5. Ark.—Hamilton Coal & Coke Co. v. Johns, 1 S.W.2d 812, 175 Ark. 1146.

6. Tex.—House v. Moore, Civ.App., 271 S.W. 244.

Conflicting agreement not supported by consideration

Where testator's legal representatives acknowledged receipt and application to estate's uses of full consideration for mining lease for original term, and permitted lessee to hold over, operate, and improve property after expiration of term without prompt payment of additional compensation called for in extension provision in original lease agreement, the estate was bound, although extension agreements not supported by consideration were made after execution of the original lease agreement; but lessee was liable for stipulated compensation in original agreement.—House v. Moore, supra.

7. Pa.—Moore v. Trainer, 97 A. 462, 252 Pa. 367.

8. Tenn.—Edwards v. McCall, 10 Tenn.App. 276.

Tenant entitled to cancellation of rent notes

Tenn.—Edwards v. McCall, supra.

9. Va.—White v. Bannister, 1 Wash. 166, 1 Va. 166.

10. Iowa.—Wright v. Zachgo, 271 N.W. 512, 222 Iowa 1368.
24 C.J. p 192 note 74.

not defeat a judgment for recovery of possession of the property and impeach the personal representative's title by setting up an outstanding legal title in another, without first surrendering to the representative the possession obtained under the tenancy.[11]

A trustee appointed by a court of competent jurisdiction to administer a trust created by the will and a purchaser from such trustee are entitled to recover possession of realty belonging to the trust estate as against a lessee of the administrator with the will annexed, who took no interest in the real estate by virtue of his appointment.[12]

Actions for waste. Although an executor who has no interest as reversioner cannot maintain an action against a lessee for waste committed on premises leased by him, he may maintain an action on covenants in the lease against committing waste.[13]

e. Rights of Lessee

Where a lease of realty executed by the personal representative is void, the lessee may be entitled to a return of the consideration paid.

Where a lease of realty executed by a personal representative is void because of the invalidity of his appointment, the lessee, never having exercised any rights under the lease, is entitled to recover the consideration paid;[14] in such case the rule of caveat emptor does not apply.[15] However, the doctrine of caveat emptor is applicable in so far as the estate's title to the demised property is concerned;[16] an executor's or administrator's lease does not imply any covenant of quiet enjoyment,[17] and, if the lessee loses part or all of the land, he cannot recover back from the estate the rent paid or any portion thereof.[18]

Changing terms of lease. Until the lease expires, the executor or administrator cannot, without the consent of the lessee, change the terms of a lease made by a prior executor or administrator.[19]

f. Duty to Rent and Liability of Representative

A personal representative, authorized to lease the decedent's realty, is not chargeable with neglect merely by his failure to lease the property, but he must exercise ordinary prudence in determining whether the premises should be leased.

Although an executor or administrator may be authorized by statute to lease the realty of decedent, he is not chargeable with neglect merely by his failure to lease the property.[20] In determining whether the premises should be leased, he must exercise ordinary prudence in the light of the surrounding circumstances.[21] Where he possesses the real estate only for the purpose of using the funds derived therefrom to pay charges against the estate, an abundance of other assets to pay such charges may justify him in permitting the heirs to occupy the lands without charge, even in the absence of permission from the court;[22] but where he has reason to anticipate that the estate cannot be settled for a considerable period of time, ordinary prudence requires that he make a reasonable attempt to rent the real estate in his possession.[23] An administrator who has power to rent out real estate, but through whose negligence it is not rented, is chargeable with the rental value,[24] at least where the assets of the estate are insufficient to discharge the valid claims against it;[25] but where executors are given a naked power to sell real estate, without the

11. Ala.—Carson v. Rains, 187 So. 707, 237 Ala. 534.

12. Ill.—Dixon v. Nefstead, 2 N.E. 2d 135, 285 Ill.App. 463.

13. Ill.—Page v. Davison, 22 Ill. 111.

14. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.

Ratification by heirs

Where lease executed by administrator was void, agreement, to which lessee was not a party, executed by administrator and heirs and ratifying acts of administrator, was insufficient to validate lease and to prevent lessee's recovery of consideration paid, in view of statutory provision that no unauthorized act can be made valid retroactively to prejudice of third persons without their consent.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

Estoppel

(1) Lessee, never having exercised any rights under lease and having, on learning that appointment was invalid, made repeated demands, first, for valid lease and then for its money, and having warned administrator that it would be held responsible for the money, was not estopped from asserting invalidity of lease and demanding repayment of consideration given.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

(2) Lessee was not concluded, by order settling and approving administrator's account, from demanding of special administrator repayment of consideration since lessee, not being person interested in estate, and not being able to contest account, was not bound by order of settlement.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

15. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

16. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, supra.

17. Cal.—Miller v. Gray, 68 P. 770, 136 Cal. 261.
24 C.J. p 192 note 77.

18. Cal.—Miller v. Gray, supra.

19. Mich.—Kuhns v. Marvel Paint Stores, 206 N.W. 513, 233 Mich. 108.

20. Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.

21. Conn.—Hall v. Meriden Trust & Safe Deposit Co., supra.

22. Conn.—Hall v. Meriden Trust & Safe Deposit Co., supra.

23. Conn.—Hall v. Meriden Trust & Safe Deposit Co., supra.

24. Ala.—James v. Faulk, 54 Ala. 134.

25. Conn.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.

legal title or the right to possession, they are not liable for the rents which might have been made by leasing the same until a sale could be made.[26] Where an executor contracts to lease the real estate, under a power in the will, and dies before performance, his own estate is not liable for the breach.[27]

If the representative rents out the land of his decedent he holds the rent collected as assets of the estate, and for the use of those legally entitled to it,[28] and he cannot escape liability therefor by setting up that he leased the land without authority.[29] He is not liable for losses of rent which could not have been avoided by the exercise of good faith and ordinary prudence and diligence;[30] nor is he chargeable with unlawful renting of the land where, in the mistaken belief that the lease is for a longer term than it actually is, he permits the lessee to hold over after its expiration, without a new lease being executed and without the approval of the probate judge, where it is not shown that the rent was inadequate or that the estate suffered thereby;[31] but for losses resulting from his fraud or culpable negligence, whether in reference to collection, taking security, or otherwise, he is liable.[32]

An executor or administrator who enters into a lease without authority is personally liable thereon.[33] Under some statutes an executor who may rent the property without first obtaining a court order approving the rental contract may avoid personal liability by obtaining an order of approval prior to renting it.[34]

§ 298. Mortgage

a. In general
b. Authorization by court
c. Stipulations and provisions of mortgage; construction
d. Title, rights, and liabilities of mortgagee
e. Right to attack mortgage
f. Personal liability of representative
g. Effect of unauthorized mortgage

a. In General

Unless authorized by statute or by the terms of a will, a personal representative may not mortgage the decedent's realty, although the consent or acquiescence of the beneficiaries may validate an unauthorized mortgage.

The personal representative cannot, merely by virtue of his office, mortgage the lands of his decedent,[35] even though the money obtained thereby is for the benefit of the estate;[36] and where there is no statutory authorization for the administrator to mortgage the realty of the estate, the obtaining of a court order authorizing such a transaction will not render the mortgage valid.[37]

However, authority to mortgage decedent's realty may be and frequently is conferred by will, or by statute authorizing this to be done pursuant to an

26. W.Va.—Dunn v. Renick, 10 S.E. 810, 33 W.Va. 476.

27. Pa.—Hauck v. Stauffer, 31 Pa. 235.

Representatives of deceased executors or administrators see infra §§ 1048, 1049.

28. Tex.—Morrell v. Hamlett, Civ. App., 24 S.W.2d 531, error refused.
24 C.J. p 192 note 79.

Under power to sell

In jurisdictions where a direction in a will to sell land works an equitable conversion of it into personalty as of the date of the death of the testator, executors who lease realty which the will directs them to sell have the responsibility of accounting for the rent as part of the assets of the estate.—Ihle v. Ihle, 270 N.W. 452, 222 Iowa 1086.

29. Ala.—Terry v. Ferguson, 8 Port. 500.

Mo.—Hartnett v. Fegan, 3 Mo.App. 1.

30. Ala.—Patapsco Guano Co. v. Ballard, 19 So. 777, 107 Ala. 710, 54 Am.S.R. 131.
24 C.J. p 192 note 81.

31. Idaho.—Hubbard v. Ball, 81 P. 2d 73, 59 Idaho 78.

32. Or.—In re Laberee's Estate, 269 P. 861, 126 Or. 301.

Tex.—Morrell v. Hamlett, Civ.App., 24 S.W.2d 531, error refused.
24 C.J. p 193 note 82.

Liability for fair rental value

Administrator, who leased farm property of estate to partner, was chargeable with fair rental value for entire period, regardless of rent actually paid.—In re Laberee's Estate, 269 P. 861, 126 Or. 301.

Costs of collection

Estate fiduciaries, acting as officers of corporation owning realty, must seek rent collection service at market price and will be surcharged for loss from diminution of income by payment of more than such price on proper objection.—In re Witkind's Estate, 4 N.Y.S.2d 933, 167 Misc. 885.

33. Iowa.—Cohen v. Hayden, 157 N. W. 217, 163 N.W. 238, 180 Iowa 232.

Liability to tenant for overpayment of rent

While tenant cannot deny authority of landlord's agent to execute lease, executor executing lease for estate without authority under will or statute or from court is personally liable to tenant for overpayment of rent where estate has not received benefit of rent paid.—Cheyne v. Quackenbush, 199 N.W. 367, 198 Iowa 420.

34. Tex.—Maddox v. Smart, Civ. App., 140 S.W.2d 579, error refused.

35. Ala.—Scott v. Mussafer, 134 So. 857, 223 Ala. 153

Cal.—Meier v. Hayes, 67 P.2d 120, 20 Cal.App.2d 451.

Fla.—Evans v. Tucker, 135 So. 305, 101 Fla. 688, 85 A.L.R. 170.

Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.

Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740, 743, quoting **Corpus Juris.**
24 C.J. p 193 note 88.

Mortgage or pledge of personalty see infra § 303.

Consent of remaindermen

Executor, under will devising real estate to widow with remainder to children, may not mortgage real estate without remaindermen's consent.—Bowling v. Bank of New Haven, 294 S.W. 499, 219 Ky. 731.

36. Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.

37. Ga.—Field v. Manly, supra.

order of, or license from, the probate court.[38] A power to mortgage need not be expressed in the will, but may be implied from the powers and instructions given therein to the executor,[39] and an express power may be extended by implication to property other than that designated.[40] A power given by will can, of course, be exercised only when the circumstances contemplated by the will arise,[41] and only for the purposes for which it is given,[42]

38. Hawaii.—In re Beckley's Estate, 31 Hawaii 163.
Iowa.—In re Christensen's Estate, 290 N.W. 34, 227 Iowa 1028.
Mass.—Altobelli v. Montesi, 15 N.E. 2d 463, 300 Mass. 396.
N.Y.—In re Wells' Will, 26 N.Y.S.2d 604.
N.C.—Caffey v. Osborne, 186 S.E. 364, 210 N.C. 252.
Pa.—Farmers Trust Co. of Lancaster v. Schlotzhauer, 179 A. 227, 319 Pa. 125.
Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740, 743, quoting **Corpus Juris.**
24 C.J. p 193 note 89, p 550 note 94 [a].
Necessity for order of court see infra subdivision b of this section.

Applicability of statute
The statute governing sale and mortgage of decedent's lands when personalty is insufficient to pay debts is inapplicable where will provides for equitable conversion and sale of realty, and executor is continuing testator's business under court supervision and with the consent of all interested parties.—Ottstadt v. Jardine, 281 N.W. 644, 229 Wis. 85.

Construction of testamentary power
(1) The fact that final clause of paragraph of testator's will which authorized executor to execute mortgage directed that proceeds of mortgage should be invested did not diminish the power granted, nor limit the executor to execution of a mortgage for investment purposes only.—In re Clyde's Estate, 198 A. 640, 329 Pa. 552, 115 A.L.R. 1412.

(2) Other cases see 24 C.J. p 193 note 89 [b].

Successive mortgages
Where power to mortgage is given to the executor, it is not exhausted by a single exercise, but he may execute successive mortgages on the property.
U.S.—Ames v. Holderbaum, C.C. Iowa, 44 F. 224.
Iowa.—Iowa Loan & Trust Co. v. Holderbaum, 52 N.W. 550, 86 Iowa 1.

Trust deeds
(1) Section of statute relative to execution of trust deeds by executors, administrators, and guardians confers on such persons right to execute trust deeds.—Schwan v. Superior Court in and for Orange County, 266 P. 532, 204 Cal. 61.

(2) Abortive attempt to amend one section of statute relative to execution of trust deeds by executors and administrators does not preclude execution under other section sufficient to authorize exercise of such power without amended section.—Schwan v. Superior Court in and for Orange County, supra.

(3) Statute permitting execution of trust deeds by executors and administrators is applicable, although decedent died prior to passage of amendment.—Schwan v. Superior Court in and for Orange County, supra.

Property which may be mortgaged
(1) The personal representative cannot mortgage property which decedent held as trustee.—In re Doyle's Estate, 233 N.Y.S. 667, 133 Misc. 647.

(2) The administrator or county court acquires no jurisdiction to mortgage the homestead of intestate, where she leaves surviving no husband, but unmarried minor children residing on said homestead, and, if said mortgage is executed, a court of equity has the power to set the same aside at the instance of the minor children.—Pioneer Mortgage Co. v. Carter, 202 P. 513, 84 Okl. 85.

Consideration
The forbearance of creditor from bringing action to establish lien on testator's realty was sufficient consideration for mortgage executed by executor.—In re Clyde's Estate, 198 A. 640, 329 Pa. 552, 115 A.L.R. 1412.

Payment of indebtedness out of rents
(1) Where the mortgage was validly executed, the rents collected by the executor from decedent's realty may be rightfully applied to the indebtedness secured thereby.—In re Clyde's Estate, supra.

(2) Executor could rightfully claim exoneration out of the assets of the estate in his hands for payments of interest made on note secured by the mortgage.—In re Clyde's Estate, supra.

(3) Rents of realty as available for payment of decedent's debts see infra § 480.

Presumption of validity
(1) Under a will giving executors power to mortgage real estate, the paramount title to the property is in the executors, the interest of the heirs at law being that of cestuis que trust or remaindermen, and a mortgage by the executors will be presumed valid, in the absence of attack by the heirs at law.—Field v. Chronik, 179 N.Y.S. 891, 190 App. Div. 501.

(2) Other cases see 24 C.J. p 193 note 89 [l].

39. Hawaii.—In re Beckley's Estate, 31 Hawaii 163.
24 C.J. p 194 note 90.

40. Minn.—Brown v. Morrill, 48 N. W. 328, 45 Minn. 483.
24 C.J. p 194 note 91.

41. N.Y.—Smith v. Peyrot, 94 N.E. 662, 201 N.Y. 210, reversing 118 N. Y.S. 1143, 134 App.Div. 954, affirming 116 N.Y.S. 543.
24 C.J. p 194 note 92.

Time of execution
Where executor authorizedly agreed, within time during which creditor could have instituted suit to establish lien on testator's realty, to execute mortgage to induce creditor to forbear the institution of such suit, the fact that mortgage was not actually given within time for bringing suit did not defeat executor's right to exoneration for payments thereon out of the estate.—In re Clyde's Estate, 198 A. 640, 329 Pa. 552, 115 A.L.R. 1412.

42. Pa.—Columbia Ave. Sav.-Fund, Safe-Deposit, Title & Trust Co. v. Lewis, 42 A. 1094, 190 Pa. 558.

Particular purposes
(1) Under will devising farm to testator's children for life with remainder to testator's grandchildren, life tenants to maintain farm in then state of cultivation and in good repair, executors to have power to pledge land to pay debts if necessary, executors could mortgage land to pay debts, but not to pay for improvements.—Matherly v. Johnson's Ex'r, 71 S.W.2d 663, 254 Ky. 307.

(2) Under will authorizing executor to mortgage estate if he deemed it necessary for support of testator's wife or advantageous to the estate, the executor had authority to execute mortgage to induce creditor to forbear institution of action to establish lien on testator's realty.—In re Clyde's Estate, 198 A. 640, 329 Pa. 552, 115 A.L.R. 1412.

(3) Where business enterprises had been disposed of by executrix and life tenant, whom chancellor had authorized to exchange farm for town property, testamentary power to sell and mortgage property to pay testator's debts or to conduct such business enterprises, gave executrix and life tenant no power to mortgage town property to secure money to pay taxes and amount owed for new roof.—Old Nat. Bank v. Swearingen, 72 S.W.2d 545, 167 Tenn. 529.

and the same is true of a statutory power.[43] However, in jurisdictions in which the statutes do not limit the purposes for which a mortgage by an executor or administrator may be authorized, but in which the whole matter is intrusted to the courts, the courts have general jurisdiction of such matter with power and authority to determine in every case properly presented to them whether a mortgage is for the advantage, benefit, and best interests of the estate and those interested therein.[44]

Where the court possesses express statutory power to authorize a mortgage, its exercise is a matter of discretion.[45] In determining whether a mort-

(4) Other cases see 24 C.J. p 194 note 93 [a].

Application of proceeds

(1) That balance on decedent's unsecured notes paid by executrix to payee came from proceeds of a mortgage given by executrix did not affect payee's right to apply such payment on the notes, especially since payee was not under duty to inquire where executrix obtained the money. —Farmers Trust Co. of Lancaster v. Schlotzhauer, 179 A. 227, 319 Pa. 125.

(2) Where deceased's creditor fixed lien on realty by suing on unsecured notes within year after death, and executor, under power of sale in will, mortgaged realty and out of proceeds paid balance on the notes, whereupon creditor released the lien of such debt, creditor was not precluded from thereafter enforcing decedent's mortgages securing a different debt, as against heirs' contention that executrix' mortgage was void and that proceeds became impressed with trust in favor of heirs and constituted set-off to balance due on decedent's mortgages.—Farmers Trust Co. of Lancaster v. Schlotzhauer, supra.

43. N.C.—Caffey v. Osborne, 186 S. E. 364, 210 N.C. 252.

Okl.—Parks v. Producers Nat. Bank of Tulsa, 54 P.2d 398, 176 Okl. 67 —Parks v. Illinois Life Ins. Co., Chicago, Ill., 54 P.2d 392, 176 Okl. 63.

Purposes for which mortgage authorized

(1) To pay debts.

Iowa.—In re Christensen's Estate, 290 N.W. 34, 227 Iowa 1028.

Mass.—Altobelli v. Montesi, 15 N.E. 2d 463, 300 Mass. 396.

N.Y.—In re Wells' Will, 26 N.Y.S.2d 604.

Pa.—Farmers Trust Co. of Lancaster v. Schlotzhauer, 179 A. 227, 319 Pa. 125.

(2) To pay liens on the realty.

Ark.—Reed v. Futrall, 115 S.W.2d 542, 195 Ark. 1044.

Cal.—In re Freud's Estate, 63 P. 1080, 131 Cal. 667, 82 Am.S.R. 407—Murphy v. Farmers' & Merchants' Bank of Los Angeles, 63 P. 868, 131 Cal. 115.

(3) To pay taxes and assessments against the premises.—Long v. Landman, 76 N.W. 374, 118 Mich. 174.

(4) To pay existing mortgage and delinquent taxes on lands of intestate's widow and minor children.—Lynch v. Stanton, 167 S.E. 392, 168 S.C. 249.

(5) To obtain funds to pay expenses of administration.—In re Lair's Estate, 102 P.2d 436, 38 Cal. App.2d 737.

(6) If amount of cash on hand, together with amount owed by executors to estate, was insufficient to pay claim against estate and executors' and attorney's fees, and heirs would not advance sufficient funds, executors could apply for leave to mortgage sufficient estate property to pay the claim and fees, and court could then distribute estate to heirs subject to such mortgage.—In re Ryan's Estate, 96 P.2d 916, 109 Mont. 340.

(7) That administrator had paid debts with money he had borrowed prior to filing petition seeking sale or mortgage of realty of decedent's estate did not preclude administrator from being subrogated to rights of creditors whose debts he had paid, and hence order of clerk approved by judge of the superior court permitting mortgaging of realty of estate was authorized.—Caffey v. Osborne, 186 S.E. 364, 210 N. C. 252.

(8) Where testator's account, which he used to carry on private banking business, was withdrawn by executors to pay claims which were chargeable against general assets of estate, executors were entitled to mortgage real estate belonging to estate to secure funds in amount necessary to liquidate depositor's claim.—In re Griffin's Estate, 262 N.W. 473, 220 Iowa 1028.

(9) Where administrator, who took possession of farm and continued farming operations, advised court, by his petition for authority to borrow money, of his purpose to plant a large acreage of alfalfa, and court authorized crop mortgage to obtain money for seed, labor, and rental of equipment, without objection from heirs, payments for seed, oil, fuel, and power, and tires and battery for automobile were properly approved. —In re Maddalena's Estate, 108 P. 2d 17, 42 Cal.App.2d 12.

(10) Other cases see 24 C.J. p 194 note 94 [a].

Purposes for which mortgage unauthorized

(1) Under a statute providing that an executor or administrator may borrow money to pay obligations secured by liens against any real property belonging to the estate, notes and mortgage executed by executor for money wherewith to pay unprobated claims, not secured by liens on the realty of the estate, are void.—Acker v. Watkins, 134 S.W.2d 523, 199 Ark. 573.

(2) Probate court was without jurisdiction to authorize mortgage of estate's lands by administrator for carrying on farming operations.—First Nat Bank v. Teters, 32 S.W.2d 622, 182 Ark. 599.

(3) Other cases.—In re Seem's Estate, 27 Northumb.Leg.J. 101.

Debts accruing after death of decedent

Under a statute authorizing the execution of a mortgage for the "purpose of paying the debts against the estate of any deceased person," the probate court may authorize the execution of a mortgage to pay debts and charges accruing after the death of decedent.—Long v. Landman, 76 N.W. 374, 118 Mich. 174.

44. S.D.—Equitable Life Assur. Soc. of U. S. v. Lunning, 265 N.W. 876, 64 S.D. 168.

Property of minors

(1) When a court of equity has properly before it the estate of wards of chancery, it may in the exercise of its broad, comprehensive, and plenary jurisdiction, and for the purpose of protecting and preserving the corpus, direct the placing of a loan on their property, the payment of the loan to be secured by deed.—Davie v. Willis, 200 S.E. 283, 187 Ga. 340.

(2) Minor children of testator were wards in chancery, and superior court had jurisdiction to grant order authorizing administratrix to borrow money and to secure its payment by deed, so that order was binding on minors who were represented by guardian ad litem.—Davie v. Willis, supra.

45. Iowa.—In re Christensen's Estate, 290 N.W. 34, 227 Iowa 1028.

Where indebtedness small

Where amount required to pay decedent's debts was only a small percentage of the appraised value of specifically devised property, court

gage should be authorized, the court should be guided by general legal and equitable principles.[46]

Power to sell as authorizing mortgage. Although there is some authority to the contrary,[47] as a general rule a mere power to sell realty does not authorize the making of a mortgage by the personal representative.[48] However, a power to sell may include a power to mortgage,[49] but only, it has been held, because of some exceptional reason, as where there is a particular charge to which the devise is subject, and it is proper to raise money to meet it.[50] So, in jurisdictions where the mere power to sell does not imply the power to mortgage, as well as in those where it does, it has been held that if the power to sell was for the payment of debts, or of a specific charge, and the property was devised subject thereto, a power to mortgage may be implied from the power to sell, unless the will shows a contrary intent.[51] It has been held that, where the representative has petitioned for an order to sell real estate to pay debts, an order directing him to mortgage such real estate is invalid.[52]

Consent or acquiescence of the beneficiaries may validate a mortgage executed by the personal representative without authority.[53]

Parties. Where a mortgage of decedent's realty is authorized, the mortgage should be executed by an executor or administrator who has been duly qualified.[54] The executor or administrator may not mortgage the realty to himself.[55]

b. Authorization by Court

Except where the power to mortgage is expressly conferred by will, an application for leave of court is ordinarily essential to warrant the execution of such an instrument.

In the absence of a statutory requirement an order of court is unnecessary to authorize the execution of a mortgage under a power expressly conferred by a will.[56] Where the power is not so expressly conferred it is necessary, often by express provision of the statute, that the consent or approval of the probate court to such an act by the executor or administrator be obtained,[57] the proceedings being

would direct the executrix to mortgage the property rather than direct the executrix to sell or lease it.—In re Wells' Will, 26 N.Y.S.2d 604.

46. S.D.—Equitable Life Assur. Soc. of the U. S. v. Lunning, 265 N.W. 876, 64 S.D. 168.

47. Pa.—Farmers Trust Co. of Lancaster v. Schlotzhauer, 179 A. 227, 319 Pa. 125.
24 C.J. p 195 note 97.

48. Ark.—Acker v. Watkins, 134 S. W.2d 523, 199 Ark. 573.
N.J.—Watts v. Minez, 198 A. 218, 123 N.J.Eq. 371.
24 C.J. p 195 note 96.

49. N.J.—Watts v. Minez, supra.

True principle is, that a power to sell and convey may include the power to mortgage, but it does not necessarily do so; and whether such power is or is not included depends on the character of the estate, the words granting the power, and the purpose for which the debt was created.—McMillan v. Cox, 34 S.E. 341, 109 Ga. 42, 49.

50. N.J.—Watts v. Minez, 198 A. 218, 123 N.J.Eq. 371.

51. Tex.—Faulk v. Dashiell, 62 Tex. 642, 50 Am.R. 542.
24 C.J. p 195 note 98.

52. Ind.—Edwards v. Baker, 44 N.E. 467, 145 Ind. 281.
24 C.J. p 602 note 49.

53. N.C.—Haywood v. Rigsbee, 173 S.E. 108, 207 N.C. 695.
24 C.J. p 195 note 99.

54. Ky.—Andrews v. Minor, 58 S.W. 441, 22 Ky.L. 561.

Persons nominated but not qualified
Persons nominated as executors but who have not qualified have no power to execute a mortgage of the testator's real estate.—Andrews v. Minor, supra.

55. Ark.—Acker v. Watkins, 134 S. W.2d 523, 199 Ark. 573.

Public policy
Such a contract would be against public policy and void.—Acker v. Watkins, supra.

Power of court to authorize mortgage
The court has no power to authorize the executor to lend money to the estate and to direct the clerk of the orphans' court to execute and deliver a mortgage.—Wilhelm's Estate, 20 Pa.Co. 413.

Executor an officer of mortgagee bank
Notes and mortgage executed by executor to trustee for bank, of which such executor was president and active manager, were void for lack of meeting of two minds.—Acker v. Watkins, 134 S.W.2d 523, 199 Ark. 573.

56. Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S. W.2d 740.
24 C.J. p 198 note 89 [j].

57. Cal.—Meier v. Hayes, 67 P.2d 120, 20 Cal.App.2d 451.
N.C.—Caffey v. Osborne, 186 S.E. 354, 210 N.C. 252.

Jurisdiction of court
(1) Where will provided for equitable conversion and sale of realty and executor continued testator's business under court supervision with consent of all parties, county court had jurisdiction, on notice to all interested parties, to authorize executor to mortgage realty without strict compliance with statutes governing mortgage of realty to pay testator's debts, and hence mortgage executed pursuant to court order was enforceable.—Ottstadt v. Jardine, 281 N.W. 644, 229 Wis. 85.

(2) Jurisdiction of court to make order permitting estate property to be mortgaged is not dependent on administratrix' filing of account.—In re Chandler's Estate, 297 P. 638, 112 Cal.App. 606, followed in 297 P. 639, 112 Cal.App. 765.

Term of court
Where an order granting authority to borrow money and secure its payment must have been granted in term in order to be valid, it will be presumed, where it does not appear from the petition whether the order was granted in term or in chambers, that it was granted in open court during its regular session in the transaction of term business, and therefore was a proceeding in term.—Davie v. Willis, 200 S.E. 283, 187 Ga. 340.

Matters determined
(1) The matter of an accounting between executor and remaindermen was not a matter for determination on application of executor for authority to mortgage realty to secure funds to pay claims against estate, where it had been theretofore adjudicated that such claims were not proper claims for determination in a previous proceeding involving the same parties.—In re

ordinarily substantially identical with those to obtain leave to sell, considered infra §§ 555–586, a mortgage being in many respects the equivalent of a sale.[58] Substantial compliance with a specific procedure prescribed by the statute for authorization of a mortgage is necessary[59] although the mortgage will not be invalidated by a mere irregularity in such proceedings.[60] Where the statute so provides, proceedings are to be instituted by a petition presented by the executor or administrator or by a creditor.[61] The application or petition must contain appropriate jurisdictional recitations or the mortgage will be void and subject to cancellation,[62] unless the defects are supplied by proof at the hearing and such fact is affirmatively stated in the order authorizing the mortgage.[63]

Notice. Notice of the application for permission to mortgage the realty ordinarily must be given to those persons interested in the realty;[64] and where due notice is given the court has jurisdiction although the adversaries to the petition are not present at the hearing.[65] Want of notice will not render void a judgment authorizing the execution of a mortgage or other encumbrance where the adversary parties file an answer to the application.[66]

Dismissal. An application for an order to mortgage real estate to pay debts, after jurisdiction of the parties is acquired, can be dismissed only by an order to that effect.[67]

Christensen's Estate, 290 N.W. 34, 227 Iowa 1028.

(2) District court had jurisdiction on administrator's application to mortgage lands to determine whether property mortgaged descended to heirs of deceased owners as exempt homestead.—Reinsurance Life Co. of America v. Houser, 227 N.W. 116, 208 Iowa 1226.

Construction of order

(1) Declaratory judgment purporting to adjudicate that executors were empowered by testator to give mortgage to secure loan of two thousand six hundred dollars to pay debts must be construed as attempting to adjudicate that executors were also empowered to include in such loan two hundred fifty dollars to pay for improvements, where petition alleged that two thousand three hundred fifty dollars was necessary to pay debts and that two hundred fifty dollars was necessary to pay for improvements.—Matherly v. Johnson's Ex'rs, 71 S.W.2d 663, 254 Ky. 307.

(2) An order authorizing execution of a trust deed on assets of an estate left by deceased in trust for maintenance of her husband, to secure payment of administration expenses which directed that form of deed should include an assignment of rent, to secure payment of note and that principal should be paid out of the whole estate, should be construed as directing payment of the principal out of the corpus of the estate and not out of the income.—In re Lair's Estate, 102 P.2d 436, 38 Cal.App.2d 737.

Effect of insufficient order

If order made by judge, who was stockholder, director, and vice president of bank, authorizing executrix of an estate to execute mortgage to secure indebtedness was not broad enough to authorize mortgage to the bank with which the judge was connected, mortgage executed by executrix to the bank was invalid for want of an order authorizing it.—Gaer v. Bank of Baker, 107 P.2d 877, 111 Mont. 204.

Subsequent approval

That an executor mortgaged property of the estate for purposes of paying debts of deceased without authorization of probate court was not ground for complaint by legatees, where no injury to estate resulted and mortgages were ratified by order of superior court approving executor's interim report.—Bostock v. Brown, 88 P.2d 445, 198 Wash. 288.

58. Wash.—Wallace v. Grant, 67 P. 578, 27 Wash. 130.

59. N.Y.—Duryea v. Mackey, 45 N. E. 458, 151 N.Y. 204.

Statutory requirements held satisfied

Order permitting administrator to mortgage realty to pay debts of decedent's estate was authorized, where there were findings by clerk that mortgaging land to pay debts would materially promote interests of beneficiaries, clerk's order and findings were approved, and execution of mortgage directed by judge of superior court.—Caffey v. Osborne, 186 S.E. 364, 210 N.C. 252.

60. Cal.—Thomas v. Parker, 32 P. 562, 97 Cal. 456.
Mich.—Griffin v. Johnson, 37 Mich. 87.

61. N.Y.—Duryea v. Mackey, 45 N. E. 458, 151 N.Y. 204.

Time for application

Where intestate died on Nov. 28, 1935, administrator was granted letters on Nov. 22, 1937, and administrator filed petition asking for decree to mortgage intestate's realty on April 17, 1939, administrator's delay was excused by his desire, if possible, to obtain payment of intestate's debts and funeral expenses without instituting any proceeding, and thus save all parties expense.—In re Lindsay's Estate, 18 N.Y.S.2d 800.

Temporary administrator may not apply for leave to mortgage decedent's realty.—Duryea v. Mackey, 45 N.E. 458, 151 N.Y. 204.

62. Ark.—Reed v. Futrall, 115 S. W.2d 542, 195 Ark. 1044.

Notice of invalidity; estoppel

A bank which had loaned money to an estate on the security of an unauthorized mortgage was charged with knowledge of the probate records of the county; conduct of heirs was not such as to estop them from asserting the invalidity of the mortgage.—Reed v. Futrall, supra.

63. Idaho.—Walker Bank & Trust Co. v. Steely, 34 P.2d 56, 54 Idaho 591.

64. Ind.—Martin v. Neal, 25 N.E. 813, 125 Ind. 547.

Validity of proceedings

(1) Where there is no notice the proceedings are void.—Martin v. Neal, supra.

(2) Where the record shows that no notice was given the judgment giving permission to mortgage may be attacked collaterally.—Martin v. Neal, supra.

Statute requiring five days' notice of trial of issues of fact is not applicable to petition to mortgage estate property.—In re Chandler's Estate, 297 P. 638, 112 Cal.App. 606, followed in 297 P. 639, 112 Cal.App. 765.

65. Cal.—In re Chandler's Estate, 297 P. 638, 112 Cal.App. 606, followed in 297 P. 639, 112 Cal.App. 765.

66. Ga.—Davie v. Willis, 200 S.E. 283, 187 Ga. 340.

67. N.Y.—Raven v. Norton, 2 Dem. Surr. 110.

c. Stipulations and Provisions of Mortgage; Construction

A mortgage of the decedent's realty by his personal representative may contain such stipulations and provisions as are authorized by the order or license under which it is executed or which are customary in mortgages in the state where it is executed, including, in some jurisdictions, a provision for attorney fees.

Where the court has power to authorize and direct the execution of a mortgage of decedent's realty by his personal representative for the purpose of paying debts, it may determine the manner and terms of the mortgage,[68] and the percentage of property to be contributed by the various devisees or heirs.[69] Where the executor is authorized to execute a mortgage or trust deed he may insert therein such provisions as are customary in mortgages in the state where the instrument is executed,[70] but, of course, the provisions should conform to the order or license under which it is executed.[71]

Stipulation for attorney's fees. It has been held that authority given to the representative by will or by statute to mortgage the realty authorizes him to stipulate for the payment of attorney's fees in the event of its becoming necessary to collect the debt by suit,[72] but there is authority which holds otherwise.[73] However, even if the insertion of a provision for an attorney's fee in the mortgage is unauthorized it will not invalidate the mortgage, but will only give rise to a claim for a reduction of the amount due upon it.[74]

Construction. Whether or not a mortgage is that of the representative as such, or simply his individual mortgage, should, in a jurisdiction under the statutes of which a mortgage is not an instrument under seal, be determined not only from the form of the instrument itself, but by reading it in the light of the facts and circumstances attending its execution, and considering the situation of the parties.[75] A reference to the order of the court and a recital of the execution of the mortgage pursuant to such order, with other similar recitals, is sufficient to show that the mortgage was executed by the mortgagor as personal representative in pursuance of law and the court's order, and not in a personal capacity.[76]

d. Title, Rights, and Liabilities of Mortgagee

The rule of caveat emptor applies to mortgagees of realty from executors or administrators, but where the mortgagees act in good faith they are not required to ascertain the necessity for the loan or to see to its application.

The rule of caveat emptor applies to mortgagees of real property from executors or administrators,[77] and where a mortgagee lends prematurely, or the transaction is unauthorized, he obtains no title or security as against a subsequent purchaser,[78] although he will be entitled to repayment out of the proceeds of the sale.[79] Where the representative has authority to mortgage decedent's land a bona fide mortgagee who advances funds to such representative on the security of decedent's land is not bound to ascertain the necessity for the loan to the executor,[80] or to see to the application of the money realized by the mortgage;[81] nor does the fact that payment of claims against the land of a testator was made by the executor without the approbation of the court affect the validity of a mortgage given under a power in the will to secure the loan with which such payment was made.[82] However, where a mortgagee lends under such circumstances that he is chargeable with constructive notice of the

68. N.Y.—In re Wells' Will, 26 N.Y.S.2d 604.

69. N.Y.—In re Wells' Will, supra.

Pro rata

Court prorated the debt among the properties devised according to valuation and authorized executrix to mortgage each of the properties for proportionate amount of debt, unless devisees paid such amount to executrix.—In re Wells' Will, supra.

70. Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740.

Clause waiving valuation and appraisement laws

Under the statute providing that a mortgage executed by the personal representative under the authority of the court shall be as valid as though executed by the deceased in his lifetime, a mortgage executed under order of court and approved by the court has been held valid, although it contained a clause waiving the valuation and appraisement laws.—Smith v. Eels, 61 N.E. 200, 27 Ind. App. 321.

Power of sale

(1) Executor may insert in trust deed power of sale under instrument, where provision for sale is customary in state where instrument is executed.—John Hancock Mut. Life Ins. Co. v. Duval, Tex.Civ.App., 96 S.W.2d 740.

(2) Other cases see 24 C.J. p 196 note 2.

71. Mich.—In re Vedder, 81 N.W. 356, 122 Mich. 439.

72. Ga.—Fletcher v. American Trust & Banking Co., 36 S.E. 767, 111 Ga. 300, 78 Am.S.R. 164.
24 C.J. p 196 note 1.

73. Colo.—Pershing v. Wolf, 40 P. 856, 6 Colo.App. 410.

74. Mich.—Griffin v. Johnson, 37 Mich. 87.

75. U.S.—Ames v. Holderbaum, C.C.Iowa, 44 F. 224.

76. Cal.—Thomas v. Parker, 32 P. 562, 97 Cal. 456.

77. Ala.—First Nat. Bank of Birmingham v. De Jernett, 159 So. 73, 77, 229 Ala. 564, quoting **Corpus Juris.**
24 C.J. p 196 note 4.

78. N.C.—Dancy v. Duncan, 1 S.E. 455, 96 N.C. 111.

79. N.C.—Dancy v. Duncan, 1 S.E. 455, 96 N.C. 111.

80. Tex.—Faulk v. Dashiell, 62 Tex. 642, 50 Am.R. 542.

81. Tex.—Faulk v. Dashiell, supra.
24 C.J. p 196 note 7, p 707 note 30.

82. Iowa.—Iowa L. & T. Co. v. Holderbaum, 52 N.W. 550, 86 Iowa 1.

executor's intention to apply the money to an improper purpose, he cannot hold the mortgage as against the estate.[83]

A person who takes a mortgage on intestate's realty from the person in whom it vested, as security for an indebtedness of a third person, is presumed to do so with full knowledge that the premises are subject to the debts of the deceased and to know that, until the administrator takes possession of the premises or unless he institutes proceedings to sell and sells them to pay decedent's debts, it is the duty and obligation of the person in whom the title to the premises is then vested to pay the taxes and charges which accrued after decedent's death.[84]

Validity of debt. A mortgage executed under a decree of the court conclusively determines that the debts named in the administrator's petition to mortgage are due.[85]

e. Right to Attack Mortgage

Only persons having a beneficial interest in the property may attack a mortgage of the decedent's realty executed by the executor or administrator; such persons may be estopped to question the validity of the mortgage.

Only persons having a beneficial interest in the property are entitled to attack a mortgage of decedent's realty executed by the executor or administrator.[86] Where property charged with the payment of a legacy was sold, and the proceeds paid to the legatee in partial discharge of the legacy, neither the legatee nor a judgment creditor nor residuary devisees named in the will were entitled, in the absence of fraud on the part of the executors, to object to the validity of a mortgage executed by them on land belonging to the estate without express authority in the will, all of the proceeds of such mortgage having been applied to pay debts of the estate.[87]

Estoppel. Heirs or devisees of decedent may be estopped to question the validity of a mortgage or deed of trust of realty executed by the executor or administrator.[88] Where they execute a ratification and confirmation of the mortgage or deed of trust they will be estopped to attack it for want of authority in the executor or administrator.[89] Creditors[90] and legatees[91] of a testator may by their acquiescence for a number of years in the executor's management of the estate under the provisions of the will become estopped to question the validity of mortgages executed by him under authority given by the will; but although an administrator by mortgaging the land of decedent, title to which had not been perfected, was enabled to purchase it for the heirs, the latter are not estopped in an action to foreclose the mortgage to plead the invalidity of the administrator's act because of the benefits resulting to them, it appearing that the money was not borrowed by the heirs or by anyone in their name or at their request.[92]

Where there is no statutory authorization for the administrator to mortgage the realty of the estate, the obtaining of a court order authorizing such a transaction will not estop him from subsequently attacking its validity, where all the debts are not paid and the legal duties of administration are uncompleted.[93] The executors are estopped in their capacity as devisees from denying the validity of a mortgage executed by them as executors.[94] One to

83. N.J.—Goodell v. Taylor, Ch., 97 A. 569.

84. N.Y.—In re Lindsay's Estate, 18 N.Y.S.2d 800.

85. Pa.—Mendenhall v. Jackson, 110 A. 799, 268 Pa. 123.

86. N.C.—Haywood v. Rigsbee, 178 S.E. 108, 207 N.C. 695.

87. U.S.—Thomas v. Provident Life & Trust Co., Wash., 138 F. 348, 70 C.C.A. 488, certiorari denied 26 S.Ct. 755, 200 U.S. 618, 50 L.Ed. 622.

88. N.C.—Haywood v. Rigsbee, 178 S.E. 108, 207 N.C. 695.

Minor heirs

Remaindermen, who were minors at time of disposal of real estate with reinvestment, with purchase-money mortgage for difference, are not estopped from questioning validity of lien by their acquiescence in the situation as they found it at the time they arrived at the age of twenty one years, they not being required to take any steps to preserve their rights until the termination of the preceding life estate.—Bowling v. Bank of New Haven, 294 S.W. 499, 219 Ky. 731.

89. N.C.—Haywood v. Rigsbee, 178 S.E. 108, 207 N.C. 695.

Consent or acquiescence of beneficiaries as validating mortgage see supra subdivision a of this section.

90. U.S.—Ames v. Holderbaum, C.C. Iowa, 44 F. 224.

Iowa.—Iowa L. & T. Co. v. Holderbaum, 52 N.W. 550, 86 Iowa 1.

91. Mont.—Montgomery v. Gilbert, 108 P.2d 616, 111 Mont. 250.

Simulated sale for purpose of mortgaging

Where sale by executor of certain real estate was merely a simulated sale for purpose of mortgaging property through purchasers and thus obtaining money to pay debts of estate, but property had been reconveyed to the executor in trust and the mortgagee acted in good faith in making loan and relied on record and no damage resulted to those interested, facts did not entitle heirs to relief against executor notwithstanding the proceeding was highly irregular, especially where the matters appeared of record and time fixed by statute for bringing action for such relief had expired.—Montgomery v. Gilbert, supra.

92. Kan.—Black v. Dressell, 20 Kan. 153.

93. Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.

Approval of heirs as material

The rule of the text is true even though all the heirs at law join in the application to the court, since, while the administrator as an individual and the heirs might thus estop themselves, the administrator could not by such illegal acts and conduct estop himself as the representative of the estate with unperformed duties to creditors.—Field v. Manly, supra.

94. Neb.—Arlington State Bank v. Paulsen, 80 N.W. 263, 59 Neb. 94,

whom property has been mortgaged under order of court must show that the estate, by the administrator, was actually the recipient of the money in order to ask that the estate be estopped to plead illegality of the mortgage.[95]

Collateral attack. An order of court authorizing the executor or administrator to mortgage the estate's realty is not open to collateral attack, even if erroneously entered, if the court had jurisdiction of the subject matter and of the persons.[96] Where a court has general jurisdiction to determine when a mortgage of realty by an executor or administrator should be authorized, the determination of the court on that question in a proceeding in which there is substantial compliance with the statutory requirements as to petition and notice is not, in the absence of fraud, open to collateral attack.[97]

f. Personal Liability of Representative

Under certain circumstances a personal representative who mortgages his decedent's real estate may be individually liable.

Under certain circumstances a personal representative who mortgages the realty of his decedent may be personally liable.[98] A mortgage executed without authority by an executor who is also interested in the estate, while not binding on the estate is, it has been held, binding on him personally to the extent of his individual interest in the property.[99] It has been held that where an executor, empowered by a will to mortgage his testator's property, executes a mortgage in his capacity as executor containing warranties of title and a promise to pay taxes and attorney's fees, and gives his notes for the money secured thereby, he is personally bound therefor, as giving the notes and making the warranties are not necessary to the execution of the power.[1] Executors of a grantee of mortgaged premises, who executed a mortgage extension agreement, have been held individually liable for payment of the mortgage debt and a deficiency judgment resulting from a sale of the premises, although the agreement described them as executors.[2]

g. Effect of Unauthorized Mortgage

An unauthorized mortgage of the decedent's realty by his personal representative does not create an equitable lien on the mortgaged property or other assets of the estate, but where the money lent was used to pay debts of the estate it is bound in equity to repay the amount with interest.

Where a mortgage of decedent's realty by his personal representative was unauthorized, the fact that the money lent thereon was used to pay debts of the estate gives the lender no equitable lien on the mortgaged property or other assets,[3] but under such circumstances the estate is bound in equity to repay the amount advanced with interest.[4] An action to set aside an invalid mortgage by the representative may be maintained without the complaining party first paying the amount owed to the mortgagee.[5]

setting aside judgment 78 N.W. 303, 67 Neb. 717.

95. Wash.—Wallace v. Grant, 67 P. 578, 27 Wash. 130.

96. Idaho.—Walker Bank & Trust Co. v. Steely, 34 P.2d 56, 54 Idaho 591.
Wis.—Ottstadt v. Jardine, 281 N.W. 644, 229 Wis. 85.

Attack in other court
A mortgage authorized and approved by the orphans' court cannot be attacked in any other court, unless for fraud.—Mendenhall v. Jackson, 110 A. 799, 268 Pa. 128.

Admissibility of extrinsic evidence
In action to foreclose real estate mortgage executed by executor pursuant to order of proper court regular on its face, made in response to petition for leave to execute mortgage likewise regular on its face and sufficient in substance, evidence that order to show cause designated April 22 as date for hearing of petition which actually took place on April 18 was inadmissible to impeach validity of order authorizing execution of mortgage, and, although such evidence was introduced by plaintiff and admitted, court properly ordered foreclosure of mortgage.—Corporation of America v. Bank of America Nat. Trust & Savings Ass'n, 46 P. 2d 262, 7 Cal.App.2d 470.

Matters examined on collateral attack
Attack on order granting executor leave to mortgage real property of estate, where made in action to foreclose mortgage, constituted collateral attack, requiring court to limit itself to examination of matters which appeared on face of record in proceeding which resulted in entry of order, and to uphold order, if no defect of jurisdiction appeared on face of record, despite showing of error in exercise of jurisdiction, or of irregularity in proceeding, and requiring court, in examining record, to indulge usual presumptions in favor of regularity and validity of proceeding.—Corporation of America v. Bank of America Nat. Trust & Savings Ass'n, 46 P.2d 262, 7 Cal.App. 2d 470.

97. S.D.—Equitable Life Assur. Soc. of U. S. v. Lunning, 265 N.W. 876, 64 S.D. 168.

98. **Personal liability and liability as trustee**
Where mortgage executed by widow as executrix was void because not approved by county court, but will authorized her execution of mortgage as trustee, designation of widow as individual, as well as trustee and executrix, in execution of notes and mortgage, rendered her liable only personally and as trustee.—Parks v. Illinois Life Ins. Co., Chicago, Ill., 54 P.2d 392, 176 Okl. 63.

99. Mont.—Gaer v. Bank of Baker, 107 P.2d 877, 880, 111 Mont. 204, citing **Corpus Juris.**
24 C.J. p 197 note 17.

1. Ind.—De Coudres v. Union Trust Co., 58 N.E. 90, 25 Ind.App. 271, 81 Am.S.R. 95.
24 C.J. p 196 note 13.

2. N.Y.—Smith v. Wagner, 174 N. Y.S. 205, 106 Misc. 170.

3. Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Carter v. Davis, 164 S.E. 264, 174 Ga. 824.
24 C.J. p 196 note 15.

4. U.S.—Thomas v. Provident Life & Trust Co., Wash., 138 F. 348, 70 C.C.A. 488, certiorari denied 26 S. Ct. 755, 200 U.S. 618, 50 L.Ed. 622.
Fla.—Evans v. Tucker, 135 So. 305, 309, 101 Fla. 688, 85 A.L.R. 170, citing **Corpus Juris.**
Mont.—Gaer v. Bank of Baker, 107 P.2d 877, 880, 111 Mont. 204, citing **Corpus Juris.**

5. **Actions by heirs**
Mont.—Gaer v. Bank of Baker, 107 P.2d 877, 111 Mont. 204.

L. PERSONAL PROPERTY

1. In General

§ 299. Title and Authority

a. In general
b. Nature of title
c. When title vests; relation back
d. Duration and termination of title

a. In General

Except as modified by statute, the general rule is that the executor or administrator acquires the legal title to the personalty of the deceased, including that specifically bequeathed.

It is well established that as a general rule the legal title to personal property of which decedent died possessed does not vest at his death in his next of kin or distributees, see Descent and Distribution § 67, but vests, for the time being, in his executor or administrator,[6] who is the proper person to follow such property into the hands of others or dispose of it.[7] The general rule has been modified by statute in a few jurisdictions so that the title to personal property vests in the heirs or beneficiaries, subject to the payment of debts and to the representative's right of possession.[8] Further, when

6. U.S.—Staudenmaier v. Bechaud, C.C.A.Wis., 110 F.2d 517—U. S. v. Johnson, C.C.A.Okl., 87 F.2d 155, affirming, D.C., 11 F.Supp. 897—Bomar v. U. S., D.C.S.C., 12 F. Supp. 881.
Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623.
Conn.—Blodgett v. Bridgeport City Trust Co., 161 A. 83, 115 Conn. 127.
Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
D.C.—Cunningham v. Rodgers, 267 F. 609, 50 App.D.C. 51, affirmed 42 S. Ct. 149, 257 U.S. 466, 66 L.Ed. 319.
Fla.—Mills v. Hamilton, 163 So. 857, 121 Fla. 435.
Ga.—Mullen v. Carlton, 14 S.E.2d 719.
Ill.—In re Swartz's Estate, 218 Ill. App. 449.
Ind.—State ex rel. Department of Financial Institutions v. Kaufman, 30 N.E.2d 978, 980, citing **Corpus Juris**—Bickel v. Bibler, App., 32 N.E.2d 127—Condo v. Barbour, 200 N.E. 76, 101 Ind.App. 483.
Kan.—Farmers' State Bank of Kingman v. Callahan, 256 P. 961, 123 Kan. 638.
Ky.—Moore's Adm'x v. Brookins, 92 S.W.2d 813, 263 Ky. 519—Farmers' Exchange Bank of Millersburg v. Moffett, 75 S.W.2d 1063, 256 Ky. 160—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74—Burchett v. Burchett, 10 S.W.2d 460, 226 Ky. 5.
Md.—Noel v. Noel, 195 A. 315, 173 Md. 152.
Mass.—Harrison v. Stevens, 26 N.E. 2d 351, 305 Mass. 532—Hobbs v. Cunningham, 174 N.E. 181, 273 Mass. 529—S. S. Pierce Co. v. Fiske, 129 N.E. 609, 237 Mass. 39.
Minn.—In re Butler's Estate, 284 N. W. 889, 205 Minn. 60.
Miss.—Anderson v. Gift, 126 So. 656, 156 Miss. 736.
Mo.—Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242—B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo.App. 510.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 767, 86 Mont. 340, citing **Corpus Juris.**
Neb.—Dutch v. Welpton, 237 N.W. 579, 580, 121 Neb. 480, quoting **Corpus Juris.**
N.J.—State v. Then, 190 A. 495, 502, 118 N.J.Law 31, citing **Corpus Juris,** and affirmed 196 A. 740, 119 N.J.Law 429, and State v. Sangor, 197 A. 5, 119 N.J.Law 429.
N.M.—York v. American Nat. Bank of Silver City, 55 P.2d 737, 40 N. M. 123.
N.Y.—In re Hammer's Estate, 261 N. Y.S. 478, 237 App.Div. 497, reversing 258 N.Y.S. 841, 144 Misc. 39, and affirmed In re Ehlert, 185 N.E. 789, 261 N.Y. 677, reargument denied 188 N.E. 104, 262 N.Y. 647—Sauvage v. Sauvage, 257 N.Y.S. 325, 327, 235 App.Div. 460, quoting **Corpus Juris**—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423—In re Booth's Estate, 248 N.Y.S. 264, 139 Misc. 253—In re Bernheimer's Estate, 240 N.Y.S. 410, 136 Misc. 566.
N.C.—Parker v. Porter, 179 S.E. 28, 208 N.C. 31—Hayes v. Green, 123 S.E. 7, 187 N.C. 776.
Ohio.—Du Vall v. Faulkner, 149 N.E. 868, 113 Ohio St. 543—Central Nat. Bank, Savings & Trust Co. v. Gilchrist, 154 N.E. 811, 23 Ohio App. 87.
Or.—Dencer v. Jory, 284 P. 163, 131 Or. 653, 70 A.L.R. 855.
Tenn.—Union Planters Nat. Bank & Trust Co. v. Beeler, 112 S.W.2d 11, 172 Tenn. 317.
Vt.—In re Clark's Estate, 136 A. 389, 100 Vt. 217.
Va.—Strader v. Metropolitan Life Ins. Co., 105 S.E. 74, 128 Va. 238.
W.Va.—Elder v. Gibson, 155 S.E. 662, 663, 109 W.Va 582, citing **Corpus Juris.**
Wis.—In re Arneberg's Estate, 200 N.W 557, 184 Wis. 570—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548—Pietraszwicz v. Pietraszwicz, 181 N. W. 722, 173 Wis. 523.
24 C.J. p 201 note 62.

Executor or administrator as legatee or distributee see infra § 486.
What constitutes personalty to be administered as assets see supra § 97 et seq.

Title to nonexempt personalty passes to the personal representative.—Sovereign Camp, W. O. W., v. Snider, 148 So. 831, 227 Ala. 126.

Title and other benefits
Except as otherwise provided by statute, the personal representative succeeds not only to the title of the personalty, but also to all benefits accruing from the prior actual possession of his decedent.—Page v. Skinner, 125 So. 36, 220 Ala. 302.

Domiciliary representative
Subject to the right of a foreign state to administer property within its borders for protection of its own citizens, the domiciliary representative becomes invested with title to all personal property of deceased.—New York Trust Co. v. Riley, Del., 16 A.2d 772, reversing Coca-Cola International Corporation v. New York Trust Co., Ch., 8 A.2d 811, and certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105, 313 U.S. 555, 85 L.Ed. 1517, motion granted 62 S.Ct. 357, affirmed 62 S.Ct. 608, rehearing denied 62 S.Ct. 903.

"For most purposes," an executor or administrator becomes the legal owner of the personal property of decedent.—Brown v. Indian River Orange Lands, 179 So. 789, 791, 131 Fla. 466—Carter v. Gilbert, 128 So. 250, 99 Fla. 1056.

7. Neb.—Dutch v. Welpton, 237 N. W. 579, 580, 121 Neb. 480, quoting **Corpus Juris.**
23 C.J. p 1172 note 32.
Personal representative as proper party in suits relating to personalty see infra § 738.

8. Tex.—Smith v. Price, Civ.App., 230 S.W. 836.
24 C.J. p 203 note 67.

there is no need for administration on decedent's estate, or when decedent's personal property has gone, without administration, where it rightfully belongs, and would go by administration, the administrator's naked legal title will not prevail in equity against one to whom the equitable title and rightful possession have passed.[9]

Property specifically bequeathed or set aside. The representative acquires title to decedent's personal property, even though it has been specifically bequeathed,[10] or has been set aside for the payment of a particular legacy.[11]

b. Nature of Title

A personal representative takes title to personalty only as trustee for the benefit of distributees and creditors, and acquires only such title as the decedent had; but his title is exclusive and carries with it the right to dispose of the property.

A personal representative acquires his title to personalty of deceased by operation of law.[12] His interest in the property is the same as that owned by decedent at the time of his death, and is subject to all valid liens and encumbrances which then existed.[13]

It has been held that the representative takes an unqualified title to all personalty not specifically bequeathed,[14] and that his title and authority as to personal property is exclusive, for the time being, as against creditors, legatees, and all others beneficially interested in the estate.[15] Nevertheless, the representative, as such, takes title only for the purpose of administration, payment of claims,[16] and

9. Ala.—Kennedy v. Davis, 55 So. 104, 171 Ala. 609, Ann.Cas.1913B 225.

Absence of debts

(1) Where the personal property left by the intestate is disposed of by the sole heir and distributee, and there are no debts to be proved against the estate, an administrator subsequently appointed on the petition of such sole distributee cannot recover the property so disposed of. —Cooper v. Hayward, 74 N.W. 152, 71 Minn. 374, 70 Am.S.R. 330.

(2) Where a testatrix bequeathed all of her personal estate to testamentary trustees to hold, invest, and reinvest the principal, and to receive, hold, and disburse the income for the purposes mentioned in the will, and no special power or authority was given to the executor, it was held that the title to the property bequeathed to the trustees, it not being necessary to pay debts, vested in them immediately on testatrix's death, the executor being authorized only to possess himself of such property and deliver it to the trustees.—Matter of Ryer, 88 N.Y.S. 52, 94 App. Div. 449, affirmed 72 N.E. 1150, 180 N.Y. 532.

10. Mass.—Hobbs v. Cunningham, 174 N.E. 181, 273 Mass. 529.
Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 988, 180 Wash. 347, quoting **Corpus Juris.** 24 C.J. p 203 note 65.

Legal title to chose in action evidenced by note passed to representative, notwithstanding bequest of note.—Oulvey v. Converse, 157 N.E. 245, 326 Ill. 226.

Qualified title

The executor takes a qualified title to property specifically bequeathed.—In re Voelker's Estate, 27 N.Y.S.2d 339, 176 Misc. 362—In re Booth's Estate, 248 N.Y.S. 264, 139 Misc. 253.

Where not needed to pay debts a specific bequest belongs to the legatee at once on the death of the testator.—In re Stoiber, 170 N.Y.S. 897, 103 Misc. 654.

11. S.C.—Graveley v. Graveley, 25 S.C. 1, 60 Am.R. 478.
Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 988, 180 Wash. 347, quoting **Corpus Juris.**

12. Mo.—B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo. App. 510.
N.Y.—In re Starbuck's Ex'x, 167 N. E. 580, 251 N.Y. 439, 65 A.L.R. 216, reversing In re Starbuck, 228 N.Y. S. 174, 223 App.Div. 844, affirming In re Starbuck's Estate, 221 N.Y.S. 540, 129 Misc. 460.

13. Ala.—Norris v. Commercial Nat. Bank of Anniston, 163 So. 798, 231 Ala. 204.
Ill.—Greenspahn v. Ehrlich, 277 Ill. App. 322—Kinder v. King, 180 Ill. App. 62.
Md.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.
Ohio.—Citizens Nat. Bank Co. v. Andrews, 24 Ohio N.P.,N.S., 361.
24 C.J. p 201 note 62 [d].

Executor as purchaser for value

Executors to whom a note passes as a part of property of the estate are not purchasers thereof for value, and have no greater rights than the testator would if living.—Kuhlmeyer v. Buts, 215 Ill.App. 414.

14. N.Y.—Milliner v. Morris, 219 N. Y.S. 166, 219 App.Div. 425—In re Voelker's Estate, 27 N.Y.S.2d 339, 176 Misc. 362—In re Booth's Estate, 248 N.Y.S. 264, 139 Misc. 253 —In re Starbuck's Estate, 221 N.Y. S. 540, 129 Misc. 460, affirmed In re Starbuck, 228 N.Y.S. 174, 223 App. Div. 844, reversed on other grounds In re Starbuck's Ex'x, 167 N.E. 580, 251 N.Y. 439, 65 A.L.R. 216.

15. Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623.
Neb.—Dutch v. Welpton, 237 N.W. 579, 580, 121 Neb. 480, quoting **Corpus Juris.**
N.Y.—Sauvage v. Sauvage, 257 N.Y.S. 325, 327, 235 App.Div. 460, quoting **Corpus Juris.**
Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.
Wis.—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.
24 C.J. p 202 note 64.

Rights superior to rights of assignees

The rights of two individuals holding title to most of the estate personalty by assignment from heirs were inferior to the rights of one of them acting in his capacity as administrator with the will annexed. —Baurer v. Myers, 278 N.W. 302, 224 Iowa 854.

Title to legacy payable to deceased

"The fact that this title [to a legacy which was payable to a deceased] was received by . . . [her executor] in a fiduciary capacity did not make him any less the complete legal owner thereof."—In re Schwarzmann's Estate, 21 N.Y.S. 2d 912, 914, 174 Misc. 834.

16. U.S.—Brewster v. Gage, N.Y., 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457, affirming, C.C.A., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted 49 S.Ct. 418, 279 U.S. 831, 73 L.Ed. 981—First Nat. Bank v. U. S., C.C.A.Mass., 76 F. 2d 200, reversing, D.C., 7 F.Supp. 915, and certiorari granted U. S. v. First Nat. Bank, 56 S.Ct. 96, 296 U.S. 564, 80 L.Ed. 398, affirmed 56 S.Ct. 54, 296 U.S. 102, 80 L.Ed. 83, 101 A.L.R. 304, rehearing denied 56 S.Ct. 305, 296 U.S. 664, 80 L.Ed. 473—Anderson v. U. S., Ct. Cl., 15 F.Supp. 216, certiorari de-

distribution, and acquires no beneficial interest;[17] he holds as a trustee,[18] particularly as to the surplus remaining after the payment of debts.[19] Except as permitted by statute,[20] the representative cannot acquire absolute title to the property merely by paying the debts or discharging the obligations of the estate.[21]

Right to dispose of property. The personal representative, as the legal owner of the personal property, generally has the right to dispose of it,[22] although he remains responsible for the faithful execution of his trust;[23] and his power of disposal extends to choses in action.[24]

Where executors are also appointed trustees, their

nied 57 S.Ct. 668, 300 U.S. 675, 81 L.Ed. 880.
Del.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Ga.—Mullen v. Carlton, 14 S.E.2d 719.
Ill.—Russell v. Bulliner, 18 N.E.2d 879, 370 Ill. 260, reversing In re Bulliner's Estate, 13 N.E.2d 634, 294 Ill.App. 189.
Kan.—Richards v. Tiernan, 91 P.2d 22, 150 Kan. 116.
Ky.—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74.
Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840.
Minn.—In re Butler's Estate, 284 N.W. 889, 205 Minn. 60—Weis v. Kundert, 215 N.W. 176, 172 Minn. 274.
Neb.—Pilger v. State, 234 N.W. 403, 404, 120 Neb. 584, 75 A.L.R. 297, quoting **Corpus Juris.**
N.Y.—Milliner v. Morris, 219 N.Y.S. 166, 219 App.Div. 425—In re Bernheimer's Estate, 240 N.Y.S. 410, 136 Misc. 566.
Ohio.—Central Nat. Bank, Savings & Trust Co. v. Gilchrist, 154 N.E. 811, 23 Ohio App. 87.
Or.—In re McLeod's Estate, 82 P.2d 884, 159 Or. 687—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.
24 C.J. p 203 note 68.

17. U.S.—Brewster v. Gage, N.Y., 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457, affirming, C.C.A., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted, 49 S.Ct. 418, 279 U.S. 831, 73 L.Ed. 981—Anderson v. U. S., Ct.Cl., 15 F.Supp. 216, certiorari denied 57 S.Ct. 668, 300 U. S. 675, 81 L.Ed. 880.
Ky.—Gibson's Adm'r v. Gibson, 43 S.W.2d 343, 241 Ky. 74.
Neb.—Pilger v. State, 234 N.W. 403, 404, 120 Neb. 584, 75 A.L.R. 297, quoting **Corpus Juris.**
N.Y.—Milliner v. Morris, 219 N.Y.S. 166, 219 App.Div. 425—In re Booth's Estate, 248 N.Y.S. 264, 139 Misc. 253.
Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.
Vt.—In re Clark's Estate, 136 A. 389, 100 Vt. 217.
24 C.J. p 203 note 68.

Equitable title to property in custody of executors and administrators is in beneficiary, subject to claims of creditors.—In re McElfresh's Estate, 254 N.W. 84, 218 Iowa 97.

"When there are no claims against the estate to be paid, the administrator has only the naked legal title to the personal property with the beneficial interest in the distributees."—Thomas v. Morristown State Bank, 221 N.W. 257, 259, 53 S.D. 499.

18. U.S.—Brown v. Routzahn, D.C. Ohio, 58 F.2d 329, reversed on other grounds, C.C.A., 63 F.2d 914, certiorari denied Routzahn v. Brown, 54 S.Ct. 60, 290 U.S. 641, 78 L.Ed. 557—Brewster v. Gage, C.C.A.N.Y., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted 49 S.Ct. 418, 279 U.S. 831, 73 L.Ed. 981, affirmed 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457.
Del.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Ill.—Furst v. Brady, 31 N.E.2d 606, 375 Ill. 425, 133 A.L.R. 558, reversing In re Brady's Estate, 24 N.E. 2d 748, 303 Ill.App. 139.
Kan.—Richards v. Tiernan, 91 P.2d 22, 150 Kan. 116.
Mich.—Windoes v. Colwell, 225 N.W. 573, 247 Mich. 372.
N.Y.—Milliner v. Morris, 219 N.Y.S. 166, 219 App.Div. 425—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423—In re Voelker's Estate, 27 N.Y.S.2d 339, 176 Misc. 362—Schneider v. American Telephone & Telegraph Co., 9 N.Y.S.2d 564, 169 Misc. 939—In re Booth's Estate, 248 N.Y.S. 264, 139 Misc. 253.
Ohio.—Williams v. Williams, 5 N.E. 2d 956, 54 Ohio App. 13—Central Nat. Bank, Savings & Trust Co. v. Gilchrist, 154 N.E. 811, 23 Ohio App. 87.
Or.—In re McLeod's Estate, 82 P.2d 884, 159 Or. 687.
Tenn.—Baker v. Baker, 142 S.W.2d 737, 24 Tenn.App. 220.
Vt.—In re Clark's Estate, 136 A. 389, 100 Vt. 217.
Va.—Hampton Roads Fire & Marine Ins. Co. v. Coburn Motor Car Co., 164 S.E. 723, 158 Va. 675, 84 A.L.R. 731.
Wis.—In re Arneberg's Estate, 200 N.W. 557, 184 Wis. 570.
23 C.J. p 1172 note 31 [a].
Representative capacity of executor or administrator generally see supra § 142.

19. U.S.—Anderson v. U. S., Ct.Cl., 15 F.Supp. 216, certiorari denied 57 S.Ct. 668, 300 U.S. 675, 81 L.Ed. 880.
Neb.—Pilger v. State, 234 N.W. 403, 404, 120 Neb. 584, 75 A.L.R. 297, quoting **Corpus Juris.**
Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.
24 C.J. p 204 note 69.

At ancient common law the title to personal property left by deceased person vested absolutely in his executor or administrator, and any surplus remaining after payment of debts, legacies, and the charges of administration, belonged to the executor or administrator as payment for his services.
Del.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.
Or.—In re McLeod's Estate, 82 P.2d 884, 159 Or. 687.

20. Executor as residuary legatee
By virtue of statutes which relieve an executor who is also residuary legatee from the necessity of returning an inventory on his giving bond to pay all the debts and legacies, it is held that the executor, on giving such bond, becomes immediately the absolute owner of the estate in his own right.—Richardson v. Bailey, 41 A. 263, 69 N.H. 384, 76 Am.S.R. 176—24 C.J. p 204 note 73.

21. U.S.—Wilson v. Taylor, D.C., 30 F.Cas.No.17,840a, 2 Hayw. & H. 334.
24 C.J. p 204 note 72.

22. Fla.—Brown v. Indian River Orange Lands, 179 So. 789, 131 Fla. 466—Carter v. Gilbert, 128 So. 250, 99 Fla. 1056.
N.Y.—In re Booth's Estate, 248 N.Y. S. 264, 139 Misc. 253.
24 C.J. p 51 note 19.
Power to sell see infra § 305.

23. Conn.—Beecher v. Buckingham, 18 Conn. 110, 44 Am.D. 580.
24 C.J. p 51 note 19.

24. Fla.—Brown v. Indian River Orange Lands, 179 So. 789, 131 Fla. 466—Carter v. Gilbert, 128 So. 250, 99 Fla. 1056.

Release or discharge
Executor or administrator has full legal title to deceased's choses in action and may, in absence of fraud or collusion, release, compound, and discharge them as if he were the absolute owner, being answerable for improvidence in exercise of power. —In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46.

title to the testator's personalty as executors is superior to, and takes precedence over, their title as trustees.[25]

c. When Title Vests; Relation Back

According to some authorities, a representative acquires title to personalty at the time of the decedent's death; according to others, the title remains in abeyance until the representative's appointment, although the title he then acquires relates back to the time of death.

It is frequently asserted that the title to the personal property of decedent vests in his personal representative,[26] whether executor[27] or administrator,[28] at the time of decedent's death. On the other hand, there is authority to the effect that title vests in a personal representative on his appointment, or when his letters are granted,[29] and that until such time it remains in abeyance.[30] However, in any event, the title of the representative relates back to the death of decedent,[31] although it does not render the intervening possession of the heirs wrongful.[32]

d. Duration and Termination of Title

The representative retains title to personalty until the estate is settled, unless he chooses, or is forced, to part with it earlier.

The title to the personal property remains in the personal representative until administration is completed and the estate is fully settled or distributed,[33] unless he chooses,[34] or is forced,[35] to part with it earlier.

25. N.Y.—Lockman v. Reilly, 95 N. Y. 64.
24 C.J. p 203 note 66.

26. U.S.—Brewster v. Gage, C.C.A. N.Y., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted 49 S.Ct. 418, 279 U.S. 831, 73 L. Ed. 981, affirmed 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457.

27. Md.—Home for Incurables of Baltimore City v. Bruff, 153 A. 403, 160 Md. 156.
Mass.—Rolfe v. Atkinson, 156 N.E. 51, 259 Mass. 76—S. S. Pierce Co. v. Fiske, 129 N.E. 609, 237 Mass. 39.
Wash.—Devereaux v. Anderson, 264 P. 422, 146 Wash. 657.
24 C.J. p 204 note 74.

Before qualification
Title to testator's personalty vests in executors on date of testator's death, although they have not yet qualified.—In re Brann's Will, 265 N.Y.S. 362, 148 Misc. 310.

Reason for rule
The executor derives his title not from the probate, but from the will. —Shirley v. Healds, 34 N.H. 407—24 C.J. p 204 note 74.

28. Md.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.
Mass.—Rolfe v. Atkinson, 156 N.E. 51, 259 Mass. 76—S. S. Pierce Co. v. Fiske, 129 N.E. 609, 237 Mass. 39.
N.Y.—Genesee Valley Trust Co. v. Newborn, 6 N.Y.S.2d 498, 168 Misc. 703.
Wash.—Devereaux v. Anderson, 264 P. 422, 146 Wash. 657.

29. Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840.
24 C.J. p 204 notes 74 [b], 75.

30. U.S.—Peterson v. Demmer, D.C. Tex., 34 F.Supp. 697.
D.C.—Cunningham v. Rodgers, 267 F. 609, 50 App.D.C. 51, affirmed 42 S. Ct. 149, 257 U.S. 466, 66 L.Ed. 319.
Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840—Windoes v. Colwell, 225 N.W. 573, 247 Mich. 372.
24 C.J. p 204 note 75 [a].
"Property must have a living owner. When the owner dies, his title ceases. As to personalty, the title remains undefined and in abeyance, until a personal representative is appointed and qualifies. When that is done the title of the decedent vests eo instante in such personal representative. Not by virtue of a conveyance, for there is none. The appointment effects the transfer proprio vigore."—Nelson v. Boynton, 54 Ala. 368, 376.

31. U.S.—Brewster v. Gage, N.Y., 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457, affirming, C.C.A., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted 49 S.Ct. 418, 279 U.S. 831, 73 L.Ed. 981.
Ala.—Norris v. Commercial Nat. Bank of Anniston, 163 So. 798, 231 Ala. 204—McAleer v. Cawthon, 112 So. 251, 253, 215 Ala. 674, quoting **Corpus Juris.**
Mass.—Reardon v. Whalen, 29 N.E.2d 23, 306 Mass. 597.
Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840—Windoes v. Colwell, 225 N.W. 573, 247 Mich. 372.
Wis.—Maloney v. McCormick, 193 N. W. 966, 181 Wis. 107.
24 C.J. p 204 note 76.
Relation back of letters see supra § 151.

Specific bequest to administrator
Title to property specifically bequeathed to the personal representative vests in him as of the date of decedent's death.—Hobbs v. Cunningham, 174 N.E. 181, 273 Mass. 529.

32. Ill.—Hardy v. Wallis, 103 Ill. App. 141.

33. U.S.—Globe Indemnity Co. v. Bruce, C.C.A.Okl., 81 F.2d 143, reversing, D.C., Bruce v. Globe Indemnity Co., 9 F.Supp. 761, and certiorari denied 56 S.Ct. 591, two cases, 297 U.S. 716, 80 L.Ed. 1001—Brewster v. Gage, C.C.A.N.Y., 30 F.2d 604, reversing, D.C., 25 F.2d 915, and certiorari granted 49 S. Ct. 418, 279 U.S. 831, 73 L.Ed. 981, affirmed 50 S.Ct. 115, 280 U.S. 327, 74 L.Ed. 457.
Ind.—State ex rel. Department of Financial Institutions v. Kaufman, 30 N.E.2d 978, 980, citing **Corpus Juris.**
Ky.—Moore's Adm'x v. Brookins, 92 S.W.2d 813, 263 Ky. 519—Burchett v. Burchett, 10 S.W.2d 460, 226 Ky. 5.
Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 767, 86 Mont. 340, citing **Corpus Juris.**
Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.
Vt.—In re Clark's Estate, 136 A. 389, 100 Vt. 217.
24 C.J. p 201 note 62.

Before representative has accounted, heir at law cannot treat personal property of the estate as his individual property.—Rolfe v. Atkinson, 156 N.E. 51, 259 Mass. 76.

34. Mich.—Michigan Trust Co. v. City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840.
24 C.J. p 201 note 62.

Payment or delivery
The representative's title may be terminated by his voluntary payment or delivery of the property to the right parties.—In re Clark's Estate, 136 A. 389, 100 Vt. 217, followed in In re Morse's Estate, 136 A. 394, 100 Vt. 227.

Assent of executor
It has been held, under a statute in effect so providing, that legal title to bequeathed personalty is in the executor until he assents to the legacy.—Peck v. Watson, 142 S.E. 450, 165 Ga. 853, 57 A.L.R. 560.

35. Mich.—Michigan Trust Co. v.

§ 300. Possession and Use

The personal representative is generally entitled to the exclusive possession of the personalty of the estate for the purposes, and during the course, of administration. His possession is deemed that of the court.

In the absence of testamentary provision to the contrary,[36] the personal representative has the right to the possession, control, and use of the personal estate of decedent, whether testate or intestate,[37] for the purposes of administration.[38] As a general rule, the representative is entitled to possession and control as against, or to the exclusion of, the widow, next of kin, legatees, or creditors;[39] but there are exceptions to this rule,[40] as, for example, where all debts have been paid and the heirs or other parties beneficially entitled to the personal property are in proper possession thereof,[41] in which case the naked legal title of the representative has been held not to entitle him to possession as against such persons.[42]

The mere possession of personal property, not wholly wrongful, by decedent at the time of his death under a claim of title may give his executor or administrator a right of possession,[43] but ordinarily the representative's right of possession extends only to such personalty as belonged to decedent.[44]

The possession of personal property by an executor or administrator is the possession of the court,[45]

City of Grand Rapids, 247 N.W. 744, 262 Mich. 547, 89 A.L.R. 840.
24 C.J. p 201 note 62.

36. Ind.—Bragdon v. Prudential Ins. Co. of America, App., 34 N.E.2d 173.

Life tenancy

(1) Law does not impose on executor duty to hold personal property in his custody during a life tenancy unless testator so intended; and testator may create life tenancy with right of possession in life tenant, in which case executor must deliver possession to life tenant, who then becomes custodian and accountable as such to the remainderman.—In re Von Kleist's Will, 193 N.E. 256, 265 N.Y. 422, reversing 270 N.Y.S. 435, 240 App.Div. 436, modifying In re Von Kleist's Estate, 263 N.Y.S. 888, 147 Misc. 416—24 C.J. p 204 note 78 [f]. [i].

(2) The right of a life tenant, bequeathed the income from certain stock for life, to share in managing the corporation, is not inconsistent with the retention of the stock by the executor.—In re Strasenburgh's Estate, 242 N.Y.S. 447, 136 Misc. 86.

(3) Life tenant's right to possession of corpus generally see Estates § 134.

37. D.C.—Wade v. Security Savings & Commercial Bank, 99 F.2d 995, 69 App.D.C. 226.
Mass.—Harrison v. Stevens, 26 N.E. 2d 351, 305 Mass. 532.
Minn.—In re Butler's Estate, 284 N. W. 889, 205 Minn. 60.
Mo.—Hoshaw v. Fenton, 110 S.W.2d 1140, 232 Mo.App. 137.
Mont.—In re Clark's Estate, 74 P.2d 401, 105 Mont. 401, 114 A.L.R. 496.
N.Y.—In re Slensby's Will, 7 N.Y.S. 2d 471, 169 Misc. 292.
Tex.—Freeman v. Banks, Civ.App., 91 S.W.2d 1078, error refused.
24 C.J. p 204 note 78.

Duties

(1) Not only is it the representative's right to take possession of the personal property of the estate, but it is his duty to do so.
D.C.—Wade v. Security Savings & Commercial Bank, 99 F.2d 995, 69 App.D.C. 226.
Me.—Trundy v. Fournier, 166 A. 57, 132 Me. 486.
23 C.J. p 1172 note 31 [e].

(2) It is the duty of the personal representative to care for live stock. —Boehme v. Fraase, 126 N.E. 534, 291 Ill. 571.

Withdrawal of bank deposits

The right of possession includes the right to withdraw bank deposits standing in the name of deceased.—Wade v. Security Savings & Commercial Bank, 99 F.2d 995, 69 App.D. C. 226.

Wages

Executor or administrator, as against employer, is entitled to possession of wages due deceased employee at time of death.—Dobney v. Chicago & N. W. Ry. Co., 235 N.W. 585, 120 Neb. 824.

Property purchased under title retention contract

Administrator of buyer under title retention contract rightfully took possession of the property covered by the contract.—Universal Credit Co. v. Ratliff, Tex.Civ.App., 57 S.W. 2d 238.

Note

The personal representative of holder of note may recover possession of note from third person having custody thereof, where deceased holder had property right in note and it became an asset of his estate. —Baker v. Bank of Milton, 6 S.E.2d 7, 121 W.Va. 682.

Personalty of married woman

The executor or administrator of a married woman is entitled to custody of her personalty as fully as if she were single or a man.—Kilpatrick v. Kilpatrick, 96 S.E. 988, 176 N.C. 182.

38. Ind.—Bragdon v. Prudential Ins. Co. of America, App., 34 N.E.2d 173.
Iowa.—In re Sweet's Estate, 277 N. W. 712, 224 Iowa 589.
Ky.—Watts' Adm'r v. Smith, 63 S. W.2d 796, 250 Ky. 617, 91 A.L.R. 1206.
Ohio.—Citizens Nat. Bank Co. v. Andrews, 24 Ohio N.P.,N S., 361.

39. Ala.—Mancill v. Thomas, 114 So. 223, 216 Ala. 623.
Ind.—Smith v. Massie, 179 N.E. 20, 93 Ind.App. 582.
Ky.—Gibson's Adm'r v. Gibson, 43 S. W.2d 343, 241 Ky. 74.
Pa.—In re Herster's Estate, 28 North.Co. 113, 10 Som.Leg.J. 360.
Wash.—Bishop v. Locke, 158 P. 997, 92 Wash. 90.
24 C.J. p 205 note 79.

40. Ohio.—In re Heintz' Estate, App., 38 N.E.2d 431.
Right of possession of decedent's pledgee or mortgagee see infra § 301.

Decedent's donee who received choses in action as gift acquired such right of possession as would defeat administrator's action of trover, regardless of whether donee acquired such legal title as would authorize suit in own name against obligors in choses in action.—Underwood v. Underwood, 159 S.E. 725, 43 Ga.App. 643.

41. Ohio.—In re Heintz' Estate, App., 38 N.E.2d 431.
24 C.J. p 204 note 78 [k], p 205 note 79 [g].

Burden of proof is on the person so claiming possession to show that there are no debts.—Stramler v. Holman, 173 So. 377, 234 Ala. 36.

42. Ohio.—In re Heintz' Estate, App., 38 N.E.2d 431.

43. Mich.—Cullen v. O'Hara, 4 Mich. 132.
24 C.J. p 206 note 85.

44. Cal.—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.
W.Va.—Baker v. Bank of Milton, 200 S.E. 346, 120 W.Va. 788.

45. Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County,

at least where the possession has been taken pursuant to an order of the court;[46] but no order of court is necessary to authorize the representative to take possession of the personalty.[47] The representative's right of possession is not impaired by an injunction forbidding distribution.[48]

Duration of right. The right to the possession of the personalty of decedent vests in the personal representative from the time of his appointment and qualification,[49] but, by relation back, is considered to have arisen as of the date of decedent's death.[50] The right continues for the duration of the administration, and until the estate is settled, or until distribution is ordered or made.[51]

§ 301. Rights and Duties as to Pledged or Mortgaged Property

A personal representative is bound by a pledge or mortgage of personalty by which deceased was bound; and except as statutes may otherwise provide, the pledgee or mortgagee may enforce his right to possession. The representative should redeem the property if it is of greater value than the indebtedness.

A personal representative acquires the interest held by his decedent in pledged or mortgaged personalty.[52] Contracts of pledge or mortgage which bound decedent will also bind his executor or administrator,[53] at least to the extent of available assets in his hands;[54] and the pledgee's or mortgagee's rights on default must be respected by him.[55] Thus, as a general rule, a personal representative must respect the mortgagee's right, in the event of a default under the mortgage, to take possession of the property[56] or to proceed by summary foreclo-

23 N.E.2d 425, 216 Ind. 231, 134 A.L.R. 1238.

Control by court

(1) The possession of the personal representative is subject to control by the court.

Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, supra.

Mont.—In re Clark's Estate, 74 P.2d 401, 105 Mont. 401, 114 A.L.R. 496.

(2) Although administrator was his intestate's only child, where a surviving husband was claiming one half the estate, administrator had no right to deal with personal property other than as administrator, and under directions of probate court, until such claim was determined and decree of distribution made passing title to him.—Ex parte Mason, 232 P. 157, 69 Cal.App. 598.

46. U.S.—In re Durel, C.C.A.Cal., 10 F.2d 448, certiorari denied Barusch v. Brainard, 47 S.Ct. 94, 273 U.S. 699, 71 L.Ed. 846.

47. Mo.—Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

48. Ala.—McCutchen v. McCutchen, 8 Port. 151.

49. N.Y.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.

50. Iowa.—Brandenburg v. Carmichael, 185 N.W. 486, 192 Iowa 694.
Okl.—Shawnee Nat. Bank v. Van Zant, 202 P. 285, 84 Okl. 107, 26 A.L.R. 1349.
24 C.J. p 704 note 78.

51. Fla.—Mills v. Hamilton, 163 So. 857, 121 Fla. 435.
Neb.—Dobney v. Chicago & N. W. Ry. Co., 235 N.W. 585, 120 Neb. 824.
Okl.—In re Gentry's Estate, 13 P.2d 156, 158 Okl. 196—Shawnee Nat. Bank v. Van Zant, 202 P. 285, 84 Okl. 107, 26 A.L.R. 1349.
Wash.—Bishop v. Locke, 158 P. 997, 92 Wash. 90.
24 C.J. p 205 note 80.

52. Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.
Md.—Goldsborough v. DeWitt, 189 A. 226, 171 Md. 225.

Equity of redemption; accounting

(1) Executors succeed testator as pledgor and hold equity of redemption in pledged securities.—Goldsborough v. De Witt, supra.

(2) If a mortgage was in default at the time of decedent's death, so that title and the right to possession were in the mortgagee at that time, the mortgagor's representative acquires only an equitable right of redemption, or a right to an accounting.—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo 599.

Extinction of debt

A bank which treated a debt to it as extinguished and charged it off its books as loss had no further right to retain collateral pledged to it by deceased.—Studer v. Harlan, 109 S.W. 2d 687, 233 Mo.App. 811.

53. La.—Foote v. Sun Life Assur. Co. of Canada, App., 173 So. 477.
24 C.J. p 206 note 92.

Sale as conversion

Sale by administrator, without consent of mortgagee, of property covered by chattel mortgage executed by intestate, is conversion of property.—Dawkins v. People's Bank & Trust Co., 245 P. 594, 117 Okl. 181—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.

Creditor's right to hold collateral

Collateral held by decedent's creditor to secure debt belonged to decedent's estate, but was subject to creditor's right to hold and use it to secure payment of debt.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.

Debt secured by personalty and realty

The representative cannot compel a bank which holds securities and also a mortgage on land as security for a debt of decedent to first exhaust its remedies against the land; and this is true, notwithstanding a contention that the bank could thereby avoid the effect of a statute providing for a moratorium with respect to mortgages on realty.—In re Vicinus' Estate, 290 N.Y.S. 20, 159 Misc. 903.

Proving insolvency to contest validity

Under statute providing that assets of insolvent estate shall be distributed ratably among creditors, executor of mortgagor must plead and prove insolvency of estate to be entitled to contest validity of mortgage.—Federal Reserve Bank of Philadelphia v. Welch, 192 A. 431, 122 N.J.Eq. 90.

Ratification of unauthorized act

Suit by executor of pledgee to foreclose contract pledging stock as security for notes was ratification of previous unauthorized act of executor, as agent or attorney in fact of pledgee, in renewing notes and extending time of payment thereof.—Streichert v. Higgins, 254 P. 1023, 121 Or. 303.

54. N.Y.—Matter of Van Houten, 42 N.Y.S. 1115, 18 Misc. 524, reversed on other grounds 46 N.Y.S. 190, 18 App.Div. 301.
24 C.J. p 206 note 92.

55. Cal.—Mathew v. Mathew, 71 P. 344, 138 Cal. 334.
24 C.J. p 207 note 93.

56. Colo.—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599.
Mo.—Rice's Estate v. Hudson, App., 225 S.W. 111.
Okl.—Costal Sales Corporation v. Hood, 295 P. 891, 147 Okl. 66—Daw-

sure and sale,[57] or, where the terms of the mortgage so provide, to take possession in case he believes that his security is in danger.[58] Under a statute providing comprehensively for the representative's right of possession and sale, however, it has been held that the property is released from the direct, active operation of mortgages and other liens, and the creditor must enforce his rights through the administration proceedings.[59]

A personal representative cannot, for the benefit of heirs, attack a pledge or mortgage, valid as between the parties, on the ground of failure to comply with statutes intended for the protection of creditors or third persons.[60] Thus, he cannot, for the benefit of heirs, attack the validity of a chattel mortgage on the ground that it has not been properly filed or renewed;[61] nor can he, for the benefit of heirs, attack a pledge under a statute rendering a pledge agreement in which the amount of the debt is not stated unenforceable as against third persons.[62] It has been held that where the estate is insolvent the representative can, on behalf of creditors, attack the validity of a chattel mortgage on the ground of the mortgagee's failure to comply with statutory provisions respecting filing;[63] but there is also authority to the contrary.[64]

On a sale of pledged personalty at the instance of the pledgee, the representative should endeavor to have the best possible price secured.[65] In the absence of fraud, undue influence, or similar circumstance, the personal representative of a deceased mortgagor can agree with the mortgagee to have the mortgaged personalty sold without foreclosure, the proceeds to be applied on the debt.[66]

Redemption; preservation of rights. It is the right and duty of the personal representative to employ funds of the estate in redeeming pledged or mortgaged personalty of the estate having a greater value than the secured indebtedness.[67] In this connection it is necessary, but sufficient, for the representative to act in good faith, and to exercise reasonable prudence and sound discretion.[68]

It is not the duty of an executor or administrator

kins v. People's Bank & Trust Co., 245 P. 594, 117 Okl. 181—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.
24 C.J. p 207 note 93 [a], [c] (1).

Statute prohibiting alienation

(1) A chattel mortgagee who, before the granting of letters of administration, alienates any of the property of decedent covered by the mortgage, may be made, by statute, liable to an action by the administrator for double the value of the property alienated.—Litz v. Alva Exch. Bank, 83 P. 790, 15 Okl. 564.

(2) Such a statute does not preclude the mortgagee from taking possession of the mortgaged property before the appointment of an executor or administrator.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231—Secrest v. Wood, 224 P. 349, 98 Okl. 60.

(3) Statutory liability generally for double the value of property embezzled or alienated see supra § 170.

57. Alaska.—Courtnay v. Brenneman, 6 Alaska 233.

58. Okl.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231.

59. Tex.—Universal Credit Co. v. Ratliff, Civ.App., 57 S.W.2d 238.

Summary seizure

Provisions in title retention contract for summary seizure and sale of truck and application of proceeds were revoked and superseded by administration on deceased buyer's estate.—Universal Credit Co. v. Ratliff, supra.

60. Utah.—Wasatch Livestock Loan Co. v. Nielson, 56 P.2d 613, 90 Utah 307, amended on other grounds 61 P.2d 616, 90 Utah 331.

61. Utah.—Wasatch Livestock Loan Co. v. Nielson, supra.

Validity of unrecorded mortgage as against representative generally see Chattel Mortgages § 134.

62. La.—Foote v. Sun Life Assur. Co. of Canada, App., 173 So. 477.

63. Utah.—Wasatch Livestock Loan Co. v. Nielson, 56 P.2d 613, 90 Utah 307, amended on other grounds 61 P.2d 616, 90 Utah 331.

64. Wis.—Graham v. Perry, 228 N. W. 135, 200 Wis. 211, 68 A.L.R. 267.

65. Cal.—Landis v. First Nat. Bank, 66 P.2d 730, 20 Cal.App.2d 198.
Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.
Pa.—Chiswell v. Campbell, 150 A. 90, 300 Pa. 68.

66. Mo.—State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.
Wash.—Harding v. American State Bank, 221 P. 599, 127 Wash. 484.
Necessity of court order for sale by representative see infra § 305.

Sale in name of estate

The mere fact that a chattel mortgagee, for the supposed benefit of the estate, consented that the sale might be made in the name of the estate, he attending and receiving the sale money, would not render the sale invalid.—Rice's Estate v. Hudson, Mo.App., 225 S.W. 111.

67. Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.
N.Y.—In re Witkind's Estate, 4 N. Y.S.2d 933, 167 Misc. 885.
24 C.J. p 206 note 91.

General pledge

The representative cannot obtain pledged securities on paying off one debt of decedent to the pledgee, where another debt is still outstanding and the securities are held under a general pledge to secure all liabilities.—In re Vicinus' Estate, 290 N.Y.S. 20, 159 Misc. 903.

Maintenance of margin account

Where a broker is to retain securities as long as a proper margin is maintained, the executor of the customer has the duty, without express or implied authority under will, to perform contract of testator with broker, for such reasonable time as may be necessary for purpose of realization of value of securities.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

Redemption for nominal consideration

Decedent's estate was legal owner of pledged stock until it was sold, and advantage accruing from redemption for nominal consideration belonged to estate and not to administrator and his attorneys.—Chiswell v. Campbell, 150 A. 90, 300 Pa. 68.

68. Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.
N.Y.—In re Witkind's Estate, 4 N. Y.S.2d 933, 167 Misc. 885.
Pa.—In re Mellier's Estate, 18 Pa.

to pledge his own property or use his own credit in order to borrow money to redeem pledged property of the estate,[69] but if he advances his own funds to preserve the rights of the estate in such property and is justified by the circumstances in so doing, he should be credited therefor.[70]

§ 302. Contracts of Decedent

The rights and duties of an executor or administrator as to the performance of decedent's obligations generally are considered supra § 189, and as to his contracts of pledge or mortgage, supra § 301.

§ 303. Mortgage or Pledge by Representative

Generally, an executor or administrator can pledge or mortgage personalty for administration purposes, although a court order may be required. A pledgee or mortgagee who knew, or should have known, that the pledge or mortgage was not for a just purpose of administration cannot hold the property against the beneficiaries.

While there is authority to the contrary,[71] it is usually considered that, in the absence of any statutory or testamentary provision to the contrary, an executor or administrator has power to raise money by pledge or mortgage of the personalty in his hands, in order to pay the debts or fulfill other purposes of administration.[72] The pledgee or mortgagee acquires good title as such where he acts in good faith,[73] even though the representative is guilty of a breach of trust in connection with the transaction;[74] but where the pledgee or mortgagee knew, or should have known, that the loan was not for any just purpose of administration, he becomes a participant in the wrong and cannot hold the pledged or mortgaged property against the beneficiaries,[75] although his possession will generally hold good as against the representative.[76] A personal representative cannot encumber estate assets to secure his individual debt,[77] and the fact that the mortgage or pledge was given to secure an individual debt of the executor or administrator establishes the wrongful character of the transaction, and

Dist. & Co. 595, affirmed 167 A. 358, 312 Pa. 157, 92 A.L.R. 430.
24 C.J. p 206 note 91.

Acts without advice or approval

Fact that representative did not consult persons experienced in business or seek approval of probate court before turning over additional security and paying interest to prevent a sale of pledged personalty, does not of itself establish a breach of duty.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.

69. Or.—In re Holladay, 22 P. 750, 18 Or. 168.

70. Conn.—Reiley v. Healey, 187 A. 661, 122 Conn. 64.

71. Miss.—Ford v. Russell, Freem. 42.
24 C.J. p 227 note 54 [h].

72. Mass.—Lyman v. National Bank of Republic, 63 N.E. 923, 181 Mass. 437.
N.Y.—In re Schmutz' Estate, 288 N. Y.S. 98, 159 Misc. 454.
N.C.—Felton v. Felton, 195 S.E. 533, 213 N.C. 194.
R.I.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.
24 C.J. p 227 notes 54, 55.
Right to borrow money generally see supra § 202.

Preservation of assets

If value of estate asset to be preserved by raising a mortgage is commensurate with expense of preservation, it is duty of administrator to conserve it; he can do all things which prudent men would do in conduct of their own like affairs, and the question of whether the expense is too great is for the representative, and not for the court, to determine.—In re Schmutz' Estate, 288 N. Y.S. 98, 159 Misc. 454.

Preference

Personal representative cannot, in contravention of statute, prefer some creditors over others of the same class by giving them a mortgage on the property of the estate. —Jenkins v. First Nat. Bank, Tex. Civ.App., 101 S.W.2d 845.

Participation in unauthorized pledge

Administrator cannot maintain an action to recover property of his intestate which the latter's friends, without authority, pawned to procure his coffin, if he was a party to the transaction, although not then the administrator, and if the price of the coffin has not been paid; but proof of his mere presence and passive assent is not sufficient to defeat his action.—Jones' Adm'r v. Logan, 50 Ala. 493.

73. N.C.—Felton v. Felton, 195 S. E. 533, 213 N.C. 194.
R.I.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.
24 C.J. p 227 note 56.

74. Wis.—Hemmy v. Hawkins, 78 N.W. 177, 102 Wis. 56, 72 Am.S. R. 863.
24 C.J. p 227 note 57.

75. Pa.—Schell v. Deperven, 48 A. 815, 198 Pa. 591.
24 C.J. p 228 note 58.

Property improperly included

The mortgagee has no right to property the inclusion of which in the mortgage is unauthorized.—Haley v. Austin, 223 P. 43, 74 Colo. 571.

No consideration for mortgage

A mortgage executed by an executor to pay a debt existing at the time of the decedent's death has been held invalid as without consideration where there was no contemporaneous renewal or extension of the debt.—Jenkins v. First Nat. Bank, Tex.Civ. App., 101 S.W.2d 845.

76. Mass.—Lyman v. National Bank of Republic, 63 N.E. 923, 181 Mass. 437.
24 C.J. p 228 note 59.

Individual interest of representative

An unauthorized chattel mortgage executed by a representative in his individual, as well as his representative, capacity, constitutes a lien on any interest which he may have in the property as an individual.—In re Bramer's Estate, 273 N.Y.S. 790, 151 Misc. 786.

77. Cal.—Brownfield v. McFadden, 68 P.2d 993, 21 Cal.App.2d 208.
N.Y.—In re Bramer's Estate, 273 N. Y.S. 790, 151 Misc. 786.

Authorization by court

A probate court has no power to make ex parte order authorizing executor to pledge assets of estate to secure his note.—Brownfield v. McFadden, 68 P.2d 993, 21 Cal.App.2d 208.

Improper continuance of business

No lien attaches against a distributee's share under a mortgage executed by the representative to secure payment for merchandise bought by him while wrongfully continuing to operate decedent's business; and this is true although the distributee was partly supported from the proceeds of the business.—In re Bramer's Estate, 273 N.Y.S. 790, 151 Misc. 786.

charges the mortgagee or pledgee with notice thereof.[78]

Order of court. A promissory note or other chose in action has been held to be "property" within the meaning of a statute under which a personal representative cannot pledge or mortgage personal property of the estate without obtaining an order of the court.[79]

Application of proceeds. A pledgee or mortgagee making a loan in good faith, and without notice of any intended misapplication by the personal representative, is not responsible for the application of the proceeds of the loan.[80]

§ 304. Acquisition of Property by Representative

a. In representative capacity
b. In individual capacity

a. In Representative Capacity

Ordinarily, a personal representative should not buy additional personalty for the estate; but where he does acquire property in his fiduciary capacity or with estate funds, he holds it as an asset of the estate.

Ordinarily, the duty of a personal representative is to distribute the personalty of the estate and not to buy additional property.[81] He should not purchase claims,[82] unless they are against decedent and require disposition in order to settle the estate.[83]

Money received or property acquired by the representative in his fiduciary capacity and in the exercise of his official duties becomes assets of the estate in his hands,[84] and the same is true of securities taken for debts due decedent or on a sale of decedent's assets.[85] Whatever profit may have accrued to the representative acting as such, including gains made through compromise or award, belongs rightfully to the estate and should be accounted for.[86] Property purchased by the representative with the funds of his decedent is the property of the estate held by him in trust for the heirs and distributees.[87] Where the representative recovers in his own name on a contract made with him personally after the death of his decedent, respecting the estate, or receives money for the use of the estate, he is answerable as representative for the amount.[88] The personal representative cannot retain for the estate property improperly acquired by him from a third person as a result of wrongful advice given, or advantage taken, by the representative's attorney.[89]

b. In Individual Capacity

(1) In general
(2) Acquisition of interest of heir or legatee

(1) In General

A representative cannot directly or indirectly purchase personal property of the estate for himself, except at a judicial or execution sale.

An executor or administrator cannot purchase for himself personal property of the estate,[90] and a pur-

78. U.S.—Smith v. Ayer, Ill., 101 U. S. 320, 25 L.Ed. 955.
24 C.J. p 228 note 60.

79. Wash.—Harden v. State Bank of Goldendale, 203 P. 16, 118 Wash. 234.

80. R.I.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.
24 C.J. p 228 note 62.

81. Ohio.—West v. Dean, 15 Ohio Cir.Ct. 261, 9 Ohio Cir.Dec. 797.

Property mortgaged to decedent

It has been held that an administrator cannot buy property mortgaged by a chattel mortgage to the intestate, and bind the estate by a promise made in his capacity as administrator to pay therefor.—West v. Dean, supra.

Bank stock

A personal representative has been held without authority to acquire bank stock and thereby render the estate liable for a double assessment.
S.D.—Baird v. Barnes, 235 N.W. 122, 58 S.D. 128, modifying Baird v. Mall, 232 N.W. 47, 57 S.D. 309.
Tenn.—Nottingham v. Kent, App., 155 S.W.2d 882.

82. U.S.—Kevan v. John Hancock Mut. Life Ins. Co., D.C.Mo., 3 F. Supp. 288.
N.Y.—In re Jarvis' Estate, 285 N.Y. S. 285, 158 Misc. 255.

Life insurance

A statute empowering executors and administrators to collect money due to deceased, and to maintain necessary actions, confers no authority on the representative to take an assignment of a cause of action existing in favor of the beneficiary of a life insurance policy.—Kevan v. John Hancock Mut. Life Ins. Co., D.C.Mo., 3 F.Supp. 288.

83. N.Y.—In re Jarvis' Estate, 285 N.Y.S. 285, 158 Misc. 255.

84. Ky.—Aulbach v. Read, 77 S.W. 204, 25 Ky.L. 1130.
24 C.J. p 228 note 64.

85. Ala.—King v. Green, 2 Stew. 133, 19 Am.D. 46.
24 C.J. p 229 note 65.

86. Md.—Gephart v. Strong, 20 Md. 522.
24 C.J. p 229 note 67.

87. Tex.—Parker v. Portis, 14 Tex. 166.
24 C.J. p 229 note 66.

88. Mass.—Mowry v. Adams, 14 Mass. 327—Dawes v. Boyleston, 9 Mass. 337, 6 Am.D. 72.

89. Mass.—Goldston v. Randolph, 199 N.E. 896, 293 Mass 253.
Mich.—Meigs v. Thayer, 287 N.W. 342, 289 Mich. 680.

Joint bank account

A transfer of a bank deposit by joint owner to executor of deceased coowner because of transferor's mistaken belief, induced by estate's attorney, that deposit was not hers because she made no contributions thereto, must be set aside.—Meigs v. Thayer, supra.

90. Cal.—Landis v. First Nat. Bank, 66 P.2d 730, 20 Cal.App.2d 198.
N.J.—In re Gallagher, 196 A. 430, 123 N.J.Eq. 384.
24 C.J. p 115 note 41, p 229 note 70.
Purchase at representative's own sale see infra § 314.

Exchange of property for services

Transaction, whereby administrator and his attorney accepted shares of stock in exchange for claims for services, was forbidden by Idaho statute, prohibiting administrator from purchasing property of estate

chase at an inadequate price is especially improper.[91] He cannot buy out for himself his decedent's share in a partnership,[92] and a sale indirectly made by him to a corporation in which he is largely interested is, in law, deemed fraudulent, and may be affirmed or disaffirmed at the option of the parties in interest.[93] However, an executor is not guilty of any wrong where he purchases at par a note due the estate at a time when the estate is in pressing need of money, and the value of the collateral securing the note is less than the amount due thereon.[94]

An executor who, without authority to carry on a business of his testator, purchases goods for that purpose, obtains title to such goods individually, and they are subject to an execution against him.[95] Where an intestate died leaving certain real estate subject to notes for the purchase price secured by a trust deed thereon, the purchase of such notes by the administrator constituted a purchase in his individual capacity, and not for the estate.[96]

Purchase at judicial or execution sale. A personal representative is at liberty to purchase the goods of his decedent at a judicial or execution sale,[97] unless he has in some way caused the sale to be made, or is indirectly the vendor thereat.[98]

(2) Acquisition of Interest of Heir or Legatee

An executor or administrator may acquire the interest of a distributee if the transaction is fair and the facts fully disclosed; the burden is on him to show that he has taken no advantage.

While an executor or administrator may, if the transaction is fair and the consideration adequate, purchase or acquire all or part of the interest of a legatee or distributee,[99] such a transaction should be closely scrutinized,[1] for the relation of the parties makes such a dealing suspicious and imposes on the representative the burden of showing that no advantage has been taken by him.[2] It is the duty of the representative to disclose the facts fully and fairly to the heir,[3] and if the transaction is tainted

or being interested in any "sale," notwithstanding that technically there was no sale in the sense that money was paid for property; and heirs were entitled to relief which would deprive administrator and his attorney of "profits" made on transaction.—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U. S. 571, 84 L.Ed. 479 and conformed to, D.C., Bruun v. Hanson, 30 F. Supp. 602.

91. Pa.—Chiswell v. Campbell, 150 A. 90, 300 Pa. 68.

Good will

In determining the adequacy of the price paid by a personal representative for a going business, or an interest therein, the value of the good will should be taken into consideration.

Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

N.Y.—In re Westhall's Estate, 6 A. 2d 757.

92. N.Y.—Matter of Barlow, 15 N.Y. St. 721.

24 C.J. p 229 note 71.

93. Ill.—Roberts v. Weimer, 130 Ill. App. 297, affirmed 81 N.E. 40, 227 Ill. 138.

94. Mich.—Houghteling v. Stockbridge, 99 N.W. 759, 136 Mich. 544.

95. Ala.—Eufaula Nat. Bank v. Manassas, 27 So. 258, 124 Ala. 379.

96. Ill.—Mayer v. McCracken, 92 N. E. 955, 245 Ill. 551.

97. N.J.—Earl v. Halsey, 14 N.J. Eq. 332.

24 C.J. p 230 note 86.

98. N.C.—Boatwell v. Raynell, 3 N. C. 1.

99. N.Y.—In re Hastings' Will, 8 N.Y.S.2d 73, 255 App.Div. 913, reversing 4 N.Y.S.2d 100, affirmed In re Hasting's Estate, 21 N.E.2d 201, 280 N.Y. 694.

24 C.J. p 229 note 77.

Transactions with heirs, etc., generally see supra § 240.

Agreement to support as consideration

Contract between administrator and sole distributee, whereby administrator retained money in consideration of his agreement to support and care for sole distributee during remainder of latter's life, was held valid and binding.—Bowles v. Bowles, 126 S.E. 49, 141 Va. 35.

Taking assignment as security

An assignment by an heir of his interest in the estate to the representative as security for a loan is not improper where no one is injured.—In re Stewart's Estate, 28 P. 2d 642, 145 Or. 460, 91 A.L.R. 818.

Agreement to repurchase stock taken as share

It is not unlawful for an executor to transfer at par, in settlement of a legacy, stock which is worth less than par, and at the same time to agree to repurchase the stock later at an advanced price on his personal account.—Weymouth v. Goodwin, 75 A. 61, 105 Me. 510—24 C.J. p 230 note 85.

Inadequacy of price may be explained by showing that the distributee, with knowledge of the inadequacy, intended, in effect to make a gift, or was obliged to sell without delay and obtained from the representative as much as, or more than, others had offered.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

Presumption of purchase

A presumption that the representative purchased from the legatees may arise where he retains property which belonged to the estate, claiming it as his own, for a considerable time after the close of the administration.—Cole v. Collett, Litt. Sel.Cas., Ky., 47.

1. Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

24 C.J. p 230 note 78.

2. Iowa.—Bettendorf v. Bettendorf, supra.

24 C.J. p 230 note 79.

Presumption of fraud

An executor or administrator, in dealing with those interested in the estate, is regarded as a trustee, and a presumption of fraud or undue influence arises against him when he undertakes to purchase the trust property from his cestuis.—Bettendorf v. Bettendorf, supra.

Effect of independent advice

The fact that a party interested in an estate obtained independent advice before selling her share of the estate to the administrator does not alone obviate the presumption of undue influence; and the presumption is not rebutted if the independent adviser has been misled by the administrator, or is so situated as to the administrator as not to be impartial.—Bettendorf v. Bettendorf, supra.

3. Iowa.—Milroy v. Milroy, 181 N. W. 473, 190 Iowa 1215—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

with fraud or imposition it will not be allowed to stand.[4] In determining whether a distributee received an adequate price for property sold by him to the personal representative, the value of the property should be ascertained as of the date of the sale;[5] but subsequent statements by the representative concerning the value of the property can be considered as bearing on the good faith of his previous representations to the distributee at the time of the purchase.[6]

Who may object. Where the personal representative purchases the interest of a particular heir or legatee, only the vendor can object to the transaction, and the other heirs or legatees have no right to object.[7]

Interest. It is proper to charge interest against the representative on the amount recovered against him by reason of his acquisition of property from a distributee at an inadequate price.[8] Where an administratrix obtained a voidable assignment of certain stocks, she was liable, on the heir's disaffirmance, to account for the value of the stocks, dividends received thereon by her, and interest on the avails of a sale thereof from the time the stocks were sold.[9]

2. Sale

§ 305. Power to Sell and Transfer Title

A representative has absolute power to sell the personal property of a decedent's estate as he sees fit, except where it is required by statute that he first obtain the sanction of the court; and authorities differ as to whether violation of the statute invalidates the sale. Where the power of sale is conferred by will, a court order may not be necessary.

Under the common-law rule, and in the absence of any statute providing otherwise, an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass good title to a purchaser;[10] and the courts of one state will presume that the common-law rule prevails in another state in the absence of any showing that it has been changed by statute.[11] It has been held that, where is does not appear that the sale is necessary for the payment of debts or legacies, and is not made so by the terms of the will, the beneficiaries may elect to take the property in specie.[12]

However, in many jurisdictions, under statutes to that effect, an executor or administrator is required to obtain the sanction of the court before the representative can sell or otherwise dispose of the personalty.[13] Some of the statutory provisions as to

Trust company, as administrator, and the president of the company, occupied such a confidential relation with heirs that neither could acquire, by gift or purchase from the heirs, any property belonging to the estate of deceased, except under the most perfect understanding by the heirs of their rights and by their entirely free and voluntary act.—Walsh v. Walsh, 226 S.W. 236, 285 Mo. 181.

Distributee does not ratify the representative's fraudulent purchase of property by a purported settlement made at a time when the distributee is as ignorant of the true facts as at the time of the sale.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

4. Iowa.—Bettendorf v. Bettendorf, supra.
N.Y.—In re Patten's Estate, 298 N.Y.S. 827, 252 App.Div. 807, affirmed 13 N.E.2d 457, 277 N.Y. 525—In re Robertson's Estate, 1 N.Y.S.2d 423, 165 Misc. 710.
24 C.J. p 230 note 80.

Purchase at discount
Executor's purchase of heirs' interest in solvent estate at discount is against public policy.—Wells v. Wood, 263 P. 54, 125 Or. 38.

5. Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

6. Iowa.—Bettendorf v. Bettendorf, supra.

7. N.C.—Hale v. Aaron, 77 N.C. 371.
24 C.J. p 230 note 81.

8. Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.

9. Conn.—State v. Culhane, 63 A. 636, 78 Conn. 622.

10. U.S.—Equitable Life Assur. Soc. of U. S. v. Mallers, C.C.A.Ill., 104 F.2d 567—Owen v. Paramount Productions, D.C.Cal., 41 F.Supp. 557.
Alaska.—In re Holt's Estate, 7 Alaska 630.
Cal.—Aronson v. Bank of America N. T. & S. A., 109 P.2d 1001, 42 Cal.App.2d 710.
Ky.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330.
N.C.—Felton v. Felton, 195 S.E. 533, 213 N.C. 194.
Or.—In re Fehlmann's Estate, 292 P. 1027, 1028, 134 Or. 46, quoting **Corpus Juris.**
24 C.J. p 207 note 96.

Property not otherwise disposed of
The executor has the right to sell property of which the testator failed to dispose.—Andrew's Ex'x v. Spruill, 112 S.W.2d 402, 271 Ky. 516.

Executor as legatee
Gift of residue to executors does not restrict ordinary right and duty of executors to sell securities.—In re Pressprich's Estate, 207 N.Y.S. 412, 124 Misc. 15.

Satisfaction of representative's debts
(1) It was formerly the rule at law that executors and administrators could make a valid sale of the personal property of decedent in satisfaction of their individual debts.—Allender v. Riston, 2 Gill & J., Md., 86—24 C.J. p 208 note 13.

(2) But the present rule is that they cannot sell in payment of their individual debts.—Horton v. Jack, 58 P. 1051, 126 Cal. 521—24 C.J. p 208 note 14.

(3) However a sale in payment of representative's debts has been held proper where debt was for advance to the estate.—Graff v. Castleman, 5 Rand. 195, 26 Va. 195, 16 Am.D. 741.

11. Ala.—Brannan v. Oliver, 2 Stew. 47, 19 Am.D. 39.
Ind.—Rogers v. Zook, 86 Ind. 237.

12. N.Y.—Lane v. Albertson, 79 N.Y.S. 947, 78 App.Div. 607.

13. Alaska.—In re Holt's Estate, 7 Alaska 630.
Cal.—King v. Harford, 191 P. 998, 48 Cal.App. 405.
Ga.—Sheffield v. First Nat. Bank, 121 S.E. 809, 157 Ga. 422—Bald

the sale of personalty have been considered to be merely directory and for the protection of the representative, and not to affect his jus disponendi and power to pass a good title,[14] but it has also been held that a sale without an order of court is absolutely void and passes no title to the purchaser.[15] Under statute to that effect, personal property may be sold at public sale without an order of the court where necessary to pay debts or legacies.[16]

Sales pursuant to court order are considered in §§ 536-666 infra.

Advice of court. Provision may be made by statute for the securing of the direction and advice of the surrogate as to the sale of personalty. Applications under such a statute, it has been held, should not be favored.[17] However, unusual circumstances may be present which will warrant the surrogate in disposing of the matter.[18]

Effect of testamentary provisions. A power of sale may be conferred on an executor by the will, in which event he acts in making the sale by virtue of the power so conferred, and not by virtue of his common-law power or pursuant to any authority derived from the probate court.[19] As a gen-

win v. Boaz, 129 S.E. 670, 34 Ga. App. 393.
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.
Tex.—Cartledge v. Billalba, Civ.App., 154 S.W.2d 219, error dismissed.
24 C.J. p 209 note 16.

Liability for value
Administrator who without order of court sold a team of horses to another in part payment for services alleged to have been rendered by such other to the estate was chargeable with market value of horses—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.

Temporary administrator
Statute authorizing temporary administrators to do such acts as might be required of a receiver in the superior court does not permit sales by such administrators without order from the ordinary.—Dowling v. Keen, 200 S.E. 789, 187 Ga. 394.

Sale of leasehold interest in real estate is within rule.—Zimmerman v. Dawson, 222 Ill.App. 212.

Agreement for sale
Where the probate court had ordered a sale, no additional order was necessary to authorize the making of an agreement for the sale, such agreement being a mere incident to the sale.—State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.

Jurisdiction
Application by administrator for sale and division of assets, with recital as to lapse of legacy given for securing prohibition, was held not outside jurisdiction of county court as involving construction of will.—Women's Christian Temperance Union of El Paso v. Cooley, Tex.Civ. App., 25 S.W.2d 171, error refused.

14. U.S.—Equitable Life Assur. Soc. of U. S. v. Mallers, C.C.A.Ill., 104 F.2d 567, 570, construing Illinois statute and citing **Corpus Juris.**
24 C.J. p 209 note 17.

15. Ga.—Porter v. La Grange Banking & Trust Co., 1 S.E.2d 441, 187 Ga. 528—Dowling v. Keen, 200 S. E. 789, 187 Ga. 394—Price v. Nehi, Inc., 174 S.E. 722, 49 Ga.App. 196.
La.—Escat v. Leaman, App., 181 So. 621, applying Texas law.
Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
24 C.J. p 210 note 18.

Representative who was sole legatee is within this rule.—King v. Harford, 191 P. 998, 48 Cal.App. 405.

Recovery of fair value for use
Notwithstanding rule that administrator cannot sell personal property of estate without court order, when goods have been in fact delivered to and used by vendee, while administrator cannot recover contract price, he can recover their value as on a quantum valebat or implied contract to pay market value at time and place of delivery and use.—Baldwin v. Boaz, 129 S.E. 670, 34 Ga.App. 393.

Property held under conditional sale
In trover by assignee of conditional seller of machinery, defendant's claim under void sale from conditional buyer's administrator was ineffective against assignee's right to rescind sale contract and retake machinery after indebtedness had become past due, and defendant could not claim accounting for payments by previous buyers under sale contract, since defendant had never been recognized as debtor by seller or assignee, and had no privity with assignee.—Price v. Nehi, Inc., 174 S. E. 722, 49 Ga.App. 196.

16. Mo.—Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176, judgment quashed on other grounds State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S. W. 411, 296 Mo. 636, followed in Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 182, and Stadtman v. Citizens' Bank of Warrenton, App., 237 S.W. 182, opinion quashed on other grounds 247 S. W. 411, 296 Mo. 636, opinion conformed to, App., 249 S.W. 1118 and 249 S.W. 1119.

17. N.Y.—In re Schleif's Estate, 169 N.Y.S. 814.

Jurisdiction not conferrable by consent
Where all the parties interested consented to the granting of the administrator's application for advice by the surrogate as to the proposed sale by them of corporate stock held under a void trust at the time of decedent's death, the surrogate can entertain the application, when justified by the unusual circumstances, although the consent of the parties could not confer jurisdiction on the surrogate, if none existed.—In re Kraus' Estate, 197 N.Y.S. 636, 120 Misc.Rep. 21.

18. N.Y.—In re Kraus' Estate, supra.

Subject matter of void trust
Where certificates of corporate stock owned by decedent were held under a trust suspending the power of alienation for a period forbidden by the statutes against perpetuities (Real Prop.L. § 42; Pers.Prop.L. § 11), so that the trust was void, the title to the stock vested in the administrators, so that an application for advice as to sale of such stock was properly brought before the surrogate.—In re Kraus' Estate, supra.

19. Ala.—McCollum v. McCollum, 33 Ala. 711.
24 C.J. p 210 note 19.

Contract held not sale
If agreement between deceased's widow and administrator of deceased's estate provided that widow was to substitute herself for deceased as guarantor of obligation of a company, and that for her undertaking widow was to receive practically all assets of estate of any value, as contended, by widow, agreement did not amount to a "sale," and administrator had no authority to enter into such contract by virtue of provision in will authorizing administrator to sell.—Fry v. Bryant, 103 P.2d 760, 165 Or. 61.

Particular testamentary provisions
(1) Where testator, after specific bequests, directed executor to sell all property and to divide proceeds among certain legatees, he intended

eral rule statutes requiring an order of court to authorize a sale of personalty do not apply in cases where the testator has by his will authorized the executor to sell expressly,[20] or by necessary implication;[21] but it has also been held that if the testator desires the power to be exercised without such order it should be so expressed in the will and otherwise an order is necessary.[22]

Restrictions may also be imposed by the will on the executor with reference to the sale of the testator's personalty,[23] although an executor may sometimes be justified in selling, notwithstanding the sale is in opposition to a direction of the will.[24] The fact that a chattel is specifically bequeathed does not deprive an executor of the power to sell or dispose of it,[25] at least if he has not assented to the legacy;[26] but such a disposition constitutes a breach of duty, except where the general personal assets are insufficient.[27]

Representative appointed by foreign court. On principles of comity and state policy, the courts of one state will not interfere with the power of the representative of an estate appointed by the court of another state to sell the property of deceased in the absence of a showing that irreparable injury would result.[28]

Power as dependent on office. The authority to sell can be exercised only while the personal representative is in office, because his title to the assets is divested as soon as he ceases to be executor or administrator,[29] but a sale while in office is not invalidated by the subsequent removal, resignation, or discharge of the representative.[30] Where a person named as executor did not qualify by giving

to include everything not previously effectually disposed of.

R.I.—Dunham v. Randall, 151 A. 193, 51 R.I. 55.

Tex.—In re Chaney's Estate, 36 S.W. 2d 709, 120 Tex. 185.

(2) Will directing division of estate into shares for distribution among named beneficiaries in stated proportions, and providing that sale and distribution thereof should be left to judgment of beneficiary nominated as executor, gave latter power to sell personalty.—Knight v. Gregory, 165 N.E. 208, 333 Ill. 643.

(3) Right given executors, under will bequeathing life estate in real property, to sell products of land and to pay a legacy out of the proceeds of such sale, was held not destroyed by the subsequent merger of the life estate and the remainder. —Shull v. Rigby, 144 S.E. 372, 196 N.C. 4.

(4) Provision of will directing executors to dispose of personal property within one year after testator's death had reference to tangible property instead of intangible property such as notes.—Diebold v. Diebold, App., 141 S.W.2d 119, transferred, see, Mo., 133 S.W.2d 401.

(5) Will directing executors to divide securities in residue was held to contemplate division on notice to and consent of all residuary legatees, and transfer to coexecutor without knowledge of others was unauthorized.—In re Boyle's Estate, 230 N.Y.S. 392, 128 Misc. 639.

(6) Residuary clause authorizing executor to sell such stocks as he thought proper for payment of taxes was held to refer to taxes estate would be compelled to pay, and not to require executor to pay inheritance taxes otherwise chargeable to legatees.—In re Youngblood's Estate, 178 A. 517, 117 Pa.Super. 550.

Sale and replenishment of stock in trade

Where an executor, with power of sale by the will, sells part of a stock in trade in the course of continuing the business and purchases new stock with the proceeds of such sale, the new stock remains in the estate, since such sale and replenishment are not a disposition of the property within the terms of the will.—Vincent v. Putnam, 217 N.Y.S. 381, 127 Misc. 647, affirmed 223 N.Y. S. 361, 221 App.Div. 211, affirmed 161 N.E. 425, 248 N.Y. 76, which affirmed Vincent v. Rix, 223 N.Y.S. 364, 221 App.Div. 209, affirming 217 N.Y. S. 393, 127 Misc. 639.

20. Wash.—In re Crim, 154 P. 811, 89 Wash. 395.
24 C.J. p 210 note 20.

Power to sell realty

A lease of premises for ninety-nine years is personal property, and is not included in a power given to the executor of a will to sell real estate or any interest therein.—Zimmerman v. Dawson, 222 Ill.App. 212.

21. **Provision for division of property**

A will providing for the division of personal property in certain proportions may by necessary implication direct its sale so that an order of sale is not necessary.—Blackmon v. Blackmon, 101 S.E. 827, 113 S.C. 478.

22. Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225—Brooks v. Bergner, 35 A. 98, 83 Md. 352.

23. N.J.—Lembeck v. Lembeck, 68 A. 237, 73 N.J.Eq. 427, affirmed 71 A. 240, 74 N.J.Eq. 848.
S.C.—Smith v. Smith, 1 S.C.Eq. 304.
24 C.J. p 210 note 22.

Restraining sale in violation of will

The orphans' court had jurisdiction in proceeding on petition for order restraining executors from selling testator's stock in a corporation in violation of by-laws of corporation under direction in testator's will.—In re Garvin's Estate, 6 A.2d 796, 335 Pa. 542.

Restriction on sale by remaindermen

Where testator devised property to his widow for life with full power to dispose of property by investment or reinvestment, and devised remainder over to his children, further provision limiting children's right to dispose of certain stock for ten years after testator's death did not restrict executrix' right to sell but clearly placed restriction on children.—Tyson v. Moore, C.C.A.Ala., 92 F.2d 741.

24. N.J.—Stephens v. Milnor, 24 N. J.Eq. 358.
N.Y.—Meeker v. Crawford, 5 Redf. Surr. 450.
24 C.J. p 210 note 23.

25. Ala.—Alexander v. Bates, 28 So. 415, 127 Ala. 328.
24 C.J. p 208 note 99.

Residue of property

Representative may sell a residue of personal property given for life with remainder over.—Jones v. Simmons, 42 N.C. 178—Smith v. Barham, 17 N.C. 420, 25 Am.D. 721.

26. Tenn.—State ex rel. Franklin v. Sullivan, 138 S.W.2d 435, 176 Tenn. 107, 127 A.L.R. 1067.

27. Tenn.—State ex rel. Franklin v. Sullivan, supra.

28. Del.—Bowles v. R. G. Dun-Bradstreet Corporation, Ch., 12 A.2d 392.

29. Ala.—Whorton v. Moragne, 62 Ala. 201.

30. S.C.—Benson v. Rice, 11 S.C.L. 577—Price v. Nesbit, 10 S.C.Eq. 445.

bond as required by statute, a sale by him is void as against an executor who did qualify.[31]

Annual crops. Although the law may require the representative to obtain authority from the court to sell the personalty, yet, in the case of annual crops, if he is unable to obtain the order from the court in time to prevent loss and he makes a sale, the maxim, Lex non cogit ad impossibilia, is applicable,[32] and annual crops are sometimes expressly excepted from the operation of a statute requiring an order of court to authorize a sale.[33] The administrator has authority to sell sufficient of the annual crops to reimburse one who has made advances to him to aid in putting in the crops on the estate.[34]

Perishable property. Under statute to that effect, a representative may, with the approval of the court, sell perishable goods for the purpose of conserving and protecting the assets of the estate,[35] and, under statute to that effect, it has been held that perishable property may be sold without an order of court at public sale.[36] As a general rule when perishable property is given by a will to one for life with remainder to another, it is the duty of the executor to sell the property and invest the fund, only the interest on which would belong to the person having the life estate; but if the will indicates an intention that the life tenant shall enjoy the property in specie it should not be sold.[37]

Particular property. Various particular kinds of personal property have been held to be[38] or not to be[39] within the representative's power to sell under the general rules hereinbefore stated.

§ 306. —— Choses in Action

a. In general
b. Commercial paper

a. In General

Except as an order of court may be required by statute, an executor or administrator has the absolute power to transfer choses in action of the estate, as, for example, in payment of debts, and even at a discount.

The common-law rule is that an executor or administrator may transfer choses in action of the estate as fully as though he were the absolute owner thereof,[40] and, although ordinarily choses in ac-

31. Va.—Monroe v. James, 4 Munf. 194, 18 Va. 194.

32. Md.—Levering v. Levering, 2 A. 1, 64 Md. 399.
24 C.J. p 210 note 24.

33. Ga.—Baldwin v. Boaz, 129 S.E. 670, 34 Ga.App. 393.
24 C.J. p 210 note 25.

34. Miss.—Starling v. Wyatt, 27 So. 526.

35. **Sale held proper**
Sale of grocery stock by special administrator to conserve and protect assets was proper where the price was not greatly disproportionate to the actual value.—In re Holm's Estate, 252 P. 145, 141 Wash. 475.

36. Mo.—Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176, judgment quashed on other grounds State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411, 296 Mo. 636, followed in Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 182, and Stadtman v. Citizens' Bank of Warrenton, App., 237 S.W. 182, opinion quashed on other grounds 247 S.W. 411, 296 Mo. 636, opinion conformed to, App., 249 S.W. 1118 and 249 S.W. 1119.

37. Tenn.—Woods v. Sullivan, 1 Swan 507.

38. **Claim for services rendered by decedent**
Kan.—Lappin v. Mumford, 14 Kan. 9.

Land certificates prior to location
Tex.—McLain v. Pate, 124 S.W. 718, 58 Tex.Civ.App. 500, 505.
24 C.J. p 208 note 4.

Mining contract not for term certain
Ohio.—Horn v. Bowen, 4 Ohio Dec. (Reprint) 419, 2 Clev.L.Rep. 133.
24 C.J. p 208 note 5.

Interest of decedent in pledged property
U.S.—Bell v. Mills, Cal., 123 F. 24, 59 C.C.A. 104.
24 C.J. p 208 note 6.
Power to assign patent rights see the C.J.S. title Patents § 224, also 48 C.J. p 243 notes 48–50.

39. **Fixtures**
Fixtures cannot be separated from real estate and sold as personal property.—Walters' Estate, 10 Kulp (Pa.) 221.

Good will of personal business
Good will or name of business that is strictly personal in its nature and one which requires personal skill, such as the business of a doctor, dentist, attorney, or playwright, cannot be conveyed after one's death by his representatives.—Coffey v. Metro-Goldwyn-Mayer Corporation, 289 N.Y.S. 882, 160 Misc. 186.

A reversionary interest in chattels cannot be the subject of sale by an executor or administrator.—May v. May, 7 Fla. 207, 68 Am.D. 431—24 C.J. p 208 note 8.

Increase of bequeathed live stock
Where, by the terms of a will, personalty, including live stock, is bequeathed to the widow for life, and the executor authorized to sell such property at her death, the executor could not sell the increase of the live stock born during such life estate, since such increase belonged absolutely to the widow and passed to her representative.—Leonard v. Owen, 20 S.E. 65, 93 Ga. 678.

40. Idaho.—Cummings v. Lowe, 10 P.2d 1059, 1060, 52 Idaho 1, citing **Corpus Juris.**
Or.—In re Fehlmann's Estate, 292 P. 1027, 1028, 134 Or. 46, quoting **Corpus Juris.**
24 C.J. p 210 note 29.

Executory contract for purchase of real estate was chose in action, subject to disposal by administratrix.—Carter v. Gilbert, 128 So. 250, 99 Fla. 1056.

Judgments
Where administrator as such obtained judgments against bank, judgment was owned by and vested in the administrator and he alone had the right to assign or transfer it.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330.

Claim for benefit of another
A claim which is essentially for the benefit of another may be assigned by the administrator to such other person, since the only interest of the estate is to see it paid to such person.—Christy v. Chicago, B. & K. C. R. Co., 70 Mo.App. 43.

Cause of action for death
(1) An administrator may assign a cause of action for decedent's death.—Barrett v. Chicago, M. & St. P. Ry. Co., 175 N.W. 950, 190 Iowa

tion should be collected, rather than sold, circumstances may render a sale, even at a discount, beneficial to the estate; and of the existence of such circumstances the executor or administrator is to judge in the exercise of the discretion committed to him.[41]

Statutes requiring sales of personalty to be under order of court have been held in some cases to apply only to tangible personalty, and not to affect the representative's power to dispose of choses in action,[42] but the more generally accepted view is that such statutes are not so restricted but apply to choses in action as well as tangible personalty;[43] and, in order that an assignment of a claim be valid, evidence of such authority must appear.[44]

Transfers in satisfaction of debts. Transfers of choses in action in satisfaction of decedent's debts may be made by an executor or administrator,[45] but the personal representative has no right to make such a transfer to the prejudice of other creditors of the estate,[46] although it will be sustained as between himself and the transferee.[47] However, a transfer of a chose in action in satisfaction of an individual debt of the representative is unauthorized.[48]

A provision of a will directing the executor to dispose of personal property has been held to refer only to tangible property and not to authorize a sale of intangible property.[49]

Foreign debts. While the more generally accepted view is that an executor or administrator may assign a claim against a nonresident of the state in which he was appointed and is acting so as to authorize the assignee to sue the debtor in the courts of the latter's domicile,[50] the right of the representative to make such an assignment has also been denied, apparently on the view that to give effect to such assignment would extend the representative's authority beyond the state in which he was appointed, and amount to an administration in another state, to the possible detriment of resident creditors.[51]

Effect of assignment. An authorized assignment of a claim by the executor or administrator of the claimant enables the assignee to sue on the claim anywhere.[52] Where an executor or administrator having the power to do so assigns a chose in action, the only remedy of the distributees is on the representative's bond.[53] Where an administratrix was fraudulently induced to assign a policy on her

509, rehearing denied 180 N.W. 670, 190 Iowa 509.

(2) He may not do so without consideration.—Flynn v. Chicago Great Western R. Co., 141 N.W. 401, 159 Iowa 571, 45 L.R.A.,N.S., 1098.

41. Or.—In re Fehlmann's Estate, 292 P. 1027, 1028, 134 Or. 46, quoting **Corpus Juris.**
24 C.J. p 211 note 30.

Consent of legatee

Disposition of notes by executor for much less than face value, was not improper under circumstances, where done with consent of attorney in fact for residuary legatee.—In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46.

Right to credit for costs of sale

Where executor sold certain assets at a loss, if executor used diligence to collect assets, costs of sale of such assets were a proper credit to him, otherwise not.—In re Flynn's Estate, Mo.App., 142 S.W.2d 1069.

Assignment of insurance policy held proper

Where executrix of estate of deceased beneficiary, who had absolute ownership in life policies, assigned the policies to insured who promised to pay to beneficiary's estate amount of dividends which had been applied to policies to keep them in force, provided insured should keep policies in force for period of one year, assignments were supported by consideration, even if insured, who kept policies in force for required period, would not have been required to pay the amount of the dividends to the beneficiary's estate if insured had not kept the assigned policies in force; nor were assignments void on ground of trust relationship between the parties, where there was no evidence of fraud, collusion or bad faith, and evidence indicated that executrix exercised good judgment in making the assignments and that they were for the benefit of the estate.—Equitable Life Assur. Soc. of U. S. v. Mallers, C.C.A.Ill., 104 F.2d 567.

Sale of mortgage held proper

It was not incumbent on executor to foreclose mortgages owned by testatrix and purchase mortgaged realty, and his failure to do so did not indicate failure to exercise sound business judgment or lack of prudence, where he tried to sell them in ordinary course of business for nearly year before advertisement of public sale; and sale, regularly advertised, well attended and fairly conducted, in customary manner after competitive bidding, for amount not shown to be less than would have been realized on foreclosure sale, was within executor's judgment and discretion.—In re Martin's Estate, 4 A.2d 551, 135 Pa.Super. 136.

42. Or.—In re Fehlmann's Estate, 292 P. 1027, 134 Or. 46.
24 C.J. p 211 note 36.

43. Idaho.—Cummings v. Lowe, 10 P.2d 1059, 1061, 52 Idaho 1, citing **Corpus Juris.**
Okl.—Warner v. Mason, 234 P. 747, 109 Okl. 13.
24 C.J. p 211 note 37.

44. Cal.—Miller v. Murphy, 248 P. 934, 78 Cal.App. 751.

45. Mo.—Cowgill v. Linnville, 20 Mo.App. 138.
24 C.J. p 211 note 32.

46. Ark.—Whittaker v. Wright, 35 Ark. 511.
24 C.J. p 211 note 33.

47. Pa.—Neely v. Bair, 27 A. 777, 157 Pa. 417.

48. Ala.—Farmers' & Merchants' Bank of Abbott, Tex. v. Sanford, 43 So. 226, 150 Ala. 195.
24 C.J. p 211 note 35.

49. Mo.—Diebold v. Diebold, App., 141 S.W.2d 119, transferred, see, Sup., 133 S.W.2d 401.

50. R.I.—Mackay v. St. Mary's Church, 23 A. 108, 15 R.I. 121, 2 Am.S.R. 881.
24 C.J. p 211 note 38.

51. Me.—Stearns v. Burnham, 5 Me. 261, 17 Am.D. 228.
24 C.J. p 212 note 39.

52. U.S.—Owsley v. Central Trust Co. of New York, D.C.N.Y., 196 F. 412.

53. Ky.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330.

intestate's life, and the assignee transferred it to another who had knowledge of the fraud, but who did not know that the transfer was made without an order of court, the ultimate transferee did not acquire title to the property.[54]

Construction of assignment. Rules governing the construction of contracts generally have been held to apply to assignments of choses in action.[55]

b. Commercial Paper

Except in so far as the power may be limited by statutes requiring court authorization, a representative has the power to transfer and indorse commercial paper payable to the decedent. His indorsement carries with it the same burden as any other indorsement for value.

According to the common-law rule it is within the power of an executor or administrator to indorse over and transfer commercial paper payable to his decedent,[56] and it necessarily follows from this that he may transfer such paper when it is payable to himself in his representative capacity.[57] In some jurisdictions the representative is held to have power to transfer negotiable paper without an order of court authorizing him to do so, although the statute requires an order of court to authorize the transfer of personalty, it being considered that such statutes do not apply to negotiable instruments,[58] and that such transfers are valid at least as to strangers and parties not interested;[59] but in other jurisdictions such statutes are held to include negotiable instruments.[60] In some jurisdictions the power of the executor or administrator to transfer notes is limited to certain specific cases.[61]

In those states where the administrator has power to indorse and assign notes due decedent it will be presumed that an administrator in another state has the same power,[62] unless it is alleged or shown that the administrator's power is regulated or restricted by statute of that state;[63] and in a state where the administrator must be authorized by order of court before he can assign a note, it has been presumed that the law of a foreign country is the same.[64]

Effect of transfer or indorsement. The executor's indorsement of a note carries with it the same burden as that of any other indorsement for value.[65] A "without recourse" indorsement transfers title but negatives all personal liability on the part of the representative.[66]

The transfer of a note by the representative of

54. Ga.—Whitehurst v. Mason, 78 S.E. 938, 140 Ga. 148.

55. **Against party causing uncertainty**
Language of ambiguous assignment should be interpreted most strongly against party who caused uncertainty to exist; and, so construed, assignment imputed intention to transfer only individual interests of administratrix and daughter, and finding that sale from estate was intended, was held unsupported. Miller v. Superior Court in and for City and County of San Francisco, 258 P. 614, 84 Cal.App. 605.

56. Del.—Carre v. Seaman, 190 A. 564, 8 W.W.Harr. 197.
Fla.—Brown v. Indian River Orange Lands, 179 So. 789, 791, 131 Fla. 466, quoting **Corpus Juris.**
24 C.J. p 212 note 41.

Discounting
A legal representative may discount the notes of an estate if the exigencies of the estate make it advisable to do so.—Felton v. Felton, 195 S.E. 533, 213 N.C. 194.

Maker could not prevent payee's administrator from exercising right to assign notes to third person.—Carter v. Piercy, 159 S.E. 154, 156 Va. 640.

Blank indorsement may be filled by executor or administrator of holder.—Lucas v. Byrne, 35 Md. 485—Mitchell v. Mitchell, 11 Gill & J., Md., 388.

Indorsement to beneficiary
Where an executor obtains checks payable to a beneficiary he has authority to indorse such checks for deposit to the account of the beneficiary.—Manufacturers' Trust Co. v. U. S. Mortgage & Trust Co., 204 N. Y.S. 105, 122 Misc. 726, affirmed 210 N.Y.S. 613, 213 App.Div. 345, affirmed 155 N.E. 893, 244 N.Y. 550.

57. Mo.—Vandeventer v. Florida Sav. Bank, 141 S.W. 900, 162 Mo. App. 34.
24 C.J. p 212 note 42.

58. Or.—Grignon v. Shope, 197 P. 317, 100 Or. 611.
Tex.—Short v. Phelps, Civ.App., 274 S.W. 662.
24 C.J. p 212 note 43.

59. Tex.—Ringle v. Waggoner, Civ. App., 238 S.W. 236.

60. Okl.—Warner v. Mason, 234 P. 747, 109 Okl. 13.
24 C.J. p 212 note 44.

Indorsement held proper
Executors of decedent's estate were empowered, with court's approval, to create liability against estate by indorsement of note and mortgage transferred to plaintiff.—University State Bank v. Johnson, 210 N.W. 785, 202 Iowa 654.

Sale of notes held authorized
In mortgagors' action to cancel notes secured by deed of trust, facts were held to show that sale of notes to defendant by deceased holder's administratrix was authorized by probate court.—Webb v. Salisbury, 39 S.W.2d 1045, 327 Mo. 1123.

Subsequent approval
Payee indorsers of notes were liable to purchaser, notwithstanding administrator of joint payee was not expressly authorized to indorse notes by Louisiana court which had jurisdiction of administration of estate, where purchaser paid payee's interest in proceeds of notes to payee's heirs who assigned to purchaser their interest in notes and sale of notes, and disbursement of proceeds was approved by administration court, especially where neither such court nor payee's heirs had repudiated administrator's indorsement.—Weston v. Merchants' Bank & Trust Co., 161 So. 145, 173 Miss. 34.

61. Ark.—Whittaker v. Wright, 35 Ark. 511.
24 C.J. p 212 note 45.

62. Ind.—Rogers v. Zook, 86 Ind. 237.
Mass.—Clark v. Blackington, 110 Mass. 369.

63. Ind.—Rogers v. Zook, 86 Ind. 237.

64. Cal.—Wickersham v. Johnston, 38 P. 89, 104 Cal. 407, 43 Am.S.R. 118.

65. Iowa.—University State Bank v. Johnson, 210 N.W. 785, 202 Iowa 654.

66. Fla.—Brown v. Indian River Orange Lands, 179 So. 789, 131 Fla. 466.

the deceased maker, after the obligation had been extinguished by its return to the representative, has been held to amount to a new obligation by such representative individually, even though he undertook to bind the estate.[67]

§ 307. —— Stocks, Bonds, and Mortgages

Subject to statutory limitations or requirements, a representative has the power to transfer stocks and bonds and mortgages, which belonged to the decedent.

At common law the executor or administrator has power to transfer stocks and bonds which belonged to his decedent at the time of his death.[68] However, under statutes to that effect, the representative must first obtain a court order authorizing such sale.[69] Such statutes have been held to be mandatory,[70] so as to render a sale in violation thereof invalid.[71]

An executor may have the power to sell corporate stock under the provisions of a will to that effect;[72] and it has been held that the power so granted supersedes the statutory requirement that a court order be obtained,[73] provided, however, the will expressly authorizes a sale without court order.[74]

67. Ga.—Nolin v. Mooty, 113 S.E. 814, 29 Ga.App. 97.

68. N.Y.—In re Dooper's Will, 212 N.Y.S. 616, 125 Misc. 909.
24 C.J. p 213 note 51.

Administrator's personal advantage
Administrator, who before sale of stock held legal title thereto and had absolute control thereof as property of estate, was authorized to sell shares, notwithstanding finding in decree for removal of administrator that such sale was for administrator's personal advantage.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

Bank stock
(1) The statute providing that no transfer of stock shall be valid against a bank so long as the registered holder thereof is indebted to the bank does not affect the right or duty of the administrator to sell bank stock listed in the inventory, but only requires that any liability of the transferor to the bank be paid before an absolute title can be given to the purchaser.—In re Park's Estate, 75 P.2d 842, 147 Kan. 142.

(2) At any time before decree of distribution, administrators of an estate had authority to effect a sale of personalty, and short of knowledge or notice of a wrongful purpose, a bank's predecessor was in no position to question a request by administrators for transfer of stock made on presentation of a properly endorsed certificate, and without such knowledge, no liability could attach to bank for a transfer so made.—Aronson v. Bank of America N. T. & S. A., 109 P.2d 1001, 42 Cal. App.2d 710.

69. Ky.—Alexander v. Hendricks, 258 S.W. 81, 201 Ky. 677.
24 C.J. p 213 note 52.

Direction in letters of administration
Direction, contained in letters of administration appointing special administrator, that he might close out margin account which deceased had with brokerage company, was held not broad enough to authorize sale of deceased's stock in absence of proof that stock was about to depreciate and of filing of petition for order to sell, and hence brokerage company was justified in refusing to accept letters as authority to sell stock.—Off v. Russell, 60 P.2d 331, 16 Cal.App.2d 337.

Liberal construction of statute
Statute requiring the consent of the court or judge to a sale by an executor of dividend-paying stock was manifestly intended for the better protection of property rights, and is therefore remedial and to be liberally construed to effectuate the legislative purpose.—Barth v. Fidelity & Columbia Trust Co., 224 S.W. 351, 188 Ky. 788.

Payment of debts and legacies
However, under statute authorizing executor to sell personalty other than perishable goods for the purpose of paying debts and legacies, executor was authorized to sell securities to pay legacies without order of court.—In re Flynn's Estate, Mo.App., 142 S.W.2d 1069.

70. Ind.—Interstate Public Service Co. v. Weiss, 193 N.E. 226, 208 Ind. 122.

Effect on representative's discretion
Statute transfers from the executors to the court or judge the discretion to determine the propriety of selling the stock.—Barth v. Fidelity & Columbia Trust Co., 224 S.W. 351, 188 Ky. 788.

71. Ind.—Interstate Public Service Co. v. Weiss, 193 N.E. 226, 208 Ind. 122.

Estoppel; warranty of title
Transfer of stock by executrix in her representative capacity by indorsement thereof, without court order, did not give subsequent transferee title under doctrine of estoppel as against executrix personally, where executrix was not asserting individual right to stock as legatee; nor was she liable personally as for breach of warrant of authority, in absence of proof of reliance on representation that court authority had been obtained; moreover, estoppel cannot be asserted against her as executrix since personal representative has no power to give warranty of title; nor can subsequen transferee claim as bona fide purchaser since certificate disclosed attempted transfer by executrix without any showing of authority.—Merchants' Bank v. People's Savings & Loan Ass'n, C.C.A.Okl., 70 F.2d 16 93 A.L.R. 226.

Knowledge imputed to purchaser
Corporation repurchasing stoc from deceased stockholder's executor at private sale was held boun to know that executor could no make valid sale without court or der.—Interstate Public Service C v. Weiss, 193 N.E. 226, 208 Ind. 12

Repurchase by corporation pursuant to agreement
Where corporation, when sellin stock to stockholder, gave him op tion to return stock at any time a certain price, and stockholder's ex ecutor, pursuant to the agreemen surrendered stock for cancellatio and received the money without hav ing obtained court order, transac tion between executor and corpora tion was "sale" of stock within stat ute forbidding such sale without court's direction, so that sale was in valid and corporation was require to account to estate for the stoc where executor allegedly did not ac count for proceeds.—Interstate Pub lic Service Co. v. Weiss, 193 N.E 226, 208 Ind. 122.

72. **"Property"**
Share of stock in a railroad com pany is embraced in the term "prop erty," directed by a will to be sold —Adams v Jones, 59 N.C. 221, 22

"Securities"
Term "securities," as used in wil authorizing executors to sell what ever securities were necessary to pa expenses, referred to shares of cor porate stock.—In re Westfield Trus Co., 176 A. 101, 117 N.J.Eq. 429, re versing 172 A. 212, 115 N.J.Eq. 61

73. Ky.—Colwell v. Holliday, 63 S.W 2d 776, 250 Ky. 584.

74. Md.—Goldsborough v. De Wit 189 A. 226, 171 Md. 225.

Where a transfer is to be made, it may be made in the representative's own name,[75] and such an assignment carries with it a cause of action for the conversion of stock.[76] In the absence of ancillary administration or statutory prohibition the domiciliary administrator duly appointed has authority to sell and assign the stock of decedent in a foreign corporation.[77]

In determining when and what securities to sell, an executor should act in good faith and with the same degree of care as a reasonable and ordinarily prudent man in a similar situation; and when he so acts he is not an insurer of the results and is not responsible for losses.[78]

Mortgages. As a general rule the authority of the executor or administrator of a mortgagee, extends to an assignment of the mortgage,[79] although it is sometimes required under statutes so providing that an order of court to that effect be procured in order to warrant such an assignment.[80] A purported assignment of a mortgage by the widow of a deceased member of a partnership as executrix before the partnership affairs have been settled is invalid.[81] Where an interested party had consented to the transfer by the representative of mortgages belonging to the estate, such party would be bound by such transfer.[82]

§ 308. Duty to Sell

A representative is not under a duty to sell nonperishable property except where a will so directs, or it is necessary to pay debts or legacies or to make distribution.

Executors and administrators are not required to sell nonperishable property unless the will so directs, or unless a sale is necessary to pay debts or legacies.[83] However, except where the parties desire that distribution be made in specie,[84] it is the duty of the representative to convert the assets of the estate in order that distribution may be made.[85] Moreover, an executor or an administrator with the will annexed is under a duty to sell property where he is so directed by the provisions of the will.[86]

The duty of the representative to sell property in order to avoid depreciation of the assets of the estate, and his liability for loss resulting from his failure to sell, or delay in selling, the property, are considered supra § 248.

75. N.Y.—Leitsch v. Wells, 48 N. Y. 585—Mahaney v. Walsh, 44 N. Y.S. 969, 16 App.Div. 601.
Pa.—Henke's Appeal, 14 A. 45, 10 Pa. Cas. 295.

76. N.Y.—Mahaney v. Walsh, 44 N. Y.S. 969, 16 App.Div. 601.

77. N.H.—Luce v. Manchester & L. R. Co., 3 A. 618, 63 N.H. 588.
24 C.J. p 213 note 55.

78. Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

79. Md.—Alexander v. Fidelity & Deposit Co., 70 A. 209, 108 Md. 541.
24 C.J. p 213 note 56—41 C.J. p 664 note 62.

Judgment or decree of foreclosure
S.D.—Poppke v. Poppke, 231 N.W. 933, 57 S.D. 262.
24 C.J. p 213 note 56 [a].

Certificate of sale on foreclosure
S.D.—Poppke v. Poppke, 231 N.W. 933, 57 S.D. 262.

Effect of provision of mortgage
An assignment by an executor of a mortgage held by his testator, and not foreclosed, is valid, although it contains a provision that on the payment of certain other specified claims held by the assignee against a third person the mortgage shall be canceled and discharged.—Burt v. Ricker, 6 Allen, Mass., 77.

80. Idaho.—Cummings v. Lowe, 10 P.2d 1059, 1061, 52 Idaho 1, citing **Corpus Juris.**
24 C.J. p 213 note 57.

Burden of proof
Burden was on one, suing to foreclose mortgage assigned to him by administrator, to prove probate court order authorizing sale thereof.—Cummings v. Lowe, 10 P.2d 1059, 52 Idaho 1.

81. S.D.—Miller v. Berry, 104 N.E. 311, 19 S.D. 625.

82. Iowa.—Wilson v. Norris, 216 N. W. 46, 204 Iowa 867.

83. Iowa.—In re Fisher, 104 N.W. 1023, 128 Iowa 626.
N.Y.—Matter of Mullon, 26 N.Y.S. 683, 74 Hun 358, affirmed 39 N.E. 821, 145 N.Y. 98, and distinguishing Utica Ins. Co. v. Lynch, 11 Paige 520.
24 C.J. p 213 note 59.

Sale unnecessary
(1) Where will gave executors right to retain property in the same form of investment, with full power and authority to invest or reinvest, although stating testator's preferences, executors' account was not subject to objection on ground of failure to sell securities.—In re Sawin's Estate, 19 N.Y.S.2d 465, 173 Misc. 428.

(2) Under will authorizing executors to retain securities owned by testator, executors could retain testator's share of securities owned by dissolved holding company in which testator and his brother each owned half of stock, since testator's equitable ownership was equivalent to absolute ownership.—In re Herb's Estate, 296 N.Y.S. 491, 163 Misc. 441.

84. Pa.—In re Mellier's Estate, 18 Pa. Dist. & Co. 595, affirmed 167 A. 358, 312 Pa. 157, 92 A.L.R. 430—In re Tyson's Estate, 80 Pa. Super. 29.

85. Pa.—In re Tyson's Estate, 30 Pa.Super. 29—In re Mellier's Estate, 18 Pa.Dist. & Co. 595, affirmed 167 A. 358, 312 Pa. 157, 92 A.L.R. 430.

Corporate stock
Ordinarily the representative of an estate is charged with the responsibility of converting the personalty of a decedent into cash and making proper distribution thereof, although corporate stock is not usually sold, but is distributed and transferred in kind, under direction of the court.—State ex rel. Department of Financial Institutions v. Kaufman, Ind., 30 N.E.2d. 978.

Government bonds
It was unnecessary for administrator to procure court order to sell government bonds belonging to deceased when they were susceptible of distribution in kind.—Maynard v. Maynard's Adm'r, 64 S.W.2d 567, 251 Ky. 246, 91 A.L.R. 697.

86. Executors granted discretion
A power of sale given by will to executors and provisions directing executors to retain securities owned by testator if reasonably safe, were not inconsistent and gave executors power to retain or sell in their sound discretion.—In re Herb's Estate, 296 N.Y.S. 491, 163 Misc. 441.

§ 309. Time for Sale

Subject to testamentary provision or court order otherwise, a representative should sell the personalty, where a sale is proper, within a reasonable time; but he may properly respect the wishes of the beneficiaries. Under statutes to that effect a sale must be held within a limited time from the granting of letters.

So far as an executor or administrator may be bound to sell and dispose of personalty, he should proceed to do so within a reasonable time,[87] except in so far as the rule may be affected by testamentary provisions[88] or court orders.[89] However, notwithstanding the duty of the representative to sell property at a particular time, it has been held proper for him to respect the wishes of the beneficiaries with respect to the time of sale.[90] In any event the representative should not attempt to sell the personalty before probate of the will and the issuance of letters testamentary;[91] and under a provision that the representative must discharge the specific legacies after the expiration of one year it has been held that a sale of the property within the year is improper even with the consent of the legatees.[92]

In some jurisdictions, under statutes so providing or construed, sales must ordinarily be held within a specified period from the granting of letters;[93] but where special circumstances have intervened which make the sale impractical at the indicated time the court may allow a reasonable extension,[94] or, where no prejudice is done, waive a past compliance.[95] The beneficiaries may, by laches, lose the right to object to an order allowing an extension, where they fail to make the objection within a reasonable time after notice of such order.[96]

Sale as of what date. Under an express provision to that effect in the will, a sale was held to be effective as of the date of the testator's death, and all acts relating to the sale similarly related back to that date.[97]

§ 310. Manner and Conduct of Sale

In the absence of statute the representative may sell the personalty of the estate at public or private sale, as he

87. N.Y.—In re Gray, 91 N.Y. 502.
24 C.J. p 213 note 62.
Liability for loss resulting from delay in selling see supra § 248.

As expeditiously as possible

Ordinarily a representative should convert his decedent's personal property into cash as expeditiously as possible, although this rule varies with the circumstances of the case. —In re Stephen's Estate, 181 A. 559, 320 Pa. 97.

Sale on qualifying

It has been held a proper performance of his duty for the representative to sell the property at its inventory value immediately on qualifying.—In re McLean's Estate, 4 A. 2d 318, 333 Pa. 293.

Sale at advanced prices

It is executrix' duty to administer estate and make every effort to liquidate assets remaining in her hands as speedily as good business indicates, and effort should be made to dispose of securities retained by her at advanced prices, if such opportunity presents itself in near future.—In re Easton's Estate, 13 N. Y.S.2d 295.

Eighteen years

The transfer of a land certificate by an administratrix before her discharge has been held valid although made eighteen years after letters were taken out.—McLain v. Pate, 124 S.W. 718, 58 Tex.Civ.App. 500.

88. N.Y.—In re Pinney's Estate, 282 N.Y.S. 680, 156 Misc. 844, reversed on other grounds 294 N.Y.S. 29, 250 App.Div. 60, affirmed 15 N.E. 2d 669, 278 N.Y. 507, reargument denied 16 N.E.2d 851, 278 N.Y. 704.

As promptly as possible

Testator's directions that executors sell his New York Stock Exchange membership as promptly as possible, after his death was binding on his executors, who had affirmative duty of making sale when they assumed office.—In re Pinney's Estate, supra.

89. **Time in decree held elastic**

Provision in decree entitling executors and trustees to further reasonable time, a year at least from date of decree, to dispose of nonlegal investments and allowing renewal of application at close of year, was held not to limit executors and trustees but sufficiently elastic to enable them to procure further time upon showing that it is essential.—In re Wainwright's Will, 289 N.Y.S. 510, 248 App.Div. 336, modifying 284 N. Y.S. 578, 157 Misc. 531, motion granted 291 N.Y.S. 180, 248 App.Div. 891.

90. N.Y.—In re Pinney's Estate, 294 N.Y.S. 29, 250 App.Div. 60, reversing 282 N.Y.S. 680, 156 Misc. 844, and affirmed 15 N.E.2d 669, 278 N.Y. 507, reargument denied 16 N. E.2d 851, 278 N.Y. 704.
Pa.—In re Stephen's Estate, 181 A. 559, 320 Pa. 97.

However, it has also been held that an executor or administrator, as regards converting the assets of the estate, is not to be controlled by the directions of the next of kin.—Matter of Thompson, 84 N.Y.S. 1111, 41 Misc. 420, affirmed 71 N.E. 1140, 178 N.Y. 554.

91. N.C.—Smith v. Barham, 17 N. C. 420, 25 Am.D. 721.
Va.—Monroe v. James, 4 Munf. 194, 18 Va. 194.

92. N.Y.—Warren v. Bouvier, 124 N. Y.S. 641, 68 Misc. 159.

93. Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.
Pa.—In re Curran's Estate, 18 Pa. Dist. & Co. 103.
24 C.J. p 214 note 66.

Effect of statute as to bank stock

Under statute requiring the administrator to sell the whole of the personal property within three months, and statute providing that transfer of bank stock shall not be valid until indebtedness due bank is paid, administrator of estate of one owing debt to bank, which debt was due and unpaid, had duty to sell the stock which deceased held in the bank, subject to bank's lien.—In re Park's Estate, 75 P.2d 842, 147 Kan. 142.

94. Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

95. Md.—Goldsborough v. De Witt, supra.

96. Md.—Goldsborough v. De Witt, supra.

"Notice"

Orders extending time for sale of securities by executors were procedural in nature and parties affected were charged with knowledge of their existence from time they had "actual notice" of their passage, which notice could be express or "implied."—Goldsborough v. De Witt, supra.

97. N.Y.—In re Juilliard's Will, 202 N.Y.S. 429, 207 App.Div. 478, affirming In re Juilliard's Estate, 191 N.Y.S. 904, 117 Misc. 642, and reversed on other grounds 144 N.E. 772, 238 N.Y. 499.

deems best; but under statute to that effect the sale must be public unless a private sale is authorized by the court or the will.

Statutory provisions, if any, as to the procedure for sale of personal property must be at least substantially complied with.[98] While it has been held that an executor or administrator should normally sell the property of the estate by a public sale, after notice to the parties interested, and adequate advertisement, according to the circumstances,[99] it is the rule at common law that the manner of sale is a matter resting in the discretion of the personal representative,[1] who may sell at either private or public sale as he may deem best.[2] However, if he sells it at private sale he is subjected to a higher degree of care and attention than if the property is sold at public sale.[3] An executor, under a general power of sale in the will, may sell either by public or private sale.[4] A testamentary direction that certain paintings owned by the testator and of which a sale is directed "are to be taken to Europe to be recognized by art authorities" in order that the highest price be obtained for them has been held to be directory merely.[5] As to funds within the jurisdiction and control of the court, the representative is required to follow the orders of the court in disposing of the fund.[6]

In some states, under statutes to that effect, the property must be sold by public or auction sale, unless the court has specially authorized a private sale;[7] and while some authorities have held that such a statute is merely directory, so that a bona fide private sale is nevertheless valid,[8] others have held that a private sale in violation of the statute is void and conveys no title to the purchaser.[9] However, despite such a statute, an executor may sell the property at private sale where the will so provides;[10] and the statute does not control a discretion given to executors by the will with respect to the manner of sale.[11]

Ordinarily rules governing the conduct of public sales must be complied with;[12] but it has been held that a representative acting in good faith is not liable for mistake of law or for error in judgment in connection with the sale.[13] The fact that property is to be sold at private sale does not prevent advertisement of the sale and notice to the public so that the property is brought more properly into the market.[14]

98. Cal.—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148.

99. Pa.—In re Tyson's Estate, 80 Pa.Super. 29.

1. Tenn.—Johnson v. Kay, 8 Humphr. 142.
24 C.J. p 214 note 72.

2. Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445.
Ga.—Wright v. Zeigler, 1 Ga. 324, 44 Am.D. 656.
Tenn.—Johnson v. Kay, 8 Humphr. 142.

Sale at retail

That administrator authorized to make private sale sold merchandise at retail instead of in bulk is not conclusive evidence of mismangement.—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

Public sale held proper

An executor exercised common skill, prudence and caution in selling mortgages owned by testatrix at public sale after trying for nearly year to sell them in ordinary course of business and should not have been surcharged for loss to estate in liquidation of such assets, in absence of evidence of gross or supine negligence or willful default.—*In re Martin's Estate*, 4 A.2d 551, 135 Pa.Super. 136.

Negotiations for sale to partner

It was proper for executor to negotiate with decedent's associate for latter's purchase of decedent's stock in corporation in which decedent and associate each owned half of stock.—In re Crowe's Estate, 249 N.Y.S. 114, 139 Misc. 648.

3. Md.—*Park & Tilford Import Corporation v. Nash*, 171 A. 339, 166 Md. 373.

4. S.C.—Huger v. Huger, 9 Rich.Eq. 217.

5. N.J.—Case v. Hasse, 93 A. 728, 83 N.J.Eq. 170.
24 C.J. p 215 note 77.

6. Ohio.—Royon v. Greenstein, 171 N.E. 595, 122 Ohio St. 340.

7. Ga.—Baldwin v. Boaz, 129 S.E. 670, 34 Ga.App. 393.
Kan.—Rossman v. Christenson, 230 P. 72, 117 Kan. 41.
Mo.—Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176, judgment quashed on other grounds State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411, 296 Mo. 636, followed in Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 182, and Stadtman v. Citizens' Bank of Warrenton, App., 237 S.W. 182, opinion quashed on other grounds 247 S.W. 411, 296 Mo. 636, opinion conformed to, App., 249 S.W. 1118 and 249 S.W. 1119.
24 C.J. p 214 note 74.

8. N.C.—Felton v. Felton, 195 S.E. 533, 213 N.C. 194.
24 C.J. p 214 note 74 [a].

9. Mo.—Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176, judgment quashed on other grounds State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411, 296 Mo. 636, followed in Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 182, and Stadtman v. Citizens' Bank of Warrenton, App., 237 S.W. 182, opinion quashed on other grounds 247 S.W. 411, 296 Mo. 636, opinion conformed to, App., 249 S.W. 1118 and 249 S.W. 1119.
24 C.J. p 214 note 74 [b].

10. Mo.—State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411, 296 Mo. 636, quashing judgment Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176. Opinion conformed to 249 S.W. 1118 and Stadtman v. Citizens' Bank of Warrenton, 249 S.W. 1119.

11. U.S.—Lovewell v. Schoolfield, Tenn., 217 F. 689, 133 C.C.A. 449, certiorari denied 36 S.Ct. 165, 239 U.S. 644, 60 L.Ed. 483.

12. Sale en masse

It has been held improper for the representative at a public auction to sell all of the personal property en masse, instead of auctioning off each item separately.—In re Spicer's Estate, 120 A. 90, 13 Del.Ch. 430.

Vendue list

There is no requirement in Pennsylvania that a vendue list be filed following the sale of personal property of a decedent by auction.—In re Roderick's Estate, 3 Fay.L.J., Pa., 93.

13. Pa.—In re Martin's Estate, 4 A. 2d 551, 135 Pa.Super. 136.

14. Md.—Park & Tilford Import

§ 311. By Whom Sale Made

In general the sale must be made by the representative; but he may employ an agent or auctioneer.

As a general rule the sale is to be made by the executor or administrator,[15] and if the will directs that property shall be sold, without naming the person to sell, the executor is the proper person to carry out the directions.[16] While an executor cannot delegate to another the execution of a special power of sale committed to him by the will in personal trust and confidence,[17] neither an executor nor an administrator is required to act personally, but he may employ an agent or auctioneer to sell.[18] In case of such employment, however, the sale is still the representative's own act, and he is responsible for the negligence or defalcation of the agent, unless he used due and proper care in making the selection.[19]

§ 312. Price, Terms, and Conditions

A representative should realize the best price obtainable, but he will not be liable for obtaining less where he acted in good faith and with prudence. He may ordinarily sell for reasonable credit; and must take good security for the deferred payments. His liability in connection with the security depends on whether he acts in good faith and with prudence.

It is the duty of an executor or administrator to realize the best price obtainable for the property;[20] and if he fails in this duty he is personally liable to the persons interested in the estate for the difference between the amount received and the amount which he could have realized.[21] While it is sometimes required that the property shall not be sold for less than its appraised value,[22] it is generally held that if the representative acts in good faith and with reasonable prudence and diligence he cannot be held liable as for a devastavit upon the theory that he might have sold for a better price than he actually obtained,[23] and it has been held that, in the absence of fraud, if the property is sold at a price not less than the appraised value, the representative's acts cannot be questioned.[24]

Where the price to be paid for certain property is specified in the will, it is sufficient that the executor sell for that price.[25] Where a will authorized a sale of property to the decedent's surviving partners on the inventory value and on an inventory basis, it is immaterial that the inventory value, as determined for such sale, is not the same as the inventory value as stated in transfer tax proceedings.[26]

Credit. While it has been said that if the repre-

Corporation v. Nash, 171 A. 339, 166 Md. 373.

15. Ala.—McCollum v. McCollum, 33 Ala. 711.
24 C.J. p 215 note 78.

Executor in right of wife

Where a married woman in the capacity of an executrix is directed to sell property for the payment of the testator's debts, her husband, as executor in right of his wife, may sell the chattels of the estate which pass by delivery.—May v. Frazee, 4 Litt., Ky. 391, 14 Am.D. 159.

16. Ala.—McCollum v. McCollum, 33 Ala. 711.

17. Ga.—Neal v. Patten, 47 Ga. 73.
N.Y.—Berger v. Duff, 4 Johns.Ch. 368.

18. Ind.—Lewis v. Reed, 11 Ind. 239, 241.
24 C.J. p 215 note 81.

19. N.C.—Smith v. Smith, 79 N.C. 455.
24 C.J. p 215 note 82.

20. Del.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445.
24 C.J. p 215 note 83.

Duty to learn value

The representative is bound to learn the value of the property to be sold, so as to be certain that the price is fair.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.

Denuding estate

Administrator had no right to make an agreement that would denude the estate of its assets, and this especially in the absence of consideration.—Tennessee-Carolina Mills v. Mauk, 14 Tenn.App. 517.

21. N.C.—Grant v. Reese, 94 N.C. 720.
24 C.J. p 215 note 84.

No loss shown

Where evidence did not show that deceased's household goods were worth more than appraised value, sale at appraised value at private sale did not result in loss to estate or create liability against administrator.—Boyer v. Cole, 143 A. 489, 16 Del.Ch. 445.

22. Alaska.—In re McIntire, 1 Alaska 73.

Order of court

Where will did not authorize executors to sell securities without application to open court, court had power to pass order restricting sale by executors to appraised value or better.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225.

Sale on second offering

It has been held that a statute providing that unless the purchase price of property belonging to a succession is equal to its actual value its sale for less than the amount of its appraisement is void relates only to the first offering, and when the property is readvertised for sale and at a second offering sold on a twelve-months' credit it may be validly sold for whatever it will bring.—Campbell v. Owens, 32 La.Ann. 265.

23. Ill.—In re Aldag's Estate, 262 Ill.App. 349.
Or.—In re Steeby's Estate, 20 P.2d 1080, 143 Or. 501.
24 C.J. p 215 note 85.

Sale at market value

(1) A representative will not be held liable on the ground that he sold the property at an inadequate price where the price obtained was the fair market value at the time of the sale.—In re McLean's Estate, 4 A.2d 318, 333 Pa. 293.

(2) A representative is properly credited with the difference between the par value of bonds and what they brought on a sale, where it does not appear that they were sold for less than their market value.—Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

24. Wis.—Shupe v. Jenks, 218 N.W. 375, 195 Wis. 334.

25. **Sale of good will to partners**

Where the will of a partner fixed the price which his surviving partners should pay for the good will of the firm, the remaindermen could not, in the absence of bad faith, fraud, or collusion, complain that the executors sold on the terms prescribed.—Brown v. Brown, 107 N.Y.S. 864, 122 App.Div. 576.

26. N.Y.—In re Juilliard's Estate, 191 N.Y.S. 904, 117 Misc. 642.

sentative sells for anything but cash, except in rare and exceptional cases, he becomes the guarantor of the result of the transaction, and if it proves unfortunate he may be charged as for a devastavit,[27] the more general rule allows him to sell on reasonable credit.[28] In some jurisdictions, under statute to that effect, credit for a specified period may be granted;[29] but a sale on a longer credit has been held void.[30] However, where the terms and conditions are provided for by the will, the provisions of the will are controlling;[31] and even the statute limiting the period for which credit may be given has been held not to limit the power of a testator to authorize a longer term.[32]

Security. Except in so far as the rule may be affected by testamentary provisions,[33] where an executor or administrator may and does sell property on credit he must take good security for the deferred payments;[34] and if he fails to take security or takes insufficient security he is liable for any resulting loss.[35] As a general rule it is for the executor or administrator to determine the sufficiency of the security, and he is personally liable for any loss occasioned by his negligence or improper conduct with regard thereto,[36] but approval by the court is sometimes required.[37]

If the representative acting in good faith and without negligence takes security which is apparently good and sufficient when taken, he is not liable if a loss subsequently occurs not attributable to his fault or laches;[38] but he is liable for any loss due to his lack of diligence in collecting or realizing on the security.[39] Insolvency of sureties at the time they were accepted shows prima facie that the personal representative was negligent;[40] but an executor or administrator who accepts sureties who are at the time sufficient is not chargeable because of their subsequent insolvency,[41] or because an action on the note was successfully defended without fault on his part,[42] unless the sale was unauthorized and improper,[43] or the security was such as he had no right to take.[44] Although as a general rule an executor or administrator relieves himself of personal liability for the price of goods of the estate sold on credit, where he takes sureties of sufficient financial ability at the time when he accepted them, he cannot relieve himself of liability by taking nonresidents of the state,[45] or a person who is the purchaser's partner in business;[46] and there is authority for the view that the personal security afforded by sureties on the note of the purchaser should not be allowed at all.[47]

Exchange of property. Where administrators, instead of selling bonds for cash, exchanged them for

27. Conn.—Foster v. Thomas, 21 Conn. 285.
N.Y.—Matter of Gilman, 80 N.Y.S. 1122, 39 Misc. 762, reversed on other grounds 81 N.Y.S. 713, 82 App.Div. 186.
24 C.J. p 216 note 91.

In absence of permission of court
Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.

28. N.C.—Stone v. Hinton, 36 N.C. 15.
24 C.J. p 216 note 92.

29. Ind.—Citizens' St. R. Co. v. Robbins, 26 N.E. 116, 128 Ind. 449, 25 Am.S.R. 445, 12 L.R.A. 498.

30. Ind.—Citizens' St. R. Co. v. Robbins, 26 N.E. 116, 128 Ind. 449, 25 Am.S.R. 445, 12 L.R.A. 498.
24 C.J. p 216 note 92 [d].

31. **Time for payment of note**
Provision that stock was to be sold to daughter and her note taken in payment, said note to be renewed from year to year at the option of the daughter, indicated that she should have a reasonable time in which to pay; and while seventeen months was held not a reasonable time, under such provisions, the court will not determine such time in advance, since it is dependent on all the circumstances.—Dougherty v. Conly, 123 A. 401, 14 Del. Ch. 176.

32. N.Y.—Leonard v. Leonard, 201 N.Y.S. 113.

Will authorizing credit generally
A will authorizing the executor to sell on cash or credit has been held to give the executor a power to grant a longer term of credit than the statute allows, since the testator is presumed to have known the law; and the executors were held not negligent in selling testator's stock at price fixed by him, but on longer terms of credit, instead of liquidating business of corporation at a certain loss.—In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684.

33. **Note as full payment**
Where will provided that note of daughter should be taken in full payment, no security for payment could be required.—Dougherty v. Conly, 123 A. 401, 14 Del.Ch. 176.

34. Ill.—Bowen v. Shay, 105 Ill. 132.
24 C.J. p 216 note 93.

35. W.Va.—Wolfe v. Morgan, 56 S. E. 504, 61 W.Va. 287.
24 C.J. p 216 note 94.

36. Ohio.—Hamilton v. Bonham, 20 Ohio Cir.Ct. 252, 10 Ohio Cir.Dec. 834.
24 C.J. p 217 note 1.

37. N.Y.—Matter of Woodbury, 35 N.Y.S. 485, 13 Misc. 474.

38. Vt.—Mead v. Byington, 10 Vt. 116.
24 C.J. p 226 note 49.

39. Ala.—Raines v. Raines, 51 Ala. 237.
24 C.J. p 227 note 50.

40. Ala.—Stewart v. Stewart, 31 Ala. 207.
Ill.—Curry v. People, 54 Ill. 263.

41. Pa.—Wilson's Appeal, 4 Pennyp 432.
24 C.J. p 217 note 96.

42. Ala.—Stewart v. Stewart, 31 Ala. 207.
24 C.J. p 217 note 97.

43. S.C.—Smith v. Smith, 1 S.C.Eq. 304.
24 C.J. p 217 note 98.

44. S.C.—Peay v. Fleming, 11 S.C. Eq. 97.
24 C.J. p 217 note 99.

45. S.C.—Roberts v. Adams, 2 S.C. 337.

46. Va.—Southall v. Taylor, 14 Gratt. 269, 55 Va. 269.

47. N.Y.—Matter of Woodbury, 35 N.Y.S. 485, 13 Misc. 474.
24 C.J. p 217 note 5.

stock of a corporation which proved worthless, they were properly surcharged with the loss.[48]

§ 313. Who May Purchase

As a general rule, which, however, is subject to certain exceptions, anyone may buy the property of the estate from the representative.

Except as appears in this section, and in § 314 infra, the property of an estate offered for sale by an executor or administrator may be purchased by anyone.[49]

Relative of representative. The husband of an executrix or administratrix cannot purchase from her or from her coexecutors or coadministrators without the consent of all the beneficiaries.[50] It has been held that a public sale of the assets to the son of the executor was not invalid, where a proper notice was given, and the price obtained was the best price bid, and there was no pretense that the purchase in any way operated to the benefit of the executor.[51]

§ 314. —— Personal Representative

Subject to certain exceptions, as where the beneficiaries consent to or ratify such sale, an executor or administrator may not ordinarily purchase the property of the estate directly or indirectly. Such a sale is voidable by those interested in the estate, and may render the representative personally liable.

Subject to the exceptions hereinafter considered, and in the absence of a testamentary provision authorizing such purchase,[52] it is well settled that an executor or administrator has no right to purchase the property at a sale thereof, either public or private, whether the sale is made by himself or by his coexecutor or coadministrator.[53] However, except where such a sale is declared void by statute,[54] it is usually considered not void, but only voidable, at the option of those interested in the estate;[55] and it is valid as to them until it is set aside at their instance.[56]

While it has been held that the representative may become a purchaser at his own sale, if he makes the sale fairly and pays full value,[57] and that the sale may be allowed to stand where it appears that the price was fair and that the transaction was for the benefit of the estate, and satisfactory to those beneficially interested,[58] it has also been held that it may be avoided regardless of whether it was made in good or bad faith,[59] or whether the sale was fair and the price adequate.[60] Until the sale is set aside the representative holds the title in trust for the beneficiaries of the estate.[61]

As to the representative the sale is valid and it cannot be avoided by him,[62] nor will it be set aside at the instance of persons who have no interest in the estate.[63]

An assignee of the representative stands in the

48. Pa.—In re Locher, 67 A. 954, 219 Pa. 46.

49. Mich.—Owen v. Potter, 73 N.W. 977, 115 Mich. 556.

Surviving partners

A surviving partner may purchase property from the executor or administrator of the deceased partner. —In re Crowe's Estate, 249 N.Y.S. 114, 139 Misc. 648—24 C.J. p 220 note 41.

50. Ga.—Lowery v. Idson, 45 S.E. 51, 117 Ga. 778.
La.—Scott v. Gordon, 14 La. 111, 33 Am.D. 576.

51. Pa.—Bowker's Estate, 5 Wkly. N.C. 493.

52. Pa.—Pomeroy v. Bushong, 177 A. 10, 317 Pa. 459.

53. Md.—Schockett v. Tublin, 183 A. 521, 170 Md. 117.
N.J.—In re Ludlow's Estate, 129 A. 429, 3 N.J.Misc. 568.
N.Y.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.
Or.—Wells v. Wood, 263 P. 54, 125 Or. 38.
24 C.J. p 217 note 10.
Acquisition of personal property by representative generally see supra § 304.
Effect of representative having individual interest in transactions see supra §§ 239–241.

Representative as agent of another

Executor cannot make a valid sale to himself, as agent of third person, of personal property in his possession, as executor.—Rossman v. Christenson, 230 P. 72, 117 Kan. 41.

54. Or.—Wells v. Wood, 263 P. 54, 125 Or. 38.

55. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506.
Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.
N.Y.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.
Pa.—Pomeroy v. Bushong, 177 A. 10, 317 Pa. 459.
24 C.J. p 218 note 14.

Avoidance of no avail

Sale of stock of corporation by executor to himself will not be set aside, where corporation was dissolved, since such avoidance would be of no avail, but executor will be surcharged for loss to estate.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.

56. Mass.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.
24 C.J. p 218 note 15.

57. S.C.—Stallings v. Foreman, 11 S.C.Eq. 401.
24 C.J. p 218 note 13.

58. Md.—Schockett v. Tublin, 183 A. 521, 170 Md. 117.
24 C.J. p 218 note 16.

59. N.J.—In re Ludlow's Estate, 129 A. 429, 3 N.J.Misc. 568.
Pa.—Pomeroy v. Bushong, 177 A. 10, 317 Pa. 459.

60. N.J.—In re Ludlow's Estate, 129 A. 429, 3 N.J.Misc. 568.
24 C.J. p 218 note 12.

61. Mo.—Ambruster v. Ambruster, 31 S.W.2d 28, 326 Mo. 51, 77 A.L.R. 782.

62. Mo.—Benson v. Benson, 71 S.W. 360, 97 Mo.App. 460.
S.C.—McClure v. Miller, 8 S.C.Eq. 107, 21 Am.D. 522.
24 C.J. p 219 note 17.

Representative bound by bargain

Pa.—In re Barclay's Estate, 20 Pa. Dist. & Co. 626, 50 Montg.Co. 81.

63. Md.—Williams v. Marshall, 4 Gill & J. 376.
24 C.J. p 219 note 18.

Pledgor

In proceeding by pledgor to set aside sale of pledged bonds by the administrator of the pledgee to himself, the fact that sale was made

shoes of the representative and acquires no greater rights than did the representative.[64]

Purchase from original purchaser. While a purchase by an executor or administrator from a third person who was an actual bidder at the sale, but who was acting in collusion with the executor or administrator, or pursuant to an agreement or understanding with him, is merely an indirect purchase by him at his own sale, and therefore subject to the same infirmity as though he had purchased in the first instance,[65] the representative may purchase from a purchaser, if the original transaction was in good faith and without collusion;[66] but the court will look with great jealousy at such a transaction, particularly where the transfer of bids or title takes place very soon after the sale.[67]

Exceptions to rule. The rule forbidding an executor or administrator to purchase property of the estate is subject to several exceptions,[68] such as that he may purchase with the consent of all the persons interested in the estate,[69] or where he is himself a beneficiary of the estate,[70] or that he may take specific property to pay any indebtedness of the estate to himself for advances or otherwise.[71] In some jurisdictions, under statutes to that effect, executors and administrators may, subject to certain restrictions, purchase at sales of their decedents' property.[72]

Ratification. A sale by an executor or administrator to himself may be ratified by those interested in the estate,[73] and there is a ratification where such persons, with knowledge of the facts, acquiesce or fail to object within a reasonable time,[74] or accept a note given by the personal representative for the purchase money,[75] or where the representative accounts with them for the price, without any unfairness in the settlement and with knowledge on their part of all the facts.[76]

Liability of representative. The representative who purchases the property of the estate becomes personally liable for the price[77] or value[78] thereof, and is chargeable with the amount as cash after the expiration of the term of credit.[79] It has been held that if the representative purchases at less than the appraised value he will be accountable for the difference,[80] and also that, if he purchases and resells at a profit, such profit belongs to the estate.[81] An administrator who, having taken property of the estate, crediting it therefor, is personally sued therefor by another is not entitled to a credit, on his accounting, for the amount of the judgment recovered against him.[82]

on legal advice as part of proceeding to collect, in view of probable expenses and delay in finally getting money on them, did not show that sale was colorable or fraudulent or with no intention to change relation of pledgor and pledgee; nor does the fact that purchase money bid at sale of bonds pledged by pledgee's administrator to himself was not paid in, and bonds remained in hands of administrator, invalidate sale as to pledgor.—Persons v. Russell, 103 So. 543, 212 Ala. 506.

64. Assignee of bid
N.C.—Creech v. Wilder, 193 S.E. 281, 212 N.C. 162.

65. Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.
24 C.J. p 218 note 11.

Repurchase by representative's firm
However, where the executor of the estate of a deceased partner sold to the surviving partner the interest of the estate in the business, and such interest was then acquired by a firm in which such survivor and the executor, individually, had almost the entire interest, and the sale was approved by the county court in proceedings to which the legatees of the deceased partner were not parties, and they did not know of the transaction until long after the term of court had expired, a court of equity had jurisdiction to set the sale aside.—Mettler v. Warner, 94 N.E. 522, 249 Ill. 341.

66. Va.—Staples v. Staples, 24 Gratt. 225, 65 Va. 225.
24 C.J. p 219 note 28.

67. Nev.—In re Millenovich, 5 Nev. 161.
S.C.—Britton v. Lewis, 29 S.C.Eq. 271.

68. Md.—Williams v. Marshall, 4 Gill & J. 376.

69. N.C.—Tayloe v. Tayloe, 12 S.E. 836, 108 N.C. 69.
24 C.J. p 219 note 20.

70. S.C.—Trimmier v. Trail, 18 S. C.L. 480.
24 C.J. p 219 note 21.

71. Ky.—Ely v. Commonwealth, 5 Dana 398—Haddix v. Haddix, 5 Litt. 201.
24 C.J. p 219 note 22.

72. La.—Linman v. Riggins, 5 So. 49, 40 La.Ann. 761, 8 Am.S.R. 549
24 C.J. p 219 note 23.

73. Mass.—Dudley v. Sanborn, 34 N. E. 181, 159 Mass. 185.
24 C.J. p 219 note 24.

74. Mo.—Ambruster v. Ambruster, 31 S.W.2d 28, 38, 326 Mo. 51, 77 A.L.R. 782, citing **Corpus Juris.**
24 C.J. p 219 note 25.

75. U.S.—Mills v. Mills, C.C.Or., 57 F. 873, affirmed 63 F. 511.

76. N.C.—Tate v. Dalton, 41 N.C. 562.
24 C.J. p 219 note 27.

77. Ky.—Young v. Wickliffe, 7 Dana 447.
24 C.J. p 219 note 30.

78. Ala.—McDonald v. Jacobs, 4 So 605, 85 Ala. 64.
24 C.J. p 220 note 31.

79. Ala.—Childress v. Childress, 3 Ala. 752.
S.C.—Berry v. Hart, 1 S.C. 125.
24 C.J. p 220 note 32.

80. Del.—In re Pennewell, 105 A. 377, 12 Del.Ch. 408.
24 C.J. p 220 note 33.

Corporate stock
Executor selling stock owned by estate for twenty-five dollars and ultimately purchasing it himself should be surcharged with difference in book value of stock, which was forty dollars, and amount received on sale.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.

Purchase by agent
Executor was properly surcharged for the appraised valuation of goods sold, where executor's agent illegally became the purchaser.—In re Istocin's Estate, 190 A. 382, 126 Pa.Super. 158.

81. N.Y.—In re Boyle's Estate, 220 N.Y.S. 392, 128 Misc. 689.
24 C.J. p 220 note 34.

82. N.Y.—Matter of Yetter, 61 N.Y. S. 175, 44 App.Div. 404, affirmed 57 N.E. 1129, 162 N.Y. 615.

§ 315. Conveyance and Transfer

A transfer or conveyance must be made by the representative in his representative capacity. The instrument need not recite his authority to convey except where a court order is required.

A transfer or conveyance of the property of an estate by the legal representative of the estate must be made by him in his representative capacity,[83] and a transfer made in his individual capacity is ineffectual to pass title.[84] If a sale is made under a power given by the will, and is absolute, and possession is delivered by the executor, no bill of sale or other written evidence is necessary to transfer the title to the purchaser.[85] The purchaser of corporate stock at an executor's sale has the right to demand the identical shares purchased,[86] but the executor is entitled to a reasonable time after the sale in which to deliver the stock certificate.[87] The assignment of a bank deposit by delivery of a bank book can be effected only in accordance with the rules of the bank.[88]

Recital of authority. It has been held that, where there is a written conveyance in which the executor neglects to recite his authority to convey, the conveyance will nevertheless be referred to such authority.[89] However, it has been held that where the authority of the representative is dependent on a court order an assignment or conveyance is of no effect where it does not contain a recital that it was so authorized.[90]

§ 316. Payment or Recovery of Price

In general, only the giving of money constitutes payment. Fraudulent representations in the sale, failure of consideration, and breach of contract have been held to be valid defenses to an action for the purchase money or a ground for action by the purchaser against the representative.

In general, only the giving of money can constitute payment for property purchased at a sale by a representative.[91] Thus the giving of a note is not a payment therefor;[92] nor is an executor or administrator authorized to receive other property in payment for property sold by him.[93] The purchaser may by agreement with the representative discharge his note given for the purchase money by applying the amount to the payment of the creditors of the estate,[94] but he cannot set off a debt due him from decedent against the purchase money,[95] at least where the assets are exhausted by claims having precedence in law.[96] Where an executor sold tobacco, made on his testator's estate, and collected a part only of the money, the residue belonged to the devisees who might pursue the debtors without recourse to the executor.[97] It is presumed, after the lapse of a proper time for collecting the purchase money, that the representative has collected it.[98] Where the representative sells through an agent, partly for cash and partly on credit, and the purchasers make a cash payment to the agent, he receives it to the use of the representative.[99]

Grounds for nonpayment or recovery of price. Among the various matters which it has been held the purchaser may set up by way of defense to an action for the purchase money or by way of an action by the purchaser against the representative are fraudulent representations in the sale,[1] failure of

83. N.Y.—Vander Veer v. M. L. Improvement Corporation, 184 N.Y.S. 528.

Omission of word "as"

Where patent assignment recited that patents were owned and assigned by assignor as executrix, assignment was made by assignor in trust capacity, notwithstanding omission of "as" between assignor's name and word "executrix" in signature. —Harris & Schafer v. Curtiss Aerocar Co., C.C.A.Fla., 69 F.2d 264.

84. N.Y.—Vander Veer v. M. L. Improvement Corporation, 184 N.Y.S. 528.

85. Tenn.—Woods v. Burrough, 2 Head 202.

86. Ky.—Ohio Valley Banking & Trust Co. v. Wathen, 179 S.W. 230, 166 Ky. 274.

87. Ky.—Ohio Valley Banking & Trust Co. v. Wathen, supra.
24 C.J. p 221 note 47.

88. Ohio.—Royon v. Greenstein, 171 N.E. 595, 122 Ohio St. 340.

89. S.C.—Legge v. Magwood, 16 S.C.L. 116—Holladay v. Holladay, 16 S.C.Eq. 279.
24 C.J. p 220 note 45.

90. Ga.—Dowling v. Keen, 200 S.E. 789, 187 Ga. 394.

91. Ill.—Dedman v. Williams, 2 Ill. 154.

Confederate money

(1) A payment in Confederate money during the Civil War might be effective.—Wright v. Scott, 46 Ala. 200—24 C.J. p 221 note 64.

(2) The representative has been held not chargeable with a loss resulting from his acceptance of such money in payment, where in so doing he acted in good faith and without negligence.—Moffatt v. Loughridge, 51 Miss. 211—24 C.J. p 221 note 65.

(3) Where a sale was made with reference to Confederate money, and after the close of the war the executors settled with the purchaser at one tenth of the price bid, such settlement being made in good faith and the amount realized being more than the value of the Confederate currency at the date of the purchase, the executors were accountable only for the amount actually received.—Smith v. Prothro, 2 S.C. 371.

92. Ill.—Dedman v. Williams, 2 Ill. 154.

93. Miss.—Columbus Ins. & Banking Co. v. Humphries, 1 So. 232, 64 Miss. 258.
24 C.J. p 221 note 50.

94. Miss.—Pittman v. Pittman, 59 Miss. 203—Bales v. Hyman, 57 Miss. 330.

95. Pa.—Steel v. Steel, 12 Pa. 64.

96. Ky.—Willis v. Loan, 2 T.B.Mon. 141.
Miss.—Bales v. Hyman, 57 Miss. 330.

97. Va.—Cary v. Macon, 4 Call 605, 8 Va. 605.

98. Miss.—Cole v. Leake, 27 Miss. 767—Gordon v. Gibbs, 11 Miss. 473.

99. Va.—Heffernan v. Grymes, 2 Leigh 512, 29 Va. 512.

1. Ill.—Ray v. Virgin, 12 Ill. 216.
24 C.J. p 221 note 53.

consideration,[2] and breach of contract.[3] The purchaser, on discovering any irregularity or defect which justifies him either in rescinding the sale or in claiming damages, should act promptly and so far as possible on his part seek to place the representative and estate in statu quo;[4] but where the sale is void in its inception the representative cannot coerce payment of the purchase money, and the purchaser may set up the invalidity of the contract without placing the representative in statu quo by a return of the property.[5]

On the other hand, various matters have been held not to relieve the purchaser from the payment of the purchase price.[6]

Overpayment. Where one bought property from an administrator and, through mutual mistake, paid for more articles than he received, the administrator obtained no title to the overpayment, and could convey none to the heirs.[7]

§ 317. Application of Proceeds

The proceeds of a sale of property of the estate should be applied for the benefit of the estate; and a representative who misapplies the proceeds will be responsible therefor, as will a purchaser with notice thereof. Assets recovered by creditors constitute a trust fund for payment of creditors and distribution.

The price of property sold, whether it is in cash or by the purchaser's note, and all other consideration or security realized, should be applied by the executor or administrator for the benefit of the estate in due course of law, and he will be held accountable accordingly;[8] but the purchaser is not bound to see to the application of the proceeds nor is he responsible for any misapplication thereof,[9] unless he had at the time of payment reasonable ground for believing that the executor intended to misapply the money or was in the very transaction applying it to his own private use.[10]

Sale of property of third person. If an executor sells the property of another among the succession effects, the owner of such property is entitled to the proceeds of its sale, not by virtue of any privilege, but because of ownership thereof.[11]

Assets recovered by creditors. Assets recovered by creditors of the estate by action against the representative and others for unfair or invalid sales have been held to constitute a trust fund for the payment of the creditors, and, if there should be a residue, for distribution.[12]

§ 318. Validity and Effect of Sale

In general a sale or transfer by a representative is presumed to be valid, particularly after a lapse of time; and the validity of particular sales has been adjudicated.

2. Property taken from purchaser
In an action on a note the purchaser may show that the property for which the note was given was taken out of his possession and sold under judgments against the estate, and that the consideration of the note thus failed.
Ill.—Welch v. Hoyt, 24 Ill. 117.
Miss.—Buckels v. Cunningham, 14 Miss. 358.

Tax sale
One purchasing personal property of an administrator individually and permitting it to be sold without resistance for a tax due by the estate and repurchasing it is estopped to set up the eviction as a defense to the notes given to the administrator for the price.—Johnson v. Dunbar, 26 La.Ann. 188.

3. R.I.—Ferris v. Pett, 105 A. 369, 42 R.I. 48.
Breach of warranty as defense see infra § 320.

Breach as to sale of good will
Where a physician and eye specialist entered into a contract with an oculist, who was administrator of the estate of a deceased physician, to purchase the business and good will, and the administrator, for himself, subsequently solicited the physician's as well as the oculist's business from deceased's former patients, there was a breach of the contract, precluding recovery of the portion of the price appertaining to the good will.—Ferris v. Pett, supra.

4. Miss.—Joslin v. Caughlin, 30 Miss. 502.

5. Ala.—Fambro v. Gantt, 12 Ala. 298.

6. Partner's refusal to accept purchaser
The refusal of a surviving partner to accept as a partner and continue the business with the purchaser of the interest of the deceased partner in the firm does not defeat the sale by the administrator of such interest, since the purchaser thereof was charged with knowledge of the law, and must be content with the right he acquired to share in the distribution of the firm's assets.—Currie v. Landis, 202 P. 893, 55 Cal. App. 73.

Acceptance of note of third person
Where an administrator takes the note of a third person, indorsed by the purchaser at the sale, and also the bond of the purchaser, and agrees to collect the note and apply the proceeds to the payment of the bond, the administrator's neglect in collecting the note, and a loss thereby, cannot relieve the purchaser from the payment of his bond, or the property from the statutory mortgage thereon.—Steger v. Bush, Sm. & M. Ch., Miss., 172.

7. N.H.—Redington Hub Co. v. Putnam, 82 A. 715, 76 N.H. 336.

8. Ind.—Pence v. Makepeace, 75 Ind. 480.
24 C.J. p 222 note 68.

Testamentary instructions
Where the will provides how the proceeds of the sale of certain property are to be applied, the will is controlling.—Shull v. Rigby, 144 S.E. 372, 196 N.C. 4.

Purchase of stock
Where court ordered executrix to sell stock in building and loan association to pay debts of estate, executrix had no authority to use proceeds of sale exceeding amount necessary to pay debts to purchase other stock in association.—Donald v. Hattiesburg Building & Loan Ass'n, 158 So. 482, 171 Miss. 763.

9. N.C.—Gray v. Armistead, 41 N. C. 74.
24 C.J. p 222 note 69.

10. U.S.—Lowry v. Commercial & Farmers' Bank, C.C.Md., 15 F.Cas. No. 8,581, Brunn.Col.Cas. 331, Taney 310.
24 C.J. p 222 note 70.

11. La.—Cook's Succession, Mann. Unrep.Cas. 134.
24 C.J. p 222 note 68 [b].

12. Md.—Turk v. Grossman, 6 A.2d 639, 176 Md. 644.

It has been held that sales which would normally be void may be allowed to stand where the beneficiaries consent to such sale.

In the absence of any showing to the contrary it is presumed that an executor or administrator who has made a sale or transfer has exercised his power rightfully;[13] and lapse of time accompanied with proof of possession under the sale will raise a presumption in favor of the regularity of the proceedings[14] and cure informalities,[15] although it cannot cure a total want of authority.[16] Where personalty not owned by decedent but found among his chattels at the time of his death is sold the sale will usually be upheld and the right of the true owner limited to a recovery of the proceeds of sale or at most of such damages as will indemnify him;[17] and the fact that personalty belonging to an estate is traded by the executor for real estate without authority does not prevent the purchaser from getting title to the personalty which is delivered to him.[18] Where an administrator acquires possession of property previously disposed of by him at a private sale, conducted in his individual capacity, he may not set up as against his purchasers the invalidity of the sale made by himself.[19]

A sale of property by an agent appointed by a power of attorney made by an executor, but not authorized by will to be made, is illegal as against creditors.[20] A sale of the property by a person named as executor, but who did not qualify, is void as against an executor who did qualify;[21] but where, under the existing law, an administrator has power to sell personalty, a sale by him is valid, although his letters are subsequently revoked on the admission of a will to probate.[22]

Consent of beneficiaries. While a sale of personal property by an administrator without an order of court, where this is required, would be void as to distributees, if the distributees assent to it no one can complain, except perhaps creditors whose debts are unpaid or an administrator de bonis non seeking the property as assets to pay debts.[23] So also, where heirs authorized and concurred in a sale of shares of stock made by the administrator, they will not be heard to say that the sale was not necessary.[24]

Fraud. Where a sale or assignment was procured by the fraud of the purchaser the sale is invalid, and subsequent purchasers, other than bona fide purchasers, acquire no title.[25]

§ 319. Ratification of Sale; Laches

An unauthorized sale may be ratified by the court or the beneficiaries, or the right to attack the sale may be lost by laches.

An unauthorized sale of personalty may be ratified by sanction of, or confirmation by, the probate court,[26] or through the acquiescence of the beneficiaries.[27] Similarly the right to attack the sale may be lost through laches.[28] However, the representative cannot ratify a sale made by his own agent to the prejudice of creditors of the estate and others in interest.[29] Where no order of the court was necessary to authorize an executor to sell part of corporate stock, the only asset of the estate, to raise money to save the balance of the stock from forfeiture and to pay debts, the subsequent probate of the will in effect ratified the sale.[30]

§ 320. Title and Rights of Purchaser

A purchaser from a representative having power to sell acquires good title even though the sale was not warranted, or constituted waste, unless he had notice of the facts; but he acquires no title where the representative lacked authority or the purchaser participated in fraud. The purchaser takes free of equities provided he was a bona fide purchaser for value. The rule of caveat emptor applies, and warranties will not be implied.

13. Ohio.—Kause v. Gemin, App., 38 N.E.2d 96.
24 C.J. p 222 note 73.
Effect of sale where representative is the purchaser see supra § 314.

14. Ala.—Wyatt v. Scott, 33 Ala. 313.

15. Ala.—Wyatt v. Scott, supra.
La.—Robert v. Brown, 14 La.Ann. 597.

16. Ala.—Wyatt v. Scott, 33 Ala. 313.
La.—Robert v. Brown, 14 La.Ann. 597.

17. La.—Waterhouse v. Bourke, 14 La.Ann. 358.
24 C.J. p 222 note 74.

18. Neb.—Edney v. Baum, 97 N.W. 252, 70 Neb. 159.
24 C.J. p 222 note 78.

19. Ala.—Bragg v. Massie, 38 Ala. 89, 79 Am.D. 82.

20. Ga.—Neal v. Patten, 47 Ga. 73.

21. Va.—Monroe v. James, 4 Munf. 194, 18 Va. 194.

22. Md.—Phippard v. Forbes, 4 Harr. & M. 481.
S.C.—Benson v. Rice, 11 S.C.L. 577.

23. Mo.—Boeger v. Langenberg, 42 Mo.App. 7.
Tenn.—Kelso v. Vance, 2 Baxt. 334.
24 C.J. p 222 note 79.

24. Ky.—Beale v. Barnett, 64 S.W. 838, 23 Ky.L. 1118.

25. **Misrepresenting financial condition**
Where the assignee of a bond and mortgage misrepresented his financial condition to the representative the assignment is one procured by fraud, and a third person, to whom the assignee assigned the property as collateral for a past-due debt, was put on inquiry as to the authority of the representative and the manner of procurement of the assignment, and acquired no title to the property.—McCall v. Madison, 125 S. E. 737, 130 S.C. 311.

26. Neb.—Holt v. Rust-Owen Lumber Co., 96 N.W. 613, 2 Neb. (Unoff.) 170.
24 C.J. p 223 note 85.

27. Ky.—Beale v. Barnett, 64 S.W. 838, 23 Ky.L. 1118.
24 C.J. p 223 note 86.

28. Neb.—Shelby v. Creighton, 91 N.W. 369, 65 Neb. 485.
24 C.J. p 223 note 87.

29. Ga.—Neal v. Patten, 47 Ga. 73.

30. Wash.—In re Crim, 154 P. 811, 89 Wash. 395.
24 C.J. p 223 note 89.

A purchaser at a sale by an executor or administrator having power to sell acquires a good title,[31] even though the situation of the estate did not necessitate or warrant the sale[32] or the representative was committing a fraud or devastavit on the estate,[33] unless he knew of the facts[34] or is chargeable with constructive notice.[35] Even the fact that the representative misapplies the proceeds does not prevent a purchaser for value and in good faith from acquiring a good title.[36]

The purchaser acquires no title, however, where the sale was made without authority or in an unauthorized manner,[37] or where the sale is tainted with fraud by reason of collusion between himself and the representative;[38] nor is even a purchaser for value protected where the conveyance by the representative was in payment of his private debt.[39] In all such cases the distributees may recover the property,[40] although the representative is estopped by his own act from recovering the property by an action at law in his own name.[41] Even where the circumstances were such that the sale was voidable and could be set aside, the sale remains in effect and the purchaser retains title until the sale is set aside by a proceeding for that purpose to which the purchaser has been made a party.[42]

A bona fide purchaser for value of property sold by a representative takes the property discharged of all equities which attach on them,[43] but an assignee with notice takes subject to existing equities and set-offs;[44] and equity will follow the property into the hands of one who is not a purchaser for value,[45] or who, although he paid a valuable consideration, has been guilty of fraud and collusion with the representative to the injury of the estate.[46] The assignee of a cause of action already instituted by the administrator takes the cause of action subject to whatever set-offs, counterclaims, or defenses that would have been available against the original plaintiff.[47] A purchaser who accepts delivery or possession on condition that he shall acquire no title until payment of the price is estopped to repudiate such condition.[48]

A purchaser who has paid the purchase money, which has been applied to the payment of debts and to exonerate other property, cannot be compelled to surrender the property because of an irregularity in the appointment of the administrator without the purchase money being first refunded.[49]

Property not included in sale. The purchaser acquires only such property as the representative purports to sell.[50] Thus the purchaser of a chattel does not obtain title to money and other valuables which had been secreted therein by decedent and which none of the parties knew that it contained, but holds such money and valuables, on discovery thereof, as treasure trove for the personal representative of decedent.[51]

31. N.C.—Felton v. Felton, 195 S.E. 533, 213 N.C. 194.
24 C.J. p 223 note 91.
Claim of heirs to value of gin owned by plaintiffs' father and his brother, which was sold, one half in succession of father and the other half in succession of the brother, was held properly rejected.—Crouch v. Richardson, 104 So. 728, 158 La. 822.

32. Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.
24 C.J. p 223 note 92.

33. Ala.—Van Hoose v. Bush, 54 Ala. 342.
24 C.J. p 223 note 93.

34. Pa.—Schell v. Depreven, 48 A. 813, 198 Pa. 600, 82 Am.S.R. 820.
24 C.J. p 223 note 94.

35. N.J.—Goodell v. Monroe, 100 A. 238, 87 N.J.Eq. 328, reversing 97 A. 152, 86 N.J.Eq. 18.
24 C.J. p 223 note 95.

36. Mass.—Ashton v. Atlantic Bank, 3 Allen 217.
24 C.J. p 223 note 96.

37. Ga.—Price v. Nehi, Inc., 174 S.E. 722, 49 Ga.App. 196.
24 C.J. p 224 note 97.
However, where the representative sold property without obtaining the confirmation of the court required by statute, and then refused to carry out the contract, the purchaser may apply to the court to require that a return for confirmation be made.—Richmond-Chase Co. v. Schlessinger, 203 P. 418, 55 Cal.App. 165.
Bound to know authority
A purchaser from a representative is put on notice that he is dealing with a person in a representative capacity and is bound to know the extent of his authority.—Sun Oil Co. v. Blevins, D.C.La., 29 F.Supp. 901, affirmed, C.C.A., Blevins v. Sun Oil Co., 110 F.2d 566.
Effect of failure to obtain court order for:
Sale see supra § 305.
Private sale see supra § 310.

38. Del.—Barwick v. White, 2 Del. Ch. 284.
24 C.J. p 224 note 98.

39. N.Y.—Clark v. Coe, 5 N.Y.S. 243, 52 Hun 379.

40. Tenn.—Herron v. Marshall, 5 Humphr. 443, 42 Am.D. 444.

41. Ala.—Fambro v. Gantt, 12 Ala. 298.

Tenn.—Herron v. Marshall, 5 Humphr. 443, 42 Am.D. 444.

42. Mass.—Comstock v. Bowles, 3 N.E.2d 817, 295 Mass. 250.

43. S.C.—Rhame v. Lewis, 34 S.C. Eq. 269.

44. Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.

45. Pa.—Petrie v. Clark, 11 Serg. & R. 377, 14 Am.D. 636.

46. N.C.—Barnawell v. Threadgill, 40 N.C. 86.
Pa.—Petrie v. Clark, 11 Serg. & R. 377, 14 Am.D. 636.

47. Ohio.—Kause v. Gemin, App., 38 N.E.2d 96.

48. Ark.—Pierce v. Whipple, 184 S.W. 837, 128 Ark. 132.
24 C.J. p 225 note 16.

49. Miss.—Ragland v. Green, 22 Miss. 194.

50. La.—Succession of Bell v. Opposition of Ryland, App., 146 So. 768.

51. Pa.—Hutmacher v. Harris, 38 Pa. 491, 80 Am.D. 502.

Warranties and representations. The usual rule of caveat emptor applies to a purchase of personalty from an executor or administrator,[52] and the general rule is that there is no implied warranty[53] of title,[54] or soundness,[55] or value,[56] although there is authority for the view that there is an implied warranty of soundness and title.[57] The representative may, however, make a warranty and thus bind himself personally,[58] but he cannot bind the estate by a warranty,[59] although it has been held that a breach of warranty is available as a defense in an action against the purchaser for the price.[60] The estate is not liable to a purchaser on the ground that the executor induced the purchase by false representations.[61]

Proof of purchase. Where deceased's widow asserts that she purchased from the administrator the right to look to the principal debtor for reimbursement on account of the payment of an obligation of such debtor under a guaranty contract, the burden is on the widow to prove by a preponderance of the evidence that she did in fact purchase such right, and where she fails to sustain such burden she is bound to account to the estate for the amount received from the principal debtor.[62]

§ 321. Setting Aside Sale

Grounds for setting aside a sale include inadequacy of price where excessive or where coupled with other suspicious circumstances, although not otherwise, and fraud or collusion.

Mere inadequacy of price does not invalidate a sale of personalty by an executor or administrator and is not in itself a sufficient ground for setting the sale aside,[63] unless the inadequacy is so gross as to indicate mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud on the part of the administrator;[64] yet it may be considered in estimating the effect of any error, default, or dereliction on the part of the representative in selling the property,[65] and, where coupled with other suspicious circumstances or irregularities in the sale, may warrant setting the sale aside.[66]

Fraud or collusion between the purchaser and the representative making the sale is sufficient ground for setting the sale aside.[67] Similarly the fact that the purchaser has chilled the bidding at a public sale may furnish ground for setting aside the sale;[68] and an unnecessary sale at which the representative becomes the purchaser may be set aside.[69] A sale may be avoided where the purchaser knew or had good reason to suspect that the sale was made with a design to misapply the funds.[70]

It is not a ground for setting aside a conveyance that it was made to a creditor in payment of his debt, in the absence of a showing of unfairness or inadequacy of consideration.[71]

52. U.S.—Merchants' Bank v. People's Savings & Loan Ass'n, C.C.A. Okl., 70 F.2d 169, 93 A.L.R. 226.
Wis.—Shupe v. Jenks, 218 N.W. 375, 195 Wis. 334.
24 C.J. p 224 note 5.

53. Wis.—Shupe v. Jenks, supra.
24 C.J. p 224 note 6.

54. Wis.—Shupe v. Jenks, supra.
24 C.J. p 224 note 7.

55. Miss.—George v. Bean, 30 Miss. 147.
Wis.—Shupe v. Jenks, 218 N.W. 375, 195 Wis. 334.

56. Wis.—Shupe v. Jenks, supra.

57. S.C.—O'Neall v. Abney, 18 S.C. L. 317—Eastland v. Longshorn, 10 S.C.Eq. 194.
24 C.J. p 224 note 9.

58. Ind.—Huffman v. Hendry, 36 N. E. 727, 9 Ind.App. 324, 53 Am.S.R. 351.
24 C.J. p 224 note 10.

59. Ga.—Worthy v. Johnson, 8 Ga. 236, 52 Am.D. 399.
24 C.J. p 224 note 11.

60. Ala.—Craddock v. Stewart, 6 Ala. 77—Peden v. Moore, 1 Stew. & P. 71, 21 Am.D. 649.

61. Ind.—Huffman v. Hendry, 36 N. E. 727, 9 Ind.App. 324, 53 Am.S.R. 351.

62. Or.—Fry v. Bryant, 103 P.2d 760, 165 Or. 61.

63. Ill.—Kimball v. Lincoln, 99 Ill. 578, affirming 7 Ill.App. 470.
Md.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.

Subsequent higher bid

Without ruling on the question whether the representative could set aside a sale where a higher offer was subsequently received, it was held that where the higher offer was withdrawn before the representative was authorized to accept it the sale would not be set aside.—In re Peters' Estate, 39 Pa.Dist. & Co. 594.

64. Md.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.

Consideration held reasonable and fair

Purchase for eight thousand five hundred dollars of fourteen thousand dollar note, on which no interest had been paid for seventeen years, secured by assignment of remainderman's interest in trust, from executors, who had offered it for ten thousand dollars was held for reasonable and fair consideration.—Westchester Mortg. Co. v. Grand Rapids & I. R. Co., 213 N.Y.S. 593, 126 Misc. 534, modified on other grounds 219 N.Y.S. 695, 219 App. Div. 733, modified on other grounds 158 N.E. 70, 246 N.Y. 194, reargument denied 159 N.E. 643, 246 N.Y. 540.

65. Md.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.

66. Ill.—Christy v. Christy, 80 N.E. 242, 225 Ill. 547
24 C.J. p 225 note 21.

67. U.S.—Smith v. Ayer, Ill., 101 U. S. 320, 25 L.Ed 955.
24 C.J. p 225 note 22.

Exclusive ground

It has been laid down that a sale regularly made at a public auction as required by law can be avoided only for such fraud or collusion.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

68. Ind.—Anderson v. Pedigo, 26 N. E. 397, 126 Ind. 564.
24 C.J. p 225 note 24.

69. Va.—Rosserd v. Depriest, 6 Gratt. 6, 46 Va. 6, 50 Am.D. 94—Anderson v. Fox, 2 Hen. & M. 245, 12 Va. 245.

70. U.S.—Equitable Life Assur. Soc. of U. S. v. Mallers, C.C.A.Ill., 101 F.2d 567.

71. Ga.—Tinsley v. Maddox, 168 S. E. 297, 176 Ga. 471.

Proceedings. An action to avoid a sale by an executor or administrator for his own debt may be brought by creditors, legatees, or distributees.[72] Unless there are exceptional circumstances,[73] the personal representative cannot attack his own sale on the ground that it was made without authority.[74] An offer of indemnity is unnecessary where a bill in equity is filed to set aside a purchase by the representative at his own sale;[75] and in a case where certain corporate stock belonging to plaintiff had been fraudulently sold by an executor, and the purchaser had received from the corporation thereon more than the amount received by plaintiff as the proceeds of the sale, plaintiff was not required to surrender anything as a condition to receiving a return of the stock.[76]

Rules governing similar questions in civil proceedings generally have been applied, in proceedings to set aside a sale by an executor or administrator, to questions relating to parties,[77] pleading,[78] evidence,[79] and judgments, decrees, and orders.[80]

§ 322. Liability of Representative

The liability of a representative in connection with the selling of property is dependent on whether he has acted with good faith, due diligence, and sound judgment. He is chargeable with the price realized; and will be charged with the actual or appraised value where he sells improperly for less than such value.

The usual rule requiring a representative to exercise good faith, due diligence, and sound judgment in the performance of his duties, see § 184 supra, applies in cases of sales by a personal representative;[81] but where an administrator has used such a degree of intelligence as a man of ordinary prudence would have exercised he is not personally liable for selling personal property without the authorization of an order of court.[82]

Where the representative sells property of the estate, he is chargeable with the price realized,[83] especially if the sale was made without authority.[84] Even though personal property may have been sold by the representative for less than its full value, he is not chargeable with more than the price actually realized where he has been guilty of no bad faith or negligence in the transaction;[85] but he is chargeable with the actual or appraised value where he sells for less without authority[86] or in an unauthor-

72. Wis.—Stronach v. Stronach, 20 Wis. 129.
24 C.J. p 225 note 26.

73. Representative's action held warranted
Where an administratrix having made an invalid assignment of a life policy belonging to the estate placed the policy in the hands of an attorney who stated he did not see how to prevent payments by the company to the assignee, and later retired without having brought suit, whereupon the administratrix employed other counsel, her former attorney's declaration did not estop her to set aside the transfer for fraud.—Empire Life Ins. Co. v. Mason, 78 S.E. 935, 140 Ga. 141.

74. Ala.—Bragg v. Massie, 88 Ala. 89, 79 Am.D. 82.
24 C.J. p 225 note 27.

75. Ala.—Rayne v. Turner, 36 Ala. 623.

76. U.S.—Smith v. Moore, Mont., 199 F. 689, 118 C.C.A. 127.

77. Widow
If the widow of an intestate is surviving she, as well as the heirs, should be made a party to an action to avoid a sale.—Stronach v. Stronach, 20 Wis. 129.

78. Alleging fraud
In a proceeding to set aside an administrator's sale of certain stock belonging to his intestate for fraud the petition must allege the facts constituting the fraud.—Chappell v. Chappell, 99 S.W. 959, 124 Ky. 691, 30 Ky.L. 935.

79. Sufficiency
(1) Evidence held to support finding that executor's sale of testator's stock was made in good faith, without agreement permitting executor's participation therein.—Davis v. Smith, 239 N.W. 150, 184 Minn. 422.

(2) Evidence established that administrator sold trade-mark and good will connected therewith for inadequate price and without proper effort to ascertain value thereof; hence exceptions to sale were properly sustained.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.

80. Res judicata
An order of surrogate's court which was not final but left alleged fraudulent sale of stock by executrix open to attack on accounting wherein creditors of estate could show any facts tending to establish that sale was made in fraud of creditors, was not res judicata in subsequent action in equity which was first proceeding instituted by creditor in which complete relief could be obtained by it.—American Equitable Corporation v. Parkhill, 299 N.Y.S. 284, 252 App.Div. 260.

Decree held erroneous
Where a creditor of an intestate's estate sought to set aside a sale and conveyance made by the administrator for the payment of debts on the ground of fraud, the administrator not being a party to the suit, but it did not appear that the suing creditor was the only creditor of the estate, a decree directing the payment to such creditor out of the proceeds of the sale was erroneous, but the proceeds should have been put in the hands of the administrator to be applied according to law under the supervision of the probate court.—State Bank v. White, 23 Mo. 342, 66 Am.D. 671.

81. Md.—Park & Tilford Import Corporation v. Nash, 171 A. 339, 166 Md. 373.
24 C.J. p 226 note 36.

82. Ill.—Christy v. Christy, 125 Ill. App. 442, affirmed 80 N.E. 242, 225 Ill. 547.

83. Ala.—Irby v. Kitchell, 42 Ala. 438.
24 C.J. p 226 note 38.

84. Ky.—Henning v. Conner, 2 Bibb 188.
S.C.—Smith v. Smith, 1 S.C.Eq. 304.
Tenn.—Little v. Cook, 10 Lea 715.

Failure of security for sale
If security taken for sale without authority should prove defective the executor will be liable therefor.—Smith v. Smith, 1 S.C.Eq. 304.

85. Pa.—In re Wellner's Estate, 6 Pa.Dist. & Co. 457.
24 C.J. p 226 note 41.

86. Pa.—In re Tyson's Estate, 80 Pa.Super. 29.
Tex.—Cartledge v. Billalba, Civ.App., 154 S.W.2d 219, error refused.
24 C.J. p 226 note 42.

ized manner,[87] where he is guilty of improperly making or conducting a sale at which less than the true or appraised value is realized,[88] or where he has failed to keep an account of the amount actually realized.[89]

Distributees, who direct an administrator to sell personal assets of the estate at a private sale without order of the probate court, are bound by his action, where he acts in good faith, and cannot hold him liable for a greater sum than he obtained on the sale;[90] nor can distributees complain of an administrator's action in selling personal assets at private sale without order of court if they suffer no damage thereby.[91] Where a representative acting in good faith has sold at what is apparently a fair price, he is not chargeable with profits made by the purchaser on a new sale shortly afterward.[92] Where an executor sells property of the estate, together with property of his own, for a gross sum, a portion of which he receives, the amount received will be presumed to be on account of the property belonging to the estate.[93]

An administrator cannot avoid liability for the sale price of property by pleading his failure to obtain a court order or to collect purchase price on the ground that the sale could therefore be avoided and the property recovered.[94]

The liability of a representative for violations of particular duties relating to sales is also considered supra in §§ 305–317 in connection with the treatment of the particular duty involved; for example, the liability of a representative in connection with the taking of security for payment is considered supra § 312. The liability of a representative for loss resulting from the failure to sell, or delay in selling, the property of the estate where a sale is necessary to avoid depreciation is considered supra § 248.

Value at time of sale
Ga.—Dorsett v. Frith, 25 Ga. 537.

87. Mo.—State v. Dickson, 111 S.W. 817, 213 Mo. 66.
24 C.J. p 226 note 43.

88. N.H.—Brackett v. Tillotson, 4 N.H. 208.
24 C.J. p 226 note 44.

89. N.J.—Hunt v. Smith, 43 A. 428, 58 N.J.Eq. 25.

90. Mo.—State v. Dickson, 111 S.W. 817, 213 Mo. 66.
24 C.J. p 226 note 46.

91. Mo.—State v. Dickson, 111 S.W. 817, 213 Mo. 66.

92. Pa.—In re Seidman, 104 A. 799, 261 Pa. 540.
24 C.J. p 227 note 51.

93. S.C.—Rolain v. Darby, 6 S.C.Eq. 472.

94. Ariz.—U. S. Fidelity & Guaranty Co. v. Greer, 240 P. 343, 29 Ariz. 203.

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